

Y. P. DE SILVA  
GENERAL SECRETARY,  
SLMP AND ANOTHER  
V.  
RAJA COLLURE,  
SECRETARY,  
USA AND TWO OTHERS

COURT OF APPEAL.

S. N. SILVA, J.

C. A. APPLICATION NO. 88/91.

MAY 31, and JUNE 10, 1991.

*Mandamus - Election Law - Nomination to fill vacancy in Provincial Council caused by death of elected member - Provincial Councils Elections Act, No. 2 of 1988, s.65 - Public Authority.*

Section 65 of the Provincial Councils Elections Act sets out the several steps in the filling of a vacancy:

1. The Secretary of the Provincial Council informs the Commissioner of Elections of the fact of the occurrence of the vacancy [section 65(1)].

2. The Commissioner calls upon the Secretary of the recognized political party or the Group Leader of the independent group to which the member vacating office belonged to nominate within a period specified by the Commissioner a person eligible to be elected as a member to fill such vacancy [section 65(2)].

3. A nomination made by the Secretary of the recognized political party or the group leader accompanied by the requisite oath or affirmation and the Commissioner declares that person elected to the Council [section 65(2)].

4. If the Secretary or the group leader fails to make such a nomination within the period specified the Commissioner declares as elected, the candidate who secured the highest number of preferences at the election of members next to the last member declared elected from the relevant party or group [section 65(2)].

5. Where there are no names remaining in the nomination list of the relevant political party or group, the Commissioner informs the President who may direct the Commissioner to hold an election to fill such vacancy [section 65(3)].

A political party is a voluntary association of its members and is regulated by its constitution. Although there is a considerable public interest in the activities of political parties, they are essentially private organisations subject to the control of the members and their decisions are made by the respective authorities under each constitution. They are unincorporated bodies of persons and are not established under any statute. The Parliamentary Elections Act, No. 1 of 1981 [section 7(1)] provides for the recognition of political parties "for the purpose of elections". This recognition by itself does not convert a political party into a public authority.

The provisions of section 65 of the Provincial Council Elections Act impose certain statutory duties on two public authorities: The Secretary of the Provincial Council and the Commissioner of Elections.

What is conferred on the Secretary of the Party or the group leader is in the nature of a right to make a nomination within the specified period and not in the nature of a duty to make a nomination. The Secretary or the group leader, as the case may be, is merely the designated functionary who will act on behalf of the party or the group. The section does not have the effect of converting the Secretary or the group leader to a public authority. The Secretary or the group leader of an independent group is not subject to the norms of Administrative Law as to the manner of discharging his functions.

The dispute between the component parts of the Alliance is a private dispute.

Hence mandamus does not lie.

APPLICATION for writ of mandamus.

*Faiz Musthapa P.C.* with *J. C. T. Kotalawela* and *Sunil R. de Silva* for petitioner.

*R. K. W. Gunasekera* with *K. Balapatabendi* for 3rd respondent.

*K. C. Kamalabayson D. S. G.* for 2nd respondent.

July 15, 1991.

**S. N. SILVA, J.**

The Petitioner has filed this application for a Writ of Mandamus against the 1st Respondent directing him to convey to the 2nd Respondent the name of the 2nd Petitioner as the person who should fill a vacancy that has arisen in the Provincial Council of the North Central Province. At the commencement of the hearing learned President's Counsel submitted that the Petitioner is not pursuing the reliefs prayed for against the 2nd Respondent.

The 1st Respondent on whom the Writ of Mandamus is sought is the Secretary of the United Socialist Alliance being a recognized political party under section 7 of the Parliamentary Elections Act, No. 1 of 1981 and section 8 of the Provincial Councils Elections Act, No. 2 of the 1988. The United Socialist Alliance contested the Provincial Councils elections and one P. M. K. Tennakoon was elected from its nomination paper as a member of the Provincial Council of the North Central Province. He died on 01-12-1990, resulting in a vacancy in the Provincial Councils. The Secretary of the Council informed the Commissioner of Elections (the 2nd Respondent) of the occurrence of the vacancy in terms of section 65(1) of the Provincial Councils Elections Act (2R1). Thereupon the Commissioner called upon the 1st Respondent to nominate within a period of 30 days from 27-12-1990, a person who is eligible to be elected as a member of the Provincial Council, to fill such vacancy (2R2). The Writ of Mandamus is sought in this context to direct the 1st Respondent to make a nomination.

The United Socialist Alliance is a political party that gained recognition in 1988. The constitution of the party has been produced marked P1. According to clause III of the Constitution, it is a voluntary union of the Communist Party of Sri Lanka, the Sri Lanka Mahajana Party, and the Lanka

Sama Samaja Party. A constituent party is deemed to be an individual member of the Alliance. The ruling body of the Alliance is an Executive Committee consisting of delegates appointed by each constituent party [clause IV (a)]. All decisions of the Executive Committee "shall be on the basis of consensus except as provided for in clause XI" [clause IV (c)].

When the aforesaid vacancy arose in the Provincial Council the 1st Petitioner being the Secretary of the S.L.M.P. wrote letter dated 11-12-1990 (P11) to the 1st Respondent requesting that the 2nd Petitioner be nominated to fill the vacancy. The letter states that the deceased member of the Provincial Council was a member of the S.L.M.P. and that the vacancy should be filled by a nominee of that party. This claim was made on the basis of a resolution of the Executive Committee of the Alliance made on 05-11-1988 (P3), which states that a vacancy should be filled by a nominee of the respective party to which the member whose vacancy is being filled, belonged.

On the receipt of the said request the 1st Respondent circulated it amongst the two other constituent parties. The Secretaries of these parties replied by letters marked '1R1' and '1R3' stating that no nomination should be made by the 1st Respondent to fill the vacancy and that he should permit the vacancy to be filled by the Commissioner according to the relevant provisions. The letter '1R2' of the L.S.S.P. states that the previous resolution (P3) cannot be applied since there has been a split in the S.L.M.P. after that resolution was passed. On receipt of the said letters the 1st Respondent wrote letter dated 25-1-1991 (P13) to the 1st Petitioner stating that in view of the disagreement amongst the constituent parties he is unable to accede to the request made by the 1st Petitioner. Thereafter the 1st Petitioner wrote two letters to the Commissioner (P14 & P15) requesting the Commissioner to intervene in this matter. There was no response from the Commissioner and this application was filed.

The submission of learned President's Counsel for the Petitioners is that a Secretary of a recognized political party has several statutory functions to perform in relation to elections, being of a public nature and is subject to judicial review in the matter of performing these functions. It was submitted that the duty cast upon a Secretary under section 65(2) of the Provincial Councils Election Act is a public duty. In support of the submission that the S.L.M.P. had a right to nominate a person to fill the vacancy, learned Counsel relied upon the resolution of the Executive Committee of the Alliance made on 05-11-1988 (P3) referred above. The resolution has been made upon consensus as provided for in Article IV(c) and should hold good until it is revoked by consensus. It was submitted that the disagreement expressed in documents '1R2' and '1R3' should not affect the decision of the 1st Respondent unless the previous resolution itself is rescinded.

Learned Counsel for the 3rd Respondent submitted that the Petitioners are not seeking the performance of a statutory duty but attempting by the application to enforce a resolution of the Alliance made several years ago which is not legally enforceable by way of mandamus. It was also submitted that section 65(2) does not cast a duty on the 1st Respondent but only gives the 1st Respondent a right as the Secretary of the Alliance to make a nomination. Since the section provides for a situation where the Secretary fails to make a nomination, the right given to the Secretary cannot be enforced by a Writ of Mandamus. Learned Deputy Solicitor General appearing for the 2nd Respondent submitted that on an examination of section 65(2) the public authorities who have statutory duties are the Secretary of the Provincial Council and the Commissioner of Elections. The Secretary of the political party has only a right to make a nomination and is neither a public authority nor has he a statutory duty to discharge. Learned Counsel for the 1st Respondent relied on documents marked '1R2' and '1R3' and submitted that the 1st Respondent could not possi-

bly accede to the request of the 1st Petitioner in view of the specific disagreement expressed by the Secretaries of the other two constituent parties.

An examination of the provisions of section 65 reveals that there are several stages in the process of filling a vacancy in a Provincial Council. These stages are as follows:

- (1) The Secretary of the Provincial Council informs the Commissioner of Elections of the fact of the occurrence of the vacancy [section 65(1)];
- (2) The Commissioner calls upon the Secretary of the recognized political party or the Group Leader of the independent group, to which the member vacating office belonged to nominate within a period specified by the Commissioner a person eligible to be elected as a member, to fill such vacancy [section 65(2)];
- (3) A nomination made by the Secretary of the recognized political party or the group leader accompanied by the requisite oath or affirmation and the Commissioner declares that person elected to the Council [section 65(2)];
- (4) If the Secretary or the group leader fails to make such a nomination within the period specified, the Commissioner declares as elected the candidate who secured the highest number of preferences at the election of members next to the last member declared elected from the relevant party or group [section 65(2)];
- (5) Where there are no names remaining in the nomination list of the relevant political party or group, the Commissioner informs the President who may direct the Commissioner to hold an election to fill such vacancy [section 65(3)];

The Writ or the order of Mandamus is the normal means of enforcing the performance of a public duty by a public authority (Administrative Law by H. W. R. Wade, 5th Edition,

pages 629, 630; Judicial Review of Administrative Action by S. A. de Smith, 4th Edition, page 540). Hence it is necessary to examine, whether in the aforesaid statutory scheme, the 1st Respondent being a Secretary of a recognized political party is a public authority on whom a public duty is cast by section 65(2).

A political party is a voluntary association of its members and is regulated by its Constitution. Although there is considerable public interest in the activities of political parties, they are essentially private organisations subject to the control of the members and their decisions are made by the respective authorities under each constitution. They are unincorporated bodies of persons and are not established under any statute. The Parliamentary Elections Act, No. 1 of 1981 [section 7(1)] provides for the recognition of political parties "for the purpose of elections". This recognition by itself does not convert a political party into a public authority.

The provisions of section 65 of the Provincial Councils Elections Act impose certain statutory duties on two public authorities. They are the duties imposed upon the Secretary of the Provincial Council referred in stage (1) above and the Commissioner of Elections referred in stages (3), (4) and (5).

These duties are undoubtedly enforceable by a Writ of Mandamus. The question to be determined is whether the functions reposed in a Secretary of a political party or a group leader of an independent group is also of the same class. Section 65(2) requires the Commissioner to call upon a Secretary of the recognized political party or the group leader of the independent group, as the case may be, to make a nomination. The words "if such Secretary or group leader nominates within the specified period....." and the words "if on the other hand such Secretary or group leader fails to make a nomination within the specified period the Commissioner shall declare elected.....", reveal the true nature of the functions reposed in the Secretary or the group leader, as the case may be. I am

inclined to agree with the submissions of learned Deputy Solicitor General and Counsel for the 3rd Respondent that this function is in the nature of a right to make a nomination within a specified period and not in the nature of a duty to make a nomination. That, it is not a duty, is borne out clearly by the alternative provided by the section itself in reposing a duty in the Commissioner to declare the candidate who got the next highest number of votes elected where the Secretary or the group leader fails to make a nomination within the specified period. Furthermore, it is seen that the legislature in effect gives this right to the political party or the independent group to which the member whose seat became vacant belonged. The Secretary or the group leader, as the case may be, is merely the designated functionary who will act on behalf of the party or the group. This section does not have the effect of converting the Secretary or the group leader to a public authority. They remain, as office bearer of the party or as the leader of the group, responsible to the party or the group, in regard to the discharge of their functions. The party of the group will determine the manner in which they exercise their functions. If any wrong is committed by the Secretary or the group leader in the discharge of their functions, so as to constitute a cause of action, that would be a matter for a regular action in the Civil Courts. I am inclined to agree with the submission of learned Deputy Solicitor General that the Secretary of a recognized political party and the group leader of an independent group are not subject to the norms of Administrative Law as to the manner of discharging their functions. To impose the norms of Administrative Law and to make them subject of judicial review in an application for a prerogative Writ would be in effect to subject the political parties and independent groups themselves to the norms of Administrative Law and of judicial review, which has not hitherto happened in this country or in any other country where judicial review is based on the English system of Administrative Law. Learned President's Counsel appearing for the Petitioner conceded that he has not come across any case in which the actions or decisions of a



political party or any of its office bearers have been subject to judicial review in an application for prerogative Writs.

Learned Counsel for the 3rd Respondent submitted that the relief prayed for relates not merely to the performance of a duty by the Secretary but also to the manner of discharging that duty. The relief is for an order to direct the 1st Respondent to convey the name of the 2nd Petitioner. Conveying the name of a particular person who should fill the vacancy relates to the manner in which the 1st Respondent should discharge his functions. As regards this matter the Petitioner relies on the resolution of the Alliance made on 05-11-1988 (P3), regarding the manner in which vacancies should be filled. The Petitioner is thus, in effect, seeking to enforce that resolution by a Writ of Mandamus. On the other hand, the Secretaries of two parties have stated that the resolution should not be followed due to intervening circumstances. Therefore the matter is really a dispute between the component parties of the Alliance. Learned President's Counsel submitted that the United Socialist Alliance is no longer united. The averments in the petition where serious allegations are made against the other parties for joining another alliance which is stated to be hostile to the Petitioner's party, clearly show that there is no alliance as contemplated in the constitution of the United Socialist Alliance. It is a private dispute between the Petitioner's party and the other two parties and there could be no recourse to a public law remedy to enforce the rights claimed by the Petitioner's party in this dispute.

For the foregoing reasons I am of the view that the Petitioners are not entitled to the Writ of Mandamus as prayed for. It was submitted by learned Counsel for the Respondents that the period within which the 1st Respondent could make a nomination has lapsed and that the Commissioner should now fill the vacancy in the manner provided in section 65(2).

On that basis it was submitted that it would be futile to issue a Writ of Mandamus at this stage. In view of the forego-

ing findings it is not necessary for me to consider this aspect. The question of futility has to be considered only if a Writ could ordinarily issue.

The application is dismissed. The Petitioners will pay Rs. 1,500/- as costs to each of the Respondents.

*Application dismissed.*

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