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

In the matter of an application for an Order in the nature of Writ of Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/45/2019

1. Ven. K. Wacheeswara Thero
   Buddhist Cultural Center,
   Malasinghagoda Road,
   Hokandara.

2. Ven. H. Gnanissara Thero,
   Sri Sugatharamaya,
   Urule Deniya,
   Dewalegama.

3. W. M. J. B. Wijekoon
   430, 3rd Lane, Ranasingha Road,
   Neduna,
   Ganemulla.

4. J. K. S. Pathirana
   Pathirana Vila, Koodella,
   Anguruwa Thota.

5. S. S. G. Pushpakumara
   No.6,
   Wickramasinghapura,
   Mawathagama.

6. L. G. De Lenarolle
   No. 30/37,
   Walawwatta,
   Meerigama.

7. P. Hemachandra
   No.188
   Dambagoda,
   Danture.

8. D. A. R. C. K. Silva
   534C, Ransiri Mawatha,
   Narangodapaluwa.

9. C. L.W. Senanayaka
   117, 5th Lane,
   George E. De Silva Road,
   Kandy.

10. D. M. I. S. Dharmadasa
    No.4 Pussa Wila, Kadawan Gama,
    Kadugannawa.

11. I. Alahakoon
    35/21A,
    Maligathenna Road,
    Matale.

12. R. A. N. Mangala Ranasingha
    158/C, Bandaranayake Road,
    Asgiriya, Gampaha.

13. D. M. Premarathna
    21, Dora Kumbura, Dunkolawatta,
    Mathale.

14. H. M. Bandara Menike
    144,
    Wijaya Rajadahana,
    Mirigama.

15. Padma Batathota
    54/B/1, 3rd Lane,
    Hansagiri Road, Gampaha.

16. S. R. D. J. B. Senanayake
    260/B,
    Wathurugama Road,
    Urapola.

17. D. M. Piyathilaka
    125A,
    Palipana
    Poojapitiya.

18. M. S. Ponnambalam
    No.1, Alwiswatta,
    Hendala,
    Wattala.

19. D. D. Thamara Dilrukshi Perera
    23/21, Diyawanna Garden, Pagoda Road, Nugegoda.

20. W. G. N. Amaradiwakare
    138/6 High Level Road, Meepe,
    Padukka.

21. W. W. N. Senarathne
    Palle Pamunuwa,
    Dewanagala.

22. W. D. Muthukumarana
    Kreedangana Road,
    Kegalle.

23. K. Rupasingha
    6/64/01, 8th Lane,
    Nadun Uyana, Halpe,
    Mirigama.

24. D. A. Ekanayake
    Disne, Kongolla, Hakmana.

25. K. S. Ranaweera
    210, Balagolla,
    Kengalla.

26. D. E.V.S. Premarathna
    'Premali', Muragoda, Thelijjawila.

27. P. Daniel
    38, New Weligama,
    Norwood.

28. B. N. D. Shanthi Batagoda
    Beliatta Road,
    Polkiripitiya,
    Hakmana.

29. R. S. K. Abenayaka
    813, Sakwithi Uyana,
    8th Lane, Jayamalapura, Gampola.

30. W. M. Y. P. K. Senewirathna
    34, Lakshaya Watta, Ethgala,
    Gampola.

31. P. A. Gunasena
    76/3,
    Palle Kanda Road, Walasmulla.

32. R. C. W. Nanayakkara
    44C,
    Walaw Watta
    Thelijjawila.

33. D. A. P. Sandya Kumari
    92, Katuwaweala Road, Ambagahapura,
    Maharagama.

34. A. G. B. Kumarihamy
    No. 8/389, Wewa Road,
    Kapuruwala, Alawwa.

35. R. M. P. K. Ilukkubura
    35/28, Maligathenna, Hulangamuwa,
    Mathale.

36. N. A. A. P. Nissanka
    No. 21A,
    Napagoda,
    Nittambuwa.

37. K. E. Premasooriya
    No. 197,
    Meerigama Road, Kal Eliya.

38. S. A. H. Gunawardhana
    38/1, Medawatta,
    Mudungoda,
    Gampaha.

39. Kamala Samarasingha
    98/4,
    Attanagalla Road,
    Nittambuwa.

40. M. L. Seetha Jayawardhana
    No. 251/13, Kandy Road,
    Horagolla,
    Nittambuwa.

41. A. G. Gunapala
    Weda Niwasa, Poththewela,
    Hakmana.

42. M. S. M. Farook
    114, Nazar Road, Mallawapitiya,
    Kurunegala.

43. R. M. D. C. Dasanayaka
    278, Bate pola, Donnagaha.

44. Leela Baladora
    333/3, Vijayaba Place,
    Ihala karagahamuna
    Kadawatha.

45. R. L. M. Rajapaksha
    No.09, Niyangoda, Kumburegama.

46. T. Juvaneswary
    61, Flory Road, Nattipiddy, Munai,
    Kalmunai.

47. A. S. Yogarajah
    60/2,
    Adigar Road,
    Batticaloa.

48. M. M. Leelawathi
    No.92, Yata Rawum Road,
    Horagollawatta,
    Nittambuwa.

49. S. R. Liyanamanage
    257/12, Pelawatta, Pamburana,
    Matara.

50. P. W. Bandara
    Randeniya Wewa Road, Pelwehera,
    Dambulla.

51. A. H. W. Jayasekara
    14/85,
    Hiththetiya Central,
    Matara.

52. Maddumage Samarawickrama
    No.117,
    Kulupana,
    Pokunuwita, Horana.

Petitioners

Vs.

1. Dharmasena Dissanayaka
   Chairman,

2. Prof. Hussain Ismail
   Member,

3. Dhara Wijayatilake
   Member,

4. Dr. Prathap Ramunujam
   Member,

5. V. Jegarasasingam
   Member,

6. Santi Nihal Seneviratne
   Member,

7. S. Ranugge
   Member,

8. D. Laksiri Mendis
   Member,

9. Sarath Jayatilaka
   Member,

   <u>All of 1st to 9th Respondents:</u>
   The Public Service Commission,
   No. 1200/9,
   Rajamalwatta Road,
   Battaramulla.

10. M. M. N. D. Bandara
    Chairman,

11. E. H. M. P. Elkaduwa
    Member,

12. K. L. M. Thamby
Member,

<u>All of 10th to 12th Respondents:</u>
The Education Service Committee of the
Public Service Commission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.

13. Secretary to the Ministry of Education,
Ministry of Education,
Isurupaya,
Battaramulla.

<u>Respondents</u>

Before **:** Sobhitha Rajakaruna J.

M. T. Mohammed Laffar J.

Mayadunne Corea J.

Counsel **:** Shantha Jayawardana with Neranjan Arulpragasam, Hirannya Damunupola and A. Basheer for the Petitioners.

Vikum de Abrew PC, ASG with Avanti Weerakoon SC for the Respondents.

Argued on **:** 13.10.2022

Written Submissions: Petitioner - 27.07.2020

Respondents- 18.09.2020

Decided on **:** 30.03.2023

Sobhitha Rajakaruna J.

The Petitioners in the instant Application seek an order in the nature of a writ of Mandamus directing the 1st to 12th Respondents to promote the Petitioners to Class 2 Grade 1 of the Sri Lanka Teacher Educators' Service with effect from 01.01.2005. This Court on 07.03.2019 has decided to issue notice of this Application on the Respondents and fixed the matter for hearing. The parties have filed Statement of Objections and also the Counter Affidavit.

Before this matter was taken up for hearing, the learned Counsel for the Petitioners has brought to the attention of this Court that certain Respondents have ceased to hold office and accordingly, he has sought to substitute current office bearers in place of 2nd, 3rd and 6th Respondents who were previously holding office. At this stage a question has arisen whether the named Respondents who have ceased to hold public office can be substituted with new office bearers in an application for a writ of Mandamus. The learned Counsel for the Petitioners has submitted that there are conflicting judgements on the said point of view. The learned Deputy Solicitor General who appeared for the Respondents has pointed out the judgements where it has been decided that a Mandamus can be issued only against a designation and also judgements where it has been decided that a Mandamus can only be issued against a natural person.

His Lordship the President, Court of Appeal, taking into consideration the importance of resolving this issue, appointed a Divisional Bench to hear and determine the above issue before dealing with the merits of the instant Application. The Divisional Bench assembled to consider the issues arising out of the aforesaid conflicting judgements without prejudice to the jurisdictional objections under Article 61A of the Constitution raised by the learned Additional Solicitor General ('ASG') who asserts that the Application be dismissed in limine based on such jurisdictional objection.

The learned Counsel for the Petitioners as well as the learned ASG, after their submissions invited this Divisional Bench to pronounce a judgement considering the below mentioned questions and also based on the facts and circumstances of this case.

1) Whether it is necessary to name a respondent in person in an application seeking orders in the nature of a writ of Mandamus against a public officer in view of Rule No. 5 of the Court of Appeal (Appellate Procedure) Rules 1990;
2) Whether the substitution is necessary when a respondent who is a public officer has ceased to hold office in an application seeking orders in the nature of a writ of Mandamus.

In fairness to their Lordships, it needs to be stressed that their Lordships have arrived at such conclusions in those conflicting judgements by applying the relevant legal provisions to the facts and circumstances of each case. This Court is of the view that the above questions should be dealt with considering the importance of such questions from the perspective of its legislative and legal antecedents. The jurisdictional objection raised by the learned ASG and if necessary, the merits of the instant Application will be examined after resolving the above questions.

Origin

At this stage, I must draw my attention to the origin of writ of Mandamus. Prof. Christopher Forsyth in '***Administrative Law' by the late Sir William Wade and Christopher Forsyth, 11th Edition (2014), Oxford,*** has shown a tendency to identify the writs of Mandamus as 'mandatory orders'. The prerogative remedy of a mandatory order has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds[1]. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of a mandatory order is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. As per Prof. Forsyth, Mandamus reached the zenith of its utility in the 18th century (above '***Administrative Law'***, p.520).

H. W. R. Wade in '***Administrative Law', 4th Edition (1977), Clarendon Press Oxford,*** has stated that the essence of Mandamus is that it is a royal command, issued in the name of the Crown from the court of King's Bench (now the Queen's Bench Division of the High Court), ordering

[1] See- Harding, Public Duties and Public Law, ch. 3

the performance of a public legal duty. In the ***5th Edition (1982)*** and as well as in the ***6th Edition (1988)*** of the said ***'Administrative Law'*** the same sentence appears therein. However, the said sentence is reflected in the ***11th Edition (2014)*** of the above '***Administrative Law', p.520*** using the words 'mandatory order' instead of 'writ of Mandamus'. This may be due to the amendments in reference to the judicial review procedures in English law introduced to the Supreme Court Act 1981 (now known as the Senior Courts Act 1981). The Clause 3(a) of the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 No. 1033 which came into effect on 1st May 2004 provides that the "orders of mandamus, prohibition and certiorari" described in Section 29 of the said Supreme Court Act shall be known instead as "mandatory, prohibiting and quashing orders" respectively.

I found the following passage in a publication by Lewis & Clark Law Review;

> "In its earliest uses in the fourteenth and fifteenth centuries, mandamus served as a charge from the Crown to a third party with no option of return[2]. An option of return in this context would give the party subject to the mandamus an opportunity to come to court and explain why the commanded action could not or should not take place[3]. Later into the fifteenth century, mandamus offered individuals a way to petition Parliament for redress, most commonly restoration to public office, and it eventually came to be known as a "writ of restitution[4]". Next, it grew into its modern use as an original writ, offering a legal remedy in the form of a command from King's Bench[5]." (See- **Audrey Davis, *'A Return to the Traditional Use of the Writ of Mandamus'* in Lewis & Clark Law Review, Audrey Davis (Editor in Chief), 24 Lewis & Clark L. Rev. 1527 [2020]**)

[2] Thomas Tapping, The Law and Practice of The High Prerogative Writ of Mandamus 2 (1853), at 57; see also, e.g., John Cowell, A Law Dictionary (London, D. Browne et al. 1708) (defining mandamus as "a Charge to the Sheriff, to take into the King's hands all the Lands and Tenements of the King's Widow, that against her Oath formerly given, marryeth without the King's consent")
[3] See-John Cowell, A Law Dictionary (London, D. Browne et al. 1708) (defining "Return").
[4] Thomas Tapping, The Law and Practice of The High Prerogative Writ of Mandamus 2 (1853), at 57; see also, e.g., James Bagg's Case (1615) 77 Eng. Rep. 1271, 1272; 11 Co. Rep. 93 b. (KB) (restoring plaintiff to his position in a corporation on a "writ of restitution").
[5] Thomas Tapping, The Law and Practice of The High Prerogative Writ of Mandamus 2 (1853), at 57 (explaining that mandamus grew to "obtain[] the sanction of an original writ").

'Originally, the writ of Mandamus was merely an administrative order from the sovereign to his subordinates. Modern government is based almost exclusively on statutory powers and duties vested in public bodies, and a mandatory order is a regular method of enforcing the duties. The plethora of ancient and customary jurisdictions no longer exist. A mandatory order now belongs essentially to public law. Today the majority of applications for a mandatory order are made at the instance of private litigants complaining of some breach of duty by some public authority. Typical application of a mandatory order in modern cases are to enforce statutory duties of public authorities to make a rate,[6] to refer a complaint to a statutory committee,[7] to decide a dispute between education authorities on proper grounds,[8] to determine an application for a licence,[9] to reconsider an application for a licence on proper grounds,[10] to appoint an inspector of a company,[11] to adjudicate between landlord and tenant,[12] to approve building plans,[13] to pay college lecturers,[14] top pay a police pension,[15] to improve conditions of imprisonment[16] and to implement an employment scheme.[17]' (vide- ***'Administrative Law' by the late Sir William Wade and Christopher Forsyth, 11th Edition, Oxford, p.522 to p.523***)

Parameters Adopted

Having considered the origin of the writs of Mandamus, it would be useful to briefly observe the parameters adopted by other jurisdictions in applications for writs of Mandamus for the purpose of better adjudication of the above questions which need consideration of this Court.

M. P. Jain and S. N. Jain (in ***'Principles of Administrative Law', 9th Edition (2022), LexisNexis, at p.2440***) observe that "Mandamus means a command; Mandamus is used to enforce the

[6] R vs. Poplar Borough Council [No. 1] (1922) 1 KB 72
[7] Padfield vs. Minister of Agriculture, Fisheries and Food (1968) AC 997
[8] Board of Education vs. Rice (1911) AC 179
[9] R vs. Tower Hamlets London Borough Council ex. p. Kayne-Levenson (1975) QB 431
[10] R vs. London County Council ex. p. Corrie (1918) 1 KB 68
[11] R vs. Board of Trade ex. p. St. Martin's Preserving Co. Ltd. (1965) 1 QB 603
[12] R vs. Pugh (Judge) (1951) 2 KB 623
[13] R vs. Tynemouth Rural District Council (1896) 2 QB 219
[14] R vs. Liverpool City Council ex. p. Coade, The Times, 10 October 1986
[15] R vs. Leigh (Lord) (1897) 1 QB 132
[16] R vs. Home Secretary ex. p. Herbage [No.2] (1987) QB 1077
[17] R vs. Liverpool City Council ex. p. Secretary of State for Employment (1989) COD 404

performance of public duties by public authorities; The essence of mandamus is that it is a command by the court ordering the performance of a public legal duty.[18] Mandamus is a command issued by a court to an authority directing it to perform a public duty belonging to its office; Mandamus is issued to enforce performance of public duties by authorities of all kinds; Mandamus is available against any public authority including administrative and local bodies." It is further observed that a Mandamus can be issued to any kind of authority in respect of any type of function-administrative, legislative, quasi-judicial, judicial and only when (a) a legal duty is imposed on the authority in question and it does not perform the same; and (b) the petitioner has a legal right to compel performance of this duty.[19]

It is observed that in order to issue a writ of Mandamus, the court must be satisfied of the existence of a public duty owed and an existing legal right in the petitioner to have it performed. Therefore, it will not be available conditionally or for the performance of merely moral duties. The court must take cognisance of the distinction of a duty and a privilege or discretion as a Mandamus exists only where a duty lies. A duty and privilege found in a statue may be distinguished to a large extent by examining the language of the statute.

The Sri Lankan courts in cases such as ***De Alwis vs. De Silva 71 NLR 108; Weligamawa Multi Purpose Co-operative Society Ltd. vs. Daluwatta (1984) 1 Sri L.R. 195; Hakmana Multi-Purpose Co-operative Society Ltd. vs. Ferdinando (1985) 2 Sri L.R. 272; Piyasiri vs. People's Bank (1989) 2 Sri L.R. 47; Sannasgsala vs. University of Kelaniya (1991) 2 Sri L.R. 193*** and ***Samaraweera vs. Minister of Public Administration (2003) 3 Sri L.R. 64*** have established that a writ of Mandamus is issued only if there is a public or statutory duty. Duties arising out of orders or directives, regulations and circulars have however been enforceable by a writ of Mandamus, despite the lack of statutory duty or flavour, so long as it attracts the feature of a public duty and/or a statutory right.

[18] KVR Setty vs. State of Mysore, AIR 1967 SC 993: 1967 (2) LLJ 434: 1967 (2) SCR 70
[19] M.P. Jain & S.N. Jain, '*Principles of Administrative Law',* 9th Edition, Volume 2 (2022, LexisNexis) at p.2441

Contrasting Views

Now, I need to assay the contrasting views taken in those conflicting judgements in granting the prerogative remedy of a mandatory order enforcing the performance of public duties by public authorities. The judgements referred to this Court by both parties of the instant Application for consideration are mainly in the cases of ***(i) Haniffa vs. The Chairman, U.C. Nawalapitiya 66 NLR 48; (ii) Samarasinghe vs. De Mel and another (1982) 1 Sri. L.R. 123; (iii) Abayadeera and 162 others vs. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another (1983) 2 Sri. L.R. 267; (iv) Shums vs. People's Bank and others (1985) 1 Sri. L.R. 197; (v) Kamil Hassan vs. Fairline Garments (International) Ltd. and Two others (1990) 1 Sri. L.R. 394; (vi) Dayaratne vs. Rajitha Senaratne, Minister of Lands and others (2006) 1 Sri. L.R. 7; (vii) Dhilmi Kasunda Malshini Suriyarachchi vs. Sri Lanka Medical Council and others CA/Writ/187/2016 decided on 31.01.2017; (viii) Methodist Trust Association of Ceylon vs. Divisional Director of Education of Galle CA/Writ/192/2015 decided on 08.01.2019; (ix)Wickramamthanthrige Viraj Amanda Wickramasinghe vs. Minister of Education and Others CA/Writ/230/2016 decided on 08.01.2019; (x) Rupahinge Nayanananda Indrakumara vs. Land Reform Commission and others, CA/Writ/271/2013 decided on 15.10.2019***.

The principal position on the need to name natural persons as respondents in an application for the issuance of a writ of Mandamus was propounded in the Supreme Court case ***Haniffa vs. The Chairman, U.C. Nawalapitiya 66 NLR 48*** where Dr. H.W. Tambiah J. (in agreement with Sri Skanda Rajah J.) held that a Mandamus can only be issued against a natural person, who holds a public office and if such person fails to perform a duty after he has been ordered by court, he can be punished for contempt of Court; therefore, the application for a writ of Mandamus against the Chairman of the Urban District Council failed on the basis that the person against whom the writ can be issued was not named.

In ***Samarasinghe vs. De Mel and another (1982) 1 Sri. L.R. 123 (at p.128)*** H. D. Tambiah J. (in Court of Appeal) observed referring to the said ***Haniffa case*** that;

> *".....A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt*

of Court. (See, Haniffa v. The Chairman, U.C. Nawalapitiya, 66 NLR 48). Before this Court issues a Mandamus, it must be satisfied that the respondent will in fact be able to comply with the order and that in the event of non-compliance, the Court is in a position to enforce obedience to its order……"

However, the Court of Appeal took a different view in ***Abayadeera and 162 others vs. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another (1983) 2 Sri. L.R. 267.*** Atukoralle J. (P/CA) in agreement with Tambiah J. and Moonemalle J. held that;

"In our view the proper body to be directed by a Mandamus, assuring that a writ can go, is the University of Colombo and not the respondents to this application. The University of Colombo therefore is a necessary party and ought to have been made a party to these proceedings. The failure to do so is fatal to the petitioners' application."

The Court in the said case has referred to ***Halsbury's 'Laws of England', 4th Edition, Vol. 1, p.111, para. 89***;

"The Order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

In ***Shums vs. People's Bank and others (1985) 1 Sri. L.R. 197 (at p. 204),*** which is one among the other cases referred to us as mentioned above, H. A. G. De Silva J. referring to the decision in ***Haniffa case*** distinguished writs of Certiorari and writs of Mandamus and observed;

"Therefore it would be seen that the remedy by way of writ of Certiorari could not be equated to one of Mandamus as far as the effect on the parties is concerned."

Meantime, in the year 1991, Rule 5 of Part IV of the Court of Appeal (Appellate Procedure) Rules 1990 was published in the Extraordinary Gazette Notification No. 645/4 on 15.01.1991. I believe it is pertinent to take cognizance of the said Rule 5 at this juncture as it deals with applications to which public officers are respondents. Such Rules shall apply to

applications under Articles 140 and 141 of the Constitution under which the Court of Appeal exercises writ jurisdiction including writs of Mandamus. It is important to note that the said Rule 5 was adopted and enacted after the aforesaid cases including the ***Haniffa case***. The Rule 5(1) to 5(7);

5 (1) This rule shall apply to applications under Articles 140 and 141 of the Constitution, in which a public officer has been made a respondent in his official capacity, (whether on account of an act or omission in such official capacity, or to obtain relief against him in such capacity, or otherwise).

5 (2) A public officer may be made a respondent to any such application by reference to his official designation only (and not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name. If a respondent cannot be sufficiently identified in the manner, it shall be sufficient if his name is disclosed in the averments in the petition.

5 (3)No such application shall be dismissed on account of any omission, defect or irregularity in regard to the name designation, description, or address of such respondent, if the Court is satisfied that such respondent has been sufficiently identified and described, and has not been misled or prejudiced by such omission, defect or irregularity. The Court may make such order as it thinks fit in the interests of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any such omission, defect or irregularity.

5 (4) (a) In respect of an act or omission done in official capacity by a public officer who has thereafter ceased to hold such office, such application may be made and proceeded with against his successor, for the time being, in such office, such successor being made a respondent, by reference to his official designation only, in terms of sub-rule (2).

(b) If such an application has been made against a public officer, who has been made a respondent by reference to his official designation (and not by name),

in respect of an act or omission in his official capacity, and such public officer ceases to hold such office, during the pendency of such application, such application may be proceeded with against his successor, for the time being, in such office, without any addition or substitution of respondent afresh, proxy, or the issue of any notice, unless the Court considers such addition substitution, proxy or notice to be necessary in the interests of justice. Such successor will be bound, in his official capacity, by any order made, or direction given, by the Court against, or in respect of, such original respondent.

(c) Where such an application has been made against a public officer, who has been made a respondent by reference to his official designation (and not by name), and such public officer ceases to hold such office after the final determination of such application, but before complying with the order made or direction given therein, his successor, for the time being, in such office will be bound by and shall comply with, such order or direction.

5 (5) The provisions of sub-rules (4) (b) and (4) (c) shall apply to an application under Article 140 or 141, filed before such date as may be specified by the Chief Justice by direction, against a public officer, in respect of an act or omission in his official capacity, even if such public officer is described in the caption both by name and by reference to his official designation.

5 (6) Nothing in this rule shall be construed as imposing any personal liability upon a public officer in respect of the act or omission of any predecessor in office.

5 (7) In this rule, "ceases to hold office" means "dies, or retires or resigns from, or in any other manner ceases to hold, office".

Dayaratne vs. Rajitha Senaratne, Minister of Lands and others (2006) 1 Sri. L.R. 7 has been decided after the publication of the said Gazette Notification No. 645/4 which introduced the said Rule 5. In the said case Marsoof J. (P/CA) (as he then was) distinguishing Rules 5(2) and Rule 5(4)(a) observed that neither Rule 5(4)(b) nor Rule 5(4)(c) would apply to the said case as it was not a case where a public officer is cited as respondent by his official designation

only and has ceased to hold office during the pendency of the case or after the judgement but prior to its execution. However, the application in that case was filed after 31st of December 1991, which is the date specified by the Chief Justice for the purposes of Rule 5(5). On that basis, Marsoof J. decided that Rule 5(5) will not have any application to that case and accordingly, Rule 5(4)(b) too will not have any application. Finally, Marsoof J. dismissed the application upholding the preliminary objections that the petitioners cannot seek a writ of Mandamus directing the respondents to continue the relevant acquisition since the 1st and 2nd respondents do not hold office respectively as Minister of Lands and Minister of Highways.

The Court of Appeal in ***Mohideen and others vs. Director General of Customs, CA/784/1998 decided on 14.12.2011; Kahapolage Kithsiri Palitha Fernando vs. The Registrar General and others, CA/Writ/43/2012 decided on 07.07.2015*** and ***Abdul Carim Mohamed Rizvi vs. The learned Magistrate and others, CA/PC/APN 150/2016 decided on 18.05.2017*** has favoured the position that a Mandamus does not lie against a *nomine officii* and that no Court should make orders which cannot be enforced.

In the year 2016, His Lordship Justice A. H. M. D. Nawaz with the concurrence of His Lordship Justice Vijith Malalgoda PC (P/CA) (as he then was) has taken a progressive approach in ***N. Ekanayake vs. Hon. Attorney General, CA/Writ/58/2012 decided on 25.04.2016.*** The analytical view of His Lordship Justice Nawaz in that judgement can be considered as a recent milestone in the evolution of the principles governing the writ of Mandamus in this country as he has arrived at a conclusion completely disregarding ***Haniffa case*** of the Supreme Court. The Court in that case rejecting the argument of the respondent that Mandamus cannot lie against a public body such as the Sri Lanka Ports Authority, decided:- 'the law seems to have moved away; and today a juristic person, no less than a natural person, can be commanded by Mandamus to carry out its public duty'. His Lordship Justice Nawaz has given much weight to the dicta of ***Abayadeera and 162 others vs. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another***[20] when arriving at his above conclusion and has also observed;

[20] (1983) 2 Sri. L.R. 267

"Darling J's dictum in R v Hanley Revising Barrister[21] is pertinently cited to drive home the point that no shackles should be placed on the issue of this constitutional remedy.[22]

> *"Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case which, by any reasonable construction, it can be made applicable."*

So we reject the argument that mandamus cannot lie against a public body such as the Sri Lanka Ports Authority."

The above modern trend in reference to Mandamus enunciated in the above ***N. Ekanayake vs. Hon. Attorney General*** has been echoed in ***Dhilmi Kasunda Malshini Suriyarachchi vs. Sri Lanka Medical Council and others, CA/Writ/187/2016 decided on 31.01.2017*** in which His Lordship Justice Vijith K. Malalgoda PC. (P/CA) (as he then was) has considered the preliminary objection that a writ of Mandamus does not lie against a juristic person, in light of the above mentioned decisions including ***Haniffa case***. His Lordship Justice Malalgoda held;

"Recently in the case of Ekanayake V. Attorney General and two Others CA Application 58/2012 (CA minute dated 25.04.2016) ***this court re affirm the position taken in the Abeydeera's case referred to above*** *and observed that "the law seems to have moved away. Today a juristic person, no less than a natural person, can be commanded to carry out its public duty" and rejected the argument that Mandamus cannot lie against a public body such as the Sri Lanka Ports Authority.*

When considering the decisions referred to above I see no merit in the said argument raised by the 1st respondent." (Emphasis added)

Further, in the year 2019, another significant departure has been made from the decision in ***Haniffa case*** by His Lordship Justice Mahinda Samayawardhena in ***Methodist Trust Association of Ceylon vs. Divisional Director of Education of Galle and others CA/Writ/192/2015 decided on 08.01.2019***. His Lordship has held that it is a myth that Mandamus can only be

[21] (1912) 3 KB 518 at 529
[22] See Administrative Law, Eleventh Edition, Wade & Forsyth p522

issued against natural persons; Mandamus, like any other prerogative writ, can be issued against natural, juristic or non-juristic persons including tribunals, corporations, public bodies, public officials identified by their official designations provided the other requirements to issue Mandamus are fulfilled.

His Lordship Justice Samayawardhena has categorically decided that the only exception to Rule 5 is Rule 5(5) which is applicable only in respect of applications filed before 31.12.1991. He has further held that the reference to ***Haniffa's case*** by Marsoof J. in ***Dayaratne v. Rajitha Senaratne***[23] is clearly obiter dicta; thus, the judgment of Marsoof J. is not an authority to say that writ of Mandamus is an exception to Rule 5. The Court in that case further held;

> "*Is the judgement in Haniffa's case a well-considered Judgement? This is a nagging question for me…….The observation in Haniffa's case that "If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court" presupposes the position that if mandamus is issued against a juristic person as opposed to a natural person, in case of a violation, the juristic person cannot be dealt with for contempt of Court. This is not correct. When a writ of mandamus is issued against a juristic person the parties who must obey it are those in control of the affairs of the juristic person, and in case of a violation, they can be dealt with for contempt.*

His Lordship Justice Samayawardhena even in ***Wickramamthanthrige Viraj Amanda Wickramasinghe vs. Minister of Education and Others CA/Writ/230/2016 decided on 08.01.2019,*** after considering the preliminary objection that the 1st to 3rd respondents against whom Mandamus has been sought are not natural persons in order to avail the issuance of a writ of Mandamus, has concluded pronouncing that such objection is baseless as the Court of Appeal (Appellate Procedure) Rules 1990 *"speak of the exact antithesis, i.e., the Rules say that the petitioner need not specify and identify the respondents by names.".*

The Court of Appeal when pronouncing the judgement in the same year 2019 in ***Rupahinge Nayanananda Indrakumara vs. Land Reform Commission and others, CA/Writ/271/2013 decided on 15.10.2019*** has not taken into consideration the dicta of the above judgements of

[23] (2006) 1 Sri. L.R. 7

His Lordship Justice Samayawardhena. The court in the said case deciding that all persons who would be affected by the issue of Mandamus shall be made respondents to the application, has favoured the proposition that a writ of Mandamus could only be issued against a natural person who holds public office. For completeness, I must mention here the case of ***Jayantha Liyanage vs. Commissioner of Elections, SC Appeal/96/2011 decided on 17.12.2014*** also. Although the Supreme Court in the said case has not dealt with the question whether a Mandamus can be issued only against a natural person, the Court has not shown any reluctance to issue a writ of Mandamus against the Commissioner of Elections, who was the respondent (to recognize the Sinhala Jathika Peramuna (SJP) as a political party and to assign an appropriate symbol to such party).

Evolution

Now, I advert to assay the experience in other jurisdictions including such as England relevant to the above questions. It appears that there is a considerable evolution in the concept of Mandamus that has taken place over the last few centuries.

It is important to note that Prof. Christopher Forsyth in '***Administrative Law' by the late Sir William Wade and Christopher Forsyth, 11th Edition, Oxford*** explaining the modern statutory duties in reference to mandatory orders has referred to the famous case of ***R vs. Poplar Borough Council ex. p. London County Council [No. 1] (1922) 1 KB 72*** which dealt with a matter similar to the present question in the instant Application. In the said case when the Borough Council of Poplar refused to pay their statutory contributions to the London County Council for rates, the London County Council obtained a Mandamus ordering the proper payments to be made and when they were not made, the County Council obtained writs of attachment for the imprisonment of the disobedient councillors (See also-[No. 2] (1922) 1 KB 95[24]).

'Where parliament has imposed a duty on particular persons acting in some particular capacity, a mandatory order will issue not withstanding that those persons are servants of the Crown and acting on the Crown's behalf. This is because the legal duty is cast upon them personally, and no orders given to them by the Crown will be any defence. If therefore the act

[24] R vs. Poplar Borough Council ex. p. London County Council

requires 'the Minister' to do something, a mandatory order will lie to compel the minister to act.' (***Padfield vs. Minister of Agriculture, Fisheries and Food (1968) AC 997; R vs. Home Secretary ex. p. Phansopkar (1976) QB 606***). Similarly, a mandatory order was granted against the Special Commissioners of Income Tax, acting as servants of the Crown, commanding them to authorize repayment to a tax payer. (***R vs. Special Commissioners of Income Tax (1888) 21 QBD 313***)'. (vide-***'Administrative Law' by the late Sir William Wade and Christopher Forsyth, 11th Edition, Oxford, p.530)***

The above ***Poplar Borough Council case*** prescribed that disobedience to a mandatory order is punishable as a contempt of court by fine or imprisonment. In the case of a corporation, which cannot be imprisoned, the members responsible should be named in the writs of attachment; but in the ***Poplar case*** this requirement was held to be waived by the members who appeared and persisted in disobedience. Whereas in ***Kamil Hassan vs. Fairline Garments (International) Ltd and Two others (1990) 1 Sri L.R. 394 (at 405)*** it was held;

> *"…In the case of disobedience to injunctions and undertakings given to court - "coercive" orders - there is strict liability. But in the case of other orders, non-compliance with the judgment of a Court would not ordinarily be a contempt of Court Ismail v. Ismail (1). In the latter case, (a) where the law provides for execution contempt proceedings should not be resorted to as a means of obtaining execution, and (b) even where there is no provision for execution, contempt proceedings cannot be used as "a legal thumbscrew" to compel enforcement, and mere disobedience would not be contempt, unless there is defiance of the court, or contumacious disregard of its order…"*

In ***Guruswamy vs. State of Mysore, AIR 1954 SC 592: 1955 (1) SCR 305***, the Supreme Court of India decided that the Mandamus is a command issued to direct any person, corporation, inferior court or government requiring him or it to do some particular thing therein specified which appertains to his or its office and is in the nature of a public duty.[25] ***Birendra Kumar vs.***

[25] Also see-State of Mysore vs. Chandrasekhara, AIR 1965 SC 533; S. I. Syndicate vs. UOI, AIR 1975 SC 460: (1974) 2 SC 460: (1974) 2 SCC 630; Bihar Eastern Gangetic Fishermen Co-operative Society vs. Sipahi Singh, AIR 1977 SC 2149: (1977) 4 SCC 145; Chet Ram vs. Delhi Municipality, AIR 1981 SC 653: (1980) 4 SCC 647; Samir Kumar vs. State, AIR 1982 Pat 66; Comptroller & Auditor General vs. K. S. Jagannathan, AIR 1987 SC 537: (1986) 2 SCC 679.

UOI, AIR 1983 Cal 273 is a case where the High Court (in India) directed the telephone authorities to restore the connection within a week when the telephone of the applicant was wrongfully disconnected in spite of him paying his dues regularly.

By perusing the above legal literature and the judgements on the evolution of Mandamus, to my mind, the tool of Mandamus has been used many a time not only against the individual public servants but at certain instances even against the local government institutions such as county councils/borough councils. Hence, a reasonable question arises in my mind on what grounds our Courts, such as in ***Haniffa's case***, have attempted to limit the expansion of this prerogative remedy completely overlooking the systematic progress in the relevant field of law and the environment which prevailed at the birth of Mandamus. The scope of remedy in administrative law has been expanded with a considerable degree of judicial activism for the last three decades. At a time where the judges take a liberalized or progressive stand in their judicial creativity to control public power, I possibly cannot understand why we still need to cling to primitive principles on Mandamus whereas the English courts themselves have already broken the traditional parameters and taken drastic measures to use Mandamus as a powerful tool to issue orders in the mandatory nature against juristic persons such as local government institutions. The Administrative Court Judicial Review Guide 2022 in England[26] specifically provides in its Clause 12.2.1 that a mandatory order is an order the Court can make to compel a public body to act in a particular way.

It is essential to bear in mind the socio-political factors in the country to a certain extent when judges exercise their jurisdiction in order to review the public power. The removal from a post, dismissal and transfers are in the hands of administration or sometimes it's a prerogative of the executive subject to limitations. It cannot be assumed that holding a high post for a long period would be available all the time in public service as well as at semi-governmental institutions. Such premise should not be a hindrance for an individual to recourse to the remedy under Mandamus when he or she seeks to get the public duties executed. I am attracted to the words of His Lordship Justice Samayawardhena in ***Methodist Trust Case*** where he has addressed exactly the same point;

[26] which applies to cases heard in the Administrative Court wherever it is sitting and in the Administrative Court Offices ("ACOs") across England and Wales.

"When mandamus is sought, public officers are made respondents by their names and designations for otherwise their applications are destined to be dismissed in limine on the Judgment of Haniffa's case. Quite often, holders of the public office are changed, and whenever there is such a change, substitution is made and caption is changed adding the successor in office by his name, and notice is then issued upon the successor. This is a never-ending process until the Judgment is delivered. If the holder of the public office is changed even after the delivery of the Judgment but before giving effect to it, still the successor needs to be substituted as the former has been cited by name."

The foundation of judicial review in Sri Lanka is constitutional, as such looking at the exercising of judicial review jurisdiction in the constitutional perspective cannot be considered outdated. Adherence to the conventional views in respect of the parameters of judicial review has restrained the judges from taking expected measures to protect citizens' rights. No proper codification of accepted parameters for the purpose of exercising the jurisdiction in respect of judicial review is available in Sri Lanka[27]. Jan-Erik Lane has observed in ***'Constitutions and political theory', Manchester University Press, p. 41;***

"Old constitutionalism used to be the political theory that attempted to constrain State power and authority by means of special institutions, formulated in a so-called fundamental law. The development of constitutionalism over time has already been portrayed, but a new interpretation of constitutionalism would have to focus upon institutions that decentralize political power and authority in various ways as well as protect citizen rights."

Conclusion

In light of the above, our Courts in some cases have correctly deviated from the dicta in ***Haniffa case***. Based on the reasons adduced above, I am inclined to follow the judicial precedent enunciated in the above cases of ***N. Ekanayake vs. Hon. Attorney General, Dhilmi Kasunda Malshini Suriyarachchi vs. Sri Lanka Medical Council and others, Methodist Trust***

[27] Statutes such as Crown Proceedings Act 1947, Common Law Procedure Act 1852 and Senior Courts Act 1981 (earlier known as the Supreme Court Act 1981) on various aspects are seen in England.

Association of Ceylon vs. Divisional Director of Education of Galle and others, Wickramamthanthrige Viraj Amanda Wickramasinghe vs. Minister of Education and Others and ***Abayadeera and 162 others vs. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another*** in order to arrive at the final conclusion of the instant Application. I take the view that there is no bounden duty to follow the misconstrued principle that a writ of Mandamus can only be issued against natural persons.

As I have observed earlier, it is not practical in the present day context to expect a litigant to always be aware of the frequent changes in respective public office. Anyhow, the Court of Appeal (Appellate Procedure) Rules 1990 have clearly identified the notion that a public officer may be made a respondent to any such application by reference to his official designation only (and not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name.

On a careful consideration of the above legal antecedents together with the relevant jurisprudence and for the reasons set out above, I have come to the conclusion that it is not essential to name a respondent in person in an application seeking orders in the nature of a writ of Mandamus and it can even be issued against juristic persons/public bodies such as corporations, tribunals, local government institutions or against any person holding a post of a public nature[28] and who has been sufficiently made a respondent in his official capacity or by reference to his official designation. The above conclusion is always subject to the other established requirements that should be fulfilled by a petitioner when seeking for a writ of Mandamus. Similarly, when such respondent has been named in person in an application for writs of Mandamus, the substitution should be allowed when he or she ceases to hold office.

However, the prerogative nature of issuing writs should not be undermined at any cost and thus, the Review Court should be able to deviate to a certain extent from the above conclusions as it thinks fit in the interest of justice. This is merely because the far reaching principle of the Rule 5 of Part IV of the Court of Appeal (Appellate Procedure) Rules 1990 is

[28] Similarly, it is observed that the term 'public officer' is defined in the Constitution as well as in the said Rule 5(8) of the Court of Appeal (Appellate Procedure) Rules 1990 for the purpose of such Rules.

that the Court should satisfy that such respondent has been sufficiently identified & described and has not been misled or prejudiced any party. Hence, the Review Court should have the sole discretion to decide, upon satisfaction, that such respondent who is a natural person or a juristic person or otherwise, has been sufficiently identified and described for the purpose of making a mandatory order which can be enforced. This emphasized the fact that such discretion of the Review Court should exist even in an application for substitution of parties in applications for Mandamus.

In the case of disobedience to a Mandatory order of the Review Court, the law in the said area should certainly be guided by the decision of His Lordship Justice Samayawardhena in the said ***Methodist Trust case*** where His Lordship has underscored the notion that when a writ of mandamus is issued against a juristic person, the parties who must obey it are those in control of the affairs of the juristic person, and in case of a violation, they can be dealt with for contempt.

Substantive reliefs

Having considered the above questions specifically referred to this Divisional Bench, now, I need to examine the substantive reliefs sought by the Petitioners of the instant Application. The Petitioners' primary relief is for an order in the nature of a writ of Mandamus directing the 1st to 12th Respondents to promote the Petitioners to Class 2 Grade 1 of the Sri Lanka Teacher Educators' Service ('SLTES') with effect from 01.01.2005. It is observed that the 1st to 12th Respondents were the members of the Education Service Committee of the Public Service Commission ('PSC').

The Petitioners have submitted applications to the post of Class II Grade 1 of SLTES, in view of the advertisement published in the Gazette Notification marked 'E'. The Petitioners state that they were not promoted on the premise that the prescribed date referred to in the 'Note' in the Clause 15 of the Service Minute, marked 'D' and as the Petitioners have not completed the age of 45 years by 01.01.1995; the Petitioners cannot be exempted from the said qualifications required under its Clause 15(i). The Petitioners further contend that they became aware that four officers who are similarity circumstanced to the Petitioners have been

promoted to the said post consequent to an order made by Administrative Appeals Tribunal ('AAT'). It is specifically noted that the Petitioners have not lodged an appeal to the AAT.

The Petitioners' main complaint is that the PSC and the Education Service Committee of the PSC have failed to grant the said promotions to the Petitioners and such failure amounts to a refusal to promote the Petitioners. In view of my above conclusions on the questions raised upon writ of Mandamus, the Petitioners will be entitled for substitution of Respondents afresh. Even such substitution is effected, the current members of the PSC will be the 1st to 12th Respondents.

Anyhow, as per the learned ASG, the grievance of the 52 Petitioners is based on the purported failure on the part of the PSC or the Education Service Committee of the PSC and as such he raises the preliminary objection that the Petitioners cannot maintain the instant Application by virtue of the provisions of Article 61A of the Constitution[29].

Article 61A;

> Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

It is reflected in the advertisement ('E') upon which the Petitioners have submitted their applications for the said promotion that the selection process is based on the results of a structured interview conducted by a panel approved by the PSC and according to a Scheme of Recruitment approved by the PSC. It appears that if this Court commence relevant examination to consider the reliefs prayed for by the Petitioners, this Court certainly will have to inquire into or call-in question orders or decisions made by the PSC or by the Education Service Committee of the PSC. The restrictions contained in the Article 61A are ouster clauses

[29] 1978 Constitution of the Republic of Sri Lanka.

stipulated in the Constitution itself and the powers of this Court will be restricted by those provisions.

As discussed by Shiranee Tilakawardane J. (P/CA) (as she then was) in ***Katugampola vs. Commissioner General of Excise and others (2003) 3 Sri. L.R. 207,*** the Writ jurisdiction could be sought under circumstances where the person who made the impugned decision did not have any legal authority to make such a decision. However, in the instant Application no claim has been made that the person who made the impugned decisions had no legal authority to make such decisions. The learned ASG has drawn the attention of this Court that the PSC has delegated its powers relating to the SLTES to an Education Service Committee by a delegation published in Extraordinary Gazette No. 1989/29 dated 19.10.2016.

In the circumstances, the Petitioners are not entitled to maintain the instant Application in this Court based on the above jurisdictional question raised by the learned ASG. Hence, I proceed to refuse this application in view of the constitutional ouster stipulated in the Article 61A of the Constitution, however, without any hinderance to the legal regime upheld in this judgement in respect of issuing writs of Mandamus.

Application is dismissed.

Judge of the Court of Appeal

M. T. Mohammed Laffar J.
I agree.

Judge of the Court of Appeal

Mayadunne Corea J.
I agree.

Judge of the Court of Appeal