

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGREGOR (P), A. FERNANDO (J. A.), B. RENAUD (J. A.)

Civil Appeal SCA35/2018

(Appeal from Supreme Court Decision MC37/18 and MA134/18)

TORNADO TRADING & ENTERPRISE EST

Appellant

VS

PUBLIC UTILITIES CORPORATION

1st Respondent

PROCUREMENT REVIEW PANEL

2nd Respondent

Heard on: 6 November 2018

Counsel: Mr. Derjacques for Appellant

Mr. Rajasundaram for the 1st Respondent

Mrs. Lansinglu/Mr. Esparon for 2nd Respondent

Delivered on: 20 November 2018

JUDGMENT

B. Renaud (JA)

[1] A learned Judge of the Supreme Court refused leave to Tornado Trading & Enterprise EST, the Appellant which made an *ex parte* application before the Supreme Court to commence proceedings for judicial review against the two Respondents. The Appellant is appealing against that decision of the 2nd Respondent Procurement Review Panel (hereinafter "PRP") of the National Tender Board Project Oversight Unit (hereinafter NTBOU)

[2] The 2nd Respondent, Public Utilities Corporation, intended to install two water desalination plants, one at Providence and one at Anse Boileau in Mahe. In this respect, in August 2017, the 2nd Respondent with the involvement of the National Tender Board (hereinafter "NTB"), initiated bidding procedures for the said two projects.

- [3] When the bids were opened in October 2017, NTB accepted two of the bidders, namely, the Appellant and Best Water Technology HOH (hereinafter “Best Water”), as being *technically qualified*.
- [4] In November 2017, the Appellant and Best Water were invited by the 1st Respondent to submit price bids for both the Providence and the Anse Boileau projects. The bids of the Appellant were the lowest in respect both of the said projects. In February 2018, the 1st Respondent decided to proceed with only the Providence desalination plant project due to budget constraints. On 17 February 2018, the 1st Respondent notified the two bidders that the Appellant was the most competitive bidder for the Providence project. It invited the Appellant for further negotiation of the price. On 23 February 2018, Best Water wrote to the 1st Respondent, *inter alia*, challenging its decision to invite only the Appellant to negotiate the price for the Providence Project. On 9 March 2018, the 1st Respondent wrote to Best Water maintaining its decision.
- [5] On 21 March 2018, Best Water appealed to the 2nd Respondent against the 1st Respondent’s decision and requested for a review of the latter’s decision. The 2nd Respondent after having considered the challenge of Best Water and the 1st Respondent’s responses to the challenge, conveyed its decision to the said parties by a letter dated the 15 May 2018, as follows:

“Re: Appeal Against Award of the Tender for the Plant Design and Build Tender for Mahe Desalination Plants Extension II

Reference is made to the above-mentioned Appeal by BWT HOH A/S.

The Procurement Review Panel met on Friday 9th May 2018 and debated on the said appeal and on the points brought up by Mr. Thomas Larsen, the Project Director of HOH BWT A/S as well as those brought up by yourself during the hearing.

After much deliberations, the Panel has come to the conclusion that in deciding to award the Tender to Tornado Trading & Enterprise, PUC did not follow procedures whereby both companies (i.e. BWT HOH A/S and Tornado Trading & Enterprise) should have been consulted prior to awarding the Tender.

In light of the reason stated above, the Procurement Review Panel, in accordance with Section 100(10)(a) of the Public Procurement Act 2008, hereby

requests that the tender be annulled and that PUC issues a new tender specifically for the Providence desalination project.

Thanking you for your understanding.

Yours sincerely,

Jean-Claude D'Offay

Chairman

Procurement Review Panel

Cc: CEO – NTB

Director Procurement Oversight Unit”

[6] On 30th May 2018, the Appellant, filed a Petition in the Supreme Court supported by Affidavit to initiate Judicial Review proceedings, praying the Court to issue a Writ Certiorari quashing the decision of the 2nd Respondent dated, 15th May, 2018 and to issue a Writ Mandamus to compel the 1st and 2nd Respondents to award the Plant and Design – Build Desalination project for Providence to the Appellant, with costs and interest.

[7] Article 125(1)(c) the Constitution confers supervisory jurisdiction on the Supreme Court as follows:

“125 (1). There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –

(a)...

(b)...

(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have the power to issue injunctions, directions, orders, writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing and securing the enforcement of its supervisory jurisdictions, and ...

[8] The “*Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules*”, (hereinafter “the Rules”) made in terms of Article 136(2) of the Constitution, are the rules applicable to Judicial Review.

- [9] The Supreme Court framed the issues raised by the objections of the 2nd Respondent as follows:
- (a) The Petitioner failed to file an application for leave to proceed together with the petition;
 - (b) The Petition is bad for non-joinder of necessary and affected parties;
 - (c) In breach of Rule 2(2), a certified copy of the decision/order being canvassed was not attached to the Petition; and
 - (d) That the Petitioner needed to satisfy Court that in instituting the Petition, there was no bad faith on its part.
- [10] On 4th July, 2018 the Supreme Court delivered its Ruling and refused leave to the Appellant to proceed for judicial review.
- [11] The Appellant appealed against that said Ruling setting out 11 grounds of appeal and praying this Court to set aside and dismissed the said Ruling with costs, and to maintain the Appellant's award as the best/lowest evaluated bidder. The grounds of appeal are made in relation to the issues addressed by the Learned Judge in his Ruling. We find that all the grounds of appeal are concerned with the non-granting of leave to proceed. We find that there is no necessity to address each ground individually but rather on the basis as to whether it was proper for leave to be refused.
- [12] We observe that the present matter is one of extreme urgency and importance and has a particular and peculiar dimension as borne out by the facts. This Court has an imperative duty to avoid any foreseeable impending catastrophe and take into consideration the public good which outweighs procedural flaws, always maintaining fair hearing in the process. In that regard, we exceptionally held a series of preliminary hearings in order to resolve this matter expeditiously. In the process we invited the representative of Best Water to intervene if it so wishes, in order to defend the interest of his Firm in the proceeding, but he elected not to do so.
- [13] We received comprehensive representations from all the parties, both in writing and viva voce. We will now, address all the procedural issues as well as the merits of this matter in order to bring it to a speedy conclusion.
- [14] The Appellant registered its Petition at the Registry on 30th May, 2018 which Petition was listed *inter-partes* before the Judge to grant leave to proceed. Learned Counsel for the 2nd Respondent firstly objected for the granting of leave to proceed as the Appellant had failed to file a formal notice of motion supported by affidavit to seek such leave.

The Court considered that objection and allowed time to the Appellant to do so. The Appellant complied and the Court proceeded with the matter. The Court rightly found that the matter was thenceforward properly before the Court and it overruled that objection. We find that the decision of the Learned Judge cannot be faulted.

- [15] Learned Counsel for the 2nd Respondent secondly objected for leave to be granted because the Petition was bad in law for non-joinder of necessary and affected parties, namely Best Water. The Court for reasons given overruled the second objection. We likewise find that the decision of the Learned Judge cannot be faulted.
- [16] Learned Counsel for the 2nd Respondent thirdly objected for leave to be granted because a certified copy of the decision/order being canvassed was not attached to the Petition. We considered this objection together with the fourth objection that the Appellant needed to satisfy Court that in instituting the Petition, there was no bad faith on its part.
- [17] The decision being impugned is contained in the letter emanating from the 2nd Respondent dated 15 May, 2018 reproduced at paragraph 5 supra. The 1st Respondent had no issue with that as it was obviously evident what decision was being canvassed. We note from the records of the proceeding of the Court sitting on 27th June, 2018 that Learned Counsel for the Appellant offered to produce to the Court the original of that letter in order to cure such omission. We find that in the circumstance no injustice was caused to the 2nd Respondent for the non-attachment of the document to the Petition since it was the 2nd Respondent which issued the said letter and was therefore fully aware of its contents. We find that there is no merit in the third objection.
- [18] With regard to the fourth objection we find that the omission of the Appellant in not formally seeking leave to appeal was cured as directed by the Court, the non-citing of Best Water as a Respondent and the non-attachment of the letter conveying the decision to be impugned, cannot amount to be a sign of bad faith on the part of the Appellant as found by the Court below. Having overruled the three objections of the 2nd Respondent there is no basis to find that the Appellant acted in bad faith. The fourth objection is overruled. In the circumstances, we find that it is fair, just and proper to set aside the Ruling of the Court below and hereby grant leave to the Appellant to proceed.
- [19] In the normal circumstances we would have referred this matter back to the Supreme Court for the determination of the merit of the judicial review. That will take some time

before it is heard and concluded and thereafter possibly come back to this Court on appeal. In view of what we stated at paragraph 12 supra, in order to avoid further delay, as agreed at our preliminary sittings, we proceed to determine the matter on its merits.

- [20] In the process of determining this matter on the merit, we reviewed the pleadings and proceedings and arguments of Counsel in the Court below, the reasoning of the Learned Judge in his considered Ruling of 4th July 2018, the 11 grounds of appeal of the Appellant, we also take note of all the authorities cited by the parties both in the Court below and before us, we also gave careful consideration of the arguments and submissions of the parties both *viva voce* and in writing.
- [21] The 1st Respondent followed all the procurement procedures of the Public Procurement Act 2008 which took considerable time. It reached the situation where it realized that only the Providence project could be proceeded with, for financial reason. There is no reason to believe that originally the 1st Respondent did not genuinely believe that it could afford to undertake both desalination projects in order to alleviate foreseeable water supply shortage in Mahe. The 1st Respondent was not operating in normal circumstances as it had already caused works to start on the La Gogue Dam which required the availability of water to be drawn from alternative source, namely, through desalination process. The La Gogue Dam would have to be closed down soon in view of work already started there. In such circumstances, time is a critical factor to avoid a water shortage catastrophe.
- [22] In any event, no injustice ought to be suffered by any party involved in the process. The interest of Best Water, although not a party before us, cannot and ought not to be ignored. The 1st Respondent in all fairness should have at least invited the two qualified bidders to re-submit fresh financial bids when it decided to pursue only the Providence project. This apparent injustice ought to be set right and the 2nd Respondent was trying to put this right by deciding the way it did as contained in its letter of 15 May 2018. We find, however, that the 2nd Respondent failed to take into consideration certain matters that it ought to have, in reaching its decision. Such matters are, the critical factor of impending water shortage, the urgency of the project and the adverse consequences that will arise by the delay should the procurement process be made to start all over again. It is therefore our considered judgment that there is no necessity to re-start the procurement process from the beginning, but such process should continue from where the 1st Respondent started to act erroneously.

[23] **Section 100(10) of the Public Procurement Act Cap 305** (hereinafter “the Act”) reads as follows:

“The Review Panel may dismiss an application for review or may, if it determines that there is merit in it, order one or more of the following remedies –

- (a) prohibit the public body from acting or deciding in an unauthorized manner or following an incorrect procedure;*
- (b) recommend the annulment in whole or in part of any unauthorized act or decision of the public body;*
- (c) recommend a re-evaluation of a bid or a review of the decision for an award, specifying the grounds for such recommendation; or*
- (d) recommend payment of reasonable costs incurred in preparing the bid or participating in the bidding process where a legally binding contract has been awarded which, in the opinion of the Review Panel, should have been awarded to the applicant.”*

ORDER

[24] In view of the reasons stated earlier, we hereby order that the decision of the 2nd Respondent as conveyed by its letter of 15 May 2018 made in terms of Section 100(10) (a) of the Act, be varied and we hereby order and direct the 2nd Respondent, to instead act in terms of Section 100(10)(b) of the Act, and *recommend to the 1st Respondent the annulment of its decision inviting only the Appellant to submit financial bids and negotiate the price for the Providence project, but to now also invite both technically qualified bidders to do so and proceed from there.*

[25] Our order and direction effectively mean that there will not be any necessity for the 1st Respondent to re-initiate the entire procurement process all over again but to continue from where it had reached in the procedures set out in the Act. Fairness and justice demand that both technically qualified bidders Tornado Trading & Enterprises, Est. (Tonado) as well as Best water Technology A/S (BWT HOH) be invited by the 1st Respondent to re-submit their respective revised financial bids in respect of only the Providence project and thereafter to continue following the procurement procedures in accordance with the Act.

[26] We would like to place on record and emphasize that the approach we have adopted in the instant matter was done, as agreed by the parties, in view of the critical circumstances of the matter in issue as stated in paragraph 12 supra. This approach is not to be taken as a precedent in judicial review matter. We would like to urge the 2nd

Respondent to urgently act on our order and direction and that the 1st Respondent likewise proceed with urgency in the circumstances.

[27] In view of the peculiar circumstances of this matter we make no order as to costs.

B. Renaud (J.A)

I concur:

F. MacGregor (PCA)

I concur:

A. Fernando (J.A)

Signed, dated and delivered at Ile Du Port on 20 November 2018