

1/2008

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

In the matter of an application for order
in the nature of Writ of Mandamus
Kalawila Pathirage Janaka Chandana
24/20/4 Wickrema Place,
Bandarawatta Gampaha.

Petitioner

C.A.Writ Application No:-1/2008

Vs

Commissioner General of Examinations
Department of Examinations,
Pelawatta, Battaramulla.

Respondent

Hapuarachchige Saman Nalaka
Hapuarachchi 10 Others.

Added Respondents

Before:- Anil Gooneratne, J. &

H.N.J.Pererra, J,

Counsel:-Sanath Jayathilake for the Petitioner

Janak De Silva D.S.G. for the Respondent

S.N.Vijithsinghe for the Added Respondents

Argued On:-25.03.2013

Written Submissions:-28.05.2013/30.05.2013

Decided On:-06.06.2014

H.N.J.Perera, J.

The Petitioner has sought a writ of Mandamus directing the Respondent Commissioner General of Examinations either directly by himself or through a person duly appointed by him to inquire into the complaint made by the Petitioner that the IQ paper annexed to P7 marked "A" had leaked and as to whether this paper had reached any of the candidates who sat the said examination and to take all necessary steps thereafter according to law and justice depending on the said findings.

When this matter was taken up for argument, learned D.S.G. Counsel for the Respondent took up a preliminary objection that a writ of Mandamus cannot be issued since the Respondent is neither a natural nor a legal person .

It was the contention of the learned D.S.G. that the Respondent named in the application "Commissioner General of Examination" is not a natural person. It is neither a legal person. It was further submitted that the Public Examinations Act No 25 of 1968 as amended by Act No 15 of 1976 refers only to a "Commissioner of Examinations". There is no "Commissioner General of Examinations" referred to in the Said Act. Hence even the caption is incorrect in this regard.

The Counsel for the Petitioner on 3rd June 2013 filed a motion and had moved in terms of Rule 3(8) of the Court of Appeal (Appellate

Procedure) Rules 1990 that the word "General" in the caption which reads "Commissioner General of Examinations, Department of Examinations, Pelawatta, Battaramulla" be deleted so that the caption would read "Commissioner of Examinations, Department of Examinations, Pelawatta, Battaramulla"

The Counsel for the Respondent had objected to the said application of the Petitioner stating that the preliminary objection raised by the Respondent as set out at paragraph 19 (c) of the statement of objections filed On 16.11.2009 and that the Petitioner had ample notice of the objection and if the said amendment of the caption is allowed it will prejudice the Respondent. The Counsel appearing for the Added Respondents have not objected to the said application of the Respondent on the basis that it it has been made by accidental mistake and moved to permit the Respondent to amend the caption as Commissioner of Examinations accordingly.

The main contention of the Counsel for the Respondent is that there is nothing in the Public Examinations Act No 25 of 1968 as amended by Act No 15 of 1976 indicating the intention of the legislature to expressly vest legal personality in either of the said officers.

In Ladamuttu Pillai Vs The Attorney General 59 N.L.R 313, the court held that the intention to incorporate though not established by express words of creation can be gathered from the statute having regard to the nature of the functions and duties entrusted to the functionary and that such corporations are corporations by implication. The Privy Council in appeal in The Land Commissioner Vs Ladamuttu Pillai 62 N.L.R.169 concluded that the Land Commissioner is not expressly created a Corporation sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name and that furthermore no legislative enactment

seems to reveal any intention to incorporate. In this case the Privy Council held that there must be express creation of legal personality.

The contention of the learned Counsel for the Respondent was that the said Public Examinations Act No. 25 of 1968 as amended by Act No. 15 of 1976 does not contain any provision incorporating the ““Commissioner of Examination” and therefore the said Commissioner of Examinations has no corporate personality.

In the Land Commissioner Vs Ladamuttu Pillai (62 N.L.R.182) it was held that for purpose of incorporating a legal person with capacity to sue and be sued, there must be express provision. It had been very clearly held in that case that only a legal person can sue or be sued (in addition to a natural person) and any action filed by or against such non legal person cannot be maintained.

In M.R. Singho Mahatmaya Vs the Land Commissioner 66 N.L.R. 94, the Supreme Court following the decision in the Privy Council in The Land Commissioner Vs Ladamuttu Pillai held that the Land Commissioner cannot be regarded as a corporation sole and therefore cannot be sued nomine officii.

The decision in the said The Land Commissioner Vs Ladumuttu Pillai was quoted with approval by the Supreme Court in Sri Lanka Transport Board Vs Colombo Metropolitan Bus Company Ltd and Others [S.C. (spl) L.A. No 77/2007; S.C. Minutes of 02.07.2008]. After considering the decision of the Privy Council in Land Commissioner Vs Ladamuttu Pillai it was held in that case that for purpose of incorporating a legal person with capacity to sue and be sued, there must be express provision. There should be express provisions, which would reveal such desire for incorporation.

Section 2 of the Public Examinations Act states that the Commissioner of Examinations, hereafter in this Act referred to as “the Commissioner”, and the other officers of the Department of

Examinations shall be responsible for the administration of this Act. The Commissioner of Examination is not expressly created a Corporation sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name.

The learned Counsel for the Petitioner made no reference to any direct provisions, which reveals the intention of the "Commissioner of Examinations" to be a body corporate under the present Act. In the absence of any direct provisions or any intent to incorporate, it is evident that the Commissioner of Examination, under the present Act cannot be regarded as a body corporate. Further during the course of argument the learned Counsel for the Petitioner submitted that the Public Examinations Act No 25 of 1968 as amended by No 15 of 1976 does not create a Commissioner of Examinations.

Therefore even if this court allows the application of the Counsel for the Petitioner to amend the caption still as the commissioner of Examinations cannot be considered as a legal person a writ of Mandamus cannot be issued on the Respondent who is neither a legal nor a natural person. In *Haniffa Vs The Chairman, Urban Council, Nawalapitiya* 66 N.L.R. 48 it was held that:-

"A Mandamus can only issue against a natural person, who holds a public office."

See also- *Samerasinghe Vs De Mel and Another* (1982) 1 Sri.L.R. 123, *Abayadeera and 162 Others Vs Dr.Stanley Wijesundera, Vice Chasncellor, University of Colombo and Another* (1983) 2 Sri.L.R. 267

In *Dayaratne Vs Rajitha Senearatne, Minister of Lands and Others* (2006) 1 Sri.L.R.1, like in this present case, the Counsel for 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 made against a public office without naming the holder of the office. Marsoof, J disagreed with this contention and stated that:-

“...this being an application for Mandamus, relief can only be obtained against a natural person who holds a public office as was decided in Haniffa Vs Chaiman, Urban Council, Nawalapitiya.”

Accordingly for the reasons, aforementioned, I uphold the preliminary objection raised by the Counsel for the Respondent and dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne, J

I agree.

JUDGE OF THE COURT OF APPEAL