

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

In the matter of an Application for a
mandate in the nature of a Writ of Quo
Warranto under Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

C.A (Writ) Application No: 38/2017

Harshan Ajith Kumara Jayaweera,
No. 136/07,
Wishwakala Watta,
Mampe, Piliyandala.

Petitioner

Vs.

1. Suranga Naullage,
Director, National Savings Bank.
2. National Savings Bank.
3. Aswin De Silva,
Chairman, National Savings Bank.
4. A.K. Seneviratne,
Director, National Savings Bank.
5. Ajith Pathirana,
Director, National Savings Bank.
6. Anil Rajakaruna,
Director, National Savings Bank.
7. D.L.P.R. Abeyaratne,
Postmaster General,
(Ex-Officio Director)
National Savings Bank

8. Chandima Hemachandra,
Director, National Savings Bank

all of,
National Savings Bank,
"Savings House",
No. 255, Galle Road,
Colombo 3.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: W.D.S.K. Siriwardena for the Petitioner

J.C.Weliamuna, P.C, with Pasindu Silva, Senura Abeywardena and
Ms. Thilini Vidanagamage for the 1st Respondent

Susantha Balapatabendi, Senior Deputy Solicitor General for the
2nd – 8th Respondents

Argued on: 17th September 2018

Written Submissions: Tendered on behalf of the Petitioner on 19th October
2018

Tendered on behalf of the 1st Respondent on 08th October
2018

Tendered on behalf of the 2nd – 8th Respondents on 19th
October 2018

Decided on: 23rd November 2018

Arjuna Obeyesekere, J.

The Petitioner has filed this application seeking a Writ of Quo Warranto declaring that the 1st Respondent is disqualified and/or not entitled to hold office as a Director of the 2nd Respondent Bank.

The Petitioner states that he is a customer of the 2nd Respondent National Savings Bank (NSB), which is a licensed Specialised Bank incorporated under the National Savings Bank Act No. 30 of 1971 as amended (the NSB Act). There is no dispute between the parties that the 2nd Respondent is a Government owned Bank with an authorised share capital of Rs. Ten Billion and the shares of the Bank issued in the name of the Secretary to the Treasury.

The Petitioner states further that he is invoking the jurisdiction of this Court not only in his capacity as a customer of the 2nd Respondent but also in the public interest, a fact which has been disputed by the Respondents who question the motives of the Petitioner in bringing this action.

The 1st Respondent, whose appointment as a Director of the 2nd Respondent is being challenged in this application, has over 35 years of professional banking experience and a Bachelor of Commerce (Special) Degree awarded in 1982 by the University of Kelaniya. The 1st Respondent was an employee of the 2nd Respondent Bank until his retirement from service on 1st June 2015.

Provisions with regard to the composition of the Board of Directors of the 2nd Respondent is contained in Section 8(1) of the NSB Act, which reads as follows:

"The Board shall consist of seven directors of whom-

- (a) five shall be appointed by the Minister (hereinafter referred to as the "appointed Directors") from among persons whom he considers to be capable of directing the affairs of the Bank efficiently and effectively in such a manner as will enable the Bank to achieve its object, and each of whom-
 - (i) has had experience at a senior managerial level, in banking, commerce, business or allied fields or has had administrative experience; or
 - (ii) as professional qualifications in banking, economics, commerce, law, accountancy, business management or other discipline; and
- (b) one shall be the Secretary to the Treasury or his nominee; and
- (c) one shall be the Postmaster-General or his nominee."

The Petitioner states that by a letter dated 9th February 2015, annexed to the petition marked 'P2', the Minister of Finance, exercising the powers vested in him by Section 8(1)(a) of the Act had appointed the 1st Respondent as a member of the Board of Directors of the 2nd Respondent¹. In this application, the Petitioner is not challenging the power of the Minister to appoint Directors

¹'P2' reads as follows: "In terms of Section 8(1)(a) of the National Savings Bank Act, No. 30 of 1971, as amended by Act No. 28 of 1995, the Hon. Minister of Finance has been pleased to appoint you as a Member of the Board of Directors of the National Savings Bank with immediate effect".

to the 2nd Respondent Bank nor is the Petitioner claiming that the 1st Respondent does not have the required professional qualifications. Instead, the Petitioner is challenging the 1st Respondent's eligibility to be appointed as a Director of the 2nd Respondent Bank.

The basis of the Petitioner's case is twofold. The first complaint of the Petitioner is that the 1st Respondent, by virtue of being an employee of the 2nd Respondent at the time he was issued 'P2' by the Minister of Finance, was not eligible to be appointed as a Director of the 2nd Respondent. The second complaint is that the 1st Respondent continued to be ineligible inspite of his subsequent retirement from the employment of the 2nd Respondent, as a period of two years had not lapsed since the cessation of his employment.

It is in this factual background that the Petitioner is seeking a Writ of Quo Warranto on the 1st Respondent.

In Geetha Samanmali Kumarasinghe vs N.W.E Buwaneka Lalitha and Others²

Justice Sisira De Abrew described the Writ of Quo Warranto in the following manner:

"Quo warranto is a remedy available to call upon a person who is holding a public office to show the authority under which he claims to hold the office. This view is supported by the following legal literature. In the book titled "Constitutional Law and Administrative Law of Sri Lanka (Ceylon)" by J.A.L Cooray at page 364 the learned Author says as follows: "*Under*

²SC Appeal 99/2017; SC Minutes of 2nd November 2017.

the law the writ of quo warranto may be granted by the Supreme Court to determine whether the holder of a public office is legally entitled to it."

At page 365 the learned Author states as follows: "..... the writ is nevertheless available for the purpose of calling upon a person who is *prima facie* disqualified from holding a particular office to show upon what authority he claims to hold such office."

In the book titled "Principles of Administrative Law in Sri Lanka" by Sunil F A Cooray at page 899³ the learned Author says as follows: "If the office in question is a "public office", for *quo warranto* to be available it must be shown that the election/appointment of the *de facto* holder of it is a nullity. On the question whether the election/appointment is a nullity, the relevant facts and the applicable law must be considered in each case. The election/appointment may be a nullity for different reasons, namely, absence of a necessary qualification for the office, presence of a disqualification for the office, incorrect procedure adopted for the election/appointment, or the wrong person or body has held or conducted the election or made the appointment."

In Dilan Perera Vs Rajitha Senaratne⁴ Justice Yapa observed as follows: "It is to be observed that *quo warranto* is a remedy available to call upon a person to show by what authority he claims to hold such office. Therefore, the basic purpose of the writ is to determine whether the holder of a public office is legally entitled to that office. If a person is

³ Volume 2, 3rd edition.

⁴ [2000] 2 SLR 79 at page 100.

disqualified by law to hold statutory office the writ is available to oust him.”

Having considered the above legal literature, I hold that writ of quo warranto is a remedy available to call upon a person to show the authority under which he holds the public office and that if the holder of the public office is not legally entitled to hold the public office, court has the power to grant a writ of quo warranto to oust him.”

In the case of N.W.E.B Lalitha and others vs. Geetha Kumarasinghe⁵, P. Padman Surasena, J (as he then was)⁶, held that the Writ of Quo Warranto would not be issued unless the statute itself clearly disentitles a person from holding such office and that the Writ seeks to prevent an occupier or an usurper of an office of public nature from continuing in that position.

The gravamen of the first complaint of the Petitioner is that the appointment of the 1st Respondent is contrary to Rule 1.4 of the Direction issued by the Monetary Board in 1997, under Section 76J(1)⁷ of the Banking Act No. 30 of 1988 as amended. The said Direction has been annexed to the petition, marked 'P8'. Rule 1.4 thereof reads as follows:

“No person shall be appointed or elected as a director of a licensed specialised bank if he is an employee or a director of any other licensed

⁵CA (Writ) 362 / 2015; CA Minutes of 3rd May 2017. The appeal to the Supreme Court was dismissed on 2nd November 2017.

⁶ With Justice Vijith Malalgoda, P.C , P/CA (as he then was) agreeing.

⁷Section 76J(1) of the Banking Act reads as follows: Notwithstanding the provisions of any other law, the Monetary Board may give directions to licensed specialised banks or to any category of licensed specialised banks, regarding the manner in which any aspect of the business of such banks is to be conducted...

specialised bank or an employee (other than the chief executive officer) of the licensed specialised bank.”

The Petitioner states that this Rule prohibits the Minister from appointing the 1st Respondent as a Director of the 2nd Respondent as he was still an employee on the day he was issued the letter of appointment by the Minister, and thus not eligible to be a director of the 2nd Respondent. The Petitioner claims therefore that the 1st Respondent has no legal authority to hold the position of Director of the 2nd Respondent.

The Petitioner has also annexed to the petition, marked 'P9', Direction No. 12 of 2007 issued by the Monetary Board under Section 76J(1) of the Banking Act on 26th December 2007. Although not specifically stated, this Direction, being the later Direction, should supersede the provisions of the Direction 'P8', in the event of an inconsistency. The Direction 'P9', which is titled, 'Directions on Corporate Governance for Licensed Specialised Banks in Sri Lanka' contain detailed rules with regard to the composition of the Board of a licensed specialised bank.

Rule 3.2(iii) of 'P9' provides for the appointment of employees of a bank as a director of that bank and reads as follows:

“An employee of a bank may be appointed, elected or nominated as a director of the bank (hereinafter referred to as an “executive director”) provided that the number of executive directors shall not exceed one-third of the number of directors of the board. In such an event, one of the executive directors shall be the chief executive officer of the bank.”

Thus, although Rule 1.4 of the Direction marked 'P8' issued in 1997 prohibited the appointment of employees as a Director of a licensed specialised bank, the subsequent Direction issued in 2007 marked 'P9' specifically provided for the appointment of employees as directors of that bank. In these circumstances, this Court is of the view that the appointment of the 1st Respondent as a Director of the 2nd Respondent is not contrary to the Directions issued by the Monetary Board and hence, the said appointment is neither illegal nor arbitrary.

The learned President's Counsel for the 1st Respondent and the learned Senior Deputy Solicitor General for the 2nd -8th Respondents drew the attention of this Court to the provisions of Section 42 of the Banking Act, which is contained in Part VI of the Banking Act titled, 'Disqualification for appointment as Director, Secretary, & C. of Licensed Commercial Banks'.

Section 42(3)(b) of the Banking Act reads as follows:

"An employee of a licensed commercial bank may be appointed, elected or nominated as a director of that bank subject to the following conditions:⁸

- (i) the number of employees appointed, elected or nominated as directors (hereinafter referred to as "executive directors") shall not

⁸The third condition specified in Section 42(3)(b)(iii) – i.e. "a meeting of the Board of Directors of the bank shall not be duly constituted although the number of Directors required to constitute the quorum at such meeting is present unless more than one half of the number of directors present at such meeting are directors who are non-executive directors" - is not relevant to the issue under consideration.

exceed one-third of the number of members of the Board of Directors of the bank;

- (ii) where employees are appointed, elected or nominated as executive directors one of them shall be the Chief Executive Officer of the bank and the others shall be such officers of the bank performing executive functions as may be determined for the purposes of section 44A"

By virtue of the provisions of Section 76H of the Banking Act⁹, the above provisions would apply to all Licensed Specialised Banks including the 2nd Respondent. Thus, the appointment of the 1st Respondent as a Director of the 2nd Respondent is in accordance with the provisions of the Banking Act.¹⁰ Therefore, this Court is in agreement with the submission of the learned Counsel for the Respondents that the appointment of the 1st Respondent as a Director of the 2nd Respondent, at a time when he was an employee of the 2nd Respondent, is neither illegal nor *ultra vires* the provisions of the Banking Act.

There is one other matter that this Court would like to advert to, with regard to the first complaint of the Petitioner. That is the involvement of the Director of Bank Supervision¹¹ in the appointment process of a person as a Director of a licensed specialised bank. In terms of Section 42(4) of the Banking Act, the first step in this process is that the appointment of a Director to the 2nd Respondent

⁹Section 76H reads as follows: "The provisions of Part V, Part VI of this Act shall, *mutatis mutandis*, apply to a licensed specialised bank as they apply to a licensed commercial bank."

¹⁰ No proof of the number of "executive directors" exceeding one-third of the number of members of the Board has been produced before this Court.

¹¹In terms of Section 28(2) of the Monetary Law, the Director of Bank Supervision is the head of the Department of Bank Supervision which is entrusted with the continuous supervision and periodical examination of all banking institutions in Sri Lanka.

must be notified to the Director of Bank of Supervision. Section 42(4) reads as follows:

"Every licensed commercial bank shall notify the Director of Bank Supervision in such form as may be determined by the Director, the name, address and occupation of:

- (a) each person proposed to be appointed, elected or nominated as a director of the bank, before such appointment, election or nomination as the case may be;
- (b) each person appointed, elected or nominated as a director of the bank, within fifteen days after such appointment, election or nomination as the case may be."

Section 42(5) specifies that the "Director of Bank Supervision may, having regard to the matters specified in Section 42 (1), (2) and (3), approve or refuse to approve the proposed appointment, election or nomination as the case may be as a director of the licensed commercial bank of the person referred to in paragraph (a) of subsection (4) and shall, within thirty days after submission of the name of such person under that subsection, notify the bank of such approval or refusal, giving reasons therefor."

Keeping with the requirements of Section 42 (4) read with Section 76H of the Banking Act, the 2nd Respondent Bank had notified the Director of Bank Supervision of the appointment of the 1st Respondent as a Director of the 2nd Respondent. It is observed that the appointment by the Minister of Finance

could only be actualised and the said individual could function in the capacity of Director, only after obtaining the approval of the Director of Bank Supervision. By letter dated 27th March 2015¹², the 2nd Respondent had requested the 1st Respondent to submit an affidavit confirming that the disqualifications set out in Section 42(1) does not apply to the 1st Respondent, which had been duly complied with, by the 1st Respondent submitting an affidavit dated 18th June 2015, marked '1R5'. The approval of the Director of Bank Supervision had been granted only thereafter, by letter dated 21st July 2015, marked '1R7'.

By the time approval for the appointment of the 1st Respondent was granted, which would be the date from which the 1st Respondent can function as a Director of the 2nd Respondent, the 1st Respondent had admittedly retired from the service of the 2nd Respondent with effect from 1st June 2015¹³. Thus, by the time his appointment was approved by the Director of Bank Supervision, the 1st Respondent was no longer an employee of the 2nd Respondent and therefore was not in any case subject to any disqualification set out in 'P8'. Thus, the appointment of the 1st Respondent as a Director is not illegal or *ultra vires* the provisions of the Banking Act or any Direction issued thereunder.

The Petitioner's second complaint to this Court is that the said appointment of the 1st Respondent is contrary to the provisions of Rule 3(2)(iv)(c) of the Directions marked 'P9', which reads as follows:

¹²The said letter has been produced by the 1st Respondent marked '1R4'

¹³The fact that the 1st Respondent had retired from service had been notified by the 1st Respondent to the Director of Bank Supervision, by letter dated 1st June 2015, which has been produced by the 1st Respondent marked '1R6'.

“The Board shall have at least three independent non-executive directors or one third of the total number of directors, whichever is higher....

A non-executive director shall not be considered independent if he/she has been employed by the bank during the two year period immediately preceding the appointment as director.”

The argument of the Petitioner is that once the 1st Respondent ceased employment with the 2nd Respondent, he could only be appointed in the capacity of a non-executive Director but that in terms of the said Rule, the 1st Respondent was not eligible to be appointed as a non –executive Director as a period of two years had not lapsed since the cessation of his employment. This Court is of the view that the said Rule does not prohibit an ex-employee from being appointed as a Director of the Bank where he had been previously employed but only states that such person shall not be considered as an independent Director until the lapse of two years. Thus, this Court does not see any merit in the second complaint of the Petitioner¹⁴.

In the above circumstances, this Court is of the view that the 1st Respondent was eligible to be appointed as a Director of the 2nd Respondent while being employed with the 2nd Respondent and that he continued to be eligible to function as a Director, even after his retirement.

The learned Counsel for the Respondents raised an objection that the Minister of Finance and the Director of Bank Supervision, both of whom are statutorily

¹⁴ Neither party has submitted any proof that the total number of ‘independent directors’ is less than three.

tasked with the appointment of the 1st Respondent, are necessary parties to this application and that the failure on the part of the Petitioner to name them as parties, is fatal to the maintainability of this application. However, in view of the above findings of this Court, the necessity for this Court to consider the said objection does not arise.

For the reasons set out in this judgment, this Court is of the view that there is no merit in the arguments presented by the Petitioner and that there is no legal basis to issue the Writ of Quo Warranto prayed for. The application of the Petitioner is accordingly dismissed, without costs.

Judge of the Court of Appeal