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

In the matter of an Application in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 426/2013

Asia Capital PLC.,
No. 21-01, West Tower,
World Trade Centre,
Echelon Square, Colombo 01.

PETITIONER

Vs.

1) P. K. Prajitha,
No. 27/121, Perakumba Place, Wellawatta.

2) M. Ariff,
No. 47/1, Hospital Road, Dehiwela.

3) K. D. Manoj Priyantha,
Labour Commissioner (Industrial),
Department of Labour,
Labour Secretariat, Colombo 5.

4) Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 5.

5) Minister of Labour
Department of Labour,
Labour Secretariat, Colombo 5.

6) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Mohammed Adamaly with Aeinsley Silva for the Petitioner

D.H. Siriwardena for the 1st Respondent

Ms. Farzana Jameel, P.C., Additional Solicitor General for the 3rd – 6th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 21st December 2018, 24th October 2019 and 25th February 2020

Tendered on behalf of the 1st Respondent on 31st January 2019, 5th December 2019 and 25th February 2020

Tendered on behalf of the 3rd – 6th Respondents on 12th July 2019 and 24th February 2020

Decided on: 2nd June 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument, all learned Counsel informed Court that written submissions have already been tendered and moved that this Court deliver judgment on the said written submissions. This Court thereafter invited the parties to tender their response to four questions raised by this Court, which has been duly complied with.

The Petitioner has filed this application on 5th December 2013. Even though an amended petition had been filed on 4th March 2015, the journal entry of 27th May 2015 bears out the fact that notice of the amended petition has not been issued and that this Court had decided to proceed to argument on the original petition.

The facts of this matter very briefly are as follows.

The Petitioner admits that by a letter dated 23rd April 2003, it appointed the 1st Respondent to the post of driver with effect from 1st April 2003. It is also admitted that the 1st Respondent had been assigned to work for the Chairman of the Petitioner, who at the relevant time was a person whom this Court shall refer to as 'Mr.SY'. It is the case of the Petitioner that Mr.SY resigned on 30th June 2007, and that as the 1st Respondent did not report for duty thereafter at its Head Office, the Petitioner issued the 1st Respondent a letter dated 15th October 2007 informing that he has been treated as having vacated his post with effect from 1st July 2007.

Prior to the aforementioned letter being issued, the 1st Respondent had complained to the Department of Labour that his services have been unfairly terminated by the Petitioner. In the absence of an amicable resolution of the said complaint, the Minister of Labour, acting in terms of Section 4(1) of the Industrial Disputes Act (the Act) had referred the following dispute for resolution by arbitration:

> "*Whether any injustice was caused to Mr. P.K.Prajitha due to non granting of employment from the month of July 2007 to Mr. Prajitha who was recruited to the post of Personal Driver with effect from 1st April 2003 by Asia Capital Limited, and if any injustice was caused, to what relief he is entitled.*"

Arbitration proceedings had commenced before the 2nd Respondent Arbitrator on 12th May 2010. While the Petitioner had led the evidence of its Manager (Human Resources) Mr. P.N.Jansen, the 1st Respondent had given evidence on his behalf. There is no dispute with regard to the manner in which the proceedings were conducted before the 2nd Respondent.

By an award dated 14th November 2012, annexed to the petition marked '**P2**', the 2nd Respondent had held as follows:

> **"ඒ අනුව ඉදිරිපත් වී ඇති සාක්ෂි සලකා බලා සත්‍යතාවය වැඩි බර මත මෙහි සඳහන් ආකාරයෙන් එකී සේවක මහතාගේ සේවය සේවා යෝජක පාර්ශවය විසින් අත්හිටුවා ඇති බවටත් ඒ හේතුවෙන් ඔහුට අසාධාරණයක් සිදුවී ඇති බවටත් තීරණය කරනු ලැබේ.**
>
> **එබැවින් ඔහුට ලැබිය යුතු සහනයන් වශයෙන්:-**

(අ) සේවක පී. කේ. ප්‍රපිත මහතා 2007 ජූලි මස සිට ක්‍රියාත්මක වන පරිදි නැවත සේවයේ පිහිටුවිය යුතු බවටත්,

(ආ) 2007 ජූලි මස සිට 2012 ඔක්තෝම්බර් මස අවසානය දක්වා 2007 ජූනි මස ගෙවන ලද, රු. 25604.58 ක වැටුප පදනම් කරගෙන හිඟ වැටුප් අවම වශයෙන් රු. 2,538693.12 ක මුදලක් ගෙවිය යුතු බවටත්,

(ඇ) මුල් පත්වීමේ ලිපියට අනුව 2007 ජූනි මස දක්වා ගෙවන ලද අනෙකුත් දීමනාවන් ද, අනෙකුත් සියළුම වරප්‍රසාද, ලැබිය යුතු බවටත් මෙයින් තීරණය කරනු ලැබේ."

Aggrieved by the aforementioned award of the 2nd Respondent, the Petitioner has filed this application seeking a Writ of Certiorari to quash the said award. This Court has considered the written submissions filed on behalf of the Petitioner and notes that the grounds on which the award has been challenged can be divided into three. The first argument is with regard to the finding of the Arbitrator that the 1st Respondent has not vacated his post. Under this argument, the learned Counsel for the Petitioner has submitted that the award is perverse, unreasonable and arbitrary, and that the Arbitrator has failed to take into consideration the material that was placed before him. The second argument is with regard to the relief granted to the 1st Respondent, with the learned Counsel for the Petitioner arguing (a) that there has been a failure to consider compensation as an alternative to reinstatement; and (b) that there has been a manifest error in the calculation of the sum awarded as back wages. The third argument is that the Commissioner General of Labour did not follow the provisions of the Act when he sought an interpretation of the award, and therefore the interpretation given by the Arbitrator is null and void.

The above three arguments of the learned Counsel for the Petitioner comes under irrationality and/or unreasonableness, and procedural impropriety, which have been described by Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**[1], as follows:

> *"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'[2]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."
>
> "*I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice*."

This Court shall now consider the first argument of the learned Counsel for the Petitioner that the finding that the 1st Respondent has not vacated his post is perverse, unreasonable and arbitrary. It would be important to consider at the outset, what constitutes a vacation of post. This issue was considered by this

[1] 1985 AC 374
[2] Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948(1)KB 223

Court in **Nelson Silva vs. Sri Lanka State Engineering Corporation**[3] where it was held as follows:

> "*The concept of vacation of post involves two aspects; one is the mental element, that is intention to desert and abandon the employment and the more familiar element of the concept of vacation of post, which is the failure to report at the work place of the employee. To constitute the first element, it must be established that the Applicant in not reporting at the work place, was actuated by an intention to voluntarily vacate his employment*."

This Court also held in **Nelson Silva** that the physical absence and the mental element should co-exist for there to be a vacation of post.

The Supreme Court in **Coats Thread Lanka (Pvt) Limited vs Samarasundera**[4] has held as follows:

> "*It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved, proof of physical absence as well as the mental element of intent needs to be established….*
>
> *I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and*

[3] (1996) 2 Sri LR 342 at 343.
[4] 2010 (2) Sri LR 1 at page 9

such absence continues it can be safely assumed that the first ingredient had been met. The mental element or what is referred to as 'animus non revertendi' is the intention to abandon the contract permanently."

The above cases have been cited with approval by this Court in **Mahaweli Authority of Sri Lanka vs Leslie Arambawela and Others**[5] and have been followed in several other cases, both by this Court and by the Supreme Court[6].

This Court shall now consider whether the award of the 2nd Respondent is irrational or unreasonable, in the light of the evidence that was presented to him. It was the position of the Petitioner that the 1st Respondent was working for Mr. SY as a driver since 2002, and that after Mr.SY became the Chairman of the Petitioner, the 1st Respondent was offered employment with the Petitioner in the post of driver. The letter of appointment specified that the 1st Respondent *will report to the Chairman as his personal driver*, *and attend to any other work including office related work that the Management may see fit to assign from time to time*. It was in evidence that the 1st Respondent had been confirmed in his employment by the Petitioner and that the salary of the 1st Respondent had been remitted to his bank account each month by the Petitioner. The 1st Respondent was therefore an employee of the Petitioner, who had been assigned to work for its Chairman, as his personal driver.

[5] CA (Writ) Application No. 293/2012; CA Minutes of 30th April 2014, per Sisira De Abrew, J [P/CA, as he then was]
[6] See the judgment of the Supreme Court in D.M.B.Warnakulasooriya vs. Hotel Developers (Lanka) Ltd [SC Appeal No. 101/2014; SC Minutes of 26th July 2018]

It is not in dispute that Mr.SY resigned from his post as Chairman at the end of June 2007. It was the submission of the learned Counsel for the Petitioner that in terms of his letter of appointment, the 1st Respondent was required to report for duty at the office of the Petitioner, after Mr.SY ceased to be its Chairman. This Court must note that during the period Mr. SY was in the country, the 1st Respondent reported to work at the house of Mr. SY, and not to the office of the Petitioner. However, the 1st Respondent did admit that during the absence of Mr. SY, he reported for duty to the office of the Petitioner, thus confirming the position of the Petitioner that the 1st Respondent was required to report to the Head Office, in the absence of Mr. SY.

The learned Counsel for the Petitioner has drawn the attention of this Court to the evidence of the 1st Respondent before the Arbitrator where the 1st Respondent admits that he was required to report for duty at the office of the Petitioner whenever the Chairman was out of the country and that in this instance, he did not report for work in July 2007, even though the former Chairman had not only left the country, but the company itself. There however appears to be some confusion whether the Chairman had left the country in early July or the latter part of July.

Be that as it may, if the 1st Respondent did not report for duty in July, and if it was the position of the Petitioner that the 1st Respondent, by his conduct had demonstrated an intention to abandon his employment, it was open for the Petitioner to have served the 1st Respondent with a vacation of post notice soon

thereafter. This was admittedly not done, although it was the practice adopted by the Petitioner.

During cross examination, Mr. P.N. Jansen, had stated as follows:[7]

"Q – *When your organization vacates the post of an employee, what is the procedure that you adopt?*

A – *Firstly, we send a letter asking him to report for work. If he (does) not respond within the time frame given to him to report for work, we send him a letter terminating his services.*

Q – *Have you sent any such letter to the applicant?*

A – *We sent him a letter saying that he is deemed to have vacated his post.*

Q – *That was the final and only letter which you sent?*

A – *That is after 3 ½ months.*

Q – *During the 3 ½ months nothing was done to communicate with the employee concerned*?

A – *We have no record*."

[7] Page 9 of the proceedings of 7th July 2010.

It was only by letter dated 15th October 2007 that the Petitioner informed the 1st Respondent that, '*You have not reported for work on your own accord since 1st July 2007. You are therefore deemed to have vacated your post.*'

Mr. Jansen also admitted that even though the Petitioner never informed the 1st Respondent that no salary will be paid if he does not report for duty, the Petitioner had informed the company preparing the pay-sheets of its employees not to pay the salary due to the 1st Respondent. It is an admitted fact that the salary of the 1st Respondent for the month of July was not remitted to the bank account of the 1st Respondent, as was the practice.

This Court has examined the evidence led before the Arbitrator and observes that, even if this Court accepts the position of the Petitioner that the 1st Respondent did not report for duty on 1st July 2007, two important events took place thereafter but prior to 15th October 2007 that negates the mental element that is required in order to satisfy the test of vacation of post.

The first event is the fact that the 1st Respondent did report for duty at the office of the Petitioner, at least by end July 2007, and well before the letter dated 15th October was sent. This is borne out by the letter dated 27th November 2007 written by the 1st Respondent where he states as follows:

> "**වර්ෂ** 2007 **පුනි මස අගට ක්‍රියාත්මක වන පරිදි, මෙම ආයතනයෙන්** SY **මහතා සභාපති දුරයෙන් ඉවත් වූ බව දැන ගන්නට ලැබුණු නිසා පුලි මාසයේ මුල් සතියේ දිම එම ආයතනයේ සේවය කරන** NS **මහතා හමුවන්නට ගියෙම්. ඔහු හමුව් මගේ සේවයේ ගැන විමසා බැලුවෙම්. ඒ අවස්ථාවේදි ඔහු විසින් මාගෙන් ඉල්ලා අස්විමේ ලිපියක් ඉල්ලා**

සිටියේය. මම එසේ ඉල්ලා අස්වීමේ ලිපියක් දීමට අකමැති බව ප්‍රකාශ කර සිටියෙමි. ඉන් අනතුරුව මාගේ පූලි මස වේතනයද, ආයතනය විසින් නොගෙවා සිටින ලදි. සාමාන්‍යයෙන් වේතනය සෑම මසකම 25 වනදා කමර්ෂල් බැංකුවේ මාගේ ගිණුමේ තැන්පත් කරනු ලබයි."

"එසේ පූලි මාසයේ සිදු නොවුන නිසා නැවත මා විසින් පූලි මාසයේ අග භාගයේම නැවත NS මහතා හමුවන්නට ගියෙමි. එවිට ද, ඔහු විසින් කියා සිටියේ මට එම ආයතනයට ඉල්ලා අස්වීමේ ලිපියක් භාරදෙන ලෙසයි. එසේ මා විසින් කරන ලද රැකියාවෙන් ඉවත් වීමේ අදහසක් කිසි විටෙක මාහට නොතිබුනි."

"මෙසේ මාගේ මාසික වේතනය නවතා රැකියාව අවසන් කිරීම අසාධාරණ වූයෙන් අසරණ තත්වයකට පත් වූ බැවින් මා විසින් ඔක්තෝම්බර් මස 09 දිනැති ලිපියෙන් කම්කරු කොමසාරිස් තුමාට පැමිණිල්ලක් ඉදිරිපත් කලෙමි. එම පැමිණිල්ල ඉදිරිපත් කිරීමෙන් පසුව ඒෂියා කැපිටල් ආයතනය ඔක්තෝම්බර 15 දිනැති ලිපියෙන් මා විසින් සේවය අතහැර ගියා සේ සලකනබව දන්වමින් ලිපියක් එවන ලදි. එකී 2007-10-15 දිනැති ලිපිය මා මේ සමග පැ3 ලෙස ලකුණු කර ඉදිරිපත් කරමි. මාවිසින් කිසිදු, අවස්තාවක සේවය අත්හැරයෑමක් සිදුනොකරන ලද අතර එසේ කිරීමේ අදහසක් ද නොතිබුණි. "

The fact that the 1st Respondent reported for duty on 1st July 2007 but was told by Mr. NS to tender his resignation has in fact been suggested to the witness of the Petitioner.[8]

The position of the 1st Respondent as to what happened in July 2007 and thereafter is reflected in the following evidence during his examination-in-chief: [9]

"ප්‍ර:තමන්ට පූලි මාසයේ වැටුප ලැබුණේ නැහැ?

උ:නැහැ.

[8] Page 8 of the proceedings of 7th July 2010.
[9] Page 4 of the proceedings of 30th September 2010.

ප්‍ර:තමන්ට වැටුප ලැබුණේ නැති වුනාම තමන් මාසය අන්තිම තෙක් බැලුවාද?

උ:මගේ පඩිය බැංකුවට යවන්නේ. මම බැංකුවට ගොස් කාඩ් එක දමා බලන විට මගේ පඩිය ලැබී තිබුනේ නැහැ.

ප්‍ර:එතකොට තමන් ගත් පියවර මොකක්ද?

උ:ඊටපසුව මම ඒසියා කැපිටල් ලිමිටඩ් ආයතනයට ගොස් NS මහතා හමුවුනා.

ප්‍ර:ඒ කොයි කාලසීමාවේද කියා කියන්න?

උ: 1 වෙනි පාර ගියේ පූලි මාසයේ අන්තිමට වාගේ.

ප්‍ර:එතකොට මොකක්ද වුනේ?

උ: මම ආයතනයට ගොස් NS මහතා හමුවී අපේ වැටුප ලැබී නැහැ කිව්වාම ඔහු කිව්වා ඔයගොල්ලන්ගේ සභාපති මහතා මෙය විකුනා තිබෙන්නේ ඒ නිසා මේ මාසයේ ඔවුන් පඩිය බැංකුවට යවන්න නැහැ කියා.

ප්‍ර:ඒ මාසය මොකක්ද?

උ:පූලි මාසය.

ප්‍ර:ඒ මහතා එසේ සඳහන් කළා?

උ:ඔව් එසේ සඳහන් කළා.

ප්‍ර:ඔබ කිව්වා නේද මේ ගැන තමන් දන්නේ නැහැ කියා?

උ:මම කිව්වා මේ ගැන කිසිදෙයක් දන්නේ නැහැ. අපිට සාධාරණයක් ඉෂ්ඨ කරන්න කියා. එවිට NS මහතා කියා සාටියා අපි ඔයගොල්ලන් හොඳට දන්න දෙන්නෙක් නිසා ඔයගොල්ලන්ට මම මැදිහත්වී යම්කිසි දෙයක් කරලා දෙන්නම් කියා. ඉන් පසුව අපිට කිව්වා මාස 3 ක වැටුප් දෙන්නම් කියා. අපි කිපවතාවක් ගියා එය ගන්න. තුන්පාරක් විතර ගියාම NS මහතා අපිට AS මහතාට යොමුකළා.

ප්‍ර: එම නිලධාරියාගේ තනතුර කුමක්ද?

උ: මම දන්න තරමින් වෙයාර්මන් මහතාට පසුව ඉන්න දෙවෙනි මහතා.

ප්‍ර: ඒ කියන්නේ ප්‍රධාන විධායක කිව්වොත් හරිද?

උ: එය මම දන්නේ නැහැ.

ප්‍ර: ඒ මහතා හමුවුනාද තමන්ට?

උ: ඒ මහතා අපි යන විට කාර්යාලයේ සිටියේ නැහැ. NS මහතා කිව්වා ඒ මහතා දවල් වෙලා එයි ටිකක් වෙලා ඉන්න කියා. ඊට පසු AS මහතා ආවාම අපි ඒ මහතාගේ කාමරයට ගියා. ඒ මහතා අපිට වාඩි වෙන්න කියා කාරණය මොකක්ද කියා ඇසුවා. අපි කිව්වා අපිට මේ මාසයේ පඩිය ලැබුනේ නැහැ. මෙම ආයතනයේ සභාපතිතුමා විකුණු බව අපි දැනගෙන සිටියේ නැහැ. අපිට සාධාරණයක් ඉෂ්ඨ කරදෙන්න කියා කිව්වා. අපි කිව්වා අපි සභාපතිතුමා ළඟ වැඩ කළබව. එවිට ඒ මහතා කිව්වා මට කරන්න දෙයක් නැහැ තමුසෙලාගේ සර් මේක විකුණලා ඉවරයි. මෙහෙන් ශත 05ක් වත් අපි ගෙවන්නේ නැහැකියා. ඉන්පසු අපි කිව්වා සර් අපි ඒසියා කැපිටල් ලිමිටඩ් එකට වැඩ කළා. එයින් පැවරූ නිසා අපි සභාපති මහතාට වැඩ කළබව. එවිට ඒ මහතා කිව්වා තමුසෙලා කම්පැණියේ වැඩකර නැහැ ඒනිසා තමුසෙලාට මෙහෙන් ශත 05ක් වත් දෙන්නේ නැහැ කියා."

During cross examination, the 1st Respondent had stated as follows:[10]

"ප්‍ර:දැන් තමුන්ට කියන්න පුලුවන්ද අවසානවතාවට කවදද අවසාන වතාවට සේවයට ගියේකියලා?

උ: අවසානවතාවට මට මතක විදියට 2007 ජූලි වැටුප මට ලැබුන්නැති නිසා මමත් සමග වැඩකරපු NS මහතා හමුවී අපේ වැටුප නොලැබීම ගැන කථාකර සිටියා එතැනින් පස්සේ අපහට යම් සාධාරණයක් ඉෂ්ඨ කරන බව කියා සිටිනමුත් අපට ඒ මහතා ගෙන් සාධාරණයක් ඉෂ්ඨ වුනේ නැහැ. එම නිසා අපි Labour Department ඇවිල්ලා අපිට යම්කිසි සාධාරණයක් ඉටුකර දෙන ලෙස ඉල්ලා සිටියා.

ප්‍ර:තමුන්ගෙන් සාක්ෂිකරු මා අසා සිටියේ වෝදනාවක් තියෙනවානේ වැඩ නැවැත්තුවා කියා ඒ කොයි කාලේ හැටියටද මතක?

[10] Page 1 of the proceedings of 25th May 2011.

උ: 2007 ජූලි වලින් පසු ව නැවැත්තුවා කියා සිතනවා.

ප්‍ර:තමුන්ට අවසාන වතාවට රැකියාවට ගියේ කවදාද?
උ:අවසාන වතාවට වාර්තා කරපු දිනේ මතක නෑ .

ප්‍ර: දළ වශයෙන් කියන්න පුලුවන්ද?
උ: ජූලි මාසයේ මුල සතියේ පමණ සභාපතිතුමා සමග මීටිමකට ගියා මතකයි.

ප්‍ර: එතකොට තමන්ට දළ වශයෙන් හරි කියන්න පුලුවන්ද වැඩ නැවැත්තුවේ කොයි මාසේද කියා.
උ: මම හිතන්නේ ජූලි මාසයේ තමයි වැටුප ලැබුන්නැති නිසා මගේ වැඩ නැවතුනේ කියා.

ප්‍ර:දැන් සාක්ෂිකරු නැවතත් තමුන් ගෙන් අහනවා තමුන් ජූලි මාසේ සභාපතිතුමා පැමිණෙන්නට පෙර හරි Asia Capital ආයතනයේ සේවයට වාර්තා කලාද කියා?
උ:ජූනි මාසේ සේවයට වාර්තා කළේ නැහැ පඩිය නොලැබුණ නිසාත් NS මහත්මයා හමුවී මේ බව ප්‍රකාෂකර සිටියා. නමුත් ඔහු පවසා සිටියා සභාපතිතුමා ආයතනය විකුණා ඇති හෙයින් ඔයාලට අපි යම් සහනයක් දෙන්නම් කියලා නමුත් ඔවුන්ගෙන් සාධාරණයක් නොවුන බැවින් අපි Labour Department එකේ පැමිණිලිකලා."

The 1st Respondent has reiterated the above position when he was cross examined on the next date,[11] as well as during re-examination.[12]

The above position of the 1st Respondent that he reported to the office of the Petitioner in early July, as well as when he did not receive his salary for the month of July, and that he was told by Mr. NS and Mr. AS that he would no longer be

[11] Page 3 of the proceedings of 9th June 2011.
[12] Page 9 of the proceedings of 20th June 2011.

employed by the Petitioner, has not been challenged during cross examination of the 1st Respondent.

It is the view of this Court that the above conduct of the 1st Respondent is not the conduct of a person who had the intention to abandon his employment. Having considered the evidence that was placed before the Arbitrator, this Court is not in a position to arrive at the conclusion that the failure on the part of the 1st Respondent to report at the work place, was actuated by an intention to voluntarily vacate his employment.

The second event that negates the mental element that is required in order to satisfy the test of vacation of post is the fact that the 1st Respondent had complained to the Department of Labour by his letter dated 9th October 2007 about not being allowed to report for work. The 1st Respondent would not have complained to the Department of Labour if he did not have any intention of continuing with his employment at the Petitioner. By a letter dated 15th October 2007, the Department of Labour had informed the Petitioner to be present for an inquiry on 31st October 2007. Thus, by the time the vacation of post letter was served, the 1st Respondent had already lodged a complaint with the Department of Labour. It therefore appears that the letter of 15th October 2007 was sent by the Petitioner, possibly as a defence to the said complaint of the 1st Respondent. It is the view of this Court that in the above factual circumstances, the said letter of vacation of post served by the Petitioner does not serve any purpose, bears no value, and fails to negate the mental element that is required to establish that the 1st Respondent had vacated his post.

In the above circumstances, it is the view of this Court that the evidence led before the Arbitrator was sufficient to establish that the 1st Respondent did not have any intention to vacate his post. Furthermore, the evidence establishes that the absence of the 1st Respondent from his work place was as a result of the action of the senior employees of the Petitioner. In the above factual circumstances, it is the view of this Court that the conclusion of the Arbitrator that the 1st Respondent had not vacated his post is a reasonable conclusion. Hence, this Court cannot agree with the first submission of the Petitioner that the Arbitrator erred in fact and in law, when he arrived at the said conclusion.

The second argument of the learned Counsel for the Petitioner has two aspects. The first was that the 1st Respondent served in the capacity of a personal driver to the Chairman of the Petitioner and in view of that fact, the Arbitrator erred when he failed to consider compensation as an alternative to reinstatement, as required by Section 33(3) of the Act.

Section 33(3) reads as follows:

> "*Where any award or order of a labour tribunal contains a decision under paragraph (b) of subsection (1) as to the reinstatement in service of any workman in any employment, then, if the employment is in the capacity of personal secretary, personal clerk, personal attendant or chauffeur, to the employer, or of domestic servant, or in any other prescribed capacity of a description similar to those hereinbefore mentioned, the award or order of a*

labour tribunal shall also contain a decision, under paragraph (d) of that subsection, as to the payment of compensation to the workman as an alternative to his reinstatement."

It is an admitted fact that the 1st Respondent, having been issued a letter of employment by the Petitioner, was an employee of the Petitioner. His assignment was to work as a personal driver to the Chairman of the Petitioner. It is relevant to note that the letter of appointment refers to *the Chairman* as opposed to *Mr. SY, the Chairman*. Once Mr. SY ceased to function as Chairman, it was the case of the Petitioner that the 1st Respondent was required to report for duty at the head office of the Petitioner, which is an admission on the part of the Petitioner that the 1st Respondent is the driver of the Chairman, whoever the Chairman may be. In fact, the failure to report for work after Mr. SY ceased to be the Chairman, formed the basis for the Petitioner treating the 1st Respondent as having vacated his post. If this be so, the 1st Respondent cannot be categorized as a personal driver for the purposes of Section 33(3) of the Act, and therefore, the Arbitrator has not erred by not considering the provisions of Section 33(3).

The second aspect of the second argument of the learned Counsel for the Petitioner was that there has been a manifest error in the calculation of the sum awarded as back wages. The arbitrator has directed that the 1st Respondent be paid back wages for the period July 2007- October 2012 at the rate of Rs. 25,604.58 per month. The aggregate sum due should therefore be a sum of Rs. 1,638,693.12. The Arbitrator has however given the aggregate as Rs. 2,538,693.12, which is Rs. 900,000 more than what it should be. The learned

Counsel for the Petitioner has submitted that this is an error on the face of the record which vitiates the validity of the award. While there is certainly an error, this Court does not agree that it affects the validity of the award. It is the view of this Court that there shall be sufficient compliance with the award if the Petitioner pays back-wages for the period July 2007- October 2012 at the rate of Rs. 25,604.58 per month.

This Court shall now discuss the final argument of the learned Counsel for the Petitioner. The award of the Arbitrator was delivered on 14th November 2012, and was published in the Gazette on 6th December 2012. By letter dated 28th March 2013, the 1st Respondent had informed the 3rd Respondent that the Petitioner has not complied with the award, which, as noted earlier, was to reinstate the 1st Respondent. As the award was silent as to the date on which the reinstatement should take place, the 3rd Respondent had sought a clarification from the Arbitrator. It is the view of this Court that the order of reinstatement should have been complied with, no sooner the award was conveyed to the Petitioner, and hence the necessity to seek an interpretation, as done by the 3rd Respondent, did not arise. The only exception to not complying with the award is found in Section 20 of the Act, in terms of which an employer may give notice of repudiation, which notice however is prospective in nature.

Be that as it may, an interpretation can be sought in terms of Section 34(1) of the Act, which reads as follows:

"If any question arises as to the interpretation of any award made under this Act by an arbitrator or by an industrial court, or of an order made under this Act by a labour tribunal, other than an order made on an application made under section 31B of this Act, the Commissioner or any party, trade union, employer or workman, bound by the award or order, may refer such question for decision to such arbitrator or the person or persons who constituted such industrial court or to such labour tribunal, and if such reference is not possible for any reason whatsoever, may refer the question for decision to an industrial court; and ***the arbitrator*** *to whom or the industrial court or the labour tribunal to which the question has been referred* ***shall decide such question after hearing the parties****, or without such hearing if the consent of the parties has been first obtained:*

Provided that no employer or workman who is a member of any trade union shall, independently of such union, refer a question for decision under the preceding provisions of this subsection."

It is the position of the learned Counsel for the Petitioner that the Arbitrator proceeded to issue the letter dated 1st October 2013 informing that the effective date would be *13th August 2012*, but that the Arbitrator failed to hear the parties before doing so.[13] This Court is of the view that the provisions in Section 34(1) with regard to a hearing must be complied with, and in the absence of a hearing, the interpretation is not valid. Non compliance with the provisions of Section 34(1) however, does not affect the validity of the award '**P2**'. Therefore, this Court

[13] The said letter contains the details of another award delivered by the same Arbitrator in respect of another employee of the Petitioner.

is of the view that the failure on the part of the Arbitrator to act in terms of Section 34(1) has not prejudiced the Petitioner.

In the above circumstances, and subject to the decision of this Court with regard to the calculation of back wages, this Court does not see any legal basis to grant the relief prayed for by the Petitioner. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal