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

C.A. (Writ) Application No: 0370/2012

White Coal (Pvt) Ltd,
No. 133/19A, Nawala Road,
Narahenpita,
Colombo 05.

Petitioner

- **Vs -**

The Sri Lanka Sustainable Energy Authority
No. 3G-17, BMICH, Bauddaloka Mawatha
Colombo 07.

And 35 others

Respondents

Before : P. Kirtisinghe J
&
R. Gurusinghe J

Counsel : Sanjeewa Jayawardena, P.C. with Rajeev Amarasuriya,

Charitha Rupasinghe, and Yohani Yogarajah

For the Petitioner

M Gunathilaka, P.C., A.S.G., with M. Jayasinghe, DSG,

For the Respondents

Argued on : 26.09.2023

Decided on : 26.10.2023

R. Gurusinghe J

The petitioner is a Private Limited Liability Company. The petitioner has applied to build and operate a new Hydro Power Station capable of generating and supplying two megawatts of electricity to the national grid by using water from Polwathuganga, which contributes to Ratganga.

The petitioner seeks the following reliefs among other reliefs.

a. Issue a Writ of Mandamus directing the 1st respondent to determine forthwith the application dated 19-07-2011 made by the petitioner to engage in and carry out an On-Grid renewal energy project as applied by P37;

b. Issue a Writ of Mandamus directing 23rd to 31st respondents to forthwith issue to the petitioner provisional approval to engage in and carry out an on-grid renewal energy project as applied by P37;

c. Writ of Certiorari quashing the decision by 1st to 31st respondents to grant priority to 36th respondent over and above petitioner for the grant of new provisional approval for the proposed renewal energy project in Kudawa;

d. Issue a Writ of prohibition restraining and preventing 1st to 31st respondents from granting provisional approval for the said renewal energy project in Kudawa on the basis that the 36th respondent had priority over and above the petitioner pertaining to the site location;

e. Issue Writ of Certiorari quashing the "Guide to the Project Approval Process for On-Grid Renewal Energy Project development - policies and procedures to secure approval to develop renewable energy project to supply electricity to the National Grid. Produce marked P60- or such part or portion thereof.

Facts of the case as stated by the petitioner

The Petitioner has submitted an application to the 1st respondent, Sustainable Energy Authority (SEA) by letter dated 18-04-2008 expressing his intention to undertake the Kudawa Mini-Hydro Power Project. The petitioner states that in response to that letter, the petitioner received the 1st respondent's letter dated 15-04-2009 informing that the proposed Kudawa Project by the petitioner's company has been considered for the issuance of the Provisional approval. The petitioner having complied with requisites, a duly completed application for provisional approval for the Kudawa Project was tendered to the 1st respondent by application dated 11-06-2009, together with the other relevant documents described in the form. The resources verification fee and the provisional approval fee were paid together as required by the 1st respondent (SEA). The provisional approval for the project was issued by the 1st respondent by letter dated 11-06-2009, which remained valid until 10-12-2009 and bears the provisional approval no. 233501 and registration no. 155901. The petitioner tendered an application for an extension of another six months in the prescribed form with the requested progress report and paid the requisite fee. An extension of the provisional approval had been granted, valid until 11-06-2010. In that letter, it is expressly stated that under the provisions of section 17(d) of the Sri Lanka Sustainable Energy Authority Act No. 35 of 2007 (hereinafter referred to as the Act), the provisional approval would automatically lapse on 11-06-2010 and that no further extensions would be granted to the petitioner.

The petitioner by letter dated 07-06-2010, applied for a six-month extension of the validity of the provisional approval briefly detailing the key steps taken by the petitioner, the approvals and other documents that had been already obtained by the petitioner. The letter further provided a brief explanation of legitimate reasons for the delay in completing the groundwork of the project. By letters dated 21-09-2010 and 12-10-2010, the petitioner made further appeals to extend the period of validity of the provisional approval. The 2nd respondent the Director of the SEA informed the petitioner by letter dated 27-10-2010, that the provisional approval that was granted to the petitioner stands cancelled.

The petitioner made a further application dated 27-10-2010, pertaining to the same project informing the 1st respondent in detail about the groundwork undertaken and already completed by the petitioner and informing the fact that the required land has also been purchased. The respondent and its officials

strongly resisted every effort the petitioner made to get his application accepted and considered for provisional approval. In these circumstances, the only alternative path available for the petitioner was to submit a second fresh application for provisional approval under the new regulations which had been promulgated by that time. The 2nd application for provisional approval was made dated 19-07-2011 and submitted on 20-07-2011, in compliance with the provisions of the Act and the applicable regulations. Rs. 150,000/- was also paid to the 1st respondent as an application fee.

The Director General of SEA informed the Divisional Secretary of Ratnapura by the letter dated 07-10-2010 that, there were two projects namely A-5590 and A-2230 for which provisional approval has been granted and that the relevant approval must be given only to the approved location for the respective projects. As indicated in the maps annexed thereto, the petitioner states that it was unreasonable for SEA to have issued this letter as the provisional approval granted to the 36th respondent had clearly lapsed by this time. The petitioner further states that the petitioner had been granted provisional approval before granting the same to the 36th respondent. Notwithstanding the fact that the provisional approvals granted to the 36th respondent had lapsed by letter dated 19-10-2010, the Director General of the SEA informed the Chairman of Ratnapura Pradeshiya Sabha that, only the 36th respondent had been authorised to carry out Mini Hydro Projects at the location mentioned therein and to cancel any approvals if given to another company. The Director General of SEA informed the Coordinating Secretary to the Ministry of Power and Energy by letter dated 19-11-2010 that instead of the original locations, the petitioner was seeking approval for a new location.

The petitioner's present pending application pertains to the following

co-ordinations: -

Weir – 80 29.142'E and 6 44.672'N

Powerhouse – 80 28.625'E and 6 44.471'N

The petitioner further states that he has obtained all the approvals for the aforesaid location and that in the event that the petitioner was granted the provisional approval for the same, it would be in a better position to obtain the relevant approvals expeditiously and commence the project very early, and ahead of the 36th Respondent.

Objections of 1st to 34th respondents

1st to 34th respondents have filed objections denying the allegations in the petition.

The respondents have submitted *inter-alia* that;

a. as it was found that this culminated one-year period was not sufficient for most applicants to obtain the necessary authorisations a new set of guidelines were promulgated. In terms of the current guidelines an applicant who has not been able to obtain all the necessary approvals is permitted to make a fresh application with respect to the same resources site the lapsed provisional approval related to;

b. however, the petitioner has made a fresh application with respect to a resources site different to the resources site identified in the first application. (a certified copy of a map indicating the location of the area with respect to which the 1st application was made is marked 1R2. A certified copy of the map indicating the location of the area with respect to which the fresh application was made is marked 1R3);

c. The petitioner's 2nd application has been made in contravention of the current guidelines and is not an application conforming to section 5 c of the SEA.

The respondents have further submitted as follows:

a. The 36th respondent's referred their application on 10-04-2008;

b. The petitioner has filed an application under the new guidelines for the same location as the 36th respondent on 19-07-2011;

c. The provisional license was granted to the 36th respondent on 22-06-2009;

d. Thus it is clear that when the petitioner made his further application long after the provisional license was awarded to the 36th respondent (certified copy of the 36th respondent's application marked 1R4 and the certified copy of the petitioner's further application is marked 1R5, a certified copy of the award of the provisional license to the 36th respondent is marked 1R6 and the proposed location is marked 1R6A).

The respondents have further submitted that;

a. The petitioner made a further application with respect to an area different to the 1st application;

b. That by the time the petitioner has made a further application, a provisional license has already been granted to the 36th respondent with respect to the area contemplated in the petitioner's second application;

c. The petitioner has failed to state clearly in his petition that his original application and the 2nd application relate to two different areas;

d. The petitioner is misleading the Court by attempting to give the impression that his application was made before the 36th respondent. The 36th respondent's application was made before the 2nd application, though not before the first.

The respondents have taken up the position that the petitioner had not come before the Court with clean hands, suppressed and misrepresented facts, guilty of laches, and moved for the dismissal of the petitioner's application. The respondents have further submitted that the petitioner's further application cannot be approved in terms of the provisions of the Sri Lanka Sustainable Authority Act No. 35 of 2007 and the relevant regulations and relevant guidelines.

Objections of the 36th respondent

The 36th respondent has also filed detailed objections denying the positions taken up by the petitioner. The 36th respondent moved for the dismissal of the petitioner's application.

Decisions

The main objection of the respondents is that the petitioner has made a fresh application with respect to a resources site, different to the resources site identified in the first application. The petitioner has failed to give a clear

answer in the counter affidavit to the above position of the respondents. The petitioner has not clearly stated in the petition whether its original application and the 2nd application relate to the same area as contemplated in the first application or to a different area.

The provisional approval for the project was granted to the petitioner by the 1st respondent by letter dated 11-06-2009 and bears provisional approval no. 233501 and registration no. 155901. That letter was produced marked P7. A location plan was annexed to P7. As per the provisional approval and the plan, it was proposed to build 4 weirs.

Paragraph 32 (g) of the petition is as follows:

"the petitioner respectfully states that the foregoing pertains to the initial two applications submitted by the petitioner, and further states that presently pending application pertains to the following co-ordination: -

Weir – 80 29.142'E and 6 44.672'N

Powerhouse – 80 28.625'E and 6 44.471'N"

However, the petitioner has failed to describe the locations of the Weirs and the Power House in the above style or any other manner. Two maps are annexed to the documents marked 1R9 sent by the first respondent to Divisional Secretary Ratnapura. Those two maps clearly show that the areas allocated to the petitioner and to the 36th respondent are different. The proposed Weirs and Power House for the petitioner's application were to be located in a place towards the North, from the place allocated to the 36th respondent.

According to the feasibility study annexed to the 1st application of the petitioner, it was proposed to build 4 Weirs. A copy of the Petitioner's 1st application dated 11-06-2009 produce marked P6A. A true copy of the pre-feasibility report submitted with the 2nd application by the petitioner was marked P37c. As per the 2nd application, the petitioner proposed to build only 1 Weir. The Weir and the Power House both shifted to a considerable distance towards the southwest. According to the documents filed by parties it clearly indicated that the petitioner's 2nd application was not made to the site allocated in the provisional approval given by the 1st respondent consequent to the petitioner's 1st application.

Paragraph 2.2 of the guidelines set by the 1st respondent in July 2011 is as follows:

2.2 RE-APPLICATION FOR PROJECTS WITH LAPSED PROVISIONAL APPROVALS

With the On-grid Renewable Energy Projects Regulation 2011, an opportunity is provided to Applicants who are faced with a cancellation of a Provisional Approval granted by SEA to seek a fresh Provisional Approval. All Applicants who were issued with a Provisional Approval will be invited to submit an application to gain an extended period to meet the conditions required for an issuance of an Energy Permit, after payment of the prescribed application fee. Any Applicant faced with a lapsed Provisional Approval will be allowed to make an application to the same resource site, supporting the re-application with documents requested by the Director General in his invitation, as available. No such consideration will be given to Applicants submitting re-applications. If the resource under consideration is later found to be in conflict with a more significant national-level development. The following aspects will be investigated by the Director General before providing recommendation on the re-application to the PAC….

a. *Feasibility studies:*
b. *Access to land resources:*
c. *Status of statutory approvals:*
d. *Environmental clearance:*

The petitioner has taken up the position that the guidelines trespass beyond the framework of the Act and are *ultra vires* including the introduction of the re-application process, under section 2.2 of the said guidelines, provided for projects with lapsed provisional approval and the guidelines purport to grant priority to such re-application in regard to the particular site for which re-application is so made. The petitioner states that this scheme of granting priority to re-applicants contravenes the scheme of the Act, especially to the provisions under section 17(4).

Section 17 (4) of the Act is as follows:

(4) A provisional approval granted under paragraph (a) of subsection (1) shall be valid for a period of one year from the date on which such approval is granted and shall stand cancelled automatically, if the documents and other information requested for is not submitted prior to the expiry of the period of one year.

The petitioner argued that once the provisional approval stands cancelled after one year, a fresh application must be made and priority should only be given to the applicant who has applied first in point of time. The petitioner further argued that in this case the 2nd fresh application by the petitioner was made before the 36th respondent. However, the petitioner has not honestly disclosed

the fact that the petitioner's 2nd application was made in respect of a resources site different to the resources site identified in the 1st application. When this fact was brought in by the respondents in their objections, the petitioner failed to provide a clear answer as to whether it was the same resource site or a different resource site.

The petitioner in this application stated that it has taken various steps to start an Energy Project, to obtain approval from various State agencies and to buy some lands. The petitioner wants to consider the above steps taken and claim priority to the petitioner over the 36th respondent in granting provisional approval for its 2nd application. However, at the same time petitioner argues that when granting provisional approval, priority should be given to an applicant considering only the date of the application.

The 1st respondent stated that it was found, that a one-year period was not sufficient for most applicants to obtain necessary authorisations.

In terms of the current guidelines an applicant who has not been able to obtain all the necessary approvals, is permitted to make a fresh application with respect to the same resources site allocated in the lapsed provisional approval.

Section 5 (c) i. and ii. make provisions to develop guidelines on renewal energy projects.

Section 5 (c) i. and ii. are as follows:-

(c) develop a conducive environment for encouraging and promoting investments for renewable energy development in the country, including: —

(i) development of guidelines on renewable energy projects and disseminating them among prospective investors;

(ii) development of guidelines in collaboration with relevant state agencies, on evaluation and approval of on-grid and off-grid renewable energy projects.

The 1st respondent has legal authority under the Act to make guidelines on renewable energy projects. It is not unfair to give priority to the applicants who have obtained provisional approval and were not able to obtain all the necessary approvals from various agencies but have taken up various steps towards fulfilling all the conditions that are set by the 1st respondent. Probably, such applicants may have invested money in the project and completed some groundwork. In such a situation it is not unfair to give priority to such applicants to have the same resource site. When one applicant has already

incurred expenses and has done some groundwork for a particular resource site, it is unfair to give that resource site to a different applicant. In these circumstances, the Guidelines issued by the first respondent are not ultra-vires the provisions of the Act.

Even for the sake of argument, there cannot be a re-application but only a fresh application by an applicant who has previously obtained provisional approval for a particular resource site and it is not unfair to allocate the same resource site to an applicant which had been previously allocated to him as per the lapsed provisional approval.

The petitioner's fresh application (the 2nd application) is for a resource site that is different to the resource site allocated to the petitioner under the provisional approval given in relation to the 1st application. The petitioner now wants to invalidate the guidelines that give priority to a resources site which has been allocated to an applicant under the previous provisional approval. The petitioner is not precluded from making an application for provisional approval for a different resource site if that site has not been allocated to any other applicant under a provisional approval. The petitioner has failed to disclose all the facts relating to the application correctly. The petitioner's application should be dismissed for this reason alone.

The petitioner tried to suppress the fact that its 2nd application was made in respect of a resource site different to the earlier resource site that had been allocated to the petitioner under the lapsed provisional approval. In this application, the petitioner has tried to give the impression to the Court that the petitioner has made the application for the same resources site that had been allocated to it under the lapsed provisional approval. The petitioner stated that it had obtained authorisations from various agencies, invested money, and bought necessary lands for the energy project. If the petitioner has done the abovementioned activities, such activities should have been done in respect of the resources site allocated to it under the previously granted provisional approval. The petitioner cannot argue that it has obtained authorisations and invested money to a resource site that has already been allocated to a different applicant.

In the case of *Alphonso Appuhamy v. Hettiaratchi 77 NLR 131,* Justice Pathirana, stated;

"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when an application for a writ or injunction is made and the process of the Court is invoked is laid down in the case of The King v. The

General Commissioners -for the Purpose of the Income Tax Acts for the District of Kensington-Exparte Princess Edmond de Poignac - (1917)1 Kings Bench Division 486. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination."

In the case of *Blanka Diamonds Pvt Ltd vs Wilfred Van Els and two Others* [1997] 1 Sri LR 360, Jayasuriya J stated;

In the decision in Alphonso Appuhamy v. Hettiaratchi, Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English Law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose uberrima-fides and disclose all material facts fully and frankly to this Court. Vide also the decision in Castelli v. Cook at p. 94

As pointed out by the first respondent, by the time the petitioner made a further application for a provisional license to a different site, that site had already been granted to the 36th respondent. As such it was not practically possible for the 1st respondent to grant provisional approval to the petitioner.

The petitioner's second application was not in conformity with the provisions of the Sri Lanka Sustainable Authority Act No. 35 of 2007 and the relevant guidelines.

For the reasons set out in this judgment, the application of the petitioner is dismissed.

Judge of the Court of Appeal

Pradeep Kirtisinghe J.

I agree.

Judge of the Court of Appeal.