



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 13/5/16

SIGNATURE

13/5/2016

CASE NO: 65337/2015

In the matter between:

GIDANI (PTY) LTD

Applicant

and

THE MINISTER OF TRADE AND INDUSTRY

First Respondent

THE NATIONAL LOTTERIES COMMISSION

Second Respondent

ITHUBA HOLDINGS (PTY) LTD

Third Respondent

MZANSI GAMES (PTY) LTD

Fourth Respondent

GRAND LOTTERY (PTY) LTD

Fifth Respondent

Date of Hearing: 16-19 February 2016.

Date of Judgment: 13 May 2016.

JUDGMENT

MOTHLE J

INTRODUCTION

1. On 8 August 2015, the Minister of Trade and Industry (*“the Minister”*) publicly announced that he had decided to award the licence to operate the Third National Lottery to Ithuba Holdings (Pty) Ltd (*“Ithuba”*). Gidani (Pty) Ltd (*“Gidani”*) approaches this Court to have that decision reviewed and set aside.
2. Gidani as applicant seeks relief against the first respondent Minister, the second respondent, the National Lotteries Commission (*“the Commission”*) and the third respondent Ithuba. The Commission is established in terms of the provisions of the Lotteries Act 57 of 1997, (*“the Act”*), to participate in the selection of a lottery operator and to supervise the operation of a lottery.

3. No order is sought against the fourth and fifth respondents being Mzansi Games (Pty) Ltd (*"Mzansi Games"*) and Grand Lottery (Pty) Ltd (*"Grand Lottery"*) respectively. These two respondents were cited in the proceedings to the extent that they participated in the bid for the acquisition of the Third National Lottery Licence. They did not participate in these proceedings.
4. Gidani's application is thus being opposed by the Minister, the Commission and Ithuba.

BACKGROUND

5. The license to operate a national lottery is granted for a period of 5 to 8 years. South Africa is now on its third period of the national lottery. For the record, the First National Lottery was operated by Uthingo and the second one, which recently terminated, had been awarded to and operated by Gidani.
6. The Second National Lottery License held by Gidani was nearing its life-span in or about May 2015. The Minister, on 11 June 2013 issued a Request for Proposal, (*"RFP"*) for the award and issue of the Third National Lottery License. Gidani, Ithuba, Mzansi Games and Grand Lottery were identified as the

applicants who had presented competitive bids. Their applications were considered by the Evaluation Committee, which then made recommendations to the Commission. The latter concluded by a split vote to recommend Gidani as the preferred applicant and Ithuba as the reserve applicant.

7. On receipt of the Commission's recommendation, the Minister engaged the services of a consulting company known as Genesis Consulting ("*Genesis*") to have an independent evaluation of the bids and give him advice. The reports of the Commission and that of Genesis identified the strengths and weaknesses in all four applications and concluded that Gidani and Ithuba were the front runners.
8. In November 2014 the Minister selected Ithuba as the preferred applicant and Gidani as the reserve applicant. He then negotiated and concluded the license agreement with Ithuba which was followed by the issuing of a license to Ithuba for the Third National Lottery. Gidani there and then launched an application for review ("*first review application*"), seeking relief to have the Minister's decision to select, conclude a license agreement with and issue the Third National Lottery Licence to Ithuba, reviewed and set aside. The respondents in that application were as currently cited in this application.

9. This first review application of November 2014 was heard and decided by this court in 2015. Tuchten J set aside and declared invalid the license agreement concluded between the Minister and Ithuba as well as the issue of the license to Ithuba. He however upheld the decision by the Minister to select Ithuba as the preferred applicant. In handing down the declaration of invalidity of the agreement concluded and the subsequent license issued, Tuchten J suspended that order for a period of one month.
10. During that period of suspension, the Minister, renegotiated with Ithuba as the preferred applicant. This resulted in an announcement by the Minister on 8 August 2015 that he has decided to award the licence to Ithuba. He entered into a license agreement with Ithuba and consequently issued the licence again to Ithuba.
11. Gidani then launched this second review application in August 2015, challenging the new agreement to grant Ithuba the licence and the subsequent award of the licence. This is the application that is presently before this Court.

12. Gidani's review application is launched in terms of the provisions of Section 33 of **the Constitution**¹ read with the **Promotion of Administrative Justice Act**² ('PAJA'), all of which provides for the right to just administrative action.
13. Gidani contends, as its grounds of review, that the Minister's decision announced on 8 August 2015 is in some instances and for a variety of reasons, unlawful, irrational, unreasonable and procedurally unfair.
14. In exercising his powers to award a lottery licence, the Minister has to act in terms of the provisions of the **Lotteries Act**³ (*"the Act"*) and the terms and conditions of the ***Request for Proposals*** (RFP), issued in terms of section 13 of the Act...

The Lotteries Act

- 14 The Act provides for the licensing of a lottery operator. It establishes a National Lotteries Commission (previously "*National Lotteries Board*"), which assesses the applications for the national lottery operator and recommends to the Minister, the preferred applicant and the reserve applicant to be awarded the

¹ The Constitution of the Republic of South Africa Act, 1996.

² Act 3 of 2000.

³ Act 57 of 1997.

lottery licence. The Minister is empowered by the Act to award and issue a lottery license to an operator.

15. Section 13(3) of the Act requires the Minister to take into account the question whether the person who will manage the business of the National Lottery will do so such that the nett proceeds of such lottery are as large as possible. The nett proceeds are the sums payable to the National Lottery Distribution Trust Fund (*"the trust fund"*). This factor that the Minister has to take into account is however not the only factor that is determined in the process of awarding the license. The RFP states that the Minister reserves the right to *"not necessarily accept the application with the highest returns to good causes"*. Therefore while it is an important factor it is not the only factor that has to be considered.
16. The primary objective of the lottery is thus to enable the Commission, through the establishment of the National Lotteries Development Trust Fund (*"the Trust Fund"*) to received contributions from the lottery operator into the fund for the benefit of worthy causes. It is therefore in the interest of the objectives of the fund, for the Minister to appoint an operator who, amongst others, will be able to maximise participation in

the lottery and thereby generate sufficient revenue for contribution to worthy causes.

Request for Proposal (RFP)

17. Towards the end of the lifespan of a lottery license, the Minister, as required by s13 (2) (a) of the Act, begins a process of identifying an operator for the next licensing period. In doing so, the Minister publishes the RFP, which provides for the terms and conditions of participation in the bid for acquisition and award of the license. The process is undertaken in terms of a timeline with return dates for submission of applications, evaluations thereof, adjudication and identification of the best two entities to be recommended to the Minister. From these entities, the Minister then decides on the one applicant as a preferred applicant and the other as a reserve applicant. In terms of the RFP, the Applicants are assessed and scored in accordance with criteria of evaluation as follows:

- 17.1 Business plan 15%;
- 17.2 Marketing and communications 15%;
- 17.3 Contributions to the National Lottery Development Trust Fund 25%;
- 17.4 Financial analysis and model 25%;
- 17.5 BBEE 10%; and

17.6 General information required 10%

18. The Minister conducts negotiations with the preferred applicant which should then lead to the conclusion of a licensing agreement in terms of which the license will be issued. In the event the negotiations with the preferred applicant falls through, the Minister has the option of negotiating with the reserve applicant or deciding not to award the license at all or place the operation of the license under an administrator or to start the process *de novo*.
19. The Act and the terms and conditions contained in the RFP constitute the overall framework within which the Minister must act in awarding and issuing the license to an operator. Thus subsections 13 (2) and (3) of the Act, read with the provisions of the RFP constitutes the main legal basis upon which a lottery operator is awarded the licence.
20. I now turn to deal with each of Gidani's grounds of review in this application.

GROUND OF REVIEW

21. Gidani contends before court that the Minister's decision to award the licence to Ithuba has to be reviewed and set aside on various grounds. In some of these grounds of review, Gidani advances several arguments in support of its contentions.

Contribution to the Fund

22. Gidani contends that Ithuba's proposal will not lead to an increase in the expected contribution to the trust fund, the following are the sub-stratum arguments advanced by Gidani in regard to this ground of review.

Selecting Ithuba as a preferred applicant:

23. Gidani contends that the Minister selected Ithuba as a preferred applicant in order to test Ithuba's contribution model.
24. The Minister states that the selection of Ithuba as a preferred applicant was based on its business plans which, according to him, address the concerns regarding the decline in interest and

participation. The business plan by Ithuba, as far as the Minister viewed it, would reinvigorate the lottery.

25. In his statement of reasons for the decision dated 8 September 2015 and submitted in terms of Rule 53 of the Uniform Rules of Court, the Minister advances five reasons for selecting Ithuba, which may be summed up as follows:

25.1 Ithuba is expected to yield higher sales than Gidani due to, amongst others, a higher capital expenditure on an expanded distribution network and higher player pay-out;

25.2 Ithuba undertakes to introduce hand-held terminals which in turn will lead to a larger retail terminal network and increase in sales;

25.3 Ithuba proposes higher player pay-outs which will improve and enhance the appeal on the lottery gains. This will then result in increase in anticipation and higher sales;

25.4 The risk of lower trust fund contributions is reduced by the fact that Ithuba is not relying on increases in player pay-outs alone, as its bid combines both increased player pay-outs and increase in capital expenditure; and

25.5 Ithuba offers more increase in sales than Gidani.

26. Gidani further argues that the removal of the guarantee or undertaking in regard to the contribution to the trust fund, following the judgment by Tuchten J, is inconsistent with the reasons given by the Minister for selecting Ithuba again as a preferred application.
27. This question of guarantees for trust fund contributions came out during the negotiation for the license agreement which resulted in the issue of the first lottery licence in 2014, after the Minister had then selected Ithuba as a preferred applicant. The Minister during the negotiations with Ithuba at the time, had raised the question of an undertaking on the part of Ithuba as one of the guarantees to ensure that there are sufficient contributions to the trust fund. Tuchten J, in his judgment set aside the decision to conclude the first license agreement as being irrational, on the ground that the Minister had not considered the possible impact of the undertaking on Ithuba's solvency. The Minister has now abandoned the idea of guarantees and as it will appear hereunder, has, in negotiating the new agreement, replaced it with the issue of penalties.
28. It is common cause that the selection of a preferred applicant precedes the negotiations for the agreement necessary to issue

a licence. Ithuba contends that the question of guarantees was raised during the negotiations which led to the conclusion of the agreement resulting in the issue of the first invalidated licence. As at that time, Ithuba had already been selected, for reasons stated by the Minister above, as the preferred applicant. The issue of guarantees could thus not have played a role in that decision. Besides, Tuchten J has dismissed the attack on the Minister's decision to select Ithuba as the preferred applicant.

29. It is thus this Court's view that this argument has no merit and it seems to me to be a rehash, albeit with a slant and different approach, of the attack on the Minister's choice of preferred applicant. This attack was raised in the first review application. It was considered and dismissed by Tuchten J.

Limited risk of lower contribution to the Fund:

30. The Minister, in his reasons of 8 September 2015, stated that:

"While Ithuba proposes a lower percentage contribution of 27% to the NLDTF, there is limited risk of a materially lower NLDTF contribution in absolute terms relative to Gidani."

31. It is on the basis of this statement that Gidani contends that the Minister misdirected himself when he formed the view that there

was a limited risk of lower contributions to the trust fund. The Minister's view is based on the second genesis report of 6 August 2015.

32. Gidani contends that there is no rational basis for the Minister's view that there is a limited risk of materially lower contributions to the trust fund. It argues, that the Minister made a mistake of fact when he formed the view, relative to Gidani's projected contributions. The argument concludes that the Minister acted irrationally and unlawfully by assuming a risk of lower contributions to the trust fund. The alleged unlawfulness arises from the argument that the Minister did not take into account whether awarding Ithuba the license, the latter would make less contributions to the trust fund, inconsistent with the provisions of Section 13(3)(c)(iii) of the Act. In support of this contention, Gidani has provided opinions from experts in order to counter the projections made by Genesis.

33. At the time of the applications in response to the RFP, the applicants have to show projections as to how they will be able to maximise contributions to the trust fund. These calculations are projections and not fact. It is indeed so that with these kinds of projections, there is always a risk that due to the downturn in

the economic situation or upswing of the economic situation in the country, the projections may turn out differently. Consequently, each of the projections by any of the applicants carries with it a certain element of risk. The Minister was alive to this fact.

34. In his reasons, of 8 September 2015, he explains that he weighed “some risk of lower absolute NLDTF contributions” against the prospect of “potentially higher absolute NLDTF contributions (both in the short term and long term)”. He states further as follows:

“27. In my decision to award the license to Ithuba in 2014, which was reviewed and set aside, I had sought from Ithuba a minimum guaranteed rand value contribution to the NLDTF on each year that improved upon historic levels.

28. On reconsideration of my decision and during negotiations with Ithuba, I decided to remove the minimum guarantee rand value contribution to the NLDTF and obtained advice on the possible risk that

Ithuba's proposed contribution of 27% to the NLDTF may result in lower NLDTF contributions."

35. The Minister decided that the risk was worth taking. Gidani's contention is that the risk-taking on Ithuba's projections is irrational as it was made in theory and not on a statutory commitment to realism. It cannot be expected of the Court to consider the experts' opinions and decide which of those experts the Minister should have taken and further that failure to do so amounts to irrationality. Further, the Supreme Court of Appeal in the matter of **MEC for Environmental Affairs and Development Planning v Clairison CC**⁴ opined thus:

" It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts the functionary with a discretion it means just that: The law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a Court to second-guess his evaluation. The role of a Court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."

⁴ 2013 (6) SA 235 (SCA) at paragraph 18.

36. Tuchten J in his judgment recognised and accepted that in matter of this kind, the decision-maker is allowed sufficient space to assume the risks. Assumption of risks is therefore not equal to irrationality. There is clearly no merit in Gidani's argument.

Minister's reliance on invigoration:

37. The Minister stated in his reasons of 8 September 2015⁵ that *"Ithuba's proposal offers the best opportunity to invigorate the lottery and stem the decline in public interest which may result in substantial upside in absolute NLDTF contributions both in the short term and long term."*
38. Gidani contends that the Minister's reliance on invigoration of the lottery was *"problematic"*. In essence Gidani contends that the Minister's reliance of invigoration of the lottery was unduly optimistic in the macro economic climate prevailing in South Africa. It further argues that invigoration strays from the statutory and policy framework, and that the Minister therefore exceeded his powers in having regard to this factor as a consideration.

⁵ Paragraph 29 of the 8 September 2015 Reasons for the decision.

39. Gidani fails to recognise that the Minister's reasoning is that invigoration intends increasing revenue and therefore increase in returns to the NLDTF. He formed the view that the declining public interest and participation in the lottery, poses a material risk to its ability to perform its mandate and improve the contributions to good causes in the long term. In his view therefore invigoration was required to address this risk. Invigoration entails introduction of additional games in order to maximise participation as well as additional chances to win. The increase in player participation is also recognised in the RFP, paragraph 1.4.2.5 where it is stated thus:

"The licensee is expected to maintain and increase the level of player participation in the lottery, increase revenue, expand the game variety, increase the net contribution to worthy causes and continue to develop the National Lottery Brand".

40. The RFP expects in respect of each applicant a creative approach to game design and creating new revenue streams.

41. Further, in paragraph 10.7 the RFP states as follows:

"Applicants must demonstrate the ability and capacity introduced both new international and new unsophisticated

localised games within the confines of the applicable South African legislation quickly and efficiently, thereby increasing the national footprint of the lottery. Applicants may explore the use of various different, but appropriate technological platforms and channels/outlets for new games.”

42. I am therefore of the view that the Minister acted within the confines of the RFP in accepting that Ithuba's proposal offered the best prospect of a reinvigoration of the lottery. The Minister's decision was thus not irrationally.

Inadequate Financial Resources

43. Gidani contends that Ithuba did not demonstrate before the Minister that they have adequate financial resources to operate the lottery. It argues that Ithuba failed to provide sufficient equity and irrevocable or fully committed debts incurred through the raise of loans from financial institutions.
44. Section 13(2)(b) of the Act requires the Minister to be satisfied that the Applicant has the necessary financial and other resources to conduct the national lottery. Gidani contends that Ithuba did not in fact have the financial resources to conduct the

lottery at the time when the new license was awarded. It is further contended for Gidani that Ithuba's revised funding arrangements were only finalised on 6 August 2015 and were therefore not in place during the period when the Minister was negotiating with Ithuba.

45. The relevant section in the Act, states that the Minister must be **satisfied** that the Applicant has the necessary financial and other resources to conduct the national lottery. There is no reference to the period when the Minister has to be satisfied. Tuchten J is of the view that "*The Minister had to form the opinion, based on reasonable grounds, having regard to the material facts before him when he made the decision to award the license, that Ithuba had on the date on which the Minister issued a license, financial resources available to conduct the lottery for the whole of the license period.*" I agree with this conclusion.

46. The assessment of financial resources becomes relevant at a time when a decision has to be taken by the Minister whether to award the license. This is further supported by the RFP in paragraph 2.9.1 where the document states that:

*“The licensee will be required to submit **on the day of issue of the Licence**, a bank guarantee or performance bond in the amount of R125m to be issued in favour of the Commission by a South Commercial Bank or DFI.” (My emphasis)*

47. The purpose of the performance bond is to provide security in the event that Ithuba failed to comply with its obligations under the licensing agreement. The argument by Gidani is that the performance bond was not in place when the Minister made the decision to award the license to Ithuba is simply incorrect and cannot stand.
48. In terms of the RFP, the applicants for the lottery licence had to make available a performance bond of R125 million, which Ithuba contends was covered by the equity fund. Ithuba further contends that the Minister throughout the negotiations was kept informed about the financial resources raised by Ithuba and as at 7 August 2015 when he awarded the license to Ithuba, the documentation pertaining to Ithuba's financial standing was before the Minister.
49. Ithuba had proposed R905 million to operate the lotto. According to Ithuba, they intended to raise R272 million through equity

funding and R650 million from loans which would constitute debt funding. They further submitted that the initial equity funding by H C I was converted to loan funding as is demonstrated in the documents attached to the record of decision. .

50. Gidani further contended that HI, which appeared as part of equity provider, had been withdrawn as such with the Minister's consent and therefore the records were not correct in reflecting HCI as part of the equity provider. This was explained by Ithuba's counsel, pointing out that during the course of the negotiations it was decided to withdraw the amount advanced by HCI as equity and convert it into a debt loan. The amount was in the bank only the transaction on papers too place. HCI therefore never withdrew its amount from the bank account of Ithuba.

51. Gidani contends further that the letter advancing the loan of R500 million from Standard Bank stated suspensive conditions which were to be met. Consequently, the loan raised was not fully committed or irrevocable as required by the RFP. Experts were approached to give opinions as to what constituted, in commercial terms, an irrevocable or full commitment as required by the RFP. One expert opinion received by Gidani states that some of the conditions obtained for a loan may not detract from

its irrevocability. This would refer to a loan received from a bank subject to signing of documents and agreements pertaining to that loan. The conditions must be such that the lender must not be able to resile or walk away from the said loan.

52. In response to this allegation, Ithuba contends that the Standard Bank had made a commitment which was irrevocable within the requirements of the RFP. The argument advanced is that because companies bidding for the National Lottery would in the ordinary course and at that stage, not have collateral. The very issue of the license would be sufficient security for the loan. It would therefore be expected in the ordinary course of business that a loan would be approved subject to, amongst others, the borrower being awarded the license. The formalities for the signing of agreements pertaining to that loan would occur once the license has been awarded. Ithuba further contends that this was the position in this case and had attached to its papers a copy of the agreement that was signed with Standard Bank in September 2015, subsequent to the award of the license in August 2015.

53. Gidani's charge raises a debate whether the content of the letter by Standard Bank contained suspensive conditions which

negated the requirement that the financing must be irrevocable. This comes down to the question of interpretation. In the matter of **Natal Joint Municipal Pension Fund v N Endumeni Municipality**⁶, the SCA on page 604A summed up the modern approach to statutory interpretation as follows:

“... Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. The sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used...”

54. Ithuba further submits that the Minister was entitled to have regard to the difficulties that will be experienced by a start-up empowered companies, when it comes to obtaining loan finance from commercial banks in advance of the grant of the license, but will generate the income needed to pay the loan. The submission is further made that the Minister was entitled to take the view that substantial compliance (rather than exact compliance) is a requirement of the RFP and would suffice. The funding from Standard Bank was subject to “*the satisfactory*

⁶ 2012 (4) SA 593 SCA.

completion of legal commercial documentation between Standard Bank and Ithuba". It is however in the nature of business transaction that financing will be made available subject to conditions, amongst others, of the acquisition of a licence. It would be absurd to expect any commercial entity to commit itself by letter fully prior to the signing of contract regarding legalities of repayment and the like.

55. In terms of the Act and the RFP, the Minister has to be satisfied that the successful applicant had "*fully committed financing*" and "*irrevocably committed financing*". The latter appears in the RFP while the former in the Act itself. The Minister took the view that the Standard Bank facility letter of 6 August 2015 amounted to fully committed debt funding within the meaning of the RFP. He stated that the completion of the debt funding agreement was only subject to the standard administrative process of completing the legal and commercial documentation and that no further approvals within the bank would be required.
56. Gidani further charges that Ithuba does not comply with the debt/equity ratio which according to the RFP should not exceed 70/30. Ithuba counters this by indicating that the debt equity ratio currently sits at 62/38 which is well within the ratio

prescribed by RFP. If regard is had to the capitalised interest, the ratio is 64/36 which is also within the ratio prescribed by the RFP.

57. The Act does not require the Court to be satisfied but rather the Minister as the decision-maker to be satisfied. Over the years there has been a line of court decisions defining the Court's approach to review applications. In the Seminal case of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**⁷, O' Regan J, writing for the Constitutional Court opines:

"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of Government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing

⁷ 2004 (4) SA 490 (CC) at paragraph 48.

interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.

58. I am unable to find that the Minister acted irrationally or unreasonably in accepting that the letter from the bank provided a fully committed funding. Further, in accepting that Ithuba had sufficient financial resources to operate the lottery, the Minister's decision was rational. There is thus no merit in Gidani's contentions.

Whether Ithuba is fit and proper to operate the license

59. Advancing this point as a ground of review, Gidani contended that the Minister ignored the finding by Tuchten J that Ithuba's CEO misled the Court in stating in her affidavit that she had provided proof of the adequacy of the financial resources to the Minister when the license was awarded in November 2014. The Court found that proof of financial resources was not provided to the

Minister and therefore he could not have rationally taken the decision that Ithuba had sufficient resources when he awarded the license in November 2014. This was one of the grounds which led to the Learned Judge setting aside the award of the license to Ithuba.

60. During argument on this review, counsel for Ithuba produced an extract from the affidavit of the CEO in which she stated to the Court under oath that she had secured (and not provided) proof of financing. Nowhere in that affidavit does she aver that she actually provided proof of financial resources to the Minister. The extract from the affidavit clearly points out that the CEO stated to the Court that she had secured (and not *provided* as it is now alleged) financial resources at the time the Minister awarded the first license in November 2014.

61. After the invalidation of his first award in 2014, the Minister's attention was drawn to finding by the court in the judgment by Tuchten J. He wrote to the CEO of Ithuba seeking an explanation to this discrepancy. The CEO wrote back explaining to the Minister that it was an error in the judgment that she had stated under oath to have provided proof of financial resources. She drew the attention of the Minister to the content of her

affidavit where she stated that she had *secured* proof of financial resources at that time. This correspondence took place after the Judgment of Tuchten J and forms part of the record which informed the reconsideration of the issue of the license to Ithuba.

62. I am thus not persuaded that the Minister had ignored the finding by the Court in the first review application. I am further not persuaded that the Minister was irrational in accepting that the CEO of Ithuba was a fit and proper person to operate the license.

Gidani contends that the Minister did not consult the Commission.

63. **Gidani contends that the Minister did not consult the Commission** when it awarded the license for the second time. **Gidani further is of the view that since the Minister stated in the affidavit that he took the decision to award the license on 7 August, he had no sufficient time to consult with the Commission. In this regard, **Gidani relies on the SCA decision of the South African Broadcasting Corporation v the Democratic Alliance**⁸ in which it is alleged that the Minister of Communications took less**

⁸ 2015 ZASCA 158

than 2 hours to decide on a matter which had volumes of documents.

64. In response to this charge, both the Minister and the Commission stated that there was consultation. The record reflects that the negotiations with Ithuba started in July 2015 and proceeded into August 2015 during the period of suspension of the court order of invalidity, concerning the issue of the first licence. Both the Minister and the Commission separately state in their affidavits that there was ongoing consultation during the negotiations as well as on 6 of August 2015. The Minister concluded the agreement with Ithuba on 7 of August 2015.

Gidani contends that the Genesis Report does not support the Minister's reasons for the decision.

65. Gidani contends that the second Genesis report, dealing with the risk factor, which the Minister had considered before making the award for the second time was unhelpful and not supportive of the Minister's conclusions and reasoning. Gidani further argues that the Minister ignored the first report of Genesis, which reported on the shortcomings in the Ithuba model.

66. Genesis issued two reports. The first report was issued prior to the award made in November 2014 and the second report in August 2015, prior to the 2015 award. Tuchten J in his judgment⁹ makes reference to Genesis' first report.

66. The second Genesis report concludes thus¹⁰ in regard to the risk factor:

“ In terms of the risk that the Ithuba proposal results in lower NLDTF contributions, this more detailed analysis indicates two things:

First, that the risk is reduced by the fact that Ithuba is not relying on increases in player pay-outs alone, as the bid combines both increased player pay-outs and increases in capex in the form of an expanded distribution infrastructure.

Second, that Ithuba is more likely to achieve an increase in sales over Gidani that is closer to the upper end of the range required than the lower end of the range in the event the risk materialises.”

67. It seems to me that Gidani's contention on this aspect is misplaced as a ground of review. The question as to how the Minister receives and considers advice on economic projections of the

⁹ Paragraph 62 of the judgment.

¹⁰ Paragraph 23 of the Genesis report of August 2015, (the second report).

risk entailed, would not, even to a Court holding a different view from that advice, constitute an appearance of irrationality. In **Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA**¹¹, the Constitutional Court held:

“Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Court can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.”

Gidani contends that the decision was rushed

65. Gidani contends that the **Cheadle Thomson and Haysom** report on the financial standing of Ithuba is dated 7 August 2015 and therefore the Minister could not have had sight of it before taking

¹¹ 2000 (2) SA 674 CC at paragraph 90.

the decision to make the award on 6 August 2015. The Minister's response in this regard is that the report which came on the 7 August was a recording of what he had considered during the negotiations and consultations, prior to making the award. The Minister contends that after being satisfied of the financial standing of Ithuba, he requested a report recording all that information, which report was provided to him on 7 August 2015. The agreement with Ithuba was concluded on 7 August 2015, after he had satisfied himself that all statutory requirements were met. Gidani's contention has no merit.

The Minister should have negotiated with Gidani

66. Gidani contends that after the award for the first license and its agreement were set aside by the Court in November 2014, the Minister should have negotiated with Gidani as a reserve applicant. However, Gidani could not point out to any authority, including in the Act and the RFP, which obligated the Minister to negotiate with the reserve applicant. On the contrary, the Minister is empowered, in his discretion, to consider and decide on the following options, in the event the negotiations with the preferred applicant break down:

- 66.1 negotiate with the reserve applicant for a license agreement and issue a license to the reserved applicant;
 - 66.2 Cancel the bidding process;
 - 66.3 Appoint an organ of state to administer the lottery; or
 - 66.4 Start the process *de novo* with a new RFP.
67. Gidani's contention is not supported by law. The Minister is not obligated to negotiate with Gidani as the reserve applicant.

Gidani's alleged "*poor performance*" of Ithuba:

68. Gidani argues that the Minister misdirected himself by failing to have regard to Ithuba's "*poor performance*" in managing the lottery during the period 1 June 2015 to 7 August 2015. It is further contended for Gidani that the Minister's decision to award the new licence to Ithuba was reckless.
69. The period mentioned above was during the month of July 2015, when the Court had declared the first license agreement invalid and had suspended the period of invalidity. It was during the same period that the Minister was in the process of re-negotiating with the preferred applicant, Ithuba, for the award of the license.

70. In response to this charge, Ithuba counters that its week by week sales revenue has more than doubled in the first 24 weeks as operator. It further compares this period with that of Gidani whose sales revenue grew by 5%. Ithuba further raises counter arguments that Gidani experienced similar problems when he took over from Uthingo in 2007. It further submitted that it is common occurrence for all new lottery operators around the world to experience teething problems. Ithuba further counter-charges that Gidani interfered with the installation of its terminals and equipment of retailers, during the transition period.
71. The Court sees no relevance in this argument insofar as the Minister's decision to award the license to Ithuba is concerned. The comparison between performance of Gidani as an ongoing operator and the initial performance of the incoming operator is not one of the criteria that the Minister needs to take into account in making the award. I therefore find it unnecessary to deal with the arguments relating to comparison on performance between the two lottery operators. There is no merit in this argument.

CONCLUSION.

72. Gidani's grounds of review do not make out a case of unlawful conduct on the part of the Minister. It has not been demonstrated that the Minister acted unlawfully or breached one or other of the legal provisions in taking this decision. The reasons for the decision are fully set out by the Minister in the statement of 8 September 2015, submitted in terms of Rule 53 of the Uniform Rules of Court.

73. Gidani conflates the concepts of irrationality and unreasonableness and fails to distinguish between the two. **In the Minister of Home Affairs v Scalabrini Centre, Cape Town and Others**¹², the Court stated as follows:

"But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason- in contra-distinction to one that is arbitrary- which is different to whether it was reasonably made. All that is required is a rational connection between the power

¹² 2013 (6) SA 421 (SCA) at paragraphs 65 to 66.

being exercised and the decision, and a finding of objective irrationality will be rare.”

74. Gidani failed to demonstrate how the decision of the Minister is not rationally connected to the objective sought to be achieved through the decision.. For the most part, Gidani sought to persuade the Court that the Minister failed to consider other options or means, in particular, to accept its proposal. In **Albutt v Centre for the Study of Violence and Reconciliation and Others**¹³ the Constitutional Court held thus:

“But, where the decision is challenged on the grounds of rationality, Courts are obliged to examine the means elected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.”

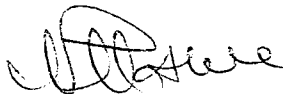
¹³ 2010 (3) SA 293 (CC)

75. Having regard to the conspectus of the evidence before this Court,
I am unable to find that there is any merit in Gidani's application,
and it stands to be dismissed.

76. On the question of costs, the rule is that these should follow the
result.

77. In the premises I make the following order:

1. The application for review and setting aside of the Minister's
decision of 7 August 2015 to conclude the Licence Agreement
with and to award the Third National Lottery Operator Licence to
Ithuba, is dismissed.
2. The applicant is ordered to pay the costs of the respondents,
including costs limited to three counsel per respondent.



SP MOTHLE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

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