IN THE SUPREME COURT OF SEYCHELLES

Civil Side: XP 150/2018

[2018] SCSC 633

In the matter of

EX PARTE TORNADO TRADING & ENTERPRISES EST.

Heard: 27 June 2018

Counsel: Mr. A. Derjacquesfor petitioner
Mr. R. Sundaram for first respondent
Mrs. L. Rongmei for 2nd Respondent

Delivered: 4 July 2018

RULING

Vidot J

[1] On 30th May 2018, the Petitioner filed an application, Supreme Court case No. MC 37 of 2018, for to exercise its supervisory jurisdiction of judicial review in terms with Article 125(1) of the Constitution and Rule 2(1) of the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunal and Adjudicating Authorities) Rules ("the Rules"). In that Application the Petitioner seeks to impugn a decision of the Procurement Review Panel dated 15th May 2018. That decision pertains to the construction of what was termed "The Desalination Plant Extension Project for Providence and Anse-Boileau". The Petitioner was awarded the bid. However, thereafter, the 1stRespondent, The Public Utilities Corporation" (PUC) changed the scope of the project, mainly by reducing the

project to the Providence plant alone. Despite that change and without following any other procedure, that project was still awarded to the Petitioner. Another company, BWT HOH A/S (hereafter "BWT") that had also placed bid for the project appealed against that decision of PUC. The 2nd Respondent, the Procurement ReviewPanel, by the aforementioned letter advised PUC that before awarding the smaller scale project to the Petitioner, both the Petitioner and BWT should have been consulted prior to the award of the tender. The 2nd Respondent advised that in pursuance with Section 100(10)(a) of the Public Procurement Act 2008, the tender should be annulled and new tender be issued.

[2] The Petitioner had on the same day, filed a Motion praying that the matter be heard as a matter of urgency, and for an interlocutory interim injunction to prevent the Respondents from initiating, commencing and organizing new and fresh bidding process for the Providence Desalination Project. In the absence of opposition from the Respondents, the Motions were acceded to.

[3] On 13th June 2018, the case was called and Court advised the Petitioner, that his Application for Judicial Review was lacking and deficient in that the Petitioner had failed to file an Application for leave to proceed. Counsel was reminded that in terms with Rule 5 of the Rules, the Court can only proceed to exercise its supervisory jurisdiction to decide whether or not to impugn the and declare the letter of the 15th May invalid, if leave to proceed is sought. Again the Respondents did not object to the Court allowing Counsel for the Petitioner to file necessary papers for application for leave, he was accordingly granted time to do so.

Considerations for Granting of Leave

[4] In terms with Rule 6(1) of the Rules, the Court shall only grant leave if the Petitioner satisfies the Court that he has sufficient interest in the subject matter of the Petition and that the Petition is being made in good faith.

[5] In his submission, Counsel for the Petitioner referred to the affidavit of Mr. Moaied Odeh, a Director of Tornado Trading & Enterprises EST, in which he notes that Petitioner lodged a bid for the project and in fact was awarded the tender for the

construction of the Desalination Plant Extension 11 Project at Providence and further pleaded that it would be in the interest of justice that leave is granted.

[6] On a consideration that the Petitioner is a party who lodged a bid and an award for the construction of desalination plant was granted the award, albeit that the scope of works had been reduced from that advertised for the bidding process, the Petitioner is definitely and interested party. The Petitioner will be directly affected by the letter of 15th May 2018, and without doubt has an interest in the subject matter of the Petition. In assessing interest, it is not enough that the Petitioner demonstrates that he has lucus standi, but equally that the Petition is being filed in good faith; vide **Cable & Wireless v Minister of Finance and Communications [1998-1999] SCAR 92**and **Duraikannu Karunakaran v CAA SCA 33 of 2016.** The Petitioner has to satisfy both these steps, i.e; sufficient interest and good faith before the Court can grant leave and therefore move to the next level; the consideration of the Petition on the merits.

[7] The Second Respondent has objected to the grant for leave on procedural irregularity and the lack of good faith on behalf of the petitioner. The First Respondent did not express any opposition to the application for leave to proceed.

[8] Rule 5 provides that any petition made pursuant to Rule 2 shall be listed ex-parte for the granting of leave. However, that does not preclude the Respondent from making opposition to the application, which opposition shall either be in writing or viva voce. Though listed ex-parte, it does mean that the case has to be decided in the absence of the other parties; vide **Duraikannu Karunakaran v CAA** (supra). Leave is not granted merely as a matter of course. In fact Rule 7 provides as follows;

(1) *"Upon the application being registered under Rule 5, the respondent or each of the respondents may take notice of it at any time and object to the grant of leave to proceed, or if leave to proceed had been granted, object to the application at any time before the time fixed by Rule 12for filing objections and the Supreme Court may make such order on the objections as it may deem fit.*

(2) *The objections under sub-section (1) may be made orally or in writing."*

Therefore, the Court allowed the Respondents to intervene; albeit that the First Respondent expressed no intention of opposing the application.

[9] On 20th June 2018, the Second Respondent filed objection to the Petition. In a nutshell the grounds of objection are as follows;

i. The petitioner failed to file an application for leave to proceed together with the petition;

ii. The Petition is bad for non-joinder of necessary and affected parties;

iii. In breach of Rule 2(2), a certified copy of the decision/ order being canvassed was not attached to the Petition; and

iv. That the Petitioner needed to satisfy Court that in instituting the Petition, there was no bad faith on its part.

The Second Respondent listed other grounds of opposition which the Court was not willing to entertain at this juncture as they were substantive matters going deep into the merits of the Petition itself. However, this Court remains aware that in assessing good faith, it has to consider whether the Petitioner has an arguable case which would require some consideration and evaluation of the Petition for judicial review.

Failure to File Application for Leave

[10] As regards the first objection, this Court alerted the Petitioner to the fact that the matter could not be entertained as there was no application for leave in terms with Rule 2 filed together with the Petition. Since, the matter is one of urgency and carries a national dimension, the Court was amenable to allowing the Petitioner to rectifying that deficiency and to therefore file necessary documents to ensure that the matter was properly before Court. Otherwise, the Petition could have been dismissed there and then.

[11] Since, it was the Court that had drawn attention to the Petitioner as to the flaw in that the Petition was not accompanied by an application for leave and invited him to remedy the same and the Respondents not having raised any objection at that material time, the Court

finds the Application to be properly before Court. Since the Petitioner had already filed the Petition, I did not consider it necessary for a new one to be filed together with the application for leave. That remained at the discretion of the Petitioner if it felt that there was necessity to do so.

Non-joinder of Parties

[12] As far as non-joinder of the parties, the Second Respondent contended that the Petitioner should have joined BWTas a party. The letter of the 15th May 2018, follows an appeal of the decision to award the revised project to the Petitioner. That appeal was lodged by BTW. Therefore, any decision of this Court will have an effect on BTW.

[13] Counsel for the Petitioner had argued that it was always opened to BWT to file for intervention. I disagree that this will have been possible. Section 117 of the Seychelles Code of Civil Procedure (SCCP) provides that;

"Every person interested in the event of a pending suit shall be entitled to be a party thereto in order to maintain his rights, provided that his application to intervene is made before all parties to the suit have closed their cases."

Counsel for the petitioner had submitted that the Petitioner is not trying to keep anyone out but that as a party that is aggrieved by the decision of the Second Respondent, BWT has the option of challenging the same through judicial review but has not exercised that right.

[14] Section 2 of the SCCP defines "suit" as *"civil proceedings commenced by plaint."* It does not appear that the definition includes proceedings began by Petition (as per present case). That suggests that BWT would not have been able to file a Motion for Intervention; see **Ina Laporte & Ors v Ministry of Land Use and Housing and the Attorney General [2016].** In that case which similarly pertains to an application for judicial review, a person with interest sought to intervene, but the court denied him that possibility despite acknowledging that he had an interest in the subject matter, because the law did not permit that.

[15] Nonetheless, Section 112 of the SCCP provides that no cause or matter shall be defeated by reason of mis-joinder or non-joinder of parties. The court is further given the discretion at any time with or without application of either party, and on any such terms as may appear to the court to be just, order that any persons who ought to have been joined, or whose presence before the court may be necessary in order to enable the court to effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. Section 2 of SCCP defines "cause" to include any action, suit or original proceedings between a plaintiff and a defendant, whilst "matter" is defined as *every proceeding* in court not in a cause. This means that the court may cause BWT to be joined as a party.

[16] However, the non-joinder of BWT by the Petitioner, in a matter that will have a direct effect on them, is tantamount to a lack of good faith and therefore, reason to dismiss the Petition. In this case, BWT could not have intervened and it would have been necessary that they were joined as a party. The law would have precluded intervention by them albeit that the court holds that discretion to order that they be joined as a party.

Procedural Failure

[17] The next objection by the Second Respondent pertains to a breach of Rule 2(2), namely that the Petitioner failed to attach a **certified** copy of the impugn decision. The copy attached to the Petition is not certified. The Petitioner was first allowed to remedy procedural failure to file an application seeking leave to proceed. This is yet another failure. This Court feels that in allowing the Petitioner to cure such procedural defect, the Petitioner should have been on alert to ensure that the Petition and Application were in full conformity with the rules. Would condoning such further failure be fair and just?

[18] It was held in **Viral Dhanjee v James Alix Michel SCCC CP03/2014**, that *"applicants might be hurt when petitions or applications are dismissed due to legal technicality. But in the long run, rule of law would be hurt, if we allow some procedural irregularities to continue...."* **In Ratnam v Cumarasamy [1964] 3 ALL ER 933** it was held that *"rules of court must prima facie, be obeyed, and in order to justify a court extending the time which some step in procedure require to be taken, there must be some material on which*

the court can exercise its discretion." It is abundantly clear that rules of procedure are to be followed and failure to do so can only be condoned in exceptional cases. In this present Application, due to national dimension of this case, an initial procedural failure was allowed to be cured, but to permit additional failures to be yet again cured, will in effect defeat the settled positions as set out in the aforementioned 2 latter cases.

Good Faith and Arguable Case

[19] The Second respondent further opposed the Application on that ground of good faith. In an application for judicial review, once the applicant has satisfied court that he has sufficient interest in the matter, the second test to satisfy court is that the application is made in good faith. When addressing good faith, the Applicant must show that the issue(s) it raises in his application is/are arguable. It was held in **Duraikannu Karunakaran** v CAA (supra) that *"if the issue raised in the application is arguable, it would follow that it has been made in good faith. If the issue is not arguable and only made frivolously, with levity and with the intention of challenging authority simply for the sake of it, if it is made on an ego trip, then there is no arguability, consequently no good faith."* In its affidavit attached to the Application, Mr. Odeh has averred that the Petitioner has sufficient interest in the subject matter and that the petition has been brought in good faith.

[20] In **R v Cable & Wireless (Seychelles) Ltd. v Minister of Finance and Communications & Ors CS 377 of 1997**, it was held that *"the concept of "good faith" required under Rule 6 aforesaid is not to be considered in contra distinction with the concept of "bad faith". It involves the concept of ubberima fides to the extent that the petitioner when filing the petition should have had an arguable case. This is however an objective consideration that has to be assessed by court deciding whether leave should be granted or refused."*

[21] I note that despite declaring that the Petitioner was acting in good faith through the affidavit of Mr. Odeh, Counsel did not in submission expand on the same. The Court needs to consider ex facie if the Petitioner has an arguable case. In this case the Court needs to consider if the award of the work project to the Petitioner, after the scope of

work had changed was in conformity with the Public Procurement Act ("the PPA). It is stated in the impugn letter of the 2nd Respondent, that PUC, the procuring entity, acted ultra vires in failing to meet both the Petitioner and BTW before awarding the tender to the Petitioner. Therefore the 2nd Respondent acting in terms with Section 100(10)(a) of the PPA requested the annulment of the tender and for the 1st Respondent to issue new tender specifically for the Providence project.

[22] It is evident that other bidders, including BTW, was not granted the same opportunity as granted to the Petitioner, to retender on the revised desalination plant project, and that in entering in direct negotiation with the Petitioner, the 1st Respondent was not acting with fairness as required under Section 15(2)(c),(d) and (f) of the PPA. Section 73(1) provides that a statement of procurement shall give a complete and correct description of the works required. Bidders submitted bids subject to the initial tender. Once the scope changed, retendering should have taken place. At that stage the 1st Respondent should have, as provided under Section 54(1) published notice inviting bidders to participate in the procurement process. That was not done. Such procedure was against the PPA.

[23] The Review Panel acted within its mandate and in conformity with Section 100(10)(a) in issuing the impugn letter since the 1st Respondent acted outside the ambit of the PPA. As such therefore I don't consider the Petitioner to have come with an arguable issue, albeit that the Petitioner is not precluded from claiming damages for any loss caused by the 1st Respondent acting outside the ambit of the law.

Determination

[24] After full and thorough investigation of the above matters, I note particularly procedural flaws which the court cannot adopt a lax approach towards and in the absence of arguability in the issue raised, I thereby deny the Application for leave to proceed.

[25] I make no order as to cost.

[26] Consequently, the interlocutory injunction of the 13th June 2018 is hereby cancelled and lifted.

Signed, dated and delivered at Ile du Port on 04 July 2018

M. Vidot
Judge of the Supreme Court