

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 Mandamus and a Writ of Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 362/2009

1. L.D.C. Jayanatha Kumara,
No. 120, Araliya Gahawatte,
Nawuththuduwa,
Matugama.
2. K. Jayalath
Bandurakadawatte,
Rupeewala,
Boossa.

PETITIONERS

Vs.

1. Thilak Collure,
Secretary, Ministry of Transport.
- 1A. Dhammika Perera,
Secretary, Ministry of Transport.
- 1B. Lalithasiri Gunaruwan,
Secretary, Ministry of Transport.
- 1C. Nihal Somaweera,
Secretary, Ministry of Transport &
Civil Aviation.
2. P.P. Wijesekera,
General Manager Railways.

- 2A. B.A.P. Ariyaratne,
General Manager Railways.
- 2B. Wijeya Amarathunga,
General Manager Railways.
- 2C. B.A.P. Ariyaratne,
General Manager Railways.
- 3. G.H. de Silva,
Additional General Manager Railways
(Administration).
- 3A. A.U.K. Dodanwala,
Additional General Manager Railways
(Administration).

2nd, 2A, 2B, 2C, 3rd and 3A Respondents at
P.O. Box 355,
Office of the General Manager Railways,
Colombo 10.

- 4. Dullas Alahapperuma,
Minister of Transport.
- 4A. Kumara Welgama,
Minister of Transport.
- 4B. Ranjith Maddumabandara,
Minister of Internal Transport.

1st, 1A, 1B, 1C, 4th, 4A and 4B Respondents at
No. 1, D.R. Wijewardena Mawatha, Colombo 10.

- 4C. Nimal Siripala de Silva,
Minister of Transport & Civil Aviation.

1C and 4C Respondents at
Ministry of Transport & Civil Aviation,
7th Floor, Sethsiripaya, Stage II, Battaramulla.

5. Dayasiri Fernando,
Chairman, Public Service Commission.
- 5A. Dharmasena Dissanayake,
Chairman, Public Service Commission.
6. S.C. Mannapperuma.
7. Ananda Seneviratne.
- 7A. D. Shirantha Wijayatilaka.
8. N.H. Pathirana.
- 8A. Prathap Ramnujam.
9. Palitha M. Kumarasinghe.
- 9A. V. Jegarasasingam.
10. Sirimavo A. Wijeratne.
- 10A. Santi Nihal Seneviratne.
11. S. Thillanadarajah.
- 11A. R. Ranugge.
12. M. Mohamed Nahiya.
- 12A. D.L. Mendis.
13. M.D.W. Ariyawansa.
- 13A. Sarath Jayathilaka.
14. Justice Sathya Hettige,
Former Chairman, Public Service Commission.
15. Kanthi Wijethunga,
16. Sunil A. Sirisena.
17. I. N. Soyza

5th to 17th Respondents at
Public Service Commission,
No. 177, Nawala Road, Narahenpita.

RESPONDENTS

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

Counsel: Manohara De Silva, P.C., with Hirosh Munasinghe for the Petitioners

Milinda Gunatilake, Additional Solicitor General for the Respondents

Argued on: 24th July 2020

Written Tendered on behalf of the Petitioners on 14th December 2018 and 7th

Submissions: September 2020

Tendered on behalf of the Respondents on 14th May 2019 and 19th
March 2021

Decided on: 3rd June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioners filed this application on 6th June 2009. After pleadings were complete, the Petitioners sought to amend the petition in September 2014 by adding the Chairman and members of the Public Service Commission as Respondents. Although the application to amend was resisted, by an Order delivered on 31st October 2016, this Court has allowed the said amended petition. The objections of the Public Service Commission were filed in November 2017.

This application pertains to the non-appointment of the Petitioners to the post of Assistant Divisional Transportation Superintendent (Non-Mechanical) in the Department of Railways, now known as Sri Lanka Railways.

The Service Minute for the said post marked 'P1' provides for recruitment from external candidates and internal candidates, with the ratio between the two determined at 60:40. It must be noted that this ratio between external and internal candidates must be maintained at all times, and must be reflected when calling for applications to fill the vacancies that exist under each category.

Those wishing to apply as an external candidate must possess one of the following qualifications set out in Clause 5.1 of 'P1':

- a) A degree from a recognized University with a First or Second Class Special Degree;
- b) Associate membership of the Institute of Transport, London with:
 - (i) at least five years experience in a subordinate Grade post in the Department of Railways; or
 - (ii) with at least ten years administrative experience in a permanent post in a recognized institute of transport of which five years should be in a staff grade and five years of satisfactory service;
- c) A degree from a recognized University with at least five years of experience in a permanent subordinate post in the Department of Railways and five years of satisfactory service.

It is clear that even those employed at the Department of Railways were entitled to apply under the external category, provided they possessed one of the above qualifications.

The qualifications required by an internal candidate are at Clause 5.2 of 'P1'.

The Petitioners state that by a notice published in Gazette No. 1406 dated 12th August 2005 marked 'P2', the then Secretary, Ministry of Transport called for applications for **three posts** of Assistant Divisional Transportation Superintendent (Non-Mechanical) under the external category. In terms of paragraph 6 of 'P2', the method of recruitment was declared as follows:

*“Of the candidates possessing the qualifications referred to in paragraph 5 above (those) who have scored the highest marks at the Open Competitive Examination by obtaining a minimum of 60% marks on each subject, the required number in order of merit will be interviewed by an Interview Board appointed with the approval of the Public Service Commission and on its recommendation after scrutinizing their eligibility, **three candidates** who have scored the highest marks will be selected. No marks will be assigned at the Interview Board.”*

‘P2’ therefore made it clear that applications were being called to fill three vacancies that existed in the external category.

The Petitioners who possessed the relevant qualifications had submitted their applications in response to **‘P2’**. The Petitioners have thereafter successfully completed the examinations and had been asked to present themselves for the interview. The Petitioners state that by a letter dated 19th November 2007 marked **‘P9’**, the Public Service Commission had granted approval for the following:

“අදාළ බඳවා ගැනීමේ පටිපාටියේ අනුමත අනුපාතයට අනුව අභ්‍යන්තර අයදුම්කරුවන්ගෙන් පුරප්පාදු 04 ක් හා බාහිර අයදුම්කරුවන්ගෙන් පුරප්පාදු 06 ක් පිරවීමට”

The Petitioners state that according to **‘P9’**, the Public Service Commission has granted approval to recruit six candidates under the external category. The Petitioners state further that inclusive of the Petitioners, only nine candidates had qualified for the interview. According to the marks sheet marked **‘P10’**, three candidates had not presented themselves before the interview. The Interview Board had recommended the other six candidates, including the two Petitioners as being suitable for recruitment, with the two Petitioners placed at the 5th and 6th positions. The Petitioners therefore state that the six candidates who came for the interview and who have been recommended for selection by the Interview Board must be recruited to fill the six vacancies from the external candidates.

The Petitioners state that they later became aware that notwithstanding 'P9' and their selection by the Interview Board, the Public Service Commission had approved the recruitment of only three candidates under the external category. The Petitioners state further that seven candidates had been recruited under the open category in complete violation of the 60:40 ratio that was required to be maintained.

Aggrieved by their non-recruitment, the Petitioners filed this application, seeking *inter alia* the following relief:

- a) A Writ of Mandamus compelling the Respondents to implement the selection made by the Interview Board as reflected by 'P10';
- b) A Writ of Mandamus compelling the Respondents to follow the 60:40 ratio between external and internal candidates when filling the vacancies that exist in the said post;
- c) A Writ of Prohibition preventing the Respondents from filling the cadre vacancies from the external category.

I shall now consider the position of the Respondents.

The learned Additional Solicitor General submitted that in 2005, there were in total, seventeen approved cadre positions in the said post of Assistant Divisional Transportation Superintendent (Non-Mechanical). This is confirmed by the letter dated 13th June 2005 marked 'R1' sent by the Department of Railways to the Public Service Commission. He submitted that in accordance with the Service Minute 'P1', 60% out of the total approved cadre had to be filled under the external category, and that the balance 40% was to be filled from the internal category. Accordingly, out of the seventeen cadre positions, ten positions could be filled from the external category while the balance seven had to be filled from the internal category. This is clearly set out in 'R1'.

The learned Additional Solicitor General submitted further that as borne out by 'R1', in 2005 the total number of vacancies that existed in the said post under the external category was three. He submitted that by letter dated 28th February 2005 marked 'R3' and by letter dated 8th April 2005 marked 'R4', the approval of the Public Service Commission to call for applications to fill the said three vacancies had been sought by the Department of Railways and the Secretary, Ministry of Transport, respectively. He submitted further that the Public Service Commission had accordingly granted its approval by its letter dated 1st July 2005 marked 'R5', and that the notice calling for advertisements marked 'P2' was issued in August 2005, wherein it was specifically stated that advertisements were being called to fill three vacancies that existed under the external category.

Parallel to the above process, the Department of Railways had also sought and obtained the approval of the Public Service Commission to fill the seven vacancies that existed under the internal category. A separate examination has been held under this category.

The cadre position that prevailed in 2005 is set out in the following table:

Method	Approved Cadre			Number of cadre posts filled at the time of calling applications	Number that should be recruited
	Total	As per Scheme of Recruitment			
		Percentage	Number of Vacancies		
External	17	60	10	07	03
Internal		40	07	None	07

It was submitted further that the results of those who sat the examination under the external category were issued by the Department of Examinations in April 2007 – vide 'R2'. According to the marks sheet annexed thereto, while thirty four candidates had applied, only eighteen candidates had sat for the examination. Of these, only nine candidates, including the two Petitioners had obtained the minimum mark for each subject, and therefore, qualified to be called for the interview.

While it is clear that there were only three vacancies in the external category and that the entire recruitment process outlined above was to recruit three candidates under the external category, the issue that has given rise to this application arose in view of the letter dated 19th November 2007 marked 'P9' written by the Public Service Commission. By this letter to which I have already adverted to, the Public Service Commission had directed that in terms of the Scheme of Recruitment, six cadre positions must be filled under the external category while the balance four must be filled under the internal category. The submission of the Respondents that this is a mistake on the part of the Public Service Commission is borne out when one considers that there were only three vacancies under the external category in 2005 and that approval was sought and obtained to fill the said three vacancies. Furthermore, if 'P9' was implemented, thirteen out of the seventeen cadre positions would be filled from the external category, thereby violating the 60:40 ratio specified in the Service Minute 'P1'.

By his letter dated 30th July 2008 marked 'R9', the General Manager of Railways had brought the above mistake to the attention of the Public Service Commission and sought the approval of the Public Service Commission to appoint the three candidates who obtained the highest marks at the examination to the said post. The Public Service Commission has accordingly granted its approval by its letters dated 13th November 2008 and 13th March 2009 marked 'SR1' and 'R12', respectively.

It is in this factual background that I must consider the application of the Petitioners for a Writ of Mandamus compelling the Respondents to implement the selection made by the Interview Board as reflected by 'P10'.

The conditions that must be satisfied for a Writ of Mandamus to issue have been clearly set out by the Supreme Court and this Court. The Supreme Court in **Ratnayake and Others vs C.D.Perera and Others**¹ has held as follows:

"The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command issued by the

¹ (1982) 2 Sri LR 451.

superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties.”

The above position has been reiterated in **Jayawardena vs. People’s Bank**² where it was held that:

“Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty. In the absence of a public duty an intrusion by this Court by way of mandamus into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ.”

In **Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd**³ J.A.N. De Silva J. (as he was then) held as follows:

“There is rich and profuse case law on mandamus on the conditions to be satisfied by the applicant. Some of the conditions precedent to the issue of mandamus appears to be:

- (a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought (R. v Barnstaple Justices. The foundation of mandamus is the existence of a legal right (Napier Ex parte).*
- (b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.*

² [2002] 3 Sri LR 17.

³ [2005] 1 Sri LR 89 at 93.

- (c) *The legal right to compel must reside in the Applicant himself (R. v Lewisham Union)*
- (j) *Writ will not be issued where the Respondent has no power to perform the act sought to be mandated."*

In **Rajeswari Nadaraja v. M. Najeeb Abdul Majeed, Minister of Industries and Commerce and Others**⁴ Aluwihare, J held that:

"In an application for a writ of mandamus, the first matter to be settled is whether or not the officer or authority in question has in law and in fact the power which he or she refused to exercise. As a question of law, it is one of interpreting the empowering statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists."

It is clear that from the time applications were called in 2005 and until the appointments were made in 2009, there were only seventeen positions in the entire cadre of Assistant Divisional Transportation Superintendent (Non-Mechanical). In terms of the ratio specified in the Service Minute '**P1**', at all times, ten positions had to be filled by external candidates and the balance seven could be filled by internal candidates. In 2005, there were only three vacancies that existed in the external category and it is for this reason that approval was sought to fill three vacancies. The fact that there are only three vacancies is clearly reflected in the notice '**P2**' by which applications were called. Thus, the legal right of the Petitioners is to have these three vacancies filled by those who were successful at the examination. The legal duty of the Respondents is to fill the three vacancies in the external category from those who obtained the highest marks at the interview. It is admitted that the said three vacancies have been filled by selecting the three candidates who obtained the highest marks. I am of the view that the Petitioners cannot seek undue advantage of the mistake made by the Public Service Commission in '**P9**' and seek an order from this Court to appoint the Petitioners to the said post, as the Petitioners have not established that they have a legal right to the

⁴ SC Appeal No. 177/15; SC Minutes of 31st August 2018.

performance of a legal duty. Thus, in the absence of the factual and legal situation that must exist for a Writ of Mandamus to issue, I am of the view that the Petitioners are not entitled to the relief prayed for.

The learned Additional Solicitor General for the Respondents has also submitted that in any event, this Court does not have the jurisdiction to consider this application in view of the Constitutional ouster of the Writ jurisdiction of this Court in terms of Article 61A.

In **Ratnasiri and Others v. Ellawala and Others**,⁵ Saleem Marsoof, P.C., J/ President of the Court of Appeal (as he then was) having considered the provisions introduced by the 17th amendment with regard to the Public Service, held as follows:

"In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

In **Hewa Pedige Ranasingha and Others vs Secretary Ministry of Agricultural Development and Others**,⁶ the petitioners had challenged the manner in which a competitive examination to select Agricultural Instructors had been conducted by the Secretary, Ministry of Agricultural Development in terms of the powers delegated by the Public Service Commission. Sisira De Abrew, J upheld the argument of the Respondents that in view of the provisions of Article 61A of the Constitution, the Court of Appeal has no jurisdiction to inquire into the conducting of the examination, and that the petitioners could not have invoked the jurisdiction of the Court of Appeal to quash the results of the said examination.

⁵ [2004] 2 Sri L.R. 180 at page 190.

⁶ SC Appeal 177/2013; SC Minutes of 18th July 2018.

The learned Additional Solicitor General submitted further that the Petitioners are trying to circumvent the constitutional ouster by seeking a Writ of Mandamus without challenging the decision of the Public Service Commission. It is clear from the above narration of facts that the Public Service Commission has decided to only recruit three candidates under the external category. Although the Petitioners have only sought a Writ of Mandamus, this Court cannot proceed any further without quashing that decision of the Public Service Commission, which this Court is prevented from doing in terms of Article 61A.⁷ I therefore agree with the learned Additional Solicitor General that in any event, this Court does not have the jurisdiction to grant the relief prayed for.

The learned President's Counsel for the Petitioners brought to my attention a letter dated 9th February 2015 sent by the General Manager, Railways informing that the Department of Railways has no objection to the appointment of the Petitioners to the said post as vacancies have arisen in the external category of the said post. This judgment shall not act as a bar to the Public Service Commission considering the said request of the General Manager, Railways.

Subject to the above, this application is dismissed, without costs.

President of the Court of Appeal

⁷ See *Amarasekara vs Kodituwakku* (2005) 1 Sri LR 59.