

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

In the matter of an application for the  
grant of writs of certiorari  
and mandamus under and in terms of  
Article 140 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

Anods Cocoa (Pvt) Ltd.,  
No 66, Gampalagedera,  
Pugoda.

**PETITIONER**

**CA (writ) Application No.  
CA/WRIT/459/2022**

**Vs.**

1. T. T. Upulmalee Premathilalke,  
Controller General of Import and  
Export,  
Import and Export Control Department,  
No.25-1/3, 1<sup>st</sup> Floor,  
Hemas Building,  
York Street,  
Colombo 1.
2. P.B.S.C. Nonis,  
Director General of Customs,  
Sri Lanka Customs,  
No.10,  
Main Street,  
Colombo 11.
3. (Dr.) Ramesh Pathirane,  
Minister of Industries.

4. J.M. Thilaka Jayasundara,  
Secretary.

Both of  
Ministry of Industries,  
No.73/1,  
Galle Road,  
Colombo 3.

5. Hon. Attorney General  
Attorney Generals Department, Colombo  
12.

**RESPONDENTS**

**Before:** **Bandula Karunaratha J (P/CA)**  
**&**  
**B. Sasi Mahendran, J.**

**Counsel:** Upul Jayasuriya, PC with I. Kanagaratnam AAL, Nisala Seniya Fernando  
AAL for the petitioner.

Milinda Gunatilleke, ASG, PC with Mihiri de Alwis, SC for the  
respondents.

**written Submissions:** By the petitioner – 29.02.2024.  
By the respondent – 19.03.2024.

**Argued on:** 26.01.2024.

**Decided on:** **04.04.2024.**

**N. Bandula Karunarathna J. P/CA**

The petitioner has filed this application seeking writs of certiorari to quash the alleged decisions made by the 1<sup>st</sup> respondent to refuse to issue a letter of authorization in relation to the goods imported under the bill of lading marked P11, in order to enable the clearance of the consignments in question on open account terms, and the decisions made to the effect that the petitioner has violated the provisions of the Import and Export (Control) Act.

The petitioner has also sought writs of mandamus directing the 2<sup>nd</sup> respondent to permit the petitioner to cancel the bank guarantee marked P18. After filing this application, the respondents filed their limited statement of objections by which they resisted the interim relief sought by the petitioner.

Thereafter, the matter was supported by the petitioner on 31<sup>st</sup> May 2023 and the order was delivered by this Court on 27<sup>th</sup> June 2023 granting interim relief sought under prayer (q) of the amended petition dated 16.12.2022. Accordingly, an interim order was issued by this Court against the 2<sup>nd</sup> respondent directing them not to encash the guarantee bearing number LG/G22/6195. (P 18)

The interim relief prayed for by prayers (p), (r) and (s) were not granted.

The matter was then fixed for argument for 26<sup>th</sup> January 2024 and both parties made oral submissions on the said date.

The petitioner is an importer who admittedly has to comply with the regulations made under the Imports and Exports (Control) Act No. 1 of 1969. The regulations in question are the Import Control Regulations on Payment Terms No. 7 of 2022 dated 24.06.2022. (P1). The said regulations are made under S.20 read with S.4(1) and S. 14 of the Import Control Act. S.20 vests the Minister with the power to make regulations. S. 4(1) provides that no person shall import or export goods except under a license, subject to S. 4(2) and 4(3).

S. 4(2) states that goods imported to Sri Lanka without a license under any other written law shall be deemed not to be a contravention of subsection (1). The petitioner does not rely on this section as no other written law is applicable to this case.

Section 4(3) states that regulations may be made providing to exemptions under section 4(1). The said section 4 of the Import and Export (control) Act No. 1 of 1969 is reproduced below;

"Section 4 (1): Subject to the provisions of sub-section (and of any regulations made under subsection (3) no person shall import into, or export from, Ceylon any goods except under the

authority, or otherwise than in accordance with the conditions, of a license Issued in that behalf under this Act by the Controller.

- (2) The importation into, or the exportation from Ceylon after the date of commencement of this Act by any person of any goods without a license issue in that behalf under this Act shall be deemed not to be a contravention of the provisions of subsection if such importation or exportation was authorized by a license issued under any written law for the time being in force.
- (3) Regulations may be made exempting a specified class or classes of persons or goods from the provisions of sub section (1)”

The regulations made in terms of section 4 (3) of the Act, and relied on by the petitioner are annexed to the petition marked P7. The petitioner claims to have imported goods coming under clause 4 (c) of P7. In terms of section 4(1) read with section 4(3) unless the importation complies with clause 4(c) of P7 the importation is prohibited. Accordingly, neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondent has been vested with any discretion under clause 4 (c). If the importation is not in conformity with clause 4(c) it must be treated as a violation.

Paragraph 4(c) of the regulation marked P7 reads as follows;

'Local Manufacturers, who import goods as raw material which are not available locally but required for manufacturing of their products with minimum local value addition of 30% or more, subject or more to a letter of authorization issued by the Controller General of Imports and Exports based on the recommendation of the Secretary, Ministry of Industries, prior to arrival of such goods to any ports or airports of Sri Lanka.'

Paragraph 4 (c) requires that the importation on open account terms is permitted only subject to a letter of authorization issued by the Controller Imports and Exports prior to the arrival of the goods at the seaport or airport.

In order to issue a letter of authorization the Controller of Imports and Exports requires a recommendation from the Secretary to the Ministry of Industries. The learned Counsel for the respondent argued that the petitioner did not obtain the required letter of authorization prior to the arrival of the goods.

This is admitted in paragraph 25 of the petition as follows:

' The petitioner states that after a considerable delay at the said Ministry of Industries, by factors beyond the control of the petitioner, a letter of recommendation was issued by the said ministry on 19<sup>th</sup> October 2022 prior to the arrival of the ships but it was

impossible for the petitioner to forward the said recommendation to the 1<sup>st</sup> respondent, before 20<sup>th</sup> October 2022, the date the vessel bearing the consignment arriving in Sri Lanka, notwithstanding every possible endeavor by the petitioner to do so; a fact made known to the 1<sup>st</sup> respondent.'

Accordingly, the respondents argued that the goods had been imported in violation of the regulations made under S.4(1) of Import and Export Control Act. Therefore, the goods fall within schedule B of the Customs Ordinance. Clause 7 of the regulations (P 7) provide that the Director General of Customs shall act in accordance with the provisions of the Customs Ordinance on any importation made in violation of the above regulations.

Clause 7 also provides for the Director General Custom to consult the Controller in the event of a violation of clause 4(c). The petitioner seeks to quash the decision of the 1<sup>st</sup> respondent not to issue the letter of authorization. The 1<sup>st</sup> respondent (The Controller General of Imports and Exports) was precluded by the terms of the regulation 4(c) from issuing a letter of authorization after the goods were imported. The recommendation by the Secretary Ministry of Industries was submitted by the petitioner to the 1<sup>st</sup> respondent only after the goods arrived in Sri Lanka. Therefore, that 1<sup>st</sup> respondent had no discretion to issue a letter of authorization.

If the 1<sup>st</sup> respondent had done so, the 1<sup>st</sup> respondent would be acting contrary to regulation 4(c), since the regulations do not give the 1<sup>st</sup> respondent any power to issue a letter of authorization after the vessel arrives in a port of Sri Lanka.

Thereafter, as set out in paragraph 34 and 35 of the petition the Director General Customs initiated on an inquiry in relation to the importation of the consignment. The said inquiry was conducted and a mitigated forfeiture under S. 12, 43 and 163 was imposed on the petitioner. The petitioner was thereafter permitted to clear the goods subject to a bank guarantee pending the decision of the Minister of Finance under sections 163 and 164 of the Customs Ordinance.

In terms of section 163 and section 164, the petitioner has an alternative statutory remedy. That is, an appeal to the Minister. This has not been exhausted. The learned President's Counsel for the respondents argued that these facts have been suppressed from this Court.

The petitioner has instead provided an evasive response. In paragraphs 15 and 16 of the affidavit of the 2<sup>nd</sup> respondent it is stated in substance as follows:

- a) The goods have been cleared by the petitioner on 02.12.2023.

- b) The goods imported on open account basis without complying with the regulations of the Import Export Control Act shall be dealt with, under and in terms of the provisions of the Customs Ordinance.
- c) The customs inquiry in terms of S.8(1) of the Customs Ordinance commenced on 25.11.2023 and a mitigated forfeiture of Rs. 118,002,638 was imposed in terms of S. 12, 43 and 163 of the Customs Ordinance on 01.12.2022.
- d) The goods were cleared by the consignee on 02.12.2022 on a bank guarantee marked and annexed as P18 to the petition and bank guarantee has not been demanded and is secured at the Customs Department.
- e) S.21 of the Import and Export Control Act reflect the fact that that the goods, the importation of which is prohibited or restricted by this Act, shall be deemed to be the goods the importation of which is prohibited or restricted by the Customs Ordinance.
- f) The 2<sup>nd</sup> respondent has a legitimate power as provided for by the aforesaid legal provision to initiate an inquiry against the goods which were contrary to the Import and Export Control Act No.01 of 1969 and accordingly steps had been taken to conduct an inquiry, the outcome of which is annexed as 2R6 referred to above.

In response, on paragraph 33 of the counter affidavit the petitioner states as follows;

'Answering the averments contained in paragraphs 15 and 16 of the said affidavit of the 2<sup>nd</sup> respondent, I deny the averments contrary to and/or inconsistent with the averments in the amended petition and reiterate the averments contained in paragraphs 34 and 35 of the amended petition. '

'I further state that no goods were imported which were prohibited by the Imports and Export Control Act and state that no customs inquiry commenced on 25.11.2022 but the representative of the petitioner explained the facts to the 2<sup>nd</sup> respondent.'

Paragraph 21 of the affidavit of the 2<sup>nd</sup> respondent states as follows;

'I deny the averments contained in paragraph 50 of the petition and re-iterate that a mitigated forfeiture of Rs.118,002,638 was imposed in terms of S. 12, 43 and S. 163 of the Customs Ordinance, subsequent to an inquiry and the petitioner on its own volition submitted a bank guarantee for a sum equivalent to Rs.118, 002, 638 against the mitigated forfeiture to have the goods released

and the said order that has been made is a final order which has not been challenged by the petitioner.'

The response of the petitioner is at paragraph 37 of the counter affidavit as follows:

'Answering the averments contained in paragraphs 21 and 22 of the said affidavit of the 2<sup>nd</sup> respondent, I deny the averments contrary to and/or inconsistent with the averments in the amended petition. I further state that petitioner was compelled and strong armed to submit a bank guarantee in order to obtain the release of perishable goods, which has caused immense cash flow problems and an exorbitantly heavy monetary burden to the petitioner, adversely affecting the finances of the petitioner.'

Thus, the petitioner does not expressly deny the document 2R6 or that the bank guarantee was given after an inquiry in order to clear the goods pending the decision of Minister under S. 164 and S. 165 of the Customs Ordinance. The respondent therefore argued that the decision at 2R2 in relation to the mitigated forfeiture of Rs.114 million imposed by the 2<sup>nd</sup> respondent has been suppressed. The petitioner has also not sought to quash the decision at 2R2.

It is important to note that the sequence of events to determine whether there was a delay on the part of the petitioner in applying for a recommendation.

1. The impugned consignment of milk powder has been shipped to Sri Lanka from New Zealand on 20<sup>th</sup> September 2022 on 'open account terms'.
2. Ministry of Industries was in receipt of the letters dated 7<sup>th</sup> October 2022 (P 12) and 14 October 2022 (P13) sent by the petitioner seeking a recommendation in terms of Regulation 4(c) of P 7.

As all the information required was not submitted by the Petitioner, said Ministry of Industries sought additional information from the petitioner including details about their offshore bank accounts. However, the petitioner had submitted the requested information only on the 18<sup>th</sup> of October 2022 which is two days before the arrival of the consignment of milk powder at the port. The respondents stress the fact that there was no delay on their part and the information that was received by them was submitted to the relevant committee to make a decision on 19<sup>th</sup> October 2022. The information so received had been carefully analyzed by the said committee and a decision had been made to recommend only one invoice for importation of full cream milk powder under open account terms on 19<sup>th</sup> October 2022.

The recommendation granted by the committee had been submitted to the 1<sup>st</sup> respondent by the petitioner only on 3<sup>rd</sup> November 2022 which is more than 2 weeks from the date of arrival

of the impugned consignment at the port of Colombo which was in clear violation of the regulation 4 (c) stipulated in the Gazette Notification No: 2285/19 dated 24<sup>th</sup> June 2022.

Answering the aforesaid paragraphs 12(e) and 13 of the objections, the petitioner takes up the position that the recommendation of 19<sup>th</sup> October 2022 (P14) was delayed by the respondents as it was "interdepartmental correspondence". The respondents say that this is false as it is directly contrary to paragraph 25 of the petition where the petitioner states that;

"it was impossible for the petitioner to forward to the recommendation of the 1<sup>st</sup> respondent before 20<sup>th</sup> October 2022 which is the date the vessel bearing the consignment arrived in Sri Lanka."

The relevant provision of the regulation 4 (c) is re-produced, below;

'Regulation No. 3 (1) (b) of the Special Import License and Payment Regulations No. 1 of 2011 Published in the Gazette Extraordinary No.1739/3 dated 2nd January 2012 shall be amended that the open account payment terms or Consignment Account Terms shall only be allowed to,

- (a) Local manufacturers, who import goods as raw materials which are not available locally but required for manufacturing of their products with minimum local value addition of 30% or more, subject to a letter of authorization issued by the Controller General of Imports and Exports based on the recommendation of the Secretary, Ministry of Industries prior to arrival of such goods to any ports/airports of Sri Lanka.'

The 1<sup>st</sup> respondent submitted the request of the petitioner to the 2<sup>nd</sup> respondent along with her letter dated 15<sup>th</sup> November 2022, since it is the 2<sup>nd</sup> respondent who is vested with the authority to make decisions in instances where importations are made in violation of the relevant regulations. Any decision with regard to deviation of payment terms has to be made by the 2<sup>nd</sup> respondent as clearly stated in the aforesaid Gazette P 7.

The relevant regulation is as follows:

'The Director General of Customs shall act in accordance with the provisions of the Customs Ordinance on any importation made in violation of the above regulations. However, the Director General, Sri Lanka Customs shall consult the Controller General, Department of Imports and Exports Control on any importation made in violation of the regulation No.4(c) of the Gazette Extraordinary No: 2278/21 dated 06,2022 as amended above.'



The letter dated 15<sup>th</sup> November 2022 of the 1<sup>st</sup> respondent was not a letter of authorization issued by the 1<sup>st</sup> respondent. The said letter was sent to the 2<sup>nd</sup> respondent as there was a clear violation of payment terms and the 2<sup>nd</sup> respondent was empowered to make decisions in such instances in terms of the provisions of the applicable gazettes.

Thereafter, the 2<sup>nd</sup> respondent consulted the 1<sup>st</sup> respondent by the letter dated 23<sup>rd</sup> November 2022 in compliance with the provisions set out in regulation No.7 of Imports Control Regulations on Payment Terms No. 10 of 2022 of the Extraordinary Gazette No. 2285/19 dated 24<sup>th</sup> June 2022 as the provisions only stipulate that the Director General of Customs should consult the Controller General, Department of Imports and Exports Control on any importation made in violation of Regulation No. 4(c) of the Gazette Extraordinary No. 2278/21 dated 06<sup>th</sup> May 2022 as amended.

By the letter dated 15<sup>th</sup> November 2023 no favorable treatment for the petitioner had been recommended by the 1<sup>st</sup> respondent and it was a mere reference to the 2<sup>nd</sup> respondent to make a decision in that regard.

The 2<sup>nd</sup> respondent is required to act in terms of the provisions of the Customs Ordinance on any importation done in violation of regulation 4(c) of the Gazette Extraordinary No.2285/19 dated 24<sup>th</sup> June 2022. Consequently, the 2<sup>nd</sup> respondent has imposed a mitigated forfeiture of the petitioner. Thereafter, the petitioner has tendered a bank guarantee and cleared the consignment without settling the penalty that was imposed. The sequence of events that took place is summarized briefly as follows;

P4 Pro forma invoice P6 (also 2R1)	14.02.2024
Gazette — Imports on open account basis not allowed	06.05.2022
P9 — Contract 04.06.2022 P7 (also 2R2)	
Regulation 4 (c) Import possible subject approval 24.06.2022 obtained before goods arrived in Sri Lanka	
P10 — the date on which the goods were shipped (7 days after the goods were shipped).	20.09.2022
P12 Application to Ministry of Industries	07.10.2022

P 14 Recommendation by Ministry Industries	19.10.2022
Goods arrive in Sri Lanka	20.10.2022
P15 (also 2R3)	
1 <sup>st</sup> respondent, Import Controller's letter	15.11.2022
P16 (also 2R5)	15.11.2022
2R4-2R consulted IR with regard to the impugned consignment.23.11.2022	
2R6 — Mitigated forfeiture	01.12.2002

The petitioner's case is that the principle '*lex cogit ad impossibilia*' applies and that the petitioner was prevented by circumstances beyond the petitioner's control from submitting the recommendation of the Ministry of Industries to the 1<sup>st</sup> respondent before the goods arrived in Sri Lanka on the 20<sup>th</sup> of October 2022. It is noted in terms of the above timeline as at the 4<sup>th</sup> of June 2022, the petitioner by P9 had contracted to import the goods on open account basis. The regulation 4(c) of P7 which the petitioner relies on was issued on 24<sup>th</sup> June 2022. At least from this date the petitioner knew that the letter of authorization was required before the goods arrived in Sri Lanka and that the letter of authorization from the 1<sup>st</sup> respondent could not be issued after the goods had arrived in the ports of Sri Lanka. Since the contract was entered into on the 24<sup>th</sup> of June 2022, by P9, any reasonable importer would have submitted the application for a recommendation soon after the gazette P 7 was published on the 24<sup>th</sup> of June 2022.

However, the goods were shipped by PIO on 20<sup>th</sup> of September 2022, and the petitioner submitted an application to the Ministry of Industries 17 days after the goods were shipped. This application marked P 12 is dated 7<sup>th</sup> of October 2022 i.e. 14 days before the goods were deemed to arrive in Sri Lanka.

Accordingly, it is clear from the above that it was the petitioner's unexplained delay and not any fact beyond the control of the petitioner that resulted in this and the petitioner not obtaining the required authorization before the goods arrived in Sri Lanka.

The principle '*lex cogit ad impossibilia*' has been explained in the following manner in Hughey V JMS Development Justice Owens. (78 F.3d 1523):

'The law does not compel the doing of impossibilities. It thus means a body of law does not compel or forces someone to do the thing which is impossible. Law requires nothing impossible.'

Accordingly, the principle '*lex cogit ad impossibilia*' does not have any application in relation to this case.

The respondents draw this Court's attention to the fact that the petitioner has not sought to have the order by which the mitigated forfeiture had been imposed (2R6) quashed. The respondents also highlight the fact that the petitioner had failed to submit the said document to this Court.

Furthermore, the respondents also stress the fact that the documents in respect of which reliefs (d), (e), (f) and (g) of the prayer are sought have not been annexed to the petition or identified by a marking and as such the petitioners are not entitled to the relief sought.

This Court's attention is drawn to the following case law which supports the above position;

In Weerasooriya V. The Chairman, National Housing Development Authority and Others (C.A. Application No.866/98, C.A.M. 08.03.2044) Sripavan J (as he was then) cited Binithi Huzaima Nizar and 31 others V Minister of Lands and Others (CA/writ/141/2022) decided on 20.05.2020 and held that the Court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition.

The respondents further state that the petitioner had failed to amend the petition referring to the aforesaid document marked 2R6 or file a fresh application to challenge it. The said conduct of the petitioner is tantamount to acquiescence of the mitigated forfeiture.

The petitioner has sought to have the following decisions made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents quashed by way of writs of certiorari:

1. The 1<sup>st</sup> respondent's letter that the petitioner is not entitled to a letter of authorization.
2. The decision of the 1<sup>st</sup> respondent to refuse to issue a letter of authorization.

Decisions, letters, communications issued by the 1<sup>st</sup> respondent to the Department of Customs, indicating and/or stating that the petitioner has violated any provisions of the Imports and Exports (Control) Act.

However, the decisions the petitioner has referred to, are not before this Court and as such the petitioner is not entitled to the relief sought as the petitioner is unable to produce the impugned decisions to this Court.

The respondents also rely on the following case law in strengthening their position to state that the petitioner is not entitled to writs of certiorari.

The respondents rely on the decision in Council of Civil Service Unions V Minister of Civil Service [1984] UKHL 9, or the GCHQ where it was held thus.

'Judicial Review has, I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which the administrative action is subject to control by judicial review. The first I would call 'illegality', the second irrationality and the third 'procedural impropriety.'

These respondents stress the fact that the manner in which they had conducted themselves with regard to the impugned consignments do not fall under any of the limbs referred to above and therefore the petitioner is not entitled to the discretionary remedy of writ of certiorari.

In Jayaweera Vs. Assistant Commissioner of Agrarian Services Ratnapura and Another, [(1996) 2 SLR 701], the Court of Appeal held as follows:

"A petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief. "

The respondents state that the importation of whole milk powder on open account basis was allowed by the Gazette Notification issued on 24<sup>th</sup> June 2022. However, the petitioner had made the application to the Ministry of Industries only on 7<sup>th</sup> October 2022 seeking clearance for the consignment of whole milk powder of 153.375 MTS.

Furthermore, the additional information requested by 4R had only been submitted on the 19<sup>th</sup> of October 2022 which is a day prior to the arrival of the shipment at the port.

The respondents stress the fact that the petitioner has sought approval from the 1<sup>st</sup> respondent with regard to the shipment only on 3<sup>rd</sup> November 2022 which is after the lapse of two weeks from the date of arrival of the consignment at the port.

As such, it is evident that the petitioner had failed to act promptly and that it had faced repercussions of its own delay.

In the case of Mendis Vs. Land Reform Commission and Others, [S.C. Appeal No. 90/2009, SC Minutes dated 12.02.2016], Gooneratne J held thus:

"Even if such grounds to issue a writ of certiorari and mandamus could be established, court has also to consider whether the petitioners are disentitled to the relief prayed for even if the grounds of issuing a writ are satisfied, due to the discretionary nature of the remedy."

This Court's attention is also drawn to what has been held in the case of Jayawardena vs. People's Bank 2002 3SLR 17:

"Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty."

It is submitted on behalf of the respondents that there is no public duty on the part of these respondents to allow the petitioner to import whole milk powder in violation of the payment terms available in the relevant gazette notifications.

Moreover, the petitioner has failed to establish a legal right in order to be entitled to the relief that had been sought and the petitioner has failed to take immediate steps in adherence to the provisions of the relevant gazettes disentitling him from obtaining discretionary remedy.

In Credit Information Bureau of Sri Lanka vs M/S Jafferjee and Jafferjee (Pvt) Limited 2005 1SLR Pg.89 it was reiterated that,

"the foundation of mandamus is the existence of a legal right. A court should not grant a writ of mandamus to enforce a right which is not legal and not based upon a public duty."

The petitioner has filed the amended petition dated 16.12.2022 seeking *inter alia* the following reliefs.

- a) Issue notice on the respondents.
- b) Call for the entire record pertaining to the subject matter of this case from 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

- c) Direct the aforesaid respondents to tender to this Court all letters and/or communications made by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent pertaining to the consignments of the perishable goods imported by the petitioner under the bill of lading marked PI 1.
- d) Declare and pronounce that the refusal by IR to issue a valid letter of authorization under and in terms of regulation 4(c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No.2285/19 dated 24<sup>th</sup> June 2022 to enable the clearance of a consignment of approximately 153 metric tons of perishable full cream milk powder imported by the petitioner on open account terms, is arbitrary, malicious, capricious, unreasonable, irrational, ultra vires, unlawful and/or pernicious.
- e) Quash, by way of a mandate in the nature of a writ of certiorari, the decision made by the 1<sup>st</sup> respondent that the petitioner is not entitled to a letter of authorization under and in terms of regulation 4 (c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No. 2285/19 dated 24<sup>th</sup> June 2022 to clear on open account terms, the consignments of the perishable goods imported by the petitioner under the bill of lading marked P11.
- f) Quash, by way of a mandate in the nature of a writ of certiorari, the decision made by the 1<sup>st</sup> respondent to refuse to issue a letter of authorization to enable the clearance on open account terms, the consignments of the perishable goods imported by the petitioner under the bill of lading marked P11.
- g) Quash by way of a mandate in the nature of a writ of certiorari the decision of the 1<sup>st</sup> respondent to refuse to issue a letter of authorization to enable the clearance on open account terms, the consignments of the perishable goods imported by the petitioner under the bill of lading marked P11.
- h) Call for and quash, by way of mandates in the nature of a writ of certiorari, any and all decisions, letters/communications issued by the 1 respondent to the Department of Customs, indicating and/or stating that the petitioner has violated any provisions of the Imports and Exports (Control) Act No.01 of 1969 (as amended) and/or the Customs Ordinance No. 17 of 1869 (as amended) pertaining to the consignments of the perishable goods imported by the petitioner under the bill of lading marked PI 1.

- i) Grant and issue a mandate in the nature of a writ of mandamus directing the 1<sup>st</sup> respondent, and/or the successors in office, and/or servants and agents to issue a letter of authorization under and in terms of Regulation 4 (c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No.2285/19 dated 24<sup>th</sup> June 2022 to enable clearance of the consignments of the perishable goods imported by the petitioner under the bill of lading marked P11, on open account terms.
- j) Quash by way of a mandate in the nature of a writ of certiorari, the decision by the 2<sup>nd</sup> respondent to commence a customs inquiry in respect of the consignment of goods imported by the petitioner under the bill of lading P11.
- k) Quash by way of a mandate in the nature of a writ of certiorari the decision of the 2<sup>nd</sup> respondent and/or servants and agents to call for a bank guarantee to release the goods. The petitioner suppressed from Court the fact that a mitigated forfeiture of RS. 114 million was imposed on the petitioner at the conclusion of the customs inquiry. the fact that petitioner has cleared the goods based on a bank guarantee in lieu making payment on the mitigated forfeiture as required by law.

The petitioner is now estopped from seeking to quash the decision to call for the bank guarantee having cleared the goods based on such bank guarantee.

- l) Grant and issue a mandate in the nature of a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents to permit forthwith, the clearance of the consignment of goods imported by the petitioner under the bill of lading marked P 11 on open account terms, without imposition of any penalty and/or punishment.
- m) Grant and issue a mandate in the nature of a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents to permit forthwith, the clearance of the consignment of goods imported by the petitioner under the bill of lading marked P 11 on open account terms without imposition of any penalty and/or punishment.
- n) Grant and issue a mandate in the nature of a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents to permit the petitioner to cancel the guarantee bearing No: LG/G22/6195 marked P 18.

- o) Grant and issue a mandate in the nature of a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents not to demand on and/or call upon the guarantee bearing number LG/G22/6195 marked P18.
- p) Grant and issue a mandate in the nature of a writ of prohibition preventing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents from, taking any steps to encash the guarantee bearing number LG/G22/6195 marked P 18.

In addition to the submissions set out extensively above, in view of Weerasooriya Vs. Chairman NHDA and Others cited above, no relief can be granted in terms of prayers (d) to (h) as no document containing such a decision is annexed to the petition.

The writs of mandamus cannot be granted as there is no statutory duty to act in violation of regulation 4 (c) of P7 referred to above.

No writs of certiorari can be granted as the respondents have not acted in violation of the regulation 4 (c) of P7.

In addition, due to suppression and misrepresentation of material facts as referred to above, the discretionary remedies available under and in term so of the writ jurisdiction should be refused

Objections raised by the petitioner stating that the statement of objections of the respondents were filed out of time.

The statements of objections of the respondents were filed on the 23<sup>rd</sup> November 2023 along with a motion. The matter came up for argument on the 24<sup>th</sup> of November 2023 before this Court. On the said date the petitioner objected to the filing of the objections and made an application to have the same rejected.

The petitioner relies on rule 3. Rule 3 does not prescribe any penalty for the failure to file objections by the stipulated date. As such, it is submitted that this Court has the discretion to accept the objections particularly to assist in serving the ends of justice.

However, the bench was not properly constituted on the said date and a date was granted to the petitioner for its counter affidavits. The mere fact that a date was granted for the petitioner to file counter affidavits implies the fact that the said statement of objections of the respondents had been accepted by this Court.



In any event the respondents filed their limited statement of objections on 22<sup>nd</sup> February 2023 by which strong objections were raised in respect of the application of the petitioner which was accepted and filed of record and as such the objections raised by the respondents, form part of the record.

The respondents draw the attention of this Court to the following case law which supports the position that objections raised by relying on rules are mere technical objections and all parties deserve a full hearing where they are allowed to state their respective cases before Court.

In Union Apparels (Pvt) Ltd. Vs. Director General of Customs 2000-1 SLR 27, it had been held that non-compliance of the rules should be considered along with the circumstances of the case and then only could it be decided whether due diligence was not shown in prosecuting the application. The preliminary objection of non-compliance of the rules was thus overruled.

By relying on the above decision, the respondents state that they have shown due diligence in prosecuting the application of the petitioner by duly filing limited statement of objections and comprehensive statement of objections at the relevant stages. The respondents state that even though there was a delay in filing objections the same was filed prior to the date of the argument which clearly shows that the respondents had strong intentions to contest the application of the petitioner.

This Court's attention is also drawn to the case of Fernando Vs. Fernando, SC Appeal No. 81/09. (SC Minutes of 30.04.2010), wherein it has been held that 'one should look for a greater degree of reasonableness and fairness' in a matter. The preliminary objection taken up in the said case with regard to non-compliance with the rules had been overruled stating that it cannot be concluded that the petitioner had failed to show due diligence in prosecuting the matter.

Similar decisions had been made by the Supreme Court in the following matters overruling objections raised with regard to non-compliance with rules Chandrani Vs. Lakmini & others, S.C. Appeal No. 15/09 (SC Minutes of 07.10.2010 and Elias Vs. Gajasinghe & another, S.C. Appeal No. 50/2008 (S.C. Minutes of 28.06.2011).

In Ananda Dharmasiri Bandara V Herath Mudiyansele Leelawathie Manike S. C. Appeal 172/2011 (SC Minutes of 22.01.2014) Marsoof J has held that;

"Rules not having been complied with was taken up, the opposing party submitted to Court that the case of the other party be dismissed *in limine*. I see this as a plea to cut short the proper matter in issue before Court and an attempt to end a case without going into the merits of the case. Rules of procedure are fine and should be in place to regulate the procedure which smoothens out the

path to justice. Yet, I believe rules should not obstruct the path of justice. Rules are made to facilitate those who hear the case to get ready to do their part, to reach the end, which is nothing but justice. The litigants come to Court to get justice. They know nothing but the rules. They do not expect their lawyers to win the case for them on technical actions. They expect their lawyers to place their side of the story to Court to reach justice."

The aforesaid Judgments make it evident that non-compliance of rules is not a reason to the statement of objections filed on behalf of the respondents as long as it is apparent to the respondents have diligently prosecuted the application.

The petitioner has failed to obtain the authorization of the 1<sup>st</sup> respondent prior to the arrival of the goods at the ports of Sri Lanka as stipulated in the relevant gazette notification.

Moreover, the respondents have acted within their powers discharging their statutory ties at all times material to this application in a reasonable manner.

In the circumstances the respondents plead that this Court be pleased to dismiss the application of the petitioner with costs.

A preliminary objection was taken by the petitioner both on 24<sup>th</sup> November 2023 as well as in the counter affidavit of the petitioner dated 8<sup>th</sup> December 2023 that the affidavits of the 1<sup>st</sup> respondent dated 23.11.2023 and the 2<sup>nd</sup> respondent dated 23.11.2023 have been submitted in contravention of the rules of this Court, more specifically rule 3(4)(c), and thus should not be admitted.

Rule 3(4)(c) of the rules of this Court stipulates that;

" (c) the dates fixed by the Court, or specified in the preceding paragraph, shall not be varied by the Registrar except upon a consent motion signed by all the parties or their attorneys-at-law. Any party may by motion apply for variation without such consent after giving notice thereof (including notice of the date on which such motion will be supported) to all other parties; such application shall be dealt with by a single Judge in Chambers, who may, however direct that the matter be dealt with in open court. "

Thus, it is quite apparent that it is mandatory for either a consent motion to be filed or for the party by motion to apply for a variation.

The affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were submitted to this Court by motion dated 23.11.2023, i.e. on the day the matter was fixed for argument, with no explanation as to undue delay and without the said respondents seeking permission of this Court to tender such affidavits months after the date given to submit such affidavits have lapsed, i.e. seeking

a variation of the due date. As a result, the instant application could not be taken up for argument but was re-fixed for argument.

Rule 3(14) states that an order should be made by this Court when parties fail to comply with the requirements set out in the rules.

Considering part 11 applications chapter of the rules of this Court (of which rule 3(4)(C) is a part of) deals with applications made to this Court under Articles 140 and 141 of the Constitution (i.e. rule 3(a) and (b) specifically refer to applications made to this Court under Articles 138, 140 and 141), rule 3(15) stipulates that the said rules apply, *mutandis mutandis*, to other applications made to this Court as well.

It is pertinent to note that the Court of Appeal (Appellate Procedure) Rules were made under Article 136 of the Constitution by the Chief Justice with three other judges of the Supreme Court nominated by him. The Constitution empowers to make such rules regulating the practice and procedure including matters pertaining to appeals such as the terms under which appeals to the Supreme Court to be entertained.

In Sudath Rohana and another v Mohamed Zeena and another (2011)2 SLR 134 at 144-145 Her Ladyship Dr. Shirani Bandaranayake, Chief Justice, emphasized the significance and the importance of the procedural laws in a legal system and held, *inter alia*, thus:

"When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal system. Whilst the substantive law lays down the rights, duties, powers, and liberties; the procedural law refers to the enforcement of such rights and duties. In other words, the procedural law breathe life into substantive law, sets it in motion, and functions side by side with the substantive law. Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the courts of civil jurisdiction, the Supreme Court Rules thus regulates the practice and procedure of the Supreme Court."

The above is applicable to rules of this Court as well which, as mentioned above, were made under Article 136 of the Constitution by the Chief Justice with three other judges of the Supreme Court nominated by him.

Therefore, the affidavits of the 1<sup>st</sup> and the 2<sup>nd</sup> respondents dated 23.11.2023 have been submitted in contravention of the rules of this Court, more specifically rule 3(4)(c), and thus should not be admitted. It is further emphasized that no explanation was given by the respondents as to why the said respondents failed to abide by the aforementioned rule.

Thus, it should be considered that the respondents are not disputing the averments in the amended petition.

In terms of the Special Import License Payment Regulation No. 1 of 2011, published in the Gazette Extraordinary No. 1739/3 dated 2<sup>nd</sup> January 2012, milk powder, is not an item that requires an import license issued under the Control of Imports Act No. 01 of 1969. [Document marked P5]

On 14<sup>th</sup> February 2022, the petitioner contracted with Pure Dale (Pte) Ltd in Singapore to import 153.375 metric tons of whole milk powder for a total price of six hundred and thirty-five thousand seven hundred and thirty-nine US Dollars and thirty-eight cents (USD 635,739.38), an order which formed part of a larger order placed by the petitioner. [Document marked P4]. The payment was agreed to be on open account terms, to be made ninety days from the date of the bill of lading, for in terms of regulation 3 (1) (b) of the aforesaid Special Import License Payment Regulation No. 01 of 2011, such milk powder could lawfully be imported on open account basis and consignment account basis. Thus, no restrictions were imposed on the importation of milk powder under open account payment terms at the time the said order was placed by the petitioner.

By the Imports Control Regulations on Payment Terms No. 07 of 2022, published in the Gazette Extraordinary No. 2278/21 dated 6<sup>th</sup> May 2022, restrictions were imposed on payments on open account payment terms and consignment account terms, and such payment method was allowed only to a restricted category of exporters and local suppliers who supplied goods for those exporters. Thus, the petitioner had already placed orders with the suppliers of milk powder; no restrictions on payment on open account terms were imposed at the time contractual commitments were made by the petitioner in February 2022.

On 6<sup>th</sup> June 2022, Pure Dale (Pte.) Ltd of Singapore confirmed the sale of 3020.8 MT of whole milk powder, to be shipped to Sri Lanka between the period August 2022 February 2023, which larger quantity included the aforementioned 153.375 MT of whole milk powder.

Subsequently, the categories of persons allowed to import on open account terms were expanded and in terms of regulation 04(c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No. 2285/19 dated 24<sup>th</sup> June 2022, open account payment terms and consignment account terms, were permitted *inter alia* to:

'Local manufacturers, who import goods as raw materials which are not available locally but required for manufacturing of their products with . minimum local value addition of 30% or more, subject to a letter of authorization issued by Controller General of Imports and Exports based on the recommendation of the Secretary, Ministry of Industries, prior to the arrival of such goods to any Ports / Airports of Sri Lanka.' (emphasis added)

In August 2022, the petitioner applied to be registered under the Industrial Promotion Act, No. 46 of 1990 to be verified by the Ministry of Industries as an industry contributing 42.51% and 31.03% as local value addition, for 'Anods Chocolate' and 'Puredale Kirite'.

On 20<sup>th</sup> September 2022, the petitioner was informed by Pure Dale (Pte.) Ltd. of Singapore, that the consignment of 153.375 MT of whole milk was loaded from Tauranga, New Zealand. The estimated date of arrival (ETA) in the said commercial invoice was not specified. On 20<sup>th</sup> September 2022, the bill of lading was issued to the petitioner.

Thereafter, the petitioner received the aforementioned certificate of registration of an industrial undertaking verified by the Ministry of Industries dated 28<sup>th</sup> September 2022.

Considering the fact that the petitioner satisfied the criteria stipulated in the aforesaid Gazette Extraordinary No. 2285/19 dated 24<sup>th</sup> June 2022 [P 7] with regard to local value addition, and in view of the dire necessity to source sufficient milk powder to ensure that the industry run by the petitioner can be maintained as a going concern, the petitioner decided to avail of the aforesaid regulation 4(c), *inter alia* in respect of the said consignment of whole milk powder.

On 7<sup>th</sup> October 2022, the petitioner made a request to the 4<sup>th</sup> respondent seeking, *inter alia*, approval to clear the said 153.375 metric tons (153.375 MT) of milk powder in the aforementioned upcoming shipment, on open account terms (i.e. 90 days from the bill of lading) and submitted all relevant documentation including the aforementioned certificate of registration of an industrial undertaking verified by the Ministry of Industries received on 28<sup>th</sup> September 2022.

By a further letter dated 14<sup>th</sup> October 2022, the petitioner renewed its request to the 4<sup>th</sup> respondent for permission to clear, *inter alia*, the said 153.375 metric tons (153.375 MT) of whole milk powder on open account terms.

The petitioner made every possible endeavor to obtain the recommendation of the Ministry of Industries, which included representatives of the petitioner making several representations in person.

On 19<sup>th</sup> October 2022, prior to the arrival of the ship, a letter of recommendation was issued by the said Ministry to the 1<sup>st</sup> respondent.

Upon receipt of the recommendation from the Ministry of Industries, the petitioner made several earnest requests and/or representations to the 1<sup>st</sup> respondent to issue a letter of

authorization to enable the said consignments to be cleared on open account terms, in terms of the aforementioned regulation.

Thereafter, nearly one month after the letter of recommendation from the Ministry of Industries (dated 19.10.2022), the 1<sup>st</sup> respondent proceeded to issue a letter dated 15<sup>th</sup> November 2022, addressed to the 2<sup>nd</sup> respondent requesting and/or recommending a "favorable consideration", by the Director General of Customs. By the aforesaid letter, the 1<sup>st</sup> respondent held out to the petitioner that she had authorized the clearance of the said consignment based on the recommendation of the Secretary to the Ministry of Industries.

The use of the phrase "favorable consideration" connotes that the 1<sup>st</sup> respondent recommended the consideration to be made in favor of the petitioner by the Director General of Customs. It is thus emphasized that the recommendation given by the 1<sup>st</sup> respondent is an effective approval that cannot be retracted in law.

The petitioner or the representatives of the petitioner were apprised that the 02<sup>nd</sup> respondent does not consider the aforesaid letter dated 15<sup>th</sup> November 2022 as a valid letter of authorization issued by the 1<sup>st</sup> respondent for the purposes of regulation 04(c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No. 2285/19 dated 24<sup>th</sup> June 2022 and that he had therefore sought further clarifications from the 1<sup>st</sup> respondent.

On or about 15<sup>th</sup> November 2022, Sri Lanka Customs issued a detention notice in terms of section 135 of the Customs Ordinance No. 17 of 1869 (as amended), in respect of the aforementioned cargo.

On 23<sup>rd</sup> November 2022, the petitioner submitted a written entreaty to the 1<sup>st</sup> respondent to submit a clarification to the 2<sup>nd</sup> respondent and to issue a letter of authorization in terms of regulation 04(c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 published in the Gazette Extraordinary No.2285/19 dated 24<sup>th</sup> June 2022.

The petitioner was verbally apprised that the 1<sup>st</sup> respondent had subsequently communicated to the 2<sup>nd</sup> respondent stating that the petitioner was in 'breach' of the aforesaid regulations, in apparent contradiction to the prior stance adopted by the said respondent, authorizing the 'favorable consideration' to the petitioner. The petitioner was not issued with a copy of the said communication made to the Department of Customs, nor has the petitioner received any response whatsoever to the written appeal dated 23<sup>rd</sup> November 2022 (P 17). Thus, the 1<sup>st</sup> respondent has failed to communicate any reasons for rejecting the reasoned request submitted by the petitioner in good faith.

On 28<sup>th</sup> November 2022, in a much-delayed response, the petitioner was verbally apprised by officers of the Sri Lanka Customs that the goods could be released if the petitioner submitted a bank guarantee in favor of the 2<sup>nd</sup> respondent.

Given the danger posed to the goods which are of a perishable nature, the petitioner was compelled to submit a bank guarantee. As such the bank guarantee bearing number LG/G22/6195 was given for a sum of one hundred and eighteen million two thousand six hundred and thirty-eight Rupees (LKR 118,002,638/-) in favor of the 2<sup>nd</sup> respondent.

Additionally, the petitioner has been compelled to bear the costs pertaining to the bank guarantee such as a sum of three million five hundred forty-nine thousand seven hundred seventy-seven rupees and ninety-nine cents (LKR 3,549,777.99) along with a value-added tax of five hundred thirty-two thousand four hundred sixty-six rupees and seventy cents (LKR 532,466.70) as the issuance commission, as well as a limit charge of one hundred twenty thousand rupees (LKR 120,000/-) along with a value-added tax of eighteen thousand rupees (LKR 18,000); [document marked P19].

The petitioner has been adversely affected by the retrospective application of the Imports Control Regulations on Payment Terms No. 07 of 2022, by which restrictions were imposed on payments on open account payment terms, as it came into effect only on 6<sup>th</sup> May 2022, by which time the petitioner had already placed orders with the suppliers of milk powder; no restrictions on payment on open account terms were imposed at the time contractual commitments were made by the petitioner in February 2022.

Nevertheless, the petitioner submitted the request for approval to the 4<sup>th</sup> respondent well prior to the goods arriving in Sri Lanka, in compliance with the requirements stipulated by the said Regulations as soon as practicable after the petitioner had notice of the goods being shipped and the necessary documentations were made available.

There is no dispute over the fact that the petitioner is qualified in law to receive the approval on the basis that the local value addition is well over the required threshold of thirty percent (30%) and submissions to the contrary were not made on behalf of the respondents during the oral hearing of the instant application.

The inordinate delay of the aforesaid Ministry in forwarding the aforesaid request to the 1<sup>st</sup> respondent was a blatant administrative delay that was beyond the control of the petitioner. The petitioner has at all times acted diligently and the said delay occurred notwithstanding multiple attempts by the petitioner to expedite the decision of the Ministry of Industries; a fact made known to the 1<sup>st</sup> respondent.

There was no reasonable explanation given nor can any justification be made for the submission of all the necessary documentation to the aforesaid Ministry in due time.

It is further emphasized that the aforesaid Ministry did not request the petitioner to submit any additional documentation and/or information material to the petitioner's

application/request during the period the said Ministry was in possession of the said application/request before the same was forwarded to the 1<sup>st</sup> respondent.

Moreover, any contention advanced by the respondents that the petitioner could not forward the request from the aforesaid Ministry to the 1<sup>st</sup> respondent is immaterial as state organs are to possess a mechanism to communicate internally and it is unreasonable and/or irrational to cast such burden on ordinary citizens and/or business entities,

Therefore, the 1<sup>st</sup> respondent cannot reasonably expect the petitioner to comply with what is beyond the control of the petitioner and thus impossible as reflected in the Latin maxim, "impossibilium nulla obligatio est".

The contention advanced on behalf of the respondents that such obligation should be insisted with and penalizing the petitioner by denying the aforesaid approval by reason of administrative lapses and delays on the part of the respondents which are beyond the control of the petitioner is arbitrary, malicious, capricious, unreasonable, irrational, *ultra vires*, unlawful, pernicious and contrary all principles justice and fairness.

Moreover, once the application for approval is submitted to the Ministry of Industries, the communications with the Import Controller is an internal matter for which the petitioner cannot be responsible and to do the same would be to place an unreasonable onerous burden on the petitioner and require the petitioner to do what is impossible and/or beyond the control of the petitioner; ("*impossibilium nulla obligatio est*").

The petitioner has had no control over the Ministry of Industries in the delayed issuance of the letter of recommendation dated 19<sup>th</sup> October 2022.

Without prejudice to the above, it is re-emphasized that the use of the phrase "favorable consideration" by the 1<sup>st</sup> respondent connotes that the said respondent recommended the consideration to be made in favor of the petitioner by the Director General of Customs and such recommendation given by the 01<sup>st</sup> respondent is an effective approval which cannot be retracted in law.

A reasonable interpretation of the aforesaid regulation 04(c) of the Imports Control Regulations on Payment Terms No. 10 of 2022 makes it clear that the petitioner is entitled to be permitted to clear the goods under reference on the basis of open account payment terms in as much as;

- (a) the provision stipulates that open account terms would be permitted upon;



"a letter of authorization issued by Controller General of Imports and Exports based on the recommendation of the Secretary, Ministry of Industries, prior to the arrival of such goods to any Ports / Airports of Sri Lanka "

- (b) the 'basis 'of the approval is the recommendation of the 4<sup>th</sup> respondent which has to be obtained prior to the arrival of the goods;
- (c) the 1<sup>st</sup> respondent is not required to exercise a statutory function under the Imports and Exports (Control) Act, No. 01 of 1969 (as amended), by issuing an import license but is vested with the administrative function of issuing a letter of authorization based on the recommendation of the 04<sup>th</sup> respondent, which is largely a ministerial act, once the 4<sup>th</sup> respondent has made the recommendation;
- (d) therefore, once such a recommendation of the 4<sup>th</sup> respondent is in place, the 01<sup>st</sup> respondent is not vested with the right/discretion to refuse or reject the recommendation of the 04<sup>th</sup> respondent
- (e) by doing so the 1<sup>st</sup> respondent has acted beyond her powers. duties, rights, and/or responsibilities under the Imports and Exports (Control) Act, No. 1 of 1969 (as amended) as well as the applicable regulations, thus rendering such action and/or decision ultra vires;
- (f) additionally, such recommendation of the 4<sup>th</sup> respondent cannot be 'rejected' or 'ignored' simply by reason only of the fact that the recommendation reached the 01<sup>st</sup> respondent after the arrival of the cargo;
- (g) it is reiterated that once the application for approval is submitted to the Ministry of Industries, the communications with the Import Controller is an internal matter for which the petitioner cannot be responsible and to do the same would be to require the petitioner to do what is impossible and/or beyond the control of the petitioner; (*"impossibilium nulla obligatio est"*).

Without prejudice to the above, it is submitted that the plain meaning of both the Sinhala and English drafts of the aforesaid regulations makes it clear that the said Regulations do not mandate the authorization of the 1<sup>st</sup> respondent to be in place prior to the arrival of the goods.

At best, the stipulation that a letter of authorization should be in place 'prior 'to the arrival of the cargo, is merely a 'directory 'provision, and therefore granting the authorization 'after 'the arrival of the cargo cannot and will not render the decision of the 1<sup>st</sup> respondent invalid or a nullity, as the circumstances of this case justify such approval.

Moreover, the failure and/or refusal to give reasons for the rejection of, the petitioner's appeal dated 23<sup>rd</sup> November 2022, submitted to the 1<sup>st</sup> respondent, is arbitrary, illegal, and contrary to all norms of natural justice, particularly in view of the fact that there has been no violation of the customs duty and or the import control.

By affidavit dated 22.02.2023, the 1<sup>st</sup> respondent has affirmed several facts which are not within the knowledge of the said respondent.

The averments in, *inter alia*, paragraphs 6(a), 6(b), 6(c), 6(d), 6(e), 6(f), and 6(g) are not and cannot be based on the personal knowledge of the 1<sup>st</sup> respondent.

It is submitted that the 1<sup>st</sup> respondent cannot be said to possess personal knowledge of the correspondence between the petitioner and the 04<sup>th</sup> respondent, nor of a purported ambiguous "committee meeting" the participants of which has not been disclosed.

At the oral hearing of the instant application, it was submitted on behalf of the respondents that the petitioner has not challenged the purported inquiry instituted against the petitioner.

The said submissions made on behalf of the respondents are blatantly false and misleading since paragraph 35 of the amended petition specifically avers, *inter alia*, that a customs inquiry has been instigated against the petitioner, without any reasonable basis, while specific substantial and interim relief has been sought against the purported inquiry by prayers (j) and (p) of the amended petition.

It is reiterated that the petitioner was compelled to submit a bank guarantee for a sum of one hundred and eighteen million two thousand six hundred and thirty-eight rupees (LKR 118,002,638/-) in favor of the 2<sup>nd</sup> respondent. [Document marked P 18]

Moreover, the petitioner has been compelled to bear the costs pertaining to the bank guarantee such as a sum of three million five hundred forty-nine thousand seven hundred seventy-seven rupees and ninety-nine cents (LKR 3,549,777.99) along with a value-added tax of five hundred thirty-two thousand four hundred sixty-six rupees and seventy cents (LKR 532,466.70) as the issuance commission, as well as a limit charge of one hundred twenty thousand rupees (LKR 120,000/-) along with a value-added tax of eighteen thousand rupees (LKR 18,000) [Document marked P19].

Thus, a heavy monetary burden has been placed on the petitioner to bear the aforementioned costs, which is having a serious detrimental impact on the working capital of the petitioner along with the risk of the 02<sup>nd</sup> respondent proceeding to encash the aforesaid guarantees marked as P 18.

The financial commitments of meeting its contractual payment commitment, unfair penalties, as well as demurrage costs, impose an unfair and unjustified burden on the petitioner who cannot absorb the said cost through price/profit margin readjustments.

The aforesaid unreasonable, irrational, *ultra vires* acts of the respondents, given the current economic situation prevailing in the country and the restrictions imposed by the State, would compel local businesses such as the petitioner in case and/or downgrade operations, resulting in loss of employment opportunities the petitioner has currently facilitated to the local labor force and further adversely affecting the already volatile economy.

Considering the above circumstances, we are of the view that the petitioner's application should be allowed.

Article 140 of the Constitution prescribes the law under which this Court can issue writs in the nature of certiorari, mandamus and prohibition. Therefore, we issue writs as follows:

- (e) This Court issues a writ of certiorari quashing the decision made by the 1<sup>st</sup> respondent that the petitioner is not entitled to a letter of authorization under and in terms of regulation 4 (c) of the Imports Control Regulations on payment terms No.10 of 2022 published in the Gazette Extraordinary No.2285/19 dated June 24, 2022, to clear on open account terms, the consignment of the perishable goods imported by the petitioner under the bill of lading marked P 11.
- (f) This Court issues a writ of certiorari quashing the decision of the 1<sup>st</sup> respondent to refuse to issue a letter of authorization to enable the clearance on open account terms, the consignments of the perishable goods imported by the petitioner under the bill of lading marked P11.
- (g) This Court issues a writ of certiorari call for and quashing any and all decisions, letters/communications issued by the 1<sup>st</sup> respondent to the Department of Customs, indicating and /or stating that the petitioner has violated any provisions of the Imports and Exports (Control) Act, No. 1 of 1969 (as amended) and/or the Customs Ordinance No.17 of 1869 (as amended) pertaining to the

consignments of the perishable goods imported by the petition under the bill of lading marked P11.

- (h) This Court issues a writ of mandamus directing the 1<sup>st</sup> respondent, and/or the successors in office, and/or servants and agents to issue a letter of authorization under and in terms of regulation 4 (c) of the Imports Control Regulations on Payment Terms No.10 of 2022 published in the Gazette Extraordinary No.2285/19 dated June 24, 2022, to enable clearance of the consignment of the perishable goods imported by the petitioner under the bill of lading marked P11 on open account terms.
- (i) This Court issues a writ of certiorari quashing the detention notice marked P16 issued by the 2<sup>nd</sup> respondent.
- (j) This Court issues a writ of certiorari quashing the decision by the 2<sup>nd</sup> respondent to commence a custom inquiry in respect of the consignment of goods imported by the petitioner under the bill of lading P11.
- (k) This Court issues a writ of certiorari quashing the decision of the 2<sup>nd</sup> respondent and/or servants and agents to call for a bank guarantee to release the goods.
- (l) This Court issues a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents to permit forthwith, the clearance of the consignment of goods imported by the petitioner under the bill of lading marked P11 on open account terms, without imposition of any penalty and/or punishment.
- (m) This Court issues a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents to permit the petitioner to cancel the guarantee bearing number LG/G22/6195 marked P18.
- (n) This Court issues a writ of mandamus directing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents not to demand on and/or call upon the guarantee bearing number LG/G22/6195 marked P18.

- (o) This Court issues a writ of prohibition preventing the 2<sup>nd</sup> respondent, and/or the successors in office, and/or servants and agents from, taking any steps to encash the guarantee bearing number LG/G22/6195 marked P18.

No order for Cost.

**President of the Court of Appeal**

**B. Sasi Mahendran, J**

**I agree**

**Judge of the Court of Appeal**