

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

In the matter of an application for the issuance of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 324/2017

Dr. Abdul Hassan Mohamed Mawjood,
623/8A, Rajagiriya Garden,
Nawala Road, Rajagiriya.

Petitioner

Vs.

1. Dr. S.D. Happuarachchi,
Chairperson and Director,
(Member of Board of Management),
Institute of Indigenous Medicine
University of Colombo, Rajagiriya.
- 1a. Professor Priyani Paranagama,
Chairperson and Director,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
2. Dr. P.R. Waratenna,
Head of Ayurveda Section,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.

- 2a. Dr. L.P.A. Karunathilake,
Head of Ayurveda Section,
(Member of the Board of Management)
Institute of Indigenous Medicine
University of Colombo, Rajagiriya.
3. P.H. Ariyaratne,
Deputy Registrar,
(Secretary to the Board of
Management),
Institute of Indigenous Medicine
University of Colombo, Rajagiriya.
- 3a. T.M.H.P.K. Gunathilake,
Deputy Registrar,
(Secretary to the Board of
Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
4. L.H. Thilakarathne,
Additional Secretary (Administration),
Ministry of Health Nutrition and
Indigenous Medicine,
(Member of Board of Management),
Institute of Indigenous Medicine,
Suwasiripura, Colombo 10.
5. Dr. Dammika Abeygunawardena,
(Member of Board of Management),
Provincial Commissioner of Ayurveda,
Provincial Department of Ayurveda,
Pallakele, Kundasala.
6. Prof. Jeniffer Perera,
Dean, Faculty of Medicine,

University of Colombo,
(Member of Board of Management)
Institute of Indigenous Medicine,
No. 25, Kynsey Road, Colombo 8.

7. Prof. S.S.B.D.P. Soysa,
Faculty of Medicine, University of
Colombo,
(Member of Board of Management),
Institute of Indigenous Medicine
No. 25, Kynsey Road, Colombo 8.
8. Dr. S.M.H. Sena Banda,
(Member of Board of Management)
Institute of Indigenous Medicine
Ayurveda Medical Council,
Old Kottawa Road,
Navinna, Maharagama.
9. M.D.D. Peiris,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
10. Dr. Tharaka Prasad Hendawitharana,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
11. C. Maliyadde,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
12. Dr. J.C.K.D. Kumarasekera,
(Member of Board of Management),
Institute of Indigenous Medicine

Director, Ayurveda Teaching
Hospital, Colombo 8.

13. Mrs. J.M.C.J. Wijetunga,
State Secretary,
Ministry of Higher Education and
Highways, Higher Education
Division,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
14. Mr. K.D.C.S. Kumaratunga,
Commissioner of Ayurveda,
(Member of Board of Management),
Institute of Indigenous Medicine,
Old Kottawa Road,
Navinna, Maharagama.
15. Dr. M.D.J. Wijayabandara,
Director,
(Member of Board of Management),
Institute of Indigenous Medicine,
Bandaranayake Ayurveda Research
Institute, Navinna, Maharagama.
16. Dr. M.S. Chamari Weeraratne,
(Faculty of Medicine)
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
17. Dr. U.R.P.P. Wimalasooriya,
(Medical Officer NATH),
Member of Board of Management,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.

18. Dr. T. Weeraratne,
(Director Technical Ministry of
Health, Nutrition & Indigenous
Medicine)
Member of Board of Management,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
19. Dr. B.M. Rishad,
(Medical Officer NITM),
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
20. Prof. Kapila Senaviratne,
Department of Chemistry,
University of Kelaniya,
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
21. A.V. Janadara,
(Director, Department of National
Budget),
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
22. T.P. Liyanarachchi,
(Deputy Bursar),
(Member of Board of Management),
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
23. Dr. M.I. Manuha,
Senior Lecturer Gr. 1, Sectional Head,

Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.

24. Dr. N. Fahamiya,
Senior Lecturer Gr. II,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
25. Dr. M.S.M. Shiffa,
Senior Lecturer Gr. II,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
26. Dr. M.H.M. Nazeem
Senior Lecturer Gr. II,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
27. Dr. B.M. Nageeb,
Senior Lecturer Gr.I,
Institute of Indigenous Medicine,
University of Colombo, Rajagiriya.
28. Senior Prof. Laxman Dissanayake,
Vice-Chancellor,
University of Colombo,
No. 94, Cumaratunga Munidasa
Mawatha, Colombo 3.
29. University Grants Commission,
of Sri Lanka, 20, Ward Place,
Colombo 7.
30. Hon. Wijeyadasa Rajapaksha;
Ministry of High Education,
20, Ward Place, Colombo 7.

31. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before: P. Padman Surasena, J / President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: G. Sureshkumar for the Petitioners

Sobhitha Rajakaruna, Senior Deputy Solicitor General for the 1st –
22nd and 29th – 31st Respondents

M.S.M.Falim for the 24th – 27th Respondents

Supported on: 01st August 2018

**Written Submissions of the Petitioner
tendered on:** 28th August 2018

**Written Submissions of the 1st – 22nd,
24th – 27th and 29th – 31st Respondents
tendered on:** 13th September 2018

Decided on: 28th September 2018

ARJUNA OBEYESEKERE, J

By an amended petition dated 3rd January 2018, the Petitioner has sought the following relief:

- a) A Writ of Certiorari to quash the decision of the Board of Management of the Institute of Indigenous Medicine taken at its meeting held on 24th July

2017 to reject the recommendation of the 1st Respondent to reappoint the Petitioner as the Head, Department of Unani of the said Institute¹;

- b) A Writ of Certiorari to quash the election held on 10th August 2017 to elect the Head, Department of Unani;
- c) A Writ of Certiorari to quash the appointment of the 23rd Respondent as the Head, Department of Unani;
- d) A Writ of Mandamus compelling the 1st to 22nd Respondents to reappoint the Petitioner to the post of Head, Department of Unani.

The Institute of Indigenous Medicine has been established in terms of the Institute of Indigenous Medicine Ordinance No. 7 of 1979, published in Extraordinary Gazette No. 67/14 dated 21st December 1979. A copy of the said Ordinance has been produced by the Petitioner marked 'P10'. The said Institute is attached to the University of Colombo.

In terms of paragraph 12(1) of the said Ordinance, the Board of Management of the Institute shall exercise, perform and discharge the powers, duties and functions conferred or imposed on, or assigned to, the Institute by the said Ordinance. Paragraph 12(3) of 'P10' sets out in detail the powers, duties and functions of the Board of Management and includes the power to regulate and to determine all matters concerning the Institute in accordance with the provisions of the Universities Act² and the broad power to exercise all other

¹ The said decision of the Board of Management of the Institute of Indigenous Medicine has been annexed to the petition, marked 'P11'.

² Paragraph 12(3)(b) of 'R10'

powers of the Institute, the exercise of which is not otherwise provided for in the Ordinance.³

The Director of the Institute shall be its principal executive officer, the principal academic officer⁴ and is the Chairman of the Board of Management⁵. In terms of paragraph 8(3) of the said Ordinance, 'it shall be the duty of the Director to give effect, or to ensure that effect is given, to the decisions of the Board of Management'.

The Petitioner is a Unani Medical Doctor. By letter dated 30th May 2014⁶, he had been appointed as the Head, Department of Unani of the Institute of Indigenous Medicine for a period of 3 years, by the Board of Management of the said Institute. By letter dated 24th May, 2017 annexed to the petition marked 'P9', the Petitioner had been re-appointed as the Head of the said Department for a second term of three years⁷ by the 1st Respondent Director of the Institute, subject to the approval of the Board of Management.

The Board of Management, at its meeting held on 24th July 2017 had considered the board paper⁸ relating to the re-appointment of the Petitioner as the Head of Department for a further period of three years, and rejected the said appointment made by the 1st Respondent. The Board of Management had decided that the 1st Respondent should summon a meeting of the board of lecturers of the Unani Section and choose a suitable candidate. The Board of

³ Paragraph 12(3)(t) of 'R10'.

⁴ Paragraph 8(1) of 'R10'.

⁵ Paragraph 11(1) of 'R10'.

⁶ The letter of appointment has been produced with the petition, marked 'P6'.

⁷ The three year period was from 1st June 2017 to 31st May 2020.

⁸ The Board paper has been produced with the petition, marked 'P9a'.

Management had also proposed that a secret ballot be taken in the event of there being more than one candidate. The relevant decision of the Board of Management has been produced with the petition, marked 'P11'⁹ and reads as follows:

“අංශ ප්‍රධාන තනතුර සඳහා සුදුසු අයෙකු තෝරා ගැනීම සඳහා අධ්‍යක්ෂකවරයාගේ ප්‍රධානත්වයෙන් යුතුව අංශයේ ආචාර්යමණ්ඩලය රැස් වී යෝජනා ස්ථිරත්වයෙන් සුදුසු අයෙකු තෝරා ගන්නා ලෙසත් එහිදී එක් නමකට වඩා යෝජනා වන්නේ නම් රහස් පත්දැක් පැවැත්වීම වඩා සුදුසු බවත් කළමනාකාර මණ්ඩලය විසින් තීරණය කරන ලදී.”

In pursuance of this decision of the Board of Management, the 1st Respondent had summoned a meeting of all the lecturers for 10th August 2017 to discuss the appointment of the Head of Department.¹⁰ At this meeting, the name of the Petitioner and the 23rd Respondent had been proposed as candidates and therefore, a secret ballot had been taken of the permanent confirmed lecturers who were present at the said meeting. The 1st Respondent had not permitted the probationary lecturers the opportunity of voting. The 23rd Respondent had received 11 votes while the Petitioner received 9 votes. Accordingly, the 23rd Respondent had been selected as the Head of Department. Although the 23rd Respondent had been subsequently appointed as the Head of Department, material relating to the said appointment has not been presented to this Court.

⁹ The said decision has also been marked as 'P15'.

¹⁰ The minutes of the meeting has been annexed to the petition, marked 'P18'.

Being dissatisfied with the appointment of the 23rd Respondent as the Head of the Department, the Petitioner invoked the jurisdiction of this Court seeking the aforementioned relief.

The grounds urged on behalf of the Petitioner before this Court are three fold. The Petitioner's first ground is that the Board of Management ought to have afforded the Petitioner a hearing prior to rejecting his re-appointment as Head, Department of Unani and that no reasons have been given for the said rejection.

Provision with regard to the appointment (and re-appointment) of the Head of Department is found at paragraph 14(1) of the Ordinance 'P10' and reads as follows:

"Each Department of study shall have a Head of Department, who shall be a full-time officer of the Institute and the administrative and academic head of that Department. He shall be **appointed by the Board** from among the teachers of that Department **upon the recommendation of the Director.**" [emphasis added]

It is clear from the above provision that the appointment must be made by the Board of Management on a recommendation by the Director. However, according to 'P9', the Petitioner has been re-appointed as Head by the 1st Respondent Director, subject to the approval of the Board of Management. Thus, it is clear that the 1st Respondent has exceeded her powers when she issued the letter of appointment marked 'P9'. Therefore the said appointment made by 'P9' is void *ab initio*. In these circumstances, this Court is of the view

that the Board of Management was right when it rejected the said recommendation marked 'P9a'.¹¹ Given the fact that the appointment made in 'P9' was clearly wrong, this Court is of the view that the necessity to give the Petitioner a hearing or to adduce reasons, as claimed by the Petitioner, does not arise. In these circumstances, this Court does not see any merit in the first complaint of the Petitioner and is of the view that a Writ of Certiorari does not lie to quash the decision reflected in 'P11'.

The Petitioner's second ground is that the conducting of an election to select a person to be appointed as the Head, is an abdication by the 1st Respondent of her right to recommend a person to be appointed as the Head of Department. The third ground of the Petitioner is that the probationary lecturers have been wrongfully excluded from voting at the election. Both these grounds urged by the Petitioner relate to the conducting of the election that led to the selection of the 23rd Respondent and her subsequent appointment.

In this regard, this Court observes that the Petitioner has been conferred an alternative remedy by way of paragraph 23 of the Ordinance of the Institute marked 'P10' which reads as follows:

'If any question arises as to whether any person has been duly elected, appointed, nominated or co-opted as, or as to whether any person is entitled to be, a member of any Authority or other body of the Institute, such question shall be referred to the (University Grants) Commission, whose decision thereon shall be final.'

¹¹ Vide the decision of the Board of Management, marked 'P11'.

This Court has consistently taken the view that this Court will not exercise its writ jurisdiction, which is discretionary in nature, where there exists an effective alternative remedy.¹² This Court is of the view that the above remedy provided to the Petitioner is not only an effective and satisfactory alternative remedy but a remedy which is more convenient and beneficial to the Petitioner and that the Petitioner's purported grievance with regard to the election and appointment of the 23rd Respondent should have been referred to the University Grants Commission. The Petitioner has not only failed to do so but has not explained why he did not avail himself of this remedy.¹³ In these circumstances, this Court is of the view that the Petitioner is not entitled to the Writ of Certiorari to quash the holding of the election and the subsequent appointment of the 23rd Respondent. Therefore, this Court is of the view that this is not a fit case in which notices should be issued.

However, as the Petitioner is complaining of a purported illegality in the election process and for the purpose of completeness, this Court would proceed to consider the second and third grounds urged by the Petitioner.

Paragraph 14(i) of the Ordinance 'P10' only specifies that the recommendation for the appointment of a Head of department shall come from the Director. Paragraph 14 is silent on the manner in which the Director shall make the recommendation and therefore, it is within the power of the Director to devise a suitable scheme. The decision of the Board of Management in 'P11' that a suitable candidate be selected by the 1st Respondent in consultation with the Staff members and that it would be preferable to conduct an election where

¹² See the judgment of this Court in *Thajudeen v Sri Lanka Tea Board and another* (1981) 2 SLR 471.

¹³ See the judgment of this Court in *Halwan and Others v. Kaleelul Rahuman* (2000) 3 SLR 50.

there is more than one candidate does not result in the Director abdicating her power to recommend a suitable candidate for appointment by the Board of Management. This Court must note that the management of the said Institute has been structured in such a manner where the Board of Management will issue directions and the responsibility of implementing them will be with the Director. The course of action proposed by the Board of Management has ensured the effective participation of all the important bodies and persons at the Institute in the selection of the Head, Department of Unani. Thus, this Court is of the view that the decision of the Board of Management in 'P11' has ensured transparency in the selection of the Head, Department of Unani.

This Court must observe that the person selected as the Head must have the support of the majority of the staff and therefore obtaining their consensus is a healthy practice. Having an election where there is more than one candidate is a manifestation of such practice and is within the power conferred on the 1st Respondent to recommend a suitable candidate.

In exercising her discretion to select a suitable candidate, the 1st Respondent can decide who is entitled to vote in the event of there being an election. When one considers the fact that only teachers and other staff who have been confirmed in their appointments are eligible to be members of the Departmental Committee¹⁴, this Court does not find the decision of the 1st Respondent to exclude probationary lecturers as being arbitrary.

In this background, the selection and subsequent appointment of the 23rd Respondent as the Head is not illegal. Therefore, this Court is of the view that

¹⁴ Paragraph 15(1) of the Ordinance 'P10'.

the second and third grounds urged by the Petitioner are without merit and that the Petitioner is not entitled to a Writ of Certiorari to quash the election and the subsequent appointment of the 23rd Respondent.

There is one other matter that this Court would like to advert to. The Petitioner has annexed with the petition material relating to the selection of the Head of Department in the past. According to a Board paper dated 17th July 2009 marked 'P21', it was the Unani Academic Staff Committee that had unanimously decided to propose to the Director the appointment of Mrs. M.S.S. Fawmiya as the Head, Department of Unani. After Mrs. Fawmiya refused to accept the appointment, the Unani Academic Staff had been summoned for a meeting on 13th August 2009 by the then Director 'to get the decision (of the staff) for appointing a new person as the Head of the Unani section.' The minutes of the said meeting has been annexed to the petition marked 'P19'. This Court has examined 'P19' and finds that the proposal that the academic staff nominate a suitable candidate from among themselves had come from the Petitioner himself. Thus, the 1st Respondent consulting the staff members of the Unani Department in 2018 is not a new phenomena but something that has happened even in 2009 with the full knowledge and participation of the Petitioner.

In view of the decision of this Court that the Petitioner is not entitled to the Writs of Certiorari prayed for, the necessity to consider the Writ of Mandamus does not arise, suffice to say that the Petitioner has no legal right to be appointed as the Head of Department and therefore, would not be entitled to a Writ of Mandamus in any event.

For the reasons set out in this Order, this Court sees no legal basis to issue notices on the Respondents. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal