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 Mandamus.

CA (Writ) Application No: 363/2016

1. Ceylon Bank Employees Union,
   No. 20, Temple Road,
   Colombo 10.

2. Prabhath Akalanka Abeysooriya,
   No. 554/11/1, Madatiyagahawatte,
   Gonahena, Kadawatha.

3. Buddhika Prasanna Gamhewa,
   No. 42/6A, Luwisawaththa,
   Yakkala.

4. Lasitha Sanjaya Gunasekara,
   No. 35A, Piyarathanarama Road,
   Dehiwela.

PETITIONERS

Vs.

1. M.D.C. Amarathunga,
   Commissioner General of Labour.

1A. R.P.A. Wimalaweera,
   Commissioner General of Labour,
   Department of Labour, Colombo 5.

2. Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

RESPONDENTS

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

Counsel: Uditha Egalahewa, P.C., with Amaranath Fernando for the Petitioners

Ms. Indumini Randeny, State Counsel for the 1st Respondent

Romesh De Silva, P.C., with Shanaka Cooray for the 2nd Respondent

Argued on: 11th June 2020

Written Submissions: Tendered on behalf of the Petitioners on 26th May 2020.

Tendered on behalf of the 1st Respondent on 27th May 2020.

Tendered on behalf of the 2nd Respondent on 1st June 2020.

Decided on: 20th July 2020

Arjuna Obeyesekere, J

The 1st Petitioner is a Trade Union duly registered in terms of the Trade Union Ordinance No. 14 of 1935. The 2nd – 4th Petitioners are members of the 1st Petitioner, and are employees of the 2nd Respondent, Hatton National Bank.

The Petitioners state that the 1st Petitioner has entered into several Collective Agreements with the 2nd Respondent over the years, containing *inter alia* the agreement reached between them on the terms and conditions of employment of the members of the 1st Petitioner.[1] The Petitioners have annexed to the petition the Collective Agreement dated 13th November 2009 relating to Junior Executives, the Collective Agreement dated 11th November 2015 relating to Clerical and Allied Grades and Support Staff, and the previous Collective Agreement dated 13th November 2009 relating to Clerical and Allied Grades and Support Staff, marked '**P3**', '**P4**' and '**P5**', respectively.

The effect of a Collective Agreement is set out in Section 8 (1) of the Industrial Disputes Act No. 43 of 1950, as amended (the Act) which reads as follows:

> "*Every collective agreement which is for the time being in force shall, for the purposes of this Act,* ***be binding on the parties****, trade unions, employers and workmen referred to in that agreement in accordance with the provisions of Section 5(2); and the terms of the agreement shall be implied terms in the contract of employment between the employers and workmen bound by the agreement*."

It is agreed between the parties that the Disciplinary Procedure set out in each of the said agreements is similar. The Disciplinary Procedure that should be followed by the 2nd Respondent against an employee to whom the said Collective Agreements would apply, can be summarised as follows:

[1] Section 5(1) of the Industrial Disputes Act reads as follows:
"In this Act, "collective agreement" means an agreement –
(a) which is between –
(i) any employer or employers, and
(ii) any workmen or any trade union or trade unions consisting of workmen, and
(b) which relates to the terms and conditions of employment of any workman, or to the privileges, rights or duties of any employer or employers or any workmen or any trade union or trade unions consisting of workmen, or to the manner of settlement of any industrial dispute."

a) Where the 2nd Respondent proposes to take disciplinary action against an employee, it shall in the first instance issue such employee with a show cause letter setting out the particulars of the charges leveled against such employee.

b) Within ten calendar days after the date of the show cause letter, the employee shall tender in writing to the 2nd Respondent his explanation to the said charges. The employee has the option to seek an extension of time, which shall normally be granted by the 2nd Respondent.

c) If the employee tenders his explanation within the time period specified, and the 2nd Respondent is satisfied with such explanation, the charges shall be withdrawn.

d) Where the 2nd Respondent is not satisfied with the explanation, it shall hold an inquiry against such employee.

e) The 2nd Respondent shall commence such inquiry within 21 working days from the date of receipt of the written explanation to the show cause letter, **unless** it is not possible to do so for reasons beyond the control of the 2nd Respondent, or by reason of the employee's own conduct or seeking, or by reason of unforeseeable circumstances.

The 2nd Respondent had issued the 2nd – 4th Petitioners with letters dated 12th August 2015, marked '**P6a**' – '**P6c**', alleging that they had posted on *Facebook* comments detrimental to the 2nd Respondent. The 2nd – 4th Petitioners were required to submit their explanation on or before 26th August 2015. Having sought an extension of seven days to do so, the 2nd – 4th Petitioners had submitted their response by letters dated 1st September 2015. The 2nd

Respondent had thereafter scheduled the disciplinary inquiry against the Petitioners for 27th November 2015.

By letters dated 24th November 2015 and 26th November 2015,[2] the Petitioners had informed the 2nd Respondent that the disciplinary inquiry ought to have commenced within 21 days of the receipt of the response to the show cause letter, and as the 2nd Respondent has not done so, proceeding with a disciplinary inquiry is a clear violation of the said Collective Agreements. The 2nd – 4th Petitioners had stated that for that reason, they would not be participating at the inquiry scheduled for 27th November 2015. Even though the inquiry had proceeded in the absence of the 2nd – 4th Petitioners, it had been adjourned until an opinion was obtained from the Department of Labour on the above issue. Although no such opinion had been sought by the 2nd Respondent, the inquiry had recommenced on 29th September 2016 without the participation of the 2nd – 4th Petitioners.

By a letter dated 26th September 2016 marked '**P19**', the above matters had been brought to the attention of the 1st Respondent by the 1st Petitioner, where an allegation was made that by proceeding with a disciplinary inquiry which did not commence within the stipulated 21 day period, the 2nd Respondent had violated the provisions of the said Collective Agreements. A further letter dated 7th October 2016, marked '**P21**', had been sent to the 1st Respondent by the Attorney-at-Law of the 1st Petitioner. By '**P19**' and '**P21**', the Petitioners had moved that the 1st Respondent initiate action against the 2nd Respondent in terms of Section 40(1)(a) of the Act read with Sections 43(1) and 44 the Act.

[2] Vide 'P10' and 'P11a' – 'P11c'.

Section 40(1)(a) of the Act stipulates as follows:

> "*Any person who being bound by a collective agreement or by a settlement under this Act or by an award of an arbitrator or an industrial court, does any act or aids, abets or incites the commission of any act in contravention of, or fails to comply with, any of the terms or conditions of that agreement, settlement or award, shall be guilty of an offence under this Act.*"

Section 43 (1) reads as follows:

> "*Without prejudice to the provisions of subsection (5) every person who commits any offence under this Act, other than an offence under section 40 (1) (ss), shall be liable on conviction after summary trial before a Magistrate to a fine not exceeding five hundred rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment.*"

Section 44 provides that, "*No prosecution for an offence under this Act shall be instituted except by or with the written sanction of the Commissioner.*"

The learned President's Counsel for the Petitioners submitted that in terms of Section 40(1)(a) of the Act, the breach of any provision of a collective agreement is an offence, and that in terms of Section 43(1) read with Section 44 of the Act, the 1st Respondent is legally obliged to prosecute any person who commits an offence contemplated by the Act. This was the basis on which the 1st Petitioner had demanded that the 1st Respondent institute legal proceedings against the 2nd Respondent.

Dissatisfied by the failure on the part of the 1st Respondent to take steps in terms of the above provisions of the Act, the Petitioners filed this application on 24th October 2016, seeking '*a Writ of Mandamus directing the 1st Respondent to act in terms of Section 40(1)(a) read with Sections 43 and 44 of the Industrial Disputes Act* ***considering*** *the 2nd Respondent has acted illegally and unlawfully by conducting a disciplinary inquiry against the 2nd – 4th Petitioners contrary to the Collective Agreements marked '**P3**', '**P4**' and '**P5**'.*'

The conditions that must be satisfied for a Writ of Mandamus to issue have been clearly set out by the Supreme Court and this Court. The Supreme Court in **Ratnayake and Others vs C.D.Perera and others**[3] held as follows:

> "*The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command issued by the superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties."*

The above position has been reiterated in **Jayawardena vs. People's Bank**[4] where it was held as follows:

> "*Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must*

[3] (1982) 2 Sri LR 451.
[4] [2002] 3 Sri LR 17.

necessarily be a situation where there is a public duty. In the absence of a public duty an intrusion by this Court by way of mandamus into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ."

In **Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd**[5] J.A.N. De Silva J. (as he was then) held as follows:

"*There is rich and profuse case law on mandamus on the conditions to be satisfied by the applicant. Some of the conditions precedent to the issue of mandamus appear to be*:

(a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought (R. v Barnstaple Justices. The foundation of mandamus is the existence of a legal right (Napier Ex parte).

(b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.

(c) The legal right to compel must reside in the Applicant himself (R. v Lewisham Union)

(d) The application must be made in good faith and not for an indirect purpose.

(e) The application must be preceded by a distinct demand for the performance of the duty.

[5] [2005] 1 Sri. L.R. 89 at 93.

(f) The person or body to whom the writ is directed must be subject to the jurisdiction of the Court issuing the writ.

(g) The Court will as a general rule and in the exercise of its discretion refuse writ of Mandamus when there is another special remedy available which is not less convenient, beneficial and effective.

(h) The conduct of the Applicant may disentitle him to the remedy.

(i) It would not be issued if the writ would be futile in its result.

(j) Writ will not be issued where the Respondent has no power to perform the act sought to be mandated."

In **Rajeswari Nadaraja v. M. Najeeb Abdul Majeed, Minister of Indistries and Commerce and Others**[6] Aluwihare, J has held that, "*In an application for a writ of mandamus, the first matter to be settled is whether or not the officer or authority in question has in law and in fact the power which he or she refused to exercise. As a question of law, it is one of interpreting the empowering statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists*."

The question that this Court must therefore determine in this application is twofold. The first is, given the factual circumstances of this case, whether the 1st Respondent has the power to take steps in terms of Section 43(1) at this stage. The second is, if so, whether the 1st Respondent owes a legal duty to the Petitioners to act in terms of Section 40(1)(a) read together with Sections 43 and 44 of the Act.

[6] SC Appeal No. 177/15; SC Minutes of 31st August 2018.

I shall now consider whether the 1st Respondent has the power to institute action against the 2nd Respondent.

As stated above, the position of the Petitioners is that by proceeding with a disciplinary inquiry which did not commence within the stipulated 21 day period, the 2nd Respondent had violated the provisions of the said Collective Agreements.

The learned President's Counsel for the 2nd Respondent submitted that it is not mandatory that the disciplinary inquiry commence within 21 days of the receipt of the response to the show cause letter. This submission was on the premise that no sanctions follow the failure to commence the inquiry as scheduled, and thus, the said provision is not a mandatory provision. It was also submitted that in any event, the failure to commence the inquiry falls within the exceptions provided in the Collective Agreements, namely that it was not possible to commence the inquiry for reasons beyond the control of the 2nd Respondent, or by reason of the employee's own conduct or seeking, or by reason of unforeseeable circumstances. I am of the view that it is not for this Court to decide in an application filed in terms of Article 140 of the Constitution, whether the said provision in the Collective Agreements is mandatory or not, as it arises from an agreement between two private parties.

There are two sections in the Act which sets out the power of the 1st Respondent to take steps in terms of the law, where there exists a dispute relating to the terms of employment of the 2nd – 4th Petitioners contained in the said Collective Agreements.

The first is Section 3(1) of the Act, which reads as follows:

> *"Where the Commissioner is satisfied that an industrial dispute exists in any industry or where he apprehends an industrial dispute in any industry, he may:-*
>
> *(a)* ***if arrangements for the settlement of disputes in that industry have been made in pursuance of any agreement*** *between organizations representative respectively of employers and workmen engaged in that industry,* ***cause the industrial dispute to be referred for settlement by means of such arrangements****, or*
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> *(b) endeavour to settle the industrial dispute by conciliation, or*
>
> *(c) refer the industrial dispute to an authorized officer for settlement by conciliation, or*
>
> *(d) if the parties to the industrial dispute or their representative consent, refer that dispute, by an order in writing, for settlement by arbitration to an arbitrator nominated jointly by such parties or representatives, or in the absence of such nomination, to an arbitrator or body of arbitrators appointed by the Commissioner or to a labour tribunal."*[7]

The second is Section 10A which reads as follows:

> *"If any question arises as* ***to the interpretation of any collective agreement****, any party to such agreement may, in the absence of any*

[7] Section 48 of the Act has defined 'industrial dispute' to mean, "any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purpose of this definition "workmen" includes a trade union consisting of workmen".

provision in that agreement as to who should interpret such question, refer such question for decision to the Commissioner and the Commissioner shall decide such question."

The submission of the learned State Counsel and the learned President's Counsel for the 2nd Respondent, which revolved around the above provisions, was that in terms of Clause 33(ii) of '**P4**',[8] '*any dispute over the interpretation of the Agreement shall be settled by voluntary arbitration under Section 3 of the Industrial Disputes Act 1950*', and that the Petitioners should in the first instance refer any dispute relating to the mandatory nature of the disputed provision for resolution by arbitration, and, once an award has been made, to make an application to the 1st Respondent to take steps in terms of Section 43 on the basis that an offence in terms of Section 40(1)(a) has been made out.

It is not in dispute that the Petitioners have not invoked the dispute resolution mechanism provided for in '**P3**', '**P4**' and '**P5**'. However, no explanation has been given to this Court by the Petitioners for the failure to invoke the said mechanism contained in the said Collective Agreements.

I am of the view that Section 10A of the Act makes it clear that a question as to the interpretation of a collective agreement may be determined by the 1st Respondent only *in the absence of any provision in that agreement as to who should interpret such question.* In such a situation, the 1st Respondent may determine any question either by an inquiry conducted by the Department of Labour, or by resorting to the provisions of Section 3 of the Act and referring the said dispute for resolution by arbitration. However, where the collective agreement contains a provision as to who should interpret any dispute over the interpretation of such collective agreement, as in '**P3**', '**P4**' and '**P5**', the 1st

[8] Vide Clause 24(b) of 'P3' and Clause 32(ii) of 'P5'.

Respondent cannot conduct an inquiry into such dispute, but may nonetheless refer the said dispute for arbitration in terms of Section 3 of the Act, which is the mechanism agreed between the 1st Petitioner and the 2nd Respondent for the settlement of any dispute relating to the interpretation of the said Collective Agreements '**P3**', '**P4**' and '**P5**'.

The Petitioners have demanded the 1st Respondent to institute legal proceedings against the 2nd Respondent, and have subsequently filed this application seeking the aforementioned Writ of Mandamus, on the basis that there has been a failure on the part of the 2nd Respondent to comply with the provisions of the Collective Agreements marked '**P3**', '**P4**' and '**P5**'. Thus, any power that the 1st Respondent has to institute action against the 2nd Respondent would flow from the establishment of an offence under Section 40(1)(a), or in other words, only where it has been established that the 2nd Respondent has failed to comply with the terms and conditions of '**P3**', '**P4**' and '**P5**'.

It is in fact clear that the Petitioners were alive to the fact that the dispute must be first adjudicated, and that it is only thereafter that the 1st Respondent can act in terms of the law. The learned President's Counsel for the 2nd Respondent drew the attention of this Court to the manner in which the relief has been prayed, which is for "*a Writ of Mandamus directing the 1st Respondent to act in terms of Section 40(1)(a) read with Sections 43 and 44 of the Industrial Disputes Act* ***considering*** *the 2nd Respondent has acted illegally and unlawfully by conducting a disciplinary inquiry against the 2nd – 4th Petitioners contrary to the Collective Agreements marked '**P3**', '**P4**' and '**P5**'*."

The wording in the prayer is an acknowledgement on the part of the Petitioners that a finding must initially be made on the critical issue of whether there has been a breach of the provisions of the Collective Agreements, and that it is only if there is such a decision against the 2nd Respondent, that the next step of prosecuting the 2nd Respondent for breaching the provisions of the Collective Agreement can be resorted to.

Applying the proposition laid down by the Supreme Court in **Rajeswari Nadaraja v. M. Najeeb Abdul Majeed, Minister of Industry and Commerce and Others,**[9] to the facts of this application, I am of the view that:

(a) The 1st Respondent does not have the power to determine the dispute that has arisen between the Petitioners and the 2nd Respondent;

(b) The power to institute action shall only arise once the factual situation has been determined through the mechanism adopted by the parties and stipulated in the Collective Agreements. Until that occurs, the 1st Respondent owes no legal duty to the Petitioners to institute action in terms of Section 43(1) of the Act for an offence set out in Section 40(1)(a).

There are three other matters that I must advert to, for the sake of completeness.

The first is to the plaint in Case No. DSP/84/2016 filed by the 1st Petitioner against the 2nd Respondent, marked '**P22**'. The crux of the said action is the failure of the 2nd Respondent to commence the disciplinary inquiry within the 21 day period from the receipt of the response to the show cause letter.[10] The

[9] Supra.
[10] Vide paragraphs 20 and 21 of 'P22'.

relief claimed by the 1st Petitioner *inter alia* is for a declaration that by such failure, the 2nd Respondent has breached the said Collective Agreements.[11] In addition to the aforementioned action, the 1st Petitioner has also filed Case No. DSP/145/2015 in the District Court of Colombo. I have examined the plaint filed in that case on 22nd October 2015, marked '**Z1a**' and observe that even though the complaint relates to the incident that led to the issuance of the charge sheet, and does not relate to the alleged failure on the part of the 2nd Respondent to commence the disciplinary inquiry within 21 days, the relief sought is a declaration that disciplinary proceedings could not have commenced given the factual circumstances. Thus, the factual situation that must be established for the 1st Respondent to act in terms of Section 43(1) is presently the subject matter of two cases instituted by the Petitioners, and further confirms the view expressed by me that the Petitioners were fully aware that a finding must initially be made on the critical issue of whether there has been a breach of the provisions of the Collective Agreements.

The second matter that I wish to advert to is the submission of the learned State Counsel that in any event, there has not been a refusal on the part of the 1st Respondent to act. The learned State Counsel submitted that the Department of Labour is in receipt of '**P19**', and that the Department of Labour "*was taking the necessary step as per the usual course/procedure in such cases in terms of the relevant provisions of the Industrial Disputes Act"* at the time this application was filed. It is on this basis that the learned State Counsel submitted that the 1st Respondent has not declined to take steps in terms of the Act, but has stayed his hand after this application was filed, as the issue was *sub judice*. It was therefore her submission that in the absence of a refusal, the application for a Writ of Mandamus is not only premature, but that a Writ of Mandamus would not lie.

[11] Vide paragraphs (a), (c) and (f) of the prayer in 'P22'.

I am in agreement with the submission of the learned State Counsel that in any event, the 1st Respondent required time to consider the steps that should be taken, especially given the fact that that this application has been filed less than thirty days after writing '**P19**', and less than eighteen days after '**P21**', and that in these circumstances, there has not been a refusal by the 1st Respondent to act in terms of the law.

On the question of refusal, the learned President's Counsel for the Petitioners has drawn the attention of this Court to the judgment of the Supreme Court in **Wijeyesekera and Company Limited vs The Principal Collector of Customs**[12] where the Principal Collector of Customs failed to inform the petitioner that the procedure adopted by Customs in clearing a previous consignment of the petitioner, which the petitioner claimed is contrary to the provisions of the Customs Ordinance, would not be repeated in respect of future shipments. This was in spite of the petitioner having sent the first letter n November 1950, and the final letter in the latter part of February 1951.

The Supreme Court held that the application for a writ of Mandamus compelling the Principal Collector of Customs to respond, would issue, given the fact that over a period of three months had lapsed since the initial letter and it was paramount that the petitioner had a reply since he was ready to effect his next shipment. The situation that has arisen in this application is different, in that the time period available to the 1st Respondent was grossly inadequate, and the issue required a proper consideration of the provisions of the Act and the Collective Agreements, unlike in **Wijeyesekera**.[13]

[12] 53 NLR 329.

[13] Supra; See Sunil F.A. Cooray, *Principles of Administrative Law in Sri Lanka* [4th Edition, 2020], Volume 2 page 980 where it has been said that, "On a complaint of an express or implied refusal to exercise power, the first matter to be settled is whether or not the officer or authority in question had, in law and in fact, the power which he or it has refused to exercise. As a question of law, it is one of interpreting the empowering (and

The final matter that I must advert to is the submission of the learned President's Counsel for the 2nd Respondent that the Petitioners have acted in bad faith in filing this application. As observed by the Supreme Court in **Namunukula Plantations Limited vs Minister of Lands and Others**,[14] "*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.*"

I have already observed that the Petitioners had a remedy provided in the Collective Agreements of referring the purported dispute for resolution by arbitration conducted in terms of the Industrial Disputes Act. No explanation has been given as to why recourse has not been made to the said remedy. It is an admitted fact that the jurisdiction of the District Court was invoked by '**P22**' on 15th July 2016, which is two months prior to writing to the 1st Respondent by '**P19**'. The Petitioners could very well have awaited the decision of the District Court, prior to seeking a legal remedy through the 1st Respondent. Thus, while it appears that the Petitioners have written '**P19**' to exert pressure on the 1st Respondent, such fact is apparent by the filing of this application barely thirty days later, without affording the 1st Respondent adequate time to submit his response. In the above circumstances, I am not satisfied that the Petitioners have filed this application in good faith and that this conduct of the Petitioners would disentitle the Petitioners to the relief prayed for.

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possibly, limiting) statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists."

[14] SC Appeal No. 46/2008; SC Minutes of 13th March 2012; per Saleem Marsoof, P.C./J.

Taking into consideration all of the above maters, I see no legal basis to grant the relief prayed for by the Petitioners. This application is accordingly dismissed.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal