

BIN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

8/7/15

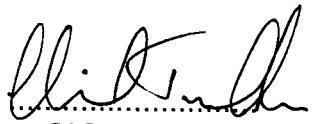
CASE NO: 81420/2014

In the matter between:

GIDANI (PTY) LIMITED

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
04/07/15 DATE		 SIGNATURE

MINISTER OF TRADE AND INDUSTRY

First Respondent

NATIONAL LOTTERIES BOARD

Second Respondent

ITHUBA HOLDINGS (PTY) LIMITED

Third Respondent

MZANSI GAMES (PTY) LIMITED

Fourth Respondent

GRAND LOTTERY (PTY) LIMITED

Fifth Respondent

JUDGMENT

Tuchten J:

- 1 This is an application to review and set aside two decisions made by the first respondent (the Minister). Both relate to the question who the Minister would license as the third operator of the SA National Lottery (the lottery) for the eight year period beginning on 1 June 2015. By

notice of motion dated 7 November 2014, the applicant (Gidani) launched the present review and brought an urgent application for temporary interdicts to stop the Minister from issuing the lottery license to the third respondent (Ithuba) and to stop Ithuba from taking any steps to implement any license agreement concluded between the Minister and Ithuba. But on 24 November 2014, before the urgent application could be heard, the Minister awarded the license to Ithuba. Gidani then proceeded only with the application to stop Ithuba from taking steps required in the license agreement to prepare itself to assume its duties on 1 June 2015. I heard the application for interim relief on 7 December 2014 and dismissed it in a written judgment (the interim judgment) handed down on 9 December 2014. The present judgment should, for background purposes and for a recitation of the applicable statutory material, be read together with the interim judgment. Of course, as I made clear,¹ my earlier conclusions were provisional, in the sense that they were made on the material before me at the time, and were not to be taken as binding on the court hearing the review in due course. I heard the present case, for review relief, over 20 to 22 May 2015 and again on 23 and 24 June 2015.

¹ Paragraph 10

- 2 In the review, Gidani attacks firstly the decision to negotiate the terms of a license with Ithuba in preference to Gidani and secondly the decision to award the license to Ithuba. The case made by Gidani in its founding affidavits is, in point of paper, very extensive but fortunately counsel for Gidani at my request identified the grounds of attack. I need only refer to those which follow. Firstly, that the Minister acted unfairly in selecting Ithuba as the tenderer as his first choice for negotiations towards a license agreement when the second respondent (the Board) had recommended that Gidani should be the Minister's first choice of negotiating partner. Secondly, that Ithuba did not have available at the date on which the Minister made his decision, 24 November 2014, the necessary financial means to conduct the lottery which are, so runs the argument, required as a prerequisite for any award of the license,. Factually, Gidani says, the papers demonstrate that Ithuba did not, at that date, have the necessary financial means. Thirdly, that Ithuba had not put up a performance bond of R125 million which all those tendering for the license had been told must be provided by the date upon which the license was issued. Fourthly, the decision to award the license to Ithuba was irrational because certain provisions in the license agreement (called in the papers "the guarantee") would, if implemented, inevitably result in Ithuba's insolvency. A decision in the

present context which if implemented will result in the insolvency of the lottery operator, is, Gidani says, irrational.

- 3 Gidani, the Minister, the Board and Ithuba all participated through counsel in the present application. The fourth respondent (Mzansi) and the fifth respondent (Grand Lottery) abided.
- 4 Before the enactment of the Lotteries Act² (the Act), lotteries were prohibited. The evil which the common law sought to prevent in this regard was that lotteries encouraged poor people to gamble rather than use their lottery stakes to feed their families. But that policy changed with the inception of the Act. The loss of the stakes was not considered to be an evil as such. Although certain other lotteries were rendered lawful, only the National Lottery provided for in Chapter 2 of the Act was empowered to collect money from the general public. Only one operator of the lottery may be licensed to conduct the lottery at any given time. The operator of the lottery is obliged to pay part of its net income to worthy causes. It has been authoritatively stated that it is

... clear that the intention of the Lotteries Act is that the National Lottery should generate as much money as possible for distribution to those causes.³

- 5 Counsel for all concerned were agreed that s 13(2)(b) created certain jurisdictional prerequisites to the exercise by the Minister of his powers under the Act. Of importance for present purposes is s 13(2)(b)(ii), that the Minister be satisfied that

... the applicant has the necessary financial ... resources to conduct the National Lottery.

This, counsel were agreed, meant that the Minister had to form the opinion, based on reasonable grounds, having regard to the material before him when he made the decision to grant the license, that Ithuba had on the date on which the Minister issued the license, 24 November 2014, financial resources available to conduct the lottery for the whole of the license period. This period is eight years, to run from 1 June 2015, the day after the license granted to the present incumbent, Gidani, expired.

³

Firststrand Bank Ltd v National Lotteries Board 2008 4 SA 548 SCA paras 7-9

6 Section 13(3) provides:

In considering whether to grant the licence, the Minister shall take into account-

(a) whether any person who appears to the Minister to be likely to manage the business or any part of the business of the National Lottery under the licence, is a fit and proper person to do so;

(b) whether any person for whose benefit that business is likely to be conducted, is a fit and proper person to benefit from it; and

(c) whether any person who is likely to manage the business or any part of the business of the National Lottery under the licence or a sports pool, will do so-

(i) with all due propriety and strictly in accordance with the Constitution, this Act, all other applicable law and the licence for the National Lottery together with any agreement pertaining to the licence;

(ii) so that the interests of every participant in the National Lottery and sports pools are adequately protected; and

(iii) subject to subparagraphs (i) and (ii), so that the net proceeds of the National Lottery and sports pools are as large as possible.

- 7 The provisions of s 13(3)(c)(iii) relating to the ability of the persons likely to manage the lottery to run the lottery so that the proceeds of the lottery are as "large as possible" were debated at length during argument. Counsel for Gidani pointed to the other provisions within s 13(3). Those provisions, counsel submitted, although not expressly said to be so, are in fact jurisdictional in nature. It is inconceivable that

the Minister could be empowered under the Act to appoint a licensee whose managers and shareholders or other persons likely to benefit from the lottery business were not fit and proper persons. So too, counsel argued, it was similarly inconceivable that the Minister could be empowered to grant a license to a person whose managers would not do so with all due propriety or otherwise than strictly in accordance with the Constitution or would manage the business otherwise than so that the interests of lottery participants would be adequately protected. Counsel for the respondents accepted that the provisions of s 13(3) other than s 13(3)(c)(iii) are jurisdictional.

- 8 Counsel for Gidani submitted that s 13(3)(c)(iii) was similarly jurisdictional. Counsel for the respondents submitted that it was not. Within the provision itself, it is rendered subordinate to the requirements that the managers of the lottery business must act in accordance with law and protect adequately participants in the lottery. The provision requires no more, submitted counsel, than that managers of the lottery business must strive for as large net proceeds as possible *within the context of their business plans and policies*. The measure does not in terms describe the maximising of net proceeds as jurisdictional.

- 9 I agree with counsel for the Board who submitted that the broad purpose of s 13(3) is to ensure that the personnel of the operator and those who are likely to benefit from the award of the license are both capable of administering the lottery and are suitable persons to do so. The question to which the Minister's mind should be directed by s 13(3) is whether the persons identified can be trusted to administer the lottery to its maximum potential and are reliable, trustworthy, competent business persons. In that sense the provisions are jurisdictional, in that it would be absurd to award the license to persons who had the personal attributes contemplated but would not strive to maximise the potential of the business, subject to proper business ethics and adherence to the law and the protection of the customers of the lottery. No absurdity would result, as it would in the case with the other provisions within s 13(3)(c), if the measure were not jurisdictional, except in the sense I have described.
- 10 I therefore conclude that having regard to the purpose of the Act and the other factors I have mentioned, maximising the net proceeds of the lottery is not determinative of the Minister's decision making power but is a highly important factor which the Minister must weigh in the decision making process.

- 11 Section 13(2)(a) provides that before granting a license to operate a lottery, the Minister must
- ... by notice in the Gazette and in not less than two newspapers circulating in every province invite interested parties to apply in writing for a copy of a request for proposal or any other document which may be made public
- 12 The Minister chose to initiate the decision making process by issuing a notice inviting interested parties to apply for a request for proposal (RFP). The RFP is a lengthy document, running to some 172 pages.⁴
- 13 Section 14 empowers the Minister to include in the license “conditions” to be determined by him after consultation with the Board. Section 14(2) lists a number of such conditions which the Minister “shall” include in the license.
- 14 Counsel for all the parties agreed that the RFP fulfils the function of delegated legislation and is to be treated as equivalent to a framework created during a tender process. Counsel accepted that the principle articulated in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security*

⁴ The purpose of the evaluation process is well captured by the terms of clause 8.2 of the RFP. The process was designed to “assess which Applicant will maximise the net proceeds for distribution to good causes.”

*Agency, and Others*⁵ (*Allpay*[1]) is applicable to the RFP. The result is that the RFP is not merely an internal prescript that may be disregarded at whim.

Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.

- 15 I agree with counsel for Gidani that in the present context, this means that the Minister was not at liberty to depart from material provisions of the RFP unless he did so in accordance with the machinery provided in the RFP itself for this purpose, and then at the very least after notice to all the participants in the process that he intended to do so.
- 16 The relevant provisions of the Act, which I quoted in full in the interim judgment, do not prescribe the procedure by which the Minister must exercise his statutory power to select an operator for the lottery. But

⁵ 2014 1 SA 604 CC para 40

irrespective of the process selected by the Minister, before it is commenced, the Minister

... shall by notice in the Gazette and in not less than two newspapers circulating in every province invite interested parties to apply in writing for a copy of a request for proposal or any other document which may be made public ...⁶

All counsel appearing in the case agree that this means that the Minister must follow a fair process and that as part of the process, the Minister must be satisfied that the applicants whom he is considering for award of the license have the necessary financial resources to conduct the lottery⁷ and must take into account whether an applicant will maximise net proceeds to the NLDTF.⁸ The process chosen by the Minister is embodied in the RFP.

- 17 I shall deal first with the argument that the Minister acted unlawfully in choosing to negotiate with Ithuba rather than with Gidani. Some background context is necessary for the evaluation of this argument. I described in the interim judgment how the Board proposed Gidani as the Minister's first choice negotiating partner and how the Minister decided rather to negotiate with Ithuba. Was this choice open to the

⁶ Section 13(2)(a)

⁷ Section 13(2)(b)(ii)

⁸ Section 13(3)(c)(iii)

Minister, given the provisions of the RFP? That, I think, is the issue I must decide at this level.

18 The case for Gidani is that the Minister, having committed himself to the process identified in the RFP, was not entitled, unfairly and arbitrarily, to depart from that process as the Minister saw fit.

19 In order to evaluate this argument, I must identify what the various parties say are the relevant provisions in the RFP. The purpose of the RFP, at this level, is to enable the Board to advise the Minister toward the Minister's ultimate task of selecting an operator by identifying from the tenderers a proposed "Preferred Applicant" and a proposed "Reserve Applicant". The RFP itself defines these expressions. The Preferred Applicant is

the Applicant recommended by the [Board] to the Minister, following an evaluation and adjudication process that has met all the requirements and to whom the Minister may consider appropriate to award the License.

20 The Reserve Applicant is

an Applicant whom the [Board] recommends to the Minister, in the event that the Preferred Applicant fails to conclude the License Agreement with the Minister.

- 21 Counsel submitted that the proper interpretation of these provisions is that the Preferred and Reserve Applicants are those whom the Board recommends to the Minister for the purposes mentioned. I accept that these submissions are correct.
- 22 Counsel for Gidani identified different features in the RFP which show how the Board is required by the Minister to exercise its recommendation function. The process required the Board to conduct its evaluation in three stages, ie a pre-qualification investigation (stage 0), a technical evaluation (stage 1) and a financial evaluation (stage 2). Counsel for Gidani say that the process was detailed, extensive and carefully and thoroughly considered and envisaged a rigorous evaluation and adjudication process, conducted according to carefully weighted criteria. I shall accept that it was and did.
- 23 Counsel go further. They say that the RFP does not make provision for the use of technical criteria as an overall analytical tool beyond the technical evaluation stage, for the “invigoration of the lottery”⁹ as an evaluative factor, for a holistic or cumulative evaluation by the

⁹ Which was one of the factors which the Minister says caused him to prefer Ithuba as his first choice negotiating partner and ultimately to choose Ithuba to operate the lottery.

Minister¹⁰ and the appointment by the Minister of independent advisers after he received the recommendations of the Board.¹¹

24 I think that this reasoning misses the point. The RFP process, at this level, was not designed to identify how the Minister would make his decision. Its purpose, again at this level, was to identify how the Board would evaluate the competing tenders for the purpose of advising the Minister. The Minister was thereafter required to make up his own mind, by reference to such factors as he might properly regard as significant but always subject to the Act and the provisions of the RFP.

25 The power to appoint the operator of the lottery is conferred by s 13(1) of the Act, which provides that the Minister may *after consultation with* the Board issue the necessary license. It is settled law that a statutory provision which requires a decision to be taken *in* consultation with another functionary requires the concurrence of that functionary. But a decision which is required to be taken *after* such consultation requires no more than that it be taken in good faith, after consulting

¹⁰ The way the Minister describes the process by which he made up his mind.

¹¹ In fact the Minister did make use of independent advisers for the purpose of further informing him before he exercised his decision making power. He appointed a firm of economists called Genesis, who provided the Minister with advice in the form, amongst others, of reports.

with and giving serious consideration to the views of the other functionary.¹²

26 It is established that such consultation did take place. One of the functions of the Board is to *advise* the Minister on the issuing of the license to conduct the lottery.¹³ The RFP did not purport to prescribe to the Minister to whom he should award the license.

27 I have mentioned that the Act requires the existence of certain jurisdictional facts prerequisite to the exercise by the Minister of his decision making power.¹⁴ Counsel were agreed that the requirement in s 13(2)(b) that the Minister “shall be satisfied” stands in contrast to a provision requiring the objective existence of the fact.¹⁵

28 It is the Minister who must be satisfied of the existence of the jurisdictional facts made necessary under s 13(2)(b) for the decision lawfully to be made, ie whether the successful applicant has, or has unconstrained access to, sufficient appropriate knowledge and experience to conduct the lottery; has the necessary financial and

¹² *Unlawful Occupiers, School Site v City of Johannesburg* 2005 4 SA 199 SCA para 13

¹³ Section 10(a)

¹⁴ Section 13(2)(b)

¹⁵ Compare the discussion in this regard in *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 CC paras 21-26.

other resources to do so; will show a clear and continuous commitment to the social upliftment programme identified in the Act and to the advancement upliftment and economic empowerment of persons disadvantaged by unfair discrimination; and that no political party or political office-bearer has any direct financial interest in such applicant or any of its shareholders.

- 29 It is as well to mention here the principles fundamental to the approach of the aspects of this review which come down to an attack on the rationality of the Minister's decisions. No organ of state may exercise any power or perform any function beyond that conferred by law. Furthermore, the decisions of all organs of state, without exception, must be rationally related to the purpose for which the decision making power was given, for otherwise the exercise of the power would be arbitrary and at odds with the Constitution.
- 30 It is useful to keep the concepts of reasonableness and rationality distinct. Reasonableness requires a simple test: was the decision one which a reasonable decision maker could have reached? Rationality and reasonableness evaluations may overlap. However the rationality evaluation must bear in mind

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts

may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the 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.¹⁶

- 31 Section 14 makes provision for “conditions” to be included in the license. Section 14(2) describes certain such “conditions” which must be in the license but the same subsection makes clear that the Minister may, after consultation with the Board, include other provisions falling within the rubric of what the Act calls conditions.
- 32 The RFP identifies two broad categories of relevance to the task of evaluation: technical factors and financial factors. Within these two categories, the RFP makes provision for subcategories or subcriteria. These subcriteria are called “metrics” in the papers. A process was developed pursuant to which these subcriteria were given arithmetical

¹⁶

Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 3 SA 293 CC para 51

weightings. The evaluation process was complicated because the applicants were advised to provide two projections based on their business models. These were called in the RFP the Base Case and the Conservative Case forecasts. The Base Case Forecast¹⁷

must represent the version of the business plan that best illustrates the Applicant's view of the financial projections that result as a consequence of the proposals set out in the Applicant's Application.

- 33 The Conservative Case Forecast,¹⁸ on the other hand, was not defined but was interpreted as being founded on historic lottery turnover figures. The evaluators concluded that all the applicants gave unrealistically high Base Case Forecasts and took this into account when evaluating the competing proposals.
- 34 Four applicants in all paid the R50 000 to receive a copy of the RFP and the R2,5 million to submit a proposal. These were Mzansi, Grand Lottery, Ithuba and Gidani. In the scoring on technical factors, an organ of the Board called the Evaluation Committee (the EC) scored Ithuba higher than Gidani (91,52 to 86,78), and scored Grand Lottery third (83,1). A 70% score was required to progress to the next round

¹⁷ Clause 14.9.1

¹⁸ Clause 14.10

of evaluation, ie financial factors.¹⁹ The EC then evaluated the applicants for financial factors, scoring Ithuba first with 87,95, Grand Lottery second with 80,24 and Gidani third with 76,76. The EC's report conveying these findings was on 2 June 2014 presented to the Board, which in this capacity featured in the papers as the Adjudication Committee (the AC) .

- 35 The AC began its process on about 17 June 2014. In the assessment of the three proposals before it, the AC conducted site visits and consulted with members of the EC and the AC's own legal gaming and financial experts. The AC accepted the scoring in the EC's technical evaluation but differed from it in relation to financial evaluation. The AC scored Grand Lottery first for financial evaluation with a score of 83,98, Ithuba second with 82,95, and Gidani third with 79,72.
- 36 Although Gidani came third on financial scoring, the AC (and thus the Board) selected Gidani as the Preferred Applicant. The decision of the AC was reached by majority vote. The Board justified its recommendation in paragraphs 13.2 and 13,3 of its report to the Minister:

¹⁹ Mzansi was thus disqualified from progressing further, although it was in fact evaluated for financial factors.

The recommendation is based on the differential between the conservative and base case which provides an indication of the possible risks attached to the applicant achieving the proposed turnover. ... Ithuba has the highest differential of 145% followed by Grand Lottery at 35% and Gidani at -3.4%. If one compares the operational efficiency of the three Applicants, Gidani would be the preferred Applicant as their proposal is substantially less volatile than the other Applicants. Although Ithuba has the highest differential, cognisance has been taken of the risk mitigation strategies adopted in terms of their marketing and payout strategies. The turnover projections are critical to the NLDTF contributions as they ultimately determine the contributions that could be made. In terms of contributions to the NLDTF, Gidani reached the highest contributions in terms of percentage and the lowest in terms of Rand value over the period of the license (Gidani 34% and R16bn, Ithuba 27% and R22bn and Grand Lottery 32% and R32bn). Based on the financial opinion sought, Gidani's turnover figures seem to be more realistic as compared to the other Applicants.

- 37 On 11 August 2014, the Board submitted its report to the Minister. The Minister held a meeting with members of the Board. The Minister then decided not immediately to read the report of the Board and its recommendations. He instructed officials from his department and his lawyers to review the evaluation and adjudication process. This review began on 11 August 2014. During the review process, it was recommended to the Minister that financial experts be retained to undertake an independent assessment of the evaluation of the four

applicants which had been conducted by the EC and the Board. A firm called Genesis Analytics was retained for this purpose. Genesis proceeded to assess the evaluation of the four applicants at the financial evaluation level.²⁰ Genesis submitted written reports to the Minister and also made an oral presentation to him.

38 Genesis' first report was dated 1 October 2014. It evaluated the applicants under the rubrics of business plan, marketing and communications, contribution to the NLDTF, financial assessment and model and BBBEE and general information. In its final assessment, Genesis took the view that both Mzansi and Grand Lottery should fall out of the reckoning.

39 The Minister accepted this advice which, in fact, accorded with the views of the AC and the Board. There is no attack upon this aspect of the decision making process. Indeed, in my view, the decision to exclude Mzansi and Grand Lottery from further consideration was both rational and reasonable. What was left then was, if I may use the expression, a two horse race between Gidani and Ithuba.

²⁰

The Minister also retained a firm called Honeycomb BEE Ratings to assess the Board's BBBEE evaluation. I mention this only for the sake of completeness. The BBBEE assessments are not in issue.

40 Genesis proceeded in section 7.2 of this report to consider the question whether Ithuba or Gidani should be treated as “preferred bidder”. Genesis reasoned that on its substantive assessment, the two were

closely matched with both performing generally well in every category and each displaying slightly different strengths compared to the other across categories.

41 In paragraph 167 (within section 7.2) of this report, Genesis expressed the opinion, for which it gave reasons which (assuming the correctness of the assumptions upon which the reasons were based) were both reasonable and rational, that both Ithuba and Gidani were

... capable of successfully operating the Lottery from a financial evaluation perspective.

42 In paragraph 169, Genesis identified what it called the most substantial difference between the two: the NLDTF contribution. It concluded that Ithuba presented “a risk” of lower NLDTF contributions. This was because on Ithuba’s business model, it proposed a *lower percentage contribution to the NLDTF* (27,4% on Ithuba’s base model compared to 34% for Gidani). This meant that for Ithuba to achieve a higher absolute NLDTF contribution, Ithuba had to achieve a turnover significantly higher than Gidani. As I shall show, to achieve parity with

Gidani's forecast absolute NLDTF contribution, Ithuba would have to generate a turnover some **25% higher than *Gidani***.

43 I think it is important to remember that this risk is based on a forecast related to the turnovers which Genesis thought the respective applicants were likely to achieve during the license period. Forecasts, or predictions, are just that: they may be conservative, prudent or reckless; they may be based on historical data or be mere thumbsucks; but they are not facts.

44 The furthest that any of the advice given to the Minister went in this regard was what Genesis said in paragraph 169.2:

In our opinion, Ithuba's sales forecast is unrealistic and therefore this cannot be the basis to determine which of the applicants is likely to deliver higher absolute contributions. The relevant question is how much higher would Ithuba's sales have to be relative to *Gidani* in order to ensure absolute contributions to the NLDTF are the same. We have calculated this at around 25% higher. In our view, whilst Ithuba does more than *Gidani* on the business plan and *is therefore likely to achieve higher sales*, we are of the opinion that this seems unlikely and presents a risk of lower contributions.²¹

21

My italics

- 45 Genesis went on to identify other perceived differences between the bids of Ithuba and Gidani. Gidani did better on marketing spend and retail commissions. Ithuba did better on high level financial measures. Gidani did better on financial risk assessment. Ithuba did better on BBBEE. Ithuba, said Genesis,

... does perform better on an investment and business plan perspective *as it offers a more substantial invigoration of the Lottery operation* and therefore we would expect Ithuba to provide for a more substantial expansion of the Lottery game revenue and distribution reach.²²

- 46 The Minister then asked Genesis to provide a quantitative scoring of the competing bids. Genesis responded to this request in a letter dated 17 October 2014 (the Genesis scoring report). In performing this task, Genesis used the qualitative measures it had identified in its report. It considered the weighting to score its metrics; generally but not invariably it weighted the individual criteria equally. It used the scoring approach reflected in procurement regulations. The Genesis scoring report concludes:

The scores are largely in line with the substantive analysis contained in the Genesis Report ... which indicates that the

scoring metrics are doing a good job of representing the substantive analysis. In particular:

... Ithuba and Gidani scored very close together overall and well above the other Applicants. In terms of the individual categories, Ithuba does better on the business plan with Gidani better on marketing and NLDTF contributions, whilst both are fairly equal on the financial analysis

- 47 The result of the Genesis scoring report was that Gidani came out the overall winner on financial evaluation by 0,6%. That the scoring placed Gidani and Ithuba closely together was broadly consistent with the analyses of the EC and the Board. The Minister took the view, one that in my opinion cannot be faulted (given my conclusion that the Act read with the RFP did not compel the Minister to select the applicant with the highest absolute contribution forecast) for rationality or reasonableness, that Gidani and Ithuba were evenly matched.
- 48 On 23 October 2014, the Minister selected Ithuba as Preferred Applicant. He did so, in essence, because he thought that Ithuba and Gidani were closely matched on scoring but Ithuba's plan to invigorate the lottery appealed to him. On the advice presented to the Minister, *at this stage*, I cannot fault the Minister's conclusion that both had demonstrated their ability sustainably to operate the lottery.

49 Fundamental to the conclusions reached by the AC, the Board and Genesis was that both Ithuba and Gidani had the necessary financial resources to run the lottery. The question before me is not whether Ithuba did have the necessary financial resources but whether the Minister could reasonably have been satisfied that it did. All those who evaluated this aspect thought that it did. There seems to me to be no basis for a finding that the Minister could not have come to the same conclusion, at the stage when the Minister was considering whom to appoint as Preferred Applicant. But as I shall show, matters changed when it came to the negotiation of a license agreement.

50 Similarly fundamental to the reasoning of all concerned in arriving at this point was an assumption legitimately made on the strength of the RFP and a draft license agreement which was available to all the bidders through the Virtual Data Room²³ that irrespective of how optimistically (or unrealistically, in the view of some) an applicant had been in forecasting its projected turnover during the life of the new license, *the Successful Applicant would not be required to commit to its turnover forecast*. Instead, the Successful Applicant would only be required to commit to paying a stated percentage of its turnover to the NLDTF. With all commercial gambling, as every experienced gambler

²³ Clause 2.3.1 of the RFP provides that each applicant will have sight of the draft license via the VDR. The Draft License is defined in the definitions section of the RFP.

knows, matters are so arranged that the odds favour the house. So but for rank administrative incompetence or a disastrous slump in the numbers of prospective gamblers, the Successful Applicant is guaranteed a profit. That is why the competition for this license is so keen.

51 The importance of this is that there was no significant risk that Ithuba's unrealistic projected turnover forecast would, on the hypotheses I have mentioned, impact on its ability to run the lottery. It follows therefore, at this juncture in the analysis, that the Minister was free in principle to take the risk that Ithuba would not make good on its forecast and that Ithuba's absolute contribution to the NLDTF would turn out to be lower than it would have been if the Minister had selected Gidani as Preferred Applicant and had proceeded, *on the basis of no commitment to absolute contribution*, to award the license to Gidani.

52 Perhaps the decision can be characterised as displaying an excessive appetite for risk. I express no opinion on the question because it is not within my province to do so. The decision to appoint the Preferred Applicant lay with the Minister. Even if the decision to appoint Ithuba as Preferred Applicant can be criticised on this score, it is neither irrational nor unreasonable. Perhaps Ithuba is correct in its optimistic

forecast of its own potential. If it were to turn out that those who doubted Ithuba's ability to deliver on its forecast are correct, the remedy would lie in the political sphere.

53 For these reasons, in my judgment, the application to set aside the decision of the Minister to select Ithuba as Preferred Applicant cannot succeed.

54 But the Minister was concerned by the prospect that Ithuba's forecast had been characterised by his advisers as unrealistic. He investigated this aspect further. He factored a potential commitment by the Successful Applicant²⁴ to a *fixed rand value contribution to the NLDTF* into his thinking. Even before selecting Ithuba as Preferred Applicant, the Minister instructed Genesis to explore the issues which would arise from the insertion into the license agreement of a provision committing the Successful Applicant to such a fixed rand value commitment. Genesis responded in a letter dated 17 October 2014. The letter sets out the specific questions posed by the Minister. These questions related firstly to the role of an expansion in the lottery within the respective proposals of Ithuba and Gidani and secondly Ithuba's profit margin and the risks faced from a decline in sales, having regard

²⁴ ie as defined in the RFP as the Applicant who has been recommended as the Preferred Applicant and who then enters into and successfully concludes the license negotiations with the Minister

to Ithuba's modelled 1,2% nett profit. In paragraph 1.2.3 of the letter, the following question is recorded:

Please consider whether a risk arises for Ithuba's business model given its narrow profit margin, in the event of a significant drop in sales.

- 55 The conclusion to which Genesis came in relation to this question was that even if Ithuba were to suffer a "relatively severe drop in sales",²⁵ Ithuba would still be likely to meet its financial obligations. But this conclusion was arrived at on the assumption that no fixed rand contribution commitment (as opposed to a commitment expressed as a percentage of turnover) was imposed on Ithuba. Such a fixed rand commitment changed the position and, indeed, changed the position utterly. This is how Genesis deals with the case if Ithuba were to be subject to a fixed rand contribution:²⁶

In terms of NLDTF contributions, Ithuba is also far more dependent on the expansion of the Lottery to increase the NLDTF contribution simply because it proposes a NLDTF contribution percentage that is far lower than Gidani. Ithuba proposes a NLDTF contribution roughly 6% lower than Gidani and therefore needs to achieve sales of 25%-27% higher than Gidani to make similar NLDTF contributions.

²⁵ Paragraph 10 of the letter

²⁶ Paragraphs 5 and 5.1 of the letter

We note that this cannot necessarily be fixed by contracting for the payment of minimum contribution level equal to current contributions by Ithuba.²⁷ This is because even under inflationary growth in lottery sales (which is far higher than historic growth), Ithuba would fall short of current contribution levels by roughly R150m per annum but is only forecast to make a profit of roughly R250m over the license period. *It therefore seems unlikely that it could honour such payments without losing money and going insolvent.*²⁸ [my italics]

56 The irrationality argument in relation to the decision to appoint Ithuba to operate the lottery focusses on the undertaking in the license agreement under which Ithuba commits to a fixed rand undertaking to contribute R16,5 billion to the NLDTF over the lifetime of the license. This commitment will, argues Gidani, cause Ithuba to go insolvent. If Ithuba goes insolvent, it cannot operate the lottery.

57 Under the Act, as the Act read at the time the decision was made, the insolvency of the operator would have the consequence that South Africa would be without a national lottery until a new operator was appointed. The Act was however amended. Prior to its amendment, the Act did not contemplate that the country should not have a

²⁷ I think that this reference to "current contributions of Ithuba" is an error and should be read as "current contributions of Gidani".

²⁸ I have omitted a footnote to paragraph 5.1 of the letter which states that Genesis sourced the contribution shortfall and profitability from an adjusted conservative model discussed in Genesis' initial report

national lottery.²⁹ The position as a result of the amendment is now different. But perhaps more to the point, contributions to the worthy causes which have relied on or believe that they might receive such contributions will cease or be disrupted if the lottery operator becomes insolvent. A decision made in the face of this likely outcome, Gidani says, is irrational.

58 Although this was an administrative decision, I need not for the purposes of the irrationality attack, dwell on the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Every exercise of public power is subject to judicial scrutiny for rationality. This does not mean that the court may take over the function of government to formulate and implement policy. The question is whether the means chosen are rationally connected to the ends sought to be achieved.³⁰ The examination of the means and ends relationship is not aimed at determining whether some means will achieve the purpose better than others but whether the means employed are rationally related to the purpose for which the power

²⁹ The amendments in question were effected by the Lotteries Amendment Act, 32 of 2013, which commenced on 14 April 2015 pursuant to Proclamation R19 of 2015, published in the Government Gazette of that date pursuant to s 34 of the Amendment Act.

³⁰ *Ronald Bobroff & Partners Inc v De La Guerre* 2014 3 SA 134 CC paras 6-7

was conferred. "The means" in this context includes everything that is done to achieve the purpose.³¹

59 I have set out the advice which the Minister received from Genesis at some length because it was the only advice which bore upon the consequences of the importation of a fixed rand undertaking into the license agreement. The most significant consequence, for present purposes, of the fixed rand undertaking was the risk that it brought of Ithuba going insolvent during the currency of the license. Absent the fixed rand undertaking, the advice of Genesis, which was not irrational, was that Ithuba's business model did not present a significant risk of insolvency.

60 But, as Genesis recognised, that very risk arose when the fixed rand commitment was imported into the license agreement. Absent this commitment, it did not much matter for the purposes of decision making and within the context under discussion what Ithuba's likely turnover was. The Minister had reason to believe that under either Gidani or Ithuba, the operation of the lottery would be sustainable.

³¹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 CC paras 32 and 36.

61 But once the Minister decided that a fixed rand commitment by Ithuba was an appropriate “condition” to include in the license agreement, that question assumed great significance. The evidence shows that Ithuba would have to achieve a turnover of 29% more than Gidani’s forecast (a prospect which the Minister’s advisers characterised as unrealistic) or 86% more than Gidani’s actual historic turnover to break even.

62 There is no suggestion that the Minister appreciated that in order to satisfy himself as to the sustainability of the scheme to which Ithuba offered to commit under the license agreement, he needed to consider whether Ithuba was likely to achieve such a turnover. This is not a case where the Minister considered the facts relative to the question and made a decision in favour of Ithuba which some might consider imprudent. The Minister provided reasons for his decisions in an extensive document dated 13 January 2015. There is no reference in the reasons to this, in my view, critical question. My conclusion is that the Minister simply failed to consider this question at all. I am fortified in this conclusion by the evidence. Mr Hodge, Genesis’ lead economist, states that Genesis concluded that Ithuba’s probable turnover would lie somewhere in a range above that of Gidani but below that forecast by Ithuba. “We did not,” said Mr Hodge at paragraph 11.3 of his affidavit, “seek to identify where in this range

Ithuba's sales are likely to be." Mr Felet, also an economist and a partner at Genesis, stated in a footnote to paragraph 8.2 of his affidavit that in assessing Ithuba's probable sales, "a revenue forecast somewhere between that of Gidani at R48bn and that of Ithuba at R85bn should be used."

63 I accordingly find that a vital component within the means and ends analysis was missing from the Minister's consideration. I emphasise again that the question at this level is not whether it is likely or not that Ithuba will achieve a turnover large enough to save it from insolvency. The question is whether the Minister gave the necessary consideration to this component of the analysis. In my judgment, the Minister did not adequately consider the point.

64 it was submitted by counsel for Ithuba that Ithuba's commitment to the fixed rand commitment showed that Ithuba's shareholders and backers sincerely believed that Ithuba could honour the commitment and that this saved the decision from irrationality at this level. I do not agree. Firstly, the question is not whether those behind Ithuba believed what they said. The question is whether there was material on the strength of which the Minister could conclude that what had been forecast would be achieved. Secondly, the commitment was not a guarantee, properly so called. No financially powerful third party had

undertaken to make Ithuba's commitment good. All the Minister had to go on was the hope that Ithuba's shareholders and funders would want to make good on Ithuba's commitment. And then there was no indication that those shareholders and funders would be financially able to make good the very substantial amounts that the commitment might require.

65 It follows therefore, in my judgment, that the decision to appoint Ithuba the Successful Applicant and to award the license to Ithuba was irrational. The same facts lead to a conclusion under s 6(2)(e)(iii) of PAJA that the Minister took the decision without considering this relevant consideration. On either basis, the decision to award the license to Ithuba must be declared under s 172(1)(a) of the Constitution to be invalid.

66 Counsel for Gidani submitted that the element of the fixed rand commitment vitiated not merely the decision to award the license to Ithuba but also the decision to select Ithuba as Preferred Bidder. I do not agree. At the stage before choosing the preferred bidder, the Minister was merely exploring the concept. Whether the importation of this commitment would lead to insolvency depended on the numbers built into the commitment measured against the chances that Ithuba could meet the commitment. It was, as I see it, not at that

stage of the decision making process necessary for the Minister to consider the insolvency issue. That would only arise when and if Ithuba during negotiations declared its willingness to accept the fixed rand commitment.

- 67 For completeness I should deal with two further submissions by counsel for Gidani with which I do not agree. Counsel submitted that the Minister was not entitled to appoint and rely on the advice of independent experts (other than lawyers) outside the Board to help him to form a view on the decisions he was called upon to make. But clause 8.4 of the RFP declares that the evaluation of the competing proposals will be undertaken by an

... evaluation team, which may include Advisers ...

“Advisers” is defined in the RFP to include

... external third parties advisers or consultants appointed by
... the Minister.

- 68 The employment of such persons is thus expressly authorised by the RFP. Counsel further criticised the Minister for considering the reports of the AC and the Board only after he received advice from his chosen external adviser, Genesis. In my view the order in which the Minister

reads and evaluates the various advices, reports and recommendations submitted to him is for the Minister to determine. He should not ignore any thing that is put up to him. It is not suggested that he did so.

69 Counsel for Gidani submitted that by permitting Ithuba to undertake the fixed rand commitment, the Minister had permitted Ithuba to improve its proposals. This, so ran the argument, was impermissible, unless at the least all the other applicants were offered a similar opportunity. But s 14(2) of the Act gives the Minister a wide discretion to include "conditions" in the license. I see no improvement on a proposal where the applicant is required to commit to something offered by the applicant in that very proposal.

70 There are further grounds on which I find that the decision to award the license to Gidani was invalid under s 172(1)(a) of the Constitution. They relate to the performance bond of R125 million which the RFP required a Successful Applicant to put up.

71 Under s 13(2)(b)(ii) of the Act, the Minister had to have been satisfied when he issued the license that Ithuba had the necessary financial resources to conduct the lottery. One of the financial resources

required is the performance bond in question. Clause 2.9 in Section 2 of the RFP makes provision for this bond:

- 2.9.1 The Licensee will be required to submit on the day of the issue of the License, a bank guarantee or performance bond in the amount of R125m to be issued in favour of the [Board] by a South African Commercial Bank or DFI.³² The amount of R125m has been calculated as a percentage of an assumed estimated annual turnover. This amount will be reviewed annually. Applicants may suggest an alternative approach for this calculation. In the event that the amount is adjusted upwards, an additional performance bond or supplementary performance bond may be required. Multiple performance bonds can be issued to make up the aggregate amount of R125m.
- 2.9.2 The performance bonds may require cash to be held on deposit with or to be pledged as security in favour of the South African Commercial Bank or DFI issuing the performance bond.
- 2.9.3 This performance bond will bind the Licensee to fulfil and perform its contractual commitments and obligations in accordance with the License Agreement, throughout the License Period and up until the last official date of claiming prizes in any game supplied under the License.
- 2.9.4 The cost of issuing and maintaining the performance bond is to be covered by the Licensee.

32

DFI is defined as any development finance institution in the RSA

- 2.9.5 A pro forma form of performance bond will be contained in the VDR³³ and will be required to be commented on by the Applicant in their Application, with the final form of the performance bond being negotiated as part of the License Agreement. Salient provisions relating to the performance bond shall form part of the License conditions.
- 2.9.6 The License conditions shall provide for and shall permit the [Board] to request payment of an amount of money as compensation in respect of a failure by the Licensee, or any person acting in terms of or under the License for non-performance as specified in the License. In the event of penalties not being paid or non-performance or inadequate performance, the performance bond may be called.
- 2.9.7 The requirement of the performance bond is in addition to the requirement for the Licensee to provide security in relation to prize monies.

72 The scheme of the RFP is that the Minister will first announce his decision to award the license. Then, at some later date, the license agreement will be signed. In accordance with this scheme, clause 4.1.1 of the RFP obliges the Successful Applicant within ten business days of the decision to award the license to provide written confirmation from a South African commercial bank or DFI in regard to the financial guarantees or performance bonds required.

33

Defined as the Virtual Data Room containing the documents for the RFP

73 Paragraph 17.10.1 in Section 17 of the RFP states that the

... Performance Bond is required to ensure that the Licensee complies with the terms of the License, including the transition period.

74 The transition period is not defined but transition is provided for in Section 13 of the RFP. Under clause 13.1, each applicant was required to provide a transition plan covering the period from award of the license to the commencement of operations showing how it proposed to take over from the then current license holder. The hope was expressed (in the transition timetable³⁴) that the transition would begin on 1 November 2014.

75 Counsel for the Minister and Ithuba submitted that the requirement that the performance bond cover the transition period as well as the license period proper was of little moment in the scheme of the RFP and that the risk to the Minister arose purely from the operator's actions during the currency of the license period. I do not agree. Clause 4.2.5 of the RFP provides for financial penalties for breach of the license agreement. Clause 4.2.3 requires the Successful Applicant to commit to milestones in relation, amongst others, of its transition

34

At internal p23 of the RFP

plan against the risk of penalties for the failure to achieve key milestones.

76 The purpose of this performance bond is clear: to provide the Minister with security against the risk that a potential lottery operator, which might be a hitherto untried lottery operator, would fail to comply with its obligations under the license agreement to the prejudice of the broad body of citizenry of the Republic and the NLDTF whose interests the Minister represented.

77 But the license agreement was ultimately drawn, not to impose an obligation on Ithuba to provide the performance bond of R125 million, but so that the provision of the guarantee was made a resolute condition of the license agreement. Clause 3.2.1.1 of the license agreement provided that the resolute condition was that Ithuba furnish the Board with the bond by no later than 28 November 2014. Clause 3.1.1 of the license agreement recorded that Ithuba had provided the Board with a "letter of comfort" from a commercial bank or DFI regarding the bond.

78 The letter of comfort was not identified in the license agreement as such but there are three such letters in the record. One was issued by Rand Merchant Bank and two by the Standard Bank. The first is from

RMB, dated 21 November 2014. The RMB letter explains that RMB has provided Ithuba with a document setting out the

... summary terms on which RMB expects to be able to provide the necessary R905 million to fund the equity and debt requirements of Ithuba... .

The RMB letter goes on to say that the letter confirms RMB's "interest" in providing the funding but that the letter did not constitute a "commitment" to providing funding.

79 The second letter, dated 27 February 2015, from Standard Bank recites that the Bank had received

... credit approval is to provide Ithuba with a senior secured debt facility of ZAR 500 million

But as with so much in this case, the devil is in the commercial detail because the letter goes on to state that the availability of the funds will be

... subject to the completion of our due diligence process which includes finalisation of satisfactory documentation, all legal and regulatory requirements and the related legal opinions and satisfactions of conditions precedent to the disbursing of the financing.

There is no indication in the papers that any of this was completed.

- 80 The third letter of comfort is again from Standard Bank, dated 12 March 2015. The letter records that the "finalisation of the [Bank's] requisite finance and project documentation" has not been achieved as at the date of the letter. The reasons for the absence of finalisation is not divulged. The letter proceeds to state that a "number of conditions precedent that are required to be addressed prior to first disbursement" have not yet been "addressed".
- 81 I shall say no more about these letters than that they provide no comfort at all. There is nothing in either of the letters that says any more than that Ithuba is in the process of negotiating a loan agreement with the Bank.
- 82 If this were the position as at 12 March 2015, then the position as at 24 November 2014, when the license agreement was signed, could not have been any better for Ithuba. The RMB letter dated 21 November is probably the letter of comfort to which the license agreement refers. At best for the Minister, that letter of comfort gave the mere illusion of comfort.

83 On the fifth day of argument, Ithuba made application to admit further evidence. In a separate judgment, I dismissed this application save only in respect of one document: a performance bond for R125 million dated 29 May 2015, issued by Investec Bank Ltd. This document demonstrates that while Ithuba has now put up the bond, until that date Ithuba did not put up any such performance bond and the Minister operated during that period on risk because the possibility of Ithuba's malperformance was unguaranteed.

84 It will be seen that the license agreement did not conform to the provisions of the RFP regarding the requirement that the bond be put up at the latest on the day the license was issued. The RFP itself provided that changes to the RFP could be made by the Board in consultation with the Minister and, in clause 2.7.2 within Section 2

All Applicants will receive notification of changes [to the RFP]
only via the VDR.

85 In my view the provisions in the RFP requiring the bond to be put up by the latest on the day the license was issued were material. The provisions were designed to ensure that at the latest at the time the Minister committed to licensing the Successful Applicant, the security was in place. Such security markedly reduced the risk posed by a licensee with no previous experience of running the lottery and with no

excess of assets over liabilities from which penalties and damages could be recovered. The ability by the Successful Applicant to provide the bond also enabled the Successful Applicant to demonstrate (in a relatively modest way, given the sums at stake) that the Successful Applicant was creditworthy.

- 86 There is no suggestion on the papers that the Board amended the RFP to provide for the provision of the bond to be a mere condition, as opposed to an obligation, as contemplated in the RFP, to provide the bond against the award of the license; nor is there any suggestion that the other applicants were given notice of the proposed change in relation to the bond. The obligation to provide a bond against the issue of the license would have operated to exclude all prospective applicants who were not financially powerful enough to provide the bond as called for by the RFP. The obligation would also have had the effect, at least potentially, of compelling prospective applicants to commit part of their financial capacities towards raising such a bond before they could hope for the issue of a license. In this sense, the necessary finance constituted venture capital. An applicant which was released from this obligation stood at a significant, and in my judgment untoward, advantage against its competitors.

87 The provision in the RFP requiring the bond to be in place before any harm could be done by the new licensee was further attenuated by clause 3.2.2 of the license agreement:

3.2.2 The above resolute post-license conditions have been inserted for the benefit of the Minister who can, in his sole discretion -

3.2.2.1 waive the fulfilment of any of the resolute post-license conditions; or

3.2.2.2 postpone the due date for fulfilment thereof ...

88 Clause 3.2.3 of the license agreement provided for the lapsing of the license and the restoration of the *status quo ante* if any of these resolute conditions were not fulfilled. But the protection which clause 3.2.3 afforded was itself significantly attenuated by the power sought to be vested in the Minister, in his sole discretion (*inter alia* without any obligation to consult the Board) to waive conditions or postpone their operation. The Minister thus purported to secure for himself under the license agreement the power entirely to dispense with the R125 million performance bond.

89 In fact the Minister did, more than once, postpone the date for the fulfilment of the condition regarding the provision of the bond. When the case was argued before me over the period 20-22 May 2015, the

due date had been postponed to 31 May 2015, the day Gidani's license expired. The Minister thus allowed Ithuba to operate during the transition period without having provided any bond. Part of the reason why the Minister did this emerges from Ithuba's own answering affidavit.

- 90 In paragraph 54.3 of Ithuba's main answering affidavit, the allegation is made that although a delay from 31 August to 23 October 2014 on the part of the Minister in announcing the Preferred Applicant made it difficult for Ithuba to secure finance

Despite this, Ithuba had secured the performance guarantee by the time of the signing of the License. By agreement between the Minister, the [Board] and Ithuba, the performance guarantee would not be effective until 29 May 2015.

- 91 I do not see how this statement can be true. Although the failure by Ithuba to provide the performance bond was pertinently raised by Gidani, no such document was placed before the court until the performance bond issued by Investec on 29 May 2015 was admitted during argument on 24 June 2015.

- 92 Ithuba goes on in paragraph 55 of the same affidavit, which was sworn on 9 April 2015, to say that the

... mere existence of litigation, no matter how meritless, resulted in a perception of some risk to Ithuba's creditors. Quite understandably, as a result of the pending litigation, Standard Bank has conducted a rigorous due diligence process to assess the risk arising from the litigation before it will release R500m of debt funding to Ithuba.

- 93 It was clear from the text of and materials referred to in Ithuba's own affidavit that RMB had fallen out of the picture and Standard Bank was, at the date the affidavit was signed, still considering its position. The irresistible conclusion on the papers is that at the time when this argument on this case began, Ithuba had either no debt funding at all or had no debt funding of any significance.
- 94 As a matter of fact, it is now clear that the statement in Ithuba's answering affidavit that Ithuba had provided the performance bond was not true. As I explained in paragraph 83 above, Ithuba secured a performance bond for R125 million as required by the RFP on 29 May 2015 and not before.
- 95 The crucial date, however, for present purposes, is 24 November 2014, the day on which the Minister issued the license. At that date, on Ithuba's own version, it had no debt funding of any significance; not even a commitment to provide funding which was conditional upon Ithuba's being awarded the license.

96 Counsel for the Board made the argument that because the inability of Ithuba to obtain funding was caused by the litigation launched by Gidani, the Minister was excused from the legal obligation imposed by s 13(2)(b)(ii) to satisfy himself that the applicant has the necessary financial and other resources to conduct the lottery. Quite apart from the obvious problem of establishing causation in the absence of any evidence from the relevant Bank, the purpose of the measure does not permit words to be implied into it to ground this submission.

97 Counsel for the Minister and the Board made the argument that the deviations from the RFP which I have described were mere "discrepancies" which were permitted under clause 1,5,7 of the RFP which provides:

Where a discrepancy occurs between the RFP and the License, the License will take precedence, unless the relevant provision is inconsistent with the Lotteries Act, in which case the Lotteries Act shall prevail.

98 In my view, this provision was designed to cover minor, non-material differences within the provisions of the two instruments. If this were otherwise, the Minister would be free to contract on terms entirely at variance with the RFP and, for example, be entitled to waive or eliminate entirely from the license agreement the requirement that the

Successful Applicant put up the R125 million performance bond. I do not think the deviations from the scheme of the RFP upon which I have concentrated can be said to be minor or non-material.

99 These findings have two consequences. The first is that the Minister acted beyond his powers in entering into a license agreement which was conditional on Ithuba's providing the necessary performance bond for R125 million by any date later than the date of signature of the license agreement. The second, more far reaching, consequence is that the Minister could not have been satisfied, in the light of the fixed rand commitment, that, as at the date on which the license agreement was concluded, 24 November 2014, Ithuba had the necessary financial resources to conduct the lottery. It was unable to put up a guarantee for R125 million. It could hardly have actually secured the much larger funding required to finance its equity, capital and debt needs.

100 To put it another way: the Act prescribes that a Successful Applicant must, *before it is so constituted*, establish to the reasonable satisfaction of the Minister that it has the necessary financial resources to operate the lottery. The RFP is clear on this topic. Clause 17.6.4.5 requires that the Successful Applicant must obtain *fully committed* financing from its funders *before* the Minister can award

the license. Clause 2.5.8 provides that each Applicant must be in a position to show at the date of issue of the license that its finances are *irrevocably committed*.

101 The Minister got it right when he said in the forward to the RFP that the ultimate aim of the RFP is to identify a credible lottery licensee that will run the lottery effectively. It is not open to the Minister to contract with the Successful Applicant on the basis that the Successful Applicant will try to demonstrate its financial credibility *after* the award to it of the license. It is not open to the Minister to run the risk that the Successful Applicant will fail to negotiate or trade itself into financial credibility.³⁵

102 In the result, Gidani has established that mandatory and material procedures or conditions prescribed by an empowering provision in the RFP read with the Act were not complied with by the Minister, a ground of review provided by s 6(2)(b) of PAJA.

103 I must therefore declare under s 172(1)(a) of the Constitution that the conduct of the Minister in issuing the license to Ithuba was inconsistent with the Constitution and therefore invalid. Under

35

I do not come to any conclusion on the question whether a firm commitment from a financial institution which is subject to the condition that the license be awarded passes muster in the context under discussion.

172(1)(b) of the Constitution and s 8(1) of PAJA, I must now assess what remedy would be just and equitable in the circumstances and it is to that question that I now turn.

104 In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*³⁶ (*Allpay[2]*), the Constitutional Court set out, in the context of a public tender case, the principles to be applied in the evaluation of a just and equitable remedy after a finding of constitutional invalidity. The court referred first to the principle identified in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 CC para 29 that

it goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. ... Ultimately the purpose of a public remedy is to afford the prejudiced party

administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.³⁷

105 The court continued:

[29] ... The emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made 'to allow the competent authority to *correct the defect*' (own emphasis). Remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.

[30] Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.

[31] In the merits judgment³⁸ this court stated:
'Once a finding of invalidity ... is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory

³⁷ In my quotations from *Allpay*[2], I omit all footnotes.

³⁸ *Allpay*[1]

procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. ...'

- [32] This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity - in this case the setting-aside of the contract between SASSA and Cash Paymaster - but also in relation to the effect of the order on future procurement and social-security matters.
- [33] The primacy of the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.

106 A party before the court in *Allpay[2]* proposed that the court articulate a general formulation for when it would be just and equitable to deviate from the corrective principle. In response to this the court pointed out³⁹ that a general statement of this kind might not be desirable or even feasible once it is accepted that the application of the corrective principle is not uniform. The corrective principle might be capable of implementation at certain levels, but not others.

107 The first point to be made in the present context is that the default position is that the rule of law be upheld. In the present case, the deviation from the standards laid down by the lawgivers⁴⁰ was pronounced. The law has set its face against a situation in which a license could be awarded to a person which had not shown, at the time of signing the license agreement, the existence of the necessary financial resources. The parties to and concerned with the license agreement, ie the Minister, the Board and Ithuba, designed a scheme to circumvent the law in this regard. There is a compelling ground in public policy to require that this deviation be corrected. In addition, I have found the license agreement to be irrational in one of its vital components.

³⁹ Para 34

⁴⁰ Parliament in relation to the Lotteries Act and the Minister, perhaps in a metaphorical sense, in relation to the RFP.

108 There is no great need in public policy for the public to continue to have uninterrupted access to the diversion and prospect of unearned wealth provided by the lottery. But the purpose of the lottery is to provide funds to good causes. Any interruption in the conduct of the lottery will have severely detrimental consequences for those institutions that rely, or have a reasonable expectation of relying, on funding generated by the lottery.

109 I give scant weight to the position of Ithuba. In paragraphs 45 and 48 of the interim judgment I said the following"

Gidani is worried that if Ithuba is allowed to prepare itself to take up its responsibilities on 1 June 2015 by entering into contracts and making other financial commitments, Ithuba will create, as it were, facts on the ground and position itself better to make an argument to a reviewing court that upon a finding of invalidity in relation to the Minister's decision, the award of the license to Ithuba should not be set aside because of the great prejudice to Ithuba and because of the dislocation to the administration of the lottery that this would cause.

...

... I am by no means convinced that a market participant in this high risk high reward industry which chooses to spend money on risk will receive much judicial sympathy in the context described.

- 110 Ithuba went ahead alive to the risks it ran. I accept that it has committed very substantial sums of money to the venture. Those risks to my mind are inherent in a tender environment which is subject to the rule of law.
- 111 The Minister, with the support and cooperation of both Ithuba and the Board, entered into the license agreement while litigation to prevent their doing so was pending. Now that all the evidence is in, I cannot see any reason for the haste with which this happened other than a desire to create the very facts on the ground to which I referred in the interim judgment. To add to this, these respondents starved Gidani of documentary information which Gidani thought needed to make a proper assessment of its case.⁴¹
- 112 I do not say, in relation to information, that they broke the law in their efforts to keep information away from Gidani. This was a case which called urgently for general discovery. I have little doubt that if Gidani had sought a general discovery order, it would have been granted one. But such an order was not sought and the Minister and the Board took a narrow view of the documents to which Gidani was entitled, ie the record before the Minister as at 24 November 2014, the date of

⁴¹ I have no doubt that the absence of complete information was at least part of the reason why Gidani in its founding and supplementary founding affidavits took numerous points that were later abandoned.

the award of the license, and those documents which might properly be described as having been referred to in their affidavits. I have no doubt that practicalities, particularly a perceived need to prevent its opponents from creating facts on the ground, informed Gidani's decision to press ahead without seeking a general discovery order for fear that this might further delay the hearing of the review.

113 The consequence was at least three interlocutory applications were brought by Gidani for access to documents. One of these came before me and I dismissed it. The other two, I was told, remain undetermined. The respondents which opposed the interlocutory application which came before me had good grounds for resisting it. I found in their favour. I am prepared to accept that the respondents had good legal grounds, absent a general discovery order, for resisting the interlocutory applications which did not come before me.

114 But while private litigants no doubt are under no such, or a much attenuated, obligation, the organ of state respondents are under a legal obligation to uphold the spirit of the Constitution. In the present context, that effectively meant opening their files to Gidani, an aggrieved contestant in a two horse race. No legitimate government interest could be advanced by demanding strict compliance with procedural law before they did so. I give some weight in the

consideration of remedy to this factor. It is in the public interest that a flawed decision, defended in this manner, should not be allowed to stand. There is a risk that the full picture has even now not emerged. Giving this factor weight will also contribute towards affording Gidani administrative justice.

115 The Minister has damage control powers under the Act. Sections 13A and 13B were imported into the Act by Act 32 of 2013. They read as follows:

13A Appointment of organ of state to conduct National Lottery

- (1) In the event that the Minister decides on justifiable grounds not to issue a licence as contemplated in section 13, the Minister may, after consultation with the board, licence or authorise an organ of state to conduct the National Lottery for a period not exceeding eight years, on such terms and conditions as the Minister deems appropriate, including such conditions as stipulated in section 14(1) and (2).
- (2) In deciding whether justifiable grounds contemplated in subsection (1) exist, the Minister shall consider any relevant factor including but not limited to-
 - (a) national government policies or priorities;
 - (b) the need to grow local industries and to procure goods from local manufacturers;
 - (c) the need to transfer skills and technology to the citizens of the Republic; and

- (d) the need to comply with the legislative framework for the promotion of broad-based black economic empowerment and transformation.
- (3) In appointing an organ of state to conduct the National Lottery, the requirements contemplated in section 13(2)(a) do not apply.
- (4) The licence issued to an organ of state may allow such organ of state to appoint any other person to conduct certain lotteries of the National Lottery on behalf of such organ of state, subject to the written approval of the Minister: Provided that the board has made a recommendation to the Minister to allow such appointment if the person to be appointed has satisfied the provisions of section 13(2)(b) and any other requirements or conditions as directed by the Minister.
- (5) The Minister shall publish in the Gazette the appointment of an organ of state to conduct the National Lottery in terms of this section.

13B. Temporary licence

The Minister may at any time owing to the fact that-

- (a) the licensee is for any reason whatsoever unable to conduct the National Lottery in terms of the conditions of the licence or is unable to meet the conditions of the licence to the satisfaction of the Minister;
- (b) the licence to conduct the National Lottery is suspended for any reason whatsoever;
- (c) the licence to conduct the National Lottery is revoked in terms of this Act; or
- (d) the licence to conduct the National Lottery has expired,

after consultation with the board, appoint or authorise any person or organ of state as the case may be, for a

non-renewable period not exceeding 24 months to conduct the National Lottery on such terms and conditions the Minister deems appropriate.

- 116 Two matters of significance arise from this new legislation. Firstly, the Act as amended provides ample scope for the Minister to limit or even eliminate the risk that the lottery will cease to function. Under s 13A(1) the Minister may, in a proper case, decide not to issue a license at all, in which case he may appoint an organ of state to run the lottery. Under s 13B(a), where the licensee is for any reason whatsoever unable to conduct the National Lottery, the Minister may under certain circumstances issue a temporary license.
- 117 Secondly, the legislature has allocated this decision making power to the Minister. I appreciate that this will require the Minister to take further decisions which may aggrieve one or more of those interested and lead to further litigation. But I do not think that this would justify the intervention of the court into the province of the Executive.
- 118 In all these circumstances, I think that a just and equitable remedy will be to set aside the decision of the Minister to issue the license to Ithuba and consequentially set aside the license agreement itself but to suspend this part of the order for a period to enable the Minister to take further steps in the light of this judgment.

119 Counsel for the Minister asked that a period of suspension of one month be afforded to the Minister for this purpose. I shall accede to this request.

120 Costs in my view should follow the result. I have considered whether to exempt the Board from the costs order. But the Board went further than merely placing information before the court. It actively supported the Minister and Ithuba. So it is fair to say that the Board has been substantially unsuccessful.

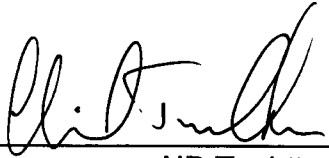
121 As to the costs of the two unresolved interlocutories: although these costs were reserved for consideration by the reviewing court, counsel for the Minister made the valid point that these interlocutories have not been argued yet. I shall assume that if they had been argued, the respondents would have won on the merits. However, because I have decided the review, the interlocutories no longer give rise to live issues and should be disposed of. I have set out that in my view the Minister, consistent with his obligations to promote the spirit of the Constitution, should not have made an issue in relation to the production of documents. In line with the rule in *Jenkins v SA Boilermakers Iron Steelworkers and Shipbuilders Society* 1946 WLD at 15, I rule that there should no order as to costs on the interlocutories. As I have not had the benefit of full argument, I shall

provide in the order for the parties to revisit the question of the reserved costs, if so minded.

122 I make the following order:

- 1 The application to set aside the decision of the first respondent (the Minister) to select the third respondent (Ithuba) as the Preferred Applicant for the third license for the South African National Lottery (the lottery) is refused.
- 2 The decision of the Minister to award the third license for the lottery to Ithuba is declared under s 172(1)(a) of the Constitution to be inconsistent with the Constitution and invalid.
- 3 The license issued by the Minister to Ithuba on 24 November 2014 and the license agreement concluded on that date between the Minister and Ithuba are both hereby set aside; provided, however, that the operation of the order in this paragraph 3 is suspended for a period of one month (ie 31 calendar days) from the date upon which this order is handed down.
- 4 The awarding of the third license is remitted to the Minister for reconsideration.

- 5 The Minister, the second respondent and Ithuba, jointly and severally, must pay the costs of this application including the costs consequent upon the retention and employment of both senior and junior counsel.
- 6 No order is made in relation to the costs reserved for determination by this court; provided, however, that any party may on notice to all other parties delivered within 10 days of the date on which this order is handed down, set the costs order in this paragraph down for reconsideration by the court. If no such notice is delivered, the costs order will, upon the effluxion of the period of ten days, become final.



NB Tuchten
Judge of the High Court
4 July 2015

\For the applicant:
Adv DN Unterhlater SC and Advs AD Stein and J Mitchell
Instructed by Bowman Gilfillan Inc
Johannesburg

For the first respondent:
Adv HN Maenetje SC and Advs PG Seleka and MD Stubbs
Instructed by Cheadle Thompson and Haysom Inc
Johannesburg

For the second respondent:
Adv M Chaskalson SC and Adv BD Lekokotla
Instructed by Gildenhuys Malatje Inc
Pretoria

For the third respondent:
Adv IV Maleka SC and Advs C Steinberg and N Ferreira
Instructed by David Bam Attorneys
Pretoria