

1985 July 3

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

COLAKIDES & ASSOCIATES AND OTHERS,

Applicants,

v.

1. THE REPUBLIC OF CYPRUS, THROUGH
THE PRESIDENT OF THE TENDER BOARD,
2. THE CYPRUS TOURISM ORGANIZATION,
3. THE CYPRUS DEVELOPMENT BANK LTD.,

Respondents..

(Case No. 429/85).

Recourse—Provisional order suspending effect of sub judice act or decision—Principles upon which such provisional orders may be granted—Flagrant illegality of sub judice decision—Irreparable damage to the applicant if order not granted—In determining the issue of flagrant illegality the Court must avoid going into the merits of the recourse. 5

On the 3rd February 1984 the respondents by a notice published in the Official Gazette invited applications from consulting firms qualified and experienced in undertaking comprehensive tourism development plans for prequalification tenderers for the Paphos Tourism Development Plan. All 4 applicants submitted a joint application for prequalification for the aforesaid project but their joint application was turned down by the respondents and only applicants 1 were prequalified for tendering for the project in question on condition that they must co-operate with one of the foreign firms, who had been also prequalified. Applicants 1 requested to be informed of the reasons why their joint application with applicant 4 was turned down but despite their efforts to be informed of such reasons they did not receive any reply. As a result appli- 10 15 20

cants filed the present recourse together with an application for a provisional order praying, inter alia, for the suspension of the operation of the act or decision, subject-matter of this recourse.

5 *Held*, dismissing the application for a provisional order
(1) For a Court to grant a provisional order an applicant
has to prove that the act or decision sought to be stayed
is tainted with flagrant illegality. One further element that
has to be examined is whether the applicant will suffer ir-
10 reparable damage if the order is not granted. In deciding
whether a flagrant illegality has been committed the Court
must avoid going into the merits of the recourse as by
doing so the case may be disposed of there and then on
its merits.

15 (2) In the present case the application for the provi-
sional order cannot be examined without entering deeply
into the merits of the recourse; further the applicants failed
to give any explanations why they will suffer irreparable
20 damage, if the order is not granted. For these reasons the
application has to be dismissed.

Application dismissed.
No order for costs.

Cases referred to:

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

25 **Application for a provisional order.**

Application by applicants for a provisional order sus-
pending the effect and/or operation of the act and/or deci-
sion of the respondents, subject-matter of the recourse
whereby applicants' application dated 30.3.1984 for their
30 joint prequalification as tenderers for the Paphos Tourism
Development Plan was treated and/or considered not as
jointly made and submitted by the applicants but as sepa-
rately made by applicants, 1 and 4, pending the final deter-
mination of the recourse or until further order.

35 *P. Mouaimis, for P. L. Cacoyiannis & Co.,*
for applicants.

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

Cur. adv. vult.

DEMETRIADES J. read the following decision. By this re-
course the applicants seek the following remedies:

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“1. A declaration that the act and/or decision of
the respondents, notified to the applicants by the res-
pondents 2’s letters to the applicants dated 19.12.1984
and 23.1.1985, received by the applicants on 28.1.
1985 to treat and/or consider the joint application of
applicants 1 and 4 dated 30.3.1984 for their joint pre-
qualification as tenderers for the Paphos Tourism De-
velopment Plan, jointly submitted by the applicants to
the respondents, following the latter’s invitation in
that regard, contained in Notification No. 286 pub-
lished in the Official Gazette of the Republic of Fe-
bruary 3, 1984, as distinct and separate for each one
of the said applicants is null and void and of no
effect whatsoever; and/or

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2. A declaration that the act and/or decision of the
respondents not to treat and/or consider and/or accept
the application of the applicants aforesaid as one
jointly made and submitted for the applicants’ joint
prequalification as tenderers for the Paphos Tourism
Development Plan is null and void and of no effect
whatsoever; and/or

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3. A declaration that the respondents’ omission to
attend to and decide on the applicants 1’s request
addressed to the respondents by a letter dated 14.2.
1985 for the communication to the applicants of the
reasons of the respondents’ decision not to accept
and/or to consider and/or treat the application of
the applicants dated 30.3.1984 as aforesaid as one
jointly made and submitted by both applicants ought
not to have been made and that whatever has been
omitted ought to be done; and/or

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4. A declaration that the respondents’ omission to
deal with the applicants 1’s said request dated 14.2.

1985 amounts to a refusal to treat and/or accept the applicants' application dated 30.3.1984 as one jointly made and submitted by both applicants and/or to a decision not so to treat the applicants' application and that
5 such decision is null and void and of no effect whatsoever; and/or

5. A declaration that the decision of the respondents not to prequalify the applicants 4 jointly with applicants 1 or at all as a tenderer for the Paphos Tourism Development Plan as notified by the respondents
10 to the applicants by the letters referred to in paragraph 1 hereof is null and void and of no effect whatsoever; and/or

6. A declaration that the respondents' omission to prequalify the applicants 4 as aforesaid ought not to have been made and that whatever has been omitted ought to be done;

7. The costs of this application."

The applicants base their application on the following
20 grounds of law:-

"1. (a) The respondents had no right to treat and/or consider the joint application of the applicants dated 30.3.1984 as if made and submitted to them for consideration by each of the applicants separately.

25 (b) The refusal of the respondents to treat and/or consider the applicants' application aforesaid as one jointly made and submitted by applicants 1 and 4 was unlawful and/or arbitrary and/or was in excess or abuse of powers and such refusal amounted to a decision
30 not to treat the applications aforesaid as jointly made and submitted.

(c) The decision of the respondents to treat and/or consider the joint application of the applicants as if made and submitted by the applicants separately was
35 not lawful, being taken in flagrant disregard and/or in contravention of Articles 21 and 26 of the Constitution.

2. (a) Non-consideration and/or non-acceptance by

the respondents of the application of the applicants, as one jointly made and submitted by both applicants, and/or the respondents' failure to consider jointly with applicants 1's or at all the application of applicants 4 was contrary to good and proper administration as well as discriminatory and hence contrary to the principle of equality safeguarded by Articles 6 and 28 of the Constitution. 5

(b) The decisions of the respondents were reached in an irregular manner and/or in a manner inconsistent with the principles of free competition. 10

(c) The decisions of the respondents complained of herein are contrary to the provisions of the Contract Law, Cap. 149.

(d) The decisions of the respondents were not duly reasoned or at all and/or were based on a defective reasoning. 15

3. (a) The respondents in refusing to accept and/or treat and/or consider the applicants' application as one jointly made and submitted to them by applicants 1 and 4, have acted under a misconception of law and/or facts and/or contrary to the administrative law principles. 20

(b) The respondents have acted under a misconception of law in thinking that they had a discretion in the matter. 25

4. The respondents in deciding not to and/or in refusing to accept and/or treat the applicants' application as one jointly made and submitted by applicants 1 and 4, have acted under circumstances which amount to an abuse or excess of power. Particulars of such abuse or excess of power are to be found inter alia in the other grounds of law herein stated and in the facts relied upon in this application. 30

5. (a) The respondents were required by Article 29.1 of the Constitution to attend to and decide on the applicants 1's request addressed to the respondents by letter dated 14.2.1985 expeditiously. 35

5 (b) The respondents were also required by Article 29.1 of the Constitution to notify to the applicants their decision with reference to the request or inquiry addressed to them as aforesaid immediately and in any event within a period not exceeding 30 days.

(c) The omission of the respondents to attend to and decide on the applicant's request dated 14.2.1985 persisted to the date of the filing of this Application and is likely to persist upto the date of hearing.

10 6. (a) The omission of the respondents to deal with the applicants' request and to reply to the applicants as aforesaid is unconstitutional.

15 (b) The delay of the respondents to attend to and decide on the applicants 1's request was so unjustifiably long that it rendered the relevant omission of the respondents both an omission contrary to the spirit of Article 29.1 as well as of Article 146.1.

20 (c) The omission and/or failure of the respondents to attend to and decide on the applicants' request amounts to a refusal to deal with the same and/or a decision not to deal with the same.

25 (d) The omission of the respondents and/or their decision not to deal with the applicants 1's request as aforesaid was not duly reasoned, the respondents never having given any reasons for their said omission and/or decision.

30 7. (a) The non-inclusion by the respondents of applicants 4 in the list of foreign firms prequalified for tendering for the Paphos Tourism Development Plan jointly with applicants 1 or at all was in excess or abuse of powers and/or was not duly reasoned and/or was arrived at on misconception of the law and the facts applicable and/or amounted to a discrimination against the applicants 4 and/or against the applicants 1 and 4 jointly and/or against the applicants 1 as against all other local and foreign applicants who were prequalified for tendering.

(b) The decision not to include applicants 4 among

the prequalified tenderers and/or the omission to include applicants 4 as above was arbitrary and/or illegal and in fact such decision or omission was completely unjustified.

(c) Therefore, the said decision and/or omission was contrary to the Constitution and/or to Article 28 thereof and/or was taken in excess and/or abuse of powers.”

This recourse was filed together with an application for a provisional order by which the applicants pray for:

“(1) a provisional order suspending the effect and/or operation of the act and/or decision of the respondents, subject-matter of recourse No. 429/1985, by virtue of which the applicants’ application dated 30.3. 1984 for their joint prequalification as tenderers for the Paphos Tourism Development Plan was treated and/or considered not as jointly made and submitted by both applicants but as separately made by applicants 1 and applicants 4, pending the final determination of the above recourse filed against the validity of such act and/or decision and/or until further order;

(2) such other order as the Court may deem fit to make or that justice may require to be made in the circumstances;

(3) costs.”

The application is based on rule 13 of the Supreme Constitutional Court Rules of Court and the facts relied upon in support of the application are set out in an affidavit sworn by applicant No. 3 Pavlos C. Pavlides.

The file of the recourse together with the application for the provisional order prayed for was brought to me by the Registrar of this Court on the 10th April, 1985, when I made an order that copies of the application and the affidavit filed in support be served on the respondents.

The application was fixed for directions on the 25th April, 1985. On that day the recourse against the Cyprus Development Bank Ltd. was withdrawn and dismissed,

but as respondents 1 and 2, though duly served with copies of the application, the affidavit and my order of the 10th April, 1985, did not appear, I made a provisional order in the terms of para (1) of the prayer to the application.
5 This order was made returnable for the 2nd May, 1985, when respondents 1 and 2 appeared through counsel and opposed it. The application was heard and the decision was reserved.

Applicant 3, who has sworn the affidavit filed in support
10 of the application, adopts in his said affidavit the facts stated and documents filed, in support of the recourse.

The facts on which the recourse is based are, in brief, the following:

Applicants 2 and 3 are an architect and civil engineer
15 respectively and are carrying on their profession in partnership under the firm name of "Colakides & Associates", who are the first applicants. The fourth applicants are a body corporate established in Greece, carrying on the profession of engineers, architects and consultants on tourism
20 development and planning.

On the 3rd February, 1984, the respondents published in the Official Gazette of the Republic, under Notification No. 286, a notice by which they invited applications from consulting firms qualified and experienced in undertaking
25 comprehensive tourism development plans for prequalification as tenderers for the Paphos Tourism Development Plans. On the 30th March, 1984, all applicants, being interested in participating in the said tenders, and after they obtained a printed leaflet issued by the Cyprus Tourism Or-
30 ganization containing instructions to interested firms, submitted a joint application for prequalification as tenderers for the project mentioned above.

On the 28th December, 1984, applicants 1 received a
35 letter from the Cyprus Tourism Organization, by which they were informed that the procedure for the prequalification for tendering for the project was completed and that applicants 1 were included amongst the Cypriot firms of consultants that had been prequalified for tendering for the project, but that their co-operation with one of the foreign

firms listed in the said letter, and who had been prequalified, was imperative.

As a result of the contents of this letter, correspondence was exchanged between applicants 1 and the respondents, but despite the request of applicants 1 to be informed of the reasons why their joint application with applicant 4 was turned down, no satisfactory reply was given to them. As a result, they filed the present recourse.

In his relevant affidavit applicant 3 alleges that the decisions and omissions of the respondents, the subject matter of this recourse, are flagrantly illegal and that the applicants will, unless the Court issues the provisional order suffer irreparable financial and other damage which cannot be easily estimated or adequately compensated for in terms of money. The affiant, however, gives no particulars of -

- (a) the flagrant illegality with which the decision of the applicants is tainted, and
- (b) why any damage which the applicants may suffer cannot be estimated or adequately compensated for in terms of money.

The first and second respondents opposed the application and in support they filed an affidavit sworn by Mrs. Phrini Michael who holds the post of First Tourist Officer at the Cyprus Tourist Organization.

In her said affidavit Mrs. Michael gives particulars of the decision of the Council of Ministers by which the procedure for the prequalification of firms from which tenders were to be asked for the project in question were approved, the mode by which invitations for tenders was to be made and what were the qualifications and experience required from each tenderer.

According to Mrs. Michael, the application of the applicants was examined as a joint one, that is of the co-operating firm of "Colakides & Associates" and "Frank E. Basil," but such application was rejected because it did not fulfil

the general criteria that were set by the Committee appointed by the Council of Ministers, in that they had no recent experience of studies of similar nature to those required by the Committee.

5 Mrs. Michael, in her said affidavit, alleges that if the order applied for is granted, it would be to the detriment of public interest.

For a Court to grant a provisional order, an applicant has to prove that the act or decision sought to be stayed is
10 tainted with flagrant illegality. One further element that has to be examined is whether the applicant will suffer irreparable damage if the order is not granted. (See, inter alia, the case of *Sofocleous v. The Republic*, (1971) 3 C.L.R. 345).

15 In deciding whether flagrant illegality was committed, the Court must avoid going into the merits of the recourse as by doing so the case may be disposed of there and then on its merits.

In the present recourse the issue to be decided is the
20 meaning and effect of the decision of the respondents, namely whether the joint application of the applicants was rejected or whether the respondents considered the application as two separate ones and rejected that of applicants 4.

Having this in mind, I find that I cannot decide the
25 application for the provisional order without entering deeply into the merits of the recourse and for this reason I am of the view that I cannot exercise my discretion in favour of the applicants and grant the order applied for.

I now come to the question of whether by not granting
30 the order applied for the applicants will suffer irreparable financial and other damage which cannot be easily estimated or adequately compensated for in terms of money.

Applicant 3, in his affidavit, gives no explanation why
35 they will suffer irreparable damage which can neither be estimated or adequately compensated for in terms of money and as I cannot come to the conclusions of this vague allegation that such damage may be suffered by the applicants, I am not prepared to accept this allegation and,

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therefore, the application must be dismissed on this issue too.

In the result, the application fails and is dismissed with no order as to its costs.

*Application dismissed
with no order as to costs.*

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