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 Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No: 13/2019

Anura Kotuwegedara
No. 47/48A, Aruppala Watta Road,
Watapuluwa, Kandy.

Petitioner

Vs.

1. R.P.A. Wimalaweera,
   Commissioner General of Labour.

2. Y.A.B.S. Yahalawela,
   Assistant Commissioner of Labour.

3. H.D.R. Kumari Jayarathne,
   Commissioner of Labour.

4. P.K. Sanjeevani,
   Deputy Commissioner of Labour,
   Termination Branch.

5. V. Kumarasinghe,
   Assistant Commissioner,

   All of the Department of Labour,

Labour Secretariat Building,
Kirula Road, Colombo 5.

6. Unilever Sri Lanka Limited,
No. 258, M Vincent Perera Mawatha,
Colombo 14.

7. Sumeet Verma.
Director,Unilever Sri Lanka Limited,
No. 258, M Vincent Perera Mawatha,
Colombo 14.

Respondents

Before: **Deepali Wijesundera, J**
Arjuna Obeyesekere, J

Counsel: S.H.A. Mohammed for the Petitioner

Ms. Nayomi Kahawita, State Counsel for the 1st – 5th Respondents

Ms. Chamantha Weerakoon Unamboowe with O.L. Premaratne and Ms. Lumbini Kohilawatte for the 6th and 7th Respondents

Supported on: 21st February 2019

Written Submissions: Tendered on behalf of the Petitioner and the 6th and 7th Respondents on 28th February 2019

Tendered on behalf of the 1st – 5th Respondents on 2nd April 2019

Decided on: 7th May 2019

Arjuna Obeyesekere, J

After the conclusion of the oral submissions on 21st February 2019, the parties were directed to tender brief written submissions together with any authorities, as the issue that requires to be determined in this application only requires an interpretation of the provisions of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, as amended (the TEW Act).

On 4th April 2019, all Counsel agreed that the Order that would be pronounced in this application would apply to CA (Writ) Application No. 14/2019, as the facts and the law in both applications are almost identical.

The Petitioner has been an employee of the 6th Respondent, Unilever Ceylon Limited, for a period of over 25 years and had last been employed in the capacity of Production Assistant at the Horana Factory of the 6th Respondent. The Petitioner states that the 6th Respondent by a letter dated 11th September 2017, annexed to the petition marked '**P2**' had informed the 1st Respondent, Commissioner General of Labour that its production facility was completely destroyed by a fire that broke out at its Horana factory on 4th February 2016. The 6th Respondent had stated further in '**P2**' that as a result, it is faced with a situation of having to terminate the contracts of employment of the Petitioner.

Section 2(1) of the TEW Act provides that:

> "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."

Section 5 of the TEW Act sets out the consequences of terminating the employment of a workman outside the above procedure. Section 5 of the TEW Act reads as follows:

> "Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever."

Section 6 of the TEW Act sets out the power of the 1st Respondent where the employment of a workman is terminated in contravention of the Act and reads as follows:

> "Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, the Commissioner may order such employer to continue to employ the workman, with effect from a date specified in such order, in the same capacity in which the workman was employed prior to such termination, and to pay the workman his wages and all other benefits which the workman would have otherwise received if his services had not been so terminated; and it shall be the duty of the employer to comply with such order. The Commissioner shall cause notice of such order to be served on both such employer and the workman."

Accordingly, by '**P2**', the 6th Respondent had sought the approval of the 1st Respondent to terminate the services of the Petitioner. Approval to terminate the services of four other employees, including the three Petitioners in CA (Writ) Application No. 14/2019 had been sought on 31st August 2017 but for different reasons. Simultaneously with '**P2**', the 6th Respondent had issued the Petitioner with a letter annexed to the petition marked '**P3**' informing the Petitioner not to report for work from 12th September 2017 until such time a final ruling is made by the 1st Respondent on '**P2**'.

The 6th Respondent had stated in '**P2**' that the "company will pay basic salaries to the redundant employees until a final determination of this application". In '**P3**', the Petitioner had been informed that he would be paid his basic salary and would be entitled to medical benefits.[1] It is not in dispute between the parties that the Petitioner was paid his wages and all allowances until the date on which the application '**P2**' was made.[2] It is also not in dispute that in addition to his basic salary of Rs. 94,288 per month, the Petitioner was receiving the payment of a sum of Rs. 16,465 as Transport allowance, Special overtime allowance of Rs. 12,785 at the normal rate and Rs. 7,749 at the double rate, and that pursuant to '**P2**' being sent by the 6th Respondent, the Petitioner has been paid his basic salary of Rs. 94,288 per month.

Section 2(2) of the TEW Act sets out the procedure that should be followed by the 1st Respondent upon receipt of an application under Section 2(1)(b) of the TEW Act and the powers of the 1st Respondent in deciding a request by an employer.

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[1] This Court has been informed by the 1st Respondent that the 6th Respondent had undertaken to pay the Conveyance allowance to the Petitioners in CA (Writ) Application No. 14/2019-vide letter dated 11th January 2019 annexed to the written submissions of the 1st Respondent marked '1R3'.

[2] The pay slip of the Petitioner for the month of August 2017 has been annexed to the petition, marked 'P1c'.

Accordingly, an inquiry commenced before the 2nd Respondent on 10th October 2017 with the participation of the Petitioner and the 6th Respondent, where the Petitioner took up a preliminary objection relating to the maintainability of the application '**P2**'. The basis of the said objection was that the failure by the 6th Respondent to pay the allowances due to the Petitioner while the application under Section 2(1) is pending, tantamount to a termination of his employment, as provided by Section 2(4) of the TEW Act, and that as a result, the 2nd Respondent does not have the jurisdiction to inquire into the application '**P2**'.

The Petitioner states that even though the 2nd Respondent had initially informed the 6th Respondent, by her decisions annexed to the petition marked '**P7**' and '**P12**' that its application '**P2**' will not be proceeded with unless all allowances are paid to the Petitioner, the 6th Respondent has failed to comply with the said decisions. However, the Petitioner alleges that on 7th December 2018 the 2nd Respondent had decided to proceed with the application of the 6th Respondent, without any compliance by the 6th Respondent with **P7**' and '**P12**'. The learned State Counsel for the 1st Respondent has taken up the position that the decision to proceed with the inquiry was taken as the 6th Respondent had complied with '**P7**' and '**P12**'.

Dissatisfied with the said decision of the 2nd Respondent annexed to the petition marked '**P16a**'[3] to proceed with the inquiry, the Petitioner filed this application, seeking *inter alia* the following relief:

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[3]'P16a' reads as follows: "මේ පරීක්ෂණය දැනට වසරකට අධික කාලයක් ගතව තිබෙන පරීක්ෂණයක් වන අතර ආයතන පාර්ශවය විසින් සේවකයන්ට වැටුප් ගෙවමින් මෙම පරීක්ෂණය පවත්වා ගෙන යන බවයි. සේවය අවසන් කිරීමේ පනත අනුව සේවා යෝජකගේ ඉල්ලීමක් මාස 02 ක් ඇතුලත අවසන් කිරීම කල යුතුයි. පැමිණිලිකාර පාර්ශවය විරෝධතාවය දක්වන්නේ නම් ඒක පාර්ශවීය පරීක්ෂණ කටයුතු සිදු කිරීමට සිදු වන බව කියා සිටි. අද දිනට පරීක්ෂණය සිදු කිරීමට නියම කර තිබුණද ආයතනයේ නිතිඥ මහතා අසනීප තත්ත්වයෙන් පසු වන බව දැනුම් දුන්

(a) A Writ of Certiorari to quash the decision of the 2nd Respondent marked '**P16a**' as reflected in the record of proceedings of the inquiry marked '**P16**';

(b) A Writ of Mandamus to compel the 1st – 5th Respondents to dismiss the application of the 6th Respondent;

(c) An interim order on the 1st – 5th Respondents to stay and/or suspend the operation of the decision of the 2nd Respondent to proceed with the inquiry until such time the 6th Respondent complies with '**P7**' and '**P12**'.

The principle contention of the Petitioner is that it is an essential pre-requisite in terms of the law that there must be a valid contract of employment to maintain a Section 2(1) application. The Petitioner contends further that as only his basic salary is being paid, proceeding with the application '**P2**' is illegal as his contract of employment is deemed to have been terminated. The Petitioner is relying on the provisions of Section 2(4) of the TEW Act, and it appears more particularly on Section 2(4)(a), in support of his contention.

Section 2(4) reads as follows:

"For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any

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කරුණා මත අද දින පරීක්ෂණ කටයුතු සිදු කිරීමට අපහසු බවයි. නමුත් මිලඟ දිනයේ අනිවාර්යයෙන්ම මෙම පරීක්ෂණ කටයුතු ආරම්භ කරන ලෙස දෙපාර්ශවයට දැනුම් දෙන ලදි. සේවක පාර්ශවය මෙය විභාගයට ගැනීමට සුදානම් වන සැම අවස්ථාවේදීම කුමක් හෝ විරෝධතාවයක් ඉදිරිපත් කරමින් පරීක්ෂණය ප්‍රමාද කරන බවත්, ඒ හේතුවෙන් පරීක්ෂණය ආරම්භ කිරීම වසරකට අධික කාලයක් ගත වී ඇති බවත් දන්වමින් අද දින ඉදිරිපත් කල පැමිණිලිකාර පාර්ශවයේ විරෝධතාවයද ප්‍රතික්ෂේප කරන බව කියා සිටි."

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."

It has been pointed out by S.R.De Silva in his work, **The Contract of Employment**[4] that the types of non-employment contemplated by the definition in Section 2(4)(a) are 'lay off, lock-out and a non-disciplinary suspension of a contract of employment involving the non-payment of wages', which confirms that where the payment of the basic salary continues but without the allowances, there is no termination of the employment or deemed termination as contemplated by Section 2(4) of the TEW Act.

This Court must also observe that Sections 2(1) and 2(2) do not specify that the payment of wages pending an application is a condition precedent to maintaining an application under Section 2(1). However, in view of the provisions of Section 2(4), it is clear that the payment of wages until the date of the application is mandatory, as non-employment without wages would result in the termination of employment. It is noted that Section 6 of the TEW

[4] Revised Edition (2017) paragraph 365

Act confers the 1st Respondent the power to conduct an inquiry where there has been a termination contrary to Section 2(1) of the TEW Act. If it is the contention of the Petitioner that his services have been terminated contrary to the provisions of the TEW Act, he was entitled to make an application in terms of Section 6 of the TEW Act or filed an application under Section 31B of the Industrial Disputes Act, both of which admittedly he has not done. In fact, a finding by this Court that the non-payment of the allowances has resulted in the services of the Petitioner being terminated in September 2017, which is in effect the Writ of Mandamus that has been prayed for, would be to the detriment of the Petitioner, as any application to challenge the termination under any of the above laws would be out of time.

The issue raised by the Petitioner was considered by the Supreme Court in **Samalanka Limited vs Weerakoon, Commissioner of Labour and others**[5]. The facts very briefly of that case are as follows. The business of the appellant had suffered owing to a disagreement with its foreign collaborator resulting in the production coming to a standstill in November 1983. The appellant had continued to pay the wages of its workmen even though they did not report for duty. On 25th June 1984, the appellant had made an application under Section 2(1)(b) of the TEW Act to terminate the services of the workmen upon the closure of the factory. Having made the application, the appellant had ceased the payment of wages. The Deputy Commissioner of Labour (the 2nd Respondent), who held the inquiry, had taken up the position that as the 'wages had not been paid for the month of July, I consider the contract of employment the company had with the workmen is frustrated and the application fails.' The 2nd Respondent had thereafter proceeded to consider

[5] 1994 (1) Sri LR 405; Judgment by Kulatunga, J with G.P.S.De Silva, CJ and Ramanathan, J agreeing.

the application under Section 6A of the TEW Act[7] on the basis that there had been a '*de facto*' termination of employment, contrary to Section 2(1). Having considered the above facts, the Supreme Court held as follows:

"On a careful consideration of the facts and the relevant legal provisions, I find that no inquiry under Section 6A(1) was competent, and the impugned decision (which makes no reference to any section) is attributable to Section 2(2) alone for the reason that on the available facts it cannot be said that there was a termination of employment of workmen in contravention of the Act which is a condition precedent to a valid inquiry under Section 6A(1).

The reason for this finding may be elaborated thus:

(a) from November 1983, the working of the factory came to a standstill, after which the workers were requested not to report for work, but they were paid their wages upto the time the appellant applied to the 1st respondent on 25.06.84 for permission to terminate their services;

(b) where the employer does not, or cannot provide work but nevertheless continues to pay wages, there is no termination of employment within the ambit of Section 2(4)(b) i.e. non-employment in consequence of the closure. S. R. de Silva in his work "The Contract of Employment" (1983) page 212 says –

[7] Section 6A reads 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."

"... apart from exceptional cases a contract of employment does not oblige an employer to provide work but only to pay wages. There appears to have been no necessity for the legislature to cover cases of non-offer (of) work so long as wages are paid as it causes no real prejudice or damage to the employee. The object of the Act was to exercise control over situations of a non-disciplinary nature where there is a loss of employment involving a loss of earnings".[8]

This in my view is a correct interpretation of the expression "non-employment". As such, there was no termination of employment of workmen in consequence of a closure by the appellant.

(c) permission of the Commissioner is required not for the closure but for the termination of employment of a workman in consequence of a closure. Thus S. R. de Silva says (page 214) –

"It is not a closure but only a non-employment of a workman consequent upon a closure that is covered by the Act".[9]

In the circumstances, the appellant's application dated 25.06.84 made to the 1st respondent is a valid application for permission to terminate employment within the ambit of Section 2(1)(b). The inquiry was commenced in terms of that section. It has been suggested that at that stage the character of the inquiry changed to one under Section 6A(1) in view of the allegation that wages of employees had not been paid for the

[8] Revised edition (2017) paragraph 363, page 450.
[9] Ibid. paragraph 367, page 455.

month of July. There is no admission of the alleged default by the witness who testified on behalf of the management. But even if there had been a failure to pay wages pending the inquiry, I do not think that in the circumstances of this case, it could constitute a "termination" which would entitle the inquiring officer to convert the inquiry into one under Section 6A(1). I therefore agree with the appellant's submission before the Court of Appeal that the order made by the 2nd respondent which is said to have changed the character of the inquiry was wrong in law.

I hold that the inquiry held by the 2nd respondent was under Section 2(2)."

The reasoning of the Supreme Court thus makes it clear that once the process under Section 2(1) is triggered by making an application, non-payment of wages thereafter, does not render the Commissioner General of Labour *functus* in respect of that application. The 1st Respondent is required by law to proceed with the inquiry and make a decision on the application. This Court would, with all due respect, take the view that it would be in the best interests of justice if the basic salary is paid to the employee during the period that the application is under consideration.

Thus, the condition precedent to making an application under Section 2(1)(b) and thereafter receiving a decision under Section 2(2), is for the employer to pay all wages inclusive of allowances until the time the application is made to the 1st Respondent. In these circumstances, this Court is of the view that in the present application, even though the 6th Respondent did not pay the allowances that the Petitioner was entitled to after the application '**P2**' was

made, the decision of the 2nd Respondent to proceed with the inquiry is neither illegal nor irrational.

This Court takes the view that in the absence of a termination as contemplated by Section 2(4) or Section 5 of the TEW Act, the 1st Respondent is under a legal duty in terms of Section 2(2) and Section 2(2A) of the TEW Act to inquire into the application made to it by the 6th Respondent and make a decision either granting approval to terminate the services of the Petitioner or refusing such approval.

The rationale for the above reasoning is found in Section 2(2) of the TEW Act itself. Section 2(2) reads as follows:

> "The following provisions shall apply in the case of the exercise of the powers conferred on the Commissioner to grant or refuse his approval to an employer to terminate the scheduled employment of any workman:
>
> (a) such approval may be granted or refused on application in that behalf made by such employer; a copy of which application shall be served on the workman concerned, who shall be afforded an opportunity of being heard;
>
> (b) the Commissioner may, in his absolute discretion, decide to grant or refuse such approval;

(c) the Commissioner shall grant or refuse such approval within three months from the date of receipt of an application in that behalf made by such employer;

(d) the Commissioner shall give notice in writing of his decision on the application to both the employer and the workman;

(e) the Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment; and

(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.

There are two significant features in Section 2(2) that merit consideration by this Court and demonstrate the rationale for the reasoning that what is required is the payment of wages and allowances until the date of the application.

The first is the time period within which the inquiry must be concluded. The legislature, while protecting the interests of the employee through the introduction of the TEW Act, has also been mindful to protect the interests of the employer by requiring that the inquiry be concluded within three months from the date of receipt of the application of the employer. Although the 1st Respondent's failure to make an order within three months does not affect the validity of the order,[10] it is in the best interests of both parties that a decision is made either way within the shortest possible period of time so that the employer does not have to incur a loss by continuing the payment of the salary for a period of more than three months and the employee does not have to suffer a loss by receiving only his basic salary for a period beyond three months. The need to conclude the inquiry within a short time period of time has been recognised by the introduction of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 11 of 2003[11] which has reduced the time period to two months.[12] It is rather unfortunate that an application made on 11th September 2017 has still not been taken up for inquiry, thereby prejudicing the Petitioner as well as the 6th Respondent. Thus, this Court is of the view that it is in the interests of both parties that the inquiry is concluded expeditiously.

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[10] Nagalingam vs de Mel [SC Application No. 650/74; SC Minutes of 10th December 1975]; Mendis vs Ceylon Luxury Hotels Limited [CA Application No. 960/77; CA Minutes of 26th November 1982] referred to by S.R.De Silva in his work, The Contract of Employment [Revised Edition – 2017; page 460] as follows: "The Supreme Court took the view that the 3 month time limit was intended to discourage bureaucratic delays and not to deprive the Commissioner of jurisdiction after the lapse of 3 months."

[11] The preamble to Act No. 11 of 2003 reads as follows: "Whereas it has become necessary to ensure an expeditious disposal of applications and references made under the Industrial Disputes Act and the Termination of Employment of Workmen (Special Provisions) Act, in order that parties to such applications and references may be able to obtain decisions in respect of the same within a short period of time: and whereas to facilitate such expeditious disposal it is considered desirable to stipulate time frames in respect of the procedure adopted in the determination of applications made to labour tribunals and the Commissioner and references made to an arbitrator, and in respect of the hearing and deciding of appeals lodged against orders made on such applications." This is a clear recognition of the importance of making a decision within the time limit.

[12] Section 11 of Act No. 11 of 2003 reads as follows: "In the exercise of his powers under section 2 of the Termination of Employment of Workmen (Special Provisions) Act, to grant or refuse approval to an employer to terminate the scheduled employment of any workman, it shall be the duty of the Commissioner to make his order within two months of the date of receipt of the application from the employer."

The second significant feature is that in terms of Section 2(2)(b) of the TEW Act, the decision to grant or refuse the application '**P2**' is at the 'absolute discretion' of the 1st Respondent. Section 2(2)(e) sets out with even greater force this 'absolute discretion' conferred on the 1st Respondent in the following terms:

> "the Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment."

Thus, the legislature in its wisdom has granted the Commissioner General of Labour an 'absolute discretion' whether to grant or refuse approval to an application by an employer to terminate the services of an employee. That discretion has still not been exercised and this Court will not interfere at this stage with the scheme set out in the TEW Act and the powers vested with the 1st Respondent. In this regard, this Court must observe that in the event the 1st Respondent refuses to grant approval to '**P2**', an order for reinstatement can be made, with a suitable order on the allowances and other payments that were due to the Petitioner during the period the said application was pending. On the other hand, if the 1st Respondent grants approval to '**P2**', the terms and conditions on which such approval is to be granted including the payment of compensation for loss of employment and the payment of allowances and other payments that were due to the Petitioner during the period the said application was pending, can be decided by the 1st Respondent. It is also observed that in terms of Section 2(3) of the Act, failure to comply with any decision made by the 1st Respondent is an offence punishable by law. Thus,

this Court is of the view that it is in the best interest of both parties that the 2nd Respondent is permitted to conduct the inquiry on '**P2**' where each party can be afforded a full hearing and thereafter an order be made without any further delay.

The Petitioner had cited the judgments in **Eksath Kamkaru Samithiya vs Commissioner of Labour**[13] and **Pradeep vs Skypan Asia (Pvt) Limited and others**[14] in support of its argument that wages and benefits must be paid during the pendency of an inquiry under Section 2. This Court however observes that both these cases dealt with an application under Section 6 of the TEW Act, which specifically provides for the payment of 'wages and all other benefits' unlike Section 2(1). Hence, the said judgments have no application to the issue before this Court.

For the reasons set out herein, this Court is of the view that the 2nd Respondent proceeding with the inquiry and making a determination on '**P2**' is not illegal. In the said circumstances, this Court does not see any legal basis to issue notices on the Respondents.

Accordingly, this Court directs the 2nd Respondent to re-convene the inquiry within one week from today, afford the parties a proper and fair hearing in terms of the law and conclude the hearing and deliver the decision, within two months from today. This Court, while directing all parties to co-operate in the conclusion of the inquiry, directs the 6th Respondent to continue the payment of the basic salary and other payments that it made to the Petitioner at the time it submitted '**P2**', as well as any other payments that the 6th Respondent had agreed to make to the Petitioner and/or the Petitioners in CA (Writ)

[13] 2001 (2) Sri LR 137.
[14] 2005 (3) Sri LR 121.

Application No. 14/2019, until the decision of the 1st Respondent is informed to the parties.

Subject to the above, this application is dismissed, without costs.

As has been agreed upon by all the learned Counsel, this Order must apply to CA (Writ) Application No. 14/2019. Hence, CA (Writ) Application No. 14/2019 must also stand dismissed without costs.

Judge of the Court of Appeal

Deepali Wijesundera, J

I agree.

Judge of the Court of Appeal