IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 1204/12

In the matter between:

IBUYILE DEVELOPMENT CONSORTIUM	First Applicant
SEA KAY PROPERTY DEVELOPMENT (PTY)LTD	Second Applicant
And	
THE PREMIER OF THE WESTERN CAPE	First Respondent
THE MEC OF THE DEPARTMENT OF HUMAN SETTLEMENTS, THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	Second Respondent
BUSINESS VENTURE INVESTMENTS 1171 (PTY) LTD. (IN LIQUIDATION)	Third Respondent
SM GORE N.O.	Fourth Respondent
D TERBLANCHE N.O.	Fifth Respondent
G PHILANDER N.O.	Sixth Respondent

(the fourth – sixth respondents are cited in their capacities as the duly appointed final liquidators of Business Venture Investments 1171 (Pty) Ltd. (in liquidation)

JUDGMENT: 19 MARCH 2012

KOEN, AJ

[1] This is an application for an interim interdict restraining the First and Second Respondents from awarding two tenders for the construction of housing in precincts 3 and 5 at Delft Symphony. The First Respondent is the Premier of the Western Cape, cited in her capacity as the representative of the Provincial Government. The Second Respondent is the MEC for the Provincial Government Department of Human Settlements. For all practical purposes there is no distinction between them that is important for the purposes of this judgment and I propose to refer to them collectively as "the Government".

[2] The application is brought because the Applicants, Ibuyile Development Consortium ("Ibuyile") and Seakay Property Development (Pty) Ltd ("Seakay") contend that Seakay, alternatively Ibuyile, have already been granted the right to develop housing at Delft Symphony, or to perform the construction which forms the subject of the tenders in question.

THE FACTS

[3] To contextualise the dispute it is necessary to back some way in time. There has for years been a dire shortage of housing in the Western Cape Province. Some years ago, in order to improve matters, the N2 Gateway Development Project was conceived. Its aim was to provide improved

accommodation for eleven communities residing in informal settlements on land adjacent to the N2 highway near Cape Town. The area known as Delft Symphony, which was divided into six "precincts", comprised a part of the land in question. It was owned by the Provincial Government.

[4] On 10 January 2005 the City of Cape Town ("the City") issued a "Request for Proposal" document in which it invited proposals for what it described as the "turnkey implementation" of the N2 Gateway Development Project. The First Applicant ("Ibuyile") submitted such a proposal. A short while later, on 7 February 2005, the City wrote to three of the entities which had submitted proposals, including Ibuyile, to say that it had *"resolved to form a panel of service providers which have satisfied the requirements of the RfP; and to select members of the panel best suited on a competitive basis for implementation of sub-projects on specific sites as the project rolls out."* A few months later, on 26 May 2005, the City wrote to Ibuyile stating that it had been appointed as developer to complete the Delft Symphony Project. It must be remembered that the Delft Symphony project was only a portion of the larger N2 Gateway Development Project. In all likelihood it was one of the *"sub-projects on specific sites"* which the 7 February 2005 letter referred to.

[5] It is necessary to note at this juncture, that the N2 Gateway Development Project has been administered on behalf of the Government by two other entities. The City of Cape Town was involved at the very early stages, and later Thubelisha Homes. In what follows, and for the sake of simplicity, I refer to actions taken by either the City or Thubelisha Homes as actions on the part of the Government. It is common cause that their conduct bound the Government.

[6] A large number of the houses to be constructed in the Delft Symphony Project were fully subsidised by the State. But there was a category of persons who earned too much to qualify for fully subsidised State housing, and too little to qualify for mortgage finance normally made available by the banks. To address this problem the National Department of Housing and Firstrand Bank Ltd, during December 2006, adopted a memorandum of understanding in terms of which the bank undertook to support the efforts of the State to provide formal housing to citizens who lived in informal settlements. Instead of the housing being fully subsidised by the State, houses would be financed, in part at least, by the bank, which would make mortgage finance available to buyers. These houses, which were slightly larger and more expensive than the fully subsidised houses, were known as GAP houses. The houses to be built on precincts 3 and 5 were GAP houses.

[7] On or about 19 June 2007 Ibuyile concluded an agreement with M5 Housing (Cape) (Pty) Ltd ("M5") and Seakay. In essence, the purpose of the agreement was for Ibuyile to transfer the rights it had flowing from its appointment as developer for the Delft Symphony project in terms of the 26 May 2005 letter to a joint venture between Seakay and M5 for a consideration of R 31 650 554. Seakay was to attend to all construction work necessary to complete the Delft Symphony Project and M5 was to negotiate with FirstRand Bank for the purpose of raising finance for the project. M5 was also to attend to the marketing of the houses which were to be built. The joint venture between Seakay and M5 conducted its business through a company known as Business Venture Investment No 1171 (Pty) Ltd ("BVI"), in which both Seakay and M5 were shareholders. BVI paid a consideration of R 31 650 554 to Ibuyile for the development rights and Ibuyile, the agreement records, then lost any rights it had as the appointed developer for the Delft Symphony development.

[8] At some stage around the first half of 2007 Firstrand Bank began to make enquiries of the Government about the GAP housing it was to finance. It is quite clear from the tenor of the correspondence sent by the Government to Firstrand Bank during September 2007 that although the Government was not going to develop the land and build GAP housing, it owned the land on which the housing was to be constructed, and its

participation was necessary for transfer of the houses to be built to be registered in the names of buyers. Firstrand Bank's interest in the matter, it seems obvious, arose from the fact that it would advance finance to buyers against registration on mortgage bonds over properties. In this correspondence, dated 25 and 28 September 2007, the Government stated that it recognised and acknowledged the Seakay/M5 joint venture, which would operate through BVI, and also acknowledged that the Seakay/M5 joint venture *"held the development rights...in relation to the Precincts 3 and 5 of township Delft Symphony"*. It is also apparent from a letter written almost a year later, on 19 August 2008, that the Government, through its then agent Thubelisha Homes, was aware that the development rights had been transferred to BVI. In none of these letters is there any indication that the Government objected to the arrangements the letters record as having been made between Ibuyile, BVI, Seakay and M5.

[9] During March 2008 Seakay concluded an agreement with BVI. The preamble to the agreement records that BVI required Seakay to construct a number of houses in Delft Symphony precincts 3 and 5, and that Seakay had agreed to construct the houses.

[10] During June 2009 BVI was finally liquidated at the instance of Firstrand Bank for reasons which are not relevant to this matter. It, and the fourth to sixth Respondents, who are its liquidators, are cited as Respondents in this application. They did not participate in the proceedings and have filed a notice stating that they abide the judgement of the Court. Their joinder was necessary because BVI had concluded a contract with Seakay in terms of which Seakay was to construct the houses in precincts 3 and 5 and because the liquidators of BVI have not yet made the election whether or not to stand by that contract.

[11] It must also be mentioned that in June 2009 the liquidators of BVI instituted proceedings - which are not finalised - claiming repayment of the amount paid to Ibuyile by BVI. In those proceedings the liquidators allege that BVI did not receive from Ibuyile the rights it had paid for. If the liquidators are successful, then such rights as may have been transferred from Ibuyile to BVI will revert to Inbuyile.

[12] Although there are disputes about the quality of certain work and materials used by Ibuyile it is not denied by the Government on the papers that since 2006 Ibuyile has completed and handed over in excess of 3200 homes and that it is currently engaged with the completion of 900 homes in precincts 1 and 2. It is also common cause that this work was

done pursuant to the conclusion of formal agreements between Ibuyile and the Government.

[13] During May 2011 it became necessary to construct a biodiversity fence and to clean dumped materials from the site at Delft Symphony. In internal documentation the Government describes Ibuyile as its appointed turnkey contractor to undertake all construction work in precincts 1 to 6 Delft Symphony.

[14] On 2 December 2012 the Government issued two tenders for the construction of houses and other work at Delft Symphony Precincts 3 and 5. Upon becoming aware of this development attorneys instructed by Ibuyile and Seakay wrote to the Government to say that their clients had the rights to perform the work in question and that these rights could not be awarded to anyone else. The letter called upon the Government to furnish an undertaking not to award the tender until the dispute had been resolved. No such undertaking was forthcoming, and this application was then launched.

THE APPROACH TO THE FACTS

[15] Counsel for the Government contended that the relief sought, although framed as interim, was final in effect. If this submission were to be correct it would be necessary for the Applicants to establish a clear right, an injury actually committed or reasonably apprehended, and absence of another adequate remedy.

[16] In regard to final interdicts LAWSA, which provides a commendably clear statement of the law, has this to say[1]: *"Whether an applicant has a right is a matter of substantive law. Whether that right is clear is a matter of evidence. In order therefore to establish a clear right the applicant has to prove on a balance of probabilities facts which in terms of the substantive law establish the right relied upon. In application proceedings the ordinary rules relating to the discharge of the onus on affidavit apply."*

[17] The *"ordinary rules"* applicable to disputes of fact in application proceedings are set out in *Plascon Evans*[2]. They are well known and I do not propose to repeat them.

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[1] Joubert, *The Law of South Africa*, 2nd Ed, Vol 11 at page 415.
[2] *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 624 (A)

[18] The approach to the proof of the facts in interim interdicts is different to that which pertains to final interdicts. It is aptly summarised in LAWSA[3] as follows:

"The proper approach is to consider the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed."

[19] Because different tests apply it is evident that it is necessary, firstly, to determine whether the relief claimed is interim, as the Applicants contend, or final, as counsel for the Government urged me to find.

[20] Whether or not an interdict is final or interim depends upon its effect on the issue in dispute. Interim interdicts are not intended finally to determine legal issues. They exist only to preserve the *status quo,* and to protect the rights of parties until their claims have been finally

[3] Joubert, *The Law of South Africa*, 2nd Ed, Vol 11 at page 420

adjudicated. If the effect of an interdict is not to decide the issue, but to leave it open for later determination, then it is of an interim nature only.

[21] With this in mind I have some difficulty in accepting the submission advanced by counsel for the Government that the effect of the order sought by the Applicants is final. It is true, of course, that the practical consequence of the grant of the order sought by the Applicants would be that the Government would be precluded from awarding the tenders in question. It is also true that such inconvenience would be irreversible. That, however, is the kind of irreversible inconvenience or prejudice to which Stegmann J referred in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (WLD) at 603 F- 604 H. It is sanctioned in our law, as the learned judge put it, *"...for the sound practical reason that it is necessary for the purpose of preserving the subject matter of the dispute for the benefit of the party who is ultimately successful in the main dispute..."*.[4]

[22] If an interim interdict in the terms sought by the Applicants is to be granted in this case the real issue between the parties, namely whether the Government has already given the rights to develop precincts 3 and 5 to Seakay or Ibuyile, will not have been decided. Those development rights

[4] At 604 H of the judgment.

will merely have been preserved for the benefit of whichever party is successful in the future action. In my judgment, therefore, the relief sought is interim in nature, and not final, and the manner in which the facts must be determined is that applicable to interim, and not final, interdicts.

HAVE THE APPLICANTS ESTABLISHED THE EXISTANCE OF A *PRIMA FACIE* RIGHT, EVEN IF OPEN TO SOME DOUBT

[23] The question to be determined is, of course, whether the Applicants have proved, *prima facie*, facts that establish the existence of a right in law. The right in law which the Applicants sought to establish was a contract with the Government, entitling Seakay, alternatively Ibuyile, to develop, or perform the construction work involved at, precincts 3 and 5 Delft Symphony.

[24] I shall deal, firstly, with the position of Seakay. The Government resisted the suggestion that Seakay had any enforceable rights against it to construct the houses in question. Seakay's rights, if any, it argued, were enforceable only against BVI because it was with BVI that it had concluded the written agreement relied upon during March 2008.

[25] I think that this approach takes too narrow a view of the facts. The Delft Symphony Project required for its successful conclusion the participation of not only BVI, and Seakay, but also the Government. It must be remembered that the very purpose of the Delft Symphony project was to enable the Government to fulfil its duty to provide housing. The Government owned the land upon which Seakay was to build the houses. The right to construct housing on the Government's land derived from it, as the owner of the land. Moreover, it seems likely that the Government knew that Seakay had acquired the right to build upon its land and that it acquiesced in this state of affairs. It had, after all, written twice to Firstrand Bank during September 2007 to say as much. In neither of those letters was any objection to the fact that Seakay was to build upon its land recorded.

[26] Counsel for the Applicants contended that the representations made in the letters addressed to FirstRand Bank estopped the Government from denying that Seakay held the right to construct the houses. It is not necessary for me to decide whether or not this is correct, but it is trite that our law will hold a party bound to a contract, even if actual consensus is wanting, in order to protect a party who is induced by the conduct of the other party reasonably to believe that there is consensus. This process of constructing contractual rights and obligations is referred to as the

doctrine of quasi-mutual assent. In my view, having regard to the inherent probabilities, it should be possible for Seakay to show that the Government would be bound by its apparent agreement to the transfer of the development and construction rights for Delft Symphony to Seakay in terms of the March 2008 agreement.

[27] It follows that if Seakay has established *prima facie* that it holds the rights to construct the housing in question Ubuyile is excluded from doing the same. Both cannot hold such rights. However, it is still necessary to consider the position of Ubuyile. This is because if the liquidators do not succeed in the Gauteng proceedings such rights as Ibuyile obtained under the May 2005 letter revert to it.

[28] Ibuyile's position is considerably more tenuous than that of Seakay. Its fate rests upon it being unsuccessful in the application brought by BVI's liquidators to which reference has been made above. For this to happen its version of the facts must be rejected. It would, in my view, be a remarkable thing if our law would permit a party to obtain an interim interdict when the right that party contends for is contingent upon a Court rejecting its own version of the facts. If it has a right at all it is questionable to say the least.

[29] Moreover, it is apparent from the papers that it is far from certain that the juristic entity which was Ibuyile in 2005 is the same juristic entity which is the Applicant in this matter. There is much evidence in the affidavits filed by the Government to the effect that the partners who constituted the Ibuyile partnership in 2005 are not the same partners as those which constitute the partnership today. In my view the facts put up by the Government concerning the standing of the partnership which is the Applicant in this matter throw serious doubt upon its standing. I am thus of the view that the Ibuyile which is before the Court in this application has not shown a sufficiently cogent right for it to qualify for the grant of an interim interdict.

IRREPERABLE HARM and ALTERNATIVE REMEDY

[30] The question to be answered is whether a reasonable person would apprehend the probability of harm. The harm relevant to this case is the threatened breach by the Government of Seakay's rights to perform the construction work at Precincts 3 and 6 Delft Symphony. As I understand our law proof of the threatened breach of contractual rights satisfies the requirement of reasonably apprehended harm[5]. Moreover, our law does

[5] *V & A Waterfront Properties v Helicopter and Marine Services* 2006 (1) SA 252 (SCA) at paras [21] and [22]

not require a party in this position to cancel the contract and sue for damages. Parties to a contract are ordinarily entitled to enforce the bargain they have made. The more so where proof of damages flowing from the breach of a contractual right is difficult, as Seakay asserts will be the case. The suggestion by counsel on behalf of the Government that a claim for damages is an acceptable alternative remedy which, in itself, disqualifies Seakay from obtaining an interim interdict cannot therefore be accepted.

BALANCE OF CONVENIENCE/ DISCRETION

[31] In considering this aspect of the application I am required to weigh the prejudice which Seakay may suffer if it is forced to content itself with cancellation of the contract it alleges exists between it and the Government and an action for damages, against the prejudice which the Government will suffer if it is required to wait until the proposed action is finally determined. Of course, the Government is the representative of the citizens of the Western Cape and it is essentially their interests, and, in particular, the interests of those citizens who would obtain housing when the N2 Gateway project is completed, to which I must have regard. I am also required to exercise a judicial discretion whether or not to grant an interim interdict after having had regard to all the features of the case.

[32] Although I have found that Seakay has proved facts which should substantiate its right to perform the construction work in question it must be observed that its case is open to some doubt. Where on the *continuum* between a strong case and a tenuous one Seakay's proposed action for a declaratory order lies is difficult to pinpoint with precision. It is clearly unwise to attempt to express its prospects of success in accurate arithmetical terms. In my view, however, its prospects of successfully and expeditiously obtaining the declaratory order it proposes to seek are positioned more towards the tenuous end of the scale.

[33] There are certain other factors which cannot be ignored. These are that Seakay's rights depend upon an election which the liquidators of BVI have yet to make, which will not be taken until the Gauteng proceedings are finally determined, against the liquidators. Seakay's rights are thus contingent upon an unpredictable choice to be made at some time in the future by the liquidators. When this might be does not appear with any clarity from the papers. However, one's experience of Court process cannot be wished away, and it is safe to assume that it may well be quite some time before the legal proceedings are finally determined. If an interim interdict were to be granted it would be quite some time, at best for the Applicants, before the housing project proceeds.

[34] It is important not to underestimate the importance of the N2 Gateway Project for the citizens of the Western Cape. In *Grootboom*[6] the Constitutional Court dealt with the intolerable conditions endured by those with no access to adequate housing, and the importance of rendering effective the Constitutional promise of dignity and socio-economic equality. These rights must exist not only on paper and it is the duty of the Court to see that this is so. This should not be understood to mean that these considerations override, in all cases, the rights which the Applicants seek to assert in this matter, but they are in my view, powerful considerations which must be taken into account in the exercise of the Court's discretion whether or not to grant an interim interdict in favour of the Applicants.

[35] In my judgement the balance of convenience does not favour the grant of an interim interdict in this case. The right which Seakay seeks to assert, though it should be established, is doubtful. The right which Ibuyile seeks to assert is considerably more tenuous. If those rights are proven one or the other of the Applicants will have a remedy regardless of the outcome of this application, albeit in the form of a damages claim only. It may not be the perfect result for them, but they will not be left empty handed.

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[5] *Government of the RSA and others v Grootboom and Others* 2001 (1) SA 46 (CC)

[36] On the other hand the prejudice which those whom the Government represents, and in whose interest it acts, will suffer if the construction work is appreciably delayed, as I consider is inevitable if the interim relief sought is granted, is very great indeed. They will be forced to continue to endure the indignity of being without adequate housing. I therefore conclude that the application cannot succeed.

[37] There is no reason in my view, why costs should not follow the result.

[38] I therefore make the following order:

The application is dismissed with costs, including the costs of two counsel.

S. J. KOEN

ACTING JUDGE OF THE HIGH COURT