

**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 Writs of Certiorari and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 229/2018**

Saparamadu Wickramasinghe  
Arachchige Mohan Sanathkumara,  
No. 71/2, Horton Place, Colombo 7.

**PETITIONER**

Vs.

1. Hon. Mano Ganesan,  
Minister of National Integration,  
Reconciliation and Official Languages.
  2. M.Y. S. Deshapriya,  
Secretary,  
Ministry of National Integration,  
Reconciliation and Official Languages,  
40, Buthgamuwa Road, Rajagiriya.
  3. Chandrasiri Kannangara,  
National Secretariat for  
Non-Governmental Organizations.
  4. K.L. Inoj Perera,  
National Secretariat for  
Non-Governmental Organizations.
  5. U. Wilson De Silva,  
National Secretariat for  
Non-Governmental Organizations.
  6. G.J. Sampath,  
National Secretariat for  
Non-Governmental Organizations.
  7. Shakya Nanayakkara,  
Director General,  
National Secretariat for  
Non-Governmental Organizations.
- 3<sup>rd</sup> – 7<sup>th</sup> Respondents at

90/2, Parakum Mawatha,  
Pannipitiya Road, Battaramulla.  
And/or  
3<sup>rd</sup> Floor, “Sethsiripaya”, Battaramulla.

8. Marja Van Leeuwen
9. Saskia Jolande Pahud de Mortanges Kroes,  
  
8<sup>th</sup> and 9<sup>th</sup> Respondents at  
Stitching Weeshuis ,  
Meer En Bosalaan 106, 2554 GA  
Den Haag, Netherlands.
10. Saparamadu Wickramasinghe  
Arachchige Kassapa Devamitta,  
250/7, High Level Road,  
Kirulapona, Colombo 6.
11. G.H. Ajith Kumara,  
84/3, Nagarukkarama Mawatha,  
Kalegana, Galle.

### **RESPONDENTS**

**Before:** Arjuna Obeyesekere, J

**Counsel:** Faisz Musthapha, P.C., with Kuvera De Zoysa, P.C., Shantha Jayawardane,  
Pulasthi Rupasinghe and Charaka Jayaratne for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General with Ms. Kanishka  
De Silva Balapatabendi, Senior State Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and  
7<sup>th</sup> Respondents

Senani Dayaratne with Ms. Eshanthi Mendis for the 10<sup>th</sup> Respondent

**Argued on:** 25<sup>th</sup> June 2019, 11<sup>th</sup> July 2019, 25<sup>th</sup> July 2019 and 6<sup>th</sup> August 2019

**Written** Tendered on behalf of the Petitioner on 26<sup>th</sup> September 2019

**Submissions:** Tendered on behalf of the 10<sup>th</sup> Respondent on 25<sup>th</sup> September 2019  
  
Tendered on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents on 20<sup>th</sup>  
September 2019

**Decided on:** 8<sup>th</sup> September 2020

**Arjuna Obeyesekere, J**

The Petitioner is a trustee of a charitable organisation known as the ‘*Somawathie Saparamadu Trust*’ or ‘*Somawathie House*’. The said Trust had been established under and in terms of an Indenture of Trust No. 344 dated 13<sup>th</sup> November 1997, which had subsequently been amended by Trust Deed No. 359 dated 5<sup>th</sup> November 2014.

The Petitioner states that the main objective of the said Trust was to manage and administer a home for orphaned children situated at Habaraduwa, on a land donated by S.S. Saparamadu, who is the father of the Petitioner and the 10<sup>th</sup> Respondent. The said home is registered with the Department of Probation and Child Care Services, Southern Province. According to the Petitioner, the Home presently has 125 children ranging from the ages of 3 to 18 who are provided *inter alia* with free medical and dental care, education etc. In 2005, the said Trust had entered into an agreement marked ‘**P2**’ with the 8<sup>th</sup> and 9<sup>th</sup> Respondents and with a foundation based in Netherlands, in terms of which the Trust received funding to carry out the affairs of the Home.

The Petitioner claims that the affairs of the Trust are governed in a transparent manner, with the financial affairs of the Trust being audited by a reputed firm of Chartered Accountants.

The Petitioner states that disputes relating to the manner in which the Home and the Trust were being operated had arisen between the Petitioner on the one hand, and his three siblings, including his brother, the 10<sup>th</sup> Respondent, and their mother, on the other. This had resulted in action being filed in terms of the Companies Act No. 7 of 2007 in the Commercial High Court against two companies owned by the Petitioner, namely Tisara Investments (Private) Limited, and Desano Investments (Private) Limited.<sup>1</sup> Although several interim orders had been issued *ex-parte* against the said companies, the said Orders had subsequently been vacated, and the said cases are pending before the Commercial High Court.

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<sup>1</sup> Vide the petitions filed in Commercial High Court Case Nos. 24/2014/CO and 26/2014/CO, marked ‘P9a’ and ‘P9b’.

The Petitioner states that the 10<sup>th</sup> Respondent had made a complaint to the Criminal Investigations Department (CID) against the Petitioner, which had resulted in a 'B' report being filed in the Magistrate's Court of Nugegoda. This Court has examined the said report, annexed to the petition marked 'P10' and observes that the complaint relates to the following three matters:

- (a) Depositing a sum of Rs. 14,725,899.75 belonging to the Trust in Deshan Investments Private Limited owned by the Petitioner.
- (b) Misappropriating a sum of Rs. 17,964,899.61 belonging to the Trust by presenting forged receipts.
- (c) Using a generator valued at Rs. 15 million received by the Trust for the purposes of Thisara Investments owned by the Petitioner.

The Petitioner states that no adverse orders have been made against the Petitioner in the said case, and that the CID has referred the matter to the Hon. Attorney General for legal advice, which advice is pending. In fact, the Honourable Magistrate, by an Order dated 12<sup>th</sup> August 2016 has held as follows:

“මෙම අවස්ථාව වන විට වරදක් සම්බන්ධයෙන් විමර්ශනයක් පවතින අතර එම වරදට යොදාගෙන ඇති මුදල් සේමාවකි ඩාරයේ මුදල් වන බවට පැමිණිල්ල ලැබී තිබේ. ඒ සම්බන්ධයෙන් විමර්ශන මේ දක්වා පවත්වාගෙන යනු ලබන අතර යම් වරදක් සිදු කර ඇති බවට සහ එකී වරද කරන ලද සැකකරුවන් කවුරුන්ද යන්න පිළිබඳව මේ දක්වා අනාවරණයක් කර නැත.”

The Petitioner states that the 10<sup>th</sup> Respondent and their mother had filed a private plaint in the Magistrate's Court, Galle against the Petitioner, his wife and a relative, who had functioned as a trustee of the said Trust. The Petitioner states further that the subject matter of the reports filed in the Magistrate's Court of Nugegoda and Galle are almost identical. This Court has examined the charge sheet filed in the latter case, annexed to 'P14' and observes that the allegation against the Petitioner is that he and the other persons mentioned earlier had caused criminal breach of trust or in the alternative, misappropriated property belonging to the said Trust. The charges do not refer to any specific incidents. The 10<sup>th</sup> Respondent has however submitted that this case has since been withdrawn, owing to the death of the mother of the Petitioner and the 10<sup>th</sup> Respondent.

It is not in dispute that the said Trust has been registered as a Voluntary Social Service Organisation / non-governmental organisation under and in terms of the Voluntary Social Service Organisations (Registration and Supervision) Act No. 31 of 1980, as amended (**the Act**),<sup>2</sup> and that the provisions of the Act would apply to the activities and affairs of the said Trust.

According to its preamble, the objective of the Act is to “*provide for the registration with the Government of voluntary social service organizations, to provide for their inspection and supervision; to facilitate the co-ordination of the activities of such organizations; to give governmental recognition to such organizations which are properly constituted; to enforce the accountability of such organizations in respect of financial and policy management under the existing rules of such organizations, ... to prevent malpractices by persons purporting to be such organisations...*”

Section 9 of the Act provides as follows:

*“The Registrar or any officer authorized by him in writing in that behalf shall have the power-*

- (a) to enter and inspect at all reasonable hours of the day, the premises of a voluntary organisation registered under this Act for the purpose of ascertaining whether satisfactory standards of service are maintained in such organisation;*
- (b) to bring to the notice of the Minister any allegation of fraud or misappropriation of funds committed by such organisation ;*
- (c) to attend any meeting of the executive committee of such organisation or a general meeting of the members of such organisation, upon the written request of all or a majority of the members of the executive committee of such organisation, or with the concurrence of the office bearers of such organisation or the Minister. The Registrar or the officer so attending shall not have the right to vote at such meeting..”*

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<sup>2</sup> Vide Certificate of Registration marked ‘P5’.

Provision to investigate allegations of fraud or misappropriation by an organisation registered under the Act is provided under Sections 10, 11, 12 and 13 of the Act, which are re-produced below:

Section 10 –

*“Where, in respect of a voluntary organisation registered under this Act, any allegation of fraud, or misappropriation is made by any person, the Minister may refer such matter to a Board of Inquiry.”*

Section 11 –

- “(1) The Minister may appoint a Panel consisting of six persons of standing who are not public officers.*
- (2) The Minister may, for the purposes of this Act, constitute a Board of Inquiry or Boards of Inquiry, each consisting of three members chosen from the Panel. The Minister may nominate one member to be the Chairman of a Board of Inquiry.*
- (3) ....”*

Section 12 -

- “(1) Where a matter is referred to a Board of Inquiry under Section 10, such Board shall inquire and report on such matter to the Minister.*
- (2) The procedure for the hearing and disposal of any matter referred to such Board shall be in accordance with the regulations made in that behalf.*
- (3) Such Board shall submit the report on its findings to the Minister within fourteen days after the conclusion of the inquiry.”*

Section 13 –

*“For the purpose of an inquiry under Section 12, a Board of Inquiry shall have the power:*

- (a) *to summon and compel the attendance of witnesses;*
- (b) *to compel the production of documents*
- (c) *to administer any oath or affirmation to any person.”*

The powers of the Minister, on receipt of the report of the Board of Inquiry are set out in Section 14 and reads as follows:

Section 14 –

*“Upon the receipt of the report of the Board of Inquiry in terms of section 12 (3), the Minister shall refer such report to the appropriate authority for steps to be taken according to law.”*

The Voluntary Social Service Organisations (Registration and Supervision) (Amendment Act), No. 8 of 1998 introduced Section 14A, which is reproduced below:

*“Notwithstanding the provisions contained in section 14, where a Board of Inquiry constituted under section 11 reports to the Minister that there is evidence to support any allegation of fraud or misappropriation made against a voluntary organisation and **the Minister is satisfied that the fraud or misappropriation is of such nature as would affect the financial management of the organisation and that public interest will suffer** if such organisation is continued to be carried on by its existing executive committee, he shall, by Order published in the Gazette, appoint an Interim Board of Management for the purpose of administering the affairs of such voluntary organisation.”*

The Petitioner states that he received a letter dated 9<sup>th</sup> November 2015, marked ‘**P12a**’, from the Secretary of the Board of Inquiry informing him that a Board of Inquiry consisting of three members has been appointed by the Minister to inquire into a complaint relating to the *Somawathie Home*, and requesting him to be present before the said Board on 16<sup>th</sup> November 2015 with the documents set out therein.

The Petitioner states that as one of the members of the Board of Inquiry is an associate of the 10<sup>th</sup> Respondent, he had filed CA (Writ) Application 448/2015 on 13<sup>th</sup>

November 2015. This Court has examined the petition filed in that application marked '**P13a**' and observes that the Petitioner had sought:

- (a) A Writ of Certiorari to quash the decision of the Minister to appoint a Board of Inquiry to inquire into and report on the said Trust;
- (b) A Writ of Certiorari quashing the appointment of the 5<sup>th</sup> respondent (who is the 11<sup>th</sup> Respondent to this application) as a member of the Board of Inquiry;
- (c) A Writ of Certiorari quashing the proceedings of the inquiry conducted by the Board of Inquiry; and
- (d) A Writ of Certiorari quashing the decision to summon the Petitioner for the inquiry set out in '**P12a**'.

This Court also observes that in paragraph 22 of '**P13a**', the Petitioner had stated that, *"he has reliably learned that the said purported inquiry had already commenced and certain parties including the 14<sup>th</sup> Respondent had given evidence and/or statements therein."*

This Court had issued an interim order on 16<sup>th</sup> November 2015 suspending the inquiry referred to in '**P12a**' from proceeding. However, on 24<sup>th</sup> May 2016, the parties had agreed as follows<sup>3</sup>:

*"This matter is coming up today to inquire into the extension of the stay order. At this stage, the learned Senior Deputy Solicitor General who is appearing for the 1<sup>st</sup> – 3<sup>rd</sup> Respondents informs that under the law, there has to be an inquiry held. However, the stay order issued by this Court had prevented any inquiry being conducted by even a different panel. **At this stage, parties agree to vary the stay order preventing only the fourth, fifth, and sixth respondents from conducting the inquiry. The Minister is free to appoint a fresh panel under the provisions of the Voluntary Social Service Organisations (Registration and Supervision), Act No. 31 of 1980 and to conduct the inquiry. Subject to the above variation, the stay order issued by this Court will continue until the next date.**"*

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<sup>3</sup> Vide '**P13d**'.



The above application had subsequently been withdrawn by the Petitioner on 13<sup>th</sup> June 2017 reserving the right to file a fresh application.

The 3<sup>rd</sup> – 5<sup>th</sup> Respondents, who are members of the Panel appointed under the Act, had thereafter been appointed by the Minister as members of the Board of Inquiry to inquire and report into the complaint of the 10<sup>th</sup> Respondent.

The Petitioner states that he received the following letter dated 25<sup>th</sup> May 2017, marked ‘**P16**’, from the 6<sup>th</sup> Respondent, Secretary of the Board of Inquiry.

“හඬරාදූව පිහිටි සෝමාවතී සපරමාදු භාරය මගින් පාලනය වන සෝමාවතී ළමා නිවාසය වෙත ලැබී ඇති අරමුදල් වංචා කිරීම සහ ව්‍යුපහරණය පිළිබඳ පැමිණිල්ල

ඔබ භාරය මගින් පාලනය වන හඬරාදූව පිහිටි සෝමාවතී ළමා නිවාසය වෙත අරමුදල් වශයෙන් ලැබී ඇති රාජ්‍ය හා රාජ්‍ය නොවන මුදල් අවභාවිතා කිරීමක් සම්බන්ධයෙන් කොළඹ 06 නයිලෙවල් පාර, අංක 250/7, ස්ථානයේ පදිංචි ඩබ්ලිව්.ඒ.කේ.ඩී. සපරමාදු යන අය විසින් කරන ලද 2014.02.27 දිනැති පැමිණිල්ල අප වෙත ලැබී ඇත. 1980 අංක 31 දරණ ස්වේච්ඡා සමාජසේවා සංවිධාන (ලියාපදිංචි කිරීම හා අධීක්ෂණය) පනතේ 11(01) වගන්තිය ප්‍රකාරව පත් කර ඇති ව්‍යුපහරණ විභාග කිරීම පිණිස පත් කර ඇති මූල මණ්ඩලයෙන් තෝරාගත් සාමාජිකයන් තිදෙනෙකුගෙන් යුත් පරීක්ෂණ මණ්ඩලයකට එකී පැමිණිල්ල පරීක්ෂා කිරීම පිළිබඳ කටයුතු පවරා ඇත. උක්ත පනතට අදාළව නිකුත් කරන ලද අංක 1101/14 හා 1999.10.15 දිනැති අති විශේෂ ගැසට් නිවේදනයේ අංක 01 දරන ස්වේච්ඡා සමාජසේවා සංවිධාන නියෝග වල 7(1)(අ) නියෝගය ප්‍රකාරව එකී චෝදනා සාරාංශ ගත කොට පහත සක්වනු ලැබේ.

- 01) සෝමාවතී භාරය වෙත ඇති ස්ථාවර තැන්පත් එම භාරයේ පාලන ව්‍යවස්ථාවේ විධිවිධාන වලට පටහැනිව නිත්‍යානුකූල නොවන ආයතනයක් වන “දෙසානෝ ඉන්වෙස්ට්මන්ට් ප්‍රයිවේට් ලිමිටඩ්” (Desano Investment (Private) (Limited) නැමැති ආයතනයේ ආයෝජනය කිරීම.
- 02) මෙම භාරයට පරිත්‍යාගශීලීන්ගෙන් ලැබී ඇති වටිනා භාණ්ඩ විශාල ප්‍රමාණයක් කොශ්ගල ඩිව් හෝටලයේ පරිහරණයට ලබා දීම සහ අධිබලැති විදුලි උත්පාදන යන්ත්‍රය දැවගැමුණු විදියේ තිසර ඉන්වෙස්ට්මන්ට් සමාගමේ ප්‍රයෝජනය සඳහා ලබා දීම.
- 03) භාරයට වාර්ෂිකව ලැබෙන සමාජ සුභසාධන පරිවාස හා ළමාරක්ෂන සේවා දෙපාර්තමේන්තුව හරහා ලැබුණු රාජ්‍ය මූල්‍ය ප්‍රතිපාදන රජයේ මුදල් රෙගුලාසිවලට පටහැනිව අවභාවිතා කිරීම.
- 04) ළමා නිවාසයේ ගොඩනැගිලි ඉදිකිරීම සඳහා රජය මගින් හා පරිත්‍යාගශීලීන් විසින් ලබා දුන් මුදල් පිළිගත් ටෙන්ඩර් පටිපාටියෙන් බැහැරව ඉදිකිරීම සඳහා යොදා ගැනීම.
- 05) ළමා නිවාසයේ ඉදිකිරීම සඳහා මලදි ගන්නා ලද අමුද්‍රව්‍ය, ළමා නිවාසයේ ඉදිකිරීම සඳහා යොදා නොගෙන කොශ්ගල ඩිව් හෝටල් ව්‍යාපාරයේ හා තිසර ඉන්වෙස්ට්මන්ට් සමාගමේ හා විලා මෝදරවත්ත නිවාඩු නිකේතනයේ ඉදිකිරීම සඳහා යොදා ගැනීම

06) භාරයේ සමාපිකයෙකු වන මොහාන් සපරමාදු යන අය විසින් ගොඩනැගිලි දූව්‍ය අලෙවි කරන ආයතන වල නාමයෙන් භාවිතා කරමින් ව්‍යාප්ත බිල්පත් සකස් කොට ඔහු විසින්ම එම බිල්පත් සහතික කර භාරයේ මුදල් වංචා කිරීම.

මෙම චෝදනා පිළිබඳ ඔබ සංවිධානය විසින් පරීක්ෂණ මණ්ඩලය වෙත පිරිණැමීමට ඇති කරුණු පැහැදිලි කිරීම මෙම ලිපිය ලැබී දින 14 ක් ඇතුළත ඉදිරිපත් කරන මෙන් ඉල්ලා සිටිමි. නියමිත කාලය තුළ කරුණු ඉදිරිපත් කිරීම මගින් පරීක්ෂණ කටයුතු ඉක්මනින් ඉටු කර ගැනීමට සහය දක්වන්නේ නම් මැනවි.”

By letter dated 6<sup>th</sup> June 2017, marked 'P16a', the Petitioner had sought time to submit his explanation. By letter dated 19<sup>th</sup> June 2017 marked 'P18', the Petitioner had written to the 6<sup>th</sup> Respondent requesting that the proposed inquiry be stayed until the case in the Magistrate's Court of Nugegoda is concluded. By letter dated 17<sup>th</sup> July 2017, marked 'P21', the Petitioner had *inter alia* responded to the matters set out in the charge sheet marked 'P16'.

By letter dated 22<sup>nd</sup> January 2018, marked 'P22', the 6<sup>th</sup> Respondent had directed the Officer-in-Charge of the Somawathie Home to appear before the Board of Inquiry on 8<sup>th</sup> February 2018 together with the documents mentioned therein. It appears that 'P22' has not been complied with, resulting in the Petitioner being required by letter dated 5<sup>th</sup> June 2018 marked 'P24a' to appear before the Board of Inquiry on 3<sup>rd</sup> July 2018.

The Petitioner has thereafter sought a postponement of the inquiry, which prompted the 6<sup>th</sup> Respondent to call for further material by his letter dated 4<sup>th</sup> July 2018 marked 'P24e'. The Petitioner does not appear to have responded to 'P24e', but had instead filed this application on 11<sup>th</sup> July 2018 seeking *inter alia* the following relief:

1. A Writ of Certiorari quashing the decision of the 1<sup>st</sup> Respondent to appoint a Board of Inquiry under the provisions of the Act to inquire into the affairs of the said Trust contained in 'P16'.
2. A Writ of Certiorari quashing the appointment of the 3<sup>rd</sup> – 5<sup>th</sup> Respondents as members of the Panel of Inquiry to conduct an inquiry under the provisions of the Act.

3. A Writ of Certiorari quashing the proceedings of the inquiry conducted by the 3<sup>rd</sup> – 5<sup>th</sup> Respondents.
4. A Writ of Prohibition preventing the Respondents from conducting and/continuing with the inquiry into the affairs of the Trust.
5. A Writ of Prohibition preventing the 3<sup>rd</sup> – 5<sup>th</sup> Respondents from conducting and/ or continuing with the inquiry into the affairs of the Trust.

This Court had issued *ex-parte* the interim order prayed for by the Petitioner preventing the 3<sup>rd</sup> – 5<sup>th</sup> Respondents from proceeding with the inquiry.

When this matter was taken up for argument, the learned President's Counsel for the Petitioner informed this Court that he would not be challenging the appointment of the 3<sup>rd</sup> – 5<sup>th</sup> Respondents as members of the Board of Inquiry. The necessity for this Court to consider the relief at paragraph (2) above therefore does not arise.<sup>4</sup> The learned President's Counsel for the Petitioner however submitted that proceeding with the Inquiry is illegal on four principal grounds, which this Court shall now proceed to consider.

The first argument of the learned President's Counsel for the Petitioner was that once a matter has been referred to the Police or the CID, as the case may be, the Minister cannot appoint a Board of Inquiry to inquire into the affairs of the Trust.

It is not in dispute that the 10<sup>th</sup> Respondent has complained to the CID relating to the affairs of the Trust, and that the CID, having reported facts to the learned Magistrate, has referred the matter to the Hon. Attorney General. It is also not in dispute that the private plaint instituted in the Magistrate's Court of Galle has been withdrawn due to the death of the mother of the Petitioner and 10<sup>th</sup> Respondent. It is however admitted that the Somawathie Trust is an organisation to which the provisions of the Act would apply. This Court is of the view that once registration has been obtained in terms of the said Act, the provisions of the said Act should apply to the Trust with full force, notwithstanding an inquiry being conducted by the Police. The power of the Minister to appoint a Board of Inquiry to inquire into the affairs of a body registered

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<sup>4</sup> Vide paragraph (d) of the prayer to the petition.

under the Act, is not conditional upon any other authority conducting an inquiry, and therefore, this Court is of the view that the fact that the affairs of the Trust are being investigated by the Police shall not be a bar to the Minister exercising the powers conferred on him by the Act.

The learned President's Counsel for the Petitioner submitted further that in terms of Section 14, what the Minister can do upon receipt of the report of the Board of Inquiry is to refer such report to the appropriate authority for steps to be taken according to law, which he submitted was a reference to the Police, and that as the matter has already been referred to the Police, proceeding with the Inquiry would be an exercise in vain. The learned Deputy Solicitor General for the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents and the learned Counsel for the 10<sup>th</sup> Respondent however submitted that referring a matter to the Police, once an inquiry has been concluded, is only one of the steps that can be taken. The specific attention of this Court was drawn to the provisions of the Trust Ordinance, which would be applicable to the Somawathie Trust, and to Section 14A of the Act itself, which empowers the Minister to take action set out therein, which is something that cannot be achieved through an investigation by the Police.

Contrary to the position taken up on behalf of the Petitioner, this Court is of the view that the failure by the Minister to appoint a Board of Inquiry when an allegation of fraud, or misappropriation has been made, would be a dereliction of his statutory duty, since he owes a public duty:

- (a) to ensure that each organisation which has been conferred with governmental recognition by virtue of being registered under the Act is held financially accountable;
- (b) to prevent malpractices that may take place at such organisation;
- (c) to take action in terms of the Act when a complaint containing allegations of fraud or mismanagement is made.

This Court therefore does not see any merit in the first argument of the learned President's Counsel for the Petitioner.

The second argument on behalf of the Petitioner is twofold.

The first is that a copy of the complaint made by the 10<sup>th</sup> Respondent has not been made available to the Petitioner, thus depriving him and the Trust from presenting *their side of the story*. The Petitioner has however admitted in paragraph 30 of the petition that, *'by letter dated 17<sup>th</sup> July 2017 sent by their Attorneys-at-Law,<sup>5</sup> the Trustees of the Somawathie Trust **comprehensively responded to and refuted the purported charges made out in the letter marked 'P16' together with the necessary documentation to substantiate their case'***, thus demonstrating that the Petitioner and the Trust have not been prevented from defending their position, even though a copy of the complaint had not been provided.

The second aspect of this argument is that the power to conduct an inquiry arises only when an allegation of fraud or misappropriation is made, and in the absence of the complaint being made available to the Petitioner, there is no material that Section 10(1) has been triggered. It is not in dispute that the complaint made by the 10<sup>th</sup> Respondent has not been made available to the Petitioner, and that instead, what was informed to the Petitioner by way of a Charge Sheet was only a synopsis of the complaint.

In order to consider this aspect of the second argument of the Petitioner, this Court directed the learned Deputy Solicitor General to file of record a copy of the said complaint, which was duly complied with<sup>6</sup>. This Court has examined the said complaint, and is satisfied that the matters set out in 'P16' are borne out by, and are therefore based on the complaint of the 10<sup>th</sup> Respondent. Therefore, this Court does not see any merit in the argument that there is no basis to trigger the provisions of Section 10(1) of the Act.

Even though the non-availability of the complaint has not prejudiced the Petitioner in the preparation of his response to 'P16', this Court is of the view that the Trust, as well as the Petitioner are entitled to receive a copy of the complaint made by the 10<sup>th</sup> Respondent.

The third argument of the learned President's Counsel for the Petitioner was that the proceedings before the Board of Inquiry are quasi-judicial in nature, and that even though in terms of Section 41(2) of the Judicature Act, he has a right to legal

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<sup>5</sup> Vide 'P30'.

<sup>6</sup> Vide motion dated 21<sup>st</sup> July 2020.

representation, the Board of Inquiry, which comprises of two Attorneys-at-Law have declined his request. The learned Counsel for the Respondents have however submitted that the inquiry before the Board of Inquiry is only a fact finding exercise, and that the necessity to provide legal representation does not arise.

This Court, having carefully considered:

- (a) The nature of the allegations made in 'P16', and the response of the Petitioner 'P21';
- (b) The claim of the Petitioner that the accounts of the Trust have been audited by a reputed firm of Chartered Accountants;
- (c) The procedure that would be followed by the Board of Inquiry;<sup>7</sup> and
- (d) The nature of the action that could be taken by the Board of Inquiry at the conclusion of the inquiry – vide Section 12(1),

is satisfied that the Board of Inquiry is only engaged in a fact finding exercise, and that the rights of the Petitioner would not be affected by the Petitioner not being represented by an Attorney-at-Law.

The final argument of the learned President's Counsel for the Petitioner is that his participation before the Board of Inquiry would violate the principle of self incrimination. This argument is founded upon Section 13 of the Act, in terms of which the Board of Inquiry has the power to summon and compel the attendance of witnesses, to compel the production of documents, and to administer an oath or affirmation. Considering the fact that (a) the Petitioner is not an accused, (b) the Board of Inquiry is only conducting a fact finding inquiry, (c) the Board of Inquiry is only required to submit a report on its findings, this Court is of the view that the question of self incrimination does not arise at this stage.

The learned President's Counsel drew the attention of this Court to an Order made by the 'Commission of Inquiry inquiring into the issuance of Treasury Bonds' where the said Commission upheld the refusal to give evidence on the basis of the principle

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<sup>7</sup> Ibid.

of self incrimination. This Court must observe that in terms of Section 24 of the Commissions of Inquiry Act No. 17 of 1948 (as amended), it is lawful for the Attorney General to institute criminal proceedings based on material collected in the course of an investigation or inquiry conducted by a Commission of Inquiry appointed under the said Act. However, as pointed out by the learned Counsel for the Respondents, the proceedings before a Board of Inquiry appointed under the Voluntary Social Service Organisations Act does not entail the immediate invocation of the criminal law and procedure, as any action pursuant to a reference in terms of Section 14 would have to be based on an investigation conducted by law enforcement agencies. This is a fundamental difference between the regimes put in place by the aforementioned Acts.

The Petitioner has also taken up the position in its written submissions that the Respondents have not placed any material to demonstrate that the appointment of the 3<sup>rd</sup> – 5<sup>th</sup> Respondents as members of the Board of Inquiry has been made by the Minister. While the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, in their Statement of Objections have confirmed that the appointment of the Board of Inquiry has been carried out in conformity with the provisions of the Act, it must be noted that the necessity to consider the said objection does not arise in view of the submission of the learned President's Counsel for the Petitioner that he is not challenging the appointment of the 3<sup>rd</sup> – 5<sup>th</sup> Respondents as members of the Board of Inquiry.

There are two matters that this Court wishes to advert to, prior to concluding.

The first is the fact that having obtained registration and Governmental sanction, thereby giving legitimacy to the affairs of the Trust, the Petitioner cannot and should not be allowed to prevent the Minister from initiating the processes that have been introduced by the legislature for safeguarding the financial integrity of organisations registered under the Act.

The second is the argument of the learned Counsel for the Respondents that this application is an abuse of process, in that since 2015, the Petitioner has scuttled all attempts to inquire into the affairs of the Trust, and that this has been done in spite of agreeing before this Court in the previous Writ application that the inquiry shall proceed. The learned Counsel for the Respondents drew the attention of this Court to the sequence of events commencing from November 2015, which this Court has

already adverted to, in support of the said submission. While this Court does not wish to engage on this issue, it is of the view that the Inquiry must be commenced as soon as possible, and that the Board of Inquiry must conclude the Inquiry expeditiously. This Court expects the Petitioner to co-operate in this regard, thus establishing his *bona fides*, and the position that he has presented to this Court that the complaint against the Trust has been actuated by malice borne towards him by his siblings and especially the 10<sup>th</sup> Respondent.

In the above circumstances, this Court therefore directs the 6<sup>th</sup> and 7<sup>th</sup> Respondents to make available to the Petitioner (a) a copy of the complaint made by the 10<sup>th</sup> Respondent, and (b) a copy of the statements recorded so far, four weeks prior to the recommencement of the inquiry. The Petitioner shall be entitled to submit a consolidated response to 'P16', if any, within three weeks from the receipt of the said documents. Upon recommencement of the inquiry, the Petitioner shall be entitled to be present when statements are recorded under oath before the Board of Inquiry.

Subject to the above, this Court does not see any legal basis to grant the Writs of Certiorari and Prohibition prayed for. This application is accordingly dismissed, without costs.

**Judge of the Court of Appeal**