

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

In the matter of an Application for mandates in the nature of Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application No. 37/2018

1. Ratnayake Mudiyansele Nihal,
Nirmana Cleaning and Janitorial Service Agency,
No. 2, Sisira and Sisira Building,
Havelock Road, Colombo 6.

Presently at No. 10, Ruhunukala
Mawatha, Colombo 8.

2. Nirmana Cleaning and Janitorial Service Agency,
No. 2, Sisira and Sisira Building,
Havelock Road, Colombo 6.

Presently at No. 10, Ruhunukala
Mawatha, Colombo 8.

Petitioners

Vs.

1. A. Wimalaweera,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Narahenpita,
Colombo 5.
2. E. C. P. Dabare,
Deputy Labour Commissioner,
Special Investigation Unit,
Department of Labour,
Labour Secretariat, Narahenpita,
Colombo 5.
3. P. B. Chandi Pemabadu,
Assistant Labour Commissioner,
Labour Office (Colombo West)
Department of Labour,
Labour Secretariat, Narahenpita,
Colombo 5.
4. Labour Office,
Department of Labour,
Assistant Labour Commissioner's
Office,
Matara.
5. Assistant Labour Commissioner,
Assistant Labour Commissioner's
Office
Matara.
6. Neil Kusantha Kumara,
No. 34, Sinhasana Road,
Devundara.

7. D.D.N. Hiroshima
8. D.Widanagamage
9. M.J. Sampath
10. K.K. Priyanthi
11. J. Vekunagodage
12. Nirosha Liyanage
13. H.G. Mangalawathie
14. M. Ramesh Tharuka
15. N.W.G. Sumathipala
16. Jayasiri Gamage
17. P.A. Mallika
18. D.N. Nanayakkara
19. S.T. Liyanora
20. B.A. Dharmasiri
21. H.G. David
22. T.M. Piyasili
23. P.K. Indrani
24. S.P.N. Nandani
25. M. Ranni
26. N. Laliha Weerasinghe
27. G.H. Sumanawathie
28. R. Ekanayake
29. P. Shriyani Premalatha
30. K.G. Shanthilatha
31. A.M. Renuka Damayanthi
32. B.A. Nilangani
33. M.A.D. Dayani
34. G. De. Silva
35. D.V. Irangani
36. P. Shanthi Mallika
37. R. Dilan
38. S.G.N.N. Menike
39. M.G.S.I. Samaraweera
40. W.R.P. Pushpika
41. S.R. Kumarasinghe

42. D.M.W. Malani
43. H.H.N. Renuka
44. Y.G. Mithrani
45. C.D. Dahanayake
46. S.W.A Ariyawathi
47. H.W. Ajantha Malani
48. M.M. Premalatha
49. R. Samarajiwa
50. E.D. Kusumawathi
51. K.G.A. Ranjane
52. M. Senevirathna
53. B.B. Gunawathi
54. H.L. Rathnasile
55. W. Abewardana
56. H.M. Alicenona
57. H.M. Palika
58. W.D. Indrasena
59. K.M.L. Darmasiri
60. H.L. Aththanayake
61. U. Wikramarathna
62. D.D. Saroj
63. K.A. Pasannajith
64. R.P. Somadasa
65. A.P.T. Ediriweera
66. P.H. Sujeewa
67. K.P.S. Sriyalatha
68. W.D. Ranathunga
69. A.D. Sriyawathi
70. P.T.R Palliyaguru
71. P.W.A.M. Priyadarshana
72. K.G. Sudarma Santhi
73. H.N. Sadamali
74. P.P.D. Aravinda
75. W.H.K. Buddhika
76. G.G. Dayasiri

77.K.D. Susanthi

All of
C/o. Department of Labour,
Labour Secretariat, Narahenpita,
Colombo 5.

78.University of Ruhuna,
Matara.

79.Registrar,
University of Ruhuna,
Matara.

80.Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: P. Padman Surasena, J / President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: D.H.Siriwardena for the Petitioners

Ms. Ganga Wakishtaarachchi, Senior State Counsel for the
Respondents

Supported on: 25th July 2018

Decided on: 12th October 2018

Arjuna Obeyesekere, J

The Petitioners have filed this application seeking Writs of Certiorari to quash:

- a) Letter dated 21st December 2015, annexed to the petition marked 'P11';
and
- b) Letter dated 19th January 2016, annexed to the petition marked 'P12',

by which the 1st Petitioner has been asked to pay a sum of Rs. 4,233,060 being the aggregate of the arrears of the Employees Provident Fund contributions due to the employees of the 2nd Petitioner and a surcharge of 50% on such arrears.

When this matter was supported on 25th July 2018, the learned Counsel for the Petitioner submitted that the 1st Respondent Commissioner General of Labour has not provided, either with 'P11' or 'P12', details of the employees in respect of whom the said EPF payments are due or the period in respect of which such payments are due. He submitted further that providing such details is mandatory in terms of Section 38(2) of the Employees Provident Fund Act¹, as amended and drew the attention of this Court to the judgment of the Supreme

¹ Section 38(2) of the Employees Provident Fund Act reads as follows: "Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of the opinion that it is impracticable or inexpedient to recover that sum under section 17 or under subsection (1) of this section or where the full amount due has not been recovered by seizure and sale, then, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer, to the Magistrate having jurisdiction in the division in which the place of work....is situate."

Court in City Carriers Ltd vs The Attorney General² and Mohamed Ameer and another vs Yapa, Assistant Commissioner of Labour³, in support of his argument. It was also submitted on behalf of the Petitioners that this was the only ground that he would be agitating in seeking the Writs of Certiorari to quash 'P11' and 'P12'.

The learned Senior State Counsel denied the aforementioned position of the Petitioners and stated that the relevant details have been provided to the Petitioners. The Court directed the learned Senior State Counsel to file limited statement of objections, together with documents in support of her position, only on this issue. Accordingly, a comprehensive statement of objections of the Respondents has been filed on 12th September 2018, together with documents marked '1R1' – '1R21'. This Court must note that even though the Petitioner was afforded an opportunity of filing a counter affidavit, the Petitioner has failed to do so. The learned Counsel for the Petitioner has instead filed Written Submissions, which do not address the matters raised in the limited statement of objections of the Respondents.

In keeping with the reasoning of the aforementioned judgments that particulars of the amounts due should be made available to the employer, this Court would now examine the purported complaint of the Petitioners.

² 1992 (2) Sri LR 258 where the Supreme Court held that, Section 38(2) of the Employees Provident Fund Act, No. 16 of 1958 as amended imposes the duty on the Commissioner of Labour to give particulars of the sum due in the Certificate he files in the Magistrate's Court for recovery of Provident Fund dues. Where the certificate contains no particulars of the sum claimed, there is in law no certificate.

³ 1998 (1) Sri LR 156.

The 1st Petitioner is the sole proprietor of the 2nd Petitioner, which is engaged in the provision of janitorial and cleaning services. The Petitioners state that they provided janitorial services to the University of Ruhuna, for which purpose they employed male and female janitors and supervisors.

According to the Respondents, a complaint has been received on 5th July 2010 that the Petitioners have not remitted the EPF contributions of its employees. An investigation has been launched in this regard by the Department of Labour and by letter marked '1R3', the 1st Petitioner had been asked to call over on 2nd October 2010 with details that the Petitioners were required to maintain in terms of the Wages Board Ordinance No. 27 of 1941⁴, the Shop and Office Employees Act No. 19 of 1954⁵ and the Employees Provident Fund Act No. 15 of 1958⁶.

The 1st Petitioner has failed to present himself at the said meeting as well as failed to submit the documents called for by '1R3', inspite of several reminders⁷. On 9th March 2011, the Administrative Officer of the Petitioner had tendered to the Department of Labour the list of employees, marked '1R8' and '1R8a'. As the Petitioners did not provide the salary particulars relating to these employees and as the employees in question had been used for providing janitorial services at the University of Ruhuna⁸, the Department of

⁴ Pay sheets, attendance records and leave taken by the employees.

⁵ Pay sheets, attendance records and leave taken by the employees.

⁶ The 'C' forms by which EPF payments have been remitted to the Central Bank and the receipts issued by the Central Bank.

⁷ The reminders are dated 26th October 2010, 15th December 2010 and 29th December 2010 and have been marked as '1R4A', '1R5A' and '1R5B', respectively.

⁸ According to the document annexed to the petition, marked 'P' which is the bid submitted by the Petitioner to the University of Ruhuna for the provision of janitorial services, the Petitioner had proposed to the University of Ruhuna to use 30 employees for the Faculty of Engineering complex at Hapugalle, Galle, 32 employees at the Faculty of Medicine Complex at Karapitiya, Galle and 70

Labour had called for and obtained salary particulars from the University of Ruhuna.

The Department of Labour had thereafter calculated the EPF contributions due for each employee based on the names of the employees provided by the Petitioner and the salary details provided by the University of Ruhuna. A copy of the said calculation sheets have been tendered by the Respondent, marked '1R11B'. This Court has examined '1R11B' and notes that details tabulated under the name of the employee, the period of service, the salary paid, the EPF contribution that should be remitted and the surcharge have been set out in '1R11B'. It is the position of the Respondents that '1R11B' had been dispatched to the Petitioners, under registered cover together with the letter marked 'P11'.⁹

The failure on the part of the Petitioners to file a counter affidavit and contradict the above position of the Respondents that all particulars of the sum so due were in fact provided to the Petitioners, demonstrates to this Court that the Petitioners have no explanation to offer to the documents submitted by the learned Senior State Counsel. This Court is satisfied with the manner in which the calculation of the amounts due as EPF contributions has been carried out by the Respondents and accepts the submission of the learned Senior State Counsel that the Respondents have in fact provided to the Petitioner the particulars of the sum so due. In these circumstances, it is clear to this Court that the Petitioners have suppressed the fact that the relevant

employees at the Main complex at Wellamadama, Matara. Payment was to be at the rate of Rs. 516 per day for male labourers and Rs. 449 per day for female labourers, and included the contribution that was to be made towards the EPF.

⁹ The registered receipt article in proof thereof has been produced, marked as '1R11C' and '1R11D'.

particulars were given with 'P11' and that the Petitioners have attempted to mislead this Court.

This Court is also in agreement with the submission of the learned Senior State Counsel that 'P11' and 'P12' are not certificates filed in the Magistrate's Court but are documents by which the Petitioners have been notified that proceedings would be instituted, if the sums of money set out therein are not paid. Therefore, the provisions of Section 38(2) of the Act would not apply to 'P11' and 'P12'. In this background, it is not difficult for this Court to conclude that the Petitioners have presented this application with the clear intention of misleading this Court to believe that 'P11' and 'P12' attract the provisions of Section 38(2) of the Act. Once confronted by the Respondents, the Petitioners have chosen to remain silent on this issue, as well.

In these circumstances, this Court does not see any merit in the argument of the Petitioners that particulars of the sum due were not given with 'P11' or that 'P11' and 'P12' are illegal or *ultra vires* the provisions of Section 38(2) of the Act.

The Petitioners have further stated in their petition that they were not given the opportunity of submitting documents and challenging the quantification of the amount due as EPF arrears. However, the documents furnished by the Respondents make it clear that the said position of the Petitioners is factually incorrect as the Commissioner of Labour has given the Petitioners the opportunity of providing the required documents on multiple occasions, as borne out by the documents marked '1R4A', '1R5A', '1R5B' and '1R13'¹⁰. In

¹⁰ '1R13' is dated 4th July 2016, which is after 'P11' and 'P12'.

these circumstances, this Court is satisfied that the Petitioners have been given every opportunity of contradicting the details in 'P11' and 'P12' but that they have not availed themselves of such opportunity.

It is also clear from the documents produced by the Respondents marked '1R14A', '1R14B', '1R15A' - '1R15C', '1R16A' - '1R16C', '1R17A', '1R17B', '1R18A', '1R18B', '1R19A', '1R19B' and '1R20'¹¹ that the Petitioners have failed to provide the material requested and have not co-operated with the Department of Labour. What is most significant is that the Petitioners have not produced a single document to demonstrate that they have in fact remitted the EPF contributions of the employees. It is clear from the conduct of the Petitioners that they have acted with the sole intention of obstructing regulatory action being taken against them by the Department of Labour. The Petitioners have therefore not only suppressed from this Court the above events that transpired after 'P12' was sent in January 2016, but attempted to mislead this Court by stating that the Department of Labour had not given the Petitioners any opportunity of defending themselves.

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and utmost good faith. The Supreme Court in Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others¹² citing the case of Jayasinghe v National Institute of Fisheries and Nautical Engineering and Others¹³ has held as follows:

¹¹ These letters have been sent between August 2016 and November 2017.

¹² 2013 (1) Sri LR 6 at page 15.

¹³ 2002 (1) Sri LR 277.

“The conduct of the Petitioner in withholding these material facts from Court shows a lack of *uberrima fides* on the part of the Petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the Petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court.

In Timberlake International Pvt. Ltd. Vs. The Conservator General of Forests¹⁴, the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court, stated as follows:

“It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrimae fides* or (utmost) good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application.”

This Court therefore accepts the submission of the learned Senior State Counsel that the Petitioners have suppressed material facts from this Court as well as misrepresented material facts to this Court. Thus, this application is liable to be dismissed in limine, on this basis alone.

The Respondents have also taken up the position that the Petitioners are guilty of laches in that this application has been filed over two years after ‘P11’ and

¹⁴ S.C. Appeal No: 06/2008 SC Minutes of 2nd March 2010.

'P12' were sent. This Court observes that the Petitioners have not explained the reasons for their delay and that on this ground too, this application is liable to be dismissed.

In the above circumstances, this Court does not see any legal basis to issue notices on the Respondents and accordingly dismisses this application. Taking into consideration the fact that the Petitioners are guilty of suppression and misrepresentation of material facts, this Court directs the Petitioners to pay the State a sum of Rs. 50,000 as costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal