

**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 writ of Certiorari, Prohibition and
Mandamus under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/140/2021

1. N.W.Chaminda Pramuditha Lanka
408/1, Mawella Road,
Pethiyagoda,
Kelaniya.
2. A.G.G. Nishan Dammika,
“Dilupa”, Thalagoda,
Urugamuwa.
3. M.A.Ranjith Manchanayaka,
Kospala Watta,
Boyagama,
Galigamuwa Town.
4. L.B. Danushka Lahiru Sangeeth,
23/128, Megazine Road,
Borella.
5. M.D. Padmasiri,
162, Lakmal Place,
Pasyala.
6. A.M. Darshana Udayantha Abesinhe
"Sinha Sevana", Ambagolla,
Udapola,
Polgahawela.
7. K.A. Ranjith Premalal,
320/8B, Bopaththa,
Gothatuwa,
Angoda.
8. D.T. de Silva Wijesundara,
111/15, Anniwatta Rd,
Anniwatta,
Kandy.

PETITIONERS

Vs.

1. Geological Survey and Mines Bureau,
569, Epitamulla Road,
Pitakotte.
2. Hon. M. Amaraweera
Minister
Ministry of Environment,
"Sobadam Piyasa", 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.
- 2A. Hon. Ahamed Zenuabdeen Naseer,
Minister of Environment
Ministry of Environment,
"Sobadam Piyasa", 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.
3. D.S. De Silva
Director General,
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
4. A Walpola
Chairman
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
- 4A. Senarath Hewage
Chairman
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
5. A.R. Wickramarathne,
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
6. W.D.S.C. Weliwatte
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,

- Pitakotte.
6A.I.C. Pathiraja,
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
- 6B.T.H.M.P. Sagara
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
7. W.P.G. Wijewardhana
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
- 7A.T.H. Eknathgedara
Member
Geological Survey and Mines Bureau
569, Epitamulla Road,
Pitakotte.
8. Anil Jasinghe
Secretary
Ministry of Environment,
"Sobadam Piyasa", 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Sanjeewa Jayawardana PC, with Rukshan Senadheera for the Petitioner
Kuvera de Zoysa PC, with Pasindu Bandara for the 3rd Respondent
S. Dharmawardana ASG PC, with Mihiri Alwis SC for the 1st, 2nd, 4th to 8th
Respondents

Argued on: 05.12.2022, 16.01.2023, 22.03.2023, 14.06.2023

Written submissions: Petitioners - 31.07.2023
1st, 2nd, 4th to 8th Respondents - -
3rd Respondent - 13.09.2023

Decided on: 20.09.2023

Sobhitha Rajakaruna J.

What needs resolution by this Court in the instant Application is, whether the appointment of the above named 3rd Respondent to the post of Director General of the Geological Survey and Mines Bureau ('Bureau') by way of a letter dated 15.07.2020, marked "P6", is lawful.

The Petitioners primarily seek a mandate in the nature of a Writ of Certiorari, quashing above decision ("P6") to appoint the 3rd Respondent to the said post. Additionally, the Petitioners are seeking a Writ of Prohibition, restraining the 1st, 2nd, 4th to the 7th Respondents to appoint the 3rd Respondent or any individual to the substantive post/position of Director General of the Bureau as contemplated in the letter dated 15.07.2020, marked "P6", in violation of the provisions contained in section 6(1) of the Mines and Minerals Act, No.33 of 1992 ('Act').

In the focus of the factual matrix, the Chairman of the Bureau ('Chairman') by way of a Board Paper dated 25.03.2020 marked "P2" informed the Board of Management ('Board') of the said Bureau that their former Director General has retired, necessitating the appointment of an 'Acting' Director General to fill his position. It seems that the Chairman has sought to appoint a Director General ('DG') in an acting capacity, as the former DG had retired on a day (i.e. 25.03.2020) when a curfew was in force during the COVID-19 pandemic in the country. The Chairman in the said Board Paper has emphasized that the relevant Minister had informed him that, an appropriate candidate to fill the said position of Acting DG, must be chosen from among the current senior officers of the Bureau. Thus, in the same Board paper, the Chairman describes the qualifications of both Mr. K.T.U.S De Silva (Senior Director – Geology) and the 3rd Respondent who was the Senior Director - Mining at that time. Anyhow, the Chairman, in the same Board Paper, further notes that he received a petition against Mr. K.T.U.S De Silva dated 06.02.2020 and due to such reason, he deemed that the said Mr. De Silva

is unqualified to be appointed as the Acting DG. Hence, he proceeds to seek permission from the Board to appoint the 3rd Respondent to the position of Acting DG through the same Board Paper given the alleged advice of the relevant Minister.

At this stage, it is important to observe that the Minister, to whom the subject of Minerals is assigned ('Minister'), has the power to appoint the DG of the Bureau under section 6(1) of the said Mines and Minerals Act. The said section 6(1):

"The Minister shall appoint in consultation with the Board, a person having at least twelve years of demonstrated professional and applied experience as a geologist or a mining engineer with a postgraduate degree or Charter as the Director General of the Geological Survey and Mines Bureau."

By virtue of the provisions of the said section, the Minister has the authority to appoint a DG in consultation with the Board subject to other conditions therein.

The Minister has appointed the 3rd Respondent as the Acting DG with effect from 27.03.2020 by his letter dated 08.04.2020 ("2R2"). Anyhow, a brief perusal of the letter dated 22.07.2020 ("P7") addressed to the Secretary of the relevant Ministry by the Chairman, demonstrates that the Board has granted only a covering approval to appoint the 3rd Respondent to the post of Acting DG. The said Chairman in "P7" has drawn the attention of the Secretary by the said letter "P7" to an investigation conducted against the 3rd Respondent by the Commission to Investigate Allegations of Bribery or Corruption ('CIABOC') under reference No. BC/2040/14. Further, he has indicated therein that the information taken into consideration at the time of granting the covering approval to make the acting appointment was not accurate. Despite the occurrences above, on a later date the Minister by way of his letter dated 15.07.2020 ("P6") has formally appointed the 3rd Respondent as the 'Director General' of the said Bureau.

The Petitioner's contention is that this appointment, by virtue of "P6" is, ultra vires the law set out in the aforementioned section 6(1), as the Board Members, by way of a Circular Resolution had given the approval to appoint the 3rd Respondent as the DG of the Bureau only in acting capacity. The Petitioners, referring to the above mentioned investigations led by the CIABOC, further argue that the 3rd Respondent is in no way qualified to be appointed

to the position of DG in light of the several severe complaints leveled against him, including a complaint of obtaining a vehicle permit upon producing fabricated certificates to certify his service period.

It is significant that the Chairman has categorically informed in the said letter “P7” that the Board has not considered whether the 3rd Respondent is qualified under the above section 6(1), for him to be appointed as Acting DG. When the Board, on 16.09.2020, took up the matter of confirming the alleged covering approval to appoint the Acting DG, the Chairman and several members of the Board altered their perspective in light of a bigger picture considering the evidence against the 3rd Respondent emanated subsequently. The Board has particularly considered the allegations of bribery and corruption against the 3rd Respondent, as well as the fact that his personal file had been taken by the CIABOC, which eventually limited the Board’s capacity to ascertain whether the 3rd Respondent fulfills the eligibility criteria set out under the relevant section in the said Act. Finally, at the said Board meeting held on 16.09.2020, the members of the Board unanimously decided that they had not granted any approval to appoint the 3rd Respondent to the post of DG.

Although the statement of objections on behalf of the 2nd and 8th Respondents have been filed, the learned Additional Solicitor General who appears for the 1st, 2nd, 4th to 8th Respondents informed Court that such Respondents are willing to abide by any order of this Court after the final determination of this case. The Chairman affirming an affidavit dated 02.02.2022 submitted to this Court that the 3rd Respondent is not a fit and proper person to be appointed to the post of DG of the Bureau as the 3rd Respondent is tainted with allegations of bribery and misconduct. The 3rd Respondent, in his limited Statement of Objections, pleads that the said section 6(1) of the Act only provides for the appointment of a DG; not for an Acting appointment, and the Board's duty is limited to guide the Minister to ascertain the qualifications of the intended DG. The said Respondent considers the letter dated 26.03.2020 issued by the Minister as an act well within the powers conferred to the Minister by the Act.

Firstly, I must examine whether the provisions of section 6(1) of the Act apply only to the appointment of a DG on a permanent basis and do not apply to the instances when an acting appointment is made. Although the procedural rules of the Public Service Commission are not directly applicable to the Bureau the criteria adopted therein to make acting appointments

are vital to be considered here. In terms of Clause 131 of such Rules, a public officer may be appointed to act in a particular post a.) when the substantive holder of the said post is away from work for a particular length of time and b.) until the appointing authority makes a permanent appointment to fill a vacancy created to the substantive post. This implies an acting appointment should be mandatorily made only for a limited period. Thus, a letter of appointment to act in a substantive post needs to specify until what date or what specific occurrence the acting appointment will be effective. No officer should be appointed to act in a certain post for an indefinite period and without assigning an appropriate reason thereto. In terms of Article 41(c)(2) of the Constitution, even the prerogative of the President to make an acting appointment to specific posts is limited to 14 days. The said Article spells out that the approval of the Constitutional Council is needed for appointments to act for a period exceeding 14 days.

Bearing in mind, the criteria adopted in the above Procedural Rules and the Constitution, I take the view that the lack of nominating a particular period or a reason when making the appointment to act as the DG of the Bureau can be seen as a grave deviation from a due procedure and thus it is irregular. This is evinced by the aforementioned letter dated 08.04.2020 (“2R2”). Therefore, making an appointment to act as the DG of the Bureau without adopting a criteria and violating the due process should not be safeguarded by undue interpretation restricting the provisions of section 6(1) only to permanent appointments.

Thereafter, it needs consideration by this Court whether the Minister has appointed the 3rd Respondent to the post of DG by his letter dated 15.07.2020 (“P6”) in consultation with the Board as specifically required under the said section 6(1). The 3rd Respondent sought in argument to justify his appointment. His contention is that, the then Minister after being satisfied with the 3rd Respondent’s ability and/or skills shown during the tenure as the Acting DG has taken steps to appoint him as the DG on permanent basis. I’m afraid that I cannot accept such a proposition as there is no provision in the Act for the Minister to appoint the DG on his own assessment and without first consulting the members of the Board. The Act doesn’t provide any additional mechanism for the Minister to deviate from the process prescribed in said section 6(1).

The Board decision reflected in “P8”, the Chairman's assertions in “P7” and the affirmations the Chairman made in his Affidavit submitted to Court all unambiguously illustrate that neither the acting appointment nor the permanent appointment to the post of DG gained the Board's concurrence or approval. What further proof is required to decide this point of law, since the Board including the Chairman are quite precise on the fact that the 3rd Respondent is not a fit and proper person to be selected as the DG of the Bureau? Hence, in the absence of any consultation or concurrence of the Board in order to affect the appointment as reflected in “P6” and also due to this irregularity explained above in making the acting appointment, it does not appear any necessity to conduct a thorough analysis to inquire whether the initial covering approval is sufficient to fulfill the requirements of section 6(1) when making the permanent appointment.

But for completeness, I should consider the submissions made on the above facet of the arguments by the learned President's Counsel, who appears for the Petitioner. Referring to several other statutes, he submits that it is the deliberate and categorical intention of the lawmakers to emphasize the mandatory duty on the relevant Minister, under the said section 6(1), to consult the Board of the Bureau before making an appointment to the post of DG whereas other respective statutes require two-tier scrutiny to make appointments. The said learned President's Counsel strenuously argues that the predecessor of the 2nd Respondent Minister has not obtained the concurrence of the Board prior to the impugned appointment of the 3rd Respondent as the DG. He further emphasizes the fact that the words ‘in consultation’ means agreement or concurrence between the parties and accordingly, he places considerable reliance on the below-mentioned *ratio* in the judgement of the Supreme Court of India in ***Indian Administrative Service (SCS) Association Uttar Pradesh v. UOI 1993 SUPP (1) SCC 733:***

“Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.”

As opposed to the Petitioner's such arguments, the 3rd Respondent submitted that the word 'in consultation' does not cast a mandatory obligation on the Minister to act in accordance with the decisions of the Board. In view of my above reasons, I'm not inclined to agree with such the stand taken by the 3rd Respondent and I have taken serious note to the assertions made by the 3rd Respondent that he was appointed to the post of DG after the then Minister Hon.S.M. Chandrasena was satisfied with his purported ability and skills shown during the acting appointment.

In light of the reasons given above and based on the circumstances of this case I hold that the 3rd Respondent has been appointed on a permanent basis to the post of DG in gross violation of the provisions of section 6(1) of the Act. Thus I proceed to issue a writ of Certiorari quashing the decision of the predecessor of the 2nd Respondent to appoint the 3rd Respondent to the post of DG of the Bureau and also the letter dated 15.07.2020 marked "P6". Additionally, a writ of Prohibition is issued restraining the 1st, 2nd, 4th to 7th Respondents from appointing the 3rd Respondent or any other person to the substantive post of DG of the Bureau in pursuance and/or in furtherance of the decision reflected in "P6" and also in violation of the provisions of section 6(1) of the Act.

At this stage, I must emphasize that the circumstances of this case compel me to exercise my discretion to reject the contention of the 3rd Respondent that the reliefs prayed for in the Petition have become academic and/or futile. I have arrived at such a conclusion since, the serious repercussions due to the unlawful appointment described above cannot be concealed by a mere objection based on futility.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree

Judge of the Court of Appeal