

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

CA (Writ) Application No. 167/2017

1. Prof. A.L.P. De S. Seneviratne,
No. 54/10, Chakkindarama Road,
Ratmalana.
2. Dr. S.W.W. Samaranayake,
No. 12, Bawa Place, Colombo 8.
3. Dr. Sarath Paranavitane,
No. 132, S. De. S. Jayasinghe Mawatha,
Nugegoda.
4. Dr. A.A.M.B.A. Perera,
Sr. Joseph's Hospital (Pvt.) Ltd.,
No. 229/10, St. Joseph Street,
Negombo.
5. Dr. P.R. Siriwardane,
No. 11A, Kottawa Road, Piliyandala.

PETITIONERS

Vs.

1. Sri Lanka Medical Council.
2. Prof. Carlo Fonseka,
Former President,
Sri Lanka Medical Council.

2A Prof. Colvin Gunaratne,
President,
Sri Lanka Medical Council,

3. Dr. S.T.G.R. De Silva,
The Registrar,
Sri Lanka Medical Council.

4. Dr. Naradha Warnasuriya

5. Dr. Lalantha Ranasinghe

6. Dr. Susith Senarath

7. Dr. Sivapriyan

4th – 7th Respondents are members of
the Preliminary Proceedings
Committee, Sri Lanka Medical Council.

1st – 7th Respondents at
No. 31, Norris Canal Road, Colombo 10.

8. Dr. D.L.S. Munasinghe,
No.43/91, Poorwarama Mawatha, Colombo 5.

9. Dr. K.H.D. Milroy,
No. 29/13, Jaya Mawatha, Mirigama.

10. Dr. D.J.H. Gunasekara,
No. 624/23, Kendaliyaddapaluwa, Ragama.

11. Dr. W.G.P. Gunawardhana,
No. 33, Kurana, Katunayake.

12. Dr. C.M.A. Anthony,
No. 374, Galle Road, Colombo 3.

13. Dr. M.U.K. Galhena,
No. 29C, Perera Avenue, Kohuwala,
Nugegoda.
14. Dr. M.G.T. Fernando,
No. 22, Vidyala Road, Gampaha.
15. Prof. Janaka De Silva,
Director,
Post Graduate Institute of Medicine,
No. 160, Prof. Nandadasa Kodagoda
Mawatha, Colombo 7.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Senany Dayaratne with Ms. Nishadi Wickremasinghe
for the Petitioners

Chathura A. Galhena for the 1st – 6th Respondents

Asthika Devendra with Milindu Sarathchandra for the
8th – 14th Respondents

Written Submissions: Tendered on behalf of the Petitioners on 20th
September 2018 and 26th November 2018

Tendered on behalf of the 1st – 6th Responents on 29th
October 2018

Tendered on behalf of the 8th – 14th Respondents on
26th October 2018

Decided on: 29th November 2019

Arjuna Obeyesekere, J

When this matter was taken up for argument on 7th May 2019, the learned Counsel for all parties moved that this Court pronounce its judgment on the written submissions that have already been tendered on behalf of the parties.

There are two issues that arise for the determination of this Court in this application. The first is whether the 1st Respondent, Sri Lanka Medical Council (SLMC) acted in excess of its jurisdiction when it decided to proceed against the Petitioners on the complaints made by the 8th – 14th Respondents. The second issue is, in doing so, whether the SLMC acted in a procedurally improper manner.

The Post Graduate Institute of Medicine (PGIM) has been established by the Post Graduate Institute of Medicine Ordinance No. 1 of 1980 made under the provisions of the Universities Act No. 16 of 1978, as amended. The PGIM is the body that conducts post graduate programmes of study in Medicine and Surgery in Sri Lanka, including the MD programme in Family Medicine. A Board of Study as well as a Board of Examiners has been established by the PGIM in respect of each MD programme conducted by it.

The 8th – 14th Respondents are MBBS qualified Doctors who had enrolled for the said MD programme in Family Medicine conducted by the PGIM, and who, having successfully completed the training component of the said Programme, had sat for the MD Family Medicine examination held in July 2013. The said examination consisted of the following components:

- a) Portfolio of learning – 10 marks
- b) Written examination – 20 marks
- c) Clinical examination – 40 marks
- d) Research dissertation and viva voce examination – 30 marks

The 1st – 5th Petitioners are Board Certified Medical Specialists and Senior Practitioners in Family Medicine. During the time the above examination was conducted, the Petitioners had held the following positions in the Board of Study and the Board of Examiners of the MD programme in Family Medicine:

	Board of Study	Board of Examiners
1 st Petitioner	Chairman	Member
2 nd Petitioner	Member	Chief Examiner
3 rd Petitioner	Member	Member
4 th Petitioner	Member	Member
5 th Petitioner	Member	Member

The facts of this application revolve around three separate complaints made by the 8th – 14th Respondents relating to the manner in which the said examination had been conducted, namely:

- (a) The complaint made to the PGIM;
- (b) Fundamental Rights Application No. 354/2013 filed in the Supreme Court; and
- (c) The complaint made to the SLMC

The 8th – 14th Respondents had sat for the said examination in July 2013 together with four others. Soon after the completion of the examination, the said Respondents had complained to the PGIM about certain irregularities that had taken place with regard to the manner in which the said examination had been conducted. At a meeting of the Board of Management of the PGIM held in August 2013, a decision had been taken to conduct an inquiry into the said complaints. Accordingly, a Committee of Inquiry comprising of Professor Malkanthi Chandrasekara, Professor M.D.Lamawansa and Mr. C. Maliyadda had been appointed. The Committee, having recorded the statements of the Petitioners as well as those who had complained, had submitted its report to the Board of Management of the PGIM.

The summary of the findings and observations in respect of each component of the examination as well as the conclusion and recommendations of the Committee are re-produced below:¹

"D. Summary of the findings and observations

Assessment of Portfolio of learning

There have been serious lapses in adhering to standard practice. Examiners have not been approved by the Board of Management. One examiner who was not eligible to be even a trainer has been put as an examiner at the last minute. He was given the portfolio only few minutes before starting the examination. However most of the candidates have passed this section of the examination.

¹ A copy of the Report has been annexed to the Counter Affidavit in SC (FR) 354/2013, marked 'P16'.

OSCE

This is the component that had the highest number of failures. The dispensing of the examination has been extremely poor. It is extremely difficult to quantify the effect of this on the results. But there are several reasons in the preceding paragraphs to believe that the effect was substantial.

Dissertation of Viva

As the presentation of the first candidate was poor others have not been requested to make presentations. This cannot be justified at all. The fact that most candidates have passed this examination does not make the practice adopted to justify the way the examination has been dispensed.

Alteration of marks

In one of the candidates (number 9) marks have been altered significantly and the candidate is a batch mate of examiner/s.

E. Conclusion

There had been substantial irregularities in administering three components of the examination. Some of those may have resulted in low pass rates while others may have contributed to artificially high pass rate.

F. Recommendations

Options

1. *Assessment of Portfolio of learning*

- (a) Approve the list of examiners retrospectively; or*
 - (b) Hold a fresh examination*
- 2. *OSCE - Reschedule the examination for all the candidates.*
- 3. *Dissertation of Viva - No change is recommended."*

The above report had been tabled at the meeting of the Board of Management of the PGIM held in September 2013, where the following decisions had been taken:

"The report of the Committee of inquiry appointed by the Board of Management to investigate the concerns and irregularities raised by the candidates of the above examination was tabled. On the request of the Board, the Chairperson of the Committee of Inquiry read the summary of the findings, observations and conclusion of the report. The Chairman, Board of Management thanked the members of the Committee for the submission of a comprehensive report to the Board of Management on time.

Following a lengthy discussion it was decided to implement the following immediately:

- 1. *Cancel the unofficial results released following the results board.*
- 2. *To have another examination for the OSCE component.*
- 3. *To re-assess the portfolio viva.*
- 4. *To appoint 10 new examiners including retired persons (more than 65 years) from service to the OSCE/Portfolio components.*

5. *Appoint a new Chief Examiner for this examination.*

It was also decided to call a special meeting of the Board of Study immediately to convey the findings and conclusions of the report and the decisions taken by the BOM on the matter.

The Chairman while appreciating the good work done by the Committee of Inquiry requested the approval of the Board of Management to appoint the same Committee to investigate the allegation of changing marks of one candidate (Index Number 9, Dr. K.C.P. Perera) at the above examination. Accordingly the BOM appointed the following members to enquire into this allegation.

1. *Professor Malkanthi Chandrasekara*
2. *Professor M D Lamawansa*
3. *Mr.C. Maliyadde".²*

Although formal notice of the above decision of the Board of Management had been given on 9th September 2013, the 8th – 14th Respondents had filed Fundamental Rights Application No. SC (FR) 354/2013 on 8th October 2013, complaining of the manner in which the said examinations had been conducted, and alleging that the respondents in that case, including the Petitioners in the present application, have infringed their fundamental rights guaranteed under Articles 12(1) and 14(1) of the Constitution.

² The above decision has been produced with the affidavit of the Director of the PGIM, marked '3R21' filed in SC (FR) 354/2013.

Apart from a declaration that the respondents have infringed the fundamental rights of the petitioners guaranteed under Articles 12(1) and 14(1)(g), the petitioners had also sought a direction on the Board of Management of the PGIM:

- (a) to dissolve the existing Board of Study and to appoint a new Board of Study excluding the members of the present Board of Study for the rescheduled MD (Family Medicine) examination;³
- (b) to appoint a new panel of examiners under a new Board of Study for the rescheduled MD (Family Medicine) examination 2013.⁴

The Supreme Court had granted leave to proceed with the said application on 19th December 2013, and hearing had been fixed for 9th September 2014. This Court must observe that what the petitioners were eventually seeking to achieve through the said Fundamental Rights application was primarily to sit for the examination under a new Board of Examiners and secondarily, under a new Board of Study.

While the above fundamental rights application was pending before the Supreme Court, each of the 8th – 14th Respondents had made separate complaints, by way of affidavits dated 7th February 2014, to the Sri Lanka Medical Council. The said complaints, marked 'P3AA' – 'P3AE' are identical in content, and is re-produced below:

³ Paragraph 'F' of the prayer to the petition.

⁴ Paragraph 'G' of the prayer to the petition.

"I state that I sat for MD Family Medicine July 2013 conducted by the PGIM and further, I make the following serious allegations with regard to the following members of the present Board of Study in Family Medicine.

- Prof. A L P De S Seneviratne (Chairperson BOS in Family Medicine)*
- Dr. P R Siriwardana (Secretary BOS in Family Medicine).*
- Dr. S W W. Samaranayake*
- Dr. A A M B A Perera*
- Dr. S R Paranavithane*
- Dr. Sanath Hettige*

I. Alteration of marks of the said examination to pass their favoured candidates.

- a. According to the three member independent inquiry panel report (annexure 1) appointed by the Board of Management of the PGIM, a candidate bearing index No. 9 (Dr. K C P Perera) has been passed fraudulently by adding additional marks to bring his marks up to the level of pass mark at several components of this exam.*

II. Members of the Board of Study had shown their unethical bias behavior towards some of the candidates as follows:

- b. They engaged two unqualified examiners, Dr. Jithangi Wanigasinghe and Dr. Deepani Rathnayake, who are batch-mates of two candidate of this exam, namely Dr. W D S Karunathilake and Dr. K C P Perera.*

c. *They had shown their bias behavior by a letter addressed to the Director, PGIM, dated 16/09/2013 criticizing the decision taken by the Board of Management of the PGIM, particularly trying to protect their favoured candidates and conceal their derogatory behaviour (annexure 2).*

d. *They have shown their undue authoritative behavior (annexure 2).*

i. *By badly criticizing the decision taken by the Board of Management (BOM) for cancelling the provisional results.*

ii. *Questioning the power vested to the BOM by the PGM Ordinance to inquire into misconducts of board of studies activities.*

iii. *They have badly criticized the qualification of the members of the three member inquiry panel, questioning their professional qualifications to conduct an inquiry.*

III *With regard to the incompetence in discharging duties at the said exam.*

a. *Cancellation of the result of the said exam by the Director, PGIM, after conducting an independent inquiry (annexure 3)*

b. *Resignation of Dr. Jayantha Jayatissa, an examiner at the said exam and a member of the BOS in Family Medicine, protesting against the irregularities that occurred in the said examination annexure 4).*

c. *Appointing unqualified examiners for the said exam, including the Chief Examiner.*

i. *Dr. S W W Samaranayake (Chief Examiner)*

ii. *Dr. P R Siriwardana*

iii. *Dr. S R Parनावithane*

iv. *Dr. Jithangi Wanigasinghe*

v. *Dr. Deepani Rathnayake*

vi. *Dr. Rohan Siriwardane*

The above examiners, does not have the required seven years of service after board certification to qualify as an examiner as per the PGIM Guidelines for Conduct of Examination (annexure 5). The website containing the Board certification dates is at www.cmb.ac.lk/pgim/boc/index.php

The 3rd and 5th Petitioners admit that they received letters dated 18th February 2014 annexed to the petition marked 'P3' and 'P3A' sent by the Acting Registrar of the SLMC, requesting the Petitioners to submit their explanation to the above complaint marked 'P3AA' and 'P3AB'. The Petitioners had also been informed that in terms of the Regulations with regard to Disciplinary Procedure, the President of the SLMC had decided to refer the said complaints for inquiry to the Preliminary Proceedings Committee (PPC). The 4th – 7th Respondents were the members of the Preliminary Proceedings Committee of the SLMC at the time the said complaints 'P3AA' and 'P3AB' were received by the SLMC.

In response to 'P3', the Petitioners, by a letter dated 1st March 2014, annexed to the petition marked 'P4', informed the SLMC as follows:

"We wish to submit that the said doctors have taken up the same issue to the Supreme Court of the country and annex herewith a copy of the petition filed by them for your information.

You will undoubtedly observe that the issue raised in the alleged complaint had been more specifically set out in their petition and they have sought a determination in that regard from the Supreme Court. Therefore, we would urge you that any step to proceed regarding the alleged complaint made by the complainant doctors be done upon the conclusion of the Supreme Court case ..."

It appears that the SLMC had sent a reminder to the Petitioners seeking a response to 'P3', for the reason that by letter dated 3rd July 2014 annexed to the petition marked 'P4A', the 2nd – 5th Petitioners had informed the SLMC that, '*The position of the Supreme Court case is that it would meet on 7th July 2014 to consider a settlement. In these circumstances, as stated in our previous letter, we will revert to you upon the conclusion of the Supreme Court case.*'

The entire set of the journal entries of the said Fundamental Rights Application have been annexed to the petition marked 'P1'. This Court, having perused 'P1' observes that the journal entry of 7th July 2014 reads as follows: '*This matter is settled and (is) not (to) be called hereafter (See the signed order for details).*' The case had again been taken up on 7th October 2014 and the journal entry states that, '*Proceedings are terminated (see the order for details)*'

The Order dated 7th October 2014 has been annexed to the petition marked 'P2' and reads as follows:

"We have heard Counsel for the Parties when this matter was taken up for support on 6th June 2014.

This Court having taken the view that this was a matter that was eminently suitable for settlement, encouraged the parties to enter settlement as suggested by the Court. The Court also directed that the Settlement Terms will be pronounced by way of an Order on 9th June 2014. This Court, however, observes that the Terms of Settlement as directed had not been incorporated in the record although the Journal Entry makes reference to the matter being settled and consequently terminated.

This Court, therefore, reiterates its Order which is in the following terms.

1. *The 1st to 7th Petitioners⁵ and the 217th to 219th Respondents⁶ shall repeat the two components-*
 - a) *Portfolio Viva; and*
 - b) *Clinical Examination (OSCE) of the examination held on 20th May 2013 and 16th July 2013, respectively.*
2. *The examination will be conducted by the new panel of Examiners and the new Chief Examiner already appointed by the Senate in January 2014. It must be noted that if there is any member of the*

⁵ This is a reference to the 8th – 14th Respondents in this application.

⁶ This is a reference to the candidates who had passed the said examination.

panel who has reviewed any results of the examination held in 2013, such member shall not participate as an Examiner but a suitable substitute be appointed as Examiner.

3. The Senate will take steps as recommended by the Board of Management to fill the existing vacancies in the Board of Studies subject to the condition that the 40th to the 49th Respondents⁷ shall be retained as members of the Board of Study until their terms of office ends.
4. The results of the Petitioners who were unsuccessful in-
 - a) The written examination
 - b) Dissertation Viva of the Examination held in 2013 shall be reviewed by the new panel of Examiners.

The Petitioners have agreed to be bound by the decision of the new panel of Examiners.

5. The Members of the Board of Study and the panel of Examiners must ensure that they are impartial in the conduct of the said examination.
6. The 217th to the 218th and 219th Respondents undertake to withdraw Case No. 171/2013/DSP in the District Court of Colombo.
7. The District Judge of Colombo is directed to dismiss the said actions upon the withdrawal of Case No. 171/2013/DSP.

⁷ The Petitioners of this application were among the 40th – 49th Respondents in the Fundamental Rights Application.

We reiterate our Order that these proceedings are terminated subject to the aforementioned Terms."

This Court, having examined the above terms of settlement observes that it essentially relates to the manner in which the examination must be re-conducted, and especially the fact that the examiners must be impartial. Accordingly, all candidates were required to repeat the Portfolio of learning component and the Clinical component of the examination under a new panel of Examiners headed by the Chief Examiner already appointed by the Senate of the University of Colombo in January 2014. The Terms of Settlement also dictated that if there is any member of the panel of examiners who has reviewed any results of the examination held in 2013, that such members shall not participate as examiners in the repeat examination in order to ensure impartiality. This meant that the Petitioners would not examine the 8th – 14th Respondents in the fresh examinations that was to be conducted, which is part of the relief sought in paragraphs (f) and (g) of the prayer to the petition in the said Fundamental Rights application.

In the said terms of settlement, the 8th – 14th Respondents had agreed to the existing members of the Board of Study including the Petitioners continuing as members of the Board of Study until their term of office came to an end. Thus, the relief sought by the 8th – 14th Respondents in their Fundamental Rights application, to dissolve the Board of Study and replace the Members of the Board of Study has been abandoned in the above Terms of Settlement.

The grievance of the Petitioners that is presently before this Court commences at this point of time. The Petitioners state that notwithstanding the

abovementioned 'Order' of the Supreme Court, the Petitioners received yet another letter dated 11th November 2014 annexed to the petition marked 'P6', requesting them to submit their explanation on the aforementioned complaints made against them by the 8th -14th Respondents.

By a letter dated 14th November 2014 annexed to the petition marked 'P5', the Attorney-at-Law for the Petitioners had informed the SLMC that the Supreme Court had vindicated the Petitioners of the complaints made against them, by granting them authority to remain as members of the Board of Study until the end of their term and that *"it would not be proper or appropriate for the SLMC to embark upon a further inquiry into the same allegations, as the matter is now effectively res judicata, and resolved."* The Petitioners had also sent a letter dated 23rd November 2014 to the Acting Registrar of the SLMC, reiterating the contents of 'P5'.

The SLMC had replied 'P5' by letter dated 25th November 2014, marked 'P8B' informing the Petitioners that the Preliminary Proceedings Committee and the Professional Conduct Committee (PCC) are empowered to conduct inquiries independently and that their failure to submit explanations would result in an inquiry being held without their explanations being considered.

It would perhaps be useful to lay down briefly the procedure adopted by the SLMC when complaints relating to disciplinary issues are made to it. The Medical Disciplinary (Procedure) Regulations 1990, containing the disciplinary procedure of the SLMC have been published in Gazette Extraordinary No. 757/07 dated 10th March 1993. A copy thereof has been annexed to the petition marked 'P7'.

In terms of 'P7', when a complaint is made to the SLMC against any medical practitioner, which alleges any fact or matter constituting a ground on which the SLMC is empowered to take action under Section 25(1)(a) of the Medical Ordinance, the President of the SLMC (the President) shall direct the Registrar of the SLMC (the Registrar) to refer the said complaint or report to the Preliminary Proceedings Committee for consideration, and report whether there is a case which should be referred to the Professional Conduct Committee⁸.

When a complaint is referred to the Preliminary Proceedings Committee, the President is required to direct the Registrar to notify the practitioner of the receipt of the complaint or report stating the matters contained therein and request the practitioner to submit to the Preliminary Proceedings Committee, any explanation that the practitioner may have to offer in respect of such facts.⁹ It is in terms of this Regulation that the SLMC, by letters marked 'P3A' and 'P6' requested the Petitioners to submit their explanations.

Regulation 5 of the said Regulations contains the powers of the Preliminary Proceedings Committee in obtaining evidence and summoning witnesses for the purpose of the inquiry. The Regulations stipulate that the inquiry and the evidence shall be led in camera.¹⁰

Upon conclusion of the said inquiry, the Preliminary Proceedings Committee is required to prepare and transmit to the Professional Conduct Committee, a

⁸Regulation 2(1).

⁹Regulation 4.

¹⁰Regulation 9.

report embodying its findings on each of the facts or matters alleged in the complaint or report, together with a copy of such complaint or report.¹¹

Thereafter, the Professional Conduct Committee shall consider the report of the Preliminary Proceedings Committee and shall determine whether or not an inquiry should be held into the facts or matters alleged in the complaint or report.¹² When the Professional Conduct Committee determines that no inquiry should be held, the Professional Conduct Committee shall direct the Registrar to notify the practitioner/s concerned of their decision. Where however the Professional Conduct Committee determines that an inquiry should be held into all or any of the matters contained in the report of the Committee, the Registrar shall instruct that a notice of inquiry specifying the charge or charges against the practitioner be issued to the practitioner. Part II of the said Regulations contain detailed provisions with regard to the procedure that should be followed by the Professional Conduct Committee, including the right of representation by an Attorney-at-Law and the opportunity of leading oral evidence.

This Court is of the view that according to the above provisions, the role of the Preliminary Proceedings Committee seems to be to conduct a fact-finding inquiry to assist the Professional Conduct Committee to ascertain whether there is sufficient material to charge the practitioners concerned.

The Petitioners had provided their explanations to the SLMC by letters annexed to the petition marked 'P10', 'P10A', 'P10B', 'P10C' and 'P10D'. After acknowledging the receipt of the said letters, the SLMC, by letter dated 22nd

¹¹Regulation 10.

¹²Regulation 12(1).

May 2015 marked 'P11', requested the Petitioners to appear before the Preliminary Proceedings Committee on 5th June 2015 in order to "*assist the Committee in its inquiry into the above-mentioned complaints.*"

The Petitioners state that they duly attended and participated in the said inquiry and had given evidence on a number of days. After the conclusion of the Inquiry, but prior to the submission of the report of the Preliminary Proceedings Committee, the Petitioners filed this application on 16th May 2017 seeking *inter alia* the following relief from this Court:

- "(d) A Writ of Certiorari to quash the entire proceedings conducted before the 4th – 7th Respondents;
- (e) A Writ of Certiorari to quash the purported decision of the 1st and/or 2nd and/or 3rd Respondent¹³ and/or any one or more of them, to refer the complaints produced marked P3AA – P3AE for inquiry before the 4th – 7th Respondents;
- (f) A Writ of Certiorari to quash any purported decisions and/or findings and/or report by the 4th – 7th Respondents against the Petitioners, if any, including any purported decision to refer the subject matter of the said inquiry to the Professional Conduct Committee of the SLMC;
- (g) A Writ of Certiorari to quash any consequential or ancillary decisions by the 1st – 3rd Respondents against the Petitioners, if any, including any

¹³ The 2nd Respondent is the President of the SLMC while the Registrar of the SLMC is the 3rd Respondent.

purported decision to refer the subject matter of the said inquiry to the Professional Conduct Committee of the SLMC;

- (h) A Writ of Certiorari to quash all consequential decisions taken by the 1st – 7th Respondents and/or anyone or more of them and/or their servants and agents, in pursuance of any inquiry report containing any findings against the Petitioners, compiled in relation to the said inquiry;*
- (i) A Writ of Prohibition restraining the 1st – 7th Respondents and/or anyone or more of them and/or their servants and agents from further inquiring into the purported complaints produced marked 'P-3AA to P3AE', and/or taking any further steps consequent to the inquiry before the 4th – 7th Respondents;*
- (j) A Writ of Prohibition restraining the 1st – 7th Respondents and/or anyone or more and/or their servants and agents from transmitting any report containing any findings against the Petitioners, compiled in pursuance of the said inquiry, to anyone, including the Professional Conduct Committee of the SLMC;*
- (k) A Writ of Mandamus directing the 1st and/or 2nd and/or 3rd Respondents to issue Certificates of Good Standing to all Petitioners, indicating that there are no adverse findings against the Petitioners as of date."*

At the outset, this Court must observe that the Petitioners have failed to produce before this Court any document containing the decision of the 4th – 7th Respondents, although relief has been sought on the assumption that there is

in fact a decision. In Weerasooriya v. The Chairman, National Housing Development Authority and Others¹⁴ this Court has held that court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition. It was the position of the 1st – 7th Respondents that the 4th – 7th Respondents have not communicated their decision to the 1st Respondent. Therefore, in the absence of any document evidencing the decision of the Preliminary Proceedings Committee, this Court cannot consider the reliefs sought in paragraphs (f), (g) and (h) of the prayer to the petition.

The first argument of the learned Counsel for the Petitioners is that the SLMC and its President acted in excess of its jurisdiction when it referred the complaint of the 8th – 14th Respondents to the Preliminary Proceedings Committee, and thereafter exceeded its jurisdiction by conducting an inquiry against the Petitioners. The Petitioners state that the complaints filed by the 8th - 14th Respondents to the SLMC and inquired into by the Preliminary Proceedings Committee are identical, or if not, lesser in degree to the complaints made before the Supreme Court. It is the contention of the Petitioners that their Lordships of the Supreme Court completely exonerated the Petitioners of the alleged complaints of the 8th – 14th Respondents by permitting the Petitioners to remain on the Board of Study until the end of their term. This is specifically due to the fact that the Supreme Court did not grant the relief prayed for in paragraphs '(f)'¹⁵ and '(g)'¹⁶ of the prayer to the

¹⁴ CA (Writ) Application No. 866/98; CA Minutes of 8th March 2004; per Sripavan J. (as he was then).

¹⁵ Paragraph (f) reads as follows: "Direct one or more or all of the 1st to 216th Respondents including the Chairman of the members of the Board of Management of the PGIM to dissolve the present Board of Study and appoint a new Board of Study excluding the members of the present Board of Study for the rescheduled MD (Family Medicine) examination."

¹⁶ Paragraph (g) reads as follows: "Direct one or more or all of the 1st – 216th Respondents including the members of the Board of Management, Board of Study and Senate of the 1st Respondent University to appoint

petition in the fundamental rights application. In other words, it is the position of the learned Counsel for the Petitioners that the subject matter of the complaint referred to the Preliminary Proceedings Committee are now *res judicata* due to the fact that the said matters were already considered and the proceedings terminated by the Supreme Court in SC (FR) Application No. 354/2013.

This Court, in the case of Lanka Maritime Services Ltd v. Sri Lanka Ports Authority and six Others¹⁷ has summarized the doctrine of *Res Judicata* as follows:

"It is trite law that the doctrine of res judicata precludes fresh proceedings only where there is a previous judicial decision on the same cause between the same parties. It is common ground that there is no prior judicial pronouncement to thwart the application made by the Petitioner in this case. The question for determination on the preliminary objection taken on behalf of some of the Respondents is whether the wider maxim "interest reipublicae ut sit finis litium" which when converted to contemporary language means that "it is in the public interest that there should be an end to litigation" would preclude the Petitioner from maintaining the present application. The said maxim was considered in the old case of Mendis v Himmappooa¹⁸ in which the record revealed that the plaintiff has twice already brought the identical action, and has twice been absent on the date of the trial, and the case has been twice dismissed. Stark J considered the maxim and observed:

a new panel of examiners under a new Board of Study for the rescheduled MD (Family Medicine) examination."

¹⁷ 2004 (3) Sri LR 332; Order of Saleem Marsoof J, P.C, P/CA (as he then was).

¹⁸ 1855 - Ramanathan Reports 88

" *'interest reipublicae ut sit finis litium'* is a good maxim; it flows out of the very nature of society, for unless there is an end to litigation, rights would forever remain uncertain and no man would ever enjoy that security of person and property, without some degree of which society could not subsist, and it may be added, in proportion to the enjoyment of which in any society civilization advances, or has opportunity to advance."

Accordingly, it is a rule of law that a solemn judgment on any matter standing *pro veritate accipitur*.¹⁹ But this effect cannot attach to a judgment given without a hearing of the case, which appears to be the predicament in which the subject-matter of the present suit is placed. If the judgments in the previous cases were in respect of the absence of the plaintiff, and so of the nature of non-suits without evidence taken in the cause, they do not amount to *Res Judicata* which is properly defined as legal judgment on the same point between the same parties, on the same grounds or *media* concluded after argument or confession."

It will follow from this decision that where there is no prior judicial pronouncement (including a withdrawal without reservation of the right to initiate fresh proceedings) in a case involving the same parties and the same cause, a Court will not dismiss any fresh action or application in *limine*, and will entertain the subsequent action or application."

¹⁹ A thing adjudged must be taken for truth.

Prior to considering the submission of the learned Counsel for the Petitioners, this Court wishes to make an important observation. That is, the SLMC was not a party to the aforementioned Fundamental Rights application, and therefore the SLMC was not a party to the settlement that the parties to that application reached between themselves, which has been recorded as reflected by 'P2'. Thus, on the face of it, the SLMC is not bound by the terms of settlement that the parties reached before the Supreme Court.

The Petitioners state further that as no new complaints have been made to the SLMC against the Petitioners after the conclusion of the Supreme Court case, the SLMC could not have referred the complaint 'P3AA' to the Preliminary Proceedings Committee and/or the Preliminary Proceedings Committee could not have held an inquiry against the Petitioners on the same issues that were agitated before the Supreme Court.

This Court observes that while in terms of Regulation 2(1) the President can direct the Registrar to refer any complaint to the Preliminary Proceedings Committee, in terms of Regulation 2(2), the President has the discretion to refer the complaint to the Council itself (i.e. the Sri Lanka Medical Council) as opposed to the Preliminary Proceedings Committee.²⁰

²⁰ Vide Regulation 2(2) of 'P7' which reads as follows: "Where any complaint or report relates to the conduct or negligence or incapacity relating to professional duties of a practitioner and it does not appear to the President that such conduct constitutes infamous conduct in any professional respect, or, that such negligence or incapacity constitutes negligence or incapacity relating to professional duties by reason of which the practitioner cannot be allowed to continue to practice as a practitioner or where any complaint or report relates to the conviction of a practitioner by a Court of law and it does not appear to the President that the offence of which the practitioner is alleged to have been convicted shows him to be unfit to practice as a practitioner, then, the President may instead of referring such complaint or report to the committee, direct the Registrar to place such complaint or report before the Council at its next meeting for consideration."

It is the contention of the Petitioners that the President should not have referred the complaints to the Preliminary Proceedings Committee in view of the resolution of the dispute in the Supreme Court and should have instead directed the Registrar to place such complaint or report before the Council. The Petitioners have sought a Writ of Certiorari against the said decision of the President to refer the matter to the Preliminary Proceedings Committee.

As observed earlier, it is the contention of the learned Counsel for the Petitioners that the subject matter agitated before the Supreme Court is identical to the complaints which formed the subject matter of the inquiry before the Preliminary Proceedings Committee. This Court, having examined the proceedings of SC (FR) Application No. 354/2013 and the Order containing the Terms of Settlement 'P2', observes that the crux of the complaint before the Supreme Court was fundamentally different to the purpose of the inquiry before the Preliminary Proceedings Committee. Although the Fundamental Rights application contained similar allegations of malpractice concerning the Petitioners, the purpose of the application was to obtain an opportunity to be adjudicated fairly and impartially at the MD in Family Medicine final examination. In contrast, the objective of the inquiry before the Preliminary Proceedings Committee was to trigger a process by which the SLMC could ascertain if the Petitioners have upheld the disciplinary standards required of them, as members of the medical profession.

This is buttressed by the fact that the 'Order' 'P2' is only an 'Order' containing the Terms of Settlement and that it contains nothing on the culpability or innocence of the Petitioners with regard to the allegations levelled against them. The Petitioners are relying on paragraph 3 of the Order, by which the

Supreme Court permitted the Petitioners to remain on the Board of Study till the end of their term, as proof that the Supreme Court has exonerated the Petitioners of all allegations levelled against them. This Court is of the view that the said paragraph does not exonerate the Petitioners from the allegations of malpractice and bias with regard to conducting the said examination, which complaints were made against the Petitioners in their capacity as members of the Board of Examiners, and not in their capacity as members of the Board of Study.

At the time the terms of settlement were agreed upon, the Petitioners were aware that the 8th – 14th Respondents had made a complaint to the SLMC. However, the 'Order' 'P2', contains no mention of any agreement reached between the parties on the complaints made against the Petitioners to the SLMC. This is in spite of the fact that 'P2' makes specific reference to the District Court case bearing No. 171/2013/DSP, and the undertaking by the 217th – 218th and 219th Respondents to withdraw the said cases.

This Court is of the view that if the Supreme Court intended that the complaints against the Petitioners should not be considered and/or proceeded with by the SLMC, such a direction would have formed part of the terms of settlement 'P2'. The Petitioners were admittedly well aware of the complaints made against them before the SLMC at the time the terms of settlement were entered, but have chosen to leave the said complaints out of the terms of settlement.

Therefore, in the absence of any undertaking by the 8th – 14th Respondents to withdraw the complaint made against the Petitioners, and in the absence of an

averment in the terms of settlement that the allegations against the Petitioners have been withdrawn, this Court is of the view that the power of the SLMC to initiate disciplinary proceedings against the Petitioners has not been fettered or restricted. In the above circumstances, it is the view of this Court that the aforementioned terms of settlement is not a legal impediment to the SLMC initiating and proceeding with the inquiry against the Petitioners.

Where the President of the SLMC is satisfied that the matter relates to infamous conduct in any professional respect or negligence relating to conducting professional duties, and in the absence of any resolution of the dispute between the parties, the President is required to forward the matter to the Preliminary Proceedings Committee. This Court, having taken the view that the terms of settlement 'P2' is not a bar to the SLMC proceeding with the complaint against the Petitioners, is only concerned whether the President of the SLMC took into account relevant factors when exercising his discretion in referring the complaints to the Preliminary Proceedings Committee. It appears to this Court that the complaints made against the Petitioners were in fact in relation to misconduct, as borne out by the report of the Committee appointed by the PGIM, and in the absence of any substantial reasons to demonstrate that the President of the SLMC made an irrational decision in referring the complaints to the Preliminary Proceedings Committee, this Court sees no basis to issue a Writ of Certiorari to quash the said decision of the President of the SLMC, to refer the complaints to the Preliminary Proceedings Committee. This Court must however state that these findings are made only for the purposes of this application, and that the SLMC, as well as the Preliminary Proceedings Committee and, if applicable, the Professional Conduct Committee, shall arrive at its own findings, independent of the findings of this Court.

In the above circumstances, this Court is of the view that the SLMC, its President and the Preliminary Proceedings Committee did not exceed their jurisdiction when it decided to proceed with the complaints made by the 8th – 14th Respondents against the Petitioners.

The second issue that arises for the consideration of this Court is whether the Preliminary Proceedings Committee has conducted the said inquiry in violation of the principles of natural justice, or in a procedurally improper manner, with the Petitioners alleging that *'the inquiry was an artifice which was designed to bring disrepute to the Petitioners'*, and that *'it was conducted in a manner that was hostile to the Petitioners, and maintained no standards of decorum.'*²¹

This Court has examined the petition in order to ascertain the precise complaint of the Petitioners in this regard and observes that the said allegation is twofold. The first is the refusal by the SLMC to provide the Petitioners with a copy of the proceedings before the Preliminary Proceedings Committee. The second is that the members of the Preliminary Proceedings Committee, namely the 4th – 7th Respondents were biased towards the Petitioners and was actuated with malice.

There is one matter that this Court would like to address at the outset that would negate the above complaints of the Petitioners. That is the fact that the proceedings before the Preliminary Proceedings Committee is only a fact finding exercise. In the event a report containing findings adverse to the Petitioners are made, that would only enable the Professional Conduct

²¹Vide paragraph 47 of the petition and page 6 of the written submissions of the Petitioners dated 20th September 2018.

Committee to initiate a formal inquiry against the Petitioners. In such a situation, the above two complaints of the Petitioners would be rendered nugatory as the Petitioner would be entitled to a fresh hearing before a Committee consisting of persons other than the 4th – 7th Respondents. As observed earlier, an inquiry by the Professional Conduct Committee would require a charge sheet to be served on the Petitioners, an opportunity being afforded to the Petitioners to defend the said charges, and the entitlement on the part of the Petitioners to be represented by an Attorney-at-Law. Therefore, even if the above allegations are true, no prejudice has been caused to the Petitioners.

Prior to considering the above two grounds however, and in order to place in context the above two grounds urged by the learned Counsel for the Petitioners, this Court would like to advert to the submission of the learned Counsel for the 1st – 6th Respondents that the Petitioners are guilty of *laches*, in that this application has been filed only on 16th May 2017 whereas (a) the decision to refer the complaint of the 8th – 14th Respondents to the Preliminary Proceedings Committee was taken in 2014, (b) the proceedings before the Preliminary Proceedings Committee were concluded in August 2015, and (c) the two allegations complained of took place during the period of the inquiry. This Court must state that there is much merit in this submission, and in the absence of a plausible explanation for the delay in invoking the jurisdiction of this Court, this entire application is liable to be dismissed due to delay.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained

to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus. While this Court expects parties to seek relief from Court as soon as it may reasonably be possible, a delay, if any, should be due to reasons beyond the control of the party seeking relief. A party cannot 'sit' on his entitlement to seek relief and thereafter belatedly make an application to Court seeking relief, the granting of which is at the discretion of Court.²²

The submission of the learned Counsel for the 1st – 6th Respondents regarding *laches* becomes important when one considers the factual circumstances relating to the above two grounds urged by the learned Counsel for the Petitioners. Following the conclusion of the inquiry, the Petitioners had requested by letter dated 1st August 2015 marked 'P14', that a complete and unabridged copy of the written proceedings of the said inquiry be made available to them. The Petitioners state that there were audio recordings of the entire proceedings and had requested a copy of the same in the said letter. The Attorney at Law for the Petitioners had stated that *"access to an accurate and complete record of the proceedings in a judicial or quasi-judicial inquiry is the inalienable right of persons being subjected to such inquiry, and is an essential requirement in terms of the rules of natural justice."*

The Assistant Registrar of the SLMC declined the said request through letter dated 14th August 2015 marked 'P15'. It appears from 'P15' that the Preliminary Proceedings Committee has in fact sent a report to the Professional Conduct Committee on the conclusions reached at the said

²² Vide *Biso Menika v. Cyril de Alwis* [(1982) 1 Sri LR 368; at pages 377 to 379 - Sharvananda, J (as he then was)]; followed by the Supreme Court in *Ceylon Petroleum Corporation v. Kaluarachchi and others* [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

inquiry. The Assistant Registrar of the SLMC had informed the Petitioners that *"the Professional Conduct Committee may frame charges against those who are responsible for serious professional misconduct. Such proceedings will be conducted by the Professional Conduct Committee and recorded verbatim and reports of such proceedings can be obtained by the lawyer representing the person against whom such charges are framed."*

The Petitioners had made a further request dated 20th September 2016 marked 'P18' for the said information to be released to the Petitioners under the Right to Information Act, No. 12 of 2016. The Petitioners state that to date, there has been no response to the said request. The Respondents state that the said request was made prior to the Right to Information Act coming into force by Gazette Extraordinary No. 2004/66 dated 3rd February 2017 and that there is no evidence to show that the Petitioners have attempted to obtain the information through this avenue again. The Respondents state further that releasing the proceedings to the parties before it is referred to the Professional Conduct Committee is not contemplated by the Medical Disciplinary (Procedure) Regulations 1990, 'P7'. The Respondents state that according to Clause 12(1), the Preliminary Proceedings Committee is required to forward its reports to the Professional Conduct Committee and that Clause 12(8) specifies the documents that can be given or released to a party to an inquiry.²³

While this Court takes the view that the SLMC could have made available copies of the proceedings to the Petitioners, what is important to note in this

²³ Regulation 12(8) reads as follows: "The Attorney-at-Law shall, on application made by a party to any inquiry and on payment of such fees as may be fixed in that behalf by the Council, send to such party copies of any affidavit, explanation or other statement or communication sent to the Council by the other party."

regard is that the request for the proceedings was made after the conclusion of the inquiry. Thus, the Petitioners cannot be heard to state for instance that the non-availability of the proceedings affected their ability to present their case before the Preliminary Proceedings Committee, and thus, this Court is of the view that the Petitioners have not been prejudiced by such refusal. In any event, by 14th August 2015, the Petitioners had been clearly informed by the SLMC that they will not be provided with the proceedings, and therefore, this Court is of the view that the Petitioners ought to have challenged that decision, soon thereafter, which the Petitioners did not do. The Petitioners are to blame for this delay, and must face the consequences for their laches. This Court is accordingly of the view that the proceedings before the Preliminary Proceedings Committee cannot be quashed on this ground.

The allegation that the 4th – 7th Respondents were biased towards the Petitioners and was actuated with malice has not been supported with any specific accusations, nor have any findings of the said Respondents evidencing such malice been placed before this Court. A litigant cannot expect this Court to act on allegations made in thin air. If there was some merit in this allegation, this Court would have expected the Petitioners to have complained immediately to the SLMC, citing specific incidents or else invoked the jurisdiction of this Court, as soon as may be possible, none of which has been done. This Court is therefore of the view that there is no merit to the allegation of the Petitioners that the 4th – 7th Respondents were biased towards them, or that the said Respondents were actuated by malice.

In the above circumstances, this Court does not see any legal basis to grant the relief prayed for by the Petitioners. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

Website Copy
Website Copy