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

Sri Lanka Standards Institution,
No.17, Victoria Place,
Elvitigala Mawatha,
Colombo 8.
Petitioner

CASE NO: CA/WRIT/54/2016

Vs.

1. M.D.C. Amaratunga,
Commissioner General of Labour,
Department of Labour,
7th Floor, Labour Secretariat,
Colombo 05.

1A. R.P. Ananda Wimalaweera,
Commissioner General of Labour,
Department of Labour,
7th Floor, Labour Secretariat,
Colombo 05.

2. H.K.K.A. Jayasundara,
Commissioner of Labour
(Industrial Relations),
Department of Labour,

Industrial Relations Division,
7th Floor, Labour Secretariat,
Colombo 05.

2A. K.V. Manoj Priyanka,
Commissioner of Labour
(Industrial Relations),
Department of Labour,
Industrial Relations Division,
7th Floor, Labour Secretariat,
Colombo 05.

3. T. Piyasoma,
Arbitrator,
No.77, Pannipitiya Road,
Battaramulla.

4. Ceylon Federation of Trade
Unions,
No.513 – 2/1 Elvitigala Mawatha,
Colombo 05.

5. P.A.K. Gomes,
No.27, 3rd Lane,
Rawathawatte
Moratuwa.

6. N.S. Jayasooriya,
No.53/22, Sambuddhi Lane,
Athurugiriya Road, Kottawa,
Pannipitiya.

7. M.D.L. Dissanayake,
Akarangaha,
Badalgama.

8. M.V.R. Perera,
   No.552, Sinharamulla,
   Kelaniya.
9. S.U.W. Rodrigo,
   No. 143/4, Pethiyagoda,
   Gampaha.
10. G.I. Lalani Lokusuriya,
    Galthuduwa,
    Gonagalpura,
    Induruwa.
11. V.B.P.K. Weerasinghe,
    Commissioner of Labour,
    Department of Labour,
    7th Floor, Labour Secretariat,
    Colombo 05.
12. Hon. W.D. John Seneviratna,
    Minister of Labour and Trade
    Union Relations,
    Ministry of Labour and Trade
    Union Relations,
    2nd Floor, Labour Secretariat,
    Colombo 05.

    Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Kushan D'Alwis P.C., with Prasanna de Silva for the Petitioner.

R. Gooneratne, S.C., for the 1A, 2A, 11th and 12th Respondents.
Shyamal A. Collure with Prabath S. Amarasinghe for the 5th to 9th Respondents.

Argued on: 16.06.2020

Decided on: 03.07.2020

Mahinda Samayawardhena, J.

The Petitioner filed this application seeking to quash by a writ of certiorari the arbitral award of the 3rd Respondent Arbitrator marked P19. By the said award, the Arbitrator directed the Petitioner to pay a sum of Rs 683,040 each to the 5th, 7th, 8th, and 9th Respondents and Rs. 752,640 to the 6th Respondent on the ground that injustice had been caused to the said Respondent employees by their promotion to the post of Sampling Officer/Technical Assistant (Executive Grade V) instead of Scientific and Research Personnel (Executive Grade VI).

The 5th-9th Respondents had joined the Petitioner Institution as Technical Assistants (Grade III) and were subsequently promoted to Sampling Officer/Technical Assistant (Grade II) and then Sampling Officer/Technical Assistant (Grade I).

The Petitioner concedes in the petition that according to the 1986 salary and recruitment scheme, which was applicable at the time, the next available promotion for the said Respondents was Scientific and Research Personnel (Executive Grade VI).

However, the Petitioner in paragraph 26 of the petition states "*as 5th to 10th Respondents did not have the required educational qualifications of a Special Degree, or a General Degree with a class, or a General Degree with a Post Graduate qualification, the 5th to 10th Respondents were not eligible for the next available promotion for the 5th to 10th Respondents as a Scientific and Research Personnel (Grade VI)*". The Petitioner reiterates the same with equal force in paragraphs 46(j)-(l) and 47 of the petition.

According to the Petitioner, as the 5th-9th Respondents did not have the necessary qualifications to be promoted to the post of Scientific and Research Personnel (Executive Grade VI), a new category was introduced by a scheme of internal promotion and recruitment in 1997, and it was on this basis the said Respondents were promoted as Sampling Officer/Technical Assistant (Executive Grade V). The 5th-9th Respondents state the said new post was not approved by the line Ministry and the Department of Management Services, and therefore had no legal validity.

The said Respondents in their statement of objections point out the statement contained in paragraph 26 of the petition quoted above is suppression or misrepresentation of material facts, in that, according to the 1986 salary and recruitment scheme, the requirements for the post of Scientific and Research Personnel (Executive Grade VI) were: (i) a Special Degree, or (ii) a General Degree with a Class, or (iii) a General Degree with a post graduate qualification, or (iv) equivalent qualification approved by the Ministry. The said Respondents further state three years'

relevant experience as Technical Assistants was considered equivalent to the National Diploma in Technology (NDT) for internal candidates with G.C.E. Advanced Level qualifications.

In the said paragraph 26 of the petition, the Petitioner has deliberately omitted (iv) above (i.e. equivalent qualification approved by the Ministry), as a qualification for promotion to the post of Scientific and Research Personnel (Executive Grade VI). The Respondents say this qualification could have been used to promote them to the said post.

By paragraph 9(b) of the counter objections, the Petitioner effectively accepts the allegation of suppression of material facts by stating:

> *The qualification for Scientific and Research personnel (Executive – Grade VI) as set out in the New Salaries and Schemes of Recruitment – 1986 were as follows:*
>
> *i. BSC Special Degree; or*
> *ii. BSC General Degree with class; or*
> *iii. BSC General plus post graduate qualification; or*
> *iv. Equivalent qualification approved by the Ministry*

In paragraph 9(c) the Petitioner states "*The equivalent qualification mentioned in (iv) above was the National Diploma in Technology (NDT) or similar qualification. Since the inception of the Institution it has not been considered that (03) three years of relevant experience of internal candidates as Technical Assistants (3 years in Grade III) is equivalent to NDT*."

In the first place, the Petitioner does not specify or explain what is meant by "similar qualification" referred to in 9(c) of the counter objections quoted above. In my view, the Petitioner is duty bound to explain this to the Court.

Secondly, learned Counsel for the Respondents, in the written submission, states the relevant scheme (at page 374 of X) demonstrates three-years' experience in Grade III is equivalent to NDT in the case of G.C.E. Advanced Level qualified employees such as the 5th-9th Respondents.

I am of the view "equivalent qualification approved by the Ministry" stated in (iv) above, which was omitted in the petition, is a material fact at the root of the matter.

I am in full agreement with the submission of learned Counsel for the Respondents that the said failure or omission is a grave suppression of material fact which the Petitioner ought to have disclosed when the Petitioner initially presented facts to this Court to have notice issued on the Respondents.

Further, the said Respondents, in paragraph 21(a) of the statement of objections, supported by the document marked R, make an additional revelation that the posts of Scientific and Research Personnel Grades VI and V were amalgamated to form a new Grade IV, by an amendment to the 1986 salary and recruitment scheme in 1989, long before the instant dispute was referred for arbitration. It is the position of the said Respondents in the written submission that the said Respondents were eligible to be appointed to the newly formed Grade IV position, as they had the requisite "equivalent

training". The said Respondents state the Petitioner also suppressed the said amalgamation in the petition.

The Petitioner in paragraph 21 of the counter objections states:

(a) *Scientific and Research Personnel Grades VI and V were amalgamated according to the new consolidated salary scheme along with the recommendation of the salaries and Cadres Committee as per their Report No.72 A dated 29/05/1989. This new Grade IV is applicable only to the Scientific and Research Personnel who were having the following qualifications.*

   (i) BSC Special Degree; or
   (ii) BSC General Degree with class; or
   (iii) BSC General plus post graduate qualification; or
   (iv) Equivalent qualification approved by the Ministry with 4 years experience after first degree plus Post graduate degree or equivalent training.

(b) *The 5th to 8th Respondents did not have the above-mentioned qualifications at that time nor does the 5th to 8th Respondents have the said qualifications even now.*

(c) *The 5th to 8th Respondents were not promoted as Scientific & Research Personnel (Executive Grade IV) because they did not have the required qualifications for the same.*

The position of the Petitioner is the new Grade IV position is applicable only to Scientific and Research Personnel having the qualifications mentioned in (a) above, and therefore it is irrelevant to the Respondents.

In my view, the Petitioner ought to have disclosed the said fact in the petition, as according to (a)(iv) above a candidate having equivalent qualifications approved by the Ministry *with* either four-years' experience after the first degree plus a postgraduate degree *or* equivalent training is eligible to apply. It appears to me "equivalent qualifications" with "equivalent training" would have arguably qualified the said Respondents for the new Grade IV. It may be recalled the position of the 5th-9th Respondents is they were eligible for promotion to Scientific and Research Personnel Grade VI due to their experience in the post of Sampling Officer/Technical Assistant (Grade I).

Writ is a discretionary remedy. The Applicant invoking the extraordinary jurisdiction of this Court by way of writ is duty bound to disclose all material facts when he first makes his application to Court. He shall act with *uberrima fides* – utmost good faith – making full declaration of all material facts. Suppression or misrepresentation of material facts entitles the Court to dismiss the writ application *in limine* without going into its merits. Once the omitted facts are disclosed by the Respondent, the Applicant cannot be heard to say he was unaware of the importance of those facts at the time of filing the application.

Discussing the discretion of the writ Court to withhold relief, Wade in *Administrative Law* (11th Edition) states at 598 "*An applicant may lose his claim to relief because his own conduct has been unmeritorious or unreasonable.*"

Similarly, Sunil Cooray in *Administrative Law in Sri Lanka* (3rd Edition) at 973 recognises *inter alia* suppression/ misrepresentation of material fact as a ground for the Court to exercise its discretion in refusing relief by way of writ.

In the landmark case of *Alponso Appuhamy v. Hettiarachchi (1973) 77 NLR 131*, the Supreme Court, having considered English authorities on this point in great detail, held:

> *When an application for a prerogative writ or an injunction is made, it is the duty of the Petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the Petitioner must act with uberrima fides.*

The Supreme Court again stressed the importance of full disclosure at the inception of a writ application in the case of *Moosajees Ltd. v. Eksath Engineru Saha Samanya Kamkaru Samithiya (1976) 79 NLR 285*. Holding against the Petitioner in the said case, the Court stated at 287-288:

> *The pleadings in their petition and affidavit do not contain a full disclosure of the real facts of the case and to say the least the petitioner has not observed the utmost good faith and has been guilty of a lack of uberrima fides by a suppression of material facts in the pleadings. It was neither fair by this Court nor by his counsel that there was no full disclosure of material facts.*

In *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els [1997] 1 Sri LR 360*, this Court adopted the reasoning of the Supreme Court

decisions above in their entirety to dismiss the application for certiorari *in limine*.

> *When a party is seeking discretionary relief from court upon an application for a writ of certiorari, he enters into a contractual obligation with the court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to Court. The Petitioner company has been remiss in its duty/obligation to court and has failed to comply with that contractual obligation to court.*

In *Mowbray Hotels Ltd. V. D.M. Jayaratne [2004] BLR 51*, this Court disallowed the application for certiorari against an order of the Minister of Agriculture and Lands, made under the Land Acquisition Act, citing *inter alia* misrepresentations in the petition, and stating at 59 "*The Petitioner has violated this solemn contract of utmost good faith, which by itself attracts the sanction of refusal of discretionary relief*."

In the more recent case of *Fernando v. Commissioner General of Labour [2009] BLR 74*, this Court despite overruling a preliminary objection of suppression of material fact, nevertheless reiterated its position on this important point of law at 79-80:

> *It is trite law that any person or persons seeking to invoke the discretionary powers of this Court whether by way of a writ application or an application in revision, must come to Court with clean hands. Among other things, this would*

> *mean that such person or persons must not suppress or misrepresent material facts and thereby violate the duty of utmost good faith or ubberimae fides owed to Court.*

In the Supreme Court case of *Namunukula Plantations Limited v. Minister of Lands [2012] 1 Sri LR 365* at 376 it was held:

> *It is settled law that a person who approaches the Court for grant of discretionary relief, to which category an application for certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberrima fides) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence.*

The Supreme Court at page 374 further remarked:

> *If any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.*

In *Sarath Hulangamuwa v. Siriwardena, Principal, Visakha Vidyalaya [1986] 1 Sri LR 275*, *Fonseka v. Lt. General Jagath Jayasuriya [2011] 2 Sri LR 372*, *Abee Kuhafa v. The Director*

General of Customs [2011] 2 BLR 459 the superior Courts reached similar conclusions.

I take the view this application of the Petitioner shall be dismissed *in limine* on suppression of material facts.

Before I part with this Judgment let me also add the following. The impugned decision was made by the Arbitrator upon the Minister referring the dispute to be settled by arbitration, under section 4 of the Industrial Disputes Act. Once so referred, the Arbitrator in terms of section 17(1) of the said Act is expected to make a just and equitable order. Upon conclusion of the arbitral hearing, the Arbitrator can exercise his discretion in making an award. The Arbitrator is not bound by the rigid rules of law. For instance, section 36(4) of the Industrial Disputes Act expressly excludes from arbitral proceedings the applicability of the Evidence Ordinance, which governs important aspects such as onus of proof, standard of proof, and relevancy. To put it differently, the Arbitrator may be sensitive to the spirit of the law but not the letter of the law.

Section 17(1) of the Industrial Disputes Act reads as follows:

> *When an industrial dispute has been referred under section 3(1)(d) or section 4(1) to an Arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable. A labour tribunal shall give priority to the proceedings for*

> *the settlement of any industrial dispute that is referred to it for settlement by arbitration.*

In *United Engineering Workers Union v. Devanayagam (1967) 69 NLR 289*, the Privy Council stated:

> *The powers and duties of an Arbitrator under the Industrial Disputes Act, of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are the same. In relation to an arbitration, the Arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the Arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair.*

In *Asian Hotels and Properties PLC v. Benjamin [2013] 1 Sri LR 407* at 419, Bandaranayake C.J. whilst referring to section 17(1) of the Industrial Disputes Act stated:

> *An Arbitrator, who has been empowered to make such award should do so, as may appear to him just and equitable. Section 17 of the Industrial Disputes Act, referred to earlier, clearly had granted an unfettered discretion for the Arbitrator to mete out just and equitable relief.*

In *Brown & Company PLC v. Minister of Labour [2011] 1 Sri LR 305* at 316-317, Marsoof J. held:

Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make an award which is "just and equitable". When an industrial dispute has been referred under Section 3(1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable". In my view, the word "make" as used in the said provision, has the effect of throwing the ball in to the Arbitrator's court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon "to hold an inquiry", where the ball would be in the court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the Arbitrator to be just a judge presiding over the inquiry, the control and progress of which will be in the hands of the parties themselves or their Counsel. What the Industrial Disputes Act has done appears to me to be to substitute in place of the rigid procedures of the law envisaged by the "adversarial system", a new and more flexible procedure, which is in keeping with the fashion in which equity in English law gave relief to the litigants from the rigidity of the common law. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the

> *opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. His role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. Just as much as the procedure before the Arbitrator is not governed by the rigid provisions of the Evidence Ordinance, the procedure followed by him need not be fettered by the rigidity of the law.*

In *Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training [1998] 1 Sri LR 235* at 249, F.N.D. Jayasuriya J. also came to the same conclusion.

However, I must hasten to add the Arbitrator's discretion, similar to the discretion exercisable by all public bodies, is not unfettered. It is subject to time-tested principles and of course judicial review.

The instant impugned award of the Arbitrator is in my view innocent – a one-off payment to the 5th-9th Respondents for the injustice caused to them by denying them their due promotions. It is clear from the arbitral proceedings there had not been a proper scheme of promotion in place at the Petitioner Institution; this is admitted in the testimony of the Petitioner's Assistant Deputy Director (Administration). The employees shall not be made to suffer for this deficiency. Taking everything cumulatively, the Arbitrator's award is neither unreasonable nor perverse.

I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal