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 Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Vasudeva Nanayakkara,
   Member of Parliament,
   Ratnapura District,
   No. 49/1/1, Vinayalankara Mawatha,
   Colombo 10.

PETITIONER

CA No. CA/Writ/0370/2019

v.

1. Hon. Sagala Ratnayaka**,**
   Minister of Ports and Shipping and Southern Development,
   Ministry of Ports and Shipping and Southern Development,
   No. 19, Chaithya Road,
   Colombo 01.

1A. Hon. Johnston Fernando,
   Minister of Ports and Shipping,
   Ministry of Ports and Shipping,
   No. 19, Chaithya Road,
   Colombo 01.

2. Admiral Sirimevan Ranasinghe,
Secretary to the Ministry of Ports and Shipping and Southern Development,
Ministry of Ports and Shipping and Southern Development, No. 19,
Chaithya Road,
Colombo 01.

2A. Mr. M. M. P. K. Mayadunne,
Secretary to the Ministry of Ports and Shipping,
Ministry of Ports and Shipping,
Chaithya Road,
Colombo 01.

2B. Mr. U. D. C. Jayalal,
Secretary to the Ministry of Ports and Shipping,
Ministry of Ports and Shipping,
Chaithya Road,
Colombo 01.

3. Mr. Ajith Wickrama Seneviratne,
Director General of Merchant Shipping,
Ministry of Ports and Shipping,
1st Floor, Bristol Building,
43-89, York Street,
Colombo 01.

4. Hon. Mangala Samaraweera,
Minister of Finance and Mass Media,
Ministry of Finance and Mass Media,
The Secretariat,
Lotus Road,
Colombo 01.

4A. Hon. Mahinda Rajapaksa,
Minister of Finance,
Ministry of Finance,
The Secretariat,

Lotus Road,
Colombo 01.

4B. Hon. Basil Rajapaksa,
Minister of Finance,
Ministry of Finance,
The Secretariat,
Lotus Road,
Colombo 01.

5. Mr. Kavan Ratnayaka,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

5A. General (Rtd) Daya Ratnayake,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

5B. Dr. Prasantha Jayamanna,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

6. Hayleys Advantis Limited,
1st Floor, Thurburn Wing,
400, Deans Road,
Colombo 10.

7. McLarens Investments (Pvt) Limited,
284, Vauxhall Street,
Colombo 02.

RESPONDENTS

BEFORE	:	M. Sampath K. B. Wijeratne J. & Wickum A. Kaluarachchi J.
COUNSEL	:	Faisz Musthapha P.C., with Faiszer Musthapha P.C. and Akeil Deen for the Petitioner. M. Gunathilleke P.C. ASG, for the 1st to 5th Respondents. Dr. Harsha Cabral, P.C., with Ruwantha Coorey for the 6th Respondent. Sanjeewa Jayawardena P.C., with Dilumi de Alwis for the 7th Respondent.
SUPPORTED ON	:	09.03.2023
DECIDED ON	:	15.09.2023

M. Sampath K. B. Wijeratne J.

Introduction

When this matter came up on 9th March 2023, for submissions by the learned President's Counsel for the Petitioner in support of the application to issue formal notice to the Respondents, the learned President's Counsel for the 6th Respondent raised a preliminary objection regarding the maintainability of this application. When the matter next came up on the 22nd of June 2023, all parties moved to tender written submissions regarding the objection. It was also agreed that the Respondents should tender their submissions first, and the Petitioner should file a written submission in response. Accordingly, the 1st to 5th, 6th, and 7th Respondents filed their written submissions and the Petitioner filed his reply written submission. Thereafter, the matter was fixed for the Order of Court.

Analysis

The Petitioner instituted these proceedings seeking *inter alia*, to '*grant and issue a Writ of mandamus directing the 1st Respondent to act in terms of Section 28 (1) (a) read with Section 28 (2) of the Merchant Shipping Act No.52 of 1971 (as amended) and declare it an offence for any person either as Principle or agent to enter into a contract or to be or continue to be a member of or engaged in any combination in relation to the carriage of goods by sea to and from Sri Lanka in restraint of or with intent to restrain such carriage of goods by sea and prescribe penalties and other punishments for such offence within a period of Three (03) months or such other period as the Court may determine*;'

and also to '*grant and issue a Writ of Mandamus directing the 1st Respondent to act in terms of Section 28 (1) (b) read with Section 28 (2) of the Merchant Shipping Act No. 52 of 1971 (as amended) and declare it an offence for any person to monopolize, or to combine or conspire with any other person to monopolize, any part of the trade-in relation to the carriage of goods by sea to and from Sri Lanka and prescribe penalties and other punishments for such offence within a period of Three (03) months or such period as the Court may determine.*'

As it was correctly submitted by the 1st to 5th Respondents, the Petitioner sought writs of *mandamus,* directing the Minister to make Regulations and prescribing the Regulations that the Minister should make.

The relevant parts of Section 28 (1) and (2) of the Merchant Shipping Act No.52 of 1971 (hereinafter sometimes referred to as 'the Act') read thus;

> 28 (1) *'The Minister **may,** in accordance with the provisions of sub-section (2,) **if he deems fit,***
>
> *(a) – (e) (...)*
>
> (2). ... ***may** make Regulations for <u>giving effect to the provisions of this Section</u> and related matters.'* (emphasis added)

Accordingly, the Minister has the power to make subsidiary Legislation in the form of Regulations, to give effect to the provisions of Section 28 of the

Merchant Shipping Act and related matters. The Regulations that need to be made are defined in Sub Sections (a) to (e) of Section 28 (1).

The learned President's Counsel for the 1st to 5th Respondents argued that in view of the aforementioned wording in Section 28, the intention of the Legislature is, while specifying the type of Regulations that should be made, to leave the discretion with the Minister to decide whether such Regulations should be made or not. In support of the above contention, the learned Additional Solicitor General, President's Counsel, for the 1st to 5th Respondents relied on the words '*The Minister may'* and *'if he deems fit'* in Section 28 (1) of the Act. He contended that the Legislature deliberately opted not to use the word *'shall'* in Section 28. Moreover, it was argued that the Legislature, by introducing the words *'if he deems fit'* irrefutably leaves the discretion of making Regulations with the Minister.

In response to the submissions made by the Respondents to the effect that the discretion of making Regulation has been left to the Minister by the Legislature, the Petitioner cited the following from Wade where the question of 'when *may* means *must*' was considered. Professor Wade[1] states;

'The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. ***But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory.*** *This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case…'* (emphasis added)

N.S. Bindra in his treatise titled *'Interpretation of Statutes'* states as follows regarding the fundamental rules of interpretation of statutes[2]:

'First, the literal rule that, if the meaning of a section is plain, it is applied whatever the result; second, the 'golden rule' that the words should be given their ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the instrument.'

[1] Administrative Law, 10th Edition, H.W.R. Wade and C.F. Forsyth, p. 196.
[2] Twelfth Edition, at pp. 314 and 316.

N.S. Bindra states as follows regarding the word '*may'* used in a statute[3];

'It is well-settled that the use of the word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word "may", the court has to consider various factors, namely, the object and the scheme of the Act, the context, and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well-settled that where the word "may" involve a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words a directory significance would defeat the very object of the Act, the word "may" should be interpreted to convey a mandatory force. As a general rule the word 'may' is permissive and operative to confer discretion; and especially so, where it is used in juxtaposition to the word "shall", which ordinarily is imperative as it imposes a duty. Cases however, are not wanting where the words "may", "shall", and "must" are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose, and effect. The distinction reflected in the use of the word "shall" or "may" depends on the conferment of power. Depending upon the context, "may" does not always mean "may". May is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes a duty to exercise. If it appears to be the settled intention of the legislature to convey the sense of compulsion, as where an obligation is created, the use of the word "may" will not prevent the court from giving it the effect of compulsion or obligation.

In the case of *Anulawathie Menike v. Abeyratne and others* (S.C.),[4] it was observed that *'It is well known that the use of the word "may" in a statutory*

[3] *Ibid*, pp. 447, 448.
[4] SC Appeal No. 29/2009.

provision with regard to taking action under that statutory provision, means that the right given to take that action is permissive and optional and not mandatory or compulsory. Thus, Maxwell [Interpretation of Statutes 12th ed. at p. 234] states "In ordinary usage "may" is permissive and "must" is imperative, and, in accordance with such usage, the word "may" in a statute will not generally be held to be mandatory. In this regard, Maxwell cites COOPER vs. HALL [1968 1 WLR 360 at p.364] where Lord Parker CJ held that regulations which provided that an Authority "may" act in a particular manner were "purely permissive". Similarly, Bindra [Interpretation of Statutes 7th ed. at p.1087] states the word "may" is "prima facie enabling and permissive.". Bindra cites Venkataramana Rao J in RAJAH of VIZIANAGARAM vs. SECRETARY OF STATE [AIR 1937 Mad. 51 at p.77] who observed "The section says `may'. It is prima facie enabling and permissive. Generally, when coupled with a duty, it is construed as obligatory.". Venkataramana Rao J cited the well-known words of Lord Cairns CJ in JULIUS vs. LORD BISHOP OF OXFORD [1880 5 AC 214 at p.222] that when words such as "may" and "it shall be lawful" are used in a statute "They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power."'

Accordingly, it is clear that the directory and mandatory effect of the word *'may'* depend on the language used in the statute under consideration and the object of the statute.

However, the words *'if he deems fit'* cannot be taken out of the context of the word *'may'* in this instance. In my view, the word '*may'* in Section 28 (1) of the Act is subject to the qualification that the Regulations may be made by the Minister '*if he deems fit'*. It is important to note that in Sections 41, 44, 126, and 127 of the same Act, the Legislature has used the word *'may'* only. If the word '*may'* in Section 28 is interpreted to mean *'shall',* the subsequent words '*if he deems fit'* become redundant. It is a well-established theory of interpretation that the Legislature does not waste words or say anything in vain[5]. Consequently, the discretion as to whether such Regulations should be made or not is left entirely to the Minister.

[5] *Stassen Exports Limited v. Brooke Bond (Ceylon) Limited and another,* (1990) 2 Sri. L.R. 63 at p.85.

As such, I am of the firm view that the word *'may'* in Section 28 is permissive and not obligatory.

It was also argued by 1st to 5th Respondents that in this writ application, the Petitioner seeks to take away the discretion vested in the Minister by seeking a writ of *mandamus* directing the Minister to make Regulations that the Petitioner believes are appropriate. Nevertheless, I am not inclined to accept the above submission. The prayers (b) and (c) of the Petition in which the Petitioner prayed for the writs of *mandamus* are clearly in line with Section 28 (1) (a) and (b) of the Act. Therefore, what the Petitioner seeks is to promulgate legislation keeping in line with the aforementioned sub-Sections 28 (1) (a) and (b) and not in the form the Petitioner thinks fit.

Be that as it may, the Petitioner submitted that in the Landmark case of *Padfield v. Minister of Agriculture, Fisheries and Food*[6] it was held that the permissive words gave the Minister discretion, but he was not entitled to use his discretion in such a way that thwart the policy of the Act.

Professor Wade[7] cited the following extract from the judgment of Lord Reid: '*Parliament must have conferred the discretion with the intention that it should be used to promote the* ***policy and objects*** *of the Act', the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind, it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.*' (emphasis added)

Section 4 of the Act provides that the Minister may give directions to the Director General to pursue the administration of the *policy* of the Act and the Director shall take steps accordingly. Consequently, I do concede that the implementation of the policy of the Act is a matter within the purview of the Minister.

However, the general power to make Regulations for the implementation of the Act is granted to the Minister separately under Section 321 of the Act.

[6] [1968] AC 997.
[7] 10th Edition, at p.298.

Section 321 of the Act provides that the Minister may make Regulations *'generally for carrying this Act into effect'.* Section 28 of the Act specifically states that Regulations may be made *'for giving effect to the provisions of this Section'.* Hence, it is clear that the power granted to make Regulations under Section 28 is a special power that is independent of the general power granted under Section 321 to make Regulations to give effect to the Act. Accordingly, in my view, the Legislature has made a clear distinction between the power granted to the Minister to make Regulations to carry out the policy and objects of the Act and the special power granted to make Regulations to give effect to Section 28 of the Act.

The learned Additional Solicitor General for the 1st to 5th Respondents submitted that it is a well-established principle of law that where the Legislature has vested a public authority with discretion, a writ of *mandamus* will not lie to direct such public authority as to how that discretion should be exercised. He cited Wade on *'Administrative Law'*[8] wherein it is stated that ***'obligatory duties must be distinguished from discretionary powers with the latter a mandatory order has nothing to do; it will not, for example, issue to compel a Minister to promote Legislation'***

In terms of Section 321 (1) of the Act, every Regulation made by the Minister should be published in the Gazette and brought before Parliament for approval, and any Regulation not approved by the Parliament shall be deemed rescinded. Accordingly, the promulgation of Regulations by the Minister under the Act is a legislative function.

Consequently, the aforementioned principle that writ jurisdiction should not be exercised to direct a public authority to promulgate legislation should apply with full force in this instance.

The Petitioner submitted Gazette Notification No. 1897/15 dated 18th January 2015 and Gazette Notification No. 2289/43 dated 22nd July 2022 and argued that under items 4 and 8 of column 1, respectively, it is unambiguously stated that making Regulations is a duty of the 1st Respondent Minister. However, these Gazette notifications are published under Article 44 (1) of the Constitution. According to Article 44 (1), it is the subjects and functions that are assigned to the Ministers and not the duties. Therefore, whether the

[8] 11th Edition, at p. 524.

promulgation of Regulations is a duty of the Minister or not has to be decided on the interpretation of the relevant provisions of the Act. The mere use of the word *duty* at the top of the column of the Gazette will not make it a duty of the Minister.

In light of the analysis above in this judgment, it is my considered view that the promulgation of regulations is not a *duty* assigned to the Minister.

In the case of *Alexander Pintuge Abeyaratne v Minister of Lands and six others,*[9] the Supreme Court dealt with the executive power vested in the Minister by law, under the Land Acquisition Act.

His Lordship Sarath N. Silva C.J. observed that '*in a writ of mandamus issue is not that of an* ***abuse of discretion*** *but whether the public authority* ***failed to discharge a duty*** *owed to the applicant*[10]*'.* His Lordship also cited the following from Wade[11] '*obligatory duties must be distinguished from discretionary powers.* ***With the latter mandamus has nothing to do****....'*

Accordingly, although the question as to whether the Minister exercised his discretion properly may be subject to scrutiny by the Court in appropriate cases, it is settled law that a writ of *mandamus* will not lie to compel a Minister to promote Legislation.

In light of the above analysis, it is my considered view that the Petitioner has failed to establish a legal basis to issue the writs of *mandamus* prayed for in the Petition.

Yet, for completeness, I will also consider the other preliminary objections raised by the Respondents.

Is the Petition in compliance with Rule 3 (2) of the Court of Appeal (Appellate Procedure) Rules 1990?

The 6th Respondent raised another preliminary objection that the Petition is not in compliance with Rule 3 (2) of the Court of Appeal (Appellate Procedure) Rules 1990. Rule 3 (2) reads as follows;

'***Rule 3 (2).*** *The petition and affidavit, except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall*

[9] SC. Appeal No. 85/2008 and 101/2008, SC. minutes dated 1st June 2009.
[10] At p. 14.
[11] 9th Edition, at p.620.

contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed.'

The 6th Respondent cited the case of *Nicholas v. Olm Macan Markar Ltd and others*[12] wherein the Court of Appeal analysed Rule 47 of the Supreme Court Rules, 1978 that are almost identical to the Court of Appeal (Appellate Procedure) Rules, 1990 and held that;

'*Rule 47 of the Supreme Court Rules, 1978, which requires the petition filed in the Court of Appeal to contain an averment that the jurisdiction of that Court has not previously been invoked in respect of the same matter is mandatory. Non-compliance with the said Rule which is in imperative terms would render such application liable to be rejected.*'

The 6th Respondent submitted that the Petitioner sought similar reliefs in the previous writ application No. CA. Writ 368/2017 and was withdrawn later. The Petitioner disclosed the institution and withdrawal of the above case reserving the right to file afresh (P 13 (a)) in paragraph 29 of the Petition. However, the fact of reserving the right to institute a fresh application is not reflected in the journal entry marked '6 R(iv)' submitted by the 6th Respondent. Maybe due to the above fact, the 6th Respondent stated that there was no reason to anticipate that the Petitioner would institute a fresh application. Nevertheless, in the Order marked 'P 13(a)', it is clearly stated that the right is reserved. Furthermore, in both 'P 13(a)' and '6R(iv)', it is clearly stated that the Court *pro forma* dismissed the application. According to Black's Law Dictionary,[13] *pro forma* means '*made or done as a formality and not involving any actual choice or decision.'* Hence, it is clear that this Court has dismissed writ application No. CA. Writ 368/2017 without considering the merits of the application.

The 6th Respondent submitted that in addition to the aforementioned writ application, the Petitioner filed and withdrew the writ application No. CA.

[12] [1981] 2 Sri L.R. 1.
[13] Thomson Reuters, 11th Edition.

Writ 52/2018 as well. The Petitioner disclosed the filing and withdrawal of the above writ application in paragraph 32 of the Petition.

The 6th and 7th Respondents both cited the judgment of His Lordship Sarath N. Silva J., (as His Lordship then was) in the case of *Jayawardena and five others v. Dehiattakandiya Multi Purposes Co-operative Society Ltd and fifty others*[14] (C.A.) wherein His Lordship observed that;

'*The formulation of the foregoing Rules that a petition should contain an averment that the jurisdiction of this Court has not been previously invoked in respect of the same matter, clearly indicates that a party may not institute fresh proceedings in respect of the same matter after the previous application has been concluded. This formulation is a clear guide that there could be no situation where a second application can be filed by the same party on the same subject matter.*'

'*…the doctrine is founded upon the maximum "nemo debet bis vexari pro una et eadem causa" which is itself an outcome of the wider maxim interest "reipublicae ut sit fins litium". It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules have clearly an underpinning of the aforesaid element of public interest. It is for that reason that the Rules require to state that he has not invoked the jurisdiction of the court in respect of the same matter. The basic assumption is that if a party has invoked the jurisdiction of the court previously in respect of the same matter, he is barred from invoking the jurisdiction for the second time…*'

The 7th Respondent also cited the following extract from the same case:

'The Supreme Court Rules relevant to applications for Writs and other applications has at all times contained a provision that a petition should include an averment that the jurisdiction of the Court of Appeal has not been previously invoked. Rule 47 of the Supreme Court Rules 1978 contains a specific provision that reads thus'

> *"The Petition and affidavit except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of*

[14] [1995] 2 Sri L.R. 276.

the Court of Appeal has not been previously invoked in respect of the same matter. Where such averment is found to be false the application may be dismissed."

'The formulation of the foregoing Rules that a petition should contain an averment that the jurisdiction of this Court has not been previously invoked in respect of the same matter, clearly indicates that a party may not institute fresh proceedings in respect of the same matter after the previous application has been concluded. This formulation is a clear guide that there could be no situation where a second application can be filed by the same party on the same subject matter. ***Indeed, there could be situations where there is fresh material on the basis of which a party may seek leave of court to institute fresh proceedings in respect of the matter challenged in the previous proceedings.*** *There may also be a situation where a specific reservation is made, reserving the right of the petitioner to institute fresh proceedings at a future date.* ***In the absence of any exceptional circumstances such as fresh material*** **or** ***reservation as aforesaid, it would be inconsistent with the said Rules for a party to institute a subsequent application*** *regarding the matter that has been challenged in a previous application.*[15] *'*

'In view of the foregoing provision a plaintiff in a civil action would be barred from instituting another action in circumstances as stated above. A civil action is instituted as of right to redress a wrong. ***On the other hand, the granting of a Writ is a discretionary remedy in the exercise of the extraordinary jurisdiction of this Court. A Petitioner has no right to relief by way of a writ. The conduct of a petitioner is relevant in considering whether his application should be entertained.*** *For the reasons stated above. I am of the view that a petitioner who has withdrawn an application for a writ without reserving his right to institute fresh proceedings will be barred, in the absence of exceptional circumstances, from instituting a fresh application in respect of the same matter*[16]*. '* (emphasis added)

Accordingly, the 7th Respondent submitted that no exceptional circumstances have taken place to justify reinstituting the instant application just two months after the withdrawal of the previous application. As such, the 7th Respondent

[15] *Ibid* at pp. 279, 280.
[16] *Ibid* at p. 282.

submitted that the instant application is vexatious and amounts to abuse of the process of this Court.

His Lordship Sarath N. Silva J., described two instances where a party could initiate a new writ application. These are exceptional circumstances, such as the surfacing of fresh material and when the previous application is withdrawn, reserving the right to initiate a fresh application.

The rationale behind Court of Appeal Rule 3 (2), where the Petitioner is required to state whether jurisdiction of this Court has been previously invoked in respect of the same matter, and if so, to disclose the relevant details can never be only to determine whether the petitioner is truthful and correct, and to dismiss the application in accordance with the Rule. In my view, the obvious reason is for this Court to determine whether there are reasonable grounds to entertain subsequent applications. Otherwise, a Petitioner would be free to initiate writ applications on the same matter one after the other, after withdrawing the previous application.

As I have already stated above, the Petitioner has withdrawn the previous writ application No. CA. Writ 368/2017, reserving the right to institute a fresh application. Therefore, the Petitioner has the right to institute the instant application. However, the Petitioner has failed to set forth any exceptional circumstances such as fresh material in the instant application. Nevertheless, none of the Respondents have objected to the withdrawal, with the liberty to institute a fresh application. Consequently, I am of the view that the Respondents have waived off their right to object to this application.

Non-compliance with Rule 3 (1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990.

The 6th respondent submitted that the Petitioner has failed to comply with Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules. Rule 3 (1) (a) reads as follows;

‘**3. (1) (a)** *Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified-copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document,*

he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application.'

The 6th Respondent submitted that the documents marked 'P 9', 'P 10(a)', 'P10(b)' and 'P 11(a)' submitted by the Petitioner do not contain the attachments to those. It was also submitted that the Petitioner was unable to provide any reasons whatsoever for the inability to tender the documents annexed as part and parcel of the main documents. Accordingly, it was contended that the Petitioner's application is not in accordance with Rule 3(1)(a).

The 6th Respondent cited the case of *Brown and Co. Ltd and another v. Ratnayake, Arbitrator and others*[17] (S.C.) having considered Rule 4 of the Supreme Court Rules of 1978 which is similar to Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rule held that the Rule is mandatory.

His Lordship Surasena J., in the case of *Jayantha Perera Bogodage v. D.S.P. Senaratne, Controller of Imports and Exports*[18] (C.A.) having considered non-compliance with Rule 3 (1) (a) held that the Rule is mandatory. His Lordship observed that '*Thus, the resultant position before this Court is that the Petition has adduced no evidence to substantiate his claim. Therefore, this Court has no legal basis to consider the issuance of writs the Petitioner has prayed in this application… This application should therefore stand dismissed*.'

In this instance, although the annexures to the main documents are not attached, the documents pleaded in the Petition by the Petitioner are annexed to the Petition. Furthermore, the Petitioner has specifically reserved the right to tender a certified copy of the entire case record of the previous writ application[19]. Therefore, in my view, the Petitioner has sufficiently complied with Rule 3 (1) (a).

Is the Petitioner guilty of *laches?*

The 6th Respondent also submitted that the Petitioner is guilty of *laches*. As I have already analysed above, the Petitioner instituted this application after

[17] [1994] 3 Sri L. R. 91.
[18] CA. Writ 345/2012, Court of Appeal minutes dated 12th December 2018.
[19] At paragraph 29 of the Petition.

withdrawing the previous writ application No. 368/2017 reserving his right to file a fresh application. This application is instituted on the same basis. Therefore, the Petitioner cannot be held to be negligent and was sleeping over his rights.

Hence, the Petitioner is not guilty of *laches*.

Improper motive of the Petitioner.

The 6th Respondent submitted that Petitioner instituted these proceedings with an improper motive. The 6th Respondent's contention was that the Petitioner has no affiliation or involvement whatsoever in the shipping industry. In fact, the Petitioner has not stated as such. According to the Petitioner, his affiliation is public interest.

Accordingly, I am of the view that the Petitioner's motive is not improper and also does not lack *bona fides.*

Conclusion

In this Order, I have already stated that the Petitioner failed to establish legitimate grounds to issue the writs of *mandamus* prayed for in the Petition. Consequently, I see no basis to issue formal notice of this application to the Respondents.

This application is accordingly dismissed. No costs.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL