

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

*In the matter of an application for
mandate in the nature of Writ of
Mandamus under and in terms of
Article 140 of the Constitution of The
Democratic of Sri Lank*

C.A. (Writ) Application

No. 41/2017

Dr.M.S.M.Saleem,
163, M.P.C.S.Lane,
Samanthurai.

Petitioner

Vs.

01. **South Eastern University of Sri Lanka,**
P.O. Box No: 1,
University Park,
Oluvil.
02. **Prof.M.M.M.Najim,**
Vice Chancellor.
03. **Mr.S.M.M.Mazahir,**
Dean,
Faculty of Islamic Studies and Arabic
Language.
04. **Mr.M.L.Fowzul Ameer,**
Dean, Faculty of Art and Culture.

05. **Dr.S.Gunapalan,**
Dean, Faculty of Management and
Commerce.
06. **Dr.U.L.Zainudeen,**
Dean, Faculty of Applied Science.
07. **Dr.S.M.Janaideen,**
Dean, Faculty of Engineering.
08. **Dr.M.G.MohamedThariq,**
Dean, Faculty of Technology.
09. **P.K.C.L.Jayasinghe,**
Member of the Council.
10. **M.M.S.K.BandaraMapa,**
Member of the council.
11. **Rev.Prof.G.F.Rajendran,**
Member of the Council.
12. **Prof.M.A.M.Nahuman,**
Member of the council.
13. **D.A.R.K.Dayaratne,**
Member of the Council.
14. **S.Abdul Rasheed,**
Member of the Council.
15. **NavinAdikaram,**
Member of the Council.
16. **M.S.Razzaaq,**
Member of the Council.
17. **R.M.Gunawardena,**

Member of the Council.

18. **Dr.A.M.Muzathik,**
Member of the council.
19. **M.H.A.Munas,**
(Head of the Department,
Department of Arabic Language)
Member of the Council.
20. **H.AbdulSaththar,**
Registrar,
South Eastern University of Sri Lanka.
The 2nd20th Respondents all of;
South Eastern University of Sri Lanka,
P.O.Box.No. 1,
University Park,
Olivil.
21. **University Grant Commission,**
No. 20, Ward Place,
Colombo 07.
22. **M.T.Habeebullah,**
People's Bank Lane,
Kinniya 06.

Respondents

Before : P.R.Walgama, J (P / CA) &
S.Thurairaja, P.C, J

Council : Shantha Jayawardena with
ChamaraNanayakkarawasam.
Vikum de Abrew, SDSG, for the A.G.

Written Submissions

Of both parties filed on : 19.05.2017

Judgement delivered on : 23.05.2017

S.Thurairaja, P.C. J.

This is an order regarding extension of interim relief

The petitioner in the main application sought relief in the following manner.

(a) Issue Notice on the respondents;

(b) Call for an examine the entire record pertaining to this application including;

i. the council Memo bearing No: SEU/C/ 2017 /197 /Addi /31Submitted to the Council seeking its approval to appoint the 23rd Respondent as a Lecturer.

ii. Interview schedules, mark sheets and the 23rd Respondent's application in response to the advertisements P9 and P9A.

iii. The recommendation of the Selection Committee at the interview held on 27.01.2017 pursuant to the newspaper advertisement marked P9.

iv. The minutes of the Council meeting held on 28.01.2017, including the decision to appoint the 23rd Respondent;

(d) Call for and quash by way of an order in the nature of Writ of Certiorari, the selection and recommendation of the Selection Committee for appointment of the 23rd Respondent as a 'Lecturer unconfirmed and / or Lecturer Probationary and / or

Senior Lecturer Grade II and / or Senior Lecturer Grade I, in the Department of Arabic Language of the 1st Respondent University;

(e) Call for and quash by way of an order in the nature of Writ of Certiorari, the decision of the Council of the 1st Respondent University made at its meeting held on 28.01.2017, to appoint the 23rd Respondent as a 'Lecturer unconfirmed' and / or Lecturer Probationary and / or Senior Lecturer Grade II and / or Senior Lecturer Grade I in the Departments of Arabic Language of the 1st Respondent University;

(f) Call for and quash by way of an order in the nature of Writ of Certiorari, the appointment (if any) of the 23rd Respondent as a 'Lecturer unconfirmed' and / or Lecturer Probationary and / or Senior Lecturer Grade II and / or Senior Lecturer Grade I in the Department of Arabic Language of the 1st Respondent University;

(g) Call for and quash by way of an order in the nature of Writ of Certiorari, the approval (if any) granted by the 22nd Respondent for the appointment of the 23rd Respondent for the appointment as a 'Lecturer unconfirmed' and / or Senior Lecturer probationary and / or Senior Lecturer grade II and / or Senior Lecturer Grade I in the Department of Arabic Language of the 1st Respondent University;

(h) Grant and issue an order in the nature of Writ of Mandamus direction the 1st to 22 Respondents to appoint the petitioner as a Senior Lecturer Grade II in Arabic, in the department of Arabic Languages of the 1st Respondent University;

(i) Grant and issue an Interim Order restraining the 1st to 21st Respondents from appointing the 23rd respondent as a 'Lecturer unconfirmed' and /or Lecturer Probationary and / or Senior Lecturer II and / or Senior Lecturer grade I in the department of Arabic Language of the 1st Respondent university, until the final hearing and determination of this application;

(j) Grant and issue an interim Order restraining the 22nd Respondent approving the appointment of the 23rd Respondent as a Lecturer Grade II and / or Senior Lecturer Grade I in the department Arabic language of the 1st respondent University, until the final hearing and determination of this application;

(k) Grant and issue an interim order suspending the operation of the appointment (if any) of the 23rd Respondent as a Lecturer unconfirmed and /or Lecturer probationary and /or Senior Lecturer grade II and / or Senior Lecturer grade I in the department of Arabic language of the 1st Respondent University, until the final hearing and determination of this application;

The petitioner submitted to the court that there is an imminent danger and irreparable loss will be caused, if an interim relief is not granted. On hearing the submission ex-parte the court issued the interim relief for a limited period of 7 days. On the notice returnable date the Respondents who were represented by the Honourable Attorney General, appeared and objected for the extension of the said stay order. Both parties filed limited and counter objections, argued the matter extensively and filled written submissions.

The main contention of the learned Deputy Solicitor General were of two fold one is the Petitioner had suppressed an important circular and the other was the petitioner had an alternate remedy under the law.

The Counsel for the Petitioner submits that he had not suppressed any materials, it is the Respondent who had mislead the people in their advertisement. Therefore the Petitioner is entitled for a stay order and the relief prayed for.

When the matter was supported before Justice Malalgoda, President of Court of Appeal (as then), and I, on the 6th March 2017, the petitioner heavily relied on the advertisement and the University Grants Commission (UGC) circular number 721, which is marked as P12, and submitted that the respondents blatantly violated the said circular therefore the Petitioner directly affected, further the appointment of 23rd Respondent will cause irreparable loss to the petitioner.

On hearing the submissions and perusing the petition and affidavit, especially paragraph numbered 9, 10, 11, 12 and 18 of the petition, the court was made to understand that there is a serious and imminent loss caused or going to be caused to the Petitioner. I wish to quote paragraph number 12 for easy reference.

" 12. The petitioner further states that the criteria and method for selection of Lecturer Probationary set out in the Circular No.721 was modified / amended by the following Circulars:

- (a) Establishments Circular Letter No. 8/ 2005 dated 11.08.2005:
- (b) Commission Circular No. 935 dated 25.10.2010:
- (c) Establishments Circular Letter No.3/2012 dated 18.01.2012:

True copies of the said establishments letter No. 8/2005 dated 11.08.2005, the Commission Circular No. 935 date 25.10.2010, and the Establishments circular letter No. 3/2012 dated 18.01.2012 are annexed hereto marked as P13, P14, P15 respectively and pleaded as part and parcel hereof."

The learned DSG submits that the Circular number 721 was amended on the 9th October 2012 by circular No. 996. According to the amendment a candidate with less than 6 years of experience can be appointed as lecturer (unconfirmed), subject to three year period of probation and the approval of UGC.

Both Counsels made extensive submissions on the extension of interim relief and the substantive matter, but in the prayer they confined to seek an order only for the extension of stay order. Considering their prayers this order only in relation of extension of interim relief.

When the petitioner supported the interim relief, he heavily relied on P12 considering the requirements stated in the said circular and the as submitted by the petitioner, the qualifications and experience of the 23rd Respondent, this court was convinced of a serious irregularity and issued an interim relief as prayed by the petitioner.

Considering the fact that the petitioner is presently employed at the University of Peradeniya, it can be easily presumed that he is well aware of circulars issued by the governing authority, namely UGC. When we peruse the petition and the affidavit it evident that he is well acquainted with the rules, regulations, laws and circulars of the UGC. It is heard the petitioner submitted in court that he is presently employed in the same level at the University of Peradeniya, his hometown is Sammanthurai and joining the 1st Respondent will be more convenient for him to work from home. In fact the present application of the petitioner to join the 1st respondent is of more convenience and comfort of the Petitioner.

As per paragraph no 12 of the petition of the petitioner that the said circular was amended thrice by P13, P14 and P15. The Circular No. 996 was dated 9.10.2012 was not mentioned anywhere by the petitioner in the application nor in the submission in court. If that circular was before the court the issuance of the interim relief would have been different.

When the court issues an interim order ex-parte the court keeps an absolute trust on the applicant, that creates a contract between the applicant and the court. It is the duty of the applicant to be truthful and disclose all relevant materials to the court as stated in *Alphonsu Appuhamy vs Hettiarchchi* 77 NLR 131.

In the case of *Moosajees vs Ekasath Engineru Saha Samanya Kamkaru Samithiya* 79 (1) NLR 285 the court cited the following passage, which demonstrate the effect of suppression. *Rajaratnam J* at Page 288 says, as follows;

“If I may repeat the words of *Wigram V.C* in the case of *Castelli v Cook*, (1849) 7 Hare 89,94: -

“A Plaintiff applying ex-parte comes (as it has been expressed) under a contract with the court that he will state the whole case fully and fairly to the court, if he fails to that, and the

Court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits, and that, as he has broken faith with the court, the injunction must go."

It is well established law, that when an order for interim relief is granted ex-parte, there is a contract created between the Court and the party who obtains the relief. If there is a suppression, misleading of facts or misrepresentation of any material facts will be frowned upon by the court and that will compel the Court to refuse to extend any interim relief granted.

Considering all the available materials before the court, I am of the view that the petitioner had failed to disclose all relevant materials to court at the time supporting for interim relief, hence the extension of interim relief granted on the 6th March 2017 is refused and vacated herewith.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J (P /CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL