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

In the matter of an Application for Orders 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.

CA (Writ) Application No.99/2012

M.S.S Salahudeen,
No. 1, Anderson Road, Colombo 5.

PETITIONER

Vs.

1. Sri Lankan Airlines Ltd.,
   Airline Centre,
   Bandaranaike International Airport,
   Katunayake.

2. Captain Navin De Silva,
   Head of Flight Operations Department.

3. R.S.E. De Silva,
   HR Services and Compliance Manager,

   2nd and 3rd Respondents at
   Sri Lankan Airlines Ltd.,
   Airline Centre,
   Bandaranaike International Airport,
   Katunayake.

4. Civil Aviation Authority of Sri Lanka,
   No. 4, Hunupitiya Road, Colombo 2.

5. Captain Patrick Fernando,
   Examiner,
   Civil Aviation Authority,
   No. 4, Hunupitiya Road, Colombo 2.

RESPONDENTS[1]

Before: **Arjuna Obeyesekere, J**

Counsel: Faisz Musthapha, P.C., with Senany Dayaratne and Nisala Fernando for the Petitioner

Sanjeeva Jayawardena, P.C., with Rajeev Amarasuriya and Ms. Lakmini Warusevithana for the 1st – 3rd and 5th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 30th January 2019 and 28th June 2019

Tendered on behalf of the 1st – 3rd and 5th Respondents on 31st October 2018, 1st November 2018 and 9th April 2019

Decided on: 23rd September 2019

Arjuna Obeyesekere, J

When this matter was taken up for argument on 5th December 2018, the learned President's Counsel for the parties moved that this Court pronounce its judgment on the written submissions that would be tendered on behalf of the parties.

[1] The 4th Respondent has been discharged from this application.

The Petitioner has filed this application seeking *inter alia* the following relief from this Court:

1. A Writ of Certiorari to quash the decision of the 1st Respondent, Sri Lankan Airlines Limited, to terminate the Petitioner's Cadet Pilot Training, which decision is reflected in the documents annexed to the petition marked '**P24**' and '**P29**';

2. A Writ of Mandamus directing the 1st – 3rd Respondents to afford the Petitioner a second attempt in the Final Full Flight Simulator Evaluation.

The facts of this matter very briefly are as follows.

The Petitioner states that he is a 'Licensed Commercial Pilot' who has successfully completed several aviation training courses. He states further that having completed the relevant foreign license conversion course, he has received a Commercial Pilot License from the Civil Aviation Authority of Sri Lanka[2].

By an advertisement published in the Sunday Observer newspaper of 19th December 2010, the 1st Respondent had invited applications for its "Cadet Pilot Intake". The Petitioner had responded to the said advertisement and subsequent to being successful at the several interviews that followed, had secured a place as a 'Trainee Cadet Pilot' at the 1st Respondent Airline. By letter dated 30th March 2011 annexed to the petition marked '**P14**', the 1st Respondent had informed the Petitioner *inter alia* as follows:

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[2]A copy of the said license issued by the 4th Respondent has been annexed to the petition, marked 'P5'.

"With reference to your application and selection process for the post (of) Cadet Pilot with Sri Lankan Airlines, it is with pleasure we offer you training as a Cadet Pilot with effect from 18th April 2011 subject to your being security screened and medically checked.

Nothing in this offer of training shall be construed to mean or imply an obligation on the part of the Company to employ you after the training period. Nor does this training confer any rights of priority in consideration for selection for any future jobs at the Company."

Thus, on the face of it, '**P14**' was simply an offer to provide training to the Petitioner as a Cadet Pilot, at the 1st Respondent Airline.

In order to commence the training programme, the Petitioner was required to enter into an Agreement with the 1st Respondent. The Petitioner states that he accordingly entered into the 'Agreement for Training of Cadet Pilots' with the 1st Respondent on 31st March 2011. A copy of the said Agreement has been annexed to the petition marked '**P15**'. In addition, the Petitioner had entered into a Surety Bond for a sum of Rs. 8,000,000. The Petitioner states that he was also required to obtain an insurance policy valid for a period of 8 months from 18th April 2011 to 18th December 2011 in a sum of Rs. 6,651,350 to cover the cost of the training, with the 1st Respondent being the beneficiary under the said policy.

On 18th April 2011, the Petitioner, together with fourteen others, had commenced the training programme, which consisted of three components,

namely Ground School Training, Simulator Training and Line Training. The Petitioner states that after the successful completion of the Ground School Training, the Cadet Pilots were split into groups of two, for the purpose of being sent to Singapore, Malaysia or Dubai to complete the Airbus 320 Simulator Training, as no simulator was available in Sri Lanka at the time. The Petitioner and another Cadet Pilot from the same batch were scheduled to undergo Simulator Training in Malaysia in November 2011. However, on 20th October 2011, an Airbus 320 Simulator had been installed and opened in Sri Lanka at the premises of the 1st Respondent and the Petitioner and his batch mate who were scheduled to undergo their simulator training in Malaysia, were requested to do their Simulator Training in Sri Lanka.

The Petitioner states that from the time of its installation, the simulator of the 1st Respondent had many technical issues. The Petitioner has annexed a photograph marked '**P21**' of a notice containing several issues relating to the simulator, which was affixed in the briefing room notice board of the 1st Respondent. The Petitioner also states that during the period of 15th – 16th December 2011, the simulator was grounded by the 4th Respondent, the Civil Aviation Authority of Sri Lanka, due to it malfunctioning.

Having completed the Simulator Training on 18th December 2011, the Petitioner had undertaken the 'Final Full Flight Simulator Evaluation' (FFFS Evaluation) on 20th December 2011 in the same simulator installed in the premises of the 1st Respondent. It is the position of the Petitioner that during his FFFS Evaluation, the simulator started to malfunction and that his performance was severely affected by the malfunctioning of the simulator, resulting in the tail of the airline striking the runway.

The Respondents have however disputed the narration of events of the Petitioner that led to the above situation. The Respondents state that during the FFFS Evaluation, the Petitioner was involved in a clear *'crash situation due to a tail strike that involved basic safety'* arising from the negligence of the Petitioner. As a result, the Petitioner's performance was considered to be of unsatisfactory standard and the Petitioner's FFFS Evaluation had been discontinued and terminated. This Court must observe at this stage that whether there existed defects in the simulator and if so, whether such defects affected the Petitioner are all disputed questions of fact, which this Court, in the exercise of its Writ jurisdiction, cannot go into.

As the Petitioner had failed to successfully complete the FFFS evaluation, the 1st Respondent states that it was compelled to terminate the training of the Petitioner with effect from 20th December 2011, by letter dated 3rd January 2012, annexed to the petition marked '**P24**', It is the position of the Respondents that in terms of Clause 8 of the Agreement for Training of Cadet Pilots marked '**P15**', the 1st Respondent Company is entitled to terminate the said Agreement on any of the grounds specified therein. [3] On this occasion, it is the position of the Respondents that the Petitioner *'failed to make satisfactory progress in the said training and failed to achieve the expected standards of the company'*.

[3] In terms of Clause 8 of 'P15', "The Company shall be at liberty to amend, curtail, terminate the training course of training period, rescind this agreement and/or recall the trainee from the training course at any time for any one or more of the following reasons.
8.1 Where the Trainee by his work and/or conduct renders himself unsuitable in the opinion of the company to continue with the course of study contemplated in the training course.
8.2 Where the trainee fails to show sufficient application or fails to make satisfactory progress in the course of study contemplated in the training Course and/or is unlikely to achieve the result/standard for which the training course of study of training is designed. "

The Petitioner had thereafter sought a re-evaluation of the FFFS Evaluation through letters of appeal dated 28th December 2011 marked '**P25**' and 29th January 2012 marked '**1R13**'. By letter dated 27th February 2012, marked '**1R14**', the Petitioner had been informed that the decision to terminate his training could not be changed since the Petitioner had *'failed to achieve the expected standards of the Company'*. The Respondents have also taken up the position that in terms of Clause 7 of the Agreement '**P15**', the certificates and reports certified by the nominated official, in this case the 5th Respondent, regarding the trainee's suitability, fitness and progress shall be final and conclusive and binding on the respective parties.

It is against the said decision to terminate the Petitioner's Cadet Pilot Training that the Petitioner has filed this application, seeking the aforementioned relief. In the written submissions filed on behalf of the Petitioner, it has been submitted that *'the Petitioner principally impugns'* the wrongful and unreasonable termination of his flight training as a Cadet Pilot, which of course arises from the Agreement '**P15**'. The principal contention of the learned President's Counsel for the Petitioner is that the termination of his training was irrational due to the fact that the simulator on which he performed his Simulator Training on 18th December 2011 and on which the FFFS Evaluation was carried out on 20th December 2011 was malfunctioning. This Court observes that the Petitioner has made extensive submissions on the functioning of the simulator and the interferences by the Supervisors which allegedly caused the Petitioner to fail the said test, which have however been denied by the Respondents. As observed earlier, where the principal facts are disputed, this Court, in the exercise of its Writ jurisdiction, cannot go into such disputed facts.

The learned President's Counsel for the 1st – 3rd and 5th Respondents (the Respondents) have raised a preliminary objection that the purported dispute before this Court arises out of a contract and for that reason, this Court does not have the jurisdiction to entertain this application. As this objection relates to the maintainability of this application, and as the Petitioner himself concedes that what is being impugned before this Court arises out of the agreement '**P15**' between the parties, this Court is of the view that it should first consider whether in such circumstances, the Petitioner can invoke the Writ jurisdiction of this Court.

The Writ jurisdiction conferred on this Court by Article 140 of the Constitution is limited *inter alia* to an examination of the legality of a decision of a body exercising a public or statutory function. The Supreme Court as well as this Court have consistently upheld the argument that this jurisdiction cannot be extended to examine rights and obligations arising from a private contract, even if the act that is being challenged is that of a statutory authority, unless there is a statutory flavour to the act that is being impugned.

In **Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another**[4] a Writ of Certiorari was sought to quash the termination of an agreement between the petitioner and the Board of Investment. The respondents raised a preliminary objection that the petitioner was seeking relief based on a breach of a contractual right and therefore the petitioner cannot maintain the said application.

[4] (2002) BLR 10

Having considered the underlying facts, this Court held as follows:

> *"An analysis of the relationship that existed between the parties reveals that as it was purely a contractual one of commercial nature, neither certiorari nor mandamus will lie to remedy the dispute over the rights of the parties. The purported breach of such rights (and) the grievance(s) between the parties, arise entirely from a breach of contract, even if one of the parties was a statutory or public authority."*[5]

This Court then went onto consider if the fact of the 1st Respondent being a statutory authority would lend to the commercial arrangement between the parties, a statutory flavour, thus enabling the petitioner in that case to invoke the writ jurisdiction in terms of Article 140 of the Constitution. This Court, having taken into consideration the fact that even though the power to enter into a contract arises from the statute, the terms and conditions between the parties were entirely contractual and that the decision that was sought to be quashed was purely contractual, held as follows:

> *"Therefore the exercise of powers by parties in terms of the agreement, exclusively arises through the contract and though one of the parties is a public authority, rights of the parties are not amenable to writ jurisdiction."*[6]

This position has been reiterated in **Gawarammana vs. Tea Research Board and Others**[7] where Sripavan J (as he then was), held as follows:

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[5] Ibid. page 11
[6] Ibid. page 12
[7] [2003] 3 Sri LR 120 at page 124.

"The powers derived from contract are matters of private law. The fact that one of the parties to the contract is a public authority is not relevant since the decision sought to be quashed by way of Certiorari is itself was not made in the exercise of any statutory power (vide Jayaweera v. Wijeratne)."[8]

A similar view has been expressed by this Court in **De Alwis v Sri Lanka Telecom and Others**[9] where a writ of Certiorari had been sought to quash the decision to disconnect the telephone connection of the petitioner on the basis of non-payment of charges. This Court, while refusing the writ held as follows:

"The decision sought to be quashed is a decision founded purely on contract. The telephone was disconnected for failure to settle the outstanding bills as provided for in the agreement. This was a decision taken wholly within the context of the contractual relationship between the parties and not in the exercise of the powers of a public authority. Neither Certiorari or Mandamus will lie to remedy the grievances arising from an alleged breach of contract. (vide Jayaweera v. Wijeratne)."[10]

In **Chandradasa v. Wijeratne**[11], the Supreme Court when called upon to consider whether a dispute under a contract of employment is outside the Writ jurisdiction held as follows:

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[8] [1985] 2 Sri LR 413.
[9] [1995] 2 Sri LR 38 at page 41.
[10] Supra.
[11] [1982] 1 Sri LR at 412 at page 416.

"As observed by Lord Norris of Broth-Y-Guest in University Council of Vidyodaya University v. Linus Silva (66 NLR 505 at p.518) the mere fact that the University is established by Statute does not necessarily make its powers statutory; it may engage its employees under ordinary contracts of service. The Act does not deal with the question of dismissal of employees at all. It does not specify when and how an employee can be dismissed from service - the grounds of dismissal or the procedure for dismissal. So that, when the respondent made his order of dismissal, he did so in the exercise of his contractual power of dismissal and not by virtue of any statutory power. "Certiorari is not available to review a disciplinary decision taken by a public authority against an employee with whom it has only a contractual relationship." (Smith, 4th Edn. at p.365). If the petitioner's dismissal was in breach of the terms of the employment contract, the proper remedy is an action for declaration or damages. The Court will not quash the decision on the ground that natural justice has not been observed."[12]

It is the position of the Respondents that the Petitioner was contracted in the capacity of a Trainee Cadet Pilot only and that there was no contract of employment between the parties. The Petitioner was therefore only a participant in the Cadet Pilots training programme.

The above dicta illustrate the consistent view taken by our Courts that disputes arising out of contractual relationships do not attract public law remedies such as Writs of Certiorari and Mandamus. Bearing in mind the propositions of law

[12] The above position has been reiterated in Siva Kumar v. Director General, Samurdhi Authority of Sri Lanka and Another [[2007]1 Sri LR 96] and in M.P.A.U.S. Fernando and Others vs. Timberlake International (Pvt) Limited [SC Appeal No. 06/2008; SC Minutes 2nd March 2010].

laid down by the above judgments, this Court will now consider the relationship that existed between the Petitioner and the 1st Respondent. As observed at the outset, the Petitioner responded to an advertisement placed by the 1st Respondent calling for applications to train suitable candidates as Cadet Pilots. The Petitioner responded to the said advertisement and having successfully faced several interviews, was chosen to undergo the said training.

It is not in dispute that the parties entered into the Agreement '**P15**' in order to set out the rights and obligations of the parties during the period of the training. It is the submission of the learned President's Counsel for the Respondents that *"all matters pertaining to the providing of training as a Cadet Pilot including the training programme, conducting of examinations and tests and the termination thereof, are governed by the Agreement marked P13."* Thus, the Respondents have argued that the relationship between the Petitioner and the 1st Respondent is purely a contractual relationship. This Court has examined '**P15**' and observes that in terms of Clause 2 thereof, the 1st Respondent was only required to provide the Petitioner with the Training Course as described in Schedule 2. It was the obligation of the Petitioner *'to proceed to the training location as may be directed by the 1st Respondent and diligently pursue the instruction and training provided'* by the 1st Respondent.

It has also been submitted in the written submissions of the Petitioner that the Petitioner could not have refused to engage in simulator training even though the simulator was malfunctioning, as that would have been a breach of the Training Agreement. This is an admission that everything relating to the simulator training arose from the agreement.

Clause 8 of the Agreement '**P15**' provides that where the Petitioner by his work and/or conduct renders himself unsuitable in the opinion of the 1st Respondent to continue with the Course of Study, the 1st Respondent shall have the right to terminate the Agreement and to recall the trainee from the training course.

It is also not in dispute that the Petitioner did not successfully complete the FFFS evaluation. While the reason for such non-completion is not relevant to the preliminary objection that this Court is now considering, the fact of the matter is that the 1st Respondent exercised its rights under the Agreement '**P15**' when it decided to terminate the training period of the Petitioner. The Petitioner himself admits that '*the Petitioner principally impugns*' the wrongful and unreasonable termination of his flight training as a Cadet Pilot, which arises from the Agreement '**P15**'. If that be so, does not the cause of action of the Petitioner arise from the Agreement '**P15**'?

In the reply written submissions, it has been submitted on behalf of the Petitioner that the decision to terminate is *ultra vires* and disproportionate as First Officers and Captains who have flying experience are given two attempts during their final evaluation checks whereas a Cadet Pilot is only given one chance. Even if this be so, the decision of the 1st Respondent arises from the powers that the 1st Respondent had in terms of '**P15**' and is therefore a decision taken on a purely contractual and commercial basis.

Taking into consideration the above circumstances, it is clear to this Court that the relationship between the Petitioner and the 1st Respondent Company is solely based on the Agreement for Training of Cadet Pilots marked '**P15**' and

that there can be no doubt that the conduct of the 1st Respondent that is complained of arises out of the Agreement '**P15**'.

Even if this Court accepts the argument of the Petitioner that the decision to terminate the traineeship of the Petitioner is unreasonable, can this Court issue a Writ of Mandamus directing the 1st Respondent to afford the Petitioner a second attempt in the FFFS Evaluation? It would perhaps be appropriate to refer at this stage to the judgment of the Supreme Court in **Ratnayake and others vs C.D.Perera and others**[13] where it was held as follows:

> *"The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command issued by the superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties -*
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> *"The duty to be performed must be of a public nature. A Mandamus will not lie to order admission or restoration to an office essentially of a private character, nor in general, will it lie to secure the due performance of the obligations owed by a company towards its members, or to resolve any other private dispute, such as a claim to reinstatement to membership of a trade union, nor will it issue to a private arbitral tribunal" de Smith judicial Review 4th Ed. page 540."*

[13] (1982) 2 Sri LR 451.

The above position has been reiterated in **Jayawardena vs. People's Bank**[14] where it was held as follows:

> *"Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty. In the absence of a public duty an intrusion by this Court by way of mandamus into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ."*

In the above circumstances, this Court is of the view that the Petitioner is not entitled to a Writ of Mandamus even if this Court holds that the decision of the 1st Respondent, taken under the Agreement '**P15**', is irrational.

The Respondents have also argued that the relief sought by the Petitioner cannot be granted due to the fact that the 1st Respondent is not a State functionary. In the Statement of Objections of the 1st – 3rd Respondents[15], it is asserted that the 1st Respondent is not a State agency or instrument which is dependent on State financing and that it is in fact a classic example of a public limited company which is engaged in a commercial venture, with commercial motivations and objectives. In light of the conclusion reached by this Court that the issue in the present application is one that had arisen out of a contract and therefore does not fall within the scope of the Writ jurisdiction conferred by Article 140, the necessity to make a determination on whether or not the 1st Respondent Company is a State functionary does not arise.

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[14] [2002] 3 Sri LR 17..
[15] Paragraph 65(c).

In the above circumstances, this Court is in agreement with the learned President's Counsel for the Respondents that the purported complaints of the Petitioner are entirely contractual and that the Petitioner therefore cannot invoke the Writ jurisdiction of this Court. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal