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 Mandamus under and in terms of Article 140 of the Constitution.

S.T.Y International Garments (Private) Limited, No12, 5/1,
Castle Court,
Castle Lane,
Colombo 4.

Court of Appeal Writ Application No: 409/2014 **Petitioner**

-VS-

1. Commissioner General of Labour.
   Department of Labour,
   Labour Secretariat,
   Kirula Road,
   Colombo 5.

2. Ms. G.W.N Viraji
   Deputy Commissioner of
   Labour-Termination Division.
   Department of Labour,
   7th Floor, Labour Secretariat Building,
   Kirula Road,
   Colombo 5.

3. Sagara Jayasekara
   Ahangama Watta,
   Andugoda,
   Dikkumbura

   and 74 others,
   Respondents

Before: **Janak De Silva J.**
&
N. Bandula Karunarathna J.

Counsel:	Geoffrey Alagaratnam PC with Bushan Illeperuma for the Petitioner. Kanishka Balapatabendi SSC for the 01st and 02nd Respondent
Written Submissions:	By the Petitioner on 28/11/2018 and 19/06/2020 By the Respondent on 14/02/2020 and 10/07/2020
Argued on:	10/07/2019 and 25/07/2019
Judgment on:	**18/11/2020.**

N. Bandula Karunarathna J.

The Petitioner is a duly incorporated company that ceased to function since June 2009. The 3rd Respondent together with other employees preferred an appeal regarding the termination of their employment and that the said complaint is at "P2". The Petitioner states that the Petitioner suffered heavy losses due to unforeseen events and that employee salaries could not be paid and that the overdue salaries were paid to the employees on or about 30th June 2009.

The Petitioner states that the Petitioners filed a statement of objections in the proceedings before the 1st and 2nd Respondent. Thereafter the directors of the Petitioner Company did not receive notifications regarding the proceedings before the 2nd Respondent. The Petitioner states that the Petitioner became aware that proceedings had been filed in the Magistrate's Court seeking the enforcement of an Order against the Petitioner directing it to pay the employees a sum of Rs 4,049,625/- The Petitioner states that the inquiry proceedings by the 1st and the 2nd Respondents were contrary to the principles of natural justice, lacks transparency and is contrary to the legitimate expectation of the Petitioner and grave and irreparable loss has been caused to the Petitioner.

The petitioner seeks a writ of certiorari quashing the determination dated 22.08.2012 and a writ of mandamus directing the 1st and 2nd Respondents to conduct a due inquiry into the complaints made by the 3rd Respondent and 74 other employees.

The Petitioner states that the Application on which the Learned Commissioner made the impugned order P6 was as admitted in the Objections of the Commissioner made on 28.02.2010 (Paragraph 11(i) of objections dated 30.09.2015) almost nine months after the alleged termination.

The Petitioner states that the power of the Commissioner is circumscribed by the very statute of Parliament. Commissioner can only entertain and make an application provided the fundamentals of the statute are complied with. Section 6B (1) of the termination of Employment of Workmen's Act (TEWA) which set out the time period is mandatory and it reads;

"No order shall be made by the Commissioner under section 6 or section 6A in pursuance of an application made by a workman unless such application was made within six months of the termination to which such application related"

To ignore such stipulation is to violate the intent of Parliament and an abuse of powers giving rise to a Patent and not a Latent lack of jurisdiction and such is not curable by consent or waiver implied or otherwise. The Petitioner states that where there is a Patent lack of jurisdiction, the objection to same can be taken at any time and there cannot be consent to or waiver of same due to non-pleading. The statutory bar is the Basis of the Commissioners jurisdiction and cannot be equated to and is not similar to the principles on prescription under the Prescription Ordinance. The papers provided by the Commissioner was provided only prior to filing this Application.

P2 and annexes disclose that the letter of 2009.09.07 annexed to P2 was only signed by one person who has no authority to do so and under the Act cannot make an Application for others. The Petitioner states that a comparison of Section 31B(i) of the Industrial Disputes Act which permits a workman or Trade Union to prefer an application has not been similarly provided for in the TEWA. The facts as pleaded will disclose a vexatious application as an afterthought which was out of time. In any case the Commissioners refusal to reconsider the matter though requested by P7 at last paragraph conclusively makes it ultra vires.

The Petitioner states that the word "workman" is defined in the TEWA to include the meaning given for that term in the Industrial Disputes Act except for the category of employees described under subsection (1) of section 3 of the Act and thus the definition of 'workman' as stipulated in the Industrial Disputes Act reads as follows;

"workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such. Person is or is not in employment at any particular time, and includes any person whose services have been terminated".

The Petitioner further states that Section 6 B (1) of the TEWA read together with the above definition of 'workman would sufficiently demonstrate that a complaint has to be made by the workman himself and it does not permit any other person, agent or otherwise to make a complaint to the Commissioner General of Labour on behalf of such employee.

The Petitioner states that a comparison of section 6 B (1) of TEWA with section 31 B (1) of the Industrial Disputes Act will provide a clear guideline to the intention of the Legislature as to whether the term 'workman" in the TEWA could include an agent, union or any other busybody, claiming as agent or otherwise.
Section 31 B (1) of Industrial Disputes Act reads as –

"A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters: -"

The Petitioner states that in terms of the section 31 B (1) of the Industrial Disputes Act, either a workman himself or a trade union for and on behalf of the workman could make a valid complaint to the Labour Tribunal. For a trade union to make a complaint to the Tribunal such is limited to the employee seeking relief being a member of the said union. Thus, the Petitioner states that it is clear that even under section 31 B (1) of the Industrial Disputes Act only a Trade union and not anyone else can make an application.

In the instant application, the Petitioner states that the learned counsel for the 1st and 2nd Respondents sought to argue that the 3rd Respondent and other employees made a complaint on 7th September 2009 (P2) upon which the inquiry was commenced and carried out by the 1st and or 2nd Respondents. It is reiterated that the Petitioner had no notice of P2 until such time it applied and obtained certified copies of the part of the inquiry records from the 2nd Respondent subsequent to the Petitioner receiving notice on enforcement proceedings in the Magistrate Courts of Galle.

It is also the position of the Petitioner that a bare perusal of the purported complaint marked P2 would sufficiently demonstrate that it was a complaint made only by the 3rd Respondent for himself and for the other employees with a schedule of the details of such other employees attached thereto. There were not even the signatures of the other employees. Consequently, there were no separate complaints made by each of the aggrieved employee when the 1st and 2nd Respondent wrongly without authority assumed competence jurisdiction inquiring into the said purported complaint marked P2.

In view of the aforesaid the Petitioner argued that the said complaint marked P2 does not constitute a complaint within the purview of section 6 B (1) of the TEWA and thus inquiry claimed have to have been carried out on such complaint and determination made thereon is void ab initio. It is further submitted that the Petitioner by letter sent to the 1st Respondent which forms part of the pleadings due to same being annexed to the Petition marked P8, categorically stated that the purported complaints by the employees, were not in compliance with the required legal procedure and were time barred. Thus, the learned Counsel for the 1st and 2nd Respondent's position that the Petitioner failed to take up such objection in the Petition is misconceived if not wrong.

The Petitioner also states that the 1st and 2nd Respondents have in paragraph 11 (i) of their Objections unequivocally conceded that the 3rd Respondent and other employees made complaints to the 1st Respondent by way of affidavits only on 28.2.2010 which being almost after nine (09) months from the alleged termination of the employment of the 3rd Respondent and the other employees. Therefore, the Petitioner states that it is clear from the said admission of the 1st and 2nd Respondent that there was a patent lack of jurisdiction or competence and thereby inquiring into a complaint made by employees after the period prescribed in the statute.

The essence of the Respondents' position is *inter alia* that the Petitioner Company terminated the services of its employees and ceased operations of the Company with effect from 01.07.2009. The Respondents state that the Respondents afforded the Petitioner an opportunity to make representations and submissions. The Respondents also hold the view that the Petitioner lacks *uberima fides* necessary to seek prerogative relief from this Court.

The Respondents state that the Petitioner has violated the express provisions of the Termination of Employment of Workmen Act 45 of 1971 as amended. The Respondents also state that the Petitioners have failed to disclose a breach of any statutory duty on the part of the 1st and 2nd Respondents

Subsequent to a thorough analysis of the facts of the case, my observation is as follows;

When this matter was argued before court on 3rd October 2018, Counsel for the Petitioner contended that the "Complaint" received by the 1st Respondent is time barred. Before dealing with this aspect substantively the attention of Court was drawn to the fact that the Petitioner did not in its Petition, raise an objection to this effect and it is only in the Counter Objection that this objection was set out.

In fact, in the Petition, the Petitioners admit that the Complaint preferred by the 3rd Respondent and other employees is at "P2". Therefore the Petitioner's own document evinces that the Complain received is dated 7th September 2009.

Section 6 B of the Termination of Employment of Workmen Act No 45 of 1971 as amended by Act Nos 51 of 1988 and 12 of 2003 stipulates that;

> "No order shall be made by the Commissioner under section 6 or Section 6A in pursuance of an application made by a workman unless such application was made within six months of the termination to which such application related."

I believe that It is uncontested that the operations of the factory ended on 30th June 2009. The Petitioner does not contest the fact that the employment of the workmen terminated on the said dated. The Notice at P2, to which is attached the application of the 3rd Respondent along with the other workmen, is dated 7th September 2009. It is therefore clear that the application has been made in just over two months from the date of termination and that it is unquestionable within the three-month time period stipulated in the Act.

It is pertinent to note therefore that the objection of the Petitioner that the application is out of time cannot be sustained. It is also pertinent to note that the Act does not provide a particular format that applications under Section 6B should conform to. There is no statutorily stipulated format by way of an annexure or schedule. So, it cannot be argued that the application annexed to `P2" is not a proper application. Furthermore, the interpretation section of the Act provides no definition of the term "application". Therefore, it cannot be maintained that the application is not a proper application. Furthermore, the application dated 07th September 2009 contains the following information;

- Name and address of the Employer
- Names, personal addresses, employment details, salary particulars, contact details of all applicants.
- Date on which termination of employment was affected.

Thus, it is apparent that the application at "P2" dated 07.09.2009 along with the annexures is comprehensive and constitutes a valid application. The Petitioner was Aware of the Proceedings Before 1st and 2nd Respondents and opted not to Participate.

I believe that "P2" is clear proof of the fact that the 1st Respondent, acting on the application annexed thereto, as far back as 14th September 2009, wrote to the Petitioner, referring to the application dated 07.09.2009 and informed the Petitioner of the inquiry to be conducted. The Petitioner has at no stage contested the fact that "P2" was received. The "Statement of Objections" at "P5" evinces that the Petitioners in fact participated in the proceedings to the extent that a statement of objections was filed. If the addresses the Directors were contactable had changed the onus was on the Petitioner, who was aware of the inquiry to make available the new addresses to which notices could be sent. The Petitioner having avoided the inquiry, having being aware of the same, has failed to come before this court with clean hands, in invoking the prerogative power of Court.

It is also pertinent to note that the notice at "I RI" has been dispatched to Mr. Kadirawelu Jayaruban to the address that appear in the Caption of this case, filed before this Court. Therefore, the Petitioner's claim that the notices were not received cannot be accepted.

I further note that the Petitioner has Failed to Comply with Statutory Requirements in Terms of the Termination of Employment of Workmen Act

Section 2 of the Termination of Employment of Workmen Act stipulates that;

"No employer shall terminate scheduled employment of any workman-

a) The prior consent in writing of the workman; or
b) The prior written approval of the commissioner"

The Petitioners have at no point contended that the aforementioned requirements were fulfilled. The Respondents clearly state that the prior consent of the Workmen were not obtained prior to termination of their employment. The Respondents also state that prior approval of the Commissioner was not obtained. In the circumstances it is evident that the Petitioners have acted in contravention of Section 5 of the Act.

Section 5 of the Termination of Employment of Workmen Act stipulates as follows;

> "Where an employer terminates the scheduled employment of a workman in contravention of the provision of this Act, such termination shall be illegal, null and void and shall be of no effect whatsoever."

Justice Nimal Dissanayake in **Hidellarachchi v United Motors Lanka Limited and Others 2006, (3) SLR, 411,** in reference to the afore cited section held as follows;

> "(5) Where any employer terminates the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action, the employer shall notify such workman in writing the reasons for the termination of employment before the expiry of the second working date of such termination."

Until the aforesaid amendment came into effect, the Commissioner of Labour to whom an application under the aforesaid Act was referred to, had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2(1) read with section 5 and 6 of the said Act."

It is to be observed that in terms of the aforesaid amendment, the employer who terminates the employment has to give reasons to the workman within 2 days of such termination. And if the termination has been effected by reason of punishment imposed by way of disciplinary action the jurisdiction to entertain an application by the Commissioner made by the workman against such termination was ousted. Therefore, the present position of the law is where there is a termination of employment the employer was required, within 2 days to give his reason for such termination. Where such termination has been effected either by mutual consent or with the prior written approval of the Commissioner of Labour as a punishment imposed by way of disciplinary action, the Commissioner has no jurisdiction to hear and determine the said matter.

Section 6 A of the Act reads as follows;

"where the scheduled employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade, industry or business, the Commissioner may order such employer to pay to such workman on or before a specified date any sum of money as compensation as an alternative to the reinstatement of such workman and any gratuity or other benefit payable to such employer."

It is apparent that the Petitioner has acted in contravention of the above provisions thereby depriving workmen, not only of their means of livelihood, but also money statutorily due to them.

there are three grounds of review of an administrative decision of a public officer/public body as recognized in the case of ***DESMOND PERERA AND OTHERS v KARUNARATNE, COMMISSIONER OF NATIONAL HOUSINGAND OTHERS [I994] 3 SLR 316*** as follows;

I. Illegality

II. irrationality

III. Procedural impropriety

It is my view that non-of the facts stated by the Petitioner comes under above mentioned three grounds for review and a writ cannot be issued accordingly.

In the circumstances aforesaid, it is apparent that the Petitioners, having opted not to participate on the inquiry proceedings are now claiming to have been at a disadvantage owing to the same. It is clear that the Petitioners have violated the provisions of the Termination of Employment of Workmen Act and have failed to come to Court with clean hands.

In the said circumstances, I hereby dismiss the application of the Petitioner, with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal