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

Panchalingam Associates (Pvt) Ltd,
No.165, Station Road,
Udahamulla,
Nugegoda.
Petitioner

CASE NO: CA/WRIT/145/2018

Vs.

1. The Monetary Board,
   Central Bank of Sri Lanka,
   Level 06,
   No.30,
   Janadhipathi Mawatha,
   Colombo 01.
2. The Governor,
   Central Bank of Sri Lanka,
   Level 06,
   No.30,
   Janadhipathi Mawatha,
   Colombo 01.

3. A. A. M. Thassim,
The Director of Bank Supervision,
Bank Supervision Department,
Central Bank of Sri Lanka,
Level 06,
No.30,
Janadhipathi Mawatha,
Colombo 01.

3A. Anjula De Silva,
The Director of Bank Supervision,
Bank Supervision Department,
Central Bank of Sri Lanka,
Level 06,
No.30,
Janadhipathi Mawatha,
Colombo 01.

4. Hatton National Bank PLC,
HNB Towers,
Level 21,
No.479,
T. B. Jayah Mawatha,
Colombo 10.

5. Central Depository Systems
(Private) Limited,
No.69/6,
Kynsey Road,
Colombo 08.

6. Colombo Stock Exchange,
   No.04-01,
   West Block,
   World Trade Centre,
   Echelon Square,
   Colombo 01.
7. Securities and Exchange
   Commission,
   Level 29,
   East Tower,
   World Trade Centre,
   Echelon Square,
   Colombo 01.

   Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Nihal Fernando, P.C., with Harshula Seneviratne for the Petitioner.
Chaya Sri Nammuni, S.S.C., for the 1st, 3rd and 7th Respondents.
Dr. Harsha Cabral, P.C., with Kushan Illangatillake and Shasheen Arsekularathne for the 4th Respondent.
Jivan Goonethilaka for the 5th and 6th Respondents.

Argued on: 29.06.2020

Decided on: 28.07.2020

Mahinda Samayawardhena, J.

The Petitioner has filed this application mainly against the 3rd Respondent, the Director of Bank Supervision of the Central Bank, seeking to quash by certiorari the "*decisions or determinations*" contained in P10 dated 11.12.2017 and P12 dated 19.02.2018, insofar as they relate to the Petitioner's entitlement to accumulated "*distribution rights*", i.e., cash dividends and scrip dividends, in respect of the "*unregistered*" shares held by the Petitioner in the 4th Respondent licensed commercial bank, Hatton National Bank PLC.

There is no dispute that, in order to ensure the soundness of the banking system, the 1st Respondent, the Monetary Board of the Central Bank, in terms of section 46(1) of the Banking Act, No. 30 of 1988, as amended, issued "Directions No.1 of 2007" (hereinafter referred to as the Directions) marked P3 dated 19.01.2007 to licensed commercial banks regarding "*ownership of issued capital carrying voting rights*".

Accordingly, under clause 3 of the Directions marked P3, which is in line with section 12(1C)(a) of the Banking Act, an individual, partnership or corporate body shall not directly or indirectly or through a nominee or "*acting in concert*" with any other individual, partnership or corporate body, acquire a "*material interest*" in a licensed commercial bank without the prior written approval of the 1st Respondent given with the concurrence of the subject Minister.

A "*material interest*" is defined, both in P3 and in the Banking Amendment Act, No.2 of 2005, as "*the holding of over 10% of the*

issued capital of a licensed commercial bank carrying voting rights."

The term "*acting in concert*" is defined in section 12(1C)(a) of the said amending Act, No.2 of 2005, as follows:

> *"acting in concert" means acting pursuant to an understanding (whether formal or informal) to actively co-operate in acquiring a material interest in a licensed commercial bank so as to obtain or consolidate, control of that bank.*

In terms of clause 4 of P3, subject to conditions, the 1st Respondent can grant permission to some categories of shareholders to acquire a "*material interest*" up to 15%.

Clause 6 of P3 contains the following:

> *6(1) Any material interest previously acquired by any of the categories of shareholders referred to in sections 12(1C) and 46(1)(d) in excess of 15 per cent of the issued capital carrying voting rights in a licensed commercial bank and held at the date of these Directions, shall be disposed of and/or otherwise reduced by such shareholders to a level not exceeding 15 per cent of the issued capital carrying voting rights in the licensed commercial bank.*
>
> *(2) Such disposal and/or reduction shall be carried out within the period as may be specified by the Monetary Board on a case by case basis, provided that such period shall not exceed five years from the date of stipulation.*

> *(3) In the event, any of the categories of shareholders referred to in section 12(1C) and 46(1)(d) fails to comply with the directives of the Monetary Board within the stipulated period of time, the voting rights in excess of 10 per cent attributable to the ownership of shares held by the categories of shareholders subject to this Direction shall be deemed invalid with effect from the last date of the period specified by the Monetary Board to reduce the material interest.*

The Petitioner draws a distinction between clause 3 and 6 to say the former is applicable to new shareholdings acquired after the amending Act, No.2 of 2005, and the latter to existing shareholdings at the time of P3 coming into effect; and further says the Petitioner falls into the latter category, as it held 6.45% of the issued share capital carrying voting rights of the 4th Respondent at the time. However, there is no necessity to dwell on this point, as the said distinction is not relevant or material to the facts of the instant case, as I will explain in the course of this Judgment.

Pursuant to P3, the 1st Respondent informed licensed commercial banks to disclose all categories of shareholders who have a "*material interest*" greater than 15% of the issued share capital carrying voting rights of each bank.

In response, the 4th Respondent, by 3R2, disclosed *inter alia* the Stassen Group as a shareholder holding 24.39% of the issued share capital carrying voting rights of the 4th Respondent.

The 4th Respondent did not disclose that the Petitioner and a company by the name of CBD Exports Limited are part of the Stassen Group.

However, upon an investigation carried out by the Bank Supervision Department of the Central Bank, it was established that the Petitioner and the said CBD Exports Limited are part of the Stassen Group, and they each held 6.45% and 8.11% of the issued share capital carrying voting rights of the 4th Respondent, in violation of the Directions marked P3.[1] This finding of the 3rd Respondent is not directly challenged by the Petitioner.

As a result, the 3rd Respondent, by P4 dated 26.08.2010, informed the 4th Respondent "*to implement the (following) Direction of the Monetary Board*".

> *(a) HNB (the 4th Respondent) to aggregate the shareholding of 14.56% of CBD and PAL (the Petitioner) in HNB with that of the Stassen Group with immediate effect for the purpose of the Direction No.1 of 2007 dated 19.01.2007 issued by the Monetary Board (P3).*
>
> *(b) CBD and PAL to dispose of the shareholding of 14.56% in HNB within six months from 19.08.2010.*
>
> *(c) HNB to remove the names of CBD and PAL from the register of members of the bank with immediate effect as required in terms of section 12(1C)(c) of the Banking Act.*

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[1] *Vide* P5, 3R17, 3R19(a), P4/3R5, Paragraph 23 (viii) of the statement of objections of the 1st-3rd Respondents and paragraph 25(viii) of the corresponding affidavit of the 3rd Respondent.

The above was conveyed to the Petitioner by the 4th Respondent by P4 dated 26.08.2010.

As seen from 3R8, the 4th Respondent "*immediately complied with*" (a) and (c) above, i.e., the 4th Respondent aggregated the shareholding of the Petitioner with that of the Stassen Group and removed the name of the Petitioner from the Register of Shareholders of the 4th Respondent bank.

3R9 dated 15.02.2011 reveals that the Petitioner requested an extension of time from the 2nd Respondent to sell its (the Petitioner's) shares in the 4th Respondent "*for a better price*".

By 3R10 dated 16.03.2011, the Petitioner again requested additional time to sell its shares. This request was turned down by the 3rd Respondent, who informed the Petitioner "*the direction of the Monetary Board has to be complied with immediately and such request is not warranted*". The Petitioner was further informed "*HNB has already removed the name of PAL (the Petitioner) from its members' register*".

By 3R11 dated 21.04.2011, the 4th Respondent informed the Petitioner "*to take immediate measures*" to divest its shareholding in the 4th Respondent, as non-compliance with the Directions of the Monetary Board is an offence under section 79 of the Banking Act.

This was repeated by the 3rd Respondent *inter alia* by 3R13 dated 13.06.2011, whereby the Petitioner was directed "*to take steps to dispose of the shares of HNB held by PHL with immediate effect*".

Despite repeated demands, the Petitioner kept on postponing the divestiture of its shares in the 4th Respondent, finally disposing of the same only in or around March 2018 whereas the shares should have been disposed of on or before 19.02.2011.

During the period of its shares being unregistered, the dividends due to the Petitioner were not paid by the 4th Respondent, and the Petitioner repeatedly demanded the payment. One such demand is P8(a) dated 19.05.2017, which was answered by the 4th Respondent by P8(b) dated 25.05.2017 wherein the 4th Respondent *inter alia* informs the Petitioner:

> *Please note that since Panchalingam Associates (Pvt) Ltd (PAL) is not registered in the Bank's Shareholders' Register, we are not in a position to accede to your request.*
>
> *According to our records, by its letter dated 13th June 2011, Central Bank of Sri Lanka has given a direction requiring PAL to take steps to dispose of the shares of HNB held by PAL with immediate effect and up to date PAL has not complied with this direction. Therefore, you are in continuous violation of a direction given by the Central Bank of Sri Lanka and in terms of section 79 of the Banking Act this is a punishable offence.*

Thereafter, the Petitioner wrote several letters to the 3rd Respondent, complaining against the actions of the 4th Respondent in this regard[2] and requesting the 3rd Respondent to intervene in order to "*direct Hatton National Bank PLC to*

[2] *Vide* P9(a) dated 06.10.2017, P9(b) dated 20.10.2017, P9(c) dated 16.11.2017.

immediately cease its unreasonable, arbitrary and unfair conduct and to direct them to pay our company its lawful dividend entitlement from the date of the purported un-registration of our shares along with other distribution rights enjoyed by the shareholders of Hatton National Bank during the subject period."[3]

The 3rd Respondent replied these letters by P10 dated 11.12.2017, wherein the 3rd Respondent *inter alia* informed the Petitioner "*HNB has removed the name of PAL (the Petitioner) from the register of members of the bank to comply with the above direction. Since unregistered shares do not have rights to dividends, HNB has not paid any dividends to PAL since that date*." P12 dated 19.02.2018 is a reiteration of the same.

The substantive relief sought by the Petitioner in this application is to quash by certiorari the "*decisions or determinations*" in the aforementioned P10 and P12 "*relating to the entitlement of the Petitioner to accumulated distribution rights*". What the Petitioner essentially seeks thereby is recognition of its entitlement to the dividends (cash and scrip) that accumulated during the period its shares in the 4th Respondent Bank were unregistered.

Is this permissible? Or, is the abovementioned position taken up by the 4th Respondent and confirmed by the 3rd Respondent legally correct? Let me now consider this.

It is undisputed that the name of the Petitioner was removed from the Share Register of the 4th Respondent around August

[3] *Vide* P9(a).

2010.[4] What flows from such a removal? The Companies Act, No.7 of 2007, provides the answer.

Section 130 of the Companies Act enacts:

> *130(1) The entry of the name of a person in the share register as holder of a share shall be prima facie evidence that title to the share is vested in that person.*
>
> *(2) Subject to the provisions of subsections (2) and (3) of section 86, a company may treat the registered holder of a share as* ***the only person entitled to*** *—*
>
> *(a) exercise the right to vote attaching to the share;*
>
> *(b) receive notices;*
>
> *(c) receive a distribution in respect of the share; and*
>
> *(d) exercise any other rights and powers attaching to the share.* (emphasis added)

Section 86 of the Companies Act reads:

> (1) *In this Act, the term "shareholder" means—*
>
> *(a) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company;*
>
> *(b) until a person's name is entered in the share register, a person named as a shareholder in an*

[4] *Vide* 3R8.

application for incorporation of a company at the time of registration of the company;

(c) until a person's name is entered in the share register, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company;

(d) until a person's name is entered in the share register, a person to whom a share has been transferred and whose name ought to be but has not been entered in the register.

(2) Where a notice of any trust has been entered in the share register in respect of any shares in a company under subsection (2) of section 129, the person for whose benefit those shares are held in trust—

(a) shall be deemed to be a shareholder in the company; and

(b) shall in respect of those shares, enjoy all such rights and privileges and be subject to all such duties and obligations under this Act, as if his name had been entered in the share register as the holder of those shares.

(3) Where a company has wrongfully failed to enter in the share register the name of a person to whom shares have been transferred, that person—

> *(a) shall be deemed to be a shareholder in the company; and*
>
> *(b) shall in respect of those shares, enjoy all such rights and privileges and be subject to all such duties and obligations under this Act, as if his name had been entered in the share register as the holder of those shares.* (emphasis added)

Let me also quote section 129 of the Companies Act (referred to in section 86(2) above) for completeness.

> *129(1) Subject to the provisions of subsection (2), no notice of any trust, expressed, implied or constructive, shall be entered on the share register or be receivable by the Registrar in the case of companies registered in Sri Lanka.*
>
> *(2) A company shall enter in its register and the Registrar shall receive notice of any trust, the trustee of which is a company and-*
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> *(a) the principal business of which is to act as a central depository to a stock exchange licensed under the Securities and Exchange Commission of Sri Lanka Act, No. 36 of 1987; and*
>
> *(b) which has been approved by the Minister in consultation with the Securities and Exchange Commission of Sri Lanka, established by that Act.*

The following is deducible from the above:

(a) The Petitioner, whose name was removed from the Share Register, cannot, in a strict technical sense, be regarded as a shareholder. (subsection (1) of section 86)

(b) The Petitioner does not fall into the two specific exceptions contained in sections 86(2) and (3) to be treated as a shareholder whose name is not included in the Share Register.

(c) The Petitioner is therefore not entitled to dividends as of right. (sub section (2) of section 130)

Accordingly, the refusal to pay dividends for the unregistered shares of the Petitioner by the 4th Respondent and the confirmation of the same by the 3rd Respondent are flawless.

Having said so, let me also add the following.

The shares of the Petitioner in the 4th Respondent were unregistered by the 4th Respondent not of its own volition, but pursuant to a ruling by the Monetary Board upon the violation of the Directions marked P3. The Monetary Board took the view the 4th Respondent "*HNB has failed and/or willfully defaulted in providing the CBSL with accurate details pertaining to the relationship between and among CBD, PAL and Stassen Group upon the request of the Director of Bank Supervision*"[5] and therefore approved "*Reprimanding the Chief Executive Officer/Managing Director and the Company Secretary of HNB for violation of the Direction No.1 of 2007 by providing incorrect*

[5] *Vide* 3R19(a). *Vide* also 3R5, 3R15, 3R17.

information".[6] It is thereafter the 4th Respondent "*surrendered*" and complied with the Directions in this regard, which included unregistering the Petitioner's shares forthwith.

For the aforesaid reasons, the Petitioner's application is bound to fail.

However, the Petitioner does not stop here. The Petitioner indirectly seeks to attack the decision of the 1st Respondent Monetary Board contained in 3R19(b) dated 19.08.2010, whereby the Petitioner was directed to dispose of its shareholding in the 4th Respondent within six months of the date of the Directions, which was communicated, as I have already explained, both to the Petitioner and the 4th Respondent by the 3rd Respondent.

The Petitioner, having accepted the said decision of the 1st Respondent Monetary Board at that time, cannot, in my view, after a lapse of eight years, challenge the same by way of a writ application.

The Petitioner says "*it is trite law that estoppel does not and cannot be invoked in the face of a statute, for against a statute no estoppel can prevail.*" I agree. But there is no violation of a statute on the part of the 1st or 3rd Respondents for this principle to be applied in favour of the Petitioner.

I must also emphasise, in the same breath, writ being a discretionary remedy, the Court is not bound by the rigidity of the law as in the case of an appeal, which the appellant is

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[6] *Vide* 3R19(b).

entitled to invoke as of right whereas the applicant in a writ application has no such legal right in that notwithstanding he may be entitled in law to the relief he seeks, the Court can still refuse the relief on various considerations.

The Petitioner submits "*The 1st to 3rd Respondents have inter alia acted arbitrarily and unreasonably in directing the Petitioner to dispose of its shares whilst allowing other parties to reduce their shareholding by way of P4 which amounts to unequal treatment before the law*". Even assuming the Petitioner is correct, the Petitioner knew about P4 and about the alleged unequal treatment in or around August 2010. "*Unequal treatment before the law*" is a violation of the fundamental right guaranteed by Article 12 of the Constitution. Without having filed a fundamental rights application at that time, the Petitioner cannot, eight years later, agitate the same matter by way of a writ application.

Although the Petitioner filed this application seeking to quash by certiorari the "*decisions or determinations*" of the 3rd Respondent contained in P10 and P12 regarding payment of dividends, this relief, in my view, is misconceived in law.

If I may explain, there is no decision or determination in P10 and P12 made by the 3rd Respondent in respect of dividends. The decision to remove the Petitioner from the Share Register of the 4th Respondent and to direct the Petitioner to dispose of its shares within six months of the Directions marked P3 was taken by the 1st Respondent Monetary Board, not by the 3rd Respondent. Upon the said decision of the Monetary Board, the

3rd Respondent expressed the opinion "*unregistered shares do not have rights to dividends, HNB has not paid any dividends to PAL since that date.*" This is not a decision amenable to writ jurisdiction. The decision of the Monetary Board is not challenged in this application. Without challenging the main decision, the Petitioner cannot challenge the consequences of the decision although *vice versa* is possible, in that, once the main decision is declared a nullity all that flows from it becomes a nullity — it does not happen in the reverse, as the Petitioner attempted to suggest at the argument.

Although there is no necessity to go further, let me now briefly consider the basis on which the Petitioner says the Monetary Board could not have compelled the unregistering of the Petitioner's shares in the 4th Respondent bank.

The Petitioner, whilst stating it held over 6% of shares in the 4th Respondent well before the Directions marked P3 was issued, further submits:

> *In terms of section 6 of Direction No.1 of 2007 of the Monetary Board (P3), which is clearly applicable to existing shares, if at all only the voting rights of the shares of the Petitioner could have been limited/curtailed and not otherwise. There is no right or power given under the said section 6 to unregister shares or to deny distribution rights in respect of shares which were already held by persons at the time of coming into operation of Direction No.1 of 2007.*

Although there is no power to unregister shares under clause 6 of P3, such power is given to the Monetary Board by clause 8, which reads as follows:

> *In terms of section 12(1C)(c) (of the Banking Act) and subject to Directions 6 and 7 above, a licensed commercial bank shall not enter in its register of members the name of any shareholder referred to in sections 12(1C) and 46(1)(d) as the holder of shares of the bank, who or which has contravened the provisions of section 12(1C) and/or* ***these Directions***. (emphasis added)

I cannot agree with the argument of the Petitioner that "*the said provisions apply only prospectively and do not and could not have affected the shareholders and shareholdings that existed at the time of the amending enactment in 2005*."

At this juncture, I must also make reference to the Wrongdoer Principle, which seems to be the further development of the Roman-Dutch Law principle *spoliatus ante debet omnia restituendus est.*[7] The Wrongdoer Principle demands "*A wrongdoer shall not be allowed to benefit out of his own wrongdoing.*" *Vide Seelawathie Mallawa v. Millie Keerthiratne*,[8] *Subramanium v. Shabdeen*,[9] and *Kariyawasam v. Sujatha Janaki.*[10] *Ex turpi causa non oritur actio* is another legal doctrine worth mentioning at this stage, according to which "*a party*

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[7] This means the party dispossessed ought first of all to be restored. *Vide Enso Nona v. Somawathie* [1998] 3 Sri LR 239 at 244.
[8] [1982] 1 Sri LR 384.
[9] [1984] 1 Sri LR 48 at 56.
[10] [2013] BLR 77.

cannot be permitted to pursue a legal remedy if it springs from his own illegal act."

In the instant matter, what did the Petitioner do? The Petitioner did not dispose of its shares in the 4th Respondent bank for seven long years, despite its name being removed from the Share Register and despite the 3rd Respondent as well as the 4th Respondent repeatedly insisting that the unregistered shares be disposed of immediately. Instead, the Petitioner kept on violating the Monetary Board Directions marked P3, thereby perpetrating a punishable offence under section 79 of the Banking Act. CBD Exports Limited, which was also identified as a violator along with the Petitioner, complied with the Directions immediately and sold its shares.[11] The Monetary Board could not strike off or cancel the shares of the Petitioner. All it could do was direct the 4th Respondent to remove the Petitioner from the Share Register of the 4th Respondent until the unregistered shares of the Petitioner were disposed of, which the Petitioner was required to do as soon as possible. The result of the unregistering was to prevent the Petitioner from benefiting from the said shares in any manner other than by sale of the shares. The Petitioner is now asking this Court to allow it to benefit from its wrongdoing, stating that from August 2010 until the unregistered shares were sold in March 2018, the shares formed part of the total capital of the 4th Respondent, thereby accruing dividends, and the Petitioner as the owner of the shares is solely entitled to the said dividends. The writ Court exercising discretionary and equitable jurisdiction will not be a party to such a transaction.

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[11] *Vide* 3R9.

The Petitioner's repeated assertions before this Court that "*in December 2017 (by P10) the 3rd Respondent approved and permitted the sale of the purported unregistered shares held by the Petitioner in the 4th Respondent bank*" and "*consequent to the decision/permission/approval of the 3rd Respondent dated 11th December 2017 (P10) the Petitioner disposed of its subject shares held in the 4th Respondent company*" are manifestly misleading. From August 2010, the 3rd Respondent insisted that the Petitioner sell its shares forthwith. In P10, the 3rd Respondent made it abundantly clear "*there is no requirement to seek CBSL approval to dispose of the said shares which have been long overdue.*" It appears the Petitioner purportedly sought "*approval*" to sell its shares from the 3rd Respondent in November 2017 by P9(c) in order to lay the foundation for this application.

I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal