

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

1. Elapex (Pvt.) Limited  
Level 3, Prince Alfred Towers  
10, Alfred House Gardens,  
Colombo 3.
2. Lincoln Piyasena  
Liquidator of Elapex (Pvt.) Limited  
M/s B R de Silva & Company  
22/4, Wijaya Kumarathunga  
Mawatha, Colombo 5.

C.A. 445/2008 (Writ)

**PETITIONER**

Vs.

1. Commissioner General of Labour  
Department of Labour  
Labour Secretariat  
Colombo 5.
2. Indika Kumara Ratnayake  
12/31 A, Kajukotuwawatte,  
Kamburugoda,  
Bemmula.

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** A. Rodrigo for the Petitioner  
Keshan Thalgahagoda for the Liquidator 2<sup>nd</sup> Petitioner  
J. Jayawickrama and Anupama Gunasekera  
for the 2<sup>nd</sup> Respondent  
  
Chaya Sri Nammuni S.C. for the 1<sup>st</sup> Respondent

**ARGUED ON:** 23.10.2012

**DECIDED ON:** 23.01.2013

**GOONERATNE J.**

The Petitioner Company was involved in manufacture of concrete poles and as explained in paragraphs 3 – 6 of the petition, the company having financial problems, made an application to the 1<sup>st</sup> Respondent Commissioner General of Labour in terms of Section 2 (ii) of the Termination of the Employment of Workmen (Special Provisions) Act No. 45 of 1971, seeking approval to terminate 143 employees of the Petitioner Company. A writ of Certiorari/Prohibition and Mandamus was sought to quash the order of the 1<sup>st</sup> Respondent marked P4. Mandamus to direct the 1<sup>st</sup> Respondent to allow the application of the Petitioner marked P1 subject to payment of proper compensation in law.

At the hearing of this application the learned counsel for the Petitioner submitted to court that the only challenge or contest to order marked P4 is as regards the award of arrears of salary for the period of May 2007 to 15.5.2008. The approval, granted to terminate on 15.5.2008, of the

employment of the employees, and the amount of compensation as stated in P4 is Rs. 12,990,400/=. As such learned counsel for Petitioner informed court that his client Company does not wish to challenge the amounts awarded in P4 by way of compensation and that his client is always willing to settle the said amount payable by way of compensation.

The learned counsel for Petitioner submitted inter alia that:

- (a) Company was closed by March 2007
- (b) On a priority basis liquidator would be obliged to pay the compensation to employees.
- (c) The Commissioner of Labour has no jurisdiction under Section 2 of the said Act, to order arrears of salary as described in order marked P4.
- (d) Emphasis on Section 6(a) of the Statute.

The learned counsel for the liquidator informed court that liquidation Process is in progress and payments could be made only on a priority basis i.e compensation and not arrears of salary for which the Company is not responsible or has not employed any workman after March 2007 the date of closure of the Company.

The learned State Counsel for the 1<sup>st</sup> Respondent and the learned counsel for 2<sup>nd</sup> Respondent submitted that the workmen are entitled to back wages or arrears of salary as in order P4 and any delay in the conclusion of the inquiry before the 1<sup>st</sup> Respondent was due to the lapses or delays caused by the 1<sup>st</sup> Respondent Company. Both learned counsel for

Respondent drew the attention of this court to certain undertakings given by the Attorney at Law for the Petitioner Company who appeared before the 1<sup>st</sup> Respondent inquiring officer where the said attorney had agreed to pay salary arrears by 1<sup>st</sup> May 2007 for the salary due in April 2007 (pg 73 of proceedings of 17.5.2007). This court was also invited to pgs 82/83 of the proceedings of 21.6.2007. As such the only matter to be resolved in this application seems to be the question of the Commissioner of Labour having jurisdiction to make the order as in order P4 in terms of the said statute- re-arrears of salary?

It is the prayer to the petition, more particularly sub paragraphs (a) & (b) that would be relevant to this application i.e order of 1<sup>st</sup> Respondent marked P4 and the question of due and proper compensation payable under the statute. I would refer to the gist of the order at P4 as follows.

- (a) Approval granted to terminate the services of 143 employees of the Petitioner Company. Accordingly approval granted as from 15.5.2008.
- (b) Compensation calculated according to the powers vested in Section 6C of the Termination of Employment Act, and the method of calculation spelt out in gazette 1384/07 of 15.3.2005.
- (c) Compensation calculated in a sum of Rs. 21,160,760/= and back wages for the period May 2007 to 15.5.2008 (day of granting approval) in a sum of Rs. 12,990,400/-. Full sum on both the above items would Rs. 34,151,160/=.
- (d) Above sum to be deposited on or before 15.5.2008.

Reasons

- (e) Having applied to the 1<sup>st</sup> Respondent to grant approval to terminate the services of employees by application of 14.3.2007 the establishment had been fully closed down.
- (f) The matters that resulted in closure of the establishment being strikes/unrest of employees and production being below standard and as such establishment running at a loss were matters on which employer placed facts before 1<sup>st</sup> Respondent but those facts not proved.

I would for purposes of clarity incorporate the last paragraph of P4.

ආයතනය දැනටමත් වසා දමා ඇති බැවින් සේවකයින්ගේ සේවය අවසන් කිරීමේදී වන්දි ගෙවීමට නියම කිරීම හැර වෙනත් චක්ල්පයක් නොමැත. එබැවින් පනතේ 2(2) වගන්තිය යටතේ පැවරී ඇති බලතල ප්‍රකාරව ඉල්ලුම්පත්‍රයේ නම් සඳහන් කර ඇති සේවකයින් 143 දෙනාගේ සේවය අවසන් කිරීම සඳහා අනුමැතිය ලබා දෙමි. එසේ සේවය අවසන් කිරීමේදී පනතේ 6 ඇ වගන්තිය යටතේ මා වෙත පැවරී ඇති බලතල ප්‍රකාරව 2005.03.15 දිනැති අංක 1384/7 දරණ අතිවිශේෂ ගැසට් නිවේදනයේ උපලේඛනයේ දැක්වෙන වන්දි සුත්‍රයට අනුව සේවකයින්ගේ සේවා කාලය පදනම් කරගෙන ගණනය කරනු ලැබූ වන්දි මුදලක් ඔවුන්ට ගෙවීම සඳහා 2008.05.15 දින හෝ එදිනට පෙර කම්කරු කොමසාරිස් පනරාල් වෙත තැන්පත් කිරීමට නියෝග කරමි.

In the reasons given in order P4 the 1<sup>st</sup> Respondent states, having submitted application dated 14.3.2007 the establishment was fully closed. It is also stated that though facts pertaining to strikes/unrest of employees and production below standard resulted in loss of business and as

such the establishment had to be closed, the said matters were not proved. Then the other important question is having accepted the fact that the establishment was closed on or about 14.3.2007, there is no clue as to how the approval to terminate services of employees were granted as from 15.5.2008. The question that has to be posed is whether the Commissioner had jurisdiction, having accepted the closure of the company on 14.3.2007, thought it fit to grant approval to terminate employees in terms of the statute on a subsequent date i.e 15.5.2008 and award back wages for the period May 2007 to May 2008? The proper basis of granting back wages for a period of 1 year between May 2007 and May 2008 remains unexplained by the 1<sup>st</sup> Respondent in P4. Nor can I find any reason to grant back wages stated in the affidavit of the 1<sup>st</sup> Respondent.

An application to the Commissioner for approval to terminate the services of employees on the closure of a business, quite apart from the fact that in equity an employer must be permitted to close his business if he so wishes, the Commissioner must grant approval subject to conditions he may attach. That does not mean the Commissioner would enhance or exaggerate employers liability to grant relief to the employees in contravention of the Statute.

The 2<sup>nd</sup> Respondent in his submissions take up the position that the company existed till the winding up order made by the High Court on 8.11.2009. 2<sup>nd</sup> Respondent further contends that employees were terminated without notice on or about April 2007 and as such employees would be entitled to back wages in lieu of notice as per letter of appointment. In other words the 1<sup>st</sup> Respondent could award back wages as reasonable compensation in addition to the guide line in the relevant gazette on computation of compensation.

What is being challenged in the order of termination was the so called unpaid salary from May 2007 to May 2008. On the side of the Petitioner the business was closed down and no employment to any employee was possible on closure of the business. If the employees have lost employment the employees need to be compensated for loss of employment during the above period. I have attempted to find the answer to the above by reference to case law. However the dicta in *The Associated Newspapers of Ceylon Limited Vs. Jayasinghe* 1982(2) SLR 595 dealt with a situation prior to coming into force the compensation formula referred to in the relevant gazette on calculation/computation of compensation.

Per Soza J. at 600...

“The relief of reinstatement is granted where the contract of employment has been unjustifiably breached by the employer. Back wages can then be awarded on the basis of

an unbroken contact of employment ..... But when the Tribunal orders compensation, can it also order back wages? ..... To order back wages and compensation as an alternative to reinstatement would be to duplicate one factor which should enter into the computation of compensation. .... When a Tribunal is called upon to determine compensation it should take into account the back wages lost but it is not entitled to make a separate award of back pay in addition to compensation.”

A case more or less on point is the case of Wickramasinghe Vs. Nethasinghe 2005 (1) SLR 1997 which incorporated the dicta and cited with approval the case of Eksath Kamkaru Samithiya Vs. Commission of Labour 2001 (2) SLR 137 at 148 – 149.

Marsoof J. the then President of the Court of Appeal incorporated in the case of Wickramasinghe Vs. Nethasinghe the dicta of Gunawardena J. as followed.

pgs. 148/149..

The term “wages” employed in section 6 of the Act means remuneration payable for a given period to a workman for personal services. The term “wages” can include salaries, commissions, bonuses, tips i.e presents for service and any other similar payment received from the employer. The term “wages” indicates payment for services rendered usually under or in terms of the contract of employment whereas compensation would ordinarily mean reparation for an injury or damage of any description. In section 6 of the Act the term “wages” is obviously used in the sense of a fixed payment to be made by the employer at regular intervals, very often monthly, to a workman in return for the work or services rendered by the workman. It is to be observed that in section 6A (1) of the relevant Act the term “compensation” is used in contradistinction to the term “wages”. To quote the said section 6A(1), introduced by Amendment Law No. 4 of 1976, which is worded thus: “where the scheduled employment of any workman is terminated in



contravention of the provisions of this Act in consequence of the closure by his employer of any trade industry or business, the Commissioner may order such employer to pay such workman .... any sum of money as compensation as in alternative to the reinstatement of such workman..... “ (Section 6A (1) in the Amendment Law No. 4 of 1976 takes effect as section 6A of the principal enactment. As this section had been referred to in the submissions of the learned counsel as 6A(1), I shall also identify or refer to the section as such.) section 6A(1) has in contemplation a situation where a closure of the business or trade had been brought about. In such a case, section 6A(1) makes it incumbent on the employer to pay the workman, what one may call compensatory damages, that is, a payment, made once and for all, not regularly, as in the case of wages, or salary to compensate the workman for the injury or loss that he had sustained directly in consequence of the loss of employment caused by the closure. What I am seeking to explain is this, that is, that “compensation” is not a thing of the same class or kind as “wages” and as such in the expression that is employed in section 6 of the Act i.e “wages and all other benefits” – the term “benefits” cannot be interpreted as embracing “compensation” which is paid as damages to make good the harm or injury caused by the loss of employment, and not paid, like wages, under the contract of employment itself, whilst such contract subsists.

I have fortified my views with the dicta in the above mentioned case laws. It is not possible to bring into the payment formula wages lost as a separate head or item. In calculation or computing compensation, wages lost as a result of cessation of employment should necessarily be included and taken into account. The scheme of the Act contemplates in awarding back wages in cases where reinstatement is ordered and not otherwise. The 1<sup>st</sup> Respondent would not have jurisdiction to award back wages in addition

to granting compensation. The 1<sup>st</sup> Respondent is duty bound in law to necessarily include in the compensation the wages lost and cannot award it under a separate item.

In all the above circumstances I allow a writ of certiorari (prayer 'b') only in part and quash that part of the order pertaining to payment of back wages. The 1<sup>st</sup> Respondent's award, in the order marked P4 regarding compensation in a sum of Rs. 21,160,760/- would stand and would remain unaltered.

Subject to above variation, application allowed without costs.

JUDGE OF THE COURT OF APPEAL