

THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 691
MC 35/2020

In the matter between:

GCC EXCHANGE (SEYCHELLES) LIMITED
(rep. Bernard Georges)

Petitioner

and

SEYCHELLES CIVIL AVIATION AUTHORITY
(rep. by S. Rajasundaram)

Respondent

Neutral Citation: *GCC Exchange (Seychelles) Limited v Seychelles Civil Aviation Authority*
(MC 35/2020) [2021] SCSC 691

Before: Dodin J.

Summary: Judicial Review – Exercise of Supervisory Jurisdiction – writ of certiorari – whether petition defective.

Heard: By written submissions

Delivered: 15 October 2021

ORDER

The Respondent ignored relevant considerations and took irrelevant considerations and failed to apply the same consideration to other bids. Such ambiguity and procedural caprice were fatal to the process in the circumstances.

Consequently I hereby invoke the powers given to this Court under Article 125(1)(c) of the constitution and I hereby issue a writ of certiorari quashing the decision of the Respondent conveyed by letter dated 13 February 2020 wherein the Petitioner was deemed not to be the most responsive bidder.

I further declare that any award made from that tender process to be void.

JUDGMENT

DODIN J.

- [1] The Petitioner is a company incorporated and registered in Seychelles and carrying on the business of currency exchange and the Respondent is a government authority managing civil aviation at the Seychelles International Airport which includes the management and provisions of services at the airport directly, through agents or by contracting out.
- [2] This case arises from a tender by the Respondent (SCAA) for rental of a foreign exchange counter at Seychelles International Airport. The Petitioner appeared to have been the highest bidder but the award was made to another bidder by the name of Unimoni. The Petitioner being dissatisfied, challenged the award made to the other applicant. The challenge was successful and following a hearing under the Public Procurement Act, the Procurement Review Panel in December 2019 ordered a re-evaluation of the tenders. This led to a decision in February 2020, against the Petitioner and in favour of Unimoni, on three grounds, namely: that the Petitioner's bid was refused as 'unresponsive' for (i) having incomplete audited accounts, (ii) the proposed rental was 'was beyond the benchmark' and (iii) the financial performance of the Petitioner would not sustain the operation at the rent proposed.
- [3] The Petitioner moves the Court for the following remedies:
- a. To grant the Petitioner leave to bring this application for judicial review of the decision of the Respondent not to award the tender for the Bureau de Change at the Seychelles International Airport to the Petitioner;
 - b. Issues a writ of certiorari quashing the decision of the Respondent conveyed by letter dated 13 February 2020 wherein the Petitioner was deemed not to be the most responsive bidder; and
 - c. Order the Respondent to pay cost of this application.
- [4] The Respondent admitted that the bid of the Petitioner was the highest but that merely the highest bid was not the sole criteria for a successful award. The fact that the Procurement Review Panel recommended a re-evaluation of the bids did not amount to meritorious

appeal by the Petitioner. The decision of the Respondent at all times and throughout all the levels were rational, reasonable, legal and justified, taking into account the material facts and considering relevant matters and evidence available before the Respondent.

[5] The Respondent raised three further issues in addition to it above defence, namely:

1. The Procurement Review Panel and or National Tender Board is not a party [in this case] hence the application is devoid of merits;
2. The decision of the Respondent cannot be construed as an adjudication on the perspective of scope and application of supervisory jurisdiction over subordinate court, tribunals and adjudicating authorities, thus this court does not have jurisdiction in terms of writ of certiorari; and
3. The Petition is defective in that the Applicant has failed to attach a certified copy of the decision being canvassed and there is no bona fide interest and or good faith shown in the application both at the stage of leave and at this stage.

[6] Learned counsel for the Petitioner submitted that this application for Judicial Review was brought by the Petitioner on the grounds of illogicality, irrationality and Wednesbury unreasonableness. Learned counsel submitted that ever since the House of Lords decision in Council of Civil Service Unions v Minister of State of Civil Service (1985), the so-called *GCHQ* case, the categorisation of grounds for Judicial Review by Lord Diplock broadly into illegality, irrationality and procedural impropriety has stood the test of time. Irrationality was merged into Wednesbury unreasonableness and was broadly defined by the House as a ‘decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’. The decision of the House of Lords has been accepted and applied in this jurisdiction numerous times since. The two cases where the decision has been followed are Georges v Electoral Commission [2012] SLR 199 and Vidot v Minister of Employment and Social Affairs [2000] SLR 77.

[7] Learned counsel submitted that these submissions argue that the decision of the SCAA was irrational and illogical such that it fits neatly into the description of the kind of

decision amendable to review because of its illogicality and unreasonableness. The first ground on which the SCAA rejects the Petitioner's tender is that there are pages missing from the financial statements of the Petitioner lodged with its tender. The Petitioner disputes the statement of the SCAA (or the committee re-evaluating the decision) that the audited accounts of the Petitioner were incomplete due to missing pages and information.

- [8] Learned counsel submitted that the entire audited accounts for the year 2017 comprising pages 1 to 16 and all supporting documents were tendered with the bid application. In fact, on page 3 of the report of Reevaluation of Tender Documents, at items 7 (Certified audited accounts of current business for 2017), the panel has remarked 'OK' against Bidder 2, the Petitioner. Additionally, in the remarks at page 5 of the document, there is no mention of any 'missing pages and information'. Instead, the remark is 'uncertainties' and not 'missing', but with no explanation of what these uncertainties are. Clearly, thus, the part of the SCAA which is based on 'missing pages and information' (in the March 2019 letter) and 'submitted financial position of GCC which was also incomplete' (in the February 2020 letter) is wrong and irrational.
- [9] Learned counsel submitted that when one reads the remarks of the re-evaluation committee at page 5, one is left with the distinct impression that in the first two bullet points the committee is seeking to find a justification for rejecting the bid. The phrases 'questions its reliability and practicability' and 'uncertainties in the Financial Statement' without any more analysis reveal a vagueness more attuned to an unreasoned decision than one based on clear reasoning from uncontroverted facts.
- [10] Learned counsel submitted that the next two grounds can be taken together. They are basically a reflection that the proposed rental (R63,900) was way above the SCAA benchmark of R25,000 and would prove to be unsustainable. Without more analysis of the reasoning here, it is impossible to understand why the SCAA decided to forego a rent almost three times more than the applicant who was awarded the tender was offering, especially since no attempt was made by SCAA to obtain more information from the Petitioner, and since the Petitioner had put up a 6-month guarantee of the rent.

- [11] Learned counsel argued that as a result, the decision of the SCAA is so illogicality and outrageous that no reasonable person applying the principles sent in the *GCHQ* case could have come to the same decision. In fact, the decision smacks of a pre-determined one where even the re-evaluation arrived at the same decision and avoided confronting facts which would have brought it to decide differently.
- [12] With reference to the submission of the Respondent the Petitioner submitted that the Respondent makes two legal submissions, namely:
- The Petition is bad because it failed to attach a certified copy of the decision with the Petition;
 - The Petition is bad because the successful tenderer, Unimoni, was not made a party to the Petition and it stood to suffer an injustice if the Petition is allowed.
- [13] Learned counsel submitted that both these matters were considered by the Court of Appeal in *Tornado Trading v PUC & Anor (Civil Appeal SCA 35/2018) [2018] SCCA 45* but both submissions were dismissed as there was no bad faith on the part of the Petitioner. There is no dispute as to the nature of the decision sought to be reviewed which was communicated to the Petitioner by letter, which letter was attached to the Petition. While Rule 2 (2) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules does provide for certified copies of the decision and other material documents to be annexed to the Petition, it is submitted that the breach of the rule is not fatal and that, in this case, it is excusable in so far as there is no dispute between the parties as to the nature and content of the decision sought to be reviewed.
- [14] Learned counsel submitted that as for the joinder of Unimoni as a party, there is no rule that this should be applied or legal obligation that has been breached. The decision was made in the absence of Unimoni and there is no argument that Unimoni could bring against the Petitioner, other than that the decision to award it the tender was correct and the petition should be dismissed. In the event that the petition succeeds, all that will happen is that the process of examining the tenders will have to restart. Unimoni will have a right to bid again and may succeed if its bid is the successful one.

- [15] Learned counsel for the Respondent submitted that the Public Procurement process and procedure allows for a series a mechanisms to ensure just and fair decision making, these include safeguard and modes of challenges to ensure that the decision maker is kept accountable at all times. On that note, the Respondent at all material times followed meticulously the procurement procedures established under the Public Procurement Act 2008.
- [16] Learned counsel submitted that in relation to the award of tender, it refers to the fact that the tender would only be awarded to the bid which is most responsive, feasible, technically and financially and not necessarily on the term of highest offer in financial terms. The Respondent submits that strict compliance is necessary with the Tender Document and any deviation or non-compliance would lead to disqualification or resulting in a bid not being responsive, specially essential requirements of ascertaining the capabilities of the tenderer. The Respondent is guided by re-evaluation report and those mandatory requirements thereunder, which the bidders were at all times aware of in the Form of Tender.
- [17] Learned counsel further submitted that both the evaluation and re-evaluation reports demonstrated that the Petitioner was not most responsive financially, eventually would not be able to run any consistent business to the detriment of the Respondent, which provides money changing services to the travelers and others in the Airport. There is no reason to suggest that the Respondent acted erroneously in its decision making process so as to be construed as unfair to the Petitioner. The procurement proceedings were halted pending completion of all challenges and review applications made by the Petitioner and duly responded to within the time frames imposed by the procurement procedures. In fact, the successful awardee / tenderer UNIMONI is not made a party in this petition that this would result in injustice.
- [18] Learned counsel submitted that the petition is bad and procedurally improper for non-joinder of the necessary party Unimoni. In cases of this technical nature it is paramount that any party to be affected be given an opportunity to present their cases as well. The Petitioner being aware of the successful bidder would have been aware that the rights of

Unimoni could be affected by the decision of this court and has a right to be heard as well. Learned counsel further submitted that the Petitioner failed and omitted to make them a party which amounts to a lack of good faith and therefore reason to dismiss the petition.

[19] Learned counsel submitted that the Petition is in breach of Rule 2 (2) Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules which states that: “*The petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof in the form of exhibits*”.

[20] Learned counsel submitted on the issue of reasonableness, it is to be noted that this involves a subject assessment as a formulated in *Associated Provincial Picture Houses v Wednesbury Corporation (1984) 1 KB 223*. The stringent test requires that for a decision to be reasonable it must be one

“*which is so outrageous in its defiance of logic or of accepted moral that no sensible person who had applied his mind to the question to be decided could have arrived at it*”.

Taking into account all of the circumstances in the decision making process of the Respondent, it is clear that the Respondent acted in accordance with law and in accordance with evidence substantiating the mandatory requirement under the Tender, which demonstrates rightful and lawful consideration on the part of the Respondent in its decision making process. The Respondent rightly and on reasonably awarded the Tender to the best evaluated bidder taking into consideration all relevant factors which ought to have been taken into account in determination of responsiveness and ranking of bidders. The Petitioner on the other hand failed to establish as to how the Respondent’s decision is illogical, irrational and unreasonable to claim the relief of quashing the Respondent’s decision.

[21] Learned counsel concluded that based on the above submissions the Respondent submits that the Petitioner has failed to establish the ground for judicial review and that the Respondent in its decision making process acted at all material times in good faith,

rationality, reasonably and lawfully. Learned counsel moved Court to dismiss the Petition with costs.

[22] I shall start with article 125 of the constitution of the Republic of Seychelles which provides:

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

(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;

(b) original jurisdiction in civil and criminal matters;

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

(d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.

It is without doubt that the Respondent, SCAA, a government agency, was adjudicating on which bid was the best to cater for its need to have a bureau de change at the international airport. I therefore do not understand the logic behind the Respondent's contention that "*the decision of the Respondent cannot be construed as an adjudication on the perspective of scope and application of supervisory jurisdiction over subordinate court, tribunals and adjudicating authorities, thus this court does not have jurisdiction in terms of writ of certiorari*".

[23] This also overlap onto the fact that the power to adjudicate and decide on the appropriate bid fell on the Respondent only and not on the Procurement Review Panel, nor on the successful bidder Unimoni. Not even this Court is empowered to determine whether Unimoni or any other bidder should have been successful. This argument raised by the Respondent at the end of its response is therefore not sustainable.

[24] The third issue raised being that the Petition is defective in that the Applicant has failed to attach a certified copy of the decision being canvassed and there is no bona fide interest and or good faith shown in the application both at the stage of leave and at this stage can be disposed of in a phrase. It is correct that this rule, being Rule 2 (2) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules which states that:

“(2) The petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof in the form of exhibits.”

was not abided to by the Petitioner and the Respondent did not raise any objection to the same until in its final submission.

[25] The Court must always keep in mind that whilst rules are made to be followed, litigants should not be made slave to rules whilst meritorious claims are thrown by the wayside particularly when blind obedience to such rule does not add any value to the matters to be determined. Failure to abide by Rule 2(2) is not fatal to these proceedings since the Respondent disclosed the whole file to the Court and the file contained the decision in question. Consequently there is no unfairness or prejudice cause to any party. The matter can therefore be determined on the merits.

[26] The concept of judicial review is for the Court to ensure that natural justice prevails particularly when a public authority is given power to make decisions which affects the common person or legal person. Grounds for judicial review are many, including but not necessary limited to the following:

- i. Illegality
- ii. Jurisdiction: Error of law or error of fact
- iii. The decision maker went beyond their power: ultra vires
- iv. Ignoring relevant considerations or taking irrelevant considerations into account
- v. Fettering discretion
- vi. Irrationality
- vii. Proportionality to the aim it seeks to achieve
- viii. Procedural impropriety

- ix. Statutory procedures where it is so required
- x. Breach of natural justice; fairness. Some examples of the rules of natural justice required to be observed:
 - a. The rule against bias
 - b. The right to a fair hearing
 - c. Duty to give reasons
 - d. Legitimate expectations.

[27] It is submitted by the Respondent and this Court also subscribes to the view after reading the tender documents that putting forth a higher monetary bid does not ensure that the bid finds success. It was right and proper for the Respondent to ensure all-round and long-term sustainability of the operation as appears to come from the context of the tender. Nevertheless, when there are so many criteria to meet, it is generally expected that the bidders would be assessed on all the set criteria and standards.

[28] In the present case the grounds raised in support of this application for judicial review are three: i. Irrationality/unreasonableness; ii. Breach of natural justice; and iii. Ignoring relevant considerations or taking irrelevant considerations into account.

[29] The first ground I shall consider is irrationality/unreasonableness. A decision would be irrational if it is *"so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it."* See the decision in Associated Provincial Picture Houses Ltd v Wednesbury Corporation, as rehearsed by learned counsel for the Respondent in his submission. Unlike illegality and procedural impropriety, the court looks at the merits of the decision, rather than at the procedure by which it was arrived at or the legal basis on which it was founded. The question to ask is whether the decision makes sense. It may also overlap on illegality and the decision may also be considered irrational.

[30] Arriving at the decision it did, did not require a large leap imagination or machinations by the Respondent. The Respondent could have reached the same decision without having to comment unfavourably against the bid of the Petitioner. The aim to for the Respondent to get more money from the operator of the bureau de change was not the sole or maybe

main criteria for being the successful bidder. Hence, an objective consideration of the decision does not reveal a high level of irrational or outrageous defiance to logic to meet the concept of *Wednesbury* unreasonableness. On that account I do not find merit in the Petitioner's argument.

[31] In respect of breach of natural justice one cannot proceed without being reminded of Lord Bridge's dictum in *Lloyd v McMahon* [1987] AC 625,

"the rules of natural justice are not engraved on tablets of stone".

Nevertheless natural justice requires that the adjudicator approaches the decision making process with fairness which approach may also differ from case to case. In this case, the two main aspects that the Petitioner has hinted at but not developed fully are the rule against bias and the right to fair hearing.

[32] The rule against bias as developed in the case of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*, H.L 15 January 1999 are not particularly relevant here as there has been no assertion that any of the adjudicating members of the Respondent had any type of relationship to any of the bidders. However, learned counsel argued that in all circumstances, it appears as if the decision to award the tender to Unimoni had already been made and the bidding and adjudication were just formalities. It can be a strong perception but without more supporting facts, this court is not satisfied on balance of probabilities that this was the case.

[33] The right to a fair hearing would have arisen if it was necessary for the adjudicators to hear the bidders before awarding the bid. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. This principle was expounded in the case of *Ridge v Baldwin* [1964] AC 40. In this case, there was no such requirement. It would therefore be unreasonable for this court to impose such additional requirement in order to reach its decision.

[34] The third contention is that the Respondent in their assessment of the Petitioner's bid ignored relevant considerations or took irrelevant considerations into account. Hence, the Respondent has based its decisions on considerations which were not relevant to their

decision making power and acted unreasonably which may also be qualified as having used their powers for an improper purpose. For this ground to succeed, the improper purpose or the irrelevant consideration must be such as to *materially influence* the decision. Where the improper purpose is not of such material influence, the authority may be held to be acting within its lawful discretion. In *R v Broadcasting Complaints Commission, ex parte Owen [1985] QB 1153*, the broadcasting authority refused to consider a complaint that a political party has been given too little broadcasting time mainly for good reasons, but also with some irrelevant considerations. It was held that the irrelevant consideration were not of material influence on the decision.

- [35] In the present case, the consideration given to the Petitioner's bid appears to have been adequate, so long however that all the other bids were accorded the same treatment and given the same consideration. It appears that negative comments, however vague were made only in respect of the Petitioner's bid even in respect of the Petitioner's highest monetary offer. The question is whether taken at their face value, these comment placed unduly serious or material consideration detrimental to the Petitioner.
- [36] Considering the nature and competitiveness of the business for which the bids were being considered, it is more likely than not that the comments revealed a more fundamental insight into the weight given to the Petitioner's bid which was not apparent in regards to the other bids. It is apparent that other hidden considerations must have come into play which was detrimental to the process. It shows clear lack of transparency and there appear to be uncertainty as to the relative importance of the different criteria.
- [37] I maintain the position that not awarding the bid to the highest bidder is on itself not fatal to the process. However when such is considered alongside the comments made and the lack of guidance on what weight each criteria carries, it makes it highly probable that the Respondent ignored relevant considerations such as the highest or most appropriate bid, but took irrelevant considerations such as whether there were missing account pages only from the Petitioner's bid and failed to apply the same considerations to other bids. I find that on balance such ambiguity and procedural caprice were fatal to the process in the circumstances.

[38] Consequently I hereby invoke the powers given to this Court under Article 125(1)(c) and hereby issue a writ of certiorari quashing the decision of the Respondent conveyed by letter dated 13 February 2020 wherein the Petitioner was deemed not to be the most responsive bidder.

[39] I further declare that any award made from that tender process to be void.

[40] I award cost to the Petitioner.

Signed, dated and delivered at Ile du Port On 15 October 2021.

Dodin J