

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MC43/2018**

[2018] SCSC 991

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**AIRTEL (SEYCHELLES) LIMITED (HEREIN REP BY ITS ACTING CHIEF  
EXECUTIVE OFFICER, MR LUKALANGINDU PAPUS)**

Petitioner

versus

**1. REVIEW PANEL OF THE NATIONAL TENDER BOARD**

First Respondent

**2. ATTORNEY GENERAL (HEREIN REP. BY THE GOVERNMENT OF  
SEYCHELLES)**

Second Respondent

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Heard: 5 October 2018 and 12 October 2018

Counsel: Mr. Kieran Shah Attorney at Law for the Petitioner

Mrs. Lansinglu Rongmei Attorney at Law for the First Respondent

Mr. Ananth Subramaniam Attorney at Law for the Second Respondent

Delivered: 2 November 2018

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**ORDER**

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**Burhan J**

- [1] This is an application before the Supreme Court to exercise its supervisory jurisdiction powers or powers of Judicial Review under Article 125 (1) (c) of the Constitution in respect of a decision of the Review Panel of the National Tender Board on the 29<sup>th</sup> of

March 2018, dismissing the petitioner's appeal in respect of a decision made initially by the National Tender Board.

- [2] The background facts are that the petitioner Airtel (Seychelles) Ltd (also referred to as Airtel) and Cable and Wireless (Seychelles) Ltd (also referred to as C&W), were bidders for the tender for the provision of mobile communications services to government's close user group (CUG). 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 as borne out by its letter dated 29<sup>th</sup> of November 2017 to the Principal Secretary DICT (Annexure H) and proceeded to award the tender to Cable and Wireless (Seychelles) Ltd. Thereafter by letter dated 1<sup>st</sup> December 2017, the Principal Secretary informed the Managing Director Airtel of the fact that the tender had been awarded to C&W (Annexure I).
- [3] A challenge was issued by Airtel on the 18<sup>th</sup> of December 2017, against the said decision which was dismissed by the Department of Information Communications s Technology (DICT) by letter dated 3<sup>rd</sup> January 2018 (Annexure K) on the basis that Airtel had no right to challenge the decision because its bid was deemed to be non-responsive for failure to submit the financial proposal in the correct format. Further by e mail dated 4<sup>th</sup> January 2018 DICT further informed Airtel that it was not a successful contestant for the tender for reasons that the bid was unresponsive. Airtel thereafter under section 99 of the Public Procurement Act CAP 305 (hereinafter referred to as the Act) applied for review of the said decision of DICT to the Review Panel of the National Tender Board by letter dated 17<sup>th</sup> January 2018 ( Annexure L). On the 29<sup>th</sup> of March 2018 (Annexure M) the Review Panel of the National Tender Board dismissed Airtel's appeal. It is this decision that the petitioner Airtel (Seychelles) Ltd, seeks to review in this particular application.
- [4] It would be pertinent at this stage to set down the reasons given by the Review Panel for dismissing the appeal of the petitioner. The reasons are set down below in verbatim:

*The PRP is in agreement with DICT when they claimed that Airtel made a material deviation in not properly filling in the form as was provided for in the "instruction to bidders" of the Request for Proposal which stated that "The proposal should list the*

*costs associated with the provision of the service. Your financial proposal should have been prepared using the forms attached in “section 7 – Format for Financial Proposal”. PRP is of the opinion that modification of the form provided should not have been done as it is in breach of Regulation 64 (2) (a) of the Public Procurement Regulations, 2014.*

*Regarding the issue of conflict of interest, the PRP is of the view that there was no breach of Section 15 (2) of the Public Procurement Act, 2008 as Section 21 (1) clearly stipulates that for a member of the Board to disclose his/her interest in the matter being discussed shall be in instances when the member’s close relative is directly or indirectly interested in a private capacity.*

- [5] Being aggrieved by the decision making process of the Review Panel, the petitioner has sought an application for Judicial Review for the said decision and seeks a writ of certiorari to quash the said decision on the basis it was ultra vires as it was not lawful, unreasonable, irrational and procedurally wrong.
- [6] The Rules which govern the procedure of such Judicial Review applications are found in Rules of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals, Adjudicating Bodies) Rules 1995 (“the Rules”). It is apparent on consideration of the Rules that a Judicial Review application comprises of two stages: initially the ‘leave stage’ and thereafter the ‘merits stage’. The Rules applicable to leave stage are Rules 5 to 6 which are set down below:

Rule 5 reads:

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

Rule 6 reads:

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

[7] The purpose of the requirement for permission to proceed at the leave stage is to eliminate at an early stage claims that are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing, if the Court is satisfied that there is a case fit for further consideration. In the case of **Derrick Chitala v Attorney General (1995) ZR** it was said that this up-front screening was meant -

- (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless; and
- (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.

[8] The leave stage also “*enables the court to prevent abuse by busybodies, cranks, and other mischief-makers*” as was stated in **R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] Act**.

[9] In the case of **R v Secretary of State for the Home Office Ex parte Doorga (1990) C.O.D. 109** Lord Donaldson MR referred to three categories of cases to be considered at the leave to proceed stage. At this stage, the Judge should undertake an up-front screening of the case and decide which of the following categories it belongs to:

- “(a) *those in which there are prima facie reasons for granting judicial review;*
- (b) cases that are wholly unarguable and so leave must be refused;*
- (c) an intermediary category where it was not clear and so it might be appropriate to adjourn the application and hold a hearing between the parties.”*

The above mentioned decision has been followed by the Supreme Court of Seychelles in the decision of **Cable & Wireless (Seychelles) Ltd v. Minister of Finance and Communications & Anor (Civil Side No. 377 of 1997)**, and in the Seychelles Court of Appeal in the recent case of **Karunakaran v CAA SCA 33/2016**.

[10] On an upfront screening of ~~the~~ this instant application, this Court is of the view that on the face of the application ex-facie, it belonged to category (c) as set out in paragraph [9]

herein and issued notice on the respondents and proceeded to hold a hearing between the parties referred to in the petition.

- [11] It would be pertinent at this stage to refer to Rule 6 of the Rules set out in paragraph [6] herein which indicates that at the leave stage what the petitioner has to establish is “*a sufficient interest in the subject matter of the petition and that the petition is being made in good faith.*”
- [12] In the *Cable & Wireless* and *Karunakaran* cases (supra), it was held that the concept of ‘good faith’ required in Rule 6 is not to be considered in contra-distinction with the concept of “bad faith”. It involves the notion of *Ubberima Fides* to the extent that the petitioner when filing the petition should have had an ‘arguable case’. There is no challenge from the respondents that the petitioner has sufficient interest to continue with this application.
- [13] It is the submission of Learned Counsel for the petitioner that in order to establish that he has an arguable case, he would have to refer to the merits of the case which in the view of this Court is understandable and accordingly Learned Counsel did proceed to refer to the merits of the case to support the fact he had an arguable case.
- [14] The first ground urged by Learned Counsel for the petitioner was that the petitioner was not given an opportunity to rectify any deficiency, before the decision to render their bid non responsive was made which in his view was exceptionally grave as there were only two bidders for this tender. However Annexure F, produced by the petitioner himself refers to a letter from Mr. Moustache dated 7<sup>th</sup> November 2017 that states at para (iii) *Please clarify how the amount indicated in the column titled “Total Monthly Cost breakdown (SCR) inclusive of VAT for item 7,8 and 9 have been computed.* Therefore on the petitioner’s own documents filed, it is apparent that an opportunity was given to clarify certain issues pertaining to the tender. Clarification was also sought in respect of Technical solutions and Financial proposals as to why they were not submitted using the forms given in sections 6 and 7 of the Tender Document and why new elements had been introduced. The petitioner had replied by email dated 7<sup>th</sup> November 2017 (Annexure G).

Therefore it would be unfair to say that an opportunity was not given to rectify any deficiency.

- [15] The petitioner further states in paragraph 5 of his reply submissions dated 11 October 2018 that *“the objectives of open bidding is to obtain value for money and promote private sector participation through maximum possible competition.”* However in this instant case it is to be observed, the bidding was not conducted by way of open bidding but conducted by way of limited bidding which by definition as set out in section 2 of the Act are bids by direct invitation to a shortlist of bidders in this case Cable and Wireless ((Seychelles) Ltd and Airtel (Seychelles) Ltd. without open advertisement. This was done due to the technical nature of the tender and is provided for under section 2 of the Public Procurement Act. Therefore Learned Counsel’s reference to “open bidding” bears no relevance.
- [16] It is also to be borne in mind that paragraph 10 at page 6 of the Tender Document (Annexure A which comprises of 15 pages) in relation to the award of the contract, refers to the fact that the contract would be awarded to the bid which is more responsive technically and financially. Therefore it would be at the discretion of the National Tender Board to accept a bid which is more responsive technically and financially. It is to be further observed that paragraph 3 at page 7 of the Tender Document refers to the documents that should be sent with the tender and refers to a Covering letter, Technical proposal document as per section 6, Financial proposal document as per section 7, the completed form of Bid as per section 8, capability statement indicating the details of experience in undertaking similar projects and Draft Service level agreement.
- [17] I observe that on the face of the documents tendered by Airtel the petitioner, as set out in Annexure C, the technical proposal form on the Tender Document as per section 6 has not been used but instead a separate document prepared which on face value comprises 11 pages containing not only technical solutions to minimize the impact of mobile number change for existing CUG customers as requested in the tender format but also additional information namely world-wide Roaming Tariffs, Zonal Roaming Tariff, One Airtel roaming Tariff and Tariff information of different countries which are new

elements, despite 3.3 at page 4 of the Tender Document indicating that the technical proposal shall not include any Financial information.

- [18] It is the contention of the petitioner that the decision of the National Tender Board to reject the bid of Airtel on the basis that the bid was deemed to be non-responsive for failure to submit the financial proposal in the correct format (Annexure K) is incorrect as the petitioner only gave a breakdown of the costs in International calls and Roaming charges which differ to different regions of the world but the petitioner provided one global sum for each product in the last column which was a flat rate. He further argued that the change was only one of format and not substance and therefore in terms of section 64 (2) of the regulations not a material deviation. The fact that the 'Charging Mode' vertical column has been amended by the petitioner and the format not followed and additional information provided is therefore not in dispute. It is the contention of the respondents that strict compliance is necessary with the Tender Document and any additional data provided be a deviation resulting in a bid not being responsive. It is their contention that the failure to use attached documents as instructed, the failure of the petitioner to set down a flat rate in columns 4, 7 and 8 of the Financial proposal form when specifically requested to do so, does not make his bid a substantially responsive bid as it does not conform to all instructions, requirements terms and conditions of the bidding documents as per section 61 (2) of the Regulations as there are material deviations.
- [19] This Court also observes that the petitioner in addition to their amended "Financial Proposal form (7) and Form of Bid (8) of Tender Document has annexed another document titled Other Benefits as seen in Annexure C. At page 2 of his document it is stated that *"Aside to the financial details in both the completed Financial Proposal and the Completed form of Bid, Airtel will also offer other value added services to complement the service offered to the government's CUG"* the other value added benefits numbering 1 to 5 are set down . On the face of this document it is a document not called for in the Tender Document and is an additional document relating to and referring to once again the Financial Proposal section 7 form and the Form of Bid section 8 and contains additional information some of which is contained already in the Financial



proposal form. In fact Learned Counsel for the petitioner made use of this form to substantiate the argument that the Airtel tender was lower than that of C&W as this amount of 4,680,000.00 has to be considered as value added service and has to be reduced from the tendered amount bid SR 18, 586, 344.00. I am of the view that on the face of this document, the petitioner himself has attempted to supplement and add (*“ will also offer ”*) further particulars to the Financial Proposal and the Form of Bid, which in the view of this Court is a material deviation from the limited and specific details called for in section 7 and 8 of the Tender Document, thereby supporting the claim of the Respondents that there are material deviations under Regulation 64 (2) of the Public Procurement Regulations 2014 from the terms and conditions of the bidding document, thereby making their tender non responsive.

- [20] Learned Counsel for the 1<sup>st</sup> Respondents has also taken objection to the fact that the petition is bad and procedurally improper for non-joinder of necessary party Cable and Wireless (Seychelles) Ltd. This Court is of the view that in cases of this technical nature, it is best that the party to be affected be given an opportunity to present their case as well. There is no doubt in my mind that the petitioner would have been well aware that there was a possibility that the rights of the successful bidder Cable and Wireless (Seychelles) Ltd would be affected by the decision of this Court in regard to the instant application and therefore they had a right to be heard as well. However the petitioner failed and omitted to make them a party. It is the petitioner’s contention that the C&W could at any time intervene if they sought to do so. The petitioner cannot contend that he was unaware that the present application before this Court would affect the rights of the successful bidder and therefore it is the view of this Court that the failure of the petitioner to include C&W as a party to this action tantamounts to a lack of good faith and therefore reason to dismiss the petition cf. **Vidot J in Tornado Trading & Enterprises EST [2018] SCSC 633 at paragraph 16.**

- [21] When one considers the formal Bid as per the proper procedure and format set out in section 8 of the Tender Document, the Bid of Cable and Wireless of 16,804, 914.00 as referred to by Learned Counsel for the 2<sup>nd</sup> respondent in their submissions which is definitely lower than that of formal bid as per section 8 of the petitioner which is



18,586,344.00 based on the financial proposal contained in section 7 of the Tender Document. As C&W has not been made a party, it is not possible to determine if there were any value added services on their part but as per facts set out in the submissions based on Form 8 of the Tender Document, the National Tender Board has granted the tender to the lesser bid and thus cannot be faulted on that issue.

- [22] I also note on perusal of the documents filed that one of the contentions of Learned Counsel for the petitioner is that he was not given an opportunity to be heard by the Review Panel. On consideration of the law contained in section 99 (6) of the Act it states the Review Panel shall endeavour to avoid formality in its proceedings and may conduct them in such a manner as it thinks fit. It is apparent ex-facie on the documents filed that the detailed submission in respect of the challenge in Annexure L, has been considered by the Review Panel and an order made in accordance with section 99 (6) of the Act.
- [23] Therefore having considered the above facts raised by Learned Counsel for the petitioner including the merits of the case relied on to establish that he has a arguable case, I am inclined for the aforementioned reasons to disagree with Learned Counsel for the petitioner that he has an arguable case and therefore leave to proceed is declined. The petition stands dismissed.

Signed, dated and delivered at Ile du Port on 2 November 2018



M Burhan  
**Judge of the Supreme Court**