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

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

WRIT Application No. 343/2024

Sanken Construction (Private) Limited

No. 295, Madampitiya Road

Colombo 14.

Petitioner

Vs.

1. Mr. K.D.S. Ruwanchandra
   Secretary
   Ministry of Ports, Shipping and Aviation
   No. 19, Chaithya Road
   Colombo 01.

2. Airport and Aviation Service (Sri Lanka)
   Private Limited
   Bandaranaike International Airport
   Katunayake
   Sri Lanka.

3. G.S. Withanage

   Chairman

   Procurement Appeal Board

   Presidential Secretariat

   Colombo 01.

4. Anura Lokugamage

   Member

   Procurement Appeal Board

   Presidential Secretariat

   Colombo 01.

5. Madhawa Devasurendra

   Procurement Appeal Board

   Presidential Secretariat

   Colombo 01

6. Chairman
   Standing Cabinet Appointed
   Procurement Committee under the
   Ministry of Finance Aviation Division
   Ministry of Ports, Shipping and Aviation
   Level 30, West Tower, World Trade
   Centre
   Colombo 01
   Sri Lanka

7. Chairman
   Technical Evaluation Committee

Ministry of Ports, Shipping and Aviation
No. 19, Chaithiya Road
Colombo 01

8. Consulting Engineers and Contractors (Pvt) Ltd. And China Nautical Aero Technology
   International Engineering Corporation
   Joint Venture
   No. 423, Nawala Road
   Sri Jayawardenepura Kotte
   Sri Lanka
   And also
   7/7,79, Hyde Park Corner
   Colombo 02
   Sri Lanka

9. Tuduwe Brothers (Private) Limited and China
   Harbour Engineering Company Limited
   Joint Venture
   505/2, Elvitigala Mawatha
   Colombo 05
   And also
   Level 32, East Tower
   World Trade Centre, Echelon Square

10. Maga Engineering (Private) Limited
    No.200 Nawala Road
    Narahenpita
    Colombo 05.

11. China Civil Engineering Construction Corporation

No.33, 18/F Parkland office Building
Park Street
Colombo 02
Sri Lanka

12. Hon. Attorney General
Attorney General's Department
Colombo 12.

13. Secretary to the Cabinet of Ministers
Office of the Cabinet of Ministers
Loyd's Building
Sri Baron Jayathilaka MW
Colombo 01
Sri Lanka.

Respondents

Before : **N. Bandula Karunarathna P/CA, J.**
B. Sasi Mahendran, J.

Counsel: Dilshan Jayasooriya with Priyangi Jayasooriya, Dushinka Nelson, Cristian Pieris, Devaka Jayasooriya for the Petitioner
Sumathi Dharmawardhene, ASG PC with Manohara Jayasinghe, DSG bb and Pulina Jayasooriya, SC for the 1st- 5th, 12th,13th Respondents
Sanjeewa Jayawardena, PC with Suren Gnanaraj and Rukshan Senadheera For the 8th Respondent

Supported On: 26.07.2024

Written Submissions: 16.08.2024
21.08.2024 (by the 1st to 5th , 12th and 13th Respondents)
On

Order On: 25.09.2024

B. Sasi Mahendran, J

This order pertains to whether the notice and interim order are to be issued to the Respondents.

The Petitioner; a company incorporated under the Companies Act No.7 of 2007 engaged in the construction industry as a Civil Engineering Contractor, instituted this action praying for the following reliefs as prayed in the petition dated 03.06.2024.

A. Issue Notice of this Application on the Respondents;
B. Grant and issue an Interim Order suspending the operation of any decision/determination/recommendation made by the 3rd to 5th Respondents, the PAB, in consideration of an Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 8th March 2024 (P-6), inter alia overturning/setting aside the decision made by the 6th Respondent to award the subject Contract/Tender to the Petitioner, until the final hearing and determination and/or conclusion of this Application;
C. Grant and issue an Interim Order restraining and/or preventing the 1st Respondent and the 2nd Respondent from awarding the subject Contract/Tender to any Bidder, other than the Petitioner, relying on any decision/determination/recommendation made by the 3rd to 5 Respondents, the PAB, in consideration of an Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 18th March 2024 (P-6), until the final hearing and determination and/or conclusion of this Application;
D. Grant and issue an Interim Order restraining and/or preventing the 1St Respondent and the 2. Respondent from issuing a Letter of Award and/or Letter of Acceptance and/or from entering into a Contract/Agreement with any Bidder, other than the Petitioner, relying On any decision/determination/recommendation made by the 3rd to 5th Respondents, the PAB, in consideration of an Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 18th March 2024 (P-6), until the final hearing and determination and/or conclusion of this Application;
E. Grant and issue an Interim Order restraining and/or preventing the 1St Respondent and the 2 Respondent from taking any further steps whatsoever concerning the awarding of the subject Contract/Tender, relying on any

decision/determination/recommendation made by the 3rd to 5't Respondents, the PAB, in consideration of an Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 18" March 2024 (P-6), until the final hearing and determination and/or conclusion of this Application;

F. In the event the 1" Respondent and/or 2nd Respondent have already taken steps to issue a Letter of Award and/or Letter of Acceptance and/or to enter into a Contract/Agreement with any Bidder, other than the Petitioner, relying on any decision/determination/recommendation made by the 3rd to 5" Respondents, the PAB, in consideration of an Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 18th March 2024 (P-6):-

I. Grant an Interim Order restraining and/or preventing the 15 Respondent and the 2nd Respondent from taking any further steps in furtherance of such Letter of Award and/or Letter of Acceptance and/or Contract/Agreement, until the final hearing and determination and/or conclusion of this Application; and it.

II. Grant an Interim Order restraining and/or preventing any one or more of the 8 to 11" Respondents, from acting in furtherance of such Letter of Award and/or Letter of Acceptance and/or Contract/Agreement, until the final hearing and determination and/or conclusion of this Application.

G. Grant an Interim Order directing the 1st and/or 2nd and/or 3rd to 5th Respondents to furnish and/or produce to Your Lordship's Court the following documents and/or material required for the determination of the above Application:-

a. Minutes of the 3rd to 5th Respondents' (PAB) meetings/hearings held in pursuance of determining any Appeal submitted by any one or more of the unsuccessful Bidders vis a vis the letter dated 18th March 2024 (P-6);

b. Any decision/determination/recommendation made by the 3 to 5th Respondents (PAB) to award the Contract/Tender to any Bidder other than the Petitioner;

c. The original decision/determination/recommendation made by the 6 Respondent, as indicated in the letter dated 18th March 2024 (P-6), intending to award the Contract/Tender to the Petitioner;

d. The original report of the 7 Respondent (TEC), regarding the technical compliance of the several Bids received in response to the Invitation for Bids (P-3);

e. The relevant minutes of the meetings of the 7" Respondent (TEC) and the minutes of the meetings of the 6l Respondent (SCAPC), leading to the decision made to award the Contract/Tender to the Petitioner vis a vis the letter dated 18th March 2024 (P-6).

H. Direct the 1 and/or 2nd Respondents to disclose, in writing, the names of the members of the TEC & SCAPC (6" Respondent and the 7th Respondent), to Your Lordships' Court;

I. Grant and issue a mandate in the nature of a Writ of Certiorari quashing any decision/determination/recommendation of the 3rd to 5" Respondents, the PAB, made arbitrarily without affording a hearing to the Petitioner, to award the subject Contract/Tender to any Bidder other than Petitioner;

J. Grant and issue a mandate in the nature of a Writ of Certiorari quashing any decision/determination of the 1$ Respondent and/or 2nd Respondent, made relying (either directly or indirectly) on any recommendation made by the 3rd to 5' Respondents, the PAB, to award the Contract/Tender to any Bidder other than Petitioner;

K. Grant and issue a mandate in the nature of a Writ of Prohibition preventing/prohibiting the 1" Respondent and/or 2 Respondent and/or the 6 Respondent from acting on any recommendation made arbitrarily by the 3rd to 5th Respondents, the PAB, without affording a hearing to the Petitioner, in furtherance of awarding the subject Contract/Tender to any Bidder other than the Petitioner;

L. Grant and issue a mandate in the nature of a Writ of Mandamus compelling the 1st Respondent and/or 2nd Respondent to rely on the recommendations/determinations made by the 6'Respondent and 7! Respondent, the SCAPC &TEC, respectively, and proceed to award the subject Contract/Tender to the Petitioner;

M. Grant and issue a mandate in the nature of a Writ of Mandamus compelling the 3rd to 5th Respondents, the PAB, to reconsider, according to applicable laws, regulations and Procurement Guidelines/Manual, any Appeals that have already been submitted by any Bidders in pursuance of the letter dated 18th March 2024 (P-6);

N. Grant and issue a mandate in the nature of a Writ of Mandamus compelling the 3rd to 5th Respondents, the PAB, g1 U to correctly and/or duly and/or lawfully apply the Domestic Preference Margin contained in Clause 7.9.5 of the Procurement

Guidelines/Manual when re-considering/determining the appeals submitted by any Bidder/s;

O. Grant such relief and/or issue such directions as may be deemed just and equitable by Your Lordships Court by taking into account all the facts and circumstances enumerated by the Petitioner in this Application;

P. Grant Costs of this Application to the Petitioner; and

Q. For such other and further relief as to Your Lordship's Court may seem meet.

The facts of this case are briefly as follows:

This application is in relation to the 'Construction of New Buildings for Capacity Enhancement to Departing Passenger, Check-Ins & Satellite Boarding Gates and Baggage Handling System (Package – 1) at the BIA, Katunayake, Sri Lanka (hereinafter referred to as 'the Project'). The Chairman of Standing Cabinet Appointed Procurement Committee (hereinafter referred to as the 'SCAPC') called for Bids (Bid No. 113/T/2023) for the above said Project by a Newspaper Advertisement on or about 04.12.2023.

The Petitioner avers that the Petitioner submitted its Bid on 26.01.2024 in accordance with the provisions of the Bid Document together with a Bid security.

The Petitioner claims that, although the 8th Respondent's price appeared to be the lowest bid, the Petitioner becomes the lowest bidder, pursuant to the application of the Domestic Preference Margin. According to the petition, the Petitioner has not received any further communication from the 1st, 2nd or 6th Respondents in connection with the procurements.

However, the Petitioner learnt through a fellow bidder who took part in the bidding process for the said Project that, they had received a letter dated 18.03.2024 from the 1st Respondent, a copy of which was also received by the Petitioner through the said fellow bidder. As per the said letter, the fellow bidder's bid has been unsuccessful and the project was intended to be awarded to the Petitioner, as the Petitioner's Bid has been selected as the substantially responsive lowest evaluated bid. The letter further states that, the unsuccessful bidder can make an appeal to the Procurement Appeals Board (hereinafter referred to as the 'PAB') who are the 3rd to 5th Respondents. The Petitioner pleads that although the Petitioner had been identified as the substantially responsive lowest

evaluated bidder, the Petitioner was not informed of this outcome by the 1st or 2nd Respondents.

Thereafter, the Petitioner by the letter dated 28.03.2024 addressed to the Secretary to the Line Ministry inter alia requested for an immediate update on the current status, progress of the proceedings leading up to the awarding of the Bid/Project, and whether a final decision has been taken on who the successful bidder is.

The Petitioner further avers that, the Petitioner has reliably learnt that one of the unsuccessful bidders, the 8th Respondent, namely CEC+CAIEC Joint Venture has appealed against the decision of the 6th Respondent to the PAB under Clause 8.3 of the Procurement Guidelines, where the PAB had considered the said appeal. The Petitioner contends that, the Petitioner was kept in the dark with regards to the proceedings before the PAB and although the decision to award the contract to the Petitioner has been challenged, the Petitioner was neither notified by the PAB nor given a hearing by the PAB.

The Petitioner further learnt that, the PAB has provided its recommendations to the Cabinet of Ministers for their approval under Clause 8.4.1 of the Procurement Guidelines and that the recommendation of the PAB is to overturn the decision of the SCAPC and the Technical Evaluation Committee (hereinafter referred to as the 'TEC') and award the contract to the 8th Respondent.

The Petitioner, by a letter dated 31.03.2024 submitted formal requests for information under Section 3 of the Right to Information Act No. 12 of 2016, requesting the disclosure of the Report of the 7th Respondent namely the TEC appointed by the 1st and 2nd Respondents, the copy of the Appeal filed by the 8th Respondent and the recommendations made by the PAB if any.

The Petitioner has sent another letter dated 31.05.2024 to the Secretary to the Cabinet of Ministers, to be forwarded to the Members of the Cabinet of Ministers, informing them of the procedural irregularities that had happened in the procurement and appeal process, and requesting the Cabinet of Ministers to refrain from making any final decision regarding the award of the Project until the Petitioner's concerns are resolved.

The Petitioner also sent the above-said letter dated 31.05.2024 to the National Procurement Commission, inter alia requesting the Commission to intervene and conduct an investigation into the said procedural irregularities.

The Petitioner has filed this application seeking inter alia to quash the recommendation of the PAB to the Cabinet of Ministers to consider the 8th Respondent as the substantially responsive lowest evaluated bidder which is marked as Y1, on the basis that the PAB has failed to adhere to the principles of natural justice.

On the other hand, the Respondents have taken the position that, there is no provision available to the Petitioner to be heard. When we peruse the said decision of the PAB which is marked as Y1, they have mentioned that the said PAB has considered the TEC report dated 20.02.2024 where the TEC has recommended the Petitioner as the lowest bidder. But, they have rejected the particular report on the basis that, the 8th Respondent is only a partner of the JV that if a joint venture has more than 50% of the Sri Lankan ownership, it is qualified for domestic ownership.

During the arguments, the Petitioner has brought to notice that, through the Right to Information Act by document marked A3, the Petitioner has received a document that, subsequently, the TEC has met on 15.03.2024 and they have given 3 reasons for recommending the Petitioner which are as follows:

1. Technical Evaluation
2. Financial Evaluation
3. Domestic Preference

However, this document was not considered by the PAB when they made recommendations to the Cabinet which was made on 14.05.2024.

The purpose of setting up the PAB is to reconsider the report of the TEC, but the TEC report dated 15.03.2024 marked as P17 was never considered by the PAB.

We are mindful that, this order pertains to whether to issue notice or not. The main contention of the Petitioner is that, the PAB has not given a fair hearing to the Petitioner when they rejected his bid. According to the said Procurement manual marked as P2(b), the PAB shall submit an independent report to the Cabinet of Ministers either endorsing the decision of the SCAPC or rejecting the decision of the SCAPC. This observation is necessary for the Cabinet to approve the said contract.

The question before us is whether the PAB has considered the TEC report made on 15.03.2024 which has recommended the Petitioner on three grounds. We are mindful that, the Cabinet will arrive at a decision on the recommendation made by the PAB. The Respondents in their submission have not objected this position. But the main contention

was that the guidelines of the PAB do not provide for a successful bidder to give an opportunity to participate. At this juncture, I refrain from make a ruling whether the Petitioner should be given an opportunity.

However, when we consider the recommendations made by the PAB, the PAB has not considered the relevant document made by the TEC on 15.03.2024.

The question is whether the decision made by the PAB is ultra vires.

Clause 8.4 of the Procurement Guidelines reads as follows:

> "8.4 **Appeal Board**
>
> 8.4.1. (a) The Appeal Board upon receipt of any representations from the bidder against any recommendation of the CAPC shall promptly notify same to the Secretary of the Line Ministry.
>
> (b) After investigating into such representations, the Appeal Board shall submit its independent report to the Cabinet of Ministers, with copy to the Secretary of the Line Ministry and such report shall:
>
> i. Provide their reasons for endorsement of the decision of the CAPC; or
>
> ii. for rejecting same together with their independent recommendation of contract award."

C.I.Gunasekera, V. W. P. L. De Mel, Commissioner Of Labour And two Others, 79 II NLR 409 At 426, Tittawella, J. held that,

> "Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account.
> Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of
> law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a

wrong legal test to

the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari

for error of law on the face of the record- If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made. The above is a summary of some of the grounds for awarding certiorari as set down in S. A. de Smith's work-Judicial Review of Administrative

Action (Third Edition)."

***De Smith's Judicial Review*, Eighth Edition, page 245**,

An administrative decision or other exercise of a public function is unlawful under the broad chapter head of "illegality" if the decision-maker:

(a) Misinterprets a legal instrument relevant to the function being performed
(b) Has no legal authority to make the decision
(c) Fails to fulfil a legal duty
(d) Exercises discretionary power for an extraneous purpose
(e) Takes into account irrelevant considerations or fails to take account of relevant considerations
(f) Improperly delegates decision-making power.

MP Jain and SN Jain , Principles of Administrative Law, 7th Edition,Volume 2, page 2405;

"Thus, if a tribunal bases its decision on extraneous considerations which it ought not to have taken into account, or fails to take into account a vital consideration which it ought to have taken into account, then it amounts to jurisdictional error; its decision becomes a nullity and certiorari may be issued to quash the tribunal's decision."

Further at page 2408

"The Supreme Court has ruled that if a tribunal exercises its discretion on the basis of irrelevant considerations, or without regard to relevant considerations,

certiorari may properly issue to quash the order. One such relevant consideration, the disregard of which would render its order amenable to interference, would be the well-settled principles laid down in court decisions binding on the tribunal to whom the discretion is entrusted. This ruling accords with what the House of Lords has said in Anisminic."

Re Racal Communications, (1980) 2 ALL ER 634 at page 638, Lord Diplock held that ;

> "In Anisminic [1969] 1 All ER 208, [1969] 2 AC 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity."

In the instant application, the PAB has not taken into account a vital consideration which it ought to have taken into account, that is the TEC report made on 15.03.2024 where they have clearly considered the totality of the facts before providing its recommendations to the Cabinet of Ministers.

With the above authorities, we now consider whether there are errors on the face of the record of the said report.

1. The report dated 15.03.2024 was not considered by the PAB
2. The PAB has only considered the Domestic Preference Margin.

As it was observed by K Sripavan CJ in Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapitiya and Others, SC FR No. 394/2015, decided on 24. 06.2016, that:

"Thus, the Courts apply the broader notion of "fairness" and "fair procedure" than the "duty to act judicially". In the leading case of Kesava Mills Co. Vs. Union of India [(1973) AIR SC 389] Mukherjea J. rightly stated that the administrative authority concerned should act fairly, impartially and reasonably. The legitimacy of an action/expectation can be inferred if it is founded on the sanction of law or custom or established practice or procedure in regular or natural sequence, otherwise, it would betray the expectation of the Petitioner to present his appeal before the PAB. Whilst the PAB had finally recommended to the Cabinet of Ministers to cancel the tender and to call for international bids again, I am of the view that the PAB was duty bound to act fairly and reasonably in dealing with the rights and/or interests of the people and in case of any breach thereof the Court should act upon in striking down, any order made by the PAB in the exercise of the Courts' jurisdiction and direct the concerned authorities to exercise its functions fairly, reasonably in compliance with the Guidelines, the established practice or procedure and in accordance with legal and constitutional provisions."

Further held that:

"When specific provisions are laid down in the Government Procurement Guidelines – 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated. The power of the State is conferred on the Members of the SCAPC and the PAB to be held in trust for the benefit of the public.

……..

It has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to protect the nation in directing it to act within the framework of the law and the Constitution.

…..

In the words of Md Faizal Karim J, in the case of SSA Bangladesh Ltd. Vs. Engineer, Mahmud – ul Islam 9 BLC (AD)(2004), "The judiciary has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to guide the nation in shaping its destiny within the framework of the law and the Constitution. The Court of law would always jealously guard against any abuse or misuse of power/authority by the State functionary in dealing with the State property."

In light of the above-mentioned reasons, we hold that, the prima facie case has been established by the Petitioner warranting the issuance of the notice to the Respondents. This notice is issued based on the fact that, PAB has not considered the report made by the TEC on 15.03.2024.

Whether there is a need to follow the principles of natural justice will be considered at the argument stage.

Regarding the interim order, the Counsel for the 1st to 5th, 12th and 13th Respondents informed the Court, that until the conclusion of this proceeding, the Cabinet has decided not to take any further steps with regard to the procurement. Thus, this Court is not inclined to grant the interim relief.

Therefore, we issue notice to the Respondents.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna (P/CA), J.
I AGREE

PRESIDENT OF THE COURT OF APPEAL