

**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 Writs of Certiorari, Prohibition and
Mandamus under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/518/2021

1. K.G.D. Walter Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.
2. D.C.M. Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.
3. K.G.D.M.Y. Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.

All three of them in Partnership under
the name and style of “Amil Janitor
Services”

Presently at No. 22, Welikada Plaza,
Rajagiriya.

Petitioners

Vs.

1. Dr. S. H. Munasinghe
Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

2. Y.L.M Navavi
Additional Secretary,
(Procurement)
Ministry of Health,
Suwasiripaya,
No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
3. Ms. D.L.U. Peiris
Chairperson,
Ministerial Procurement Committee
“C2” for Janitorial Services for the
National Hospital – 2021/2022 in
respect of the Tender Bearing No.
MH/PB/CL/19/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
4. Mr. K. P. Yogachandra,
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/19/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
5. Ms. P. Walli,
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/19/2021,

C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

6. Dr. H.D.B. Herath
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/19/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
7. Mr. R.A.S.K. Ranasinghe
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/19/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
8. Mr. Sirmal Lokugamage
The Chairman,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/19/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,

No.385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

9. Ms. Jamuna Hassim
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/19/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
10. Mr. J.H.S. Srimalka
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/19/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
11. Mr. H.D.W. Gunawardena
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/19/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.

12. Mr. S.M.T.A.R. Bandara
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/19/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.

13. Smart Janitor (Pvt) Limited
No. 154. Rajagirya Road,
Rajagiriya.

Respondents

Before :Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel :Rajeev Amarasuriya with Malith Pitipanaarachchi for the Petitioners.
Amasara Gajadeera, SC for the 1st to 12th Respondents.
Niranjan Arulpragasam for the 13th Respondent.

Argued on :11.03.2021, 21.03.2022, 01.04.2022

Written submissions: Petitioners -21.04.2022
1st to 12th Respondents -25.04.2022
13th Respondent -20.04.2022

Decided on :31.05.2022

Sobhitha Rajakaruna J.

The Ministry of Health invited bids from registered institutions for the supply of cleaning services, *inter alia*, in respect of the Castle Street Women's Hospital and several other hospitals by virtue of a National Competitive Bid Invitation-2021/2022, marked 'P5'. The

Petitioners submitted a bid in respect of the said Castle Street Women's Hospital under the Procurement No. MH/PB/CL/19/2021. The 13th Respondent, M/S Rakna Arakshaka Lanka Limited and M/S Floor Care also submitted bids in addition to the Petitioners' bid. The bid submitted by the Petitioners, at the opening of bids, has been placed as the 3rd lowest among the bidders. The bid submitted by M/S Rakna Arakshaka Lanka Limited which was the lowest, has been rejected at the Appeal stage for non-compliance of tender conditions. Consequently, the 13th Respondent who submitted the 2nd lowest bid was awarded the subject tender.

The Petitioners challenging the award of the tender to the said 13th Respondent, seek *inter alia*, from this Court a writ of Prohibition restraining 1st to 12th Respondents from issuing the Letter of Award and also entering into a contract in respect of the subject tender for year 2021/2022 with the 13th Respondent. The Petitioners are seeking for a writ of Certiorari to quash even the decisions of the Procurement Committee ('PC') and the Technical Evaluation Committee ('TEC').

Worth Certificate

One of the main contentions of the Petitioners is that the 13th Respondent has not duly submitted the Worth Certificate which is a requirement in terms of Clause 1.VIII of the Tender Conditions and the Petitioners argue that it is a threshold eligibility requirement and non-compliance of the said condition would amount to a major deviation in terms of clauses 7.8.4 and 7.8.6 of the Government Procurement Guidelines of 2006 ('Procurement Guidelines'). The Petitioners complain is that the Worth Certificate of the 13th Respondent should be under the name of the 13th Respondent company whereas the said Certificate submitted by the 13th Respondent, marked 'R13', has been issued under the name of one Ms. Ramyani Fonseka.

The learned Counsel for the Petitioners referring to the purpose of incorporating a company and also to the fundamental attribute of an incorporated company submits that the Worth Certificate provided by the 13th Respondent should transpire the worth of the 13th Respondent Company and not the worth in relation to Ms. Fonseka. The learned Counsel for the 13th Respondent referring to the annual return of the 13th Respondent Company marked '13R8' submits that 13th Respondent is a company run by husband and wife who are both Shareholders and Directors and the relevant Worth Certificate is in the name of the wife (Ms. Ramyani Fonseka) who is also a Director and a Shareholder.

The Worth Certificate No. A140711 submitted by the Petitioners is being challenged, in turn, by the 13th Respondent on the basis that the Petitioners should have first satisfied the Court that they had submitted a lawful bid and as such, should have demonstrated to Court that their rights were affected by the decision to award the tender to the 13th Respondent. As opposed to the argument raised by the Petitioners, the learned Counsel for the 13th Respondent submits that the above Worth Certificate submitted by the Petitioners is only in favour of the 1st Petitioner and if the Petitioners are to maintain the aforesaid argument, their worth certificate should also be in favour of all three Petitioners. Further, it is submitted that the Petitioners are a partnership and a partnership is not a privileged suitor to this tender process and in order to conduct business in the name of the partnership, all three partners must necessarily be signatories to any agreement/contract. Moreover, the Petitioners' argument in opposition to the contention of the 13th Respondent in this regard is that '*whether it would be one partner or all the partners of a partnership, the effect and impact on obligations would be the same*'. In my view the said assertions of the Petitioners cannot be taken in to account as a tenable argument in this regard based on the moot point raised by the learned Counsel of the 13th Respondent. My reasons for arriving at the said conclusion are discussed hereinafter.

The Petitioner submits that in terms of clause 7.9.10 of the Procurement Guidelines, 'Bids shall be first evaluated strictly according to the criteria and methodology specified in the bidding documents and such, evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid.' Admittedly, the issue raised by the Petitioner against the Worth Certificate 'R13' is not based on the value of the Certificate but on the question of issuance of such Certificate in favour of a Shareholder/Director instead of issuing it in favour of the 13th Respondent Company. On perusal of the documents submitted by the 13th Respondent, I am convinced that the said Ms. Ramyani Fonseka is a Director and Shareholder of the 13th Respondent Company.

The basic criteria specified in Clause 1.VIII of Tender Conditions is that the Worth Certificate should be in form Gen.170 for the values mentioned therein and if the contractor is submitting bids for several hospitals/institutions, the Certificate should be for the total value or more of such hospitals/institutions. The value enumerated in Worth Certificate marked 'R13' is Rs.8,000,000.00. The value of the said Certificate is not in dispute and therefore, I am of the view that the 13th Respondent, prima facie, has fulfilled the requirement of a Worth Certificate.

In order to examine whether such Certificate should be issued in favour of the Company's name when the bidder is a limited liability Company, it is eventually needed to ascertain the legal basis and the criteria on issuance of Worth Certificates. In *K.G.D. Walter Abeysundara and others vs. Dr. S.H. Munasinghe, Secretary-Ministry of Health and others, CA/Writ/514/2021 (decided on 28.01.2022)*, I have extensively dealt with the Tender Conditions as regards to the requirement of submitting a Worth Certificate. As I have observed in that case, the Divisional Secretaries issue such Worth Certificates may be based on the information received from the relevant Grama Sewa Niladari. The relevant Divisional Secretary arrives at the conclusion upon the value of the property only by looking at a deed shown to him by the person who requests for it and also may be on the knowledge and belief of the Divisional Secretary. In such a Worth Certificate, the Divisional Secretary certifies that the respective land is not subjected to any partition case or any other litigation only on his knowledge and belief. The wordings in the said Form Gen.170 evince the above position elaborated by me.

In the above case CA/Writ/514/2021, I have differentiated the purpose of obtaining a Worth Certificate with a requirement of submitting a Bid Security which is usually being issued by a bank under several criteria. What is the governing law in respect of a Worth Certificate? What are the criteria that should be followed by the Divisional Secretary before making a certification on the relevant Form Gen.170? What is the due process of arriving at a conclusion on the knowledge and the belief of the Divisional Secretary in respect of a Worth Certificate? What should be the appropriate link between a Company/Partnership and a beneficiary of a Worth Certificate? are reasonable questions arising out of the act of issuing a Worth Certificate. The Petitioners and the other parties of this application didn't even have a clue on how to answer those questions.

One of the main objectives of the procurement process in the Procurement Guidelines is to maximize economy, timeliness and quality in Procurement resulting in least cost together with the high quality. The subject Tender being a 'public tender' is subjected to all the laws and the regulations relating to public tenders. Having a criteria which is ambiguous, uncertain and which is not supported by an active law of the country in the Tender Conditions is an obstacle to uphold the good governance and also it encourages the participants of a tender to involve in corrupt practice by getting fabricated amounts displayed in Form Gen.170. Therefore, I take the view that, introducing a requirement of submitting a Worth Certificate as per Form Gen.170, which has not been duly and

lawfully interpreted, can create ambiguity and also it is an antiquated procedure. The procurement entity has a major role in formulating criteria in the Tender Conditions by providing fair, equal and maximum opportunity for eligible interested parties to participate in Procurement.

Therefore, I am of the view that the benefit of the doubt as to whether the Worth Certificate should be issued in favour of the company or in favour of their shareholders/directors should not be bestowed on the Petitioners based on the circumstances of this case. Accordingly, I am not inclined to accept the proposition of the Petitioners in respect of the Worth Certificate submitted by the 13th Respondent. Accordingly, I hold that the requirement in above clause 1.VIII of the Tender Conditions has been, prima facie, fulfilled by the 13th Respondent and there is no major deviation as per the above reasons given by me.

Non eligibility of the 13th Respondent

Although, the Petitioners have pleaded in their Petition that the 13th Respondent has failed to comply with clause 1.I, clause 1.II and clause 1.IX of the Tender Conditions, those aspects were not supported by the learned Counsel at the hearing stage of this application. Further, the Petitioners have disclosed in their Petition a purported issue on composition of the TEC which had been raised by the Petitioners at the relevant Appeal and such position was also not properly supported at the hearing.

Provisions of clause 8.5.1 of the Procurement Guidelines

In terms of clause 8.5.1(a), the Secretary to the line Ministry, within one week of being informed of the determination of the Ministry Procurement Committee ('MPC'), should inform in writing simultaneously to all the bidders. The Petitioners submit that they were never informed of the decision to award the subject tender to the 13th Respondent and objections were never called for in respect of the same and accordingly, the Petitioners claim that it is a gross violation of the Procurement Guidelines.

It is obvious that the Petitioners have participated at the discussion/appeal hearing summoned by the Additional Secretary (Procurement) of the Ministry of Health by letter dated 22.09.2021, marked 'P16'. As observed above the tender submitted by the M/S Rakna Arakshaka Lanka Limited was rejected at the Appeal stage. The Petitioners have not clearly sought for an order from this Court in their Petition in respect of purported

violation of said clause 8.5.1(a). The Respondents have also not answered to any such specific averment in the Petition by way of their statements of objections. However, it is important to note that the 1st to 12th Respondents have divulged in their Statement of Objections that the Petitioners have been informed of the decision of the appeal and also the fact that the next responsive bidder (13th Respondent) had been awarded the tender. The copy of the relevant letter dated 25.10.2021 is annexed to the said Statement of Objections marked 'R7', which has been addressed to the Petitioners with copies to the 13th Respondent and M/S Rakna Arakshaka Lanka Limited. Even in the event the Petitioners deny the receipt of such letter, the Petitioners simply cannot deny the fact that they were unaware of the decision of the Appeal as the Petitioners have effectively involved in the said Appeal process. In that event, it can be assumed that the Petitioners were aware that the tender would be awarded to the next responsive bidder who has quoted the second lowest price.

In the light of the above, I am of the view that in any event this is not a fit matter where the discretion of this Court should be exercised at this stage in favour of the Petitioner based on the provisions of the said clause 8.5.1(a).

Whether the Petitioners have submitted a bid that is bad in law

The 13th Respondent strenuously argues that the Petitioners' bid document marked, 'P8' contains the following 'major deviations' in terms of clause 7.84 of the Procurement Guidelines, making the bid unacceptable in law;

- a) No address to send formal correspondence pertaining to the tender (*Vide*-page 36 of the brief, clause 45 of the bid document)
- b) Not filled columns 3, 6 and 8 in the list of chemicals (*Vide*-page 47 of the brief)
- c) Not filled column 3 in the list of equipment to be provided annually (*Vide*-page 48 of the brief)
- d) Not filled columns 3 and 6 in the list of equipment to be provided monthly (*Vide*-page 49 of the brief)

The argument of the learned Counsel for the 13th Respondent is that the Petitioners cannot challenge the tender process to award the tender to the 13th Respondent on the basis that such decision does not affect the rights of the Petitioners as they have submitted a bid that is bad in law. The 13th Respondent asserts that the Petitioners are of a fishing expedition in this Court without any material whatsoever and that their entire application is built on

surmise and conjecture without an iota of material whatsoever. Further, it is submitted that Petitioners in their Petition have made 7 allegations against the 13th Respondent without any material whatsoever and also that the motion dated 15.03.2022 filed by the Petitioners has not been supported in open Court. The 1st to 12th Respondents have admitted that the copy of the Bid marked 'P8' is the bid that is submitted to the Procurement Entity by the Petitioners, although, the Petitioners claim that it was only an office copy.

On a careful perusal of the said Bid document 'P8', it is observed that the clause 45 of the Bid of the Petitioners (page 36 of the brief), the 3rd, 6th & 8th columns in the list of chemicals submitted by the Petitioners (page 47 of the brief), the 3rd column in the list of equipment (to be provided annually) submitted by the Petitioners (page 48 of the brief) and the 3rd & 6th columns of the list of equipment (to be provided monthly) submitted by the Petitioners (page 49 of the brief) have not been filled by the respective Petitioners. There is no sufficient material before Court to believe that the 'P8' is only an incomplete office copy and that there is another duly filled original copy submitted to the Procurement Entity. This Court can presumably arrive at the said opinion due to the admission of the 1st to 12th Respondents in that regard and also due to the reason that the Petitioners have not taken effective measures for this Court to make an order in view of paragraph (p) of the prayer of the Petition.

The question which arises here is whether a party could claim relief in a judicial review application against another whilst the claiming party is also at fault or his/her conduct is wrongful within the same impugned process. In other words, it is whether the claiming party's fault or the wrongful conduct has made it such that granting relief would be against good conscience. In my view, this question can be assayed with the 'clean hands doctrine' which is usually based on the maxim of equity which states that one who claims equity must come with clean hands. The other question which comes in to my mind is whether this is a fit case to simply disregard the defense of unclean hands which is the root cause to unreasonableness.

I am attracted by the concerns of Herstein, Ori J., a visiting Assistant Professor of Cornell University Law School, raised in his article titled '*A Normative Theory of the Clean Hands Defense*' (published in Cornell Law Faculty Publications, 210)¹ which indicates

¹ Full article can be viewed through <http://scholarship.law.cornell.edu/facpub/210>

that, ‘the objective of unclean hands to prevent unfair advantage-taking by wrong doers is said to rest on moral values such as *in delicto*, *tu quoque*, and even retribution’². Herstein, Ori J., claims that the scope of the Clean Hand Doctrine is wider than that of the *tu quoque* in that it also incorporates cases of *in delicto*. He further states in the same article;

“In cases of tu quoque a party A—who previously performed a certain wrongful action φ—blames, judges, or condemns B for similar, connected, or related wrongdoings. The in delicto maxim involves cases wherein A blames, judges, or condemns B for a specific wrong that A himself is also involved with or responsible for.” (Emphasis added)

In pari delicto, a Latin phrase commonly used in tort and contract law which means “in equal fault.” This doctrine states that there is a bar to a plaintiff’s recovery of damages for a wrong the plaintiff participated in and serves as an equitable defense.

I am of the view that this is a fit case to adopt clean hands doctrine and also the propositions of the above Herstein, Ori J. on the doctrine of clean hands. I take the view that a party claiming relief against an irregularity of another stakeholder, in a judicial review application, should come to Court with clean hands without having a record of committing a similar irregularity within the same impugned process. I have approached the said opinion as I strongly take the view that a person who applies for judicial review should come to Court with clean mind & clean heart expressing the true conscience on the objective which are, in my view, part and parcel of the doctrine of clean hands. My said findings cannot be considered as imaginary as the policy of ‘good governance’ is well embodied in the objectives of the said Procurement Guidelines. There cannot be effective ‘good governance’ without good conscience, transparency & accountability within the relevant government authorities and even within all the stakeholders. The theory of good governance cannot be confined only towards the decision maker but it is an essential element on the part of all the relevant stakeholders. By perusing legal literature and the Superior Court’s judgements, it emanates that, the doctrine of clean hands is also an important limb of the principle of *uberrimae fidei*.

In such a backdrop, it is quite clear that the Petitioners have not come to this Court with clean hands. It is important to examine at this stage whether my said conclusion on the aforesaid defense of ‘unclean hands’ outweigh the 13th Respondent’s purported

² Also see T. Leigh Anenson, J.D., LL.M, Ph.D., ‘Announcing the “Clean Hands” Doctrine’, University of California, Davis, [Vol. 51:1827-2018], p. 1847

irregularities upon which the Petitioners have articulated their arguments against the said 13th Respondent. Based on the circumstances of this case, I take the view that there is no reason for me to grant relief to the Petitioner, based on the above point in issue.

Conclusion

In view of the foregoing, it is my considered view that there are no sufficient grounds to restrain or prevent the 13th Respondent from proceeding in respect of the agreement already entered in to between the Ministry of Health and the 13th Respondent, Furthermore, I am of the view that there are no sufficient grounds to quash the decisions of the 1st to 12th Respondents. Therefore, on a careful consideration of the whole matter including the events relating to the decisions made by the Procurement Entity, especially by the TEC and MPC, I have come to the conclusion that the Petitioners are not entitled to any reliefs as prayed for in the prayer of the Petition. Application is dismissed without costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal