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

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

CA/WRIT/491/2021

1. Design Team 3 (Private) Limited
   No. 10-03,
   10, Jalan Basar,
   Singapore,
   208787.

2. Archt. Athula Amarasekera
   No. 36,
   Chapel Lane,
   Nugegoda.

Petitioners

Vs.

1. Urban Development Authority
   06th and 07th Floors,
   'Sethsiripaya',
   Battaramulla.

2. Chairman
   Urban Development Authority,
   06th and 07th Floors,
   'Sethsiripaya'
   Battaramulla.

3. Mr. N.P.K. Ranaweera
   Director-General,
   Urban Development Authority,
   06th and 07th Floors,
   'Sethisiripaya',

Battaramulla.

4. Siri Nimal Perera,
   Secretary,
   Ministry of Urban Development and Housing,
   17th and 18th Floor,
   Suhurupaya,
   Battaramulla.

5. Mr. P.D.K.A. Wilson,
   Chief Fire Officer,
   Fire Service Department,
   T.B. Jayah Mawatha,
   Colombo 02.

6. Hon. Mahinda Rajapakse
   Prime Minister and Minster,
   Ministry of Urban Development and Housing,
   17th and 18th Floor,
   Suhurupaya,
   Battaramulla.

7. Indocean Developers Private Limited
   No. 127,
   Sir James Peiris Mawatha,
   Colombo 02.

8. Shapoorji Pallonji Lanka Limited
   No. 3,
   Geethanjalee Place,
   Colombo 03.

9. S.M. Madawalagama
   Chairman,
   Committee on fire safety procedures adopted at the Altair Project,
   Office of the special authorized officer for the Altair Project Colombo 02,
   No. 121A, Sir James Peiris Mawatha,
   Colombo 2.

10. L.L.N.A Samarasinghe
    Member,
    Committee on fire safety procedures
    adopted at the Altair Project,
    Office of the special authorized officer
    for the Altair Project Colombo 02,
    No. 121A, Sir James Peiris Mawatha,
    Colombo 2.

11. M.P. Ranathunga
    Member,
    Committee on fire safety procedures
    adopted at the Altair Project,
    Office of the special authorized officer
    for the Altair Project Colombo 02,
    No. 121A, Sir James Peiris Mawatha,
    Colombo 2.

12. Dr. Ravihansa Chandrathilaka
    Member,
    Committee on fire safety procedures
    adopted at the Altair Project,
    Office of the special authorized officer
    for the Altair Project Colombo 02,
    No. 121A, Sir James Peiris Mawatha,
    Colombo 2.

13. P.N.R. Fernando
    Member,
    Committee on fire safety procedures
    adopted at the Altair Project,
    Office of the special authorized officer
    for the Altair Project Colombo 02,
    No. 121A, Sir James Peiris Mawatha,
    Colombo 2.

14. Lalith Wijerathna
    Member,
    Committee on fire safety procedures
    adopted at the Altair Project,
    Office of the special authorized officer
    for the Altair Project Colombo 02,
    No. 121A, Sir James Peiris Mawatha,
    Colombo 2.

15. Eng. W.C. Soysa
Chartered Engineer,
Project Director-SLP Engineering
Lanka (Pvt) Ltd,
No. 32B, Jambugasmulla Road,
Nugegoda.

Respondents

Before **:**Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:**Sanjeewa Jayawardena PC with Suren Gnanaraj, Rukshan Senadeera for the Petitioners.

Sumathi Dharmawardena PC, ASG with Chaya Sri Nammuni DSG, Monahara Jayasinghe DSG and Sabrina Ahamed SC for the 1st, 2nd, 3rd, 4th, 6th, 9th to 14th Respondents.

Eshanthi Mendis for the 5th Respondent.

Monoj Bandara with H. Gamage and Nayomi Chethana for the 7th Respondent.

Romesh De Silva, PC with Niran Ankatell for the party sought to be intervened.

Argued on **:**14.12.2021, 08.02.2022, 09.02.2022 and 08.03.2022

Decided on **:**06.05.2022

Sobhitha Rajakaruna J.

The 1st Petitioner ('the Architect') and the 7th Respondent ('Developer') who is the Developer of the Altair project ('Project') which comprises of a high-rise vertical tower and a sloping tower located at Sir James Peiris Mawatha, Colombo 2, entered in to an agreement, marked 'P6' in respect of the said Project. The 2nd Petitioner is the Chief Executive Officer and founder of the 1st Petitioner Company and he was the designated qualified person for Architecture for the Project in terms of the said agreement. There is no written contract between the 2nd Petitioner and the Developer. As per the said

agreement, any dispute under the agreement should be settled initially by mediation and failing which such dispute can be resolved in terms of the Rules framed under the Singapore International Arbitration Center 2010.

The Petitioners in this application seek *inter alia* for a mandate in the nature of a writ of Prohibition, prohibiting 1st to 3rd Respondents from accepting and/or acting upon a purported certificate submitted by a Chartered Architect other than the Petitioners for the purpose of issuing the Certificate of Conformity ('CoC') in respect of the said Project. However, after filing this application, the CoC has been issued by the 1st Respondent-Urban Development Authority ('UDA') and this Court temporarily suspended the said CoC until Court looks in to the questions involved in this application.

In view of the grounds of urgency urged by all learned Counsel appearing for several parties in this case, the Court as far as possible gave priority to this matter despite of the busy schedule of this Court. This Court at one occasion fixed this matter to be taken up for support even during late evening (from 2.30pm to 6.00pm) in order to accommodate the learned Counsel. As well illustrated in the Journal Entries, this matter has been fixed for hearing on dates with short intervals.

All learned Counsel for several parties concluded their submissions on 08.03.2022. The learned President's Counsel for the Petitioner was supposed to make his reply submissions on 22.03.2022, on which day the learned President's Counsel for the Petitioners and the learned Counsel for the Developer drew the attention of Court to the contents of a joint motion dated 21.03.2022 filed on behalf of the Petitioners and the Developer. On perusal of the said motion, it appears that the Petitioners and the Developer have entered in to a written settlement agreement on 20.03.2022, a date which is only 12 days away from the last day of submissions in this case. On 31.03.2022, the learned President's Counsel for the Petitioners moved to withdraw this application based on the fact that the payments have been duly received in terms of the settlement agreement as elaborated in the motion dated 24.03.2022. At this juncture, the learned Additional Solicitor General ('ASG') for the 1st to 4th, 6th, 9th to 14th Respondents and the learned Counsel for the 5th Respondent moved that costs be awarded in favour of the respective Respondents and indicated that they had no objections in withdrawing the application subjected to costs. The learned ASG raised the questions on costs apart from the preliminary objections raised by him on the purported defective affidavit of the Petitioners and also on the question of not having necessary parties before Court.

The only question that is in issue at this stage is whether the Court should award costs to be paid by the Petitioners to the 1st to 6th and 9th to 14th Respondents.

When dealing with costs, I need to draw my attention to Section 211 of the Civil Procedure Code although it is not directly applicable to applications on judicial review. The said provisions give a discretionary power to the Civil Court with regard to costs in all actions. The said section 211(1) reads;

> "(1) The court shall have full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power:
> Provided that if the court directs that the costs of any application or action shall not follow the event, the court shall state its reasons in writing."

By virtue of the its section 211(2), without prejudice to the generality of the powers of the court under the above subsection (1), the court may give costs to a party, in the case of any frivolous or vexatious action or application or defence by the other party or in the case of expense to such party, occasioned by the delay or default of the other party or by the making of any unnecessary or unreasonable application by the other party.

I am of the view that this Court can be guided, in the applications for judicial review, by the rationale of the said section 211 of the Civil Procedure Code in awarding costs. Therefore, the question that arises here is to examine whether the instant application of the Petitioners is frivolous/vexatious/unreasonable or misconceived in law.

The learned ASG pointing out to paragraphs 63 and 64 of the Petition of the Petitioner ('Petition'), submits that serious allegations which are utterly false have been raised against the 4th Respondent who is the Secretary to the Ministry of Urban Development and Housing. The learned ASG relying upon the judgement of ***Ranmenike vs. Senaratne (2002) 3 Sri. L.R. 274*** claims that 'exemplary costs' which is to penalize the parties who had made false declarations to Court should be awarded in favour of the 1st to 4th, 6th and 9th to 14th Respondents. The learned Counsel for the 5th Respondent also moves for costs based on the damages caused to the good reputation of the 5th Respondent by way of such false allegations.

Firstly, it is important to note that the Petitioners have filed this application in their own interest as well as in the purported overriding public interest (*Vide*-paragraph 6 of the

Petition). The joint motion dated 21.03.2022 and the motion dated 24.03.2022 clearly envisaged that the settlement reached between the Petitioners and the Developer includes terms and conditions of remitting payments to be made by the Developer to the Petitioners. Eventually, a sensible doubt creates in a reasonable mind as to how a public interest litigation could be settled among the parties by accepting a monetary incentive. The forceful submissions made by the learned Counsel for the Petitioners and for the Developer against each other until 08.03.2022 are still echoing in our ears. As I have mentioned earlier, within 12 days from the last day of such forceful submissions, a public interest litigation has come to an end by the Petitioners accepting a monetary emolument. Neither the Petitioner nor the Developer was keen on tendering a copy of the said terms of settlement to Court even at the point of rigorous applications for costs are being made by the aforesaid Respondents.

Now I turn to the pleadings of the Developer and the submissions made by the learned Counsel for the Developer whose main contention was that;

a) the Petitioners' only claim was about the fees claimed by the 1st Petitioner, but there was no outstanding invoice payable;
b) in a letter dated 03.10.2021 marked 'P42', the Petitioners have threatened new Architects that in case of engagement of other Architects prior to settlement of Petitioner's fees, disciplinary actions would be taken against such new Architects;
c) in a letter dated 22.09.2021 marked 'P35', the Petitioners proposed to the Developer to mutually terminate the contract and to appoint a new Architect to certify the building after settlement of their fees;
d) by a letter dated 03.10.2021 copied to the Sri Lanka Institute of Architects, the Petitioners objected to appointment of a new Architect for the Project on the sole basis that their fees have not been settled (a copy of the said letter has been annexed to the limited statement of objections of the Developer marked as 'D1');
e) the Petitioners have now sought to contrive a purported legal position before this Court in order to abuse the process of Court to achieve their commercial ends;
f) the relationship between the Petitioners and the Developer is purely contractual and/or commercial in nature and highly contentious litigation and other commercial disputes exists between the parties.
(*Vide*-paragraphs 2 and 3 of the limited statement of objections of the Developer) (Emphasis added)

The Court observes that the 1st Petitioner has recoursed to an alternative dispute resolution process as per the document marked 'P40' calling for mediation according to the contractual provisions against the decision of the Developer to terminate all contracts/agreements between the Developer & the 1st Petitioner and/or 2nd Petitioner. Moreover, the Developer has instituted action against the Petitioners in the District Court of Colombo (in case bearing No. 328/2021/DSP) seeking *inter alia*, a declaratory judgement that *'post termination of contracts (between the Developer and the 1st Petitioner) the above Petitioners have no right to interfere with or obstruct any of the processes followed by the Developer in connection with the said Project'*. The learned District judge has already issued certain interim orders also in that case against the Petitioners of the instant application.

It emanates, based on the lengthy submissions made by all the learned Counsel and on the pleadings, that the disputes between the Petitioners and the Developer have arisen after the Developer terminating all the contracts/agreements, the Developer had with the 1st Petitioner and/or the 2nd Petitioner. This position is well evinced by the fact that the Petitioners compressing the allegations made against the aforesaid Respondents and simmering down to accept a monetary emolument as a term of settlement in lieu of the contractual disputes among the Petitioner and the Developer.

The 2nd Petitioner by way of his Affidavit filed along with the Petition claims that the Developer has taken steps to obtain the CoC in *a fraudulent, illegal and surreptitious manner in blatant disregard of the law and the safety and security of the buildings, the future occupants and other users* (*Vide*-paragraphs 9 and 11 of the Affidavit). The 2nd Petitioner further claims that in the event the UDA issues the CoC to the Developer *a grave and irreparable loss and damage to human life and property will be caused*. He further submits in his Affidavit that there are *serious defects in the building and accordingly, no such CoC can be issued unless all the preconditional aspects and requirements including the most critical aspect of the fire safety of the building are being fulfilled* (*Vide*-paragraphs 17 and 50 of the Affidavit). Also, the 2nd Petitioner asserts that *UDA should not issue the CoC until complete investigation and rectifications have been carried out and until the proper fire safety measures are implemented*.

The above assertions on behalf of the Petitioners, in my view, clearly enrich the submissions made by the learned ASG and the learned Counsel for the 5th Respondent upon the question as to how a public interest litigation could be purportedly resolved without any evidence of rectifying the various errors/allegations such as defects in the fire

protection system. The Court also observes that the purported errors highlighted during the submissions of the learned Counsel could not be rectified within a very short period of time namely within 12 days from the last date of forceful submissions of the parties. Further, it appears that the litigation between the Petitioners and the Developer in the District Court also revolves around the aforesaid termination of the contracts between the 1st Petitioner and the Developer.

Therefore, I am inclined to accept the contention of the learned ASG as well as the learned Counsel for the Developer and the 5th Respondent that the relationship between the Petitioners and the Developer is clearly contractual and/or in commercial nature which prevents the Petitioners to seek any relief in an application for judicial review only by making the public authorities such as UDA a party. I am of the view that filing a judicial review application against the state parties including the UDA in order to resolve a dispute arising out of a contract between the 1st Petitioner (and/or the 2nd Petitioner) and the Developer is unreasonable.

The learned ASG strenuously argued that the allegations raised against the UDA and its officials including the 4th Respondent are false and unreasonable. In paragraph 63 of the Petition, the Petitioner alleges that the actions/conduct mentioned therein *demonstrate the palpable mala fides on the part of the 4th Respondent who was also hand in glove with the Developer*. In paragraph 64 of the Petition, it is stated about *a machiavellian agenda on the part of the 4th Respondent which misleads the purchasers of the apartments that the subject buildings were safe for occupancy*. I have very carefully gone through the limited statement of objections filed on behalf of the 1st to 3rd Respondents and also on behalf of the 5th Respondent and the submissions of the learned ASG during the hearing of this application who has contended that all the requirements to issue a CoC under the law have been fulfilled. The learned ASG made a strong complaint that the Petitioners and the Developer have entered in to a settlement in respect of their commercial disputes among them, without any notification to the UDA and to the other state parties.

In the light of the above I am convinced and I hold that the application of the Petitioner is vexatious in respect to the 1st to 6th and 9th to 14th Respondents. I take the view that, among other grounds that may be taken in to account by a supervisory Court, the reason of filing an application seeking for a writ on a dispute arisen out of a clear written contract without a reasonable ground, causing unreasonableness, whilst an action in the District Court is

pending on similar disputes would amount to vexing the relevant Respondents. Having considered that this application is vexatious and/or unreasonable on the part of the above Respondents, I now advert to consider the 'exemplary costs' urged by the learned ASG and the learned Counsel for the 5th Respondent.

Shirani Thilakawardane J. in ***Ranmenike vs. Senaratne (2002) 3 Sri. L.R. 274*** referring to the case of ***K. Leela Violet v. I. P. Vidanapathirana and Others (1994) 3 Sri. L.R. 377*** (decided by Sarath N. Silva J.) observes that the original concept of 'exemplary cost' has come from the Indian case of ***Sebastian M. Hongray vs. Union of India (1984) AIR SC 1026***. The Court in that case considered the charges of civil contempt which could have been preferred against the Respondents in dealing with exemplary costs. Such exemplary costs have a different identification than the Bills of Costs and Taxation of Costs mentioned in Supreme Court (Fess and Costs) Rules 1978 (Gazette Extraordinary No.12/11 dated 30.11.1978).

It is important to note the statement made by Justice Bowen (*in Copper vs. Smith [1884]*) where he has said "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs". The Indian Supreme Court has dealt extensively with the issue of awarding costs in the celebrated judgements of ***Ashok Kumar Mittal vs. Ram Kumar Gupta (2009) 2 SCC 656, Vinod Seth vs. Devinder Bajaj (2010) 8 SCC 1, Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust [JT 2011 (12) SC 435], Ramrameshwari Devi vs. Nirmala Devi (2011) 8 SCC 249.*** The common thread running through all these cases is the reiteration of three salutary principles:

i. costs should ordinarily follow the event;

ii. realistic costs ought to be awarded keeping in view the ever increasing litigation expenses; and

iii. the cost should serve the purpose of curbing frivolous and vexatious litigation

(*Vide*-Law Commission of India, Costs in Civil Litigation, Report No. 240, May 2012)

The above three categories are very much suitable to be adopted as the principles on the law of costs.

In ***Public Interest Law Foundation vs. Central Environmental Authority and others, CA/Writ/527/2015 (decided on 24.02.2020)***, Samayawardhena J. held as follows;

> *"Public interest litigation is a hallowed concept. Nevertheless, public interest litigation shall not be converted to public vexatious litigation. Frivolous and vexatious applications cost the judiciary and Government agencies dearly. Such applications inter alia impede the efficacy of the Courts by detracting from the limited time and resources available to devote to cases which legitimately deserve attention. Public interest litigation shall be a boon not a bane."*

In the circumstances, I am of the view that fixing of costs is discretionary exercise of the Court. Therefore, I take the view that the application made on behalf of the 1st to 4th, 6th and 9th to 14th Respondents is just and reasonable under the circumstances of this matter. In the light of my above findings, this Court awards a sum of Rs.500,000.00 to be paid by the Petitioners (jointly and severally) to the 1st Respondent and a sum of Rs.250,000.00 to be paid by the Petitioners (jointly and severally) to the Secretary Ministry of Urban Development and Housing.

Although the 5th Respondent also moves for costs, he has categorically stated in his limited statement of objections that there were no allegations made or reliefs sought against him in this application. However, apart from awarding additional costs in the nature of exemplary costs, the Court should also be empowered, in my view, to impose punitive costs for mismanaging in utilization of the resources of the Court by filing an application which is unreasonable, frivolous or vexatious and also by selecting a wrong forum for litigation. Therefore, I award a sum of Rs.100,000.00 to be paid by the Petitioners (jointly and severally) to the 5th Respondent who is a public body as his costs for litigation.

I am of the view that the above costs awarded by this Court are reasonable and proportionate under the circumstances of this case. I am influenced by the fees structure enumerated in the agreement marked 'P6' in apportioning the costs. Though the monetary transactions taken place between the Petitioners and the Developer are not known to Court, the professional fee for the Architect in terms of the said agreement is US Dollars 506,000 which is payable in Singapore.

The application of the Petitioner for the withdrawal of the instant application is allowed subject to the payment of the above costs awarded by this Court.

I need to thank the learned President's Counsel for the Petitioner and the other learned Counsel for the Respondents, who appeared on the instructions of their respective clients, for the assistance given to Court at the hearing stage in view of getting this matter concluded expeditiously.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal