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, Quo Warranto and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Nigamuni Piyuji Rasanja Mendis
Supipi, Ginigalgoda Road,
Pathegama, Balapitiya.

CA/WRIT/90/2021

(together with CA/WRIT/101/2021)

PETITIONER

Vs.

1. University of Kelaniya
2. Prof. N.R. De Silva
   Vice-Chancellor
3. Prof. J.M.D. Ariyarathnam
4. Dr. P.G. Wijayarathna
5. Dr. P.N.D. Fernando
6. Prof. M.M. Gunathilaka
7. Prof. S.R.D. Kalingamudali
8. Mr. U.S. Senarath
9. Prof. S.J. de S. Hewavisenthi

10. Mr. R. Shri Dharshana Abeygoonawardana
11. Prof. H. Abeygunawardena
12. Prof. Ranjith Arthanayake
13. Mr. Sanjaya Bandara
14. Mr. S.M. Gotabaya Jayarathne
15. Prof. Ananda Patabandige
16. Prof. Nimal Perera
17. Prof. Rohan Rajapakse
18. Mr. L. E. Susantha Silva
19. Mr. Cyril Suduwella
20. Mr. Upali Wijayaweera
21. Ven. (Prof.) Induragare Dhammarathana Thero
22. Prof. P.M.C. Thilakeratne
23. D.M.Semasinghe
    Former Vice Chancellor
24. Prof. A.H.M.H. Abeyrathna
    Former Dean of the Faculty of Social Sciences
25. Dr. R.T.W.K.O. Nayanapriya
26. Ms. M.Y.N. Mendis
27. Mr. W.M. Karunarathna
    Registrar
28. Ms. H.D.H. Jeewanthi
29. Ms. U.L.H.D. Perera
30. Ms. W.M.S.C. Bandara
31. Mr. K.R.D.Y.M.S. Karunarathna
32. Ms. K.M.C.D. Prasadi
33. Ms. E.R.D.M. Epa
34. Ms. M.K. Nadeeka Damayanthi

All of
C/O Registrar
University of Kelaniya, Kelaniya.

35. University Grants Commission
No 20, Ward Place,
Colombo 07.

36. Mr. P.M.P. Perera
Former Member of the Council

37. Mr. H.M.N. Warakaulla
Former Member of the Council
35th to 37th of
C/O Registrar
University of Kelaniya,
Kelaniya.

RESPONDENTS

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : K.G. Jinasena with Chathuba Abeywickrama for the Petitioner.
Navodi de Soyza, SC for 1st to 27th and 33rd to 36th Respondents.
Uditha Egalahewa, PC with Vishva Vimukthi for the 28th to 30th Respondents.

Written submissions: Petitioners - 05.07.2023
(in CA/Writ/101/2021)

1st to 27th and 33rd to 36th Respondents - 26.06.2023
(in CA/Writ /101/2021)
28th to 30th Respondents - 06.07.2023

Supported on: 23.05.2023

Decided on: 02.08.2023

Sobhitha Rajakaruna J.

The Petitioner in the instant Application seeks the issuance of a writ of certiorari quashing the order dated 20.08.2019 marked 'Z' made by the Members of the 38th Respondent, University Services Appeals Board ('USAB') on the purported basis that the said Order is illegal and that the USAB has seriously erred in law in failing to act in terms of the mandate given under Universities Act No. 16 of 1978. A writ of certiorari quashing the recommendation made in 'P14' by the Selection Committee to of the 1st Respondent University of Kelaniya ('University') appoint the 28th, 29th and 30th Respondents to the posts of Lecturer (Probationary) and further, writs of mandamus and quo warranto have also been sought by the Petitioner.

The main contention of the Respondents is that the Petitioner has filed;

a) a fundamental rights Application bearing case No. SCFR/111/2019, ('FR Application')
b) an Action in the District Court bearing Case No. DSP 35/2019, and
c) an Application at the USAB bearing case No. USAB 977
on the same subject matter, seeking nearly identical reliefs.

The Petition of the Petitioner to the Supreme Court is dated 14.03.2019. The Supreme Court in the said FR Application has declined to grant leave to proceed on 09.12.2021. The instant writ Application has been filed on 18.02.2021, almost 2 years after the Application was made to the Supreme Court. The Application to USAB submitted by the Petitioner is dated 20.03.2019.

The Respondents contend that the Petitioner is not entitled to maintain the instant Application in this Court on the same grounds upon which the Petitioner has filed the said FR Application in which the Supreme Court has arrived at a finality by refusing leave to proceed. The Respondents further assert that the Petitioner is guilty of laches. Accordingly, the Respondents move that this Application be dismissed in limine without issuing formal notice on the Respondents.

At this threshold stage I am compelled to examine whether the Petitioner has satisfied this Court that there is a proper basis for claiming judicial review. It is the duty of this Court to identify the appropriate issue on which the case can properly proceed before formally issuing notice on the Respondents.[1] As such, I should be guided by the arguability principle which requires the party who applies for judicial review to satisfy that there is an arguable ground for judicial review which has a realistic prospect of success.[2] In assaying the above objections raised by the Respondents it is important to ascertain;

i. whether the Petitioner is entitled to file a writ Application on the same grounds alleged in the Supreme Court in the said FR Application,
ii. whether the facts necessary to support the claim in the instant Application and the reliefs sought are the same as those in the said earlier adjudication in the Supreme Court,
iii. whether the Supreme Court has given an order or arrived at a conclusion in the said FR Application upon/considering the same cause of action or same course of dealing between same parties referred to in the instant writ Application.

As regard to the first query above, I am inclined to follow the precedent enunciated in ***Shanthi Chandrasekaram v. D. B. Wijethunga and others [1992] 2 Sri L. R. 293*** which appears to be a matter referred to the Supreme Court by the Court of Appeal under Article 126(3) of the Constitution.[3] In the said case, the Supreme Court has observed that there could be transactions or situations in which, on virtually the same facts and grounds, a person appears

[1] also see *R v Social Security Commissioner ex p Pattni* (1993) 5 Admin LR 219 at 223G.
[2] also see (i) The Administrative Court Judicial Review Guide 2021 (sixth edition of the Judicial Review Guide-July 2021) (ii) *Prof. D.G. Harendra de Silva & others vs. Hon. Pavithra Wanniarachchi Minister of Health & others* CA/WRIT/422/2020 decided on 01.02.2022.
[3] The Second Republican Constitution (1978 Constitution)

entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141 of the Constitution; also from the Supreme Court by an FR Application under Article 126. Mark Fernando J. has stated therein;

> *"Article 126(1) confers sole and exclusive jurisdiction in respect of infringements of fundamental rights, and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from this Court. On the other hand, there could be transactions or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141, and from this Court by a fundamental rights application under Article 126. Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical "causes of action" arising from the same transaction, unless there is express provision permitting joinder. The prevention, in such circumstances, of a multiplicity of suits (with their known concomitants) is the object of Article 126(3)."*

The learned State Counsel who appears for the 1st to 27th and 33rd to 36th Respondents placed reliance on ***Saundra Marakkala Imasha Lahiruni Upeksha and others v. Hasitha Kesara Weththimuni and others CA/Writ/166/2017 decided on 04.04.2019*** in which His Lordship Justice Janak De Silva referring to the above paragraph in ***Shanthi Chandrasekaram Case,*** has held that;

> *"Thus, it is possible that there could be transactions or situations where a party can seek remedies both in the Supreme Court, invoking the fundamental rights jurisdiction, and this Court, invoking the writ jurisdiction on virtually identical causes of action..."*

In light of the above, I am of the view that a litigant is entitled to file a writ application on the same facts and grounds upon which he or she sought reliefs from the Supreme Court by way of an FR Application provided that joinder of such claims is not permitted by a written law. It is interesting to note how the Section 34 of the Civil Procedure Code has been formulated

and it states that 'Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action...'

Anyhow, as per the observations made by Fernando J. in the above case, it needs consideration by this Court whether the Petitioner has unduly attempted to smuggle the question referred to Supreme Court into the instant writ Application. The learned State Counsel strenuously argued that the main reliefs prayed for in the said FR Application and in the instant Application are identical and as such the doctrine of res judicata should be applied to evaluate whether the cause of action of this instant Application has already been dealt with by the Supreme Court.

Res judicata in an administrative context is illustrated by a decision of the House of Lords about the making of Sludge Lane, Wakefield[4] and the House of Lords in that case 'has treated the original decision as a judgement in rem, binding on everyone'. (Vide- 'Administrative Law' by the late Sir William Wade and Christopher Forsyth, 11th Edition, Oxford, pp 202, 203).

'Res judicata takes two distinct forms: issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. [5] Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding.[6] If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters'.[7] (Vide- ***'What is Settled is Settled: the Doctrine of Res Judicata***' by **Maurice Mirosolin, Pacific Law Group**, < https://pacificlaw.ca/cased-closed-doctrine-of-res-judicata/> (accessed 31 July 2023))

I wish to borrow the information illustrated by the author in the said Law Blog by the Pacific Law Group in arriving at a conclusion in the instant Application. The said author discussed further the aspects on abuse of process of court stating that; "Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process

[4] *Wakefield Cpn v. Cooke* [1904] AC 31.
[5] *Toronto (City) v. C.U.P.E., Local 79 2*—3 SCC 63.
[6] *Erschbamer v. Wallster,* 2013 BCCA 76. See also *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319.
[7] *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" : *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667.

was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" : *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667.....It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.). One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined."

The Wade & Forsyth's above 'Administrative Law' which is considered as the definitive account of the principles of judicial review states (at p. 201) that one special variety of estoppel is res judicata and that results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong.

S. Eva Wanasundera PC J has observed in ***Manamalage Michael Ranjith Fernando alias Mahipalage Michael Ranjith Perera v. Manamalage Marcus Fernando and another SC Appeal No. 117/2011 decided on 15.03.2017***:

> *"In Roman Dutch Law, K.D.P. Wickremasinghe in his book Civil Procedure in Ceylon states that, for the doctrine of res judicata to operate, there must be three requisites, namely, same person, same thing and same cause of action. It is contained in Sec. 207 of the Civil Procedure Code."*

In order to consider of adopting the principles of res judicata including the concept of abuse of process, I must now examine whether a.) the Petitioner has cited the same parties as Respondents in the said FR Application and the instant Application and also b.) whether the reliefs sought by the Petitioner in both above Applications are nearly identical and are based on same issues or transactions.

The Petitioner has filed both the FR Application and the instant writ Application against the University of Kelaniya, Members of the Council of the University, the Registrar of the University, University Grants Commission and its' Chairman, Vice Chairman, etc. The 28th, 29th and 30th Respondents of the FR Application are the candidates selected by the Selection

Committee and appointed to the post of Lecturer-Probationary in the Department of Political Science, Faculty of Social Sciences of the 1st Respondent University. The 31st and 32nd Respondents are the candidates who had been purportedly allocated higher marks than the Petitioner by the said Selection Committee. The caption of the FR Application and the 2nd paragraph 2 of the Petition of the Petitioner in the instant writ Application evince that the Petitioner has filed the instant Application against the same parties mentioned above. Moreover, it is essential to be spotlighted the primary grievance alleged in paragraph 31 of the said FR Application, which reads;

> "...the Petitioner states that the decision taken by the Council of the 1st Respondent University at its meeting held on 12th February 2019 to appoint the 28th to 30th Respondents for the Posts of Lecturer (Probationary) in Political Science of the 1st Respondent University is irregular, unreasonable, illegal, arbitrary, capricious and contrary to the procedure followed in the past and in violation of the rules of natural justice..."

The first portion of paragraph 26 of the Petition filed in the writ Application is verbatim and accordingly, it is abundantly clear that the reliefs sought in the Court of Appeal are completely based on the same grounds/issues where the Petitioner has invoked the fundamental rights jurisdiction in the Supreme Court.

The main reliefs sought by the Petitioner as per the prayer in the said FR Application are:

(b) "Declare that the Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution has been infringed by the 1st to the 27th Respondents;"

(c) "Declare that the Petitioner's fundamental right guaranteed under Article 14(1)(g) of the Constitution have been infringed by the 1st to the 27th Respondents;"

(d) "Quash the recommendation made in P14 by the Selection Committee of which 2nd, 5th, 19th, 22nd, 25th and 26th Respondents are members that met on 6th and 7th February 2019, to recommend the Council to appoint the 28th to 30th respondents as Lecturer (Probationary) in Political Science of the 1st Respondent University;"

(e) "Quash the decision made by the Council at its 468th meeting held on 12th February 2019, of which 2nd to 24th Respondents are members, to appoint the 28th to 30th respondents as Lecturer (Probationary) in Political Science of the 1st Respondent University;"

(f) "Order the 1st Respondent University to appoint me as an Lecturer (Probationary) in Political Science of the 1st Respondent University effective from 15th February 2019;"

Whereas, the main reliefs sought by the Petitioner in the prayer of the instant Application are:

b) "Grant and issue a mandate in the nature of Writ of Certiorari quashing the Order (Z) dated 20th August 2019, made by the 39th and 41st Respondents of the 38th Respondent USAB;"

c) "Grant and issue a mandate in the nature of Writ of Certiorari to quash the recommendation made in P14, by the Selection Committee that met on 6th and 7th of February 2019 to appoint 28th, 29th and the 30th Respondents for the posts of Lecturer (Probationary) of the Department of Political Science, Faculty of Social Sciences of the 1st Respondent University;"

d) "Grant and issue a mandate in the nature of Writ of Certiorari to quash the decision made by the Governing Council at its 468th meeting held on 12th February 2019 to appoint 28th, 29th and the 30th Respondents for the posts of Lecturer (Probationary) of the Department of Political Science, Faculty of Social Sciences of the 1st Respondent University;"

e) "Grant and issue a mandate in the nature of Writ of Certiorari to quash the letters of appointments already issued to the 28th, 29th and the 30th Respondents appointing them as Lecturer (Probationary) of the 1st Respondent University."

g) "Grant and issue a mandate in the nature of Mandamus compelling the 1st Respondent University to appoint me as an Lecturer (Probationary) in Political Science of the 1st Respondent University effective from 15th February 2019;"

On a careful perusal of the documents submitted to Court and considering all circumstances of this case, it appears that the Petitioner in each proceeding before this Court and Supreme

Court has predicated his claim on the same underlying factual transaction and has requested nearly identical reliefs. However, it needs to pay special attention to the relief sought by the Petitioner in the instant Application to get the order of the USAB marked 'Z' quashed.

As such, I must examine the factual foundation for the relief sought in the proceedings before the USAB. The Petitioner submitted the Application to the USAB under Section 16 of the Universities Act No.16 of 1978 and the Petitioner has reproduced the contents of paragraph 31 of the FR Application (marked 'X') in the Application to the USAB as well. Thus, it appears that the said Application to USAB also has been made in respect of the issues and causes of action similar to the proceedings in the FR Application and the writ Application. Despite such findings, it is important to note that the USAB by its' decision delivered on 13.10.2020 ('Z') has dismissed the Application of the Petitioner on the basis that the USAB in terms of Section 86 of the Universities Act was not competent to quash an appointment already made and also to make an order that another candidate be appointed. I am mindful of the fact that no estoppel/res judicata would legitimize an action which is ultra vires. In such context, I am convinced that the USAB has not pronounced an illegal or unreasonable order which needs evaluation at a merit stage of the instant Application.

In the circumstances, it is apparent that the factual foundation for the reliefs sought in each of the above proceedings are similar and I am satisfied that all three of the above proceedings have been initiated based on the same course of dealings between the same parties. In other words, the Petitioner has sought reliefs from the Supreme Court, Court of Appeal and the USAB on the same cause of action upon which the principles of res judicata elaborated above can be employed easily. Although the conclusion of the proceedings before USAB is not material to my findings on res judicata, it is paramount to note that the proceedings before the Supreme Court in the said FR Application have been concluded. This Court may not be able to adopt the principles of res judicata in a writ application, in an event where the proceedings before the Supreme Court were not concluded.

It needs to be stressed that the Petitioner has failed to give adequate and appropriate reasons for maintaining the FR Application and the writ Application parallelly. With the modern trends and the complexity of issues in present day society while recognizing the right of a litigant to procure similar reliefs through multiple adjudications, I must emphasize that it is a

fundamental requirement that the suitor should satisfy this Court with exceptional grounds that the factual foundation in such multiple proceedings do not amount to an abuse of process of court and also the suitor is not estopped by any established principle of law. In ***R. A. Piyaratna and others vs. Buddhist and Pali University of Sri Lanka and others CA/WRIT/133/2022 decided on 10.06.2022*** I have observed that the grounds for review in writ applications are inextricably interwoven with the fundamental rights recognized by law and however the adoption of such grounds should be carefully done by Review Courts subject to limitations discussed therein based on the respective jurisdiction of the Court.

In the said ***Shanthi Chandrasekaram Case,*** Mark Fernando J. concentrating on the provisions of Article 140/141 and 126 has taken the view that those provisions do not permit joinder of such claims and also observed that Article 126(1) confers the Supreme Court sole and exclusive jurisdiction in respect of infringement of fundamental rights and such jurisdiction of the Supreme Court in respect of Article 126(3) extends not only to the question of infringement, but to the entire Application. However, if a person who seeks redress from Supreme Court alleges that his fundamental rights have been infringed, he cannot smuggle that question into a writ Application parallelly by seeking reliefs on different facts and grounds abusing the process of Court and also without satisfying the Court of Appeal with adequate and sufficient reasons.

The term forum shopping, in my view, also contributes to abuse the process of Court. "Forum shopping has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgement or verdict".[8] The American legal system tends to treat forum shopping as unethical and inefficient; parties who forum shop are accused of abusing the adversary system and squandering judicial resources. Forum shopping, however, is more complex than these characterizations suggest." (Vide- ***'Forum Shopping Reconsidered' Harvard Law Review***, vol.103, no.7, 1990, p 1677 https://www.jstor.org/stable/1341283 (accessed 31 July 2023))

By wide reading I have found that the Indian Judiciary has time and again condemned the practice of forum shopping by litigants and termed it as an abuse of law. In ***M/S. Chetak***

[8] Black's Law Dictionary 590 (5th ed. 1979)

Construction Ltd. v. Om Prakash & Ors decided on 20.04.1998 the Supreme Court of India has held; "*We certainly, cannot approve of any attempt on the part of any litigant to go "forum shopping". A litigant cannot be permitted `choice' of the `forum' and every attempt at "forum shopping" must be crushed with a heavy hand*".

I shall now try to deviate to a certain extent from the traditional definition given to abuse of process through forum shopping. It would be convenient for me to describe this by referring to the law in respect of transferring of cases on various lawful grounds. Superior Courts have considered the aspect of a judge being biased, among other reasons, in order to make a determination regarding the transfer of cases. The eloquent words of Wanasundera, J. in ***Hewamanne v De Silva [1983] 1 Sri L.R. 1 at 24*** are apt here.

> *"The proper administration of justice requires judges who are skilled and learned. It is even more important that their decisions are honest and impartial and are arrived at without pressures or interference however slight or from whatever quarter. For, truly, justice must not only be done but it must also appear to be done."*

Thus, although I agree with the concept that the forum shopping should not be allowed within our court system, a thin margin should be left for a litigant to have multiple proceedings when it does not appear to the litigants that justice has been done. This should be apart from the other grounds discussed above in this regard.

On a careful consideration of the whole matter and based on the cause of action and the course of dealings between the same parties in proceedings initiated by the Petitioner in Supreme Court and Court of Appeal, I am compelled to arrive at the conclusion that all the requisites discussed above to reject the instant Application on the principles of res judicata are fulfilled. Moreover, I am of the view that the Petitioner is guilty for abusing the process of court. The main contributory factor for my said conclusion is the failure of the Petitioner to give adequate and sufficient reasons for maintaining the instant Application despite the Supreme Court, which has the sole and exclusive jurisdiction on fundamental rights Applications, assaying a similar cause of action and course of dealings among the same parties. When analyzing the chronological arrangement of dates chosen by the Petitioner to apply to the Supreme Court, USAB and to Court of Appeal, I need to emphasize that the Petitioner is guilty of laches. The Petitioner has recourse to the Court of Appeal only after the

Supreme Court in the said FR Application takes a decision unfavourable to the Petitioner. The Petitioner has waited almost 2 years until some favourable consequential or ancillary decision was taken and therefore, the delayed Application for judicial review cannot be assumed to be reasonable.

The special circumstances of this case imply that the Petitioner has failed to satisfy the initial threshold requirement in order to warrant this Court to issue formal notice of this Application to the Respondents. Therefore, upholding the preliminary objections dealt with in this order, I proceed to refuse this Application.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal