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 under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 238/2020

Porakara Mudiyanselage Aruna Samantha Kumara,
No. 47/8, Kirapane, Gampola.

PETITIONER

Vs.

1. T.A.C.N. Thalangama,
   Returning Officer,
   Gampola Urban Council,
   Deputy Election Commissioner,
   Kandy District Election Office,Kandy.

2. Akila Viraj Kariyavasam,
   General Secretary.

3. Naveen Dissanayake.

4. D.M. Swamindhan.

5. Daya Gamage.

6. Ruwan Wijayawardane.

7. Nissanka Nanayakkara.

8. Sagala Rathnayake.

9. Palitha Range Bandara.

10. Anoma Gamage.

11. Prasanna Shamal Senarath.

12. Edward Gunasekara.

13. Lakshman Wijemanne.

14. K.K. Piayadasa.

15. Vajira Abeywardane.

16. A.D. Premadasa.

17. Wijayakala Maheshwaran.

18. John Amarathunge.

19. Tilak Marapana.

20. Sirinal De Mel.

21. Ronald Perera.

22. Jeyaraj Chandrasekara.

23. Ananda Kularathne.

24. Lasantha Gunawardane.

25. Sunethra Ranasinghe.

26. A.A. Wijethunge.

27. Ajith Mannapperuma.

28. Chanaka De Silva.

29. Sunil De Silva.

30. Daya Pelpola.

31. Wasantha Aluwihare.

32. Gamini Jayawickrama Perera.

33. Niroshan Perera.

34. Mahinda Haradasa.

    2nd – 34th Respondents are members of the Working Committee.

35. Anil Rajakaruna.

36. Asendra Siriwardane.

37. K. Udugampola.

35th – 37th Respondents are members of the Disciplinary Committee.

2nd – 37th Respondents are at
United National Party,
"Sirikotha"
No.400, Pitakotte Road,
Sri Jayawardanepura, Kotte.

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**
Mayadunne Corea, J

Counsel: Faisz Mustapha, P.C., with Thisath Wijegunawardena, P.C., Farman Cassim, P.C., Budwin Siriwardena, Nimesh Kumarage, Mithun Imbulamure and Vinura Kularatne for the Petitioner

Ms. Nayomi Kahawita, Senior State Counsel for the 1st Respondent

Ronald Perera, P.C., with Dinesh Vidanapathirana for the 2nd Respondent

Eraj De Silva for the 19th Respondent

Neomal Palpola for the 30th Respondent

Supported on: 9th March 2021

Written Submissions: Tendered on behalf of the Petitioner on 19th April 2021

Tendered on behalf of the 1st Respondent on 29th April 2021

Tendered on behalf of the 2nd Respondent on 22nd March 2021 and 23rd April 2021

Decided on: 21st May 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner is a member of the United National Party (UNP). He states that he successfully contested the Kirapane Ward situated in the Gampola Urban Council area at the Local Authorities elections held on 10th February 2018. The Petitioner states further that at the Council meeting held on 10th April 2018, the Petitioner was elected as the Chairman of the Urban Council, Gampola.

The Petitioner states that on 19th March 2020, he tendered his nomination to contest from the Kandy District at the Parliamentary Elections from the *Samagi Jana Balawegaya*. The said elections were held in August 2020, but the Petitioner was not elected.

Disciplinary Action by the UNP

The Petitioner states that on 18th June 2020, he received a letter dated 22nd May 2020, marked '**P5**', from the leader of the UNP, stating that his membership in the UNP has been suspended for violating the Constitution of the UNP, as it had been reported that the Petitioner has tendered his nominations to contest the Parliamentary Elections from another political party.[1] By '**P5**', the Petitioner has been requested to show cause within seven days of the receipt of the said letter, as to why disciplinary action should not be taken against him.

The Petitioner states that after requesting further time to respond, he submitted an explanation by letter dated 30th June 2020, marked '**P7**', informing that his decision to contest from the *Samagi Jana Balawegaya* was in conformity with a decision taken by the Working Committee of the UNP. The Petitioner admits that thereafter he was served with a charge sheet marked '**P9**' and directed to appear before the Disciplinary Committee of the UNP on 25th July 2020. The Petitioner states that at his request the inquiry was initially postponed to 1st August 2020 and thereafter postponed by the Chairman of the Disciplinary Committee without specifying a date – vide '**P13**'.

[1] See paragraph 3.4(we) of 'P16'.

However, by letter dated 28th July 2020, marked '**P14**', the Petitioner had been informed by the 2nd Respondent, the General Secretary of the UNP that the Working Committee of the UNP, acting on the recommendation of its Disciplinary Committee had decided to expel the Petitioner from the UNP.

Intimation by the 1st Respondent

By a letter dated 11th August 2020, marked '**P15**' the 1st Respondent, the Returning Officer for the Gampola Urban Council, referring to the aforementioned decision of the UNP, had sent the following letter to the Petitioner:

> "ඒ හේතුවෙන් ඔබ ඉහත සභාවේ දැරූ සභික ධුරය අතහැර ඇතැයි මව්සින් පළාත් පාලන ආයතන පන්ද විමසීම අඥාපනතේ (262 වන අධිකාරය) 10 අ(1)(අ) වගන්තිය ප්‍රකාර දැන්වීමක් ගැසට් පත්‍රයේ පළ කරනු ලබන බව මෙයින් දන්වම්."

Aggrieved by the decision of the UNP to expel him from its membership, and the intimation of the 1st Respondent in '**P15**', the Petitioner filed this application, seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the purported recommendation, if any, of the Disciplinary Committee recommending that the Petitioner be expelled from the UNP, as evidenced by '**P14**';

(b) A Writ of Certiorari to quash the decision of the Working Committee of the UNP to expel the Petitioner from the UNP, as evidenced by the letter marked '**P15**';

(c) A Writ of Prohibition prohibiting and/or preventing the 1st Respondent from acting in terms of Section 10A(1)(a) of the Local Authorities Elections Ordinance as amended (the Ordinance) and declaring that the Petitioner has vacated his office as a member of the Urban Council, Gampola.

Preliminary objections

When this matter was taken up for support, the learned President's Counsel for the 2nd Respondent raised the following three objections relating to the maintainability of this application:

I. All members of the Working Committee of the UNP have not been made parties to this application, and therefore necessary parties are not before Court;

II. In any event, decisions of the Working Committee of the UNP are not amenable to the Writ jurisdiction of the Court of Appeal;

III. The Returning Officer (1st Respondent) exercises only a ministerial function in terms of Section 10A(1)(a) of the Ordinance and is thus not amenable to the writ jurisdiction of the Court of Appeal.

As all learned Counsel were agreeable to the said objections being considered as preliminary issues of law, this Court directed the learned President's Counsel for the 2nd Respondent to tender written submissions on the said preliminary objections and for the learned President's Counsel for the Petitioner and the learned Senior State Counsel to respond thereto.

I shall now consider each of the above three objections.

The first objection was that even though the Petitioner was seeking to quash the decision of the Working Committee of the UNP to expel the Petitioner from its membership – vide '**P14**'- all members of the Working Committee of the UNP who made the said decision reflected in '**P14**' have not been made respondents to this application. It was submitted further that the failure to do so renders this application liable to be dismissed *in limine*.

The legal position on naming necessary parties

It is trite law that any person whose rights are affected by an order that a petitioner is inviting a Court of law to make in his favour is entitled to be named as a party and is entitled to be heard, before Court makes any order adverse to such person. The rule is that all those who would be affected by the outcome of an application should be made respondents to such application.[2]

[2] See Hatton National Bank PLC vs Commissioner General of Labour and Others. [CA (Writ) Application No. 457/2011; CA Minutes of 31st January 2020; per Janak De Silva, J]

The consequences of a party who is necessary to a proper adjudication of an application not being named as a party has been considered by the Supreme Court as well as by this Court in several cases.

In the case of **Rawaya Publishers and others v Wijedasa Rajapaksha, Chairman Sri Lanka Press Council and Others**[3] the petitioners sought to quash the order made by the 1st – 7th respondents, that the petitioners should apologise to the complainant, the Secretary General of the Janatha Vimukthi Peramuna (JVP). The Secretary General of the JVP however was not made a party to the proceedings.

Upholding the objection of the respondents that a failure to cite the Secretary General of the JVP was fatal to the maintainability of that application, this Court held as follows:

> "*In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another*[4]*,it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative capacity (vide Prabodh Verma and others v. State of Uttar Pradesh and others*[5] *also see Encyclopaedia of Writ Law By P. M. Bakshi*)."

[3] [2001] 3 Sri LR 213 at 216.
[4] AIR 1963 – SC 786 at 788.
[5] AIR 1985 SC 167.

Wijeratne (Commissioner of Motor Traffic) v. Ven Dr. Paragoda Wimalawansa Thero and Others[6] concerned a Buddhist priest who sought to quash the decision of the Commissioner of Motor Traffic not to issue a driving license to the Petitioner upon a decision being made by the *Samastha Lanka Sasanarakshaka Mandalaya* that it would be inappropriate to issue driving licenses to Bhikkus. The Commissioner of Motor Traffic raised a preliminary objection that the Commissioner of Buddhist Affairs, who communicated the decision of the *Samastha Lanka Sasanarakshaka Mandalaya* to the Commissioner of Motor Traffic has not been made a respondent.

The Court of Appeal rejected the preliminary objection. The Commissioner of Motor Traffic appealed to the Supreme Court which upheld the decision of the Court of Appeal on the basis that the Commissioner of Buddhist Affairs has not made any decision or determination with regard to the application for a driving license.

However, the Supreme Court laid down two rules in respect of naming necessary parties. It was held that:

> "*The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application.* ***If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent.*** *The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine. Jamila Umma vs. Mohamed*[7]*, P. Karunaratna vs. the Commissioner of Co-operative Development and another*[8]*; British Ceylon Corporation vs Weerasekera and Others*[9]*.*
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> *If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and the failure to*

[6] [2011] 2 Sri LR 258 at 267 – per Amaratunga, J.
[7] 50 NLR 15.
[8] 79 2 NLR 193.
[9] [1982] 1 Sri LR 180.

make such party a respondent is fatal to the validity of the application. Mudiyanse v. Christie Silva, Government Agent, Hambantota[10]*.*

The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application, Abayadeera and others v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo and another[11]*; Farook vs. Siriwardena, Election Officer and Others*[12]*."*

The learned President's Counsel for the 2nd Respondent has drawn my attention to the judgment of this Court in **Arulsamy v Upcountry Peoples Front and Others**.[13] In this case, the petitioner was elected as a member of the Central Provincial Council as a nominee of the 1st Respondent, the Upcountry Peoples Front, a recognized political party. The Petitioner later received a letter from the 3rd respondent, asking him to show cause on certain disciplinary charges leveled against him. This Court was called upon to determine whether the expulsion of the Petitioner from the Upcountry Peoples Front was valid or not. The respondents took up the position that the petitioner has not named the members of the Disciplinary Committee and the Central Committee as parties to the action.

Upholding the objection of the respondents, Sripavan J (as he then was) held as follows:

"*This court also takes the view that when mala fides are alleged against the purported expulsion, the members of the Central Committee who took the decision must necessarily be made parties to this application. Since the preliminary objection raised by the learned President's Counsel is of a fundamental nature which strikes at the heart of the jurisdiction of this Court, I hold that the conduct of the respondents do not disentitle them from taking the objection relating to "necessary parties" even though it was not specifically pleaded in their statement of objections. In my view, it is not only mandatory but fairness too requires prima facie that the members of the Central*

[10][1985] 2 Sri LR 52.
[11][1983] 2 Sri LR 267.
[12][1997] 1 Sri LR 145.
[13][2006] 3 Sri LR 386.

Committee be made respondents , an opportunity be given to explain, controvert or mitigate the case against them and the right to make submissions.

For the reasons set out above, I hold that the failure to make the members of the Central Committee as parties to this application is fatal and this application therefore fails."[14]

The 2nd Respondent has also cited the case of **Gnanasambanthan v Rear Admiral Perera and Others**.[15] In this case, the Petitioner and his son obtained title to a portion of the property of the 2nd and 3rd respondents, which were subsequently damaged in the 1983 riots. In terms of Section 19 of the Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations made under Section 5 of the Public Security Ordinance, the said premises were declared as "affected property", and the Rehabilitation of Property and Industries Authority (REPIA), in the exercise of its powers under the said regulations divested the property to the 2nd and 3rdrespondents. The letter was signed by the Chairman of REPIA.

The petitioner sought a Writ of Certiorari to quash the said decision and a Writ of Mandamus to divest the property to the Petitioner. REPIA was not made a party to the action although its Chairman, who signed the letter was named. The Court of Appeal dismissed the petition on this basis. The Court held that what is sought to be quashed is an order from REPIA and not its Chairman. The question was therefore whether REPIA should have been cited as a necessary party because it was a decision which only REPIA was empowered to make.

On appeal, the Supreme Court held that the failure to cite REPIA was a fatal irregularity. In response to the submission of the learned Counsel for the petitioner that the failure to make the party who made an impugned order would not justify the rejection of the petition without reference to the merits of the case, Amerasinghe, J held that:

"*In any event, how does one go into the merits of a case without hearing the necessary parties*."

[14]Ibid; page 392.
[15][1998] 3 Sri LR 169.

The position therefore is that if a necessary party is not made a respondent, the application is liable to be dismissed *in limine*. I use the word *liable* as, for reasons that I would advert to later, it is a decision that is within the discretion of Court that must be exercised judicially having carefully considered the facts and circumstances of each case.

I shall now consider the factual circumstances of the first objection in light of the abovementioned authorities.

Are the members of the Working Committee before Court?

It is admitted by all parties that in terms of the Constitution of the UNP marked '**P16**', the power of disciplinary control in respect of the members of the UNP is vested with its Working Committee. It is further admitted by the Petitioner that the decision reflected in '**P14**' has been taken by the Working Committee. Therefore, it is the Working Committee that will be in a position to explain to this Court the basis of such expulsion. As '**P14**' is being impugned, the members of the Working Committee had to be named as Respondents to this application and are necessary parties to this application.

In terms of Article 7 of the Constitution of the UNP marked '**P16**', the Working Committee of the UNP consists up to 92 members *including* its Leader, Deputy Leader, Assistant Leader, General Secretary, National Organiser, Chairman, Treasurer, and the other persons referred to in Article 7.

At the time this application was filed, the Petitioner had named the 2nd – 34th Respondents as *constituting the working committee of the UNP.* By naming as Respondents, the persons whom the Petitioner *believed* were members of the Working Committee, it is clear that the Petitioner is not disputing the fact that the members of the Working Committee are necessary parties to this application. Although it should have been clear to the Petitioner that in terms of '**P16**' the Working Committee consists of up to 92 members and that naming 32 members appears to be insufficient, it does not appear that the Petitioner has made any attempt to ascertain the names of the entire Working Committee prior to filing this

application. In any event, only 27 of the 2nd – 34th Respondents are members of the Working Committee.[16] The result is that even though 27 members of the Working Committee have been named as Respondents, the entirety of the Working Committee have not been made parties to this application, a fact which has been admitted by the Petitioner. This includes the Leader of the UNP, who signed the letter of suspension marked '**P5**', and whose name appears at the top of Article 7 of '**P16**'. I must however observe that the Petitioner has reserved the right to add other persons as respondents, although no specific mention has been made of adding members of the Working Committee.

It was submitted further that upon being apprised that the membership of the Working Committee is subject to alteration from time to time, and that all members of the Working Committee have not been named as Respondents, the Petitioner's Attorney-at-Law, by letter dated 2nd November 2020 addressed to the 2nd Respondent, sought to be furnished with the present membership of the Working Committee. In response, the Chief Executive Officer of the UNP has provided the names of forty persons who comprise the membership of the Working Committee. Of those, 13 persons, including the Leader of the UNP, are not parties to this application. The Petitioner had thereafter sought permission of this Court by a motion dated 15th January 2021 to add the balance members as the 38th – 50th Respondents. The said motion is yet to be supported.

The above facts can be summarized as follows:

a) The Petitioner was aware that the decision to expel him from the UNP was taken by the Working Committee of the UNP;

b) The Working Committee therefore had to be named as parties to this application;

c) The Petitioner did name 32 persons whom he *believed* were the members of the Working Committee, although in reality the Petitioner has only named 27 members of the Working Committee;

[16] The 12th, 26th, 27th, 31st, 32nd and 33rd Respondents are not members of the Working Committee.

d) It now transpires that there are more members of the Working Committee who have not been named as Respondents.

e) The Petitioner had not made any attempt to inquire and find out who all the members of the Working Committee were, prior to the issue of necessary parties being raised by the 2nd Respondent;

f) Upon inquiry by letter dated 2nd November 2020, the Petitioner had been informed by the Chief Executive Officer of the UNP that the Working Committee consisted of forty members;

g) The Petitioner had made an application to this Court by motion dated 15th January 2021, seeking permission to add those members of the Working Committee who have not been made parties to this application;

h) The fact remains however that as at today, all members of the Working Committee are not before Court.

It is in this factual background that the learned President's Counsel for the 2nd Respondent raised his first preliminary objection that this application is liable to be dismissed *in limine* as all members of the Working Committee have not been named as Respondents.

Substantial compliance by the Petitioner

The learned President's Counsel for the Petitioner, while admitting that it has now transpired that all members of the Working Committee have not been made Respondents, submitted that a majority of the members of the Working Committee have in fact been named as Respondents, and therefore, the Working Committee cannot be said to have been prejudiced by the failure to name a few of its members as the reasons as to why the Working Committee decided to expel the Petitioner can be placed before Court by those named as Respondents. In other words, it was his position that there has been substantial compliance and the failure to name all members of the Working Committee as Respondents is not fatal to the maintainability of this application.

The learned President's Counsel for the Petitioner submitted further that both **Arulsamy** and **Gnanasambanthan** are distinguishable from the present case. In those cases, none of the members of the Central Committee and the REPIA, who took the decision were made parties to the case. The failure to name those parties was fatal because there was a violation of the principles of Natural Justice in that those who took the decision were not given an opportunity of being heard. He submitted that the Petitioner has in any event sought permission of this Court at a very early stage to add the other members as Respondents, and that there is no legal obstacle for this Court to permit the said application, to cure their admitted failure to name all members of the Working Committee as Respondents to this application.

Application to cure the defect

The Petitioner has relied on the case of **Dominic v Minister of Lands and Others**[17] in support of this position. In this case, at the stage of argument the Petitioner moved to add the respondents as parties. Holding that the application to add parties is belated, Sriskandaraja, J quoted the following passage from **Principles of Administrative Law in Sri Lanka**:[18]

> "*The failure to make a necessary party a respondent is fatal. If the omission is discovered during the pendency of the application for the writ the Petitioner is well advised to apply to court to add such party as a respondent.* ***Such an application for addition will be allowed only if the application is not yet ready for final disposal by court****; Vinnasithamby v. Joseph*[19]*. Once the final hearing of the application by court commences, such an application made thereafter will be refused; Goonetileke v. Government Agent, Galle*[20]*; Jamila Umma v. Mohamed*[21]*, Dharmaratne v. Commissioner of Elections*[22]*."*[23]

[17] [2010] 2 Sri LR 398.
[18] S. F. A. Coorey; 2nd Edition at page 537 [See page 1120 of the 4th Edition].
[19] 65 NLR 359.
[20] 47 NLR 549.
[21] Supra.
[22] 52 NLR 429.
[23] See Ramasamy v. Ceylon State Mortgage Bank and Others [78 NLR 510], where the Minister who made the vesting order under the relevant Act in respect of the redemption of land was not made a party to the application for a writ of certiorari but was allowed to be added as a party respondent on an application made four years after the case was originally filed as the Court was concerned about the proprietary rights of the petitioner.

This would perhaps be an appropriate stage for me to refer to the judgment of the Supreme Court in **Kiriwanthe and another v Navaratne and another**[24] where the issue was non-compliance with Rule 46 of the Supreme Court Rules of 1978 which required a party to file along with the petition and affidavit, originals of documents.

The Supreme Court held as follows:

> "*I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute compliance is not essential; it is sufficient if there is compliance which is "substantial" - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction; dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter."*[25]

Mark Fernando, J remarked that:

> "*The weight of authority thus favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of noncompliance (by reason of impossibility or* ***for any other reason****) is a* ***matter falling within the discretion of the Court****, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule.''*

Should this Court exercise its discretion in favour of the Petitioner?

Although the above judgment was in relation to a Rule, and reflects the liberal approach adopted by the Supreme Court in relation to compliance with the Rules of the Supreme Court, a parallel can be drawn to the facts of this application. When

[24] [1990] 2 Sri LR page 393.
[25] Ibid. at p 401.

confronted with an objection that a necessary party has not been named as a respondent, Courts must exercise their discretion with care and with due regard to all the surrounding facts and circumstances.

I am of the view that in this application, the discretion vested in this Court should be exercised in favour of the Petitioner, for the following reasons:

a) There is substantial compliance by the Petitioner;

b) The failure to name all members of the Working Committee as Respondents is not deliberate.

c) There is no allegation that the Petitioner picked and chose persons who were favourable to him and named them as Respondents;

d) The failure to name all members of the Working Committee as Respondents has not prejudiced those who have been named/not named as Respondents;

e) The reasons for the expulsion can still be placed before this Court by the members who have been added as Respondents;

f) In any event, there is presently before me an application to add the other members of the Working Committee;

g) The application has been made within a reasonable time period and at an early stage of this case.

I must state that my conclusion may have been different if the impugned decision had been taken by an individual and that person had not been named a party, or there was no application to add necessary parties or the application to add necessary parties had not been made in a timely manner.

Taking into consideration all of the above circumstances, I am of the view that this application is not liable to be dismissed at this stage due to the failure to name as Respondents all members of the Working Committee.

Is a political party amenable to the Writ Jurisdiction of this Court?

This brings me to the second preliminary objection raised by the learned President's Counsel for the 2nd Respondent, that decisions of the Working Committee of the UNP are not amenable to the Writ jurisdiction of the Court of Appeal. This is a question of jurisdiction and is the core objection relating to the maintainability of the Petitioner's application.

It would be helpful to begin with a reference to the historical development of the scope and availability of judicial review. I would start with the often quoted words of Atkin, J in the case of **Rex v. Electricity Commissioners ex parte London Electricity Joint Committee Co**[26] where it was held that the controls of judicial review may be used "*wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority*."

While these words still cannot be jettisoned in its entirety, it is difficult to fit within this formula, the full scope of judicial review as it stands in the modern day. For instance, '*the duty to act judicially*' was reinterpreted by Lord Reid as early as 1964 in **Ridge v Baldwin**,[27] where it was considered a consequence of the power to determine questions affecting rights, as opposed to an additional condition. This view has been fortified by the subsequent exclusion and disuse of this limitation imposed by the requirement of the '*duty to act judicially*' by Lord Diplock in the case of **O'Reilly v Mackman.**[28]

The scope of judicial review has now expanded further to the actions of non-statutory bodies. This is widely accepted after the landmark case of **R v. Panel on Take-Overs and Mergers, Ex parte Datafin plc. and another**[29] where it was held that the Panel on Takeovers and Mergers, part of the London Stock Exchange's system of self-regulation which has no statutory or contractual basis, is subject to judicial review, because it operates in the public sphere and exercises immense power *de*

[26] [1924] 1 KB 171.
[27] [1964] AC 40.
[28] [1983] 2 AC 237 at 279.
[29] [1987] QB 815.

facto,[30] and violations of the Take overs and Mergers Code, adjudged by itself, may lead to exclusion from the London Stock Exchange or investigation by the Department of Trade and Industry or other sanctions.[31]

In that case, Sir John Donaldson MR adopted the following formula which drastically expanded the scope of judicial review:

> "*Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."*[32]

The defining feature in the above formula however, is the reference to a 'public element', which is considered a lenient threshold and invites litigants to apply for judicial review in situations where otherwise they could find no legal foothold.[33]

The term "public" as stated in **Ex parte Datafin plc**, has been analysed in **Judicial Remedies in Public Law**,[34] as follows:

> "*Two approaches to the definition of "public" can be discerned in the Datafin case. First, there is the extent to which the body operates under the authority of the government or was established by the government or, presumably, by some other recognized public authority. Secondly, there is the extent to which a particular function is performed against a background of statutory powers even though there is no specific statutory or prerogative authority for the power which is sought to review. Both these approaches involve some link between the government, or the legislature, and the body in question...The current approach of the courts is to consider whether the body is woven into the fabric of public regulation or governmental control of an activity or is integrated into a system*

[30] H.W.R Wade & C.F. Forsyth, *Administrative Law* (11th Edition), Oxford University Press, page 377.
[31] Ibid. at page 540.
[32] *Ex parte Datafin plc* (supra) at page 838.
[33] Ibid.
[34] Clive Lewis, Judicial Remedies in Public Law (5th Edition, 2017), Sweet & Maxwell, at page 49. This is cited with authority in the case of Lanka Securities (Private) Limited v. Colombo Stock Exchange and other [CA (Writ) Application No. 326/2019; CA Minutes of 29th May 2020].

of statutory regulation or, but for its existence, a governmental body would have assumed control over the activity regulated by the body under challenge."

This position is aptly summarised in **De Smith's Judicial Review**[35], as follows:

"In the orthodox approach, the court assumes that the fact that the source of a public authority's power is statutory is in and of itself insufficient to make a dispute about a contract amenable to judicial review; the court therefore goes on to consider whether there is some additional "sufficient public element, flavour or character" to the situation. A more straightforward approach (though not one widely applied by the courts) would be to say that if the contractual decision in issue involves that exercise of a statutory power, then in principle it should be subject to judicial review and the court should consider whether any of the grounds of review have been made out.

As in other contexts, in working out whether a decision is susceptible to judicial review the court considers two main factors. It will have regard to the source of the power under which the impugned decision is made. If this is "purely" contractual, judicial review is unlikely to be appropriate; some close statutory (or prerogative) underpinning of the contract will normally be needed. Alternatively, the court may consider whether the function being carried out by the defendant is a public function."

This Court, in **Harjani and another v Indian Overseas Bank and others**[36] has affirmed the developments discussed above, in Sri Lankan law. In this case, the Court considered whether the 1st respondent, being a company which has not been incorporated under any statute enacted in Sri Lanka, and discharging functions which are not administrative in nature, is amenable to prerogative remedies. After considering the developments in judicial review in this area, Saleem Marsoof, J (P/CA)(as he then was) held as follows:

[35] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell, page 148-149. See Kumuduni Madugalle v. National Housing Development Authority and others [CA(Writ) Application No. 540/2019; CA Minutes of 16th June 2020 – per Samayawardhena, J]..
[36] [2005] 1 Sri LR 167.

"*The said Respondent has sought to take advantage of the provisions of the Recovery of Loans by Banks (Special Provisions) Act relating to parate execution. In fact in terms of the said Act the 1st Respondent had the option of either adopting a resolution under Section 4 to sell by public auction the property mortgaged to it or authorize a person by resolution in terms of Section 5 of the Act to take over possession to manage the said property and to utilize its produce or profits for the settlement of the loan. These powers have been conferred by the statute on any 'Bank' as defined in Section 22 of the Act. The Act lays down special procedures for the exercise of the powers conferred on such Banks, and I am of the opinion that this Court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these Banks are local or foreign Banking companies*."

The fact that a party performs characteristically 'public functions' in itself does not attract or justify judicial review for acts that involve them. Courts must consider whether the impugned decision itself is one which is amenable to judicial review. In **Lanka Securities (Private) Limited v. Colombo Stock Exchange and Others**, Janak De Silva, J considered whether the role of the 1st respondent, Colombo Stock Exchange, in the enforcement of the Rules framed in terms of its Articles to carry out an investigation into trading in securities and financial transaction of stock brokers can be impugned in judicial review proceedings, and held as follows:

"*In these circumstances, I have no doubt that the 1st Respondent is performing public duties or exercising powers that can be characterized as "public" and as such is subject to judicial review. But that is not the end of the analysis as Court must ascertain the type of power that is impugned in these proceedings.* ***Even where public bodies are concerned there may be certain powers that are derived solely through contract in which case there is no judicial review.*** *For example, in cases involving decisions of public bodies in relation to the dismissal of their employees, if the power to dismiss can be seen to stem from the contract of employment rather than any statutory or prerogative source, then the issue can be viewed as simply a private law contractual matter not a public law matter [R. v. East Berkshire Health Authority Ex. p. Walsh (1985) Q.B. 152].*"

De Silva, J went onto hold as follows:

"*although judicial review is not available in the context of purely contractual powers, the authority of a contractual nature which various self-regulating organizations have over their members help these organizations to perform their public functions, and accordingly the failure of such an organization to perform a contractual obligation may be subjected to judicial review [Harjani and Another v. Indian Overseas Bank and Others[37]].*

As was pointed out earlier, the SEC Act requires the rules of the 1st Respondent to make satisfactory provision for investigating into trading in securities and financial transactions of stock brokers and is an essential component of the system of statutory regulation and the jurisdiction that the 1st Respondent exercises over the Petitioner. Furthermore, in the instant matter it has a statutory underpinning as well."

As pointed out above, the powers that the 1st Respondent exercised over the Petitioner as one of its members is rooted in the SEC Act requirements that the rules of a licensed stock exchange must provide for specific situations such as investigating into trading in securities and financial transactions of stock brokers. Therefore, the dispute between the Petitioner and the 1st Respondent is not purely contractual. It has a statutory underpinning.

In this background, let me now consider whether the Working Committee is amenable to the writ jurisdiction of this Court.

The learned President's Counsel for the 2nd Respondent has cited the case of **Y.P. de Silva, General Secretary, SLMP and another v Raja Collure, Secretary, USA and others**[38] in support of his position, where Sarath N. Silva J (as he then was), held as follows:

"*A political party is a voluntary association of its members and is regulated by its Constitution. Although there is considerable public interest in the activities of political parties, they are essentially private organisations subject to the control of the members and their decisions are made by the respective authorities*

[37] Supra.
[38] [1991] 2 Sri LR 323 at p 329.

*under each constitution. They are unincorporated bodies of persons and are not established under any statute. The Parliamentary Elections Act, No. 1of 1981 [section 7(1)] provides for the recognition of political parties "for the purpose of elections".**This recognition by itself does not convert a political party into a public authority***."

The Constitution of the UNP can be considered something akin to the Articles of Association of a Company. In the case of **Mendis v. Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others**[39], the Court held that the legal force and binding effect of a Company's Articles of Association is contractual, and is not amenable to writ jurisdiction. The petitioner, who was the Managing Director of the 1st respondent Company, was removed from his post by the 3rd respondent Secretary to the Treasury who held 50% of the shares in the 1st respondent. The Petitioner sought judicial review on the basis that the 3rd Respondent did not follow the provisions of Section 185(1) of the Companies Act which contains a general procedural mechanism for the removal of a Director in any Company, and the provisions of the Articles of Association of the 1st Respondent. Dismissing the application of the petitioner, Sarath N. Silva, J (as he then was) held as follows:

"*It is clear these Writs come within the purview of administrative law which is a branch of law that has been developed by courts for the control of the exercise of governmental or statutory powers by mainly public authorities.... Writs of Certiorari and Prohibition are instruments of Public Law to quash and restrain illegal governmental and administrative action.*

It is thus seen that prerogative remedies such as Certiorari and Prohibition lie in situations where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the Public. ***The essential ingredient is that a member of the public who is affected by such a decision has to submit to the jurisdiction of the authority whose action is subject to review****. In other words, there is an* ***unequal relationship between the authority wielding power and the individual who has to submit to the jurisdiction of that authority.*** *The principles of Administrative Law that have evolved such as the doctrine of ultra vires, error on the face of the record, rules of natural*

[39] [1995] 2 Sri LR 284.

justice, requirement of procedural fairness and the reasonableness of decisions, coupled with the remedies by way of prerogative Writs, lie to correct any illegality or injustice that may emanate from this unequal relationship. It is in this context that the view has ***been firmly held that relationships that are based on contract, without any statutory underpinning and actions of companies and private individuals and bodies, are not subject to judicial review by way of the Writs of Certiorari and Prohibition****."*

if the 3rd Respondent, as a member of the company has acted contrary to the Articles of Association, ***he is in breach of a covenant signed and sealed by him****. It is a matter of Private Law and it cannot be the subject of judicial review in an application for a prerogative Writ."*

<u>The power of the Supreme Court and the Court of Appeal to examine the legality of an expulsion from a political party</u>

It was submitted by the learned President's Counsel for the 2nd Respondent that the Supreme Court and the Court of Appeal have the power to examine the legality of the expulsion of a Member of Parliament or a Member of a Provincial Council, as the case may be, as specific provision to that effect has been provided. He submitted further that the expulsion of a Member of Parliament is governed by the proviso to Article 99(13)(a) of the Constitution, by which the member who has been expelled from his political party or independent group has a right to apply to the Supreme Court, which has the jurisdiction to consider if the expulsion is valid. Similarly, where a Member of a Provincial Council has been expelled from the membership of his political party, such member too has a right to challenge his expulsion by preferring an application to the Court of Appeal in terms of Section 63 of the Provincial Councils Elections Act.

It is important to note that apart from the specific provisions referred to above, a Member of Parliament or a member of a Provincial Council cannot invoke the Writ jurisdiction of this Court in order to challenge an expulsion. The Ordinance does not provide any specific mechanism to challenge the expulsion of a member of a local authority, either in the Supreme Court or in this Court. Therefore, the only mechanism available to the Petitioner is to seek a private law remedy by way of a District Court action.

The learned President's Counsel for the Petitioner has cited the case of **Rambukwella v United National Party**[40] in support of his position that this Court can consider decisions of the Working Committee of a political party. This however was a case which dealt with the expulsion of a Member of Parliament under the provisions of Article 99(13)(a) of the Constitution. It is in this context that Chief Justice Sarath N. Silva held as follows:

> "*The submission of Mr. Choksy, as to the basic nature of a Political Party being akin to that of a "club" and the relationship between the members and the party being one of contract, a subject in realm of Private law, is correct. However there is merit in Mr. Wijesinghe's submission that in* ***the exercise of the power of expulsion*** *the matter transcends the realm of Private Law and* ***attracts the standard of review of the public law****. A Political Party comes into existence as a matter of private arrangement (contract) between persons who have the object of gaining political power at elections but the character of such Association alters to a certain extent after gaining recognition as a Political Party, as provided in section 7 of the Parliamentary Elections Act No. 1 of 1981. Section 7(4)(b) requires Secretary of a Political Party at the time of making an application for recognition to furnish to the Commissioner of Elections a copy of the Constitution of such Party and a list of its office bearers. Thus, a Political Party which commences as a private Association gains statutory recognition in reference to its Constitution with specific legal powers generally in regard to Elections and it plays a vital role in the realm of Democratic Governance.*
>
> *As a result of the expulsion by the Party the voters preferred candidate is removed from his seat in Parliament and replaced by a candidate who at the original election failed to obtain adequate preferential votes to gain election to Parliament. In short the winning candidate is replaced by a candidate who has lost, as a result of the expulsion. Thus in consequence of the expulsion not only the member loses his seat in Parliament but also there is a subversion of the preference indicated by the electors in exercising their franchise.* ***In view of these far reaching consequences I am inclined to agree with the submission of Mr. Wijesinghe, that the standard of review of a decision of expulsion should***

[40] [2007] 2 Sri LR 329 at pages 339-340.

be akin to that applicable to the review of the action of an authority empowered to decide on the rights of persons in Public Law. *Generally such review comes with the rubric of Administrative Law.*"

It is clear that the reference to the franchise of the people was made only in response to the submission that the standard of review that must be applied must be akin to that applicable in Public law. The Supreme Court did not hold that an expulsion of a member by a political party can be the subject matter of an application under Article 140 and therefore, I am of the view that the reasoning in **Rambukwalle** does not help the Petitioner's argument.

Decisions of political parties are not amenable to the Writ jurisdiction of this Court

Having considered all of the above, I am of the view that the UNP, like all other political parties is a private organisation with a Constitution that enables its efficient and orderly functioning. Membership in a political party and all matters relating to such membership is regulated and governed by its Constitution. Those who join the UNP as members, voluntarily submit themselves to the authority and governance of the Constitution of the UNP, and are thereafter bound by the provisions thereof. The relationship that exists between the party and its members is therefore, contractual and will always remain so. Where a member is in breach of the provisions of the Constitution of a political party, to borrow the words of Justice Sarath N. Silva, such member *is in breach of a covenant signed and sealed by him*.

The fact that a political party is registered in terms of the Parliamentary Elections Act does not confer a statutory flavour to its Constitution *vis-à-vis* the contractual nature of the relationship between the party and its members. Furthermore, the fact that members of a political party may become public representatives performing public functions upon being elected by the public, does not alter the contractual relationship that such members have with the party, nor does it give the much needed public element or the statutory flavour needed for the invocation of the Writ jurisdiction of this Court. I therefore uphold the objection of the learned President's Counsel for the 2nd Respondent that the Writ jurisdiction of this Court does not extend to reviewing the decisions of the Working Committee of the UNP to expel the Petitioner.

Is the 1st Respondent performing a Ministerial function?

The third objection raised by the learned President's Counsel for the 2nd Respondent is based on Section 10A of the Ordinance, which is re-produced below:

*(1) If the elections officer of the district in which a local authority area is situated, is **satisfied** that any person whose name has been included as a candidate for election as a member of that local authority, in the nomination paper of a recognized political party, has ceased to be a member of that party, the elections officer shall, subject to the provisions of subsection (2), by notice published in the Gazette **declare that** such person-*

a. has vacated his office of member, if he had been elected as a member of that local authority; or

b. has forfeited his rights to have his name retained in the nomination paper of that recognized political party for filling any casual vacancy,

and thereupon, such person shall vacate his office as member of that local authority or the name of such person shall be expunged from the nomination paper of that recognized political party, as the case may be, as from the date on which such declaration is published in the Gazette.

(2) The elections officer shall not publish the notice referred to in sub section (1) except after-

a. notice to such person and such recognized political party; and
b. expiry of a period of twenty-one days from the date of such notice.

Every such notice shall be sent by registered post.

(3) *Whenever any person whose name has been included in the nomination paper of a recognized political party **ceases to be a member of such party the secretary** of that party shall furnish such information to the elections*

officer of the district in which the local authority, to which that nomination paper relates, is situated."

It was the position of the learned President's Counsel for the 2nd Respondent that the 1st Respondent exercises only a ministerial function in terms of Section 10A(1)(a) of the Ordinance and that his actions are therefore not amenable to the writ jurisdiction of this Court. In order to better appreciate the above submission, it is appropriate to consider at this stage what is meant by a ministerial duty.

The terms "Ministerial", "Ministerial Act" and "Ministerial Duty" are defined in **Black's Law Dictionary**[41] as follows:

"*Ministerial - Of, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, **judgment**, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance"*

*Ministerial act – An act performed without the independent exercise of discretion or **judgment**. If the act is mandatory, it is also termed a ministerial duty.*

*Ministerial duty – A duty that requires neither the exercise of official discretion nor **judgment**"*

In **Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others**,[42] Wijetunga, J quoted the following paragraph from **The Principles of Administrative Law** by Jain and Jain:[43]

*"A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or **judgment** of the authority. It does not involve investigation into disputed facts or making of choices. **The authority concerned***

[41] 11th Edition.
[42] [1998] 3 Sri LR 206 at 219.
[43] 4th Edition; page 325.

acts in strict obedience to the law which imposes on it a simple and definite duty in respect of which it has no choice."

In **Seenithamby Palkiararajah v Dayananda Dissanayake, Commissioner of Elections and Others**,[44] Nawaz, J referring to the above passage from Jain and Jain held that, *"The thrust of the cases and the principle is that a ministerial function (performance of duty as prescribed by the law and not a discretionary function) is not amenable to the prerogative writ jurisdiction*."

As stated in **Principles of Administrative Law in Sri Lanka**:[45]

"*To perform a merely ministerial act is not "to determine questions" affecting a party, and certiorari does not issue to quash a mere ministerial act.*

The phrase "to determine questions" earlier meant "to exercise power" by changing the legal position or legal relations of parties; from more recently, that phrase also means, "by otherwise adversely affecting them" by coming to adverse findings of fact or expressing adverse opinions. It is important to emphasise that the phrase does not include any ministerial act because a ministerial act contains no "determination" affecting anyone."

Section 10A of the Local Authorities Elections Ordinance

The essence of the objection of the learned President's Counsel for the 2nd Respondent is that for the Returning Officer to act in terms of Section 10A(1), the Returning Officer is not required make any determination, and that the Returning Officer must only be *satisfied* that a candidate whose name appeared on the nomination paper of a recognised political party has ceased to be a member of such party. The manner in which he is *satisfied* of this fact is set out in Section 10A(3) – namely the intimation by the Secretary General of the political party that a member of such party has ceased to be a member of such party. He submitted that the Returning Officer is not required at this stage to probe further and ascertain the

[44] CA (Writ) Application No. 674/2009 [CA Minutes of 19th July 2018]
[45] Supra.; page 931.

legality of the cessation of membership of such member, nor is he required to make an independent decision.

The learned President's Counsel for the 2nd Respondent drew my attention to the judgment of this Court in **Farook v Siriwardena (Returning Officer)**[46] where an almost identical situation had arisen. In that case, the petitioner had contested the Colombo Municipal Council (CMC) at the elections held in 1991 as a candidate of the Sri Lanka Muslim Congress and was declared elected as a member of the CMC. Sometime later the 2nd respondent, the General Secretary of the Sri Lanka Muslim Congress had informed the petitioner with a copy to the Returning Officer, the 1st respondent, that he has been expelled from the Party with immediate effect. On receipt of the letter, the 1st respondent served the petitioner notice in terms of Section 10A(2) that he would be taking steps to publish a notice declaring that the Petitioner has vacated his seat.

The petitioner contended that the purported expulsion is *mala fide*, unreasonable and in breach of natural justice. He contended that a misrepresentation was made to the elections officer and that the 1st respondent was misled into taking steps to remove the petitioner from the membership of the party. The main submission on the law was that the Elections Officer could not have under Section 10A of the Ordinance proceeded to act solely on the letter of the secretary of the recognized political party without himself having made further inquiries and being reasonably satisfied, adopting the test of a reasonable man, that the petitioner has been expelled from the party.

The petitioner sought a Writ of Certiorari to quash the decision of the 1st respondent to remove him from the membership of the CMC. He had also instituted an action in the District Court of Colombo against the 2nd Respondent seeking a declaration that the expulsion is null and void.

Noting that "*the petitioner cannot and does not in these proceedings seek to have the legality or otherwise of his expulsion from the party determined*", and in dismissing the Petitioner's application, the Court of Appeal held as follows:

[46] [1995] 2 Sri LR 124.

"*There is nothing in the above provisions to indicate that the elections officer should himself take any further steps to ascertain whether the member has been lawfully removed from the party, quite apart from the information furnished by the secretary under section 10A (3) of the Ordinance. The elections officer has a ministerial duty to perform on receipt of the information from the secretary in strict obedience to the provisions contained in section 10A (1) and (2) of the Local Authorities Election Ordinance.*

I am of the view that there is no further duty cast on the elections officer on receipt of information received from the secretary of the party that a member has ceased to be a member of the party other than to firstly, give notice under section 10A (2), and on the expiry of 21 days from the date of such notice to proceed under section 10A (1) to declare by publishing in the Gazette that such person has vacated his office as member of the local authority. The 1st respondent has in this case strictly observed the provisions contained in section 10A of the Local Authorities Elections Ordinance. The petitioner cannot therefore succeed in this application."

Argument of the Petitioner

The learned President's Counsel for the Petitioner sought to rely on the following paragraph from the recent judgment of this Court in **Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjana Leo Sylvester Alphonsu, Alias Ranjan Ramanayaka v. Secretary General of Parliament and Another**:[47]

"*The function the Secretary General performs when he arrives at the decision that Article 89(d) is operative, in my view, is not purely ministerial. While it is true that the Secretary General does not inquire into the validity of the conviction,* ***he is nonetheless required to make a determination or exercise his judgment as to whether the Petitioner has in fact become subject to a disqualification****. In my view, the latter requires the Secretary General to give his mind to the issue and the decision he arrives thereafter appears to me to be subject to judicial review*."

[47] CA (Writ) Application No. 52/2021; CA Minutes of 5th April 2021.

The abovementioned passage however came with a caveat which has not been quoted by the Petitioner:

> *"I must however admit that it is a very thin line that separates such a decision from being ministerial and therefore outside the scope of judicial review as opposed to a decision that is subject to judicial review."*

In order to place in perspective the above conclusion, I would briefly refer to the four statutory provisions which were considered in that case, namely Article 91(1)(a), Article 89(d), Article 66(d) and Section 64 of the Parliamentary Elections Act.

While Article 91 specifies the disqualifications from being elected as a Member of Parliament, Article 91(1)(a) provides that, *"No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament, if he is or becomes subject to any of the disqualifications specified in Article 89."*

Article 89(d) reads as follows:

> "*No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely*
>
> *(d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence: ....."*

In terms of Article 66(d), "*The seat of a Member of Parliament shall become vacant if he becomes subject to any disqualification specified in Article 89 or 91."*

The cumulative effect of the above provisions is twofold. The first is that a person who is subject to the disqualification in Article 89(d) is not qualified to be elected as a Member of Parliament or to sit and vote in Parliament. The second is that the seat of a Member of Parliament **shall become** vacant once he becomes subject to the disqualification specified in Article 89(d).The consequential step upon the vacancy arising *as provided in Article 66* is set out in Section 64(1) of the Parliamentary Elections Act in terms of which *the Secretary-General of Parliament **shall** inform the Commissioner (of Elections) who shall direct the returning officer of the electoral district which returned such Member to fill the vacancy as provided for under paragraph 13 (b) of Article 99 of the Constitution within one month of such direction.*

In that case, the function of the Secretary General in terms of Article 89(d) was explained in the context of the following two tiers.

> "*(a) A determination by the Secretary General that an event has occurred that triggers the disqualification set out in Article 89(d); and*
>
> *(b) The communication of such determination by the Secretary General to the Election Commission*"

Having done so, it was held as follows:

> "*I shall start with the requirements of the first tier, namely, a determination by the Secretary General that an event which triggers the disqualification set out in Article 89(d) has occurred. In doing so, I must bear in mind that the events set out in Articles 89 and 91 that results in a disqualification are wide and varied. For example, in terms of Article 91(1)(c), a Member of Parliament is disqualified from being a Member of Parliament if he is or becomes the President. Whether the disqualification would apply in such a situation is straight forward and requires no further consideration.*
>
> *Having closely examined the provisions of Article 89(d) and taking into consideration the facts of this application, it is clear that the following matters must be satisfied for the disqualification in Article 89(d) to apply to the Petitioner:*

a) *The Petitioner must be serving a sentence of imprisonment;*

b) *Such term of imprisonment must not be less than six months;*

c) *The said sentence must be imposed after conviction by any Court;*

d) *The said sentence must be imposed in respect of an offence;*

e) *The said sentence must be imposed in respect of an offence punishable with imprisonment for a term not less than two years.*

It is common ground that wide publicity was given to the conviction of the Petitioner by the Supreme Court and the subsequent imprisonment to serve the sentence imposed by the Supreme Court. The question that I must consider is can or should the Secretary General act in terms of Section 64(1) on the basis that a vacancy has arisen, the moment he reads about the said conviction? I do not think so, for the reason that unlike some of the other events of disqualification set out in Articles 89 and 91, the disqualification in Article 89(d) is not triggered by a mere conviction for any offence. I say this for the reason that the Secretary General must form the opinion or be satisfied that each of the above elements of Article 89(d) which are relevant to this application has been satisfied. I must stress, however, that in doing so, the Secretary General is not assessing the validity of the conviction.

In other words, in this instance, prior to the obligation of the Secretary General in terms of Section 64(1) being triggered, he must form the opinion or judgment that the provisions of Article 89(d) have, in fact, been satisfied. In order to be satisfied, the Secretary General must examine the judgment of the Supreme Court and ensure that the requirements of Article 89(d) have been met by the conviction. Only once he is able to do this, can he form an opinion that a vacancy in terms of Article 66(d) has arisen."

It is only thereafter that this Court arrived at the conclusion with regard to the first tier, which conclusion is relied upon by the Petitioner.

This Court thereafter went on to hold as follows with regard to the second tier:

"*In my view, once the Secretary General determines under the first tier that the seat of a Member of Parliament has fallen vacant as a result of any disqualification specified in Articles 89 or 91, then, Article 66(d) and Section 64(1) of the Act are triggered. It is* ***mandatory*** *for the Secretary General of Parliament at that stage to inform the Election Commission of such fact, thus enabling the Election Commission to take steps as provided in such Section*."

It is only thereafter that it was held that:

"*..... the act of sending a communication to the Election Commission under Section 64(1) of the Parliamentary Elections Act would tantamount to a physical act by the 1st Respondent, short of an exercise of power. In other words, with a vacancy staring in his face, the Secretary General has no option but is required by law to inform the Election Commission of such vacancy. In doing so, he is carrying out a purely ministerial act. I have already referred to the fact that the exercise of a purely ministerial act is not subject to be quashed by a Writ of Certiorari nor is such an exercise subject to any restriction by a Writ of Prohibition. If the Secretary General fails to act at that stage, a Writ of Mandamus would lie to compel him to perform his legal duty*."

<u>The 1st Respondent is performing a Ministerial function</u>

The two tiers were explained in that case to illustrate that there first needed to be a determination by the Secretary General that a vacancy has occurred before the Secretary General could act on it, as the disqualification in Article 89(d) was not straightforward. Applying the above analysis to this case, the role of the Secretary General of Parliament under the first tier is akin to the role played by the 2nd Respondent, the General Secretary of the UNP in this application. The role of the Returning Officer in terms of Section 10A of the Ordinance is different, in that the first tier determination of a vacancy has already been made by the 2nd Respondent and has been communicated as per Section 10A(3) to the Returning Officer. Furthermore, unlike the Secretary General who receives no information that a vacancy has occurred in terms of Article 89(d), Section 10A(3) stipulates that *whenever any person* ***ceases to be a member*** *of such party the* ***secretary*** *of that*

party shall furnish such information to the elections officer. It is upon this communication that the Returning Officer must be satisfied of the vacancy and carry out the ministerial function set out in Section 10A(1).

Therefore, I am of the view that the Returning Officer must act on the communication of the Secretary of the party and therefore his duty begins at the second tier explained above, which is Ministerial in nature and not subject to judicial review. In the above circumstances, I uphold the third objection raised by the learned President's Counsel for the 2nd Respondent that the 1st Respondent is only carrying out a ministerial function when he acts under Section 10A(1) and that such action is not amenable to the Writ jurisdiction of this Court.

For all of the above reasons, I do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal