

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 54314/21

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

7 March 2022

DATE

SIGNATURE

In the matter between:

ITHUBA HOLDINGS RF (PTY) LTD

Applicant

and

**NATIONAL LOTTERIES COMMISSION
IGT GLOBAL SERVICES LTD
MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

**First Respondent
Second Respondent**

Third Respondent

NEUKIRCHER J:

- 1] Part A of the application was set down before me in the urgent court and on 26 November 2021 I granted an order in the terms sought and postponed Part B *sine die*. On 3 December 2021 I gave reasons for the order. The order prevented Ithuba from changing over to the new Paytronix lottery system and “going live” with it on 1 December 2021. Certain other relief was also granted which had the outcome that the agreement Ithuba had entered into with Paytronix was suspended and Ithuba was ordered to comply with the terms of the License awarded to it by the NLC and the Minister. The order was granted pending the outcome of Part B of the application which would, if successful see the agreement entered into between Ithuba and Paytronix being reviewed and set aside, or an interdict granted preventing its implementation. This would include that the “go live” date of the Paytronix system would be suspended until such time as the NLC Board had given its approval to the system and the “go live” date.
- 2] The judgment handed down on 3 December 2021 sets out the background facts and reasons fully, and I therefore do not intend to deal with those.
- 3] It is as against the whole of the order and the reasons that Ithuba now seeks leave to appeal to the Supreme Court of Appeal.
- 4] Whilst paragraph 1 of the order (ie the issue of urgency) did form part of the Application for Leave to Appeal., it was not argued before me and I do not intend to deal with this issue as a result. I will therefore only deal with the application as

it lies against paragraphs 2 and 3 of the order granted.

- 5] In the main, Ithuba's argument is premised upon 4 main grounds:
- a) that the court made a contract for the parties (and in particular as between Ithuba and IGT, when granting the interim relief;
 - b) that the effect of the order granted was the same as if the court substituted its decision for that of the decision-maker in review proceedings;
 - c) the order granted raises important constitutional issues regarding parties' freedom to contract¹; and
 - d) the order goes against the spirit of the granting of an interim interdict.

- 6] Mr Bhana has argued that on any one of these grounds, leave could, and should be granted. He has bolstered his argument with the argument that this is a matter of extreme importance for his client – not only was Ithuba enjoined by the terms of the License Agreement to make provision for the phasing in of local content so that by year 6 of the term of the License, the hardware and software would be 100% locally owned, but it had invested R250 million into this and its partnership with Payronix which, were the order to stand, would be lost. Thus, this matter was of extreme importance to his client. He also argues that, as the order prevents implementation of these terms of the license, his clients are in breach of contract.

- 7] He has also argued that the matter is of national importance given the terms of the

¹ Barkhuizen v Napier 2007(5) SA 323 (CC)

License and the import of the judgment. He argues that, in effect, what the court has now done is conclude a contract on behalf of the parties to which they have not consented.

- 9] Lastly, an important part of Mr Bhana's argument has focused on the issue of the "prospects of success" in Part B – this is in keeping with the issue of whether the NLC had a *prima facie* case even if open to some doubt. On this issue, Mr Bhana argues that there are no such prospects for the NLC, as the argument on which this finding is based is premised on the question of whether Ithuba can be said to be an organ of state or that it exercises a public power or performs a public function. On this issue, the finding set out in paragraph 72 of the judgment is based on what I considered to be a concession by Ithuba that the offering of lottery tickets or the verification of winning tickets may possibly "*and at a stretch be construed as the performance of a public function...*" Mr Bhana argues that whilst this was indeed said, Ithuba in fact denied that any of this could be so construed so that it could be said to be performing a public function and therefore that it could, as a result be found to be an organ of state.
- 8] Mr Motepe argues that the application is nothing more than a rehashing of the arguments that were before court originally, which is not permitted². He also argues that the reasons for the grant of Part A do not bind any court hearing Part B – this is made very clear in the judgment itself. His argument is that, at best for Ithuba,

² Klencovljevic v Discovery Life Limited [2014] ZAGPJHC 249 at para 4; T & M Canteen v Charlotte Maxeke Academic Hospital and Another [2021] ZAGPJHC 519 para 8

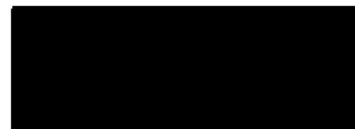
the grant of Part A of the application, is the grant of an interim interdict which enforces specific performance in respect of the License which is valid for a period of 8 years. He argues, that the enforcement of the terms of the License does not make a new agreement as between Ithuba and the NLC and therefore there is no merit in any appeal.

- 9] Section 17 of the Superior Courts Act no 10 of 2013 provides
“17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a) (i) the appeal would have a reasonable prospect of success; or*
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*
- 10] In this matter I am of the view that Ithuba does have prospects of success on two issues that were argued: the first is the issue of whether a contract was made for the parties by the order that was granted and the second is on the issue of whether there are prospects of success in the review – this being tied up with the issue of whether the NLC demonstrated that it had a prima facie right even if open to some doubt.

ORDER

11] In the circumstances, the order I make is the following:

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. Costs are costs in the appeal.



**NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 March 2022.

For the applicant	:	Adv AR Bhana SC, with him Adv Williams and Adv Davel
Instructed by	:	Roodt Attorneys
For the respondents	:	Adv JA Motepe SC, with him Adv Stubb
Instructed by	:	Malatjie & Co Attorneys
Matter heard on	:	18 February 2022