

**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,
Prohibition and Mandamus under and in
terms of Article 140 of the Constitution.*

CA/WRIT/24/2020

R.M. Sanath C de Silva
No. 197/6,
Sirima Bandaranayaka Mawatha,
Mahara,
Kadawatha.

PETITIONER

Vs.

1. National Insurance Trust Fund
Board
No.95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.
2. B.K.R. Balasuriya
Chairman (Acting)
National Insurance Trust Fund
Board,
No.95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.

Mawahib Mowjood
Chairman
National Insurance Trust Fund
Board,
No.95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.

**[SUBSTITUTED 2nd
RESPONDENT]**

3. Geetha Wimalaweera
Chief Executive Officer (Acting)
National Insurance Trust Fund

Board
No.95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.

4. Insurance Regulatory
Commission
of Sri Lanka
Level 11, East Tower,
World Trade Centre,
Colombo 01.
5. Razik Zarook
Chairman
Insurance Regulatory Commission
of Sri Lanka
Level 11, East Tower,
World Trade Centre,
Colombo 01.
6. P. Algama
Member
Insurance Regulatory Commission
of Sri Lanka,
Level 11, East Tower,
World Trade Centre,
Colombo 01.
7. D.N.R. Siriwardena
Member
Insurance Regulatory Commission
of Sri Lanka,
Level 11, East Tower,
World Trade Centre,
Colombo 01.
8. H.A. Karunarathna
Member
Insurance Regulatory Commission
of Sri Lanka
Level 11, East Tower,
World Trade Centre,
Colombo 01.
9. Harischandra Salpitikoral
Member
Insurance Regulatory Commission
of Sri Lanka

Level 11, East Tower,
World Trade Centre,
Colombo 01.

10. Raja Gunaratne

Member

Insurance Regulatory Commission
of Sri Lanka

Level 11, East Tower,
World Trade Centre,
Colombo 01.

11. Indra Baduge

Member

Insurance Regulatory Commission
of Sri Lanka

Level 11, East Tower,
World Trade Centre,
Colombo 01.

12. Damayanthi Fernando

Director General

Insurance Regulatory Commission
of Sri Lanka

Level 11, East Tower,
World Trade Centre,
Colombo 01.

13. Hon. Mahinda Rajapaksha

Hon. Prime Minister and Minister
of Finance, Economy and Policy
Development

Ministry of Finance, Economy and
Policy Development

The Secretariat,
Lotus Road,
Colombo 01.

14. S.R. Attygalle

Secretary

Ministry of Finance, Economy and
Policy Development

The Secretariat,
Lotus Road,
Colombo 01.

15. C. Jayasuriya

Former Acting Chairman of the
National Insurance Trust Fund
Board
Sri Lanka Administrative Service
Officer
Ministry of Public Administration,
Home Affairs, Provincial Councils
and Local Government,
Independence Square,
Colombo 07.

16. Sathiesh Kumar
Director Finance and
Administration
Insurance Regulatory Commission
of Sri Lanka
Level 11, East Tower,
World Trade Centre,
Colombo 01.
17. Osmand Chandrawansha
Board Member
National Insurance Trust Fund
Board
No. 95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.
18. Rohan Jayasinghe
Board Member
National Insurance Trust Fund
Board
No. 95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.
19. D.P.G. Pradeep
Board Member
National Insurance Trust Fund
Board
No. 95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.
20. M.K.P. Kumara

Board Member
National Insurance Trust Fund
Board
No. 95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.

21. Chandana Kumarasinghe
Board Member
National Insurance Trust Fund
Board
No. 95, UPTO Building,
Chittampalam A Gardiner
Mawatha,
Colombo 02.

RESPONDENTS

Before: Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel: Sanjeewa Jayawardena PC with Rukshan Senadheera for the Petitioner.

Sumathi Dharmawardena PC ASG with S. Dunuwille SC for the 1st to 14th, 16th,
and 19th to 21st Respondents.

Argued on: 19.09.2023

Written Submissions- Petitioner - 06.11.2023

1st to 14th, 16th, and 19th to 21st Respondents - 03.11.2023

Decided on: 05.12.2023

Sobhitha Rajakaruna J.

The main relief sought by the Petitioner is for a quashing order against the decision of some of the Respondents including the 1st Respondent- National Insurance Trust Fund ('NITF') to interdict the Petitioner with effect from 16.12.2019, as evident from the letter dated 15.12.2019 marked 'P14'. The Petitioner also challenges the communication of the 4th Respondent- Insurance Regulatory Commission of Sri Lanka ('Commission') dated 12.12.2019 marked 'P13'. The said Commission notified the Chairman of NITF by the said letter 'P13' that the NITF's operations were being run in a way that was harmful to the organization, the national interest, and the policyholders' interests. This information was gleaned from the Ernst and Young special audit report in which it is further revealed,

inter alia, that the Petitioner- Chief Executive Officer ('CEO') of the NITF had been acting without due care neglecting the fiduciary duties. In addition to the above reliefs, a directive is also sought by the Petitioner against several Respondents, to reinstate the Petitioner as the CEO of the NITF.

The Petitioner has also filed another Writ Application bearing case No. CA/Writ/114/2021 in this Court seeking relief pertaining to the decision of several Respondents to send the Petitioner on alleged premature retirement with effect from 15.04.2021 as reflected in a letter dated 08.10.2020. When the instant Application as well as the case bearing No. CA/Writ/114/2021 was taken up in open Court on 19.09.2023 both parties of the said CA/Writ/114/2021 agreed to abide by the final determination of this Court in respect of the instant Application. Accordingly, all parties moved that the legal issues of the said CA/Writ/114/2021 also be addressed by this Court in the final judgement of the instant Application.

The issues relating to both of the above writ applications revolve around the interdiction of the Petitioner and his subsequent retirement. It is important to note that at the time of the said interdiction, the Petitioner was on probation, however, his services have not been confirmed at any point in time. Given the letter of appointment dated 17.11.2014 marked 'P4,' the Petitioner needs to be on probation for three years from the date of appointment and his position was to be confirmed after satisfactory services. Since the third year of the Petitioner's services, the Regulator (the Commission/ Insurance Board of Sri Lanka¹) by way of letters such as 'R9', 'R11', 'R12', 'R10', 'R13' and 'R6' has voiced several concerns about the alleged mismanagement of risks related to business operations, non-submission of statutory returns, and non-compliance with regulatory requirements against the NITF. Apart from those, several directions have been issued by the Commission to the Petitioner to rectify several shortcomings and to improve the standards of the business operations of NITF. (Vide-'R4', 'R5', and the annexures to 'R6'.)

It appears that the Petitioner has been interdicted primarily based on a direction issued by the said Commission under section 57(1)(b) of the Regulation of Insurance Industry Act

¹ By the Regulation of Insurance Industry (Amendment) Act, No. 23 of 2017 the principal enactment (Act No. 43 of 2000) has been amended and accordingly, in the principal enactment and in any other written law, there shall be substituted for the words "Insurance Board of Sri Lanka" and "Board" (denoting the Insurance Board of Sri Lanka), of the words "Insurance Regulatory Commission of Sri Lanka" and "Commission" respectively.

No. 43 of 2000 ('Act'). The said Commission by its letter dated 12.12.2019 ('P13') has informed the Petitioner that seven critical issues identified by the special audit report of Ernst and Young had been considered and given the seriousness of such matters, the Commission had decided to direct NITF inter alia, to remove the Petitioner and the Chief Financial Officer from their respective positions and to appoint suitable persons with immediate effect. Further, the Commission has directed the NITF to warn the Members of the Board of NITF for not taking corrective action referring to the 151st and 153rd Board Meetings.

The Petitioner states that an independent audit can be commissioned by the 4th Respondent only if the interest of the policyholders of an insurer is in danger; or any insurer is unable to meet its obligations; or has made a default in complying with any of the provisions of the said Act. Further, it is submitted that giving reasonable notice and providing an opportunity to be heard is necessary in that regard. The Petitioner contends that the interests of the policyholders of the NITF were not in danger and the insurer never failed to meet its obligations or never made a default in complying with the provisions of the Act.

However, the Petitioner was interdicted and disciplinary proceedings were commenced against the Petitioner. In the meantime, the Petitioner reached the age of 55 years; the optional retirement age. The Board of Directors of the NITF on 10.09.2020 granted approval to retire the Petitioner at the age of 55 years in view of Clause III of the Public Enterprise Circular 01/2013 ('PE Circular'). Clause III of the said PE Circular reads;

“If the appointing authority decides that the extension of service beyond the age of 55 years, should not be granted to any officer, whose efficiency and performance is not satisfactory, the appointing authority has the authority to retire him/her from the service by giving 06 months prior notice, enabling the officer to appeal against the decision”.

The Chairman of NITF issuing a letter dated 08.10.2020 informed the Petitioner that he will be made to retire with effect from 15.04.2021 in terms of the above Clause III of the PE Circular but subject to the pendency of the disciplinary inquiry against him. A charge sheet dated 09.06.2021 was served on the Petitioner who has subsequently denied all the charges framed against him. When the instant Application was supported before this

Court on 06.08.2020 while issuing formal notice of this Application on the Respondents the Court directed the NITF to pay the Petitioner half the last drawn salary with effect from the date of his interdiction up to a determination that could be made consequent to a disciplinary inquiry. Nevertheless, the retirement of the Petitioner was made effective on the dates reflected in the letter dated 08.10.2020.

The Petitioner challenging the decision of the Commission to remove the Petitioner from his position submits that the Commission has not exercised its powers with due adherence to the basic rules of Natural Justice and the fundamental principles of administrative law. The additional argument raised by the Petitioner is that the decision to interdict him was taken by the Board of NITF at a meeting held without the necessary quorum. Another facet of the argument of the Petitioner is that under section 21 of the National Insurance Trust Fund Act No. 28 of 2006 ('NITF Act') the Board of the NITF is the appointing and disciplinary authority of the Petitioner and as such the 15th Respondent who was the Acting Chairman of NITF at that time had no authority to interdict the Petitioner.

The Commission contends that the Principal Officer of an insurer is responsible for the general control, direction and supervision of the insurer's business activities. It is further stated that the Commission has received several complaints about the procurement process for reinsurance in respect of the NNDIS Cover (National Natural Disaster Insurance Scheme). Additionally, the NITF which was under the control and supervision of the Petitioner has been accused of failing to comply with regulations issued by the Commission; failing to file statutory returns, and also to respond to the repeated directives and orders of the Commission relating to such failures. The Commission under section 54 of the said Act ordered an investigation into the affairs of NITF as a consequence of the above-mentioned mismanagement.

It is important to observe that by way of the letter dated 09.04.2018 marked 'P8' the Petitioner has communicated to the Commission the concurrence of the NITF to appoint an independent auditor to carry out an audit and as per the scope indicated in the Commission's letter dated 27.03.2018 ('R14'). According to the Commission, the Petitioner's allegation of failing to give a fair hearing is limited to the Petitioner's personal opinion and not that of the NITF. Not only is the aforementioned 'R14' evidence of the NITF's agreement to appoint an independent auditor, but the Director of Finance of the NITF also addressed the Petitioner with a letter marked 'R15' in that regard. Similarly,

Board Paper No.155-09, marked 'R22', emphasizes the concurrence of the Board of the NITF to conduct an independent audit. The Petitioner has neither challenged the respective audit report per se nor has he taken steps to name Ernst and Young as a party in this Application.

Having carefully perused the communication between the Commission and the NITF, it appears that the Commission has given sufficient opportunity to the NITF to raise any concerns on the decision to commence an investigation. Hence, the question that arises is whether due notice or opportunity to defend was given to the Petitioner personally.

It is not in dispute that the Petitioner served as the CEO who is considered the Principal Officer of the NITF. The primary duty of a Principal Officer is to hold the responsibility for providing dynamic leadership to steer whatever the organization he gets in all aspects such as policy, teamwork, labour force and also to uphold the objectives and vision of the respective institution. In terms of the Board Paper marked 'P5', the CEO of the NITF shall be the Chief Administrative and Operational Officer and he shall direct and supervise its administrative affairs and general management; and perform such other duties as may be prescribed from time to time by the Board of the NITF. Thus, the Petitioner was bestowed with a paramount responsibility to carry out his duties enabling the Board of the NITF to fulfill its objectives laid down in section 12 of the said NITF Act. In light of the sequence of circumstances that occurred since the time at which it was decided to carry out an independent audit, I take the view that the Petitioner's rights and opportunities to defend himself did not tend to be eliminated until the moment he was interdicted.

One of the main allegations against the Respondents is that the Petitioner was never informed that his standard of services was unsatisfactory to the Respondents. It is observed that most of the communication originating from the Commissioner was addressed to the personal name of the Petitioner. In light of my findings above, especially in respect of the gravity of the responsibilities of a CEO, I am of the view that the totality of the contents of those letters focus on the conduct of the Petitioner to a greater extent. The Petitioner himself has responded to some of the letters by which the NITF was requested to provide reasons for alleged mismanagement.

There is no evidence before Court for me to disbelieve that the Petitioner being the CEO of NITF had the full privilege of responding effectively to any communication including

the directives of the Commission. Despite the Petitioner's complaints of a breach of natural justice, I cannot see any instance where the Petitioner's right to defense was restricted or hampered. In contrast to a typical employment contract between a minor employee and an employer, the Petitioner's role and responsibilities must be assessed from a broader perspective while taking into account the required standards of service concerning the advancement and enhancement of the statutory obligations of the NITF. Hence, the issue of whether the Petitioner has been heard or been allowed to defend himself should be evaluated based on the overall facts and circumstances of this case without clinging to objections of a technical nature. The judgement of *Thalayarithne Mudalige Jagath Wickramasekara v. State Mortgage and Investment Bank CA/Writ/160/2022 decided on 23.11.2023*, portrays a certain evolution of legal jurisprudence, regarding the concept of Natural Justice which has gone beyond its ancient parameters and giving it a broader definition. To my mind, the issue relating to the Petitioner continuing to hold the post of CEO as emanated through the documents annexed as 'R2' dilutes the strength of the Petitioner's argument on Natural Justice.

As opposed to the argument raised by the Petitioner that the 15th Respondent had no authority to issue the letter interdicting the Petitioner, the NITF asserts that the respective letter of interdiction ('P14') has been copied inter alia, to the Secretary to the Treasury and on a subsequent date the Board of the NITF ratified the decision to interdict the Petitioner. In support of such assertions, the NITF has annexed Board Paper No. 162-01 dated 17.02.2020 & 24.02.2020 ('A2' and 'A3') and the letter dated 12.12.2019 (marked 'P13') addressed to NITF by the Commission. One may argue as per the traditional norm that if an initial stage during a decision-making process is faulty then the whole process becomes a nullity. If I am to uphold such a stand, I will be restricting the modern evolution of legal jurisprudence concerning the customary principles of the Rule of Natural Justice. Anyhow, I am not inclined to accept such a proposition in this case. The facts and circumstances of this case lead me to hold that the subsequent ratification by the members of the Board of the NITF, who met many a time after issuing the letter of interdiction ('P14'), transformed the said impugned decision to interdict the Petitioner into a semblance where such decision was taken with everyone's approval.

Now I advert to the issue on the retirement of the Petitioner. As mentioned above, the Board of the NITF at its 166th meeting held on 03.09.2020 has decided to place the

Petitioner on retirement in terms of Clause III of the PE Circular. The Petitioner placing reliance on the judgement of *Devendra Budalge Sudesh Lalitha Perera v. Janatha Estates Development Board CA/ WRIT/004/2022 decided on 06.10.2022* formulates an argument that the NITF marginalizing and victimizing the Petitioner has prematurely retired him a) without even issuing a show cause notice on the Petitioner; b) without holding an inquiry or carrying out an efficiency/ performance evaluation, in accordance with the basic rules of Natural Justice. In the said *Devendra Budalge Sudesh Lalitha Perera case* this Court has observed that in reference to the said PE Circular 01/2013 the appointing authority has not been bestowed with an unfettered discretion to terminate the services of an employee under such Circulars, unless an appropriate inquiry is held or a proper assessment on efficiency and performance is carried out according to the rules of Natural Justice and the rule of law.

I cannot possibly overlook at this stage, the fact that the Petitioner was not an employee whose services were confirmed even after the lapse of the initial period of probation stipulated in the contract of employment. Thus, the Petitioner was made to retire when he was serving as an unconfirmed officer. This court earlier in this judgement observed that the Commission started raising various issues on the management of NITF during the period the Petitioner was serving his first three years as a probationer. I believe, by now, that I have substantially dealt with the argument of the Petitioner upon the rule of Natural Justice. The phrase ‘whose efficiency and performance is not satisfactory’, embodied in Clause III of the PE Circular cannot be assessed in isolation of the other related events that have taken place both before and after the interdiction of the Petitioner. Based on the evidence made available to Court, I am satisfied that a proper assessment on efficiency and performance of the Petitioner has been carried out by the Commission.

Anyhow, the decision to retire the Petitioner was taken whilst a disciplinary inquiry against the Petitioner was pending. Despite my findings above it is observed that a fresh question emanates due to the non-conclusion of the disciplinary inquiry commenced against the Petitioner. The question as to whether the Petitioner should be afforded an opportunity to establish his alleged defense at the said disciplinary inquiry to clear his image needs to be resolved. This is because the Petitioner in the said CA/Writ/114/2021 asserts that the principles of Natural Justice have been violated by not giving an opportunity for him to defend himself against the allegations of unsatisfactory service that

is embodied in Clause III of the PE Circular. Thus, I take the view that the said question should be duly examined in CA/Writ/114/2021 for the best interest of justice and for the fuller and proper adjudication of the said Application.

Having considered the main questions pertaining to the instant Application what remains to be considered is whether a deep evaluation is necessary regarding the Respondents' objections. The Respondents among other objections resist the maintainability of the instant Application. One such is that no writ lies upon the alleged grievances of the Petitioner as those emanating from the contract of employment entered into between the Petitioner and the NITF. However, it is important to note that this court has constantly decided, inter alia, that the Court of Appeal has the discretionary power to exercise writ jurisdiction even on a question arising out of a contract of employment if the disciplinary order of a public authority was in breach of statutory restrictions/provisions². I am convinced that all such issues in relation to breach of statutory restrictions have been considered above and thus, there is no necessity to assay this objection as well as the other objections which are in preliminary nature.

In the circumstances, I hold that the Petitioner is not entitled to any of the reliefs as prayed for in the prayer of the Petition. Thus, I proceed to dismiss the instant application.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal

² See: - W G Chamila v Urban Development Authority and others CA/WRIT/215/2022 decided on 26.10.2022; Devendra Budalge Sudesh Lalitha Perera v Janatha Estates Development Board and others CA/WRIT/004/2022 decided on 06.10.2022; Vithanage Vajira Kelum Perera v Sudath Rohana Chairman, Independent Television Network and Others CA/WRIT/508/2021 decided on 29.08.2023