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

In the matter of an application for the grant of mandates in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

McCallum Brewing Company (Private) Limited
Black Pearl Estate, Old Road, Wataraka, Meegoda.
Petitioner

Case No. CA (Writ) 469/2008

Vs.

1. Commissioner General of Excise
   Excise Department of Sri Lanka,
   No. 28, Staple Street, Colombo 02.

2. Hon. Attorney General
   Attorney General's Department, Colombo 12.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Romesh De Silva P.C. with Shanaka Coorey for the Petitioner

Anusha Samaranayake DSG for the Respondents

Written Submissions tendered on:

Petitioner on 14.12.2012, 21.01.2013, 31.05.2017, 25.07.2019 and 16.10.2019 (Only Authorities)

Respondents on 13.12.2012 and 31.05.2017

Argued on: 19.09.2019

Decided on: 18.12.2019

Janak De Silva J.

The Petitioner is a limited liability company duly incorporated in Sri Lanka under the company laws and is an associate of McCallum Breweries (Ceylon) Ltd.

The Petitioner is seeking a writ of certiorari to quash letter dated 04.03.2008 (P9) by which the 1st Respondent sought to recover interest from the Petitioner in terms of Rule (2) in the Schedule to the Excise Notification No. 744 (P3) on the outstanding excise duty.

Futility

The gravamen of the case of the Petitioner is that the 1st Respondent is seeking to recover penal interest due on the outstanding excise duty which is inter alia ultra vires the Excise Ordinance, without jurisdiction/in excess of jurisdiction, which cannot be charged by delegated legislation in view of Article 148 of the Constitution.

The learned DSG submitted that Rule 2 of Excise Notification No. 744 (P3) made by the Minister of Finance on 13.08.1985 stipulates that an interest of 3% per month is liable to be paid on excise duty not paid on time. Therefore, a preliminary objection was raised that the Petitioner cannot maintain this application without a prayer to quash P3 as P9 is only a letter setting out the details requested by the Petitioner.

The learned Presidents Counsel for the Petitioner responded that as P3 is a nullity, there is no need for it to be set aside or in the alternative the Petitioner is entitled in these proceedings to attack P3 collaterally. On the question of nullity, he relied on two judgments of this Court in *Ashokan v. Commissioner of National Housing* [(2003) 3 Sri.L.R. 179] and *Leelawathie and Another v. Commissioner of National Housing* [(2004) 3 Sri.L.R. 175] where Sripavan J. quotes with approval Lord Denning in *Mcfoy v. United Africa Co. Ltd.* [(1961) 3 All E.R. 1169 at 1172] where he said "You cannot put something on nothing and expect it to stay there, it will collapse".

However, in *Ashokan v. Commissioner of National Housing* (supra) the Petitioner specifically sought a quashing of A9 which was the decision that was held to be a nullity. In *Leelawathie and Another v. Commissioner of National Housing* (supra) Sripavan J. was not confronted with a situation of futility arising from the absence of any relief sought against a decision that was a nullity.

It is apposite to briefly set out at this point the meaning of nullity in Administrative Law. Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., South Asia Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):

> "The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problem arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. **Once its illegality is established, and if the courts are prepared to grant a remedy**, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as ever incapable of ever producing legal effects." (emphasis added)

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*, 9th Ed., Indian Edition, 281:

> "...the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings"

Prior to *Mcfoy v. United Africa Co. Ltd.*(supra), this approach was reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* [(1956) A.C. 736, 769-770] where he held:

> "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

In fact, Wade and Forsyth (supra page 305), states that the statement of Lord Denning in *Mcfoy v. United Africa Co. Ltd.*(supra) relied on by the Petitioner is not the correct position in law.

Wade and Forsyth, *Administrative Law*, (supra) page 304, after restating the above statement of Lord Radcliffe sets out the correct position as follows:

> "This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. **The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.** Lord Diplock spoke still more clearly [*F Hoffmann-La Roch and C AG v. Secretary for Trade and Industry* (1975) AC 295 at 366], saying that
>
> It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction." (emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court [*F Hoffmann-La Roche and Co. A G v. Secretary of State for Trade and Industry* (1975) AC 295]. However, this 'presumption of validity' exists pending a final decision by the court [Lord Hoffmann in *R v. Wicks* (1998) AC 92 at 115, Lords Irvine LC and Steyn in *Boddington v. British Transport Police* (1999) 2 AC 143 at 156 and 161, and 173-4].

This presumption applies to subordinate legislation as well. It is in this context that Lord Irvine LC in *Boddington v. British Transport Police* (1999) 2 AC 143 held:

> "The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its

legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever."

Accordingly, I reject the proposition of the learned President's Counsel for the Petitioner that as P3 is a nullity, there is no need for it to be set aside. Even if P3 is a nullity as alleged by the Petitioner, the 'presumption of validity' applies and it is to be considered as valid until and unless its legality is successfully challenged in appropriate proceedings.

In this context, what is meant by appropriate proceedings needs to be elaborated. An ultra vires administrative act can be challenged in two ways, Firstly, it can be challenged directly where for example a writ of certiorari can be sought to quash the illegal decision. Secondly, it can be challenged collaterally for example by way of defence to a criminal charge.

The Petitioner relies on the following extract from Clive Lewis, *Judicial Remedies in Public Law*, 4th ed., Sweet and Maxwell, 2011, page 206:

> "Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity where questions of validity become relevant".

In this application, the Petitioner is alleging that the demand for penal interest on the outstanding excise duty is ultra vires. That is the core of its case. The Petitioner has annexed to its petition the relevant Gazette (P3) on which the claim for penal interest is based but has not sought a quashing of the relevant part. In that context the Petitioner is not making a collateral challenge on P3 since P3 is the core of the Petitioner's case. An issue is not collateral if it is the central issue to be decided [*Wandsworth LBC v. Winder* (1985) AC 461].

Accordingly, I reject the position of the Petitioner that he is entitled to collaterally attack P3 in these proceedings.

In any event, in *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) 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 Petitioner has failed to pray for any relief against P3.

For all the foregoing reasons, I hold that the application of the Petitioner is futile and dismiss the application with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal