

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

**In the matter of an application in  
the nature of Writs of *Certiorari* and  
*Mandamus* under article 140 of the  
Constitution of the Democratic  
Socialist Republic of Sri Lanka.**

Lankan Heritage and Tours International (Pvt)  
Ltd  
No. 41, Minuwangoda Road,  
Ekala,  
Ja-ela

**Petitioner**

**CA (Writ) 402/2016**

**Vs,**

1. Mr. Nihal Somaweera,  
Secretary,  
Ministry of Transport and Civil Aviation  
7<sup>th</sup> Floor, Sethsiripaya, 2<sup>nd</sup> Stage  
Battaramulla
2. Airport and Aviation Services (Sri Lanka) Ltd  
Bandaranaike International Airport,  
Katunayake.
3. Mr.Saman Ediriweera,  
Chairman – Airport and aviation Services  
(Sri Lanka) Limited,  
And Chairman – Tender Board 01 – Airport  
and Aviation Services (Sri Lanka) Limited,  
Bandaranaike International Airport,  
Katunayake.
4. Mr.Geeth Karunaratne.  
Head of Commercial and Properties,  
Airport and Aviation Services (Sri Lanka) Ltd  
Bandaranaike International Airport,  
Katunayake.
5. Hon. Attorney General,  
Attorney General's Department,  
Hulftsdorp,  
Colombo 12.
6. Casons Travels (Private) Limited,  
No.181, Gothami Gardens,  
Gothami Road,  
Rajagiriya.

7. A.A.M. Wazeer,
8. U.R.Wazeer
9. I.M.Wazeer,  
All in partnership under the same name and  
style of  
"JNW Lanka Tours",  
No.67, Maligakanda Road,  
Maradana,  
Colombo 10.
10. Ayubowan Tours and Travels (Private)  
Limited,  
No.15, Ranomoto Shopping Complex,  
Colombo Road,  
Negombo.

### Respondents

**Before** : Vijith K. Malalgoda PC. J (P/CA) &  
S. Thurairaja PC, J

**Counsel** : Dinal Phillips, PC with Heshan Thambimuttu for the Petitioner  
Sanjeewa Jayawardane, PC with Rajeev Amarasuriya for the 6<sup>th</sup> to 10<sup>th</sup>  
Respondent  
Zuri Zain, SSC for the State

**Order on** : 01<sup>st</sup> March 2017

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### Order

#### **S.Thurairaja, PC J**

The Petitioner above named filed a petition on the 24<sup>th</sup> November 2016 with the following prayers.

- (a) Issue notice of this application on the respondents,
- (b) Grant and issue an Interim Order staying and/or suspending the operation of the awarding and/or signing of any contract agreements with parties pursuant to the purported tender document and/or bidding document for the tender No.0069/T/2015 in respect of the operation of travel service counters at Arrival Public Concourse at the Bandaranaike International Airport,
- (c) **Grant and Issue an Interim Order suspending and/or suspending the operation of the said letter dated 25.10.2016 marked 'X10' pending the hearing and final determination of this application,**

- (d) Make Order forthwith calling for and examining the file pertaining to tender No.0069/T/2015 and more particularly documents adverted to in paragraph 17 marked 'X8' and the entire documentary process including the approval of the short listing and the Technical Evaluation Committee documents and recommendations,
- (e) Issue a Writ in the nature of a writ of certiorari quashing the purported decision of the 1<sup>st</sup> and/or 2<sup>nd</sup> and/or 4<sup>th</sup> Respondents as more fully set out in the letters dated 25.10.2016 marked 'X10',
- (f) Grant and Issue a writ of mandamus directing the Respondents to grant and issue and/or continue the process recommendation of the Technical Evaluation Committee and/or directing the respondents to call for fresh tender in relation to the operation of the travel service counters at the Arrival Public Concourse at the Bandaranaike International Airport.
- (g) For costs.
- (h) For such other and further relief as to this Court deem meet.

The Petitioner claims that he has been operating a travel and tourism services at the Arrival Public Concourse at the Bandaranaike International Airport for more than 14 years. (In the same location)

The Petitioner states that there was an advertisement in the newspaper calling for tenders for operation of travel service counters at the Arrival Public Concourse at the Bandaranaike International Airport. The Petitioner and several other forwarded their bids for the said tenders.

It was pleaded, that the Petitioner and several others were notified by the Technical Evaluation Committee (TEC) that they were selected, on or about 30/03/2016. Petitioner also pleads that the Ministerial Committee had changed the TEC recommendation and had included 6 parties as successful bidders, which includes two parties who were rejected originally for lack of financial pre-qualifications. Rejection was communicated by the 1<sup>st</sup> respondent via X6.

The Petitioner submits that they made several protests including communication with relevant authorities including H.E the President; due to the impasse the secretary to the Ministry by letter dated 14/07/2016 took a decision to cancel the tender awards (X9). Subsequently the Petitioner was suddenly informed by (X10) letter dated 25/10/2016 that the cancellation is cancelled and the original tender selection will stand as it is.

Petitioner claims that the said revocation is untenable in law, violation of the original bidding documents and tender process and the secretary has no authority to cancel or to make any other arrangements.

1<sup>st</sup> to 5<sup>th</sup> respondents submit that the second affidavit dated 17<sup>th</sup> January 2017 submitted on the same date be rejected due to the following reasons.

- I. The Managing Director of the Petitioner's Company had filed an affidavit without prior permission of the court which is in violation of Rules of the Court of Appeal.

II. The Petitioner had deposed matters which are not in his personal knowledge, which is contrary to basic requirements of an affidavit.

6<sup>th</sup> to 10<sup>th</sup> respondents submit that the Petitioner had suppressed material facts to the court.

There were three writ applications before this court namely 255/2016, 256/2016 and 257/2016 the Petitioner filed papers to intervene which were not successful and in the present application the Petitioner states that it verily believes that three parties filed applications and those are pending.

Further 6<sup>th</sup> to 10<sup>th</sup> respondents submits that the application is misconceived and it cannot be granted.

Respondents also submit that necessary parties are not before the court namely the Members of Ministerial Procurement Committee (MPC) and Members of Technical Evaluation Committee. (TEC)

All respondents submits that the Petitioner had misrepresented the fact that it was operating for last 14 years in the same location, where the company itself was incorporated 8 years ago, (i.e. in 2008).

Before I consider the substantive issues, wish to consider the preliminary objections and issues.

The Petitioner had filed on the 17<sup>th</sup> January 2017 an affidavit together with documents marked B1 to B6. I do not find that any permission was granted to do so. When the matter came before me on the 15<sup>th</sup> December 2016 Mr. Sanjeewa Jayawardane PC, who appeared in connected matters appeared and informed the court that the Petitioners had not included the relevant parties as respondents. The counsel for the Petitioner under took to add relevant parties and serve notice on them. Journal Entries reveal that the amended caption was filed on the 26<sup>th</sup> December 2016 and served on the respondents including the 6<sup>th</sup> to 10<sup>th</sup> respondents.

17<sup>th</sup> January 2017 journal Entry reveals that the Petitioner had filed an affidavit together with B1 to B6. I do not find any permission sought to file these additional papers nor permission been granted.

The Managing Director of the Petitioner had sworn an affidavit above mentioned which deposed as follows:

Para 3 I depose to the matter herein contained from my own personal knowledge and from the information, documents and records in the Petitioner Company which I have perused

Para 4 I state that I received a letter by registered post from the Airport and Aviation Services (Sri Lanka) Ltd on 31/10/2017 which contained therein the financial statements of Airport Tourist Drivers Association.

I tender herewith a copy of the said financial statement marked 'A' together with the registered postal envelops marked 'A1'.

I presume the date stated above 31/10/2016 may be a typographical error. Anyhow the said 'A1' is not submitted to the court, at least not in the main court record.

In paragraph 5 of the affidavit he states as follows:

Para 5 I state that I received a letter together with several annexure by registered post on 28/12/2016 from a group that call themselves ගුවන් තොටුපොල රැක ගැනීමේ ලංකා නිදහස් වෘත්තීය සමිති ශාඛාව

බණ්ඩාරනායක ජාත්‍යන්තර ගුවන් තොටුපොල කටුනායක

The Petitioner had submitted the said document marked B1 which letter does not have a date, address or signature. It is an anonymous letter, I cannot believe the Petitioner had submitted a document of which no one takes ownership and wants the court to act upon. Adding insult to the injury the Petitioner also claims that he has personal knowledge on documents which he submitted to court. This is not a healthier practice.

Considering the core issues of the transaction, there are 6 travel desks provided by the 2<sup>nd</sup> respondent which were given to the person who pays the highest amount. Accordingly there were 6 companies selected for 6 counters. Perusing the details submitted by the respondents' details are as follows:

Counter Number	Company Recommended by the MPC	Lease rental per month offered in the 1 <sup>st</sup> Year	Lease rental per month offered in the 2 <sup>nd</sup> Year	Lease rental per month offered in the 3 <sup>rd</sup> Year	Total for all three years
1	Airport Tourist Drivers Association	1,900,500	2,090,550	2,299,605	75,487,860
2	Abans Tours (Pvt) Ltd	1,500,000	1,650,000	1,815,000	59,580,000
3	Ayubowan Tours and Travels Limited	1,279,000	1,406,900	1,547,590	50,801,880
4	Lanka Travels Agent Association	1,050,900	1,155,990	1,271,589	41,741,748
5	Casons Travels (Pvt) Ltd	900,000	990,000	1,089,000	35,748,000
6	JNW Lanka Tours	1,078,691	1,186,560	1,305,216	42,845,604
	<b>TOTAL</b>	<b>92,509,092 (total for year 1)</b>	<b>101,760,000 (total for year 2)</b>	<b>111,936,000 (total for year 3)</b>	<b>306,205,092 (total for all 3 years)</b>

The following chart shows the offer made by the Petitioners and the award amount offered by the successful bidder.

Counter Number	Bid of the Petitioner for the 1 <sup>st</sup> Year- per month	Bid of the company awarded the contract for the 1 <sup>st</sup> Year monthly
1	750,000	1,900,500 - Airport Tourist Drivers Association
2	600,000	1,500,000 - Abans Tours (Pvt) Ltd
3	580,000	1,279,000 - Ayubowan Tours and Travels Limited
4	560,000	1,050,900 - Lanka Travels Agent Association
5	550,000	900,000 - Casons Travels (Pvt) Ltd
6	550,000	1,078,691 - JNW Lanka Tours

The Petitioner complains that the bidding document was altered to favour the successful bidders. Perusing the instructions to bidders (submitted by the Petitioner marked 'X4') considering clause 13.5 and 13.6 the 2<sup>nd</sup> respondent has the right to act in the best interest of the company. The selection shows that the company is benefitting at the end of the transaction.

Even though the 2<sup>nd</sup> respondent is a company fully owned by the government they too should venture into profit making whenever possible, if not, it will be a burden to the tax payers.

Considering all circumstances, especially the conduct of the Petitioners making an offer contrary to the bidding guide lines, I find that the decision of the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent is acceptable by this court.

Considering the preliminary objection against the Petitioner and all other matters, I find that there is no prima facie case established by the Petitioner to issue notice hence issuance of notice and interim orders are refused.

**Application dismissed without cost.**

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda PC J (P/CA)**

I agree,

**PRESIDENT OF THE COURT OF APPEAL**