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 Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/196/2022

Courtaulds Trading Company (Pvt) Ltd
Plugahawela,
Katuwellegama

Petitioner

Vs.

1. P. J. R. A. S. S. Ranasinghe
   Hon. President of the Labour Tribunal,
   Labour Tribunal No. 13,
   95, Dr. N. M. Perera Mawatha,
   Colombo 08.

2. Juliet A. Yambao
   232/2, Lewis Place,
   Kudapaduwa,
   Negombo.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:** Akiel Dean with Nishika Fonseka for the Petitioner.

S. M. A. Mohamed for the 2nd Respondent.

Argued on **:** 30.06.2022

Written Submissions : Petitioner -15.07.2022

2nd Respondent -15.07.2022

Decided on **:** 29.07.2022

Sobhitha Rajakaruna J.

This matter was taken up for support on 30.06.2022 to decide on the issuance of formal notice of this case on the Respondents. However, both parties agreed that this matter could be taken up for argument on the same day, after issuing formal notice, on urgent basis and also parties agreed to proceed with the hearing of this case based on the pleadings already filed.

The Petitioner alleges that the instant application relates to the writ application bearing No. CA/Writ/34/2022 filed in this Court by the Petitioner (with a Co-Petitioner) against the above-named Respondents. The Petitioner, inter alia, seeks for a writ of Certiorari quashing every decision and/or determination of the 1st Respondent made in the Labour Tribunal, (Colombo) inquiry bearing No. LT/13/141/2015 reflected in the order dated 04.03.2022 marked 'P3Y(1)' and 'P3Y(2)'. The said reliefs are being sought mainly based on the grounds emanating from the order of this Court issued on 02.03.2022 in the said writ application No. CA/Writ/34/2022. Additionally, the Petitioner is seeking for a writ of Certiorari quashing the decision and/or determination of the said Labour Tribunal in the orders dated 01.11.2021, 07.12.2021 and 03.02.2022, marked 'P3(A)', 'P3(B)' and 'P3(X)' respectively.

The broader question identified by this Court in the said Writ Application No. CA/Writ/34/2022 was whether the Labour Tribunal could issue an order to disallow a witness who was not examined by the adverse party (cross-examination), to be summoned again to court. The grievance of the Petitioner in the said case was that the learned President of the Labour Tribunal failed to recognize and record that there was no cross-examination on behalf of the 2nd Respondent in respect of the particular witness. This Court has observed in the said order that the aforesaid question directly dealt with the decision-making process of the learned President of the Labour Tribunal and it fell within the jurisdiction in respect of the applications for judicial review. However, in view of resolving the issue, the learned Counsel for the 2nd Respondent undertook specifically to get it recorded before the President of the Labour Tribunal in case no. LT/13/141/2015 that he would not cross examine the witness namely, Mr. Himal Alahakoon.

In view of the said undertaking, the learned President of the Labour Tribunal was directed by this Court to accommodate the learned Counsel of the 2nd Respondent to perform the said undertaking. The impugned orders marked 'P3(Y)(1)' and 'P3(Y)(2)' has been made

by the 1st Respondent – the President of the Labour Tribunal No. 13 ('learned LT resident') on the day that the 2nd Respondent of the instant application tendered to the Labour Tribunal ('LT') a copy of the order made by this Court in the said writ application No. CA/Writ/34/2022 on 02.03.2022.

At the outset, I draw my attention to Section 5(1) of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003. In terms of the said Section, it shall be the duty of a Labour Tribunal to whom an application is made, to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable. Further, such order should be made not later than four months from the date of the making of such application.

Similar provisions are contained also in Sections 31(c)(1) of the Industrial Disputes Act. As regards those statutory provisions, the prime duty of the Labour Tribunal is to inquire into the applications, hear evidence and make orders within a very short period of time as stipulated in the Statute. The parties to an application before the Labour Tribunal is also duty bound to assist the Tribunal to conclude an inquiry expeditiously. This notion, in my view. is very much relevant to the issues of the instant application.

Primarily, I need to observe the extent to which this Court should intervene in to the questions in relation to the orders made by the Labour Tribunal.

The Section 7(1) of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003 stipulates that;

> *'Where an application is made to the Court of Appeal under subsection (4) of section 31D of the Industrial Disputes Act, for the issue of an order in the nature of a writ of certiorari, prohibition, procedendo or mandamus, against the President of a labour tribunal in respect of an order made by such President, the Court of Appeal shall hear and decide such application within four months of the date on which such application is made to the Court of Appeal.'*

'The writ court does not sit as an appellate court to scrutinize the decision of the lower authority on merits. The writ court does not substitute its own decision for that of the authority concerned in which the statute has vested discretion. Discretion means that more than one choice is available to the authority. The authority has the right to choose between

more than one possible course of action and there may be difference of opinion among reasonable persons as to which option to follow. So, the court gives freedom of choice to the authority having discretion. Only when the exercise of discretion is flawed by a vitiating factor, the court would quash the decision. Judicial review is concerned with the legality of a decision and not its merits. The courts often assert that it is not their function as review courts to substitute their wisdom and discretion for that of the persons to whose judgement the matter in question is entrusted by law. The principle has been stated firmly by the House of Lords in *Chief Constable of the North Wales Police vs. Evans*[1]**,** that judicial review is concerned not with the decision, as such, but with the process of decision making.' (*Vide-**M. P. Jain and S. N. Jain, Principles of Administrative Law, 9th Edition, [2022], Lexis Nexis, Volume 2, at p. 2042)***

Bearing in mind the above inferences in law, I now advert to examine the impugned orders which were made by the learned LT President. The issues in relation to the application bearing No. CA/Writ/34/2022 and in the impugned orders marked 'P3(Y)(1)' & 'P3(Y)(2)' emerged after the 2nd Respondent (the 'Applicant' in the relevant LT case) informed the LT that the Petitioner's (the 'Respondent' in the relevant LT case) witness namely Mr. Himal Alahakoon would not be examined (cross-examination) by the 2nd Respondent soon after the Petitioner completed examining (examination-in-chief) its said witness.

When a party to a matter in a court of first instance or in a tribunal declares that a witness of the adverse party would not be cross-examined, the usual practice is to simply write down in the case record that there is "*no cross-examination*". Having recorded that there would be *no cross-examination*, the Court or Tribunal should proceed with the next witness or with the other steps in the case. However, on perusal of the proceedings of the LT, it is observed that voluminous assertions and observations/orders have been made by the respective parties and the learned LT President, instead of simply writing down-"*no cross-examination*".

I can recall an important paragraph in ***'Judicial Writing - A Benchmark for the Bench' [2016], Partridge)*** by Chinua Asuzu, which is very much apt even for judicial writing by Tribunals. The said paragraph reads as follows (at p.10);

[1] (1982) 1 WLR 1155

'Judges, whether trial or appellate, should review their drafts to minimize, if not eliminate, all dicta not pertinent to the outcome or not true to principle. As Mansfield CJ put it in 1772, "I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle."[2] Obiter dicta can also hurt the system by being misread as part of rationes decidendi. So judges must resist the lure of the literary or philosophical frolic. Reserve your beloved but impertinent adages, examples, maxims, parables, poetry, quotable quotes and stories for your forthcoming memoirs. Never mind how your decision would have read if the facts had been different. Solve the problem before you. "Avoid wondering off on hypotheticals or addressing issues that go beyond resolving the case. Doing so will lead readers to incorrect interpretation and unwelcome dicta"[3]'

On 04.03.2022, the learned Counsel for the 2nd Respondent has categorically submitted to LT that the said witness Mr. Himal Alahakoon would not be cross examined by the Applicant in the said LT case. However, nowhere in the proceedings, I can find the simple words to the effect-"*no cross-examination*". The learned LT President has instead analyzed, *inter alia*, in his order marked 'P3(Y)(2)', upon an application by the Petitioner, the admissibility of the evidence of the above witness in the absence of any cross-examination.

In my view, the learned LT President is not wrong in deciding at page 16 of the said impugned order 'P3(Y)2' that the relevancy of evidence and admissibility of evidence should be decided along with the final order of the case. However, the learned LT President without pausing at that has arrived at an ambiguous conclusion that there is no legal existence to the stand taken by the Respondent that the said witness's evidence has not been challenged. The learned LT President has phrased the said conclusion as follows;

"....ඒ අනුව වගඋත්තරකරු වෙනුවෙන් අදාල සාක්ෂිකරුගේ සාක්ෂිය අභියෝගයට ලක්කර නොමැති බවට විනිශ්චය අධිකාරය ඉදිරියේ දරනු ලබන ස්ථාවරයෙහි කිසිදු නෛතික පැවැත්මක් නොමැති බවට තීරණය කරමි."

The above portion, among several other, of the said order was heavily censured by the learned Counsel for the Petitioner. Similarly, the said learned Counsel referring to the order marked 'P3Y' brought to the attention of this Court the observations and the

[2] Sommersett vs. Stewart Case (1772) 98 ER 499: (1722) 20 State Trials 1, (Mansfield CJ)
[3] Gerald Lebovits & Lucero Ramirez Hidalgo, 'Advice to Law Clerks: How to Draft Your First Judicial Opinion', 36 Westchester Bar Journal, No. 1, Spring/Summer 2009, 29, 32

conclusion of the learned LT President on the matter of granting a 'final date' for the purpose of the Petitioner's case and such portions of the said order is also being disputed.

The Petitioner is challenging the orders marked 'P3(A)', 'P3(B)' and 'P3(X)'. As I have observed earlier those orders have been made on 01.11.2021, 07.12.2021 and 03.02.2022 respectively. In other words, the said orders have been made by the LT before issuing the aforesaid order dated 02.03.2021 in the said writ application No. CA/Writ/34/2022. Presumably, most of the issues arising out of those orders have been resolved to a greater extent as a result of the said order made by this Court on 02.03.2022 and by subsequent orders made by the learned LT President.

The learned Counsel for the Petitioner submits that the portion of the order dated 03.02.2022 in page 13 of 'P3(X)' by which the learned LT President implicated that there was no requirement to follow any other principles of natural justice, is incurably defective and cannot be allowed to stand. The learned LT President has alleged such comments in view of the availability of the statutory provisions which requires the LT to conclude an inquiry within 4 months. The said portion of the order is as follows;

> "....ඉහත සඳහන් පරිදි නඩු කටයුතු අනලස්ව මාස 4ක කාලයක් තුළ එදිනෙදා පැවැත්වීමේ ක්‍රමවේදයට යටත්ව අවසන් කළ යුතු බවට ව්‍යවස්ථාපිත ප්‍රතිපාදන සැකසීම තුළ, ඉන් ඔබ්බෙහි පවතින වෙනත් කිසිදු ස්වභාවික යුක්ති මූලධර්මයක් අනුගමනය කිරීමේ අවශ්‍යතාවක් පවතින බවද විනිශ්චය අධිකාරයට පෙනී නොයයි...."

The Petitioner's main contention is that the learned LT President, as borne out in the impugned orders 'P3(Y)(1)', 'P3(Y)(2)', 'P3(A)', 'P3(B)' & 'P3(X)', has manifestly surrendered his independent judgement in terms of the inquiry into the said LT case and has predetermined the matter. Further, the Petitioner complains that the learned LT President has failed to conduct the said inquiry in an impartial manner and denied the Petitioner a fair hearing.

The learned Counsel for the Petitioner drew the attention of this Court to the paragraphs in page 394 of the ***Administrative Law by Wade and Forsyth, (11th Edition) Oxford*** and the paragraphs in pages 532 to 533 of ***De Smith's Judicial Review (6h Edition)***. Referring to the conception established in those legal literature, the said learned Counsel argues that the administrative law has developed over time such that any decision that appears to have been predetermined, whether by the adoption of an inflexible policy or failure to make an

independent judgement, should be struck down in judicial review. The said proposition in my view falls within the "activist model" in administrative law which was generally espoused by persuasive judges such as Lord Denning as opposed to the "restrain model". On principle, I agree with the submissions of the learned Counsel on the legal aspect of predetermination. Anyhow, my considered view based on the circumstances of this case is that I should not use my discretionary power in favour of the Petitioner in this instance. I have arrived at the said conclusion on this point because I am not convinced with the propriety of the motive of the learned LT President in respect of the events of predeterminations that are highlighted by the Petitioner on the part of the learned LT President.

On a careful examination of the impugned orders, I take the view that those orders are more vulnerable to be challenged in a Court which exercises the appellate or revisionary jurisdiction than in a writ court. Moreover, I make an observation that the predeterminations, if any, made by the learned LT President can eventually be challenged in such an appeal or revision at an appropriate stage of the case.

An application for judicial review against an order of the Labour Tribunal should be examined in the context of the legal position discussed at the beginning of this judgement. A writ court does not usually issue a writ merely on the basis that the decision of the lower court or tribunal is wrong or erroneous and accordingly, this court cannot examine the correctness of the impugned decisions. In the circumstances, I am of the view that no mandate in the nature of a writ of Certiorari could be issued against the learned LT President as prayed for in the prayer of the Petition.

The assertions of the Petitioner on bias against the learned LT President cannot simply be unaddressed as I consider it as an allegation of serious nature against a judicial officer. Two different types of bias can be identified as (i) actual or (ii) apprehended. The actual bias requires proof that a decision-maker in fact approached the issues with a closed mind or had prejudged. (*See-**Minister for Immigration and Multicultural affairs vs. Jia Legeng (2001) HCA 17; (2001) 205 CLR 507***). Apprehended bias requires reconsideration of "whether, in all the circumstances, a fair-minded lay observer with knowledge of the objective facts might entertain in a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question. (*Vide-**Webb and Hay vs. R (1994) HCA 30; (1994) 181 CLR 41 at 67***).

Although, the learned Counsel for the Petitioner made submissions on bias against the learned LT President, what was actually averred in the Petition by the Petitioner is that those impugned orders had given rise to both reasonable suspicion of bias and a real likelihood of bias on the part of the said learned LT President. I am of the view that the allegation of judicial bias should be inextricably entwined with the facts and the circumstances upon which such allegations are being raised. Based on the special circumstances of this case and in light of my above findings on issuance of a writ against the decisions of the LT, I should exercise my discretion not to make a determination on the allegations of bias against the said learned LT President.

However, I make an observation that parties are entitled to expect that their dispute will be heard by a fair and an independent court or tribunal. The court/tribunal should be impartial such that justice should not only be done, but should manifestly and undoubtedly be seen to be done. When there are reasonable charges against a judge on bias and unfair trial, the respective judge is free to get himself recused from hearing the case with a good grace, based on his own opinion. Anyhow, it seems to be that the Petitioner has not directly raised any objection before the learned LT President upon bias on the part of the said President.

For the reasons set forth above, I do not proceed to grant reliefs as prayed for in the prayer of the Petition of the Petitioner. Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal