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 a Writ of Certiorari and a Writ of Prohibition in terms of Article 140 of the Constitution.

Aruma Kankanamge Salika Sumanapala
No. 112, Colombo Road, Kegalle.

Petitioner

Case No. C. A. (Writ) Application 754/2007 **Vs.**

1. The Urban Development Authority
   "Sethsiripaya," Battaramulla.

2. The Urban Council Kegalle
   Main Street, Kegalle.

3. G. K. Samarasinghe
   Chairman, Urban Council, Kegalle.

4. Leeladara Somawathie
   Secretary, Urban Council, Kegalle.

5. G. Ratnapala
   Acting Secretary, Urban Council, Kegalle.

6. D. P. R. K. Gunatilake
   Planning Officer, U. D. A. Office,
   Palladeniya Road, Kegalle.

7. K. W. D. L. Gunasekera
   Superintendent of Works,
   Urban Council, Kegalle.

8. J. M. D. P. Jayasundara
   Engineer, Road Development Authority,
   Kegalle Branch, Ambanpitiya, Kegalle.

9. H. M. Sanjeewa Herath
   Public Health Inspector,
   Health Department, Kegalle.

10. Y. M. Seneviratne
Urban Council, Kegalle.

11. Mananna Devage Premachandra Jayasooriya
No. 6/1, Meepitiya Foot Path, Kegalle.

Respondents

Before: Janak De Silva J.

Counsel:

Faisz Musthapha P.C. with Shantha Jayawardena and Hirannya Damunupola for the Petitioner

Chaya Sri Nammuni SSC for 1st to 7th and 9th and 10th Respondents

Manohara De Silva P.C. with Hirosha Munasinghe for the 11th Respondent

Written Submissions tendered on:

Petitioner on 27.09.2018

1st and 8th Respondents on 08.05.2019

11th Respondent on 08.11.2018

Decided on: 27.02.2020

Janak De Silva J.

The Petitioner is the owner of Lot 1 in plan no. 4310 (P-4-B). The 11th Respondent is the owner of Lots 2 and 3 of the said plan. These lands are situated adjacent to each other and originally formed part of the same land which was subsequently partitioned in terms of deed of partition no. 10617 (P3).

The Petitioner is seeking writs of certiorari quashing the decision to approve the construction of a hospital complex proposed to be constructed by the 11th Respondent on Lot 2 which decision is reflected in P-9 and P13. The Petitioner claims that such approval is contrary to the Kegalle Development Plan for the period 2001-2025 (P5) prepared by the 1st Respondent in terms of sections 8A, 8B, 8C, 8D and 8E of the Urban Development Authority Law No. 41 of 1978 as amended (UDA Law) and given effect to by Order made by the Minister in terms of section 8F of the UDA Law.

When this application was supported on 02.10.2007, the Court granted interim relief in terms of prayers (e), (f) and (g) to the petition which reads:

> (e) suspending the approval granted to the 11th Respondent to construct a private hospital in lot 2 in plan no. P4-B;
>
> (f) restraining the 2nd, 3rd and 4th Respondents from taking any further steps in pursuance of the said decisions of the 1st and/or 2nd Respondents as set out in P-9 and P13 until the final determination of this application;
>
> (g) restraining the 11th Respondent from constructing the said hospital complex on the said Lot 2 in plan P-4-B until the final determination of this application.

These interim reliefs were in operation until 05.12.2019 after which it was not extended. It appears that an application for such extension was not made, may be due to an oversight since by this date the judgment had been reserved.

In terms of section 8A(1) of the UDA Law, the Urban Development Authority (UDA) shall having regard to the amenities and services to be provided to the community, prepare a development plan for any development area with a view to promoting and regulating the integrated planning and physical development of lands and buildings in that area or part thereof. The 1st Respondent has prepared a Development Plan for Kegalle for the period 2001-2025 (P5). This has been approved by the relevant Minister in terms of section 8F of the UDA Law. The Development Plan for Kegalle for the period 2001-2025 (P5) has therefore the force of law and are regulations within the meaning of the law.

There is no dispute that Lots 1, 2 and 3 of plan no. 4310 (P4-B) are within the Primary Residential Zone – 1 of the Development Plan for Kegalle the period 2001-2025 (P5) (3R1).

Clause 7.1.1 of the said Development Plan states that where the use of a site or premises is designated for a specific use in the Zoning Plan (Map No. 2), it should be used only for the purpose so designated. In this case it does not appear that the land in issue was designated for a specific use.

Clause 7.1.3 states that where a site or premises is not designated for a specific use, its use shall not be contrary to the use permissible in the zone where it lies.

Clause 7.3.1 sets out the permitted uses of Primary Residential Zone – I which includes Medical Clinic not exceeding 100 sq. m. in extent. The proposed construction by the 11th Respondent does not fall within this permitted use.

It appears that for this reason the Chairman of the 2nd Respondent had by letter dated 04.07.2007 addressed to the Petitioner (P9) stated that the 2nd Respondent had suspended the granting of approval for the said hospital complex. However, the same letter goes on to state that the 1st Respondent had decided to grant approval for the same.

The minutes of the Planning Committee meeting of the 2nd Respondent dated 05.07.2007 (P13) item 21 indicates that the granting of approval for the said hospital is contrary to the Zoning Regulations and as such at its meeting held on 07.02.2007 it was decided that the application of the 11th Respondent cannot be approved. But the minutes of 05.07.2007 (P13) goes on to state that it was decided to grant approval for the said construction after considering a letter sent by the Secretary to the Ministry of Urban Development and Sacred Areas.

Clearly, the Planning Committee of the 2nd Respondent had changed its earlier refusal to the construction and approved it acting under dictation of the Secretary to the Ministry of Urban Development and Sacred Areas. In this regard, I concur and reiterate the following statement of S.N. Silva J. (as he was then) in *Kandiah v. Land Reform Commission and Two Others* [(1988) 2 Sri.L.R. 119 at 128]:

> "In dealing with the facts I found that the 1st Respondent did not implement the decision in document P8 and later purposed to vary the decision acting under dictation by the Member of Parliament. **The 1st Respondent is a statutory functionary and it cannot abdicate its duty or exercise its discretionary power under dictation by the Member of Parliament or any other person. Document P14 which was sent by the 1st Respondent under dictation by the 1st Respondent is accordingly of on force or avail in law.**" (Emphasis added)

Yet the learned Senior State Counsel for the 1st and 8th Respondents sought to argue that although a hospital is not specifically provided for, clause 7.1.3 provides for this eventuality and a private hospital is the same nature of activity as a medical centre. I have no hesitation in rejecting this submission.

In construing instruments that confer power what is not permitted should be taken as forbidden. This strict doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied. Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. Acts of statutory authorities that go beyond the strict letter of this enabling provision can reasonably be considered as being incidental to or consequential upon that which is permitted, been done with a view to promoting the general legislative purpose in

the conferment of power to such authorities. This is in keeping with the purposive approach to statutory interpretation. Anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by courts in an exercise of statutory interpretation [*Liyanage and Others v. Gampaha Urban Council and Others* (1991) 1 Sri.L.R. 1].

The construction of a hospital as the subject matter of this application is not incidental or consequential to the permitted uses of Primary Residential Zone – I. In fact, it is prohibited as the relevant clause states "Medical Clinic not exceeding 100 sq. m. in extent".

The learned President's Counsel for the 11th Respondent submitted that the Kegalle Development Plan (P5) was amended in 2016 which identifies the land belonging to the 11th Respondent as a Mixed Residential Zone and as such the construction sought to be done is permitted. This contention must fail on two grounds.

Firstly, I have previously held that even in writ applications the rights of the parties must be decided as at the date of the application [*Tissa Abeywickrema and Others v. Mayor, Badulla Municipal Council and Others* {CA (PHC) 111/2011, C.A.M. 22.02.2019}]. Secondly, section 6(3) of the Interpretation Ordinance is applicable.

For all the aforesaid reasons, I hold that the Planning Committee of the 2nd Respondent had changed its earlier refusal to the construction and approved it acting under dictation of the Secretary to the Ministry of Urban Development and Sacred Areas and as such it is of no force or avail in law. Accordingly, I issue writs of certiorari as prayed for in prayers (a), (b) and (c) to the petition dated 29.08.2007.

The 1st and 2nd Respondents are directed to pay Rs. 50,000/= each as costs to the Petitioner.

For the avoidance of doubt, this judgment will not prevent the 11th Respondent from making a fresh application seeking approval for the construction of a hospital on the land in dispute if the present Development Plan for Kegalle permits such a construction.

Judge of the Court of Appeal