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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
21 July 2011
DATE SIGNATURE

Case No: 28465/11

21/7/2011

In the matter between:

BASIL READ (PTY) LTD	1st Applicant
BOUYGUES BATIMENT INTERNATIONAL	2nd Applicant
COLLIERS PROPERTY AND FACILITIES MANAGEMENT (PTY) LTD	3rd Applicant
CROSS ATLANTIC PROPERTIES 155 (PTY) LTD	4th Applicant
INSAKI CONCESSIONS (PTY) LTD	5th Applicant
IMALIVEST STUDY TRUST INVESTMENT COMPANY (PTY) LTD	6th Applicant
VUYA INVESTMENTS (PTY) LTD	7th Applicant
WSP GROUP AFRICA (PTY) LTD	8th Applicant

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	1st Respondent
THE MINISTER OF FINANCE	2nd Respondent
TSHALA BESE UYAVUNA CONSORTIUM	3rd Respondent
GROUP FIVE CONSTRUCTION (PTY) LTD	4th Respondent
GROUP FIVE INFRASTRUCTURAL DEVELOPMENTS (PTY) LTD	5th Respondent
WILSON BAYLEY HOLMES OVCON (PTY) LTD	6th Respondent

TOTAL FACILITIES MANAGEMENT COMPANY

(PTY) LTD 7th Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant has instituted urgent application for relief on the following terms:

1.1 that, to the extent necessary, the applicants' non-compliance with the rules of this Court in relation to service and time limits be condoned in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court and permitting this matter to be heard as one of urgency;

1.2 that the first and third to seventh respondents be interdicted and restrained from implementing the tender for the design, construction, operation maintenance and finance of a serviced working environment for the department of Rural Development and Land Reform (the "Department") tender number K7/3/6/3 (0023) 2008/09 ("the Tender") including, without limitation, interdicting and restraining the third to seventh respondents from performing any of their respective obligations in terms of any contracts concluded with the Department pursuant to the tender, pending the finalisation of review proceedings to be brought by the applicants regarding a decision to award the tender to the third respondent, such proceedings to be initiated within fifteen days of the taking of the decision;

1.3 That the first respondent, any such other respondent as oppose the application, be ordered, jointly and severally to pay the costs of this application.

[2] In effect what the applicant is seeking is an interim interdict in terms of which the respondents are restrained from implementing a contract which might be concluded between the Department and the third respondent if all the necessary approvals for the finalisation of the tender process are obtained and a contract is concluded between the first and the third respondents.

[3] This hearing is limited to the determination of two points *in limine* raised by the respondents:

3.1 urgency; and
3.2 whether or not the application is premature.

[4] In the event of a finding that the application is urgent and that it is not premature, counsel for all the parties would arrange with the Deputy Judge President for the enrolment of this application on the special motion court within three weeks of this court's determination of the two points *in limine.*

[5] The second respondent is not opposing the application and will abide by the decision made.

[6] The following facts are common cause. In July 2009 the Department invited bids for a tender to a proposed Public Private Partnership (PPP) project for the design, construction, operation, maintenance and finance of a serviced working environment for the Department. The first respondent is the political head of the Department. The deadline for the submission of bids was 31 December 2009. The first

applicant submitted its bid on behalf of itself and the second to eighth applicants. The third respondent submitted a bid on behalf of itself, together with the fourth to seventh respondents. In January 2010 an evaluation process of the bids took place. During July 2010 the third respondent was selected as the preferred bidder and the first applicant as the reserve bidder. The Department and the third respondent are currently involved in negotiations in order to finalise the bidding process, which if successful, could lead to the signing of a PPP contract between the Department and the third respondent. Further, other necessary approvals for the finalisation of the bidding process have been obtained. The only outstanding approval is the one from the National Treasury, the TAIII, if and when it is obtained would lead to the signing a PPP contract between the Department and the third respondent for the implementation of the PPP project. According to the submissions made on behalf of the first respondent, the applications for the approval of the TAIII has not been submitted to the National Treasury yet as the negotiations are still ongoing. Further, it is common cause that the applicants are not challenging the selection of the third respondent as the preferred bidder and its selection as the reserve bidder. What the applicants contend is that they are challenging the decision, still to be made, awarding the tender to the third respondent, from being implemented pending the finalisation of review proceedings the applicants intends bringing should the tender be awarded to the third respondent.

[7] It was submitted on behalf of the respondents that the application is not urgent and that it is in fact premature. Counsel for the first respondent contended that at this stage, no final decision to award the tender to the third respondent has been taken as the parties are still negotiating. Further that not all the necessary approvals have been obtained. Counsel contends that until such time that the approval from treasury has been obtained for the conclusion of a PPP contract with the third respondent, the applicants have no rights to protect. No

administrative action, as defined in section 1 of the **Protection of Administrative Justice Act** 3 of 2000, adversely affecting the rights of the applicants has been taken. Counsel further submitted that the first respondent has offered to inform the applicant as soon as the negotiations between the Department and the first respondent have been successfully concluded and before the PPP contract is signed. The Department through the first respondent also offered to inform the applicants when the necessary documents are submitted to National Treasury for approval. Furthermore that the applicant would be informed when National Treasury has given its approval and of the reasons for awarding the tender to the third respondent, if that happens. Further that the applicant will be given a period of 10 days to weigh its options, from receipt of the first respondent's reasons to the proposed date for the signing of the contract.

[8] It was submitted for the respondents that the applicant stands to suffer no prejudice before the decision to award the tender to the third respondent is made. Counsel for the third respondent also made submissions as to the negative effect the relief sought would have on the current tender processes, if it was granted before a final decision has been made. Counsel pointed out that if the relief is granted, that would be the end of the process since it would be almost impossible for the third respondent to find people or financial backers where it is uncertain as to when the tender would be implemented. It was further submitted that should the tender be awarded the tender, the respondents will cooperate with the applicant if he decides to bring expedited review proceedings against the decision taken. Further that there was still a possibility that treasury would refuse approving the conclusion of a contract with the first respondent which could result in the first applicant being considered as the preferred bidder.

[9] On behalf of the applicants it was submitted that relief was not sought not for the purpose of preventing the TAIII approval. Nor do the applicants seek to review a decision which had not been taken yet. What they are seeking is to forestall or delay the implementation of that decision once it has been taken. It was contended that the relief was sought as the applicants had a reasonable anticipation and a well grounded apprehension that the TAIII will be given and once given, a contract will be signed between the Department and the third respondent, implementation would take place immediately, thereby denying the applicants from exercising their right to access to courts and to administrative justice. It was contended that the courts are loathe to setting aside a tender once implementation has taken place. It was argued on behalf of the applicant that the probabilities were that the tender would be awarded to the third respondent hence the anticipation of that eventuality by seeking to suspend the implementation of such a decision pending the bringing of a review application. It is the applicants' contention that the first step to the implementation of the contract is the signing of the contract. Counsel for the applicants argued that once the contract is signed a court would be reluctant to intervene in order to prevent any prejudice to the tenderer who was not successful.

[10] From the papers filed and from submissions made by counsel for the applicants, it appears that the reason the applicant claims this matter to be urgent is that once a decision has been made to award the tender to the third respondent, the implementation of the contract would be immediate thereby denying the applicant the opportunity to come to court to challenge the decision of the first respondent. I am, however, not convinced by this argument. In the first place, no final decision has been taken to award the tender, and in particular to award it to the third respondent. As explained by both counsel for the first and third respondents, the first respondent is still negotiating with the third respondent as the preferred bidder. These negotiations were at the time

of the hearing of this application, not yet concluded. Further no recommendation has yet been made to National Treasury that the PPP contract should be signed with the third respondent.

[11] I am of the view that this application is not urgent in that the applicants are seeking an interim interdict to protect rights which have not and could possibly not vest in them if National Treasury decides not to approve the signing of a contract with the third respondent. As a result, I am also of the view that this application is premature until a final decision has been taken to award the tender to the third respondent. The applicant should have waited until a final decision was made to award the tender to the third respondent. What the applicant is seeking is for this court to determine what may or may not happen. It is not a certainty that the first and third respondent will successfully conclude their negotiations and if they did that National Treasury will give its approval. Until a final decision has been taken and National Treasury has given its approval, the applicants cannot seek relief in order to protect rights it does have. Further in as much as the applicants do not allege any impropriety in the process thus far, it cannot seek to challenge a decision which may or may not adversely affect their rights, firstly before such a decision has been taken, and, secondly without knowing the reasons for the award of the tender to the third respondent, if in fact it is awarded to it.

[12] I am also not convinced that once the final decision has been taken that the applicant would not be in a position to bring an urgent application, if necessary, to suspend the implementation of the contract. More so in view of the undertakings given by the first respondent to keep the applicant abreast of the progress made in the tender process, including informing the applicant once agreement with the third respondent has been concluded, when submission is made to National Treasury for approval of the conclusion and signing of a PPP contract with

the third respondent. The respondents have further given an undertaking that after the conclusion of the negotiations; the first respondent would not sign the contract for a period of 10 days after the notification has been given to the applicants in order for it to consider what steps, if any, they should take. Furthermore, the first respondent also undertakes not to sign the contract for a period of 10 days from the time that the reasons (if reasons are requested) for the decision have been given to the applicant. The period offered affords the applicants sufficient time to bring an urgent application on the same terms and on the same papers, supplemented, where necessary, in view of the reasons given. Furthermore the respondents from their submissions appear amenable that, if the decision is taken to award the tender to the third respondent, to give the applicant the opportunity of bringing an expedited reviews application against such a decision. This clearly answers the question whether the applicant cannot obtain substantial relief in due course. As matters stand now there is no certainty as to whether the applicants, once given the reasons for the decision, will find grounds for review.

[13] In the premises I am of the view that the application is not urgent and also that it is premature.

[14] Accordingly the following order is made:

14.1 The two points in limine are upheld;

14.2 The application is dismissed for lack of urgency and for prematurity; and

14.3 The applicants to pay the costs of this application, including the costs of two counsels of the first and the third respondents.

NP MNGQIBISA-THUSI

Judge of the North Gauteng high Court

CASE NO: 28465/2011

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

PRETORIA 21 JULY 2011

BEFORE THE HONOURABLE MR/MADAM JUSTICE MNGQIBISA-THUSI

In the matter between:

BASIL READ (PTY) LTD	1st Applicant
BOYGUES BATIMENT INTERNATIONAL	2nd Applicant
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HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

JUDGMENT

1. The two points *in limine* are upheld.
2. The application is dismissed for lack of urgency and for pre-maturity.
3. The applicants to pay the costs of this application, including the costs of two counsels of the first and the third respondents.

BY THE COURT

REGISTRAR

☐ Att: BELL DEWAR

HIGH COURT TYPIST: RIA DAVEL