

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

In the matter of an application for mandates in the nature of Writs of certiorari and mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Fasmila Raviraj,
NILET,
Galewahtha, Agalawathth.

PETITIONER

CA No. CA/Writ/0218/2019

v.

1. National Institute of Language Education and Training,
No.321/1, Makubura,
Pannipitiya.
2. Prasath R. Herath,
Director Gernal,
National Institute of Language Education and Training,
No.321/1, Makubura,
Pannipitiya.
3. T. M. K. B. Thennakoon,
Chairman.
- 3A. Mr. Jayampathy Bandara Heenkende
Chairman,

National Institute of Language Education
and Training,
No.321/1, Makubura,
Pannipitiya.

4. M. Y. S. Deshapriya.

4A. A. S. M. S. Mahanama
Secretary.

4B. J. J. Rathnasiri
Secretary.

4C. M.M.P.K Mayadenne
Secretary,
Ministry of Public Administration, Home
Affairs, Provincial Council and Local
Government,
Independence Square,
Colombo 00700.

5. N. W. W. W. R. P. Wickramasinghe,
No. 231/2B, Pragathi Mawatha,
Katuwana Road, Homagama.

6. Sanjeewani Weerasekara,
Director,
Ministry of Public Administration and
Management
Colombo 00700.

7. R. Karunasiri
Director,
National Languages and Humanitarian
Studies Branch,
2nd Floor, Education Ministry,
Isurupaya, Battaramulla.

8. Dr. S. Sridharan,
Ministry of Health,

No. 385, Ven Baddegama Wimalawansa
Thero Mawatha,
Colombo 01000.

9. W. A. D. Chandrika Rupasinghe.
Additional Secretary.

9A. R. Waijayalakshmi
Additional Secretary,
Language Division,
Ministry of Government Services,
Local Government and Provincial Council,
Colombo 00700.

9B. Mr. Anuradha Wijekon,
Additional Secretary,
Ministry of Public Administration,
Home Affairs. Provincial Council and
Local Government.
Independence Square.
Independence Ave,
Colombo 00700.

10. P. Hemachandra,
Organizing and Methods,
21st Floor,
Main Office,
Bank of Ceylon,
Colombo 00100.

11. K. Nagularaja,
Ramanadan Hindu Girl's College,
Lawrence Road,
Colombo 00400.

12. S. G. M. A. P. Senarathne,
Accountant,
Public Finance Department,
National Treasury.

13. Dr. S. J. Yogaraja.
Linguistic Department,
University of Kelaniya.

14. Hon. Attorney General,
Attorney General's Department,
Colombo 01200.

RESPONDENTS

BEFORE : M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL : Nuwan Bopage with R. I. Sheriff for the
Petitioner.

M. C. Jayaratne, P.C. with M. D. J.
Bandara for the 1st, 2nd, 3A, 6th, 7th, 8th,
10th, 11th, 12th, and 13th Respondents.

Lakshman Jeyakumar for the 5th
Respondent.

R. Gooneratne, S.C. for the 4C
Respondent.

ARGUED ON : 15.03.2023

DECIDED ON : 08.06.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings against the 1st to 14th Respondents seeking *inter-alia*, a writ of *certiorari* quashing the decisions contained in the documents marked 'P 10', 'P 11', 'P 22', and 'P 23', a writ of *mandamus* compelling the 1st to 13th Respondents to appoint the Petitioner to the post of Director of National Institute of Language Education and Training

(hereinafter referred to as ‘NILET’) and a writ of prohibition preventing 1st to 13th Respondents from amending and/or changing the qualifications contained in the advertisement marked as ‘P 3’, acting upon the decisions contained in the documents marked ‘P 22’ and ‘P 23’.

The 5th Respondent tendered objections against the Petitioner’s applications *inter-alia* seeking to reject and dismiss the Petition.

The 1st to 3rd, 6th to 8th, and 10th to 13th Respondents filed their limited objections against the interim relief sought by the Petitioner and at the stage of filing objections informed Court that no further objections will be filed. Therefore, the limited objections filed by the 1st to 3rd, 6th to 8th and 10th to 13th Respondents have to be considered as their objections in which the above Respondents sought dismissal of the Petitioner’s application.

5th Respondent also relied on the limited objections filed on the 31st July 2019¹.

‘4 C’ Respondent filed his objections seeking the dismissal of Petitioner’s application.

The Petitioner filed a counter affidavit answering the several averments contained in the objections and seeking to reject the Respondent’s objections. Upon the closure of pleadings, the matter is fixed for argument and the learned Counsel for the Petitioner, the 1st Respondent, the 5th Respondent and the learned State Counsel for the 9 B and 14th Respondents made their submissions.

Factual background

The Petitioner is an Academic and Research Officer at NILET. The 2nd Respondent, the Director General of NILET, published the newspaper notification ‘P 3’ calling for applications for the two vacant Director positions in the 1st Responding institution, NILET.

The required qualifications for the external candidates are;

- i. A bachelor’s degree with a second class in the field of Education, or in the subjects of Sinhalese/Tamil/English or Public Administration/ Finance/ Business Administration/ Management/ Education Administration or Law, together with a two-year Post Graduate degree

¹ 5th Respondent’s motion dated 24th November 2022.

in any one of the above subject fields obtained from a university recognised by the University Grants Commission.

- ii. Minimum twelve years of experience at the management level in the public sector or in a semi-government organization, after obtaining the bachelor's degree, out of which a minimum of three years should be after obtaining the postgraduate degree. High-level competence in the second language, in the English language, and experience in Information Technology, is considered additional qualifications.

The qualifications for the internal candidates are the fulfilment of the aforementioned qualifications for the external candidates or five years of satisfactory service as a grade I Assistant Director in the category of management level in the institute or eight years of satisfactory service as a grade I officer in the category of academic and research service category. The Petitioner and the 5th Respondent both applied for the post of Director at NILET as internal candidates. Following an interview, the 5th Respondent was selected for the post of Director. The Petitioner initiated this writ application challenging the appointment of the 5th Respondent.

Analysis

The Petitioner submitted that she has '*sufficiently*' fulfilled the qualifications referred to in the paper notice marked 'P 3' and alleged that the 5th Respondent who was selected to the post of Director has not fulfilled the qualifications referred to in 'P 3'. Accordingly, the Petitioner contended that the 1st Respondent's refusal and/or rejection to appoint the Petitioner to the post of Director is illegal, unlawful, arbitrary, unreasonable, and a breach of legal duty. However, the 1st, 2nd, 3rd, 6th, 7th, 8th, 10th, 11th, 12th, 13th Respondents, and the 5th Respondent challenged the position of the Petitioner that she has fulfilled the qualifications referred to in 'P 3'. The Petitioner submitted her application for the post of Director, as an internal candidate, while serving at NILET in the capacity of an Academic and Research Officer, since 2016. Upon consideration of the Petition and the Counter affidavit of the Petitioner, especially, in view of the qualifications stated in paragraph 5 of the Petition, it is obvious that the Petitioner has submitted her application for the post of Director as an internal candidate who has fulfilled the qualifications required for external candidates. According to the Petitioner's own document 'P 1', the effective date of her bachelor's degree is 1st August 2007. According to 'P 2',

the Petitioner obtained her postgraduate degree on 26th August 2014. Consequently, as of the effective date of notice 'P 3', 23rd June 2017, the Petitioner did not have the required twelve years of experience at the management level in the public sector or in a semi-government organization from the date of obtaining the bachelor's degree and also the required three years of experience from the date of obtaining the postgraduate degree.

Nevertheless, the Petitioner's contention is that she was the most qualified candidate for the advertised position. She alleged that yet, the 1st Respondent selected the 5th Respondent who has lesser qualifications than the Petitioner and who did not fulfil the qualifications referred to in 'P 3'. Another argument of the Petitioner is that the 5th Respondent's bachelor's degree in Bachelor of Science (Estate Management and Valuation) as well as the postgraduate degree of the same category is not a degree that falls under the category of degrees specified in 'P 3'. The Petitioner submitted that even on a previous occasion, the 5th Respondent applied for the same post and he was not selected, among other grounds, on the ground that his bachelor's degree and the postgraduate degree both do not fall within the specified degrees. According to 'P 6', which is also marked as '5 R 1' by the 5th Respondent, 5th Respondent's degree is a Bachelor of Science (Estate Management and Valuation). The 5th Respondent stated that his degree falls within the category of '*management*' in 'P 3'. The 5th Respondent submitted the letter marked '5 R 2' and contended that the degree in Bachelor of Science (Estate Management and Valuation) is a degree offered by the Faculty of Management Studies and Commerce of the University of the Sri Jayawardhanapura and it is a degree in management.

The document submitted by the Petitioner herself, marked 'P 1' indicates that the scope of study of the degree of Bachelor of Science (Estate Management and Valuation) includes subjects such as financial management, human resource management, management process etc. Therefore, it is clear that the above degree is not confined to studies on estate management. Furthermore, in 'P 3' the degree in *management* is clearly separated from other degrees that are also separated from each other. Therefore, it is clear that any degree in *management* would fulfil the required qualification.

The Petitioner stated that the 5th Respondent has only an ordinary pass in the Bachelor of Science degree. The Petitioner submitted the 5th Respondent's degree certificate as 'P 5'. According to 'P 5', the 5th Respondent has only an ordinary pass. As it was correctly submitted by the Petitioner, 'P 3' requires a

bachelor's degree with a second class. It is an admitted fact that the 5th Respondent has only an ordinary pass in his bachelor's degree. At the argument, the learned Counsel for the 5th Respondent, while admitting that the 5th Respondent does not possess a bachelor's degree with a second class, submitted that the 5th Respondent has a postgraduate degree. But this does not fulfil the requirements under 'P 3'. This does not fulfil the requirement of having 12 years of experience after obtaining the bachelor's degree, under 'P 3'.

The 5th Respondent obtained his bachelor's degree on the 25th March 2003 ('P 5') and the postgraduate degree on the 10th October 2011 ('P 6'). According to the 5th Respondent, he was the Assistant Director (Administration) for a period of four years prior to his appointment as a Director. Other than this he has not stated that he possesses experience at the management level. According to 'P18' he was the Assistant Director of NILET from 2013, for four years. Accordingly, it appears that the 5th Respondent does not have twelve years of experience from the date of obtaining his bachelor's degree. However, according to 'P18', 5th Respondent served as an Assistant Land Officer at the Urban Development Authority from 1st July 2005 to 2nd February 2013 ('P 7' and 'R5'), until he joined NILET. The 5th Respondent submitted that the said post is a third management level post. Accordingly, it was submitted that the Petitioner possesses the required twelve years of experience. The Petitioner submitted document 'P 8' in support of his contention that the above post is at the management level. However, 'P 8' is issued on the 25th April 2016 and it is only a little over a year to the date of closing of the applications called under 'P 3'. Therefore, anyway, the Petitioner cannot rely on 'P 8' to claim that his previous post of Assistant Land Officer fulfils the condition of the required twelve years of experience. Therefore, the observation made by the Secretary to the Ministry of National Integration, Reconciliation and Official Languages in a letter marked 'P 18', under Clause 2 (iv), to the effect that the Petitioner has over twelve years of experience in the management level in terms of Circular No. 2/2016 is erroneous. Most importantly, the 5th Respondent completes twelve years of service starting on 1st July 2005 only on the 1st July 2017. The closing date for applications for the position of Director of NILET was 23rd June 2017, less than twelve years from 1st July 2005.

On the other hand, according to the observations made by The Parliamentary Commissioner for Administration (Ombudsman) in the document marked

‘P20’, at the inquiry held on the complaint made by the Petitioner (‘P 19’), the Petitioner herself has admitted that she does not possess the required twelve years of experience. The Ombudsman also observed that the 5th Respondent also does not possess the required 12 years of experience at the management level. Thereafter, the Secretary to the Ministry of National Integration, Reconciliation and Official Languages informed the decision of the Ombudsman to the Chairman of the NILET by the latter marked ‘P 21’ and requested to discuss the matter at the next management committee meeting. However, according to the document marked ‘P 22’, the management committee has decided to change the required qualifications of having a second-class degree into an ordinary pass. Subsequently, the Ombudsman has written to the Minister of National Integration Reconciliation and Official Languages, informing the aforementioned findings of the Ombudsman (‘P24’).

*Ariyawansa and others v. The People’s Bank and others*² is a case where some of the Petitioners were recruited to the Respondent bank in 1990 and the others in 1994. After a training they were appointed to grade 3-II in 1999 March and December. Thereafter an examination was held by the bank and the 1st to 3rd Petitioners who pass the examination were promoted to grade 3-I in the year 2000. The other Petitioners were awaiting the next examination. In 2002 another batch was recruited and while they were undergoing their training, the Respondent bank abruptly change the criteria set out in a circular and decided to place the batch of 2002 in grade 3-I. In the fundamental rights application made to the Supreme Court by the Petitioners, the Supreme Court held that the change of procedure of appointment and the scheme in a circular is prejudicial to the Petitioners and was arbitrary and unjustified, though in principle the bank may alter the scheme of recruitment. The Supreme Court was of the view that this amounts to a violation of fundamental rights of the Petitioners under Article 12 (1) of the Constitution.

*Samarasinghe v. National Servings Bank*³ is a case where the facts are as follows. The Respondent bank called for applications for the post of Chief Legal Officer. The candidate who was placed 1st declined the post. Then the post was advertised again. There again, the candidate who was placed 1st declined the appointment. On both these occasions the Petitioner was placed 2nd in the merit order. But, the Board of the Respondent bank did not appoint

² [2006]2 S. L. R. 145.

³ [1999]2 S. L. R. 287.

the Petitioner. The bank decided to appoint the most Senior Legal Officer who did not apply to the post and also did not possess the basic qualifications. The Supreme Court held that the decision of the Board to deviate from the previous scheme of recruitment was ad hoc, arbitrary, and bad in law.

Another argument advanced by the 5th, 4C, and 1st to 3rd, 6th to 8th, and 10th to 13th Respondents is that the Petitioner misrepresented and/or suppressed facts stated in the objections and this should result in the dismissal of Petitioner's application. According to the 5th Respondent, the statement in the Petition that the Petitioner has '*sufficiently, fulfilled qualifications referred to in the notice marked 'P 3'*' is a misrepresentation since she has not fulfilled the necessary qualification as of the relevant date. As I have already stated above in this judgment, the Petitioner has admitted that she does not possess the required experience at the management level. However, all that she has submitted to the Court is that she is more suitable than the 5th Respondent who had been appointed to the post of Director.

Another fact that the 5th Respondent alleged that was misrepresented by the Petitioner is that the 5th Respondent's bachelor's degree and the postgraduate degree do not fall within the degrees specified in 'P 3'. I have analysed this fact above in this judgment and already held that the 5th Respondent's degree falls within the degrees specified in 'P 3'. Be that as it may, the Petitioner's interpretation of the degree possessed by the 5th Respondent cannot be considered baseless when the category of the degree is considered. On the face of it, it is a degree of Bachelor of Science (Estate Management and Valuation). This Court arrived at the conclusion that it comes under the category of *management*, based on the supporting documents tendered by the 5th Respondent which would not have been available to the Petitioner. Therefore, I am not inclined to accept that the above is a misrepresentation of facts. Further, the 5th Respondent submitted that the Petitioner suppressed the fact that the 1st Respondent had called for applications for the post of Director on subsequent occasions and the 5th Respondent verily believes that on all three occasions, the Petitioner applied for the post and was not selected. The Petitioner admitted that she applied for the post on subsequent occasions, but stated that she was not called for the interviews.⁴ In my view, the subsequent calling for applications for the same post is irrelevant to the case at hand and the 5th Respondent's statement that the Petitioner had not been selected on

⁴ Paragraph 20 of the Counter affidavit.

those occasions is also not well founded. Therefore, I am not inclined to accept the position of the 5th Respondent.

In the case of *Shell Gas Lanka Limited v. Consumer Affairs Authority*⁵ it was observed that ‘*the suppression of facts has to be material to the determination of the application.*’

Another argument advanced by the 5th, 4C and 1st to 3rd, 6th to 8th, and 10th to 13th Respondents was that the Petitioner is guilty of *laches*.

The 5th Respondent had been appointed to the post of Director with effect from 1st of November 2017⁶ and the Petitioner has made this application one year and seven months later. Therefore, at the first glance one would see that there is an inordinate delay in making this application.

Nevertheless, it appears from the record that the Petitioner has first appealed to the chairman of NILET on two occasions (‘P 12’ and ‘P 13’). Thereafter, exercising her statutory rights has made complaints to the Human Rights Commission⁷ and also to the Ombudsman⁸.

Therefore, in my view, the Petitioner has exercised her alternative remedies before invoking writ jurisdiction of this Court which has caused an inevitable delay.

It was observed by Wanasundara J., in the case of *V. Ramasamy v. Ceylon Mortgage Bank*⁹ (S.C.),

‘....., it is my view that when we are dealing with a matter concerning the extent of the powers and jurisdiction, which is reposed in us, to be exercised for the public good, we should hesitate to fetter ourselves with arbitrary rules, unless such a course of action is absolutely necessary. The principles of *laches* must, in my view, be applied carefully and discriminatingly and not automatically and as a mere mechanical device.....’

Further in the case of *Lulu Balakumar v. Balasingham Balakumar*¹⁰ (S.C.), it was observed that,

⁵ [2008]1 S. L. R. 128.

⁶ (‘P 11’).

⁷ ‘P 14’.

⁸ ‘P 15’.

⁹ 78 N.L.R. 510 at p.517.

¹⁰ 1997 [B.L.R.] 22 and 23.

‘.....mere delay does not automatically amount to laches and that the circumstances of the particular case, the reasons for the delay, and impact of the delay on the other party, must be taken into account.

Further it was observed that,

‘In any event, the question of laches cannot be determined only by considering how (...) how long a period of time, has elapsed. The circumstances are relevant.’

In the case of *Biso Menike v. Cyril de Alwis*¹¹ (S.C.) it was observed that;

‘.....When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically.....’

Hence, the aforementioned judicial precedence clearly set out that mere delay does not amount to *laches* and depend on the facts of each case. In view of the facts stated above, I am of the view that the Petitioner has explained the delay satisfactorily and therefore, is not guilty of *laches*.

Conclusion

In light of the above analysis of facts I hold that the 5th Respondent did not possess the required qualifications for the appointment as a Director at NILET. Therefore, the decision contained in the documents ‘P 10’ and ‘P 11’ are *ultra-vires*.

Further, as it is reflected in the documents marked ‘P 22’ and ‘P 23’, the decision to amend the recruitment criteria for the post of Director after the newspaper publication calling for applications, holding an interview and the 5th Respondent being appointed to the post of the Director is in my view arbitrary and unjustified.

The Petitioner has also sought a writ of *mandamus* compelling the 1st to 13th Respondents to appoint the Petitioner to the post of the Director of NILET.

¹¹ [1982] 1 S. L. R. 368.

However, in view of the above analysis, even the Petitioner did not possess the required qualifications at the time she applied to the post of Director at the NILET.

Accordingly, I issue writs of *certiorari* prayed for in paragraphs ‘B’ and ‘C’ of the prayer of the Petition quashing the decisions contained in documents marked ‘P 10’, ‘P 11’, ‘P 22’ and ‘P 23’.

Further, the writ of prohibition prayed for in paragraph ‘E’ of the prayer of the Petition preventing the 1st to 13th Respondents from amending and/or changing the qualifications contained in the advertisement marked as ‘P 3’, acting upon the decisions contained in the documents ‘P 22’ and ‘P 23’.

I refuse to issue a mandate in the nature of writ of *mandamus* prayed for in paragraph ‘D’ of the prayer of the Petition compelling the 1st to 13th Respondents to appoint the Petitioner to the post of Director of NILET.

Parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL