

BLANCA DIAMONDS (PVT) LTD.  
v.  
WILFRED VAN ELS AND TWO OTHERS

COURT OF APPEAL,  
JAYASURIYA, J.  
C.A. 601/95  
ETF BOARD INQUIRY EN/12/2/4/32  
MARCH 19, 27, 1997.

*Employees Trust Fund – Contributions – Enforcement Inquiry – Writ of Certiorari – Uberrima fides – Contractual obligation to Court.*

In an application for a Writ of Certiorari to quash the decision and directions of the 2nd respondent Board (ETF) contained in certain letters.

**Held:**

When a party is seeking discretionary relief from 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 Court."

The petitioner company has been remiss in its duty/obligation to court and has failed to comply with that contractual obligation to court.

**APPLICATION** for a writ of Certiorari.

**Cases referred to:**

1. *Alphonso Appuhamy v. Hettiaratchi* – 77 NLR 121.
2. *Castelli v. Cook* – 1848 7 HARE 89 at 94.
3. *King v. General Commissioner for Income Tax, Kensington* – 1971 KBD 486.
4. *Moosagees v. Eksath Kamkaru Samitiya* – 1979 1 NLR 285 at 289.
5. *In re Vasso* – 1984 1 Lloyds Report 235.

*R. K. W. Goonesekera with Sidath Sri Nandalochana and J.C. Weliamuna* for petitioner.

*Chula Bandara with D.K. Dhanapala* for first respondent.

*Adrian Perera S.S.C.*, for 2nd and 3rd respondents.

*Cur. adv. vult.*

April 04, 1997.

**JAYASURIYA, J.**

The petitioner company, which is a Board of Investment approved incorporated body carrying on the business of gem cutting and

polishing, for export to Belgium, has filed this application *inter alia* for the issue of a mandate in the nature of a writ of certiorari, which is a claim for discretionary relief from this Court, seeking an order quashing the decisions and directions of the second respondent contained in certain letters marked P6, P8, P15 and P16. At the close of the argument on this application, the issue arose whether the petitioner, who is claiming discretionary relief from this Court has disclosed *uberrima fides* and has frankly and fully disclosed to this Court material facts for the purpose of this Court arriving at an effectual and complete adjudication of all the issues that arise upon this application.

The petitioner company has received a series of letters written by the Manager (Enforcement) of the Employees' Trust Fund Board on issues relevant to the petitioner company's alleged liability to make Employees' Trust Fund contributions in respect of the claim of the first respondent. These documents, *inter alia*, are marked as P10 and P13. In those letters the reference number to the file maintained at the Employees' Trust Fund Board on the complaint made by the first respondent has been clearly set forth as EN/12/2/4/32. In fact, in letters written by Messrs, Julius & Creasy, Attorneys-at-Law, appearing originally for the petitioner company, this reference number EN/12/2/4/32 is prominently spotlighted in such letters (*Vide* documents P11 and P14). Thus, the petitioner company and its agents were fully conversant with the particular reference number in regard to the file maintained at the Employees' Trust Fund Board on this subject. If the petitioner company or its Attorney-at-Law or its agents did make an application to inspect the aforesaid file, then the petitioner company would have become aware that, after holding the inquiry on 10.4.96, on the basis of material which was placed both orally and by adduction of documents, a decision and determination was arrived at by the third respondent on the 30th of April, 1996. The petitioner company has failed in its duty to produce before this Court the aforesaid determination or decision arrived at on 30.4.96 on the proceedings held between the parties who were represented by counsel on 10.4.96.

Without the benefit of perusing the aforesaid copy of the determination and decision made on 30.4.96, this Court is unable to exercise its supervisory jurisdiction and judicially review the order, the findings and determinations made by the third respondent which are sought to be quashed, in the present proceedings filed by the petitioner company. In the course of the argument the relevant file

bearing this reference number was produced and it became manifest that at the inquiry held on 10.4.96, the petitioner company was represented by senior Attorney-at-Law Mr. Sidath Sri Nandalochana and that the first respondent was represented by Attorney-at-Law Mr. Chula Bandara. Both counsel have made statements and submissions on behalf of their respective clients and produced documents before the Board. It transpired that Mr. Sidath Sri Nandalochana, on behalf of the present petitioner Company, had made a statement at the inquiry that Blanca Diamonds (Private) Limited had paid a part of the remuneration paid out to the first respondent. Without the benefit of the record, this Court is unable to ascertain whether it was a part payment of salary or a part payment of the cost of living allowance. A consideration and evaluation of the admissions made on that occasion in regard to the payments made to the first respondent would be highly relevant to determine the issue that was agitated between the parties and also to judicially review whether the findings of the third respondent set forth in P15 and P16 are legal or illegal, upon this application for the exercise of powers of certiorari by this Court. I hold that the petitioner company has been remiss in its contractual duty in filing this application in the Court of Appeal Registry, in failing to produce the findings, determination and decision dated 30.4.96 made by the third respondent. 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*<sup>(1)</sup>, 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*<sup>(2)</sup> 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. *Vide also King v. General Commissioner for Income Tax, Kensington*<sup>(3)</sup>. The aforesaid judgment of Justice Pathirana appears to have been followed, after making a pointed reference to the aforesaid landmark English decisions, by Justice Rajaratnam in a Labour and Industrial Law litigation in *Moosagees v. Eksath Kamkaru Samitiya*<sup>(4)</sup> at p. 289. The House of Lords in an Admiralty Court Case in *Vasso*<sup>(5)</sup> has again re-affirmed this same principle that the petitioner upon that application was obliged to make a full and frank disclosure of all material facts to Court. I hold that the petitioner company has been remiss and has failed to comply with that contractual obligation to Court and in the circumstances this Court is entitled to dismiss and reject the application of the petitioner company with costs payable to the respondents.

The first respondent, in paragraph 8 of his affidavit *inter alia*, states that he was paid by the petitioner company his salary in Belgium Franks by making payment to the first respondent's bank account in Luxembourg through the petitioner company's bank account in Switzerland and that his cost of living allowance was paid in Sri Lanka by the petitioner company in both Sri Lanka, Rupees and American Dollars as set out in the schedule to his letter of appointment marked 1R1. The first respondent further states that the petitioner company has failed to file the schedule of payments which is an integral part of the letter of appointment which has been marked by the petitioner company as P2. It is not open to Mr. Patrick Van Den Eynde, who is both the Chairman of Blanca Diamond (Private) Limited, the petitioner company and of the Belgian company named Fr. Van Den Eynde and Zonen B.V.B.A. to disclaim all knowledge in regard to the schedule of payments which has been produced marked 1R1. Since this individual acted in a dual capacity as Chairman of the Belgian company and as Chairman of the Sri Lankan company, he ought to be aware of the document 1R1, which is the schedule of payment and which is **expressly** referred to in the letter of appointment P2 under the column relating to remuneration in clause 4 of P2. Clause 2, *inter alia*, states this "allowance is mentioned in enclosure for the period starting ..." In the circumstances, due to the fact that Patrick Van Den Eynde was the Chairman, of the Belgian company as well as the Sri Lankan company, it becomes apparent that the petitioner company, despite

the dual role of its chairman, has failed to file the schedule of payment marked 1R1 and which is an integral part of the letter of appointment P2, as an exhibit to his application and in this respect too it has failed to discharge his duty to disclose *uberrima fides* and make a full and complete disclosure of all material facts to this Court. The contents of the schedule of payments disclosed that certain payments are to be made in Rupees in Sri Lanka and that payments for the children's expenses and school fees in sums of US\$ 870 and US\$ 645 are to be paid in Dollars in Sri Lanka. Thus the contents of 1R1 seem to substantiate the admission alleged to have been made by Mr. Sidath Sri Nandalochana appearing for the petitioner company before the aforesaid Board on the 10th of April, 1996, which admission is specifically referred to in the findings, determination and decision of the third respondent dated 30.4.96.

In the result, on both the aforesaid points I hold that the petitioner company has failed to make a full and frank disclosure of all materials to Court and the petitioner company has been remiss in complying with the aforesaid contractual obligation to Court and to disclose *uberrima fides*. In the circumstances, I proceed to dismiss and reject the application in *limine* with costs in a sum of Rs. 5250/- payable to each of the first and the third respondents. I dismiss the present application with costs in a sum of Rs. 10,500/- payable by the petitioner to the first and third respondents.

There has been a change of registered attorneys who have been appearing for the petitioner company and this change of registered Attorneys may have contributed to the failure on the part of the instructing Attorneys of the petitioner company in applying for inspection of the record in Application No. EN/12/2/4/32 and for obtaining certified copies of all relevant proceedings and orders which are germane to this application. The correspondence which have been produced only disclose that the petitioner company asked for a certified copy of the proceedings of 10.4.96 but did not ask for a certified copy of the findings, determination and decisions and the reasons which are set out in the document filed of record dated 30.4.96. In fact, the petitioner company has further failed to apply for or to ask for a copy of the reasons pronounced by the third respondent.

*Application dismissed.*