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

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

CA (Writ) Application No: 395/2020

Kitsen Sanjeewa Bandaranayake,
32/4, 6th Lane, Wimalewatta Road,
Mirihana, Nugegoda.

PETITIONER

Vs.

1. The Monetary Board of the
   Central Bank of Sri Lanka.

2. Professor W.D. Lakshaman,
   Governor of the Central Bank of Sri Lanka.

3. J.D.S. Nanayakkara,
   Director – Department of Supervision of
   Non-Bank Financial Institutions.

   1st – 3rd Respondents at
   No. 30, Janadhipathi Mawatha, Colombo 1.

4. Hon. Chamal Rajapaksha,
   State Minister of Internal Security,
   Home Affairs and Disaster Management,
   "Nila Medura", Elvitigala Mawatha,
   Narahenpita, Colombo 5.

5. Secretary,
   Ministry of Defence,
   15/5, Baladaksha Mawatha, Colombo 3.

6. Chandana Wickramaratne,
Inspector General of Police,
Police Headquarters, Colombo 1.

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

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**
Mayadunne Corea, J

Counsel: Pinsith Perera with Ms. Maheshi Gunasekara for the Petitioner

Milinda Gunatillake, Senior Deputy Solicitor General with Ms. Chaya Sri Nammuni, Senior State Counsel for the Respondents

Supported on: 10th February 2021

Decided on: 16th March 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner is a Chartered Accountant by profession. Having held several senior managerial positions in the Private Sector, the Petitioner had joined People's Leasing and Financing PLC, a subsidiary of People's Bank and a company listed on the Colombo Stock Exchange, in 2007. The Petitioner is presently holding the position of Senior Deputy General Manager (Operations) at the said Company.

The Petitioner states that in January 2015, a former employee of the said Company had made a complaint marked '**P1**' against its Chief Executive Officer. The said complaint had been investigated by the Financial Crimes Investigation Division (FCID) of the Sri Lanka Police. Pursuant to the said investigation, the 7th Respondent, the Hon. Attorney General had forwarded three indictments dated 28th August 2015 to the High Court of Colombo against the Petitioner and three others, under Case Nos. HC 8023/15, 8024/15 and HC 8025/15, charging them with having committed criminal breach of trust of monies belonging to the Company in a sum of Rs. 20,290,579.43, Rs. 38,886,833.45 and Rs. 5,048,431.19, respectively.

The Petitioner admits that all three indictments have been served on him and that at all times, he has been represented by an Attorney-at-Law. The learned Senior Deputy Solicitor General for the Respondents submitted that the trial in the said cases have commenced and that the evidence of Woman Police Constable K.G.S. Dhammika attached to the FCID has been recorded in Case Nos. HC 8023/15 and HC 8025/15.

The Petitioner states that while the trial in the said cases were proceeding, he came to know on or about 12th October 2020 that the 1st Respondent, the Monetary Board of Sri Lanka and the 3rd Respondent, the Director of the Department of Supervision of Non Bank Financial Institutions were contemplating the issuance of a direction against the Petitioner in terms of Section 21 of the Finance Business Act No. 42 of 2011. The provisions of Section 21 which are relevant to this application are re-produced below:

> *"A person shall be disqualified from being appointed or elected, as the case may be, as a director, chief executive officer, secretary or key management personnel of a finance company or from holding such post if such person-*
>
> *(e) (i) is being subjected to any investigation or inquiry in respect of an act of fraud, deceit, dishonesty or other similar criminal activity, conducted by the police, any regulatory or supervisory authority, professional association, commission of inquiry, tribunal, or any other body established by law, in Sri Lanka or abroad;*
>
> *(f) (i) is being subject to court proceedings for an offence involving an act of fraud, deceit, dishonesty or other similar criminal activity;"*

The Petitioner states that grave and irreparable loss and damage will be caused to the Petitioner if the 1st and 3rd Respondents are allowed to issue such a direction, as that would affect his livelihood and his reputation.

It is in the above factual circumstances that the Petitioner has filed this application, seeking a Writ of Prohibition preventing the 1st – 3rd Respondents from issuing any direction to suspend the Petitioner from his employment at People's Leasing and Finance PLC. During the course of his submissions, the learned Counsel for the Petitioner submitted that although he is seeking the above relief, he is not

challenging the power of the 1st and 3rd Respondents to issue such a direction in terms of Section 21 of the said Act. In my view, the 1st and 3rd Respondents would not be acting illegally if it issues such a direction as the Petitioner presently stands indicted before the High Court of Colombo in the aforementioned three cases. In the absence of any illegality on the part of the 1st and 3rd Respondents in issuing such a direction, the Petitioner would not be entitled to a Writ of Prohibition against the said Respondents.

The Petitioner is also seeking the following relief:

a) A Writ of Certiorari to quash the use of 'Crime note pad of the Financial Crimes Investigation Division' marked as '**P2d**' – '**P2f**';

b) A Writ of Prohibition preventing the use of 'Crime note pad of the Financial Crimes Investigation Division' in any judicial proceedings initiated under the provisions of the Code of Criminal Procedure Act No. 15 of 1979, as amended (the Act);

c) A Writ of Prohibition preventing the 6th Respondent, the Inspector General of Police and the 7th Respondent from using the 'Crime note pad of the Financial Crimes Investigation Division' in any judicial proceedings initiated under the provisions of the Code of Criminal Procedure;

d) A Writ of Prohibition to prevent the 6th Respondent or any of his subordinates taking action in any manner in the proceedings before the High Court Colombo in Case Nos. HC 8203-8205/15.

The learned Counsel for the Petitioner submitted that he is challenging the legality of the establishment of the FCID, and thereby the legality of utilising at the trial, the material that has been collected by the FCID during the course of the investigation, including the Crime note pad of the Officers of the FCID. He was candid when he stated that if successful with this application, the prosecution will not be able to proceed with the trial in the absence of the said material, and would thus be compelled to *crash* the case, resulting in a discharge of the Petitioner from the above cases. The learned Counsel for the Petitioner submitted that in the absence of any criminal proceedings against the Petitioner, the 1st and 3rd Respondents will not have

any legal basis to issue any direction against the Petitioner. It is therefore clear that the Petitioner is trying a circuitous route to prevent and/or stultify any direction that may be issued against him by the 1st and 3rd Respondents.

I shall now consider whether the Petitioner is entitled to any of the aforementioned relief.

The Petitioner states that by a memorandum tendered to the Cabinet of Ministers on 12th February 2015, the then Prime Minister had proposed the establishment of the FCID, under the direct supervision of the 6th Respondent. The said memorandum has been approved by the Cabinet of Ministers. The Petitioner states that the 6th Respondent had thereafter sought and obtained the approval of the Minister of Public Order for the establishment of the FCID.[1] Having done so, the 6th Respondent had published in the Gazette the notification in terms of Section 55 of the Police Ordinance announcing the establishment of the FCID.

The learned Counsel for the Petitioner submitted that in terms of Section 2 of the Act, a 'Police Station' means any post declared generally or specially by the Minister in charge of the subject of Defence to be a Police Station, and includes a mobile police post, the Criminal Investigation Department and any Bureau of Investigation. He submitted that the FCID has not been declared as a Police Station by the Minister of Defence and that the FCID is not a Bureau, and for that reason, the FCID cannot maintain an Information Book as provided for in Section 109(3) of the Act. The learned Counsel for the Petitioner therefore submitted that the notes of investigation maintained by the FCID in the form of a *Crime Note Pad* cannot be used against the Petitioner in the trials that are pending against the Petitioner.

The learned Senior Deputy Solicitor General submitted that if it was the position of the learned Counsel for the Petitioner that the establishment of the FCID is illegal, the Petitioner should have prayed for a Writ of Certiorari to quash the Order by which the FCID has been established. It is admitted that this has not been done.

I observe that the evidence of the Police Officer attached to the FCID who carried out the investigation has commenced on 13th February 2020 in Case No. 8023/15, and on 21st October 2020 in Case No. 8025/15, which incidentally is one day after the filing

[1] Vide letters dated 13th February 2015, marked 'P7' and 'P8', respectively.

of this application. If the Petitioner wished to challenge the legality relating to the establishment of the FCID, that could have been done before the High Court. While this has not been done, the witness has not even been cross examined in the High Court, with the Attorney-at-Law for the Petitioner who appeared in the High Court informing the Hon. Trial Judge that he will not be cross examining the said witness.

The fact that the Petitioner has opted not to raise this matter before the High Court is a further indication that this belated challenge to the legality of the FCID is being made for a collateral purpose and amounts to an abuse of the process of Court. It is clear that the Petitioner has not invoked the jurisdiction of this Court with clean hands. I am therefore in agreement with the submission of the learned Senior Deputy Solicitor General that proceeding to consider the argument of the learned Counsel for the Petitioner with regard to the legality of the establishment of the FCID would be an exercise in vain and that the application of the Petitioner is misconceived in law.

The learned Senior Deputy Solicitor General for the Respondents also submitted that the Petitioner is guilty of delay. It is admitted that this application has been filed in October 2020. The material that was relied upon by the prosecution has been listed in the said indictments served on the Petitioner in 2015. If the Petitioner was challenging the legality of the use of such material by the prosecution, the Petitioner ought to have come before this Court at the time the indictment was served on the Petitioner, or at least soon after the evidence of the Police Officer commenced on 13th February 2020. The Petitioner has done neither nor has the Petitioner explained the delay in invoking the jurisdiction of this Court.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay. Where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies such as Writs of Certiorari and Mandamus.

In **Biso Menika v. Cyril de Alwis**[2] Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

[2][1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

"***A Writ of Certiorari is issued at the discretion of the Court****. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed*." (emphasis added)

In **Seneviratne v. Tissa Dias Bandaranayake and another**[3], the Supreme Court, adverting to the question of long delay, held as follows:

"*If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,*[4] *and for other reasons refuses to assist those who sleep over their rights and are not vigilant*."

In **Issadeen v. The Commissioner of National Housing and others**[5] Bandaranayake J, dealing with a belated application for a Writ of Certiorari held as follows:

"*It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In*

[3] [1999] 2 Sri LR 341 at 351.
[4] For the law assists the watchful, (but) not the slothful.
[5] [2003] 2 Sri LR 10 at pages 15 and 16.

fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy".

I am therefore in agreement with the submission of the learned Senior Deputy Solicitor General that the Petitioner is guilty of delay, the cause for which has not been explained, and therefore is not entitled to any discretionary relief.

The learned Senior Deputy Solicitor General for the Respondents drew the attention of this Court to Sections 394 and 456A of the Act. While in terms of Section 394, "*All persons appearing before the High Court against whom an indictment is preferred shall, unless the contrary is shown, be deemed to have been brought before the Court in due course of law and (subject to the provisions herein contained) shall be tried upon the indictment so preferred*", Section 456A provides that, "*The failure to comply with any provision of this Code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice.*"

He submitted that all Officers attached to the FCID were Police Officers and that even if the argument of the learned Counsel for the Petitioner is accepted, that does not affect the ability of the FCID Officers to give evidence relating to the investigations conducted by them against the Petitioner. While this submission has merit, the necessity for me to consider it does not arise in view of the aforementioned conclusion reached by me.

In the above circumstances, I do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal