

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

In the matter of an Application for mandates in the nature of Writs of Certiorari and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 289/2019

Maharagama Urban Council,
Maharagama.

Petitioners

Vs.

- 1) Assistant Labour Commissioner,
District Labour Office,
Maharagama.
- 2) Labour Commissioer,
Labour Department,
Colombo 5.
- 3) A.A.D.Chandana,
No. 98, Yahampath Mawatha,
Maharagama.
- 4) C.D.Somasiri,
117/2, Abeyratne Mawatha,
Makuludoowa, Piliyandala.
- 5) G.H.G.Samantha Rohana,
21/6, Samagi Mawatha,
Depanama, Pannipitiya.

- 6) H.D.A.Malkanthie,
179/5, Temple Road,
Thalapathpitiya,
Nugegoda.
- 7) S.L.Ranaweera,
60, Gemunu Mawatha, Bangalawatte,
Kottawa, Pannipitiya.
- 8) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: Ms. Chandrika Morawaka with Ms. Kumari Hettige for
the Petitioner

Ms. Madubashini Sri Meththa, State Counsel for the
1st, 2nd and 8th Respondents

Supported on: 24th October 2019

Written Submissions: Tendered on behalf of the Petitioner on 14th February
2020

Tendered on behalf of the 1st, 2nd and 8th Respondents
on 13th February 2020

Decided on: 18th June 2020

Arjuna Obeyesekere, J

The Commissioner General of Labour had instituted Case No. 19594 against the Petitioner in the Magistrate's Court of Gangodawila in terms of Section 38(2) of the Employees Provident Fund Act No. 15 of 1958, as amended (the Act), seeking to recover (a) a sum of Rs. 1,497,120 being the amount that the Commissioner General of Labour claims the Petitioner ought to have contributed to the Employees Provident Fund on behalf of the 3rd – 7th Respondents, and (b) a surcharge of Rs. 707,609.72, on the aforementioned sum.

The learned Magistrate, after having afforded the Petitioner a hearing, had allowed the application of the Commissioner General of Labour. A revision application filed by the Petitioner against the Order of the learned Magistrate has been dismissed by the Provincial High Court of the Western Province.

A few days prior to the judgment of the High Court being delivered, the Petitioner filed this application seeking *inter alia* the following relief:

- a) A Writ of Certiorari quashing the decision of the 1st Respondent to issue a certificate in terms of Section 38(2) of the Employees Provident Fund Act No. 15 of 1958, as amended;
- b) A Writ of Prohibition preventing the 1st Respondent from continuing with any proceedings against the Petitioner;
- c) An interim order staying further proceedings in Magistrate's Court, Gangodawila Case No. 19594.

It is common ground that proceedings before the Magistrate's Court, Gangodawila have come to an end with the aforementioned Order of the

learned Magistrate delivered on 25th May 2016. In these circumstances, the necessity for this Court to consider the prayer for interim relief does not arise.

This matter was supported for notice and interim relief on 24th October 2019. In addition to the petition and the documents filed together with the petition, this Court had the benefit of the limited Statement of Objections and documents filed on behalf of the 1st and 2nd Respondents. At the conclusion of the oral submissions of both learned Counsel, the learned Counsel for the Petitioner moved for an opportunity to discuss a resolution of this dispute with the 1st and 2nd Respondents. However, as this Court was informed on 20th December 2019 that there was no resolution, the parties were directed to tender written submissions, which has been complied with. When this matter was mentioned on 14th February 2020, the learned Counsel for the parties agreed to this Court delivering the Order on whether notices should be issued on the Respondents.

It was the position of the learned Counsel for the Petitioner that even though the 3rd – 7th Respondents were rate collectors on behalf of the Petitioner, the said Respondents were not its employees, but were independent contractors. It was therefore the position of the Petitioner that it is not liable to contribute towards the Employees Provident Fund on behalf of the 3rd – 7th Respondents. The substantive issue that arises for the determination of this Court therefore would be whether the decision of the Commissioner General of Labour that the 3rd – 7th Respondents were employees of the Petitioner, and not independent contractors, is illegal, irrational or unreasonable.

The Petitioner has also complained to this Court that the Department of Labour did not afford the Petitioner an opportunity of explaining that it is not liable for such contribution, and that it became aware of the finding by the

Department of Labour only when proceedings were instituted in the Magistrate's Court, in April 2014.

Together with the limited Statement of Objections, the learned State Counsel has filed two letters marked 'R6' and 'R7'. By the first letter dated 2nd May 2012, the Department of Labour has informed the Petitioner that it has failed to contribute towards the Fund on behalf of the 3rd – 7th Respondents, and had requested that payments be made. By the second letter dated 13th September 2013, the Department of Labour had informed the Petitioner that legal action will be instituted unless payments are made. The Petitioner claims that it never received these two letters.

The learned State Counsel has submitted further that the Petitioner is guilty of inordinate delay, in that this application has been filed five years after proceedings were instituted in the Magistrate's Court, and that this application is liable to be dismissed *in limine*. This Court must observe that the said submission has merit and that the Petitioner must explain its delay.

In Nallaperuma Thantrige Leelawathie and another vs Divisional Secretary, Karadeniya and others¹ this Court, having referred to the judgments of the Supreme Court in Biso Menika v. Cyril de Alwis², Seneviratne v. Tissa Dias Bandaranayake and another³ and Issadeen v. The Commissioner of National Housing and others⁴, and to the judgment in Lindsey Petroleum Co., Vs. Hurd referred to in Bisomenike's case⁵, held as follows:

¹ CA (Writ) Application No. 218/2017; CA Minutes of 2nd December 2019.

² [1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

³ [1999] 2 Sri LR 341 at 351.

⁴ [2003] 2 Sri LR 10 at pages 15 and 16.

⁵ (1874) L.R., 5 P.C 221 at 239.

“The above judgments clearly illustrate four important matters, although not necessarily in a particular order. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court. The third is that delay can be ignored, if the act complained of is manifestly illegal, such as a decision of a statutory authority made in excess of jurisdiction. The fourth is the nature of the acts that have taken place during the time period between the impugned decision or act and the filing of the application. These factors are relevant when determining whether an application should be dismissed on account of the Petitioner being guilty of delay.”

Thus, dismissal of an application on account of delay is not automatic, especially where questions have been raised with regard to the legality of the decision. In this application, the learned Counsel for the Petitioner has raised three important questions of law. The first is that the Petitioner was not afforded a hearing. The second is with regard to its liability to contribute to the Employees Provident Fund on behalf of the 3rd – 7th Respondents. The third is that the procedure laid down in the Act has not been followed prior to the institution of action. It is therefore the view of this Court that the question of delay must be considered in the context of the above three questions of law, at a full hearing with the participation of the 3rd – 7th Respondents.⁶

This Court accordingly issues formal notice of this application on all Respondents.

Judge of the Court of Appeal

⁶ See the judgment of the Supreme Court in Sebastian Fernando vs the Katana Multi Purpose Co-operative Society and others. [1990] 1 Sri LR 342.