

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for orders in the nature of Writ of Certiorari made under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lanka Securities (Private) Limited
No. 228/1, Galle Road, Colombo 04.

Petitioner

Case No. CA (Writ) 326/2019

Vs.

1. Colombo Stock Exchange
2. Prof. Jeeva Niriella
Chairperson of the Dispute Resolution Committee
3. Ray Abeywardena
A member of the Dispute Resolution Committee
4. Anton Godfrey
A member of the Dispute Resolution Committee
5. Shanil Fernando
A member of the Dispute Resolution Committee
6. Renuke Wijayawardhane
Chairman of the Panel of Inquiry of the 2nd
Defendant – Colombo Stock Exchange
7. Renu Ranatunge (Ms.)
A member of the Panel of Inquiry of the 2nd
Defendant – Colombo Stock Exchange

8. Kanishka Munasinghe (Ms.)
A member of the Panel of Inquiry of the 2nd
Defendant – Colombo Stock Exchange

The addresses of all the Respondents – No.
04-01, West Tower, World Trade Centre,
Echelon Square, Colombo 01.

9. Biren Molamure
Representative of N. R. Molamure (Mrs.)
(Deceased) – No. 57, Gangaboda Road,
Piliyandala.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

W.R.J. Pieris for the Petitioner

Avindra Rodrigo P.C. with Kasuni Jayaweera for 1st to 8th Respondents

Nigel Bertholomeusz for the 9th Respondent

Supported On: 01.11.2019

Written Submissions Filed On:

Petitioner on 21.01.2020

1st to 8th Respondents on 21.01.2020

9th Respondent 21.01.2020

Decided On: 29.05.2020

Janak De Silva J.

The Petitioner is a private company with limited liability and a licensed stock broker of the Colombo Stock Exchange (CSE). As a licensed stock broker the Petitioner acts, mediates, assists and/or brokers for clients who maintain accounts with it in their selection, buying and/or selling shares of companies listed in the CSE.

The Petitioner is seeking writs of certiorari quashing:

- (a) the determination dated 4th June 2019 (date of ratification by the Board of Directors of CSE) of the Dispute Resolution of Committee of the CSE, the 1st Respondent (P6(a)),
- (b) the determination dated 1st October 2008 made by the Panel of Inquiry appointed by the Chief Executive of the 1st Respondent (P6(b)).

The above determinations were made after inquiry into a complaint made by Mrs. N.R. Molamure who had a share trading account with the Petitioner.

Additionally the Petitioner sought interim relief staying the enforcement of the said orders. In that context, the Respondents were granted an opportunity of filing limited objections to which the Petitioner tendered counter objections. When the matter was supported for notice and interim relief, the learned President's Counsel for the 1st to 9th Respondents raised the following preliminary objections:

- (a) The 1st Respondent along with other Respondents is private parties.
- (b) Dispute is purely contractual in nature.
- (c) No discretionary relief lies when an alternative and efficacious remedy is available.
- (d) Necessary parties are not before Court.

The learned counsel for the 9th Respondent while conceding that the 1st Respondent is performing a public duty in facilitating the trading of securities under the supervision of the Securities Commission of Sri Lanka (SEC), submitted that it is not performing a public duty nor is there a public nature of the function it performs by the enforcement of the Rules framed in terms of its Articles in the finding and decision of the Panel of Inquiry and/or the affirmation thereof by the Dispute Resolution Committee.

Respondents are Private Parties

The learned Presidents Counsel for the 1st to 8th Respondents submitted that the 1st Respondent is a company limited by guarantee and incorporated under the Companies Act of Sri Lanka and is a private entity. Hence it was submitted that any dispute between the 1st Respondent and the Petitioner as a member thereof is a private law issue and is not and cannot be the subject matter of any pronouncement or determination by this Court in the exercise of its writ jurisdiction.

The decision in *Trade Exchange (Ceylon) Ltd. v. Asian Hotels Corporation* [(1981) 1 Sri.L.R. 67] was cited in support where the Supreme Court held that a company incorporated under the Companies Ordinance was not amenable to prerogative writs even though almost all its shares were held by a government-owned statutory corporation as the company was a legal entity distinct from its members.

In terms of Article 140 of the Constitution this Court must act “according to law” in deciding whether to issue writs of Certiorari and Mandamus. This means English common law principles [*Sirisena Cooray v. Tissa Dias Bandaranayake* (1999) 1 Sri. L. R. 1 at 14-15]).

Although traditionally the English Courts looked at the source of power in deciding whether judicial review is available, the Court of Appeal in *R. v. Panel on Take-overs and Mergers Ex. p. Datafin plc* [(1987) Q.B. 815] accepted that the nature of the function as well as the source of the power could found the jurisdiction of the Courts to entertain a claim for judicial review. Thus bodies performing public duties or exercising powers that may well be characterized as

"public" may be subject to judicial review in respect of those powers and duties even though they are not statutory or prerogative.

Clive Lewis, *Judicial Remedies in Public Law*, 5th Ed., page 49 states:

"Two approaches to the definition of "public" can be discerned in the *Datafin* case. First, there is the extent to which the body operates under the authority of the government or was established by the government or, presumably, by some other recognized public authority. Secondly, there is the extent to which a particular function is performed against a background of statutory powers even though there is no specific statutory or prerogative authority for the power which is sought to review. Both these approaches involve some link between the government, or the legislature, and the body in question...The current approach of the courts is to consider whether the body is woven into the fabric of public regulation or governmental control of an activity or is integrated into a system of statutory regulation, but for its existence, a governmental body would have assumed control over the activity regulated by the body under challenge."

Even though the 1st Respondent is a company limited by guarantee and incorporated under the Companies Act of Sri Lanka, a closer examination of the Securities and Exchange Commission of Sri Lanka Act No. 36 of 1987 as amended (SEC Act) establishes that it operates under the authority of the government acting through the Securities and Exchange Commission of Sri Lanka (SEC) and is an integral part, in fact presently the only part, in the fabric of public regulation. There is governmental control of its activity and is integrated into a system of statutory regulation. The source of some of its powers and their scope, particularly over licensed stock brokers such as the Petitioner, is due to compulsion by law and not based on any contractual relationship. Let me elaborate.

The SEC is a statutory body established, in terms of the SEC Act, inter alia for the purpose of regulating the securities market in Sri Lanka and to grant licences to stock exchanges and managing stockbrokers and stock dealers.

In terms of sections 13 and 14 of the SEC Act, the SEC has the power as the regulator to inter alia grant a licence to a body corporate to operate as a stock exchange and ensure the proper conduct of its business, give general or specific directions to a licensed stock exchange from time to time, regulate the listing and issue of securities in a licensed stock exchange, direct a licensed stock exchange to reject any application made to it for listing, to inquire and conduct investigations into any activity of a licensed stock exchange and a licensed stock broker, implement the policies and programs of the Government with respect to the market in securities, carry out inspections of the activities of licensed stock exchanges and stock brokers in order to determine whether they are operating in conformity with the provisions of the SEC Act or any regulations or rules made thereunder. These provisions no doubt buttresses the argument made by the learned counsel for the Petitioner that Parts II & III of the SEC Act make the control of the 1st Respondent by the SEC comprehensive and penetrative into all affairs of the CSE.

Section 16 of the SEC Act prohibits the grant of a licence to any body corporate to operate as a stock exchange if it does not comply with the terms and conditions in Part I of the Schedule to the SEC Act. Accordingly, unlike any registered company, the 1st Respondent cannot permit the distribution of profits to its members in the Articles of Association. The membership of the 1st Respondent is limited to brokers and dealers only and it is engaged solely in the business of operating a stock exchange.

The Board of Directors of the 1st Respondent consists of nine members approved by the SEC out of which not less than four shall be appointed by the Minister. Even though there may be a lesser degree of involvement or connection between the government, or some other public body, and the body whose decision is under challenge, such degree of involvement is also relevant though it is not conclusive in determining whether the body is performing a "public" function. In fact, in *Datafin* (supra) the Court referred to the fact that the chairman and the deputy chairman of the panel consisting of fourteen members in total had been appointed by the Governor of the Bank of England as a relevant factor in deciding whether the panel was a

public body. In the case of the 1st Respondent, governmental involvement is there in the appointment of all the directors.

Furthermore, in terms of Part I of the Schedule to the SEC Act, the rules of the 1st Respondent must make satisfactory provision, inter alia, for the:

- (a) Admission of members,
- (b) Expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles in the transaction of business or for a contravention of or failure to comply with rules of the stock exchange or the provisions of the SEC Act,
- (c) Protection of investors in securities from misrepresentation, misleading information, fraud, deceit and other adverse practices in the issue and trading of securities and from the abuse of certain persons of privileged information not yet made available to the general public,
- (d) Investigating into trading in securities and financial transactions of stock brokers
- (e) Conduct of securities trading of stock brokers and stock dealers and the manner in which information relating to such transactions shall be maintained.

Therefore, it is seen that the legislature is dictating the scope and ambit of the rules of the 1st Respondent. There is much more in that section 25 of the SEC Act prohibits the amendment, variation or rescinding of any rules of the 1st Respondent without the prior approval of the SEC. In fact, the 1st Respondent can carry on the business of operating a stock exchange only because it fulfills the requirements in the SEC Act.

It must also be borne in mind that the 1st Respondent is the only licensed stock exchange in Sri Lanka by the SEC and hence enjoys a position of monopoly. Commentators such as Woolf [(1986) PL 220 at 224-225], Borrie [(1989) PL 552], Beloff [(1995) 58 MLR 143] and Forsyth [(1996) CLJ 122] make a persuasive case that control of monopoly power provides a coherent criterion by which to determine whether *de facto* powers should be subject to judicial review. Roch J. in *R. v. Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy* [(1993) 2

All E.R. 207 at 221] considered the existence of monopolistic power to be salient to the question of amenability to judicial review.

In these circumstances, I have no doubt that the 1st Respondent is performing public duties or exercising powers that can be characterized as "public" and as such is subject to judicial review. But that is not the end of the analysis as Court must ascertain the type of power that is impugned in these proceedings. Even where public bodies are concerned there may be certain powers that are derived solely through contract in which case there is no judicial review. For example, in cases involving decisions of public bodies in relation to the dismissal of their employees, if the power to dismiss can be seen to stem from the contract of employment rather than any statutory or prerogative source, then the issue can be viewed as simply a private law contractual matter not a public law matter [*R. v. East Berkshire Health Authority Ex. p. Walsh* (1985) Q.B. 152].

That may well be the reason for the learned Presidents Counsel for the 1st to 8th Respondents to contend that the determinations made by the Respondents which are sought to be quashed by the Petitioner are functions exercised by the Respondents in the exercise of their powers and duties under and in terms of the Articles of Association and therefore the Respondents were not exercising any public duty.

In support of this contention, the decision in *Law v. National Greyhound Racing Club Ltd.* [(1983) 3 All.E.R. 300] was cited where an application for judicial review was filed against a company limited by guarantee which acted as the judicial body for the discipline and conduct of greyhound racing in Great Britain to challenge a determination made by it to suspend a trainer's license who was found to have acted in breach of the rules of the company and the Court of Appeal held that judicial review was not available. The reason was that the steward's authority to suspend the Petitioner's license derived solely from a contract between him and the Respondent and there was no public element in their jurisdiction and as such their decision was not reviewable by judicial review.

Accordingly, it was submitted that the Respondent's authority to carry out an inquiry into the complaint made by Mrs. Molamure is solely derived from the contractual relationship existing between the Petitioner and the 1st Respondent and that the rules promulgated under the SEC Act are only in place for the orderly conduct of the business of the stock market and that it is a primary object of the 1st Respondent to promulgate, administer and enforce rules in furtherance of the business of the stock exchange.

Nonetheless, although judicial review is not available in the context of purely contractual powers, the authority of a contractual nature which various self-regulating organizations have over their members help these organizations to perform their public functions, and accordingly the failure of such an organization to perform a contractual obligation may be subjected to judicial review [*Harjani and Another v. Indian Overseas Bank and Others* (2005) 1 Sri.L.R. 167 at 173].

As was pointed out earlier, the SEC Act requires the rules of the 1st Respondent to make satisfactory provision for investigating into trading in securities and financial transactions of stock brokers and is an essential component of the system of statutory regulation and the jurisdiction that the 1st Respondent exercises over the Petitioner. Furthermore, in the instant matter it has a statutory underpinning as well. The 1st to 8th Respondents appear to concede this point in their written submissions (paragraph 48) where it is submitted that *even though the determination impugned in these proceedings were not made by the SEC, it is only through the SEC that the Respondents derived its authority to conduct an inquiry and make a determination in terms of the SEC Rules*. The basis of the complaint made by Mrs. N.R. Molamure against the Petitioner falls within this ambit.

In all these circumstances, the exercise of such power is amenable to judicial review. I overrule the first preliminary objection.

Dispute Purely Contractual

The learned President's Counsel for the 1st Respondent further submitted that the dispute at hand is purely contractual in nature and therefore no writ lies. In support of this proposition the decisions in *Jayaweera v. Wijeratne* [(1985) 2 Sri.L.R. 413] and *Mendis v. Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others* [(1995) 2 Sri.L.R. 284] were cited. It was submitted that upon becoming a member of the 1st Respondent, the Petitioner entered into a contractual relationship with the 1st Respondent and agreed to be bound by the provisions of the Articles of Association.

As pointed out above, the powers that the 1st Respondent exercised over the Petitioner as one of its members is rooted in the SEC Act requirements that the rules of a licensed stock exchange must provide for specific situations such as investigating into trading in securities and financial transactions of stock brokers. Therefore, the dispute between the Petitioner and the 1st Respondent is not purely contractual. It has a statutory underpinning.

Alternative Remedy

The learned President's Counsel for the 1st to 8th Respondents submitted that in terms of Article 64A of the Articles of Association of the 1st Respondent, there is an alternative dispute resolution mechanism. However, in my view that applies where the dispute is about their interpretation which is not the case in this matter.

In any event, it is not only a dispute between the Petitioner and the 1st Respondent, but involves Mrs. N.R. Molamure as well.

It was further submitted that Article 64 of the Articles of Association provides for arbitration and hence the jurisdiction of this Court is ousted in view of section 5 of the Arbitration Act No. 11 of 1995. However, the jurisdiction this Court exercises is in terms of Article 140 of the Constitution which cannot be ousted by an ordinary law [*Atapattu and Others v. People's Bank and Others* (1997) 1 Sri.L.R. 208]. I overrule the second preliminary objection.

Necessary Parties

The learned President's Counsel for the 1st to 8th Respondents submitted that the SEC is a necessary party and as such should have been added as a Respondent. In the absence of which, it was submitted that the application must be dismissed for want of necessary parties. Reliance was placed upon the decision in *Rawaya Publishers and Others v. Wijedasa Rajapakse and Others* [(2001) 3 Sri.L.R. 213] and *Central Cultural Fund v. Lanka General Services Union and three others* [(2008) BLR Vol. XIV Part II page 269].

It was submitted that even though the determination impugned in these proceedings were not made by the SEC, it is only through the SEC that the Respondents derived its authority to conduct an inquiry and make a determination in terms of the SEC Rules and as such the SEC is a necessary party. Further it was contended that since the Petitioner contends that the 1st Respondent acted in contravention of the Stockbroker Rules promulgated under the SEC Act the SEC must be made a party at least for the purpose of assisting Court.

The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine. [*Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258 at 267]. The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application [*Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* (supra)].

In my view the SEC does not come within either of the two situations. I overrule the third preliminary objection.

Let me now consider the issue of notice and interim relief.

Upon a careful consideration of the pleadings and documents tendered therewith, I am satisfied that the Petitioner has made out a prima facie case for notice. In particular, I am concerned about the allegations that the complaint does not comply with section 10.1 of the CSE Rules, evidence that Mrs. Molamure was aware of the transactions that were done on her behalf, fact that the complaint was time barred and that a report from the Examiner of Questioned documents was not called for even though such an assurance was given.

Accordingly, I hold that the Petitioner has made out a prima facie case for notice.

Applying the balance of convenience and equitable considerations test, I hold that in the event the interim order sought by the Petitioner is not granted, it will suffer irreparable and irremediable damage more so since Mrs. Molamure was dead when the determinations were made and it is uncertain as to who are her legal successors. The Petitioner will also suffer irreparable damage if interim relief is not granted.

For all the foregoing reasons, I issue notice and a stay order on all the Respondents as follows:

"staying recovery of or enforcement of (1) determination dated June 4, 2019 (date of ratification by the Board of Directors of CSE) of Dispute Resolution Committee RC and (II) the determination dated October 1, 2018 made by the Panel of Inquiry appointed by the Chief Executive of the 1st Respondent (CSE), which are marked as P-6(a) and P-6(b), until the final determination of this application."

Judge of the Court of Appeal

N. Bandula Karunaratne J.

I agree.

Judge of the Court of Appeal