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 in terms of Article 140 of the Constitution.

Mackwoods (Pvt.) Ltd.
No.97, Ananda Rajakaruna
Mawatha,
Colombo 10.

C.A. Case No. WRT-86/19 **PETITIONER**

TEU/C/33/2016 **Vs**

1. V. Kumarasinghe
   Assistant Commissioner of Labour
   Termination of Employment
   Branch
   7th Floor,
   Labour Secretariat,
   Colombo 5.

2. Commissioner General of Labour
   Labour Secretariat,
   Colombo 5.

3. Assistant Commissioner of Labour
   Labour Office,
   Colombo Central District
   Labour Secretarial,
   Colombo 5.

4. K. P. Devasiri

5. A. M. T. Suranga

6. W. P. Alwis

7. P. K. Jayasundara

8. A. S. D. Gunaratnam

9. Sarath Samarasinghe

10. J.V.P Chandrapala

11. N.P.A Chandana

12. H. B. A. S. Seneviratne

13. P. K. R. Perera

14. Mohomed Zafi Zein Abdu

15. J.K Sarath

(All of)

The Ceylon Mercantile & General Workers Union (CMU)
No.03, Bala Tempoe Lane,
Colombo 3.

The Ceylon Mercantile & General Workers Union (CMU)
No, 3, Bala Tempoe Lane,
Colombo 3.

RESPONDENTS

BEFORE : **M. SAMPATH K. B. WIJERATNE, J**
WICKUM A. KALUARACHCHI, J

COUNSEL : Nigel Hatch, P.C with Siroshni Illangage for the Petitioner.
Nayomi Kahawita S.C for the 1st – 3rd Respondents.
Lakmali Hemachandra with Jayantha Dehiaththage for the 4th - 15th Respondents.

ARGUED ON : 01.03.2023

DECIDED ON : 03.05.2023

WICKUM A. KALUARACHCHI, J.

The petitioner company filed this application seeking a writ of certiorari to quash the order of the Commissioner General of Labour dated 18.01.2019 marked P-10, wherein the petitioner was ordered to pay a compensation of Rs.12,889,819.50 to the 4th to 15th respondents in lieu of terminating their employment. In addition, the petitioner has sought a writ of certiorari to quash the application of the compensation formula contained in Extraordinary Gazette No. 1384/07, dated 15.03.2005 in calculating the compensation in relation to this order.

The statements of objections have been filed on behalf of the respondents and subsequently, the counter affidavit was also filed. This application has been argued before another bench of this court previously. At the request of all parties, the application was re-argued. At the hearing, the learned President's Counsel for the petitioner, the learned state counsel for the 1st to 3rd respondents, and the learned counsel for the 4th to 15th respondents made oral submissions.

The petitioner is a private limited liability company engaged in the business *inter alia*, of import/export trading, repacking/distribution of agrochemicals, import and distribution of medical equipment. The National Development Bank auctioned a petitioner's property in Ekala under parate execution due to the petitioner's failure to repay a loan. Following that, the petitioner sent a letter captioned "Cessation of Employment" to its employees on August 31, 2016, explaining the difficulty in carrying on with their business. The petitioner paid gratuity and three months' salary as an ex-gratia payment to all employees. The 4th to 15th respondents, who were members of the 16th respondent union, were dissatisfied with the petitioner's decision and filed applications before the Commissioner General of Labour under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 seeking relief for unfair termination of their employment. After holding an inquiry, the Commissioner General of Labour, the 2nd respondent, awarded the aforesaid compensation to the 4th to 15th respondents. Being aggrieved by the said order, the petitioner filed this writ application.

The learned President's Counsel for the petitioner advanced the following three main arguments.

i. There is a failure to consider the preliminary jurisdictional objection raised at the beginning of the inquiry that the Commissioner General of Labor is devoid of jurisdiction under the Termination of Employment of Workmen (Special Provisions) Act (hereinafter referred to as the "Act") because the contracts of employment were frustrated as the petitioner could not carry on the business.

ii. The order dated 18.01.2019 is vitiated in law as there is a failure to give reasons for the order.

iii. The said order is in breach of natural justice in that, in awarding a sum of Rs.12,889,819.50 to the workmen as compensation, it has disregarded the evidence that the petitioner had suffered severe economic hardship and was unable to meet its financial obligations.

The learned state counsel for the 1st to 3rd respondents contended that due to the failure to pay the loan obtained by the petitioner, the property of the petitioner was auctioned under parate execution, and it is a foreseeable and not unforeseeable circumstance and thus there was no frustration. The learned state counsel also contended that the petitioner's process of placing the property in a situation of acquisition by the bank due to non-payment of the loan and thus making it impossible to continue the services of the employees is tantamount to a termination of employment. Further, the learned state counsel contended that the case at hand is distinguished from the case of ***Sachithanandan V. Gnanum*** - C.A. No. 476/86 Court of Appeal Minutes, 18.08.1993, because in that case, a frustrating event occurred due to unforeseen circumstances.

While agreeing with the contentions of the learned state counsel for the 1st to 3rd respondents, the learned counsel for the 4th to 15th respondents contended that the petitioner's property had to be acquired by the bank due to their financial mismanagement and failure to pay the loan and that this situation could have been prevented by the petitioner. As it is not an unforeseeable circumstance, the learned counsel contended further that there was no frustration of contracts and that terminating the employment of the 4th to 15th respondents is illegal.

According to Section 2 of the Act, no employer shall terminate the scheduled employment of any workman without the prior consent in writing of the workman or the prior written approval of the Commissioner of Labour. Undisputedly, the 4th to 15th respondents were scheduled employees, and their services have been terminated without the prior written consent of them or prior written approval of the Commissioner of Labour.

The contention of the learned President's Counsel for the petitioner was that the petitioner did not terminate their employment. He contended that the Act does not apply in this case because the petitioner was unable to meet its financial obligations as a result of the severe economic hardships, and as a result, the petitioner company became non-operational and could not carry on with their business. Therefore, the learned President's Counsel contended that as the petitioner's property was auctioned by the bank, they could not continue their business, and the contracts of employment were frustrated due to the impossibility of performance. Hence, there was a cessation of employment with effect from 31.08.2016, and there was no termination of employment, he contended.

In addition, the learned President's Counsel contended that, despite the petitioner's inability to conduct business, the petitioner offered its employees three months' salary as an ex-gratia payment, as well as gratuity. He contended further that the 4th to 15th respondents also accepted the gratuity and they accepted the same as a terminal benefit, and thus, now they cannot challenge the termination of employment. The learned President's Counsel submitted that in the impugned order, the Commissioner General has not considered any of these issues.

It should be noted that accepting gratuity offered by the employer in the termination of employment does not preclude the employees from

claiming their legal entitlements. Although the learned president's Counsel attempted to formulate an argument that accepting gratuity amounts to consenting to the termination, I regret that I am unable to agree with that argument because Section 2 of the Act specifically states that the prior consent in writing of the workman should be obtained in terminating the employment. The 4th to 15th respondents have never given their prior consent in writing, and their employment were terminated without the prior written consent of any of the employees or the prior written approval of the Commissioner of Labour.

The central argument of the learned President's Counsel for the petitioner was that there was a frustration of contract, so, Section 2 of the Act does not apply and the Commissioner General of Labour has no jurisdiction to make the order dated 18.01.2019. Citing the judgment of ***Magpack Exports Limited v. Commissioner of Labour and Others*** - (2000) 2 Sri L.R 308, the learned President's Counsel contended that in this case, the petitioner company closed the establishment even without informing the workers, but in the instant case, the petitioner sent the letter dated 31.08.2016 to all employees and informed them that there was a frustration of the contract due to the impossibility of performance.

If the petitioner terminates the employment of its workmen, the termination must be done in accordance with Section 2 of the Act. The argument of the learned President's Counsel is that Section 2 of the Act does not apply because there was no termination of employment. The petitioner's position was that as a result of the frustration, contracts of employment were ceased by operation of law. Hence, the main issue to be determined in this case is whether the acquisition of the petitioner's property by the bank in accordance with the provisions of the law results in the frustration of contracts of employment.

A contract may come to an end due to its frustration or due to the impossibility of performance. Frustration refers to a situation where an unforeseen event occurs after a contract has been formed. The doctrine of frustration is based on the principle that a contract should be performed as agreed by the parties, but that there may be circumstances beyond the control of the parties that make it impossible or impractical to do so.

The issue of whether there was a frustration could be made clearer by perusing the relevant judicial authorities. In ***Satchithanandan V. Ghanum*** - C.A No. 476/86: C.A.M 18.08.1993 an employee claimed reinstatement and back wages as relief for the termination of his services, where the employer's industries and head office had been destroyed by ethnic violence. The Court of Appeal held that there was no termination of the workman's services by the employer as the contract had come to an end through the operation of law by a frustrating event for which neither party was responsible. This is a clear case of frustration of contract. Neither party was responsible for the totally unexpected ethnic violence. The industry could not be continued because the industry and head office of the employer had been destroyed as a result of ethnic violence. It is apparent that the employer had no way of knowing about the unexpected ethnic violence. The case at hand is entirely different. The employer (petitioner) knew very well even at the stage of obtaining the loan that its properties would be acquired by the bank under parate execution if the loan was not paid. The party that foresees the event is not entitled to plead frustration as decided in Magpeck Exports case.

The learned President's Counsel for the petitioner contended that there is a difference between ***Magpack Exports Limited v. Commissioner of Labour and Others*** and the case at hand. It is correct that in the Magpeck Exports case, the company was closed without informing the workers, but in the case at hand, the petitioner had informed all

employees by letter dated 31st, August 2016 about the cessation of employment. The petitioner has stated in the said letter that "There is a frustration of your contract due to impossibility of performance." Because of the reason that the petitioner mentioned about a frustration in that letter, it cannot be concluded that the contracts of employment were ceased due to frustration. Acquiring the petitioner's property by the bank due to non-payment of the loan is not an unforeseen circumstance; and thus, there was no frustration.

Citing the decision of ***Ceylon Mercantile Union V. De Mel*** - 76 N.L.R. 390 the learned President's Counsel contended that the Act has no application to a situation where a contract of service terminates by operation of law or by some act on the part of the workman. In the said case, the petitioner has admitted that the employees went on strike on 3rd February 1972 in connection with a dispute concerning the termination of the services of the President of the Times of Ceylon Branch of the petitioner Union. It was held that employees in an "essential service" who are deemed to have vacated their employment by virtue of the operation of the Emergency Regulations read with the Essential Services Order 1972 made thereunder are not entitled, when their employer refuses to offer them work thereafter, to seek re-employment through the intervention of the Commissioner of Labour under section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

Again, the case at hand is entirely different from the aforesaid case. It is precisely clear that in the instant case, the 4th to 15th respondents lost their employment due to no fault of them or no fault of any other employee. It is also clear that the contracts of employment came to an end, not by operation of law. Contracts had to be terminated because the petitioner failed to repay the loan obtained, in consequence, the bank acquired the petitioner's property and as a result, the petitioner could not carry on the business.

In the case of ***Walton Harvey Ltd v Walker & Homfrays Ltd*** [1931] 1 Ch 274, a hotel owner entered into a contract with an advertising agency enabling them to put illuminated adverts on the roof of their hotel. The hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the hotel argued the contract had become frustrated. It was held that the contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time, they entered the contract. They should have foreseen the fact that this could happen in the lifetime of the contract and made provision in the contract for such an eventuality. They were therefore liable to pay damages for breach of contract.

When considering the case at hand, it is clear that the petitioner was well aware that its properties would be acquired through parate execution if the loan obtained from the bank was not paid. Hence, acquiring the petitioner's property due to nonpayment of the loan was not an unforeseen event. Furthermore, paying the loan was entirely within the control of the petitioner and was not beyond the control of the petitioner. If the loan obtained by the petitioner had been paid as agreed, nothing would have happened beyond the control of the petitioner. When the bank proceeds to adopt its legal entitlement of parate execution to acquire the property in default of payment, an attempt to prevent the auction by instituting legal proceedings cannot be considered as a satisfactory and practical measure taken to prevent the termination of services of the employees. It was because of the petitioner’s own failure that the bank was compelled to acquire the petitioner’s property. The most successful and sure way of avoiding the acquisition of the property would have been to manage the company's financial situation efficiently while keeping in mind that they must pay the bank loan on time. Therefore, it is clearly a foreseen circumstance. Hence, I regret that I am unable to agree with the contention of the learned President’s Counsel that there was a frustration of contracts.

The doctrine of frustration could not be applied here for the reasons stated above, and thus I hold that this is not a cessation of employment as captioned in the letter P7(b), but termination of employment of the respondents 4 to 15 by the petitioner. As the termination of employment is not in accordance with Section 2 of the Act, I hold further that it is an unlawful termination of employment. In the circumstances, the petitioner company is liable to pay compensation to the 4th to 15th respondents as correctly determined by the commissioner of labour in a situation where reinstatement was not possible.

The learned President's Counsel submitted that the appellant company is presently located in a smaller place as compared to its previous place of business. Yet, the fact remains that the company is still in existence and has not been wound up. If the company has reached a point where it can no longer continue with its affairs, the company itself or its creditors could have instituted winding up proceedings. The fact that the petitioner company did not take such a step indicates that the company was in a viable state.

At this juncture, I wish to consider another main argument of the learned President's Counsel that the preliminary jurisdictional objection had not been considered by the Commissioner General. Without making an order regarding the jurisdictional objection, the Commissioner General has determined the matter on the basis that the petitioner has terminated the employment of the 4th to 15th respondents. The Commissioner General would not have jurisdiction to hear this matter only if the contracts of employment were ceased by operation of law. Already, this Court has decided that it was not a frustration of contracts of employment but a termination of employment. Therefore, the Commissioner General has jurisdiction to hear and determine this matter. In the circumstances, although there was no order regarding the jurisdictional objection, no prejudice would

be caused to the petitioner and no illegality would occur because determining the matter on the basis that the petitioner has terminated the employments of the 4th to 15th respondents is correct.

The learned President's Counsel for the petitioner also contended, citing some judicial authorities, that the order dated 18.01.2019, which has no reasons, should be quashed. He claimed that the document R3A, which was tendered with counter-objections, was a private secret document among them and that it was not shown to the petitioner until it was tendered in Court. Document R3 tendered with the statement of objections is an inquiry report and recommendations of the inquiring officer submitted through the Deputy Commissioner of Labour to the Labour Commissioner. In the said report, the reasons for the recommendations are stated in detail. Although the document R3 has not been provided to the petitioner, other than the absence of an order regarding the jurisdictional objection, reasons for the order dated 18.02.2019 have been provided under the subtopic of "හේතු" on the last page of the order, and the basis for computing the compensation has also been stated. It is my view that those reasons are sufficient for the petitioner to understand the said order. It has already been stated that the failure to issue an order regarding the jurisdictional objection has caused neither prejudice to the petitioner nor illegality. Therefore, this is a reasoned order.

The issues that remain for consideration are whether the order is in breach of natural justice by not considering the fact that the petitioner was facing severe economic hardship and was unable to meet his financial obligations and the argument that the formula for compensation as contained in Gazette Extraordinary No.1384/07 dated 15.03.2005 should not be applied in calculating compensation in this case.

It should be noted that if a person or company obtains a loan, it is their responsibility to repay it. There could be several reasons for their financial difficulties. The learned counsel for the 4th to 15th respondents submitted that the said situation arose as a result of economic mismanagement. Whatever the case may be, the 4th to 15th respondents or other employees were not liable for the petitioner's economic hardships. The employees should not suffer the consequences of taking over the property by the bank because of the failure of the petitioner company to fulfill its financial obligations to the bank. Hence, the 4th to 15th respondents must be compensated, as their services were terminated by the petitioner illegally.

With regard to the issue of applying Gazette Extraordinary No.1384/07 dated 15.03.2005 in calculating compensation, the learned President's Counsel contended that the Gazette is not a part of the Act and that only the provisions of the Act, constitute the law and thus, it is not essential to adopt the formula set out in the gazette. However, the Act empowers Gazetting. The Commissioner General of Labour has not awarded compensation arbitrarily. The necessity of having a formula in awarding compensation was dealt with in the case of ***St. Jude's Industries Ltd. and Another V. Commissioner General of Labour and 43 Others*** – C.A (Writ) Application No.138/2008 decided on 14.09.2012. It was held in the said case that *"…at different times by different commissioners of labour, compensations were awarded in an arbitrary manner. Taking these matters into consideration, the legislature has thought it fit to amend the law and to have a compensation formula formulated so that a uniform compensation formula will apply to all situations where compensation is awarded to the workmen in the event of the workman's services are terminated in violation of the provisions of the law. Therefore, the commissioner at present has no option but when he decides that the termination of the employment of the employees are in contravention of the provisions of the Termination of Employment of Workmen (Special Provisions) Act, the 1st respondent has to apply the*

formula with regard to compensation and therefore, the petitioners cannot challenge the said decision of the commissioner to apply the formula and to award compensation." I entirely agree with the aforesaid decision and I am of the view that the formula outlined in the Gazette would be the most reasonable method of awarding compensation in the instant case as well. Hence, I hold that there was no violation of the rules of natural justice and that it was correct in applying the formula as contained in Gazette Extraordinary No.1384/07 dated 15.03.2005 in computing compensation for the 4th to 15th respondents.

For the reasons stated above, I find no reasons to interfere with the order dated 18.01.2019. Accordingly, the application for writs is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M. Sampath K. B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL