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* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Continental Apparels (Pvt) Ltd.
No.929/B, Main Road,
Nawagamuwa, Ranala,
Kaduwela.

PETITIONER

C.A. Application No.344/08 (Writ)

Vs.

1. B.R.K. Meda
   Assistant Commissioner of Labour
   Termination Unit
   Labour Department
   Colombo 5.
2. D.S. Edirisinghe
   Commissioner of Labour
   Termination Unit
   Labour Department
   Colombo 5.
   & 153 Others

RESPONDENTS

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**

COUNSEL : Lasantha Hethiarichchi with Sagara Jayawickrama, for the Petitioners,
Nuwan Peiris SC
for the Respondents.

Argued on : 21.02.2011 and 03.05.2011

Decided on : 18.06.2012

S.Sriskandarajah.J,

The Petitioner is a company incorporated under the laws of Sri Lanka. Its primary business is manufacturing of garments for export. The Petitioner Company was operating a factory for production of its garments at Nugaduwa, Galle. The Petitioner submitted that in or about the year 2005, due to implementation on world trade agreements, the quota system that hitherto provided preferential trading opportunities for Sri Lanka and other Third World countries to export and supply garments to the U.S.A. and European markets was abolished and all garment exports from Third World Countries were, therefore, exposed to free competition in accessing foreign market. The Petitioner also encountered serious consequences due to the abolition of the quota system which hitherto prevailed, and many garment manufacturers in Sri Lanka were adversely affected where several companies became bankrupt and deprived employees in the garment trade lost their employment.

The Petitioner Company had employed a total number of over 700 staff members, and a large number of the said staff members had been employed after the year 1996. The Petitioner contended that those employees who were employed after 1996, were given a letter of appointment which included a condition that the employees are transferable to any company or factory within the group of companies to which the Petitioner Company belonged.

The Petitioner submitted that although it currently belongs to a group of companies, it was the Petitioner, Continental Apparels (Pvt) Ltd., was the first to be incorporated within the group in the year 1985. The other companies in the group, including the parent company, which is Hoodwin Limited, Koggala Garments (Pvt) Limited and Osprey Clothing (Pvt) Limited were all incorporated after the Petitioner Company. Notwithstanding the date of incorporation of the aforesaid companies, all these companies had been organized in such a manner where Hoodwin Limited remains the parent company.

In view of the fact that the Petitioner Company faced heavy competition in the open market, due to increased competition it has to reduce its cost of production, it took necessary steps to shift the factory premises in Nugaduwa, Galle, and to re-locate the

same to the premises where Koggala Garments (Pvt.) Limited was situated, and this re-location had made available for the Petitioner Company to carry out the production actively within the premises of its associate company, Koggala Garments (Pvt) Limited.

The Petitioner contended, in the present situation what the Petitioner in fact did was, merely to move its machineries to the factory premises of its associate or sister company at a location 12 miles away from its previous factory location. The Petitioner effecting the re-location of the premises gave adequate notice of over one month to all its employees that the factory premises at Nugaduwa, Galle, would be re-located to the premises at the Koggala Free Trade Zone where Koggala Garments (Pvt) Limited was situated. The Petitioner also contended that when it was giving notice to the employees, it differentiated between two categories of employees, i.e., employees whose contract of employment contained condition of transfers from the Petitioner Company to a company out of the group and a 2nd group of a few employees who had been recruited prior to 1996, in whose contract of employment such a condition for transferability within the group was not available.

The Petitioner's contention was that it is a tied and settled principle of law that an employer has a right to transfer an employee provided same is done in a bona fide manner. In the given circumstances the Petitioner issued a notice to these employees who were transferable from one group of company to another informing such employees that they will be transferred to serve at Koggala Garments (Pvt) Limited and their prior service with the Petitioner Company would be recognized for the purpose of computation of gratuity. The other employees who were not transferable within the group, approximately 14 out of the total of 700 employees were notified that they will be transferred to the re-located factory premises of the Petitioner which will be the current premises of Koggala Garments (Pvt) Limited, situated at Free Trade Zone in Koggala. Having given such a notice, the Petitioner also made additional provision for paying an extra Rs.1000/- to all employees who were being so transferred, and also made arrangements for free transport to be provided from its previous factory location in Nugaduwa, Galle, to the re-located premises at the Koggala Free Trade Zone by providing special buses for such purpose. The Petitioner also submitted, while most of the employees accepted the transport service and reported to work at Koggala Free Trade Zone, several employees did not accept such transport facility and complained to the Commissioner of Labour.

The Commissioner of Labour initiated an inquiry. In the said inquiry the Petitioner and the employees were represented. At the conclusion of the said inquiry, the Commissioner of Labour made order directing the Petitioner to make payment of compensation amounting to Rs.6,602,837.20 in the aggregate to a number of 153 workers who were in Schedule 1, and annexed to the order of the Commissioner marked P8. The Commissioner of Labour also decided that 221 employees who were listed in Schedule 2 were not entitled to compensation. The Petitioner in this application challenged the said decision of the Commissioner of Labour, who had awarded compensation to 153 employees on the basis that the Commissioner erroneously had come to a finding that the employment of the workmen was terminated in consequence of the closure of the trade industry or business of the Petitioner.

The contention of the Petitioner is that, that a determination that an employer has closed its trade industry or business can be arrived at only where it could be conclusively found that as a result of such closure the worker is unable to continue in employment or the contract of employment has thus been frustrated preventing the re-instatement of the worker. The contention of the Petitioner is that the re-location of the business or trade or transfer of the factory or its business by an employer to a different location is significantly different to what is contemplated within the meaning of the term of closure in the Termination of Employment of Workmen (Special Provisions) Act.

The Commissioner of Labour in his order has observed, that the employer is not entitled to place the employees in service in a totally a different entity and this act constitutes the termination of employment of the employees. As the services of these employees have been terminated contrary to the provisions of the Act No.45 of 1971 without the prior consent of the Commissioner of Labour, the Commissioner has no alternative than direct the payment of compensation to such employees. The contention of the Respondent is that, for the purpose of the Industrial Law, "closure" does not denote a formal liquidation process. The respondent relied in the case of *Hume Pipe Company Vs. Their Workmen 1958 AIR 1958 SC* where the court expressed the view "Our conclusion is that once the Tribunal finds that an employer has closed its factory, as a matter of fact, it is not concerned to go into the question as to the motive which guided him and to come to a conclusion, that because of the previous history of the dispute between the employer and the employees, the closure was not justified.

In the instant case, the Petitioner relied on a transfer clause incorporated in the letter of appointment of past employees to transfer the said employees to one of the group of companies to which the Petitioner belongs. But the Petitioner throughout took up the position that the Petitioner Company was located in Galle, and was doing its business at the said premises, and due to the change in economy and the loss of quota system, the Petitioner Company experienced losses and faced stiff competition in the open market, and due to this fact, the Petitioner had to cut its costs, and that is the reason the Petitioner had to shift his company from its present location of Galle to Free Trade Zone at Koggala. The Petitioner's decision to shift the company to the Free Trade Zone is, in other words, a re-structure of the said company, and to reduce costs. It can be seen that the step taken by the Petitioner Company is not a step that is taken in the course of a regular business. The Petitioner Company can only rely on the transfer clause of the employee's letter of employment if a transfer is effected in the course of a regular business. In this case the Petitioner Company has not made these transfers in the course of its regular business it could be seen by the transfer of all the employees from the Petitioner Company to another entity. This act cannot be seen or construe as a transfer but as a closure of the Petitioner Company, giving alternative employment to the employees of the Petitioner Company in another group of company that is affiliated to the Petitioner Company offering an option for the employees to accept or to reject. In these circumstances the Commissioner has correctly arrived at the conclusion that the Petitioner has closed its company and, in these circumstances the Petitioner should have got prior permission under section 2 of the Termination of Employment (Special Provisions) Act to terminate the services of these employees. As the Petitioner Company has violated this provision, the employees are entitled to complain to the Commissioner of Labour, and the Commissioner of Labour, after an inquiry, has correctly arrived at a conclusion that the Petitioner has closed his business. The workmen who have complained to the Commissioner, have lost their employment, and their employment had been terminated unlawfully. In these circumstances, the employees whose employment had been terminated unlawfully are entitled to compensation under Section 6A of the Termination of Employment (Special Provisions) Act.

In awarding compensation, the Termination of Employment Act has been amended, and it is now provide that the compensation has to be award under the guidance and calculation given under the compensation formula published in the gazette.

The 1st and 2nd Respondents have contended that, although at the time of making the order marked P8, the formula for the computation of compensation was as stipulated in Gazette 1384/07 dated 15th March 2005, the gazette which was in force at the time of termination (26th of November 2004,) was Gazette No.1321/17 of 31st December 2003 which, hitherto stipulated a different formula for the calculation of compensation. In view of this finding on the question of termination, the Commissioner of Labour had computed the compensation in terms of the previous Gazette No.1321/17 of 31st December 2003 that was in operation at the time of termination of the said employees.

The granting of compensation under the Termination of Employment (Special Provisions) Act was computed in a fair and equitable basis before the computation was prescribed by the aforesaid Gazette notifications. As it was found that the power given to the Commissioner to determine compensation was not exercised properly to cater different situations, the law was amended and a compensation formula was formulated for the Commissioner of Labour to follow the said formula as a guidance to calculate the compensation. Therefore, when the Commissioner concludes an inquiry and has come to a conclusion that compensation has to be paid under the said law, the Commissioner has to take into consideration the formula of compensation that is in existence at the time of the order. The Commissioner cannot rely on a repealed Gazette Notification that is not in force at the time of the order of compensation, merely on the basis that the repealed compensation formula was in existence at the time of termination of the services of the employees. As the order contained in Gazette No.1321/17 dated 31st December 2003 was repealed by Gazette No.1384/07 dated 15th March 2005, the Commissioner has to calculate the compensation based on the compensation formula gazette in the Gazette dated 15th March 2005. In view of the above finding I set aside the calculation of the Commissioner to calculate the compensation in terms of the Gazette No.1321/17 of 31st December 2003, and direct the Commissioner of Labour to calculate the compensation in the formula stipulated in Gazette No.1384/07 dated 15th March 2005.

For the above reason I partly allow the application of the Petitioner quashing the award of the order of the Commissioner subject to the above direction without cost.

President of the Court of Appeal