IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 28738/2006
Date heard: 25 & 26 /10/2007
Date of judgment: 12/05/2008

UNREPORTABLE

In the matter between:

LONDOLOZA FORESTRY CONSORTIUM (PTY) LTD	1st Applicant
PAHARPUR COOLING TOWERS LIMITED	2nd Applicant

And

SOUTH AFRICAN FORESTRY COMPANY LIMITED	1st Respondent
THE MINISTER OF PUBLIC ENTERPRISE	2nd Respondent
KOMATILAND FORESTS (PTY) LTD	3rd Respondent

JUDGMENT

DU PLESSIS J:

This is an application for interim relief. Before setting out the relief sought, a fairly comprehensive summary of the background is called for.

The first respondent (SAFCOL) is a company registered in terms of the Companies Act, 61 of 1973. It was established under the Management of State Forests Act, 128 of 1992 to manage state owned forests on a commercial basis. The state, through the second respondent (the Minister of Public Enterprises) is SAFCOL's sole shareholder.

In order to privatise its forest interests, the government established a

number of companies referred to as privatisation vehicles. The third respondent is such a company. It is a wholly owned subsidiary of SAFCOL and it holds SAFCOI's interests in the Komatiland Forest area, comprising state forests in Mpumalanga, Limpopo and a small area in KwaZulu-Natal.

After previous attempts to privatise the relevant state forests by selling shares in the third respondent, the Government in 2003 again set the wheels in motion in order to privatise the Komatiland Forests. Interested parties were invited to express their interest in the purchase of 75% of the shares in and of shareholder's claims against the third respondent. The government short-listed six interested parties and in June 2003 sent to them a set of documents called the "Transaction Documents" comprising an "Invitation to Make and Offer" ("ITO"), an "Information Memorandum" ("IM") and draft "Sale Agreements" distributed with the ITO. (According to the glossary of terms that formed part of the ITO, the term "Sales Agreements" could bear an extended meaning, but that is not presently relevant.)

From the short-listed bidders, the government chose a "preferred bidder" and a "reserve bidder". A consortium consisting of the first and second applicants (Londoloza and Paharpur) was the reserve bidder.

Towards the end of 2003, the government entered into negotiations with the preferred bidder, Bonheur Trading (Pty) Ltd). The applicants' initial

bid was to expire on 17 March 2004. While negotiations with Bonheur were still in progress, on 17 March 2004, the applicants, as reserve bidder, were requested to extend their bid until 31 July 2004. That the applicants did.

On 31 March 2004 Bonheur and SAFCOL reached an agreement conditional upon, among other conditions, the approval of the transaction by the South African competition authorities. Bonheur took the necessary steps to obtain such permission, and in the meantime the applicants were requested again to extend their bid, which they did until 31 July 2005. After initial failure to obtain it, Bonheur explored further avenues to obtain the permission of the competition authorities. While this was going on, the applicants were on 28 July 2005 again requested to extend their bid. The applicants contend that they extended their bid until 31 March 2006. In the meantime, on 6 February 2006, Bonheur withdrew its application to the competition authorities, thus effectively withdrawing also its bid to purchase the Komatiland Forest interests.

Following upon Bonheur's withdrawal, the applicants contended that they had thereby been elevated to the status of preferred bidder and they demanded that the government commenced negotiations with them. On 14 March 2006, the second respondent, however, endorsed a recommendation by SAFCOL's board and decided not to proceed with the then current process of selling the 75% shares in and claims against the third

respondent. The second respondent also decided to restructure the transaction, split the Komatiland Forest interests into different parts, and to put it up for sale by tender again.

Following the decision to discontinue the process in which they were the reserve bidder, the applicants launched a review application in August 2006. I shall discuss the relief they seek in more detail later. It is sufficient at this stage to state that the applicants are effectively seeking the review and setting aside of the decision to terminate the process and an order aimed at forcing the first and second respondents to negotiate with them. I shall refer to this review application as the "main application". The respondents in the main application are the same as the respondents in this interim application.

As is required by Rule 53 of this court's rules, SAFCOL and the second respondent filed records of the proceedings that led to the decisions that fall to be reviewed in the main application. Contending that the records filed are incomplete, the applicants launched a second application to compel the delivery of a fuller record. The papers in that application to compel were also put before this court. The parties in that application are the same as in the main and in the present application.

The first and second respondents took certain steps towards setting in

motion a new process to privatise the Komatiland Forests by selling their interests in the third respondent. This prompted the present application for interim relief pending the determination of the main application. The applicants seek interim interdicts restraining the first and second respondents from "taking any further steps in the process of selling, in whole or in part, the commercial forestry interests of the first and second respondents in the third respondent".

An interim interdict seeks to preserve the status quo pending the final determination of the parties' rights (Harms: Civil Procedure in the Supreme Court Vol. 1 A.5.5). As such, it is designed to protect the integrity and legitimacy of the pending legal proceedings. Accordingly, as a first requirement, an applicant for such an interdict must establish, at least prima facie, facts that will entitle it to the relief it seeks in the main application. It is for present purposes important to note that, if an issue in the main application is a legal one, the court must decide that issue. It cannot grant the interim relief on the basis, for instance, that the applicant has a reasonable prospect of success in the main application and thus postpone the decision of the legal issue (Harms: op. cit. A5.8).

For the respondents it was contended that the applicants have indeed failed to establish to the required degree that they are entitled to the relief they seek in the main application, I shall now consider the different prayers in the

main application in turn. Three prayers are relevant, and I start with the third for reasons that will become apparent.

The applicants' right to be negotiated with in good faith

In terms of prayer 3 in the main application, the applicants seek an order that the first and second respondents "immediately… negotiate, in good faith, with the applicants regarding the sale of their commercial forestry interests in the third respondent", For this relief, the applicants rely on the terms of a contract allegedly concluded between them, on the one hand, and SAFCOL and the second respondent on the other hand, The contract, so the applicants contend, was concluded "in light of the Consortium's participation as a bidder in the KLF (Komatiland Forests) tender, its appointment as the reserve bidder, the subsequent extension of its offer on a number of occasions over a significant period, and the correspondence that followed the withdrawal of the Bonheur Transaction ...". Counsel who appeared for the applicants stressed that the consensus required for the contract on which the applicants rely must be inferred from all the mentioned circumstances cumulatively.

It was an express, tacit or implied term of the contract, so the applicants further contend, that the first and second respondents "would enter into good faith negotiations with the Consortium for the sale of the KLF stake,

in the event of the Bonheur Transaction failing". A further express, tacit or implied term of the contract contended for was that the first and second respondents by agreement owed them "a duty to act fairly and in good faith". The effect of the latter contractual term, so the applicants aver, is that the respondents "could not refuse to negotiate with the Consortium, or withdraw the KLF transaction in bad faith or without allowing the Consortium to make representations on such a decision". In summary, and expressed in the order that events would occur, the applicants rely on contractual rights, first that the respondents would not withdraw the "KLF transaction" in bad faith. If, presumably in good faith, the respondents contemplated the withdrawal of the transaction, they would allow the applicants to make representations before taking the decision. If they decided not to withdraw the transaction, then the respondents would have a contractual duty to "enter into good faith negotiations with the Consortium for the sale of the KLF stake". It is this latter term that underpins prayer 3 of the notice of motion in the main application that I am now considering.

It is clear from the applicants' founding papers that their alleged contractual right to be negotiated with is dependant on their status as reserve bidder. I have pointed out that their bid was to expire on 17 March 2004 but that is was extended, ultimately to 31 July 2005. By letter dated 28 July 2005, the Director, Legal Services of the Department of Public Enterprises ("the Department") invited the applicants again to extend their bid, this time until

31 March 2006. The letter expressly states that "the fact that Government is requesting you to extend your offer ... should not create any expectations with regard to Government entering into formal negotiations with you as reserve bidder or as preferred bidder. ... Government reserves the right, at any time as envisaged in the ITO, to withdraw the Komatiland Forests Package from the tendering process." In their founding affidavit in the main application, the applicants make it plain that they fully understood these express conditions for any further extension of their bid. In a letter dated 30 July 2005, however, they purported to extend the validity of their bid noting that "the extension of our offer should not be construed as an admission that Government may act unlawfully or unfairly in relation to the process of selling the shares and claims in KLF … In addition, the extension of our offer does not amount to a waiver of, and does not affect, any of the legitimate expectations that Londoloza may already have (and will therefore continue to have) in relation to the sale process (whether arising from its status as the reserve bidder or otherwise)." While acknowledging that that is not what the respondents intended, the applicants contend that their letter preserved their alleged contractual right to be negotiated with. It follows that, on their own evidence, the applicants purported to extend their bid on terms different from those that the respondents offered. At best the applicants made a counter offer that they do not allege the respondents accepted. It follows further that the parties did not reach consensus as to the terms for extending the applicants' offer until 31 March 2006. Put differently, the applicants did not validly extend their offer

beyond 31 July 2005. When the respondent on 14 March 2006 decided not to proceed with the then current process of selling the 75% of the shares in and claims against the third respondent, the applicants' offer had accordingly expired and they no longer were the reserve bidder. On this basis alone the applicants are not entitled to an order compelling the first and second respondents to negotiate with them. I shall nevertheless deal with further arguments as to whether the applicants are entitled to the order sought.

It is the applicants' case that the contract that they rely on must be inferred from a cumulative consideration of their participation in the process, their status as reserve bidder, the extensions of their bid and subsequent correspondence. Bearing in mind that these factors must be considered cumulatively, I shall first consider each one in turn.

The first part of the ITO is an "Important Notice" to those taking part in the process. Paragraph f of that Important Notice provides: "The Transaction Documents are not intended to constitute an offer or recommendation to enter into any transaction involving Government, SAFCOL or Komatiland Forests and/or the Forestry Assets, nor an intention to enter into any legal relationship with any party". Paragraph j provides that the receipt "of the Transaction Documents does not confer any right on any party in respect of the Forestry Assets or in respect of or against Government. SAFCOL, Komatiland Forests and/or their respective advisors." In my view these paragraphs made it

abundantly clear to participants in the process that their participation as such could not create any rights. The applicants do not allege any facts that contradict the clear terms of the ITO.

The question is whether the applicants' appointment as reserve bidder brought about any change in their legal position as participant in the process. The term "reserve bidder" is not defined in the glossary of the ITO. Paragraph 8 of the ITO deals, inter alia, with the selection of a preferred bidder, a term that is defined in the glossary. In terms of paragraph 8.3.4, the reserve bidder, if any, is the bidder with whom "negotiations may be pursued ...". In this context, and also in view of what is contained in the Important Notice, the use of the word "may" makes it plain that the selection of a party as a reserve bidder does not entail on the part of the respondents any undertaking to negotiate with that party. By letter dated 3 December 2003 the transaction advisor appointed by the respondents, informed the applicants that the cabinet has approved them as the reserve bidder. The letter continues: "In terms of the ITO, should the negotiations with the Preferred Bidder not be successful, negotiations will commence with you immediately." The letter concludes with the following: "Please refresh your familiarity with the ITO relating to the Preferred and Reserve Bidder status". Counsel for the applicants argued that the first quoted portion of the letter indicates that the respondents intended to bind themselves to negotiate with the applicants if the negotiations with Bonheur proved unsuccessful. I cannot agree. The full

context of the letter conveys no more than that the applicants were appointed as reserve bidder in terms of the ITO which, as I have pointed out, does in terms not create an obligation to negotiate with the reserve bidder. To the extent that the first quoted portion might in itself have conveyed a definite intention to negotiate with the applicants if the Bonheur Transaction failed, it is qualified by the closing sentence of the letter. I conclude that the applicants do not allege facts that prima facie show that, by appointing them as the reserve bidder, the respondents evinced an intention, contrary to the ITO, to be obliged to negotiate with the applicants.

I have dealt with the extensions of the applicants' bid. The last, and presently relevant, request for an extension made it clear that the extension in itself would not create any obligation on the part of the respondents to negotiate with the applicants. Moreover, in my view the mere fact of several extensions does not serve to contradict the terms of the ITO.

While Bonheur sought approval from the competition authorities, the applicants launched an application to this court for a declaratory order to the effect that even the permission Bonheur was seeking would not be in accordance with the Transaction Documents. Bonheur withdrew its application to the competition authorities before judgment in that application was handed down. The applicants then wrote to the Department of Public Enterprises that they (applicants) assumed "that the Government will now

award preferred bidder status" to them. The applicants conveyed their willingness to commence negotiations with the respondents. Attorneys acting for the Department responded to the letter by stating that the "Department is willing to engage in discussions with yourselves on various matters on the ... process" of restructuring the Government's Komatiland forestry interests. The attorneys added that such discussion could, however, only start after judgment in the application for a declaratory order has been delivered. For the applicants it was contended that this letter is a further confirmation of an agreement between the relevant parties to negotiate in good faith. That is not what the letter states or implies. Also, in this respect too, the letter dos not in any way convey an intention to deviate from the terms of the ITO.

I hold that not one of the factors on which the applicants rely for the inference that a contract has been concluded, justifies such an inference, not even on a prima facie basis. Cumulatively the factors prove no more than that the applicants were afforded reserve bidder status in terms of the ITO, and that such status gave them no contractual right as they contend for. It follows that the applicants did not establish to the required degree the contract they rely on.

Counsel for all the parties were agreed that our law of contract does not recognise a contractual obligation the sole content of which is to negotiate with a view to enter into another contract (Premier, Free State and Others v

Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) par. 35). Counsel for the applicants submitted that our law should be developed to recognise such an obligation. In view of the binding authority of the judgment referred to, this court is not in the position so to develop the law. Even if it were, the facts, as I have concluded, do not even prima facie prove the consensus required for such a contract.

The applicants also contend that the facts summarised above gave rise to a legitimate expectation on their part that the respondents would negotiate with them if the Bonheur transaction failed. In my view the facts relied upon by the applicants do not show prima facie that either of the respondents concerned acted in a manner that gave rise to such a legitimate expectation. In any event, our law does not recognise that a party can attain a substantive result by way of a legitimate expectation. (Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at par. 25 to 28)

It is concluded that the applicants did not prima facie establish a right to the relief sought in prayer 3 of the notice of motion in the main application.

Setting aside of the decision not to proceed with the process to alienate the Komatiland Forestry Interests.

In prayer 1 of their notice of motion the applicants seek an order setting

aside the first and/or the second respondent's decision to discontinue the process of selling the commercial forestry interests by means of a public tender process.

I do not think that anything turns on it, but I point out that the prayer does not correctly reflect the decision. SAFCOL's board resolved that it was in the best interests of the company and its shareholder" not to proceed with the current sale process and to recommend to Government that the Komatiland package should be withdrawn from the Government Forest Restructuring Process and that the Reserve Bidder be informed accordingly". The second respondent endorsed the recommendation, albeit not in its exact form.

In the first place the applicants contend that the decision falls to be set aside because it was taken in breach of the respondents' contractual obligation to act fairly and in good faith. This contractual term implied, according to the applicants, that the respondents would not terminate the process in which the applicants took part as reserve bidder without first affording them an opportunity to make representations. Assuming that a contract that one party must treat the other "fairly and in good faith" is capable of enforcement, I hold, for the reasons stated above, that the applicants did not establish such a contract. I accept that a more precise contract that the respondents would afford the applicants an opportunity to be heard before taking the relevant decision, is capable of enforcement. That is not the

contract the applicants set out to prove, however. I should add that in my view the facts do not, on a prima facie basis, establish such a contractual obligation. The terms of the ITO make it plain that the conduct of the process itself was not to be understood to convey that the respondents in any way intended to enter into any legally binding relationship with any party.

The applicants further contend that the decision constituted administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). As such it is, so was contended, subject to review in terms of PAJA.

In order to decide whether the decision constitutes administrative action, it is first necessary to determine who took the decision. Counsel for the applicants contended that the decision was a composite one taken by the board of the first respondent and the second respondent. That contention does not accord with the evidence, however. The common cause facts establish that SAFCOL's board did resolve that it was in the best interests of the company and its shareholder not to proceed with the then current sale process and to recommend to Government that the Komatiland package should be withdrawn from the Government Forest Restructuring Process and that the Reserve Bidder be informed accordingly. It is also common cause that SAFCOL was established to manage the government's forestry interests. As such it was not empowered to sell those interests or, for that matter, to

decide to terminate the government's initiative to sell the interests. It is only the second respondent, in his capacity as a member of the executive and as such also a shareholder of SAFCOL, who could take that decision. The facts show that SAFCOL's board made a recommendation and that the second respondent, having a "decision memorandum" from the Department before him, endorsed the board's resolution and thus withdrew the Komatiland Forestry interests form the process. The decision was not a composite one, but one that only the second respondent could take and did take.

The question now is whether the second respondent's decision to terminate the relevant process constituted administrative action. Relevant to the present enquiry section 1 of PAJA defines administrative action as "any decision taken, or any failure to take a decision, by –

(a) an Oigan of state, when

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

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

Counsel were *ad idem*, and rightly so, that the second respondent, as a member of cabinet and of the national executive, is an organ or state. The question is whether, in taking the decision, the second respondent was either exercising a power in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation. As to the latter

possibility, the second respondent did not take the decision in terms of any legislation. The decision was taken in the course of implementing cabinet's general decision to privatise public enterprises, including its commercial forestry interests. In this regard it must be borne in mind that the specific decision was one not to continue the then current process of privatisation, but in its full context it was taken as part of a decision to go about the process differently. Cabinet's decision to privatise public enterprises was not taken in terms of any empowering legislation. It was, using the Concise Oxford English Dictionary's definition of "policy", "a course of action adopted by a government" (See as to the nature of a policy decision Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) Section 21 Inc. 2001 (1) SA 1 (CC) at par. 18; President of the RSA v SA Rugby Football Union 2000 (1) SA 1 (CC) par. 143). The decision now under attack, being part of the privatisation process, likewise constitutes a policy decision. Section 85(2)(b) of the Constitution of the Republic of South Africa,1996 provides for the cabinet's power of "developing and implementing national policy". When the second respondent took the decision in question, he was therefore no doubt exercising his constitutional power to develop and implement policy. However, section 1 of PAJA excludes from the definition of administrative action "the executive powers or functions of the National Executive, including the powers or functions referred to in sections ... 85 (2) (b ... of the Constitution".

I conclude that the decision under attack in prayer 1 of the notice of motion in the main application constituted a policy decision in terms of section 85(2)(b) of the Constitution and not administrative action as defined in PAJA and is not reviewable under PAJA.

For the applicants it was submitted that the decision is in any event subject to review for want of legality. I shall deal with the grounds on which such review is sought in turn.

The applicants contend that the decision lacks legality as it was motivated by bad faith or bias on the part of the second respondent. To support this ground, the applicants in their founding papers seek to demonstrate that in the course of the tender process, the Department and SAFCOL displayed an intention to favour Bonheur while treating the applicants with some disdain and unfavourably. The applicants do not allege that the second respondent's actual decision was motivated by these factors. Put differently, allegations of bias and bad faith on the part of SAFCOL and the Department are not imputed to the second respondent. I should add that, even the allegations made in regard to SAFCOL and the Department do in my view not on any basis prove mala fides or bias. That is assuming that bias is a ground for constitutional review.

The applicants contend that, when the second respondent took his

decision, he was not apprised of all the facts in that he was not referred thereto that the applicants are the reserve bidder. This allegation in itself puts paid to any allegation of bias of bad faith on the part of the second respondent. I am by no means convinced that the facts show that the second respondent did not know of the reserve bidder. In any event, in view thereof that he was taking a policy decision, the fact that there was or was not a reserve bidder was irrelevant: I have already found that the applicants had no rights in regard to the sale of the assets, and the second respondent was called upon to make a decision on principle, not *ad hominem*.

The applicants contended that the decision was taken in violation of section 217(1) of the Constitution that provides: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." The decision under attack is not a contract for goods or services, and section 217 of the Constitution does not apply to it.

Finally the applicants contend that the decision must be set aside as it fails to comply with section 51 (1)(a)(iii) of the Public Finance Management Act, 1 of 1999. The section provides: "An accounting authority for a public entity ... must ensure that that public entity has and maintains ... an appropriate procurement and provisioning system which is fair, equitable,

transparent, competitive and cost-effective". Leaving aside other questions as to the applicability of this provision to the decision under attack, the decision did not amount to a "procurement and provisioning system". The provision does not apply to the decision.

In the result the applicants did not make out a prima facie right to the relief sought in terms of prayer 1 in the main application.

The decision not to negotiate with the applicants

In prayer 2 the applicants seek to set aside the decision not to negotiate with the applicants. I have held that the applicants have no right to be negotiated with. I have also held that the applicants did not establish a prima facie right to have the decision to discontinue the process reviewed and set aside. In the circumstances the relief sought in prayer 2 is of no practical significance and of academic interest only.

Each of the parties was represented by two or more counsel. Given that fact, and also the importance and complexity of the matter, the costs of two counsel for each of the respondents are warranted.

In the result the following order is made:

1. The application is dismissed.

2. The applicants are ordered to pay the costs of the respondents, including the costs of two counsel for the first and third respondents together, and for the second respondent.

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B. R. DU PLESSIS
JUDGE OF THE HIGH COURT

Applicants' Legal Representation:
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