

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

CA (Writ) Application No. 211/2020

Aruna Iddagoda,
No. 811, Dippitiya, Aranayake.

PETITIONER

Vs.

1. Hon. Magistrate,
Magistrate's Court No.4,
Colombo 12.
2. Hayleys Aventura (Pvt) Ltd, No. 400,
Deans Road, Colombo 10.

RESPONDENTS

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

Counsel: Romesh De Silva, P.C., with Shanaka Cooray for the Petitioner
Ms. Shaheeda Barrie, Deputy Solicitor General for the 1st Respondent
Nishan Premathiratne with Krishan Fernandopulle for the 2nd Respondent

Argued on: 4th March 2021, 9th March 2021, 26th March 2021 and 28th April 2021

Written Submissions: Tendered on behalf of the Petitioner on 7th June 2021
Tendered on behalf of the 1st Respondent on 12th May 2021
Tendered on behalf of the 2nd Respondent on 7th June 2021

Decided on: 14th June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner had joined the Hayleys Group of Companies as an executive in 2008. The Petitioner states that by sheer diligence and hard work, he rose through the ranks to be appointed as a Manager of the 2nd Respondent, Hayleys Aventura (Pvt) Limited, a member of the Hayleys Group. The Petitioner states that he left the 2nd Respondent on 31st May 2018 seeking better employment opportunities. The Petitioner has thereafter joined M/s Aletek International Private Limited, which according to the 2nd Respondent is engaged in business which is in direct competition to the area of business of the 2nd Respondent.

On 6th December 2018, the 2nd Respondent had filed Case No. HC (Civil) 37/2018 in the High Court of the Western Province (the Commercial High Court) against the Petitioner. In its plaint, the 2nd Respondent had stated that the Petitioner is contractually bound and obliged by his Contract of Employment with the 2nd Respondent to maintain confidentiality in respect of confidential information obtained in the course of the Petitioner's employment with the 2nd Respondent. It was further alleged that during the course of his employment, the Petitioner had been privy to confidential information and/or undisclosed information of the 2nd Respondent, which information had been presented to the Commercial High Court by way of confidential cover.

The 2nd Respondent, having cited certain correspondence that the Petitioner has had with suppliers of the 2nd Respondent, had stated that it ***verily believes that the (Petitioner) without any legal right is continuously using the confidential information/undisclosed information/ commercially sensitive business information of the (2nd Respondent) to the benefit of Aletek International (Pvt) Limited through the aforesaid unlawful, illegal and dishonest trade practices.***¹

The 2nd Respondent had sought *inter alia* the following relief from the Commercial High Court:

- a) A declaration that the Petitioner in the course of commercial activities has acted contrary to honest practices constituting acts of Unfair Competition;

¹ Vide paragraph 23(c) of the plaint.

- b) Damages against the Petitioner in a sum of Rs. 200 million in lieu of the Petitioner's dishonest trade practices amounting to Unfair Competition.

The above action had however been settled between the parties on 11th December 2018, by the Petitioner undertaking not to make use and/or disclose directly and/or indirectly to any party, undisclosed information within the meaning of Section 160(6) of the Intellectual Property Act No. 36 of 2003 (the IP Act), with such undertaking to be valid until 11th December 2019. The 2nd Respondent had not complained to the Commercial High Court of any violation of the above undertaking by the Petitioner.

The Petitioner states that on 3rd March 2020, after the period of the above undertaking had expired, the 2nd Respondent had filed action against the Petitioner in the Magistrate's Court, Colombo Case No. 30656/04/20 in terms of Section 136 of the Code of Criminal Procedure Act No. 15 of 1979, as amended.

Section 136(1)(a) reads as follows:

“Proceedings in a Magistrate's Court shall be instituted in one of the following ways: –

(a) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or try:

Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or”

The steps that a Magistrate is required to take on a complaint made under Section 136(1)(a) have been set out in Section 139, the relevant portions of which are reproduced below:

*“Where proceedings have been instituted under paragraph (a) or paragraph (b) or paragraph (c) of section 136 (1) and the **Magistrate is of opinion that there is sufficient ground** for proceeding against some person who is not in custody-*

- (a) *if the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, he shall, subject to the provisions of section 63, issue a summons for the attendance of such person;*
- (b) *if the case appears to be one in which according to that column a warrant should issue in the first instance, he shall issue a warrant for causing such person to be brought or to appear before the court at a certain time:*

Provided that

- (i) *the Magistrate may in any case, if he thinks fit, issue a summons in the first instance instead of a warrant;*
- (ii) *in any case under paragraph (a) or paragraph (b) of section 136 (1), the Magistrate shall, before issuing a warrant, and **may, before issuing a summons**, examine on oath the complainant or some material witness or witnesses; and*

The Petitioner has produced marked 'P3a' the several documents that had been filed by the 2nd Respondent in the Magistrate's Court, which included the report signed by the Attorney-at-Law for the 2nd Respondent setting out the offence which the Petitioner is said to have committed; the charge sheet; an affidavit of the Managing Director of the 2nd Respondent, and a list of witnesses and documents.

The complaint of the 2nd Respondent to the Magistrate's Court is reflected in the charge sheet that had been filed in the Magistrate's Court, and reads as follows:

“වර්ෂ 2018 නොවැම්බර් 01 වැනිදා හා වර්ෂ 2019 ඔක්තෝබර් මස 31 දින අතර කාල සීමාව තුළදී මෙම අධිකරණ බල සීමාව තුළ පිහිටි රාජගිරියේදී ඉහත නම සඳහන් වූදින, වරදක් වනම් නො. 400, ඩින්ස් පාර කොළඹ 10, ස්ථානයේ ස්වකීය ලියාපදිංචි කාර්යාලය පිහිටි හේලිස් ඇවෙන්චුරා (පුද්ගලික) සමාගම [HAYLEYS AVENTURA (PVT) LTD] සමාගම සතු හෙලිදරවු නොකළ තොරතුරු හිඟමතා හා බලය පැවරීමෙන් තොරව නො: 195/5, රණවිරු ප්‍රභාත් කුරේ මාවත, රාජගිරිය යන ස්ථානයේදී ව්‍යාපාර කටයුතු කරගෙන යනු ලබන ඇලිටෙක් ඉන්ටර්නැෂනල් (ප්‍රයිවට්) ලිමිටඩ් සමාගම [Aletek International (Pvt) Ltd], වෙත හෙලිදරවු කිරීම සිදු කිරීමෙන් 2003 අංක 36 දරණ බුද්ධිමය දේපල පනතේ 160(8)(අ) වගන්තිය ප්‍රකාරව දඬුවමක් ලද හැකි වරදක් කල බවයි”

In terms of Section 160(8)(a) of the IP Act:

“Any person, who wilfully and without lawful authority, discloses any undisclosed information shall be guilty of an offence under this Act and shall on conviction after trial before a Magistrate be liable to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.”

A definition of ‘undisclosed information’ is found in Section 160(6) of the IP Act.

It is admitted by the parties that the ingredients of the above offence would consist of the following:

- a) The accused must possess undisclosed information;
- b) The accused should have disclosed same;
- c) Such disclosure must be willful;
- d) Such disclosure must be without lawful authority.

Thus, according to the charge sheet, the Petitioner was being accused of divulging undisclosed information to his new employer. As noted earlier, the 2nd Respondent had filed an affidavit of its Managing Director. The said affidavit must therefore necessarily contain the factual circumstances relating to the said charge and must support the above charge against the Petitioner.

The application to have summons issued on the Petitioner had been supported before the Hon. Magistrate on 4th March 2020. By an order dated 29th June 2020, the Hon. Magistrate had directed that summons be served on the Petitioner.

Aggrieved by the said decision of the Hon. Magistrate to issue summons, the Petitioner filed this application on 5th August 2020, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the said order of the Hon. Magistrate to commence proceedings and/or issue summons;
- b) A Writ of Prohibition preventing the Hon. Magistrate from taking any further steps in Magistrate's Court, Colombo Case No. 30656/04/20.

Where a complaint is made in terms of Section 136(1)(a), as in this application, prior to issuing summons, the Hon. Magistrate must form an opinion that there are sufficient grounds to proceed against the person named. The learned President's Counsel for the Petitioner, the learned Deputy Solicitor General for the 1st Respondent and the learned Counsel for the 2nd Respondent have all drawn my attention to the judgment of this Court in **Malinie Guneratne vs Abeyasinghe and another**² where Sarath N. Silva, J / P,CA (as he then was) identified in the following paragraph, the manner in which a Magistrate must proceed when issuing summons under Section 139:

*"Section 139 (1) requires a Magistrate to form an opinion as to whether there is sufficient ground for proceeding against some person who is not in custody. I am of the view that the opinion to be formed should relate to the offence the commission of which is alleged in the complaint or plaint filed under section 136(1). The words 'sufficient ground' embraces both, the ingredients of the offence and the evidence as to its commission. The use of the word opinion does not make the action of the Magistrate a purely subjective exercise. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. I am of the view that the **proper test is to ascertain whether on the material before Court, prima facie, there is sufficient ground on which it may be reasonably inferred that the offence as alleged in the complaint or plaint has been committed by the person who is accused of it**"*

The primary argument of the learned President's Counsel for the Petitioner was that the learned Magistrate had not considered the material that was placed before him nor has he considered the ingredients of the offence that the Petitioner was charged

² (1994) 3 Sri LR 196.

with in the context of the material that was before him, and therefore the decision of the Hon. Magistrate to issue summons on the Petitioner is illegal and unreasonable.

The order of the Hon. Magistrate reads as follows:

“පැමිණිල්ල සලකා බැලීමෙන් අනතුරුව අපරාධ නඩු විධාන සංග්‍රහයේ 139 වගන්තිය ප්‍රකාරව චූදිතයා සිතාසි නිකුත් කරමි”

It was submitted on behalf of the Petitioners that the case record did not contain a ‘පැමිණිල්ල’, and that what was available to the Hon. Magistrate were the documents marked ‘**P3a**’. In any event, it is clear from the above order that the Hon. Magistrate has not considered the ingredients of the offence the Petitioner was charged with nor has the Hon. Magistrate considered the material that was placed by the 2nd Respondent by way of the affidavit of its Managing Director, in order to ascertain if the averments in the affidavit support the charge. The Hon. Magistrate has therefore clearly acted in breach of the obligation cast on him by Section 139 to issue summons only where he is of the opinion that there is sufficient ground to proceed against the Petitioner in respect of the offence specified in the charge sheet.

The learned Deputy Solicitor General for the 1st Respondent, whilst submitting that the issuance of summons is in terms of the law, submitted that in arriving at a final determination on whether an offence has been committed, *it would be vital to maintain the requisite balance between preventing unfair competition and restraint of trade* and submitted that any finding of guilt must be arrived at with caution and with a proper understanding of the difference between unfair competition and restraint of trade. While this submission was made in the context of it being the threshold that must be satisfied at the end of the trial, I am of the view that given the complex nature of the offence and the intricacies thereof, and especially the fact that the Petitioner is a former employee of the 2nd Respondent who is now said to be engaging in the same business as that of the 2nd Respondent, there must be due consideration to these issues even at the stage the Magistrate is called upon to issue summons. As held by this Court in **Malinie Guneratne vs Abeysinghe and another**, the decision of the Magistrate must withstand an objective assessment and hence the necessity for the Magistrate to set out the basis for his opinion.

Taking into consideration all of the above circumstances, I am of the view that the Hon. Magistrate has acted outside the jurisdiction conferred on him and the decision to issue summons is clearly illegal and is therefore liable to be quashed by a Writ of Certiorari.

The aforementioned submission of the learned Deputy Solicitor General gives rise to another aspect that I wish to advert to. A Magistrate who is called upon to decide if sufficient grounds exist to issue summons on a private plaintiff must act with circumspection, for the reason that such a complaint is not preceded by an investigation by an independent law enforcement agency, and can arise from a private animosity or may have been filed for a collateral purpose. In other words, a Magistrate must be alive to the fact that the process of Court may be abused by a complainant in a private plaintiff and it is for that reason that the Magistrate must consider the material before him in the context of the ingredients of the offence, before issuing summons, thus preventing the criminal justice system from being used in an arbitrary manner. A Magistrate must therefore exercise caution when issuing summons on a private plaintiff for the reason that the consequence of issuing summons is to make an innocent person stand trial as an accused. To permit a case without merit to be taken through the criminal justice system has an impact on the private and work life of an accused as well as cause an unnecessary burden on an already burdened criminal justice system.³

While it is mandatory that the evidence of the complainant should be led where a warrant is sought, it is not so where the application under Section 139 is limited to summons. In exercising his discretion whether the complainant should be heard even where only summons is being sought, it would be appropriate for a Magistrate to bear in mind the following passage from the judgment of the Supreme Court in **Peter Leo Fernando vs The Attorney General and Others**⁴ which sets out the rationale for the recording of evidence prior to issuing a warrant:

“The requirement as to the examination of the complainant is imperative and should be strictly complied with in order to prevent a false, frivolous and

³ See the judgment of the Federal Court of Malaysia in *Sundra Rajoo Nadarajah vs Menteri Luar Negeri, Malaysia & ORS* [Civil Appeal No: 01(F)-38-12-2020(W) – 9th June 2021] in the context of the prosecutorial discretion of the Attorney General.

⁴ [1985] 2 Sri LR 341 at 349.

vexatious complaint being made to harass an innocent party and to waste the time of the Court. The substance of the examination, reduced to writing, should be distinct from the complaint itself. The examination is not to be a mere form, but must be a full and intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his judgment and see if there is a prima facie case or sufficient ground for proceeding. The examination should be on facts which are within the complainant's knowledge: Kesri v. Muhammad Baksh; Chitale and Rao, The Code of Criminal Procedure Vol. I, 1121; Sohoni's The Code of Criminal Procedure, 16th Ed., Vol. II, 1235."

This Court, in **Derek Kelly and another vs Yasasiri Kasthuriarachchi**⁵ having followed the judgment in **Malinie Guneratne vs Abeysinghe**, went onto state as follows:

"In Sohoni's The Code of Criminal Procedure, 16th Ed., Vol II, 1234 it is stated that the object of this provision is to prevent the issue of process in cases where the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious, and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court. The underlying principle for the examination of the complainant at the time of filing a complaint is to ascertain whether the complaint established a prima facie case; that is, whether the facts disclosed in the petition of complaint called for investigation by a criminal court. It is to help the Court concerned to find out whether there were materials sufficient for the purpose of summoning the accused or for an enquiry into the grievances made by the complainant."

In my view, the above judgments reflect the circumspection that must be exercised by a Magistrate when acting under Section 139(1)(a), as well.

The learned President's Counsel for the Petitioner submitted further that the charge sheet is vague and is therefore defective. The learned Counsel for the 2nd Respondent quite correctly submitted that the charge sheet is yet to be served on the Petitioner and that any objection thereto can be taken at the time the charge sheet is served.

⁵ CA (PHC) Appeal No. 57/2008; CA Minutes of 7th September 2012.

In the above circumstances, I issue a Writ of Certiorari quashing the Order made by the Hon. Magistrate of Colombo in Case No. 30656/04/20 on 29th June 2020 to issue summons on the Petitioner. I am not inclined to consider the Writ of Prohibition that has been sought as I am of the view that this Court must not fetter the right of a complainant to set in motion the wheels of justice.

This judgment shall not prevent the 2nd Respondent from making a further application to the Hon. Magistrate to act in terms of Section 139 of the Code of Criminal Procedure Act. Such an application, if made, shall be considered by the Hon. Magistrate in terms of the law.

I make no order with regard to costs.

President of the Court of Appeal