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 writ of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/303/2022

1. Free Trade Zone and General Services Employees Union (FTZGSEU)
   141, Ananda Rajakaruna Mawatha,
   Colombo 10.

2. W.A. Chandima Wasanthi
   Gulugahakanda Road,
   Katamburawa,
   Wadurabha.

3. M.K. Ranjani
   Govipolawaththa,
   Henatigala,
   Thalpe.

4. J.A. Nilanthi
   10A, Bhuddhasingha Road,
   2nd Lane,
   Kaduwella,
   Galle.

5. N.G.Chamila Maheshika
   Paranawaththa,
   Naakanda,
   Ahangama.

6. T.Samantha
   Badalgoda,
   Meepe,
   Habaraduwa.

7. W.S.A Kujani Dilrukshi
   122/A, Paddawalawaththa,
   Kahada,
   Agulugaha.

8. W.A. Shirani Nalika
   Pokunawaththa,
   Unawatuna.

9. K.E.Dilhani
   20/02, Abdul Wahab Mawatha,
   Thalapitiya,
   Galle.

10. J.B.Renuka Damayanthi
    61, Induwarathenna,
    2nd Step,
    Dikkumbura.

11. S.P.Danusha
    Bogaha Asala Elabada,

Kathaluwa,
Ahangama.

12. M.L.Nirosha Priyadarshani
    Yapa Gedara,
    Neraluwa,
    Maliduwa,
    Akuressa.

13. A.V.G. Dinusha Prasanthi,
    511, Gonnagahahena,
    Ahangama.

14. W.V.A. Roshani Piyumi Jayathilaka,
    Sadaru,
    Lanumodara,
    Habaraduwa.

15. G.J.Chathurika Buddhini
    Jayawardhana
    321/A/1, Lehuwalawaththa,
    A1,
    Pitaduwa Road,
    Midigama,
    Weligama.

16. T.P.G.Nayana Sudarshani,
    Govipolawaththa,
    Hinatigala,
    Thalpe.

17. W.B. Waruni Priyadarshani
    01, Pokunawaththa,
    Peleena,
    Weligama.

18. K.K. Dayana Malkanthi
    79/04, Idurannawila,
    Dikkubhura,
    Ahangama.

19. T.P.Ajani
    484/1, Kanankewaththa,
    Kananke.

20. K.T. Gimhani Geethika Dayamanthi
    Gangarama Mawatha,
    Peleena,
    Weligama.

PETITIONERS

Vs.

1. B.K.P. Chandrakeerthi
   Commissioner General of Labour
   Department of Labour,
   Labour Secretariat,
   "Mehewara Piyasa",
   Colombo 05.

2. R.P.Iresha Udayangani

Deputy Commissioner of Labour
(Inquiry Officer),
Labour Secretariat,
"Mehewara Piyasa",
Colombo 05.

3. JK Apparel Manufacturing Limited
P.O. Box 19,
Minuwangoda Road,
Ekala.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: S.H.A. Mohamed with Laknath Senevirathna for the Petitioners
Sehan Zoysa S.S.C. for the 1st and 2nd Respondents
G. Nihal Fernando P.C. with Rohan Dunuwille for the 3rd Respondent

Argued on: 18.07.2023
Written submissions: Petitioners - 11.09.2023
1st and 2nd Respondents - 04.09.2023
3rd Respondent - 04.09.2023

Decided on: 04.10.2023.

Sobhitha Rajakaruna J.

The 3rd Respondent Company was granted permission by the 1st Respondent - Commissioner General of Labour ('Commissioner') under the powers vested in the said Commissioner in

terms of section 2(2) of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 (TEWA) to terminate the services of employees whose names are mentioned in the schedule to his decision dated 09.05.2022 marked "P2(p)". Such permission has been granted subject to payment of compensation to such employees, computed in accordance with the approved formula published in the Gazette notification No. 1384/07 dated 15.03.2005 (amended by Gazette notification No. 2216/17 dated 25.02.2021). The Petitioners among other reliefs seek a mandate in the nature of a writ of Certiorari quashing the said order "P2(p)" of the Commissioner.

At the hearing of the instant Application, the Court observed that two questions similar to the ones below, need to be resolved:

(a) Whether it is reasonable to employ the doctrine of ultra vires in this case when considering the overall circumstances relating to the instant Application?
(b) Whether the Commissioner has considered adequate evidence upon the reasons tendered by the 3rd Respondent Company for its decision to wind up the Company?

The reasons given by the 3rd Respondent for the application to terminate the services of the employees (including the Petitioners) are based on their decision to wind up the Company on the pretext that the Company's business orders were affected badly as a result of the COVID 19 pandemic and also due to the alleged Chinese-American trade hostilities.

The Petitioners contend that the 3rd Respondent ('Company') presented the facts it seeks to establish at the inquiry by way of an affidavit affirmed by one Rasika Amarakoon on 03.03.2022 and no opportunity was afforded by the 2nd Respondent to subject the facts contained therein for cross-examination. Further, the Petitioners submit that the facts/documents asserted by the 3rd Respondent were not subjected to proof of verification and accordingly the application to the Commissioner by the Company should be dismissed. Another complaint made by the Petitioners was that they were not informed by the 2nd Respondent regarding the criteria for determining the admissibility of facts which were disputed by them. The Petitioners have taken much effort to establish the stance that the Commissioner cannot make an order under the law upon the existence of a particular fact

that is not subjected to transparent and verifiable proof by the party who asserts such facts. The Petitioners argue that the 1st Respondent has contemplated to examine or consider facts that are irrefutably not part of the official record pertaining to the inquiry. It is further submitted that the statutory inquiry ought to be 'transparent and verifiable' and cannot contain secret references that can be excluded from scrutiny. In a nutshell, the Petitioner's prime assertion is that the Commissioner or the 2nd Respondent conducted the inquiry on the 3rd Respondent's application contrary to the principles of natural justice.

Apart from the above, the Petitioners are raising a claim upon their request made to the 2nd Respondent - Inquiry Officer to gain a copy of the inquiry brief. The Petitioners, having noticed that the documents contained in the said copy of the brief were not in a consistent chronological order and further the pages 234-242 were missing, have subsequently written to the Inquiry Officer seeking such missing pages. The said Inquiry Officer, in response to this request, has informed the 1st Petitioner that she was unable to share the missing pages with the Petitioners as such are internal notes relating to the inquiry.

Nevertheless, it appears that the 3rd Respondent based on its decision to wind up the Company has offered a voluntary severance scheme (VSS) to all the employees of 3 factories linked to the said Company. All employees of the two factories in *Ja Ela* and *Kegalle* have accepted the said VSS. However, the 1st Petitioner Union has disputed the said scheme in regard to the factory in *Koggala.* Anyhow, it is evident that all the employees at the said *Koggala* factory except the 2nd to 20th Petitioners have accepted the VSS during different stages of the process of making payments. The contention of the 3rd Respondent is that the prerogative of the Commissioner to hold an inquiry under TEWA is limited to test the veracity of the application submitted by the 3rd Respondent and to ensure that the employees receive the compensation envisaged by law. It was argued on behalf of the 3rd Respondent that the instant Application of the Petitioner is misconceived in fact and law and thus made malafide by suppressing the material facts described in their pleadings. Predominantly the 3rd Respondent raises a vital question as to how it could re-employ the above-named 19 Petitioners at a time when the operation of the Company has ceased, due to no fault or neglect on the part of the said Company.

In addition to the above, the Petitioners sought in argument that the Commissioner is entrusted with the powers of a District Court under the provisions of sections 12, 13, 14 and 17B of TEWA, for the purposes of any inquiry conducted by him under the said Act. The Petitioners referring to section 17 of the Act argue that there remains a requirement to conduct an inquiry by the Commissioner consistent with the principles of natural justice.[1]

On a careful perusal of the provisions of the TEWA, it appears that two instances can be possibly envisaged in respect of termination of employment under this Act. Firstly, an employer may terminate the employment of workmen inconsistent with the provisions in section 2(1) of TEWA[2] and the second instance would be that the employer terminates the employment of workmen duly following the provisions of the said section 2(1). The termination referred to in the instant Application falls into the above second limb as the 3rd Respondent (employer) has duly obtained permission from the Commissioner before terminating the employment of the respective workmen. However, the question that needs to be resolved in this Application is whether the Commissioner has exercised his discretion lawfully when granting such permission to the 3rd Respondent.

At this stage, it is important to note that the requirement of holding an inquiry under section 12 of TEWA by the Commissioner, as he may consider necessary, emanates only when an employer commits an offense identified by the TEWA. Section 2(3), spells out the offense for which any person will be found guilty by failing to comply with any decision made by the Commissioner under section 2(2). Similarly, section 7(1) and 14 also identifies two respective offenses under the Act, whereas the offense of contempt[3] is recognized in section 17B(1)(b). There is no doubt that the Commissioner, in reference to the case at hand, has not conducted any inquiry on any matter emanated under the aforesaid sections in which the particular

[1] Section 17 reads – (The proceedings at any inquiry held by the Commissioner for the purposes of this Act may be conducted by the Commissioner in any manner, not inconsistent with the principles of natural justice, which to the Commissioner may seem best adapted to elicit proof or information concerning matters that arise at such inquiry)

[2] Section 2(1) reads - (1) No employer shall terminate the scheduled employment of any workman without -
(a) the prior consent in writing of the workman; or
(b) the prior written approval of the Commissioner.

[3] Offense of contempt against or in disrespect of the authority of the Commissioner.

offenses have been identified. In other words, the Commissioner has not inquired into an offense committed under the TEWA, either by the Petitioners or the 3rd Respondent.

It is obvious that the word 'inquiry' has not been embodied anywhere in section 2 of TEWA and instead specifies a requirement of affording the workman an opportunity to be heard. I do not intend here to examine whether affording an opportunity to be heard would eventually amount to an inquiry or not and it is because such an aspect doesn't necessarily fall within the ambit of this judgement. Anyhow, it can be assumed that there is a clear distinction between the requirement of the workman being heard as per in section 2(2) and holding an inquiry upon an offense committed under the TEWA. I arrived at this finding due to the discretionary nature of the power conferred on the Commissioner by the legislature when he grants or refuses approval on an application seeking permission for termination. The power bestowed on the Commissioner to make such a decision has been described as an 'absolute discretion' of the Commissioner. It appears that the Parliament has given more prominence to the absolute discretion of the Commissioner than holding a usual inquiry prior to granting or refusing permission under section 2(2) and this point of view is further supported by the special ouster clause introduced in section 2(2)(f)[4]. Anyhow, I do not intend to hold that the Commissioner should not follow the principles of natural justice when he exercises his absolute discretion under the said section as such discretion is absolutely not unfettered.

In terms of section 22 of the Interpretation Ordinance, the Court of Appeal, when exercising its powers under Article 140 of the Constitution may review impugned decisions on the matters stipulated in section 22(a) and (b) of the said Ordinance, even in the presence of an ouster clause. However, in terms of section 2(2)(f) any decision made by the Commissioner under section 2(2) shall not be called into question even by way of a writ application. Anyhow, in this regard, I need to draw my attention to the judgment of Mark Fernando J. (in agreement with Dheeraratne J. Wadugodapitiya J.) in ***Atapattu and others v. People's Bank and others***

[4] Section 2(2)(f) :

(f) any decision made by the Commissioner under the preceding provisions of this subsections shall be final and conclusive, and shall not be called in question whether by way of writ or otherwise –

(i) in any court, or

(ii) in any court, tribunal or other institution established under the Industrial Disputes Act.

(1997) 1 Sri. L.R. 208 where he has considered the apparent conflict between the ouster clause (which is pre-Constitution legislation), and Article 140. It is observed that section 2(2)(f) of TEWA was enacted before 1978[5]. The Supreme Court in the above case referring to the phrase "subject to the provisions of the Constitution" stipulated in Article 140 held[6] as follows:

> *"Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" -* ***I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it*** *(see also Jailabdeen v. Danina Umma (1962) 64 N.L.R. 419, 422). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1), where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to 'any law'"* (Emphasis added)

The eloquent words of the erudite judges of the Supreme Court in those three cases have laid down a clear principle that the writ jurisdiction exercised by the Supreme Court and the writ jurisdiction exercised by the Court of Appeal under Article 140 is unfettered[7].

Thus, I need to examine, based on the circumstances of this case, whether the Petitioners have submitted adequate grounds to substantiate their argument that the Commissioner has violated the principles of natural justice when making the impugned decision "P2(n)" and "P2(p)".

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[5] The current Constitution of Sri Lanka was certified on 31st of August 1978

[6] The Supreme Court has again upheld the dicta of the said Atapattu case (judgement by Mark Fernando J.) in B. Sirisena Cooray vs. Tissa Dias Bandaranayake and two others (1999) 1 Sri. L.R. 1 (at p. 12) (judgement by Dheeraratne J.) and Wijayapala Mendis vs. P. R. P. Perera and others (1999) 2 Sri. L.R. 110 (at p. 119) (judgement by Mark Fernando J.).

[7] see Blue Ocean Reality (Private) Limited v People's Bank and Others CA/WRIT/228/2022 decided on 28.10.2022

I take the view that the dicta in the case of ***Chairman, Pradeshiya Sabha, Dimbulagala v. Chief Minister, North Central Province and Others CA/Writ/ 168/2015*** decided on 22.06.2020, upon which the Petitioner has placed reliance, should be followed here, especially in respect of the principles of natural justice contemplated in the instant Application. His Lordship Justice Janak De Silva held as follows in the said case:

> *"The rules of natural justice are not engraved in stone. The exact scope of the requirements of fairness depends on the circumstances of each case, such as the character of the decision making body, the type of decision to be made, and the statutory framework which guides the decision making body"*

The Court of Appeal is sometimes constrained by its traditional mandate, which restricts its purview to the examination of the legality of decisions or procedures rather than delving extensively into the factual intricacies of a given case. Nevertheless, it is important to note that in certain circumstances, the judge in the Review Court may exercise his discretion, contingent upon a case-by-case assessment. This discretion may be invoked when a particular Petitioner presents the Review Court with highly precise and substantiated statements, complemented by pertinent evidence, explaining the grievances they have endured due to the relevant authority's failure to duly exercise power prior to making a final decision. In such a backdrop, I take the view that, if any litigant makes an allegation that a person who has been entrusted to conduct an inquiry has not considered the relevant facts, he should at least outline to Court at the review stage about such alleged facts that were ignored or disregarded by the respective inquiry officer. This is because, Court finally decides a writ application on an overall consideration of the facts and law relating to the questions before Court.

All that has been highlighted by the Petitioners in the instant Application is that the Inquiry Officer had failed to provide them with a complete inquiry brief and the allegation that the 3rd Respondent has failed to prove its assertions. As pleaded in paragraph 39 of the amended Petition, the Petitioners have drawn the attention of this Court to five selected reasons purportedly given by the Commissioner when granting permission to terminate the services of the workmen. The Petitioners' analysis of those reasons focuses primarily on the alleged non-disclosure of the sources from which the Commissioner acquired the information underpinning his above reasons.

Further, it appears that no specifications have been given by the Petitioners as to how the allegations raised by them have strongly influenced the Commissioner's decision to approve the termination of services of the employees of the relevant Company. Another noteworthy aspect is that the Petitioners have not raised any objections when the 2nd Respondent notified the parties on 17.02.2022, [Vide - "P2(e),"] that the testimony in respect of the inquiry will be obtained in writing and both parties would be given the same opportunity. In such a scenario, it is difficult to understand why the Petitioners are making a claim at this review stage on their lost opportunity of cross examining the opponent witness.

In light of the reasons given above, I take the view that no comprehensive submission has been made by the Petitioners in support of their case in the instant Application. Hence, I do not see any reasonable grounds for this Court to exercise its inherent powers disregarding even the aforesaid ouster clause to grant relief as prayed for in the prayer of the Petition considering solely the violation of the principles of natural justice allegedly committed by the 1st and 2nd Respondents.

In the circumstances, I am not inclined to accept the proposition of the Petitioners that the Commissioner has not considered adequate evidence upon the reasons tendered by the 3rd Respondent Company for its decision to wind up the Company. Further, I hold that it is not reasonable to employ the doctrine of ultra vires when considering the overall circumstances of the instant Application. Thus, I proceed to dismiss the instant Application of the Petitioner. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal