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.

Packserve (Pvt.) Ltd.
No. 130, Wewelduwa,
Kelaniya.

Court of Appeal Case No:
CA/WRIT/122/2018

PETITIONER

Vs.

1. Hon. John Senevirathne,
   Minister of Labour and Trade Union Relations,
   Ministry of Labour and Trade Union Relations,
   Labour Secretariat, Colombo 05.

2. A. Wimalaweera,
   Commissioner General of Labour,
   Labour Secretariat, Colombo 05.

3. S. M. S. Jayawardena,
   No. 213, First Lane,
   Egodawatta,
   Boralesgamuwa.

4. Sri Lanka Nidahas Sevaka Sangamaya,
   No 301, T. B. Jaya Mawatha
   Colombo 10.

RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Uditha Egalahewa, P.C. with Damitha Karunarathna for the Petitioner Navodi De Zoysa SC for the 01st and 02nd Respondents Asthika Devendra with Praveen Premathilake for the 04th respondent
Argued on:	22.03.2022
Written Submissions:	Tendered by the 4th Respondent on 04.03.2022 Tendered by the Petitioner on 19.06.2019
Decided on:	22.03.2022

Mayadunne Corea J

The facts of the case are briefly as follows, the Petitioner is a company duly incorporated in terms of the Companies Act No. 7 of 2007 and has come before this Court following an arbitration award made in pursuance of the Industrial Disputes Act. The 4th Respondent is the Sri Lanka Nidahas Sevaka Sangamaya, a registered trade union having a branch union at the factory which has been recognized by the Petitioner company for the purpose of discussing and negotiating with the Petitioner company.

The Respondent union represents 28 workmen, who are members of the said union who were involved in the purported dispute with the Petitioner. The Petitioner states that the 28 workers had submitted several demands including the increase of salaries to the Petitioner company. The Petitioner further states that it had informed the union and its member workers that it had consistently increased salaries over the years and is now unable to meet their demands as they were not in a position to facilitate such immediate increments. The Petitioner company informed the 4th Respondent that as an alternative, the Petitioner was working out a scheme to enhance the earnings of its employees. As such, the Petitioner states that it presented a proposal to relieve its employees to an extent, which was rejected by the 4th Respondent, who informed the Petitioner that if it failed to provide reasonable increments within 14 days the union will resort to a Trade Union Action.

The Petitioner states that the Respondent union had resorted to conducting an illegal strike and that their demands are unjust and unfair. The Petitioner further states that the member workers of

the 4th Respondent have sabotaged the machinery and infrastructure of the workplace with malicious intent and also prevented other workers from resuming work.

The purported dispute between the Petitioner and the 4th Respondent was initially referred for settlement by arbitration. In the award which was gazetted on 08.02.2018 the Arbitrator awarded, that the 28 employees were involved in a legitimate strike, the allegation that the workmen had committed acts of sabotage was not proved, the workmen had not vacated their posts, that the Petitioner had unfairly terminated the services of the workmen and ordered the said workmen be reinstated with back wages.

The Petitioner has come before this Court and impugned the award of the 3rd Respondent on the basis that it is null and void and there is an error on the face of the record and therefore has no force or avail in law.

The Petitioner aggrieved by the decision filed this writ application and prays for the following relief:

(1) Issue a mandate in the nature of a writ of certiorari quashing the award of the 3rd Respondent dated 30th January 2018.

Petitioner's complaint

- The Petitioner alleges that the 3rd Respondent has erred in failing to consider the written submissions filed by the Petitioner company and erroneously held that the Petitioner has failed to file written submission whereby failing to consider the case of the Petitioner company thus there is no fair hearing.
- The Arbitrator's decision is not equitable and not reasonable as the Arbitrator has failed to consider that the strike was illegal and therefore awarding back wages is not reasonable.
- The strikers had sabotaged and damaged the equipment and therefore awarding back wages and reinstatement is illegal.

Hence this application for a writ of certiorari.

At the commencement of the argument, the learned Counsel for the 1st and 2nd respondents submitted to this Court that they will not be making any oral submissions nor have they filed a written submission. The 3rd Respondent Arbitrator would be mentioned as 'the Arbitrator' hereinafter. This Court also observes that the 3rd Respondent has not taken part in this proceeding.

At this stage, it is pertinent to consider the background of this application.

The members of the 4th Respondent who were employees of the Petitioner had engaged in strike action after the Petitioner had failed to renew the collective agreement that was in force. The 4th Respondent had submitted new proposals to be included in a new collective agreement that was mooted to be negotiated. Especially for an increment of salary and other benefits (X6). After several discussions, the parties have failed to agree on the demands and thereby have failed to enter into a new collective agreement. The Petitioner's contention was that they were not in a position to agree to the new condition that has been forwarded by the 4th Respondent, especially for salary increment as the company was not financially performing well. This had been informed to the 4th Respondent by letter dated 06th March 2009 (X7). There had been several correspondence and discussions to overcome this disagreement. The Petitioner had submitted alternate proposals, especially a work incentive based on the production. However, the 4th Respondent by their letter dated 13th May 2009 had rejected the proposals and had given notice of trade union action by the said letter (X9). Subsequent to this letter the Petitioner alleges that they have sought three months' time from the 4th Respondent to implement the scheme of incentives based on production (X10).

However, 28 workers of the 4th Respondent had engaged in strike action. As the production was falling further the Petitioner had given an ultimatum and informed all employees to report to work by 14th August 2009 (X11). In reply to this letter the members of the 4th Respondent had informed that since they were engaged in a trade union action, they were not reporting to work by letter dated 19th August 2009. The Petitioner had issued letters of vacation of post to all the striking workers who were members of the 4th Respondent.

The said strike action had continued for several months, this dispute had thereafter been referred to an arbitrator under the Industrial Disputes Act. The said industrial arbitration commenced. However, before it could conclude the Arbitrator V. I Jayasuriya had passed away, thereafter the dispute had been referred for arbitration under a new arbitrator.

This Court will now consider the terms of reference for the said arbitration which states as follows;

"Whether it is justified by PACKSERVE (PVT LTD) to consider the following 28 employees as having vacated their employment at the company and if not justified to what relief each of them is entitled".

Both parties had filed their statements and thereafter evidence had been led. It is pertinent to note that in the statement filed by the Petitioners, they have stated sabotage by the striking workers and also stated that the strike action of the applicant union is unjustified.

Subsequent to the inquiry, the Arbitrator had given his award dated 25th September 2017. The award had been published in the Gazette on 08th February 2018 (P3). The Petitioner impugned the said award on the basis that the said award is irrational and or arbitrary illegal and ultra vires.

Now, this Court will consider the allegations of the Petitioner. The Petitioner's first allegation was that the Arbitrator has failed to consider that the strike action was unjustified and illegal.
It is not disputed by the parties that there had been several collective agreements and on 15th December 2018, the 4th Respondent had written and requested to enter into a new collective agreement that failed to materialize. The parties are not at variance that there had been several correspondences thereafter and also that a notice of strike action was given vide (R9).

The Petitioner's contention is that the strikers had obstructed the non-striking workers from reporting to work thereby causing loss and destruction to the production process and further contended that the strike should be the last weapon for a trade union. It was further argued that the 4th Respondent commencing a strike, when the Petitioner company was in financial difficulty cannot be justified especially in view of the fact that several salary increments have been given to the workers by the previous collective agreements. The Petitioner contends that the strike is illegal on the basis,

- that the strikers had gathered outside the premises and had obstructed the non-strikers from entering the premises.
- The strikers had damaged the company property which they also challenged under sabotage.
- The strike has adversely affected the production of the company.

The 4th Respondent submitted that the said strike cannot be illegal as it had commenced only after they failed in all negotiations and the 4th Respondent had informed the Petitioner company and also the Commissioner General of Labour prior to going on the strike action (A12). As per A12 dated 13th May 2009, it is clear that the trade union had given the Petitioner 14 days' time to give them a satisfactory answer and has stated that failure to get a reply would result in severe trade union action. The said letter states as follows.

"මෙම ලිපිය ලැබී දින 14 ක් ඇතුලත මෙම කරුණු සම්බන්ධයෙන් සතුටුදායක පිලිතුරක් නොලැබුනහොත් දැඩි වෘත්තීය සමිති ක්‍රියාමාර්ගයක් ගැනීමට සිදුවන බව ද මෙයින් දන්වා සිටිමු."

This letter was not disputed by the Petitioner. Thus, this Court is satisfied that adequate notice of strike had been given.

However as there had been no agreement reached, the 4th Respondent union had launched this strike. After hearing the submission of both counsels, this Court comes to the view that before the strike action was launched there had been several negotiations and correspondence. Thus,

Petitioner's contention that the strike action should be the last resort but the Respondent union had directly resolved to the last weapon in resolving an industrial dispute fails.

As contended by the 4th Respondent's Counsel the basic right to strike is an internationally recognized right and it is entrenched in the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December 1966 and has been acceded by the Government of Sri Lanka and specifically accepted the right to strike as held in the case of **Rubberite Company Ltd Vs. Labour officer Negombo (1990) (2) SLR 142.** The 4th Respondent further contended that the strikers had not engaged in any act that violated Section 40(1) of the Industrial Disputes Act and, in any event, the Petitioner had failed to adduce any evidence to substantiate the allegation of such violation before the Arbitrator.

It was the contention of the 4th Respondent that in fact, if there had been an illegal strike, the Petitioner should have made an inquiry and a charge sheet issued against the workers. Parties were not at variance that the strikers had gathered outside the premises and staged the strike. The Petitioners strongly contended that this gathering had obstructed the non-striking workforce from entering the premises. However, the Petitioner's own witness had admitted that the strikers had not obstructed the non-strikers from reporting to work (Page 565 brief)

This Court finds that as per P3, the Arbitrator had given due consideration and has come to the conclusion pertaining to the legality of the strike.

The Petitioner's next contention was based on sabotage. The Petitioner's main contention is that the 28 workmen who were members of the 4th Respondent had committed acts of sabotage namely obstructing the non-strikers from entering the company, damaging the boiler and electrical wiring to machines, and also damaging the vehicles. Further, the Petitioner contended that in this background, ordering reinstatement and granting back wages is illegal.

However, the 4th Respondent while denying this allegation contended that as stated earlier in this judgment, the Petitioner's own witness had conceded that there had been no obstruction for the employees to enter into the company and to work. Further, the Petitioner has failed to submit an assessment of damages that are alleged to have been caused by the strikers. In the absence of such material, the 4th Respondent has successfully created a doubt as to whether in fact if any damages were caused at all. It was also brought to the notice of this Court that three workers had been charged in the Magistrates Court of Kiribathgoda, for damaging the properties of the company. However, after a comprehensive trial, all three have been acquitted. The Petitioners have not submitted any material to this Court to demonstrate that they have appealed against the decision of the learned Magistrate.

The Petitioner also contended that the Arbitrator should not have reinstated the workmen as the awarding of reinstatement and back wages was illegal. The Petitioners relied on the case of **Best**

Footwear (Pvt) Ltd v Aboosally, Former Minister of Labour and Vocational Training and others (1997) 2 SLR 137. This Court has considered the said case. However, this Court finds the facts of the said case in arriving at the decision that the strike is illegal, is different from the facts of this case. In the said case the Court found that there had been no adequate notice given before the strike commenced, but in the case, before us, we find as stated elsewhere in this judgment the fourth Respondent trade union had given sufficient notice and there is material to amply demonstrate that the parties had engaged in several discussions and several correspondences have been exchanged before the strike action had commenced. The Petitioner's contention that as a result of the strike the company had suffered financial loss thus making the strike illegal cannot be accepted by this Court as any strike action where production is affected will result in financial loss to the company. But we are unable to agree that it alone, is a ground to determine that the strike is illegal unless it is coupled among other grounds with other willful and intentional acts to purposefully harm the company.

The next contention of the Petitioner is that by the strike action, the strikers have caused financial loss to the company and that the Petitioner was not capable of paying back wages.

However as quite correctly submitted by the 4th Respondent, in the absence of any justification pertaining to the termination of the workers, the Petitioner cannot escape his liability by stating that they are financially not capable of paying back wages. It was also the contention of the Petitioner that the Arbitrator has failed to consider that the industrial relations between the Petitioner company and the 28 workmen had broken down as a result of the strike.

This Court also observes that the Petitioners subsequent to the strike had informed and invited all the workers back to the workplace. This invitation had been given after the lapse of nearly two months into the strike (X11). The conduct of the Petitioner himself cuts across his defense of losing the industrial relationship between the worker and the employer. If the workers have committed sabotage which resulted in the industrial relations being deteriorated, then the Petitioner should have charge-sheeted and taken disciplinary action to justify the termination. Instead of doing so, the Petitioners had decided to commence work and invite the workers to report to work. In inviting the workers back to work, the Petitioner has only stated that they have invited the people to work because the production in the company has gone down. The said letter X11 reads as follows,

" අප කර්මාන්ත ශාලාවේ එක්තරා සේවක කොටසක් සහභාගීත්වයෙන් පවත්වාගෙන යනු ලබන වැඩ වර්ජනය හේතුවෙන් නිෂ්පාදන කටයුතු කරගෙන යාම අඩාල වී ඇත

පවතින තත්වය වලක්වාගනු වස් අධ්‍යක්ෂක මණ්ඩපයේ තීරණය පරිදි 14.08.2009 දින කර්මාන්ත ශාලාවේ නිශ්පාදන කටයුතු ආරම්භ කරනු ඇත.

එදින පෙ.ව. 8.00 ට සේවයට වාර්ථා කරන ලෙස ඔබ වෙත මෙයින් දන්වා සිටිනු ලැබේ"

This Court also observes that nowhere in X11 it is stated that failure to report to work as per X11 will result in the Petitioner considering that the members of the 4th Respondent have vacated their post.

The Petitioner also challenges the Arbitrator's award, on the ground that reinstatement was illegal and relied on Sec 33 (6) of the Industrial Disputes Act which states as follows, ***"the provision of (3) and (5) shall not be construed to limit the power of the industrial Court or an arbitrator, under paragraph (d) of subsection (1), to include in an award a decision as to the payment of compensation as an alternate reinstatement, in any case where the Court of tribunal thinks fit so to do"*** Thus, the contention that awarding back wages with reinstatement is wrong.

The said section is quite clear as it contemplates compensation only as an alternative. Merely because an employer makes an allegation that the industrial relationship with a worker is broken, an arbitrator should not act under the alternative. For the arbitrator to act under the alternative there has to be evidence of a breakdown of the relationship. In this instance, the Arbitrator is given discretion by the statute itself. The arbitrator is the sole judge on the facts and he has used his discretion. The Petitioners have failed to demonstrate to this Court that the Arbitrator has erroneously used his discretion.

The role of the arbitration is stated in **Brown & Company PLC VS Minister of Labour and six others 2011(1) SLR 305** it was held, "*Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make and award 'which is just and equitable'. When an industrial dispute has been referred under Section 3 (1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to 'make all such inquiries into the dispute as he may consider necessary, here such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him just and equitable'.* In my view, the word 'make' as used in the said provision, has the effect of throwing the ball into the Arbitrator's Court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon 'to hold an inquiry, where the ball would be in the Court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the arbitrator to be just a judge presiding over the inquiry, the control, and progress of which will be in the hands of the parties themselves or their Counsel"

It is evident that the Arbitrator has been given the discretion to consider the evidence that is necessary to come to a determination. The Petitioners have failed to demonstrate that the Arbitrator had failed to make the necessary inquiries for him to come to the conclusion that he

has arrived and also has failed to demonstrate that the Arbitrator has not considered the evidence that is present before him in arriving at his final determination

If the termination is found to be illegal or cannot be justified the normal relief is reinstatement. In the book "**A General Guide to Sri Lankan Labour Law"** by Mr. S. Egalahewa at page 695, cited the case of **Ceylon Ceramics Corporation v Weerasinghe SC 24/76, Supreme Court Minutes of 15/70/78 (unrep)** it was held that as follows,

"*The Supreme Court pointed out that except in cases falling within Section 33(3), 33(5) and 47(c) of the Industrial Disputes Act, a workman wrongfully dismissed will normally be entitled to reinstatement unless there are special circumstances which justified departure from the general rule. The Court cited Section 33(6) as fortifying this conclusion and added that the '**order for payment of compensation is not a matter of course as an alternative to reinstatement in every case; when there is finding that the termination of service is not justified, sufficient reasons should therefore exist to justify a departure from the ordinary relief of reinstatement.** '*"

As the Arbitrator had come to the conclusion that there is no sabotage, especially in view of the acquittals in the Magistrate Court action that has been filed against the strikers. We find that there is no reason for the Arbitrator to apply the alternative in giving relief to the worker. Thus, the Arbitrator's decision on reinstatement cannot be found fault with.

At this stage, in considering the Petitioner's allegation, it is important to consider the reference made for an industrial arbitration. The reference made to the Arbitrator, was to determine whether Packserve (PVT) Ltd's decision to consider the 28 employees as having vacated their employment of the company is justified or if not for what relief each of them is entitled to?

This Court will now consider the Arbitrator's decision which is marked as P3.

The Petitioner's main argument is that in the decision at P3, the Arbitrator has specifically stated that the Petitioner has failed to file their written submissions at the conclusion of the arbitration. By this statement, the Petitioner alleges that the Arbitrator has violated the rules of natural justice and not given a fair hearing to the Petitioner. Both parties are not at variance on the fact that the Petitioners have filed their written submissions which are depicted on page 837 of the brief. However, in the P3 order, the Arbitrator has specifically stated that the 4th Respondent has failed to file the written submissions. Thus, in view of the above statement, it is clear that the Arbitrator in arriving at the decision P3, has failed to consider the written submission of the Petitioner. Does it amount to a deprivation of the fair hearing to the Petitioner or as the 4th Respondent's state whether even if considered, there wouldn't have been changed in the decision. This Court will now consider whether the omission to consider the written submissions has materially affected the final determination of the Arbitrator.

As per Section 17 (1) of the Industrial Disputes Act, when an industrial dispute is referred, it is incumbent on the arbitrator to make all such inquiries into the dispute as he may consider necessary, hear all evidence that may be tendered by the parties to the dispute and make an award as may appear to him just and equitable. The Petitioner has failed to demonstrate before this Court that the Arbitrator has failed to consider the evidence, nor did he make any allegations that the Arbitrator had failed to make all such inquiries into the dispute. Their main grievance was the Arbitrator's failure to consider the written submission that had been filed. However, we are mindful of the fact that the written submissions are not considered as evidence.

This Court observes that the role of an arbitrator in adjudicating an industrial dispute arbitration is clearly explained in **"A General Guide to Sri Lanka Labour Law" page 171** by Mr. S. Egalahewa, where he has stated as follows, *"An employer in proceedings before an arbitrator has no burden to discharge in relation to a dismissal of a workman by him and a workman has no burden to discharge in respect of showing that the termination is wrongful. The burden is on the arbitrator to make all such inquiries and make a just and equitable order… the duty of the arbitrator is to look for the material and the circumstances surrounding the employment of the workman and her termination. He can elicit this material in any manner he wants subject only to the rules of natural justice."*

The Petitioner contends that when the Arbitrator gave the order P3, without considering the written submission of the Petitioner, he has violated the rules of natural justice i.e. the Petitioner has not been afforded a fair hearing. This Court cannot agree on this contention as the Petitioner has appeared in the arbitration, with legal representation. The Petitioner has cross-examined the witnesses of the 4th Respondent Union and also, on behalf of the Petitioner, several witnesses have testified. We also had the opportunity of observing the Petitioner's written submissions. Curiously the said written submission is dated 12th May 2016. However, there is a date stamp from the Industrial Courts which states the date as 27th June 2016. In the said written submission, the Petitioner has invited the arbitral tribunal to consider whether the strike is illegal but mainly has focused on the evidence led before the Arbitrator. Other than this reference, inviting the Arbitrator to ascertain the legality of the strike, the written submission is a re-production of the evidence that has been led before the Arbitrator. In our view, the Arbitrator has considered all the evidence and upon making necessary inquiries pertaining to the legality of the strike has come to a conclusion.

In this context, this Court will now consider whether by not considering the said written submission, the Petitioner had been prejudiced. This Court observes that by P3, the Arbitrator had considered all the evidence that has been led before him and also evaluated the evidence. The Arbitrator has considered the evidence of one Vijitha Kumara pertaining to the sabotage charges that have been filed against three members of the 4th Respondent Union and also the fact that after a protracted trial the accused had been discharged. The Arbitrator had considered the allegation of the sabotage of the machines. In his order, he has stated,

“විශේෂයෙන්ම 2014.07.22 වන දින මූලික සාක්ෂි 17 වන පිටුවේ දී උත්තරය ලෙස සඳහන් කර ඇත්තේ වර්ජනයට පෙර මැෂින් වලට අලාභානි කළ බවත් යන්ත්‍රෝපකරණ කොටස් චින්ශයට පත් වී තිබුණ බවත් සඳහන් කරන ලදි. විශේෂයෙන්ම මෙම විමසීමේදී දින ගණනාවක් හරස් ප්‍රශ්න වලට භාජනය කළද ඉල්ලුම්වන්ගෙන් මේ සම්බන්දයෙන් කිසිම ප්‍රශ්නයක් හෝ ඉගියක් හෝ නොඅසන ලද අතර මුල් වතාවට වගඋත්තරකාර පක්ෂයේ මූලික සාක්ෂියේදී සඳහන් කිරීම අසාමාන්‍ය සිදුවීමකි.”

The Arbitrator had also considered whether the strikers had obstructed the non-strikers from entering the premises. In answering that he had stated, **“ඉහත නම සඳහන් සාක්ෂිකරු හරස් ප්‍රශ්න වලට පිළිතුරු දුන් ආකාරය පිළිබඳ සලකා බලද්දී වැඩ වර්ජකයන්ගෙන් වැඩ වර්ජනය නොකළ අයට කිසිම අවහිරතාවයක් හෝ බාධාවක් සිදු නොකළ බව පැහැදිලිව අනාවරණය විය. වගඋත්තරකාර සමාගම වෙනුවෙන් වඩුවෙල් මර්ගදාස් මහිනද ප්‍රසාද් නැමැති අය සාක්ෂියට කැඳවන ලද අතර මූලික සාක්ෂි වලදී 1978 සිට මේ දක්වා වගඋත්තරකාර සමාගමේ විදුලි කාර්මික වැඩ කරන බව සඳහන් කරන ලදි. 2015.05.26 ව දන 6 වන පිටුවේ පළවෙනි ප්‍රශ්නය සහ උත්තරය 08 වෙනි පිටුවේදි.**

පිළිතුරු - 1978 තමයි වෘත්තීය ජීවිතය ආරම්භ කළේ 2010 සිට තමයි මෙම වගඋත්තරකාර ආයතනයේ වැඩ කරන්නේ සාක්ෂිකරු පැහැදිලිවම පළමුව 2010 වර්ෂයේ කොරුග්‍රේටඩ් යන්ත්‍රය අලුත් වැඩියාවට ගිය බව ප්‍රකාශ කරන ලදි. කෙසේ වෙතත් සාක්ෂිකරුට නිශ්චිතවම කිව නොහැකි විය. ඔහු තම සාක්ෂියෙන් කියා පෑමට උත්සහ කළේ අගල් 04 ක් පමණ පොළව යටින් ඇති සිමෙන්ති ආවරණයක් සහිත නළයක් කැඩීමෙන් යන්ත්‍රය ඇණ හිටිය බවත් එය උලකින් ඇනීමකින් සිදුවිය හැකි බවත්ය. වර්ජනය ආරම්භණ වූ කාලය සලකා බලද්දී එය 2009 මුල් වකවානුවේ දී සිදු වූ බව දෙපාරශ්වයේම සාක්ෂි මත අනාවරණය විය”.

The Arbitrator also had given his consideration towards the reduction of the production as a result of the strike and arrived at the decision on the legality of the strike.

The Petitioner although stating that the Arbitrator had failed to consider their written submissions, has failed to demonstrate to this Court, the points the Arbitrator had failed to consider which were not in evidence but only stated in the written submissions. The Petitioner has also failed to demonstrate to this Court parts of the evidence the Arbitrator had not considered which would have been vital in arriving at the decision. In our view, a mere statement alleging that the arbitrator has failed to consider the evidence and material before him is not sufficient to impugn the arbitrator’s decision. It was incumbent on the Petitioner to demonstrate the evidence that had not been considered and also to demonstrate whether the award contained evidence and material that had not been led before the Arbitrator.

We are of the view that the Arbitrator, even if he had failed to consider the written submission filed by the Petitioner, has come to the correct conclusion on the evidence and the material available. In our view, the Petitioner has failed to demonstrate that the non-consideration of the

written submission has caused a material disadvantage to him. We find that all contentions that had been summarized in the written submission, elicited at the inquiry, had been considered by the Arbitrator. We find that the Arbitrator has properly evaluated and considered the evidence and material that had been led before him. We do not see any irrationality or illegality in the Arbitrator's award.

Even though the Petitioner had pleaded that the impugned award is arbitrary and ultra-vires, the Petitioner has failed to demonstrate those grounds before the Court. In this instance, this Court is exercising very limited jurisdictions as this is not an appeal. When a decision is challenged by way of certiorari, the role of the Court in such an instance was elaborated in;

Kalamazoo Industries Ltd and Others vs. Minister of Labour & Vocational Training and Others. (1998 1SLR 235) where it was stated ***"Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principals of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of illegality. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it had to be allowed to stand unreversed. It is pertinent to refer to the principles laid down by Prof. H. W R. Wade on "Administrative Law" 12th edition at pages 34 to 35 wherein the learned author states 'Judicial review is radically different from the system of appeals. When hearing an appeal, the Court is concerned by the merits of the decision under appeal but in judicial review, the Court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful…."***.

Therefore, after considering all the grounds that had been argued by Counsel, we find that the Petitioner has failed to demonstrate any illegality in the impugned award. Accordingly for the reasons set out in the judgment we are not inclined to grant the relief prayed. Thus, this application is dismissed without cost.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal