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

In the matter of an application for an order in the nature of Writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Farab Company
No. 51/2, Ward Place, Colombo 07.

Petitioner

Case No. C. A. Writ Application 361/2014 **Vs.**

1. Commissioner General of Labour
   Department of Labour,
   Labour Secretariat, P. O. Box 575, Colombo 05.

2. K. K. Pushpakumara
   No. 263/1, Jayamalpura, Gampola.

3. M. D. Chandani Amaratunga
   Acting Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat, P. O. Box 575, Colombo 05.

4. G. W. N. Viraji
   Deputy Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat, P. O. Box 575, Colombo 05.

5. Assistant Commissioner General of Labour
   District Labour Office, Haputale.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

S.A. Parthalingam P.C. with Hiran jayasuriya for the Petitioner

Suranga Wimalasena SSC for 1st to 3rd and 5th Respondents

Shantha Jayawardena for 2nd Respondent

Argued on: 15.05.2019

Written Submissions tendered on:

Petitioner on 11.07.2016, 06.12.2016 and 15.07.2019

1st to 3rd and 5th Respondents on 14.07.2016

2nd Respondent on 13.07.2016 and 16.08.2019

Decided on: 05.02.2020

Janak De Silva J.

The Petitioner is a company established in the Islamic Republic of Iran and duly registered in Sri Lanka as an overseas company in terms of the Companies Act No. 7 of 2007. The Petitioner was awarded the Engineering, Procurement and Construction contract for the Uma Oya Multipurpose Development Project. The Petitioner engaged the services of individuals directly and non-directly, through subcontractors, to carry out the wok of the project.

The 2nd Respondent was directly engaged by the Petitioner for the said project at the Bandarawela Branch Office of the Petitioner. By letter dated 03.09.2013 (P12) the services of the 2nd Respondent was terminated which inter alia, reads:

> "as previously discussed, you are hereby informed that with effect from 01-Sep-2013 we handed over all our local staff to the Manpower Service according to our company policy. Therefore, your employment/services for Farab Company are terminated with effect from 31-Aug-2013".

The 2nd Respondent complained to the 1st Respondent (P14) that his services were terminated contrary to the provisions of the Termination of Employment of Workmen (Special Provisions) Act as amended (Act). The 1st Respondent initiated an inquiry at the end of which order dated 10.06.2014 wrongly dated as 10.06.2013 (P17) was made where it was held that the termination of services of the 2nd Respondent was done contrary to the Act and ordered that the 2nd Respondent be reinstated with payment of back wages with effect from 01.07.2014.

The Petitioner is seeking a writ of certiorari quashing the said order as it is claimed to be *"unreasonable, irrational, arbitrary, malicious and illegal and ultra vires"* the Act.

In terms of section 2(1) of the Act:

> "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"

There is no dispute that the 2nd Respondent did not give prior consent in writing for his termination. The Petitioner relies on a purported approval granted by the Commissioner.

The Petitioner places much reliance on documents marked P9 and P10 to establish that the 1st Respondent Commissioner gave "prior written approval" for the termination of the services of the 2nd Respondent. These two documents are titled "Termination of Farab company with Employee" and contains details of employees of the Petitioner including the amount received by them as compensation. The Petitioner contends that this was consequent to an application made by the Petitioner to the 1st Respondent seeking his approval for the termination. In particular the Petitioner relies on the note made by the 5th Respondent thereon stating that the payments were made in the Haputale District Labour Office. The issue is whether this indicates that the 1st Respondent has given prior written approval for the termination of the services of the Petitioner in terms of the Act.

Before considering the facts of this case I wish to advert to the Supreme Court decision in *Lanka Multi Moulds (Pvt) Ltd. v. Wimalasena, Commissioner of Labour and Others* [(2003) 1 Sri.L.R. 137] where it was held that "prior consent" required by section 2(1)(a) of the Act need not necessarily be contained in a single sheet of paper. It could be inferred from the attendant circumstances in each case. I am of the view that the same rationale is applicable to the written approval of the 1st Respondent in terms of section 2(1)(b) of the Act.

I will now examine whether the attendant circumstances of this case show that such an approval has been given by the 1st Respondent.

Section 2(2)(a) of the Act states that approval may be given by the Commissioner on an application made in that behalf by such employer, a copy of which application shall be served on the workman concerned, who shall be afforded an opportunity of being heard.

In this context one must bear in mind that section 114 of the Evidence Ordinance states that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. Illustration (d) therein states that the court may presume that judicial and official acts have been regularly performed. I see no reason to consider that that the 1st Respondent may have acted otherwise in relation to granting permission to terminate the services of the Petitioner. Therefore, if the assertion of the Petitioner is true that the 1st Respondent did give his prior written approval, there should be an application by the Petitioner and a copy of that should have been served on the 2nd Respondent and he should have been heard. However, neither the Petitioner nor the 1st to 3rd and 5th Respondents have submitted any documentation to Court indicating that the Petitioner made such an application and the workman were given an opportunity of being heard.

Furthermore, section 2(2)(d) requires the Commissioner to give notice in writing of his decision on the application to both the employer and the workman. In this situation too section 114 of the Evidence Ordinance applies. However, neither the Petitioner nor the 1st to 3rd and 5th Respondents have submitted any documentation to Court which evinces of a decision of the Commissioner in writing.

In this context it is important to point out that at the inquiry (P16) conducted into the complaint made by the 2nd Respondent (P14) about his unlawful termination, the Petitioner did not take up the position that the termination was consequent to written approval obtained from the 1st Respondent. In the written submissions signed by Attorney-at-Law for the Petitioner (Respondent at the inquiry) it is stated that "at all times material to the employment of the employees they were made to understand that there was no permanency in their employment" and that "Farab decided to hand over its functions to a contractor since they were unable to continue with its employees".

In fact, by letter dated 17 Aug 2013 (P7) the Petitioner informed the 1st Respondent that if the workers refuse to adopt the strategy of the Petitioner, which was to hand over the workman to a Manpower Company, the Petitioner would be terminating their contracts of employment. Nothing is mentioned about an application made to the 1st Respondent seeking his written approval for the termination.

In the aforesaid circumstances, it is not possible to concluded that the written approval of the 1st Respondent was obtained for the termination of the services of the 2nd Respondent.

Yet the learned President's Counsel for the Petitioner submitted that the endorsements made by the 5th Respondent on P9 and P10 that the compensation was paid before him amounts to "prior written approval" of the 1st Respondent.

The power given in section 2 of the Act is vested with the Commissioner General of Labour. It is so specifically stated. Section 19 of the Act states that in the Act, *unless the context otherwise requires* "Commissioner" means the person for the time being holding the office of the Commissioner of Labour. The learned President's Counsel for the Petitioner submitted that practical considerations require the term "Commissioner" to include officials such as the 5th Respondent. Such an interpretation is possible since section 11 of the Act states that the Commissioner may delegate to any officer of the Labour Department any power, function or duty conferred or imposed on him under his Act. However, no such delegation of power has been submitted to this Court by either the Petitioner or the 1st Respondent. Accordingly, it is not possible for this Court in these proceedings to conclude that the 5th Respondent can exercise the powers of the Commissioner in terms of section 2 of the Act.

In *Lanka Multi Moulds (Pvt) Ltd. v. Wimalasena, Commissioner of Labour and Others* (Supra) Fernando J. (at page 148) held:

> I am inclined to agree that the "prior consent" required by section 2(1)(a) need not necessarily be contained in a single sheet of paper. If for instance an employer were to make a written offer of a "golden handshake", stating "if you agree to the termination of your services, please accept the enclosed cheque for X rupees as your terminal benefits and sign and return the annexed receipt," the written offer together with the acceptance of the cheque and the signing of the receipt would constitute a "prior consent in writing" to

termination within the meaning of section 2(1)(a). However, it is not necessary to decide that question because, as learned State Counsel submitted on behalf of the 1st Respondent, there is a difference between consent to the termination itself (which is what section 2(1)(a) requires), and an agreement - as in this case - as to the quantum of terminal benefits in circumstances in which the termination itself is no longer negotiable or has already been unilaterally determined or effected (which is not enough). The Petitioner's letters and the 2nd Respondent's acceptance of the payments were all subsequent to the Petitioner's unilateral decision to terminate the 2nd Respondent's services, and are not proof of anything more than his agreement to the benefit's payable consequent upon that decision. The 2nd Respondent did not give prior consent, in writing or otherwise, to the termination of his services, but subsequently agreed to and accepted the terminal benefits offered."

In my view the Petitioner had already decided to terminate the services of the 2nd Petitioner by the time P9 and P10 were written. These two documents and its attendant circumstances, including the note thereon by the 5th Respondent that the monies were paid before him, do not amount to "prior written approval of the Commissioner" within the meaning of section 2(1)(b) of the Act. At the most it reflects the acceptance by those employees, the 2nd Respondent did not sign any of these documents, of the terminal benefits.

For all of the foregoing reasons, I hold that the Petitioner has failed to establish any grounds on which P17 should be quashed by a writ of certiorari.

The application is dismissed with costs fixed at Rs. 30,000/=.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal