IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for a mandate in the nature of a Writ of *Certiorari* and Prohibition.

Brown & Company PLC,
No. 481, T.B. Jayah Mawatha,
Colombo 10.

PETITIONER

Vs.

Court of Appeal Case No:
CA/WRIT/346/2021

1. Mr. Prabath Chandrakeerthi,
   Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat,
   Kirula Road,
   Colombo 5.

2. Ms. Y.A.B.S. Yahawela,
   Assistant Commissioner of Labour,
   Termination Unit,
   Department of Labour,
   Colombo 5.

3. Ms. R.P. Iresha Udayangani,
   Deputy Commissioner of Labour,
   Termination Unit,
   Department of Labour,
   Colombo 5.

4. The Ceylon Mercantile, Industrial & General Workers' Union,
   No. 03, Bala Tampoe Lane,
   Colombo 3.

5. Wellgamage Manoj Priyankara Perera,
   Sri Sarana, New Parliament Road,
   Battaramulla.

6. Wanni Achchi Kankanamge Chamila Jagath Siri,
   No. 64, Patabandi Kalla, Pahalagida,
   Walasmulla.

7. Hettikankanamge Chaminda Nishantha Perera,
   River Road, Medagama, Wellamilla Junction,
   Bandaragama.

8. Kadoluwa Pathirannahelage Sagara Prasad Pathirana,
   Galwalahena,
   Nittambuwa.

9. Urawala Mahamdiramlage Chaminda Jayawardena,
   Bogahawila Road, Kottawa,
   Pannipitiya.

10. Kalanchige Lasantha Laxman,
    Elipangamuwa,
    Tholangamuwa.

11. Imiyage Don Chaminda Pushpakumara,
    School Road, Walgama,
    Bandaragama.

12. Kapila Ganganatha Weerasinghe,
    Dharmapala Place,
    Rajagiriya.

13. Uhanowitage Pradeep Nirosha,
    No. 42985, Mission Lane,
    Kotte.

14. Vithana Pathirannehelage Menaka Thushara Vithanapathirana,
Thilaka Road,
Gampaha.

15. Urawala Muhandiramlage Herath Dissanayaka,
Wickramage Mawatha,
Brahmanagama, Pannipitiya.

16. Muthulingam Naguleswaran,
Central Road, Orr'shill,
Trincomalee.

17. Kulasekara Abeyrathna Mudiyanselage Nalin Kosala Gunathilaka,
No. 42, Mihindu Mawatha,
Samapura,
Dambulla Road,
Kurunegala.

18. Pathirage Don Anjana Nalinda,
No. 19, West Malamulla,
Panadura.

19. Kuruppu Arachchige Don Sanka Laleendre,
Kalalgoda,
Pannipitiya.

20. Nicholas Chandima Kumara Gunasekara,
Kapuwa Wewa Road,
Podiveekumbura,
Ragama.

21. Nuwara Paxege Sunil Shantha,
Kotiyakumbura.

22. Poobalasingham Sri Shantharuban,
Sankiliyan Road, Nallur,
Jaffna.

RESPONDENTS

Before:	Mayadunne Corea, J Mahen Gopallawa, J
Counsel:	Uditha Egalahewa, PC with Vishva Vimukthi instructed by H. Chandrakumar de Silva for the Petitioner. Shanil Kularatne, ASG, PC for the 1st to 3rd Respondents. Migara Doss with Madara Gunawardena for the 5th to 22nd Respondents.
Argued on:	07.02.2025 and 10.03.2025
Written Submissions:	For the Petitioner on 21.05.2025 For the 1st to 3rd Respondents on 22.04.2025 For the 5th to 22nd Respondents on 27.05.2025
Decided on:	25.07.2025

Mayadunne Corea J

The Petitioners in this Application, *inter alia*, sought the following reliefs:

> "(d) *Issue an order in the nature of a Writ of Prohibition prohibiting the 1st Respondent prosecuting the Petitioner company in terms of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended)*
>
> (e) *Issue an order in the nature of a Writ of Certiorari quashing the order/determination marked as 'P3'*"

The facts of the case briefly are as follows. The Petitioner Company had entered into an agreement with Fintek Managed Solutions (Pvt) Ltd. (hereinafter referred to as 'Fintek') to divest the operation of a section of the Integration Business Solution Division of the Petitioner Company. In order to secure the continuation of employment of 52 employees in the said section, Fintek had offered letters of appointment with the same terms and conditions set out in the letters of appointment given by the Petitioner. It is alleged that a majority of the employees had accepted these letters of appointment and continued their services with Fintek. However, 24 employees, including the 5th to 22nd Respondents refused continuing employment with Fintek. Therefore, the Petitioner had considered that these 24 employees had ceased employment by their own conduct.

Complaints had been made to the 1st Respondent by the 4th Respondent and the 24 employees (with only the 5th to 22nd Respondents maintaining the complaints until the end of the inquiry) stating that the Petitioner had terminated services of the employees' contrary to the provisions of Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) (hereinafter referred to as 'TEWA'). As a result, an inquiry was held and it is alleged by the Petitioner that the 1st Respondent issued his order dated 21.01.2021 marked as P3, directing the Petitioner to deposit a sum of Rs. 19,976,210.91 as compensation for the 5th to 22nd Respondents.

The Petitioner's contention

The Petitioner challenges the 1st Respondent's decision on the following grounds:

- The employees of the Petitioner had been offered an opportunity to continue their employment in Fintek with their designations, salaries and benefits unchanged.
- The employees were required to report to work at the same location as when they were employed under the Petitioner.
- The period of service at the Petitioner Company was considered the period of service at Fintek for the purposes of gratuity.
- The terms and conditions of employment remained unchanged.
- There was no *de facto* termination of employment or closure.
- The case does not fall within the scope of the 1st Respondent under the TEWA.

The Respondent's objections

The 1st to 3rd Respondents took several objections to the maintainability of this Application as follows:

- The Petitioner has wilfully suppressed and/or misrepresented material facts.
- The Petitioner has failed to come to Court with clean hands.
- The Petitioner is guilty of laches.
- The Petitioner had acted in violation of the provisions of the TEWA.

The 5th to 22nd Respondents took the following objections:

- The Integrated Business Solutions Division of the Petitioner closed down on or about 01.04.2018 and the services of the Respondents were terminated.
- Termination of services of the Respondents was contrary to section 6A of the TEWA and thus, is within the scope of the 1st Respondent's jurisdiction.

- Except gratuity, the 5th to 22nd Respondents would be deprived of other benefits and rights associated with their employment under the Petitioner Company from the new employer.
- New employment under Fintek is materially different from that of the Petitioner Company.

Analysis

In order to get a better understanding of the facts pertaining to this case, I will now consider the sequence of events that had occurred.

- The 5th to 22nd Respondents were employees of the Petitioner Company.
- On 05.04.2018 the Petitioner had entered into an agreement with the management of Fintek to divest the operation of a section of the Integration Business Solution Division of the Petitioner Company.
- Fintek is a fully owned subsidiary of Gestetner of Ceylon PLC (hereinafter referred to as 'Gestetner'), a public listed company in the Colombo Stock Exchange.
- Fintek had offered letters of appointments to the employees including the 5th to the 22nd Respondents.

It is common ground that the Petitioner had a division that dealt with, among other things, sales, technical services, back-office work of photocopy, G & D and Doculines and being the main distributor for "Sharp" products. The Petitioner alleges that the said division was taken over by Gestetner, namely, one of their subsidiaries by the name of Fintek.

It is also not disputed that the Petitioner had come to an arrangement whereby Fintek was to operate in the same premises and the Petitioner's workforce employed in the said division had been offered letters of employment by Fintek. However, from the date of accepting the letters of appointment issued by Fintek, they become employees of Fintek and thereby becomes employees of a new company. It is also common ground that the Petitioner Company and Fintek are two different independent entities.

Subsequent to the alleged divesting, there is no division called the Integration Business Solution Division that deals with "Sharp" products in the Petitioner Company. As far as the Petitioner is concerned the said division no longer exists.

The employees of the Petitioner Company

The Petitioner has made arrangements for Fintek to take over the workforce the Petitioner Company had employed. It is the contention of the Petitioner that the workforce includes the 5th to 22nd Respondents. The 5th to 22nd Respondents among the others, amounting to 52 employees, had been offered continuation of employment and the following:

- The period of service with the Petitioner Company to be considered as the period of services served in Fintek for the purposes of gratuity.
- The gratuity accrued to be transferred to Fintek.
- The employee's designation, terms of salaries, terms and conditions of employment including the accrued benefits and entitlements to be unchanged.
- The workplace to be the same.

This has been informed to the employees on 01.04.2018 by the letter marked as R4, and also by the letter dated 05.04.2018 marked as R7 (page 63 of the brief). As per the submissions, it is observed that part of the employees had accepted this but nearly half of the employees including the 5th to 22nd Respondents have not accepted the said offer. It is also common ground that the Petitioner has thereafter treated the said employees as having ceased to hold employment by letter dated 30.05.2018 found in page 115 of the brief.

Upon the said letter being sent, the 5th to 22nd Respondents have lodged a complaint with the 1st Respondent alleging that their services had been illegally terminated. It is also pertinent to note that the trade union which the said Respondent employees are affiliated with, too had lodged a complaint. Subsequent to the said complaints the 2nd Respondent commenced an inquiry pursuant to the provisions of the TEWA. It is not in dispute that both parties had taken part in the inquiry and had led evidence. The inquiry concluded with the Order that is impugned in this Application (P3). It is also pertinent to note, that the Respondents allege that the marked document P3 which is impugned is not the Order containing the decision of the inquiring officer.

The crux of the Petitioner's argument is that the said Order is bad in law as there was no termination. Hence, it is contended that the 1st Respondent had acted *ultra vires.* It is the contention of the Petitioner that for the provisions of the TEWA to be attracted there should be a termination of work of the employees. It is their contention that there was no termination as the work of the 5th to 22nd Respondents were secured with the entity Fintek.

It is observed that if there is no termination, then the Commissioner General of Labour (sometimes referred to as 'Commissioner') will have no power to assume jurisdiction pursuant to TEWA and the resulting Order would be bad in law. At this stage, I will consider the provisions of section 2 of the TEWA. It reads as follows:

"Section 2

(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"

It is not disputed by the parties, that the employees employment fell within the meaning of "scheduled employment" and that for an inquiry to begin under the provisions of TEWA, there should be an illegal termination. It is appropriate to note that as per section 2(1) of the TEWA, for the termination of an employee to whom TEWA applies, there should be prior consent of the workman or the written approval of the Commissioner.

Let me now consider the Respondents' contention along with the Petitioner's to ascertain whether there was a termination of employment within the meaning of the said Act.

Is there a termination of the services to attract section 2 of TEWA?

The Petitioner strenuously contended that TEWA should not apply in this instance as there was no termination of the employees that were employed by the Petitioner. In this context let me now consider the pivotal question raised before me as to whether there was a termination of employment pertaining to the complainants before the Commissioner.

I have considered the celebrated case of ***Sascons Knitting Company (Pvt) Ltd. v. Commissioner of Labour and others*** **SC Appeal 52/2014 decided on 07.08.2020** and ***Hassan v. Fairline Garments International and others*** **[1989] 2 SLR 137.** Although the facts are not identical, in my view the principle enunciated can be utilized in the instance case before me.

In contradicting the Petitioner's contention that the employees were offered employment with the new employer under the same terms and conditions, as of what prevailed under the Petitioner, the learned Counsel appearing for the 5th to the 22nd

Respondents brought to the attention of the Court, the letter of appointment issued to the 5th Respondent at page 97 of the brief. The said letter is dated 18.12.1997 and by the said letter the 5th Respondent has been offered a post as a Training Technician at Brown and Company PLC (hereinafter sometimes referred to as 'Brown and Co.'). It is also pertinent to note that U. P. Nirosha, the 13th Respondent too had been offered training as an Electronic Technician by the letter dated 06.07.1998 marked as R1 (also at page 787 of the brief). The letters sent to both Respondents offering them training are nearly identical. As per the said letters, as a part of their training, the 5th and the 13th Respondents are required to work *inter alia* in any division or branch of the company. The said paragraph states as follows:

> *"As a part of your training you may be called upon to work in any Division or Branch of the Company or any of its subsidiary or Associate Companies in whatsoever part of the island such Division or Branch, or the subsidiary or Associate Company may be situated, for such periods as maybe required by the Management."*

Thereafter, another letter dated 13.01.1999 offers to recruit the said 5th Respondent to the post of Electronic Technician with effect from 01.01.1999 (page 103 of the brief). Further, another identical letter dated 09.01.1999 was sent to the 13th Respondent offering to recruit him to the post of Electronic Technician. The said letters have a clause that states as follows:

> *"It is understood that you may be employed* ***in any of the Company's Departments/Branches or Associate Companies."*** **(**emphasis added)

Hence, by this letter the said two Respondents are informed that they will have to work in any of the company's departments, branches or associated companies. At this stage, I reproduce the requirement which states "***in any of the company's Departments/Branches or Associate Companies***". Hence, on a plain reading of the said letter, the Court can come to the conclusion that the Respondents are required only to work within the Petitioner Company and not under a separate company. By the letters dated 22.07.1999 both Respondents have been made permanent in their posts by the Petitioner Company (page 107 and 797 of the brief).

Thereafter, as per the material submitted to this Court by the letter dated 01.04.2018, the 5th and 13th Respondents have been issued with the letters of appointment to the company Fintek (page 109 and page 801 of the brief respectively). As per the documents tendered this letter has been attached to the letter dated 05.04.2018 (page 799) of the brief sent by the Petitioner to the 13th Respondent. In addition to the above letters, the Petitioner has sent another letter dated 06.04.2018 (at page 803 of the brief) whereby

the employees have been told to report work on 06.04.2018. It is pertinent to note that duplicates of these letters are found elsewhere in the brief.

The letter of appointment dated 01.04.2018 states as follows:

> *"In accordance with our agreement dated 31st March 2018 with Brown & Company PLC we confirm offering you employment with us effective 1st April 2018 and in consideration of your employment with Brown and Company for a period of 20 years we also confirm that such service of 20 years with Brown and Company PLC will be counted as service with us for the purpose of Gratuity.*
>
> ***You will not be entitled to any other form of payment by way of compensation from us for services you have rendered to Browns and Company PLC.***
>
> *Please note that by your acceptance of this letter of appointment* ***you will be an employee of only Fintek Managed Solutions (Pvt) Ltd."*** (emphasis added)

The wording clearly demonstrates that once the employees accept the letter of appointment their employer changes from the Petitioner to Fintek. There is no material submitted to Court that before the acceptance of this letter the employees' consent had been taken for the change of employer. It is common ground that all the Respondents (5th to 22nd Respondents) were employees of the Petitioner and that they were permanent employees. Further, it was contended that there was a collective agreement in page 129 of the brief between the Respondent employees and the Petitioner Company. Thus, the Court can come to the conclusion that there was an employer-employee contract between the parties.

As submitted, this letter has three salient features that is important to decide the question on termination. Firstly, it states that the service period with Brown and Company is to be considered as the service period for Fintek for the purposes of gratuity. Secondly, that the said Respondents are not entitled to any form of compensation from Fintek for the services rendered to Brown and Company. Thirdly, and the most crucial point, by acceptance of this letter the 5th and 13th Respondents become employees of Fintek. Hence, by accepting the said letter of appointment the nexus between the employees and the Petitioner comes to an end.

It was also brought to the attention of the Court that by the wording of this letter it appears that there had been an agreement with the Petitioner and the company Fintek on 31.03.2018. The parties are not at dispute that the employees had not been a part of this agreement. It was also brought to the attention of Court, the letters dated 05.04.2018

and 06.04.2018 also found at pages 63 and 111 and 67 and 113 of the brief. In the first mentioned letter dated 05.04.2018 the Petitioner has informed that their principal, "Sharp" has appointed Gestetner as the distributer for Sri Lanka and acknowledges that Gestetner is a public company listed in the Colombo Stock Exchange. It further states that their fully owned subsidiary, Finek will handle the business that they would be taking over from Brown and Co. It is also stated that the employment of the employees would be continued under Fintek. The letter dated 06.04.2018 appears to be a confirmation of a meeting where it is reiterated that parts of work with Brown and Co. and Co.'s Integrated Business Solutions Division is now given to Gestetner. None of the parties have submitted any material to substantiate that the Respondent employees in whose favour the award has been made has subscribed to this and accepted the said terms of employment and joined Fintek. Thereafter, the Petitioner has sent a letter dated 10.05.2018 (page 121 of the brief), addressed to the 5th Respondent, stating that the employees who have refrained from continuing employment with Fintek would be considered as there is cessation of employment with the Petitioner. Thus, in my view by this letter there is a change of employer forced on the employees.

As the said Respondents had failed to accept the letters issued by Fintek, the 5th Respondent has sent a letter which is at page 119 of the brief addressed to the Petitioner stating that he is not accepting the proposition to join another company and therefore, he and the trade union he belongs to have complained to the Commissioner General of Labour and filed a complaint before the Commissioner. The said letter further states that there would be an inquiry on 01.06.2018. The said letter is dated 17.05.2018.

In reply to the said letter by letter dated 30.05.2018 (page 115 of the brief), the Petitioner had reaffirmed to the 5th Respondent and others, that due to their failure to report to work with Fintek, the Petitioner had considered them as ceasing to be employees of the Petitioner Company.

The Petitioner contends that the 5th Respondent however, had failed to face the cross examination before the Commissioner of Labour and therefore, the entire evidence of the 5th Respondent had been expunged from the proceedings. However, the Petitioner at the argument stage had stopped short of denying the contents of the letters addressed to the 5th Respondent that are in the brief.

Is there a frustration of the contract?

It is clear by the letters of appointments given the 5th to the 22nd Respondents had entered into a contract with the Petitioner on the terms and conditions reflected in their

respective letters of appointment. This was never disputed by the Petitioner. It is apparent when the parties agreed and entered into the employment contract as per the letter of appointment the employees knew who their employer is, *vice versa* the employer knew who their employees are, and the employees knew what terms and conditions govern their employment. It is further observed by this Court that the Petitioner's letters of appointment given to the Respondents do not state that it is limited to the division the Petitioner contends to have been divested to Fintek. It is observed by this Court that by the letters of appointment tendered to this Court, the Respondents are employed with Brown and Co., the Petitioner. Even if the Integrated Business Solutions Divisions was taken over by Fintek as a result of the principal, "Sharp" deciding to make Gestetner its agents, that does not frustrate the contract the Petitioner entered into with the Respondent employees as their letters of employment do not limit them to be employees of only that division.

In my view, as per the letters of appointment, the Respondents are employed to work with Brown and Co., the Petitioner itself. Hence, the argument that the contract is frustrated is not tenable.

As stated above, when the parties have entered into a contract which is reflected in the letters of appointment, any novation to the said contract must be done with mutual consent and it cannot be done *ex parte*. In this instance, there was no material submitted to this Court that the Respondents had been given an option other than to work with Fintek or to be considered as having ceased to be employees of the Petitioner.

It was the Petitioner Company's contention that they have a right to re-organize their company. This Court does not disagree with this submission. However, the re-organization must be done within the confines of the existing legal framework.

In view of the fact that, Fintek is a subsidiary of Gestetner, there is no dispute that the Petitioner and Fintek are two separate legal entities. In my view, the Petitioner without consulting or obtaining the view of the workmen had attached the Respondent employees to a different employer to work under, which is a violation of the terms and conditions stipulated in the letters of appointment.

In my view, the said action of the Petitioner would attract section 2 of TEWA. Especially, I come to this conclusion after considering the letter of appointment as in the said letter nowhere is it stated that the Petitioner has the right to force the employees to work for another company which is a completely different legal entity from the

Petitioner. As stated, this has been held in ***Hassan v. Fairline Garments (supra)*** where the Court, referring to the contract of employment, held that:

> *"……the letter of appointment, shows that the appellant's contract of employment was with the Company. He was recruited and employed by the Company. He in turn agreed to serve the Company. He undertook and was obliged to work for the Company, for which he was paid by the Company. His hours of work and the power of control over his work were laid down and exercised by the Company. But there is nothing in the contract which would enable or empower the Company to transfer, unilaterally, the right to or the benefit of his services to another legal person or entity. The Court of Appeal seems to have placed some reliance on clauses 4 of A1 to justify the transfer of the appellant. This clause, no doubt, expressly provided that the appellant should carry out all duties entrusted to him by the Company. But there is no agreement (expressed or implied) that he should obey orders or carry out duties of another company.* ***A workman has an inalienable right to choose for himself the employer he will serve. Once the contract of employment between himself and the employer is established the employer cannot transfer his services to another without his consent or against his will."*** (emphasis added).

Application of section 6A of TEWA

This Court will now consider the Petitioner's next argument, that there is no application of section 6A of the TEWA to the instant case before me. The Petitioner submitted that the Respondent employees had not suffered a loss of employment resulting in a loss of earnings, which therefore, does not attract the intervention of the 1st Respondent. The Petitioner in this instance argues that they had offered continued employment at Fintek, their designation, salaries, benefits and employment being intact. Further, there was no change in location where the employees were to report to work. They also submitted that the period of service offered at the Petitioner Company is the same period at Finek for the purposes of gratuity. Hence, the argument that the terms and conditions of employment have not been disturbed and therefore, there is no termination. This Court cannot agree with the said submission as it was submitted by the 5th to 22nd Respondents that their designations have been changed. The Respondents argued that as per the letter of appointment of the 13th Respondent as reflected in page 797 of the brief, he is appointed as an Electronic Technician.

Although, the post he had been appointed to by Fintek reflected on page 801 of the brief gives his designation as post of Technician, it is the Respondents' contention that the 13th Respondent was in a specialized field as an Electronic Technician. However, he has been appointed as a Technician in general without specifying a specialized field. This clearly establishes that their terms and services with Brown and Co. have not been

carried the same way with Fintek. In my view, this negates the Petitioner's contention that they offered work to the Respondent employees with the new employer under the same terms and conditions.

Reverting back to the question as to whether there was termination or not, now I consider section 2(4) of the TEWA and I am especially mindful that the Petitioner's Integration Business Solution Division where the Respondent employees worked at is no longer in existence within the Petitioner Company. The said section reads as follows;

> *"Section 2*
>
> *...*
>
> *(4) For the purposes of this 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."*

In this instance as stated above the employer of the 5th to 22nd Respondents was the Petitioner Company. By the letter at page 805 of the brief, the employer has informed the Respondents that the division the employees had been working at has been sold to another legal entity and, it informs the employees that they will be employees of the new employer. Further, the letter at page 807, among other things states that the Respondents will cease to be employees of the Petitioner. In my view, the cumulative effect of these letters is that the employment of the Respondents with the Petitioner Company as their employer is no longer the *status quo*. Thereby, attracting the deeming provision envisaged in section 2(4).

Further, there is no material before Court to establish that there had been consultations with the workforce to divest the employees to the new legal entity. There is no material to demonstrate that, in transferring the employees, their consent has been obtained. In such a situation, transferring the employees from Brown and Co. to Fintek would constitute an implied termination. An implied termination attracts the jurisdiction of the Commissioner under TEWA.

In support of arriving at this conclusion, this Court relies on the case of ***Sascons Knitting Company (Pvt) Ltd. v. Commissioner of Labour (Supra)*** where it was held that

> *"Hence, as discussed earlier, a transfer of employees from Sascon Knitting to another company cannot take place in terms of the contract. The employees are not liable to be transferred as contemplated by the 1st question of law raised before this Court. Thus, the transfer of employees from Sascon Knitting to San Fashions without the consent of the employees, in my view, amounts to an implied termination of its employment with Sascon Knitting. If such implied termination is permitted, it would amount to termination of employment without any terminal benefits being paid to the employees and would, offend and go against the gravamen of the Act itself."*

Although, the facts in the above case vary to that of this Application the same principle pertaining to termination applies.

Closure of the business

It was strenuously contended that there should be a termination of employment of workman in contravention to the provisions of the Act in consequence of the closure of his employer. It was submitted that for an Order to be made under section 6A of the Act, it is imperative that there should be a termination following closure. The Petitioner alleged that the impugned Order P3 does not state of a closure. However, the Petitioner conceded that what had taken place is the sale of a division and business operations of the said division.

It is their contention that the said sale does not fall within the meaning of closure of the business. In view of the above position taken by the Petitioner in my view, whether the employer's business was closed or not cannot be considered in isolation. The parties are not in dispute that the division that the Respondents were working at was sold to a separate legal entity.

It is common ground that the said division where the Respondent employees worked, no longer exists within the Petitioner Company. The said business being operated now by a completely different legal entity, namely, Fintek. As far as the employees of the Petitioner who are working in the said division are concerned the said division no longer exists with the employer. The TEWA does not give a definition as to what closure is. In the absence of such, closure is defined in the Concise Oxford English Dictionary (11th Edition) as *"1. An act or process of closing."*

Anil Goonaratne J. in ***Institute of Technological Studies v. Commissioner of Labour and others*** **[2009] 2 SLR 130** acknowledges that the TEWA does not provide for a definition of a closure of a business and discusses at length the definition of a closure of a business in terms of TEWA.

The facts of the case draw parallels to the Application before me.

In the above case the three employees were employed as security personnel by the Petitioner. Due to their unsatisfactory conduct, the Petitioner employed an external company to provide complete security. The three employees (the Respondents) were offered continued employment with the company providing security under the same terms and conditions as they were employed by Petitioner with recognition of their previous services. The employees refused and complained to the Commissioner General of Labour under TEWA. One of the main arguments by the Petitioner against the Order of the Commissioner was that there was no closure of the business. His Lordship stated that:

> "*It must also be noted that the unilateral discontinuation of the 3 workmen in the security division would constitute a constructive closure of the type of work carried out by these workman in a branch or section within the whole business activity of the Petitioner."*

It is observed that in the instant case before me too the division the 5th to 22nd Respondents worked had come to an end with the Petitioner Company.

In reality as far as the Respondent employees are concerned, their employment with the Petitioner was terminated due to the sale of their place of employment to another entity. In my view, the document marked as P3 has considered this aspect and has come to the conclusion that by the sale of the Integration Business Solution Division of the Petitioner they have terminated the services of the employee Respondents and it further states as per section 2 of TEWA this had been done without obtaining the consent of the employees or the Commissioner General of Labour. As there is no Integrated Business Solution Division in operation, the Commissioner has concluded that there cannot be reinstatement. Hence, in my view, for the aforementioned reasons, the Commissioner has come to a conclusion that there is a closure when the business was sold.

In whole, upon the plain reading of P3, it is observed that by the sale of the said division of the Petitioner and forcibly transferring the work force without their consent to the buyer the Petitioner has in fact effected a closure of the division of business that employed the Respondents in as much as the Petitioner is concerned.

The Petitioner has also cited that the Petitioner has the right to reorganize their business and also cited on retrenchment, the case of ***Kumara Ferando v. Commissioner of Labour*** **(2007) 1 SLR 124**. However, this Court observes that the facts of this case defer. As per the Petitioner's own submissions there is no retrenchment of workmen. The Petitioner also cited the case of ***The Caledonian Estate v. Hillman*** **79 NLR 421** and ***Superintendent v. Ceylon Estates Staff Union*** **73 NLR 574**. The said cases have also been considered by the Court and find that the facts of the said cases differ from the case before me. The case of ***Paradigm Clothing (Pvt) Ltd v. Chandramadu and others*** **[2019] 1 SLR 494**, pertains to the Respondents' failure to mitigate their loss. However, the facts of the said case differ from the facts of the case before me.

Has the Petitioner sought to quash the findings and the decision of the inquiring officer?

The Petitioner is seeking a Writ of *Certiorari* to quash the Order/determination marked as P3. The learned ASG strenuously contended that the document marked as P3 is neither an Order nor a determination. Hence, it is his contention that quashing the document marked as P3 is futile.

It is further contended that the Petition is defective, in so much as the Petitioner has failed to quash the decision of the inquiring officer. It is also his contention that P3 is only the communication and not the decision. What the Petitioner is seeking by quashing P3 is to quash the communication of the decision to the Petitioner company. The said inquiry and the decision of the inquiring officer has been marked as 1R1 by the Respondents. I have considered the said findings marked as 1R1 where the inquiring officer has analyzed the evidence and given reasons for her conclusions. Keep it as it may, I may now consider the next argument raised as to the payment of compensation to the Respondent employees.

Is the 5th to 22nd Respondents entitled to compensation?

The Petitioner Company put forth an argument that the Respondent employees are not entitled to any compensation because the purpose of awarding compensation is to alleviate the "consequences of unavoidable employment". It was their contention that the Respondents would not have suffered financial loss if they had accepted the letters

of appointment given by Fintek. This Court has considered the Petitioner's argument. However, as stated elsewhere in this judgement by the Petitioner's act of divesting the Integrated Business Solutions Division amounts to implied termination. Although alternative employment was provided by Fintek, which is a separate legal entity to that of the Petitioner, it is an employee's inalienable right to choose who their employer is. If I am to accede to the Petitioner's above contention, it would result in a position whereby an employer is allowed to forcefully impose on the employee, a new employer, and the first employer with whom they had a contract of employment can absolve itself from liability. When the Respondent employees received their letters of cessation of employment, it amounted to a termination. The parties were not at dispute that the division the employees were employed at is no longer in operation with the Petitioner. The inquiring officer has considered the above in the decision marked as 1R1 and has awarded the compensation under section 6A of TEWA. In the above circumstances, the Court finds that the Petitioner's argument that the Respondents through their acts have disentitled themselves from compensation is not tenable.

The Magistrate's Court case

It was also brought to the attention of this Court that subsequent to the decision 1R1 and of its communication by P3, the Petitioner has failed to comply with the same. Accordingly for the enforcement of the Order a case in the Magistrates Court of Colombo bearing No. 53237/05/21 has been filed. The Petitioner has not sought to quash the said proceedings, nor has he made the learned Magistrate a party to these proceedings. However, in the final relief prayer (d) the Petitioner has sought a Writ of Prohibition preventing the 1st Respondent from prosecuting in terms of TEWA without disclosing that prosecution has already commenced under the above-mentioned case number before the learned Magistrate. Hence, the final relief sought would necessarily affect the case before the learned Magistrate. However, as contended quite correctly by the learned ASG the learned Magistrate is not a party to this Application.

During the argument stage, the learned ASG has brought to the attention of this Court that the Magistrates Court case was filed on 09.04.2021 and noted that this Application was filed on 22.07.2021. Hence, the contention that there is a suppression of material facts from this Court. In the submissions, the learned Counsel submitted the said proceedings would be tendered to Court. However, the parties have failed to tender the proceedings of the Magistrates Court case. Further, the Petitioner in their written submissions acknowledge that case in the Magistrates Court has been filed and stated that they have annexed the entire case record of the Magistrates Court Proceeding. This Court finds that there is no copy of proceedings attached with the written submissions. Keeping the said fact as it may, now I shall consider the next ground of argument impugning the document marked as P3.

The Petitioner contended that the date of termination in P3 is incorrect. Hence the argument P3 is bad in law. The Court finds the said ground is not pleaded as a ground impugning P3 in the Petition. However, for completeness let me consider this argument.

Date of termination

The Petitioner also contended that the communication of the Order is wrong in as much as the compensation is computed as in the said Order the inquiring officer has come to the conclusion that the termination has commenced from 05.04.2018. However, the Petitioner in their arguments argued that they have issued the cessation of employment letter to be effective only from 01.05.2018. Hence the argument that the employees work has been terminated on 01.05.2018. This submission at its face value establishes that whether it is on 05.04.2018 or on 01.05.2018, there is a termination of the employment of the employer. Be it as it may, this Court has considered the decision of the inquiring officer in 1R1. In the said decision the inquiring officer has come to the finding that the employees have been asked to report to the new employer from the letter dated 05.04.2018. Hence, the inquiring officer has come to the conclusion that the termination of employees had occurred from 05.04.2018 which was the date the letter of appointment was communicated to the employee Respondents.

The Petitioners have failed to demonstrate that the findings of the inquiring officer to be erroneous. There was no evidence tendered to the Commissioner or to Court to establish that the employees have worked or been paid all their dues from 05.04.2018. I find that the Petitioner has failed to establish this contention. Further, this Court observes that the letter of appointment sent to the 13th Respondent by Fintek, which is reflected on page 801 of the brief, is dated 01.04.2018, which has been communicated to the Respondent by the letter dated 05.04.2018 (page 799 of the brief). In my view, these two documents buttress the findings of the inquiring officer in coming to the conclusion of the date of termination.

Delay

It is observed that the decision of the inquiring officer dated 28.12.2020 is marked as 1R1. The impugned document P3 is dated 21.1.2021. The Petitioner has filed this Application only on 22.07.2021 which is after a lapse of six months. However, this Court observes that the Petitioner has not explained the delay in filing this Application although in their Petition they state that due to the "*exigent circumstances under which the Application was filed and the COVID-19 situation which prevailed in the country,*

the Petitioner was impeded in obtaining certified copies of the inquiry proceedings from the Department of Labour". Hence, the Court is not inclined to make a finding on delay.

Conclusion

In my view, the Petitioner has failed to establish any grounds to quash the impugned document marked as P3. Therefore, after considering the above facts, this Court finds that there are no reasons to interfere with the Commissioner General's determination.

Accordingly, considering the above facts and circumstances, this Court is of the view that the Petitioner is not entitled to any of the relief prayed for in the Petition. Hence, this Court dismisses this Writ Application subject to tax cost.

Judge of the Court of Appeal

Mahen Gopallawa, J

I agree

Judge of the Court of Appeal