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

In the matter of an application for the mandates in the nature of a Writs of Certiorari and Prohibition in terms of the article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Namunukula Plantations PLC
No. 310 High Level Road
Nawinna
Maharagama

Petitioner

CA (Writ) Application No. 776/2024

Vs

1. Commissioner General of Labour
   Department of Labour
   11th Floor
   "Mehewara Piyaasa" Building
   Colombo 5

2. I. C. Gamage
   Labour Officer
   Termination of Employment Unit
   Department of Labour
   Colombo 5

3. Happawana Vithanage Sujeeva
   No.23 Ranpokuna Village
   Welikala
   Pokunuwila

Respondents

Before: Dhammika Ganepola, J.

Damith Thotawatte, J.

Counsel: Suren Fernando with Shiloma David for the Petitioner
Dilantha Sampath, SC for the 1st and 2nd Respondents
S. H. A. Mohamed with Pramod Polpitiya for the 03rd Respondent

supported: 29-01-2025

Written submissions tendered on: 21-02-2025 By the 1st and 2nd Respondents
10-03-2025 By the Petitioner and 3rd Respondent

Order Delivered on: 30-04-2025

D. Thotawatte, J.

The petitioner Namunukula Plantations PLC, has filed this petition seeking a writ of Certiorari to quash the order and the decision contained therein of the first respondent Commissioner General of Labour dated 22nd October 2024 (annexed to this petition marked as P13) which was delivered at the conclusion of an inquiry instituted on the complaint of the 3rd Respondent claiming that the Petitioner had constructively terminated her employment.

The Petitioner has also prayed for a writ of Prohibition preventing Respondents taking any further steps to enforce the impugned order by which the Petitioner is directed to pay Rs. 2,462,100/- as compensation.

When this matter was supported on the 29-01-2025 the learned State Counsel appearing for the 1st and the 2nd Respondents took up a preliminary objection regarding the maintainability of this action on the ground that the petitioner has failed to comply with the threshold requirement of Section 10B of the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (hereinafter for the purposes of this order known as the TEW Act) as amended by Act No 23 of 2022.

Section 10 B (3) of the TEW Act state that when an application is made for an order in the nature of a writ, against an order of the Commissioner General of Labour, under the provisions of TEW Act, the Petitioner needs to support the application with a certificate from the Commissioner- General to the effect that the security as specified had been duly furnished.

In response to the aforementioned preliminary objection, the Petitioner, in its written submissions, has advanced three grounds contending that compliance with the provisions of the TEW Act is not required.

1. The Petitioner was not the employer of the 3rd Respondent at the time of the alleged termination and only the relevant provisions of the TEW Act are applicable to the employer.
2. The practical compliance with Section 10B (2), (3), and (4) of the TEW Act is not possible.
3. A constitutional right granted cannot be restricted by the legislature.

1. The Petitioner was not the employer of the 3rd Respondent

The above Argument is based on the circumstances under which the 3rd Respondent's employment came to an end. According to the petition, by 21st of September 2018 the 3rd Respondent was working for the Petitioner as an “Administrative Executive”. A letter dated 21-09-2021 (annexed marked as P6) signed by the General Manager of Richard Pieris & Co. PLC. had been issued to the 3rd Respondent stating that “they” are prepared to transfer the 3rd Respondent from the Petitioner company to RPC

Polymers (Pvt). Ltd. In response to letter P6, the 3rd Respondent has written to GM Richard Pieris & Co. PLC. (letter annexed as P7) requesting the transfer to be differed and allow her to remain with the Petitioner company, as she has never requested a transfer. Although the Petitioner has stated that they informed the 3rd Respondent that they are unable to accede to her request, there is no indication of a written response.

Although there is no indication that the 3rd Respondent withdrew her formal protest regarding the transfer, it is the contention of the Petitioner that the 3rd Respondent, by reporting to work at RPC Polymers (Pvt) Ltd on 02-10-2023 has accepted the transfer. However, from 05-10-2023 the 3rd Respondent failed to report to work at RPC Polymers (Pvt) Ltd without permission or leave. The GM Richard Pieris & Co. had written a letter dated 12-10-2023 (annexed marked P8) informing the 3rd Respondent to report to work or they will have to consider that she has voluntarily vacated her post.

Subsequent to the letter P8 the GM Richard Pieris & Co. had received a letter (annexed marked P9) from the 3rd Respondent stating that upon reporting to work at RPC Polymers (Pvt) Ltd as per letter dated 21-09-2023(P6) she found that the work she was assigned was totally unfamiliar to her and as such she considered by this transfer her services had been constructively terminated.

On 09-10-2023, the 3rd Respondent has submitted a complaint to the Department of Labour regarding the termination of her services.

With regards to the letter of transfer (P6) being written by GM Richard Pieris & Co., the Petitioner's explanation is that Namunukula Plantations PLC, which was initially Namunukula Plantations Ltd. was acquired by Richard Pieris & Co. PLC. in the year 2008 and brought under the umbrella of its group of companies. Further that RPC Polymers (Pvt) Ltd is also a company within said group of companies.

The Petitioner has not submitted any documents to substantiate the fact, that the above companies operate as a group or as a single administrative structure. However, that is not a relevant matter for the purposes of this application.

The Petitioners contend that, by reporting to work at RPC Polymers (Pvt) Ltd, the 3rd Respondent thereby accepted a transfer to a distinct separate legal entity, which ipso facto resulted in the formation of a new contract of employment. Consequently, the Petitioners assert that they ceased to be the employers of the 3rd Respondent from that point onwards.

The 3rd Respondent's only contract of employment is with Namunukula Plantations Ltd (annexed marked P2); thereafter, all letters with regards to the employment, including the transfer letter (P6) are done on behalf of Namunukula Plantations. There is no letter of offer or contract of employment with RPC Polymers (Pvt) Ltd.

The letter P6 mentions a transfer, not a termination of service. The letter further states that the designation and remuneration will remain the same and service at the Namunukula Plantations will be

considered for all purposes including gratuity. There is absolutely no mention of termination of services or re-employment.

If the Petitioner genuinely believes that the 3rd Respondent's act of reporting to the designated workplace, in compliance with the instructions, resulted in the termination of her employment with the Petitioner, it is apparent that the Petitioner should have been aware of this at the time of transferring the 3rd Respondent to RPC Polymers (Pvt) Ltd. Considering this fact, it appears highly likely that this transfer was orchestrated with the intention of effecting such termination. By refusing to reconsider the decision when requested to do so, the Petitioner effectively deprived the 3rd Respondent of any alternative but to adhere to the instructions given. In these circumstances, the Petitioner appears to have sought to circumvent the statutory safeguards against unlawful termination embodied in the TEW Act.

The Petitioner has consistently asserted that the 3rd Respondent's act of reporting to work at RPC Polymers (Pvt) Ltd constitutes acceptance of the transfer. However, even assuming, purely for the sake of argument, that this contention is correct, such acceptance would amount only to an acceptance of a transfer and not a termination of the 3rd Respondent's employment with the Petitioner.

In the circumstances and reasons given above, I consider Petitioner's argument that by reporting to work at RPC Polymers (Pvt) Ltd, the 3rd Respondent ceased to be Petitioner's employee unattainable.

Further, a review of the documents filed with the petition shows that this argument was not raised before the Commissioner General of Labour, either before or at the start of the inquiry. If the Petitioner had formally objected on the basis that it was not the employer, the Commissioner General of Labour would have been required to consider it. However, neither the petition nor the written submissions state that such an objection was made.

After fully participating in the Inquiry as the employer, I am of the view that the Petitioner is estopped from now taking up the position that he is not the employer.

On the above grounds, I reject the contention of the Petitioner that it is not the employer

2. The practical compliance with Section 10B (2), (3) and (4) of the TEW Act is not possible

Section 10B of the TEW Act

> 10B (1) Where an employer is dissatisfied with an order made by Commissioner-General under section 6 or 6A, such employer may make an application to the Court of Appeal

against such order for the issue of an order in the nature of a writ.

(2) Every employer who makes an application under subsection (1) for the issue of an order in the nature of a writ shall furnish to the Court of Appeal, a security in cash, where the order which is the subject of such application directs–

(a) both the payment of a sum of money as compensation and the reinstatement, of an amount of money, as salary or wages which is to be calculated from the date of such order to the date on which such workman shall be reinstated, and an amount of twelve times the monthly salary or wages of such workman for the reinstatement; and

(b) only the payment of a sum of money to the workman as compensation, of an amount equal to such sum.

(3) Every application for the issue of an order in the nature of a writ, made under subsection (1) shall be supported by a certificate under the hand of the Commissioner-General to the effect that the security as specified in subsection (2) has been duly furnished by such employer.

(4) The Commissioner-General shall cause to be deposited the sum as specified in subsection (2), in an account bearing interest, maintained by the Commissioner-General, in any approved bank in Sri Lanka.

(5) The Commissioner-General shall refund the sum furnished under subsection (2) together with the interest on such sum to the relevant party in terms of the final determination of the application to the Court of Appeal or the Supreme Court, as the case may be.

Petitioner argues that if they deposit the stipulated amount in the Court of Appeal as security in compliance with Section 10B (2) that it will not be possible for them to get a certificate from the Commissioner General of Labour. Further, if the money is deposited with the Court of Appeal, the Commissioner of Labour will not be able to deposit the said money in an account bearing interest or maintain such an account as directed by Section 10B (4).

In the event of ambiguity, meaning should be given to what appears to be the primary objective of the legislature in enacting Amendment No. 2 of 2022 to the TEW Act. In terms of Section 10B (2) of the TEW Act, an employer who seeks to invoke the discretionary writ jurisdiction of the Court of Appeal is required to furnish security in cash. The underlying legislative purpose of this requirement appears to be to safeguard against the institution of frivolous or vexatious applications which may unduly delay the reinstatement and reparations with regard to the employee. In the event the

employer is unsuccessful at the conclusion of the review, the sum of money originally granted to the employee will be secured regardless of the financial or legal states of the employer at that time. This requirement protects the rights of workmen who are considered to constitute the economically weaker party, and strikes an appropriate balance between the employer's right to seek judicial review and the necessity of preventing abuse of judicial process.

In the event of uncertainty, meaning should be given to what appears to be the primary objective of the legislature in enacting Amendment No. 23 of 2022 to the TEW Act. There is no Impediment for the money to be deposited with the Commissioner General of Labour so that the sum specified could be deposited in an account bearing interest to be maintained by him (the Commissioner-General) in any approved bank in Sri Lanka. Further, in order to comply with Section 10B, the above procedure appears to have been followed since this section became operational, whenever an application for judicial review is made under the TEW Act.

On the above grounds, I reject the contention of the Petitioner that the compliance with Section 10 B (2), (3), and (4) of the TEW Act is not possible.

3. The Legislature cannot restrict a right granted by the Constitution

In 2022, together with the TEW Act Amendment No. 23 of 2022, an amendment was brought to the Industrial Disputes Act 43 of 1950 as Industrial Disputes (Amendment) Act, No. 22 of 2022. The new section 31DDDDD introduced to the Industrial Disputes Act appears similar to Section 10 B of the TEW Act. In the written submission tendered on behalf of the Petitioner, it is contended that these sections are not identical based on the wording; however, when considering the intended purpose, the core rationale of both amendments are identical. Both amendments share a common legislative purpose, which is to safeguard employee rights by deterring bad faith litigation by employers and ensuring that financial guarantees are provided before delaying the implementation of decisions in favor of workmen, whilst still preserving the employer's right to seek judicial recourse.

Under the above-ground Judicial pronouncements regarding the requirement to furnish security prior to applying for judicial review under Section 31DDDDD of the Industrial Disputes (Amendment) Act, No. 22 of 2022, is applicable regarding the furnishing of security under the TEW Act amendment No. 23 of 2022.

The decision of the Court of Appeal in Lanka Electricity Company (Private) Limited v. B.K. Prabhath Chandrakeerthi and others[1] provides authoritative guidance on the jurisdictional precondition imposed by Section 31DDDDD of the Industrial Disputes Act (as amended by Act No. 22 of 2022), which mandates the deposit of a security and a certificate for maintainability of writ applications by employers against arbitral or industrial court awards.

His Lordship Mayadunne Corea J has stated:

> By the new amendment, the Legislature has created pre-conditions the Petitioner has to

[1] CA/Writ/120/2024, decided on 20.12.2024

comply with. The wording in the said pre-condition reads as "*the Court of Appeal* ***shall entertain".*** Hence, as per the new amendment, for the Court of Appeal to entertain an Application, the Petitioner has to follow the said conditions stipulated in the Amendment Act, No. 22 of 2022.

In summary, by the new Amendment, the Legislature has imposed the conditions to deposit the security and for the Petition to accompany the certificate under the hand of the Labour Commissioner to enable his Application to be entertained by the Court of Appeal pursuant to the Section. It is the view of this Court that the Petitioner has to make the deposit of security before he files the Writ Application.

Termination of Employment of Workmen (Special Provisions) Act No 23 of 2022 Section 10B (3) also reads as "Every application for the issue of an order in the nature of a writ, made under subsection (1) shall be supported by a certificate under the hand of the Commissioner-General". Hence, it is clear that, for the Court of Appeal to entertain an application, it is mandatory for the Petitioner to follow this said conditions and further it should be done at the time of filing or at least before the application is supported.

In Duro Pipe Industrial (Pvt) Ltd vs Hettige Pradeep Silva[2] Cited in *Lanka Electricity Company*[3] his Lordship Justice Samayawardana has stated;

> "If the appeal, application for revision or writ is not accompanied by a certificate issued under the hand of the president of the Labour Tribunal confirming that the appellant or applicant as the case may be has furnished the required security as stated in section 3 1 D (8), the high court shall reject the appeal or application.
>
> Play virtue of section 1A and 1B of section 31DD and section 31DDDDD of the Industrial Disputes Act, introduce by Act number 22 of 2022 the attachment of such a certificate obtained from the Labor Tribunal is mandatory when the employer invokes the jurisdiction of the Supreme Court and the Court of Appeal as well".

Considering the alignment in legislative intent as previously mentioned, it is clear that Section 31DDDDD of the Industrial Disputes Act and Section 10 B of the TEW Act create an identical statutory threshold for identical reasons. Rationale in *Duro Pipe* and *Lanka Electricity* is equally applicable with regard to furnishing of Security under Section 10 B of the TEW Act.

As the principle of depositing or furnishing the sum equal to the reinstatement linked payments or compensation is accepted by the courts it can be termed as settled law. As such, in this particular

[2] SC/APPEAL/111/2022 decided on 02-12-2024
[3] Note 1, ***supra***.

instant I do not see any merit in the Petitioner's argument that the legislature cannot restrict a right given by the Constitution.

For the above stated reasons, this Court is inclined to uphold the objections of the Respondents. In my view, the Petitioners have failed to comply with a mandatory precondition that should be complied with before the court is able to consider this application. As such, this Court is not inclined to issue formal notice on the Respondents.

Application is dismissed.

JUDGE OF THE COURT OF APPEAL

Dhammika Ganepola, J.

I agree.

JUDGE OF THE COURT OF APPEAL