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 under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 271/2017

1) Port Junk Dealers Association,
No. 84/5, Bristol Complex,
Sir Razeek Fareed Mawatha, Colombo 1.

2) Waligama Palliya Gurunaselage Udaya Senaka De Silva,
President,
Port Junk Dealers Association,
No. 90/2, Deva Kotikawatte,
New Town, Mulleriyawa.

3) Kudagama Liyanage Nalindrasiri,
Secretary,
Port Junk Dealers Association,
No. 48, Sumithrarama Mawatha,
Colombo 13.

Petitioners

Vs.

1) Marine Environment Protection Authority,
No. 758, Baseline Road, Colombo 9.

2) Hon. Attorney General,
Attorney General's Department, Colombo 12.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Dulindra Weerasuriya, P.C., with Chamith Marapana for the Petitioners

Ms. Nayomi Kahawita, Senior State Counsel for the Respondents

Written Submissions: Tendered on behalf of the Petitioners on 28th December 2018 and 1st November 2019

Tendered on behalf of the Respondents on 30th January 2019 and 4th December 2019

Decided on: 29th May 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 17th September 2019, the learned President's Counsel for the Petitioners and the learned Senior State Counsel for the Respondents gave a brief outline of their respective cases and moved that this Court pronounce its judgment on the written submissions of the parties.

The learned Senior State Counsel, in the course of her submissions, raised a preliminary objection with regard to the maintainability of this application. She submitted that even though the Petitioners claim in the caption that this is an application filed in terms of Article 140 of the Constitution for Writs of Certiorari and Prohibition, the prayer does not contain any relief for Writs of Certiorari and Prohibition. This Court has examined the prayer to the petition, and observes that even though in paragraph (II), the Petitioner is moving that

this Court be pleased "*to hold that Regulations 8(1), 8(2) – 8(5) of P8 is ultra vires the provisions of Section 6(e) and/or 21 and/or Section 51 of Act No. 35 of 2008"*, the Petitioners have not sought a Writ of Certiorari to quash the said Regulations.

The learned President's Counsel for the Petitioners, whilst conceding that there is a lacuna in the prayer, submitted that the petition makes it abundantly clear that the Petitioners are seeking a Writ of Certiorari, and that no prejudice has been caused to the Respondents.

The learned State Counsel drew the attention of this Court to the judgment in **Dayananda vs Thalwatte**[1] where a situation similar to what has occurred in this application had arisen, in that the petitioner had failed to identify the writ he had sought from this Court. In the prayer in that case, the petitioner had sought (a) to quash the decision of the 1st respondent to institute proceedings in terms of the State Lands Recovery of Possession Act and (b) to declare that the quit notice dated 08th April 1997 is of no force or avail. Upon an objection being taken that (a) the Petitioner has failed to identify the writ he has sought from this Court, and (b) that the prayer is misconceived and unknown to the law and therefore neither relief could be granted, and the petitioner's response being identical to what has been taken up in this application, this Court held as follows:

> "*It is necessary for the Petitioner to specify the writ he is seeking supported by specific averments why such relief is sought. Even though the Petitioner has set out in the caption that "In the matter of an application*

[1] (2001) 2 Sri LR 73.

… for writ of quo warranto and prohibition" there is no supporting averment specifying the writ and there is no prayer as regards the writ that is being prayed for. The failure to specify the writ therefore renders the application bad in law."

Although it is clear from the pleadings that the Petitioner is complaining about the *vires* of the actions of the Respondents, this Court is in agreement with the learned State Counsel that this Court cannot grant a Writ of Certiorari, in the complete absence of a prayer to that effect. An application in such a situation is misconceived in law. This situation must however be distinguished from a situation where there is a specific prayer for a Writ of Certiorari, and the power of Court to issue the said Writ of Certiorari, albeit in a modified form.

The learned President's Counsel for the Petitioners also moved that this Court be pleased to permit the Petitioners to amend the petition, on the basis that there has been a mistake. The learned State Counsel however objected to an amendment being permitted at this late stage of this application. The learned State Counsel submitted that the objection relating to the prayer was raised in paragraph 11 of the Statement of Objections of the 1st Respondent filed on 27th September 2018, which reads as follows: "*The 1st Respondent denies the averments in paragraph 26 of the petition and state by way of further answer that the relief as prayed for is misconceived in law and warrants the dismissal of the petition in limine*." This Court observes that the Petitioners have specifically responded to this averment in paragraph 9 of their counter affidavit where it has been stated that the "*Petitioners are entitled to the relief sought in the prayer."* This objection has also been raised in the written

submissions filed on behalf of the Respondent on 30th January 2019, but the Petitioners did not make an application to amend the prayer.

Even though provision to amend pleadings is found in Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules, 1990, this Court is in agreement with the learned State Counsel that the application ought to have been made soon after the objection was raised in the Statement of Objections of the Respondents. Hence, this Court is of the view that this is not a fit case where the application to amend the prayer should be allowed.

In the above circumstances, this Court upholds the preliminary objection raised by the learned Senior State Counsel, with the consequence being that this application is liable to be dismissed *in limine*.

However, this Court observes that this is the second application that is being filed by these Petitioners in respect of the same underlying issue.[2] If this application is dismissed without a consideration of the merits, the Petitioners may decide to pursue the relief claimed in this application, either in this Court or in another forum, causing much expense to the Petitioners, and the Respondents. In these circumstances, it is the view of this Court that it should consider the complaint of the Petitioners, which is that the provisions of the Marine Environmental Protection (Waste Reception Facilities) Regulations 2016, published in Extraordinary Gazette No. 1996/27 dated 6th December 2016, annexed to the petition marked '**P8**' are *ultra vires* the provisions of Sections 6(e), 21 and 51 of the Marine Pollution Prevention Act No. 35 of 2008 (the Act).

[2] CA (Writ) Application No. 220/2016.

The facts of this application very briefly are as follows.

The 1st Petitioner is the Port Junk Dealers Association, a company limited by guarantee and registered under the provisions of the Companies Act No. 7 of 2007. The 2nd and 3rd Petitioners are the President and Secretary, respectively, of the 1st Petitioner. The Petitioners state that its members are engaged in the business of removing solid waste, waste oil, sludge etc from ships that call at different Ports in Sri Lanka. This activity is commonly referred to as *providing waste reception facilities*.

The 1st Respondent is the Marine Environment Protection Authority, established under the Act. In terms of its preamble, it is an Act to provide for the prevention, control and reduction of pollution in the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka.

The functions of the 1st Respondent are set out in Section 6. The paragraphs which are relevant to this application are set out below:

> *"(b) To formulate and execute a scheme of work for the prevention, reduction, control and management of pollution arising out of ship based activity and shore based maritime related activity, in the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka;*
>
> *(d) To take measures to manage, safeguard and preserve the territorial waters of Sri Lanka or any other maritime zone, it's fore-shore and*

the coastal zone of Sri Lanka from any pollution caused by any oil, harmful substance or any other pollutant;

(e) ***To provide adequate and effective reception facilities for any oil, harmful substance or any other pollutant****."*

In terms of Section 7 of the Act, the 1st Respondent shall have *inter alia* the following powers:

"*(a) to effectively safeguard and preserve the territorial waters of Sri Lanka or any other maritime zone, it's fore-shore and the coastal zone of Sri Lanka from pollution* ***arising out of any ship based activity*** *or shore based maritime related activity;*

(b) to conduct investigations and inquiries, and to institute legal action in relation to any pollution, ***arising out of any ship based activity*** *or shore based maritime related activity;*

(c) to oversee all sea transport of oil and bunkering operations that are carried out in the territorial waters of Sri Lanka or any other maritime zone, it's foreshore and the coastal zone of Sri Lanka for the purpose of preventing of pollution."

In terms of Section 21 of the Act, the 1st Respondent shall exercise the following powers when dealing with waste management:

"*(a)* ***to provide reception facilities within*** *or outside* ***any port in Sri Lanka****, in consultation with the Marine Environmental Council to enable any ship using such port or traversing Sri Lanka waters or any*

other maritime zone, its fore-shore and the coastal zone of Sri Lanka to discharge or deposit any residue of oil or other pollutants;

(b) ***to direct the person in charge of all ports****, harbours, terminals, repair yards of ships, dry docks or any other marine related facility used by ships which have any residue of oil to discharge,* ***to provide adequate reception facilities for the purpose of such discharge****:*

For the purposes of this paragraph the Authority may seek the assistance of any other person for the provision of such facilities or arrange for the provision of such facilities by any other person*;*

(c) to direct the person in charge of all ports, harbours, terminals, repair yards of ships, dry docks or other marine related facilities used by ships which have any residue of oil discharge, to obtain the services of any such facility arranged by the Authority ;

(d) to direct the person in charge of all ports, harbours terminals, repair yards of ships, dry docks or any other marine related facilities :—

(i) to prepare a waste management plan which shall be approved by the Authority and to regularly update such plan with the approval of the Authority; and

(ii) to carry out at prescribed intervals, an environmental impact assessment (EIA) by a Classification Society approved by the Authority."

The Petitioners admit that although in terms of Section 21, the provision of waste reception facilities within a port is the function of the 1st Respondent, the 1st Respondent has the power to seek the assistance of any other person for the provision of such facilities or arrange for the provision of such facilities by any other person.

The cumulative effect of the above provisions can be summarized as follows:

a) The Act has been promulgated to make provision for the prevention, control and reduction of pollution in the territorial waters of Sri Lanka, its maritime zone and its foreshore;

b) Sri Lanka, being an island nation situated close to major sea routes have vessels passing by on a regular basis and thus, it is important to take measures to manage, safeguard and preserve the territorial waters of Sri Lanka, its maritime zone and its foreshore and prevent the pollution of its territorial waters, its maritime zone and its foreshore by such ships;

c) It is therefore the function of the 1st Respondent to provide adequate and effective reception facilities to such ships for them to discharge their waste, including any oil, harmful substance or any other pollutant;

d) The 1st Respondent may carry out the said function by itself or the 1st Respondent may seek the assistance of any other person to provide the said service.

In terms of Section 51 (2), the Minister may make regulations in respect of the following matters:—

"(a) *Specifying the conditions relating to the issue of permits and licences by the Authority and the fees if any to be charged in respect thereof*;

(g) *Specifying the conditions subject to which reception facilities shall be provided, including the registration of persons providing such reception facilities and the fees to be levied for the provision of such facilities*;

(s) Specifying the fees or charges to be levied for the issuing of licences or certificates or for the execution of any other instrument under this Act, for the provision of any services under the Act or for the performance of any essential monitoring functions."

The Minister, acting in terms of Section 51, read with Sections 6(e) and 21 of the Act, had promulgated the aforementioned Marine Environmental Protection (Waste Reception Facilities) Regulations 2016, marked '**P8**'. This Court has examined '**P8**', and observes that in terms of Regulation 2(c), the said Regulations shall apply to any service provider registered with the Authority to provide waste reception facilities. Regulation 5 provides that, '*No person other than a service provider registered with the Authority shall receive waste from any ship using any port, harbour, terminal, repair yard of ships, dry dock, anchorage or off shore marine related facility or any other marine related facility or traversing Sri Lanka waters or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka*.' The provisions of the said Regulations are therefore directly applicable to the Petitioners and its members who are engaged in the business of providing waste reception facilities.

As noted at the outset, the complaint of the Petitioners to this Court is that the provisions of the said Regulations are *ultra vires* the provisions of Sections 6(e), 21 and 51 of the Act. This Court would now consider each Regulation that the Petitioners are complaining of.

Regulation 6(1) of '**P8**' sets out the procedure that should be followed by a person who wishes to engage in the provision of waste reception facilities. Accordingly, an applicant shall submit to the 1st Respondent, an application for registration as a service provider in the form specified in Schedule II accompanied by the fee specified in Schedule III to these regulations.

Regulation 6(2) sets out the material that must be annexed to an application made under Regulation 6(1). This includes the following:

a) a copy of the permit for solid waste disposal issued by the respective local government authority or any other agency approved by the 1st Respondent.

b) a copy of the permit for sewage disposal issued by the respective Local Government Authority or any other agency approved by the 1st Respondent.

c) a copy of the hose testing certificate in respect of oil removing hoses issued by an ISO certified hose testing company;

d) particulars relating to the personnel engaged in reception operations;

e) particulars relating to the safety equipment which are available for the use of persons engaged in reception operations;

f) particulars relating to the combating equipment which are available to be used for the mitigation of accidental spillages;

g) a copy of the report of testing and inspection of metallic tanks for transportation of hazardous material.

Regulation 6(3) empowers the Authority to call for any other information for the purpose of evaluating the application.

The Petitioners have three complaints with regard to Regulation 6. The first is that the 1st Respondent does not have the power to levy an application fee. This Court observes that the 1st Respondent has the power in terms of Section 7(l) of the Act to charge fees for any services provided by the 1st Respondent from any person or body of persons. Furthermore, in terms of Section 51(2)(s), the Minister has the power to make regulations specifying the fees that can be levied for the issuing of licenses and permits.

It is imperative that the 1st Respondent is satisfied that the applicant has the capability to carry out the service, keeping in mind the onerous nature of the task that an applicant would be performing once a license is issued. The 1st Respondent may therefore have to allocate resources to process each and every application that it receives in order to ascertain if the applicant in fact has the capability to perform the said services. Such an exercise would of course cost money, and in such a situation, the 1st Respondent is entitled to levy a fee to process the application. In these circumstances, this Court is of the view that the 1st Respondent is entitled to levy n application fee from each

applicant. This Court therefore does not see any merit in the first complaint relating to Regulation 6.

The second complaint relating to Regulation 6 is that the 1st Respondent is only empowered to regulate pollution on the territorial waters of Sri Lanka and its maritime zones, and thus, the 1st Respondent has no power to call for permits issued by the respective local government authorities or any other agency specified by the 1st Respondent, with regard to solid waste disposal and sewage disposal. The third complaint with regard to Regulation 6 is that Regulation 6(3), which empowers the Authority to call any other information for the purpose of evaluating the application, is *ultra vires* the Act.

Both these arguments are misconceived. It is not in doubt that the 1st Respondent's jurisdiction is limited to preventing and managing pollution on the territorial waters of Sri Lanka, its maritime zone and its foreshore. However, that does not mean that the waste that is disposed by ships through the waste reception facilities provided by the Petitioners can be disposed with impunity on shore or land. Providing waste disposal facilities is a statutory function conferred on the 1st Respondent by the Act, and hence, the 1st Respondent must take responsibility for the disposal of the waste that is collected. The 1st Respondent must not and cannot turn a blind eye to what happens with the waste that is collected by a licensee. This position is clearly set out in Regulation 13 which provides that every service provider shall ensure the disposal of the waste received by such service provider in an appropriate manner as may be directed by the Authority. This Court takes the view that it is imperative that the 1st Respondent is satisfied that each applicant has in place approved procedures for the disposal of the waste that it collects. Thus, if it

means the 1st Respondent calling for further information to satisfy itself that the applicant has the capability to perform the service, that is something the 1st Respondent is entitled to do in terms of the Act.

The next complaint of the Petitioners relate to Regulation 7(3), which reads as follows:

> "*Where an application is approved by the Authority it shall register such applicant as a service provider and issue a certificate of registration in the form specified in Schedule IV to these regulations, subject to such terms, conditions and standards of quality as may be determined by the Authority*."

The Petitioner states that in terms of Section 51(2)(g), the conditions must be specified by regulations and that the 1st Respondent cannot impose any further conditions, over and above what is set out in the Regulations. This submission disregards the power conferred on the 1st Respondent by Section 21(c), which enables the 1st Respondent to obtain the assistance of a third party for the provision of waste reception facilities by such third parties, and thus, the ability of the 1st Respondent to specify the terms, conditions and standards of quality that must be adhered to by such person on providing such service.

The next complaint of the Petitioner is with regard to Regulation 8(1), which requires a registered service provider to apply to the Authority for each waste reception activity at least one working day before the scheduled time of the proposed waste reception activity. The complaint of the Petitioners is that there is no provision to issue a certificate for ***each*** waste reception activity, and

that once a service provider is registered, such person can engage in any number of waste reception activities without having to obtain another permit. This argument too is without merit. Neither Section 6(e), Section 21(b) or Section 51(2)(a) or (g) supports the Petitioner. This Court takes the view that the 1st Respondent must closely monitor the activities of the service providers, given the statutory responsibility cast on the 1st Respondent to prevent, control and reduce pollution in the territorial waters of Sri Lanka including its maritime zone and foreshore, and that by keeping a close watch on each service provider, the 1st Respondent is in fact complying with its statutory responsibilities.

The Petitioners' next complaint is that Regulation 9 (2) and 9(3) are *ultra* vires the Act. Regulation 9(2) and (3) reads as follows:

> *"(2) Every service provider, on completion of each waste reception activity under a permit, shall provide the particulars relating to the completion of reception activity within twenty four hours of the completion of such activity to the Authority.*
>
> *(3) The Authority shall not issue new permits to any service provider who fails to comply with the provisions set out in paragraph (2) of this regulation*."

This Court is of the view that the Minister has the power to make regulations specifying the conditions subject to which reception facilities shall be provided. Regulation 9 is consistent with that power. The view of this Court already expressed with regard to Regulation 8(1) would apply with equal force to the control that is sought to be exercised through Regulation 9(2) and (3).

The Petitioners have sought to complain about Regulations 10, 11 and 12 too. However, the said regulations apply to the owner, operator, master or agent of any ship, and therefore do not affect the Petitioners.

In the above circumstances, this Court is of the view that the provisions of the Regulations marked '**R8**' are not *ultra* vires the provisions of the Act. This Court therefore does not see any merit in the submissions presented on behalf of the Petitioners.

This application is accordingly dismissed. This Court makes no order with regard to costs.

Judge of the Court of Appeal