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

C.A. (Writ) Application
Case No: 0202/2020

1. Blue Mountain Properties (Private) Limited
   No. 37, High-Level Plaza,
   Delkanda, Nugegoda

2. Dr. Hiranaya Saumi Hettirachchi,
   No. 37, High-Level Plaza,
   Delkanda, Nugegoda

Petitioners

Vs.

1. C.D. Wickramarathne,
   The Inspector General of Police,
   Police Headquarters, Colombo 01.

2. Priyantha Weerasooriya,
   The Inspector General of Police
   Police Headquarters, Colombo 01

Respondents

Before : R. Gurusinghe, J.
&
A. Premashanker, J.

Counsel : Faisz Musthapa, PC, with Faisza Markar, PC, and Zainab Markar instructed by Dilini Gamage
for the Petitioner.

Manohara Jayasinghe, DSG
for the Respondents

Argued on: 25-06-2026

Decided on: 06-08-2026

JUDGMENT

R. Gurusinghe, J.

The petitioners instituted the present Writ application seeking, *inter alia,* the issuance of a Writ of Prohibition restraining the respondent and/or any other officer acting under his direction and control from taking any steps in pursuance of the list of cases/B-Reports, contained in document marked P4 and also a writ of prohibition restraining the respondent and/or any other officer acting under his direction or control, from taking any steps in pursuance of any complaints made against the petitioners, in so far as such complaints relate to the subject matter of the Compromise, marked (P7), entered into before the Commercial High Court in Case Nos: CHC 04/2020/CO and/or HC(Civil)60/2019/CO.

When this application was supported, the Court issued an interim order in terms of paragraph (e) of the prayer to the petition.

The 1st petitioner is a company duly incorporated under the provisions of the Companies Act No. 7 of 2007, and the 2nd petitioner is the Chairman and Managing Director of the 1st petitioner. The respondent is the Inspector General of Police.

Facts as stated in the petition.

As part of the 1st petitioner's business operations, the 1st petitioner entered into agreements with landowners for the purpose of developing, subdividing, and subsequently marketing and selling the respective lands. In certain instances, the 1st petitioner purchased lands outright by obtaining financial facilities from banks and financial institutions. Where such outright purchases were made, the lands so acquired were pledged to banks or financial institutions as collateral, with an agreement with such banks or financial institutions to release the lands on a block-by-block basis upon the fulfilment of the agreed conditions.

The 1st petitioner carries out a business that develops and subdivides lands for sale; prospective purchasers select and reserve blocks of land by paying in advance under the sales agreement. Title to the respective blocks of land of their choice making an advance payment in terms of the relevant sale agreement, while title to the respective block is to be conveyed upon the full settlement of the purchase price. The customers would pay the 1st petitioner in different ways, including full cash payment, instalment-based cash payments, payments obtained through bank loans, or under a five-year installment scheme with interest. The selected block is transferred to the customer within a specified period after full payment is received. Once the customer makes the full payment, the 1st petitioner settles the purchase consideration for that block with the owner of the land or the bank, and the title to the respective block will be transferred to the purchaser within the stipulated period.

The petitioners further avers that several factors arising from the prevailing economic conditions have contributed to a drastic reduction in working capital derived through bank loan facilities of the 1st petitioner company, including;

(a) Pronouncement by the Central Bank of Sri Lanka in the year 2017 that the real estate business comes within the high-risk category (resulting in the restriction of bank loans without prior notice, refusal of overdraft facilities and banks adopting a rigid policy with regard to real estate business).

(b) Payment delay and default by customers slow rates of sale and conversion of seller–driven market into a buyer-driven market.

(c) False and malicious campaign of rumours by the competitors of the Blue Mountain Group of Companies since 2016, causing damage and disrepute to the business volume as well as the brand image and reputation of the group.

The petitioners further state that the aforesaid circumstances have severely affected the cash flow of the 1st petitioner's company, resulting in many pending projects slowing down or coming to a standstill. Consequently, resulted in delays in the release and transfer of respective blocks to the customers upon the completion of full payment could not be effected within the agreed time frames which in turn resulted in a substantial number of customers demanding a refund of payment made by them within a very short period of time, which exacerbated the said cash flow issue and created a credit crunch within the company.

The 1st petitioner was pressurised to issue funds by way of post-dated cheques to certain prospective purchasers due to the aforementioned economic conditions and the increased number of purchasers demanding refunds of their advance payments; as a result, the 1st petitioner's financial situation has now become increasingly unstable. The petitioner further states that, the petitioners were compelled to stop payments on several cheques issued as refunds due to insufficient cash flow.

Against this backdrop, several prospective purchasers initiated criminal proceedings against the 1st petitioner and/or its Directors (for offences allegedly committed under section 403, 386 and/or 389 of the Penal Code), which resulted in certain Directors of the 1st petitioner being subjected to numerous criminal proceedings pending before several Magistrate's Courts. A list of the said criminal proceedings instituted against the 1st petitioner and/or its directors is annexed to the petition marked P-4.

Petitioners further aver that in the wake of the aforesaid severe cash flow issues experienced by the 1st petitioner together with the increased demand for refunds, the 1st petitioner has been unable to revive its cash flow and restore its business operations due to actions taken against itself and its Directors through proceedings initiated before the Magistrate's Court. In these circumstances, the 1st petitioner invokes the jurisdiction of the High Court of the Western Province (exercising its Civil jurisdiction) holden in Colombo, under and in terms of Part IX and Section 520 of the Companies Act No. 7 of 2007, in the case bearing No. HC (Civil) 60/2019/CO. A copy of the petition and the affidavit dated 02-08-2019 relating to the said proceedings, annexed and marked P-6.

The said proceedings were instituted with a view to entering into a Compromise with the 1st petitioner's creditors (within the meaning of Section 247 (b) of the Companies Act No. 7 of 2007), pursuant to a proposal approved by the Board of Directors of the 1st petitioner, designed to facilitate the revival of the 1st petitioners' business operations in order to release the respective blocks of the land or to honour the refunds of the payments already made to its customers.

Paragraph 22 of the petition is as follows:

a) The 1st Petitioner in the said case bearing No. **HC(Civil) 60/2019/CO** sought the permission and assistance of Court to hold a postal vote among 1735 creditors of 2 Classes (Class II -1559) and Class II – 176) (Vide pages 5-8 of the Petition dated 02.08.2019 produced under **"P-6"**) in order to approve the compromise plan as set out in the said petition dated 02.08.2019.

   A true copy of the said Compromise is annexed hereto marked ***P-7***

b) The said postal vote of the creditors was concluded on 02.09.2019, and the aforesaid compromise (i.e., P-7) was approved by 92.4% of the votes received.
   A true copy of the results of the aforesaid postal vote prepared by the independent auditors, namely, KN Partners, dated 02.09.2019 is annexed hereto marked ***P-8***

c) The 1st Petitioner therefore moved to withdraw the said Application and have the proceedings terminated on 12.09.2019 and accordingly the proceedings were terminated.

d) The 1st Petitioner moved to withdraw the said Application on the understanding that all stakeholders would abide by and act in terms of the Compromise which was approved in terms of the Provisions of Part IX of the Companies Act.

e) The 1st Petitioner thereafter immediately commenced acting in terms of the approved compromise produced marked P-7.

f) The 1st Petitioner had already released and/or executed 635 Deeds of Transfer of a total value of **Rs. 1,714,308,829.00** by the end of the first quarter (Q1) itself to the creditors of Class **I, which is over and above the petitioner's undertaking in terms of the approved compromise** to release Deeds of Transfer of a total value of Rs. 200,624,115.80) within such period.

   A table demonstrating the total value and details of deeds released or transferred at each project and the relevant monthly lists are consolidated and annexed hereto marked P-9

g) The repayment of funds to the creditors of Class II only commences in the second quarter (Q2) starting January 2020, and the 1st Petitioner has commenced payments to creditors of Class II.

h) Upon the approval of the compromise plan (P-7) on 02-09-2019, the obligations of the 1st Petitioner towards the said 1735 creditors and the entitlement of the creditors named therein against the 1st Petitioner were replaced by the terms set out in P-7.

i) However, some of the creditors named in P-7 continue to dispute the terms of the approved compromise and demand preferential treatment outside the approved compromise and therefore, the entire compromise is endangered by such conduct.

j) In terms of Sections 250(1) and (2) of the Companies Act, the said approved compromise (P-7) and the terms thereof are binding on both the 1st Petitioner and the creditors listed therein.

k) In the circumstances, the 1st Petitioner by way of a motion dated 24.01.2020, made an application to the High Court of the Western Province (Exercising its Civil Jurisdiction) Holden in Colombo, that the process of Court is required to ensure compliance of the 1st Petitioner and its creditors of the Approved Compromise (p-7), and in that regard sought the following relief (Vide P-6):

    1. An order setting aside the direction of Court permitting the withdrawal of the Application made on 12.09.2019;

    2. An order permitting the 1st Petitioner to continue with the Application made by its petition dated 02.08.2019;

l) An order declaring that the compromise (p-7) and the terms of conditions contained therein, which were approved by the creditors is binding on the 1st Petitioner and all creditors listed in the said Compromise. The said application of the 1st Petitioner as contained in the aforesaid Motion was rejected by the High Court of the Western Province (Exercising its Civil Jurisdiction) Holden in Colombo in view of the withdrawal and termination of Case No. HC (Civil) 60/2019/Co on 12.09.2019.

m) In terms of **Section 256 of the Companies Act**, the 1st Petitioner was entitled to make an application to the Commercial High Court seeking an order declaring that the compromise set out in P-7 is binding on the 1st Petitioner as well as the creditors listed therein and as such, the 1st Petitioner made a fresh Application bearing No. **CHC 04/2020/CO** to the High Court of the Western Province (Exercising its Civil Jurisdiction) Holden in Colombo seeking **an order declaring that the compromise set out in X3** (P-7) in this Application) and the terms and conditions therein approved by the creditors named in X3 (P-7 in this Application, is binding on the 1st Petitioner and all creditors named in X3 (P-7 in this Application.

A true copy of the Petition and Affidavit dated 11.02.2020, the relevant Motions relating to the said case bearing No. ***CHC 04/2020/CO*** *at the Commercial High Court are consolidated annexed hereto marked* ***<u>P-10</u>***

n) The said Application bearing No. **CHC 04/2020/CO** was supported on 18.02.2020 and the Commercial High Court acting under Section 256(2)(a) of the Companies Act ordered that notice of the application should be tendered to all creditors. However, since there were over 1000 creditors, the Court ordered the notices to be published in three daily newspapers in all three languages.

o) Accordingly, the 1st Petitioner published the said notices on three occasions and none of the creditors objected to the application of the 1st Petitioner.

p) Therefore, acting under Section 256(1)(f) of the Companies Act, the Court made an order dated 29.06.2020 declaring that the compromise set out in X-3 (P-7 in this application) and the terms of conditions therein approved by the creditors named therein are **binding on the 1st Petitioner and all creditors named therein.**

A true copy of the said Order of the Commercial High Court dated 29.06.2020 is annexed hereto marked ***<u>P-11</u>***

Petitioners further state that they had commenced acting in terms of the Compromise produced marked P-7, as at early March 2020. However, implementation of the said plan was halted due to the outbreak of the COVID-19 pandemic and the restrictions-imposed consequent thereto. Petitioners state that, from the end of May 2020, the 1st petitioner has recommenced acting in terms of the compromise and is in substantial compliance therewith. Despite an order having been issued by the Commercial High Court, the police continued to pursue criminal proceedings against the petitioners under the cases specified in P-4, and numerous creditors continued to lodge complaints against the petitioner, thus endangering the execution of the Compromise once again.

The detention of petitioners at this juncture would deprive them of the opportunity of making a meaningful contribution towards the execution of the Compromise and would result in the 1st petitioner being placed into a deep crisis.

On the basis of the above-said circumstances, petitioners sought two Writs of Prohibitions as prayed for in para 'B' and 'C' of the prayer to the petition.

When this application was supported on 07-08-2020, this Court issued an interim order as prayed for in prayer (e) of the petition. Prayer (e) is as follows:

"to issue an Interim Order, restraining Respondent and/or any other officers acting under his direction and control from taking any steps in pursuance of any complaints against the Petitioners in so far as they relate to the subject matter of the Compromise (P-7) entered by the Commercial High Court in Case Nos: CHC 04/2020/CO and/or HC(Civil) 60/2019/CO until the final hearing and determination of this Application."

<u>Objections of the Respondent</u>

Paragraph 5 of the objections, the Respondent states as follows:

5. Answering the averments in paragraphs 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the said Petition, the Respondent states as follows:

   i. From around March 2019, from time to time, several police stations across the country have received multiple complaints against the 1st Petitioner regarding irregular financial/property transactions;

   ii. Upon receipt of such complaints, the relevant police stations had commenced investigations, as required by the relevant provisions of the Criminal Procedure Code Act;

   iii. Consequent to such investigations, certain police stations had taken steps to report facts to the relevant Magistrate's Court;

iv. In respect of some cases, upon settlements being entered between the Petitioner and the complainants, cases had been withdrawn;

v. Some police stations had advised the complainants to seek a remedy in Civil Courts;

(A copy of the letter dated 29.09.2020 sent to the Attorney General, by the Legal Division of the Police Department, setting out the status of cases, is annexed hereto marked R1 and pleaded as part and parcel hereof)

vi. A large number of the said complaints have been received prior to the date of Petition in the Case No. HC (Civil) 60/2019/CO (P6), which is 21.01.2020 and well before the purported order of High Court in Case No. CHC 04/2020/CO dated 29.06.2020;

vii. The police officers recording such complaints were duty-bound to investigate into the said complaints and take requisite legal action;

viii. For instance, between 08.01.2019 and 01.07.2020, 13 complaints received by the Mt-Lavinia Police Station have been subject to investigation and as per the evidence revealed, the directors of the 1st Petitioner company (Maharu Perera Hettiarachchi and Nimesh Mihil Bandara Dodanwela) were identified as suspects, arrested and produced before the Magistrate of Kesbewa; they have now been released on bail;

(A copy of a table setting out the details of the said cases are annexed hereto marked R2a, and pleaded as part and parcel hereof)

ix. The investigating officer in each such police station is not equipped to nor is entitled in law to take cognisance of a purported order of court, to which the Police Department is not a party and in respect of which no direct notice has been received from the Registrar of such court;

x. The purported order of the High Court in Case No. CHC 04/2020/CO dated 29.06.2020, annexed to the Petition marked P11, is not binding on the Respondent and/or his officers and servants;

xi. The cases have been filed before the Magistrate exercising jurisdiction over the matter and the suspects were and continue to be entitled in law to furnish before the Learned Magistrate any order of court, contract, compromise or agreement they may have a bearing on the orders that may be lawfully made by the Learned Magistrate;

xii. It is the Learned Magistrate who can make an order on whether or not the purported order of High Court in Case No. CHC 04/2020/Co dated 29.06.2020, is binding on the specific complainant/s in respect of which facts have been reported to court, and relevant police station will take appropriate action to comply with such an order;

xiii. In the circumstances, the relevant police officers have acted in good faith and in fulfilment of their public duty, and the failure to investigate the matter and report facts to court would be in dereliction of their duty.

xiv. In fact, as at May 2021, the money due and owing to the complainants has not been settled and the 1st Petitioner and/or its officers, servants, directors or shareholders have not contacted the complainants. In fact, all attempts by several complainants to contact the 1st Petitioner and/or a representative have been futile.

(Additional statements were obtained from three of the complainants in May 2021, in order to ascertain the current status with regard to the purported settlement and true copies of the said statements are annexed hereto marked as R3a, R3b and R3c)

The respondent, however, contends that restraining Police Officers from conducting and from reporting the relevant facts to the Learned Magistrate in respect of the complaints would amount to an abuse of process of the court by the petitioners, and the petitioners are entitled in law to raise relevant defences before the Learned Magistrate and obtain the appropriate relief in those proceedings, rather than invoking the jurisdiction of this Court for the relief sought herein.

In paragraph 9 of the objections, the respondents stated the following:

a. The Petitioners' application is misconceived in law;

b. The Petitioners have failed to establish that the Respondent has acted illegally or in violation of any rules of natural justice that would entitle the Petitioners to a prerogative writ;

c. The Respondent has at all times acted justly, reasonably and in accordance with law;

d. The Petitioners have failed to name the necessary parties, (the complainants/ creditors) as Respondents to this application;

e. The Petitioners have failed to avail of an alternative relief available;

f. The Petitioners have not come before Court with clean hands;

g. The circumstances of this case do not warrant the grant of discretionary relief and,

h. In view of all or some of the foregoing, this application should be dismissed *in limine;*

i. In any event, the Petitioner is not entitled to the relief prayed for and this application should be dismissed with costs.

Analysis

The petitioners' application is based on the Compromise between the 1st petitioner and its creditors in terms of Part IX (Sections 247 to 254) of the Companies Act No. 7 of 2007 (Companies Act). The petitioners maintain that the said compromise is valid, effective, and binding upon all the creditors of the 1st petitioner. Accordingly, the relief sought in this application proceeds on the premise that the Compromise has been validly entered into under the Companies Act and is enforceable against all creditors of the 1st petitioner company.

Validity of the Compromise

Section 249 of the Companies Act is as follows:

249. (1) The proponent shall compile, in relation to each class of creditors of the company, a list of creditors known to the proponent who would be affected by the proposed compromise, and setting out-

(a) the amount owing or estimated to be owing to each of them; and

(b) the number of votes which each of them is entitled to cast on a resolution approving the compromise.

(2) The proponent shall give to each known creditor, the company, any receiver or administrator or liquidator respectively, and deliver to the Registrar-

(a) a notice in accordance with the requirements specified in the Seventh Schedule hereto, of the intention to hold a meeting of creditors, or any two or more classes of creditors, for the purpose of voting on the resolution; and

(b) a statement-

(i) containing the name and address of the proponent and the capacity in which the proponent is acting;

(ii) containing the address and telephone number to which inquiries may be directed during normal business hours;

(iii) setting out the terms of the proposed compromise and the reasons for it ;

(iv) setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved;

(v) setting out the extent of any interest of a director in the proposed compromise;

(vi) explaining that the proposed **compromise** and any amendment to it proposed at a meeting of creditors or any classes of creditors, will be binding on all creditors or on all creditors of that class, **if approved in accordance with the provisions of section 250**; and

(vii) containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval; and

(c) a copy of the list or lists of creditors referred to in subsection (1).

The Compromise will be binding on all creditors or on all creditors of the Class, if approved in accordance with the provisions of Section 250.

Section 250 of the Companies Act is as follows:

250.(1) A compromise including any amendment proposed at the meeting, is deemed to be approved by creditors or a class of creditors, if at a meeting of creditors or that class of creditors conducted **in accordance with the requirements specified in the Seventh Schedule hereto**, the compromise, including any amendment, is adopted in accordance with paragraph 5 of that Schedule.

(2) A compromise including any amendment approved by creditors or a class of creditors of a company in accordance with the provisions of this Part, is binding on the company and on-

(a) all creditors; or

(b) if there is more than one class of creditors, on all creditors of that class, to whom notice of the proposal was given under section 249.

(3) Where a resolution proposing a compromise including any amendment is put to the vote of more than one class of creditors, it shall be presumed unless the contrary is expressly stated in the resolution, that the approval of the compromise, including any amendment by each class, is conditional on the approval of the compromise, including any amendment by every other class voting on the resolution.

(4) **The proponent shall give written notice of the result of the voting to each known creditor, the company, any receiver or administrator or liquidator and the Registrar, respectively.**

In order to bind all the creditors with the Compromise, the meeting of creditors should be conducted in strict compliance with the requirements specified in the seventh schedule to the Companies Act.

<u>Clause 5 of the Seventh Schedule of the Companies Act is as follows</u>:

5. *Voting*

(1) At any meeting of creditors or a class of creditors, other than a meeting held for the purposes of section 250 or section 407, a resolution is adopted, if a majority in number and value of the creditors or the class of creditors, voting in person or by proxy, vote in favour of the resolution.

(2) At any meeting of creditors or a class of creditors held for the purposes of section 250 or section 407, a resolution is adopted, **if a majority in number representing seventy-five *per centum* in value of the creditors or class of creditors** voting in person or by proxy, vote in favour of the resolution. (emphasis added)

(3) The chairperson of the meeting shall not have a casting vote.

The petitioners have failed to aver in the present application that the resolution adopted under Clause 5 of the Seventh Schedule of the Act was approved by a majority representing Seventy-five per cent in value of all creditors present and voting, whether in person or by proxy. The caption of the 1st petitioner's petition dated 21-01-2020 to the Commercial High Court Case No. HCC/60/2019/CO (P-6) states,

"In an application under and in terms of Part IX and Section 520 of the Companies Act No. 7 of 2007 read together with provisions of High Court of the *Provinces (Special Provisions) Act No. 10 of 1996 (as Amended)*". In paragraph 9 of the said petition, the 1st petitioner stated as follows:
"9. The petitioner states that in terms of Section 250 (1) and (2) of the Companies Act, the aforesaid approved Compromise and terms thereof are binding on both the petitioner and the creditors named in P-9."

The 1st petitioner instituted proceedings bearing Case No. CHC 04/2020/CO in the Commercial High Court by petition dated 11-02-2020. The caption of the said petition states "In an application under and in terms of Section 256 of the Companies Act No. 7 of 2007." In the said application, the petitioners' position was that the Compromise proposal marked X was approved by the creditors, under Part IX of the Companies Act. The reliefs sought in the said application by the 1st petitioner are as follows:

"An order declaring that the Compromise set out in X3 (P-9) and terms and conditions therein approved by the creditors named in X3 (P-9), is binding on the petitioner and all the creditors named in X3 (P-9)."

It is significant to note that the 1st petitioner did not seek approval of Court for a Compromise entered into despite non-compliance with the provisions contained in Part IX of the Act. In other words, the 1st petitioner's position was that the Compromise was in conformity with, and in compliance with, the provisions contained in Part IX of the Act.

The 1st Petitioner instituted proceedings bearing Case No. HCC/60/2019/CO before the Commercial High Court by petition dated 21-01-2020. In the said application, Petitioners sought an order declaring that the Compromise marked as P-9 therein, which was stated to have been approved by the creditors named in P-9, was binding on the petitioner and the creditors identified in P-9 were binding upon the 1st petitioner as well as the creditors named therein.

However, the petitioners did not aver in the said application that the Compromise had been approved by a majority representing seventy-five per cent in value of all creditors, as required under Clause 5(2) of the Seventh Schedule to the Act. According to the petition, the total number of creditors was 1,735. Although the petitioners asserted that the Compromise had received the approval of 92.4% of the votes cast, only 487 creditors participated in the voting process, of whom 450 voted in favour of the proposal. Consequently, when considered against the total number of creditors, the Compromise received the approval of less than 26% of the creditors. Therefore, the Compromise cannot be said to have been approved in accordance with the provisions of Clause 5 sub-clause 2 of the Seventh Schedule of the Companies Act

The petitioners 2nd application before the Commercial High Court, bearing No. CHC 04/2020/CO and dated 11-02-2020, was instituted under Section 256 of the Companies Act, was also for approval of the Court to the compromise. It should be noted that there were no respondents named in the said application. The 1st petitioner had not stated in that petition whether it had duly complied with all the requirements prescribed in the Seventh Schedule of the Companies Act.

Moreover, even in the said application, the petitioners failed to state that the Compromise was approved by a <u>majority representing 75% of the value of all creditors as the law required</u>. Further, Section 250(4) mandates that the proponent of a compromise shall <u>give written notice of the result of the voting to each known creditor</u>, the company, the receiver, administrator, or liquidator, and the Registrar, respectively. The petitioners have not stated that they have complied with the provisions of Section 250(4) of the

Companies Act in this application or in any of the applications made to the Commercial High Court.

Sub-sections 3 and 4 of Section 252 of the Companies Act are as follows.

(3) Where the court is satisfied on the application of a creditor of a company who was entitled to vote on a compromise, that –

(a) insufficient notice of the meeting or of the matters required to be notified under section 249 was given to that creditor;

(b) there was some other material irregularity in obtaining approval of the compromise; or

(c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor or to the class of creditors to which that creditor belongs, the court may make an order that such creditor is not bound by the compromise, or make such other order as it thinks fit.

(4) An application under subsection (3) shall be made not later than ten working days after the date on which notice of the result of the voting was given to the creditor.

Since the petitioners are silent as to whether they have given written notice of the result of the voting to each known creditor in compliance with Section 250 (4) of the Companies Act, it cannot be ascertained whether the creditors were afforded the opportunity to invoke the remedy available under Section 252 (3) of the Companies Act.

It is further observed that, neither in the present application nor in the proceedings instituted before the Commercial High Court, have the petitioners cited any of the creditors as parties to those applications. The 1st petitioner was the sole party in such application. While in the present application, the Inspector General of Police has been named as the only respondent. At least those creditors who have made complaints against the petitioners, on which the respondent filed actions referred to in P-4, are not made parties to these proceedings.

In these circumstances, where none of the creditors has been made a party to the present application, the petitioners were under a duty to make full and frank disclosure of all material facts that could affect the rights and interests of the creditors.

In the aforesaid circumstances, the compromise relied upon by the petitioner is not a valid compromise under the provisions of the Companies Act.

Even assuming that the compromise is valid, the petitioners were obliged to fulfil all obligations arising under the Compromise within a period of three years (12 quarters). As per the terms of the Compromise and the averments contained in the petition, the petitioners commenced implementation of the Compromise in the last quarter of 2019. Accordingly, petitioners should have complied with all the obligations under the Compromise by the end of 2022.

Petitioners stated in paragraph 23 of the petition that from March 2020 to May 2020, the petitioners were unable to execute the Compromise. However, the petitioners state that the 1st petitioner recommenced acting in terms of the Compromise towards the end of May 2020. In such circumstances, had the petitioners diligently pursued the implementation of the Compromise thereafter, they ought to have discharged all obligations arising thereunder by the end of the year 2022. Therefore, the petitioners can no longer rely on the said compromise; the application is currently redundant.

On behalf of the petitioners, it was argued that they engaged in a purely commercial transaction and that there was no element of dishonesty. The Police have received a considerable number of complaints against the 1st petitioner company. Accordingly, the Police have reported the relevant facts before the respective Magistrate's Court.

Whether the transactions in question disclose any criminal element or whether the petitioners acted with dishonest intention are matters that can only be determined upon the conclusion of a proper investigation. At this stage, this Court cannot come to a conclusion with certainty whether there was any dishonesty on the part of the petitioners.

It is the statutory duty of the Police, upon receipt of complaints alleging the commission of a criminal offence, to conduct the necessary investigations in accordance with the provisions of the Criminal Procedure Code. The Court cannot grant a Writ of Prohibition restraining the Police Officers from performing their statutory duties.

It was further argued on behalf of the petitioners that the complaints in question are solely against the 1st petitioner company, and that there are no complaints against the company's Directors. It was further argued that, in the absence of any complaints against the Directors, the police were not entitled to arrest them. On behalf of the petitioners, it was argued, citing Athputharaja Wijayarajan v. Attorney General (CA 235/2011), CA Minutes 22.11.2021, that mere failure to fulfil a promise, inability to repay money, or breach of contractual obligation does not, by itself, constitute the offence of cheating unless it is established that the accused possessed a dishonest intention at the inception of the transaction. However, as noted above, this position cannot be verified without a proper investigation. At this stage, it would be premature for this Court to express any definitive view in that regard.

Petitioners argued that the Directors cannot be criminally liable for the conduct of the company. The Directors may be criminally liable in certain situations. If the Directors are involved in fraud, deception or illegal activity, they may be criminally liable. When there are complaints, the police are obligated to investigate and determine whether there are any criminal elements in the transactions between the petitioners and their creditors.

Conclusion

Petitioners' application is based on the premise that the compromise was reached in accordance with the provisions of Part IX of the Companies Act. However, petitioners have failed to demonstrate, either before this Court or before the Commercial High Court, that the compromise was approved by a majority representing seventy-five per cent in the value of the creditors or class of creditors voting in favour of the resolution as required by the Companies Act. Compliance with this statutory requirement is fundamental to the validity and enforceability of a compromise under the Act. Only 487 of 1735 creditors cast votes, and the compromise was approved by 450. Even with the number of creditors considered, the compromise was approved by fewer than 26%. Petitioners' complete silence regarding this fact may constitute a misrepresentation or suppression of material facts. Such omission raises a serious question as to whether there has been a failure to make full and frank disclosure of material facts before Court.

In the case of *Alphonso Appuhamy vs. Hettiarachchi* 77 NLR 131, the Supreme Court held that *"when an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court,* *before it issues notice in the first instance, a full and truthful disclosure of all material facts; the petitioner must act with uberrima fides."* This decision was consistently followed in subsequent cases.

In the case of *Blanca Diamonds (Pvt) Ltd v. Wilfred Van Els and two others* [1997] 1 Sri LR 360, Jayasuriya J. held as follows;

In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose uberrima fides and disclose all material facts to this Court for the purpose of this Court arriving at a correct adjudication on the issues arising upon this application. In the decision in Alphonso Appuhamy v. Hettiaratchi, Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English Law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to this Court. Vide also the decision in Castelli v. Cook) at p. 94.

It is manifestly clear that the petitioner company has been remiss in its duty and has failed to carry out its imperative legal duty and obligation to Court. In such circumstances, Justice Pathirana ruled that the Court is entitled to raise this matter in limine and to dismiss the application without investigating into the merits of the application.

In the case of Dahanayake and others vs. Sri Lanka Insurance Corporation Limited and Others [2005] 1 Sri LR 67 Saleem Marsoof, PC J. (P/CA) stated as follows:

It is necessary in this context to refer to the following passage from the judgment of Pathirana J in W. S. Alphonso Appuhamy v L Hettiarachchi (7)

"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigns (9) Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court

that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".

The petitioners failed to make complete and truthful disclosure of all material facts relevant to the determination of the present application. This court is satisfied that there has been a suppression of material facts on the part of the petitioners. Therefore, on that ground, it is justified to refuse the application for a writ of prohibition, even without going into the merits of the case. Nevertheless, this court considered the merits of the application.

The Court cannot act on the basis that there is an existing valid and enforceable compromise between the 1st petitioner company and its creditors in accordance with the provisions of the Companies Act for the reasons stated above.

In any event, even assuming the compromise is valid, petitioners should have fulfilled all obligations under the compromise within 12 quarters starting from the last quarter of 2019. By now, the petitioners have exceeded the considerable margin by taking **double the time** stipulated under the compromise to fulfil their obligations towards the creditors. Therefore, the petitioners cannot reasonably take any further extension of time to complete the obligations arising under the compromise.

The Police is under a statutory obligation to investigate when it receives complaints from creditors. The Inspector General of Police is under a corresponding obligation to ensure that such statutory duties are duly discharged. The existence of the purported compromise cannot be used as a shield against the lawful exercise of police investigation.

Section 109(5) of the Code of Criminal Procedure Act No 15 of 1979 as amended, is as follows;

(5) (a) If from information received or otherwise, an officer in charge of the police station or inquirer has reason to suspect the commission of any offence, he shall himself make an investigation or authorize the making of an investigation under this Chapter in the manner hereinafter set out;

Provided however, if the offence is a cognizable offence or he has reason to-apprehend a breach of the peace, he shall, in the case of every inquirer, forthwith submit a report to the Magistrate's Court having jurisdiction in respect of such offence and in the case of an officer in charge of the police, station, forthwith submit a report to his own immediate superior and proceed in person to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the immediate discovery and arrest of the offender;

Provided further, that an officer in charge of a police station may depute one of his subordinate officers to proceed to the spot to make such investigation and to take such measures as may be necessary for the discovery and arrest of the offender.
(b) If it appears to an officer in charge of a police station or an inquirer that there is no sufficient ground for entering on an investigation, he shall not be bound to investigate the case.

A writ of prohibition can be ordinarily issued to restrain the exercise of in excess jurisdiction or absence lawful authority. However, in the instant application, if the respondent has reason to suspect the commission of any cognizable offence, he is bound to make an investigation under the law. A Writ of Prohibition cannot be granted to stop the Police from performing their statutory duties. This is because police investigations are purely executive and administrative in nature, whereas the remedy of prohibition is designed specifically to restrain judicial or quasi-judicial bodies from exceeding their legal authority. Courts are generally hesitant to interfere with the police's statutory duty to investigate crimes. If the police find that no offence has been committed, the matter ends there in accordance with due process of law.

In the case of *T. N. Fernando, Assistant Commissioner of Excise, Kalutara v. SC Nelum Gamage, Bribery Commissioner and Another* [1994] 3 Sri L.R 190, Kulatunga, J. held that,

The question whether the decision to produce the appellant for an identification parade attracts certiorari can be decided by applying the basic principles of certiorari. This is a remedy whereby decisions and orders of inferior tribunals are examined to determine whether they are within their "jurisdiction or powers"-Wade "Administrative Law" 6th Edt. p. 625. "Jurisdiction" has become synonymous with "power" and certiorari is used to control all kinds of irregular administrative acts - Wade 631. The scope of certiorari has expanded considerably and is now much wider than that laid down in R. v. Electricity Commissioner. In terms of that decision, the existence of a decision affecting the right of subjects was a precondition to the issue of the writ. In R. v. Criminal Injuries Compensation Board, "affecting rights of *subject" meant no more than "affecting subjects". Now the emphasis is on the exercise of a power, e.g. power of a tax officer to seize anything reasonably believed to be required as evidence of tax fraud R. v. Inland Revenue Commissioners ex p. Rossminister Ltd. "... many cases of judicial review necessarily turn upon the legality of acts, as opposed to decisions" Wade 639.*

In the light of the above principles, I am of the view that the decision to invoke the jurisdiction of a Magistrate under S. 124 does not involve the exercise of a power by the respondents and hence does not attract the remedy of certiorari.

I agree that any objection to the exercise of such jurisdiction or the manner of its exercise must be taken before the Magistrate.

As the Supreme Court held above, the petitioners can raise an objection to jurisdiction before the Magistrate's Court.

The reliefs sought by the petitioners are too broad. The petitioners seek a writ of Prohibition restraining the respondents or any other officers acting under the direction and control from **taking any steps** in pursuance of the list of cases/B-Reports, contained in P4. Granting such a writ will effectively prohibit the police not only from conducting further investigations and reporting facts to the relevant Magistrate's Court, but also from performing their statutory duties in the course of the investigation. Such an order would amount to an unwarranted interference with the lawful exercise of the investigative powers of the police

A writ of prohibition is a discretionary remedy.

In the case of <u>Jayaweera vs. Assistant Commissioner of Agrarian Services, Rathnapura and another</u> [1996] 2 Sri LR 70. Justice F.N.D. Jayasuriya held *"a petitioner who is seeking relief in an application for the issue of Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has the discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction, are all valid impediments which stand against the grant of relief."*

In the case of <u>Siddeek vs. Jacolyn Seneviratne and Three Others</u> [1984] 1 Sri LR 83, Soza J. stated, citing from two Administrative Law textbooks, *"Thus, Certiorari is a discretionary remedy and may be withheld if the conduct of the applicant or it would seem, the nature of the error does not justify judicial intervention."*

For the reasons set out in this judgment, the application of the petitioners cannot be allowed. Application is dismissed.

Judge of the Court of Appeal

A. Premashanker J.

I agree.

Judge of the Court of Appeal.