IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, DURBAN

CASE NO: 8108/2009

In the matter between:

INDO CONTRACTORS CC	Applicant
and	
TFMC (PTY) LIMITED	First Respondent
TELKOM SA LIMITED	Second Respondent
GVK – SIYA ZAMA	Third Respondent

REASONS FOR JUDGMENT

SKINNER AJ:

[1] This matter was brought as an urgent application before me on 10 June 2009. The applicant sought an order pending the outcome of an application for review, interdicting *inter alia* the third respondent

from commencing with the works necessary for the construction of a new telephone exchange at Gateway ATE. It was common cause or at least not disputed that the third respondent which was the successful tenderer in the tender in dispute, "**would, in order to meet the tight deadlines which have been set in order to complete the contract timeously, have to commence establishment of the site commencing on Friday, 12 June 2009**". Accordingly, in view of the urgency of the matter I indicated that I would give a ruling on 12 June 2009 which I did with reasons to follow. I now set out my reasons for declining to grant interim relief.

[2] The applicant's case was that the first respondent was acting as the second respondent's agent, that the second respondent was an organ of state performing a public function and that the first respondent in effect by carrying out the functions it did as agent of the second respondent was subject to the Promotion of Administrative Justice Act 3 of 2000. It was accordingly submitted that the provisions inserted by the first respondent into the tender and into the conditions of contract that its decisions were not subject to the giving of reasons therefor was in conflict with the provisions of such Act. It was also submitted that there was an improper motive in not awarding the tender to the applicant. Finally it was submitted that the applicant had a *prima facie* right, if not a clear right, to the interim relief being sought and that the

balance of convenience favoured the grant of the interdict because "**the relevant site is only in the process of being handed over and accordingly there can be little inconvenience to all parties concerned**".

[3] The first respondent disputed that it was acting as an agent for the second respondent and averred that it was a wholly independent company which in terms of a contract concluded between it and the second respondent provided the second respondent with "**turnkey facilities**". It submitted that in the present instance its brief was "**to provide Telkom with a completed infrastructure facility according to Telkom's specifications**". It contended that it acts as a principal and effectively "**sells**" the completed facility to Telkom. It therefore disputed that it was exercising a public power or performing a public function in terms of an empowering provision as required in order for the matter to fall under the Promotion of Administrative Justice Act.

[4] It seems to me that the first respondent is nevertheless in a position of a mandatee. There is much to be said for the proposition advanced by the applicant that the first respondent should be treated as carrying out the functions of the second respondent Telkom. The agreement between the first respondent and the second respondent may well have been concluded in an attempt to evade the consequences of falling under the Promotion of Administrative Justice

Act and to avoid the obligations or duties falling upon Telkom as an organ of state. For present purposes I am prepared to accept in favour of the applicant that the first respondent as mandatee of the second respondent was carrying out the functions of the second respondent and therefore fell under the provisions of the Promotion of Administrative Justice Act.

[5] In my view however there are two fundamental difficulties with the applicant's case. The first is whether the applicant has a reasonable prospect of succeeding in the proposed review of the decision by the first respondent to award the tender to the third respondent. The applicant contended that it had undertaken work for Telkom over a period of seventeen years and that the quality of its work was beyond question with no contract ever being subject to time overruns or cost overruns where it was the fault of the applicant. It relied upon the inadvertent inclusion by the first respondent of an employee of the applicant in the exchange of certain e-mails between the first respondent's Durban office and its head office in Johannesburg in relation to a dispute which had arisen over a variation order in respect of a tender awarded to the applicant by the first respondent for what was referred to as the "**Beach exchange**". One of the e-mails had stated "**I suggest that we don't involve Indo [**the applicant**] in any new contracts until this dispute is resolved**". This was after the first

respondent had allegedly tried to persuade the applicant to waive its charges despite there being a signed and priced variation order. The attitude of the first respondent was that it was not prepared to waive its charges.

[6] The submission was made that:

> **"the motive in not awarding the present contract to the applicant is an attempt on the part of the first respondent to get the applicant to waive the amounts which are legally due to it and until such time as the applicant does so, the applicant will not be considered in any tenders. I submit further that this is not a legitimate reason for withholding such work, particularly where the work involved is work of a public nature and for the public benefit utilising public funds provided by the second respondent. I submit that on that basis alone the decision taken by the first respondent is reviewable and has to be set aside".**

[7] The response to this in an affidavit delivered on behalf of the first respondent was that the e-mail in question had been sent on 16 March 2009. This had however been preceded by certain events. The deponent to the affidavit who was a quantity surveyor stated:

> **"TFMC has a process which it follows before awarding tenders. There is a tender committee which consists of representatives charged with evaluating tenders technically and commercially. I was involved in the**

> **technical evaluation of the tender. To assist in doing so, I instructed an independent practising architect, Mr Roger Colley. He considered the technical aspects of Indo's bid in some detail and reported to me. As a result, I compiled a report which I signed on 12 March 2009… I may say that I trusted and relied on the architect's recommendation that GVK's bid should be preferred to that of Indo, due to his vast expertise and experience. It is significant, I submit, that the evaluation took place on 8 March 2009… and the report was signed by me on 12 March 2009. This was before the date of the e-mail which forms the cause of Indo's complaint (which was 16 March 2009)".**

[8] Another criticism of the decision to award the tender to the third respondent was that the architect in his report to the quantity surveyor previously referred to apparently indicated that he had reservations about the contractor (the applicant) not having undertaken projects of this magnitude where the contract value exceeded more than R10 million and therefore doubted whether the applicant would be able to carry out the works successfully. Mr Broster SC informed me from the bar that his instructions were that the applicant had carried out several projects in excess of the sum mentioned. While not disputing the instruction given to Mr Broster SC I clearly cannot have regard to it since it is not on the papers before me.

[9] The end result is that I am not persuaded that there are reasonable prospects that a review would succeed on the documentation before me at the time that I heard the application. From the passage set out in paragraph [7] of this judgment it would appear that if the first respondent were compelled to supply reasons for its award, it had reasons which on the face of it were valid and justified.

[10] The second aspect on which I was not satisfied is the balance of convenience. I have already set out the approach of the applicant in this regard.

[11] The deponent to the affidavit on behalf of the first respondent fairly indicated that while he had no personal knowledge of the position (in the light of the extremely limited time available to the first respondent to obtain opposing affidavits, I am prepared to accept that the relevant confirmatory affidavit would be forthcoming in due course), the position was that:

> **"the reasons for constructing the Gateway exchange is that current facilities in the Umhlanga area are "bursting at their seams". There has been considerable commercial and residential development in that area over the past few years and existing telecommunication facilities cannot cope. In addition there is the looming problem of the 2010 Fifa World Cup. That event is anticipated to draw large numbers of players, officials**

> **and supporters in the Durban area, many of whom will find accommodation in Umhlanga. This influx of persons will require adequate telecommunication facilities in both landline and broadband. One can imagine the chaos which would be caused if soccer supporters were unable to make use of telephones and/or internet facilities. I do wish to stress however that the facilities not required only to service the 2010 Fifa World Cup. As I understand the matter, unless something is done urgently, there could be a breakdown in telecommunications and connectivity in the Umhlanga area which would seriously inhibit the ability to conduct business in that area. TFMC has undertaken to hand over the completed Gateway exchange to Telkom by 31 March 2010. Time schedules are extremely tight. Any delays could result in this deadline not being met".**

[12] It further appeared from the affidavits delivered on behalf of the first and third respondents that the third respondent had appointed a number of nominated sub paragraph-contractors in respect of electrical, standby power, mechanical, fire protection and technical security. Further, it had met with the proposed excavation contractor – the earthworks were a preliminary to most of the other work being undertaken. It was submitted that if the proposed sub paragraph-contractor could not gain access to the site and commence the earthworks it may well accept other work the consequence of which would be that it might be very difficult to obtain the services of a

reputable and competent sub-contractor at a similar price to that currently being negotiated. This would cause a delay in the completion of the excavation works which would delay the entire contract.

[13] Taking the aforegoing into account I am not satisfied at this stage that the balance of convenience is in favour of the applicant.

[14] For these reasons then I declined to grant any interim relief and therefore merely adjourned the matter *sine die* with an appropriate order as to costs.

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SKINNER AJ

DATE OF HEARING	10 JUNE 2009
DATE OF JUDGMENT	12 JUNE 2009
DATE OF REASONS	17 JUNE 2009
APPLICANT'S COUNSEL	MR L B BROSTER SC
APPLICANT'S ATTORNEYS	GOODRICKES
ATTORNEYS	
1ST RESPONDENTS' COUNSEL	MR C J PAMMENTER SC
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