IN THE ARBITRATION PROCEEDINGS
HELD IN JOHANNESBURG

In the matter between -

HCI INVEST 15 HOLDCO (PROPRIETARY) LIMITED	1ST CLAIMANT
HCI TREASURY (PROPRIETARY) LIMITED	2ND CLAIMANT

and

ZAMANI MARKETING AND MANAGEMENT CONSULTANTS (PROPRIETARY) LIMITED	1ST RESPONDENT
ITHUBA HOLDINGS (PROPRIETARY) LIMITED (RF)	2ND RESPONDENT
BOY ERICK MABUZA, CHARMAINE MABUZA and JOYLEEN DIPHOKWANA *NNO* in their capacities as the Trustees of the Charmaine Mabuza Trust *NO*	3RD RESPONDENT
BOY ERICK MABUZA, CHARMAINE MABUZA and MABEL MABUZA *NNO* in their capacities as the Trustees of the Erick Mabuza Trust *NO*	4TH RESPONDENT
ZAMANI GAMING (PROPRIETARY) LIMITED	5TH RESPONDENT
ZAMANI TREASURY (PROPRIETARY) LIMITED	6TH RESPONDENT

ARBITRATION AWARD

INTRODUCTION

1. This matter concerns the funding, operation and management of the Third National Lottery Licence awarded to the second respondent, Ithuba Holdings (Proprietary) Limited (Ithuba).

2. The disputes that call for adjudication centre around the following agreements concluded between the parties:

2.1 The Management Services Agreement between the second respondent, Ithuba Holdings (Proprietary) Limited (Ithuba) and Zamani Marketing and Management Consultants (Proprietary) Limited (Zamani), dated 1 November 2013[1] (the "Management Agreement").

2.2 The Governing Agreement between the first claimant, HCI Invest 15 Holdco (Proprietary) Limited (HCI), the second claimant, HCI Treasury (Proprietary) Limited (HCI Treasury), Ithuba, Zamani, and Zamani Gaming (Proprietary) Limited (Zamani Gaming), dated 14 April 2015[2] (the "Governing Agreement").

2.3 The First Addendum to the Management Agreement between Ithuba, Zamani, HCI and the Trustees for the time being of the Erick Mabuza Trust and the Charmaine Mabuza Trust, dated 14 April 2015[3] (the "Management Agreement Addendum").

2.4 The Preference Shares Subscription Agreement between HCI and Ithuba dated 14 April 2015, read together with the Preference Share Terms.[4]

---

1 SOC1 to the statement of claim.

2 SOC2 to the statement of claim.

3 SOC4 to the statement of claim.

4 SOC16 and 17 of the statement of claim.

2.5 The HCI Treasury Loan Agreement entered into between HCI Treasury and Ithuba dated 14 April 2015 (the "HCI Treasury Loan").[5]

2.6 The Restructuring Agreement between Ithuba, HCI, HCI Treasury, Zamani Gaming, Zamani Treasury (Proprietary) Limited (Zamani Treasury) dated 5 August 2015[6] (the "Restructuring Agreement").

3. The circumstances giving rise to the conclusion of these agreements is largely common cause, and can be briefly stated.

4. On 24 November 2014, Ithuba was awarded the Third Licence to operate the South African National Lottery (the initial licence).

5. In terms of the Management Agreement Zamani undertook to manage the lottery on Ithuba's behalf.

6. The initial licence, which was to operate for an eight-year period beginning on 1 June 2015, required substantial funding in order to pay for the equipment required for the initial roll-out. Ithuba was unable to obtain funds from commercial banks because the award of the licence was challenged by the incumbent holder thereof, Gidani (Proprietary) Limited (Gidani).

---

5 CDB 900-915.
6 SOC5 to the statement of claim.

7. Consequently, Ithuba approached the claimants for funding. They agreed to advance substantial funding on the terms set out in the Governing Agreement, the Management Agreement Addendum, the Preference Shares Subscription Agreement and the HCI Treasury Loan Agreement.

8. Zamani, Zamani Gaming and Zamani Treasury also agreed to provide funding to Ithuba in terms of two agreements which are described as the Zamani Marketing Loan Agreement and the Preference Shares Subscription Agreement, both dated 7 April 2015.

THE GOVERNING AGREEMENT

9. The Governing Agreement provides the terms and conditions which would govern all of the funding provided to Ithuba by HCI, HCI Treasury, Zamani and Zamani Gaming.

10. The following were, *inter alia*, express terms of the Governing Agreement:

10.1 Zamani Gaming agreed to subscribe for the Zamani Preference Shares at an aggregate subscription price of R125 million for purposes of funding Ithuba.[7] It was recorded in clause 2.2 that a

---

7 Clause 2.2, read with clauses 204, 205 and 207.

fellow subsidiary of Zamani, Zamani Marketing, had advanced the Zamani Marketing Loan to Ithuba in terms of the Zamani Marketing Loan Agreement. The Zamani Marketing Loan amounted to R75 million.[8]

10.2 On condition that Zamani and Zamani Marketing provided the abovementioned funding to Ithuba, HCI agreed to subscribe for the HCI Invest Preference Shares at an aggregate subscription price of R150 million;[9] and HCI Treasury agreed to grant Ithuba the HCI Treasury Loan in the amount of R125 million.[10]

11. The obligation of HCI and HCI Treasury was further subject to the fulfilment or waiver of the conditions precedent contained in clause 4.1 of the Governing Agreement, which included the following:

11.1 The amendment of the Management Agreement to the satisfaction of HCI by conclusion of the Management Agreement Addendum, in order to provide the ability for HCI, upon the occurrence of certain agreed events, to give directions to Zamani and/or take cession and delegation of all of Zamani's rights and obligations arising under or in connection with the Management Agreement.[11]

---

8 Clauses 198, 199 and 202.
9 Clauses 2.3, 77, 78 and 82.
10 Clauses 86, 89 and 90.
11 Clause 4.1.8.

11.2 Zamani providing written evidence of the consent of the Minister of Trade and Industry to the terms of the Management Agreement Addendum and the possible cession and delegation by Zamani of its rights under the Management Agreement to HCI.[12]

11.3 Ithuba providing written evidence of the Minister's consent to the issue of the Preference Shares by Ithuba to HCI and Zamani Gaming and the Licence Agreement has been amended by a written addendum thereto in order to permit the issue of the preference shares by Ithuba to HCI and Zamani Gaming and the licence being amended;[13] and

11.4 HCI receiving (in form and substance acceptable to HCI), *inter alia*, the updated Base Case Financial Model, together with the Economic Assumptions, Tax Assumptions and Technical Assumptions which will form schedules to the Governing Agreement.[14]

12. All the conditions precedent were either fulfilled or waived and the Governing Agreement became unconditional in accordance with its terms.

---

12 Clause 4.1.9.
13 Clause 4.1.11.
14 Clause 4.1.17.3.

13. As a result, HCI subscribed for the HCI Invest Preference Shares and HCI Treasury advanced the HCI Treasury Loan to Ithuba.

14. On 8 July 2015, the Gauteng Division of the High Court delivered judgment in the first of two review applications brought by Gidani. In terms thereof the Court reviewed and set aside the initial licence and afforded the Minister one month (thirty-one calendar days) to conclude a new licence agreement with Ithuba. The effect thereof is that a new licence agreement had to be concluded by 7 August 2015.

15. In terms of the proposed new licence, Ithuba was required to make a minimum capital contribution. This is set out in clause 8 of the new licence,[15] which reads:

> "8.1 The Licensee shall ensure that upon signature date:
>
> 8.1.1 its shareholders subscribe for and take up such amount of unencumbered equity share capital in the Licensee, as is equal to an amount of at least R272 000 000.00 (two hundred and seventy-two million rand) ('minimum equity contribution'); and
>
> 8.1.2 it has obtained debt funding in the amount of at least R633 000 000.00 (six hundred and thirty-three million rand) ('minimum debt contribution'),
>
> ...

---

15 CDB1431 at 1464.

8.4 The Licensee undertakes to procure that its debt to equity ratio does not deteriorate beyond 70:30 ie, that the debt component of the ratio does not increase to more than 70% (Seventy Percent) for the duration of the licence period."

16. During negotiations with the Minister's representatives it became apparent that the Minister was not satisfied that the preference shares issued to HCI and Zamani Gaming would suffice as equity for the purposes of the 70:30 debt equity requirement. The Minister stipulated that he would not issue a new licence to Ithuba unless the HCI Invest Preference Shares (the Preference Shares) were removed and replaced with ordinary equity of R272 million. This appears from the letters and emails that passed between the parties and their respective attorneys.[16]

THE RESTRUCTURING AGREEMENT

17. On 5 August 2015, HCI, HCI Treasury, Zamani, Ithuba and Zamani Gaming concluded the written Restructuring Agreement.[17] Its purpose was to demonstrate to the Minister that Ithuba's debt and equity had been restructured and to ensure that the new licence agreement was concluded with Ithuba before 7 August 2015.

---

16 CDB 1252 and 1257.
17 SOC5 to the statement of claim.

18. In broad terms, the Restructuring Agreement provided for a series of transactions that would have to be implemented immediately to ensure that by 7 August 2015 Ithuba could be issued with the new licence. It also provided for a mechanism in terms of which detailed agreements would be entered into in respect of these transactions.

19. One of the transactions that required immediate implementation was the redemption of the Preference Shares. It was agreed that if the Minister was not satisfied with the Probity[18] prior to 5 August 2015, HCI would advance a loan (the "Holdco New Loan") to Ithuba in an amount equal to the capital and accrued, but unpaid, dividends of the Preference Shares. The proceeds of this loan would be used to redeem the Preference Shares. It was further agreed that if the Holdco New Loan was made and the Minister was satisfied with the Probity, the Holdco New Loan would be capitalised into new preference shares in Ithuba.[19]

20. We will deal fully with the salient features of the Restructuring Agreement later in this award.

---

18 The Probity requirement arises from the provisions of ss 13(2) and 13(3) of the Lotteries Act, 57 of 1957 (the Lotteries Act). Section 13(2) requires the Minister to be satisfied before a licence is granted that the applicant for a licence has sufficient knowledge, experience and financial resources to conduct the lottery. And, furthermore, that no political party or political office-bearer has any direct financial interest in the lottery. Section 13(3) requires the Minister to consider whether the holder of the direct financial interest in Ithuba is a "*fit and proper person*".

19 Clauses 3.1.2 and 4.4.

21. As Probity was not achieved prior to 5 August 2015, being the Designated Date, the Holdco New Loan was advanced by HCI to Ithuba and the HCI Preference Shares were redeemed.

22. On 7 August 2015, a new licence agreement (the New Licence Agreement) was concluded between Ithuba, the Government of the Republic of South Africa and the National Lotteries Commission (the "NLC") in terms of which Ithuba was again appointed to establish and operate the lottery (the "New Licence").[20]

23. Gidani again instituted legal proceedings to review and set aside the Minister's decision to grant the New Licence to Ithuba, but that application was dismissed on 14 May 2016. On 20 September 2016, an application for leave to appeal that order was refused. The High Court subsequently dismissed an application for condonation for the late filing of the application for leave to appeal in respect of Gidani's first review application. On 27 November 2015 Gidani made application to the Supreme Court of Appeal for leave to appeal that decision. This was refused on 23 February 2015.

24. In 2016 the following further events occurred:

---

[20] CDB1431.

24.1 On 18 January 2016, 4 April 2016, 19 April 2016 and 9 May 2016 HCI addressed Election Notices to Ithuba in order to enforce its oversight rights in terms of clause 5A.3 of the Management Agreement, as amended in terms of the Management Addendum. The disputes relating to the validity of these notices and HCI's entitlement to exercise the oversight rights will be fully dealt with later in this award.

24.2 On 22 July 2016, Ithuba repaid the HCI Treasury Loan, with interest, in the amount of R133 720 673.18.

24.3 On 8 August 2016, the HCI Treasury New Loan, with interest, was repaid in the amount of R50 175 464.96.

24.4 On 21 September 2016, the respondents addressed a letter to the claimants purporting to cancel the Governing, Restructuring and Management Agreements pursuant to an alleged breach and/or repudiation thereof by HCI and HCI Treasury.[21]

24.5 On 22 September 2016 Ithuba made payment of an amount of R66 223 852.14 into HCI Treasury's bank account, being accrued interest on the Holdco New Loan as at that date. On 28 September 2016, Ithuba paid a further amount of R166 023 490.81 into HCI

[21] CDB 9356.

Treasury's bank account as a purported early repayment of the capital of the Holdco New Loan.

THE DISPUTES

25. There are primarily two broad disputes.

25.1 The first relates to the repayment of the HCI Holdco New Loan. At issue is whether Ithuba was entitled to repay the Holdco New Loan on the dates that it did, and whether such payment operated to discharge the loan.

25.2 The second dispute is concerned with HCI's entitlement to exercise its step-in and oversight rights under clauses 5A.1.1 and 5A.1.2 of the Management Addendum.

THE REPAYMENT DISPUTE

26. HCI alleges that upon a proper construction of the Restructuring Agreement, as read with the Subscription Agreement and the Preference Share terms, alternatively, as a tacit term thereof, Ithuba was obliged to repay the Holdco New Loan in three equal capital instalments payable on

the sixth, seventh and eighth anniversary of the issue date of the Preference Shares (29 April 2015) and was not entitled to repay the Holdco New Loan prior to the fifth anniversary of the issue date in respect of the Preference Shares.[22]

27. Consequently, HCI seeks an award -

27.1 declaring that the HCI Holdco New Loan has not been repaid and remains owing in accordance with the terms of the Restructuring Agreement, as read with the Subscription Agreement and the Preference Share Terms;

27.2 declaring that the first claimant is entitled to receive from Ithuba payments under the HCI Holdco New Loan in the amounts and on the dates as set out in the schedule attached to the statement of claim marked "SOC19"; and

27.3 ordering Ithuba to pay to HCI those amounts set out in "SOC19" in respect of which the due date has occurred, together with interest thereon at 25% *per annum* from the due date.

28. HCI also seeks an award in the following terms-

---

22 Para 55 of the claimants' statement of claim.

28.1 declaring that the HCI Holdco New Loan to be applied to the capitalisation in Preference Shares in Ithuba, by its nature and substance constitutes a direct or indirect interest in Ithuba.

28.2 that Zamani and Ithuba take all steps necessary to capitalise the HCI Holdco New Loan by way of New Preference Shares in Ithuba upon any requisite approval of the Minister and the NLC being achieved; and

28.3 that Zamani and Ithuba take all such steps and do all such things that shall be necessary to assist in procuring the approval of the Minister and the NLC where legally required, including under the Act and including, for the purposes of HCI, acquiring the New Preference Shares and/or exercising step-in rights or rights of oversight.

29. The need for the relief set out in paragraph 2.3 above is said to arise from the following circumstances:

29.1 Clause 4.4.2 of the Restructuring Agreement provides that the Holdco New Loan will be capitalised into New Preference Shares in Ithuba on the identical basis to the HCI Preference Shares, if the Minister is satisfied on or after the Designated Date with the Probity.

29.2 A probity application was submitted by Ithuba on behalf of HCI on 5 August 2015. This application was unilaterally withdrawn by Ithuba on 24 May 2016.

29.3 HCI contends that Ithuba had a contractual duty to apply for Probity on HCI's behalf, and in law, was the only party entitled to pursue the Probity application. Ithuba was also obliged to render such assistance as was necessary in order to obtain Probity. Ithuba disputes that it had such a duty.

29.4 By withdrawing the Probity application Ithuba thwarted the capitalisation of the Holdco New Loan into New Preference Shares and breached the provisions of clause 4.4.2 of the Restructuring Agreement.

THE DEFENCES

30. Ithuba and Zamani deny liability and dispute HCI's entitlement to the relief claimed in respect of the repayment dispute. They dispute that the Holdco New Loan could not be repaid early. They allege that the Holdco New Loan was implemented at a time when the parties had not agreed upon the terms thereof based on the Principles (as defined in the

Restructuring Agreement), and furthermore that the Holdco New Loan had not been reduced to writing.

31. They further allege that HCI has no entitlement to enforce the obligations under the Holdco New Loan in circumstances where the parties were, at the time of repayment of the loan, still engaged in the process of negotiating the terms of the Holdco New Loan, and any dispute regarding the application of the Principles had not been referred to an expert in the manner provided for in clause 4 of the Restructuring Agreement.

32. They further plead that if it were found that Ithuba was prohibited from repaying the HCI Holdco New Loan prior to the fifth anniversary of the issue date in respect of the HCI Preference Shares, whether on a proper construction of the Restructuring Agreement or pursuant to a tacit term (as alleged in paragraph 55 of the statement of claim), then such prohibition would in any event be contrary to public policy, invalid and/or unenforceable.

33. Ithuba and Zamani also dispute that HCI is entitled to the declaratory award that it is entitled to receive the payments owing under the HCI Holdco New Loan from Zamani in the amounts and on the dates as set out in the schedule attached to the statement of claim, marked

"SOC19". They allege that the rate at which interest is calculated in SOC19 is usurious and therefore unenforceable in that it is tainted by extortion and/or oppression when regard is had to the ordinary rate of interest prevalent in similar transactions and relative to the risk posed to HCI.

34. They further aver that Ithuba concluded the Preference Shares Subscription Agreement and the Restructuring Agreement in circumstances of economic duress since it required funding in order to satisfy the Minister's requirements in relation to the award of the National Lottery Licence, and was unable to obtain such funding from commercial banks by virtue of a pending High Court review of the award of the National Lottery Licence.

35. It is also contended that the relief sought in relation to the Holdco New Loan amounts to specific performance. It is contended that we should decline to grant specific performance because it would lead to a double recovery as HCI already has the money and is not deprived of the use of its capital.

36. Furthermore, if we were to find that Ithuba was prohibited from repaying the HCI Holdco New Loan prior to the fifth anniversary of the issue date

in respect of the HCI Preference Shares, then such prohibition would be contrary to public policy, invalid and/or unenforceable.

37. Finally, it is alleged that the Restructuring Agreement was lawfully cancelled on or about 21 September 2016, and that pursuant to such cancellation Ithuba repaid the HCI Holdco New Loan with interest on or about 22 September 2016 and 28 September 2016.

38. Ithuba and Zamani have proffered a claim-in-reconvention in which they allege that HCI committed various acts of misconduct which amounted to a breach and repudiation of the Management Agreement (as amended by the Management Addendum), the Governing Agreement and the Restructuring Agreement. In a letter addressed by their attorneys, Roodt Inc, on 21 September 2016,[23] they accepted HCI's alleged repudiations and cancelled the Management Agreement, the Governing Agreement and the Restructuring Agreement, all of which agreements are said to be interlocked. Accordingly, they were entitled to repay the amount of interest in the sum of R65 223 852.14, and the capital sum of R166 023 490.81 owing by Ithuba under the Holdco New Loan.

39. Consequently, the Zamani and Ithuba seek an award declaring that they have lawfully terminated the Governing Agreement, the Restructuring Agreement and the Management Agreement and, in the alternative

---

[23] Annexure SD3 to the claim-in-reconvention,

thereto, declaring that Ithuba was entitled to make early payment on or about 28 September 2016 of the capital sum owing in terms of the HCI Holdco New Loan.

40. On either bases, they seek an order declaring that Ithuba has paid the capital sum under the HCI Holdco New Loan and any liability under the HCI Holdco New Loan has been discharged.

ISSUES FOR DETERMINATION

41. Three inter-related questions fall to be determined-

41.1 first, whether Ithuba was contractually entitled to make early repayment of the Holdco New Loan.

41.2 second, whether an express or tacit terms of the Restructuring Agreement prohibited Ithuba from repaying the Holdco New Loan; and

41.3 third, whether Ithuba was obliged to repay the Holdco New Loan in three equal capital instalments payable on the sixth, seventh and eighth anniversary of the issue date of the HCI Preference Shares

(29 April 2015), and was not entitled to repay the Holdco New Loan prior to the fifth anniversary of the issue date in respect of the Preference Shares.[24]

42. The reason for entering into the Restructuring Agreement is clearly detailed in a letter dated 28 July 2015 addressed by Zamani to HCI.[25] The contents of this letter were given expression to in clause 2 of the Restructuring Agreement, which reads:

"2. It is recorded that –

2.1 there are currently 160 (one hundred and sixty) ordinary shares of no par value issued in Ithuba;

2.2 there are currently 40 (forty) A Preferred Ordinary Shares issued in Ithuba;

2.3 HCI Holdco currently holds the HCI Preference Shares

2.4 Zamani Gaming currently holds the Zamani Preference Shares;

2.5 Zamani Marketing has made the Zamani Marketing Existing Loan to Ithuba;

2.6 HCI Treasury has made the HCI Treasury Existing Loan to Ithuba;

---

24 Para 55 of the statement of claim.

25 CDB 1257.

2.7 In terms of a judgment handed down on 8 July 2015 the Licence will be set aside on 7 August 2015;

2.8 It will be required to be able to demonstrate for the purposes of the New Licence that –

2.8.1 the Zamani preference shares are no longer in issue;

2.8.2 *unless the Minister is satisfied prior to the Designated Date of the Probity, the HCI preference shares are no longer in issue;*

2.8.3 55C (fifty-five) C Preferred Ordinary Shares are in issue with a subscription value of R272 000 000 (two hundred and seventy-two million rand); and

2.8.4 a further R50 000 000 (fifty million rand) has been introduced into Ithuba

resulting in Ithuba having issued equity share capital (including preferred ordinary shares but excluding preference shares) of at least R272 000 000 (two hundred and seventy-two million rand) and debt funding of the difference between R650 000 000 (six hundred and fifty million rand) and the equity share capital." [Our emphasis]

43. The manner in which the transactions referred to in clause 2.8 of the Restructuring Agreement were to be achieved is set out in clause 3 of the said agreement, which reads, in material part, as follows.

"3.1 The parties have agreed that the way in which the transactions contemplated in 2.8 will now be achieved is by –

3.1.1 the Zamani Preference Shares being converted (by way of a buy back and subscription) to 25 (twenty-five) C Preferred ordinary shares;

3.1.2 unless the Minister is satisfied with the Probity prior to the Designated Date, the HCI Preference Shares being redeemed with the proceeds of the HCI Holdco New Loan which will be made to Ithuba;

3.1.3 Zamani Treasury making the Zamani Treasury Performance Bond Loan to Zamani Gaming;

3.1.4 Ithuba repaying R22 000 000 (twenty-two million rand) of the Zamani Marketing Existing Loan so as to enable Zamani Marketing to make the Zamani Marketing Subscription Loan to Zamani Gaming;

3.1.5 Zamani Gaming using the proceeds of the Zamani Treasury Performance Bond Loan and the Zamani Marketing Subscription Loan to subscribe for 30 (thirty) C Preferred Ordinary Shares; and

3.1.6 HCI Treasury making the HCI Treasury New Loan to Ithuba and the Governing Agreement and the agreements brought into being as contemplated in the Governing Agreement being amended as necessary.

3.2 If for any reason the New Licence is not issued to Ithuba, the parties shall be restored to the *status quo ante*, which *inter alia* means the following:

3.2.1 ...

3.2.2 The HCI Holdco New Loan shall be repaid to HCI Holdco which shall utilise the proceeds to subscribe for the HCI Preference Shares;

3.2.3 The HCI Treasury New Loan shall be repaid to HCI Treasury ahead of all other payments.

..."

44. The nature and purpose of the Restructuring Agreement has already been referred to in clause 42 above.[26]

45. The Holdco New Loan is defined in clause 1.2.11 of the Restructuring Agreement as follows:

> "'HCI Holdco New Loan' means the loan to be made by HCI Holdco to Ithuba if the Minister is not satisfied as to the Probity prior to the Designated Date, the capital amount of which will be sufficient to enable the HCI Preference Shares to be redeemed at their face value together with an amount to cater for accrued but unpaid dividends for the period from the issue of the HCI Preference Shares to the day immediately prior to the day on which the HCI Preference Shares are redeemed."

46. The Designated Date referred to in clauses 1.2.11, 2.8.2 and 3.1.2 of the Restructuring Agreement was 5 August 2015.

47. The HCI Preference Shares referred to in clauses 2.3 and 3.1.2 of the Restructuring Agreement are defined in clause 1.2.13 to mean "*thirty non-participating redeemable cumulative preference Shares of no par value in Ithuba*". These shares were issued in terms of the written

---

[26] See clause 2 of the Restructuring Agreement.

Preference Shares Subscription Agreement between HCI and Ithuba,[27] redeemable in accordance with the preference share terms.[28]

48. Clause 4 of the Restructuring Agreement sets out what are termed the "Principles Applicable to the Restructuring Transactions". It provides, in relevant part, as follows:

> "4.1 The Zamani Group on the one hand and the HCI Group on the other hand must be put into as neutral a position as possible (save for the Concession) since the Restructuring Transactions have been put in place to meet the New Licence's requirements in order to procure the issue of the New Licence. Accordingly in effecting the transactions contemplated in clause 3.1 –
>
> 4.1.1 (save for the Concession) the terms thereof shall be such that neither the Zamani Group on the one hand, nor the HCI Group on the other hand should be disadvantaged by those Restructuring Transactions compared to their current positions as regards Ithuba with regard to the Zamani Preference Shares, the HCI Preference Shares and the Zamani Marketing Existing Loan and the HCI Treasury Existing Loan. *In particular, without limiting the generality of the aforegoing, as regards the HCI Holdco New Loan, if it is made it shall be on the same effective terms as those applicable to the HCI Preference Shares* and accordingly the requirements of solvency and liquidity determined *mutatis mutandis* in accordance with the provisions of the Companies Act, 2008, shall apply notwithstanding that the funding mechanism used to replace the preference shares in the form of debt funding rather than shares except that to the extent that HCI Holdco is obliged to pay tax on the accrual of the interest but

---

27 Annexure SOC16 to the statement of claim.
28 Annexure SOC17 to the statement of claim.

is not able to receive the interest because of the application of the solvency and liquidity principles, an amount equal to the tax shall be paid by Ithuba as interest so as to ensure that HCI Holdco can pay its tax.

[Our Emphasis]

4.1.2 The HCI Treasury Existing Loan, the Zamani Marketing Existing Loan as to R53 000 000's (fifty-three million rand's) worth thereof, the Governing Agreement, the Security Documents (as defined in the Governing Agreement) and the Management Agreement (as defined in the Governing Agreement) will remain as they are (subject to the changes necessary to take account of the HCI Treasury New Loan) and will not be novated;

4.1.3 The implementation of this agreement and/or the New Licence's requirements and/or any other defaults regarding the issuing of the security will not be treated as in any way entitling HCI Treasury or Zamani Marketing to claim early repayment of the HCI Treasury Existing Loan or the Zamani Marketing Existing Loan respectively or any other kind of penalty.

4.2 ...

4.3 ...

4.4 If the Minister –

4.4.1 is satisfied prior to the Designated Date with the Probity, the HCI Preference Shares will remain in existence and the HCI Holdco New Loan will never be made;

4.4.2 *is satisfied on or after the Designated Date with the Probity, the HCI Holdco New Loan will be capitalised into new preference shares in Ithuba on the identical basis to the HCI Preference Shares.*

[Our emphasis]

4.5 The parties agreed that the necessary changes will be made to the Governing Agreement in accordance with the Principles, any agreement by them based on the Principles and this agreement and any determinations by the Expert.

4.6 ...

4.7 *The parties recognise that this document has been prepared in order to demonstrate an unconditional commitment of the parties to the Restructuring Transactions, as it has been impossible in the time available to put in place all the necessary documentation to give effect to the Restructuring Transactions and other transactions and requirements contemplated in this agreement. It is intended that more detailed agreements based on the Principles will be put in place as soon as possible. However, even if such detailed agreements have not been put in place by the Designated Date, the parties agree to implement the transactions contemplated in clause 3.1 so as to ensure the issue of the New Licence.*
[Our Emphasis]

4.8 If there is any dispute as to the application of the Principles for the purposes of preparing such detailed agreements, such dispute will have to be resolved by the Expert ..."

49. If regard be had to the above-quoted provisions of the Restructuring Agreement the following observations can be made-

49.1 the sole purpose of the Holdco New Loan was to redeem the HCI Preference Shares so as to comply with the debt equity requirement stipulated by the Minister, and to ensure that the new lottery licence

was granted by 7 August 2015. This is evident from the definition of the Holdco New Loan in clause 1.2.11 and clauses 2.8.1 and 3.1.2.

49.2 the conversion of the HCI Preference Shares into the Holdco New Loan was intended to be a temporary measure, and once the Minister was satisfied with the Probity, the Holdco New Loan was to be capitalised into new preference shares in Ithuba. This is clearly specified in clause 4.4. That this was the common intention is evident from a letter addressed by Ithuba to the Department of Trade and Industry dated 1 August 2015.[29]

49.3 it is self-evident that if the Holdco New Loan could be repaid at any time or in the manner contended for by Ithuba, HCI would suffer substantial prejudice.

49.4 clauses 4.1 and 4.1.1 specifically provide that in effecting the restructuring transactions the HCI Group and the Zamani Group are to be put in as neutral a position as possible and that neither shall be disadvantaged by these transactions.

49.5 if the Holdco New Loan were repaid prior to the Minister being satisfied as to the probity, HCI would have irretrievably lost the right

---

29 CDB1282.

to capitalise the Holdco New Loan into the new preference shares as envisaged in clause 4.4.2 of the Restructuring Agreement. The effect thereof is that clause 4.4.2 would be rendered superfluous. This would also amount to a contravention of the neutrality principle.

50. It is a well-established interpretive legal principle that a court should be slow to come to the conclusion that the words of a contractual provision are superfluous. In *Wellworths Bazaars Limited v Chandler's Limited and Another*,[30] the Appeal Court referred with approval to the following passage in the English case of *Dietcher v Denison*:

> "It is a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute – to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use"

51. If the Restructuring Agreement had not been entered into, HCI would have retained the HCI Preference Shares in Ithuba, which would only have been redeemable prior to the fifth anniversary of the issue date of the shares (29 April 2015). And, until the redemption date or dates, HCI would have had the right to receive preference dividends as therein provided. If Ithuba wished to voluntarily redeem the shares it would have

---

30 1947 (2) SA 37 (A) at 43.

to provide a voluntary redemption notice and, absent the giving of such notice, Ithuba was obliged to redeem the shares on the sixth, seventh and eighth anniversary dates of the issue date of the Preference Shares.

52. From a commercial point of view it would have made no business sense at all for HCI to forego its rights under the HCI Preference Shares in favour of the Holdco New Loan which could be repaid at any time. As was emphasized in *Natal Joint Municipal Pension Fund v Endumeni*,[31] when interpreting a contractual provision, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, or undermines the apparent purpose of the contractual provision.

53. Mr Govender, the chief financial officer of HCI, whose evidence in this regard was not challenged, testified that HCI does not look to make short-term investments. In general, the investments were for a period of five years or longer. In the present case it was expected that the investment would run for a number of years, most probably for the entire duration of the New Licence. HCI's interest in Ithuba was a long-term investment held by way of preference shares.

54. As was emphasized in *Endumeni*, when interpreting a contractual provision, consideration must be given to the text, context and purpose thereof.

---

[31] 2012 (4) SA 593 (SCA) para 18.

55. Clause 4.1.1 of the Restructuring Agreement affords a strong textual indication that the Holdco New Loan was always intended to be on the same effective terms as those applicable to the HCI Preference Shares. It provides that in effecting the restructuring transactions neither the Zamani Group nor the HCI Group should be disadvantaged, and "*... in particular, without limiting the generality of the aforegoing, as regards the HCI Holdco New Loan if it is made, it shall be on the same effective terms as those applicable to the HCI Preference Shares ...*".

56. It would have been unnecessary to single out the Holdco New Loan in this manner if it were intended that the loan was repayable at any time.

57. The following is a further relevant contextual circumstance. Mr Govender testified that HCI always anticipated that it would acquire an equity stake in Ithuba. It was not possible for HCI to become an ordinary shareholder because the licence had been awarded to a specified group of shareholders. Accordingly, HCI agreed to subscribe for the HCI Preference Shares which would be redeemed within the eight-year period in the manner set out above. HCI sought to obtain an internal rate of return on the preference shares of 25% *per annum* after tax. HCI would not have agreed to be a short-term funder in the business of Ithuba.

58. It was anticipated in clause 4.7 that certain of the restructuring transactions (including the Holdco New Loan) would have to be implemented immediately and that more detailed agreements based on the principles would be put in place as soon as possible. However, the following is expressly recorded in clause 4.7:

> "... *However, even if such detailed agreements have not been put in place by the Designated Date, the parties agree to implement the transactions contemplated in clause 3.1 so as to ensure the issue of the New Licence*".

59. The redemption of the Preference Shares with the proceeds of the Holdco New Loan was one of the more important transactions that had to be immediately implemented, and it is evident from the above-quoted extract from clause 4.7 that the Holdco New Loan was intended to have immediate contractual force. The fact that matters were left over for future negotiation did not deprive it of contractual force.[32]

60. The Holdco New Loan had sufficient exigible content to give effect thereto. HCI advanced Ithuba an amount that was sufficient to redeem the HCI Preference Shares and they were in fact redeemed prior to 7 August 2015 when the new licence was to be awarded.

---

32 *CGEE Alsthom Equipments et Enterprises Electriques South African Division v GKN Sankey (Pty) Limited* 1987 (1) SA 81 (A) at 92A-F.

61. In paragraph 59 of Ithuba's plea it is disputed that the terms of the Holdco New Loan were effectively the same as those applicable to the HCI Preference Shares. The alleged reason is that the Holdco New Loan was implemented at a time when the parties had not agreed upon the terms of the loan Basic Principles and the loan had not been reduced to writing. There is no merit in this contention.The Holdco New Loan had immediate contractual force and there was no requirement that it be reduced to writing.

62. The contention in paragraph 59.4 of the plea that HCI had no entitlement to enforce payment because the parties were in the process of negotiating the terms of the Holdco New Loan and their disputes regarding the application of the Principles had not been referred to an expert is also without merit. For the reasons already stated, the Holdco New Loan had immediate contractual force and was sufficiently exigible. Reference to an expert was only required if there was a dispute relating to the application of the Principles for the purpose of preparing the Detailed agreements.

63. On a proper construction of the Restructuring Agreement, having regard to all of the aforesaid considerations, we are of the view that the Holdco New Loan was intended to be on the same effective terms as were

applicable to the HCI Preference Shares. The terms of the Preference Shares Subscription Agreement and the Preference Share terms[33] would apply *mutatis mutandis* to the Holdco New Loan.

64. Although the Restructuring Agreement contains no express term to this effect, we are of the view that such term must necessarily be implied from the facts. To interpret the Holdco New Loan differently would deprive it of business efficacy.

65. The nature of a tacit term (or a term implied from the facts) was described in *Alfred MacAlpine & Son (Pty) Limited v Transvaal Provincial Administration*[34] as –

> "... an unexpressed provision of the contract which derives from the common intention of the parties *as inferred* by the court *from the express terms* of the contract *and the surrounding circumstances.*"

66. It follows, therefore, that absent agreement to the contrary, Ithuba was obliged to repay the Holdco New Loan in three equal capital instalments payable on the sixth, seventh and eighth anniversary of the issue date of the HCI Preference Shares (29 April 2015), and was not entitled to repay the Holdco New Loan prior to the fifth anniversary of the issue date in respect of the Preference Shares.

---

33 SOC16 and 17 of the statement of claim.
34 1974 (3) SA 506 (A) at 531-532

67. It is necessary to mention that in reaching this conclusion we reject the following argument advanced on behalf of Ithuba. It was submitted that an inchoate agreement may not be supplemented by a tacit term when the term would be contrary to the method adopted by the parties for determining the content of the outstanding terms. To import a tacit term in such circumstances would, it was submitted, ride roughshod over the parties' choice as to how the outstanding terms were to be fixed.

68. We do not agree with this contention. The Holdco New Loan was not an inchoate agreement. It was an immediately binding transaction and incorporated the tacit term. The fact that the parties had provided for a mechanism by which the detailed agreements and amendments would be concluded did not detract from the validity or enforceability of the tacit term.

DID THE CAPITAL PAYMENT MADE BY ITHUBA OPERATE TO DISCHARGE THE HOLDCO NEW LOAN

69. Ordinarily, where a future date has been fixed for payment of a debt, it is open to the debtor to anticipate the date of payment. But that is not the case where the future date has been fixed for the benefit of the creditor. This principle was described as follows in *Bernitz v Euvrard.*[35]

---

[35] 1943 AD 595 at 602.

> "It is a well-recognised principle of our law that where a future date has been fixed for payment of a debt, a presumption arises that such future date was fixed for the benefit of the debtor, and consequently he can anticipate the date of payment. To this rule there are exceptions, one of which occurs where the future date has been fixed partly for the benefit of the creditor and in that case the debtor cannot pay before the agreed date unless, possibly, he pays interest up to the agreed date as well. This principle is derived from the Roman law (see Digest 45.1.41; 45.1.137.2; *McCabe v Burisch* 1930 TPD 261 and the authorities there quoted ... "

70. As we have found that the Holdco New Loan was subject, *mutatis mutandis*, to the same terms and conditions as the HCI Preference Shares, the loan could only be voluntarily repaid at the earliest on 29 April 2020.

71. The date for repayment of the Holdco New Loan was fixed for the benefit of HCI and Ithuba could not anticipate that date.

72. HCI did not accept the payment made on 28 September 2016 as a repayment of the Holdco New Loan. Mr Tindle, HCI's attorney at the time, addressed a letter on 26 September 2016 in which he plainly disputed that Ithuba was entitled to pre-pay its indebtedness under the loan.

73. It was argued on behalf of Ithuba that HCI accepted the 28 September 2016 payment by not returning it to Ithuba, and not requiring HCI Treasury, into whose account the payment was made, to return it to Ithuba. Moreover, it was recorded in the annual financial statements of HCI for the financial year ending 31 March 2017 that the Holdco New Loan had been repaid.

74. Mr Govender explained that the reflection in the annual financial statements that the Holdco New Loan had been repaid was an accounting treatment of the payment and did not reflect the factual position. Mr Govender also confirmed that if it is found that the 28 September 2016 payment should not have been repaid and that the Holdco New Loan was not discharged HCI would repay the amount transferred by Ithuba.

75. We accordingly find that HCI did not accept the transfer of the moneys that had been made into the account of HCI Treasury on 28 September 2016. That transfer was made without the knowledge and consent of HCI and could not operate to discharge the Holdco New Loan. Ithuba was not contractually entitled to make early repayment of the Holdco New Loan.

76. In the result, the capital payment made by Ithuba on 28 September 2016 did not operate to discharge the Holdco New Loan.

PUBLIC POLICY AND ECONOMIC DURESS

77. It was argued on behalf of Ithuba that if we were to find that there was a contractual prohibition on early repayment of the Holdco New Loan, then such prohibition would be contrary to public policy and unenforceable. It was submitted that there is no legitimate reason to prohibit the loan from being repaid early; once the capital is returned to the lender, the opportunity cost involved in not having access to the capital comes to an end.

78. There is, in our view, no merit in this submission. As we have found, there was indeed a legitimate reason to prohibit the loan from being repaid early. The uncontroverted evidence shows that HCI does not look to make short-term investments. HCI invested R150 million in Ithuba by subscribing for preference shares that would run for eight years. These preference shares could only be repaid in three equal instalments, commencing from the fifth year after the acquisition of shares. In so doing HCI would achieve an internal rate of return of 25% after tax.

79. HCI considered the investment in Ithuba to be high risk and the internal rate of return of 25% to be appropriate. Ithuba does not dispute this as it was at risk of losing the licence if the Gidani litigation were to succeed. The commercial banks were reluctant to advance investment finance to Ithuba. The parties contracted with each other on an equal footing and the various agreements were freely entered into by the parties.

80. There is in our view, nothing that is manifestly unfair, oppressive, contrary to public policy, public interest or good morals (see, in this respect, *Sasfin (Pty) Limited v Beukes*[36] and *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division.*[37]) in concluding such a transaction.

81. It was held in *Sasfin* (at 9B) that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. The present is not such a case.

82. For these reasons the public policy defence cannot succeed. Likewise, the contention that the rate of interest claimed in annexure SOC19 is usurious, extortionate and oppressive cannot be sustained. Similarly, there is no merit in the contention that the suite of agreements were entered into under circumstances of economic duress.

---

[36] 1989 (1) SA 1 (A).
[37] 2004 (5) SA 248 (SCA).

SPECIFIC PERFORMANCE

83. A further argument advanced was that the relief sought by HCI in relation to the Holdco New Loan amounts to specific performance. It was submitted that we should decline to grant specific performance in the exercise of our discretion because it would lead to double-recovery. Since HCI already had the money, it was not being deprived of the use of its capital. If HCI were to be paid interest for the remaining period in circumstances where it already has the capital, this would amount to double-recovery.

84. In the light of our conclusion that the capital sum has not been repaid and that the amounts transferred to HCI did not operate to discharge the Holdco New Loan, the question of a double-recovery does not arise.

RELIEF CANNOT EXTEND BEYOND FIVE YEARS

85. A final argument advanced was that if HCI was correct that the terms and conditions of the preference shares are relevant to repayment of the Holdco New Loan, then Ithuba would be entitled to repay the capital on 29 April 2020, being five years after the issue date. Annexure SOC19 nevertheless requires Ithuba to make payment of interest for three years

after 29 April 2020. It follows that HCI has no entitlement to the payments listed in SOC19 after 29 April 2020.

86. As things presently stand, HCI is entitled to the declaratory order sought in prayer (d) of the statement of claim. Obviously, if Ithuba chooses to repay the capital on 29 April 2020 then it will not be liable for interest beyond that date. If, in due course, probity is obtained and the Holdco New Loan is capitalised into new preference shares, such shares will have to be redeemed in accordance with the New Preference Share terms.

87. We turn now to consider the Zamani's and Ithuba's claim-in-reconvention.

CLAIM-IN-RECONVENTION

88. Zamani and Ithuba seek an award in the following terms:

> "(a) (i) Declaring that the respondents lawfully terminated the Governing Agreement, the Restructuring Agreement and the Management Agreement (as amended by the first addendum to the Management Agreement) on or about 21 September 2016, insofar as those agreements create rights and obligations between the claimants on the one hand and the respondents on the other;

(ii) In the alternative to paragraph (i), declaring that the second respondent was entitled to make early repayment on or about 28 September 2016 of the capital sum owing to the first claimant in terms of the HCI Holdco New Loan.

(b) On either basis, declaring that the second respondent paid the capital sum owing under the HCI Holdco New Loan to the first claimant on or about 28 September 2016 and that the second respondent's liability under the HCI Holdco New Loan has thereby been discharged.

(c) In the alternative to paragraph (b), directing the second claimant to make payment to the second respondent of the sum of R166 023 490.81 plus interest on the aforesaid sum at the prescribed rate from 28 September 2016."

89. The relief sought in prayers (a)(ii) and (b) above can be readily disposed of. We have already found that Ithuba was not entitled to make early repayment of the capital sum on 28 September 2016 and that payment made on that date did not discharge Ithuba's liability under the HCI Holdco New Loan. Accordingly, the relief sought in these prayers must be dismissed.

90. As to the relief in prayer (c), we are of the view that HCI Treasury is obliged to repay the sum of R166 023 490.81 to Ithuba. However, it is not obliged to pay interest on the aforesaid sum. Ithuba had no right to effect early repayment of the Holdco New Loan. HCI did not accept the transfer of the moneys that had been made into the account of HCI Treasury on 28 September 2016, which transfer was made without

its knowledge and consent. Neither HCI nor HCI Treasury is in *mora* and there is no evidence that they have had the use or benefit of the funds. There is no evidence to suggest that HCI or HCI Treasury have been enriched at the expense of Ithuba, and nor has Ithuba sought relief on the basis of unjust enrichment. As to the repayment of the sum of R166 023 490.81, Mr Govender tendered repayment. The claim for interest thereon falls to be dismissed.

91. Broadly stated, the case advanced in the claim-in-reconvention is that HCI and HCI Treasury committed various breaches and repudiations of the Management Agreement (as amended by the first addendum thereto) and the Restructuring and Governing Agreements. On or about 21 September 2016, and by means of the letter attached as Annexure "SD3" to the claim-in-reconvention, Ithuba and Zamani accepted the alleged repudiation and cancelled the suite of agreements. In consequence, Ithuba made payment of the accrued interest on the Holdco New Loan in the sum of R65 223 852.14 on 22 September 2016 and the capital amounting to R166 023 490.81 on 28 September 2016.

THE LEGAL POSITION

92. To rely on repudiation the innocent contractual party must allege and prove that there was a repudiation of a fundamental term of the contract, and that the conduct relied on, fairly interpreted, exhibits objectively a

party's deliberate and unequivocal intention not to be bound by the contract.[38]

93. In the words of Nienaber JA, in *Datacolor infra*, paras 16 to 18:

> "... [T]he emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.
>
> [17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.
>
> [18] The conduct from which the inference of impending non-or malperformance is to be drawn must be clear-cut and unequivocal, *ie* not equally consistent with any other feasible hypothesis. ... "

---

38 *Highveld 7 Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 (SCA) paras 19 and 21; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) paras 17 and 18 and *South African Forestry Co Limited v York Timbers Limited* 2005 (3) SA 323 (SCA) para 38.

94. An interesting but important insight is contained in the following passage from Christie's "*Law of Contract in South Africa*" (7 ed) p 612:

> "When performance is due, repudiation may take the form of insistence on the fulfilment of a term that does not form part of the contract; but raising an argument on a minor term while otherwise performing; or refusing to perform a disputed term on which the parties were not *ad idem*; or alleging a *pactum de non petendo*; or asking the other party to wait, time not being of the essence of the contract do not amount to repudiation because the existence and validity of the contract are recognised."

95. Repudiation also constitutes a breach of contract. But if the repudiation relied on is not established, the suite of agreements can only be cancelled by the respondents if it be shown that the breach or breaches relied on are material. The test, whether the innocent party is entitled to cancel a contract because of malperformance by the other, entails a value judgment by the Court. It is, essentially, a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties fairly under the circumstances, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy.[39]

---

39 *Singh v McCarthy Retail Limited t/a McIntosh Motors* 2000 (4) SA 795 (SCA) para 15.

HCI'S REPUDIATION OF THE AMENDED MANAGEMENT AGREEMENT BY ISSUING ELECTION NOTICES THAT WERE INVALID

96. It is alleged in paragraph 101 of the amended claim-in-reconvention that during the period January 2016 to May 2016, HCI unlawfully attempted to obtain oversight of the business and affairs of Zamani and Ithuba by asserting that one or more Early Trigger Events referred to in the Management Agreement had occurred.

97. It was argued that all four election notices issued by HCI were invalid and that HCI's conduct in issuing the election notices amounted to a repudiation that entitled Ithuba and Zamani to cancel the Management Agreement and the Governing Agreement. Further, that even if HCI genuinely believed that it was entitled to issue the election notices, it repudiated these agreements by purporting to exercise a power that it did not have.

98. There is no merit in these contentions.

99. As will appear more fully hereafter, we are of the view that at least one of the election notices was validly issued. HCI was justified in issuing the Election Notice dated 19 April 2016 On 16 October 2015, Mr Scott, acting on behalf of Ithuba, furnished Mr Govender with a revised financial model that provided for salaries to be paid by Ithuba. This was contrary

to the Base Case Financial Model which was in force. It also appeared from the re-stated management accounts that salaries were being paid from Ithuba's bank account, contrary to Ithuba's budget. This conduct constituted an Early Trigger Event that justified the issue of the third election notice.

100. Even if HCI had wrongly asserted that there was a breach of the financial covenants this would still not have constituted a repudiation of the Amended Management Agreement. HCI had no obligations in terms of either the Management Agreement or the Management Agreement Addendum. What it had are rights that permitted it, in the event of an Early Trigger Event, to take cession and assignment of Zamani's rights and obligations in terms of the Management Services Agreement and to exercise its rights of oversight in accordance with clause 5A.3 of the Management Agreement Addendum.

101. The fact that HCI may wrongly have purported to exercise its oversight rights would not constitute a repudiation of the Management Agreement (as amended by the First Addendum to the Management Agreement) as such conduct does not constitute a deliberate and unequivocal intention not to be bound to the terms of the Management Agreement. The wrongful exercise of such oversight rights does not impact in any way on HCI obligations or performance thereunder.

102. In the alternative, it is alleged in paragraph 103 of the claim-in-reconvention that HCI's attempts to enforce the rights of oversight are not made in good faith, or in the spirit of mutual cooperation, trust and confidence. We do not accept this contention. HCI at no stage relinquished the oversight rights granted to it upon the occurrence of an early trigger event.

ABSENCE OF GOOD FAITH

103. Ithuba and Zamani allege that HCI and HCI Treasury repudiated the Restructuring Agreement by not negotiating in good faith and reasonably in negotiating towards the conclusion of amendments to the Governing Agreement and to conclude the Detailed Agreements.

104. The alleged absence of good faith is detailed in paragraph 99 of the amended claim-in-reconvention, which reads:

> "99.2 The first claimant and/or the second claimant did not negotiate in good faith in order to make necessary changes to the Governing Agreement in accordance with the Principles and in order to conclude the Detailed Agreements, *inter alia*, in the following respects:

99.2.1 From about August 2015, the claimants asserted that the Governing Agreement should be amended to impose an obligation on the second respondent to secure the consent of the Minister to enable HCI to hold Preference Shares in the share capital of the second respondent.

99.2.2 On or about 29 October 2015, the claimants accepted that the Governing Agreement did not have to be amended to impose an obligation on the second respondent to secure the consent of the Minister to enable the first claimant to hold Preference Shares in the share capital of the second respondent.

99.2.3 On or about 13 May 2016, the claimants nevertheless sought to incorporate in the Governing Agreement a clause imposing an obligation on on the second respondent to secure the consent of the Minister to enable the first claimant to hold Preference Shares in the share capital of the second respondent.

99.2.4 On or about 26 August 2015, the claimants circulated a draft Governing Agreement that made provision for second respondent to make payment of salaries of its employees from a salaries bank account.

99.2.5 On or about 13 July 2016, the claimants sought to delete the clauses in the draft governing agreement which made provision for second respondent to make payment of salaries of its employees from a salaries bank account.

99.3 On or about 29 July 2016, the claimants were informed that the first respondent, the second respondent, the fifth respondent and sixth respondent would sign draft detailed agreements that had been marked up by the claimants' attorneys and furnished to the

respondents on or about 16 May 2016 and 13 May 2016 respectively.

99.4 In response, HCI and/or HCI Treasury indicated that they wished to reconsider the marked-up draft agreements, despite the fact that those marked-up draft agreements had been prepared by them.

99.5 On 20 August 2016, the first claimant and/or the second claimant provided a further marked-up version introducing material amendments to the draft HCI Holdco New Loan Agreement to the effect that the second respondent would not have the right to effect early voluntary repayment of its debt under any circumstances, notwithstanding the fact that this had not been a term of any of the earlier marked-up versions of the HCI Holdco New Loan Agreement prepared by the claimants.

99.6 On or about 18 July 2016, the first claimant and/or the second claimant, without any legal or contractual basis, asserted that the HCI Treasury loan may not be repaid unless the Term Facility Loan were simultaneously repaid, alleging that this was required by the Restructuring Agreement.

100 In the premises, the first claimant and/or the second claimant breached and/or repudiated the Restructuring Agreement."

105. HCI and HCI Treasury are also alleged to have breached and repudiated the Governing Agreement in one or more of the following respects. In paragraphs 92 to 98 of the amended claim-in-reconvention, the following allegations are made:

"92. In or about February 2015, the second respondent commenced negotiations with the Standard Bank of South Africa Limited (Standard Bank) in an attempt to conclude senior debt funding consisting of an inter-creditor agreement (which included provisions regulating creditor subordination), a counter-indemnity agreement, debt guarantees, a borrower security cession, a shareholder guarantee, pledge and cession, general notarial bond and a special notarial bond in accordance with the conditions in the Licence Agreement. ("the draft Standard Bank agreements")

93. From no later than September 2015, the claimants obstructed the finalisation and conclusion of the draft Standard Bank agreements, *inter alia*, as follows:

93.1 As detailed in paragraphs 99.2 to 99.5 below, the claimants frustrated the finalisation of the Detailed Agreements ... by insisting that provisions be included in the Detailed Agreements that were contrary to the terms of the Governing Agreement, the Management Agreement and the Restructuring Agreement.

93.2 The claimants withheld their consent for the second respondent to share drafts of the Detailed Agreements with Standard Bank until final Detailed Agreements had been concluded, and withheld their consent for second respondent to share the Restructuring Agreement with Standard Bank.

93.3 The claimants unreasonably delayed in their furnishing of comments on the draft Standard Bank agreements.

93.4 The claimants required that provisions be included in the draft Standard Bank agreements in circumstances where they were aware that those provisions had previously been rejected by

Standard Bank, would be unacceptable to Standard Bank and/or were contrary to ordinary debt structuring provisions.

...

95. In consequence of the conduct of the claimants as described in paragraph 93 above, the draft Standard Bank agreements could not be finalised or concluded because:

95.1 it was a condition of Standard Bank entering into the draft Standard Bank agreements that the claimants be parties to the inter-creditor agreement;

95.2 the facility agreement concluded between Standard Bank and the second respondent (the Facility Agreement) was subject to the suspensive condition that:

95.2.1 a certified copy of the HCI Invest Loan Agreement be provided to Standard Bank together with evidence that such agreement was of full force and effect (...);

95.2.2 Standard Bank be provided with the original executed inter-creditor agreement (...);

95.2.3 Standard Bank be provided with evidence that the Governing Agreement had been amended and re-stated, and that every document between the second respondent and the first claimant and the second claimant had been disclosed to Standard Bank and was in a form and substance acceptable to Standard Bank. (...)

96 By virtue of the conduct described in paragraph 93 above, the second claimant breached clause 3.2 of the Governing Agreement by failing to 'consider in good faith any further

amendments as may be required in order to facilitate the provision of further debt funding to the Company'.

97 Further and in any event, the first and second claimants breached the Governing Agreement and/or manifested an unequivocal intention not to be bound by the Governing Agreement and thereby repudiated the Governing Agreement by the following conduct as follows:

97.1 On occasions between August 2015 and April 2016, the claimants asserted that the second respondent had a duty to secure the consent of the Minister to enable the first claimant to hold preference shares in the share capital of the second respondent, in the absence of any contractual obligation on the part of the second respondent to do so and contrary to the Governing Agreement and clauses 2.8.2 and 3.1.2 of the Restructuring Agreement.

97.2 On occasions between 21 November 2015 and 15 April 2016, the first claimant and/or second claimant asserted without any legal justification that salaries payable to the second respondent's employees formed part of the management fee payable to the first respondent and, as detailed below in paragraphs 99.2.4 to 99.2.5, demanded that such be reflected in the Detailed Agreements.

98. In the premises, the first claimant and/or the second claimant breached and/or repudiated the Governing Agreement."

106. In argument, counsel for Ithuba and Zamani submitted that HCI and HCI Treasury had breached their obligations to negotiate in good faith

towards the conclusion of detailed agreements and amendments to the Governing Agreement in at least three ways:

106.1 First, HCI repeatedly represented in the negotiations that it would be prepared to conclude the HCI Holdco New Loan on the basis that Ithuba would be permitted to make early repayment without a penalty provided that Ithuba did not do so from the proceeds of further funding. At the final hour, and unprompted, HCI reversed its position.

106.2 Secondly, HCI repeatedly asserted that Ithuba was under an obligation to obtain ministerial consent for HCI to hold Preference Shares, when no such obligation existed. It impermissibly sought to make that a requirement under the re-stated Governing Agreement.

106.3 Thirdly, HCI initially made amendments to the Governing Agreement that would allow Ithuba to pay its employees from a salaries account. However, it then flip-flopped on this position and repeatedly asserted that Ithuba was not permitted to pay its own employees.

107. It was further argued on behalf of Ithuba that HCI had not acted in good faith in the negotiations towards the Detailed Agreements and amendments to the Governing Agreement in that -

107.1 HCI did not hold an honest and serious intent to conclude the Detailed Agreements and the amendments to the Governing Agreement, despite representing as early as 14 October 2015 that the Detailed Agreements and the Amended Governing Agreement prepared by its attorneys would be the final draft;

107.2 HCI reversed concessions made deliberately and expressly in the negotiations – concessions that if made in good faith would have meant the agreements could have been concluded around 29 October 2015, when HCI agreed to remove the ministerial consent provisions.

107.3 HCI did not negotiate within the confines of the neutrality principle.

THE DUTY TO NEGOTIATE IN GOOD FAITH – LEGAL PRINCIPLES

108. The most recent pronouncement concerning the content and enforceability of agreements to negotiate in good faith is contained in

Makate v Vodacom Limited.[40] Jafta J, writing for the majority, emphasized that currently the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus (para 97), In this regard, the Constitutional Court reaffirmed what was stated in *Letaba Sawmills (Edms) Beperk v Majovi (Edms) Beperk*[41] and *Southernport Developments (Pty) Ltd v Transnet Limited.*[42].

109. The Constitutional Court pointed out that whether an agreement to negotiate in good faith is enforceable where there is no deadlock-breaking mechanism remains a grey area of our law. This is because of the contrary views expressed in *Premier, Free State and Others v Firechem Free State (Pty) Limited*[43] and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Limited.*[44] (*Makate* para 100).

110. Counsel for Ithuba referred to the following passage in *Makate* (para 102), where the Constitutional Court explained the content of a duty to negotiate in good faith as follows:

> "It is not only difficult in the present circumstances but also undesirable to lay down an objective standard of good-faith bargaining which the

---

40 2016 (4) SA 121 (CC).
41 1993 (1) SA 768 (A).
42 2005 (2) SA 202 (SCA).
43 2000 (4) SA 413 (SCA).
44 2012 (1) SA 256 (CC).

parties must undertake. Suffice it to say that what the parties are precluded from doing is to negotiate in bad faith. They are not allowed to enter into those negotiations just to go through the motions. For that would not be what they have agreed to do, but a charade. Both sides must enter into negotiations with serious intent to reach consensus."

111. Ithuba's counsel also referred to the *Unidriot* "Principles of Commercial Contracts", Article 2.1.15 (Negotiations in Bad Faith), which read:

> "(1) A party is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
>
> (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach agreement with the other party. "

112. Much reliance was also placed on the decision of *South African Forestries Co Limited v York Timbers Limited*.[45] In that case, a party who was under a duty to negotiate was found to have frustrated and delayed attempts to employ the deadlock-breaking mechanism provided for in the contract. This conduct was held to constitute both a breach and repudiation of the contract.

---

[45] 2005 (3) SA 323 (SCA).

113. With the aforegoing legal principles in mind, we turn to consider whether HCI and/or HCI Treasury breached their good faith obligations in the manner alleged.

114. On the basis of *Makate*, *Letaba Sawmills* and *Southernport supra*, the parties in the present case had an obligation to negotiate in good faith as the Restructuring Agreement contains a deadlock-breaking mechanism. (see clauses 4.8 to 4.12).

115. In *York*'s case *supra*, the Supreme Court of Appeal found that *York* had frustrated and delayed attempts to employ the deadlock-breaking mechanism provided for in the contract. This, it held, constituted a breach and also amounted to a repudiation of the contract.[46]

116. The case of *OK Bazaars (1929) Limited v Grosvenor Buildings (Pty) Ltd and Another*[47] is particularly instructive. In that matter, a lease provided for a mechanism to determine a market rental of the leased premises: The parties were first required to reach agreement and, failing agreement, were required to nominate a valuer to determine the rental. The landlord failed to cooperate in fixing a market-related rental and refused to nominate a valuer. This conduct was held to constitute a

---

46 See paras 33, 35 and 38 of *York*.

47 1999 (3) SA 471 (A) at 480I.

repudiation as it exhibited a deliberate and unequivocal intention no longer to be bound to the lease.

117. The facts of the present matter are wholly distinguishable from those in *York* and *OK Bazaars*. There was no attempt by the parties to employ the deadlock-breaking mechanism provided for in the Restructuring Agreement.

118. Ithuba's witness, Mr Scott, accepted that as the parties could not agree on the terms of the Detailed Agreements, they should have approached the expert who would have helped them conclude those agreements. He also conceded that if the Detailed Agreements were not concluded the parties would still have been able to implement the Restructuring Agreement.

119. As Ithuba and Zamani's pleaded case is that HCI and HCI Treasury did not negotiate in good faith in order to make necessary changes to the Governing Agreement and to conclude the Detailed Agreements in accordance with the Principles, it was incumbent upon them to refer their disputes concerning the application of the Principles to the Expert referred to in the Restructuring Agreement. Absent such reference it cannot be said that HCI and HCI Treasury did not negotiate in good faith

in order to make necessary changes to the Governing Agreement in accordance with the Principles.

120. Had there been a referral to the Expert as required in terms of the Restructuring Agreement, there is no evidence to suggest that HCI and HCI Treasury would have frustrated, delayed or refused to cooperate with the expert or comply with the expert's determination.

MINISTERIAL CONSENT TO HOLD PREFERENCE SHARES IN ITHUBA

121. As appears from paragraphs 99.2 to 99.2.3 of the amended claim-in-reconvention, the following is said to constitute an absence of good faith in the negotiation process: From about August 2015, HCI and HCI Treasury asserted that the Governing Agreement should be amended to impose an obligation on Ithuba to secure the consent of the Minister to enable HCI to hold preference shares in Ithuba. On or about 29 October 2015, HCI and HCI Treasury accepted that the Governing Agreement did not have to be amended to impose such obligation on Ithuba. This is referred to in evidence and argument as the "*concession*". But the concession was later reversed on or about 13 May 2016, when they

sought to incorporate a clause in the Governing Agreement imposing such obligation.[48]

122. HCI has continuously asserted that Ithuba had an obligation to obtain ministerial consent but Ithuba's position is that ministerial consent was a suspensive condition of the Governing Agreement and not a continuing obligation. Ithuba could not be expected to undertake to fulfil an obligation that lay within the control of the Minister. However, Ithuba, without admitting any contractual liability to do so, undertook to write a letter to the Minister's representatives requesting a meeting to discuss the probity application.

123. The dispute concerning the obligation to obtain ministerial consent must be viewed in the context of the following circumstances.

124. In terms of the Governing Agreement, HCI agreed to subscribe for the HCI Invest Preference Shares at an aggregate subscription price of R150 million, and HCI Treasury granted the HCI Treasury loan in the amount of R125 million. The preference shares were subject to the

---

48 Reliance is placed on the following documents referred to in evidence: An email dated 14 October 2015 from HCI's attorneys (Combined Discovery Bundle (CDB) p 2021); The amended and re-stated Governing Agreement (CDB pp 2022 & 2027); Ithuba's Attorneys' Response dated 22 October 2015 (CDB 2146); The Revised Draft of the Amended and Re-Stated Governing Agreement (CDB 2165 at 2170); An email from Mr Govender; in which the "*concession*" was made (CDB 2252); An email from HCI's Attorneys dated 29 October 2015 (CDB 2253 at 2254 and 2255); A letter from Attorney Paul Tindle dated 13 May 2016 (CDB 3530) and the Amended and Re-Stated Governing Agreement dated 13 May 2016 (CDB 3533 at 3538).

terms and conditions set out in Annexure SOC17 to the statement of claim.

125. HCI's obligation to subscribe for the preference shares was subject to the condition precedent that Ithuba provide written evidence of the Minister's consent to issue the preference shares (clause 4.1.11). In order to fulfil that condition, Ithuba would have had to have obtained the Minister's consent.

126. It is clear that Ithuba and Zamani were fully aware that in order for HCI to hold preference shares or preferred ordinary shares in Ithuba, HCI would have to satisfy the probity tests contemplated in the Lotteries Act, 1997 (see clauses 1.2.20 and 3.1.2 of the Restructuring Agreement).

127. In a letter dated 1 August 2015 addressed by Ms Mabuza on behalf of Ithuba to the Department of Trade and Industry (CDB 1282), she states the following:

> "The proposal which we have made is that HCI Invest 15 Holdco (Pty) Limited will cease to hold the preference shares which it currently holds and will instead make an equivalent loan to Ithuba, but that if ultimately the probity checks required to be complied with are positive it will reinvest as a preferred ordinary shareholder into Ithuba on the same economic basis as currently applies to its preference shares."

128. It is evident from letters dated 3 August 2015[49] that Ithuba prepared the necessary documentation for the probity assessment which HCI lodged on 5 August 2015. And subsequent to the conclusion of the Governing Agreement, Ithuba interacted with the Minister and the National Lotteries Board (the NLB) to obtain the necessary consent.[50] Such consent was granted by the Minister on 23 April 2015,[51] but was later withdrawn.[52] The letters of withdrawal of the consent were sent to Ithuba and not to HCI.

129. On 15 October 2015, Ithuba was requested to re-engage with the Minister to procure reinstatement of the consent that had been withdrawn on 23 April 2015.[53] And, on 22 October 2015, Ithuba's attorneys replied as follows:[54]

> "6.1 We have been instructed by Ithuba to advise you that it is willing to assist your client in its attempts to have the Minister conduct the fit and proper assessments of your clients, HCI Holdco 15 Invest (Pty) Limited and HCI Treasury (Pty) Limited and each of their directors, but –
>
> 6.1.1 without our client conceding that it has any obligation to do so, and only because of the relationship between our client and your client;

---

49 CDB1332 and 1335.
50 See the following letters: CDB1133, 1135, 1139, 1143 and 1220.
51 CDB1139.
52 CDB1143.
53 CDB2116.
54 CDB2134.

6.1.2 without prejudice to our client's rights;

6.1.3 without our client admitting any liability to your client,

by writing a letter to the Minister's legal representatives requesting a meeting with the Minister's legal representatives to discuss the status of the aforementioned fit and proper assessments, in which letter our client will also request that your clients be permitted by the Minister's legal representatives to attend such meeting."

130. Ithuba was also aware that it, as the licensed operator, had the duty to apply for probity on HCI's behalf. This is evident from the fact that Ithuba prepared the necessary documentation for the probity assessment which HCI lodged on 5 August 2015.[55]

131. In letters addressed by the National Lotteries Commission to HCI and Ithuba on 5 April 2016 they were informed that it was the current licensed operator's responsibility to deal with matters relating to the probity assessment.[56]

132. In the letter addressed by the NLC to Ithuba[57] the following is stated:

"This correspondence serves to inform Ithuba Holdings that matters relating to the probity 'fit and proper assessment' persist at the instance of HCI, one of the members of the consortium led by Ithuba Holdings.

---

55 See letters dated 3 August 2015 (CDB1332 and 1335).
56 CDB 3413 and 3415.
57 CDB 3415.

It is our understanding that on submission of the bid by Ithuba Holdings, HCI would have not been part of the consortium led by Ithuba and that association with the current operator materialised post the bid submission phase, therefore the NLC Board expects Ithuba Holdings to attend to HCI's issues."

133. On 19 April 2016 Ithuba was invited by the NLC to attend a meeting to discuss the probity application.[58]

134. Ithuba declined the invitation to attend the meeting proposed by the NLC. And, on 21 April 2016, Ithuba's attorneys, Roodt Inc Attorneys, addressed a letter to the NLC[59] in which the following is stated:

"1 ...

2 Ithuba takes note of the Commission's view that it expects Ithuba to 'attend to HCI's issues regarding its fit and proper assessment. Ithuba presumes that this expectation originates from the fact that prior to the restructuring of Ithuba's Financing Agreement with HCI, HCI was a preference shareholder of Ithuba. We would point out that:

2.1 in terms of the restructuring of the finance agreements between Ithuba and HCI, HCI became a provider of loan funding to Ithuba. HCI is no longer a shareholder or consortium member of Ithuba, nor is it a manager of the business of Ithuba. Accordingly, Ithuba has been advised that it is under no obligation either in terms of the Lotteries Act or in

---

58 CDB 3472.
59 CDB 3486.

terms of Ithuba's licence conditions, to procure a probity approval for HCI;

2.2 contrary to HCI's allegation, there is also no contractual obligation on Ithuba to procure probity approval for, or to assist HCI to obtain, probity approval.

3. HCI has, in connection with its attempts, in excess of its contractual rights, to exercise certain rights of oversight over Ithuba, alleged that it is incumbent on Ithuba to procure probity approval for HCI. Ithuba's views in regard to HCI's demand are set out in a letter addressed to HCI's attorneys dated 15 April 2016. We enclose a copy of this letter, for the Commission's information.

4. In the circumstances Ithuba regards HCI's application to the Commission for probity approval as a matter purely between the Commission and HCI. Unless the Commission can furnish cogent reasons to Ithuba for its requirement that Ithuba should attend a meeting in connection with HCI's probity application, Ithuba declines the Commission's invitation to attend a meeting to be scheduled, as per the Commission's letter of 19 April 2016.

5. Ithuba will happily attend a meeting with the Commission should any of the content of this letter require clarification."

135. The statement in paragraph 2.1 of the letter dated 21 April 2016 to the effect that HCI is no longer a shareholder or consortium member of Ithuba and that therefore no obligation exists to procure a probity approval for HCI, plainly ignores the fact that in terms of the Restructuring Agreement the Holdco New Loan was to be recapitalised into new preference shares in Ithuba.

136. In our view, the refusal by Ithuba to attend the meeting in connection with HCI's probity application was obstructive and at odds with the evidence of Ithuba's witnesses that although not contractually obliged to do so, they would use all reasonable endeavours to procure probity.

137. In a letter dated 15 April 2016 addressed by Ithuba's attorneys, Roodt Inc, to Mr Tindle, HCI's attorney,[60] the following is stated concerning HCI's fit and proper assessment.

> "5.1 There is no provision in any of the agreements concluded between HCI and Ithuba which places an obligation on Ithuba to *assist* HCI with its fit and proper assessment.
>
> ...
>
> 5.3.1 The letter from the NLC states that it is the current lottery operator's responsibility to deal with matters relating to the fit and proper assessment of any of its shareholders and/or consortiums and the NLC directed HCI to deal directly with Ithuba regarding its fit and proper assessment in this particular context.
>
> 5.3.2 HCI is not a current shareholder of Ithuba and Ithuba is therefore not required to ensure that HCI is a fit and proper person for purposes of the Lotteries Act or the licence.
>
> 5.3.3 We are instructed that Ithuba:

---

60 CDB 3456.

5.3.3.1 has not been directed by the NLC to bring a formal application in respect of HCI's fit and proper assessment; and

5.3.3.2 has not received any correspondence regarding, and is not aware of, any 'current issues' which the NLC alleges have been referred to Ithuba for clarity."

138. The assertion in paragraph 5.1 of the above letter that there is no provision in any of the agreements concluded between HCI and Ithuba which places an obligation on Ithuba to assist HCI with its fit and proper assessment is plainly not correct. In terms of clause 5A.4 of the First Addendum to the Management Agreement, it is expressly provided as follows:

"5A.4 Notwithstanding anything to the contrary in this clause 5A, the exercise of HCI Invest's rights in terms of this clause 5A shall always be subject to the approval of the NLB, to the extent that such approval is legally required and Ithuba and Zamani shall do all such things as shall be necessary to assist in procuring such approval where legally required. " [Our emphasis]

For the same reason, the allegation in paragraph 2.2 of Ithuba's attorneys' letter dated 21 April 2016[61] is also incorrect.

---

61 CDB 3486.

139. The Governing and Restructuring Agreements do not expressly provide that Ithuba is obliged to procure the probity necessary to enable HCI to hold Preference Shares in Ithuba.

140. We are of the view, however, that if regard be had to the terms and conditions upon which HCI agreed to advance funding to Ithuba and the facts and surrounding circumstances to which we have referred, it was a tacit term of the Governing and Restructuring Agreements that Ithuba, as the licensed operator, had the obligation to apply for probity on HCI's behalf to enable it to hold preference shares in Ithuba. See, in this regard, *Alfred MacAlpine & Son (Pty) Ltd v Transvaal Provincial Administration, supra*.

141. The withdrawal of the concession given by Mr Govender in his letter of 29 October 2015[62] to remove the clause obliging Ithuba to obtain ministerial consent must be seen in its proper context.

142. Mr Govender explained that the concession was made in order to assist Ithuba in its negotiations with Standard Bank Limited in order to obtain senior funding. At the time of the concession both parties were acting in a mutually cooperative manner and HCI did not anticipate that Ithuba would not assist it in obtaining probity. This is borne out in the letter

62 CDB 2252.

addressed by HCI's attorneys dated 29 October 2015, in which the following is stated:

> "8. We are instructed that in the light of Ithuba's undertaking to assist HCI and without conceding agreement with the position adopted by Ithuba regarding their contractual obligations and in reservation of all its rights, HCI will agree to remove clause 5 in its entirety from the Amended and Restated Governing Agreement."

143. Matters changed when it became evident that Ithuba did not regard itself obligated to apply for probity on HCI's behalf or even to assist it in obtaining probity.[63]

144. On 24 May 2016, and without notice to HCI, Ithuba's attorney sent a letter to the NLC formally withdrawing HCI's probity application. It was submitted that Ithuba was justified in withdrawing the probity application as HCI was not honouring its own undertakings and was in fact seeking unilaterally to exercise the oversight rights. For the reasons that will appear more fully hereafter we are of the view that HCI did not wrongly or unlawfully seek to exercise the oversight rights.

145. For these reasons we are of the view that Ithuba's complaints concerning ministerial consent as set out in paragraph 99.2.1 to 99.2.3 do not

---

63 See CBD3413, 3415, 3472 and 3486.

amount to a repudiation of the Governing Agreement or Restructuring Agreement.

VOLUNTARY REPAYMENT OF THE HCI HOLDCO NEW LOAN

146. Another indication of HCI's bad faith is said to be their reversal of the concession concerning early repayment of the Holdco New Loan (para 99.5 of the amended claim-in-reconvention).

147. Several drafts of the Holdco New Loan, proposed by HCI's attorneys, contained a provision that entitled Ithuba to make voluntary repayment of the Holdco New Loan.[64] Ithuba contends that later, HCI, without warning or justification, removed Ithuba's right to make voluntary payment of the Holdco New Loan and this is an indication of bad faith. The draft containing the removal of the voluntary repayment right was sent by Mr Tindle to Mr Roodt on 6 May 2016.[65]

148. Mr Govender testified that the early repayment provision in the various drafts of the HCI Holdco New Loan were included on the basis that Ithuba had undertaken to assist HCI in obtaining probity. HCI had anticipated no difficulty in obtaining probity as they had interests in various gambling licences and had obtained fit and proper assessments

64 See CBD1745.94 at 1745.96; CBD2100 at 2102 and CDB3514.17 at 3515 and 3515.19.
65 CDB3513.

in the past. If HCI had suspected that Ithuba would not assist it in obtaining probity, it would not have agreed to the early repayment provisions.

149. It is common cause that HCI only withdrew Ithuba's right to make voluntary repayment after Ithuba withdrew HCI's probity application without notice to HCI on 24 May 2016. The withdrawal of HCI's probity application gave rise to a number of important consequences. Without probity, HCI could would longer be able to obtain an equity interest in Ithuba. HCI could no longer recapitalise the Holdco New Loan into New Preference Shares, as was agreed in terms of clause 4.4.2 of the Restructuring Agreement. The whole basis of HCI's funding to Ithuba was that it would be a long-term investment held by means of preference shares. HCI invested R150 million in Ithuba by subscribing for preference shares that would run the course of eight years for capital to be repaid in three equal instalments starting from year five, so that HCI would achieve an internal rate of return of 25% after tax. HCI was not a short-term funder.

150. The dispute concerning the voluntary repayment provision is a matter that should have been referred by the parties to the expert contemplated in clauses 4.8 to 4.12 of the Restructuring Agreement, but neither of the parties saw fit to refer the dispute to the expert for determination.

151. Given the aforesaid circumstances we do not consider HCI's withdrawal of Ithuba's right to make voluntary repayment of the Holdco New Loan to be an act of bad faith in the negotiation process or a repudiation of the Restructuring Agreement or any other agreement in the suite of agreements concluded between the parties.

SENIOR DEBT FUNDING

152. It is alleged in paragraph 92 of the amended claim-in-reconvention that in or about February 2015 Ithuba commenced negotiations with the Standard Bank of South Africa in an attempt to conclude senior debt funding consisting of, *inter alia*, an inter-creditor agreement which included provisions regulating creditor subordination, and other security documents (the Standard Bank documents).

153. It is further alleged in paragraphs 93 to 96 of the amended claim-in-reconvention that from no later than September 2015 HCI and HCI Treasury obstructed the finalisation of the conclusion of the Standard Bank agreements in a number of ways:

153.1 They insisted that provisions be included in the Detailed Agreements that were contrary to the terms of the Governing

Agreement, the Management Agreement and the Restructuring Agreement.

153.2 They withheld their consent for Ithuba to share drafts of the Detailed Agreements with Standard Bank until final Detailed Agreements had been concluded.

153.3 They unreasonably delayed in furnishing comments on the draft Standard Bank agreements and required provisions to be included in these agreements in circumstances where they were aware that those provisions had previously been rejected by Standard Bank and would be unacceptable to the bank.

In consequence thereof, the draft Standard Bank agreements could not be finalised or concluded.

154. Clause 3.2 of the Governing Agreement only imposed an obligation on HCI Treasury to facilitate the provision of additional debt funding to Ithuba. The relevant clause reads:

"3.2 HCI Treasury and Zamani Marketing hereby agree that in order to facilitate the provision of additional debt funding to the Company, they shall:

3.2.1 release such security as may be necessary under the Security Documents;

3.2.2 agree to a variation to the priority of payments set out in this Agreement; and

3.2.3 consider in good faith any further amendments as may be required,

in order to facilitate the provision of further debt funding to the Company."

155. Counsel for Ithuba argued that HCI Treasury had breached its obligation to consider in good faith any further amendments as may be required to facilitate senior funding in four ways:

155.1 First, by thwarting the conclusion of the Detailed Agreements and an amended and restated Governing Agreement, thereby preventing the Standard Bank facility from becoming unconditional.

155.2 Second, by unilaterally insisting that the amendments to the Governing Agreement required by the Restructuring Agreement be concluded first before considering what amendments would be required to accommodate the senior funding.

155.3 Third, by refusing Standard Bank access to the Restructuring Agreement and to drafts of the amended and restated Governing Agreement and the draft Detailed Agreements despite the obvious importance of those documents to any prospective senior funder.

155.4 Fourth, by insisting on the inclusion of terms in the Standard Bank agreements that HCI Treasury knew had either already been rejected by Standard Bank or would be rejected by Standard Bank, namely that –

155.4.1 HCI be given veto powers on Ithuba utilising the Standard Bank facility;

155.4.2 HCI be appointed as a facility agent and be given powers that were equivalent to the powers of a senior debt funder.

156. In evaluating Ithuba's contentions, we have had regard to the various letters and emails exchanged between the parties and their respective legal representatives; the draft Detailed Agreements and the various drafts of the amended and restated Governing Agreement. We have also given consideration to the various documents produced by Standard Bank and the parties concerning the provision of senior debt funding. In addition, we have also taken account of the evidence given by Mr Govender, Mr Scott and Ms Mabuza.[66]

---

66 CBD542, 566, 585, 586, 587, 1743, 1797, 2251, 2131, 2261, 2262, 2130, 2129, 2128, 2836, 2837, 3015, 2843, 2854, 2858, 2863, 2869, 2879, 2880, 2881, 2973, 2976, 2979, 1681, 3012, 3014, 2834, 2835, 3013, 3022.1, 3023, 3034, 3036, 3037, 3039, 3043, 3044, 3045, 3047.1, 3071, 3093, 3094, 3095, 3100, 3145, 3096, 3098, 3099.1, 3099.2, 3101, 3146, 3147, 3149, 3150, 3151, 3152, 3153, 3154, 3168, 3169, 3194, 3195, 3196, 3202, 3203, 3206.1, 3207, 3208, 3209, 3210, 3389, 3390, 3393, 3395, 3396, 3397, 3398, 3399,

157. To facilitate a proper understanding of what occurred during the negotiation process, it is appropriate to specifically refer to extracts from the following documents.

158. From the outset, and prior to the conclusion of the Governing Agreement, HCI made it plain as to what it expected from the proposed senior funder, Standard Bank. In an email dated 9 March 2015 (CBD 586), the following is stated:

> "8 ... HCI requires that it be treated as a co-lender notwithstanding that it will be providing preference shares funding to the Borrower. HCI requires that an intercreditor type relationship be established between Standard Bank and HCI in terms of which HCI is provided with notice of decisions/consents, waivers and defaults by the Borrower in terms of the senior loan and that HCI be permitted to take part in the consequent decision making process. HCI accepts that upon a default by the Borrower it will not be secured and that the Senior funding will be repaid first but it requires information sharing and the ability to provide input into decisions to be taken by Standard Bank in connection with the Borrower and the funding to the Borrower."

3400, 3404, 3405, 3406, 3420, 3422, 3423, 3424, 3425, 3441, 3442, 3413, 3444, 3445, 3449, 3450, 3451, 3453, 3454, 3455, 3469, 3470, 3471, 3479, 3481, 3482, 3486, 3487, 3488, 3489, 3491, 3492, 3496, 3498, 3499, 3512, 3513, 3516, 3518, 3520, 3526, 3530, 3531, 3528, 3533, 3538, 3800, 3851, 3853, 3857, 3858, 3863, 3864, 3865, 3869, 3874, 4328, 4329, 4350, 4353, 4356, 4357, 4358, 4359, 4360, 4361, 4362, 4381, 4382, 4383.

159. The Governing Agreement did not provide a time frame within which senior funding was to be procured. However, on 11 August 2015, Mr Scott addressed an email to HCI in which he stated:

> "We (and Standard Bank) are urgently looking to progress to a financial close by the 15th September for the loan facility."[67]

160. An email to similar effect was addressed to HCI on 29 October 2015.[68]

161. In November 2015, discussions were held between Mr Govender and Mr Scott with a view to reach finality on the outstanding issues with the Standard Bank agreements. These discussions gave rise to a number of concerns on the part of HCI, all of which are detailed in emails dated 17 November 2015, 18 November 2015, 21 November 2015 and 30 November 2015.[69] In our view, the concerns raised by HCI were reasonable and not indicative of bad faith in the negotiation process.

162. In December 2015, disputes arose between the parties concerning the management fee and HCI's step-in rights. See in this regard the emails dated 7 December 2015, 10 December 2015 and 17 December 2015.[70]

---

67 CDM1743.
68 CDB2251.
69 CDB2836, 2837, 3012, 3014 and 3013.
70 CDB 3034, 3036 and 3043.

163. On 18 January 2016, HCI addressed an election notice to Ithuba and Zamani as contemplated in clause 5A.1 of the addendum to the Management Agreement wherein it elected to exercise its step-in and oversight rights.

164. Nothing further appears to have been said or done by the parties concerning the Standard Bank agreements until 18 February 2016,[71] when Ithuba's attorney, Mr Roodt, addressed a letter to HCI's attorney, Mr Tindle, in which the following is stated:

> "3 Your client is aware, and indeed, has participated in, negotiations between Ithuba and the Standard Bank of South Africa Limited ('Standard Bank of South Africa'), to raise debt funding in accordance with the conditions imposed on Ithuba in terms of the Licence Agreement (as defined in the Governing Agreement). We are instructed to place on record that your client's unfounded attempts at invoking an Early Trigger Event is jeopardising Ithuba's negotiations with SBSA. To the extent that Ithuba should suffer any harm as a result of your client's conduct, your client will be held liable in damages."[72]

165. On 19 February 2016, Mr Roodt wrote the following letter to Mr Tindle:[73]

> "3. Your client is aware, and indeed, has participated in, the negotiations between Ithuba and the Standard Bank of South Africa Limited ('SBSA'), to raise debt funding in accordance with the conditions imposed on Ithuba in terms of the Licence Agreement (as

---

71 CDB3151.
72 CDB3153 dated 19 February 2016.
73 CDB3153.

defined in the Governing Agreement). We are instructed to place on record that your client's unfounded attempts at invoking an Early Trigger Event is jeopardising Ithuba's negotiations with SBSA. To the extent that Ithuba should suffer any harm as a result of your client's conduct, your client will be held liable in damages.

4. Moreover, your client is reminded of its obligation, in terms of clause 3.2 of the Governing Agreement, to consider in good faith any amendments that may be required to, inter alia, the Governing Agreement, in order to facilitate the raising of senior debt. Should your client fail to comply with its obligations in terms of clause 3 of the Governing Agreement to facilitate the raising of further debt funding, our client will hold your client in breach and will regard any further attempts on the part of your clients to enforce the Governing Agreement as excipiable."

166. On 24 February 2016, Mr Tindle responded to the letter dated 19 February 2016[74] in which, among other things, the following is stated:

"It is indeed regrettable if the current state of affairs is jeopardising your client's ability to negotiate with SBSA, but that cannot override our client's contractual right to exercise the rights conferred upon it in terms of the Management Agreement. Similarly, the provisions of clause 3.2 of the Governing Agreement cannot, with respect, be so interpreted as to require our client to relinquish the protections granted to it upon the occurrence of Early Trigger Event. In any event, we are not clear as to what amendment our client is being asked to consider in this regard.

We would be happy to discuss these aspects further at the meeting to be held next week ..."

---

74 CDB3168.

167. On 20 March 2016, Edward Nathan Sonnenbergs Inc, purporting to represent Ithuba and Zamani, addressed a letter to HCI's attorneys in which the following is stated:

> "1.1 As your clients are aware, the 'more detailed agreements' contemplated in clause 4.7 of the Restructuring Agreement concluded between our respective clients in August 2015 (the 'Restructuring Agreement'), are not yet in place. Those agreements were to have been put in place as soon as possible after signature in August 2015. We furnished you with our clients' comments on the last draft of the amended and restated Governing Agreement dated 10 November 2015, on 11 November more than 4 (four) months have passed and our clients have still not received an execution version of the amended and restated Governing Agreement nor execution versions of any other 'more detailed agreements' incorporating our clients' comments.
>
> 1.2 The lengthy delay occasioned by your client in furnishing our clients with execution versions of the 'more detailed agreements' is materially prejudicial to Ithuba as it prevents the Facility Agreement concluded between *inter alia* Ithuba and the Standard Bank of South Africa Limited (SBSA) on or about 19 November 2015 from becoming unconditional."[75]

168. The allegation made in paragraph 1.2 of the letter of 20 March 2016 is, in our view, unjustified.

---

75 CDB3207.

168.1 On 17 December 2015, HCI's attorney, Ms J Blumenthal, addressed an email to Ithuba's attorneys, copying Mr Scott, Ms Mabuza and Mr E.Mabuza, her husband, in which certain proposals were put to Ithuba. In the final paragraph of that letter, the following is stated:

> "Our client has asked us to emphasize again that, while you have indicated that your client rejects our client's proposal, our client continues to want to work together with the management of Ithuba and believes that this will be in the best interests of all shareholders in Ithuba. As we raised in our teleconference recently, should Ithuba be willing to engage on this point and to afford HCI a closer and in-depth oversight of the business, similar to as envisaged in the step-in rights, then HCI would be prepared to in that scenario, consider condonation of previous breaches."

168.2 Ithuba's attorney responded on 17 December 2015,[76] in which the following was stated:

> "Thank you for your email. As you know, Charmaine and Erick are already on leave. So we will only be able to respond to your email in the new year when everyone is back."

168.3 Some two months later, on 10 February 2016, Ithuba's attorney responded as follows to Ms Blumenthal's email dated 17 December 2015:[77]

---

[76] CDB3045.
[77] CDB3145.

"Dear Jessica,

In view of the disputes that have arisen, Ithuba and Zamani will not be responding to your email of 17 December 2015. Ithuba and Zamani's failure to respond should not be taken to be an admission of any of the allegations. Ithuba and Zamani reserve the right to respond thereto at a later date."

169. It is evident from this email that Ithuba and Zamani were not prepared to engage on any of the issues or concerns raised by HCI and HCI Treasury in Ms Blumenthal's email dated 17 December 2015. It appears from the evidence of Ms Mabuza that the reason for this stance is because HCI had, at that stage, issued the first Election Notice.

170. We are of the view that the allegations made in paragraph 1.2 of Ithuba's attorney's letter dated 20 March 2016[78] to the effect that there had been a lengthy delay occasioned by HCI is unfounded as Ithuba had deliberately refused to respond to Ms Blumenthal's letter dated 17 December 2015. This resulted in a delay of some three months.

171. On 24 March 2016, Mr Shaik, the chief executive officer of HCI, addressed the following letter to Ms Mabuza:[79]

"You and your erstwhile attorneys abandoned the effort to produce executable versions of the agreements when pressed on the

---

78 CDB3207.
79 CDM3398.

management fee first on the basis that you were on holiday and second, after the holidays, on the basis that disputes have arisen.

The resolution of this matter, the management fee, is important and begs attention. Please respond to the email of Jessica Blumenthal dated 17 December 2016 and the issues raised therein. Once we have resolved the management fee, we will be in a position to prepare executable versions of the various agreements. At any rate, there is no urgency as you and your erstwhile attorneys do not think the matter required any attention for the past four months."

172. On 29 March 2016, Mr Shaik again addressed a letter to Ms Mabuza, in which he stated:

"I have instructed Paul Tindle to attend to prepare executable versions of the various agreements."

173. On 1 April 2016, Mr Tindle, who had recently been appointed as HCI's attorney, addressed a letter[80] in which, among other things, the following was stated:

"With regards the Detailed Agreements (as defined in your letter), we are still in the process of reviewing the proposed changes and should be in a position to let you have our comments during the course of next week. Unfortunately, these agreements (and in particular the amended and restated Governing Agreement) are not, in our client's view, ready to be signed and we will let you have our comments as soon as possible. At this stage, however, we believe it will be premature to refer the

[80] CDM3404.

agreements to the expert as contemplated in the Restructuring Agreement although this may become necessary in due course.

... Your request regarding the Standard Bank agreement would appear to be slightly more problematic. It seems that Standard Bank have not taken into account any of our client's earlier comments in relation to the transaction and the introduction of the bank funding will, in our view, necessitate further amendments to the detailed agreements. We will, however, endeavour to revert with our comments on these agreements during the course of next week."

174. In a further letter sent by Mr Roodt on 15 April 2016,[81] Mr Tindle was advised as follows:

"HCI's unreasonable delay and/or refusal to respond to Ithuba's clear and unambiguous request to facilitate the conclusion of the Detailed Agreements and the senior debt agreements, is jeopardising Ithuba's ability to secure senior funding and to comply with its licence conditions. Ithuba's approved facility with the Standard Bank expires on 31 May 2016, and it is also for this reason, imperative that negotiations be concluded without further delay."

175. On 15 April 2016, Mr Tindle responded to Mr Roodt's letter,[82] and stated the following in regard to the detailed agreements:

"5.1 We are pleased that you have been retained by Ithuba to advise on the finalisation of the agreements referred to in the Restructuring Agreement. However, having worked through the historical

---

81 CDB3449.
82 CDB3451.

correspondence between our respective clients' former attorneys, it appears that there are a number of outstanding issues (including the issues raised in this letter) and our instructions are to revert to the draft agreements commented on by our clients' former attorneys during December 2015. The subsequent draft agreements prepared by your clients' former attorneys earlier this year simply ignored our clients' position in relation to the management fees and step-in rights and, in our clients' view, set an unacceptable basis for the continuation of discussions. In the circumstances we believe that it is critical that the parties resolve the issues regarding the management fees and the step-in rights as soon as possible, as these issues will inform the further discussions regarding the terms of the agreements. We would be happy to meet with you at a mutually convenient time to discuss these outstanding issues. Please let us know whether you would be available to meet in this regard and, if so, what dates and times would be convenient for you."

176. On 22 April 2016, Mr Tindle addressed a further letter to Mr Roodt,[83] in which the following was stated:

"2. At the outset, we assure you that our client is in no way attempting to frustrate the implementation of the provisions of clause 3 of the Governing Agreement. We are doing what we reasonably can to try and facilitate this process, but it is not without its challenges, particularly in the light of the forced withdrawal of our client's former attorneys.

3. We have marked up our comments on the Detailed Agreements and the second addendum to the Management Agreement, and have sent those agreements through to our clients for their consideration.

---

83 CDB3491.

Unfortunately, we were able to send them the amended draft only this afternoon and they have not yet had an opportunity to properly consider the proposed changes. Our client has, however, undertaken to review the amended agreements over the weekend, and to get back to us with their comments by Sunday night. On the assumption that their comments will not be too extensive, we should be able to circulate the marked up drafts agreements on Monday.

4. The situation regarding the Standard Bank agreement is more difficult in that

   (i) the signed facility agreement completely ignores all of our client's comments and concerns as previously raised; and

   (ii) the provisions of those agreements have not been taken into account in updating the Detailed Agreements. We realise that it was agreed between the parties that the Detailed Agreements would be updated initially to take into account only the structural changes brought about by the capital restructure, but it is extremely difficult to comment on the terms of the Intercreditor Agreement and the Account Bank Agreement in isolation without also discussing and agreeing the further changes to be made to the Detailed Agreements.

6. We would therefore suggest that the parties try and finalise the Detailed Agreements and the second addendum to the Management Agreement as soon as possible, and then look to agree to the required changes to the entire suite of agreements (including the Intercreditor Agreement and the Account Bank Agreement) to the extent necessary in order to introduce the senior funding.

7. We will send through our marked up comments on the Detailed Agreements and the second addendum to the management as soon as possible."

177. On 28 April 2016, Mr Roodt sent the following reply to Mr Tindle:[84]

> "2. Clause 3 of the Governing Agreement requires of HCI to release such security as may be necessary, to agree to a variation to the priority of payments and to consider in good faith any further amendments that may be required to the Governing Agreement to facilitate the provision of senior funding. HCI's attempt to introduce the terms of the Detailed Agreements and the Second Addendum to the Management Agreement as a pre-condition to the facilitation of senior funding is seen as obstructive, and as ongoing conduct in flagrant breach by HCI of its obligations in terms of clause 3 of the Governing Agreement.
>
> 3. Moreover, HCI's failure to comply with the demand in our letter of 19 April 2016 and also your failure to comply with your undertaking to circulate the marked up draft agreements by 25 April 2016, have left Ithuba with no alternative but to hold HCI in breach of its obligations in terms of clause 3 of the Governing Agreement. Such breach is material and goes to the root of the Governing Agreement.
>
> 4. ...
>
> 5. We are instructed to point out that the Standard Bank agreements were concluded between Ithuba and Standard Bank as the provider of senior funding. It is not for HCI to interfere in the negotiations around the terms of those agreements. Apart from the fact that Ithuba denies that the signed Facility Agreement ignores HCI's comments, HCI is not a party to that agreement and has no right to dictate the terms which have been agreed between Ithuba and Standard Bank."

---

84 CDB3498.

178. On 6 May 2016, Mr Tindle wrote to Mr Roodt,[85] in which he stated the following:

> "I have finalised the comments on the Detailed Agreements which I attach for your consideration (other than the amended and restated Governing Agreement, which still requires client's sign-off). I have sent the Governing Agreement to client and hope to get their comments on the proposed changes by Monday or Tuesday next week. In the meantime, please feel free to call me to discuss any of the changes proposed to the other agreements. Please remember that, as originally agreed between the parties, we have approached the amendments on the basis of the required restructure, and further changes may be required to accommodate the proposed bank funding."

179. On 12 May 2016, Mr Roodt addressed a further letter to Mr Tindle[86] in which he stated:

> "1. We refer to your email of 6 May 2016, wherein you informed us that you are hoping to obtain HCI's comments on the amended and restated Governing Agreement by Monday, 9 May 2016 or Tuesday, 10 May 2016.
>
> 2. We have to date not received HCI's comments on the amended and restated Governing Agreement, and despite various previous demands, have not received HCI's comments on the Standard Bank agreements. We have informed you that the Standard Bank facility expires at the end of May and that HCI's early response is essential to Ithuba's negotiations with Standard Bank."

---

85 CDB3513.
86 CDB3526.

180. On 13 May 2016, Mr Tindle responded to Mr Roodt's letter.[87] He stated:

> "2. We are pleased to advise that we had a conference call with our client yesterday and managed to work through the outstanding issues on the Governing Agreement. Our marked-up comments are set out in the draft agreement attached hereto. If you have any queries, please do not hesitate to contact us to discuss.
>
> 3. With regards to the Standard Bank agreements, we deny that our client is attempting to frustrate the implementation of the provisions of clause 3 of the Governing Agreement, as suggested in your letter. At the outset of our involvement in this matter, we were advised that the parties had agreed that the Detailed Agreements were to be amended in two phases. The first phase changes, we were advised would be those required to implement the Restructuring Agreement, and thereafter the agreements would be further amended (to the extent necessary) to accommodate the proposed senior funding. We have now given you all our comments on the Detailed Agreements and the Management Agreement Second Addendum.
>
> 4. It is, however, not a question of our client making the amendments '*a pre-condition to the facilitation of senior funding*', but rather that certain changes will be necessary to introduce the senior funding, including required changes to accommodate the proposed release of security and the amendment of the stipulated priority of payments. These are the changes we believe our client is required to consider in good faith in terms of clause 3 of the Governing Agreement. We look forward to receiving your client's proposed further changes in this regard, and assure you that upon receipt, such change will receive our attention.

---

87 CDB3530.

5. While we have worked through the provisions of the draft Intercreditor Agreement and Bank Account Agreement furnished to our client, we are not able to comment effectively on their terms as we have not yet had sight of the Senior Finance Documents referred to in the Intercreditor Agreement. It is simply not possible for us to comment on these two agreements in isolation particularly as our client is being asked to exchange its existing security for (an as yet unseen) security structure to be put forward by the bank."

181. On 13 May 2016, Mr Tindle also provided Mr Roodt with HCI's comments on the amended and restated Governing Agreement.[88]

182. On 31 May 2016, Standard Bank addressed a letter to Ithuba, in which it agreed to extend the date for finalisation of the Standard Bank documents until 30 November 2016.[89]

183. On 21 June 2016, Mr Tindle sent the following email to Mr Roodt.

"I attach our comments on the Bank Agreements for your consideration. I apologise for the delay in getting these agreements back to you, but you will appreciate that there was a lot to work through. We have still not received final sign-off from client on all changes, but I am confident that most (if not all) of their concerns have now been addressed and I want to get the process moving forward without any further delay. If they have any further comments, or if we fail to correctly capture their comments, I will let you know.

---

88 CDB3528.
89 CDB3800.

Our comments are marked up on the attached agreements and are hopefully self-explanatory. If you have any queries, please feel free to contact me to discuss.

We have not included our comments on the Account Bank Agreement as that agreement is largely administrative. We note, however, that it makes provision for a Salary Account, which we believe is unnecessary as all salaries are in our view payable by Zamani in terms of the Management Agreement, read together with the Financial Model. We would, therefore, propose that all reference to the Salary Account be deleted. We note further that the agreement provides for only 53.5% of the management fee to be paid during the first year of utilisation. As you know, our client contends that Zamani is entitled to a fee of only 2.5%, and has reserved the right to take wherever steps it deems appropriate to restrict Zamani's fee to that amount. In the circumstances, your client may wish to reword this provision to avoid any potential prejudice to your client in the event of our client prevailing in its contention."[90]

184. On 2 September 2016, a further email was sent by Mr Tindle to Mr Roodt, which reads:

"Further to my email of 19 August 2016 to which I attached our comments on the Detailed Agreements. Please let me know what progress has been made in this regard.

As discussed, I would like to arrange a time to meet with you to try and settle the terms of these agreements. Please let me know when you might be available for this purpose."[91]

---

90 CDB 3851.
91 CDB4328.

185. On 8 and 15 September 2016, Mr Roodt requested Mr Tindle to indicate whether he had been able to obtain instructions from HCI regarding the proposed amendments to the HCI Invest loan agreement and the possibility of a meeting with Standard Bank.[92]

186. On 21 September 2016, Mr Roodt wrote the following letter to Mr Tindle,[93] the material portions whereof read as follows:

> "1. We refer to the set of marked-up Standard Bank Agreements sent to us on 21 June 2016 and the set of the latest marked-up detailed agreements sent to us on 20 August 2016. For purposes of this communication, we have assumed that the mark ups were effected by you on the instructions of both HCI Invest and HCI Treasury.
>
> ...
>
> 4. Standard Bank Agreements
>
> 4.1 It is well recorded in various letters and email correspondence that HCI Invest and HCI Treasury have obstructed the conclusion of the Standard Bank Agreements by unreasonably delaying their comments on the draft agreements. When eventually comments were received, HCI Invest and HCI Treasury persisted with their requirement that provisions be included even though they were well aware that those provisions had previously been rejected and will be unacceptable to Standard Bank.
>
> 4.2 In particular, HCI Invest and HCI Treasury were made fully aware during the negotiation of prior drafts of the Standard Bank

92 CDB4350 and 4353.
93 CDB4356.

Agreements, that the following provisions which were included by HCI Invest and HCI Treasury in the last version of the draft agreements, were not acceptable to Standard Bank:

4.2.1 The requirement of HCI Invest and HCI Treasury that HCI Invest be appointed as their Facility Agent to deliver and receive notices, give consents and condone breaches; and

4.2.2 the insistence of HCI Invest and HCI Treasury that HCI Invest's approval be obtained before Ithuba may utilise the Standard Bank Facility.

4.3 It has become clear to Ithuba that HCI Invest and HCI Treasury are intent on obstructing the conclusion of the agreements that are necessary to enable Ithuba to secure funding from Standard Bank.

4.4 As a result of the inordinate delays and as a result of the persistent demands by HCI Invest and HCI Treasury to be placed in a position that cannot be reconciled with Standard Bank's normal and reasonable requirements in regard to its position as the senior provider of funding to Ithuba, negotiations between Standard Bank and Ithuba have come to a standstill.

4.5 In terms of clause 3.2 of the Governing Agreement, HCI Treasury undertakes *inter alia* to consider in good faith any further amendments as may be required in order to facilitate the provision of further debt funding to Ithuba. This is a material term that goes to the root of the Governing Agreement.

4.6 Ithuba, Zamani Marketing and Zamani Gaming regard HCI Treasury's obstructive conduct as a breach of the provisions of clause 3 of the Governing Agreement. Ithuba, Zamani Marketing and Zamani Gaming view HCI Treasury's obstructive conduct as a

clear and unambiguous indication that it does not intend to be bound by those provisions.

5. Detailed Agreements

5.1 The parties to the Restructuring Agreement agreed, in terms of clause 4.7 thereof, to conclude the Detailed Agreements as soon as possible.

5.2 At the meeting held at our offices on 28 July 2016, we informed you that Ithuba, Zamani Gaming, Zamani Marketing and Zamani Treasury would be willing to sign the Detailed Agreements in the form of the draft agreements marked up by you on behalf of HCI Invest and HCI Treasury and furnished to us on 6 May 2016 and 13 May 2016 respectively. You informed us that HCI Invest and HCI Treasury wished to reconsider the very marked-up draft agreements that had been issued by you on their behalf. We observed on behalf of Ithuba, Zamani Gaming, Zamani Marketing and Zamani Treasury that it was unfortunate that HCI Invest and HCI Treasury would not stand by draft agreements that had been the subject of drawn-out and contentious negotiations, and that were in the very format presented to Ithuba on behalf of HCI Invest and HCI Treasury.

5.3 We have considered the marked-up Detailed Agreements received from you on 20 August 2016. We note that material amendments have now been introduced in the draft HCI Holdco New Loan Agreement to the effect that Ithuba would not have the right to effect early voluntary repayment of its debt under any circumstances. Ithuba considers the reversal of the voluntary early repayment provision to be a material deviation from the terms of loan that were originally proposed by HCI Invest and that had at all times formed the basis of

Ithuba's understanding (in terms of the Principles set out in clause 4.1 of the Restructuring Agreement) of the terms of conversion of the Preference Share structure to a loan structure.

...

6. Past Conduct of HCI Treasury and HCI Invest

6.1 It is well recorded in previous correspondence that HCI Invest and HCI Treasury have in the conduct of their contractual relationship with Ithuba, Zamani Gaming, Zamani Treasury and Zamani Marketing, consistently attempted to implement the Governing Agreement and the Management Agreement in a manner that is contrary to the clear and unambiguous terms of those agreements. In this regard HCI Invest and/or HCI Treasury have:

6.1.1 repeatedly, and without any right to do so in law or in contract, attempted to obtain oversight of the business and affairs of Ithuba and Zamani Marketing by asserting, on the basis of alleged facts that are unsustainable and without merit, that one or more Early Trigger Events have occurred as contemplated in the Management Agreement;

6.1.2 asserted that Ithuba has a duty to secure the consent of the Minister to enable HCI Invest to hold Preference Shares in the share capital of Ithuba, in the clear absence of any contractual obligation on Ithuba to do so;

6.1.3 asserted that salaries payable to Ithuba's employees form part of the management fee payable to Zamani

Marketing, notwithstanding the fact that Ithuba's employee costs are included as operating costs that are payable by Ithuba in terms of the Governing Agreement;

...

7. Repudiation

7.1 By their conduct, HCI Invest and HCI Treasury have demonstrated an unequivocal intention no longer to be bound to the provisions of the Management Agreement, the Governing Agreement and the Restructuring Agreement, all of which are interlocked (collectively 'the Agreements').

7.2 Ithuba, Zamani Gaming, Zamani Treasury, Zamani Marketing, The Erick Mabuza Trust and the Charmaine Mabuza Trust regard the conduct of HCI Invest and HCI Treasury as a repudiation of the Agreements.

7.3 Ithuba, Zamani Gaming, Zamani Treasury, Zamani Marketing, The Erick Mabuza Trust and the Charmaine Mabuza Trust hereby accept the repudiation by HCI Invest and HCI Treasury of the Agreements, and regard the Agreements as being of no further force or effect insofar as they create contractual rights and obligations as between HCI Treasury and HCI Invest on the one hand and, as applicable, Ithuba, Zamani Gaming, Zamani Treasury, Zamani Marketing, The Erick Mabuza Trust and/or the Carmaine Mabuza Trust on the other."

187. Mr Scott conceded during cross-examination that Ithuba no longer required a facility from Standard Bank by the time that it had elected to

cancel the suite of agreements on account of the alleged repudiation. He also testified that in any event, Ithuba could not have utilised the Standard Bank facility until the litigation with Gidani had been finally determined. The Gidani litigation was only finalised on 20 September 2016. In this regard, the following exchange between HCI's counsel and Mr Scott during cross-examination is instructive:

> "MR SUBEL: I'm putting to you the reason you never pursued it to conclusion is because you did not need it.
>
> MR SCOTT: Ultimately to the conclusion that after operating for a year and a bit, that we actually didn't need the funding.
>
> MR SUBEL: Correct.
>
> MR SCOTT: Or a year and a half.
>
> MR SUBEL: And in due course we'll get to the point. I'll argue to the Arbitrators that this is a complete red herring, the Standard Bank issue. It's a pretext."

188. Mr Scott also conceded during cross-examination that HCI was not to blame for the delays in finalising the Detailed Agreements contemplated in the Restructuring Agreement. He could not explain why there was a delay of some three or four months from Ithuba's side after being requested by HCI's attorney to address certain issues. Nor could he explain why there was a lengthy delay on the part of Ithuba in reverting to and dealing with the concerns raised in the letter of Ms Blumental of

17 December 2015. He surmised that the reason was probably because Ithuba was engaged in court processes with Gidani.

CONCLUSION

189. The following is, in our view, evident from the documents and evidence referred to above.

189.1 Ithuba's assertion that HCI was responsible for the delay in concluding the Detailed Agreements and the Standard Bank Agreements, and that it had breached its good faith obligations in the negotiations towards the Detailed Agreements and amendments to the Governing Agreement cannot be accepted.

189.2 On 17 December 2015, HCI's attorney raised a number of legitimate and reasonable concerns, but Ithuba chose to ignore them. On 10 February 2016 Ithuba indicated that it would not be responding to the email of 17 December 2015. The first time that there was any further engagement was on 20 March 2016, when Ithuba's attorney, addressed the letter in which it was unjustifiably stated that *the lengthy delay was occasioned by the conduct of HCI furnishing Ithuba with execution versions of the "more detailed agreements".*

189.3 Mr Scott was unable to advance any satisfactory reason why there was a delay of some three to four months; and in fact, conceded that HCI was not to blame for the delay.

189.4 It is evident from the letters and emails addressed by Mr Tindle to Mr Roodt that HCI was at all times willing to act in a cooperative manner but there were certain concerns that had to be addressed before the Detailed Agreements could be finalised. These included matters such as the management fee, the step-in rights and the question of salaries. In our view, these were legitimate concerns that had to be resolved before the Detailed Agreements could be finalised.

189.5 The letter addressed by Mr Tindle to Mr Roodt on 22 April 2016[94] demonstrates that HCI had difficulty with the Facility Agreement, the Intercreditor Agreement and the Account Bank Agreement. He stressed that it was extremely difficult to comment on the terms of the Intercreditor Agreement and the Account Bank Agreement in isolation without also discussing and agreeing the further changes to be made to the Detailed Agreements.

---

94 CDB3491.

189.6 On 13 May 2016, Mr Tindle, in response to a letter addressed by Mr Roodt[95] indicated that HCI had worked through the provisions of the draft Intercreditor Agreement and Account Bank Agreement furnished but was unable to comment effectively on their terms as they had not had sight of the senior finance documents referred to in the Intercreditor Agreement. Again, it was emphasized that it was not possible to comment on these agreements in isolation.

189.7 HCI still engaged in negotiations with Ithuba and Zamani as late as 2 September 2016 to agree the terms of the Detailed Agreements.[96]

189.8 On 8 September 2016, Mr Tindle addressed a further letter to Mr Roodt inquiring whether he had been able to obtain instructions from Ithuba and Zamani on the HCI Invest loan agreement, and to ascertain whether it would be possible to meet with Standard Bank so that the Detailed Agreements could be finalised.[97]

190. On a proper conspectus of the evidence, it is clear that there were fundamental obstacles to the parties being able to reach agreement on material issues, and that this occasioned delay in the finalisation of the Detailed Agreements. We accept the explanations given by Mr Govender for the apparent flip-flopping in regard to the provisions

95 CDB3530.
96 CDB 4328 and 4329.
97 CDB 4350 and 4353.

relating to ministerial consent and voluntary repayment of the Holdco New Loan. We do not consider HCI to have breached its good faith obligations.

191. It cannot be said that HCI and HCI Treasury acted in bad faith and did not negotiate seriously with an intent to conclude the Detailed Agreements.[98]

192. Insofar as Mr Roodt's cancellation letter dated 21 September 2016[99] is concerned, we have the following comments.

192.1 We do not agree with the assertion in paragraph 4.3 that HCI and HCI Treasury were intent on obstructing the conclusion of the Standard Bank Agreements; nor do we agree with what is stated in paragraph 4.4. Mr Tindle, in his letter dated 22 April 2016,[100] pointed out that the signed Facility Agreement completely ignored all of HCI's comments and concerns. In his letter dated 13 May 2016,[101] Mr Tindle pointed out that he had difficulty in providing comments in respect of the draft Inter-creditor and Bank Account Agreements as he had not had sight of the Senior Funding Documents referred to in the Inter-creditor Agreement (see also

---

98 *Makate* (*supra*) para 102 and the Unidroit Principles (*supra*): Note (3).
99 CDB4356.
100 CDB3491.
101 CDB3530.

Mr Tindle's email dated 21 June 2016). As HCI was a substantial funder of Ithuba and was required to subordinate its rights in favour of the Standard Bank, it was entitled properly to consider and comment on the Standard Bank documents.

192.2 There is no merit in the allegations made in paragraph 6 of the cancellation letter. As we have already found, Ithuba was contractually obliged to apply for probity on HCI's behalf and to render such assistance as was necessary to obtain probity to enable HCI to hold preference shares in Ithuba. As will appear later in this award, we are also of the view that HCI had the right to obtain oversight of the business and affairs of Ithuba and Zamani Marketing. Furthermore, their complaint regarding salaries was well founded.

192.3 It is common cause that the HCI Treasury Loan had been repaid by 8 August 2016. Accordingly, HCI Treasury no longer had an interest in any of the agreements in issue by 21 September 2016 when Ithuba and Zamani purportedly elected to accept HCI Treasury's purported repudiations.

192.4 We also take note of the fact that clause 3.2 of the Governing Agreement only imposed an obligation on HCI Treasury to facilitate

the provision of additional debt funding to Ithuba. No such obligation was imposed on HCI.

193. For all these reasons, we are of the view that HCI and HCI Treasury did not act in bad faith in the negotiations towards the Detailed Agreements and the amendments to the Governing Agreement. We also find that HCI and HCI Treasury did not breach and repudiate the Restructuring Agreement, the Governing Agreement and Management Agreement as is alleged in paragraphs 92 to 105.

194. Consequently, Ithuba and Zamani did not validly cancel these agreements on or about 21 September 2016 as is alleged in paragraph 106 of the amended claim-in-reconvention.

HCI'S STEP-IN AND OVERSIGHT RIGHTS

195. The Governing Agreement, read together with the First Addendum to the Management Agreement, establishes a framework in terms of which HCI may elect to step into or exercise rights of oversight over the business of Ithuba and Zamani. The step-in rights are the rights of cession and assignment under s 5A.1.1 of the Management Agreement Addendum, and the oversight rights are the rights set out in s 5A.1.2 of the Management Agreement Addendum.

196. The power to exercise these rights occurs when there is an "Early Trigger Event" as defined.

197. The First Addendum to the Management Agreement records, *inter alia*, -

/1.1.6A1 ...

"1.1.6.A "Early Trigger Event", means:

1.1.6.A1 any breach by Zamani or any Shareholder of any term of this agreement;

1.1.6.A2 a breach by Ithuba of any of the Financial Covenants (as such term is defined in the Governing Agreement) in terms of the Governing Agreement, provided that for the purpose of this Agreement an Early Trigger Event will also occur if, as at any Measurement Date the Debt Service Cover Ratio is less than 1.35:1 or the Projected Debt Service Cover Ratio on any one of the first two Measurement Dates occurring immediately after the relevant Measurement Date is less than 1.35:1, and provided further that, for the purpose of this clause 1.1.6.A2, the terms "Measurement Date", "Projected Debt Service Cover Ratio", "Measurement Period" and "Historic Debt Service Ratio" shall bear the same meanings as ascribed thereto in the Governing Agreement, and shall be measured on the same basis as is the case in respect of the Governing Agreement.

...

5A.1 If an Early Trigger Event occurs at any time prior to the redemption by Ithuba of the Preference Shares in accordance with their terms of repayment by Ithuba of the amount outstanding and owing to

HCI-Treasury (Pty) Limited and during the currency of this Agreement, then for so long as such Early Trigger Event subsists, HCI Invest shall be entitled but not obliged by notice in writing to the remaining Parties ("**Election Notice**") to –

5A.1.1 take cession and assignment of all of Zamani's rights and future obligations in terms of this Agreement in accordance with clause 5A.2 below, or

5A.1.2 exercise its rights of oversight in accordance with clause 5A.3 below.

...

5A.3 If HCI Invest elects to exercise its rights in terms of clause 5A.1.2 above, then HCI Invest shall be granted the right to have management oversight in regard to the business of Zamani and the manner in which the Services are provided including being entitled to

...

5A.3.6 during the period of such management oversight, charge a monthly management fee equal to 1% (one per cent) of Ithuba's monthly gross revenue (plus VAT thereon), which management fee Zamani shall be obliged to pay to HCI Invest forthwith upon receipt of its Management Fee in terms of the Agreement.

...

5A.7 This clause 5A shall cease to apply in the event that both (i) neither HCI nor HCI Invest hold a direct or indirect interest in Ithuba and (ii) Ithuba no longer owes any loan obligations to HCI Treasury (Proprietary) Limited."[102]

---

[102] SOC3 to the statement of claim.

198. The financial covenants referred to in clause 1.1.6A2 of the First Addendum to the Management Agreement are contained in clause 9 of the Governing Agreement.

199. Among the covenants stipulated in clause 9 of the Governing Agreement are two debt service cover ratios and a gearing ratio. These are set out in sub-clauses 9.1.1, 9.1.1.1, 9.1.1.2 and 9.1.2, which read:

> "9.1 The Company shall ensure that as of any Measurement Date:
>
> 9.1.1 Debt Service Cover Ratio
>
> 9.1.1.1 The Projected Debt Service Cover Ratio on each of the eight Measurement Dates occurring immediately following the Measurement Date is not less than 1.25:1;
>
> 9.1.1.2 The Historic Debt Service Cover Ratio on each of the past four Measurement Dates immediately preceding the Measurement Date is not less than 1.25:1.
>
> 9.1.2 Gearing Ratio
>
> The Gearing Ratio as at each Measurement Date is not more than 70:30".

200. Clause 9.8 of the Governing Agreement makes provision for a further financial covenant that obliges Ithuba to conduct its business in accordance with the Financial Model therein referred to, and to modify and update such model in the manner described in clauses 9.8 and 9.9.

201. The "Financial Model" is defined in terms of clause 57 to mean "the Base Case Financial Model, as amended, updated, changed or replaced from time to time in accordance with the Governing Agreement". The Financial Model is incorporated as a schedule to the Governing Agreement. Clause 4.1.17.3 of the Governing Agreement provides for a condition precedent that Ithuba provide the Base Case Financial Model to HCI which, together with the Economic Assumptions, Tax Assumptions and Technical Assumptions contained in the model, would form schedules to the Governing Agreement.

202. HCI contends that Early Trigger Events have occurred which entitled it to exercise the step-in and oversight rights.

203. In the first instance, it alleges that there has been a breach of the financial covenant contained in clause 9.1.1.2 of the Governing Agreement, which provides that the Historic Debt Service Cover Ratio on each of the past four Measurement Dates immediately preceding the Measurement Date is not less than 1.25:1.

204. HCI also alleges that since September 2015 Zamani had been recovering from Ithuba wages and salaries paid to persons employed by Ithuba or seconded to Ithuba. Neither the Management Agreement nor

the Financial Model provides for the recovery of salaries or other employee expenses from Ithuba as these are the responsibility of Zamani. It is alleged that the purported recovery of these expenses from Ithuba amounts to a breach by Zamani of the provisions of the Management Agreement and also constitute an "Early Trigger Event" as defined in clause 1.1.6.A1 of the Management Agreement (inserted by clause 3.1.3 of the First Addendum to the Management Agreement).

205. It is common cause that on 18 January 2016,[103] 4 April 2016,[104] 19 April 2016[105] and 9 May 2016,[106] HCI addressed election notices to Ithuba and Zamani as contemplated in clause 5A.1 of the Management Agreement,[107] wherein it elected to exercise its step-in and oversight rights.

206. The Early Trigger Events identified in the Election Notices dated 18 January 2016, 4 April 2016 and 9 May 2016, are breaches of the financial covenant relating to the Historic Debt Service Cover Ratio.

207. In the Election Notice dated 19 April 2016, the Early Trigger Events relied on are a breach by Zamani of the Management Agreement, and a

---

[103]. SOC8 to the statement of claim
[104] SOC10 to the statement of claim.
[105] SOC14 to the statement of claim.
[106] SOC12 to the statement of claim.
[107] Clause 5A.1 was inserted into the Management Agreement in terms of the First Addendum to the Management Agreement.

breach by Ithuba of the financial covenant in clause 9.8 of the Governing Agreement. It is alleged that since September 2015 Ithuba has been accounting for the wages and salaries of Ithuba's employees and those employees seconded to it by Zamani. Furthermore, Zamani has purported to recover these expenses from Ithuba. This constitutes a breach by Zamani of the Management Agreement as these expenses are its responsibility and not that of Ithuba. Neither the Management Agreement nor the Financial Model provides for the recovery of salaries and other employees' expenses from Ithuba. Ithuba's payment of these expenses, which is inconsistent with the Financial Model, amounts to a breach of the financial covenant in clause 9.8 of the Governing Agreement.

208. The defences advanced by the respondents centre around the validity of the election notices.

209. HCI alleges that when the election notices dated 18 January 2016, 4 April 2016 and 9 May 2016 were issued, the Historic Debt Service Cover Ratio for the relevant period was less than 1.25:1.

210. The respondents assert that none of the Early Trigger Events had in fact occurred. Clause 9.1.1.2 of the Governing Agreement was never breached by Ithuba since at no stage was there a Historic Debt Service

Cover Ratio of less than 1.25:1. That clause required Ithuba to maintain, on the four measurement dates preceding any given measurement date, a Debt Service Cover Ratio of not less than 1.25:1 as measured over the four preceding measurement periods. When the first Election Notice was issued on 18 January 2016, only one Measurement Period[108] (being the period from the fulfilment date to the first measurement date had occurred. And, in the case of the Election Notice issued on 4 April 2016, only three Measurement Dates had occurred immediately preceding the Measurement Date.[109]

211. In the case of the Election Notice dated 9 May 2016, the respondents accept that 30 April 2016 was a Measurement Date that was preceded by four clear Measurement Dates (*ie* 31 July 2015, 31 August 2015, 31 October 2015 and 31 January 2016). But, on each of those Measurement Dates there must have been four preceding Measurement Dates because that is what is required by the definition of Historic Debt Service Cover Ratio. Accordingly, the respondents contend that on each of the Measurement Dates the Historic Debt Service Cover Ratio was impossible of calculation since four Measurement Periods had not preceded the relevant Measurement Date. They also contend that the Historic Debt Service Cover Ratio must be calculated as an average over four periods.

---

[108] The term "Measurement Period" is defined in clause 124 of the Governing Agreement.
[109] The term "Measurement Date" has the meaning ascribed in clause 123 of the Governing Agreement.

212. The Election Notice dated 19 April 2016 is said to be invalid for one or more of the following reasons. The respondents contend that –

212.1 the Management Agreement entitles Zamani to recover from Ithuba the costs of paying Ithuba's employees or persons seconded to Ithuba;

212.2 insofar as reliance is placed upon the Financial Model this model is not referred to in the Management Agreement and compliance with its terms is not a requirement of the Management Agreement;

212.3 even if the Financial Model is relevant, it provided for Ithuba to make payment of salaries and so when Zamani made payment of those salaries on behalf of Ithuba and recovered those salaries from Ithuba, there was no contravention by Zamani of the Financial Model;

212.4 even if Zamani's conduct was a breach of the Management Agreement and/or the Financial Model such breach did not subsist in the month of April 2016 when the Election Notice was issued. At the moment when the Election Notice was issued Zamani was not recovering salaries from Ithuba. Ithuba had already become the

employer of its own staff and paid their salaries and wages from its own bank account.

VALIDITY OF THE ELECTION NOTICE DATED 19 APRIL 2016 (SOC14)

213. We have given consideration to all of the aforesaid arguments advanced by the parties. In our view, it is unnecessary to resolve the many factual, interpretive and legal disputes that surround the validity of the Election Notices dated 18 January 2016, 4 April 2016 and 9 May 2016. Instead, we will focus on the validity of the Election Notice dated 19 April 2016,[110] as this, we believe, is dispositive of the question in issue.

214. The Election Notice dated 19 April 2016 provides as follows:

> "4 It appears from the Management Accounts that since September 2015 Ithuba has been accounting for the wages and salaries payable by Zamani to the Ithuba employees (if any) and those employees seconded to Ithuba. As the employees were all employed by Zamani at that time and Ithuba was not registered for PAYE, we assume that this liability arises indirectly as a purported recovery by Zamani of an 'out-of-pocket expense'. As we have indicated to you on numerous occasions, neither the Management Agreement nor the Financial Model provides for the recovery of salaries and other employee expenses from Ithuba, and in terms of Appendix 1 to the Management Agreement these expenses are the responsibility of Zamani. The purported recovery of these expenses

[110] SOC14 to the statement of claim.

from Ithuba therefore amounts to a breach by Zamani of the provisions of the Management Agreement.

5. That breach constitutes a further 'Early Trigger Event' as defined in 1.1.6.A1 of the Management Agreement (inserted by clause 3.1.3 of the First Addendum to the Management Agreement), entitling HCI Invest to elect either to take cession and assignment of all of Zamani's right and future obligations in terms of the Management Agreement in accordance with the provisions of clause 5A.2 of the Management Agreement or to exercise the rights of oversight in accordance with clause 5A.3 of that agreement."

215. The claimants' pleaded case is set out in paragraphs 40 to 42 of the statement of claim and reads as follows:

"40. Since September 2015 the Second Respondent has been accounting for the wages and salaries payable to the employees engaged in rendering the services under the Management Agreement and the First Respondent has been recovering from the Second Respondent the cost of all employees employed by the First Respondent and engaged in rendering services to the Second Respondent under the Management Agreement.

41. Neither the Management Agreement nor the Financial Model provides for the recovery of salaries and other expenses from the Second Respondent, and in terms of Appendix 1 to the Management Agreement such expenses are the responsibility of and are to be borne by the First Respondent.

42. The recovery of these expenses from the Second Respondent accordingly constitutes a breach by the First Respondent of the provisions of the Management Agreement, which constitutes an Early Trigger Event in terms of clause 1.1.6.A1 of the Management

Agreement (as amended by the Management Agreement Addendum)."

216. Ithuba and Zamani seek to impugn the Election Notice dated 19 April 2016 on several grounds. First, that Zamani was entitled under the Management Agreement to recover from Ithuba the salaries it paid to employees of Ithuba or persons seconded to Ithuba. Second, the Management Agreement does not refer to the Financial Model and does not impose any obligation on Zamani to comply with the Financial Model's provisions. Third, the Financial Model, if relevant, provided for Ithuba to make payment of salaries and so, when Zamani made payment of their salaries on behalf of Ithuba and recovered those salaries from Ithuba, there was no contravention of the Financial Model. Fourth, even if the recovery of salaries constituted a breach of the Management Agreement, it did not subsist in the month of April 2016 when the Election Notice was issued.

217. The following provisions of the Management Agreement are relevant to the enquiry as to whether Zamani was entitled to recover from Ithuba the salaries it paid to employees of Ithuba or persons seconded to Ithuba:

217.1 Zamani was appointed by Ithuba to provide the Services defined in Appendix 1 to the Management Agreement.[111] Appendix 1 reads as follows:

"Zamani shall be responsible for the entire management of the business of Ithuba, including without limitation -

1. ensuring the efficient and proper execution of all of the operational functions of the entire Ithuba business by every Ithuba employee or seconded employee through proper and efficient management;

2. payment of all the wages and salaries to all Ithuba employees or those seconded to Ithuba;

3. management of all Ithuba's finances;

4. outsourcing, where necessary, any operational functions of the business of Ithuba;

...

7. cause the Ithuba financial statements to be prepared and presented to Ithuba in the same way as a company CEO would do."

216.2 Clause 5 of the Management Agreement provides for the consideration payable by Ithuba in respect of the Services to be rendered. It stipulates in clause 5.1 that these shall be determined in accordance with and payable at the times specified in Part 1 of

[111] Pleadings p 85.

Appendix 2.[112] This appendix, which is titled "Fees Payable", provides as follows:

> "Management Fee
>
> 1. As from the 'effective date' until the end of the first financial year of trading of Ithuba, the Zamani monthly Management Fee to be paid by Ithuba shall be two and a half per cent (2½%) of Ithuba's gross monthly revenue.
>
> 2. As from the commencement of the second Ithuba financial year until the end of the contract period, the Zamani monthly Management Fee shall be four point sixty seven percent (4.67%) of Ithuba's gross monthly revenue.
>
> 3. The above fee is exclusive of value added tax and excludes all out-of-pocket expenses incurred from time to time, by Zamani on behalf of Ithuba, which expenses shall be reimbursed by Ithuba within 14 (fourteen) days after presentation to Ithuba by Zamani."

217. Ithuba and Zamani contend that the provisions of the Management Agreement permit Zamani to recover the expenses it incurs when paying the salaries and wages of Ithuba employees or employees seconded to Ithuba.

218. It was submitted that, properly interpreted, Item 2 of Appendix 1 simply refers to Zamani's pay roll function – being the administrative task of paying employees of Ithuba and persons seconded to Ithuba. Zamani is

---

[112] Pleadings p 86.

not liable for and has no obligation to pay salaries This meaning is apparent, so it is contended, when Item 2 is read in the context of Appendix 1 as a whole, which provides that "Zamani shall be responsible for the entire management of the business of Ithuba". When Zamani performs the management function of paying Ithuba's employees and those seconded to Ithuba by using its own funds, then Zamani is entitled to recover those costs from Ithuba as an out-of-pocket expense in terms of clause 5.2 of the Management Agreement, read with Item 3 of Appendix 2.

219. Reliance is also placed on clause 5.2 of the Management Agreement, which reads:

> "Subject to the proviso in 5.1, in addition to the Fee, Ithuba shall reimburse to Zamani within 14 (fourteen) days after written demand, the expenses referred to in Part II of Appendix 2 incurred by Zamani in the provision of the services and Zamani shall, at the request of Ithuba, supply to Ithuba receipts or other evidence of such expenses."

220. It is common cause or not in dispute that the reference to "Part II of Appendix 2" is a patent error as a reading of Appendix 2 clearly shows that it does not contain a "*Part II*". This was probably an earlier version of this clause.

221. Ms Mabuza, the chief executive officer of the Zamani Group of Companies, testified that when it came to the payment of wages and salaries for employees of Ithuba and those seconded to Ithuba, Zamani merely performed a pay roll function, and that was the meaning to be attributed to Item 2 of Appendix 1. Mr Scott also testified that Zamani fulfilled a pay roll function when paying salaries and wages to Ithuba employees and those seconded to it.

222. Item 2 of Appendix 1 falls to be interpreted in accordance with the established principles of contractual interpretation. Our courts now adopt a unitary approach to the interpretation of contracts. That approach requires consideration to be given to the text, context and purpose of the contractual provision. The point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. The words have to be interpreted sensibly and not have an unbusinesslike result (see *Endumeni supra* paras 18 and 19; and *The City of Tshwane Metropolitan Municipality and Blair Atholl Homeowners' Association.*[113]

223. In *Blair Atholl*, the Supreme Court of Appeal affirmed what was stated in *KPMG Chartered Accountants (SA) v Securefin Limited and Another*[114]

---

[113] [2018] ZA SCA 176 (3 December 2018).
[114] 2009 (4) SA 399 (SCA).

concerning the extent to which evidence may be given in relation to the interpretation of written contracts or texts. It was emphasized in *KPMG* that interpretation is a matter of law and not of fact; it is a matter for the Court and not for witnesses. Thus, in interpreting Item 2 of Appendix 1, we will ignore the evidence of Ms Mabuza and Mr Scott to the effect that what is therein stated refers to Zamani's pay roll function.

224. There is no indication in the language employed in Item 2 of Appendix 1 that Zamani was simply to perform a pay roll function when effecting payment of wages and salaries. If that were the parties' intention they would have expressly said so.

225. The following are contextual indications that Zamani and not Ithuba had the obligation to pay the wages and salaries of all Ithuba employees or those seconded to Ithuba:

225.1 The Management Agreement was entered into on 1 November 2013 and shortly thereafter, on 30 November 2013, the Base Case Financial Model was prepared. Extracts from that model were handed in and referred to in evidence.[115] It is evident from the model that salaries were not treated as an expense of Ithuba. Counsel for the respondents referred during argument to certain

[115] Exhibit 1 pp 1 & 2, and Exhibit 6, Items 1-2.

tabs incorporated in the model, which were said to refer to salaries of the employees, but these are inconclusive.

225.2 A further indication that Ithuba was not to be liable for the payment of salaries is the fact that Ithuba was not registered for PAYE.

225.3 Having regard to the express provisions of Appendix 1 and the contextual circumstances referred to above, we are of the view that on a proper interpretation of the Management Agreement, Zamani was duty-bound to pay Ithuba's employees and those seconded to Ithuba by using its own funds and was not entitled to recover those costs from Ithuba as an out-of-pocket expense in terms of clause 5.2 of the Management Agreement, read with Item 3 of Appendix 2.

226. Thus, there is no merit in the respondents' contention that Zamani was entitled under the Management Agreement to recover from Ithuba the salaries it paid to employees of Ithuba or persons seconded to Ithuba.

227. It was further argued that because the Management Agreement does not refer to the Financial Model Zamani is not obligated to comply with the provisions of the Financial Model. For the following reasons we disagree with that submission -

227.1 as appears from Items 3 and 7 of Appendix 1, Zamani was required to manage all of Ithuba's finances and to cause financial statements to be prepared. In order to have properly fulfilled that function, Zamani would have had to comply with the requirements of the Base Case Financial Model;

227.2 Zamani's obligations under the Management Agreement were materially altered when the First Addendum to the Management Agreement was entered into on 14 April 2015. In terms thereof, HCI and the third and fourth respondents became parties to the Management Agreement. The Early Trigger Events referred to in the Management Agreement Addendum were incorporated into the Management Agreement. Clause 1.1.6.A of the Amended Management Agreement provides that any breach by Zamani of any term thereof, or by Ithuba of the Financial Covenants set out in the Governing Agreement, would constitute an Early Trigger Event entitling HCI to exercise the step-in and oversight rights in respect of the businesses of Ithuba and Zamani;

227.3 In terms of the Management Agreement, prior to and after its amendment in terms of the First Addendum to the Management Agreement, Zamani had an overarching obligation to manage the business of Ithuba, including the management of all Ithuba's

finances and the payment of all wages and salaries to all Ithuba employees or those seconded to Ithuba, in accordance with the Financial Model in accordance with the Financial Model.

228. In the light of what is stated above we do not accept that the Management Agreement does not impose any obligation on Zamani to comply with the Financial Model's provisions or, as contended by the respondents, that the model is "entirely irrelevant" as to whether an Early Trigger Event had occurred.

229. Finally, it was contended on behalf of Ithuba and Zamani that even if Zamani's conduct was a breach of the Management Agreement, it did not subsist in the month of April 2016 when the relevant election notice was issued. This submission is founded upon the following unchallenged evidence given by Mr Scott:

229.1 Mr Scott testified that Ithuba had no PAYE and no employees at the time when it started operating. Ithuba and Zamani had to find a way to work around this and they did so as follows:

229.1.1 From about January 2015, Zamani seconded employees to Ithuba to perform day-to-day operational tasks and Zamani

paid the salaries and wages of the seconded employees and in due course recovered the costs from Ithuba.

229.1.2 From 1 March 2016 the seconded employees, excluding executives, were transferred to, and were employed directly by Ithuba.

229.1.3 In April 2016, Ithuba paid the salaries and wages of the employees from its own bank account. Zamani administered the pay-roll functions in respect of these employees but the payments came from the Ithuba bank account.

229.1.4 In May 2016, Zamani paid the salaries and wages of the seconded employees and recovered the costs from Ithuba because of the glitch in the payment system.

229.1.5 From June 2016, Ithuba paid the salaries and wages of the seconded employees. These payments came out of the bank account of Ithuba. However, the administrative pay roll function continued to be performed by Zamani.

229.1.6 When the Election Notice dated 19 April 2016 was issued, salaries were not being recovered by Zamani from Ithuba.

230. Counsel for the respondents also drew attention to the following features of the Election Notice dated 19 April 2016 and the claimants' pleaded case: The claimants' case turns on the recovery of salary expenses from Ithuba by Zamani. HCI alleges that since September 2015 Zamani had been recovering from Ithuba wages and salaries paid to persons employed by Ithuba or seconded to Ithuba. The Management Agreement does not provide for the recovery of salaries. On the basis of Mr Scott's unchallenged testimony Zamani ceased to recover salaries or wages from Ithuba from April 2016 when the election notice was issued. Accordingly, the breach contended for in the election notice did not subsist at the date of its issue.

231. We do not agree with this submission. What is required is a substantive approach to interpreting the notice. On a proper reading thereof it is clear that the substance of the complaint is that salaries and wages which, in terms of the Management Agreement and Financial Model are the obligation of Zamani, are being paid by Ithuba. It is evident from the wording of the first sentence of paragraph 4, which reads: "It appears from the Management Accounts that since September 2015 Ithuba has been accounting for the wages and salaries payable by Zamani to the Ithuba employees (if any) and those employees seconded to Ithuba". The essential complaint is that in the Election Notice there has been a

breach of the Management Agreement and of the Financial Model which required that salaries and wages be paid by Zamani.

232. Factually, it is clear that when the Election Notice was issued Ithuba and not Zamani was making payment of salaries and wages. Mr Scott confirmed that salaries had been recovered from Ithuba since June 2015 and until March 2016. This is evident from the two invoices sent by Zamani to Ithuba dated 31 March 2016.[116] The effect of such recovery is that Ithuba and not Zamani was making payment of the salaries and wages of Ithuba employees and those seconded to Ithuba. This is contrary to the provisions of the Base Case Financial Model.

233. Mr Scott also testified that from 1 March 2016 the Zamani employees seconded to Ithuba, were employed directly by Ithuba, and that in April 2016 Ithuba paid the salaries and wages of these employees from its own bank account.

234. It is clear, therefore, that at the present time Ithuba continues to operate contrary to the Base Case Financial Model by making payment of salaries and wages.

---

[116] CDB 3401 and 3402.

235. On 16 October 2015 Mr Scott furnished Mr Govender with a revised Financial Model that included salaries for the account of Ithuba. Mr Govender claims that this is the first time that the claimants became aware of what was actually happening with the salaries. It also appeared from the re-stated management accounts that salaries were actually being paid from Ithuba's bank account contrary to Ithuba's budget.

236. Mr Govender testified – and this was conceded by Mr Scott – that when he presented the revised financial model he was unaware of the existence of the Base Case Financial Model. Despite Mr Scott becoming aware of this model, Ithuba continued to carry costs contrary to the Base Case Financial Model. There is no dispute that to date salary costs are borne by Ithuba.

237. For these reasons we are satisfied that an Early Trigger Event had occurred and that the Election Notice dated 19 April 2016 was validly issued. Accordingly, HCI is entitled to exercise the step-in rights and rights of oversight.

238. In the alternative, it was submitted that if we find that HCI was entitled to exercise rights of oversight, then HCI should obtain no relief or limited relief for the following reasons.

THE MANAGEMENT AGREEMENT HAS BEEN TERMINATED

239. It was submitted that if Ithuba's counterclaim were to be upheld and the Management Agreement was validly terminated on 21 September 2016, then HCI's rights of oversight would have terminated prospectively from that date. HCI's only entitlement, if any, would be in respect of rights that had accrued at that date. It would follow that there is no basis for the declaratory relief sought in prayer (b); and that if we find that there is any basis for the relief sought in prayer (f), such relief should be limited to the period commencing on the date upon which we determine a valid election notice was issued and ending on 21 September 2016.

240. As we have found that the Management Agreement (as amended by the First Addendum to the Management Agreement) was not lawfully terminated on or about 21 September 2016, these contentions cannot be upheld.

CLAUSE 5A HAS CEASED TO APPLY

241. It was further argued that clause 5A, which contains the rights of oversight, has ceased to apply as neither HCI nor HCI Treasury holds an interest in Ithuba, and Ithuba no longer owes any loan obligations to HCI Treasury. This contention is founded on the wording of clause 5A.7 of the First Addendum to the Management Agreement, which reads:

"5A.7 This clause 5A shall cease to apply in the event that both (i) neither HCI nor HCI Invest hold a direct or indirect interest in Ithuba and (ii) Ithuba no longer owes any loan obligations to HCI-Treasury (Pty) Limited." [Our emphasis]

242. We accept that Ithuba no longer owes any loan obligations to HCI Treasury as the HCI Treasury existing loan and the HCI Treasury New Loan have been repaid.

243. What remains for consideration is whether HCI's existing loan, the HCI Holdco New Loan, constitutes a "direct or indirect interest in Ithuba".

244. It was submitted that an "interest" under the Management Agreement Addendum does not include loan obligations owed by Ithuba. The ordinary meaning of an "interest" in the company would be holding shares, debentures or other proprietary rights in that company. This is the ordinary and statutorily recognised manner by which a person may have an interest in a company.

245. Furthermore, it was submitted that to hold that an "interest" is sufficiently broad to include loan obligations owed by Ithuba would generate redundancy. Accordingly, it was argued that HCI lost its "interest" when the HCI preference shares were redeemed with the proceeds of the HCI Holdco New Loan. Since the HCI Holdco New Loan does not

constitute an "interest" in Ithuba, there is no basis for the relief sought in prayers (c)(ii) and (c)(iii).

246. We do not agree with these submissions.

247. The word "interest" is of wide import and capable of a variety of meanings. Our courts have interpreted the word "interest" as meaning a proprietary or pecuniary interest.[117] The meaning to be attributed thereto in the present case is a matter of contractual interpretation. The word must be assigned a sensible meaning, consistent with the contractual context in which it appears, having regard to the object and purpose of the relevant agreements (see *Endumeni* and *Blair Atholl Homeowners' Association supra*).

248. There is a marked difference between direct and indirect interests. A direct interest includes shares, debentures or other proprietary rights in a company. Indirect interests would include pecuniary and financial interests.

249. In our view, the phrase "*direct or indirect interest in Ithuba*" is sufficiently wide to include both proprietary and pecuniary or financial interests. This interpretation is consistent with the suite of interlocking agreements concluded between the parties, namely the Governing Agreement, First

---

[117] *Scheckter v Kolbe* 1955 (3) SA 109 GWD at 111C-E and cases there cited.

Addendum to the Management Agreement, Preference Shares Subscription Agreement, HCI Treasury Loan Agreement and the Restructuring Agreement.

250. HCI undoubtedly has a substantial, pecuniary and financial interest (if not a contingent proprietary interest) in Ithuba. Its long-term investment in Ithuba comprised preference shares which were redeemed with the proceeds of the Holdco New Loan. When the Management Agreement Addendum was concluded, the parties anticipated that ultimately, and provided Probity was achieved, HCI would have an interest in Ithuba in the form of preference shares. It cannot be said that upon the redemption of HCI preference shares HCI lost its direct or indirect interest in Ithuba.

251. For these reasons HCI is entitled to the declaratory order set out in prayers (c)(ii) and (c)(iii) of the statement of claim.

MERGER

252. It was further argued that if HCI were permitted to exercise its oversight rights, it would be implementing a merger within the meaning of the Competition Act, 89 of 1998. A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the

whole or part of the business of another firm (s 12(1)(a) of the Competition Act). A person controls the firm if that person, *inter alia*, is entitled to vote a majority of votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of that person; is able to appoint or to veto the appointment of a majority of the directors of the firm or has the ability to materially influence the policy of the firm.

253. It was submitted that on a plain reading of the rights that HCI would acquire in terms of clause 5A.3 of the Management Agreement Addendum, HCI would be entitled to "nominate for appointment and/or require the removal of any person(s) as directors of Zamani or Ithuba". This would constitute acquiring control over both Zamani and Ithuba since HCI would have acquired the ability to appoint or veto the appointment of a majority of the directors of both companies. Furthermore, HCI would be entitled to provide instructions to Zamani in respect of the manner in which it conducts business in relation to Ithuba. This would constitute acquiring the ability to control part of Zamani's business and all of Ithuba's business and falls within the ambit of s 12(2)(g) of the Competition Act.

254. Section 13A(1) of the Competition Act provides that "[a] party to an intermediate or a large merger must notify the Competition Commission

of that merger, in the prescribed manner and form". Section 13A(3) of the Competition Act provides that "[t]he parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions by the Competition Commission in terms of s 14(1)(b), the Competition Tribunal in terms of s 16(2) or the Competition Appeal Court in terms of s 17".

255. The need to notify mergers before they are implemented or to delay implementation until regulatory approval has been obtained, was affirmed by the Constitutional Court in *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others.*[118]

256. Thus, it was argued, we could not permissibly grant the relief sought in prayers (a), (b) and (f). If merger approval is required, HCI, Ithuba and Zamani would be prohibited from implementing the merger until such time as such approval is obtained. Consequently, any arbitration award directing Ithuba or Zamani to implement the merger would be unlawful.

257. Once again, we do not agree with these contentions.

258. We do not agree that an arbitration award directing Ithuba or Zamani to implement the merger would be unlawful. It is not for us to determine

[118] 2018 (12) *BCLR* 1553 (CC) para 33.

whether the exercise of the oversight rights constitute a notifiable merger within the meaning of s 13A(1) and (3) of the Competition Act. That is a matter for the Competition Authorities to resolve. Our function is to determine the parties' respective rights and obligations under the agreements in issue.

259. The Competition Authority has the power to investigate whether a transaction constitutes a notifiable merger. In *SOS Support Public Broadcasting Coalition and Others* (*supra*), the Constitutional Court stated the following.

> "[43] The power to investigate whether a transaction constitutes a notifiable merger stems from s 13A(1) and (3), read with s 59(1)(d)(iii) of the Competition Act. Section 13A(1) obliges a party to an intermediate or large merger to notify the Commission of the merger. Section 13A(3) prevents prior implementation of a notifiable merger without the approval of the Commission, the Tribunal or the Competition Appeal Court. If the Commission finds that a notifiable merger has been implemented without approval, it must refer that transaction to the Tribunal for adjudication. Section 59(1)(d)(i) empowers the Tribunal to impose an administrative penalty on firms that fail to give notice of a merger or implement a notifiable merger without prior approval. ..."

260. If, indeed, it is determined by the Competition Authorities that the exercise of the step-in and oversight rights in terms of clause 5A.3 of the Management Agreement Addendum meets the definition of a merger in

terms of s 12 of the Competition Act, then the duty would fall upon HCI to seek merger approval in the prescribed manner and form.

261. Should HCI implement the merger without notifying the Competition Authorities or obtaining merger approval, it would commit a contravention the Competition Act. Section 59(1)(d) empowers the Tribunal to impose an administrative penalty on parties to a merger that have failed to give notice of the merger or proceeded to implement it without approval.

262. To sum up, it is not the grant of the orders sought in prayers (a), (b) and (f) but their implementation that may be affected if merger approval is required. Consequently, any arbitration award directing Ithuba or Zamani to implement the merger would not be unlawful.

NO APPROVAL FOR HCI TO MANAGE THE BUSINESS OF ITHUBA

263. A further basis upon which it is alleged HCI may not assert a right to exercise oversight rights is that HCI has not secured the necessary consents and approvals required for it to exercise these rights from the Minister and from the NLB. Three independent grounds are relied on. First, that HCI has not obtained Probity. Second, HCI has not secured the Minister's approval to effect a change in control of Ithuba and, third,

HCI has not secured the consent of the NLB under clause 5A.4 of the Management Agreement.

264. It is common cause that HCI has not been granted Probity by the Minister. If HCI Holdco does not get Probity from the Minister prior to exercising its oversight rights, then Ithuba would breach the licence and expose itself to having its licence revoked in terms of the Lotteries Act.

265. It is further common cause that in a letter dated 23 April 2015 the Minister agreed to consent to the terms of the Management Agreement Addendum and the possible cession and delegation by Zamani of its rights under the Management Agreement. He also consented to the issue of preference shares by Ithuba to HCI and Zamani. However, that consent was withdrawn. At the present date there is no ministerial consent in favour of HCI exercising oversight rights.

266. Clause 5A.4 of the First Addendum to the Management Agreement provides:

> "5A.4 Notwithstanding anything to the contrary in this clause 5A, the exercise of HCI Invest's rights in terms of this clause 5A shall always be subject to the approval of the NLB, to the extent that such approval is legally required and Ithuba and Zamani shall do all such things as shall be necessary to assist in procuring such approval where legally required."

267. The respondents assert that HCI lacks approval from the NLB and that it may not exercise its oversight rights until it receives such approval. Accordingly, it is submitted that we could not permissibly grant the relief sought in Prayers (a), (b) and (f) in the statement of claim.

268. Again, we are of the view that HCI is contractually entitled to exercise the oversight rights and that there is no obstacle to the grant of the relief sought in Prayers (a), (b) and (f) in the statement of claim. If HCI wishes to exercise these rights it will have to obtain Probity and the necessary approval of the NLB.

SPECIFIC PERFORMANCE

269. The respondents also contend that the relief sought in prayers (a), (b) and (f) is in the nature of specific performance and should be refused in the exercise of our discretion.

270. Two reasons are advanced for this contention. The first is that HCI has sought to exercise the oversight rights because it wants to get the 1% fee, and not in order to protect its interests. HCI could not have entertained any serious doubts about the ability of Ithuba to service the debt at the time when the oversight was exercised. Ms Mabuza testified

that Mr Shaik told her that HCI wanted the fee (not the right of oversight), and her evidence was not challenged in cross-examination.

271. The second reason is that Ithuba has repaid all of its debt to HCI. It would be absurd for HCI to exercise management oversight in circumstances where Ithuba is in no need of oversight in order to ensure its ability to repay the debt to HCI.

272. In our view, these are not sufficient reasons to refuse an order for specific performance. HCI is entitled to an order compelling the respondents to comply with their contractual obligations. It is established law that a court has the discretion to refuse specific performance. A court will decline to exercise a discretion in favour of granting specific performance if compliance with its order would be impossible, cause undue hardship or injustice, or where it will be difficult for the court to enforce its order. None of these considerations applies to the present matter.

273. There is in our view sufficient justification for the grant of an order of specific performance. Ithuba is not carrying on its business in accordance with the requirements of the Base Case Financial Model. Contrary to the Model, Ithuba is paying the salaries and wages of employees and has unilaterally sought to implement a new financial

model that differs materially from the Base Case Financial Model. This was done without the concurrence of HCI as required in terms of the Governing Agreement. The reliability and accuracy of Ithuba and Zamani's financial reporting was understandably of concern to HCI.

274. It was contemplated in terms of the Restructuring Agreement that once Probity was obtained, the HCI Holdco New Loan would be capitalised into new preference shares in Ithuba on the identical basis to the HCI preference shares (see clause 4.4.2). As we have already found, Ithuba and Zamani thwarted the attempts made by HCI to obtain Probity. It has also wrongly purported to repay the HCI Holdco New Loan. The purpose of the oversight rights is to protect HCI's considerable long-term investment and financial interests in Ithuba.

275. For these reasons HCI is entitled to an order for specific performance.

CONVENTIONAL PENALTIES ACT

276. The respondents contend that clause 5A.3.6 of the Management Agreement (as amended by the Addendum to the Management Agreement) constitutes a penalty stipulation within the meaning of the Conventional Penalties Act, 15 of 1962. As such, it falls to be reduced under s 3 of the Act.

277. Section 3 of the Act provides that "[t]he court may reduce the penalty to such extent as it may consider equitable in the circumstances". It is a prerequisite to the operation of s 3 that the creditor's claim be based on a penalty stipulation.

278. Section 1 of the Act defines a penalty stipulation as -

> "[a] stipulation ... whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any person, hereafter referred to as creditor, either by way of a penalty or as liquidated damages."

Section 4 of the Act broadens the definition to include a provision relating to forfeiture of certain rights.

279. It has been held that the essence of a penalty stipulation is a payment of money intended to act "*in terrorem* and dissuade the other party from committing a breach for fear of the consequences" (*Cape Municipality v F Robb and Co Limited*).[119]

280. In our view, clause 5A.3.6 of the Management Agreement, as amended, does not constitute a penalty stipulation. The clause provides as follows:

---

[119] 1966 (4) SA 329 (A) at 336C.

"5A.3.6 during the period of such management oversight, charge a monthly management fee equal to 1% (one percent) of Ithuba's monthly gross revenue (plus VAT thereon), which management fee Zamani shall be obliged to pay to HCI Invest forthwith upon receipt of its management fee in terms of the agreement."

281. It is evident from the express wording of the clause that the 1% monthly gross fee is not a penalty but rather a fee which HCI is entitled, by virtue of its exercise of oversight over the affairs of Ithuba and Zamani. It is a fee which Zamani would ordinarily be entitled to claim in respect of the management services which it provides in terms of the Management Agreement.

282. Even if we were to assume that clause 5A.3.6 amounts to a penalty, the question that arises for consideration is whether it is disproportionate to the prejudice that HCI would suffer.

283. It was contended that the Early Trigger Event would have caused HCI no prejudice, whether financial or otherwise. And that in the circumstances we should exercise the power in terms of s 3 to reduce the penalty to nil, or to such other amount as we consider just and equitable.

284. In determining whether to act in terms of s 3, consideration must be given not only to HCI's financial prejudice, but every other rightful interest

that may have been affected by the respondents' conduct. See the discussion in Christie's "*Law of Contract in South Africa*".[120]

285. Ithuba and Zamani, who are the onus-bearing parties, have not adduced any evidence of disproportionality; nor did they present any evidence to substantiate the extent to which the penalty should be reduced.

286. Mr Govender testified that HCI has fourteen different gaming licences in various provinces. If there is any risk of impropriety happening in Ithuba or if HCI took no action to gain insight into the business of Ithuba it could imperil all of HCI's other business activities. We agree that the prejudice to HCI is, self-evidently, significant.

287. In the circumstances, the respondents' contention that the Early Trigger Event would have caused HCI no prejudice, whether financial or otherwise, cannot be accepted.

288. For these reasons we are of the view that HCI is entitled to exercise the step-in and oversight rights provided for in clause 5A of the Amended Management Agreement. We have considered all the arguments raised on behalf of the first and second respondents and have found them to be without merit.

---

[120] (7 ed) pp 664-665.

289. In the result, we propose to grant a declaratory order that HCI was entitled to give the Election Notice dated 19 April 2016 (SOC14 to the statement of claim). HCI is also entitled to the declaratory order sought in prayer (b) and the relief sought in prayer (f) of the statement of claim.

290. HCI is also entitled to an order in respect of the further prayers enumerated in the statement of claim.

291. Regard being had to all the circumstances set out above, it is manifest that the first claimant and the second claimant are entitled to the costs of the arbitration.

THE AWARD

292. The following award is made.

(1) It is declared that –

(a) the HCI Holdco New Loan has not been repaid and remains owing in accordance with the terms of the Restructuring Agreement, as read with the Subscription Agreement and the Preference Share Terms;

(b) the HCI Holdco New Loan to be applied to the capitalisation in Preference Shares in the second respondent, by its nature and substance, constitutes a direct or indirect interest in the second respondent;

(c) first claimant holds a direct or indirect interest in second respondent as contemplated in clause 5A.7 of the First Addendum to the Management Agreement (SOC4).

(2) It is declared that first claimant is entitled to receive from second respondent payments under the HCI Holdco New Loan in the amounts and on the dates as set out in the schedule attached to the claimants' statement of claim as SOC19.

(3) Second respondent is ordered to pay to first claimant those amounts set out in SOC19 in respect of which the due date has occurred, together with interest thereon at 25% *per annum* from the due date to the date of payment.

(4) The respondents are directed to take all steps necessary to capitalise the HCI Holdco New Loan by way of new Preference Shares in the second respondent upon any requisite approval of the Minister of Trade and Industry and the National Lotteries Commission being achieved.

(5) It is declared that first claimant was entitled to give the Election Notice dated 19 April 2016.

(6) It is declared that first claimant is entitled, and first and second respondents are directed, to afford the claimant its right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(7) First and second respondents are directed to take all such steps and do all such things as shall be necessary to assist in procuring the approval of the Minister of Trade and Industry and the National Lotteries Commission, for the purpose of the first claimant acquiring the New Preference Shares and/or exercising its right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(8) It is directed that second respondent make payment to the first claimant of an amount equivalent to 1% (one per cent) of the second respondent's gross monthly revenue, per month, upon fulfilment of the following conditions:

(a) The consent of the Minister of Trade and Industry and the National Lotteries Commission to first claimant's rights to management

oversight in accordance with clause 5A.3 of the Management Agreement.

(b) The approval, if necessary, of the Competition Commission, the Competition Tribunal or the Competition Appeal Court in terms of Act 89 of 1998, to first claimant's right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(c) The exercise by first claimant of its right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(9) Prayers (a)(ii) and (b) of the claim-in-reconvention are dismissed with costs.

(10) The second claimant is directed to make payment to the second respondent of the sum of R166 023 490.81.

(11) First and second respondents are ordered to pay the costs of the arbitration, the claimants' costs of the arbitration, the cost of the Arbitrators, venue, transcribing services and other related arbitration costs. The costs are to include the costs consequent upon the employment of two counsel.

DATED at JOHANNESBURG this 30th day of July 2019

M JOFFE
Arbitrator

for **L MPATI**
Arbitrator

P BORUCHOWITZ
Arbitrator