



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

21 May 2025

DATE

SIGNATURE

Case Number: 2025-039592

In the matter between:

**WINA NJALO (RF) PROPRIETARY LIMITED**

Applicant

and

**MINISTER OF TRADE, INDUSTRY AND COMPETITION**

First Respondent

**NATIONAL LOTTERIES COMMISSION**

Second Respondent

**ITHUBA HOLDINGS (RF) PTY LTD**

Third Respondent

**THE MINISTER OF FINANCE**

Fourth Respondent

**ITHUBA LOTTERY (RF) PTY LTD**

Fifth Respondent

**SIZEKHAYA HOLDINGS (PTY) LTD**

Sixth Respondent

*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 handing down is deemed to be 21 May 2025.*

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## **JUDGMENT**

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### **POTTERILL J**

#### **Introduction**

[1] The applicant, Wina Njalo (RF) Proprietary [Wina Njalo] is on an urgent basis seeking relief against the first respondent, The Minister of Trade, Industry and Competition [the Minister] to declare unconstitutional, unlawful and invalid, and to review and set aside the failure of the Minister to take a decision to announce the successful applicant of the National Lottery. Furthermore, to declare unconstitutional, unlawful and invalid, and review and set aside the Minister's decisions to extend the bid validity period for a further 12 months and to issue a Request for Proposal [RFP] to operate the National Lottery on a temporary licence for 12 months. The Minister is also to be directed to announce the successful applicant by 9 May 2025 and negotiate and conclude a License Agreement with the successful Applicant and issue the Fourth National Lottery Licence to the successful Applicant by no later than 31 May 2025.

[2] The Minister opposed all the relief sought. The second respondent, the National Lotteries Commission [the NLC] opposed the urgency of the matter and that the decision to issue the temporary licence RFP be reviewed and set aside. The fifth respondent, Ithuba Lottery (RF) Pty Ltd [Ithuba Lottery] similarly opposed the urgency of the application and the review of the decision to issue the temporary licence RFP. The sixth respondent, Sizekhaya Holdings (Pty)Ltd [Sizekhaya] abided the Court's decision and counsel for Sizekhaya was in court on a watching brief. The third

respondent, Ithuba Holdings (RF) Pty Ltd and the fourth respondent, the Minister of Finance did not partake in the proceedings.

#### Common cause facts

[3] It is common cause that the current incumbent of the licence for the National Lottery is Ithuba Holdings with its licence to expire on 31 May 2025. A new licence [the Fourth Licence] must thus be issued and to facilitate this process the previous Minister in two newspapers in early August in terms of s13(2)(a) of the Lotteries Act 57 of 1997 [the Act] invited interested parties to apply in writing for a copy of the RFP and invitation to a briefing session. The RFP was made available for purchase on 31 August 2023. In terms of Chapter 3 of the RFP for this Fourth Licence the following timelines were set out:

- The bid evaluation, adjudication and independent auditing had to be concluded by 31 August 2024;
- The Minister was to announce the successful bidder by 2 September 2024;
- The Minister and the successful bidder were to conclude and sign a licence agreement by 13 December 2024.
- The commencement of transition and handover period from Ithuba Holdings to the new operator on 1 June 2025.

[4] On 3 February 2024 the NLC received eight applications in response to the RFP. On 18 September 2024 the Evaluation Committee's report was delivered to the NLC. The NLC Board concluded its adjudication and reported to the Minister only on 11 October 2024. The Minister on the very same day appointed a Quality Assessment Committee [QAC].

[5] On 22 and 25 November 2024 the Minister consulted with the NLC Board in respect of the Fourth License process. On 20 December 2024 the Minister consulted with the Board of the NLC and advised that he was not, at that stage, in a position to make a final decision regarding the successful applicant. He further requested the Board's advice on the most appropriate means to ensure the continued operation of

the National Lottery in the interim, as well as the development of a programme to bring the licensing process to finality.

[6] On 21 December 2024 the Minister issued a media statement that was published in the Virtual Data Room [VDR] on 26 December 2024. In this statement the Minister stated he was aware that the country and the applicants for the licence were anxiously awaiting his decision, but “he was mindful of the complexity and gravity of the issues that must be considered.” And:

“Unfortunately, I am not in a position to make a final decision at this stage. Any such decision at this time would in all good conscience mean that I have not applied my mind with due consideration of all the relevant factors. I have identified matters that require further evaluation. It would be inappropriate to disclose these issues now and their disclosure could very well prejudice the proper adjudication of the awarding of the licence. A protection of the integrity of the process is of paramount importance. Therefore, I have decided to postpone my decision pending the consideration of these matters. I am awaiting advice on the best way to ensure the continuation of the national lottery in the interim and the development of a programme to finalise this process, which I have directed must be done after consultation with the National Treasury. Throughout this process I have been, and will continue to be, in communication and consultation with the Board of the National Lotteries Commission.”

[7] On 10 February 2025, the NLC addressed a letter to the Minister, recording that the Minister had “directed the Board to commence the process to furnish him with advice on the possibility of awarding a temporary license.” The NLC conveyed that its advisors had concluded that the period remaining between January 2025 and June 2025 was insufficient to allow for the proper selection of a successful applicant, the negotiation and finalisation of a license agreement, and the necessary transitional arrangements for the new operator to assume responsibility for the National Lottery by 1 June 2025. The NLC accordingly advised the Minister of various options available to him, identifying the issuance of a temporary license as the most viable course of action under the circumstances. The NLC Board further characterised the issuance of a temporary license as inevitable should a Fourth License operator not be appointed

imminently. The NLC also sought clarity from the Minister regarding the anticipated timing of his decision on the award of the Fourth Lottery License and recommended an extension of the bid validity period for the Fourth License by one year, until 31 May 2026, to allow for the proper completion of the licensing process.

[8] On 19 February 2025 the Minister informed the parties that he intended to extend the bid validity period and sought Wina Njalo's consent to the extension. On 24 February 2025 Wina Njalo indicated to the Minister that in order for it to make an informed decision it required clarity on the Minister's reasons for the proposed extension. The Minister responded on 4 March 2024 with that he had several issues of concern and that it would be "inappropriate to disclose these issues now as disclosure would prejudice the proper adjudication of the bids." On the same day, 4 March 2024, the temporary licence RFP was published.

[9] On 5 March 2025 Wina Njalo again wrote to the Minister recording his failure to provide reasons and averred that the temporary licence RFP's terms afforded only the incumbent, Ithuba Holdings, the opportunity to be a successful bidder. The Minister responded to this letter on 11 March 2025 setting out that the reasons for his decision were those set out in the earlier letter of 4 March 2025 and constituted his full reasons for seeking an extension of 12 months. The Minister stated that he would consider Wina Njalo's concerns before any decision is made regarding the temporary licence RFP.

[10] On 27 March 2025 the Minister published a letter on the VDR stating his intention to invoke clause 8.2.7 of the RFP and announce a successful applicant by "a target date" of 25 May 2025, subject to successful negotiations on the terms of the agreement.

[11] On 30 March 2025 Wina Njalo wrote to the Minister proposing a consent order to formalise the Minister's new target date so as to avoid the urgent hearing. On 1 April 2025 the Minister responded to Wina Njalo stating that he could not provide an unequivocal undertaking. In the answering affidavit he submitted: "In my letter of 3 March 2025, I indicated that my intention was to finalise the awarding of the Fourth National Lottery Licence and the conclusion of a licence agreement by 31 May 2025. It is not possible to give an unequivocal undertaking in this regard because I cannot

guarantee that the negotiations about the licence agreement will result in a satisfactory agreement.”

[12] On 24 March 2025 Wina Njalo launched the urgent application.

### Urgency

[13] Wina Njalo avers that the urgency lies therein that the Third Licence expires on 31 May 2025 with the Minister failing to award the Fourth Licence. With the Act barring an extension of the Third Licence, without Court intervention, there will be no operator for the National Lottery after 31 May 2025. Should the National Lottery cease operations there is a real and substantial risk that beneficiaries of vital funding will be deprived of necessary assistance through the National Lotteries Distribution Trust Fund [NLDTF] funds for good causes. The RFP stipulates that a five-month rollout period is necessary for a new operator to become fully operational. As such, it is imperative that a successful applicant is appointed to prevent the depletion of the NLDTF’s reserve funds. An interruption in the National Lotteries operations exacerbate the threats of illegal gambling and undermines the National Lottery’s credibility. Re-starting the Lottery would mean fewer players and damaged trust. The mounting public prejudice demanded urgency.

[14] If the Court did not intervene an unconstitutional temporary process would cause harm. The temporary license would have to be issued before 31 May 2025 and there will be no substantial redress in the ordinary cause. Similarly the award of the Fourth Licence, if not urgently addressed, will obtain no meaningful redress in due course.

[15] The application was launched on 24 March 2025 the first business day after the Minister failed to provide the undertakings sought in Wina Njalo’s letter of 13 March 2025. As no response was received from the Minister to this letter by 20 March 2025 this application was launched within 4 days. No legal action could be taken on 21 December 2024 when the media announcement was made because Wina Njalo’s complaint relates to unreasonable and ongoing delay on the part of the Minister. The

correspondence to the Minister to avoid rushing to a court is “prudent and salutatory...”<sup>1</sup>

[16] The bidders were only informed of the Bid Extension Decision on 19 February 2025 and the temporary licence RFP decision on 3 March 2025. These decisions could only be challenged thereafter and therefore these decisions of the Minister are also the subject of this legal challenge. Despite the launch of the application Wina Njalo invited the Minister to agree to a consent order which could accommodate the possibility that the 31 May 2025 deadline could not be met, but the Minister refused to consent. In the answering affidavit the Minister also did not give an unqualified undertaking. The matter is self-evidently urgent.

[17] Both the Minister, the NLC and Ithuba argue that the matter is not urgent relying on the same foundation, although not called by name: self-created urgency. It is common cause that the Minister was required to make a decision regarding the Fourth Lottery License by 2 September 2024. The Minister contended that Wina Njalo was aware from 21 December 2024, that the decision would not be made and argued that there was an unreasonably long delay between December 2024 and the launching of the application in March 2025. The Minister placed considerable emphasis on this delay in bringing the application, asserting that Wina Njalo had failed to provide a reasonable explanation for the delay.

[18] Both the Minister and Ithuba further argue that the Minister's decision to extend the bid validity period was disclosed on 19 February 2025, followed by the issuance of the temporary license RFP on 3 March 2025. Despite being aware of these developments, Wina Njalo delayed the filing of the application until late March 2025. Wina Njalo should have approached the Court at the earliest opportunity in December 2024. The NLC added that Wina Njalo could soon after 4 March 2025, pursuant to being informed of the temporary licence issuance and the extension of the current RFP, have at the very least have approached the Court.

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<sup>1</sup> *Centre for Child Law and Others v South African Council for Educators and Others* 2024 (4) SA 473 (SCA) par [11]



[19] The Minister further submitted that he did not deviate from his responses to the numerous correspondences sent by Wina Njalo over the period December 2024 to March 2025 and the correspondence by Wina Njalo was a mere tactic to obtain time to compile this substantial application. It was further argued that the cause of action for Wina Njalo to correspond with the Minister undermines the assertion that the application is urgent.

[20] The Minister further asserted that his undertaking to announce his decision regarding the successful bidder before 28 May 2025 mitigated Wina Njalo's claim of urgency and lack of substantial redress in due course. According to the Minister, in light of his undertaking, the urgency based on the alleged inaction has diminished. Wina Njalo could obtain substantial redress, namely the announcement of the successful bidder, through the Minister's undertaking, thereby rendering the urgent intervention of the Court unnecessary. The remaining issues concerning the lawfulness of the delay, the temporary license RFP, and the bid validity extension may be addressed in the ordinary course of proceedings.

[21] Ithuba further argued that the review of the temporary license RFP is not urgent, as the issuance of the temporary license would ensure that National Lottery operations continued uninterrupted beyond 1 June 2025. It was contended that the matter did not become urgent merely because the Minister may have made an unlawful decision and that Wina Njalo had failed to demonstrate why substantial relief would not be available in the ordinary course.

[22] On behalf of the NLC it was further contended that Wina Njalo had failed to demonstrate why it cannot be afforded substantial redress in due course in light of the Minister's intention to issue a temporary license and his undertaking to endeavour to announce the successful applicant by no later than 28 May 2025. There is no harm as the national Lottery will stay operational.

#### Decision on urgency

[23] The first question to be answered is whether the urgency is self-created. Self-created urgency is fatal to an application. Self-created urgency is the urgency which



stems from a deliberate inaction until the hour of reckoning. Courts have consistently refused urgent applications in cases where the urgency relied upon was clearly self-created with the appropriate order of striking the matter from the roll.<sup>2</sup> Consistency in striking self-created urgency matters from the roll is important as it informs the public and legal practitioners that the rules of Court and Practice Directives can only be ignored at a litigant's peril.

[24] The test for urgency was in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others*<sup>3</sup> reiterated as follows: "The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course."

[25] I cannot find that the urgency is self-created. If the application was brought after the media release in December 2024 it could have been argued that the application was premature as the licence still had 5 months before expiry and the Minister still had sufficient time to make the award and have it successfully implemented.

[26] The delay between the Christmas and New Year period in December till March is explained. Wina Njalo responded to the request for the extension of the bid 5 days after the Minister signalled his intention by requesting reasons for this. The Minister only responded on 4 March 2025 and on the same day published the temporary licence RFP. In the letter of 4 March the Minister stated that he intended to announce the Fourth Licence award on 31 March 2025. On 5 March 2025 Wina Njalo again wrote to the Minister informing *inter alia* that the temporary licence RFP terms would only benefit the incumbent. Due to the Minister's statement that he intended to announce the Fourth Licence on 31 May 2025 Wina Njalo sought such undertaking in its letter to the Minister on 13 May 2025. When no such undertaking was given the application was launched. On this timeline Wina Njalo acted reasonably and attempted to avoid litigation launching this application as soon as it was clear that the Minister was not prepared to give an unequivocal undertaking.

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<sup>2</sup> *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) par [9]

<sup>3</sup> (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[27] There will be no substantial redress in due course. The temporary licence RFP is to be announced on 31 May 2025, rendering any recourse in due course ineffective as to the specific remedy sought: declaring the RFP invalid as it will be announced by then. The bid extension just confirms that the Minister has catered for that the award not being timeously announced and paving the way for the temporary licence RFP.

[28] As for the Fourth Licence the Minister in these papers still refrained from giving an unconditional undertaking that the award will be announced by 28 May 2025 and with the licence to expire on 31 May 2025 the relief sought is manifestly urgent. The announcement of the award should have been done by 2 September 2024. The decision to extend the bidding process and the temporary licence RFP are indicative thereof that the decision is not imminent. Although these steps may be seen as *bona fide* contingency plans it does not negate the fact that the Minister has not announced the Fourth Licence as he was constitutionally required to do. The absence of a designated licensee beyond the expiry date creates a risk of operational disruption with potentially severe consequences for beneficiaries and the broader public. In these circumstances, the matter is urgent.

The non-decision in awarding the Fourth Licence

Facts and argument on behalf of Wina Njalo

[29] It is common cause that the Minister has not taken a decision as required by the Fourth Licence RFP within the time-frame set to take such decision. Not taking a decision is in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 [PAJA] susceptible to judicial review. In *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works Eastern Cape and Another*<sup>4</sup> the Court found that: "... no final decision has been taken in respect of the tenders, despite the effluxion of a more than unreasonable time for a decision to be taken. This means that there can be no dispute that Intertrade is entitled to relief: s 6(2)(g), together with section 6(3)(a) of the PAJA , provide that the failure to take a decision within a reasonable time was a ground of

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<sup>4</sup> 2007 (6) SA 442 (Ck) at par [34]

review and hence an infringement of the fundamental right to just administrative action.”

[30] Once there is reliance on s6(2)(g) of PAJA [failure to take a decision] a party can in turn in terms of s6(3) also review the failure to take a decision on the ground that there had been unreasonable delay in taking the decision.

[31] The Minister’s failure to issue the Fourth License is unreasonable because the record reflects no reasons for the Minister’s inaction. No reasons are set out in the answering affidavit for the delay to take the decision. It must be accepted that the delay is manifestly unreasonable as the Minister had not set out justifiable reasons for the delay. The Supreme Court of Appeal has found: “... what is expected of an administration that has justifiable reasons for what appears to be unacceptable delay in carrying out its functions are full and frank explanations that will enable a court to assess their adequacy when determining whether the administration has acted reasonably”.<sup>5</sup>

[32] Furthermore, a non-award is also executive in nature, therefore it would be subject to a legality review in light of the obligation under section 237 of the Constitution that requires all constitutional obligations to be performed without unreasonable delay. The RFP set a reasonable timetable for a smooth transition for the incumbent lottery operator to the new entity that would be taking over the operation of the lottery on 1 June 2025. The Minister and the NLC were obliged to give effect to the Lotteries Act and complete the procurement process to award a new license as required and recorded in section 13 of the Act. There is no timetable in place by the Minister to meet this deadline and the Minister has failed unequivocally to commit to making the award.

[33] The unreasonableness of the delay is borne out by the facts disclosed in the Minister’s answering affidavit. The Minister stated that the NLC made its recommendation on 11 October 2024, and on the same day he appointed the QAC to review the NLC’s process. However, the Minister failed to indicate when the QAC concluded its work, whether any specific timeframes were set for the completion of its

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<sup>5</sup> *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) par [10]

mandate, and what the scope of its review entailed. Critically, no explanation was offered as to how the QAC's appointment could reasonably justify a delay of nearly a month in the awarding of the Fourth National Lottery License. In the absence of this information, the delay remains unexplained and on the face of it unjustifiable.

[34] The Minister was invited to utilise an appropriate confidentiality regime if the evidence was sensitive, a system that has been recognized by our courts in appropriate circumstances, but has failed to do so.

[35] The decision unsupported by reasons was also irrational because if a decision affects rights there must be rational justification.<sup>6</sup> The Constitution requires that every action taken in the exercise of public power must be underpinned by plausible reasons that justify the action taken. If there are no reasons the decision is arbitrary and reviewable.

[36] The Minister's failure to disclose the unspecified concerns or matters requiring further evaluation amounts to no reasons at all. Support for this submission was found in the matter of *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)*<sup>7</sup>:

"...it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision that you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence of the decision-maker: 'Trust me, I have good reasons but I am not prepared to provide them?' Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge."

[37] Despite many requests for reasons the Minister, had failed to provide same. In the absence of reasons there is no justifiable reason why the Fourth Licence should not be awarded. The non-award decision is reviewable in terms of section 6(2)(a)(iii), 6(2)(e)(ii) and (v), 6(2)(e)(vi), 6(2)(f)(ii), 6(2)(h), 6(2)(i) and 6(2)(f)(i) and 6(2)(c) and 6(2)(f)(ii) of PAJA and/or the principle of legality. A decision is also reviewable on a

<sup>6</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay* 2007 (2) SA 106 (CC) paras [101] and [106]

<sup>7</sup> (818/11) [2012] ZASCA 115 (14 September 2012) par [44]

self-standing basis that if it constitutes a failure to take a decision in terms of section 2(g) of PAJA.

[38] The court should direct the Minister to make a decision towards the Fourth License RFP before the end of May 2025. The Court can grant the relief, as it is catered for in Section 8(2) of PAJA.

[39] The Minister's failure furthermore evidences a clear breach of his obligations under section 195 of the Constitution, which in terms of section 35 of the Act, must be strictly complied with. The obligations in terms of section 195 include *inter alia* "efficient, economic and effective use of resources,<sup>8</sup> fair provision of services<sup>9</sup>, the need to respond to people's needs<sup>10</sup>, the public administration must be accountable<sup>11</sup>, transparency must be fostered by providing the public with timely accessible and accurate information."<sup>12</sup>

[40] It is accepted that the Minister is entitled, in terms of the RFP, to amend the timetable, but only after consultation with the NLC. It is, however, contended that such consultation has not been properly undertaken. In the absence of disclosure of the Minister's actual reasons for the delay, the NLC could not have been placed in a position to engage meaningfully in the consultation process. Effective consultation requires that sufficient information be furnished to the consulted party to enable it to provide informed and constructive input. Without such disclosure, any purported consultation is rendered inadequate and fails to meet the standard.

[41] The court should direct the Minister to make a decision to award the Fourth License RFP before the end of May 2025. The Court can grant the relief as catered for in Section 8(2) of PAJA. The Minister's undertaking failed to produce the effect that he asserted. The Minister continues to act unlawfully by not making a decision. Should the delay be considered unreasonable, Wina Njalo is entitled to the declaratory relief sought in terms of section 172(1)(a) of the Constitution, and the Court is obligated to

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<sup>8</sup> Section 195(1)(b)

<sup>9</sup> Section 195(1)(d)

<sup>10</sup> Section 195(1)(e)

<sup>11</sup> Section 195(1)(f)

<sup>12</sup> Section 195(1)(g)

declare that the Minister's continued failure to award the Fourth Lottery License is both unlawful and unconstitutional. The Minister's "undertaking to try to announce a successful applicant by the end of the month" is a ground for the Court to compel the Minister to make such an announcement. It is further contended that the consequential relief, requiring the Minister to make a decision, is not rendered moot. Until such a decision is made, and in light of the Minister's ongoing failure to act, the relief sought remains warranted. The Minister seeks to retain flexibility, allowing the possibility of retracting his undertaking, thereby highlighting why the undertaking is inadequate and does not obviate the need for the relief sought by Wina Njalo. The Minister's "target date" serves to confirm his awareness that the continued delay is unjustifiable. Notably, he has failed to justify the delay on any factual grounds.

#### Facts and argument on behalf of the Minister

[42] The Minister submitted that the timeline was derailed by the QAC's failure to submit its report to him within the prescribed period, with the report only being delivered on 11 October 2024. This delay curtailed the time available to the Minister to consult the Board and to make a considered decision. This delay necessitated by thorough and responsible consideration did not equate to a failure to decide. The Minister's responsible approach should not be misconstrued as a lawful failure to act.

[43] Paragraph 8.2.4 of the RFP empowered the Minister to appoint an independent advisor, which he exercised by appointing the QAC on 11 October 2024. This appointment demonstrated that the Minister did not merely rubber-stamp the Board's recommendation but was intent on ensuring that every aspect of the process was thoroughly scrutinised prior to making a final decision. In terms of the RFP's timetable, the Minister was afforded only two calendar days to consider the Board's recommendations - a period that was manifestly insufficient. Consequently, the delay in the decision-making process arose from circumstances beyond the Minister's control. Nevertheless, the Minister remains committed to ensuring that the tender process is not rendered futile and that the National Lottery continues to function effectively.



[44] As a contingency, the Minister decided to issue a Temporary License RFP and extend the validity of the bidding process beyond 31 May 2025.

[45] It was submitted that in light of the Minister's undertaking to announce his decision by 28 May 2025, the relief sought has become moot. Accordingly, it would serve no purpose to determine whether the delay in making the decision constitutes a reviewable non-decision, as such a determination would yield no practical consequence.

[46] The Minister cannot consent to the granting of an order unless it is expressly qualified by the proviso that he cannot be compelled to make an announcement where circumstances beyond his control render such action impossible. The Minister's undertaking is, therefore, not unequivocal. The Minister maintained that the decision-making process in question is complex and sensitive, involving the appointment of the QAC, consultations with the NLC Board, and ongoing evaluative processes. He contended that a delay occasioned by the need for thorough and responsible consideration does not constitute a failure or refusal to decide. The matter of *Helen Suzman Foundation v The Judicial Service Commission* 2018 (4) SA 1 (CC) did not lay down a general principle that confidential information must always be disclosed.

[47] The Minister maintained that judicial intervention compelling him to take a decision is no longer warranted, given his commitment to act within a reasonable timeframe. It is further submitted that, for a failure to act to constitute reviewable administrative action under PAJA it must fall within the statutory definition of a "decision", which includes a failure to take a decision when there is a legal duty to do so. However, the Minister contends that his decision-making process remains ongoing and that no final decision has yet been reached. It is only once a part of the decision becomes final that it can properly be characterised as administrative action. Accordingly, any challenge premised on an alleged non-decision is premature.

[48] The Minister's press release dated 21 December 2024 provided reasons, specifically, that the Minister is not yet in a position to give full reasons. On behalf of the Minister, it was concluded that, given his commitment to make a decision, albeit not unequivocal, this undertaking should be regarded as adequate. Counsel

contended that the decision is not arbitrary, as the Minister gave reasons, although not detailed, it is sufficient.

Facts and Argument on behalf of the NLC.

[49] The NLC limited its submissions pertaining to the Minister's failure to make a decision regarding the award of the Fourth Lottery License to whether there was consultation, as required, between the Minister and the NLC.

[50] The NLC's primary contention was that both the Minister and the NLC had fully complied with the consultation requirements set forth under the Lotteries Act prior to the Minister taking any decisions. Counsel for the NLC meticulously outlined the processes followed and the consultations held between the NLC and the Minister. These processes confirmed that proper consultation had taken place and that the Minister should be in a position to make a decision.

[51] It was argued on behalf of the NLC that the Minister's failure to make a decision was remedied by his consultations with the NLC, as well as his ultimate decision to issue a temporary license RFP and extend the bidding period by one year, thereby ensuring that there would be no disruption in National Lottery operations following the expiration of the current license. Furthermore, it was contended on behalf of the NLC that section 172 of the Constitution may permit unlawful decisions where they are made in the public interest.

Decision on the non-award of the Fourth Licence

[52] I understand that the award of the Fourth Licence is complex and of national importance. I can understand that the NLC's Board report only reaching the Minister on 11 October 2024 affected the timeline within which the Minister had to make a decision. I also appreciate the Minister has as contingency devised the extension of the bid validity and the temporary licence RFP to avoid disruption to the operation of the National Lottery. But, what I do not know and therefore cannot understand is why the decision has not been taken and why an undertaking can be given, but not

unconditionally. This in turn impacts on the reasonableness and/or rationality of the decisions to extend the bid validity and the temporary RFP.

[53] In terms of s1 of PAJA refusing to issue a licence, or to make an award, or refusing to take a decision all constitute administrative action. In terms of the empowering Act and the Constitution the Minister has the duty to award the Fourth Lottery, if he does not do so within the time-frames of the RFP, he is not fulfilling his constitutional duty and at the very least must provide reasons for this delay. He simply has not. In the media statement no reasons are provided except that the Minister had “concerns” and the reason proffered for the refusal to provide reasons for these concerns is confidentiality. He has not provided reasons, under these circumstances required to do so, in the record filed.<sup>13</sup> He has not done so in the answering affidavit and therefore in terms of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the Court has to accept Wina Njalo’s facts as set out.

[54] The Minister did not at all address that if confidentiality was crucial why a confidentiality regime could not be adopted. In this Court the practice is often successfully applied. This procedure has also been endorsed by the Supreme Court of Appeal in *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) as follows:

“[81] Permitting the production of confidential documents subject to appropriate limits is now firmly established in our law. As it was expressed by Mthiyane JA more than a decade ago in *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others*<sup>14</sup>:

‘[I]f there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* [1998 (2) SA 109 (W) at 122I-J to 123A-B; 1997 (10) BCLR 1429; [1997] 4 All SA 94], where the parts of the documents in respect of which disclosure might result in breach of

<sup>13</sup> *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) par [63]

<sup>14</sup> [2007] ZASCA 128; [2007] SCA 128 (RSA); 2008 (1) SA 438 (SCA)

confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other.'

[82] The decision of this court in *Bridon International GmbH v International Trade Administration Commission and Others*<sup>15</sup> endorsed the adoption of the confidentiality regime crafted by the court a quo and observed that: 'As to the solution preferred by the court a quo, Bridon's main objection is that it is difficult to apply in practice and that it provides no absolute guarantee against leakage. Though these objections are not without substance, the types of restrictions imposed in the court a quo's order are not novel. Despite Bridon's pessimistic predictions similar orders had been granted before, for example, in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) and in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W). More recently, this type of order has also been used as a mechanism in the application of s 45(1) of the Competition Act 89 of 1998, which is very similar in wording to s 35(3), in that it requires the Competition Tribunal to "make any appropriate order concerning access to that confidential information" (see *Competition Commission v Unilever plc and Others* 2004 (3) SA 23 (CAC) at 30F-I)."

[55] The Minister has not set out justifiable reasons for the delay in awarding the licence and it is expected of the Minister to set out "full and frank explanations that will enable a court to assess their adequacy when determining whether an administration has acted reasonably."<sup>16</sup>

<sup>15</sup> [2012] ZASCA 82; [2012] 4 All SA 121 (SCA); 2013 (3) SA 197 (SCA) para 35

<sup>16</sup> *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) par [10]

[56] Furthermore the Minister is under a constitutional duty to exercise his powers in such a way that is not irrational or arbitrary. The absence of reasons offends the Constitution's proscripts of arbitrary action and established arbitrariness. The Minister is also bound by the values set out in s195 of the Constitution of transparency and accountability. In not providing reasons for the delay there is no transparency. The Minister is also in breach of s237 of the Constitution in that he has not diligently and without delay performed his constitutional obligations.

[57] It follows that the delay in the non-award decision and the failure to provide reasons the Minister must be found to have breached the provisions of S6(2)(e)(vi), 6(2)(i) and s6(2)(g) of PAJA. The same facts lead to the conclusion that the Minister did not fulfil his constitutional duty. On either basis, the non-decision must under s172(1)(a) of the Constitution be declared to be invalid.

[58] On this finding Wina Njalo has rights that are effected and it could bring this review.

Wina Njalo's submissions and arguments on the temporary licence RFP

[59] It was submitted that it was competent to challenge the temporary licence RFP prior to it being awarded. There is no divergence on reviewability between the minority and majority judgments in the *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) [ACSA- matter]. The facts in the ACSA-matter were different to the facts in this matter, but the underlying principle is directly applicable because it would be anomalous to suggest that where an RFP is fatally defective because the outcome is a foregone conclusion, it could not be reviewed until the tender process was concluded. Support for this argument is to be found in *Waco Africa (Pty) Ltd t/a SGB-Cape v SOC Ltd and Others* (57981/2021) [2024] ZAGPJHC 210(4 March 2024) par [29] and *Smec (Pty) Ltd v City of Cape Town and Others* (8277/2021; 14097/2021) [2022] ZAWCHC 131 (23 June 2022) paras [90] and [91].

[60] Despite the Minister denying that the temporary licence RFP was structured to favour Ithuba he admitted that "Ithuba has the established infrastructure to operate the lottery" and is in a better logistical position to bid. The Minister also admitted that "it may well be that Ithuba, being the current licensee has an advantage over other

potential bidders.” From these statements it can be seen that the Minister himself conflated Ithuba Holdings and Ithuba Lottery. The Minister also did not address the inter-relationship between the two entities as addressed in Wina Njalo’s supplementary affidavits.

[61] The factual position between Lottery and Holdings are set out by Wina Njalo as that both entities are controlled by the Zamani Group. Ithuba Lotteries was until recently dormant. Of the total of the 8 directors of Holdings 6 directors are also directors of Lottery, Lottery having 7 directors. Both Lottery and Holdings have the same business address and have the same website “ithubalottery.co.za”. Both entities have the same company director. The CEO of Ithuba Holdings, Ms Mabuza, also a director of Ithuba Lottery, signed the bid validity extension confirmation for Ithuba Lottery’s bid.

[62] On these facts it was argued that Ithuba Lottery was trading on the goodwill of Ithuba Holdings being the current licensee and could only do so with the knowledge and consent of Ithuba Holdings. If regard is had to the clauses of the temporary licence RFP the applicant must ensure a seamless transition and uninterrupted contribution to good causes [clause 2.1.6] and that it can assume immediate responsibility for the operation of the national lottery [clause 2.1.7]. It must provide a contingency plan setting out it will achieve a launch date of 1 June 2025 “in the event that the indicative timelines are exceeded or delayed” [clause 2.5.2]. In view of the timeline only one bidder applied, namely Ithuba Lottery which is in effect the incumbent. Even if the Minister did not intend to favour one party the effect of the decision is what matters and is fatal.<sup>17</sup> No tenable defence has been advanced justifying this effect and the review must be granted against the Minister. If that is so, then the defences raised by the NLC and Ithuba Lottery need not be dealt with.

[63] The defence by Ithuba Lotteries that Wina Njalo is ignoring the fact that Lottery and Holdings are two separate legal entities and that Wina Njalo is seeking to pierce the corporate veil is incorrect. It was argued that the matter has everything to do with public law requirements and fair administrative justice. The process for a temporary licence with only one possible winner is an entity not materially different from the

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<sup>17</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [25]; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at paras [90]-[91]



current incumbent. In this matter, as is universal application in our law, substance must be elevated over form.<sup>18</sup>

[64] The argument further went that the defence from Ithuba Lottery that any bidders for the temporary licence RFP could have obtained the necessary assets from Ithuba Holdings is based on wrong presumptions. The first is that it was known that the present incumbent had not bid for the temporary licence. Secondly, it was not known that the assets of Ithuba Holdings would be available in the absence of any obligation to make it available. Furthermore, that bidders could purchase the assets despite the clear prohibition of collusion between bidders under the RFP's.

[65] Even if collusion was not a problem because Ithuba Holdings did not bid for the temporary licence the temporary licence RFP remains fatally defective and unfair because no other bidder than Ithuba Lottery was aware of the possibility to buy the assets from Holdings. The Minister's own affidavit expressed that Holdings applied for the temporary licence, as did the NLC's affidavit. Wina Njalo did not and could not have known that Ithuba Holdings was not the Ithuba entity bidding for the temporary licence. The Minister's and the NLC's argument is just that they did not intentionally attempt to favour Ithuba.

[66] The proposed just and equitable remedy is to set aside the temporary licence RFP. If the temporary licence is allowed to stand the unlawfulness continues, increases and becomes irreversible.<sup>19</sup>

[67] The concerns about the hiatus in the running of the lottery with severe funding consequences are misplaced because the NLDTF can easily cover 5-6 months, as intended, for unforeseen events.

The Minister's submissions and argument on the temporary licence RFP

[68] In essence the Minister submitted that the issue of the awarding of the Fourth Licence is moot because he had already in his letter of 3 March 2025 indicated that his intention was to finalise the award of this licence and the conclusion of a licence agreement by 31 May 2025.

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<sup>18</sup> *Road Traffic Management Corporation v Tasima (Pty) Ltd* 2021 (1) SA 589 (CC) at para [149]

<sup>19</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) par [27]

[69] He also made it clear that he invoked paragraph 8.2.7 of the RFP that reads as follows:

“The Minister reserves the right to only announce the identity of the Successful Applicant once the final negotiations regarding the License have been concluded to his satisfaction. Should negotiations on the final terms of the License fail to be concluded to the satisfaction of the Minister, the Minister reserves the right to negotiate with the next ranking Applicant, unless there are objective grounds for the Minister to negotiate with another Applicant.” He thus indicated that he intended to announce the successful bidder after negotiations regarding the licence had been concluded.

[70] In terms of s12B of the Act the Minister can at any time after consultation with the Board, when the licence has expired, issue a temporary licence on such terms and conditions he deems appropriate for a non-renewable period not exceeding 24 months. The NLC had only provided him with its report on 11 October 2024 which in terms of the RFP timetable left the Minister with only two calendar days to consider the Board’s recommendations. This period was completely inadequate. Due to the time left before the expiry of the licence not affording him enough time to complete his enquiries and to allow the NLC to negotiate the licence conditions with the winning bidder, he took the decision to issue the temporary licence RFP. He consulted with the NLC on this issue on 20 December 2024. The Minister in a *bona fide* attempt to ensure the National Lottery continues uninterrupted published the temporary licence RFP to bridge the gap between the current licence and the Fourth licence.

[71] He denied that the RFP was structured in such a way to favour Ithuba. The Minister appointed the QAC in terms of clause 24.7 of the RFP to gather additional information to make his decision.

[72] It was argued that the decision to issue the temporary licence RFP is not administrative action. For the decision to constitute administrative action there must be a factual enquiry as to whether any rights including prospective rights of the applicant have been adversely affected.<sup>20</sup> It was submitted that Wina Njalo is a public interest litigant, was invited to participate in the process to tender for the temporary

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<sup>20</sup> *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para [30]

licence but chose not to. Wina Njalo has no prospective or other right that will be adversely affected by this RFP.

[73] The Minister in terms of S13B(b) of the Act expressly authorises the Minister to issue a temporary licence if the licence to conduct the national lottery has expired and “after consultation with the board appoint or authorise any person or organ of state as the case may be for a non-reviewable period not exceeding 24 months to conduct the National Lottery on such terms and conditions the Minister may deem appropriate.” The Minister is only required to consult with the NLC before he makes the appointment but had consulted with the NLC even prior to issuing the temporary licence RFP.

[74] If the decision to issue the temporary licence RFP is reviewed and set aside the National Lottery will become dysfunctional on 1 June 2025 because it does not have unlimited funds to bridge the period it will take for the new licensee to establish it in the market. “The National Lottery has also built up substantial goodwill in the market, which will no doubt become diluted by competition from gambling organisations, which are regulated by the various national and Provincial Gambling Acts. Any interruption in the National Lottery will be detrimental to the national interest, which lies in the provision of funds for various charities. These charities are extremely vulnerable since they are entirely dependent on funding from the National Lottery.”

[75] If the Court should find that the Minister’s conduct in taking the decision to issue the temporary RFP is unlawful then a just and equitable remedy in terms of s172(1)(b) of the Constitution would be to postpone the effective date of such order to the date on which the successful bidder takes over the National Lottery. The Constitutional Court has affirmed a court’s discretion to suspend a declaration of invalidity where the potential consequences of an immediate invalidation could lead to undue disruption and be contrary to the broader interests of justice.<sup>21</sup> In this matter an immediate setting aside could precipitate a hiatus in the operation of the National Lottery.

#### Submissions and argument on behalf of the NLC

[76] As the bulk of the allegations made by Wina Njalo must be answered by the Minister, the NLC only addressed the consultations with the Minister concerning the impugned decisions and the formulation of the temporary licence RFP. It also

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<sup>21</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others* 2011 (4) SA 113 (CC)

proposed the just and equitable remedy the Court should grant if it declares the temporary licence RFP decision invalid.

[77] In terms of s10(1)(a) the Act the functions of the Board are to advise the Minister on the issuing of the licence to conduct the National Lottery. It has to do so in applying the principles of openness and transparency and taking into account the Board's other functions in terms of the Act. Furthermore, the RFP contains the rules of engagement and the basis upon which the Minister's conduct and decisions in relation to the licence must be assessed. The RFP is not "merely an internal prescript that may be disregarded at whim."<sup>22</sup> Clause 5.5 of the RFP records that an application will be subjected to review and acceptance or rejection of its proposed contractual terms and conditions by the Minister, "after consultation with the NLC, prior to consideration for an award of the licence. Clauses 7.1.5 and 7.1.6 state that the Evaluation Committee will present a detailed report of its findings to the Board. The Board will adjudicate the Applications and prepare a report with recommendations to the Minister. "After consideration by the Evaluation Committee and adjudication by the Board the NLC will provide its report with recommendations to the Minister."

[78] There were delays in the licensing process because instead of the 4 expected applications there were 8 applications. All together the 8 applications consisted of 74 147 pages. The evaluation committee advised the Board of the NLC that it would not meet the deadline and proposed a completion date of 31 July 2024. This deadline was again extended to 18 September 2024 due to planning and conducting site visits across eight jurisdictions worldwide. On 11 October 2024 the Board reported to the Minister about the adjudication of the licence applications.

[79] On 30 January 2025 the Board received advice from its advisors that the time remaining to June 2025 was not sufficient for the selection of the successful applicant, negotiation of the licence and the transition to take over the Lottery that normally requires five to six months. Several options were put to the Board as how to proceed and the Board advisors concluded the option of a temporary licence was the most

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<sup>22</sup> *Gidani (Pty) Ltd v Minister of Trade and Industry and Others* (81420/2014) [2015] ZAGPPHC 457 (4 July 2015) at para 14. In this regard, this Honourable Court in *Gidani* cited *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para [40] (Allpay (1)) as authority for this principle and recorded that all parties accepted this to be the legal position.

plausible option. This decision was underpinned by the fact that there could not be a hiatus in the operations of the lottery as there would be a loss of market share by the lottery to gambling operators and the gambling market that compete fiercely against the lottery for participants. It would not be in the public interest to for the lottery to lose revenue from lottery operations which is used to fund good causes. Lastly it would not be possible to use reserves to fund good causes “when it was not clear how long it would take for the Successful Applicant in the Fourth Licence process to be ready to commence lottery operations. It was also to be considered that the successful applicant may fail to meet the conditions precedent in the agreement that could necessitate negotiations with a second ranked bidder. On 10 February 2025 the Board recommended that the Minister authorise a process for a temporary licence.

[80] On 11 February 2025 the Board instructed the NLC’s legal representatives to draft the provisions of the temporary licence RFP. They in turn obtained technical input from two technical experts and financial analysis from Genesis Analytics. The legal representatives also obtained advice from counsel as to what considerations should inform the temporary licence RFP.

[81] On 21 February 2025 the Board deliberated on the penultimate draft of this RFP and Genesis assured that the minimum contribution of to the NLDTF of 29,5% [inclusive of VAT] would be viable for all 8 applicants for a 12 month temporary licence period. After consideration a closed bid for the RFP was decided upon because the 8 applicants for the fourth licence had demonstrated to varying degrees their financial capacity and technical know-how on how to operate the lottery and had concluded agreements with technology partners which would enable them to offer a temporary licence operation. The Board further recommended that the temporary licence be for a period of a year and the Fourth licence bidding period also be extended by a year until 31 May 2026 so as to ensure the completion of the current licensing process. The 12 month period was determined to make the temporary licence viable and attractive to any potential applicant. If the period was for 6 months or less it would not make financial sense given the significant costs and effort involved in setting up and operating the lottery. The Board also recommended that the two processes, the issuing of the Fourth Licence and the temporary licence be done simultaneously but separately.



[82] The temporary licence RFP was prepared in terms of the Act and there is nothing in the terms and conditions of this RFP to prove that it was drafted for Ithuba. The RFP had the purpose that the temporary licensee would be able to run the lottery by 1 June 2025. "It may be a function of incumbency that would be applicable to any temporary licence awarded at the end of a licence period where the incumbent licensee is also an applicant. This would be the case where the incumbent's licence period had previously been extended or not." The perception that Ithuba may be more likely to win is not due to bias from the NLC or its advisors. The Board had the intention to ensure that the temporary licence would be attractive to all 8 the applicants who applied for the fourth licence.

[83] The temporary licence RFP was published on the VDR and was open for all bidders to participate. The Minister need not have consulted with all the bidders but went a step further by extending the invite to all the bidders. The issuing of a temporary RFP is not administrative action because there was no exclusion of any bidders. It therefore does not adversely impact on the rights of Wina Njalo.

[84] The decision to issue a temporary licence RFP was rational and lawful because there was a rational connection between the decision to appoint a temporary licensee and the achievement of the purpose of the Act.<sup>23</sup> The rationality lies therein that the appointed temporary licensee will be able to conduct the Lottery to ensure that the net proceeds are distributed for good causes. The Board approved this RFP as part of its consultation process with the Minister. Wina Njalo's contention that the temporary licence is unwinable on the terms of the RFP does not make the decision irrational.

[85] In terms of s13B(d) the Minister need not consult with the NLC. The Minister must only consult with the NLC Board when appointing a licensee for the temporary licence. But in any event, it is denied that the Minister did not consult the NLC. The letters of 10 February, 26 February and 3 March 2025 proves that there was consultation between the Minister and the NLC and that the Minister was awaiting the NLC's advice on the best way forward to continue the national lottery. The Minister

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<sup>23</sup> *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) par [65]



took the decision, despite not being required to do so after consultation with the NLC in good faith and serious consideration of the NLC's recommendation.<sup>24</sup>

[86] If the Court should declare the decisions unconstitutional a Court has a wide discretion in terms of s172(1)(b) of the Constitution to grant just and equitable remedy. Just and equitable was defined as a consideration of fairness to all implicated parties.<sup>25</sup> In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) par [45] the Court found that: "If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established."

[87] The NLC proposed that if the Court should review and set aside the temporary licence the Court should suspend any declaration of invalidity against the temporary licence RFP for a period of 12 months alternatively for a period until the Minister has announced a successful bidder. If the suspension remedy is not granted the public interest will be adversely and irremediably affected. The proceeds of the lottery fund the NLDTF which is used to fund good causes in terms of s21 of the Act. The reserve in this fund is currently R2 679 billion. The reserve is to cater for unforeseen events which may result in the cancellation or suspension of the licence agreement. More than a third of the fund will be depleted if they are used to fund good causes for the 12 months during the transition to the fourth licence. Even if the transition period is 6 months a significant amount of the reserves would be depleted. It would be imprudent to use the funds and not rather issue a temporary licence.

[88] Consideration of the public interest is paramount when considering a just and equitable remedy and this immense public interest outweighs Wina Njalo's private commercial interest; Wina Njalo stands nothing to lose if the temporary licence is granted.

Ithuba Lottery's submissions and argument on the temporary licence RFP

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<sup>24</sup> *President of the Republic of South Africa and Others v South African Football Union and Others* 1999 (4) SA 147 (CC) par [63]

<sup>25</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) par [47]

[89] Wina Njalo had submitted that the temporary RFP will inevitably favour the incumbent operator because “Ithuba” will have the necessary assets and infrastructure to operate the national lottery at short notice and for the short period of the licence. However the incumbent is Ithuba Holdings and not Ithuba Lottery.

[90] Ithuba Holdings is a private company that was established as ring-fenced special purpose vehicle by Zamani Gaming (Pty) Ltd [Zamani Gaming] and later amended its memorandum of incorporation to provide that its specific purpose was to run the national lottery. Ithuba Holdings holds various fixed assets and electronic hardware to run the lottery but does not own the software. It partnered with various B-BBEE and other investors for the purpose of bidding for the Third Licence and in June 2025 was awarded the Third Licence. The licence was extended for a further non-renewable term of 24 months until June 2025.

[91] Ithuba Lottery bid for the Fourth Licence and the temporary licence. It has also been ring-fenced for the specific purpose of operating the temporary licence and Fourth licence. Ithuba is not owned by Holdings, have different shareholders and does not own Holdings assets; Ithuba Lottery is a completely different entity to Ithuba Holdings. Ithuba Lottery intends to acquire the necessary assets and infrastructure to run the lottery from Ithuba Holdings. Any other bidder can also approach Holdings to do so.

[92] Wina Njalo's whole premise for attacking the temporary licence is incorrect because the two Ithubas are completely different entities. Wina Njalo should have known that Holdings did not bid and could not have bid because “no new bidders who are not already participating in the Fourth Licence RFP may participate in the Temporary Licence RFP.” Despite joining Ithuba Lottery in the supplementary affidavit it did not correct the error at the heart of its challenge but persists that that the two Ithubas are very closely related parties and *de facto* the same party.

[93] It was argued that the separate legal identity of Ithuba Lottery can only be disregarded if it was used to commit fraud.<sup>26</sup> Ithuba Holdings would have to had deal with the other bidders, not only Ithuba Lottery otherwise it would have contravened s8(1) of the Competition Act. Wina Njalo could have obtained the assets from Ithuba

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<sup>26</sup> *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) par 566C-F

Holdings at no risk of collusive tendering because Ithuba Holdings is not a bidder for the fourth licence. This basis for the review must accordingly be dismissed.

[94] Ithuba Lottery had not asserted that it had secured all the assets from Ithuba Holdings but that it intends to acquire the assets and infrastructure from Ithuba Lottery if it is awarded the temporary licence or the Fourth licence. In argument Wina Njalo now argues that Ithuba Lottery will obtain the assets from Ithuba Holdings. There is no basis for this averment and boils down to pure speculation that the Court must reject. Ithuba Holdings is a dominant firm in terms of the Competition Act and in terms of the Act cannot favour Ithuba Lottery.

[95] Any bidder could have approached Ithuba Holdings and IGT Global Services Ltd [IGT], the present owner and operator of the lottery system software to obtain the assets necessary to operate the temporary licence. Wina Njalo was never at risk of a collusive practice because Ithuba Holdings, Paytronix and IGT are not applicants for the Fourth Licence or the temporary licence and does not classify as competitors for the two licences. The averment that due to the interrelated nature of Ithuba Holdings and Ithuba Lottery, Lottery would due to the same managerial control with almost the same directors know if Wina Njalo made any proposal is pure speculation. Wina Njalo could and should have known that it was at liberty to approach Ithuba Holdings by making cursory enquiries.

[96] The decision to issue the temporary RFP is not reviewable because the RFP does not exclude a bidder. Reliance on the minority judgment in ACSA does not support the proposition that it affords Wina Njalo a right to review. In the ACSA matter the onerous excessive B-BBEE requirements excluded Imperial from bidding all together. Furthermore, it is only an invitation to bid and Wina Njalo was invited to bid for this temporary licence but it did not. In *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) it was found that a party has no standing to challenge a tender on the basis of alleged unfairness if it had no effect on its rights.

#### Decision on the temporary licence RFP

[97] The first issue to be decided is whether the issuing of the temporary licence RFP, prior to being awarded, constituted administrative action that is subject to review.

The Minister's decision must be of an administrative nature while exercising a public power in terms of legislation that adversely affects the rights of any person or has a direct, external legal effect. *In Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others* it was found:

"Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process . . . Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma."<sup>27</sup>

Also in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*<sup>28</sup> did the Supreme Court of Appeal fortified as follows:

"[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals[ footnotes omitted]."

[98] This dictum of the Supreme Court of Appeal was endorsed by the Constitutional Court in *Allpay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency*<sup>29</sup> wherein it was confirmed that the requirement to

<sup>27</sup> 2012 (2) SA 16 (SCA) par [20]

<sup>28</sup> 2005 (6) SA 313 (SCA)

<sup>29</sup> 2014 (4) SA 179 (CC)

adversely affect the right of a person was probably intended to convey the impugned decision must have the capacity to affect legal rights.

[99] In *Waco Africa (Pty)Ltd t/a SGB-Cape v SOC Ltd and Others*<sup>30</sup> the Full Court of this division applied the finding of the minority in ACSA that tender criteria can be challenged prior to the evaluation of a tender. I was also referred to *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) wherein the Court found that “this irregularity cannot succeed even if a case of unfairness had been made out because ACSA’s rights were not affected: ‘The unfairness, if any, is done to the excluded bidders. They do not complain of their exclusion. It is not unfair to ACSA. The exclusion of these bidders only affects ACSA if it skewed the competitive bidding so as to impact the outcome of the tender. No such case is made by ACSA.’”

[100] I make little of the criticism of Wina Njalo’s reliance on the minority judgment in the ACSA-matter pertaining to whether the temporary licence RFP can be challenged prior to the evaluation of a tender. The majority judgment did not address whether Imperial had standing or not, clearly agreeing with this principle finding of the minority. If pursuant to the analysis of the facts I can find that the RFP did effectively only favour one party, Ihuba Lottery, then the RFP has the capacity to affect the legal rights of Wina Njalo and it has standing.

[101] I also do not find the *Tswelokgotso* judgment a bar to Wina Njalo challenging the temporary licence RFP. In that matter the Court expressly found that if ACSA had made out a case that the exclusion of the bidders skewed the competitive bidding so as to impact the outcome of the tender ACSA would have had standing, but it did not make out such a case and therefore it failed in its review. I similarly agree with the finding in *Smec (Pty) Ltd v City of Cape Town and Others*<sup>31</sup> that to challenge a decision to issue tenders on supposedly objectionable terms is a sound process rather than participating and then only raising it, but with the rider that the tender has the capacity to adversely affect legal rights. I further find the finding in *Babcock Ntuthuko Engineering (Pty) Ltd v Eskom Holdings SOC Limited and Others*<sup>32</sup>, sound wherein it was held:

<sup>30</sup> (57981/2021) [2024] ZAGPJHC 210 (4 March 2024)

<sup>31</sup> (8277/2021; 14097/2021) [2022] ZAWCHC 131 (23 June 2022)

<sup>32</sup> (64288/2021) [2022] ZAGPPHC 865 (17 November 2022)



“It does not behove a tenderer in the position of Babcock to engage in a tender process well knowing the tender was going to be split, and to then after its disqualification for other reasons, attempt to review the award on this basis. It seems to me to have been raised in consequence of a 'belts and braces' approach to the review, a not unreasonable approach given the importance of the matter to all concerned.”

[102] The foundation for the ground of the review is that the RFP is fundamentally and irreparably flawed because the RFP is effectively skewed in favour of one party rendering the outcome a foregone conclusion and thus fundamentally unfair. Only the Minister, as the decision-maker, can answer this challenge.

[103] The running of the National Lottery of necessity requires equipment and substantial infrastructure totalling hundreds of millions. To establish the infrastructure includes the manufacturing and transportation of terminals to South Africa together with the required system integration testing. For the temporary licence RFP a bidder must demonstrate “operational readiness” and “technical capability to commence full operations on 1 June 2025.” I accept that it is not financially viable for any bidder to obtain the funds to run the temporary licence for a period of 12 months, unless it has already run the lottery, will run the Fourth Licence, or can obtain the equipment with the technical knowhow readily. I also accept that no entity will obtain the finances from financial institutions without the licence agreement being signed. The proposition that it would be financially unsound to obtain the equipment for a year because it would be unlikely to recover the acquisition costs over just a period of a year is accepted. Furthermore, the time-frame of more or less a month makes it near to impossible to convince a financial institution to provide the funds necessary. I can accept the above submissions because it is based on the requirements set out in the RFP with Wina Njalo’s assertions on these requirements not denied, or simply noted, by the Minister which in terms of *Plascon-Evans*<sup>33</sup> I then must accept.

[104] The Minister did make the concession that “It may well be that Ithuba, being the current licensee has an advantage over other potential bidders.” And “Ithuba has the established infrastructure in South Africa to conduct the National Lottery.” This is the Minister’s response to averments pertaining to the temporary licence RFP. The

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<sup>33</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)



Minister did not respond at all to the supplementary affidavits of Wina Njalo wherein the interrelationship between Holdings and Lottery is set out. I have to accept that the Minister did not differentiate between Ithuba Holdings and Ithuba Lottery. He did not dispute the interrelationship between them. The Minister did not answer how, when alerted by Wina Njalo in their submission the RFP only favoured one party in the letter dated 5 March 2025, he considered it and the reasons for discarding this concern.

[105] Accepting the Minister's own confusion on who had applied for the temporary licence RFP, I must accept that Wina Njalo can be excused for accepting that Ithuba Holdings was the bidder for the temporary licence RFP and therefore thought it barred from approaching Holdings for a commercial agreement to obtain the equipment and infrastructure. This is fortified by the NLC in its affidavit similarly not distinguishing between Ithuba Lottery and Ithuba Holdings in its opposition, "... the perception may be that Ithuba is better placed to win the temporary licence application and operate the temporary licence for the 12 months period is not a function of any bias on the NLC's and its advisors' part. It may be a function of incumbency that would be applicable to any temporary licence awarded at the end of a licence period where the incumbent licensee is also an applicant."

[106] Even if I could accept that the Minister did not purposefully issue the RFP to prefer a certain bidder, the RFP most certainly did. Not only the equipment and infrastructure required, but also the time frames of the RFP rendered the RFP unfair. The extreme truncated times for assessment, the award and the announcement of the temporary award did severely limit the 8 applicants who applied for the Fourth Licence, with the proof being that only 1 of the 8 applied for the temporary licence RFP. The RFP was issued on 3 March 2025 with applications to be submitted on 31 March 2025. Assessment of the applications would take place in less than two weeks after the submissions of the applications and the Minister would make the decision on the successful applicant within one week of completion of assessment and the temporary licensee would be appointed on 1 June 2025. This appointed licensee will have to commence with operation of the National Lottery on the same day. If regard is had to the Minister's submissions as to how difficult a decision is pertaining to the award of a licence for the National Lottery these time frames and requirements are simply inequitable. The only inference on these facts is that the Minister could foresee that only the incumbent or future incumbent could comply with the RFP as it was running

the Lottery and had all of the infrastructure and equipment. As the Minister conceded; the incumbent would have an advantage.

[107] A tender process cannot have an inevitable outcome or be foreseeable. This is crucial for ensuring fairness, transparency, and adherence to procurement laws. If the outcome is predetermined, it undermines the competitive nature of the tender process. The purpose of a tender is to allow multiple bidders to compete for a contract, and an inevitable outcome eliminates this competition. The award of a tender as a forgone conclusion can be seen as a lack of transparency and fairness, as it suggests that certain bidders are favoured. The lack of competitiveness led to a shortfall in the procurement process that in turn offends section 217(1)(b) of the Constitution. On this ground alone the temporary licence RFP must be declared to be invalid.

[108] I shortly address the answer that Ithuba Lotteries set up, in its own defence, as an applicant for the RFP. One may ask but how could Ithuba Lottery then bid if the RFP was uncompetitive and unfair. The answer is because it is the sister company of Holdings and therefore the RFP was effectively eschewed to favour it. As much as I am aware that Lottery and Holdings are two distinct legal entities a court cannot turn a blind eye to the fact that with 7 of the same directors the operation of the Lottery is well-known to Holdings and the newly activated Lottery. The deponent to the affidavit of Lottery is the Chief Operations and Financial Manager of Lottery, but also the Group Financial Manager of Zamani Marketing and Management Consultants (Pty) Ltd as well as a director of Zamani Gaming (Pty) Ltd and sets out in detail the position of Holdings relating to directors, shareholding etc. He pertinently sets out what infrastructure and assets Holdings has to run Lottery. He also sets out that Lottery intends to acquire the assets from Holdings. Ms Mabuza a director of Ithuba Lottery, who is also the CEO of Ithuba Holdings signed the extension bid for Ithuba Lottery.

[109] On these common cause facts it must be accepted that Wina Njalo cannot be faulted for not knowing it could approach Holdings to contract a commercial agreement to buy the assets and infrastructure without entrenching on Competition Law. Whereas Ithuba Lottery would know, due to the interrelationship, and in its affidavit expressed that that was its intent. One does not need a crystal ball to realise that with the awakening of Ithuba Lottery for the purpose of obtaining the award for the temporary licence the chances are slim, despite perhaps negotiations with other bidders [if they

could have been alive to the fact that they could negotiate] that the commercial agreement will not go to Ithuba Lottery.

[110] I am satisfied that due to the interrelationship Wina Njalo did not have a fair competitive chance and the RFP's effect was to exclude competitiveness.

[111] The NLC's argument on the temporary licence RFP is that it needed not be consulted to issue the temporary licence RFP, but only before an award for the temporary licence is made. I accept their argument in terms of s13B(d) of the Act and also their argument that they in any event consulted. This is no basis to declare the temporary licence RFP invalid on this ground.

[112] I had already addressed the NLC itself expressing that it may be the function of incumbency that a temporary licence would be awarded at the expiry of a licence to the incumbent licensee. Even if I accept that the NLC had no bias towards Ithuba in drafting the RFP the result thereof is that it does impact on Wina Njalo's rights to bid for the RFP.

[113] Aside, perhaps in the unique circumstances where the incumbent of the National Lottery has dominance together with the scarcity of the equipment and infrastructure the RFP for a temporary licence should cater for this.

[114] Wina Njalo had already on 5 March 2025 informed the Minister that the temporary licence RFP favoured one party. The Minister reverted that he would consider the issue and revert, but he never did. The Minister did not address this in the answering affidavit and the facts put up by Wina Njalo must be accepted. In view thereof the temporary licence is unfair and uncompetitive and must be reviewed and set aside and must be declared under s172(1)(a) of the Constitution to be invalid.

The remedy

[115] Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made under s172(1)(b). A Court must conduct an enquiry in ascertaining a just and equitable remedy.<sup>34</sup> S172 affords a court a wide discretion, without self-censoring,

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<sup>34</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) par [45]

determined by the specific facts of the matter at hand defined by considerations of justice and equity. The interests of the public must remain paramount.

[116] It is common cause that should there be an interruption in the operation of the National Lottery the NLDTF reserves would have to be utilised in the transition period to fund good causes. It is further common cause that the interruption in the operation of the National Lottery will substantially deplete the reserves of the NLDTF. The NLDTF's revenue is allocated to fund charities and charitable activities, the arts, sport and recreation and other Minister-approved expenditures. A legal limbo of the National Lottery would threaten to deprive beneficiaries of crucial funding and undermine the public confidence in the National Lottery. Furthermore, any interruption in the operation will exacerbate the threats of illegal gambling. The rights and expectations of Wina Njalo have to be assessed in this context.

[117] In all these circumstances I think that a just and equitable remedy will be to set aside the temporary licence RFP, but to suspend this part of the order to enable the continuation of the operation of the National Lottery. I am unconvinced that the period of 12 months argued for is necessary. When the Minister announces the award of the National Lottery, on his own version would have invoked clause 8.2.7 of RFP to already have negotiated the licence agreement, negating having to consider that time period. The 5 months for the licensee to be operational seems the time period to be the consideration.

#### Costs

[118] As for costs it is my view that the costs should follow the result. I did consider exempting the NLC, but it did actively support the Minister. In this matter the costs of 3 counsel upon retention and employment was justified.

#### Order

1. The Applicant's non-compliance with Uniform Rules of Court relating to forms, service and time periods is condoned, and this application is dealt with as a matter of urgency under Uniform Rules 6(12).

2. Declaring unconstitutional, unlawful and invalid, and reviewing and setting aside the failure by the Minister of Trade, Industry and Competition ("Minister") to award and issue the Fourth National Lottery and Sports Pools licence ("Fourth National Lottery Licence"), including the failure to announce the Successful Applicant and the failure to enter into a Licence Agreement with the Successful Applicant in terms of the Request for Proposals for the Fourth National Lottery Licence, RFP Number: NLC RFP 4 ("Fourth Licence RFP").
3. The Minister is ordered to determine a successful applicant for the fourth National Lottery License by no later than 28 May 2025. The Minister must negotiate a license agreement by no later than 28 May 2025 with the Fourth Licensee.
4. Declaring unconstitutional, unlawful and invalid, and reviewing and setting aside the Minister's issuance of the Request for Proposal to operate a Temporary National Lottery and Sports Pool Licence, RFP Number: NLC TL RFP.
5. Declaring unconstitutional, unlawful and invalid, and reviewing and setting aside the Minister's decision to extend the bid validity period for the Fourth National Lottery Licence by an additional 12 months, until 31 May 2026.
6. The Order of invalidity in paragraph 4 is suspended for 5 months for the Fourth Licensee to take over the operation of the National Lottery.
7. The costs of this application, including the costs of three counsel, are to be paid jointly and severally by the Minister, the Second Respondent, and the Fifth Respondent, such costs to be awarded on scale C.



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**S. POTTERILL**  
**JUDGE OF THE HIGH COURT**

CASE NO: 2025-039592

HEARD ON: 5 May 2025

FOR THE APPLICANTS: ADV. G. MARCUS SC  
ADV. A. COUTSOUDIS  
ADV. T. PALMER  
ADV. D. SIVE  
ADV. D. MUTEMWA

INSTRUCTED BY: Nortons Incorporated

FOR THE 1<sup>st</sup> RESPONDENT: ADV. P. ELLIS SC  
ADV. K. MAGANO

INSTRUCTED BY: Malatji & Co

FOR THE 2<sup>ND</sup> RESPONDENT: ADV. N. MAENETJE SC  
ADV. B. LEKOKOTLA  
ADV. N. SAKATA

INSTRUCTED BY: Malatji & Co

FOR THE 5<sup>TH</sup> RESPONDENT: ADV. A. COCKRELL SC  
ADV. M. LE ROUX SC  
ADV. M. MBIKIWA  
ADV. J. DAVIS

INSTRUCTED BY: Roodt Mkhabela



FOR THE 6<sup>TH</sup> RESPONDENT: ADV. I. CURRIE (WATCHING BRIEF)

INSTRUCTED BY: Cliffe Dekker Hofmeyr

DATE OF JUDGMENT: 21 May 2025