

MAHANTHEGAMA
v
THE UNIVERSITY OF PERADENIYA AND OTHERS

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
YAPA, J.
SC. NO. 540/2001(FR)
11TH MARCH, 2003

Fundamental Rights – Appointment in the University – Appointment by the University Grants Commission (U.G.C.) on interview and selection by the University – Application challenging the selection withdrawn due to misunderstanding induced by the Vice-Chancellor’s failure to disclose all facts – UGC not made party to the application – Power of the court to grant costs to the petitioner against the University – Constitution, Article 12(1).

The petitioner was an unsuccessful candidate at an interview for the selection of Curator (Higher Grade) in the University of Peradeniya (The University). The University Grants Commission (The UGC) which was not made a party to the application was the appointing authority. The UGC had delegated to the University the power to advertise the post and to make recommendations after interview.

The University recommended the appointment of the 27th respondent which was challenged by the petitioner on the ground that the 27th respondent did not possess the requisite experience. Leave to proceed was granted but a restraining order which had been earlier granted against appointment was not extended. The correspondence between the UGC and the University showed that the UGC initially insisted on re-advertising the post for want of requisite experience on the part of the 27th respondent.

By a letter dated 13.06.2002 the 2nd respondent (The Vice Chancellor) provided to the UGC “evidence” of requisite experience on the part of the 27th respondent. But the Vice Chancellor did not inform the Senior State Counsel of the existence of his letter dated 13.06.2002 with the result that neither the court nor the counsel were aware of it. In the result the petitioner’s counsel withdrew the application in the belief that the matter was still in issue between the UGC and the University. Thereafter the UGC appointed the 27th respondent.

Consequently, on a motion by the petitioner, the UGC was added as a party to ascertain whether it was remiss in its duty to the court in the matter. After consideration, the UGC was discharged.

Held :

Although the petitioner was not entitled to substantial relief it was equitable to order the University to pay the petitioner Rs.25,000/- as costs.

APPLICATION for relief for infringement of fundamental rights.

Manohara de Silva for petitioner

S. Barrie, State Counsel for 1st and 2nd respondents.

J.C. Weliamuna for 27th respondent.

Gomin Dayasiri for University Grants Commission.

Cur.adv.vult

May, 27, 2003

FERNANDO, J.

In the year 2001 there was a vacancy in the post of Curator (Higher Grade) in the University of Peradeniya, the 1st respondent. It is common ground that the appointing authority was the University Grants Commission ("the UGC"), which had delegated to the 1st respondent the power of advertising that vacancy, interviewing applicants, and making recommendations. The post was advertised, one of the stipulated qualifications being eight years experience in a supervisory capacity in a botanical garden or agricultural farm.

On 29.09.2001 the Council of the 1st respondent, having considered the recommendations of the selection committee made after interviewing several applicants, recommended to the UGC that the 27th respondent be appointed and that the 29th respondent be placed as a reserve.

On 05.10.2001 the petitioner, an unsuccessful applicant, filed this application – to which the UGC was not made a party – alleg-

ing that the 27th respondent did not have the required experience. When the application was supported on 26.10.2001 the 27th respondent moved for time to retain Counsel, and the matter was postponed for 5.11.2001. An interim order was made, operative till 06.11.2001, restraining the 2nd respondent from issuing a letter of appointment to the 27th respondent. On 05.11.2001 leave to proceed was granted but the interim order was not extended. The Court noted, however, that any appointment made was liable to be quashed if the petitioner ultimately succeeded. Senior State Counsel then informed the Senior Assistant Registrar of the 1st respondent of the order made on 5.11.2001, and advised that the UGC be informed that there was no legal impediment to the appointment of the 27th respondent.

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In the meantime the UGC sought clarification from officials of the 1st respondent as to whether the 27th respondent did have the required period of supervisory experience. Not being satisfied on that score, the UGC decided on 16.4.2002 to request the 2nd respondent, the Vice-Chancellor of the 1st respondent, to re-advertise the post. The 2nd respondent by letter dated 17.4.2002 submitted further material regarding the qualifications of the 27th respondent and again requested that he be appointed. By letter dated 8.5.2002 the UGC informed the 2nd respondent that the UGC, having considered that request on 30.4.2002, had reiterated its previous decision as the 27th respondent did not have the required experience.

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By letter dated 13.06.2002 the 2nd respondent forwarded to the UGC a copy of a letter from the Director-General of Agriculture "clarifying the services (of the 27th respondent) in a supervisory capacity", and again requested his appointment.

On 17.06.2002 when this application was taken up for hearing, Senior State Counsel who appeared for the 1st and 2nd respondents, tendered a copy of the UGC's letter dated 08.05.2002, and the UGC's decision referred to therein. Counsel for the petitioner thereupon stated, without any reservation, that the petitioner did not wish to pursue this application. The Counsel who had appeared for the 27th respondent on several previous dates was not present. Accordingly, the Court dismissed the application. It appears that the 2nd respondent had not informed Senior State

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Counsel that despite the letter of 8.5.2002, he had again urged the UGC, on 13.6.2002, to appoint the 27th respondent. Neither Court nor Counsel was aware of that letter on 17.06.2002.

By a motion dated 17.10.2002, the petitioner complained that in view of the "undertaking" by the UGC (contained in its letter dated 8.5.2002) the petitioner had not pursued his application; that "in violation and in contempt of (that) undertaking the UGC (had) appointed the 27th respondent by letter dated 27.9.2002" without re-advertising the post; that the petitioner was thereby prevented from applying; and that the UGC had not responded to the petitioner's request to stop the said appointment being given effect to. He prayed for suitable action "against the respondent" (presumably meaning the UGC) for violation of the judgment of this Court. He made no allegation and sought no relief against the 1st and 2nd respondents.

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The question arose whether the UGC had in any way attempted to induce this Court to believe that the post would be re-advertised, and to make an order in that belief, and had thereafter acted contrary to its own representation. Accordingly, the UGC was added as a respondent, and given an opportunity to state its case. Counsel on its behalf thereafter submitted the entirety of the relevant documents, and contended that the UGC had not given any undertaking to Court on 17.6.2002 (or at any time before or after); that the UGC was not a party and was not bound by the proceedings and order of 17.6.2002; that the petitioner, the respondents and their attorneys-at-law had not informed the UGC of the proceedings and order of 17.06.2002; that after considering the 2nd respondent's letter of 13.6.2002 the UGC had decided on 25.9.2002 to vary its previous decision and to appoint the 27th respondent; and that it was only after the 27th respondent had been appointed on 27.9.2002 that the Registrar of the 1st respondent forwarded a copy of the order made on 17.06.2002.

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Learned Counsel for the petitioner did not dispute the above facts. The UGC was not a party and gave no undertaking to this Court. There was no representation that the letter of 8.5.2002 contained an irrevocable decision, or constituted a settlement mutually agreed upon. On the contrary, it was a decision which the UGC was free to vary in the normal course, if justified by new material.

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There was no order restraining the appointment of the 27th respondent. It was the UGC which was the appointing authority, and if the petitioner had wished to have the benefit of either an order against the UGC, or an undertaking by the UGC, enforceable by way of contempt proceedings or otherwise, he should not have given up his claim for relief upon the mere production by the 1st and 2nd respondents of the UGC's letter of 8.5.2002, but should instead have insisted upon such an order or undertaking. 100

The UGC must therefore be discharged.

The 2nd respondent's conduct is open to criticism. By failing to inform his Counsel of his letter dated 13.6.2002, Counsel for the petitioner was probably lulled into the belief that the 1st and 2nd respondents had accepted the decision to re-advertise the post. Had he informed the UGC of the order made on 17.6.2002, the UGC may well have hesitated to dispense with re-advertising. However, the principal reason for the predicament in which the petitioner now finds himself is the failure to insist on an appropriate undertaking or order before giving up his claims. It is unnecessary to consider whether the petitioner should be given relief analogous to *restitutio in integrum* because he has not asked for it. In any event it is not equitable now to grant such relief because the petitioner took no steps to inform the UGC of the proceedings of 17.6.2002; because the 27th respondent has given up other employment to take up the post of Curator; and because the petitioner was not the candidate placed second by the Selection Committee. Having regard to all the circumstances, I consider it equitable to order the 1st respondent to pay the petitioner a sum of Rs. 25,000/- as costs. 110 120

ISMAIL, J. - I agree.

YAPA, J. - I agree.

*Costs against the University
granted to petitioner.*