

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



**Case number: 54314/2021**

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES  
(2) OF INTEREST TO OTHERS JUDGES: YES  
(3) REVISED

3/12/2021  
DATE

  
SIGNATURE

In the matter between:

**NATIONAL LOTTERIES COMMISSION**

**APPLICANT**

and

**ITHUBA HOLDINGS (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**IGT GLOBAL SERVICES LTD**

**2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF TRADE, INDUSTRY AND  
COMPETITION**

**3<sup>RD</sup> RESPONDENT**

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**REASONS FOR JUDGMENT**

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## NEUKIRCHER J

- [1] The National Lotteries Commission (“NLC”) is the applicant in this urgent application. The relief it seeks against the first respondent (“Ithuba”) will have the effect of preventing Ithuba from installing and “going live” with its new Paytronix Lottery System (“PLS”) on 1 December 2021, pending the outcome of Part B of the application.
- [2] The specific relief sought in Part A is the following:
- “3. Pending the outcome of Part B of this application –
    - 3.1 interdicting and restraining Ithuba from giving effect to an unlawful amendment to the Lottery Technology Supply and Support Agreement;
    - 3.2 interdicting and restraining Ithuba from installing Paytronix from 1 December 2021 and from “going live” with its new Paytronix Lottery System (“PLS”); and
    - 3.3 pursuant to the NLC’s rights and obligations in terms of the current licence agreement for the operation of the National Lottery in terms of the National Lotteries Act 57 of 1997 (“the Licence Agreement”) concluded between the Third Respondent (“the Minister”), the NLC and Ithuba, directing Ithuba to comply with the Licence Agreement by reverting to the terms of its pre-existing arrangement with IGT.”
- [3] In Part B, the relief sought is:
- “1. Reviewing and setting aside Ithuba’s decisions to effect the LTSSA amendments concluded between Ithuba and IGT on 7 February 2015, 8 November 2019, 7 August 2020 and 26 February 2021 as unlawful and/or constitutionally invalid.
  - 2. Alternatively to Prayer 1 above, declaring that Ithuba’s decisions to effect the LTSSA amendments concluded between Ithuba and IGT on 7 February 2015, 8 November 2019, 7 August 2020 and 26 February 2021 are unlawful and/or constitutionality invalid and are reviewed and set aside.

3. *Interdicting and restraining Ithuba from “going live” with the PLS until it has obtained necessary approval from the Board in accordance with inter alia clauses 10.2, 11, 14 and 16.7 of the licence agreement and appropriate certification from the World Lottery Association (“WLA”).*

- [4] This application was set down in my urgent court of 16 November 2021. The filed papers and heads of argument exceeded 1 100 pages but, according to the NLC, the argument would take approximately one day. After reading the papers I determined that the matter would exceed one day’s argument and with the permission of the Deputy Judge President and co-operation of the parties’ counsel, the matter was set down for hearing on 25 and 26 November 2021.
- [5] On 25 November 2021, when argument commenced, I was informed that given the fact that any software migration would have to commence by Saturday 27 November 2021, an order (one way or the other) would need to be handed down before that date.
- [6] Both urgency and merits were argued and indeed the matter took two days. Argument was finalised at 14h30 on Friday, 26 November 2021. Given the time available and the issues argued, it was not possible to hand down a full judgment, but an order in the terms set out at the end of this judgment was handed down electronically at 15h30.
- [7] These then are the reasons for that order.

#### **PART A OF THE NOTICE OF MOTION**

- [8] It is only Part A that I am required to decide. The full record and papers in respect of Part B have yet to be filed and thus any view I express as regards the applicant’s prospects of success in Part B is *prima facie*, and should not be taken as binding on the court hearing Part B in due course.

## INTERIM INTERDICT REQUIREMENTS

- [9] The NLC asks for an interim interdict, and it must therefore show:
- 9.1 the existence of a *prima facie* right, even if open to some doubt<sup>1</sup>;
  - 9.2 a reasonable apprehension of irreparable and imminent harm to this right should the interdict not be granted;
  - 9.3 that the balance of convenience favours the granting of the interdict; and
  - 9.4 that the NLC has no other satisfactory remedy.<sup>2</sup>

## BACKGROUND

- [10] On 11 June 2013 the Minister of Trade, Industry and Competition<sup>3</sup> (*“the Minister”*) published a Request for Proposal (RFP) for the Third National Lottery Licence.<sup>4</sup> The result of this saw Ithuba being appointed as the National Lottery Operator.<sup>5</sup>
- [11] As a result, on 24 November 2014, the National Lotteries Board (*“the Board”*) and Ithuba entered into a License to Operate the National Lottery (*“the License”*) from the commencement date, which is stated in the License to be 1 June 2015<sup>6</sup>.
- [12] The *“Expiry Date”* of the License is stated to be *“the 8<sup>th</sup> (Eighth) anniversary of the Commencement Date, subject to any extension which the Minister may after consultation with the Board<sup>7</sup> grant in terms*

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<sup>1</sup> *National Treasury and Other v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) where it was stated that interim interdicts based on review applications may only be granted in *“the clearest of cases”* (at paras 47 and 90) and that the applicant must also establish a separate *prima facie* right (other than the right to judicial review) that is threatened by an impending or imminent irreparable harm (at para 49)

<sup>2</sup> *Setlogelo v Setlogelo* 1914 AD 221; *Webster v Mitchell* 1984(1) SA 1186 (W)

<sup>3</sup> Who is the third respondent

<sup>4</sup> NLB RFP 3

<sup>5</sup> The details of the events relating to this appointment are set out in two judgments of Tuchten J being *Gidani (Pty) Ltd v Minister of Trade and Industry and Others* (81420/2014) [2014] ZHGPPHC 960 (9 December 2014) and *Gidani (Pty) Ltd v Minister of Trade and Industry and Others* (81420/2014) [2015] ZAGPPHC 457 (4 July 2015)

<sup>6</sup> Notwithstanding the date on which the Minister issued the license

<sup>7</sup> *“After consultation with”*: *Premier Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657 (CC); 1999 (4) BCLR 382 (CC) 29 March 1999 at fn 94 – *“... the distinction between “in consultation with” and “after consultation with” is that the former calls for concurrence, whilst the latter does not”*

of section 14(1) of the Lotteries Act”.

- [13] Section 3 of the RFP requires each bidder’s commitment to localise its procurement “*to the extent that it is reasonably possible without having a detrimental effect on the running of the National Lottery*”.<sup>8</sup>
- [14] In its bid document, Ithuba then made provision for the gradual phasing in of local content in respect of both its Central Gaming System Hardware and Software as follows:

	% local content			
	At start up	0 – 2 years	3 – 5 years	6 plus years
Hardware	0%	50%	75%	100%
Software	0%	50%	75%	100%

- [15] Thus it envisaged that by year six of its eight-year license, 100% of the hardware and software would be of local content.<sup>9</sup>
- [16] As is clear, at date of commencement of the License, Ithuba was reliant on an international company to provide both the hardware and software to operate the National Lottery. This company was GTech (now IGT). This is specifically highlighted in Ithuba’s bid. In awarding the bid to Ithuba the Minister stated that Ithuba scored better in respect of the technical evaluation stage, *inter alia* because:

“79.10.1            *Ithuba’s technology partner has a wider footprint, with operations in a number of international jurisdictions.*”

- [17] Of course, as it was reliant on IGT to provide the technical back-up for the services to be rendered, Ithuba then concluded an agreement with IGT called the Lottery Technology Supply and Support Agreement

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<sup>8</sup> The bidder had to specify what goods and services were being procured internationally and how, based on the award of the License, it intended to localise the procurement thereof

<sup>9</sup> See also section 13(2)(b)(ii) of the Act. In the evaluation process this category was weighted 20/100

(“LTSSA”) during 2014. The LTSSA was for a period of eight years which mirrored the period set out in the License.

- [18] However, on 7 February 2015 Ithuba and IGT signed an Amendment to and Extension of the LTSSA (*“the amended LTSSA”*) in which they agreed that the expiry date of the amended LTSSA was the “5<sup>th</sup> anniversary of the Start-up Date (scheduled to occur June 1, 2015)”. The amended LTSSA would therefore terminate on 31 May 2020.
- [19] Although the initial License agreed between Ithuba and the Minister was concluded on 24 November 2014, that agreement was set aside by Tuchten J on 4 July 2015. The learned Judge suspended the operation of the order for a period of one month and remitted back to the Minister for reconsideration. The basis for this was that, although Tuchten J endorsed the legality of the decision to award Ithuba the bid, the financial undertaking the Minister had secured from Ithuba at the negotiation stage brought about a risk of insolvency which the Minister had not considered.
- [20] Thus it is important to note that it was not the decision to award that formed the basis of Tuchten J’s order, but certain terms of the 2014 License itself.
- [21] Subsequent to the order of Tuchten J, Ithuba and the Minister then signed the final License on 7 August 2015. That provides that the commencement date of the License is 1 June 2015.
- [22] It is important to note that the amended LTSSA between Ithuba and IGT was signed 6 months prior to the final License Agreement between the Minister and Ithuba.
- [23] The amendment of the term of the LTSSA from 8 years to 5 years is the *causa causans* of the relief sought by the NLC in Part B. According to the NLC, the amended LTSSA is invalid as Ithuba did not seek its

permission to amend the term of the LTSSA and, following on that, did not seek approval to substitute IGT with Paytronix (and the PLS) which it was required to do under the terms of the License.

[24] On the other hand, Ithuba asserts that such no permission was or is required; that the provisions of the License enjoin it to import local content into its operations; that both the NLC and Minister have been aware of the amended LTSSA since at least 2015 and have failed to take any steps to prevent its implementation (or have it set aside) until now and that they are now estopped from doing so.

[25] It is Ithuba's position, consequently, that this application is not urgent and even if found to be so, no interdict can be granted against it as the NLC has not made out a case.

[26] As the issue of urgency is tied up with the merits, they are discussed together.

### **THE INTERDICT**

[27] As stated *supra* in paragraph 9 *supra*, the NLC must demonstrate that the four requirements for the grant of the interim interdict have been met.

### **THE FIRST GROUND: THE *PRIMA FACIE* CASE**

[28] There are several points argued by Ithuba to demonstrate that the NLC has no *prima facie* case. The first centred on whether or not the Minister and NLC has known of not only the amendments to the LTSSA, but that Ithuba would replace IGT with a local provider by 1 December 2021. The important features of that timeline<sup>10</sup> are the following:

28.1 the amended LTSSA was disclosed to the NLC in the Court proceedings before Tuchten J – the document itself formed part of the record that the Minister filed, and he also deposed to an affidavit in which he acknowledged that the LTSSA had been

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<sup>10</sup> Set out in Ithuba's heads and as argued by both parties

- amended<sup>11</sup>;
- 28.2 Ithuba notified the Board of the amended LTSSA at a Board meeting in 2015;
- 28.3 in May 2019, the Board notified Ithuba of its non-compliance with, *inter alia*, the local content clause of the License and on 21 June 2019 Ithuba informed the Board that they had been developing a South African owned central gaming system which was on track to be completed before the end of the license period;
- 28.4 on 11 May 2020 Ithuba informed the Board that it had developed the PLS which is locally owned and would be implemented by May 2021;
- 28.5 on 21 April 2020, Ithuba then provided the NLC with a requested explanation of certain amendments to the LTSSA and informed the Board that the LTSSA would come to an end on 31 May 2021 and would not be extended<sup>12</sup>;
- 28.6 on 29 June 2020, Ithuba submitted a draft amended Technical Baseline Document to the Board<sup>13</sup>;
- 28.7 in March 2021, Ithuba informed the NLC of its “go live” date of 17 October 2021 (which did not take place);
- 28.8 on 19 August 2021, Ithuba submitted its final Technical Baseline Document to the Board. It is dated 10 August 2021 and contains substantial amendments to the document submitted in June 2020;
- 28.9 on 15 October 2021, the NLC threatened to launch this urgent application if Ithuba did not undertake to withdraw the instruction to IGT to migrate the data required for the “go live” instruction;

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<sup>11</sup> The affidavit itself does not mention the amended term of the LTSSA at all – it simply notes that Zamani (Ithuba’s forerunner) and IGT had entered into an amended LTSSA

<sup>12</sup> Despite this assertion, the amended LTSSA was extended until 30 November 2021

<sup>13</sup> In paragraph 2 of this draft, Ithuba states that

*“...on 28 May 2015, ITHUBA originally submitted version one of its Technical Baseline Document to the NLC. After the original submission, several updates and new versions have been submitted, detailing important changes to the Technical Baseline – the latest version being Version 5.0 dated 28-05-2020. The Technical Baseline (PLS), this document, is a revision and update to all previous versions, and documents the implementation of the new Paytronix Lottery System (PLS), which will supersede any previous version, and become the official, published version that details the new technical infrastructure.”*



28.10 this application was launched on 26 October 2021.

[29] Thus says Ithuba, the NLC has had knowledge since 2015 of the very issue it now decries as being unlawful and upon which it bases the relief sought in Part B, and yet it has remained supine for six years. Ithuba argues that, given the above timeline, any possible review application is doomed to fail as:

- 29.1 if brought under PAJA, it is brought outside of the 180 day period in terms of section 7(1)(a)<sup>14</sup> of the Promotion of Administrative Justice Act (PAJA)<sup>15</sup>;
- 29.2 PAJA is only available to private persons and as the NLC is an organ of state it cannot use PAJA to review a contract entered into between two private parties<sup>16</sup>;
- 29.2 the present application has not been accompanied by an application for condonation which is fatal;<sup>17</sup>
- 29.3 even if the review is brought as a legality review, it has still not been brought within a reasonable time;
- 29.4 review proceedings<sup>18</sup> are not competent because Ithuba is not an “*organ of state*” as envisaged in section 239 of the Constitution<sup>19</sup>, the conclusion of amended LTSSA is not subject to attack under PAJA as its conclusion is not an “*administrative action*” as

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<sup>14</sup> “7. (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded”

<sup>15</sup> Act no. 3 of 2000

<sup>16</sup> According to Ithuba, this principle is laid down in *Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (Gijima)

<sup>17</sup> *Camps Bay Ratepayer’s Residents’ Association and Another v Harrison and Another* 2011(4) SA 112 (CC) at para 57

<sup>18</sup> Envisaged in Part B prayers 1 and 2 (according to Ithuba)

<sup>19</sup> ““organ of state” means-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”

envisaged in PAJA<sup>20</sup>.

[30] Ithuba also argues that the amended LTSSA is a horizontal agreement entered into between two private entities and neither the NLC nor the Minister have any authority or power to interfere with it. It argues that neither the Lotteries Act<sup>21</sup> (*“the Act”*) nor the License itself hold any sway over this clearly private law agreement and therefore neither the interdicts sought in prayer 3 of Part A, nor the relief sought in prayer 1 of Part B, can be granted.

[31] Ithuba asserts that the present proceedings are clearly *ultra vires* the NLC’s powers in terms of the Act as it is only the Minister who has the power to *“police”* the terms of the License and take steps to enforce it. Ithuba’s argument is that the Board’s sole function is a reporting function.

### Legislative Framework

[32] The legislative framework that informs the argument on the issue of the NLC’s *prima facie* case is the following:

32.1 Section 2A of the Act:

***“2A Functions of Commission***

*(1) The Commission shall, applying the principles of openness and transparency, exercise the functions assigned to it in terms of this Act by the Minister, board or any other law.*

*(2) The Commission must ensure that-*

*(a) the National Lottery and sports pools are conducted with all due propriety and strictly in accordance with the*

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<sup>20</sup> *““administrative action” means any decision taken, or any failure to take a decision, by—*

*(a) an organ of state, when—*

*(i) exercising a power in terms of the Constitution or a provincial constitution; or*

*(ii) exercising a public power or performing a public function in terms of any legislation; or*

*(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—  
...”*

- Constitution, this Act, all other applicable law and the licence for the National Lottery, together with any agreement pertaining to that licence; and*
- (b) the interests of every participant in the National Lottery are adequately protected.*
- (3) The Commission may, upon request by the Minister, board or on its own initiative in consultation with the board, conduct research on worthy good causes that may be funded without lodging an application prescribed in terms of this Act.*
- (4) The Commission may, upon request by the Minister, board or on its own initiative in consultation with the board, invite applications for grants from worthy good causes in the prescribed manner.*
- (5) The Commission shall-*
- (a) promote public knowledge and awareness by, amongst others-*
    - (i) developing and implementing educational and informational measures to educate the public about the lotteries and provisions of this Act; and*
    - (ii) educating the public by explaining the process, requirements and qualifications relating to the application for grants in terms of this Act;*
  - (b) manage the staff, and its financial, administrative and clerical functions; and*
  - (c) exercise any other function as delegated or directed by the Minister or the board.”*

### 32.2 Section 10 of the Act:

#### **“10 Functions of board**

- (1) The board shall in applying the principles of openness and transparency and in addition to its other functions in terms of this Act-*
- (a) advise the Minister on the issuing of the licence to conduct the National Lottery as contemplated in section 13 (1) and on any*

*matter contemplated in section 14 (2) (g);*

*(b) ensure that-*

*(i) the National Lottery and sports pools are conducted 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 that licence;*

*(ii) the interests of every participant in the National Lottery are adequately protected; ...*

*(2) The board shall have the power to institute legal proceedings in order to properly discharge its functions and responsibilities in terms of this Act.*

*(3) The board may approach any court for any order the board deems appropriate for effective regulation and enforcement of the Act.*

*(4) The board may request the Commission to conduct research on appropriately deserving worthy causes that may be funded or recipients that may be funded without lodging an application..."*

### 32.3 Section 13 of the Act:

#### ***"13 Licence to conduct National Lottery***

*(1) The Minister may, after consultation with the board, issue one licence at one time authorising a person to conduct the National Lottery, which for purposes of section 57 will constitute a lottery, in accordance with the provisions of this Act.*

*(2) Before a licence is granted under this section-*

*(a) 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, and the board shall require payment for any such documents;*

*(b) the Minister shall be satisfied that-*

*(i) the applicant for the licence contemplated in subsection (1) has sufficient appropriate knowledge or*

*experience to conduct the National Lottery, or has unconstrained and continuous access thereto, and will be able to conduct the National Lottery strictly in accordance with this Act, the licence of the National Lottery and any agreement pertaining to the licence;*

*(ii) the applicant has the necessary financial and other resources to conduct the National Lottery;...*

*(3) 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.*

*(4) A licence granted under this section shall include the conditions contemplated in section 14..."*

#### 32.4 Section 14 of the Act:

##### ***"14 Requirements and conditions of licence***

*(1) A licence granted in terms of section 13 or 13A shall be in writing, shall specify the conditions attached to it and shall be*

*granted for a period not exceeding eight years: Provided that the Minister may, after consultation with the board and at least one year before the expiry of that licence, extend that licence for a non-renewable period not exceeding 24 months: Provided further that the licensee shall have no rights or legitimate expectations in respect of an extension of the period of validity of the licence other than the rights afforded by this subsection.*

*(2) The conditions contemplated in subsection (1) shall include such conditions as the Minister shall determine, after consultation with the board, and shall in particular include conditions requiring the licensee-*

*(a) to obtain the consent of the Minister after consultation with the board before doing anything specified in the licence;*

*(b) to refer specified matters to the board and the board must refer such matters to the Minister for approval;..*

*(f) to do such things in terms of the licence, including the transfer of property or any rights, excluding intellectual property rights or proprietary software, as the board may require, upon the expiration of the licence;...*

*(h) to allow the board or anyone designated by it to enter any premises or facility belonging to or under the control of the licensee or a member of the management of the licensee, or premises to which the licensee has a right of access, at any reasonable time, if such entry is necessary for the protection of the integrity of the National Lottery, and to-*

*(i) examine or inspect anything, machine, document or data captured in any form, excluding proprietary software, found on or in the premises or facility, and make copies of or make extracts from that thing, machine, document or data;...*

*(iv) take such steps as may be reasonably necessary to protect the integrity and conduct of the National Lottery; and..."*

### 32.5 Section 16 of the Act:

#### **"16 Enforcement of conditions of licence**

- (1) *If the Minister has reason to believe-*
- (a) *that a licensee is likely to contravene a condition in the licence granted under section 13 or 13A;*
  - (b) *that a licensee has contravened such a condition and there is a reasonable likelihood that the contravention will continue or be repeated; or*
  - (c) *that a licensee has contravened such a condition and that the contravention can be remedied,*
- the Minister may, after consultation with the board-*
- (i) *notify such licensee of such contravention;*
  - (ii) *instruct such licensee to remedy the contravention within a period stipulated in such a notice; or*
  - (iii) *apply to a High Court for an order prohibiting the contravention or, as the case may be, requiring the licensee and any other person who appears to the court to have been party to the contravention, to take such steps as the court may direct...*

[33] The conditions of the license upon which the NLC basis its argument are the following:

33.1 Clause 10:

**“COMPLIANCE OF TECHNICAL OPERATIONS WITH TECHNICAL BASELINE DOCUMENT**

10.1 *The Board has approved the Technical Infrastructure to be used by the Licensee in its Lottery Operations recording the capabilities, specifications and features of the Technical Infrastructure.*

10.2 *The Technical Baseline Document can be amended during the Licence Period subject to the approval of the Board.* *If a dispute arises between the Licensee and the Board with regard to the recording of the Technical Infrastructure in the Technical Baseline Document, the matter shall be referred to an expert appointed by the Board (“the Expert”), who shall compile the final Technical*

*Baseline Document in consultation with the Board and the Licensee, taking into account the RFP and the Proposal and his determination of the final Technical Baseline Document shall be final and binding on the Parties.*

10.3 The Licensee hereby-

10.3.1 *warrants that at the Commencement Date its Technical Infrastructure, at a minimum, complies with the requirements, capabilities, specifications and features set out in the Technical Baseline Document and the final Transition Plan; and*

10.3.2 *undertakes that its Technical Infrastructure will continue to comply at least with the requirements, capabilities, specifications and features set out in the Technical Baseline Document and the final Transition Plan for the duration of the Licence Period."*

33.2 Clause 11:

**"APPROVAL AND TESTING OF TECHNICAL OPERATIONS BY THE BOARD**

11.1 *The Licensee shall prepare Descriptions in writing for all Operations undertaken in terms of this Licence. Each Description shall include:*

11.1.1 *a title by which it can be identified;*

11.1.2 *the identity of the Person or Persons with primary responsibility for creating and amending it and ensuring that the Operation to which it relates conforms with it;*

11.1.3 *a statement of its purpose and the dates of its creation and amendment;*

11.1.4 *a complete list of cross-references to all other Descriptions which relate to or concern the Operation which is the subject of the Description; and*

11.1.5 *if the Description relates to any software used by the Licensee in respect of the National Lottery, such Description shall include specifications that define:*



- 11.1.5.1 *the scope, inputs and outputs of such software;*
- 11.1.5.2 *the controls which will be put in place to ensure security and reliability; and*
- 11.1.5.3 *the levels of resilience, reliability, performance and availability of such software,*

*and which includes details of the manner in which the Board may have access to all data, software, hardware, documented procedures, event logs and accounting records, including immediate access to current information on sales of Tickets and Prizes.*

- 11.2 *The Board may require the Licensee to submit a Description to it for approval, which for the purpose of this clause shall include, but not be limited to, playing the National Lottery Games, cash management, Prize payment security, information technology ("IT") security standards, security audits, back-up and recovery of the Licensee's System, Draw procedures, Draw machine accreditation, testing of Lottery balls, emergency Draw procedures, playing Instant Lottery Games, remuneration of the Licensee's senior management. The Licensee shall make such changes to the Description as shall be required by the Board to obtain its approval. The Board undertakes to use its best endeavours to provide its approval within 60 (sixty) days..."*

### 33.3 Clause 14:

#### **"14.22 ISO Certifications and Other Standards Conditions**

*The Licensee shall ensure that it complies with the following standards and information technology governance frameworks for the duration of the License Period:*

*14.22.1 World Lottery Security Control Standard (WSS-SCS) Part A and Part B, incorporating ISO 27001, the*

*international best practice standard for Information Security Management System (“ISMS”); and*

*14.22.2 Control Objectives for Information and Related Technology (“COBIT”), which provide an information technology governance framework which assists in delivering and understanding the risks associated with information technology.”*

#### 33.4 Clause 16:

##### **“16.7 Limitations on the use of Contractors and Subcontractors**

*16.7.1 Subject to the provisions of clause 16.7.2 below, the Licensee shall ensure that no party other than the Licensee or a Wholly Owned Subsidiary of the Licensee, is or may be required or entitled (whether pursuant to a Lottery contract or Lottery sub-contract and whether as an original party thereto or as an assignee or other successor in title) to provide or supply any of the following:*

*16.7.1.1 ...*

*16.7.1.2 any telephone, computer or similar equipment (including without prejudice to that generality any radio, satellite or other electronic communications equipment or software) for use in the National Lottery,...or in any other way in connection with the business of the Licensee or any Wholly Owned Subsidiaries or any design, development, maintenance or management services in connection with any such electronic communications equipment including software design, development or testing, the use of which may affect the security and integrity of the National Lottery,... unless that party has first been approved in writing the Board, after allowing the Licensee to make a presentation*

*on its position to the Board...*

[34] The following definitions in the License are also relevant:

- 34.1 “**key contractor**” – *a Contractor that provides goods or services of a Material Nature to the Licensee, either directly or indirectly, which contractors include without limitation GTECH Corporation (incorporated in Delaware), GTECH Global Services Corporation Ltd (incorporated in Cyprus) or Zamani Marketing and Management Consultants (Pty) Ltd and their successors under the relevant supply agreements*<sup>22</sup>
- 34.2 “**Technical Baseline Document**” – *the document in which the capabilities, specifications and features of the Technical Infrastructure as approved by the Board in terms of clause 10.2 from time to time, are recorded*”
- 34.3 “**Technical Infrastructure**” – *all the technology and infrastructure, equipment, systems, software, products and hardware to be used by the Licensee in its proposed Lottery Operations*”

#### **The argument regarding “ultra vires”**

[35] It is convenient to dispose of this issue first. The argument raised by Ithuba is that the NLC is not empowered to institute these proceedings as that authority is extended to the Minister alone under the provisions of section 16 of the Act. However, this argument is incorrect: in terms of section 10 of the Act<sup>23</sup>, the Board is specifically empowered to (a) to institute legal proceedings in order to properly discharge its functions and responsibilities in terms of this Act, and (b) approach any court for any order the board deems appropriate for effective regulation and enforcement of the Act.

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<sup>22</sup> I reiterate that GTECH is now known as IGT and Zamani as Ithuba

<sup>23</sup> This point was not raised on the papers

- [36] The NLC's obligation to enforce of the terms of the License fall within the provisions of section 10 of the Act and therefore there is no merit in this point and it is dismissed.

### **The argument re the amended LTSSA**

- [37] The issue here is whether or not Ithuba was required to obtain the permission of the Board before amending the LTSSA period with IGT from eight years to five years.

- [38] It is common cause that the License itself provides for its period of validity of eight years,<sup>24</sup> and that it commenced on 1 June 2015.

- [39] It is also clear from clause 10 of the License that:

- 39.1 the Board has approved the Technical Infrastructure to be used by Ithuba;
- 39.2 the Technical Baseline Document can be amended during the License period subject to the approval of the Board;
- 39.3 that if there is a dispute with regard to these two documents, the matter "*shall*" be referred to an expert appointed by the Board, who shall compile the final Technical Baseline Document in consultation with<sup>25</sup> the Board and Ithuba "taking into account the RFP and the Proposal...".

- [40] The definition of "*Technical Infrastructure*" includes "*all the technology and infrastructure, equipment, systems, software, products and hardware to be used by the Licensee...*" and the Technical Baseline Document records "*the capabilities, specifications and features of the Technical Infrastructure as approved by the Board in terms of clause 10.2 from time to time...*".

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<sup>24</sup> With a possibility of extension under the terms and provisions of section 14(1) of the Act

<sup>25</sup> "*in consultation with*": see *Freedom Under Law v National Director of Public Prosecutions and Others* (26912/12) [2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP) (23 September 2013) where it was stated that it means "*with the occurrence or agreement of*", *McDonald and Others v Minister of Minerals and Energy and Others* 2007(5) SA 642 (C) at para 18

- [41] Whilst it is certainly so that the License makes provision for 100% local content by year six of the license period, one cannot close ones eyes to the fact that when submitting its bid, Ithuba had to disclose that it would be utilising the hardware and software systems provided by IGT.
- [42] It was required to do so as section 13(2)(b)(i) of the Act provides that before the Minister grants a license, he shall be satisfied that the applicant for the license “...*has sufficient appropriate knowledge or experience*” to conduct the National Lottery, or “*has unconstrained continuous access thereto*”.
- [43] This requirement is mirrored in the RFP which requires that:
- “7.       ...*The Applicant shall provide details of:*
- 7.1.6       *the countries the technology operates in, both past and present, and a brief history of the track record in the Lottery environment in these countries;*
- 7.1.7       *the selected technology partner that will provide the support and backup for the product along with a brief history of their track record in rolling out the selected technology in a Lottery environment.”*
- [44] In response to this requirement, Ithuba then stated<sup>26</sup> the following:
- “Ithuba’s technology supplier GTECH’s Information Security group has implemented an Information Security Management System (ISMS) to protect company assets and ensure information security compliance with both International gaming and technology industry standards, such as:*
- *International Organisation for Standardisation (ISO) 27001.*
  - *World Lottery Association (WLA) Security Controls Standards: 2006 (WLA-SCS 2006) Parts A and B). This certification is valid through March 2014, at which point GTECH will have received the updated WLA-SCS-2012 certification.*

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<sup>26</sup> In para 7.17.5.2 of its Bid Document

- *Statement on Standards for Attestation Engagements (SSAE) 16.*
- *The PCI Security Standards Council's Data Security Standard (PCI-DSS)."*

[45] The result of this saw the Minister then selecting Ithuba as the preferred bidder as:

*"29.2.2 The bid of Ithuba, which included IGT as technical partner, was superior to Gidani's in its technical capacity and that this was one of the factors that swung the decision in Ithuba's favour. The Minister stated in his written reasons that the deciding factors included that*

*(a) "Ithuba was scored better... in respect of the technical evaluation stage, which score... [the Minister] accepted".*

*(b) "[T]here were five key differences in respect of the technical capabilities of the systems proposed in Ithuba and Gidani's application"; and (c) "Ithuba's technology partners<sup>27</sup> has a wider international footprint with operations in a number of international jurisdictions."*

[46] In its bid document Ithuba demonstrated that IGT complied with various standards including, inter alia, the International Organisation for Standards (ISO) 27001 and the WLA-Security Control Standards (the WLA-SCS). This is echoed in the License itself which provides:<sup>28</sup>

*"The Licensee shall ensure that it complies with the following standards and information technology governance frameworks for the duration of the License period ... World Lottery Association Security Control Standards (WLA-SCS): Part A and Part B, incorporating ISO 27001, the international best practice standard for Information Security Management Systems."*

[47] The WLA-SCS is regarded as a benchmark in the industry because it

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<sup>27</sup> It is a *sine qua non* that, without a technology partner, Ithuba simply cannot operate the National Lottery

<sup>28</sup> At clause 14.22.1

details the security, integrity and risk management standard in operating a lottery system and sets out the rigorous controls that a lottery system must meet in order to ensure its integrity and safety. It is also worth mentioning that the World Lottery Association (WLA) has seven platinum and gold contributors, of which IGT is one.

[48] Ithuba argues that, in compliance with its agreement to ensure that 100% local content of its lottery software technology is achieved by year six of its license period, it has entered into an agreement with a black-owned South African owned company called Paytronix Systems (Pty) Ltd (*“Paytronix”*) which owns the software known as the Paytronix Lottery System (*“PLS”*).

[49] Ithuba states that, in the development of the PLS, Paytronix consulted with a company known as WIN Technologies Limited (WIN) which has provided lottery, gaming and casino software in more than 60 countries for the past 22 years. Ithuba states:

*“30.2.2 Paytronix chose to engage WIN because it is a leading software technology firm with extensive knowledge and experience in the industry. In procuring services from WIN, Paytronix gained skills and expertise which allowed it to develop the PLS under the guidance and tutelage of one of the world’s leading software technology providers”*

[50] According to it, the WIN software operates and manages National Lotteries in Argentina, Peru, Russia, India and Pakistan. It also points out that the NLC attended the World Lotteries Summit in Buenos Aires in 2018 where the WIN Lotteries system was demonstrated to the NLC representatives at an on-site visit at a retailer. The NLC admits this but states that the two lottery systems<sup>29</sup> are not compatible or comparable.

[51] In addition, Ithuba argues that Paytronix obtained an ISO 27001

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<sup>29</sup> Ie those of Argentina and South Africa

Certificate on 11 July 2020 and is compliant with the COBIT Framework. Thus the only outstanding issue is the WLA certification which Ithuba states can only be granted once the system goes live on 1 December 2021 – this, it argues, held true for IGT as well.

[52] Thus, says Ithuba, the PLS is fully compliant with the provisions of the License granted by the Minister.

[53] Ithuba also argues that it is not required to obtain the approval of either the Board or the Minister to substitute IGT with Paytronix and the PLS for two reasons:

53.1 neither the provisions of the Act nor the terms of the License make provision for this;

53.2 even if they do, as Paytronix is a “sister” company and the License and clause 16.7.1 exempts it from any such requirement.

This states:

*“16.7.1 Subject to the provisions of clause 16.7.2 below, the Licensee shall ensure that no party other than the Licensee or a wholly owned subsidiary of the Licensee, is or may be required or entitled... to provide or supply any of the following:*

*16.7.1.2 any telephone, computer or similar equipment (including without prejudice to that generality any radio, satellite or other electronic communication equipment or software) for use in the National Lottery, any Constituent Lottery, any Lottery Ancillary Activity or in any other way in connection with the business of the Licensee or any of its Wholly Owned Subsidiaries or any design, development, maintenance or management services in connection with any such electronic communications equipment including software design, development or testing, the use of which may affect the security*



- and integrity of the National Lottery;*
- 16.7.1.8 *any goods, services or other thing in relation to the National Lottery, any Constituent Lottery or any Lottery Ancillary Activity, the:*
- 16.7.1.8.1 *aggregate consideration for all of which, taken together under any number of contracts and comprising any number of separate transactions, is likely in any Financial Year to exceed R3 million (Three Million Rand) (and for the purposes of this clause 16.7.1.8, all consideration payable to every Person who is a Connected Party in relation to any party to a Lottery contract or Lottery sub-contract shall be aggregated); and*
- 16.7.1.8.2 *use of which may affect the security and integrity of the National Lottery;”*

[54] However, the above submission by Paytronix is simply obfuscation – in para 162 of the answering affidavit, Ithuba makes the following admission:

*“162. Paytronix is not a wholly-owned subsidiary of Ithuba...”*

That then puts pay to that argument by Ithuba.

[55] Ithuba’s actual case on the issue of approval is that:

- 55.1 the License itself requires Ithuba to switch contractors by year 6 of the License term and therefore no approval is required;
- 55.2 if approval is required, it cannot be unreasonably withheld;
- 55.3 as the NLC has known that Ithuba intended to switch to Paytronix as far back as 2015, it cannot now cry foul, especially on an urgent basis, when it has been supine for six years. It was required to have acted sooner and the present application amounts to a gross abuse of process.

[56] But, in my view, Ithuba has manifestly misconstrued the provisions of the License: whilst it is indeed so that the License envisages a local software provider by year 6 of the License, the License itself provides:

“13.2.1        *The License acknowledges the Board’s commitment to support the New Growth Path Policy and undertakes to localise its procurement of goods and services to the extent that it is reasonably possible without having a detrimental effect on the running of the National Lottery.*”

[57] In addition, what was envisaged was that the local content requirement would be achieved by the incorporation of a South African based company of which, *inter alia*, Ithuba and IGT would be shareholders. Thus a situation where IGT would not provide Technical Infrastructure Services was at no time envisaged by either the NLC, the Minister or Ithuba itself. The fact is that Ithuba, despite its best efforts, was unable to procure the co-operation of IGT in respect of the licensing of its lottery operation software to this local company and Ithuba was then compelled to seek other partners – WIN provided the solution and it is for this reason that Paytronix was formed and the PLS created.

[58] Furthermore, unfortunately for it, whilst Paytronix may have obtained an ISO 27001 certificate,<sup>30</sup> it has failed to demonstrate compliance with the totality of the WLA-SCS, of which the ISO 27001 is but one part.

[59] The fact also remains that when it comes to the replacement of a “key contractor” the Act, and particularly the License, require not just notification to the Board, but the Board’s actual approval - that is very clear from clause 10.1 of the License. In actual fact, Ithuba concedes this when it states<sup>31</sup> that it “*does not dispute that [it] must apply for the approval of Paytronix.*” Its argument is, however, that this does not

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<sup>30</sup> See para 51 *supra*

<sup>31</sup> In paragraph 255 of its answering affidavit

impact Ithuba's ability to use the PLS as the actual approval that must be sought is simply to substitute IGT with Paytronix.

[60] But this argument ignores the fact that at the very heart of this contentious issue is the actual software which runs the entire Lottery. It is this that is envisaged in the Technical Baseline Document. Paytronix, without the PLS system, is just another company – it is only as good as its system which is the PLS. Without providing the Board with the Amended Technical Baseline Document, the amended Technical Infrastructure Document and Amended Descriptions, the Board in my view was not required to (nor could it) approve Paytronix and the PLS. It was only when Ithuba submitted its Amended Technical Baseline Document and Descriptions to the Board for approval on 19 August 2021 that the Board was put in a position where it could consider the import and consequences of the amendments to the License and the LTSSA.

[61] In any event, when Ithuba informed the Board that it intended to replace IGT with Paytronix that, of itself, did not bring about the automatic amendment of either the License or the LTSSA. This is because the LTSSA is subject to the terms and conditions of the License (as a sub-license) and also because the License has a non-variation clause<sup>32</sup>. Bearing in mind the essential service provided by IGT, that Ithuba was “partnered” with IGT for purposes of the bid, and was awarded the bid (*inter alia*) for this reason, it stands to reason that the License would have to be amended to make provision for Paytronix and the PLS.

[62] This is then when the issue of urgency truly raised its head.

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<sup>32</sup> “No variation or amendment of the terms of this License, including a variation of this clause, shall be valid unless made in accordance with the provisions of Section 15 of the Lotteries Act, reduced to writing and signed by both the Licensee and the Minister, or if in writing authorized by the Minister for this purpose to do so on his or her behalf, by the Chairperson of the Board. Notwithstanding anything to the contrary in this License, the Licensee shall not be obliged to sign any variation of the License which materially increases the financial obligations of the Licensee under the License or which would materially reduce the revenue or profit of the Licensee.”

- [63] Furthermore, the papers show that the Board has never been averse to considering Paytronix as IGT's replacement. This is clear from the correspondence between the parties and the minutes of a meeting of the Board on 12 June 2020<sup>33</sup>. The Board's position throughout has however been that it wishes to appoint an independent expert to examine Ithuba's amended Technical Baseline Document and Descriptions. This expert will conduct the necessary tests, including stress tests, and advise the Board. It is the Board's position that, if approved, both the PLS and the IGT systems should run parallel to each other for a period to be determined by the Board, as advised by the expert, to ensure that the IGT system remains as a backup in case the PLS fails. This will also cater for the question of whether Ithuba is able to obtain WLA certification.
- [64] Given the correspondence between the parties since then, the undertaking sought by the NLC that Ithuba would not "*go live*" with the PLS until it had been tested, Ithuba's refusals and implacable stance on this issue<sup>34</sup>, and the irreversible<sup>35</sup> "*go live*" date of 1 December 2021, it is hardly surprising that the NLC approached the court in the manner it did.<sup>36</sup>
- [65] Ithuba can also hardly allege that the truncated time periods unduly prejudiced it: it managed to file an answering affidavit consisting of 168 pages and 461 pages of annexures. It also initially filed comprehensive heads of argument which were then supplemented by a further 93 pages of heads of argument. It has, in all respects, addressed every aspect of the case raised by the NLC on Part A both in its papers and in the argument which spanned two days.

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<sup>33</sup> Where it was resolved that the NLC's Chief Information Officer would commence testing and provide a timeline of testing and that an independent SANAS accredited expert would be appointed

<sup>34</sup> Especially under circumstances where it had already extended the LTSSA on two previous occasions

<sup>35</sup> See at "*Irreparable Harm*" at para 80 - 86 below

<sup>36</sup> *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC (23 September 2011)

- [66] The NLC has also argued that even were it to be found that the Board had delayed, it was incumbent on Ithuba to have brought a *mandamus* – I agree. Ithuba has not done so.

### **The Review application**

- [67] The final issue as to whether the NLC has a *prima facie* case, if open to some doubt, is tied up with the prospects of success in Part B. Ithuba argues that Part B is stillborn for three reasons:

- 67.1 Part B is premised on the success of the review application and, to this end the argument that Ithuba is an organ of state;
- 67.2 even were such an order possible, the review has been launched so late, there is no application for condonation and it is therefore doomed to fail on this basis alone;
- 67.3 the NLC is not entitled to bring an application for review under PAJA because *Gijima* prevents it from doing so.

- [68] Ithuba has argued that it cannot be considered to be an organ of state for purposes of section 239 of the Constitution or as required in the definition of “*administrative action*”<sup>37</sup> as it neither exercises a public power nor performs a public function in terms of the Constitution or legislation.

- [69] The Constitutional Court, in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No. 2)*<sup>38</sup> found that Cash Paymaster Services was an organ of state as it was implementing the constitutional right to social security when it delivered social grants to the public. Ithuba argues that the reasoning in *Allpay 2* does not apply to it and its operation of the National Lottery as it is not giving effect to a constitutional right when it operates the lottery.

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<sup>37</sup> As defined in PAJA

<sup>38</sup> 2014(4) SA 179 (C) paras 58 to 67 – *Allpay 2*

[70] In considering whether the exercise of powers or the performance of functions under the Act, and the License, are public in nature, four main criteria have been crystallised in our jurisprudence. These, in essence, are:

- 70.1 that it is not the identity of the functionary that is decisive but rather the test focuses on the nature of the function being performed;
- 70.2 whether the entity is under the control of Government or whether it is performing what is traditionally a government function despite being independent;
- 70.3 what the source of the power is; and
- 70.4 whether the functionary owes a duty of accountability to the public when exercising the power.<sup>39</sup>

These must be considered cumulatively and not disjunctively.

[71] Ithuba argues that none of the functions or powers performed by it under the License can be considered to be public as:

- 71.1 Ithuba exercises no coercive powers *vis-à-vis* IGT. This was made all the more obvious when IGT refused to make its intellectual property available to Ithuba so that a local South African-owned software provider could be established in compliance with the local content provisions of the License;
- 71.2 Ithuba does not give effect to a Constitutional right in operating the Lottery;
- 71.3 Ithuba's contracts with sub-contractors are not clothed in any way with public character, but are rather of horizontal application and clearly private in nature;
- 71.4 the award to Ithuba was made in terms of section 13 of the Act, as opposed to section 13A.<sup>40</sup>

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<sup>39</sup> *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para 186

<sup>40</sup> "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

[72] Bearing in mind that I only need to find that the NLC has demonstrated a *prima facie* right if open to some doubt, the following concession by Ithuba is relevant i.e. that a possible function performed by Ithuba which is derived from or dependant on the conduct of the Lottery<sup>41</sup> is perhaps the offering of tickets to participants or the verification of winning tickets. Ithuba has submitted that when it performs “*these public facing functions*<sup>42</sup>, it may possibly, and at a stretch be construed as the performance of a public function and therefore amount to an organ of state”. Ithuba however then specifically also states that it “*leave(s) this question open as it does not need to be answered in this matter*”.

[73] Another function performed by Ithuba that could possibly be considered to be of a public nature is the collection of monies on behalf of the National Lottery Distribution Trust Fund (“*the Fund*”).<sup>43</sup> Section 26 of the Act provides that:

“(3) *Of the balance in the fund after the deduction of the allocated sum referred to in subsection (2)-*

(a) *.....*

(b) *not less than the prescribed percentage shall be allocated for charitable expenditure;*

(c) *not less than the prescribed percentage shall be allocated for expenditure on or connected with the development of sport and recreation;*

(d) *not less than the prescribed percentage shall be allocated for expenditure on or connected with the arts, culture and the national historical, natural, cultural and architectural heritage; and*

(e) *not more than the prescribed percentage shall, subject to section 31 (1), be allocated for expenditure in respect of any other*

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*years, on such terms and conditions as the Minister deems appropriate, including such conditions as stipulated in section 14 (1) and (2)...”\**

<sup>41</sup> Per Allpay 2

<sup>42</sup> Ithuba’s precise submission

<sup>43</sup> Section 14(2)(e) of the Act as read with clause 25 of the License

*matter and approved by the Minister for that purpose.*"<sup>44</sup>

- [74] Given the very public nature of these allocated funds, I am *prima facie* of view that both the NLC and Ithuba are accountable to the public for the accounting and proper administration of the monies paid to the Fund.
- [75] Thus this, and the concession from Ithuba as set out in para 72 *supra*, suffices to justify an argument that the NLC has made out a *prima facie* case in respect of Part B prayer 1.
- [76] As to whether a review (whether PAJA or legality) would get off the ground in the absence of an application for condonation, the question is whether the fact that the NLC knew of the amendment to the LTSSA in 2015, and that Ithuba intended to replace IGT with Paytronix, meant that the present application had to be accompanied by an application for condonation for the late filing of Part B.
- [77] The NLC's argues that these submissions are without merit. It argues that:
- 77.1 the amendment to the LTSSA was not brought to either its or the Minister's direct attention prior to 19 August 2021;
  - 77.2 the LTSSA cannot validly truncate the eight-year period provided for in the LTSSA or the License as it is a subordinate (vertical) agreement<sup>45</sup> and it has to mirror these two documents;
  - 77.3 for purposes of either the 180 day period in terms of PAJA<sup>46</sup> or

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<sup>44</sup> These are to be read in conjunction with sections 27 to 31 of the Act

<sup>45</sup> And not a horizontal agreement as was submitted by Ithuba. The argument was that, in any event, the LTSSA acknowledges that it is operated subject to the provisions of the Act and the License

<sup>46</sup> *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* 2013(4) SA 639 (SCA) para 26 where it was stated that the 180-day period runs from the date "*on which the person concerned as informed of the administrative action ... or might reasonably have been expected to have become aware of the action and the reasons*". And *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019(4) SA 331 (CC) para 49 where it was stated that an application filed outside of the 180 days is "*per se unreasonable*"



the “*reasonable time*” of initiation of a legality review<sup>47</sup>, the relevant date is 19 August 2021 which is when Ithuba placed the final version of the Amended Technical Baseline Document before it for consideration and approval;

77.4 any review falls well within the time periods and that, insofar as it may be necessary to apply for condonation:

77.4.1 it will do so when Part B is considered; and

77.4.2 after the record has been filed and/or any supplementary affidavit under Rule 53(4);

77.5 whilst prayer 1 of Part B is premised on a review, prayer 2 is premised on an interdict in respect of which PAJA or legality review issues (and consequently any condonation) are irrelevant.

[78] As to whether PAJA is unavailable to the NLC because *Gijima* prevents it from reviewing the decision to amend the duration of a contract which is private in nature – the NLC’s argument was that *Gijima* is relevant solely to issues of self-review. In my view, given that Ithuba’s conduct could be considered to be the exercise of a public power and the performance of a public function, and given the interdict sought in prayer 2 of Part B, whether or not the NLC is correct in its assertion has no bearing on the alternative order in terms of prayer 2 - even if a review is not available to the NLC under PAJA, the door is not closed to it in respect of the remainder of the relief sought in Part B.

[79] In my view, given all the above, the NLC has adequately demonstrated that it has a *prima facie* right, even if open to some doubt, to the relief sought.

## THE REASONABLE APPREHENSION OF IRREPERABLE HARM

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<sup>47</sup> Which must be brought within a reasonable period and without undue delay: *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal* 2014(3) BCLR 333 (CC) para 49; *Gqwetha v Transkei Development Corporations Ltd and Others* 2006(2) SA 603 (SCA) para 24

- [80] The test in regard to this requirement is an objective one.<sup>48</sup>
- [81] The main fact upon which this is based is the common cause fact that once IGT transfers the date to Paytronix, and the PLS “goes live” on 1 December 2021, that position then is irreversible.
- [82] The NLC argues that without its independent expert conducting the necessary risk assessments there is a possibility that the PLS system may crash with the result that the Fund lose the revenue stream envisaged in the Act. This means that all the causes for which this revenue stream is so crucial will not receive essential funding.
- [83] Ithuba’s response to this is that:
- 83.1 it is required to provide a R125 million Performance Bond in terms of the License to cover any breach or loss;
  - 83.2 the NLC will have a claim for damages against Ithuba; and
  - 83.3 it has invested approximately R250 million to develop the PLS and a continuation of the LTSSA means that not only will Ithuba have to continue to pay IGT for its services, even though the PLS is ready to be used, but it will be unable to realise its investment in the PLS and it will still have to pay Paytronix. Thus it argues that these financial losses will be irrecoverable;
  - 83.4 it will remain in breach of the License as regards its local content procurement requirements;
  - 83.5 given the fact that the PLS has been given the ISO 27001 certification and is partnered by WIN which has an international footprint, there is no risk of the PLS crashing.
- [84] What this argument loses sight of is the following:
- 84.1 the PLS does not have all the WLA-SCS certifications;
  - 84.2 in answer, Ithuba states at paragraph 29.1 of its Answering

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<sup>48</sup> *Minister of Law and Order and Others v Nordien and Another* 1987 (2) SA 894 (A) at 896G- I; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 347B-E

Affidavit that there is no risk of exposing personal information because the PLS does not contain or store the personal data of players. According to Ithuba, the e-commerce platform, through which payments are received, is a stand-alone system and the only information shared between the ecommerce platform and the PLS is the information relating to the relevant ticket without reference to any personal information;

- 84.3 if anything, this answer by Ithuba conclusively shows why PLS cannot go live before it meets the WLA-SCS certification as the purpose of the WLA-SCS certification is to protect the confidentiality, integrity and availability of digital gaming systems *“in order to protect gaming and player data”*. It specifically considers both *“player data and wallet”* as critical assets for the purposes of risk assessment. Thus Ithuba’s argument in this regard is not correct;
- 84.4 the Act, and the License, require the Board’s approval before the Technical Baseline Document may be amended and the Board is entitled to appoint its expert to assess the document, the PLS and the amendments (which would include all risks, if any);
- 84.5 the National Lottery brings in revenue in excess of R1 billion per annum – the Performance Bond of R125 million is hopelessly inadequate to cover any losses sustained;
- 84.6 a damages claim is also inadequate and that will take time to finalise, will be difficult to quantify and importantly Ithuba has not presented any facts (or any undertaking) which would demonstrate it could make good any damages claim.

[85] But, in my view, the most important factor is the harm to the broader South African public and all the causes and charities which rely on the Fund for revenue – these would be severely prejudiced were PLS be unable to perform. Were this to happen, the entire purpose of the Lottery would be rendered nugatory.

[86] Thus, the NLC must succeed on this ground.

## **BALANCE OF CONVENIENCE**

- [87] This is also tied up with the issue of irreparable harm and is based on the following argument: the NLC funds the Fund and, through it, charitable institutions and other worthy causes. Once IGT transfers data to the PLS and the PLS goes live, the process is irreversible. The PLS has not been tested by an independent expert.<sup>49</sup> In the event the PLS crashes, the Fund will lose over R1 billion per annum and the player data and wallet<sup>50</sup> could be compromised.
- [88] On the other hand, Ithuba has already extended the terms of its LTSSA (on its own version) on two separate occasions and past the initial termination date of 31 May 2020 envisaged in that document.
- [89] The Board has indicated its willingness to appoint Paytronix once its independent expert has given it the go-ahead. The timeline for this is not indefinite as Ithuba attempts to insinuate: the Board has pinned its colours to the mast and stated that its expert estimates that it would require six to eight weeks to conduct the necessary tests and that it (the NLC) suggests a further four weeks be allowed for any disruption caused by the Festive Season. Thus, that timeline puts the testing and approval at end February 2022.
- [90] In any event, if all tests are conducted timeously and the Board approves the PLS, that may well put pay to Part B.
- [91] Thus, the NLC has demonstrated that the balance of convenience favours it.

## **NO SATISFACTORY REMEDY**

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<sup>49</sup> And the affidavit put up by Ithuba in an attempt to show the contrary, is deposed to by the Chief Technology Officer employed by Ithuba who is not an independent expert

<sup>50</sup> i.e. the personal information of the individual lottery player, especially one who accesses that platform via electronic means through an application, its bank or online player systems

- [92] I have already dealt with this issue *supra*. It must be emphasized that this requirement is not that there must be no alternative remedy, but rather that there is no alternative satisfactory remedy - in my view there is none available to the NLC.

## URGENCY

- [93] As stated in para 26 *supra*, the urgency of the matter is tied up with the merits. I am of the view that the consequences of a failure in the Lottery system has such enormous repercussions for the country as a whole and that this makes any possible risk to the National Lottery (no matter how remote as argued by Ithuba) simply unacceptable. The fact that the “go live” date is 1 December 2021, and that any migration of data is irreversible, adds to that and therefore the matter is clearly urgent and an order should be granted as sought by the NLC.

## COSTS

- [94] The NLC argues that, if successful, it should be awarded the costs of three counsel. It points out that, given that Ithuba has employed four counsel, such an award is well-founded.
- [95] It also argues that as Ithuba has demonstrated a lack of appreciation as regards its obligations under the License; that it (*prima facie*) concluded a LTSSA with IGT in which it illegally amended the term of that contract to 5 years in clear contravention of the terms of the License; that it stubbornly refused to accede to the Board’s request to extend its agreement one last time and that Ithuba should therefore be ordered to pay the costs of Part A.
- [96] In my view, this entire application could have been avoided had Ithuba taken a more conciliatory stance, extended the LTSSA with IGT and placed the NLC on terms to conduct its investigations by a specific date. In its opposition to this application, it filed papers of over 600 pages in what was demonstrably an attempt to ensure that the application would

not be heard in the urgent court<sup>51</sup>.

[97] In doing so it has lost sight of the purpose for which it was granted the license in the first place – to conduct itself in a way that would see optimal profits to boost the Fund, see crucial income go towards social upliftment projects, charitable expenditure and to fund the development of *inter alia* sports and recreation, and the historical, cultural and architectural heritage of South Africa.

[98] It also lost sight of the fact that it was required to conduct itself in such a fashion that not only sees it *“localise the procurement of goods and services to the extent that it is reasonably possible”* but *“without having a detrimental effect on the running of the National Lottery”*.

[99] I am therefore of the view that Ithuba should pay the costs of the application, which costs shall include the costs consequent upon the employment of three counsel.

[100] Thus the order granted on 26 November 2021 read as follows:

- “1. *The matter is found to be urgent and the forms and services as provided for in the Uniform Rules is dispensed with in terms of the provisions of Rule 6(12).*
2. *Pending the outcome of Part B of the application:*
  - 2.1 *The First Respondent (Ithuba) is interdicted and restrained from giving effect to the amendment to the Lottery Technology Supply and Support Agreement;*
  - 2.2 *Ithuba is interdicted and restrained from installing Paytronix from 1 December 2021 and from “going live” with its new Paytronix Lottery System;*
  - 2.3 *pursuant to the National Lottery Commission’s rights and*

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<sup>51</sup> It argued that the matter should be struck off the urgent roll as the Practice Manual requires semi-urgent matters exceeding 500 pages and/or arguments in excess of three hours, to be referred to the Deputy Judge President to allocate a date of hearing and set a timetable for the delivery of heads of argument. This the NLC plainly failed to do.

See also: *Several Matters on the Urgent Roll 18 September 2012* [2012] 4 All SA 70 (GSJ)

*obligations in terms of the current license agreement for the operation of the National Lottery in terms of the National Lotteries Act 57 of 1997, concluded between the Third Respondent, the National Lotteries Commission and Ithuba, Ithuba is directed to comply with the License Agreement by reverting to the terms of its pre-existing arrangement with the Second Respondent.*

3. *Ithuba is ordered to pay the costs of this application, which costs shall include the costs consequent upon the employment of three counsel.*
4. *Part B of the application is postponed sine die."*




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**B. NEUKIRCHER**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 December 2021

Date of hearing : 25 & 26 November 2021

Date of judgment : 3 December 2021

**APPEARANCES:**

FOR THE APPLICANT	:	Adv CE Puckrin SC Adv JA Motepe SC Adv K Maputla
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FOR THE 1 <sup>ST</sup> RESPONDENT	:	Adv AR Bhana SC Adv T Ngcukaitobi SC Adv K Williams

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FOR THE 2ND RESPONDENT : Adv van der Linde (on a watching  
brief)