

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF**

**SRI LANKA**

*In the matter of an application for Leave to Appeal under and in terms of Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**MATRIX LIFECARE (PVT) LTD**

No. 52/13A, Rubber Watta Road,  
Nikape, Dehiwela.

**PLAINTIFF**

**SC/HC/LA/45/2021**

Commercial High Court Case No:

**H.C.(Civil)/15/2021/IP**

-Vs-

**1. HEALTHTRUST PHARMACEUTICALS  
(PVT) LTD**

No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.

**2. FAITH ONE PHARMACEUTICALS  
(PVT) LTD**

No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.

**3. PEER MOHAMED ABDUL RAHUMAN**

No. 45/15, Swarna Road,  
Off Havelock Road, Colombo 6.

**4. MOHIDEEN RAMEEZ PEER  
MOHAMED**

No. 45/15, Swarna Road,  
Off Havelock Road, Colombo 6.

- 5. MOHAMED ZAFRULLAH MARIKKAR**  
F 23, St. Anthony's Government  
Flats,  
St. Anthony's Mawatha, Colombo 3.  
AND/OR  
No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.
- 6. SEYAD MOHAMED SITHY SHAHEENA**  
F 23, St. Anthony's Government  
Flats,  
St. Anthony's Mawatha, Colombo 3.  
AND/OR  
No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.

**DEFENDANTS**

**-AND NOW BETWEEN-**

- 1. FAITH PHARMACEUTICALS (PVT)  
LTD**  
No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.
- 2. MOHAMED ZAFRULLAH MARIKKAR**  
F 23, St. Anthony's Government  
Flats,  
St. Anthony's Mawatha, Colombo 3.  
AND/OR  
No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.

**DEFENDANTS - PETITIONERS**

**-Vs-**

**MATRIX LIFECARE (PVT) LTD**  
No.52/13A, Rubber Watta Road,  
Nikape, Dehiwela.

**PLAINTIFF – RESPONDENT**

- 1. HEALTHTRUST PHARMACEUTICALS (PVT) LTD**  
No.78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.
- 2. PEER MOHAMED ABDUL RAHUMAN**  
No. 45/15, Swarna Road,  
Off Havelock Road, Colombo 6.
- 3. MOHIDEEN RAMEEZ PEER MOHAMED**  
No. 45/15, Swarna Road,  
Off Havelock Road, Colombo 6.
- 4. SEYAD MOHAMED SITHY SHAHEENA**  
F 23, St. Anthony’s Government  
Flats,  
St. Anthony’s Mawatha, Colombo 3.  
AND/OR  
No. 78/4, Sangaraja Mawatha,  
Hunupitiya, Wattala.

**DEFENDANTS - RESPONDENTS**

Before : Hon. B.P. Aluwihare PC, J  
Hon. L.T.B. Dehideniya, J &  
Hon. E.A.G.R. Amarasekara, J

Counsel : Geoffrey Alagaratnam, PC. With S. Ragul and Ramesh  
Fernando for the Defendant-Petitioners

K.V.S. Ganesharajan and K. Nasikethan for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>  
Defendant-Respondents

Dr. Harsha Cabral, PC. With Nishan Premathiratne and Migara  
Cabral for the Plaintiff-Respondent. for the Plaintiff -  
Respondent

Argued on : 25.03.2022

Decided on : 01.12.2022

**E.A.G.R. Amarasekara, J.,**

This Leave to Appeal Application was made against the Order dated 07<sup>th</sup> July 2021 of Commercial High Court by which the Learned Commercial High Court Judge issued an interim injunction prayed for in the prayers (g) and (h) of the Plaint dated 02.06.2021.

When this matter was taken up for support for leave on the 25<sup>th</sup> March 2022, the Learned President's Counsel for the Plaintiff-Respondent raised two Preliminary Objections on following grounds:

a) The affidavit filed along with the Petition of the 2nd and 5th Defendant-Petitioners is bad in law as it was attested by a Commissioner for Oaths who was working at the same law office in which the Registered Attorney for the 2nd and 5th Defendant-Petitioners was working which is contrary to the Oaths and Affirmations Ordinance, and that is an incurable defect in terms of the law, and is fatal to this Application.

b) Material documents that were produced before the Commercial High Court had not been filed or provided to the Court docket. As the complete case record had not been filed, such failure is contrary to statute/ Rules of the Supreme Court/ case authorities, and so, is fatal to this Application.

In addition, Learned President's Counsel for the Plaintiff-Respondent further raised a concern about a purported motion that had been served on the Plaintiff-Respondent in a suspicious and unusual manner. However, this motion was not found when this Court perused the case record. Since this motion was not available at the time when oral submissions were made in open court to be identified by this court, it is not proper to make any comment on the purported motion that would have come to the case record after the date the parties made oral submissions. On the other hand, it appears that the said purported motion does not have a direct bearing on the objections mentioned above and further it appears that it relates to some incidents that took place after the impugned order.

In this regard, in its written submissions tendered on 18.04.2022, the Plaintiff Respondent has placed certain factual and legal positions in support of the preliminary objections raised, and the Plaintiff Respondent has brought this court's attention to the Section 12(2) of the Oaths and Affirmations Ordinance which reads as follows;

*“ A Commissioner for Oaths appointed under this Ordinance may administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of Peace is authorized by law so to do, and in all cases in which an oath, affirmation, or affidavit is commonly administered or taken before a Justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for Oaths shall in all legal proceedings and for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a Justice of the Peace; and all enactments relating to oaths, affirmations, and affidavits administered before a Justice of the Peace shall with the necessary modifications , apply thereto:*

*Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceedings or matter in which he is the attorney-at-law to any of the parties, or in which he is otherwise interested.” (Highlighted by me).*

In their written submissions the Plaintiff Respondent have further referred to certain decisions made by our Courts with appellate powers.

**Seybest (Private) Limited & another Vs Thebuwanna Don Waruna Rathnasekara WP/HCCA/Col/88,89,90 and 91/2019** is a decision where Civil Appellate High Court has decided, following superior court decisions which are among the decisions cited below in this Order, that an affidavit filed along with the leave to appeal application was contrary to the proviso of aforesaid section 12(2), and is bad in Law, when it was attested by the lawyer who appeared for the petitioner in the District Court.

**Seylan Bank PLC Vs Christobel Daniels CA (PHC) APN 58/2014** is a decision of the Court of Appeal where the supporting affidavit had been attested by the Legal Officer- Human Resources of the bank who also acted as its lawyer in applying certified copies for the bank. The Court found the said legal officer fell within the prohibited categories.

**Airport and Aviation Services (Sri Lanka) Limited Vs Buildmart Lanka (Private) Ltd (2000) 1 Sri. L.R 292** is a decision of this Court, where the Attorney-at Law who attested the supporting affidavit to the leave to appeal application was employed as an assistant legal officer of the petitioner in that case, who also was present in the arbitral proceedings in that capacity and was the registered attorney for the petitioner when the matter proceeded to the High Court after the arbitral proceedings. The affidavit was rejected as it was not in compliance with the proviso to said section 12(2).

In **P M A Samantha Kumara Vs T. A. C. N. Thalangama and Others SC/SPL/LA/2021**, the Commissioner of Oaths who attested the affidavit had sent a letter to the Chairman of the Election Commission on behalf of the Petitioner and it was further revealed that he had appeared for the Petitioner in the Court of Appeal and marked his appearance in this court as well. This Court dismissed the application upholding the preliminary objection raised in terms of the said section 12(2) of the Oaths and Affirmations Ordinance.

This court observes even at the beginning of the 19<sup>th</sup> century, our courts had followed the English principle and had not to accepted affidavits sworn before one's own proctor – vide **Pakir Mohideen Vs Mohamadu Casim 4 N L R 299, Cadar Saibu V Sayadu Beebi 4 N L R 130**

Thus, the Plaintiff Respondent indicates to court that, even though, a Commissioner for Oaths is empowered by the said section 12(2) of the Oaths of Affirmations Ordinance to administer an oath or affirmation or to take any affidavit similar to a Justice of the Peace, there is a prohibition created by the Section itself not to exercise such powers in any proceedings or matter in which he is the Attorney-at-Law or in which he is otherwise interested. Therefore, the position of the Plaintiff Respondent is that, as the affidavit tendered in support of the Petition of this application is attested

by Ms. D. Nishanthani, Commissioner of Oaths who is a member of the team of lawyers in the same law office, namely KVS LAW CHAMBERS, under K V S Ganesharajan, Attorney-at-Law, is bad in law.

In this regard, the Plaintiff Respondent has referred to the screenshots of the website of KVS Law Chambers which indicates that the relevant Commissioner for Oaths is a member of one team along with the Mr. Sriranganathan Ragul AAL and Mr. KVS Ganesharajan AAL. This Court is mindful of the fact that these screenshots are not supported by an affidavit and also of the fact that the petition praying for leave to appeal has been tendered to court by said Attorney-at-Law, Sriranganathan Ragul as the Attorney-at-Law of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners' Attorney-at-Law, and the said Petition or the proxy given to the said Attorney-at-Law does not indicate that the submission of the application was done as a member of KVS Law Associates, Law firm.

However, when allowing to file written submissions on the preliminary objections raised, this Court asked the Plaintiff Respondent to file written submissions first and the aforesaid Defendant Petitioners to respond within 3 weeks from the filing of the written submissions of the Plaintiff Respondent. In response to the said allegation, in their written submissions, even though, the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Respondents have stated that the relevant Commissioner for Oaths has not been/is not the registered attorney-at-law or counsel for the Defendant Petitioners or any other party, they have not denied that they work as team members in KVS Law Associates as alleged. Instead, they have admitted that the relevant Commissioner for Oaths and the registered Attorney-at-Law for them are both working in the same Law Chambers of Mr. K V S Ganesharajan, AAL – vide paragraph 8(c) and 17(ii) of their written submissions. Further, it is admitted that both the registered attorney of the 2<sup>nd</sup> and 5<sup>th</sup> Respondents and the relevant Commissioner for Oaths worked under the same Senior Lawyer- vide paragraph 17(iii) of the written submissions of the 2<sup>nd</sup> and 5<sup>th</sup> Respondents.

As per the document that contained the marking X7B, which contains written submissions tendered by the 1<sup>st</sup>,3<sup>rd</sup> and the 4<sup>th</sup> Defendants in the court below, said senior lawyer K.V.S. Ganesharajan has drafted the written submissions on behalf of the said 1<sup>st</sup>,3<sup>rd</sup> and 4<sup>th</sup> Defendants. Mr. Ganesharajan has marked his appearance in this court too. Hence, it is clear by the admissions in the written submissions and the documents available, that both the registered attorney of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Respondents and the Commissioner for Oaths are juniors to the senior lawyer K V S Ganesharajan who is an attorney-at-law in the court below as well as in this court for some of the parties and are working in the same law chambers.

The 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners, in their written submissions, try to argue that the “interest” asserted or depicted by the Plaintiff Respondent is not established and there are information barriers and “Chinese Walls” set up within professional firms including law firms as well as rules of confidentiality to avoid conflict of interest and to protect client confidentiality. In this regard, they have referred to a decision reported in [2019] EWHC 1733 (IPEC), namely **Glencairn IP Holdings Limited and another V Product Specialities INC and another**. The 2<sup>nd</sup> and 5<sup>th</sup>

Respondents have not tendered the full decision of the above case with their submissions but as per the decision available at [http://www.bailii.org/cgi-bin/formast.cgi?doc=/ew/cases/EWHC/IPEC/2019/1733.html&query=\(.2019.\)+AND+\(1733\)+AND+\(IPEC\)](http://www.bailii.org/cgi-bin/formast.cgi?doc=/ew/cases/EWHC/IPEC/2019/1733.html&query=(.2019.)+AND+(1733)+AND+(IPEC))<sup>1</sup>, it appears that the said decision is not relevant to the matter at hand and it concerns an application of an injunction against a solicitor restraining him from acting further for the defendants in that action as said solicitor had taken part in a previous mediation where certain confidential information of the petitioner was revealed to the said solicitor.

In my view, Section 12(2) proviso is more concerned with the credibility of the affidavits that are to be tendered in Judicial Proceedings rather than for to avoid conflict of interest between different clients who come to the same law firm or a lawyer or between different parties in an action as has been argued by the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners. If a person makes a statement and he himself attests that such statement is made under oath or an affirmation, there will not be any evidential value in that statement since the attestation has not emanated from an impartial or unbiased or neutral person. It will be the same if it is done before his own lawyer as he is his representative for the litigation. Similarly, if it is attested by a lawyer of another party or a lawyer who has some interest in the proceedings, such attestation may be tainted with bias and partiality. Though it may not be the same, I observe some similarity between the rule of ‘Nemo Judex Causa’ and the concept promulgated in the proviso to Section 12(2) of the Oaths and Affirmation Ordinance.

However, by stating internal arrangements within a professional firm including law firms in resisting the preliminary objections, 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners impliedly indicate what exist as KVS Law Associates/ Chambers is a law firm. In that, the relationship between two lawyers in that firm may take one of the following forms.

- They may be partners of the firm as law firms are partnerships. If so, each partner may be an agent of the other.
- The relationship may be that of one between a partner lawyer and an assistant lawyer employed for the purposes of the partnership firm.
- The relationship may be one between two assistant lawyers employed by the law firm.

Hence, irrespective of the scanned copy of the webpage of the KVS Law Chambers reproduced in the written submissions of the Plaintiff Respondent, what has been stated in the written submissions of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners indicates that the relationship between the registered attorney for the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners and the relevant Commissioner for Oaths is one that falls within the above three or one of two junior lawyers under the senior named K. V. S. Ganeshrajan.

If the Senior Lawyer in the same chamber or the partnership thrives, it is for the benefit of the lawyers under him or in the partnership either in term of financial success or reputation wise. Thus, I am unable to hold that the Commissioner for Oaths who attested the affidavit to this application

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<sup>1</sup> Visited on 11/7/2022

is one who is not otherwise interested in this application and the case before the Commercial High Court. The factual situation revealed before this court specially through the submissions of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners establishes prima facie existence of an interest of the Commissioner for Oaths in the matter. It appears that the said Defendant Petitioners take up the position that the interest of the Commissioner for Oaths has not been established. As said above, there is prima facie material to establish the interest. The real relationship existing between the Commissioner for Oaths and the lawyers of KVS Law Associates/Chambers is within the special knowledge of the Commissioner for Oaths and the said lawyers of the KVS Law Associates/ Chambers. Other than, accepting the Senior Lawyer- Junior Lawyer relationship and possible membership or employment as an Assistant Lawyer in a law firm, nothing is established to indicate that the Commissioner for Oaths practices as an independent lawyer. Even though, the lawyers of KVS Law Chambers have filed pleadings and papers in the Commercial High Court without revealing that they belong to the same law firm or Chambers, now it is established through the submissions of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant Petitioners that there is a de facto relationship among them. Thus, my view is that this leave to appeal application is defective due to the fact that the affidavit is bad in law.

Now I must see whether this defect is curable. In their written submissions, 2<sup>nd</sup> and 5<sup>th</sup> Respondents try to argue that, since Section 12(2) does not state that any non-compliance with this provision will result in a nullity as in Section 2 of the Prevention of Fraud Ordinance, contravention of said Section 12(2) does not render the affidavit invalid. In this regard, they have brought the attention of this Court to section 517 of the Civil Procedure Code which provides only a punishment for not producing the will as soon as possible and also to the section 33 of the Notaries Ordinance which states that no instrument shall be invalid merely because of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form. Further, they have referred to **Muthukuda V Leelawathie (CA) [2002] 1 A L R 14** to indicate that if section 2 of the Prevention of Fraud Ordinance is complied with, failure to comply with section 16 of the said Ordinance will not affect the passing of the title.

However, in **Airport and Aviation Services (Sri Lanka) Limited Vs Buildmart Lanka (Private)Ltd (2010) 1 Sri. L. R 292**, referred to above, this Court has already decided comparing section 31,32 and 33 of the Notaries Ordinance with the provisions in Oaths and Affirmations Ordinance that although there is provisions contained in the Notaries Ordinance granting relief when there is failure by the Notary to observe Rules in the Notaries Ordinance, a similar interpretation cannot be given to the proviso to Section 12(2) of the Oaths and Affirmations Ordinance in the absence of such provision to that effect.

On the other hand, proviso to section 12(2) of the Oaths and Affirmations Ordinance contain a prohibition and not merely a formality. A prohibition enacted to make that the affidavits tendered in court proceedings to be credible by making them to be attested by impartial and independent persons authorized for that purpose. If the credibility is in breach, affidavit has no value. Thus, I am unable to agree with the argument made on behalf of the 2<sup>nd</sup> and 5<sup>th</sup> Respondents that failure



to comply with section 12(2) of the Oaths and Affirmations Ordinance does not make the affidavit invalid.

The other way to cure a defect caused by an invalid affidavit is to tender a new affidavit with the permission of Court. Firstly, there was no such application when the objection was raised. Secondly, it cannot be done now since there is time bar to tender a leave to appeal application. As per section 757 (1) of the Civil Procedure Code, it has to be tendered within 14 days from the impugned order by a petition supported by an affidavit. This is a mandatory requirement. If the affidavit tendered within those 14 days is not valid, there is no valid application for leave- vide **Foreign Employment Bureau Vs Suraj Dandeniya C A L A 324/2004, C A minute dated 12.01.2004, and Yogaratnam V Naheem and Others [2004] 3 Sri L R 212.**

Hence, this Court has to uphold the preliminary objection raised with regard to the validity of the affidavit and the application for leave.

The other preliminary objection was raised on the premise that the material documents were not produced with the application. I do not think that this court should go into this preliminary objection since the upholding of the above preliminary objection is sufficient to dismiss the present application for leave. On the other hand, other than the impugned order itself, whether certain other documents are material or not, cannot be decided in the abstract. Whether such documents are decisive in determining the application has to be decided when the matters relating to the application are placed before the court in support of the application. Thus, this Court does not intend to decide on the second preliminary objection at this occasion.

For the forgoing reasons, this Court accepts the first preliminary objection based on the premise that the affidavit is bad in law and dismiss the application for leave with costs.

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Judge of the Supreme Court

B. P. Aluwihare, P C. J.

I agree.

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Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree.

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Judge of the Supreme Court