

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for mandates in the nature of Writs of Certiorari, Prohibition and Mandamus

**CA (Writ) Application No: 341/2020**

Avant Garde Security Services  
(Private) Limited,  
6/3, Bangalawa Junction,  
Kotte Road, Kotte.

**PETITIONER**

Vs.

1. Bank of Ceylon.
2. Kanchana Ratwatte,  
Chairman, Bank of Ceylon.
3. R.M.P. Rathnayake.
4. Lalitha Vithana.
5. Harsha Wijayawardhana.
6. Hasitha Premaratne.
7. Anura Chrstopher Fernando
8. Brigadier L.W.H. Gamage,  
Head of Security.

1<sup>st</sup> to 8<sup>th</sup> Respondents are at  
Bank of Ceylon, No. 01, BOC Square,  
Bank of Ceylon Mawatha, Colombo 1.

9. Secretary,  
Ministry of Finance.

10. Hon. Mahinda Rajapaksa,  
Minister of Finance.
11. Secretary,  
Ministry of Defence.
12. Secure Security (Pvt.) Ltd.,  
92, Kande Watte Road, Nugegoda.
13. Crown Royal Security Services (Pvt.),  
29/8, Stratford Avenue, Colombo 6.
14. Gajashakthi Security Service (Pvt.) Ltd.,  
101, Elvitigala Mawatha, Colombo 8.
15. Brave Guard Security and  
Investigation Services Pvt. Ltd.,  
No. 227, 16 Sri Jayawardenapura  
Mawatha, Kotte.
16. X Force Security Service Pvt. Ltd.,  
192, Rajagiriya Road, Rajagiriya.
17. Rakna Arakshaka Lanka Limited,  
143/A, Kirulapone Avenue, Colombo 5.
18. A B Securities (Pvt.) Ltd.,  
No. 141, Kirula Road, Colombo 5.
19. Red Force Security Services (Pvt.) Ltd.,  
No. 46/2, Kolombathanthri Mawatha,  
Ethul Kotte, Kotte.
20. Certis Lanka Security Solutions (Pvt.) Ltd.,  
No. 15, De Fonseka Place, Colombo 4.
21. Sinha Security (Pvt.) Ltd.,  
No. 136/3C, Temple Lane, Nawala.
22. Monara Holdings (Pvt.) Ltd.,  
No. 76, 5<sup>th</sup> Lane, Nawala, Sri Lanka.
23. Iron Arms Security Services (Pvt.) Ltd.,

No. 10, Ruhunukala Mawatha, Colombo 8.

24. Dilco Security & Investments (Pvt.) Ltd.,  
No. 839/C Dilco Cour, Malabe.

25. United Guards (Pvt.) Ltd.,  
No. 5, Greenlands Lane, Colombo 5.

26. Watchguard Security &  
Investments (Pvt.) Ltd.,  
No. 246/3, Dehiwala-Maharagama Road,  
Dehiwala-Mount Lavinia.

27. Kay Jay Group (Pvt.) Ltd.,  
618, Aluthmawatha Road, Colombo 15.

28. CP Lanka (Pvt.) Ltd.,  
No. 18/2, Attidiya Road, Ratmalana.

### **RESPONDENTS**

**Before:** **Arjuna Obeyesekere, J / President of the Court of Appeal  
Mayadunne Corea, J**

**Counsel:** Eraj De Silva with Manjuka Fernandopulle, Niran Anketell and  
Daminda Wijayaratne for the Petitioner

Priyantha Nawana, P.C., Additional Solicitor General with Dr. Charuka  
Ekanayake, State Counsel for the 1<sup>st</sup> – 8<sup>th</sup> Respondents

Aparrajitha Amaradasa with Ama Siriwardena for the 12<sup>th</sup> and 16<sup>th</sup>  
Respondents

Harsha Amarasekara, P.C., with Sachindra Sanders for the 14<sup>th</sup>  
Respondent

**Supported on:** 22<sup>nd</sup> February 2021 and 23<sup>rd</sup> February 2021

**Written  
Submissions:** Tendered on behalf of all parties on 8<sup>th</sup> March 2021

**Decided on:** 17<sup>th</sup> March 2021

**Arjuna Obeyesekere, J., P/CA**

The Petitioner is a company that is engaged in the business of providing security services to Private and State sector organisations since 1996. The Petitioner states that it has over 365 clients in 1200 locations and a work force of over 3000 highly trained security officers.

The Petitioner states that by a letter dated 2<sup>nd</sup> June 2020 marked '**P2**', the 1<sup>st</sup> Respondent, the Bank of Ceylon had invited the Petitioner to submit its bid for the supply of 1350 security personnel for the Head Office and the island wide branch network of the 1<sup>st</sup> Respondent, demarcated on the basis of the nine Provinces, with the Western Province being divided into three sections – i.e. North, South and Head Office/Metropolitan. It is admitted that the Petitioner and 18 other companies including the 12<sup>th</sup> – 28<sup>th</sup> Respondents submitted their bids in response to the said invitation.

According to '**P2**', those who are currently placed on the list of defaulters of the 1<sup>st</sup> Respondent have been disqualified from applying. While the engagement of the security services in terms of '**P2**' was for a period of two years, the 1<sup>st</sup> Respondent has limited the number of Provinces that each bidder would be awarded to two.

'**P2**' also provided that the bidders should have *inter alia* the following qualifications:

- a) A cadre of over 750 security personnel;
- b) Minimum of five years service as a registered security service provider;
- c) An administrative set up in the relevant Province for which bids are being submitted;
- d) Be financially stable with adequate financial resources and bank facilities to support its operations;
- e) Ability to pay salaries of the security personnel in terms of the Regulations issued by the Labour Department, irrespective of the receipt of payment from the 1<sup>st</sup> Respondent.

Paragraph 29 of Annex 'A' of 'P2' provided further that the evaluation of bids shall be carried out on the basis of the following criteria:

- a) Compliance with Conditions of Bid fulfilling the submission of documents;
- b) Past performance;
- c) Bid Price.

The Petitioner states that it later became aware that the tender for the supply of security personnel had been awarded as follows:

- a) 12<sup>th</sup> Respondent – Sabaragauwa Province and the Uva Province
- b) 13<sup>th</sup> Respondent – Eastern Province and the Western Province (South)
- c) 14<sup>th</sup> Respondent – Southern Province and North Western Province
- d) 15<sup>th</sup> Respondent – Central Province and Western Province (North)
- e) 16<sup>th</sup> Respondent – Northern Province and the North Central Province
- f) 17<sup>th</sup> Respondent – Head Office and Metro.

The Petitioner states that at about the same time that it came to know about the award of the tender, it came into possession of a report dated 24<sup>th</sup> June 2020, marked 'P6' submitted by the 8<sup>th</sup> Respondent, the Head of Security of the 1<sup>st</sup> Respondent, in which the 8<sup>th</sup> Respondent had identified certain issues relating to the past performance of the 13<sup>th</sup>, 14<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents. The Petitioner states that by a letter dated 6<sup>th</sup> July 2020 marked 'P5', it conveyed its grievance with regard to its non-selection, as well as the selection of the 13<sup>th</sup> and 14<sup>th</sup> Respondents to the Prime Minister, who was also the Minister of Finance. The Petitioner states that the 1<sup>st</sup> Respondent, acting on a letter written to it by the Prime Minister's office, had suspended the tender process on 20<sup>th</sup> July 2020. However, the process had been reactivated and the successful bidders had been notified of their selection by email on 23<sup>rd</sup> July 2020.

Aggrieved by its non-selection, the Petitioner filed this application, seeking *inter alia* the following relief:

- a) Writs of Certiorari to quash the decision of the 1<sup>st</sup> and/or 2<sup>nd</sup> – 7<sup>th</sup> Respondents to award the tender for the provision of security services to the 12<sup>th</sup> – 17<sup>th</sup> Respondents;
- b) Writs of Prohibition prohibiting the 1<sup>st</sup> and/or 2<sup>nd</sup> – 7<sup>th</sup> Respondents from awarding the impugned tender for the provision of security services to the 12<sup>th</sup> – 17<sup>th</sup> Respondents;
- c) A Writ of Mandamus compelling the 1<sup>st</sup> and/or 2<sup>nd</sup> – 7<sup>th</sup> Respondents to hold an independent inquiry into the complaint of the Petitioner relating to the irregularities in the tender process.

It is admitted that pursuant to the intimation of the award, the 1<sup>st</sup> Respondent has entered into Contracts with the 12<sup>th</sup> – 17<sup>th</sup> Respondents in respect of the provision of security services with effect from 1<sup>st</sup> August 2020. This application has been filed on 17<sup>th</sup> September 2020. The necessity to consider the Writs of Prohibition does not arise as the tenders have already been awarded, the contracts have been executed and the successful bidders have commenced providing services to the 1<sup>st</sup> Respondent.

The Petitioner is not seeking a Writ of Mandamus directing that the contracts in respect of two Provinces be awarded to him. Instead, the Petitioner is only seeking a Writ of Mandamus directing that fresh bids be called by the 1<sup>st</sup> Respondent for the provision of security services.

It is trite law that for a Writ of Mandamus to issue, the public authority must not only be under a legal or public duty to carry out the act which the petitioner demands, but also have the power to carry out the said duty, while the petitioner in turn must have a legal right to the performance of such public duty. In **Kaluarachchi vs Ceylon Petroleum Corporation and Others**,<sup>1</sup> Fernando J, referring to the judgment in **Credit**

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<sup>1</sup> SC Appeal No. 43/2013; SC Minutes of 19<sup>th</sup> June 2019.

**Information Bureau of Sri Lanka vs M/s Jafferjee and Jafferjee (Pvt) Limited**<sup>2</sup>

reiterated that, *“the foundation of mandamus is the existence of a legal right. A court should not grant a Writ of Mandamus to enforce a right which is not legal and not based upon a public duty.”*

The Petitioner does not have a legal right to demand that the 1<sup>st</sup> Respondent call for tenders for the supply of security services nor does the 1<sup>st</sup> Respondent owe the Petitioner a legal duty to do so. Thus, the Petitioner has no legal basis to seek the aforementioned Writ of Mandamus.

The only relief that is left to be considered are the aforementioned Writs of Certiorari.

The learned President’s Counsel for the 1<sup>st</sup> Respondent submitted that eighteen bids were received in response to the invitation. While six bids had been rejected for not being responsive to the invitation, one other bid had been rejected due to the price quoted being unrealistic. The balance eleven bids had been evaluated by the Technical Evaluation Committee (TEC) comprising of five persons including the 8<sup>th</sup> Respondent. On 23<sup>rd</sup> June 2020, the TEC had recommended to the Corporate Procurement Committee (CPC) that the tender be awarded to the 12<sup>th</sup> – 17<sup>th</sup> Respondents, who were the lowest evaluated and substantially responsive bidders in respect of the Provinces for which the recommendation was being made. The learned President’s Counsel for the 1<sup>st</sup> Respondent submitted further that having scrutinised the bids and the Evaluation Report of the TEC, the CPC had decided on 2<sup>nd</sup> July 2020 to proceed with the awarding of the tender to the 12<sup>th</sup> – 17<sup>th</sup> Respondents.

He submitted further that the Petitioner was not selected as the price quoted by the Petitioner was not the lowest in respect of any of the Provinces. Schedules of the rates quoted by each of the bidders for each of the Provinces have been filed by way of a motion dated 1<sup>st</sup> March 2021. I have examined the said Schedules and observe that the prices quoted by the Petitioner are higher than the prices quoted by the bidders who were selected. It is clear that the Petitioner, although technically compliant, was not the lowest bidder in respect of each of the Provinces, and was thus not entitled to the award of the tender.

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<sup>2</sup> [2005] 1 Sri LR 89.

It is an accepted fact that the 1<sup>st</sup> Respondent must procure goods and services on 'financially the most advantageous and qualitatively the best services and supplies for the country'. In Smithkline Beecham Biologicals S.A and another Vs. State Pharmaceutical Corporation of Sri Lanka and Others Amerasinghe, J defined this phrase as follows:

*"I understand this to mean that the procedure relating to Government procurements should ensure the most favourable conditions for the advancement of the People by obtaining "financially the most advantageous and qualitatively the best supplies for the country". What is financially the most advantageous and qualitatively the best supplies for the country is pre-eminently a matter of policy that the Government which is accountable to the People must decide...."*<sup>3</sup>

Thus, the 1<sup>st</sup> Respondent is entitled to award the tender to those who are technically compliant and has offered the best price.

The learned Counsel for the Petitioner did not deny the fact that the price quoted by the Petitioner was higher than those selected. He however submitted that in view of the report marked '**P6**' submitted by the 8<sup>th</sup> Respondent detailing the poor past performance of the 13<sup>th</sup>, 14<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents, the bids of the 13<sup>th</sup> and 14<sup>th</sup> Respondents ought to have been rejected, thereby rendering the Petitioner eligible to be awarded at least one Province.

I have already noted that the TEC, of which the 8<sup>th</sup> Respondent was a member, had submitted their recommendation on 23<sup>rd</sup> June 2020. It is only thereafter – i.e. on 24<sup>th</sup> June 2020 - that the 8<sup>th</sup> Respondent raised concern with the performance of the 13<sup>th</sup>, 14<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents. I have examined '**P6**' and observe that except with regard to non-payment of EPF etc, none of the other allegations are specific to a particular service provider. Be that as it may, I agree with the learned Counsel for the Petitioner that the issues raised by the 8<sup>th</sup> Respondent in '**P6**', if properly identified

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<sup>3</sup> [1997] 3 Sri LR 20 at 38.



and substantiated, are serious enough to warrant consideration by the 1<sup>st</sup> Respondent.

The issue I have with 'P6' however is that the 8<sup>th</sup> Respondent, as the Head of Security of the 1<sup>st</sup> Respondent and as member of the TEC ought to have raised the said concerns at the stage of the evaluation, which, he does not appear to have done. The learned President's Counsel for the 1<sup>st</sup> Respondent went one step further and submitted that if the said concerns of the 8<sup>th</sup> Respondent were correct, he should have intervened at the very outset of the tender process, when bidders were being pre-qualified. I would say that if the 8<sup>th</sup> Respondent as Head of Security had concerns about the performance of any of the service providers, he had a duty by his employer to have brought such matters to its attention while such service providers were actively engaged in providing services to the 1<sup>st</sup> Respondent. It does not appear that the 8<sup>th</sup> Respondent has done so, nor has the 8<sup>th</sup> Respondent given reasons in 'P6' as to why he is raising the alarm bells after the horses have bolted.

The timing of the report and the unsubstantiated allegations raised therein gives credence to the submission of the learned President's Counsel for the 14<sup>th</sup> Respondent that 'P6' has been prepared by the 8<sup>th</sup> Respondent for extraneous purposes and as a platform to enable the Petitioner to challenge the award, inspite of not being the lowest bidder. By the time 'P6' emerged, the TEC had already submitted its recommendations to the CPC. In these circumstances, I am of the view that the bids of the 13<sup>th</sup>, 14<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents could not have been rejected by the 1<sup>st</sup> Respondent on the purported allegations contained in 'P6'.

The learned Counsel for the Petitioner submitted further that at the pre-bid meeting, the officials of the 1<sup>st</sup> Respondent had clearly indicated to all bidders that it would have to pay a monthly salary of Rs. 35,000 for each Security Officer. In support of this position, the Petitioner has annexed marked 'P3a' – 'P3f', affidavits from several unsuccessful tenderers as well as its own staff members who have stated as follows:

*"At the said meeting, it was explained to all present that only bids of those who undertake to pay a minimum of Rs. 35,000 which is the prevailing requirement at comparable state banks to security guard after the deductions for the statutory payment, would be considered as qualified to bid.*

*In the circumstances, it was clearly held out that only bids which state that a security guard would get a minimum salary of Rs. 35,000 after the deduction of statutory dues, would be entertained.*

*On that understanding and representation, ... made a bid on the basis that a minimum of Rs. 35,000 would have to be paid to a security guard."*

The learned Counsel for the Petitioner submitted further that the Petitioner acted on the said announcement and quoted its prices accordingly, only to find that the successful bidders have quoted prices lower than Rs. 35,000. The Petitioner's complaint therefore is that he has been unfairly excluded from the bidding process by the 1<sup>st</sup> Respondent.

The above position is not only not borne out by the minutes of the pre-bid meeting, marked '**P3(I)**' which had been issued on 10<sup>th</sup> June 2020, it is contradicted by the Petitioner's own breakdown of the rates, annexed to its bid '**P2**' wherein the Petitioner had quoted a net salary of Rs. 35,000 only for the Western Province and the Head Office while the Petitioner had quoted Rs. 31,000 for all other Provinces. Furthermore, according to the Petitioner's letter dated 10<sup>th</sup> August 2020 marked '**P13**', what is said to have been told at the pre-bid meeting was that a minimum salary of Rs. 35,000 should be paid for the Western Province and Rs. 31,000 for the other Provinces. In these circumstances, the argument of the Petitioner that it was misled by the 1<sup>st</sup> Respondent at the pre-bid meeting is not tenable.

The final argument of the learned Counsel for the Petitioner was that the resumption of the tender process after it was suspended, without affording the Petitioner a hearing is illegal and procedurally improper. I must say that the bidding documents do not provide for a hearing to be given at that stage of the process, to a bidder who is dissatisfied with the decision of the 1<sup>st</sup> Respondent. To impose such a requirement would not only unnecessarily delay the tender process, but can give rise to an allegation that the 1<sup>st</sup> Respondent has acted outside the stipulated procedure.

All learned Counsel for the Respondents have raised several matters relating to the maintainability of this application. The first is that the Petitioner is guilty of laches in

that this application has been filed 48 days after the award of the tender. Given the fact that the Petitioner had access to the documents of the 1<sup>st</sup> Respondent – vide 'P10', 'P11' and 'P13'- the Petitioner could not have been unaware of the award prior to 1<sup>st</sup> August 2020. Thus, on the face of it, there is delay in invoking the jurisdiction of this Court. The second is the submission of the learned President's Counsel for the 14<sup>th</sup> Respondent that in the event this Court issues a Writ of Certiorari, the 1<sup>st</sup> Respondent would not have the services of armed security officers and that such a situation would lead to severe administrative inconvenience and chaos. This argument has much merit. The third matter is that the Petitioner is guilty of suppression and misrepresentation of material facts. The fourth is that the necessary parties are not before Court, in that the Petitioner has failed to name as Respondents the members of the TEC and the CPC. The necessity to consider these arguments presented on behalf of the Respondents does not arise in view of the conclusion reached by me on the three arguments presented on behalf of the Petitioner.

In the above circumstances, I do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

**President of the Court of Appeal**

**Mayadunne Corea, J**

I agree

**Judge of the Court of Appeal**