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 writ of certiorari under and in terms of Article 140 of the Constitution.

Asian Finance Limited

No.20, R.A De Mel Mawatha,

Colombo 03.

Petitioner

Case No: CA(Writ) 37/2013

Vs.

1. Wasantha Kumara Galagoda
   No.9/31E, Perera Mawatha,
   Divulapitiya,
   Boralesgamuwa.
2. Liyana Thanthri Gamage Dammika Dharshana
   Assistant Commissioner of Labour,
   Colombo East District Labour Office,
   The Department of Labour,
   Colombo 05.
3. H. Tiranagama
   Senior Labour Officer,
   Colombo East District Labour Office,
   The Department of Labour,
   Colombo 05.

4. The Commissioner General of Labour
   Department of Labour,
   Colombo 05.
5. The Monetary Board of the Central Bank of Sri Lanka
   No.30, Janapdhipathi Mawatha,
   Colombo 01.
6. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Respondents

Before: Janak De Silva J.

Counsel:

Romesh De Silva P.C. with C. Jayamaha for the Petitioner

K.G. Jinasena for the 1st Respondent

Vikum De Abrew DSG for 2nd, 4th and 6th Respondents

Written Submissions tendered on:

Petitioner on 18.10.2018 and 12.03.2019

1st Respondent on 13.03.2019

2nd, 4th and 6th Respondents on 05.03.2019

Argued on: 05.02.2019

Decided on: 10.05.2019

Janak De Silva J.

Parties agreed that the application can be disposed by way of written submissions.

The Petitioner is a duly incorporated company in Sri Lanka and earlier 90% of its shares were held by Ceylinco Finance Ltd. (presently known as Nation Lanka Finances PLC) a member of the Ceylinco Group of Companies. The Petitioner states that with the collapse of some of the companies of the Ceylinco Group there was a run on the public deposits in the Petitioner company. It is further submitted that the Central Bank moved to protect the depositors of the Petitioner and issued several circulars to that end.

The 1st Respondent was an executive director of the Petitioner when it was part of the Ceylinco Group during which time he apparently received a monthly salary of Rs. 532,000/= in addition to various perks inclusive of a BMW car. The Petitioner states that it was subject to the directions of the Central Bank which have been marked P1(a) to P1(n).

The Petitioner is seeking a writ of certiorari to quash the decision contained in order/letters marked P8(a) and P8(b). It is an order made by the 2nd Respondent under section 68(1) read with 53(3) of the Shop and Office Employees (Regulation of Employment & Remuneration) Act as amended (Act) by which the Petitioner was directed to pay a sum of Rs. 62,34,720/= to the 1st Respondent for the period February to May 2009 and November 2009 to January 2011. The burden of establishing that P8(a) and P8(b) should be quashed on the basis of illegality, irrationality or procedural impropriety is on the Petitioner.

The Petitioner seeks to assail P8(a) and P8(b) on two grounds. Firstly, that the said order is ultra vires the powers of the 2nd and 4th Respondents and secondly that it is wrong in law as it violates the directives issued by the 5th Respondent.

Section 53(3) of the Act reads:

> "(3) Where an employee has not been paid the whole or a part of the remuneration required by this Act to be paid to him by his employer, the Commissioner may, if he thinks fit so to do, by written notice require the employer to pay such amount or the balance of such amount to the Commissioner within the time specified in the notice so that the

Commissioner may remit it to such employee. Where the employer when served with such notice pays such amount or such balance directly to such employee instead of transmitting it to the Commissioner as required by such notice, he shall be deemed not to have paid such amount or such balance to such employee."

The Petitioner has not sought to argue that the 2nd or 4th Respondents did not have the power under the Act to make the impugned orders. Hence the first ground must necessarily fail.

The Petitioners main submission is found in the second ground namely that in view of the directions of the Central Bank which have been marked P1(a) to P1(n), the 2nd and 4th Respondents did not have the power to make the impugned orders.

Upon a closer examination of the directions marked P1(a) to P1(n), it is clear that P1(b), P1(c), P1(e), P1(f), P1(g), P1(i), P1(k) and P1(l) do not deal with emoluments/remunerations of a director of the Petitioner company. P1(m) and P1(n) are dated 04.03.2011 and 08.03.2011 respectively and hence irrelevant to the issue of the emoluments/remunerations of the 1st Respondent until January 2011 when the services of the 1st Respondent was terminated. Only P1(a), P1(d), P1(h) and P1(j) deals with the emoluments/remunerations of a director of the Petitioner. P1(d) directs the Petitioner not to make payments without the prior written approval of the Board and hence is irrelevant to the issue before Court as the position of the Petitioner is that they cannot pay the Petitioner in view of the directions and not that the Board did not approve payments. P1(j) is also irrelevant as it withdrew P1(d) and P1(h) with effect from 31.03.2011.

Therefore, this Court has to consider only whether either P1(a) or P1(h) was validly made and prevents the Petitioner from making the emoluments/remunerations claimed by the 1st Respondent.

There is no duty to refer to the provisions of the law under which an order is made, provided that the law grants the authority the power to make the said order [*Pieris v. Commissioner of Inland Revenue* (65 N.L.R.457), *Seneviratne v. Urban Council, Kegalle* (2001) 3 Sri L.R. 105)], However, it was incumbent on the Petitioner or the 5th Respondent to state at least in their pleadings or in the written submissions the relevant statutory provision under which the impugned orders P1(a) and P1(h) were made.

Though the Petitioner has not in the petition sought to explain how the said directions supersedes the provisions in the Act in the written submissions it is submitted that the directive P1(a) was issued under and in terms of the Finance Business Act No. 42 of 2011 (Finance Business Act) and therefore the Petitioner was bound to comply with it [paragraph 31 of the written submissions filed on 12.03.2019]. It is addressed to the then Chairman of the Petitioner company and requires him to limit the current emoluments/remunerations of every director of the company who receives emoluments/remunerations exceeding Rs. 200,000/= per month to a maximum of Rs. 200,000/= per month until the liquidity position of the company improves to a satisfactory level. P1(a) is dated 06.02.2009 whereas the Finance Business Act became law on the 11th November 2011. Clearly P1(a) was not issued under the Finance Business Act as claimed by the Petitioner.

The 5th Respondent in the objections has not specified the relevant law under which directions P1(a) and P1(h) was made. Instead it has referred to several laws such as the Monetary Law Act No. 58 of 1949 as amended, Banking Act No. 30 of 1988, Finance Companies Act No. 78 of 1988, Finance Business Act and the Finance Leasing Act No. 56 of 2000. No written submissions were filed on behalf of the 5th Respondent. This conduct clearly indicates that the 5th Respondent is seeking to justify its orders by referring to several laws without specifying the relevant provision under which it is made. This Court cannot go on a voyage of discovery looking at each and every provision of the laws referred to in order to ascertain whether the impugned orders are intra vires or not. Therefore, I hold that the Petitioner has failed to establish that the part dealing with limiting the remuneration/emoluments of the directors in P1(a) and P1(h) has been validly made and is binding on the Petitioner.

The learned counsel for the 1st Respondent has further submitted that the Petitioner has suppressed and/or misrepresented material facts and as such this application should be dismissed in limine without going into merits. This submission is based on the failure of the Petitioner to disclose letter dated 14th January 2011 (1R2) sent by the Director, Department of Supervision of Non-Bank Financial Institutions to the then CEO of the Petitioner by which it was informed that the unpaid approved allowances for 10 months of the Petitioner should be resolved in conformity with the directions issued by the Central Bank of Sri Lanka, the relevant

employment contract, prevailing company policies relating to employees/directors and applicable labour rules. Clearly it appears that the Central Bank was of the view that the directions themselves are not determinative of the issue of unpaid allowances and that the relevant employment contract and applicable labour rules must also be considered. This was a material fact which should have been disclosed.

It is established law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi* [77 N.L.R. 131 at 135,6]:

> "The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The* General Commissioner for the Purpose of the Income Tax Acts for the *District of Kensington-Ex-parte Princess Edmorbd de Poigns* Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".

This principle has been consistently applied by courts in writ applications as well. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd.* v. Commissioner of Labour [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jaysinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24].

In fact, in *Dahanayake and Others v. Sri Lanka Insurance Corporation Ltd. and Others* [(2005) 1 Sri.L.R. 67] this Court held that if there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination.

The Petitioner may well be able to contend that it disclosed the letter dated 12th January 2011 [P1(k)] which is somewhat of the same tenor as 1R2 but with a broader application. However, it is to be observed that the Petitioner has merely annexed it as part of a bundle of directions made by the Central Bank to the petition without drawing the specific attention of Court to its construction or to the material parts of it. In this context the following pronouncement of Sirimane J. in *Athula Ratnayake v. Jayasinghe* (78 N.L.R. 35 at 39-40) is instructive:

> "Learned Counsel for the petitioner submitted that the petitioner did not intend to suppress that fact as the copy of the summing up was filed with the petition. This indeed is meaningless and should have never been done. His petition though it refers to documents (A) to (J) filed with the petition makes no reference whatever to the summing up also being filed. If any documents are filed with the petition, they must be referred to in the petition itself as this Court would be led by the contents of the petition and affidavit. On reading the papers filed I myself was under the impression that the summing up had not been supplied to the petitioner at all. This type of non-disclosure in the petition and the filing of the document without it being referred to in the petition, tends to create in the mind of the Court a wrong impression and at the same time affords the petitioner, when his bona fides are questioned, to point out as an excuse that the

document was in fact filed with the petition. **The filing of such a document without any reference to it in the petition, is, as I said earlier, "meaningless and only meant to give the petitioner an excuse after having misled the Court into a wrong belief. This type of action must be viewed with strong disapproval and one hopes that it would not be followed in future."** (Emphasis added)

For the foregoing reasons, I hold that there is no illegality, irrationality or procedural impropriety in the orders marked P8(a) and P8(b). In any event the Petitioner has suppressed and/or misrepresented material facts from Court and the application is liable to be dismissed in limine without going into the merits.

The application is dismissed with costs.

Judge of the Court of Appeal