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

C.A. (Writ) Application
No. 366/2010

South West Apparel (Pvt) Ltd.,
No.1, Ring Road, Phase 1,
Export Processing Zone,
Katunayake.
PETITIONER

-Vs-

1. W. J. L U. Wijeweera,
Commissioner General of Labour,
Labour Secretariat,
Narahenpita, Colombo 05.
AND 600 OTHER
RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Kaushalya Molligoda for the Petitioner

Saliya Pieris, P.C. with Anjana Rathnasiri for the 4th, 254th, 267th, 269th, 285th, 322nd, 338th and 479th Respondents

Janak de Silva, SDSG for the 1st to 3rd Respondents

Decided on : 30.04.2019

A.H.M.D. Nawaz, J.

The Petitioner Company seeks *inter alia* a mandate in the nature of a Writ of Certiorari quashing the order dated **P1** made by the Commissioner General of Labour (the 1st Respondent to this application). The said order was made by the 1st Respondent by virtue of Section 6A of Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended (hereinafter sometimes referred to as "the TEWA") and the order directs the Petitioner-Company to deposit a sum of money calculated according to the compensation formula to be paid to 597 employees of the said company for the termination of their services.

The legal framework for non-disciplinary termination of services is set out in TEWA.

Section 2(1) of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended sets out the following:-

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.

According to Section 2(4) of the said Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include:-

a) non-employment of the workman in such employment by his employer, whether temporarily or permanently, *or*

b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business.

According to Section 19 of the said Act, the word 'scheduled employment' means, employment in-

a) any trade, in respect of which a notification has been published in the Gazette under subsection 2 of Section 6 of the Wages Board Ordinance of an order made under subsection (1) of that section and shall include the work or any worker referred to therein but excluded from the provisions of such order;

b) every shop and every office within the meaning of the Shop and Office Employees (Regulation of Employment and Remuneration) Act; *or*

c) every factory within the meaning of the Factories Ordinance;

Employees becoming unemployed due to the closure of a business were also brought under the provisions of the Act by Section 6A (1) introduced by the amending Act No. 4 of 1976. In respect of any termination made contrary to the provisions of this Act in situations such as a closure of business, the Commissioner General of Labour is empowered to order payment of compensation. Section 6A(1) of the said Act as amended by Act No. 4 of 1976 is as follows:-

> *"Where the scheduled employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade, industry or business, the Commissioner may order such employer to pay to such workman on or before a specified date any sum of money as compensation as an alternative to the reinstatement of such workman and any gratuity or any other benefit payable to such workman by such employer."*

It is a given that there had been no written approval obtained by the Petitioner Company from the 1st Respondent nor had it obtained the prior consent of its employees prior to its closure on 6th November 2009.

The events that took place on 9th November 2009 have been narrated in both the complaint and the written submissions tendered by the employees. The employees alleged that when they arrived at the factory premises for work on 9th November 2009, they found the gate locked and a notice affixed at the gate saying that the factory had

been closed with effect from 6th November 2009. No prior notice of the imminent closure of the factory had been given to them-so alleged the workmen.

However the closure was brought home to the 1st Respondent and the Board of Investment of Sri Lanka only on 9th November 2009.

The Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended sets out the imperative consequences of a termination that takes place in violation of Section 2(1).

Section 5 of the TEWA enacts that if an employer terminates the scheduled employment of a workman in contravention of the provisions of the Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever.

Upon the facts *per se*, one could see that both ingredients of an illegal termination are present in the case namely neither the approval of the Commissioner General of Labour nor the written consent of the workmen had been obtained prior to termination.

The following was submitted on behalf of the Respondents as the principal ground for closure of the business.

BACKGROUND OF THE CLOSE DOWN OF THE COMPANY

The closure of the Petitioner Company (as well as the company at *Veyangoda*) is attributed to the efforts of the management and shareholders of the Petitioner Company to abandon the garment manufacturing trade and launch a hotel project. Its directors had made a proposal to set up a hotel project and they had discussions with the Board of Investment of Sri Lanka in relation to this at least from year 2007) (*i.e.*, at least one year prior to the closure of the *Veyangoda* company and more than two years prior to the closure of the Petitioner company). This was brought home to this Court by reference to the documents annexed by the Respondents with their statement of objections marked as '11R2a' and '11R2b'.

It is quite apparent from the document marked as '11R2a'that the two directors of the Petitioner Company had discussions with the Board of Investment of Sri Lanka in respect of a hotel project at least from year 2007.

The two directors of the Petitioner Company are namely Mr. Dilip Bambhwani and Mr. Prakash Advani. Mr. Dilip Bhambhwani is also the affirmant to the affidavit filed with the Petition and also to the counter affidavit. The letter marked as "11R2a" is addressed to Mr. Dilip Bhambhweni, Director, South West Apparel, (Pvt) Limited (the Petitioner Company) with attention to Mr. Prakash Advani.

The following salient feature was also adverted to in the course of submissions.

THE PROPOSAL HAD BEEN MADE PRIOR TO THE CLOSURE OF THE TWO COMPANIES

The '11R2a' was about a proposal to establish a hotel project at Lot Nos.17, 17A & 18 Katunayake Export Processing Zone. The letter is dated 23rd of September 2009 and it states that the release of land at Lot Nos.17, 17A and 18 could be considered for the proposed Hotel Project on lease basis for a period of 50 years. This letter had been written with reference to letters dated 20th July 2009, 19th July 2007 and 10th November 2008. It also requests a confirmation of acceptance for the conditions stipulated in BOI's letters dated 19th July 2007 and 10th November 2008. By '11R2b' which is a draft letter, the Directors of the Petitioner company had confirmed their acceptance for the lease for 50 years in respect of the hotel project and for the conditions stipulated in letters dated 19th July 2007 and 10th November 2008.

THE HOTEL WASCONTEMPLATED TO BE ESTABLISHED IN THE FACTORY PREMISES OF THE PETITIONER COMPANY

The Petitioner Company was initially incorporated as two separate companies and was merged as one company in its current name, in the year 2009. The agreement which is relevant to this merger has been appended as 'P2F'. According to the Schedule to this agreement, the land leased out / to be leased out for the proposed Hotel Project for 50

years (*i.e.*, lot Nos.17 end 17A) is the same land that belonged to the Petitioner Company (vide schedule to 'P2f' and 11R2a).

THE CLOSURE OF THE PETITIONER COMPANY WAS NOT DUE TO THE GLOBAL ECONOMIC DOWNTURN

It was brought out in the course of submissions that the hotel project could not proceed as long as the factory of the Petitioner Company remained operative at its premises. Therefore it was argued that it was with a view to facilitating the hotel project that the Petitioner Company was closed down without the consent of the employees or without the approval of the Commissioner General of Labour.

Thus it was submitted that the documents which emerge in these proceedings clearly establish that the termination of the services of the workmen was with a collateral purpose to achieve the objective of establishing a hotel and not because there was a global downturn. Facts immanent in the case establish this allegation and this would then turn on the entitlement of the Petitioner to secure a discretionary remedy such as a writ of certiorari. It is trite that all facts must be clearly, fairly and fully disclosed so that the Court would be made aware of all the relevant factors. The Court will be slow to grant a writ when it finds that the Petitioner has not made a clean breast of all relevant material. It is often expressed in the stipulation that the Petitioner must come with clean hands.

As such the termination of the services of the employees of the Petitioner Company without the preconditions necessary for termination is contrary to the provisions of the Termination of Employment of Workmen (Special Provisions) Act and therefore it becomes illegal, null and void in terms of Section 5 read with Section 2 (1).

THE INQUIRY BEFORE THE 1ST RESPONDENT

For purposes of ascertaining the *vires* of the decision sought to be quashed in this case, it becomes necessary to look at the conduct of the inquiry that led to the computation of compensation made by the Commissioner. Since there is no definite procedure

specifically referred to, the law requires the Commissioner to conduct the inquiries in such a manner which befits the attributes of natural justice.

Several ex-employees of the Petitioner Company made an application dated 11.11.2009 to the 1st Respondent seeking that the ex-employees of the Petitioner Company be paid compensation in respect of the termination of their services by the Petitioner Company (marked P-5).

The Petitioner Company was summoned for an inquiry and on the date of the inquiry it sought a postponement of the proceedings to enable it to obtain legal instructions. Accordingly the proceedings were postponed.

On the next date of inquiry since there was no possibility of an agreement between the parties with regard to the quantum of compensation, the inquiring officer (2nd Respondent) decided to commence the inquiry. Since both parties agreed to dispose of the inquiry by written submissions, they were tendered with the opportunity of counter submissions.

Thereafter the 1st Respondent, under the power vested in him by law made the order at 'P1' with the reasons for his decision. Since it is the decision making process that is looked at in judicial review, it would appear that both parties were afforded an opportunity to present their respective cases. In the course of the argument that the Counsel for the petitioner took up the position *inter alia*

a) Only 47 employees were before the 1st Respondent. As such the petitioner was bound to pay compensation only to the said 47 employees.

b) P1 contains errors as to the number of employees.

I find that this argument is tenuous. The obligation to compensate the employees is not limited to the employees who participate or are represented at the inquiry. The Commissioner of Labour is not hamstrung in his power to consider all material before him and order compensation to any one whose employment has been terminated in contravention of the provisions of TEWA.

The next question to be considered is whether the order sought to be quashed P1 is erroneous. The Petitioner argued *inter alia* that:-

- Basic salary used for the computation of compensation of approximately 162 employees is incorrect.
- Period of service used for the computation of compensation of approximately 26 employees is incorrect.
- Employees who have not in fact applied for compensation have been included, but the Petitioner has failed to identify who are those employees who did not apply.

There was no evidence placed before this Court to establish the allegation that the figures used for the computation of compensation are incorrect. Without vital documents such as appointment letters, conformation letters etc, the correctness of the allegations of the Petitioner with regard to the period of service could not be verified. Further documents such as salary slips are required to ascertain the correctness of the allegation of the Petitioner with regard to the basic salary. These documents are not before this Court. This Court is hard put to verify the allegations of the Petitioner.

The argument that there is a failure to give reasons also does not hold water in view of the fact that the inquiry officer in his report dated 15.02.2010 has given reasons for his order. The said order/report is annexed to the record maintained by the Department of Labour, which was made available to this Court. In the circumstances this Court sees no illegality, irrationality or procedural impropriety and I proceed to dismiss the application of the Petitioner.

JUDGE OF THE COURT OF APPEAL