

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

LANKA

In the matter of an application for a mandate
in the nature of Writ of Mandamus under
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Case No. CA (Writ) 276/2015

1. Hemantha Abeysekera
No. 12A, Official Quarters,
Agriculture Research Centre,
Bandarawela.
2. Thusitha Pradeep Kumara
"Sathuta", Temple Rd., Ibulgoda,
Badulla.
3. Prasanna Amal
No. 29, Gajabapura,
Mahagasthota, Nuwara Eliya.
4. Chinthaka Prabath
Welagaththewala, Dikwella.
5. Ganganath Wijewickrama
No. 52, Jayantha Mawatha, Kekirawa.
6. Prabath Nalinda
No. 781/D/5, Egoda, Kiridigala,
Weliharanawa Road, Balangoda.
7. Asanka Chinthaka
Kurunduwatta, Mirissa North, Matara.

8. Nihal Suranga
No. 159/1A, Higgollawatta,
Baduragoda Road, Weyangoda.
9. Ananda Kumara
Thittala Pitigoda, Yakkala.
10. Kapila Dharmasiri
Sirimadura, Thal Araba,
Kaburugamuwa.
11. Ajith Weerakkodi
Forest Reservation Department, Head
Office, Battaramulla.
12. Priyantha Hettige
"Kala Sarana", Thalahitiyagoda,
Ratmale, Matara.
13. Wasantha Abeysiriwardana
No. 76, Ranthisa, Godakubura, Beliatta.
14. Prasad Ranaweera
No. 105/A, Damayanthi,
Witharandeniya.
15. Sanjaya Indrajith
No. 43, Sinhapitiya, Gampola.
16. Jayamal Dissanayaka
Helawatta Koratuwa, Pelawatta,
Dewinuwara.

17. Susantha Kaminda
3rd Mile Post, Sorabora Janapadaya,
Mahiyanganaya.

Petitioners

Vs.

1. Conservator General of Forests
Forest Department,
"Sampathpaya", P. O. Box 3,
Battaramulla.
2. The Secretary
Ministry of Environment,
No. 82, "Sampathpaya", Rajamalwatte
Road,
Battaramulla.
3. Justice Sathya Hettige, PC
Chairman,
Public Service Commission,
No. 177, Nawala Rd.,
Narahenpita, Colombo 5.
4. S. C. Mannapperuma
5. Ananda Seneviratne
6. N. H. Pathirana
7. S. Thilnadarajah
8. M. Mohamed Nahiya

9. Kanthi Wijetunga

10. Sunil S. Sirisena

11. I. M. Zoyza Gunasekara

Respondents

12. Dharmasiri Dissanayake,
Chairman,
Public Service Commission,
No. 177, Nawala Rd.,
Narahenpita, Colombo 5.

13. Mr. A.Salam Abdul Waid,

14. Ms. D. Shirantha Wijayatilaka,

15. Dr. Prathap Ramanujam,

16. Mrs. V. Jrgrarasasingam,

17. Mr. Santi Nihal Seneviratne,

18. Mr. S. Ranugge,

19. Mr. D.L. Mendis,

20. Mr. Sarath Jayathilaka,

The 13th to 20th Respondents are
members of Public Service Commission,
No. 177, Nawala Rd., Narahenpita,
Colombo 5.

Added Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Dharshana Kuruppu for the Petitioner

S. Balapatabendi ASG P.C. with Hashini Opatha SC for the Respondents

Argued on: 30.07.2019

Written Submissions tendered on:

Petitioner on 23.09.2019

Respondents on 25.09.2019 and 24.10.2019

Decided on: 17.01.2020

Janak De Silva J.

The Petitioners are Assistant Forest Officers of the Forest Department and in this application seek to be promoted to the posts of Beat Forest Officers. The reliefs they have sought are:

- (a) To issue directions to the 1st Respondent and/or the 2nd to 11th Respondents or one or more of them to promote the Petitioners to the post of Beat Forest Officer with effect from 19.01.2014, or from such other date as this Court shall seem fit by issue of a writ of mandamus,
- (b) To issue a writ of mandamus directing the 1st to 11th Respondents or one or more of them to conduct a fresh examination without much delay, to promote the Filed Forests Officers to the post of Beat Forest Officer.

The writs of mandamus sought against the 1st and 2nd Respondents cannot in law be issued at least on three grounds.

Firstly, both the 1st and 2nd Respondents have been sued nominee officii or in other words are not legal persons and therefore a writ of mandamus will not issue.

In *Haniffa v. The Chairman, Urban Council, Nawalapitiya* (66 N.L.R. 48) Thambiah J. stated that mandamus can only issue against a natural person, who holds a public office. In *Samarasinghe v. De Mel and Another* [(1982) 1 Sri.L.R. 123 at 128] this Court quoted with approval *Haniffa's* judgment as follows:

"The petitioner's application is beset with other difficulties as well. The petitioner has made W. L. P. de Mel, Commissioner of Labour, the respondent to his application. It is common ground that he has now ceased to hold this post and is presently the Secretary, Ministry of Trade. The petitioner has not sought to substitute the present holder of the office. A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court. (See, *Haniffa v. The Chairman, U. C. Nawalapitiya*, 66 NLR 48). **Before this Court issues a Mandamus, it must be satisfied that the respondent will in fact be able to comply with the order and that in the event of non-compliance, the Court is in a position to enforce obedience to its order.** Mandamus will not, in general, issue to compel a respondent to do what is impossible in law or in fact. Thus, it will not issue to require one who is functus officio to do what he was formally obliged to do." (*de Smith*, 2nd Edn. 581). So it seems to me, that even

if the petitioner's application succeeded, the issue of a Mandamus would be futile." (emphasis added)

Haniffa's judgment was again quoted with approval by this Court in *Abayadeera and 162 Others v. Dr. Stanely Wijesundera, Vice Chancellor, University of Colombo and Another* [(1983) 2 Sri.L.R. 267]. In *Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* [(2006) 1 Sri.L.R. 7] the Petitioner sought to rely on the Court of Appeal (Appellate Procedure) Rules 1990 to support his argument that an application for writ of mandamus can be maintained against a public office without naming the holder of the office. Marsoof J. (at page 17) disagreed with this contention and said that "...this being an application for mandamus, relief can only be obtained against a natural person who holds a public office as was decided by the Supreme Court in Haniffa v. Chairman, Urban Council, Nawalapitiya" (emphasis added).

It is also to be noted that the Court of Appeal (Appellate Procedure) Rules 1990 applies to all applications under Articles 140 and 141 of the Constitution and therefore is general in nature. The rule that in an application for a writ of mandamus the Respondent should be either a natural or a legal person is specific in nature. The difference between the remedies of certiorari and mandamus was adverted to in *Shums v. People's Bank and others* [(1985) 1 Sri.L.R. 197 at 204] by this Court as follows:

"The other cases relied on by learned State Counsel were all cases where writs of Mandamus had been applied for. In *A. C. M. Haniffa v. Chairman, Urban Council, Nawalapitiya* (8), it was held that "A Mandamus can only issue

against a natural person who holds a public office: Accordingly in an application for a writ of Mandamus against the Chairman, Urban Council, the petitioner must name the individual person against whom the writ can issue". The judgment in that case gives a reason why a Mandamus can only issue against a natural person, who holds a public office when it says that "If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court". On, the other hand in the case of a writ of Certiorari, what this court does is to bring up a decision or determination of a statutory Tribunal or a functionary and quash it. Once such a decision or determination is quashed, it ceases to exist and a fresh decision or determination would have to be made if the matter is again proceeded with. The tribunal or functionary is not enjoined to do anything or desist from doing anything, the question of non-compliance with such Orders resulting in contempt of court does not arise. Therefore, it would be seen that the remedy by way of writ of Certiorari could not be equated to one of Mandamus as far as the effect on the parties is concerned."

In *Chandana v. Commissioner General of Examinations and Others* [C.A. (Writ) Application No. 1/2008, C.A.M. 06.06.2014] Nalin Perera J. (as he was then) held that a writ of mandamus will not issue against a person sued nomine officii.

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The Supreme Court in *Gnanasambanthan v. Rear Admiral Perera and Others* [(1998) 3 Sri.L.R. 169] was called upon to consider the necessary parties to an application for writs of certiorari and mandamus and Amerasinghe J. held (at page 171):

“In any event the question before us is not whether the Chairman of REPIA could be cited nominee officii, which perhaps was possible in respect of the application for Certiorari **but not in respect of the application of Mandamus...**” (emphasis added)

A Writ of Mandamus could only issue against a natural person, who holds public office [*Mahanayake v. Chairman, Ceylon Petroleum Corporation and Others* (2005) 2 Sri.L.R. 193].

Secondly, a writ of mandamus will be issued only if there is a public or statutory duty. [*De Alwis v. De Silva* (71 N.L.R. 108); *Weligama Multi Purpose Cooperative Society Ltd. v. Chandradasa Daluwatta* (1984) 1 Sri.L.R. 195; *Hakmana Multi Purpose Cooperative Society Ltd. v. Ferdinando* (1985) 2 Sri.L.R. 272; *Piyasiri v. People's Bank* (1989) 2 Sri.L.R. 47; *Sannasgala v. University of Kelaniya* (1991) 2 Sri.L.R. 193 and *Samaraweera v. Minister of Public Administration* (2003) 3 Sri.L.R. 64].

In terms of Article 55(1) of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers are vested in the Public Service Commission (PSC). Although section 56(1) of the Constitution allows the PSC to delegate to a Committee consisting of three persons (not being members of the PSC) appointed by the PSC, the powers of appointment, promotion, transfer,

disciplinary control and dismissal of such categories of public officers as are specified by the PSC, the Petitioners have failed to establish that the 1st and 2nd Respondents have been delegated such powers that will allow them to promote the Petitioners to the post of Beat Forest Officer. In the absence of proof of such delegation this Court cannot direct the 1st and 2nd Respondents to promote the Petitioners as they do not have the power to do so. [*Credit Information Bureau of Sri Lanka v. Messrs. Jafferjee and Jafferjees (Pvt.) Ltd.* (2005) 1 Sri.L.R. 89].

Thirdly, Article 61A of the Constitution prohibits this Court exercising writ jurisdiction against the 1st and 2nd Respondents. The reason is that assuming that the PSC has delegated powers to the 1st and 2nd Respondents which enable them to promote the Petitioners to the post of Beat Forest Officer, Article 61A of the Constitution prevents this Court from exercising any writ jurisdiction over the failure by the 1st and 2nd Respondents to do so. In *Ratnasiri and Others v. Ellawala and Others* (2004) 2 Sri.L.R. 180 this Court held that the decision or determination made by the 4th Respondent Secretary, being the decision or determination of a public officer exercising authority delegated by the PSC are precluded from judicial review by Article 61-A of the Constitution.

This will be discussed in detail now as the same prohibition applies to the writs of mandamus sought against the members of the PSC.

Article 61A of the Constitution enacted by the 17th Amendment is wider than its predecessor Article 55(5) since Article 55(5) restricted the application to orders or decisions concerning "appointment, transfer, dismissal or disciplinary control of a public officer" while Article 61A of the Constitution on the other hand concerned any type of decision so long as it was made pursuant to a power conferred or imposed on such body.

It may be contended that Article 61A of the Constitution only prevents this Court from exercising writ jurisdiction in relation to orders or decisions made by the PSC or its delegates whereas in this case the Petitioners are seeking only a writ of mandamus directing that a statutory duty be performed. Such a narrow application of the constitutional ouster in Article 61A of the Constitution overlooks the purpose of the ouster.

In applying the provisions of Article 61A this Court must bear in mind the scheme formulated in the 17th Amendment in regard to the public service. Unlike previously the appointment, promotion, transfer, disciplinary control and dismissal of public officers are vested with the PSC and not the Cabinet of Ministers [Article 55(1)]. The members of the PSC are appointed by the President on the recommendation of the Constitutional Council [Article 54(1)]. The PSC can delegate to a Committee or a public officer its powers of appointment, promotion, transfer, disciplinary control and dismissal of specified categories of public officers [Articles 56(1) and 57(1)]. Any public officer aggrieved by an order made by any such Committee or public officer may appeal to the PSC [Article 58(1)]. A further appeal against any order or decision made by the PSC is provided to the Administrative Appeals Tribunal which is appointed by the Judicial Service Commission [Article 59]. This is in addition to the jurisdiction created by Article 126 of the Constitution which is retained in terms of Article 61A.

Thus, it is seen that the 17th Amendment has put in place an elaborate scheme to resolve disputes relating to the appointment, promotion, transfer, disciplinary control and dismissal of public officers. In the circumstances, in applying the provisions of Article 61A of the Constitution, the Court must apply it in the widest

form to ensure that the scheme created by the 17th Amendment is given effect. This appears to be thinking of the legislature in retaining the preclusive clause in Article 61A despite removing the “pleasure principle” embodied in Article 55(1) of the Constitution as in *Chandrasiri v. The Attorney-General* (1989) 1 Sri.L.R. 115 Mark Fernando J. commented at page 121 that *“The ouster clause was intended to give effect to the “pleasure principle”, and not to whittle it down. The application of the “pleasure principle” prevents the ground of dismissal being questioned: the ouster clause complements that principle by taking away the jurisdiction of the Courts to inquire into dismissals – on other grounds, such as that rules and procedures had not been complied with.”*

Therefore, all actions or inactions of the PSC are caught up within the constitutional prohibition contained in Article 61A of the Constitution.

For all the foregoing reasons, the application is dismissed with costs.

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Judge of the Court of Appeal

N. Bandula Karunaratna J.

I agree.

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Judge of the Court of Appeal