IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Miscellaneous Civil Application number 40 of 2003

In the Matter of the MINISTRY OF FINANCE ex parte SGS MALAWI LIMITED

CORAM: D F MWAUNGULU (JUDGE)

Kasambara, Legal Practitioner, for the applicants

Matenje, Solicitor General, and Kaphale, legal practitioner, for the respondent

Mankhanamba, Official Court Reporter

Mwaungulu, J.

ORDER

From the 23rd of May 2003, except for an intervention, which I should comment on briefly, by the Honourable the Attorney General, Mr Fatchi, this Court considered two heavily contested applications. The Minister of Finance applied to this Court to discharge a leave for judicial review this Court gave to SGS Malawi Ltd on the 28th of March 2003. In the same order this Court gave SGS Malawi Ltd interim relief SGS Malawi Ltd sought. This Court also gave an ex parte injunction for 21 days during which SGS Malawi Ltd was to prosecute the application inter partes. The second application, therefore, was for interlocutory injunction while the court determined the judicial review. As I mentioned earlier, the matter would have proceeded but for the Attorney General's intervention.

The Attorney General's intervention arises in the following circumstance. SGS Malawi Ltd, complying with the order of this Court to prosecute the interlocutory application within 21 days, obtained the 30th April 2003 as a hearing date for the application. During that time, after consultation with the Honourable the Chief Justice, judges were not to sit in any case unless the judge in-charge certified urgency. During the same time there was

re-assignment of judge business to deal with urgent business. Judges were, therefore, only available for urgent open court business, confirmations and urgent motions and chamber applications. In a series of meetings with all judges of the High Court, I, as judge in-charge, emphasized that, under the new court business arrangements, just as in the transitional period, the judge in-charge and every judge must, as part of streamlined management and to ensure litigants are not turned away from court because a judicial officer is absent from court business for some reason, cover in another judge.

On 30th of April 2003, when I was first seized of this matter, according to the arrangement of business I signed on the 27th of April 2003, Justices Ansah, Chipeta and Kapanda were motions, chambers and confirmations and appeals judges, respectively. According to this allocation, therefore, Justice Chipeta, who granted the earlier leave for judicial review and ex parte injunction, should have heard the matter. Justice Chipeta's affidavit, made because of the Attorney General's intervention, demonstrates that illness in the family and not having received the file before hand prevented him to attend to chambers that day and this chamber in particular. The clerk calling the file that day, Mr M'dala, depones that, in the absence of Justice Chipeta and other judges, he referred the matter to me as judge in-charge and only judge present. After all, I was hearing other chamber matters that day. I therefore assumed jurisdiction. There was therefore no impropriety as to that.

On the 30th April 2003 I heard an inter partes application in the business of Attorney General. The Attorney General was served with the notice of hearing for that day on 9th April, 2003. Mr. Kasambara addressed me on the question fully. I reserved the ruling and extended the ex parte injunction till my order. Before I could deliver my order, on 20th May in particular, Mr Kasambara, for SGS Malawi Ltd, and Mr Matenje, the Solicitor General, appeared before me. The Solicitor General indicated that day was set for hearing the Attorney General's application on the injunction. I intimated that that was unnecessary because I still was to order on whether SGS Malawi Ltd was entitled to the injunction. The Solicitor General then suggested he shall seek an adjournment so that he could file a formal application for setting aside the order. Yet during the previous proceedings the Attorney General never turned out. After discussions, the parties agreed to adjourn so that there was another application to set aside the inter partes interlocutory application. I informed them that they could as well apply orally to that effect. I therefore ordered an inter partes application for interlocutory injunction to be heard on 23rd May 2003. I was seized of the proceedings of the 28th May 2003 because I heard the matter that, up to that point, was not concluded. That week Justices Twea, Ansah and Chipeta were, respectively motions, chambers and confirmations and appeals Justices. Justice Kapanda was not in that week the judge assigned to any business of the court. This, it appears, is when the parties, represented by counsel, agreed, for reasons just expressed, to have me handle the matter.

On 23rd May the application was called in my court. This time around, the Solicitor General had Mr Kaphale as part of his team. The parties were exchanging heavy affidavits and detailed skeleton arguments seconds before appearing before me. Mr Kasambara presented a skeleton argument. The Solicitor General and Mr Kaphale introduced some skeleton arguments and additional affidavits. Mr Kasambara prayed for more time to examine the affidavits and skeleton arguments. The Solicitor General and Mr Kaphale, who were eager to continue with the hearing, were not for postponing because of the urgency of the matter, arguing they featured nothing new needing special attention from Mr Kasambara. I thought that it was up to Mr Kasambara, who I gave more time, to determine whether the affidavits and the skeleton arguments had nothing new. I adjourned the matter to 30th of May 2003.

On the 30th May 2003 Mr Kaphale and the Solicitor General never appeared. Instead, the Attorney General appeared. First he said the clerk should leave the room because what he was to say, for publicity, should not be recorded. Fortunately, the clerk was out already. The Honourable the Attorney General asked me to recuse myself. Spontaneously, I asked why? He said, to my surprise, I was being investigated by police for corruption and on how the matter came to be handled by me. I mentioned to him that recusal is a matter for judicial discretion and since, I was unaware of any investigations and that I was properly seized of the matter in the manner described, he should depose to this effect before I exercised discretion. I, therefore, adjourned the matter to 6th June, 2003. On the 6th June 2003, Mr Kaphale appeared without the Solicitor General and the Attorney General. Mr Kaphale informed me that the Attorney General had withdrawn his application because he cannot find anybody to depose to the allegations he made and that there was no evidence of impropriety.

I recounted all this to demonstrate two aspects of our legal system that the Attorney General's intervention compromised. First, from the perspective of the judiciary it is cardinal from our constitutional arrangements and international customary law that the allocation and assignment of court business is a matter within the full competence, without interference from any authority, of the judiciary. This is stressed by the United Nations resolutions on the minimum standard for judicial independence. The assignment of court business is absolutely non-justiciable and, subject only to recusal, not amendable for judicial review. The actual listing of cases is amenable for judicial review. The assignment of a judicial officer to a particular case is a matter for the judiciary subject only to a right of the individual to have, what in jurisprudence, we call "a natural judge." The natural judge is determined randomly or by a defined system. This Court has worked hard so far to come up with a system that ensures judicial independence in allocation of business to judicial officers and guarantees litigants the right to a natural judge. There was therefore nothing suspicious in the manner I came to be seized of the matter. The Attorney General's suggestion that the matter should have been before a different judge is adequately answered by the system in place assigning business for the dates when I was seized of the matter. It now allows me to consider the substantive

applications before me starting first with the Attorney General's application to set aside the leave for judicial review before considering the application for interlocutory injunction.

For purposes of both applications, however, it is useful at the outset, to lay down circumstance leading to these proceedings. Up to this point, Pre-shipment Inspection Services for Malawi were done by a Swiss company, Societe Generale de Surveillance S.A. (SGS), through its subsidiary in Malawi, SGS Malawi Ltd. The Government of Malawi decided to re-tender existing pre-shipment inspection services. It, therefore, decided to invite tenders from pre-shipment inspection companies with proven record in pre-shipment inspection. The terms of reference for the invitation to tender for the pre-shipment inspection services for Malawi are in the invitation to tender document and need no repetition for purposes of both applications. It is important, however, to reproduce the pre-qualification requirements because these are basic to the selection. The company to apply for tenders was to be well established, having inspection capability for the entire range of imports into Malawi; to highlight where it has provided pre-shipment services and any legal/credibility problems that might have been faced; to be independent of any trading or manufacturing group; by itself, or through companies owned or controlled by it, to have performed pre-shipment inspection services and have sufficient permanent and qualified staff to inspect, value, classify and produce reports in relation to goods exported to Malawi; to have its own laboratory facilities to conduct effective analysis when required and, within its own operations, have the computer capability to create and operate electronic data; to have a minimum of 5 years experience in the provision of pre-shipment inspection services for other Governments as a sole agency and a proved record of preventing revenue leakage and increasing Government revenue; to have adequate security of operations to ensure systems integrity and complete confidentiality of transaction information; to demonstrate commitment to transfer technical and technological skills to the Malawi Revenue Authority; to be a member of the International Federation of Inspection Agencies (IFIA); to set and enforce agreed performance indicators which will form a basis for determining contractual penalty clauses; to demonstrate that it will be able to operate effectively by 1st April, 2003; and to be willing to draft a format for the Clean Report of Findings forms harmonized so far as is possible with the local customs entry form.

The basis for selection is in paragraph 5.5 of the tender document. It is useful to reproduce 5.5.1:

"The Government of Malawi, in the selection of proposals submitted in response to this tender, will be guided by the following considerations:

(a) the applicant's previous international experience reputation and performance over a sustainable period.

(b) the adequacy of the proposed work plan for the proposal and, in particular, the degree of assistance that is proposed for the sustainable improvement of revenue collection and exchange controls

(c) the responsiveness to the Terms of Reference herein

(d) the qualifications, experience and competence of the personnel proposed for the assignment

The following weightings will be applied:

To (a) above – 50%

To (b) above – 30%

To © above (d) above – 10 % each category"

Then there is the all important and usual provision in all tender documents in paragraph 5.5.2:

"The Government of Malawi is not bound to accept the lowest or any offer and reserves the right to reject any offer without specifying any reason."

It is also important, for reasons appearing shortly, to reproduce paragraph 5.6.1:

"All applicants invited to tender shall have access to the Acting Commissioner General of the Malawi Revenue Authority and the Governor of the Reserve Bank of Malawi at mutually convenient times to discuss the operation of the proposed procedures and to obtain relevant information on current practices."

The tender also provided for a Tender Valuation Committee whose function was to oversee the opening of the tender envelopes and conduct an assessment of proposals under provision of paragraph 5.5 of the document. Four companies submitted tenders for the pre-shipment inspection services for Malawi: BIVAC International (BIVAC), COTECNA Inspection S.A (COTECNA), Intertek Testing Services (ITS) and Societe General de Surveillance S.A (SGS), the applicant.

On the 13th December 2002 at the Malawi Institute of Management the bids were opened. The system and evaluation commenced simultaneously. The evaluation team scored the companies as follows: SGS - 4.27, ITS - 4.17, BIVAC - 3.34 and COTECNA - 3.17. Although according to the invitation to tender documents the committee need not have assessed the financial proposals, the committee opened them and rated the

companies as follows: as to percentage of FOB value, BIVA 0.82%, COTECNA 0.79%, ITS 0.69% and SGS 0.89% and as to minimum fee BIVAC US$180, COTECNA US$170, ITS US$179 and SGS US$190.

The committee recommended to Government "to consider awarding the contract to SGS and in the event that SGS turns down the offer then the next company to be offered the contract may be ITS." Government awarded the contract to ITS, of course, on considering that the difference between the two companies was .10 and the prices were much better for ITS than for SGS. Government never awarded the other two bidders for poor rating. Government wrote ITS about the decision and other bidders of their bids' rejection.

On 28th March 2003 SGS Malawi Ltd applied for leave to apply for judicial review of the Government's decision. SGS Malawi Ltd wanted this Court to make an order like to certiorari quashing Government's decision to award the PSI contract to ITS or indeed any other company. SGS Malawi Ltd wanted this court to grant an order prohibiting the Government from proceeding to make arrangements for awarding negotiating and entering into a PSI contract with ITS or any other company. In addition, SGS Malawi Ltd applied that, if granted, the leave operate as a stay of proceedings relating to this application under Order 53, rule 3 (10)(a) of the Rules of the Supreme Court. SGS Malawi Ltd also prayed, if granted, that leave should operate as an injunction restraining the Government from awarding or entering into a PSI contract with ITS or any of the competitors of the applicant. Apart from an order for costs, SGS Malawi Ltd applied for expedited hearing of the judicial review application. This Court granted leave and the orders mentioned earlier. The Government wants the leave set aside. SGS Malawi Ltd wants the ex parte injunction continue up to determination of this issue.

There are high stakes for Government and SGS Malawi Ltd. Government has already awarded the contract to ITS. Consequently, Government could be in breach of that contract if, as prayed, this Court on judicial review upholds SGS Malawi Ltd's requests and grants the orders. More importantly, the judicial review, even if expedited, may not occur before or reasonably before 30th of June 2003 when the existing contract with the applicant expires. Unless, therefore, Government, as it has done before, extends the existing contract with SGS Malawi Ltd to beyond 30th of June, 2003, Government would be in the invidious position that there will be nobody performing pre-shipment inspection service. For SGS Malawi Ltd, Government awarding the contract to ITS will end a relationship dating a few years back. Although it is not said, the pre-inspection service may be the only reason why SGS Malawi Ltd is there. It is in the interest of both, therefore, that, not only should the decision be made very quickly, but that, for different reasons, the decision should be in their favour. Government therefore wants, as a way of expediting the process, to set aside the leave for judicial review on the ground that there is no arguable case for judicial review, and the further point that SGS Malawi Ltd did not make a frank and full disclosure of material matters of law and fact.

The power of this Court to set aside leave, already given, for judicial review is covered by authority from other jurisdictions: R v Secretary of State for the Home Department, ex p. Begaum (1989) 1 Admin LR 110, 112F; R v Secretary of State for the Home Department, ex p. Sholola [1992] Imm AR 135: R v Customs and Excise Commissioners, ex parte Eurotunnel Plc [1995] CLC 392, 399F; and R v Crown Prosecution Service, ex parte Hogg (1994) 6 Admin LR 7782A. I have not read the reports. The decisions are cited in Principles of Judicial Review, De Smith, Woolf and Jowell's, Sweet & Maxwell, 1999 ed. and Civil Procedure, Sweet & Maxwell, 2001 ed. Kaphale cited local authorities. I have not read Mpinganjira v Malawi Development Corporation Miscellaneous Civil Cause No. 63 of 2003, unreported. Chisa v Attorney General, Civil Cause No. 85 of 1994, was not a case of setting aside leave for judicial review. The matter went to full review. Equally, Chikosa v Southern Region Water Board, Miscellaneous Civil Cause No 47 of 2003, was not a case of setting aside the leave. The judge to who the ex parte application was made ordered the leave be obtained inter partes. The power to set aside the leave obtained ex parte is the inherent power the court has where an order is granted against a party in her absence. Mr Kasambara, however, submits, correctly in my view, that the discretion should be exercised sparingly. In R v Secretary of State for the Home Department, McGowan, J., said, "I agree with [counsel] that this is a jurisdiction that should be very sparingly exercised." In R v Customs and Excise Commissioners, ex parte Eurotunnel Plc the court said, "It is obvious that the whole purpose of the leave stage would be vitiated if the grant of leave were to be regularly followed by an application to set it aside."

Mr Kasambara submits that where leave has been given the court should lean heavily towards giving the applicant the liberty to prosecute the judicial review. He relies, by analogy, on the view courts take when a party applies to set aside the grant of leave to appeal and an application to strike judicial review proceedings. As to the former, Mr Kasambara relies on Iran Nabut [1990] 1 WLR 1115 and Brenna v Brighton Borough Council, The Times 24th July 1996 and C.O. Williams Construction Ltd v Blackman, [1995] 1 W.L.R. 102. I have not read Brenna v Brighton Borough Council. In Iran Nabut counsel argued, in an application to set aside leave to appeal to the Court of Appeal, that the court ought to set aside the leave unless the appellant demonstrated that there must be probability or a reasonable likelihood of the trial judge having gone wrong. Lord Donaldson of Lymington, M.R., said at 1117;

"I am bound to say that, for my part, I do not accept that proposition at all. The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to be exercised by the court. The bias must always be towards allowing the full court to consider the complaints of the dissatisfied litigant, and the justification for leave to appeal in its present form or (if as I hope will come to pass) in an extended form must be that it is unfair to the respondent that he should be required to defend the decision below, unfair to other litigants because the time of not be before it and thereby causing delay to other litigants, and unfair to the appellant himself who needs to be saved from his own folly in

seeking to appeal the unappealable."

In C.O. Williams Construction Ltd v Blackman the respondent applied to strike judicial proceedings under Barbados legislation for not disclosing a reasonable cause of action. Under relevant legislation, the applicant could only rely on the actual process, affidavit evidence being inadmissible to show the process, to disclose a reasonable cause of action. The passages on page 108-109 Mr. Kasambara relies on only explain that point. They do not go beyond that.

These cases, at least on the analogy Mr. Kasambara wants this court to employ, are distinguishable. In C.O. Williams Construction Ltd v Blackman, the applicant had an inchoate right to be heard unless the respondent, on who the burden lay, demonstrated the pleadings themselves showed no cause of action. The parties had pleadings before them. In Iran Nabut a litigant has an inchoate right to appeal and, where leave is given, requiring a more stringent test to sustain that leave would deprive litigants a prima facie and an inchoate right to appeal.

The leave requirement for judicial review is justified on the nature of the remedy and the subject matter of the application, public administration. Leave ensures screening for deserving cases to avoid inundation and allowing public administration to continue, at least expeditiously, where matters are unfit for judicial review. Moreover the leave requirement ensures that, at an early stage, the appropriate method merited by the law and factual complexion accompanies the proceedings. Where leave is granted, the judge will have considered pertinent matters, including, of course, the two general considerations. It does not follow, however, that the matter is closed, particularly, like here, where the applicant obtained leave ex parte. Under the new Civil Procedure Rules, Part 54.13, where a party serves the other with the leave application and the other fails to make written representations to the court, the other cannot apply to set aside the leave. Where, therefore, leave is obtained ex parte, leave should be granted sparingly and in very plain cases (R v Secretary of State for the Home Department ex parte Chinoy (1992) 5 Admin. L.Rep. 457.

This, in my judgment, means no more than that for every such case where leave initially given is to be set aside the judge must consider the matter deliberatively. The standard of circumspection is no less for obvious cases than it is for deserving cases. It is circumspection, in my judgment, that winnows the grain from the chaff. In clear cases either way, namely, where leave should be clearly granted or refused, little or no difficulty arises. In unclear cases, the court must, in my judgment, incline towards sustaining the leave given unless, of course, there are compelling reasons for acting contrariwise.

Where given, the other party may apply to have the leave set aside because the

application discloses absolutely no arguable case (R v Secretary of State for the Home Department, ex parte Khalid Al-Nafeesi [1990] C.O.D. 306) or because the applicant has not frankly disclosed material facts or material aspects of the law (R v Jockey Club Licensing Committee, ex parte Wright [1991] C.O.D. 306). In the latter case the Court held that it is up to the court, not counsel, to determine what is material matter or law or fact. The Attorney General relies both on lack of an arguable case and frank disclosure of material matters as to law and fact.

On lack of frank disclosure of material matters of law and fact, the applicant cannot be faulted for lack of such disclosure in respect of matters of fact. Even if there was such lack of frank disclosure of facts, the facts undisclosed are, in my judgment, not material. A statement made for non disclosure on an interlocutory injunction application by Gibson, L.J., in Brinks' Mat Limited v Elcome and others [1988] 1 W.L.R. 1350, and cited with approval by Kapanda, J., in Mpinganjira and others v Attorney General, miscellaneous civil cause no. 3140 of 2001, is apposite to non-disclosure for leave for judicial review:

"Finally, it is not for every omission that the injunction will be automatically discharged. A locus, poenitetiae may sometimes be afforded per Lord Denning M.R. in Bank Meliat v Nikpour [1985] F.S.R 87,90. The court has discretion, notwithstanding proof of material non disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless continue the order, or to make a new order on terms:

'When the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant . . . a second injunction if the original non disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'"

It was contended for the Attorney General that failure by the applicant to introduce the actual tender document is fatal to the application. Much of the contents of the tender document were covered in the application for leave and accompanying documents. The very significant point the Attorney General relies on, namely, Government would not be bound to follow the lowest bidder or any bidder, is adequately covered in the information the applicant relied on when applying for leave. The applicant covered in the same detail as the Attorney General has done in this application all the procedures and processes culminating in the decision to award the contract to ITS. What I understand the applicant complains about is that, contrary to the technical evaluation committee's recommendation Government award the contract to the applicant, Government awarded the contract to a rival. More significantly the applicant complains that in basing the decision on the price, Government did not only overlook the tender document but relied on matters extraneous to what the decision should have been based on. In a word, there was no lack of frank disclosure of material matters as to the facts. There is, however, a lot to say about lack of disclosure of material matters of law.

Most of the material matters of law will be covered when considering the ground that there is no arguable case for judicial review. For now it suffices to say that if a lot of material matters of law were before the judge when granting the leave for judicial review, the judge would have had adequate material on which to decide whether to grant or refuse leave. From the principles laid in R v Jockey Club Licensing Committee, ex parte Wright, at the stage of obtaining leave, the applicant must bring out all matters of law material to granting leave. In judicial review, courts exercise supervisory jurisdictions over acts or omissions by public bodies in the area of public law. As Sir John Donaldson, M.R., said in R v Panel on Takeover and Mergers ex parte Datafin [1987] Q.B. 815 at 838E, judicial review avails against public bodies, namely bodies exercising a power or performing a duty involving "a public element. Judicial review also only avails where an issue of public law arises. Judicial review cannot be used to enforce private law rights against a public authority: R v East Berkshire Health Authority ex parte. Walsh [1985] Q.B. 152 at 162. Consequently, there would be an arguable case on a judicial review where clearly the body against which judicial review is sought is not a public body properly understood. Equally, there would be no arguable case on judicial review where no issue of a public law arises. Moreover, there will be no arguable case on judicial review where the mechanism is sought to enforce an otherwise private right against a public authority. These considerations must attend a judge when refusing or granting leave under judicial review.

Both the applicant and the respondent stayed shy of arguing the aspect of a public body. There was no doubt that the Minister of Finance or Government is a public authority or person. Equally there was no doubt about SGS Malawi Ltd's locus standi, a matter which the judge granting or refusing leave must consider at the outset. The pertinent questions therefore were whether an issue of public law arises or the mechanism is sought to enforce a private right against a public body.

Clearly not all public body decisions are or should be governed by distinct principles of public law. Where a public body enters into a contract, the same principles of private law governing similar transactions between private persons apply. This is clear from this Court's decision in Chisa v Attorney General. In that case, following Au Bord Bainne Co-operative Ltd v Milk Marketing Board [1984] 2 C.M.L. R 584; R v British Broadcasting Corporation ex parte. Lavelle [1983] 3 All E.R. 241; Cocks v Thanet District Council [1982] 3 All E.R. 1135, this court said:

"Where the applicant is enforcing rights under private law the proper remedy was an action under private law. Where the action was on rights protected under private law the plaintiff could still proceed under remedies in private law even if there was a public law issue. What is clear, however, is that judicial review is not available to enforce rights that are protected by private law and the plaintiff must proceed in his remedies under private law."

In Chisa v Attorney General the applicant for judicial review was a beneficiary of a Government scheme to improve transportation business in Malawi. The Government obtained funds from the Germany Government to purchase motor vehicles. The scheme was financed and underwritten by a bank while the property remained Government's. The applicant was in huge arrears. The Government, using the police and relying on some term in the contract, seized the motor vehicle. The court refused orders under judicial review because the matter for review was predominated by private rights not withstanding that there was reference to rights protected under private law. This Court said:

"It is not that Government is proceedings under any of its coercive or plenipotentiary powers. Despite that the motion has been conjured in lofty terms so as to appear as if there are violations of the plaintiff's constitutional rights, Government is acting purely on a contractual relationship where it thinks, correctly or erroneously, it is a party. That transposes this case out of those where the plaintiff can make an application by way of judicial review."

In Chikosa v Southern Region Water Board, the applicant applied for leave for judicial review in a matter involving pure employment law, Chimasula Phiri, J., said:

"It is stated that a claim in connection with the dismissal of an employee from an employment with a public authority, where the conditions of employment are governed by a statutory instrument, is nevertheless a matter of private, not public law: R v East Berkshire Health Authority ex parte Walsh [1985] Q.B. 152 or [1984] 3 All E.R. 425 C.A. In the present case the position is not different despite ones ingenuity of quoting constitutional rights."

Even where a public body is entering into a contact, a court may still review the body's decision where the body act unreasonably, and exceeds statutory powers. This might be the case where, for example legislation governs public procurement and other contracting functions of a public body and it is alleged that the decision is unreasonable or exceeds statutory authority. It must be remembered however that whether in contractual relationships, public bodies are amenable or not to judicial review is not an easy matter resolved merely by the contractual relationship. In Chisa v Attorney General this Court said:

"The existence of a contract is an indication of existence of private rights, (R v East Berkshire Health Authority exp. Walsh (1985) Q.R. 152; Wadi v Cornwall and Isle of Scilly Family Practitioner Committee (1985) I.C.R. 492. It is not, however, decisive. Lord Lowry said in R v Kensington and Chelsea and Westminister Family Practitioner Committee [1992] 1 A.C. 624, 649:

‘But the actual or possible absence of a contract is not decisive against Dr Roy. He has in my opinion a bundle of rights which should be regarded as individual law rights against the committee arising from the Statute and regulations and including the very important private law rights to be paid for the work that he has done.’”

There have been instances where the court used its supervisory jurisdiction and applied judicial review to contractual relationships. In R v Wear Valley D.C., ex parte. Binks [1985] 2 All E.R. 699, the court subjected to judicial review the termination of an informal license to run take-away food stores. On the other hand, in R v Panel of the Federation of Communication Services Ltd, ex parte. Kubis [1998] C.O.D. 5. the court refused an application for judicial review to an applicant who, while not a member of the safe regulatory organisation, was nevertheless in a contractual relationship with the organization concerning an anti-theft scheme. The distinction between the two situations being that in the earlier cases the public authority is using conferred power, namely, power to license, which is itself subject to review albeit that there is a contractual relationship between the licensee and the licensor. In the latter case the relationship is solely contractual.

In a case, all fours with the present case, R v Lord Chancellor, ex parte Hibbit & Saunders (A Firm) [1993] C.O.D. 326, the court refused judicial review where the applicant alleged that the Lord Chancellors Department procedure for inviting tenders to provide court reporting services to the Lord Chancellor were unfair. Although there was a public interest issue in the general benefit to the public and the courts in having an efficient court reporting service, the interest was incidental to an otherwise contractual arrangement.

In R v Legal Aid Board, ex parte Donn & Co (a firm) [1996] 3 All E.R 1, the applicant applied for judicial review of a committee’s refusal of their tender contending that the committee’s decision-making process was justiciable in public law, that the treatment of the missing pages was a procedural irregularity which wanted the court’s interference, and that the issue of conflict of interest and in dealt with so unfairly as to amount to a want of natural Justice. The court held the decision making process of a legal aid committee in awarding a contract to solicitors for the conduct of a multi-party action was justiciable in public law. Treating the nature and purpose of the selection process and its consequences as one indivisible whole, the function exercised by the committee, the purpose for which they were empowered to act and the consequences of their decision-making process all clearly indicated that it would be wrong to characterize the matter for review as one of private law, and irrespective of whether there was a remedy in private law, the public dimensions of the matter were of a quality which made it justiciable in public law. Rose, L.J., said:

“The question of whether the decision involves “some other sufficient public law element as to which there is no universal test” only arises in the event that the decision is not

underpinned by statute, policy or practice. However, in the instant case, the decision is plainly one which contains such a public law element for the following reasons: 11.5.1. it relates directly to the conduct of litigation to be undertaken on behalf of hundreds of legally assisted and privately paying Plaintiffs; it is clearly in the public interest that the best firm be selected by a fair and lawful procedure. 11.5.2. the Arrangements enable the Board to select the firm or group of firms of solicitors which will do the work best . . . 11.5.3. the Arrangements themselves contain numerous provisions which give the decision a public law element: see e g Para 12 and 15 esp 15(iv) to (vi)."

The Court also held that the committee ought to have reconvened as a whole to reappraise their decision having regard to the full document and consequently their failure to consider the complete tender documents and the methods later chosen to deal with that failure amounted to procedural irregularity. Further, the matter of conflict of interest was dealt with too hastily and, as a result, a conclusion was formed based on material, which was, at best, exiguous. That amounted either to a procedural irregularity or want of natural Justice which in either case entitled the applicants to relief under judicial review.

R v Legal Aid Board, ex parte Donn & Co (a firm) instances a matter where, albeit contractual, has a public law element and statutory underpinning. Ognall, J., found that, apart from statute, there was a public law element. The path to that conclusion was, as he confessed, not an easy one. "The answer to the question of sufficient public law element," he said, "admits of no universal test." He thought such guidance as there may be could be found in a dictum of Woolf, L.J., in R v Derbyshire CC ex parte Noble [1990] I.C.R. 808 at 819 that one needs "… to look at the subject matter of the decision … and by looking at that … then come to a decision as to whether judicial review is appropriate." Ognall, J., then said at 11:

"I confess that I have not found the answering of this question an easy one. To a degree, the exhortation to which I have referred, namely to look at 'the subject matter' itself raises a question not free from difficulty . . . The answer must, it seems to me, fall to be decided as one of overall impression, and one of degree. There can be no universal test." But bearing in mind all the factors drawn to my attention, I prefer the applicants' submissions. I believe that the function exercised by this committee under the respondents' arrangements, the purpose for which they were empowered to act and the consequences of their decision-making process, all demand the conclusion that it would be wrong to characterize this matter as one of private law. Even if there were to be arguably some private law remedy, the public dimensions of this matter are of a quality which make it justiciable in public law."

Even if, as I am prepared to find, there is a public law element rendering the matter amenable for judicial review, leave could be refused, if granted, set aside if the matter in question is not justiciable. There are some decisions that courts cannot just review. They

are not justiciable. The principle bases on Lord Roskill's statement in Council for the Civil Service Union v Minister for the Civil Service, [1985] 1 A.C 374 at 418, that the matters cannot be 'made subject of judicial review.' Diplock, L.J., said:

"While I see no a priori reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of "prerogative" powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision making power a decision of a kind that would be open to attack through the judicial process on this ground. Such decisions will generally involve the application of Government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another, a balancing exercise which judges by their upbringing and experience are ill qualified to perform."

R v Criminal Injuries Compensation Board, ex parte P [1995] 1 All ER 870 is an instance where decisions about allocation of resources by a public power are not generally justiciable. Lord Neill, L.J., said:

"The Secretary of State had to make a judgment as to how to allocate the resources at his disposal. It will be remembered that in respect of claims after 1979 a time limit of three years was imposed between the relevant offence and the date of a claim. I cannot see that a different time limit, say two years, could have been attacked. Such a decision would not have been 'justiciable'. Similarly, I cannot see that the decision to continue the pre-1979 exclusion can be regarded as a 'justiciable' issue on the facts of the present case. As Lord Wilberforce said in Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petroleum Corp v Buttes Gas and Oil Co (Nos 1 and 2) [1981] 3 All ER 616 at 633, [1982] AC 888 at 938, in a case involving relations with a foreign state, the court has 'no judicial or manageable standards by which to judge' the issue."

Many epitaphs delineate non-justiciable matters: "Matters involving social and economic policy," "high policy" "matters of policy and principle" "matters without any objective criterion" "matters involving competing policy considerations", "questions of social and ethical controversy." Generally these are matters where, if involved, courts would be in, in the words of Lord Diplock in Butees Gas v Hammer [1982] A.C. 888, a "judicial no-mans land." In R v Criminal Injuries Compensation Board, ex parte P. Neill, L.J., said: "In attempting to review the Secretary of State's decision in this regard the court would be 'in a judicial no-man's land.'" In the same case Neill, L.J., introduced the concept of a polycentric:

"With these words in mind one looks at the decisions in issue in this case. In my

judgment they fall within the class of decisions which Lord Diplock had in mind. These decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with. In the language of the late Professor Fuller in his work, 'The forms and Limits of Adjudication' (1978) 92(2) Harv L.R. 353 at 395, decisions of this kind involve a polycentric task. The concept of a polycentric situation is perhaps most easily explained by thinking of a spider's web:

'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.'"

The test now is the one Watkins, L.J., suggests in R v Secretary of State for the Home Department ex parte Bentley [1994] Q.B. 349:

"The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so?"

Where the matter is clearly non-justiciable, it is clearly unarguable and the court may refuse or, if already given, set aside leave for judicial review notwithstanding the decision is of a public body on matters of public law in the manner earlier described. The applicant, if I understand him correctly, has high veneration of the process Government put in place and the outcome of the process up to the point, of course, Government decided to award the contract to ITS. At that point, the applicant argues, Government should, as the technical evaluation committee recommended, have awarded the contract to it. The applicant wants this Court on judicial review to review Government's decision because (a) in awarding the contract to ITS on the price, Government acted on a criterion outside the tender and acted irrationally in ignoring the technical evaluation committees recommendation and (b) Government overlooked the applicant's legitimate expectations.

On the first aspect whether leave should be granted or, if granted, set aside depends on whether Government's decision to award or not award a contract in the circumstances is justiciable under judicial review. On the principles enunciated, there is a public law element: pre-shipment inspections are important to importers, consumers, Government's revenues, economic and social programs. It is important that ones conducting pre-shipment contracts should be the best. The tender document underscored this. The applicant must however demonstrate that Government was under private law or public law supposed to award the contract to the applicant or any other person. On private law governing this matter, the Government was not so bound. First, the tender document

expressly stated Government was not obligated to accept the lowest or any bidder. Secondly and more importantly, on principles of contract, and in that respect, under section 2 of the Civil Procedure (Suits by and Against Government and Public Officers) Act, Government is like any private person, there is no obligation on a party to a contract to accept an offer from another. The applicant, if insisting on private rights, was the offeror. Government made no offer to the applicant. Government was the acceptor. This Court, on the general law, except in cases of specific performance, cannot compel a party to accept an agreement. Besides this is not a matter where, in the ordinary course of things, a court would order specific performance. More importantly, under section 10 of the Civil Procedure (Suits by and Against Government and Public Officers) Act, this Court cannot order specific performance against Government. The tender document itself suggests that Government is offering the contract to ITS. Government is in fact accepting ITS's offer. There is no principle of private law on which this Court can compel Government to accept offers from any of the offerors.

Equally there is no principle of public law on which to compel Government to offer the contract to any of the tenderers. R v Legal Aid Board, ex parte Donn & Co (a firm) and R v Lord Chancellor, ex parte Hibbit & Saunders (A Firm) dealt with tenders. Both turned, as we saw earlier, on whether those contractual arrangements based on public law. Much like here, the arrangements in the former were. In R v Lord Chancellor, ex parte Hibbit & Saunders (A Firm) the court refused judicial review on whether the procedure of inviting tenders was fair. In R v Legal Aid Board, ex parte Donn & Co (a firm) the court allowed judicial review and quashed the offer to another firm when the assessment was without documents omitted in the tender documents. In this case the applicant contends Government could not, the technical evaluation committee having recommended it for the contract based on the overall criteria, accept ITS's bid based on the price.

First, this premise presupposes the technical evaluation committee recommended Government accept the applicant's bid. The applicant and respondent, for purposes of this application, exhibited the technical evaluation committee's actual recommendation. The technical evaluation committee, even at the peril of being criticized for being pedantic, never recommended to Government to accept the applicant's bid. For clarity, I repeat the technical evaluation committee's recommendation:

"[T]o consider [emphasis supplied] awarding the contract to SGS and in the event that SGS turns down the offer then the next company to be offered the contract may be ITS."

According to the technical evaluation committee Government was to "consider" awarding, not award the contract to SGS. The ultimate authority on the contract Government, not the technical evaluation committee. It was to Government that the technical evaluation committee recommended consideration. Government accepted ITS's bid because, it now transpires, because the difference on the rating between ITS and SGS was only .10 but, ITS offered better pricing.

Secondly, it is said Government could only go on the criteria in the tender document, the criteria the technical evaluation committee rated the bidders on. It is suggested Government should not have used costs as criteria and, to the extent it did, the decision is vitiated. First, from commercial sense Government could not ignore the price. Although the tender document in the criteria never mentions price, this Court implies the term on the generality of the matter. However, the tender document required bidders provide a "TECHNICAL PROPOSAL" (5.3.1) and a "FINANCIAL PROPOSAL." It is true the Technical Evaluation Committee was "to oversee the opening of the envelopes and conduct an assessment of proposals under the provisions of paragraph 5.5." 'Proposals' in paragraph 5.5 refers, in my judgment, refers to both proposals. Some criteria in paragraph 5.5 cannot be used to "FINANCIAL PROPOSALS." "FINANCIAL PROPOSALS cohere to 5.5.1.a. On the other hand, I think, if anything, the "FINANCIAL PROPOSALS" were important and the technical evaluation committee should, as they did, have considered them. Otherwise, why call for them? On the tender document, therefore, even accepting the technical evaluation committee, should not have assessed the "FINANCIAL PROPOSALS", Government could only have requested them for purposes of consideration for the tender. One cannot separate the two proposals from the overall tender. From commercial sense and the tender documents, Government should have considered the cost. In so considering, Government was not acting on a matter extraneous to the tender document. Apart from these two, a public body should consider all relevant factors even if not mentioned in the enabling legislation (R v London City Council, ex parte Entertainments Protection Association [1931] 2 K.B. 215; R v G.L.C., ex parte Blackburn [1976] 1 W.L.R. 550).

Under public law, however, Government, as a public body, was under a duty to consider the cost and such decisions, on the law as I understand it, based as they are on matters the court is ill-equipped to evaluate, are not amenable to judicial review. In R v Monoploies and Mergers Commission, ex parte Argyll Group plc [1986] 1 W.L.R. 763, Lord Donaldson, M.R., remarks that good public administration needs "proper consideration of the public interest. In this context, the Secretary of State is the guardian of the public interest." In financial matters, he remarks that good public administration requires "decisiveness and finality." In R v Secretary of State for the Home Department, ex parte P the applicant challenged the Minister's decision to exclude from a statutory scheme for the benefit of victims of a crime offences within one's household. Accepting the court could review the power, Gibson, L.J., Evans, L.J., dissenting, agreed with Neill, L.J., that the decision was not justiciable involving as it did "a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with." In my judgment Government, through the Minister of Finance, has a fiduciary duty over funds in its charge. Lord Templeman in Hazell v Hammersmith and Fulham London Borough Council [1992] A.C. 1 at 37 referred to the duty of a local authority to be "prudent" with taxpayer's money. In Bromley London Borough Council v Greater London Council [1983]1 A.C. 768 at 829, Diplock, L.J., said:

"It is well established by the authorities to which my noble and learned friend, Lord Wilberforce, has already referred, that a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage;

Commenting on this fiduciary duty, De Smith, Woolf and Jowell say in Principles of Judicial Review at 218-219:

"The courts have, from time to time, invoked the principle that local authorities owe an implied "fiduciary duty" to their ratepayers. The breach of such a duty has rarely formed the ratio of a decision to strike down the expenditure concerned. The fiduciary duty could be interpreted in two ways: First, it could imply a duty to act on ordinary business principles and not be "thriftless" with ratepayers' money. Such a meaning of the fiduciary duty comes to permitting the courts themselves to decide the levels of expenditure which meet those standards. As the House of Lords has reminded us in a different context, courts are not, in judicial review, equipped to make such decisions. A second interpretation views the fiduciary duty as a duty to take into account, in reaching a decision on expenditure, the interests of the ratepayers. Since the ratepayers' interests are likely to be adversely affected by a decision to increase expenditure, it is surely right that those interests should be considered by the local authority (although not necessarily slavishly followed). This second meaning of the fiduciary duty does not involve the courts in a function to which, in judicial review, they are unsuited."

Consequently, the Minister of Finance in matters of which is the better and cheaper way to carry out pre-shipment inspection contract is the final arbiter. In matters of a purely commercial nature, this Court is the most unsuited. The consideration about corruption, even if admitted, was, as the rating criteria demonstrate, considered. Despite it the technical evaluation committee found little difference between ITS and SGS. Again, this Court should heed Lord Bridge's caution in Gillick v West Norfork & Wisbech Area Health Authority [1986 1 A.C. 112 at 193 that courts should exercise the "utmost restraint" in cases involving "questions of social and ethical controversy." Moreover courts do not normally allow bad faith to be attributed to Government (Duncan v Theodore (1917) 23 C.L.R. 510, 544; Australian Communist Party v Commonwealth (1951) 83 C.L.R. 1, 257-258. Government arrived at the decision after considering all relevant matters, matters, because of their nature courts are ill equipped to review.

It is said that the Government in so acting affected the applicant's legitimate expectations. If that expectation was that, on a better rating, Government would award the applicant the contract, the tender document clearly dispelled that expectation. Government indicated for all to see that it would not accept the lowest or any bidder. The applicant's expectation it would receive the contracts seems ill-founded. De Smith, Woolf

and Jowell say in Principles of Judicial Review at 173 :

"This kind of exercise of power has been called the "new prerogative" because it is seemingly outside the reach of judicial review. The argument is that the applicants for the grants or contracts have no right to legitimate expectation to receive them, and the Government has discretion to refuse the grants on broad grounds of public policy."

Equally, that expectation cannot have been based on that Government had all along contracted SGS for pre-shipment inspections. If there was legitimate expectation that Government would, prior to the tender, contract SGS, the tender, where the applicant fully participated in, revoked such expectation. Although where the right to legitimate expectation is established, a right to a hearing and an actual hearing can be reviewed, there is an equal right to the public body, to avoid fettering its discretion, to revoke the circumstances giving rise to the legitimate expectation (R v Secretary of State for the Home Department, ex p Ruddock [1987] 1 W.L.R. 1982.) In Re Findlay [1985] A.C. 318, 338, Lord Scarman, with whom the other members of the House concurred, said:

"Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of discretion conferred upon him by statute. Any other view would entail the conclusions that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy."

Moreover, in R v Inland Revenue Commissioners, ex p. Matrix Securities [1994] 1 All E.R. 769, Lord Griffiths said that if the person relying on a clearance from the Inland Revenue were entitled to do so, and spent money promoting a scheme before the clearance was withdrawn, then "fairness demands that the applicant should be reimbursed for out-of-pocket expense and it could be regarded as an abuse for the Revenue to refuse to do so. This decision probably underscores that a person claiming infringement of the right to legitimate expectations needs to prove steps taken to his detriment. It also suggests, to my mind, that the public body need not suffer the restricting and prohibiting orders that judicial review is all about. So much so that, infringement of the right in this case should not result in relief the applicant seeks.

Judicial review reviews decisions of persons exercising power in the public arena. Judicial review only operates in the context of rights in public law. It never protects private rights using this public law remedy. Mechanisms to enforce private rights abundantly redound in our legal system. Judicial review, however, avails to enforce private rights involving decisions with a public element or statutory underpinning. To avoid inundation and ensure continuation of good public administration, commencing

judicial review proceedings is only with the leave of the court. This screening mechanism screens deserving cases. Consequently, a party seeking leave must make a frank and full disclosure of material matters on the facts and law and must have an arguable case. Leave will be refused or, if granted, set aside if the applicant does not, at the leave stage, make a full and frank disclosure of matters material on the law and facts justifying the application.

In this matter, there was a full and frank disclosure of the material matters on the facts. The same cannot be said of disclosure on material matters on the law. The leave is, however, set aside because, in my judgment, from the facts, the written submissions and oral arguments, the case, although involving a public element, as explained, is clearly unarguable for non-justiciability. Government, under private law, the tender agreement (the basis of the application), the technical evaluation recommendation and public law, was entitled to consider the cost of the bidders' services. To impugn the Minister of Finance's judgment on the cost implications of the scheme is delving on matters this Court is unaccustomed and ill equipped to do. Under private law, Government could not be forced to accept any offer. There was no contract at that stage even to enable specific performance. Besides, even among private citizens, this Court could not order specific performance. Under section 10 of the Civil Procedure (Suits by and against Government and Public Officers) Act, even if there was a contract, the Court cannot order specific performance against Government. More importantly, the matter is non-justiciable because of its polycentric implication.

The applicant prays under this application that this Court should make orders whose effect would be that Government would not accept ITS's bid and offer it, to use the applicant's nearest words, "no other." Consequently, if the applicant's contention that Government used the wrong criteria is taken to its logical end, Government would probably have to start redesigning the tender document to include cost consideration, reconvene to reconsider the technical evaluation committee's recommendation or, worse, accept a bid which, on clear commercial and business sense, is unacceptable. Yet, at least with local authorities, as section 17 of the Local Government Act 1988, UK, demonstrates, the trend is to require public authorities to consider, when awarding contracts, only the business or commercial sense. Such a review, apart from inviting a court to do what it usually does not do and could do imperfectly, has consequences of a polycentric nature and for these reasons the matter is non-justiciable. This leave should be set aside.

I have considered whether I should order that these proceedings continue as if began by writ. On circumspection, this is a decision which the applicant should take for the purpose of the leave procedure in judicial review is to enable a party, where judicial review is not the right process to commence proceedings appropriate to private law remedies. For now I reserve the decision on the interlocutory injunction.

Made in Chambers this 10th Day of June 2003.

D F Mwaungulu
JUDGE