

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

In the matter of an Application for Mandates in the nature of Writs of Certiorari and Prohibition made under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A (Writ) Application No. 413/2016

Dr. (Ms.) Niruba S. Jayasundara,
No. 13/1A, Love Lane, Abeyapura,
Nilaveli Road, Trincomalee.

Petitioner

Vs.

1. Eastern University, Sri Lanka.
2. Dr. T. Jayasingham,
Vice-Chancellor.
3. Mr. V. Kanagasingham,
Rector, Trincomalee Campus.
4. Mr. K. Baskar,
Dean, Faculty of Languages and
Business Studies.

5. Dr. K.E. Karunakaran,
Deputy Vice Chancellor.
6. Dr. K.T. Sunderasan
7. Dr. K. Rajendran
8. Mr. R. Udayakumar
9. Dr. F.C. Ragal
10. Dr. Sivaraj
11. Mr. P. Sachithanathan
12. Mr. A. Gnanathan
13. Rev. Fr. Dr. Paul Robinson
14. Mr. P. Kannan
15. Prof. R. Sivakanesa
16. Dr. H.R. Thambawita
17. Mrs. P.S.M. Charles
18. Dr. M.S.M. Ibralebbe
19. Dr. M. Thamilvannan
20. Mr. S.M. Hussain

21. Mr. P.T.A. Hassan

22. Dr. S. Maunaguru

23. Ms. Kumudhinidevi
Shandrakumar

24. K. Maheshan

25. R. Logendra

26. Mr. N. Selvakumaran

All of Eastern University, Sri Lanka,
Wentharumoolai, Chenkalady.

Respondents

**Before: P. Padman Surasena, J/ President of the Court of Appeal
Arjuna Obeyesekere, J**

Counsel: K.G.Jinasena for the Petitioner

Suranga Wimalasena, Senior State Counsel for the Respondents

Argued on: 13th July 2018

Decided on: 27th September 2018

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision in 'P9'¹ to remove the Petitioner from the post of Head, Department of Languages and Communication Studies, Eastern University, Sri Lanka;
- b) A Writ of Certiorari to quash the decision in 'P9' to place the Petitioner under interdiction;
- c) A Writ of Certiorari to quash the charge sheet 'P10' issued under the signature of the 2nd Respondent.

When this matter was mentioned on 3rd September 2018, the learned Counsel for the Petitioner informed this Court that the Petitioner would only be seeking the reliefs prayed for in paragraphs (b) and (d) of the prayer, namely the Writ of Certiorari to quash the decision reflected in 'P9' to remove the Petitioner from the post of Head, Department of Languages and Communication Studies and the Writ of Certiorari to quash the charge sheet marked 'P10' issued under the hand of the 2nd Respondent. The Petitioner has subsequently filed a motion on 13th September 2018 informing Court that he would only be pursuing the Writ of Certiorari to quash the charge sheet marked 'P10'.

The facts which are relevant to a consideration of the above reliefs are briefly as follows.

¹ 'P9' is an extract of the minutes of the 266th meeting of the Council of the 1st Respondent University held on 25th June 2016 where the said decision was taken.

The Petitioner had been appointed to the post of Lecturer (Probationary) by the 1st Respondent Eastern University on 3rd January 2000 and had subsequently been promoted to the post of Lecturer (Grade II) in 2006. Pursuant to a decision taken by the Council of the 1st Respondent at its meeting held on 28th November 2015, the Petitioner had been promoted to the post of Senior Lecturer (Grade I), with effect from 27th May 2012.

By letter dated 23rd October 2015 annexed to the petition marked 'P2', the Petitioner had been informed that the Council of the 1st Respondent University had appointed the Petitioner as the Head of the Department of Languages and Communication Studies, with effect from 1st November 2015, in terms of Section 51(1) of the Universities Act No. 16 of 1978, as amended.

By letter dated 1st June 2016 annexed to the petition marked 'P4', the Petitioner and several other lecturers of the 1st Respondent had complained to the 2nd Respondent Vice Chancellor of certain incidents of ragging and student unrest that had taken place at the Trincomalee campus of the 1st Respondent University and had sought a meeting to discuss the situation prevailing at the campus. The Petitioner and the said lecturers had thereafter met the 3rd Respondent, the Rector of the Trincomalee Campus of the 1st Respondent University on 2nd June 2016 and 3rd June 2016.

Pursuant to the said meetings, by letter dated 3rd June 2016 annexed to the petition marked 'P7', the 3rd Respondent had complained to the 2nd Respondent about the conduct of the Petitioner at the said meetings. The 3rd Respondent had also submitted a formal complaint dated 22nd June 2016

annexed to the petition marked 'P5' to the Chairman of the Council of the 1st Respondent, in which he had reiterated his complaint on the conduct of the Petitioner and other lecturers, at the meetings held on 2nd and 3rd June 2016.

The 5th Respondent Deputy Vice Chancellor of the 1st Respondent had visited the Trincomalee campus on 3rd June 2016 to discuss the issues that had arisen at the said Campus and had submitted his report dated 10th June 2016, which has been annexed to the petition marked 'P8'. In the said report, the 5th Respondent had drawn the attention of the 2nd Respondent to the manner in which the staff of the Department of Languages and Communication Studies, including the Petitioner, had spoken at the said meeting, calling it distressing and difficult to tolerate.

The lapses in the due administration of the Trincomalee campus and the lack of co-operation of the academic staff in maintaining discipline at the Campus had been discussed at the 266th meeting of the Council of the 1st Respondent held on 25th June 2016. An extract of the minutes of the said meeting had been annexed to the petition, marked 'P9'. The Council had noted the contents of the documents 'P5' and 'P8' and arrived at the conclusion that the Petitioner is 'disturbing the administration and the harmony of the communities at the Trincomalee Campus at large'. Based on the said reports, the Council had taken *inter alia* the following decisions, in respect of the Petitioner:

"That disciplinary action be taken immediately on her in the larger interest of the Campus and the following course of action be taken in this respect:

- Remove her from the position of the Head of Department with immediate effect;
- Interdict her from the post of Senior Lecturer Grade I immediately;
- Institute disciplinary inquiry against her on the complaints.”

Accordingly, the 2nd Respondent had conveyed to the Petitioner the above decision of the Council of the 1st Respondent by his letter dated 25th June 2016 annexed to the petition marked 'P9A' and the Petitioner had been placed under interdiction with immediate effect.

By letter dated 18th July 2016 annexed to the petition marked 'P10', the Petitioner had been requested to show cause with regard to six charges mentioned therein, which the Petitioner had done by her letter of the same date. This application was filed while the inquiry against the Petitioner was proceeding on the charges set out in 'P10'.

According to the Petitioner, the Inquiry Officer had exonerated her of all charges. Pursuant to the receipt of the report of the Inquiry Officer, the Council of the 1st Respondent had decided to reinstate the Petitioner in service and by letter dated 5th October 2017 produced by the Respondents marked 'R9', the 2nd Respondent had informed the Petitioner that the Council has decided to end the suspension with effect from October 9, 2017. The Petitioner had accordingly assumed duties as Senior Lecturer (Grade I) with immediate effect.

The only matter that the Petitioner is now agitating before this Court is the decision of the Council to issue the charge sheet to the Petitioner, with the Petitioner alleging that the said decision is illegal and liable to be quashed by a Writ of Certiorari.

The learned Senior State Counsel submitted that the power of this Court to issue Writs conferred by Article 140 of the Constitution is discretionary in nature and would not be exercised where it would be futile to do so. It has been held in a long series of cases² and recently by the Supreme Court in Samastha Lanka Nidahas Grama Niladhari Sangamaya vs Dissanayake³ that no court will issue a mandate in the nature of Writ of Certiorari or Mandamus where to do so would be vexatious or futile. In the present application, pursuant to the issuing of the charge sheet, the Petitioner had submitted her response, a formal disciplinary inquiry has been held, and the Petitioner has been exonerated and reinstated in the same post that she held prior to the issuance of the charge sheet.

Thus, even if this Court accepts the position of the Petitioner that the issuance of the charge sheet was illegal, quashing the charge sheet at this stage would be futile as the Petitioner has been reinstated in service. In these circumstances, this Court is of the view that it would not be lawful for this Court to intervene in this situation at this stage.

² See P.S. Bus Company Ltd., v Members and Secretary of Ceylon Transport Board [61 NLR 491]; Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Limited [2005 (1) Sri LR 89].

³ SC Appeal No. 158/2010 SC Minutes of 14th June 2013.

However, for the purpose of completeness and as the Petitioner has referred this Court to the judgment of the Supreme Court in University of Ruhuna and others vs Dr. Dharshana Wickremasinghe⁴, this Court has decided to examine the two grounds relied upon by the learned Counsel for the Petitioner in support of his argument that the issuing of the charge sheet was illegal.

In the said case, the Supreme Court has held that the charge sheet must be approved by the Council of the University. The Supreme Court has held further that the participation of the husband of the person who made the allegations against the petitioner in that case, at meetings of the council where decisions were taken to initiate disciplinary action against the petitioner, was sufficient to raise a suspicion that there was real likelihood of bias.

The first ground urged by the learned Counsel for the Petitioner is that the charge sheet has not been approved by the Council and therefore, the charge sheet is liable to be quashed. It would be appropriate at this stage to examine the position taken up by the Petitioner in the petition. In paragraph 24 of the petition, it is stated that, 'on 25th June 2016, the Governing Council of the 1st Respondent had decided to ... **conduct a disciplinary inquiry against her on six specific charges**' and that, 'on 18th July 2016, the 2nd Respondent issued the charge sheet with six charges'.

In paragraph 25(ii) of the petition, the Petitioner has stated as follows:

'it was revealed at the said inquiry that:

⁴ SC Appeal No. 111/2010 SC Minutes of 9th December 2016.

(ii) although the **Governing Council has framed certain charges** (i.e. 1st, 3rd, 5th and the 6th charges) which had no basis as no one had made such complaints to the 2nd Respondent or the Council as per the minutes of the said meeting of the Council tendered to the subsequent meeting of the said Council held in July 2016;

(iii) The 2nd Respondent had proceeded to issue the said charge sheet against the Petitioner even prior to confirmation of the minutes of the previous meeting of the Council and the answer submitted by the Petitioner was not tabled before the Council.⁵

Thus, the position taken up in the petition was that the Council had decided to conduct an inquiry on six specific charges and that the Council has framed the charges. In this background, there was no necessity for the Respondents to provide material to substantiate that the charge sheet had been approved by the Council. The argument that was presented by the learned Counsel for the Petitioner during oral submissions, that the Council has not approved the charge sheet, has been taken up for the first time in the counter affidavit filed in December 2017, by which time the Petitioner had been reinstated. This Court is of the view that the Petitioner cannot be permitted to raise in her counter affidavit, issues which had not been raised in the petition, as the Respondents have no opportunity of answering such matters and would therefore prejudice the Respondents.

⁵ The Petitioner has not referred to any provision of the law which requires confirmation.

This position was considered by this Court in Wasana Trading Lanka (Pvt) Limited vs Dr. Sarath Amunugama and others⁶ where Sripavan, J (as he then was) held as follows:

“The Court is of the view that the Petitioner cannot set up a new case in his counter objections which was not the subject matter in his original petition dated 4th November 2004. It is not open to a petitioner in an application for Writs of Certiorari and Mandamus to present a case not set out in the petition or obtain reliefs on a basis not averred in the petition.”

For these reasons, this Court sees no merit in this argument and rejects the first ground urged on behalf of the Petitioner.

The second ground urged on behalf of the Petitioner is that the participation of the 3rd and 5th Respondents at the Council meeting held on 25th June 2016, where the decisions reflected in ‘P9’ were taken, is contrary to the principles of natural justice. While the 5th Respondent had admitted during his evidence at the disciplinary inquiry that he participated at the Council meeting held on 25th June 2016, the Petitioner’s position that the 3rd and 5th Respondents were present at the time the said decision was taken has been denied by the Respondents, whose denial has not been contradicted in the Counter affidavit of the Petitioner. While a complete set of minutes of the said meeting has not been submitted by either party, the Petitioner has not sought an order from this Court directing the Respondents to tender a list of those present when the decision in ‘P9’ was taken nor has the Petitioner filed such a list with her counter affidavit. In the absence of any material to substantiate the argument

⁶ CA (Writ) Application No. 2144/2004 CA Minutes of 21st October 2005.

of the Petitioner, this Court is not in a position to make a determination on this ground urged by the Petitioner.

In these circumstances, this Court sees no legal basis to issue the Writ of Certiorari prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal