

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

In the matter of an Application for Orders in the nature of Writs Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.(writ) Application No: 305/2017

Maithri Gunaratne,
Chairman,
Lanka Mineral Sands Limited,
No.341/21, Sarana Mawatha,
Rajagiriya.

PETITIONER.

Vs

1. Chinthaka S. Lokuhetti
Secretary to the Ministry of Industry and
Commerce.
P.O. Box 570,73/1
Galle Road, Colombo 03.

2. E.M.M.R.K. Ekanayaka,
Acting Secretary to the Ministry of Industry and
Commerce,
P.O. Box 570,73/1
Galle Road, Colombo 03.

3. K. Piyarathna,
Additional Secretary (Re-Structuring)
Ministry of Industry and Commerce.
P.O. Box 570,73/1
Galle Road, Colombo 03.

4. M.M.S.K. Bandara Mapa,
General Manager,
Lanka Mineral Sands Limited
No. 341/21,
Sarana Mawatha, Rajagiriya.
5. Lanka Mineral Sands Limited
No. 341/21,
Sarana Mawatha, Rajagiriya.

RESPONDENTS.

CA (Writ) Application No. 305/2017

Counsel : Mr. Farman Cassim with Mr. C.Jayarathne and Mr. D.Peiris for the
Petitioner.

Mr. Manohara Jayasinghe S.C. for the 1st, 2nd and 3rd Respondents.

Mr. Anura Maddegoda P.C. with Ms. Mihirini Perera, for the 5th
Respondent.

Before : E.A.G.R. Amarasekera. J

Decided on : 29.03.2018.

The Petitioner instituted this application by the Petition Dated 22.09.2017 praying
inter alia;

- an ***interim order*** suspending the operation of document marked P18 dated
10.07.2017 to the said application, and/or restraining the 4th Respondent
from functioning as the Chairman of the Departmental Tender Board of
Lanka Mineral Sands Limited (herein after sometimes referred to as LMSL or
5th Respondent) until the final hearing and determination of this application;
- an ***interim order*** restraining the 1st and /or 2nd Respondent from functioning
and/or constituting a Departmental Tender Board of LMSL without

appointing the Petitioner/Head of the Institution as the chairman to the said Departmental Tender Board of LMSL;

- an ***interim order*** restraining the 1st Respondent from cancelling the appointments of Devaka Wickramasuriya, Mr. Sunil Wichramasinghe, Chula Madugalle, T.S.H Jayasiri and U.S.B. Wijesingha to LMSL, until the final hearing and determination of this application;
- an ***interim order*** suspending the operation of documents marked P15(a) and P16 to the said application until the final hearing and determination of this application;
- an ***interim order*** restraining the 1st and 2nd Respondents from preventing LMSL selling its production in accordance with the Procurement Guidelines, until the final hearing and determination of this application;
- an ***Interim order*** permitting LMSL to sell its production in accordance with the Procurement Guide Lines until the final hearing and determination of this application.

Having heard the submissions made *ex parte* by the counsel for the Petitioner this Court has already issued the interim orders as prayed for in the Petition. 1st, 2nd and 3rd Respondents sought to vacate these interim orders. Even the 5th Respondent was supportive of the said application to vacate the interim orders. Aforesaid Respondents were allowed to file their limited objections and the petitioner has filed counter affidavits in reply to said limited objections.

Parties made their oral submission in support of their stances as well as they have tended written submissions.

For the reasons mentioned below in this order this court decides to vacate the interim orders already granted with immediate effect.

Paragraph 2 of the Petition describes the status of the petitioner to file this application. He describes himself as the Competent Authority to Lanka Mineral Sands limited, which is the 5th Respondent in this action. Furthermore, he states that he invokes the jurisdiction of this court in the best interest of the said 5th Respondent company taking in to consideration the fiduciary duty cast upon the Petitioner as the chairman and/or Director of the 5th Respondents Company.

Since the Petitioner's position is that this application is filed for the best interest of the 5th Respondent company, it can be presumed that this application is filed on behalf of the 5th Respondent company to preserve and protect the rights, privileges and smooth and lawful functioning of the 5th Respondents company but not to establish or enforce his personal rights.

It should be noted that being a limited liability company the 5th Respondent company is a Legal person. If any harm is caused to it, it has the locus standi to take steps to file action or institute proceedings against the wrong doer or one who cause the harm. If there is any illegality or irregularity that affects the functioning of the 5th Respondent Company it is the 5th Respondent company itself that should institute proceedings. The exception to this rule is found in section 234 of the Companies Act No. 07/08/2007 which make provisions for Derivative actions. Aforesaid section enables a director or a shareholder to bring proceedings, with the leave of the relevant court, on behalf of the company by way of a derivation action. It is important to note that subsection 6 of section 234 of the companies act creates a bar to bring any proceedings by a director or a shareholder in the name or on behalf of the company except in the manner provided by that section.

The Petitioner has not explained why he as a director could not initiate proceedings under section 234 of the companies act.

Though the Petitioner has brought this proceedings in the best interest of the company as stated in his petition, it is quite difficult to think that he has locus standi to bring these proceedings due to the aforesaid barrier in section 234 of the Companies Act. On the other hand, when he does not explain why he could not resort to said section 234, which provides for a director to bring proceedings on behalf of a company, to bring proceedings against harms (if any) caused to the 5th Respondent company, this court has to be cautious in granting and maintaining discretionary remedies.

The petitioner is the competent authority appointed by his excellency the President of the Republic. The letter of appointment as the competent authority is tendered marked as P6 with the Petition. It does not reveal the scope of authority given and the legal provision for such appointment.

Even the counsel for the petitioner was unable to indicate any basis for the appointment of a Competent Authority. As per the section 184 of the Companies Act, it is the board that manages the company. In such a backdrop it cannot be said that the petitioner has legal status to file this application as it belongs to the board which is legally entrusted with the management to decide whether to bring proceedings or not in the interest of the company. Nothing is placed before this court to show that the Articles of Association of the 5th Respondent provides for the appointment of a competent authority by his excellency the President of the Country for the management of the company.

As per the documents marked as P34 and 36 it seems that at the time of the petitioner's appointment as the competent authority, except Dr. Hilmy all other directors had resigned from the board. As per paragraph 9 of the petition 100% of the shares of the 5th Respondent are held by the Secretary to the Treasury on behalf of the State. As there was no properly functioning board, his excellency the President of the Republic would have appointed petitioner as the competent authority to preserve the interest of the State but the petitioner

could not indicate to this court any legal provision that allows a competent authority to manage a company registered under the Companies Act. Section 184 of the Companies Act No. 07 of 2007 provides that subject to the provisions in the Articles of the company the business and affairs of a company shall be managed by or under the supervision of the board of the company. The petitioner does not show that there are provisions in the Article of Association of the 5th Respondent Company that allows the management through a competent authority. Therefore, it is my view the task (if any) of the competent authority would have been the taking of necessary steps to constitute the board of the 5th Respondent company as per the provisions of Companies Act and the Articles of Association of the 5th Respondent company and causing the 5th Respondent company to take decisions with regard to management through the board. The Petitioner does not show that the board of the 5th Respondent took a decision to bring proceedings on the grounds mentioned in the petition for the best interest of the company through the competent authority.

For the forgoing reasons I now doubt that the petitioner has locus standi to bring these proceedings in the interest of the company as competent authority.

The Petitioner has stated that he is presently the chairman of the 5th Respondent company (vide para 2 of the petition). To support this position, he has marked a letter of appointment marked P8 issued by the Secretary to the Treasury. P8 states that the Petitioner is appointed as the chairman in terms of sections 78 of the Articles of Association (P9) but that section only empowers the Secretary to the Treasury to determine the first directors in consultation with relevant ministers. In terms of section 103 of the Article of Association the power of electing a chairman is with the board of directors. The Petitioner has not submitted any resolution by the board of directors electing him as the chairman of the 5th Respondent. Therefore, it is questionable whether this court can prima facie treat the petitioner as the lawful chairman of the 5th Respondent. Therefore, P8 can only be considered as a letter nominating a director by the 100% shareholder. The provisions of section 102(b) of the Articles of Association (P9) too is noteworthy. It provides for that even when there is lack of quorum the existing director/directors may act for the purpose of increasing the number of directors to satisfy the number needed for the

quorum or to summon a general meeting. The Petitioner does not explain why he could not adhere to these provisions and get him appointed as the chairman in the correct manner. On the other hand, this court was informed by a motion filed by the 1st to 3rd Respondent with supporting affidavit and documents marked X1 – X4 of the appointment of a new acting chairman by the board of directors. Though the counsel for the Petitioner reserved his right to file an affidavit in reply (vide Journal entry dated 19.01.2018) he has not tendered any affidavit refuting this new state of affairs. Therefore, even if for the sake of argument this court consider the petitioner was the lawful chairman at the time of filing this application his status has now seems to be changed pending this application. Even the documents marked X2 and X3 annexed to the said motion show that the 100% shareholder has consented to and aware of the appointment of acting chairman.

For the reasons mentioned above it is highly doubtful whether the petitioner has any *locus standi* to bring this proceeding or continue with it as the chairman of the 5th Respondent Company. As per the meeting dated 21.12.2017 the board has decided to withdraw this application filed by the Petitioner. This shows that the board which is entrusted with the management does not approve this application filed by the Petitioner. This Court does not see enough material at this moment to decide that the aforesaid board meeting is unlawful. In this backdrop this court doubts that the petitioner has any *locus standi* to bring this proceedings as a director even.

Having heard the oral submissions and gone through written submissions and evidential materials placed before this Court, this Court now has a serious doubt with regard to the locus standi of the Petitioner to bring these proceedings. Thus, this court now cannot be satisfied that the petitioner has a prima facie case. This court does not see that there is a winnable case for the Petitioner. Therefore, this court decides to vacate the interim orders already issued. The Respondents have placed before this court certain facts to show that the petitioner has not divulged certain matters relating to his breaches with regard

to procurement proceedings. As I have already decided to vacate the interim orders, it is not necessary to attend to those matters at this moment. For the reasons given above this court vacate the interim orders issued on 27.09.2017 with immediate effect.

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E.A.G.R. Amarasekara J