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

In the matter of an application in the nature of a writ of mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Rasika Balasuriya
No. 479/1, Temple Lane, Panagoda,
Homagama

Court of Appeal Case No:
CA/WRIT/364/2018

PETITIONER

Vs.

1. Dr. Mrs. T. A.R. J. Gunasekera,
   Director General,
   National Institute of Education,
   Maharagama

2. Mr. Sunil Hettiarachchi
   Secretary, Ministry of Education,
   Isurupaya, Battaramulla.

3. Dr. Madura M. Wehalla
   Additional Secretary,
   Ministry of Education,
   Isurupaya, Battaramulla.

4. Mr. Tissa Hewavithana
   Secretary, Ministry of Education,
   Isurupaya, Battaramulla.

5. Prof. Ravindra Fernando
   Chairman,
   National Dangerous Drugs Control Board
   Rajagiriya.

6. Dr. Harsha Subasinghe
   Member of Council,
   5, B, 4 Monarch Apartment,
   No. 89, Galle Road, Colombo 3.

7. Dr. Hemamala Rathwaththa
   Senior Lecturer
   The Open University of Sri Lanka,
   Nawala.

8. Prof. P.S.M Gunarathne
   Vice President,
   University Grants Commission,
   Ward Place, Colombo 7.

9. Mr. Pradeep Kumara
   Senior Assistant Secretary,
   Ministry of Finance,
   Colombo 01.

10. Mr. M. A. P Munasinghe,
    Secretary – (National Institute of Education Council),
    Director General's Office,
    National Institute of Education,
    Maharagama.

11. Mr. S. H. Kumarasinghe
    117/1, Niyandagala road,
    Pannipititya.

12. Mr. L. Dharmin de Silva
    Assistant Director
    (Administration and Human Resources)

    National Institute of Education,

Maharagama.

13. Mr. K. W. B. M. P. Wijesundara
Deputy Director General
National Institute of Education,
Maharagama.

14. Hon. Attorney General
Attorney General's Department
Hulftsdorp street, Colombo 12.

RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Ravindranath Dabare with S. Ponnamperuma and S. Imalka for the Petitioner S. Ahamed SC for 1st – 10th and 12th - 14th Respondents
Argued on:	12.01.2022
Written Submissions:	Tendered by the Respondents 1-10 and 12 and 14 on 10.12.2020 Tendered by the Petitioner on 15.09.2020
Decided on:	22.02.2022

Mayadunne Corea J

The facts of the case are briefly as follows, the Petitioner was awarded admission for a Ph.D. program at the Management and Science University Malaysia (MSU) by the National Institute of Education after having considered his performance and qualifications. The Petitioner was granted 2-years paid leave and a further period of one year no pay leave for this purpose. The course was to be done part in Sri Lanka and the other part in Malaysia. The Petitioner proceeded to Malaysia, having prepared himself to conduct a presentation under a topic for which he had extensively gathered materials for over a year and a half. The Petitioner states that the supervisor appointed for the Petitioner made a sudden and drastic change to his research topic for which the Petitioner was left with only 3 months to prepare.

The Petitioner states that the drastic change to his research topic caused frustration and tension which resulted the Petitioner being diagnosed with a depressive disorder and diabetes. The Petitioner also states that eventually the Petitioner had to consult a mental health professional and get treatment, which he follows to date. It is submitted that upon the advice of the psychiatric physicians he was instructed to refrain from continuing his Ph.D. program as it directly affected and complicated the mental health of the Petitioner and this is alleged to have been informed to the 1st Respondent. The Petitioner informed MSU Malaysia of his situation after which he was allowed to withdraw from the Ph.D. program owing to his medical condition. The university had issued a letter to the National Institute of Education to propose another student to follow the Ph.D. program. The Petitioner reported to work on 01.11.2016 on which day the Petitioner was verbally informed not to resume work until further notice.

The Petitioner states that he was referred to a medical board by the National Institute of Education which duly recommended that the Petitioner was competent enough to resume service at the National Institute of Education. The Petitioner states that he was later informed by the 12th Respondent that the Petitioner cannot be released from the Ph.D. program as per the recommendations of the medical board, which was contrary and misleading to the findings of the medical board. The Petitioner states that he requested in writing to the authority concerned for reinstatement of services with no favorable reply. The Petitioner further states that the National Institute of Education Council informed the Petitioner two options available to him, that is to either complete the Ph.D. course as per the agreement between the Petitioner and the National Institute of Education or proceed to work and settle the full payments including the course fees borne by the National Institute of Education, salaries paid and any other expenses undertaken on behalf of the Petitioner for the aforesaid Ph.D. program as per the agreement entered between the parties.

The Petitioner aggrieved by this decision filed this writ application and prays for the following reliefs:

1. Grant and issue an order in the nature of writs of mandamus directing the 1st Respondent to act under and in terms of the agreement and terminate the said agreement entered into with the Petitioner on the medical condition of the Petitioner.

2. Grant and issue an order in the nature of writ of certiorari quashing the decisions taken by the 1st- 11th Respondents (council members) to deduct the amount of money from the salary of the Petitioner

3. Grant and issue an order in the nature of a writ of mandamus directing the 1st Respondent to grant the salary increments entitled by the Petitioner

4. Grant and issue an order in the nature of writ of mandamus directing the 1st Respondent to reinstate the Petitioner in service with effect from 01.11.2016 with back wages up to 01.11.2017

Petitioner's complaint

- The Petitioner alleges that the Respondents should have acted under the agreement and as per the terms of the agreement and recall him and thereafter terminated the said agreement due to the ill-health of the Petitioner but has failed to do so, thus, the said failure amounts to a breach of the statutory duties cast on the Respondents.

- The Respondents have taken a decision to recover the money as per the contract and such decision is arbitrary, capricious, unreasonable and has been made with bad faith.

Hence this application for a Writ of mandamus and certiorari.

The Respondents in their objections have taken several preliminary objections and challenged the jurisdiction of this Court to grant the reliefs sought by the Petitioner. This Court will consider these Objections in a while.

The parties were not at variance on the following facts;

- The Petitioner had been selected with several other candidates to follow the Ph.D. program at the Management and Science University Malaysia.

- Pursuant to the said selection the Petitioner had entered into two agreements whereby the Petitioner was granted two years paid leave and one year no pay leave subject to the conditions of the agreement.

- A surety bond executed in favor of the National Institute of Education with two sureties.

- The government of Sri Lanka has born the expenditure for the time period the Petitioner was engaged in his studies under the agreement.

The Petitioner's grievance is that nearly two years into his first agreement P 2(a) the Petitioner has fallen sick and has requested the Respondents to relieve him of the Ph.D. program. It is contended that as per the agreement he entered into with the Director General of the National Institute of Education, upon the Petitioner falling sick or due to deteriorating health the 1st Respondent had a duty to terminate his agreement and recall the Petitioner. The Petitioner's contention is he fell sick due to a stressful condition caused in relation to the Ph.D. program. The Petitioner argues that he has informed the 1st Respondent in this regard by the letter P6. This

Court observes that the document P6 does not demonstrate that the Petitioner had fallen sick due to the educational program he has enrolled. However, the Petitioner has sent another letter dated 02.08.2016 to the Director General of the National Institute of Education, stating that he was suffering from depression due to various illnesses that has befallen him and also stated that he was suffering from the continuous strain of heavy academic work and informed that he had decided to discontinue the Ph.D. course and requested to return back to office work, and to release him from the Ph.D. course (R2).

Thereafter the Petitioner has tendered a withdrawal application to the University dated 19.08.2016 (P7). However, when the Petitioner submitted the withdrawal application whether it was done with the concurrence of the Respondent is not clear and the Petitioner has failed to clarify this position to Court. We find that the Respondents in their objections have denied the Petitioner's contention.

The Council of the National Institute of Education has decided to appoint a medical board in keeping with the request and the agreement R4. The said letter address to the Director National Hospital states as follows:

"ජාතික අධ්‍යාපන ආයතනයේ ජ්‍යෙෂ්ඨ කථිකාචාර්ය තනතුරක සේවය කරන රසික බාලසූරිය මහතා ආයතනය මගින් පිරිනමනු ලැබූ ශිෂ්‍යත්වයක් මත 2014 ඔක්තොම්බර් මස 30 දින සිට වසර 03 ක කාලයක් සඳහා අධ්‍යයන නිවාඩු ලබා මෙරටදීම වැඩිදුර අධ්‍යයන කටයුතු වල නිරතව සිටී. ඒ අතරතුර දී ඔහුට විෂාදය (depression) නම් වූ රෝගී තත්වය මත යථෝක්ත පාඨමාලාව තවදුරටත් හැදෑරීමට නොහැකි බව දන්වා 2016.08.18 දින ලිපියක් යොමු කරමින් එම පාඨමාලාවේ අධ්‍යන කටයුතු වලින් නිදහස් කරන ලෙසට ඉල්ලීමක් කර ඇත. ඔහු වෛද්‍ය නිවාඩු ඉල්ලා නැත.

මෙම නිලධරයා පාඨමාලාව හැදෑරීම සඳහා තෝරා ගැනීමද වසර 05 ක කාලයක බැඳුම්කරයකට යටත්ව ගිවිසුමකට එළඹ ඇති අතර එකී ගිවිසුමට අනුව ඉදිරි කටයුතු කිරීම අවශ්‍ය වී ඇත. ඒ අනුව ආයතන සංග්‍රහයේ XXIII පරිවඡේදය පරිදි මෙම නිලධාරියා වෛද්‍ය මණ්ඩලයකට ඉදිරිපත් කිරීමට අවශ්‍ය වේ. කරුණාකර මෙම නිලධාරියා වෛද්‍ය මණ්ඩලයක් වෙත ඉදිරිපත් කොට ඔහුගේ රෝගී තත්වය පිළිබඳ වෛද්‍ය වාර්ථාවක් ලබා දෙන මෙන් කාරුණිකව ඉල්ලා සිටිමි."

The medical board had accordingly been constituted and the medical board has come to the conclusion that the Petitioner is fit to work (R5). The final determination as per the report says

"**Fit to carry out all his usual duties.**"

At this stage, this Court will consider the objections that had been raised by the Respondents.

Suppression of material facts.

In view of the Petitioner's request to report back to work and in view of the findings of the medical board, the Respondents had sent R7 to the Petitioner. The said letter states as follow.

"මැලේසියාවේ විද්‍යා විශ්ව විද්‍යාලයේ ආචාර්ය උපාධි පාඨමාලාවක් හැදෑරීමට පිණිස ආයතනය විසින් ඔබ වෙත ලබා දී තිබූ ශිෂ්‍යත්වය මත එම පාඨමාලාව හැදෑරීමට ආයතනය සමග ගිවිසුමක්ට බැඳී ඔබ විසින් අධ්‍යයන කටයුතු සිදුකරන ලදි.

පසුව ඔබ අසනීප තත්වයක් පවතින බව සඳහන් කර එම පාඨමාලාවෙන් ඉවත්ව සේවයට වාර්තා කිරීමට අවනඵ ඉල්ලා සිටින ලදි. මේ පිළිබඳව 2016.10.20 දින රැස්වූ 407 වන 2017.06.15 දින රැස්වූ 415 වන ආයතන පාලක සභා රැස්වීම් වලදී සාකච්ඡා කර එම තීරණ ඔබට දන්වන ලදි. ඔබේ 2017.11.01 දින ඉල්ලීම 2017.11.01 රැස්වූ ආයතනයේ පාලක සභාව වෙත යොමු කරන ලද අතර පහත සඳහන් තීරණ එහිදී ගන්නා ලදි.

1. **2014 ඔක්තෝබර් 29 දින ඔබ විසින් ජාතික අධ්‍යාපන ආයතනය සමග අත්සන් කරන ලද ගිවිසුමේ පරිදි දිගටම පාඨමාලව හදාරණ ලෙස ඔබට දැන්වීම.**

එසේ නොමැතිව නැවත සේවයට වාර්තා කරන්නේනම්

2. **ඉහත පාඨමාලාව හැදෑරීම සඳහා ඔබ වෙනුවෙන් ආයතනය විසින් දැරණ ලද සියලුම වියදම් හා එම කාලයට අදාළ වැටුප් ඇතුළු ආයතනය ගෙවීමට ඇති සියලුම මුදල් නැවත ආයතනයට ගෙවන ලෙස ඔබට දැන්වීම "**

The Petitioner in turn had informed the National Institute of Education that he does not wish to let go of the opportunity that has been given to him and that he would wish to continue with the Ph.D. program (R8). The said letter states

"2014 ඔක්තෝබර් මස 29 වන දින ජාතික අධ්‍යාපන ආයතනය විසින් මා වෙත ලබා දෙන ලද Ph. D පාඨමාලාව ඉතා හොඳින් හදාරා පළමු වසර අවසානයේ පැවැත් වූ පරීක්ෂණයෙන් 'Research Methodology'ප්‍රශ්න පත්‍රයට B සාමාර්ථයක් ද ලබා ගත්තෙමි. ඉන්පසු මැලේසියාවේ විද්‍යා විද්‍යාලය මගින් කැඳවන ලදුව කරන ලද කාර්යයන් පිළිබඳව ඉදිරිපත් කිරීමේ අවස්ථාවට සහභාගි වීමට යන ලද අතර, එහිදී නොයෙකුත් අර්බුදකාරී ගැටලු පැන නැගීමෙන් Ph. D උපාධි පාඨමාලාවේ කටයුතු නිසියාකාරව ඉටු කරගැනීමට නොහැකි විය.

එම හේතු ප්‍රකාරව මා තදබල ලෙස මානසික පීඩනයකට පත්වීම හේතුවෙන් මානසික රෝගී තත්ත්වයකට පත් වුනෙමි. මේ නිසා ඉහත කී පාඨමාලාව නිසි ආකාරයෙන් හැදෑරීමට නොහැකි විය. මේ වන විටත් ඒ සඳහා මම වෛද්‍ය ප්‍රතිකාර ලබමින් සිටිමි.

කරුණු එසේ වුවද ජාතික අධ්‍යාපන ආයතනය මගින් මට ලබාදුන් මෙම අවස්ථාව පැහැර නොහැර ඉටුකර ගැනීමට බලාපොරොත්තු වන හෙයින් ඔබේ ලිපියේ සඳහන් පළමුවන වරණය එනම් Ph. D පාඨමාලාව දිගටම හැදෑරීමට තොරා ගත්තෙමි."

Thus, by this letter the Petitioner has willingly agreed to continue with the Ph.D. course. This letter had been sent on 18.12.2017 which is after three years of obtaining leave. However, in the following year on 07.02.2018 the Petitioner has once again changed his mind and sent another

letter informing, that he is not in a position to rejoin the Ph.D. program and has requested the National Institute of Education to replace him with another candidate.

As per R1(b), by this time the Petitioner had been on paid and no-pay leave from 30.10.2014 (R9). This letter had been sent in 2018 by which time four years had lapsed from the time the Petitioner had been given leave to pursue the course.

The Petitioner has failed to disclose the existence of R8 to this Court. As quite correctly submitted by the Respondents, this is a suppression of a material fact. This is a letter sent by the Petitioner and the existence of this document was never denied by the Petitioner. By this letter the Petitioner has clearly indicated that he intends to go ahead with his Ph.D. program, thus declining to accept the option of reimbursing the Government of the expenses that had been expended on him up to date. The Petitioner had never requested the National Institute of Education to act under clause 8 or 11 of the agreement.

In the case of **Alphonso Appuhamy v Hettiarachchi NLR 77 S. C. 779/72** it was held that the *"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when an application for a writ or injunction is made and the process of the Court is invoked is laid down in the case of* ***The King v. The General Commissioners -for the Purpose of the Income Tax Acts for the District of Kensington-Exparte Princess Edmond de Poignac - (1917)1 Kings Bench Division 486.*** *Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case, a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination. Lord Cozens-Hardy M. R., after stating that the authorities in the books are so strong and so numerous quoted the high authority of Lord Langdale and Rolfe B. in the case of* ***Dalglish v. Jarvie-2 Mac. & G. 231, 238,*** *the head note of which states,*
" It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

In ***R vs Kensington Income Tax Commissioners (1917) 1 KB 486,*** *it was held that* ***"****the party cannot plead that the misrepresentation was due to inadvertence or misinformation or that the*

applicants was not aware of the importance of certain facts which he omitted to place before the court".

Accordingly, the objection on suppression or misrepresentation of facts succeeds.

The relationship between the parties is contractual.

The Respondents main objection was that the relationship between the parties is contractual, if so, there cannot be a public law remedy when the dispute is contractual. The Petitioner obtained leave and proceeded to the Ph.D. course after entering into an agreement. In fact, the main grievance of the Petitioner is that the Respondents have failed to act as per the agreement entered and has failed to comply with Clause 8 of the agreement P2a (R1a). We find that the main reliefs prayed in the prayer of the petition namely relief b), c) and d) are based on the agreement. They are as follows

"(b) Grant and issue an order in the nature of writ of mandamus directing the 1st Respondent to act under and in **terms of the agreement** and terminate the said agreement entered into with the Petitioner on the medical condition of the Petitioner,

(c) Grant and issue an order in the nature of writ of certiorari quashing the decision taken by the 1st – 11th Respondents (council members) to deduct the amount of money from the salary of the Petitioner as per the document marked P25

(d) Grant and issue an order in the nature of writ of mandamus directing the 1st Respondent to grant the salary increments entitled by the Petitioner."

Now we will consider the relevant provisions of the agreement.

8. එසේම ඉදින්

(අ) එකී අභ්‍යාසලාභියාගේ වැඩ / අධ්‍යයන කාර්යයන් සහ / හෝ හැසිරීම් සතුටුදායක නොවුවහොත්

(ආ) රෝගාතුර වීම හෝ සෞඛ්‍යයෙන් පිරිහීම නිසා තවදුරටත් පුහුණුව ලබන්නට එකී අභ්‍යාසලාභියා
අයෝග්‍ය වුවහොත් හෝ නුසුදුසු වුවහොත්

(ඇ) එකී අභ්‍යාසලාභියා මෙහිලා නියම කර ඇති වගන්ති හා කොන්දේසි නොපිළි පැද්දොත්

(ඈ) එකී අභ්‍යාසලාභියා තමන් ලබන අධ්‍යනය සම්බන්යෙන් **(6)** *අධ්‍යක්ෂ ජනරාල්* වෙත වාර්ථා එවීම පැහැර හැරියහොත්

(ඉ) නිසිකලට එකී අධ්‍යනය හා අභ්‍යාස පාඨමාලාව සම්පූර්ණ නොකළහොත්

(ඊ) එකී අභ්‍යාසලාභියා **(3)** මැලේසියාවේ කළමණාකරණ හා විද්‍යා විශ්වවිද්‍යාලයේ නීති රීති රෙගුලාසි ස්ථාවර නියෝග, චක්‍රලේඛ හෝ විවෙචනය කලහොත් හෝ උල්ලංඝනය කළහොත් ඒ පිළිබඳ අයෝග්‍ය ප්‍රකාශයක් කළහොත් , එවිට මෙම ගිවිසුම අවලංගු කර නවර අවස්ථාවක වුව ද එකී අභ්‍යාසලාභියා ආපසු කැඳවීමට **(6)** *අධ්‍යක්ෂ ජනරාල්* නිදහස ඇත්තේය.

11. දර්ශනගූරී උපාදිය හි සටියදී රෝගාතුර වීම හේතුකොට ගෙන තම පුහුණු කාලසීමාව අවසන් කරන ලෙස හෝ දීර්ඝ කරන ලෙස ඉල්ලීමක් එකී අභ්‍යාසලාභියා විසින් **(6)** *අධ්‍යක්ෂ ජනරාල්* වෙත ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කරනු ලබන්නේනම් තමා රෝගාතුර වී සිටින බව සනාථ කරනු පිණිස *අධ්‍යක්ෂ ජනරාල්* විසින් අනුමත කරනු ලබන වෛද්‍ය නිලදාර්යකුගේ ලබාගත් සහතිකයක් ද ඉල්ලුම් පත්‍රය සමග ඉදිරිපත් කළ යුතු ය.

13. (අ) ඉදින් එකී අභ්‍යාසලාභියා එම පාඨමාලාවේ කාලය ගතවී අවසන් වන්නට පෙර **(6)** *අධ්‍යක්ෂ ජනරාල්* කල්පනාවේ හැටියට සතුටුදායක නොවන යම් යම් හේතූන් නිසා ස්වකීය පාඨමාලාවෙන් අසවුවහොත් හෝ තම ඉගෙනීම හා පුහුණුව අත්හැර දැමුවහොත්, මෙම ගිවිසුම යටතේ ලැබෙන සියලුම ඵල ප්‍රයෝජන ඔහුට අහිමිවුවා සේ සලකනු ලැබේ. එසේම ඔහු ඉල්ලා අස් වූ දිනය වන එකී පාඨමාලාව සම්බන්දයෙන් ආණ්ඩුව සහ ප්‍රදායක ඒජන්සිය විසින් ඔහු වෙනුවෙන් දරන ලද වියදම ද සම්පූර්ණයෙන්ම ආණ්ඩුවට ආපසු ගෙවීමට ඔහු යටත් වන්නේ ය.

Thus, it is clear that the Petitioner is seeking a writ of mandamus to compel the Respondents to comply with the provisions of the agreement prayer (b) and a writ of certiorari to quash the decision that has flowed from the agreement prayer (c).

The learned Counsel for the Respondents argued that prayer (d) is pertaining to impugned acts or in actions by the 1st Respondent which is pursuant to clause 13 of the agreement.

It is clear to this Court that the Petitioner is seeking to obtain the reliefs prayed based on the contractual relationship the parties have entered. This Court's considered view is that, the impugned rights the Petitioner is attempting to enforce, is derived from his contractual relationship with the Respondents. It is trite law that the parties cannot enforce their contractual obligations by public law remedies. The obligations and the rights of the parties are governed by the clauses of the contract. In fact, it appears to this Court that the Petitioner is seeking specific performance of the agreement. Thus, his remedy lies in the District Court.

In **U.L. Karunawathie Vs. People's Bank & others CA Writ Application No. 863/2010 (decided on 12.05.2015** it was held that, ***"If no public duty exists at a given instance, then the courts do not invoke and exercise its writ jurisdiction. As mentioned hereinbefore in this judgement, respondent bank had no public duty to perform towards the petitioner since the matter complained of comes within the contract of employment the petitioner had with the bank. Therefore, it is my opinion that the Petitioner in this case is not entitled to have the writ of certiorari and mandamus issued, as sought in petition".***

It was held in **Jayaweera Vs. Wijeratne (1985) 2 SLR** ***413 "Where the relationship between the parties is purely contractual one of a commercial nature, neither certiorari nor mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of natural justice even if one of the parties is a public authority".***

After hearing the submissions of both the learned Counsel, it is the view of this Court that the Petitioner by way of a mandamus is not attempting to compel the 1st Respondent to discharge a public duty under a statute but is attempting to enforce an alleged obligation arising from a contract.

Therefore, the objection of the Respondent succeeds.

Even though the Respondents have succeeded in their first two objections we would consider the other objections raised for the purpose of record.

Is the action filed against the correct party?

The next objection the Respondents raised was that the Petitioner had failed to name the proper/ necessary parties.

This Court will now consider the agreement signed between the parties. The agreements marked as P2a, P2b, has the heading of National Institute of Education and is for officers of the Institute who are on full pay and no pay basis engaged in studies. The agreements are signed between the Petitioner and Director General of the National Institute of Education on behalf of the Government of Sri Lanka. P2C is a surety bond in favour of the National Institute of Education signed between the sureties and the National Institute of Education. It is clear the study program is offered through the National Institute of Education for its employees. All the decisions pertaining to the study program and in this instance pertaining to the Petitioner had been taken by the Council or the board of management of the National Institute of Education. As per P21 the Petitioner himself urges the NIE that a suitable lecturer to be nominated to the Ph.D. program thus conceding that the nomination authority is the National Institute of Education. The decision marked P25 clearly states that as per the surety bond entered with the National Institute of Education the expenses incurred by the National Institute of Education pertaining to the

Petitioners Ph.D. program will be deducted from his salary. The Respondents contended that the following decisions arising out of the contract with the Petitioner were taken by the Council of the National Institute of Education namely:

(1) At its 406th meeting the National Institute of Education resolved that the Petitioner be examined by a Medical Board approved by the 1st Respondent (marked as R3), in accordance with the terms of the agreement.

(2) At its 419th meeting held on 19th October 2017, the National Institute of Education resolved that the officer should either continue studied leading to the Ph.D. OR report for duty AND refund the money spent by the National Institute of Education.

(3) At its 424th meeting held on 22nd March 2018, the National Institute of Education resolved that all expenses borne on behalf of the Petitioner must be recovered from him, and conveyed the said decision to the Petitioner by letter dated 12th March 2018 (the impugned document marked as P25)

It is undisputed that the National Institute of Education is a legal entity established under the National Institute of Education Act No. 28 of 1985. However, the National Institute of Education has not been made a party to this application. The Petitioner's Counsel without conceding, strenuously argued that, in fact, if an order is to be made in favour of the Petitioner it has to be implemented through the National Institute of Education. We observe that the Petitioner has failed to respond to this allegation.

The unexplained delay

The third objection of the Respondents was that, the Petitioner is seeking to quash the decision as per document P25 which is dated 12.05.2018. The said decision has been taken at the 424th council meeting on 22.3.2018. The decision that if unable to proceed with the program, the Petitioner should pay the expenses incurred by the Institute, had been taken on 2017.11.01 and communicated to the Petitioner by letter dated 15.11.17 (R7). The Petitioner has filed this action on 23.11.2018 nearly one year after R7 was sent. The Respondents heavily relied on the case of **Biso Menika Vs Cyril de Alwis (1982)1 SLR 368** in support of this contention.

In **Issadeen Vs The Commissioner of National Housing & others(2003) 2 SLR10** it was held, **"Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of**

certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy".

Our Courts have continuously held that a party seeking public law remedies specially by way of writ applications should do so without delay as delay defeats the reliefs sought. If there is a delay it is incumbent on the party seeking the relief to explain the delay to the satisfaction of the Court.

For the reasons best known to the Petitioner, this Court finds that the Petitioner has failed to give any reason to purge the delay or to answer the allegation of delay.

The Respondents have challenged the Petitioner's plea that he is unfit to continue his studies. This is based on the premise that Petitioner on his request has been referred to a medical board and the said board after examining him, has unanimously determined that he is fit to carry out his usual duties (R5). The Respondents contention is that by R4 the Respondents have specifically stated the reason for submitting the Petitioner before the board and the board's unanimous decision in this regard is contrary to what the Petitioner is stating.

While the Petitioner's contended that what the medical board has stated is that the Petitioner is suitable to carry out his usual duties and it means his usual office work, the Respondents argued that in the light of R4 the usual duties should be understood in the context of R4. Leaving such argument as it is, the Petitioner's contention is that as per the documents P3, P4 and P5 the Petitioner is suffering from depression and is not in a fit condition to follow his Ph.D. course. However, the Respondents submitted that this finding is contrary to the medical reports submitted by the medical board who examined the Petitioner, thus making the medical fitness of the Petitioner, a disputed fact.

This Court is mindful that a writ Court is not in a position to come to a conclusion on disputed facts as it has to be ascertained by evidence. For the Petitioner's application on his mental condition to succeed, the Petitioner's mental health condition has to be put in issue. It is trite law that when facts are in dispute, a writ will not lie. **Thajudeen Vs Sri Lanka Tea Board (1981)2 SLR 47**.

For completeness, this Court will consider the Petitioner's submission on the obligation owed to him. The Petitioner contends that the Respondents should have acted under clause 8 of the contract. Clause 8 (b) gives the discretion to the Director General to terminate and recall the scholarship recipient in the event of him falling sick or due to deteriorating health. It is a discretion that is given to the Director General. However, the recipient has to inform the Director General of his illness through an application. The said application has to be accompanied by a medical certificate from a doctor approved by the Director General. It is also pertinent to note that as stated above in this Judgement and as reflected by P2 (a), (b), (c) and R1 (a), (b), (c) the Petitioner had exhausted the paid leave as well as the no pay leave. The money spent by the

National Institute of Education on the Petitioner is reflected in the statement of account R10. Thus, the said expenditure had been borne out by the National Institute of Education. The Institution has expanded this amount to educate and qualify its employees so that the ultimate beneficiary would be the State at large.

When a recipient abruptly abandons the education program, to prevent the loss that it would cause, a clause is inserted in the agreement. Exceptions to this are the instances that are contained in clause 8 (b) and 11 namely the recipient falling ill or the deterioration of the recipient's health. Therefore, the party who is seeking the cover of the said clauses should strictly comply with the provisions of the contract that enable the said clauses to be triggered.

At the argument stage this Court posed the question to the Counsel for the Petitioner and asked whether an application has been made in compliance with these clauses and the learned Counsels answer to this Court was in the negative.
In the above circumstances this Court observes that for the Petitioner to succeed in his application to obtain relief from the contract he must first comply himself with the provisions of the contract.

After considering all the facts and the legal submissions made before this Court, for the reasons set out in this Judgment we are of the view that the Petitioner has failed to establish his right to pursue and obtain a public law remedy.

Accordingly, we are not inclined to grant the reliefs prayed for in the petition. This application is dismissed without cost.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal