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

In the matter of an Application for a mandate in the nature of *Writ of Certiorari, Prohibition and Mandamus* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Dhilmi Kasunda Malshini Suriyarachchi,
42/3, Thambiliwatha, Road,
Piliyandala

PETITIONER

CA/WRIT/187/2016

Vs,

1. Sri Lanka Medical Council,
   No 31, Norris Canal Road,
   Colombo 10.

2. South Asian Institute of Technology and Medicine Limited,
   No 60, Suhada Mawatha, Millenum Drive,
   Off Chandrika Bandaranayaike Kumarathunga Mawatha,
   Malabe.

3. Hon. Lakshman Kiriella,
   Minister of Higher Education and Highways,
   Ward Place,
   Colombo 07.

4. The Secretary,
   Ministry of Higher Education and Highways,
   Ward Place,
   Colombo 07.

5. The University Grants Commission,
   No. 20,
   Ward Place,
   Colombo 07.

6. Hon. Dr. Rajitha Senarathne,
   Minister of Health, Nutrition Indigenous Medicine,
   Ministry of Health, Nutrition Indigenous Medicine

Before: **Vijith K. Malalgoda PC J (P/CA) &**
S. Thurairaja PC J

Counsel: Romesh de.Silva PC with Sugath Caldera for the Petitioner,

Ikram Mohomed PC with Neomal Senatilake , C. Galhena, Ms. T. Marjan and Ms. Galhena for 1st Respondent.

Faiz Musthapha PC with Riad Ameen and Faizer Musthapha for 2nd Respondent.

S. Rajaratnam ASG, PC with Zhuri Zain SSC for 3rd to 6th Respondents

Argued on: 08.11.2016
Written Submissions on: 15.12.2016
Order on: 31.01.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Dhilmi Kasundara Malshani Suriyarachchi a MBBS Graduate from the South Asian Institute of Technology and Medicine Limited (hereinafter referred to as SAITM) has filed the present application before this court making the Sri Lanka Medical Council (hereinafter

referred to as SLMC) the 1st Respondent and had sought the following relief as against the said 1st Respondent;

b) To issue a mandate in the nature of a writ of *Certiorari* quashing the decision of the Sri Lanka Medical Council and/or its employees, agents and servants to refuse registration as a medical practitioner to the Petitioner as evidenced by letter dated 26.05.2016 marked P-27;

c) To issue a mandate in the nature of a writ of *Mandamus* compelling the Sri Lanka Medical Council and/or its employees, agents and servants to register the Petitioner as a medical practitioner in terms of section 29 of the Medical Ordinance as amended;

d) To issue a mandate in the nature of a writ of *Prohibition* preventing the Sri Lanka Medical Council agents and/or its employees, agents and servants from refusing to register the Petitioner as a medical practitioner in terms of section 29 of the Medical Ordinance as amended;

e) To issue a mandate in the nature of a writ of *Certiorari* quashing the decision of the Sri Lanka Medical Council and/or its employees, agents and servants to refuse provisional registration to the Petitioner as evidenced by letter dated 26.05.2016 marked P-27;

f) To issue a mandate in the nature of a writ of *Mandamus* compelling the Sri Lanka Medical Council and/or its employees, agents and servants to register the Petitioner provisionally as a medical practitioner in terms of section 29 (2) of the Medical Ordinance as amended;

g) To issue a mandate in the nature of a writ of *Prohibition* preventing the Sri Lanka Medical Council and/or its employees, agents and servants to refuse to register the Petitioner provisionally as a medical practitioner in terms of section 29 (2) of the Medical Ordinance as amended;

As revealed before this court the Petitioner has undergone a course of study at SAITM since 2009, initially undertaking a course leading to an MD degree and thereafter leading to an MBBS degree. The

Petitioner, who had successfully passed all examinations conducted by the said SAITM leading to the award of the MBBS degree, was awarded an MBBS Second Class Upper Division degree from the SAITM on 30th May 2016 (P-3).

After obtaining the said degree the Petitioner visited the SLMC accompanied by a Senior Lecturer from the SAITM Dr. Keerthi Attanayake to submit her application under section 29 (2) of the Medical Ordinance (as amended) for provisional registration as a medical practitioner for the purpose of acquiring the necessary experience required for obtaining a certificate under section 32.

When the Petitioner informed the officials at the SLMC her requirement, she was directed to the Registrar, and the Petitioner identified herself and informed him her requirement and the registrar had said to have informed the Petitioner that "the Minister of Health had already been informed that, the students from SAITM were not registrable, and that the same was communicated publicly through several news paper advertisements, and that he was therefore unable to accept her application but refused to give the refusal in writing."

The above position is confirmed before this court by the said Dr. Keerthi Attanayake by affidavit dated 08.06.2016 produced marked P-8.

As observed by this court it is necessary to consider two legal regimes in deciding this case. Although the parties before this court admitted the existence of the two legal regimes; they were not in agreement, to which extent each of the regime is applicable to the present case or the issue before this court.

Since the Petitioner had claimed that SAITM, the institution which awarded her with the MBBS degree with Second Class Upper Division, is a Degree Awarding Institution under the Universities Act, this court would first analyze the legal regime under which the said status was awarded to SAITM and the extent to which the said status will helpful for the Petitioner to claim relief from this court.

As revealed before this court the Minister in Charge of the Higher Education (3rd Respondent) is empowered under section 25A of the Universities Act No 16 of 1978 (as amended) to recognize an institution as a degree awarding institute.

The relevant provisions of the Universities Act No 16 of 1978 (as amended) can be summarized as follows;

Section 25A	Notwithstanding anything to the contrary in any other provision of the Act, the Minister may, subject to the provisions of section 70C, by an order (hereinafter referred to as a "Degree Awarding Institute Order") recognize, any institution as a Degree Awarding Institute for the purpose of developing higher education in such courses of study in such branches of learning as are specified in such order and subject to such conditions as may be specified therein.
Section 26	Every University Order, Campus order, Open University Order, University College Order, Institution for Higher Learning Order, and Degree Awarding Institute Order shall be published in the Gazette, Each such order shall come into force on the date specified therein and shall as soon as possible thereafter, be tabled in parliament.
Section 27(1) (b)	A Degree Awarding Institute Order made under section 25A, may be amended, varied or revoked by the Minister
Section 70C (1)	The Minister shall before making a Degree Awarding Institute Order under section 25A in respect of an institution, obtain a report in relation to such institution, including the educational facilities provided therein from the Specified Authority.

Section 70B (1) The Minister may by an Order published in the Gazette appoint any person by name or office to be a Specified Authority for the purpose of this Act.

As revealed from the relevant provisions referred to above, it is mandatory for the Minister to Act under section 70C before making an order under section 25 A of the Universities Act.

It was further revealed before this court that when SAITM proceeded to establish a partnership with Niznhy Novgorod State Medical Academy in Russian Federation (hereinafter referred to as NNSMA) to award a Medical Degree (MD) through cross boarder arrangements. Based on the advice received from legal experts SLMC informed SAITM that "SAITM cannot exist as the 'off-shore' campus of the NNSMA. It may however exist as a degree awarding institute referred to in the Universities Act (section 25A and 70 A-D) and also in the Medical Ordinance" (P-13)

Subsequent to the said response by the SLMC, SAITM has submitted an application to the UGC applying for degree awarding status on 25th January 2011.

In this regard the Petitioner has produced marked P-15a, P-15b, P-15c and P-16 four reports published by the Quality Assurance and Accreditation Council Division of the UGC with regard to SAITM and as observed by this court P-15a refers to Institutional Report prepared after an inspection at SAITM on 22nd and 23rd February 2011 by a committee comprising of several professors with a representative of the SLMC. P-15b is the final Institutional Review Report prepared by the same Committee after an inspection on 24th April 2011.

Another Committee comprising of several professors and two members from the SLMC had published a Program Review Report based on their meetings with SAITM on 24th and 25th February and 1st July. When perusing the said reports we observe that the said committees after studying the progress made by SAITM had made positive recommendations.

After obtaining the said Reports by the Specified Authority, the predecessor of the 3rd Respondent by virtue of powers vested in him by section 25A of the Universities Act No 16 of 1978 (as amended) made a Degree Awarding Institute Order on 29th August 2011 and Published it in the Government Gazette – extraordinary 1721/19 dated 30th August 2011.

As observed by this court, when issuing the said order the then Minister of Higher Education had specifically referred that, the said order is issued under section 25 A of the Universities Act, having obtained and satisfied a report under section 70 C of the aforesaid Act in respect of SAITM.

Under the schedule to the said order the applicable conditions have been specifically stated and it is further observed that the said order is valid to the students seeking admission to SAITM on or after the date of the said order coming in to force.

During the argument before this court the Learned President's Counsel representing the 1st Respondent Sri Lanka Medical Council (SLMC) raised several preliminary objections but the court at that stage decided to proceed with the argument both on the preliminary objections as well as the main matter and to consider both together when making the final order.

Apart from the preliminary objections raised, which I will discuss at a later stage of this Judgment, one main argument raised by the Learned President's Counsel was based on the; Degree Awarding Institute Order made by the then Minister of Higher Education.

In this regard the Learned President's Counsel argued that there was no specific date given in the said order, for the said order to come in to force and submitted that in the absence of such date, the said order has not come into force at all. However in this regard our attention was drawn to another Degree Awarding Institute Order issued by the then Minister of Higher Education under section 25A of the Universities Act (as amended) with regard to the same institution SAITM, on 26th September 2013. (P-5)

As observed by this court the second order issued on 26th September 2013 and was published in the government Gazette extraordinary 1829/36 dated 26th September 2013 extends the previous order as follows;

> " with regard only those students who are registered to read for MD degree at Nizhny Novgorod State Medical Academy Russia through SAITM during the period from 15th September 2009 to 29th August 2011 and who had fulfilled the qualifications specified by the University Grants Commission for selection of Students to Universities coming under the purview of University Act no 16 of 1978, and who are agreeable to change their course of study to a course of study leading to the MBBS Degree Awarded by SAITM, the aforesaid order shall for all purposes in respect only of such students, be deemed to have come into effect on the 15th day of September 2009, subject to such conditions as specified in the schedule here to."

The above order refers to the students who had undertaken the study of MD Degree from NNSMA during the period of 15th September 2009 to 29th August 2011, and as revealed before this court the said Degree Awarding Institute Order was also made after obtaining a report under section 70C of the Universities Act (as amended). In this regard our attention was drawn to the Report produced marked P-16 prepared by several professors appointed by the Secretary to the Ministry of Higher Education as the Specified Authority. The said committee after reviewing the study programme of the SAITM with regard to the Students enrolled between the said period had recommended that, "Based on the criteria used by the standing committee on accreditation and quality assurance for established state Universities, required quality had been maintained as regards to the academic programme from the date of inception (15th September 2009) to the date of award of the degree awarding status" (29th August 2011).

As observed by this court, the said Degree Awarding Institute Order had clarified all the doubts with regard to the date on which the previous Degree Awarding Institute Order came into operation and fixed

the said date as 29th August 2011. In addition to the above it fixes a date of operation to the second order as 15th September 2009.

In the said circumstances we see no merit in the argument raised by the Learned President's Counsel for the 1st Respondent with regard to the date on which the Degree Awarding Institute Order came into operation and therefore reject the said argument.

When considering the legal regime under the Universities Act No 16 of 1978 (as amended) it is clear that there are two Degree Awarding Institute Orders issued under section 25A of the said Act by the Minister in Charge of Higher Education after complying with section 70C of the said Act with regard to SAITM. Out of the said two orders, the 1st order has come into operation since 29th August 2011 and the second order backdates the date of operation to 15th September 2009 to cover the students who had undertaken to follow the MD Degree Programme with NNSMA including the Petitioner to the present application.

As far as the case in hand is concerned, this court is therefore satisfied that SAITM has been declared as a Degree Awarding Institution and continued to be a Degree Awarding Institution at all times relevant to the present application under the provisions of the Universities Act No 16 of 1978 (as amended)

Section 70A of the Universities Act explain the powers of a Degree Awarding Institute as follows;

70A A Degree Awarding Institute recognized by an order under section 25A shall, with the concurrence of the Specified Authority have the power;

a) To admit students and provide the instructions in such branches of learning as are specified in the order made under section 25A in respect of such institute.
b) To hold examinations for the purpose of ascertaining the persons who have acquired proficiency in the courses of study in such branches of learning

c) **To grant an confer degrees, diplomas, certificates and other academic distinctions on persons who have followed instructions in the course of study in such branches of learning and passed such examinations.**

d) To grant and confer degrees on persons who have conducted research under its supervision and subject to conditions specified by the Specified Authority. (emphasis added)

In the absence of any order made under section 27(1) (b) revoking the order by the Minister in Charge of Higher Education, it is clear that, SAITM is empowered to grant and confer the MBBS Degree on the Petitioner as per the provisions of the Universities Act (as amended) and there is no other impediment under the Universities Act for SAITM to grant and confer the said Degree to the Petitioner.

In this regard this court is further mindful of another objection raised by the Learned President's Counsel who represented the 1st Respondent before us, with regard to the issuance of a compliance certificate on the 2nd Respondent. The argument raised by the 1st Respondent in this respect was twofold. They firstly argued that the 1st Respondent is the sole governing body of the medical profession and therefore submitted that the 1st Respondent has to be considered as the specified professional body within the meaning of the regulations referred to below. Based on the said argument, on behalf of the 1st Respondent it was further submitted that the 2nd Respondent had failed to obtain a "Compliance Certificate" required under the rules referred to below and in the absence of such compliance certificate, the 2nd Respondent SAITM is not entitled to issue a MBBS Degree acceptable under the Universities Act and the Medical Ordinance.

The 1st Respondent when filing the statement of objection, had produced marked 1R4a Rules made under section 137 read with section 70 D of the Universities Act (as amended)

As observed by us section 137 of the said Act provided for making rules by the commission, the Appeal Board, the Specified Authority and any Authority or other body of a Higher Education Authority and section 70 D had specifically granted certain powers with the Specified Authority and therefore it is

understood that the rules prepared under section 70D will have to be considered within the powers granted to the Specified Authority under section 70D.

Section 70D of the Universities Act (as amended) which refers to the powers of the Specified Authority, read thus,

70D The specified authority shall exercise the following powers subject to the direction and control of the Minister;

i. Determine the requirements for the admission of persons to cause of study at Degree Awarding Institutes

ii. Determine in consultation with each Degree Awarding Institute the courses of study which shall be provided in such institute, being courses of study in such branches of learning as are specified in the order made under section 25A in respect of such institute, the examinations to be held to ascertain whether persons who have followed such courses of study have acquired proficiency therein and the degrees, diploma's and other academic distinctions which shall be awarded as such institutions.

iii. Determine from time to time in consultation with each Degree Awarding Institute the number of students which shall be admitted annually to each such institute and the apportionment of that number to the deferent course of study at such institute.

iv. Determine the qualifications of the teaching staff of Degree Awarding Institute

v. Determine the facilities to be provided and the academic standards to be maintained at such Degree Awarding Institutes

vi. Appoint such officers and servants as may be necessary for the exercise of its powers under this Act

As observed by this court the powers vested with the Specified Authority as referred to above in regulating the Degree Awarding Institutes, is more fully explained in the regulations published in

Extraordinary Gazette No 1824/12 dated 22.08.2013 and regulations 31 of the said Regulation provides as follows;

Regulations 31 All Non-state Institutes which have been recognized as Degree Awarding Institutes in pursuance to the Report made to the Ministry by the Specified Authority under section 70C of the Act and which offer study programmes leading to degrees in Medicine, Engineering, Architecture and Other Similar Professional Degrees shall, obtain compliance certification from the relevant specified professional body and shall submit such certification to the Specified Authority.

Even though the said regulations have made provision for the Degree Awarding Institute to obtain a compliance certificate, and submit the same to the Specified Authority, the purpose of obtaining such report and/or the steps the Specified Authority should take when such certificate is received or not, is not explained in the said regulations but under the provisions of regulation 32 the Specified Authority in empowered as follows;

Regulation 32 **Subject to the directions and control of the Minister**, the Specified Authority shall, from time the time examine the performance of any such Degree Awarding Institute through a Quality Assurance Monitoring System established for the purpose, to ensure that the standards set out in these rules are maintained. (Emphasis added)

In the said circumstances it is clear that all the powers vested with Specified Authority is subject to the directions and control of the Minister who is empowered to revoke the Degree Awarding Institute Order under section 27 of the Universities Act (as amended) but, as discussed earlier in this judgment, the Minister has not taken any steps to revoke the Degree Awarding Institute Order issued on 2nd Respondent Institute.

In the said circumstances we see no merit in the second argument placed before this court by the Learned President's Counsel and therefore the question of deciding the "Specified Professional Body" will not arise for the purpose of this Judgment.

Apart from the applicability of the provisions in the Universities Act and the regulations made there under, the provisions of the Medical Ordinance (as amended) was also relevant to the application in hand but one of the main issue raised before us was , the extent to which the Medical Ordinance (as amended) was applicable to the case in hand.

As already submitted by the Petitioner, the Petitioner had visited the 1st Respondent's office with a Senior Lecturer of SAITM to submit her application under section 29 (2) of the Medical Ordinance for provisional registration as a medical practitioner.

This court will now proceed to go through the relevant provisions in the Medical Ordinance (as amended)

Section 29 (1) of the Medical Ordinance refers to the Registration of a Medical Practitioner in Sri Lanka and according to section 29 (1), the person who is so applied shall posses

a) if he is of good character and
b) if he hold a Degree of Bachelor of Medicine of the University of Ceylon or corresponding University or from a Degree Awarding Institute

and a certificate granted by the Medical Council under section 32; or.....

if he or she possess a degree from an institute which is established under an order published and Gazetted under section 26 of the Universities Act, Section 32 empowers the Medical Council to issue a certificate of experience in order to register such person as a medical practitioner and the provisions of section 32 reads thus,

Section 32 (1) where a person who is **provisionally registered as a medical practitioner** applies to the Medical Council for a certificate under this section and such council is satisfied that he-

a) has been engaged in employment in a resident medical capacity for a prescribed period in one or more approved hospitals or institutions,

b) has during his employment as mentioned in paragraph (a) of this subsection been engaged for an approved period in the practice of medicine, for an approved period in the practice of surgery and for approved period in the practice of other approved fields and,

c) has rendered satisfactory service while so employed,

such council shall grant, in the prescribed form a certificate that such council is so satisfied.

As revealed from the section 32 above, a person to apply for a certificate under section 32 after fulfilling the requirements under (a)-(c), he or she should possess a provisional registration as a medical practitioner. Even though section 32 is silent on the issuance of the provisional registration, section 29 (2) of the Medical Ordinance refers to the issuance of provisional registration follows,

Section 29 (2) For the purpose only of enabling the acquirement of such experience as is required for obtaining from the Medical Council, a certificate under section 32, a person shall, upon application made in that behalf to the Medical Council registered provisionally as a Medical Practitioner-

a) if he is of good character and

b) if he

i. Hold a Degree of Bachelor of Medicine of the University of Ceylon or a corresponding University or Degree Awarding Institute

or.....

whilst referring to the above provisions of the Medical Ordinance (as amended) the Petitioner took up the position that the Medical Council is bound and cannot refuse granting provisional registration if the applicant is;

a) Of good character

b) Holds a Degree as required and 29 (b) 1-111

c) Fee for provisional registration is paid

However, as revealed above, when the Petitioner visited the Sri Lanka Medical Council with a Senior Lecturer and informed the reason for her visit, she was informed by the Registrar of the SLMC that, "Minister of Health had already been informed by a letter from the President of SLMC that students from SAITM were not registrable and that the same was communicated publicly through several news paper advertisements and therefore the registrar was unable to accept the application.

In other words, what exactly took place at the SLMC on that day was that, the SLMC had refused to accept the application of the Petitioner who possessed a MBBS Degree from SAITM a Degree Awarding Institute under section 29 (2) (b) (i) of the Medical Ordinance. Apart from the said refusal, two other important issues were also revealed from the said statement to the effect,

1. President of the SLMC had already written to the Minister of Health that students from SAITM were not registrable
2. The same was communicated publicly through Newspaper advertisements

Apart from the several objections raised, the 1st Respondent had heavily relied on its powers under the Medical Ordinance (as amended) during the arguments before us.

In this regard the 1st Respondent had further relied on a report prepared by a panel of prominent medical consultants appointed by the SLMC, chaired by Professor M.H. Rezvi Sheriff. As observed by this court the said committee has been appointed by the SLMC to inspect and report on SAITM in terms of section

19A of the Medical Ordinance. Apart from the provisions under which the said committee was appointed, the 1st Respondent relied on Regulation 31 of the Regulations made by the Specified Authority under sections 137 read with section 70C and 70D of the Universities Act (as amended) with regard to the obtaining a Compliance Certificate from the Special Professional Body.

In this regard specific reference was made to Item No 5 of schedule II of the said Rule which provides that "..... in the case of study programme in Medical Sciences, the Teaching Hospital to which the students have access and provided with clinical training must conform in to the standards stipulated by the SLMC" and argued that the 2nd Respondent must abide by the standards stipulated by the 1st Respondent and is subject to the supervision of the 1st Respondent.

As discussed earlier in this judgment, this court does not see any contravacy over the regulations Gazetted in 1R4 but as observed earlier, the said regulations were Gazetted under section 70C and 70D of the Universities Act (as amended) with regard to the powers of the Specified Authority and if there are violations of the regulations, it is the duty of the special professional body which empowered with such supervision to bring it to the notice of the Specified Authority for the Authority to take appropriate Action. However as observed earlier, such powers of the Specified Authority can only be exercised subject to the directions and control of the Minister in Charge of Higher Education.

Therefore, with regard to any power (if any) conferred upon the SLMC under Regulations promulgated under section 70C and 70D read with 137 of the Universities Act (as amended) is subject to the powers of the Minister in Charge of Higher Education and in the absence of any action taken by the said Minister under section 27 of the Universities Act (as amended) the 1st Respondent SLMC is not entitled to relied upon such provision as a ground and/or objection to the case in hand, to refuse provisional registration under section 29 (2) of the Medical Ordinance (as amended).

This court will now proceed to consider the powers vested with the SLMC under section 19A of the Medical Ordinance (as amended). As observed by this court SLMC is empowered under section 19A (1) to appoint a committee for the purpose of examination and investigation in order to ascertain,

a) Course of study provided by such university or institution leading to the grant or conferment of a medical qualification
b) The degree of proficiency required at examinations held by such university or institution for the purpose of granting or conferring any such qualification
c) The staff, equipment accommodation and facilities provided by such university or institution for such course of study

Conform to the prescribed standards, (emphasis added)

and under subsection (3) of the said section, the said committee is required to submit its report of their finding to the SLMC.

Under section 19B of the said Ordinance the SLMC is also empowered to direct the Vice Chancellor or the Head of the Institution to furnish within specified period such information or explanation as the council may require in respect of the matters referred to in subsection 1(a) as referred to above.

After considering the report submitted under section 19A and information received under 19B, SLMC is empowered under section 19C(1) of the said Ordinance to recommend to the Minister (Minister in Charge of the subject of Health) that such qualification shall not be recognized for the purpose of registration under Medical Ordinance, when the said SLMC is satisfied that,

a) The course of study provided, leading to the grant or conferment of a medical qualification
b) Any examination held for the grant or conferment of such qualification
c) The staffs accommodation and equipment provided for the purpose of such course of study

do not conform to the prescribed standards (emphasis added)

under section 19C(2) of the said Ordinance, upon receipt of such report, the Minister shall send a copy of such report to the institution concerned inviting to make its comments within a specified period.

Under section 19 C (3) of the said Ordinance the **Minister is empowered to declare by regulation that any provision of the said Ordinance which enables the holder of that qualification to be registered shall cease to have effect in relation to such institution** if he is satisfied after examination of such report, comments by the institution if any and after making such further inquiry as he considers necessary that,

a) The course of study provided, leading to the grant or conferment of a medical qualification
b) Any examination held for the grant or conferment of such qualification
c) The staffs accommodation and equipment provided for the purpose of such course of study

do not conform to the prescribed standards (emphasis added)

When going through the said provisions of the Medical Ordinance (as amended) it is clear that under section 19A the SLMC is empowered to appoint a committee as revealed in the case in hand and on its recommendation the SLMC 'may' submit its recommendations to the Minister. However as observed by this court, the role played by the SLMC ends at that point and any steps with regard to the said recommendations of the SLMC will have to be taken by the Minister under the provisions of section 19C(2) and (3) of the said Ordinance.

As further observed by this court the Minister is bound to furnish a copy of such recommendation to the institution for its comments and also empowered making further inquiry as he considered necessary and thereafter take his decision with regard to the recommendation submitted to him by the SLMC. If the Minister's decision is that, the institution concerned do not conform to the prescribed standard, in such a situation he shall declare it by regulation but, the Minister is not required to publish his decision if he is not going to act under the report or he is satisfied with the explanation forwarded by the institution.

When considering the above provisions of the Medical Ordinance (as amended) it is also important to consider as to what are the prescribed standard expected under the Medical Ordinance (as amended).

As observed by this court, section 74 of the Medical Ordinance (as amended) defined the term 'prescribed' as 'prescribed by regulation.' Section 72 of the said Ordinance had made provisions for the Minister to make regulation for the purpose specified in section 11, 19 and 25 and generally for the purpose of giving effect to the principles and provisions of the Medical Ordinance (as amended) and when making regulations under section 19 or 55 the Minister is bound to consult [Minister shall] the Medical Council. However as submitted by the Learned Additional Solicitor General who represented the 3rd to 6th Respondents including the Minister in Charge of Health, that there exist no regulation whatsoever framed by the Minister prescribing the standards or minimum standards for Medical Education by any University or Degree Awarding Institute in the Country. Even though there was Medical Education (minimum standards) Regulation No 1 of 2009 which was published in Government Gazette 1590/13 dated 25.02.2009 issued in accordance with section 72 of the Medical Ordinance the said Regulation was rescinded by Gazette Extraordinary 1637/22 dated 21.10.2010 and therefore at the time the investigating team visited SAITM there was no regulation in force specifying 'prescribed standards' as required by section 19A of the said Act.

In paragraph 39 of the statement of objection filed by the 1st Respondent the said Respondent had admitted this position but submitted that in the absence of any regulation, the 1st Respondent had formulated "Guidelines and Speculations' on standards for Accreditation of Medical Schools in Sri Lanka and Courses of Study provided by them" (1R12) but we observe that the said guideline does not carry any binding effect or legal basis to act upon.

In the said circumstances the Learned Additional Solicitor General submitted that the inspection report submitted under section 19A of the Medical Ordinance (as amended) is without any legal basis, exceeding the powers conferred on the SLMC.

As revealed during the argument before this court, by letter dated 25th September 2015 the Minister has submitted the report he received from the SLMC acting under section 19C(2) of the Medical Ordinance (as amended) [P19-a] and invited the comments from the SAITM. A letter received by SLMC dated 4th September and report prepare by the investigating team signed and dated below as 04/09/2015 was also annexed to the said letter [P-19b and P-19c].

After receiving the said letter the SAITM had responded to the report by the SLMC by their reply dated 20th October 2015 (P-20). In the said reply submitted by SAITM, the Issues referred to in the SLMC Report had been extensively dealt with a comparison of the facilities available in the state medical schools, for the Minister to understand the facilities available at SAITM and as revealed before us the Minister has not taken any steps under section 19C (3) of the Medical Ordinance as against SAITM thereafter.

As observed above in this order, if the Minister is not going to act on the report of SLMC or satisfied with the explanation given by the institute, he is not required to publish his decision and in the said context, the only inference this court can reach is that the Minister who acted under 19C(2) of the Medical Ordinance (as amended) after going through the response of the Institute had decided not to act under section 19C(3) of the Medical Ordinance (as amended)

In these circumstances it is very much clear that the report prepared and submitted to the Minister under section 19A, 19B and 19C(1) of the Medical Ordinance was acted upon by the Minister under section 19C(2) but not taken any steps under section 19C(3) of the same Ordinance and therefore the recommendations of the 1st Respondent SLMC made under 19C(1) was not implemented by the Minister (Minister in Charge of Health) under the provisions of the Medical Ordinance. In the said circumstance there is no obstacle for the SLMC to provisionally register the Petitioner who has obtain a MBBS Degree from SAITM acting under section 29(2) of the Medical Ordinance (as amended).

As discussed earlier in this judgment, when the Petitioner visited the SLMC with a Senior Lecturer from the SAITM and requested to submit her application for provisional registration, her request was turned down and during the arguments before this court the Petitioner took up the position that the said refusal was made in *mala-fide*.

This court will now proceed to consider whether the 1st Respondent's above conduct amounts to an act of *mala-fide* when considering the circumstance placed before this court.

As revealed above, at the time the Petitioner visited SLMC, the SLMC acting under section 19A and 19B of the Medical Ordinance has already submitted a report dated 04.09.2015 to the Minister for his consideration, but up to May 2016 the Minister had not made any order under 19C(3) of the said Ordinance.

However the 1st Respondent had published a newspaper advertisement on a daily newspaper on 11th November 2015, (produced marked as 1R 20K by the 1st Respondent) with regard to certain steps taken by the 1st Respondent as against to the 2nd Respondent institution.

As evident from the said paper advertisement, after explaining the general public of several correspondence between the 1st and the 2nd Respondent which took place since May 2014 had referred to the steps taken by the 1st Respondent under section 19A and 19C(1) as follows,

"9. Section 19C (1) of the Medical Ordinance states that "where the Medical Council is satisfied in a report made to it under subsection (3) of section 19A or the information furnished to it under section 19B that the facilities provided by an institution do not conform to the relevant standards it may recommend to the Minister of Health that the Degree awarded by the Institution shall not be recognized for the purpose of registration under the Ordinance.

10. Accordingly, based on the report submitted by the team of inspectors of SLMC formulated its official report which was submitted to the Hon. Minister of Health on 4th September 2015 with

the recommendation that the Degree Awarded by SAITM should not be recognized for the purpose of registration under the Medical Ordinance.

This Recommendation of the SLMC was solely guided by its compelling sense of responsibility to ensure the adequacy of the quality, efficacy and safety of health care delivered to our people."

As observed by this court the matters referred to in the said advertisement including what is reproduced above were official functions vested with the 1st Respondent SLMC and as observed earlier in this judgment, the official role played by the 1st Respondent ends when the 1st Respondent submitted its recommendation to the Minister.

Any step taken beyond its powers even by publishing a newspaper advertisement, was not empowered by the Medical Ordinance, was done in good faith is a matter to be ascertain by this court when considering the conduct of the 1st Respondent.

In this regard our attention was drawn to two important areas by the Petitioner.

The Learned President's Counsel for the Petitioner drew our attention to the contents of the Report prepared by the investigation team and to it's final recommendation. Whilst referring to the recommendation of the said report the Learned President's Counsel submitted another finding said to have published by its authors prior to the publication of the said report but as observed by this court this court is not going to decide as to which report should be accepted since that is beyond the powers of this court in a writ application.

As observed correctly in the case of ***Thajudeen V. Sri Lanka Tea Board 1981 2 Sri LR 471*** disputed facts will have to be considered before a trial court where witnesses are permitted to testify on the disputed issues.

In the said circumstances this court accepts the report submitted before this court marked P-19d by the Petitioner as the report submitted by the investigation team under section 19A of the Medical Ordinance

(as amended) but, another question arises whether the said report was available before the SLMC when it was said to have considered the said report at its 556th meeting held on 28th August 2015, since the last signatory to the said report had dated his signature on 04.09.2015. None of the other signatories have dated their signatures.

In this regard the 1st respondent submitted an affidavit from the Chairman of the investigating team (1R9) who had submitted, that,

"The report prepared by the said team was presented to the Medical Council at its 556th meeting held on 28.08.2015 duly signed by all the members of the team except Dr. L.B.L. de. Alwis, Prof K. Sivapalan and the coordinator of the team Dr. H.M.S.S.D. Herath. I state that I directed the coordinator of this team Dr. H.M.S.S.D. Herath and signed and date the said report only after the above two members place their signatures."

Even if the above position is accepted as correct, it is clear that three members of the said investigation team had not signed the report, when it was considered at the 556th meeting held on 28th August 2015.

The said report prepared by the investigation team had identified the facilities under part C, clinical facilities under part D curriculum under part E, Evaluation under part F and Clinical Skills Training under part G and had discussed at length the facilities available and the lapses if any under those headings.

Even though it is not necessary to discuss each and every heading referred to above in this judgment, when going through the said report, it is observed by this court that the team had gone into details of the facilities available at the SAITM. However, with regard to the main three areas that the final recommendations were based upon I would like to analyze some of the observations made in the said report.

Part D Clinical Facilities

D-1 Hospitals used for undergraduate training

The principle teaching hospital is the Neville Fernando Teaching Hospital which was opened in April 2013

Nawaloka Hospital Plc, Oasis Hospital, Asiri Surgical Hospital and Ninewells Hospital have been used to augment the clinical training at NFTH on a one to one arrangement with a few consultants and with the approval of the Hospital Management....

However, this type of adhoc arrangement with individual consultants in private hospitals cannot be regarded as adequate compensation for insufficient clinical exposure at the main teaching hospital

D-2 –D-4 Neville Fernando Teaching Hospital has 850 beds a new wing 152 beds (total 1002 beds). However only 200 beds have been commissioned in the 1st phase of hospital development..... The hospital also has a special psychiatry ward known as Arunalu Ward. Total admissions have increased from 873 in January 2015 to 1183 in June 2015. Total surgical procedure performed during the same period have increased from 187 to 251 total channeling appointments have increased from 3307 to 4305 total clinic patients have increased from 1477 to 1898..... All categories of patients have been used for clinical teaching.....

Despite these increasing numbers, it is clear that the patients turnover at the NFTH in all Specialties grossly inadequate for provision of sufficient clinical learning material for the large number of students currently undergoing clinical appointments

D-5 Laboratory facilities at NFTH

The NFTH laboratory has the following department;

Biochemistry, Hematology, Microbiology, Histopathology, Immunoassay and Serology, General Pathology they seem to be well equipped

D-6 Radiological Facilities at NFTH

The Radiological Department is equipped with a MRT Scanner a CT Scanner X-Ray Facilities, Ultra Sound Scanner and Doppler Scanner

D-7 Rehabilitation Facilities

These include physiotherapy and speech and language therapy

Part E Curriculum

E-5 Training in Community Medicine

With some adjustments to overcome the deficiencies mentioned above, the community Health Training Programme can be improved to fulfill the requirements of a medical undergraduate programme in community medicine. However it is necessary to provide SAITM with a suitable field practice area and enable it to develop a working relationship with the existing public health service in the area family medicine

There is a dedicated lecturer in family medicine and a family medicine room in the NFTH which stimulates the family practice environment.

E-6 Training in Forensic Medicine

The curriculum in Forensic Medicine and provision for class room- based teaching appears satisfactory. However there is no clinical attachment either in clinical forensic medicine or in medico-legal post mortem examination, as available in other medical schools in Sri Lanka.....

.....

This deficit cannot be corrected without access to the state J.M.O. System. This is highly recommended to the Ministry of Health

Part G Clinical skills training

G-3 Commencement of clinical training and hours of training

Clinical training commences in the 5th Semester – Detailed breakdown of hours of training were provided to the inspection team-students are assigned patients and present cases to consultants during ward rounds and clinics.

G-4 Labour room exposure, exposure to common obstetric and Gynecological procedures and Emergencies

The NFTH obstetric wards have private (single delivery) as well as common labour room, which has 4 beds and were well equipped. The students have to perform a minimum of 2 deliveries during their clinical training and have them certified. However, the monthly and annual statistics display on the notice boards indicates a very low number of deliveries.

A dedicated well equipped obstetric theatre is located next to the obstetric ward, but according to the statistics provided, the number of caesarian sections and vaginal deliveries are very low.

G-5 Exposure to trauma, common surgical emergencies in surgical training and operating theater exposure,

In terms of surgical training there is significant problem with the exposure to trauma and acute surgical conditions. Being a private institution the numbers of trauma patients who come to NFTH are very few and the admission register confirm that the numbers around 10 per month.....

This is significant deficiency as a surgical house officers on call in variably have to deal with lot of trauma patients.....

This aspect of their training especially in the first few batches of SAITM needs evaluation. Simulated teaching has been used recently to overcome this deficiency

With increasing recognition of the hospital and the undoubted enthusiasm of the teachers who are experienced and well-qualified, the deficiency may be rectified in the future, but at present it is unsatisfactory.

Based on the observations made including the main areas referred to above the investigating team had identified the following as the main deficiencies at SAITM,

1. General inadequacy of clinical exposure in all areas in terms of numbers and case mix is of grave concern. In particular, exposure to trauma in Surgery, common Surgical and Obstetrics and Gynecology emergencies, as well as exposure to emergencies in adult medicine and pediatric care is lacking. The Faculty is making an attempt to overcome these deficiencies, but it is still insufficient at present.
2. Lack of facilities for training in practical clinical Forensic Medicine e.g. to examine and report on clinical medico- legal cases to the Police and Courts of law; and no provision to carry out medico-legal post-mortem examinations
3. Deficiency in exposure to preventive care services in the state sector i.e. the MOH office activities and filed services

When analyzing the above deficiencies along with the observations made it is clear that the investigation team had studied the functions at the SAITM with the intention of the improving the study programme by making recommendations to expose the under graduates to the state mechanism as identify under E6 highly recommending to the Ministry of Health, the access to state JMO system and under E5 recommending suitable field practice area to develop a working relationship with existing public health service.

However, the investigating term in their conclusion had surprisingly recommended that the SLMC does not recognize graduates who have completed the study programme currently provided by the faculty of Medicine SAITM, as suitable for provisional registration.

When considering the observations made by the investigators as referred to above it is clear that the above observations does not match with the final recommendation made by them.

However, submitting that the above conclusion was made in *mala-fide* the Petitioner submitted before this court another evaluation made by the SLMC with regard to another Degree Awarding Institute namely Kothalawala Defence University, to establish the *mala-fide* of the SLMC.

The report said to have prepared by the investigating team of SLMC comprising of the president SLMC and four other members including Prof. Rezvi Sheriff who headed the investigating team to SAITM and Prof. Ranjani Gamage another member of the investigating team to SAITM in a two-page report on their preliminary investigation had concluded as follows,

> "Taking in to consideration, the facts presented and the tour of the facilities available at the FOM-KDU the visiting team considered that the FOM-KDU would be able to produce competent Military Doctors.
>
> The facilities provided for training were found to be very high standard and the team felt that once the hospital was completed in 2015 the entire training of Military Medical Graduates could be undertaken in these facilities.

When going through the report consist of only two passages this court observes that the said investigating team to reach the above conclusion they have considered the facilities at FOM-KDU in only two paragraphs of their report and come to a conclusion that the facilities provided for training were found to be very high standard" even prior to the construction of the 700-bed teaching hospital which was due to be completed in the year 2015.

When considering the two reports referred to above, it appears that one report has been made after inspecting SAITM and the other after inspecting FOM-KDU, but two different standards have been used, when preparing those reports.

The Petitioner had further submitted before this court documents marked P-25 and P-26 a letter of demand said to have sent by the Attorney at Law for the Petitioner and a reminder sent to the Chairman, SLMC demanding the provisional registration for the Petitioner in case she succeeded in her final examination at SAITM and obtaining the MBBS Degree. As observed by this court the said demand was sent on 10th March and the reminder was sent on 4th April. The said letter of demand was replied by the Attorney at Law on the instruction of the president of SLMC by letter dated 26.05.2015 (P-27)

In the said letter whilst referring to the recommendation made to the Minister under section 19C (1) and the paper advertisements published in several News Papers; replied the Attorney at Law;

> "In the said circumstances I am instructed to state that my clients position on the matter remains unchanged and that he will act according to the provisions of the Medical Ordinance at all times material. I am further instructed to state that my client has no hesitation or reluctance in vehemently resisting any legal action brought by your client with regard to the matter referred to in your letter."

However as observed above in this judgment, when the SLMC submits its recommendation to the Minister under section 19C (1) of the Medical Ordinance the role played by SLMC ends at that point, as they are not empowered under the Medical Ordinance to take over the functions of the Minister and declare that the Degree Awarded by SAITM should not be recognized for the purpose of registration under the Medical Ordinance (as amended) since the legislature had thought it fit to be given not to the SLMC but to the Minister. Where the statute prescribed the manner in which the statutory power has to be exercised, the power must be exercised in that manner alone. If the exercise of power is in violation of section 19C of the Medical Ordinance (as amended) it cannot be regarded as an act done in pursuance

of the Ordinance. If the administrative body created by the statute acts beyond the powers vested on the body by the statute such an act is *ultra vires* and the courts have a duty to quash it.

In the said circumstances when the President SLMC replied the Petitioner stating that he has no hesitation or reluctance in vehemently resisting any legal action, without any legal basis under the Medical Ordinance (as amended) for doing so, and the subsequent conduct of the 1st Respondent SLMC when the Petitioner filed the present application before this court, and also the conduct of the 1st Respondent as discussed above with regard to the recommendations reflected in the report, the paper notices issued and the two standards maintained when holding investigations at Degree Awarding Institutes, this court would like to consider whether the above conduct of the 1st Respondent amounts to an act of *mala-fide.*

In this regard this court is mindful of the Indian Supreme Court decision in ***State of Bihar V. P.P. Sharma AIR 1991 SC 1260*** that,

"*Mala-fide* means want of good faith, personal bias grudge, oblique or improper motive or ulterior purpose." The administrative action must be said to be done in good faith, if it done honestly whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must therefore act in *mala-fide* manner and should never act for an improper motive or ulterior purpose or contrary to the or requirements of the statute or the basis of the circumstances not contemplated by law or improperly exercised discretion to achieve some ulterior purpose."

When considering the conduct of the 1st Respondent referred to above, it is clear that the said Respondent had acted outside its power or acted *ultra-vires* of the provisions of the Medical Ordinance (as amended) but, the material before this court was not sufficient to conclude that the said conduct of the 1st Respondent was with an ulterior motive. In the said circumstance I am reluctant to conclude that the above conduct of the 1st Respondent amounts to an act committed in *mala-fide* but conclude that the

steps taken by the 1st Respondent after submitting its recommendation under section 19C (1) of the Medical Ordinance (as amended) was made *ultra-vires* without having any power to do so.

As referred by me earlier in this judgment the 1st Respondent at the very commencement of the argument raised several preliminary objections to the maintainability of the present application. This court at that stage decided to consider those preliminary objections in the final order. Whilst discussing the grounds raised by the 1st Respondent in the main mater I have considered some of those preliminary objections as well.

I will now proceed to consider the rest of the preliminary objections raised by the 1st Respondent during the argument before us.

As observed by us the 1st Respondent had raised several preliminary objections before this court which includes,

a) Writ of *Mandamus* does not lie against a juristic person
b) Failure to avail of the Appeal to the Minster
c) Non compliance of the Rules of the Court of Appeal (Appellate Procedures) Rules
d) Petitioner failed to made valid demand
e) Necessary party not before this court

Writ of *Mandamus* does not lie against a juristic person

The Learned President's Counsel for the 1st Respondent whilst relying on the case of ***Haniffa V. The Chairman Urban Council Nawalapitiya 66 NLR 48*** argued that a *Mandamus* cannot lie against the Sri Lanka Medical Council as it is a juristic person and not a natural person.

However in this regard this court is mindful of the decision in ***Abeyadeera and 162 others V. Dr. Stanley Wijesundera Vice Chancellor University of Colombo and another [1983] 2 Sri LR 267*** where Athukorale J (P/CA) whilst referring to the decision in the Haniffa's case had observed that;

"The law has been as follows in paragraph 112, page 127, Vol. 1, of Halsbury's "Laws of England", 4th Edition.

"The order of Mandamus will not be granted against one who is an inferior or ministerial officer bound to obey the orders of a competent authority to compel him to do something which is part of his duty in that capacity."

"The Vice Chancellor and the Dean of the faculty Medicine are officers of the University. The Council is the executive body and governing authority of the University and can exercise and discharge the powers and functions of the University, including the power to hold examinations. The Senate has control and general direction of; inter alia, education and examinations. The Vice Chancellor is subject to the directions issued by the Council and it is his duty to give effect to the decisions of the Council and the Senate. The Dean is the Head of a Faculty, and the Faculty which has powers over matters relating to examinations, is subject to the control of the Senate. It seems to us that the Respondents are officers within the intendment of the above quotation from Halsbury.

In terms of Section 29 (b) of the Universities Act, the University has the sole power to hold examinations, including the 2nd MBBS Examination. The power is reposed in the University. In their own petition, the Petitioners state that they are entitled to require the University that it holds the 2nd MBBS examinations for them and others of their batch and those repeating the said examination, and that the University has the obligation to provide such an examination. The Petitioners want this obligation of the University enforced through its officers or agents. It appears to us, assuming that the writ of *Mandamus* can issue, it must be directed to someone in whom is lodged the power to do the act ordered to be done. What if University of Colombo takes up the position that it has not been made a party to the application had has not been heard and therefore not bound in any way by these proceedings? In *Jayalingam V. The University of Colombo CA application No 415/81*, we find that the Petitioner in that case, who was an external student, asked for a writ of *Mandamus* on the University of Colombo to accept his application and permit him to sit the Final Examination in Laws, on the basis that

it was the University that had the power to conduct external examinations for enabling those who are not students of the University, to obtain degrees of the University.

Learned Counsel for the Petitioners relied on the decision in Haniffa V. The Chairman, U.C., Nawalapitya (supra). In this case the Petitioner made the chairman, U.C., Nawalapitiya, the Respondent to his petition. He was not named Tambiah, J pointed out that the Chairman was not a juristic person; that even if the Chairman was a juristic person, since disobedience to writs of *Mandamus* is punishable as contempt of Court, a person who asks for a *Mandamus* to compel a public officer to perform a duty should name the public officer who holds the office. It is in this context, that Tambiah J said, "I fail to see how we can issue a *Mandamus* on a juristic person."……

In ***Pathirana V Gunasekara 66 NLR 464,467,*** Weerasooriya, S.P.J observed,

"Where officials having a public duty to perform, refuse to perform it, *Mandamus* will lie on the application of a person interested to compel them to do so. The rule would also apply where a public body fails to perform a public duty with which it is charged"……..

Apart from this, the Petitioners presented their petition on the basis that the Respondents are the persons who are entrusted with the duty of carrying out the obligation which was reposed in the University, to hold the 2nd MBBS examination for them only. At the time they were made Respondents, the 1st respondent held the office of Vice Chancellor by virtue of an appointment made by the Chancellor, and 2nd Respondent held the office of Dean of the Faculty of Medicine, by virtue of her election by the Faculty (Sections 34 (1) and 49 (1) of the Universities Act). Under the Emergency Regulation, they cease to hold their respective office. The 1st Respondent now holds the office of Vice Chancellor on an appointment made by the Minister (Reg. 3(2); the 2nd Respondent now hold office as Dean on an appointment made by the Vice Chancellor. It is now sought to compel the 1st Respondent to perform a duty on the Basis that he has, by reason of Regulation 4 (a), absorbed in himself all the powers and duties of the University. Would not all these result in a change in the character of the petition and in the

conversion of the original petition in to a petition of another kind? What if the regulations are withdrawn tomorrow? Then the argument of learned Counsel for the Petitioners, based on the Emergency Regulations, loses its validity.

In our view the proper body to be directed by a *Mandamus*, assuring that a writ can go is the University of Colombo and not the Respondents to this application. The University of Colombo therefore is a necessary party and ought to have been made a party to these proceedings. The failure to do so it fatal to the Petitioners' application."……

In the case of the ***Government Registered Medical Officers Association and another V. Hon. John Senevirathne Minister of Health and four others CA Application 1498/2000*** CA minute dated 24.02.2004 K. Sripavan J (as he was then) issued a writ of *Mandamus* directing the 4th Respondent Sri Lanka Medical Council to take steps in terms of law duly recognize the MD degree awarded.

Recently in the case of ***Ekanayake V. Attorney General and two Others CA Application 58/2012*** (CA minute dated 25.04.2016) this court re affirm the position taken in the Abeydeera's case referred to above and observed that "the law seems to have moved away. Today a juristic person, no less than a natural person, can be commanded to carry out its public duty" and rejected the argument that *Mandamus* cannot lie against a public body such as the Sri Lanka Ports Authority.

When considering the decisions referred to above I see no merit in the said argument raised by the 1st respondent.

Failure to avail of an Appeal to the Minister

The 1st Respondent whilst referring to section 18 of the Medical Ordinance (as amended) raised this preliminary objection to the effect that, the Petitioner had failed to avail of appeal provided under the Medical Ordinance and thereby not entitled to come before this court in a discretionary remedy.

Section 18-1 of the Medical Ordinance reads thus,

> "Every order or decision of the Medical Council under this Ordinance shall be subject to appeal to the Minister whose decision shall be final"

When considering the above provision of the Medical Ordinance it appears that the order or decision referred to above, will confine to a decision taken by SLMC acting within the frame work provided by the Medical Ordinance (as amended) and if the said SLMC had acted outside powers vested on SLMC we observe that there is an illegality taken place and in such a situation, it is the duty of this court to consider whether the statutory alternative is satisfactory or not.

This position was considered in the case of ***Somasunderam Vaniasinghem V. Forbes and Another [1993] 2 Sri LR 362 at 370*** by Bandaranayake J as follow;

It may be that even though statute provides for an administrative appeal either to an administrative tribunal or a Minister the Court may not regard such an arrangement as impliedly excluding review if the applicant is entitled as a matter of law to have the order quashed as it is pointless then to have him pursue an administrative appeal on the merits. There is thus no rule requiring the exhaustion of administrative remedies. A statutory remedy may be for a different purpose being usually an appeal on the merits whereas the ordinary discretionary remedy of review is for prevention of illegality.

In the said order Justice Bandaranayake further observed, (at page 371)

> "In this area of the law, where there is no illegality the court should first look in to the question whether a statute providing for alternative remedies expressly or by necessary implication excludes judicial review. If not, where remedies overlap, the court should consider whether the statutory alternative remedy is satisfactory in all he circumstances... if not, the court is entitled to review the matter in the exercise of its jurisdiction. Of course if there is an illegality there is no question but that the court can exercise its powers of review."

As observed in this judgment, the SLMC had already acted beyond the powers vested on the SLMC under section 19C(i) of the Medical Ordinance (as amended) which act is *ultra-vires* and illegal and in the said circumstances, we observe that the Petitioner is entitled to come before this court by way of a discretionary remedy. We therefore see no merit in this preliminary objection.

Petitioner failed to make a valid demand.

As observed in this judgment the Petitioner after obtaining the MBBS degree from SAITM a Degree Awarding Institute recognized under the Universities Act had visited the SLMC accompanied by a Senior Lecturer from SAITM Dr. Keerthi Attanayake to submit her application under section 29 (2) of the Medical Ordinance (as amended). At that stage the registrar of the SLMC who refused to accept her application had refused to issue a letter to that effect and informed her,

a) The Minister of Health had already been informed by a letter from the President of the SLMC that students from SAITM were not registrable
b) The same was communicated publicly through several news paper advertisements.

The above position taken by the Petitioner was supported by an affidavit from the said Senior Lecturer Dr. Keerthi Attanayake and was not challenged by the 1st Respondent but in fact corroborated to the extent that the paper advertisement referred to above was produced marked 1R 20K with the statement of objection filed on behalf of the said Respondent.

In the said advertisement which was published on 11th November 2015 by order of the Council the Registrar had informed the public,

10. Accordingly based on the Report submitted by the team of inspectors the SLMC formulated an Official Report which was submitted to the Minister of Health on 04 September 2015 with the recommendation that THE DEGREE AWARDED BY SAITM SHOULD NOT BE

RECOGNIZED FOR THE PURPOSE OF REGISTRATION UNDER THE MEDICAL ORDINACE.

As revealed from the documents filed before this court the Petitioner had sat for MBBS final Examination in May 2016 and she had been awarded with the MBBS Degree with effect from 30th May 2016 and visited SLMC to seek provisional Registration on 06.06.2016.

However as notified by the SLMC by the above advertisement the General Public was aware of the above notification, by 11th November 2015 and therefore acting on the above notification the Petitioner decided to demand the 1st Respondent to provisionally Registrar the Petitioner in the event she obtain a MBBS degree from SAITM a recognized Degree Awarding Institute on 10th March 2016. Even though the 1st Respondent had taken up the positions that, at the time the said demand was made, the Petitioner had not obtain a MBBS Degree, we see no merit in that argument for the reasons that at the time the Petitioner sent the said letter of demand she was well aware of the notification published in newspaper and was getting ready for her final examination which was scheduled for May 2016. Since the 1st Respondent did not responded to the letter dated 10th March a reminder was sent by the Attorney at Law on 4th April 2016 and the Attorney at Law representing the President of the SLMC had replied the said demand, by informing that any legal action would be vehemently resisted.

In these circumstances we are not inclined to accept the preliminary objection raised by the 1st Respondent.

Necessary party not before court.

In this regard the 1st Respondent's argument was based on the failure by the Petitioner to name the Registrar SLMC as a Respondent to the present application.

As observed by this court section 17 (1) of the Medical Ordinance (as amended) provides the appointment of the Registrar as follows,

17 (1) Medical Council shall appoint a registrar, who shall act as secretary of the Medical Council and also as treasurer, unless the Medical Council shall appoint another person as treasurer and may appoint as assistant registrar who shall assist the registrar in the performance of his duties under this ordinance.

Even though the said Medical Ordinance has entrusted certain functions with the registrar including the maintaining of registers as found in section 20 of the Medical Ordinance, (as amended) section 29 (1) and (2) the Medical Ordinance had only provided the Medical Council to register a person as a Medical Practitioner or provisionally as a Medical Practitioner.

Where a statute prescribed the manner in which the statutory power to be exercised the said power must be exercised in that manner alone and therefore one cannot argue that the functions entrusted by the Medical Ordinance with the Medical Council can be vested with the registrar, without any legislative provision in the said Ordinance.

The powers identified in section 20 of the Medical Ordinance (as amended) to maintain registers cannot be interpreted as powers vested with the Registrar under section 29 (1) and (2) of the said Ordinance.

In these circumstances we see a clear distinction between the powers vested with the registrar under section 20 and with the Medical Council under section 29 (1), (2) and therefore we see no reason to uphold the objection raised by the 1st Respondent.

Noncompliance of the Rules of the Court of Appeal (appellate procedure) Rules,

Whilst relying on Rule 3(1)(a) of the above rules the 1st Respondent had submitted that the Petitioner had failed to adhere to the above rule and therefore her application, should be dismissed in limine.

Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules which is relevant to the present objection reads as follows;

3 (1) (a) Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the constitution shall be by way of a Petition together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits.

Where a Petitioners is unable to tender any such document he shall state the reason for such inability and seek the leave of court to furnish such document later. Where a Petitioner fails to comply with the provisions of this rule the court may, *ex mere motu* or at the instance of any party, dismiss such application.

As observe by this court, the parties to the present application had never complained of any failure from the petitioner to produce any document relevant when filling the present application before this court. As further observed by this court the majority of the documents filed by the Petitioner before this court are either letters exchanged between the parties, reports prepared by expert committees and submission submitted before such committees. In such a situation the Petitioner being a private party, will not be able to obtain originals of such documents to file before this court.

As further observed by this court, the said rule had also provided to submit duly certified copies but the rules are silent as to what is meant from the term "Certified Copies".

Osborn's Concise Law Dictionary described the term certified copy as, a copy of a public document, signed and certified as a true copy by the officer to whom custody the original is entrusted and admissible as evidence when the original would be admissible.

According to the above interpretation a certified copy can only be issued with regard to a public document and the person who issues the certified copy is the person who has the custody and authorized to certify a copy as true copy.

However when considering the documents before us, as observed earlier, majority of the documents are in private nature and in such a situation what is expected by the parties are to file papers to the satisfaction of court by submitting them with a certificate from the Attorney.

The 1st Respondent raised his concern with regard to the document produced marked P-3 the degree certificate of the Petitioner but we see no difference in the said document when compared to the others, since that too does not come under "public document"

The term public document is interpreted in section 74 of the Evidence Ordinance as follows,

74 (a) document forming the acts, or records of the acts-

i. of the sovereign authority

ii. of official bodies and tribunals an

iii. of public officers, legislative, judicial and executive, whether of Ceylon or any other part of her Majesties Realms and Territories or of a Foreign Country

(b) public records kept in Ceylon of a private document

(c) plans, surveys or maps purporting to be signed by the surveyor General or officers acting on his behalf

Our court have gone into the objections raised under this rule on numerous occasion and as observed by this court, the decisions in those cases were based on the facts of each individual case. In this regard the 1st Respondent had relied on the decision by the Supreme Court in the case of ***Shanmugavadivu V. Kulathilake 2003 (1) Sri LR 215*** where Bandaranayake J held that the requirements of rules 3 (1) (a) and 3 (1) (b) are imperative and the non compliance is fatal.

However as observed by this court, the above decision by the Supreme Court was based on failure by the Petitioner to sought leave to submit certain documents which he has failed to submit with the original papers.

As observed earlier, in the present case there is no complain of any failure by the Petitioner to submit documents before the court, but the compliant of the 1st Respondent is only limited to the failure by the Petitioner to submit originals or Certified Copies of such documents.

In this regard our attention was drawn to the case of ***Kristly V. State Timber Corporation [2002] 1 Sri LR 225*** where the Supreme Court held that a document certified by an Attorney should be accepted as a Certified Copy.

Even though the 1st Respondent has challenged the said decision on the ground that it was based on the Provisions of the Arbitration Act which provides under section 31 (2) (a) (ii) to accept document otherwise certified to the satisfaction of court, we observe that the main purpose of having this rule is for the court to satisfy with the documents filed before the court and therefore we see no reason to ignore the said decision.

In these circumstances we hold that the Petitioner has submitted all his documents for the satisfaction of this court and therefore we overrule the said objection.

When evaluating the material placed before this court, this court has already concluded that any steps taken by the 1st Respondent after submitting its recommendation to the Minster under section 19 C (1) of the Medical Ordinance (as amended) has taken in violation of the provisions of the said ordinance and the said acts cannot be considered as an act done in pursuance of the provisions of the Medical Ordinance.

It was further concluded by this court that in the absence of any finding by the Minister under section 19 C (3) of the Medical Ordinance there is no obstacle with the SLMC to act under section 29 (2) of the Medical Ordinance and provisionally register the Petitioner. In this regard we have further concluded that under the said provisions, the Petitioner has a legal right for the performance of a legal duty from the 1st Respondent. That is to say that the Petitioner has a legal right to provisionally register under section 29 (2) of the Medical Ordinance (as amended) since she has fulfilled the necessary requirements

under the said Ordinance. In this regard this court is further mindful of the Supreme Court decision in ***Credit Information Bureau of Sri Lanka V. Messns Jafferiee an Jafferjee Private Limited (2005) 1 Sri LR 89*** where J.A.N. de. Silva J (as he was then) has identified some of the conditions precedent to the issue of writ of *Mandamus*

For the forging reasons this court decides to grant the relief as prayed by the Petitioner in paragraphs (e), (f) and (g) to the Petition.

Since the arguments placed before this court was limited to the provisional registration under section 29 (2) of the Medical Ordinance (as amended) this court will not make any order with regard to the relief prayed in paragraphs (b), (c) and (d) to the Petition.

Application allowed with cost.

PRESIDENT OF THE COURT OF APPEAL

S. Thurairaja PC J

JUDGE OF THE COURT OF APPEAL