

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 36 13 August 2021
SCA 70/2018
(Appeal from CS MC 43/2018)

Airtel (Seychelles) Ltd
(rep. by Mr. Kieran Shah)

Appellant

and

Review Panel of the National Tender Board

1st Respondent

The Attorney General
(rep. by Mr. Ananth Subramaniam)

2nd Respondent

Neutral Citation: *Airtel (Seychelles) Ltd v Review Panel of the National Tender Board & Anor*
(SCA 70/2018) [2021] SCCA 36 (Arising in CS MC 43/2018)
13 August 2021

Before: Twomey JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Application for leave to bring judicial review proceedings – the test whether applicant has sufficient interest and whether matter is arguable – held matter arguable.

Heard: 4 August 2021

Delivered: 13 August 2021

ORDER

1. The Appeal is allowed –

- (a) Leave to proceed with judicial review on the merits is granted.
 - (b) This matter is remitted to the Supreme Court to hear the case on the merits.
 - (c) There is no order as to costs.
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JUDGMENT

INTRODUCTION

1. This is an appeal against the Supreme Court Ruling dismissing a petition by the Appellant for the review of a decision made by the Review Panel of the National Tender Board.
2. The ruling was delivered by Justice Burhan on 2 November 2018.
3. Essentially the Appellant is aggrieved by the decision of the court below in refusing to grant it leave to bring judicial review proceedings against the 1st Respondent. The court below held that there was no arguable case to permit the case to proceed to be heard on the merits.

FACTS

4. The material facts of this matter are common cause and bears stating briefly.
5. The Appellant Airtel (Seychelles) Limited (“Airtel”) and Cable & Wireless (Seychelles) Limited (C&W) were bidders for a tender to provide mobile communication services to the government’s closed user group (CUG).
6. The National Tender Board deemed Airtel’s bid to be non-responsive to the tender requirement due to failure to submit the financial proposal in the appropriate form, and this was indicated in a letter dated 29 November 2017, to the DICT Principal Secretary and on that basis the tender was awarded to C&W. In letter dated 1 December 2017, the Principal Secretary wrote a letter informing the Airtel Managing Director that the tender had been awarded to C&W.

7. Airtel unsuccessfully challenged the decision by the National Tender Board in a letter to the National Tender Board on 18 December 2017, on the grounds that are a matter of record, and which we have taken into account.
8. In this appeal we are called upon to determine whether the court below erred in refusing to grant leave on the basis that the Appellant herein had failed to establish an arguable case.
9. The Appellant' application to be granted leave to review the decision of the National Tender Board was rejected by the court below on a number of grounds, but the material one being that the Appellant had not established an arguable case.
10. The Appellant being unhappy with the decision of the lower court is now appealing to this court on a number of grounds. It is unnecessary to traverse each and every ground canvassed because all the grounds are capable of being crystallised into only one material complaint or ground, namely, that the court below erred in holding that the Appellant had failed to establish an arguable case.

RELIEF SOUGHT

11. The Appellant prays this court to quash the decision of the Supreme Court; and
12. To grant leave for the Appellant herein to apply for judicial review of the Respondent's decision, with costs.

THE LAW

13. The law governing judicial review is found in the Rules of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals, and Adjudicating Bodies) Rules 1995, and the jurisprudence of this Court. The rules make it clear that judicial review application comprises of two stages: the leave stage and thereafter the merits stage.

14. Rules applicable to the leave stage are Rules 5 to 6. Rule 5 provides that:

“Every petition made under Rule 2 shall be listed ex-parte for the granting of the leave to proceed”

15. Rule 6 provides that:

“The Supreme Court shall not grant the petitioner leave to proceed unless the Court is satisfied that the petitioner has sufficient interest in the subject matter of the petition and that the petition is being made in good faith”

16. It is settled law in this jurisdiction that once an applicant shows that he has sufficient interest, the application passes the first test. The second test is that the application should be made in good faith. The applicant should show by his affidavit and the materials he has attached thereto that the case he makes on the material produced is a genuine case as opposed to a frivolous one.

17. Under the good faith requirement this court has explained that the applicant should show that the issue/s raised in an application are arguable. If these two tests are met the judge makes an order for the case to move to the Merits Stage. (*Karunakaran v The Constitutional Appointment Authority SCA 33/2016*).

18. The purpose of seeking leave is not to deny litigants access to the courts (something that should not be done lightly) but to weed out vexatious and wholly unmeritorious litigation by busy bodies, what the Romans called “meddlesome interlopers”.

19. In the English case of *R v Inland Revenue Commissioners, ex parte National Federation of the Self Employed and Small Businesses Ltd [1982] AC 617* it was stated that the leave stage also “enables the court to prevent abuse by busy bodies, cranks, and other mischief-makers”.

20. It is settled law that cases that are hopeless or bound to fail, or totally devoid of merit must not be allowed to proceed further. To do so would be to squander precious judicial time unwisely. This line of reasoning is discernible from a plethora of authorities in this jurisdiction, such as the decision of *Cable & Wireless (Seychelles) Ltd v. Minister of Finance and Communications & Anor (MC 42/2017) [2018] SCSC 348 (08 April 2018)* and in the Seychelles Court of Appeal in the recent case of *Karunakaran v Constitutional Appointment Authority (Civil Appeal SCA 33/2016) [2017] SCCA 9 (14 April 2017)*
21. This court opines that in any case where application for leave is sought the court must be careful that it does not unduly impede or frustrate the right to access the court and have the real dispute determined by being too quick to deny a litigant the right to be heard on the merits, unless in situations where the application is plainly useless and a waste of the court's time.
22. Put differently, it seems to us that in all situations where leave is an issue the best approach is to adopt a liberal and generous approach that facilitates a matter proceeding on the merits than the contrary. We think that in order to give effect to the right to a fair trial it is good judicial policy that where there are doubts about whether a case is arguable or not the benefits of such doubt must accrue to the applicant.
23. This approach appears to be in accord with the modern approach adopted by many jurisdictions. The rationale of this approach is to avoid a chilling effect to challenging administrative decisions.
24. I turn now to apply the two tests set out above with respect to relevant considerations when considering an application for leave for judicial review.
25. It is not in dispute that the Appellant has sufficient interest in the matter.
26. We have considered all the grounds of appeal in this matter. As stated earlier, considered together they crystallize into only one material question: Does the case of the appellant

establish an arguable case such that it should have been allowed to proceed to the merit stage?

27. An arguable case is one that stands a realistic chance of success – certainly not one that is guaranteed to succeed. A classic statement of the law is found in the often cited case of *Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd*, where Lord Diplock stated the law in the following terms:

“If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for the relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”

28. It is settled law that at the leave stage the perusal of the material need not be thorough, it is sufficient, if on a quick perusal the court takes the view that there is an arguable case.

29. Lord Diplock puts it more succinctly, in the *Inland Revenue Commission*, when he stated that:

“ So this is a threshold question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself’

30. On a proper consideration of the facts and the law in this case it seems to us that an arguable case was indeed established if one has regard to Regulation 61 of the Public Procurement Regulations of 2014 that says that a bid shall not be responsive if there is material deviation in the manner in which it is supposed to be presented or lodged.

31. On a closer reading of the regulation above it is clear that an evaluation of whether the bid is responsive must be a function of the bidding entity's capacity to carry out the works or services required in the bidding documents. It cannot be correct that issues of form can trump substance.
32. On a consideration of all material before us it seems to us that the decision of the National Tender Board which was upheld by the Review Panel that the appellant bid was non-responsive is clearly an arguable matter. This conclusion on its own justified the granting of leave that was sought.
33. There is another aspect of this matter that has caused us concern. It is that the evidence of the National Tender board before the Review Panel was heard separately at the insistence of the Review Panel. The Appellant argues that in proceeding in this manner the Review Panel violated Article 19(1) of the Constitution of Seychelles that guarantees the right to a fair and public hearing and also breached section 15(2) of the Public Procurement Act of 2008.
34. Stripped of all the frills and sophistry the Appellant complains that in hearing the National Tender Board separately the Review Panel failed to act fairly – which is the very essence of the rules of natural justice. We must say that on this point we concede, without deciding, that proceeding in the manner the Review Panel did, which could not have been said to be transparent, may be open to credible doubt as to whether the principles of natural justice were followed. This is so because good administration requires transparent processes.
35. The duty to act fairly lies at the heart of natural justice and is part of our common law heritage. It is a fundamental principle of fairness at common law that a party whose interests may be adversely affected by what another says (in its absence) must have the opportunity to be heard in challenging what that party says that may be adverse to its interests. Just how strong this argument is, is clearly arguable.

36. It is also trite learning that the applicability of the rules of natural justice depends on the circumstances of each case, including the importance of the subject matter and the issues in contention, considered in the context of what the law says.
37. It is now incontrovertible that our law has developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of decisions which affect rights and interests, subject only to the clear manifestation of statutory intention.
38. Put differently, and pithily, it is our law that the common law requirements of procedural fairness, will in the absence of a clear contrary legislative intent, be recognized as applying generally to decision making of public bodies.
39. In the result, the appeal succeeds.
40. We make the following formal orders
- (a) Leave to proceed with judicial review on the merits is granted
 - (b) This matter is remitted to the Supreme Court to hear the case on the merits
 - (c) There is no order as to costs.

Dr. O. Dingake, JA

I concur

Dr. M. Twomey, JA

I concur

Dr. L. Tibatemwa-

Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.