**Re Bivac International SA (Bureau Veritas)**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 29 November 2005

**Case Number:** 1541/05

**Before:** Nyamu J

**Sourced by:** LawAfrica

*[1] Judicial review – Application for leave to commence proceedings – Whether leave to operate as stay*

*– Applicable principles.*

**JUDGMENT**

**Nyamu J:** By an application dated 25 October 2005, filed on 26 October 2005, the applicant seeks leave

in respect of the following prayers:

(*a*) That leave be granted to the applicant to apply for an order of *certiorari* to remove into the Honourable Court and quash the contract between the Kenya Bureau of Standards and SGS for the provision of services for pre-shipment verification of conformity to standards dated 14 September 2005.

(*b*) That lower court to grant to the applicant to apply for an order of *certiorari* to remove into that Honourable Court and quash the contract between the Kenya Bureau of Standards and Interteck International Ltd for the provision of services of the shipment verification of conformity of standards dated 14 September 2005.

(*c*) The leave be granted to the applicant to apply for an order of *mandamus* directed to the Kenya Bureau of standards requiring the said Kenya Bureau of Standards to invite the applicant to negotiate and sign a contract for provision of services for pre-shipment verification of conformity for standards.

(*d*) That leave be granted to the applicant to apply for an order of prohibition prohibiting the respondent from entering into any contract for the provision of services for pre-shipment verification of conformity to standards otherwise than in strict conformity with the terms of the tender.

(*e*) That the grant of leave to operate as a stay of the proceedings in question ie the implementation of the aforesaid contracts and of any operations there-under pending the hearing and determination of the judicial review proceedings

(*f* ) T hus the costs of and occasioned by this application be costs in the cause. The applicant contends that unless an order of stay is granted the judicial review proceedings,,with respect to which leave is sought herein, will be rendered nugatory to the irreparable loss of the applicant. The application is based on a statement dated 25 October 2005 and filed on the same date, which statement is verified by an affidavit of one Jean Spinosi sworn on 25 October 2005 and filed on the same date which has annexures measuring 6 inches. The brief facts are that the matter arises out of an invitation made by the respondent,Kenya Bureau of Standards (KBS), on 20 July 2005 for tenders to be submitted for selection of agents to offer pre-shipment verification of conformity. The applicant was invited together with six others to submit their tenders. The tender document granted a right to those who submitted proposals to information relating to evaluation of proposals and recommendations concerning awards once the successful tenderers were notified. It is contended, for the applicant, that the respondent refused to provide the information on the basis for the award of the tender and the applicant did move this Court in High Court Miscellaneous 1335 of 2005 by way of a chamber summons dated 12 September 2005 which sought the following orders: (*a*) That the applicant be granted leave to apply for judicial review in the form of an order of *mandamus* compelling the Kenya Bureau of Standards to provide forthwith to the applicant full and detailed information of the evaluation of all the relevant proposals for the Tender number KEBS/TO38/2005/2006 – Pre-shipment verification of conformity (PVoc) to Standards Services and the recommendations made concerning the awards. (*b*) That the applicant be granted leave to apply for judicial review in the form of an Order of Prohibition, prohibiting the Kenya Bureau of Standards from signing the terms of clause 1.3 (as amended) of the aforesaid tender or any contract unless and until the said information has been provided to the applicant, and if the applicant has been given such adequate and reasonable terms as the Honourable Court may determine to consider the same and act on it, if necessary.

(*c*) That the grant of leave do operate as stay the proceedings in question ie the tendering process and the signing of any contract pending the hearing and determination of the judicial review proceedings.

(*d*) That the costs of and occasioned by this application be costs in the cause.

The applicant did, on 12 September 2005, obtain leave to institute judicial review proceedings for an

order of *mandamus* to compel the respondent to provide the requested information and for an order of prohibition to restrain the signing of the contract. The applicant was also granted an order that such leave operates as stay of proceedings in question. The order was served on 14 September 2005 at 10:20am. The applicant received a letter from the respondent on 19 September 2005, stating that any issue raised will be handled in accordance with the Exchequer and Audit (Public Procurement) Regulations 2001 and on 21 September 2005 the applicant counsel responded to the letter pointing out that he said regulations did not apply to the tender. On 15 September 2005, an application for judicial review High Court 1335 of 2005 was filed and served on the respondent and the second interested party Intertech International “ITS” is on the same day but served on SGS on 16 September 2005 (*sic*).

On 26 September 2005, ITS in an affidavit filed in support of an application to set aside the *ex parte* order for leave disclosed that the contract was signed on 14 September 2005 “well after” the order had been served on the respondent. On 27 September 2005 the applicant counsel received a summary (summarised tender evaluation information). On 29 September 2005 the applicant counsel wrote to the respondent to reiterate that the Procurement Regulations did not apply to the Tender. On 26 September 2005 he applied to have the *ex parte* order for leave set aside. On 4 October 2005 SGS made an application set aside the *ex parte* order and the applicant filed a replying affidavit on 13 October 2005. All the proceedings in respect of the above application are still pending. According to the minutes of the Tender Evaluation Committee, the highest bidder, on both the technical and financial score, was the applicant and ITS in that order and that ITS had failed to satisfy the bid bond requirement. ITS is one of the two successful bidders, the other one being SGS.

According to the applicant the tender document prescribed a schedule of activities as follows:

(i) Release of tender 25 July 2005

( ii) Deadline answering questions 8 August 2005

(iii) Deadline of submitting proposals 15 August 2005

(iv) Contract awarding 22 August 2005

( v) Signing contract 22 September 2005

(vi) Start of operations 29 September 2005

On the other hand, according to Eva Adega Oduor the general manager, Standards Development Division

and the Chairperson of the Tenders Tribunal Evaluation Committee of Kenya Bureau of Standards, the

tender schedule 1.3 in the tender provides as follows:

(i) Release Tender 25 July 2005

( ii) Deadline of Answering questions 1 August 2005

(iii) Deadline of submitting proposals 8 August 2005

(iv) Contract Awarding 15 August 2005

( v) Signing of contract 15 September 2005

(vi) Start of operations 22 September 2005

She further depones that the procurement regulations apply, hence, the variation between the two sets of

activities.

The respondent has filed a replying affidavit sworn by Eva Oduor on 3 November 2005 and it also filed written submissions and a list of authorities. The interested parties have also filed written submissions and a written reply. It is important to mention that when the application came before me for hearing, under a certificate of urgency on 26 October 2005, I ordered that the application be served on the respondent for hearing *inter partes* on 1 November, 2005 when the interested parties (the IPS) also appeared through their representative advocates and sought audience. Their presence was, of course, a surprise both to the court and to the applicants and the court did subsequently direct in a ruling that the interested parties could not be shut out, in view of the fact that they appeared to be the affected parties because of the very nature of the subject matter. In this matter, although written submissions have been filed and many authorities cited to the court by all the parties, the court has opted not to refer to them in this ruling because notwithstanding the fact that the IPS were allowed to explain their respective interests the fact of the matter remains that the application is ordinarily *ex parte* and such an application does restrict the court to threshold issues, namely whether the applicant has an arguable case and whether, if leave is granted, the same should operate as a stay. The other reason why the court should avoid making findings beyond the threshold issues, as outlined above, is that in the related matter High Court miscellaneous 1335 of 2005 between the applicant and the respondent there are several pending applications where the same issues, as are raised herein, feature very prominently and the applications have not been determined. However, in view of the complex nature of the case and the fact that the matter was heard *inter partes* and the IPS allowed to explain their interests, even with the above warnings the court is aware that as judicial review remedies are at the end of the day discretionary see this Court’s judgment in *R v Judicial Service Commission of Kenya ex parte Stephen Pareno* High Court miscellaneous 1025 of 2003 (authority number 6 in the respondent’s bundle), that discretion is a judicial discretion and, for this reason, a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court’s discretion. For this reason I intend to outline the factors the court took into account without delving into the details. The other reason for outlining the factors is that in the event of an appeal the appellate court should be able to ascertain how and why the courts discretion was exercised in the way or manner it was exercised. On the issue of leave the court finds arguable issues on a *prima facie* basis as follows:

1. Whether judicial review remedies lie in respect of the application and, if so, what are the remedies.

2. Whether the prayers sought in both applications lie in judicial review or whether they are strictly enforceable as private rights by way of discovery injunction, declarations and damages.

3. Whether promptness or laches should affect the relief claimed.

4. The bona fides of bringing this second judicial review application which *prima facie* appear not to attack any decision but the contracts already signed and the implementation and whether judicial review remedies can attack signed contracts and their implementation.

5. Whether the source of the power challenged is statute ie The Standards Act or the Exchequer and

Audit Act and the regulations or whether the power springs from the contract (or tender).

6. Whether or not there is a contract at all between the applicant and the respondent.

7. The impact of the IPS signed contracts.

8. The impact of any court intervention on other parties including the impact of any such intervention on the country and the economy.

9. The effect in law on the entire application dated 25 October 2005 on the principles.

( *a*) Certiorari quashes an unlawful decision.

( *b*) Prohibition prevents a proposed unlawful act in the future.

( *c*) *Mandamus* compels the enforcement of a public duty by a public authority.

10. W hether or not the court is entitled at this stage to consider the nature of the Actual relief claimed and whether it falls outside judicial review eg whether is contractual, or discovery and mandatory and other injunctions.

11. Whether the principles of good administration apply in this case in view of the nature of the contracts

and the wide spectrum of involvement and effect on other parties, including the country as a whole.

12. Whether the court should take into account the alleged non-obedience of the *ex parte* order in High

Court 1335 of 2005 and whether these second proceedings are an abuse of the court procedure.

13. Whether the applicant has a right to legitimate expectation to a contract in the circumstances.

14. Whether the respondent bound itself to accepting the lowest or any bid at all.

15. Whether there is a principle of public law on which to compel the respondent to offer the contract to

the applicant or any other tenderer.

16. Whether the remedies of specific performance, discovery, and injunctions are available in judicial review

in Kenya.

17. Whether what is sought to be enforced are private rights against a public body.

In the estimation of the court the above are all arguable issues and although the court is aware of the test

formulated by the Court of Appeal in *Wanjuguna v Ministry of Agriculture* (*supra*)–that there should be an arguable case which without delving into details could, succeed, this particular case raises issues which could tilt the tables either way when fully ventilated but it might be in the interest of justice to have them heard on merit instead of, so to speak, tossing a coin. As regards the prayers for leave the above outline of possible arguable issues tilts the balance in favour of granting leave. In my view, an arguable case is not ascertained by the court by tossing a coin or waving a magic ward or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of law. One has to consider, without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him. Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew it became the biggest shrub of all and became a tree so that birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never ending categories of negligence after the celebrated cause of *Donoghue v Stephenson* (*supra*) in the last century. Of course I am not advocating the granting of leave as a matter of routine, without reflecting on the principles of judicial review and its unique jurisdiction – but where in doubt one should consider the wise words of Megarry J in the case of *John v Rees* [1970] Ch 345 at 402: “It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. When something is obvious, they say, ‘ why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.” This is why the litany of arguable issues, as listed above, should be given a day in court without any final pronouncements at this stage. With the above in view, I do grant leave in terms of prayers (*a*)(*b*)(*c*) and (*d*) in the application dated 25 October 2005. However, as regards prayer (*e*) on stay the same is refused after taking into account the following factors: (*a*) *Prima facie* no decision has been attacked and the contracts have already been signed and the implementation or roll out of services has already commenced. (*b*) Although it is arguable whether the regulations under the Exchequer Act apply – the applicant appears to have had an opportunity to attack the decision to award the contract under the regulations and did not avail itself of the opportunity and instead through its advocates insisted that the regulations did not apply. There is a machinery of challenge under the regulations and it is possible interim relief by way of stay would have been obtained in good. . . (*c*) The orders sought in respect of the first application, and which took up quite a bit of time even assuming that the procurement regulation did not apply, were not directed at the decision to award the contract at all. They sought information and prohibition whereas judicial review is generally aimed at decisions and the decision making process. The *prima facie* view of the court is that challenges could have been merited under both regimes – even on the assumption that the procurement regulations do not apply. *Prima facie* there was an opportunity to obtain a stay based on an application seeking leave to apply for orders of *certiorari* and prohibition. This was not done in respect of the first application. (*d*) Although the challenged contracts were signed on 14 September 2005 this application was not filed until 26 October 2005 and the delay has not been satisfactorily explained. The reason that information concerning the award was not immediately availed should have put the applicant on its guard and a challenge should have been launched immediately after the notification of award or immediately after signing of the contracts. (*e*) The principles of good administration are, in the view of this Court, a factor in the exercise of this Court’s discretion. There is absolute need for finality, for example, to enable the roll out. Other parties are involved including the wider interest of the nation to have continuous services in this critical area without interruption. Promptness is therefore a key factor in the exercise of the court’s discretion. The offer of an undertaking as to damages is not a major factor in favour of granting a stay because of the nature of the contracts and their impact on interested parties including the country. In the exercise of my discretion on whether or not to grant stay this is the second case, where I have taken into account the needs of good administration as outlined by Sir John Donaldson, Mr in the case of *R v Monopolies and Mergers Commission* ex parte *Argyll Group PLC* [1986] 1 WLR 763 Court of Appeal, as follows: “We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi judicial principles. We have to approach our duties with a proper awareness of needs of public administration. I cannot catalogue them all, in the present context, would draw attention to a few which are relevant (*sic*). 1. G ood administration is concerned with speed of decision particularly in the financial field . . .If the court were to intervene it will take a while before a fresh decision and contract is finalised on a matter touching the lifeline of this country’s economy and security as well. 2. G ood public administration requires a proper consideration of the public interest . . .in case this factor does merge with 1 above. 3. G ood public administration requires a proper consideration of legitimate interests. In this case the legitimate interest of the applicant to the contract must be weighed with the legitimate interests of the country and those of the IPS. 4. L astly good public administration requires decisiveness and finality unless there are compelling reasons to the contrary . . . In the case at hand the user of the services which are the subject-matter of the suit have already been informed following the signing of the contracts, after the expiry of the roll out period and they are therefore entitled to organise with certainty their commercial transactions and their relationships with their customers and affected countries for the period in question 2005 to 2006.” It is in the light of the above considerations and the issue of promptness in seeking relief, that I decline to order that the leave granted should operate as stay. Taking the above factors on a strictly *prima facie* basis this Court’s discretion is exercised against the grant of leave to operate as a stay and prayer (*e*) is refused. I order that costs abide the outcome of the application for judicial review.

For the applicant:

*Information not available*

For the respondent

*Information not available*