

**COLLETES LTD.**  
**v.**  
**COMMISSIONER OF LABOUR AND OTHERS**

COURT OF APPEAL  
VIKNARAJAH, J. AND A. DE Z. GUNAWARDANA, J.  
C..A. APPLICATION NO. 77/88  
MAY 16, 1989

*Industrial Law – Workman – Whether Group Managing Director, a workman within the meaning of the Payment of Gratuity Act No.12 of 1983 – Sections 8(1) and 13 – Affidavit – What an affidavit should contain – Full disclosure required in writ and injunction applications.*

An application for a writ of certiorari was filed by the petitioner to quash an order made by the 3rd respondent, the Assistant Commissioner of Labour awarding gratuity to the 4th respondent in a sum of Rs.87,500/-, and also for a mandate, in the nature of a writ of prohibition against the 1st and 2nd respondents from enforcing the said order.

The 4th respondent was first appointed Managing Director, Colombo Paints Company on 1.5.80 and served in that capacity till 28.2.82. Thereafter the 4th respondent was appointed Group Managing Director of Collettes Group of Companies from which position he resigned with effect from 31.5.87. After his resignation, he made an application to the 1st respondent to obtain an order for payment of gratuity. After inquiry by the 2nd respondent, the 3rd respondent made the said award of Rs.87,500/- as gratuity.

**Held—**

- (1) that a Managing Director has a dual capacity of being an employee of the company and also at the same time takes part in the management of the company. The fact that as Managing Director or as Group Managing Director he takes part in the management of the affairs of the company does not deprive him of his other capacity as an employee of the said company. Therefore the 4th respondent falls within the definition of a "workman" set out in the Payment of Gratuity Act;
- (2) that the fact that a person received a special allowance or a compensatory allowance does not deprive him of the right to receive gratuity under the Payment of Gratuity Act. Such payment is not covered by the provisions of section 7 of the Payment of Gratuity Act;
- (3) that there is no specific requirement in section 8(1) of the Payment of Gratuity Act to call evidence. What seems to be necessary is, for the Commissioner to be satisfied of the relevant matters necessary to decide, on the question whether a person is entitled to gratuity or not;
- (4) that an affidavit should be confined to the statements of such facts as the declarant is able to state of his own knowledge and observation to testify;

- (5) that it is essential, that when a party invokes the writ jurisdiction or applies for an injunction, all facts must be clearly, fairly and fully pleaded before the court so that the court would be made aware of all the relevant matters.

**Cases referred to:**

1. *Ceylon Electricity Board v. de Abrew* 78 N.L.R. 97.
2. *Brakes and Clutch Linings (Pvt) Ltd., v. W. L. P. de Mel and two others* SC Application No.184 of 1975 – S.C. Minutes of 27.03.78.
3. *Walker Sons and Company (U.K.) Ltd. v. W. P. Gunatileke et. al* 1985 Bar Association Law Journal Vol. 1 pt. 5 page 205; (CA) S.C. Application No.365/76 – S.C. Minutes of 28.11.79.
4. *Lee v. Lee's Air Farming Limited* (1960) 3 All ER 420.
5. *Anderson v. James Southerland* (1941) SC 203.
6. *Simon Fernando v. Gunasekera* 47 NLR 512.
7. *W. S. Alfonso Appuhamy v. Hettiarachchi* 77 NLR 131.
8. *King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington – ex parte Princes Edmond de Poignac* (1917) KBD 486.
9. *Dalglish v. Jarvie* 2 Mac & G. 231, 238.

APPLICATION for writ of certiorari to quash order of Assistant Commissioner of Labour.

S. Mahenthiran for petitioner.

P. A. Ratnayake, S.S.C. for 1st, 2nd and 3rd respondents.

G. L. T. Alagaratnam for 4th substituted respondent.

*Cur. adv. vult*

September 08, 1989.

**A. DE Z. GUNAWARDANA, J.**

This is an application by the petitioner, Collettes Ltd. for a Mandate in the nature of a Writ of Certiorari quashing the order made by the 3rd respondent contained in a letter dated 14.12.87, requiring the petitioner Company to pay a sum of Rs.87,500/- as gratuity to the 4th respondent and also for a Mandate in the nature of a Writ of Prohibition against 1st to 3rd respondents from enforcing the said order.

The 4th respondent was appointed Managing Director of Colombo Paints Company Limited from 1.5.80 and served in that capacity till 28.2.82. Thereafter the 4th respondent was appointed Group Managing Director of Collettes Group of Companies, of which Collettes Ltd. was the principal parent Company. The 4th respondent resigned from the said position with effect from 31.5.87. Subsequently, the 4th respondent made an application to the 1st respondent to obtain an order for payment of gratuity. An inquiry was held by the inquiry officer, the 2nd respondent. Upon the report made by the 2nd respondent recommending the award of a sum of Rs.87,500/- as gratuity, the 3rd respondent made order under the Payment of Gratuity Act No.12 of 1983, contained in the letter dated 14.12.87, requiring the petitioner Company to pay the 4th respondent a sum of Rs.87,500/- as gratuity in terms of section 5(1) of the Payment of Gratuity Act. The petitioner being aggrieved by the said order has filed the present application in this Court.

Counsel for the petitioner submitted that the Payment of Gratuity Act does not apply to the 4th respondent because he was the Managing Director of Colombo Paints Limited at one time and later the Group Managing Director of Collettes Group of Companies and that, in that capacity he was not a 'workman' in terms of the definition 'workman' under the Payment of Gratuity Act. In the said Act 'workman' is defined 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 workman whose services have been terminated."

It is to be noted that the word 'workman' has been interpreted by the Supreme Court both in relation to Industrial Disputes Act and Termination of Employment of Workmen (Special Provisions) Act. In the Industrial Disputes Act the word 'workman' has been given the identical definition as in the Payment of Gratuity Act. In the case of *The Ceylon Electricity Board vs. de Abrew* (1), the question whether the General Manager, Ceylon Electricity Board is a 'workman' within the meaning of the Industrial Disputes Act was considered by the

Supreme Court and was decided that he was a 'workman' within the meaning of the Industrial Disputes Act.

In the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971, a 'workman' is defined as follows:

" 'Workman' has the same meaning as in the Industrial Disputes Act but does not include a workman to whom, by virtue of the operation of the provision of sub-section (1) of section 3, the provisions of this Act other than section 3 do not apply."

Samarakoon CJ having considered this definition held in his judgment dated 27.3.78 in the unreported case of *Brakes and Clutch Linings (Pvt) Ltd., vs. W. L. P. de Mel and two others*,<sup>(2)</sup> that, the Managing Director of the said Company is a workman in terms of Termination of Employment of Workmen (Special Provisions) Act. Samarakoon CJ in his judgment states:

"He contends that the Managing Director under the Companies Ordinance has a special or peculiar status, which does not bring him within the definition of 'workman' under the provisions of Act 45 of 1971. I am however, unable to agree with this contention that he has any characteristics which takes him out of the definition in Act No.45 of 1971."

Thus it is seen that the Supreme Court has interpreted the definition of 'workman' given in the two statutes which are identical to the definition given in the Payment of Gratuity Act, to include a Managing Director of a Company.

Counsel for the petitioner drew our attention to the case of *Walker Sons and Company (U.K.) Ltd., vs. W. P. Gunatilleke et. al*,<sup>(3)</sup>. In this case it was held that a ratio decidendi of two previous cases decided by the Supreme Court is binding on the Court of Appeal. Although the two cases referred to above are interpretations of the word 'workman' in relation to two different statutes, and are therefore not binding on this Court, nevertheless, those interpretations are of great persuasive value. In the circumstances, we are inclined to follow them.

However, the learned Counsel for the petitioner contended that the 4th respondent being a Managing Director belonged to a special category of employees and is not a 'workman' within the meaning of Payment of Gratuity Act. He submitted that the 4th respondent

belonged to the group of persons who formed the "directing mind and will of the Company." He added that the 4th respondent constituted the group forming the management of the Company. In this regard Palmer in his book on Company Law 21st Edition page 521-522 states that:

"A Director can hold a salaried employment or an office in addition to that of his directorship which may for those purposes make him an employee or servant; in such a case he would enjoy any rights given to employees as such; but his directorship and his rights through that directorship are quite separate from his rights as employee."

Similarly in the case of *Lee vs. Lee's Air Farming Limited* (4), the question whether Lee was a 'workman' within the meaning of New Zealand Workers Compensation Act, which applies only to persons who have entered into a contract of service with an employer was considered. It was revealed in this case that the deceased was the sole governing director and principal of a "one-man company." He had entered into a contract with the company as the sole pilot of the company and died when the aeroplane he was flying, crashed. Lord Morris in his judgment at page 525 states that,

"It is well established that the mere fact that someone is a Director of a Company is no impediment to his entering into a contract to serve the Company...Nor in Their Lordships' view were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was rested the full government and control of the respondent Company." In another case namely *Anderson vs. James Southerland* (5), referred to by Palmer, Lord Normand states: "In my opinion, therefore, the Managing Director has two functions and two capacities. Qua Managing Director he is a party to a contract with the company, and this contract is a contract of employment – more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this; indeed it is a common place of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same persons."

Thus it is clear that a Managing Director has a dual capacity of

being an employee of the Company and also at the same time takes part in the management of the Company. The letter of appointment dated 27.11.79 appointing the 4th respondent as Managing Director of Colombo Paints Ltd., required him to enter into a formal agreement of a contract of service and the letter dated 28.2.82 appointing the 4th respondent as Group Managing Director required him to consider that letter as his official letter of appointment, and the terms and conditions of employment are set out therein. It is also evident from the said documents that the 4th respondent was paid a monthly salary for his services for the said Companies. The fact that as Managing Director or as Group Managing Director he takes part in the management of the affairs of the said Companies does not in our view deprive him of his other capacity, as an employee of the said companies. Therefore we hold that the 4th respondent falls within the definition of a 'workman' set out in Payment of Gratuity Act and is entitled to receive gratuity under the said Act.

It was contended by the Counsel for the petitioner that the 4th respondent was not entitled to receive any gratuity because he was a person who was receiving a pension under a non-contributory pension scheme. He cited in support of his contention the provision in section 7 of the Payment of Gratuity Act where it is stated that:

"The provisions of section 5 shall not apply to or in relation to a workman—

(a) .....

(b) entitled to a pension under non-contributory pension scheme."

The learned Counsel submitted that in terms of the letter of appointment as Managing Director of Colombo Paints Ltd. dated 21.11.79 there was provision to pay an allowance in lieu of the pension which the 4th respondent was forfeiting by accepting the said appointment. In order to ascertain whether this provision in the letter of appointment is in fact a contributory pension, it is necessary to consider the contents of it. Paragraph 8 of the said letter of appointment states as follows:

"In view of the fact that as a consequence of your premature retirement from your present employment to take up at our request your appointment with this Company you will be losing the

equivalent of Pounds Sterling Forty (£40/-) per month as pension; the Company will pay you, as a Special Allowance, the equivalent in Rupees of Pounds Sterling Forty (£40/-) per month calculated at the rate of exchange prevailing on the last working day of each month, for the duration of your life."

It is also to be noted that in the letter of appointment of the 4th respondent as Managing Director of Collettes Group of Companies dated 28.2.82 a similar provision was made in paragraph 4 which reads as follows:

"Compensatory allowance of Sterling Pounds Forty per month, paid now while in service, will be paid for life unless you resign the services of the Company before expiry of 5 years from 1st May 1980. This is being paid as you had to forego your pension rights in the U.K. The Compensatory allowance shall be paid equivalent in Sri Lanka Rupees."

In the first letter of appointment it is clearly stated that it is a Special Allowance in lieu of the Forty Pounds Sterling pension that the 4th respondent was losing by accepting the said appointment. It is significant that this payment is referred to, as a Special Allowance. In the second letter of appointment this said payment is referred to, as a Compensatory Allowance and the same reason is adduced for making the said payment, viz., for having to forego the "pension rights in the U.K." Thus it is clear that this payment is not a non-contributory pension and therefore would not be covered by the provisions in section 7 of the Payment of Gratuity Act. This is, as described in the said letters, a Special Allowance or a Compensatory Allowance in view of the fact that the 4th respondent had to forego his pension rights in the U.K. Therefore we are of the view that, the payment of the said allowance of Forty Pounds Sterling, does not affect the entitlement of the 4th respondent to receive gratuity under the Payment of Gratuity Act.

Learned Counsel for the petitioner submitted that the 2nd respondent failed to hold a proper and full inquiry. Therefore the order made by the 3rd respondent was not valid in law. Section 8(1) of the Payment of Gratuity Act states that,

"The Commissioner may issue a certificate after such inquiry as he may deem necessary."

It is seen that there is no specific requirement that the Commissioner should call evidence. All that seems to be necessary is for the Commissioner to be satisfied of the relevant matters necessary to decide on the question whether a person is entitled to gratuity or not. It is seen from the document 3R4, the notes of inquiry before the 2nd respondent that there had been a full discussion in regard to the matters at issue. In fact, four matters have been raised at the said inquiry, they are:-

- (1) that the 4th respondent being a Managing Director is not a 'workman' within the provisions of the said Act,
- (2) that section 189 of the Companies Act prohibits any payment to be made to any Director of the Company without disclosing such payment to the Members of the Company and without the approval of the Company,
- (3) that the 4th respondent was in receipt of a non-contributory pension of £40/- per month,
- (4) that the 4th respondent had taken unauthorised overseas calls to the value of over hundred thousand rupees and thereby caused loss to the Company.

All these matters were considered by the Inquiry Officer, the 2nd respondent, before he made his recommendation to award gratuity.

Although the Counsel for the petitioner complained that he was not allowed to lead any evidence at the inquiry and that they took up the position that 4th respondent would have to start and place necessary evidence, the 2nd respondent in his affidavit states that the petitioner Company did not take up the position that the 4th respondent would have to start and place the necessary evidence and that it is necessary to test the testimony of the 4th respondent by cross-examination.

In the circumstances it is our view that the Inquiry Officer had made such inquiry as he deemed necessary, as required by law, before he made his recommendation to award gratuity to the 4th respondent. Since there is adequate compliance with the provisions of the Payment of Gratuity Act we hold that the award made by the 3rd respondent is valid in law.

It was also contended on behalf of the petitioner that gratuity is not

payable to 4th respondent because he has caused loss to the Company by taking unauthorised overseas private calls, amounting to over a hundred thousand rupees. The learned Counsel submitted that under section 13 of the Payment of Gratuity Act, the gratuity payable is forfeited to the extent of the damage or loss caused. Section 13 of the Payment of Gratuity Act states:

"Any workman to whom a gratuity is payable under part II of this Act and whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, wilful damage to property of the employer or causing loss of goods, articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him."

Learned Counsel submitted that since the 4th respondent has taken unauthorised calls to the value of hundred thousand rupees, loss has been caused to the company. Therefore, under the provisions of this section the gratuity awarded must be forfeited. Upon a reading of the said section it is clear that provisions in the section require that,

"The services should have been terminated for reasons of fraud, misappropriation ..... or causing loss of goods ....."

In this case there is no dispute that the 4th respondent resigned from the post of Managing Director, Collettes Group of Companies on his own volition. It is evidenced by letter dated 24.2.87, document marked 4R2. It is interesting to note that by letter dated 6.4.87, document marked 4R3, the Chairman, Collettes Ltd., has thanked the 4th respondent on behalf of the Board, for carrying on the onerous duties as Group Managing Director. Therefore it is clear that the services of the 4th respondent have not been terminated for any of the reasons set out in that section and, in our view this section has no application in this case.

Counsel for the 4th respondent submitted that the affidavit filed by the petitioner is a non-affidavit because the declarant had averred facts which were not within his personal knowledge. He specifically pointed to paragraph 10 of the affidavit where it has been stated that:

"The Company took up the position that the 4th respondent would have to start and place necessary evidence and his testimony be tested by cross-examination."

The learned Counsel submitted that the declarant was not present at the said inquiry and the facts he had averred in the said paragraph were not within his personal knowledge. In any event this was not the correct position that arose at the inquiry. He pointed out that in the affidavit filed by the 2nd respondent it is stated as follows:

“Further I would like to specifically state that the petitioner Company had not taken up any position to the effect that the 4th respondent would have to start and place necessary evidence and his testimony to be tested by cross-examination.”

This position taken up by the 2nd respondent is supported by affidavit filed by the 3rd respondent in paragraph 11. It is seen from document 3R4, the notes of the inquiry held by the 2nd respondent, that the Collettes Limited was represented by its Chairman and its lawyers. There is no mention of the declarant being present at the inquiry. The declarant has not stated in his affidavit that he was present at the inquiry and has failed to state as to how these facts are within his personal knowledge.

In dealing with what the contents of an affidavit should be, section 181 of the Civil Procedure Code, states:

“Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavits.”

Thus it appears that the averment in the said paragraph of the said affidavit contravenes the provisions of section 181, of the Civil Procedure Code. In the case of *Simon Fernando vs. Gunasekera*, (6) Dias J. states:

“Section 181 of the Civil Procedure Code makes it clear that affidavit must be confined to statement of such facts that a declarant is able of his own knowledge and observation to testify to. An exception is made in the case of interlocutory affidavit, in which statements regarding his belief may be admitted, provided reasonable grounds of such belief be set forth in the affidavit.”

Learned Counsel for the 4th respondent also pointed out to paragraph 15 of the said affidavit where it is stated as follows:

"The 4th respondent was entitled for £40/- pension a month under a non-contributory pension scheme. This position is acknowledged in the 4th respondent's letter dated 4th July 1987 marked 'C'".

This is a letter sent by the 4th respondent to the Board of Directors of Collettes Limited, wherein the payment concerned is not referred to as a pension but as follows:

"According to my letter of appointment, a *Compensatory Allowance* of the Sri Lanka Rupee equivalent of Sterling Pounds Forty per month is payable for life."

Thus it is seen from the said letter that the 4th respondent has not acknowledged that he is in receipt of a non-contributory pension. However, the declarant in his affidavit had referred to the said document marked 'G' to support his contention that it is a non-contributory pension, but it is clear from the contents of the document that it is not so. Hence the learned Counsel for the 4th respondent submitted that the averment in the affidavit was a misrepresentation of fact. In our view there is substance in the said submission of the learned Counsel.

It has been repeatedly pointed out by our courts that a full and fair disclosure of all material facts should be placed before the Court when an application for a Writ of Injunction is made and the discretionary powers of the courts are invoked in that regard. In the case of *W. S. Alfonso Appuhamy vs. Hettiarachchi* (7) it has been held;

"When an application for a prerogative Writ or an Injunction is made, it is the duty of the petitioner to place before the court before it issues notice in the first instance, a full and truthful disclosure of all material facts; the petitioner must act with *uberrima fides*."

The case of *King vs. The General Commissioner of the Purpose of the Income Tax Acts for the District of Kensington – ex parte Princes Edmond de Poignac* (8) dealt with Writ of Prohibition and the principles enunciated and applicable to all cases of Writs and Injunctions. In this case the Divisional Court when dealing with the merits of the case discharged the Writ on the ground that the applicant had suppressed or misrepresented facts material to her

application. The Court of Appeal affirmed the decision of the Divisional Court. Thus it is seen that in cases where there had been a suppression of material facts they are liable to be dismissed without going into the merits of the case if there had not been a full and fair disclosure of all material facts.

Lord Cozens-Hardy M.R. in his judgment in the said case refers to the case of *Dalglish vs. Jarvie* (9) where Lord Langdale and Rolfe B have stated that,

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

Lord Cozens-Hardy M.R. goes further to state;

"That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex-parte application uberrima fides is required and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say, - We will not listen to your application because of what you have done."

Thus it is essential that, when a party invokes the Writ jurisdiction or applies for an Injunction to this Court, all facts must be clearly, fairly and fully pleaded before the Court, so that Court would be made aware of all the relevant matters. It is necessary that this procedure must be followed by all litigants who come before this Court in order to ensure that justice and fairplay would prevail.

Accordingly, for the reasons we have stated above we uphold the order made by the 3rd respondent awarding the 4th respondent a sum of Rs. 87,500/- as gratuity and dismiss the application of the petitioner with costs fixed at Rs. 210/-.

**VIKNARAJAH, J.** - I agree.

*Application dismissed.*