

1987 February 9

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CARAMONDANI BROS LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

- 1. THE MINISTER OF HEALTH,
- 2. THE MINISTER OF COMMUNICATIONS AND WORKS,
- 3. THE PRESIDENT OF THE TENDER BOARD,

Respondents.

(Case Nos. 73/87).

Executory act—Preparatory act—Tenders—The Government Store Regulations, reg. 22—Final decision on tenders of over £150,000 is taken by a Ministerial Committee—The recommendation of the Main Tender Board to the said Committee is a preparatory act.

Provisional order—Flagrant illegality—Meaning of—Irreparable damage— Alleged damage should be specifically and succinctly pleaded. 5

Recourse for annulment—It is directed against an act or omission and not against a party as such.

The applicants in this recourse prayed for a provisional order restraining the respondents from accepting the Tender of CYEMS CO. LTD for the Mechanical Services Installations at the New Paphos General Hospital until the final determination of this recourse or until further order.. 10

The applicants submitted that the decision of the President of the Tender Board to accept the said tender is flagrantly illegal in that such tender is violating the relevant instructions to tenderers, whereas counsel for the respondents argued that acceptance of the tender by the President of the Board and any evaluation he made of the tender in question are preparatory acts, which are not binding on the Ministerial Committee, which will take the final decision. 15

Held, dismissing the application for provisional order: (1) The decision complained of was not placed before the Court in clear and unequivocal terms. A recourse is directed against an act or omission and it is not made against a party as such. 20

(2) Regulation 22 of the Government Store Regulations provides that for tenders

of over £150,000 the final decision will be taken by a Ministerial Committee. In this case such Committee has not so far examined the tenders. The same Regulation provides that «the Main Tender Board submits its recommendations to the Ministerial Committee.» There is no material to the effect that such
 5 recommendation has been made, but even if it has, it would constitute a preparatory act.

(3) Assuming that the decision of respondent 3 is of an executory nature, the next question that poses for determination is whether the act complained of is flagrantly illegal. As it has been held in *Frangos and Others v. The Republic* (1982) 3 C.L.R. 53 «For the Court to act the illegality must be palpably identifiable». It is well settled
 10 that the Court should not plunge deeply into the merits of the recourse in order to trace alleged illegality. In this case the applicant failed to establish flagrant illegality.

(4) On the same assumption the last matter for determination is the issue of «irreparable damage». It must be borne in mind that the alleged damage must be
 15 specifically and succinctly pleaded. In this case there is no such a plea.

Application dismissed.

No order as to costs.

Cases referred to:

Lambrou v. E.S.C. (1970) 3 C.L.R. 75;

20 *Papadopoulos v. The Republic* (1983) 3 C.L.R. 1423;

Frangos and Others v. The Republic (1982) 3 C.L.R. 53;

Sophocleous v. The Republic (1971) 3 C.L.R. 345.

Application for provisional order.

25 Application for an order restraining the respondents from accepting the tender of the interested party for the mechanical services installations at the new Paphos General Hospital until the final determination of the recourse against the decision of the respondents to award the tender to the interested party.

30 A. *Stylianidou (Miss) with M. Malachtou (Miss) for G. Cacoyiannis*, for the applicants.

N. *Charalambous, Senior Counsel of the Republic*, for the respondents.

Cur. adv. vult.

35 LORIS J. read the following decision. This is an application praying for a provisional order restraining the respondents from

accepting the tender of CYEMS CO. LTD (CYEMS) for the Mechanical Services Installations at the New Paphos General Hospital and/or from communicating to CYEMS the acceptance of the said Tender or their decision to award to them the contract for the said works until the final determination of this recourse and/or until further or other order. 5

Learned counsel for applicants relying on the affidavit sworn on 7.2.87 by Gerasimos Y. Caramondanis of Nicosia, one of the Directors of the applicant company, and the facts incorporated in the aforesaid affidavit by reference to the material appearing in and appended to the main recourse, submitted that the provisional order applied for should be granted as the act or decision of respondent No.3, namely the President of the Tender Board, to accept the tender of CYEMS CO., is flagrantly illegal, as the aforesaid tenders are violating the instructions to tenderers appearing in Exhibit 1 attached to the main recourse; learned counsel maintained further that the applicants will suffer irreparable damage if the provisional order is not granted. 10 15

Learned counsel appearing for the respondents opposed the application for provisional order and submitted inter alia that acceptance and probably evaluation of the tenders that might have been made by the Tender Board through its President, are preparatory acts which are not binding on the Ministerial Committee which will take the final decision on the matter, pursuant to the provisions of regulation 22 of the Government Store Regulations as amended. 20 25

Counsel further pointed out: (a) that the Ministerial Committee, comprising of the Ministers of: Finance, Commerce & Industry, Communications & Works, Justice and Health did not meet so far in order to consider the tenders in question (b) that three of the Ministers comprising the aforesaid Ministerial Committee were not joined in the present proceedings which thus could not be proceeded with. 30

I have considered the present application in the light of the able arguments advanced by both sides and I have come to the conclusion that the present application must fail and the provisional Order applied for, refused, for the following reasons: 35

In the first place the act or decision complained of was not placed in clear and unequivocal terms before me. In this

connection it must be remembered that «a recourse under Article 146 of the Constitution is made in effect against the act or decision or (omission) which is its subject-matter; it is not made against any party as such...» (*Andreas Lambrou v. E.S.C.* (1970) 3 C.L.R. 75).

- 5 The maximum that can be deduced from the material placed before me, as I was able to comprehend it, is that respondent No.3, namely the President of the Tender Board has accepted and evaluated the tender of CYEMS Co. Ltd which is allegedly violating the instructions to tenderers appearing in Exhibit 1
10 attached to the main recourse.

- But it is clear from regulation 22 of the Government Store Regulations, as amended, that for tenders of over £150,000 (which is the present case) the final decision will be taken by a Ministerial Committee comprising of the five Ministers set out
15 above. And it is common ground, in fact it was stated by learned counsel for the applicant at the outset, that the Ministerial Committee did not examine the tenders so far but it is going to meet for this purpose some time in the afternoon of Tuesday, the 10th February.

- 20 It is true that the aforesaid regulation provides also that «the Main Tender Board submits its recommendations to the Ministerial Committee». There is no material before me to the effect that any recommendation was submitted by Respondent No.3 to the Ministerial Committee. Assuming though that a
25 recommendation was so submitted by Respondent No.3 (in this connection whatever is said about such a recommendation would be a mere surmise because such recommendations are due to their nature confidential); such a recommendation would be a mere preparatory act which lacks executory character as it is not
30 binding upon the Ministerial Committee; in other words such a recommendation is simply a preparatory act which is not predetermining the final decision which is up to the Ministerial Committee to take, the appropriate Organ in the circumstances.

- Of course it would have been otherwise if the preparatory act
35 would itself prejudice the result of the final administrative act as it would then create legal results by itself (vide *Papadopoulos v. The Republic* (1983) 3 C.L.R. 1423 at p.1426 and the cases therein cited).

Once the complaint of the applicants is confined to the act or

decision of Respondent No 3 I consider it unnecessary at least for the purposes of the present application to deal with the issue raised by learned counsel for the respondents to the effect that the Ministerial Committee or at least the three remaining Ministers comprising with Respondents 1 & 2 The Ministerial Committee should be joined as parties to the present proceedings 5

Assuming that the act or decision of Respondent No 3, was of an executory character and therefore justiciable under Article 146 the next question which poses for determination is whether same is flagrantly illegal 10

In the case of *Frangos & Others v The Republic* (1982) 3 C L R 53 it was stated (at p 57 of the report) that «For the Court to act, the illegality must be palpably identifiable » I am in full agreement with such statement

In the present application the tender of the CYEMS Co is not before me, the contents thereof were vaguely presented before me and thus my task to judge whether they are in contravention to the Instructions to Tenderers set in Exhibit 1 becomes more difficult My attention was specifically drawn by learned counsel appearing for the applicant to the contents of para 4 of Schedule «A», paras 6 and 8 of Schedule «B» attached to the main recourse as well as to the letter addressed by applicants to the President of the Tender Board which is also attached to the main recourse and marked Exhibit 2, it was submitted that the aforesaid material in particular indicates that Respondent No 3 acted in violation of the instructions to Tenderers and therefore such material points at flagrant illegality 15 20 25

I have considered carefully the whole of the material placed before me and I have examined the particular portions of such material in the light of the submission of learned counsel for applicants but I feel that I am unable to agree with her It is well settled that in dealing with a Provisional Order the Court should not plunge deeply into the merits of the recourse in order to trace alleged illegality which in any way would not have been «flagrant» as not palpably identifiable on the face of the recourse Going into the merits of the recourse and probing into disputed facts on occasions, will unavoidably lead to prejudging the recourse itself something impermissible at the stage of the application for a provisional Order 30 35

Having given to the matter my best consideration I have come to the conclusion that, assuming that the act complained of was of an executory character, the applicant has failed to establish flagrant illegality.

- 5 On the same assumption I intend to deal as briefly as possible with the issue of «irreparable damage». In this connection it must be borne in mind that such alleged damage must be specifically and succinctly pleaded. (*Sophocleous v. Republic* (1971) 3 C.L.R. 345).
- 10 In the application under consideration I could not trace any specific and succinct plea to that effect and I must add that hypothetical contentions as those contained in para. 7 of Schedule «A» attached to the recourse cannot carry the case of the applicants any further.
- 15 For all the above reasons the present application fails and is accordingly dismissed.

Let there be no order as to its costs.

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*Application for provisional
order dismissed. No order
as to costs.*