IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

2020- HC- DEM- CIV- FDA- 1127

BETWEEN:

1. Union of Agricultural and Allied Workers represented by **CARL LYNCH**, in his capacity as the Trustee of the aforesaid Union.
2. **LEROY LEVANS**, in his capacity as the General Secretary of the Union of Agricultural and Allied Workers.

Applicants

-and-

1. TRADE UNTION RECOGNITION and CERTIFICATION BOARD, established by the Trade Union Recognition Act.
2. CHARLES OGLE, Secretary of the TRADE UNION RECOGNITION and CERTIFICATION BOARD

Respondents

Jointly and Severally

3. GUYANA AGRICULTURAL AND GENERAL WORKERS UNION (GAWU)

Added Respondent

CORAM

Honourable Mr. Justice Franklin Holder

Attorneys

Mr. Roysdale Forde S.C for Applicants

Ms. B. Bishop- Cheddie and Ms. L. Noel for First and Second Respondents

Ms. Pauline Chase for Added Respondent

Delivered May 13th, 2022

DECISION

1. On the 16th May 2000 the Applicant Union was certified as the recognised majority Union in respect of workers of the Guyana Rice Development Board (GRDB) engaged at Burma Rice Research Centre and Seed Processing Unit at Onverwagt, save and except certain listed jobs.
2. By letter dated 18th October 2019 the second respondent representing the first respondent informed the first applicant that, "the Guyana Agricultural and General Workers Union (GAWU) in an application dated 15th July 2019 had applied to represent workers employed by the GRDB for certification of recognition of the bargaining unit for labourers and technicians".

3. The letter at paragraph 2 in effect acknowledged the applicant Union as the certified majority union. This being the case any application by GAWU to be recognised as the majority union of those category of workers would in effect be a challenge being made to the Applicant Union's certification.
4. In the letter of the 18th October 2019 the second respondent further informed the Applicants that in keeping with S. 18 of the Trade Union Recognition Act cap 98.07 (the Act) the Ministry of Social Protection (Labour Department) was requesting certain information.

Section 18 provides as follows:

> 18. (1) A trade union that desires to be treated as a recognised majority union shall apply to the board in writing to be so certified in accordance with the provisions of this Part.
>
> (2) The application shall describe the proposed bargaining unit in respect of which certification is sought and shall be in the prescribed form.
>
> (3) The union making the application hereinafter referred to as the "claimant union" shall serve a copy of the application on the employer and on the Minister.
>
> (4) The application shall be determined, within two months of the date of its receipt by the Board, in accordance with the following provisions of this Part.

5. I find that nowhere in a section 18 is it required of a recognised Union to provide the information requested by the Ministry of Social Protection (Labour Department). Be that as it may the Applicants aver in their Affidavit in Support to submitting to the first respondent some of the information requested.

6. By letter dated 19th November 2020 penned by the second respondent and addressed to the second Applicant the Applicants were informed that the Board had met on the said day and decided that a Poll be carried out to determine which Union will represent workers at the GRDB. The letter also served as an invitation to the first applicant to a meeting to work out the modalities for the Poll.

7. The Applicants did attend the meeting. The minutes of that meeting is in evidence and has not been denied by the Respondents. I note that, Mr Carryl a representative of the applicant Union at that meeting challenged the decision to conduct the Poll without the results of a survey which is required by S. 21 of the Act being presented to the recognised Union. He expressed the opinion that the criteria for holding a Poll had not been met. Mr Carryl expressed the applicant Union's reluctance to participate in a Poll without them seeing the results of the purported survey. He further said, that they would like to see the Poll conducted in accordance with the law and that the result of the survey must be known.

8. At this meeting the second respondent informed the applicants that despite their protections the Board had deliberated and approval was granted by the Board for the Poll to be conducted.

9. The Court notes that nowhere in the Minutes is it recorded that the Board after considering the survey ruled that it was inconclusive and made a decision to ignore it. It is in the Affidavit in Defence sworn by the second respondent at paragraph 10 that we are told that "the Board met to deliberate on the survey and found that the survey could not be accepted…., "reasons being provided. Interestingly the last listed reason for ignoring the survey was that four months had elapsed since the survey was conducted and it was

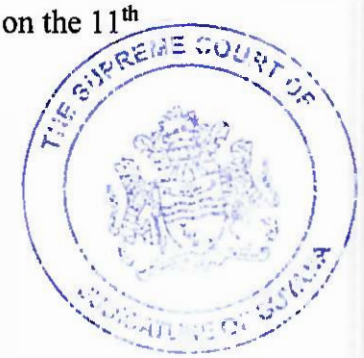
determined that the most suitable solution was to conduct a Poll". Following this decision to disregard the survey a Poll was conducted on the 14th November 2019.

10. These proceedings were filed on the 10th December 2020 at 15:21 hours and the Poll was conducted on the 11th December 2020. The results of this Poll show that the added respondents garnered 79% of the votes.

11. At the time of filing this Application for Administrative Orders the applicants also made an Urgent and Without Notice Application for interim relief which included, an injunction to restrain and prohibit the board from holding or carrying on any Poll of workers of the GRDB, Burma Research Centre, to be held on the 11th December 2020. This application was refused by the Chief Justice (ag).

Issue 1

12. The first issue which falls for determination is whether the decision of the first Respondent to conduct a Poll without consideration of the results of the survey as prescribed for by the proviso to S. 21 of the Act and the Poll conducted on the 11th December 2020 were lawful.



Law and Analysis

Section 21 of the act provides that:

> 21. (1) Where two or more trade unions have applied under section 18 in relation to the same bargaining unit, the Board shall bring the applications to the attention of the most representative organisation of trade unions providing such details as are necessary to give that organisation an opportunity to resolve the claims among the

unions and to report thereon to the Board within a period no longer than twenty-eight days and the organisation shall advise the Board of the outcome of its intervention, which advice the Board shall take you cognisance of, but where the organisation fails to report to the Board within such time or fails to report a resolution, the majority union shall be determined in accordance with subsections (2) and (3).

(2) Where two or more trade unions have applied under section 18 in relation to the same bargaining unit and there has no resolution under subsection (1), the Board shall carry out a secret Poll among workers in the unit and shall certify as the recognised majority union for the unit the claimant union which as shown by the poll to have the greatest support among the workers, provided that no union shall be certified where less than forty percent of the workers take part in the ballot.

(3) Where the results of the poll show a tie or are inconclusive, a second poll shall be carried out within seven days and in the event of a second time or the results being inconclusive, a further poll shall be conducted within fourteen days:

Provided that where is certified union is being challenged and the challenging union satisfies the Board, by means of a survey, that the last support of the challenging union among the workers in the unit is not less than forty per cent, the Board shall cause a poll to be taken, but the certificate of recognition of the challenged union shall be cancelled where the challenging union fails to obtain a majority of no less than forty per cent amongst the workers in the unit.

13. Since the Applicants were a recognised majority Union the challenge by the added respondent to replace the first applicant fell to be dealt with under the proviso of S. 21. By this proviso the first Respondent was obligated to first conduct a survey to determine whether the challenging Union enjoyed no less than 40% support of the workers it was seeking to represent. A survey was a precondition to the hosting of any Poll prescribed for the Act.

14. The evidence is that a survey was conducted however, the first Respondent determined that it was inconclusive and sought to ignore it. Whether or not they were justified in rejecting the survey is not in issue. However, what they cannot do is ignore the survey and proceed to conduct a Poll. The Board had no jurisdiction to do such. Their decision to do so was in breach of the statute, as such it was in excess of jurisdiction and ultra vires.

15. Where statute or rules prescribes for how an act is to be done a body charged with executing those provisions cannot choose to ignore the letter of the prescription of that law or rule. Since the decision was in excess of jurisdiction and ultra vires it means that the Poll conducted on the 11th December 2020 was ultra vires and as a consequence null and void.

16. MICHAEL FORDHAM in Judicial Review Handbook (fifth edition) at paragraph 44.2.2 adopted the principle pronounced by Lord Reid in ANISMINIC LTD [**Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147, 171B-EJ:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But . . . there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature

that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account",

And at paragraph 44.3.5 in discussing the consequences of an act done without or in excess of jurisdiction states:

"Where a decision is found to be in excess of or without jurisdiction, there is strictly no need to quash it, since it is a nullity".

17. The following passages from **BENNION ON STATUTORY INTERPRETATION** 5th edition support my opinion that compliance with the proviso of S. 21 as they relate to procedure following the filing of an application by a challenging Union leave no place for any other procedure or any discretion in the first respondent.

Page 44

"In ascertaining the effect of the failure to comply with the relevant requirement, it is necessary to determine whether the requirement was intended by the legislature to be mandatory or merely directory. For this purpose, it may be relevant to consider whether the person affected and the person bound are

the same, and whether the thing done under the enactment is beneficial or adverse to the person affected."

Page 51

"Where a statutory procedure is laid down for a particular purpose, the court will be reluctant to allow that purpose to be achieved in another way not primarily intended for it."

"The court, in following or applying a statutory procedure, cannot assume an inherent jurisdiction to waive or vary a requirement of the procedure where the requirement is one upon which the very existence of its jurisdiction to take the action in question depends."

[emphasis mine]

18. In **PETCH v GURNEY** [1994] 3AER 731 where in an appeal against a tax assessment the taxpayer failed to submit the case to the High Court within the 30 days period after receipt from the Commissioner as required by Section 56(4) of the Taxes Management Act 1990 **MILLETT J** at page 736 e observed:

"The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply."

"Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows."

[Emphasis mine]

HENRY LJ although pointing out that the time frame could give rise to a potential source of injustice stated that the Court had no discretion to waive the requirement. (p. 740h).

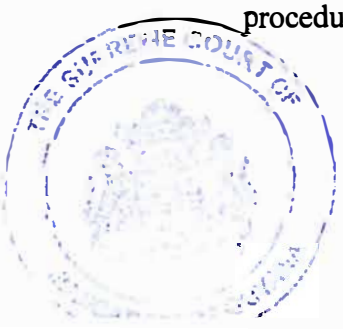
Issue 2

19. The second issue for consideration is whether the first Applicant was entitled to be shown the results of the survey held on November 14th 2019 as requested.

20. In the context of my findings that the decision to host a Poll without a survey was unlawful and ultra vires a ruling on this issue is not absolutely necessary. However, I feel compelled to give an opinion given what appears to me to be the dismissive manner in which the request for results of the survey was treated.

21. The first applicant's position as representative of the workers at the GRDB was being challenged. A successful challenge would bring an end to this status they enjoyed. They had a vested interest in the proceedings which was prescribed for by statute. They in effect had a legitimate and vested interest in the outcome of any survey conducted since this was a precondition to the hosting of any Poll, the results of which could be detrimental to their status of majority Union for the workers at the GRDB.

22. If a survey reveals that the challenging Union had met the threshold for hosting a Poll and a decision was made to conduct a Poll by the designated authority, then in my opinion procedural fairness and the need to ensure integrity of the process demand that all



information including the results of any survey necessary for the conduct of a Poll ought to be provided to a party with a sufficient interest in the outcome of that Poll.

23. I find support for my opinion in the statement of Lord Diplock in the case of **R-v-Commissioner of Racial Equality Exp Hillingdon LBC** 1982 A.C 779 where he said.

> "Where an Act of Parliament confers upon an administrative body functions which involve it's making decisions which affect to their detriment the rights of other persons or curtail their liberty to do so please, there is a presumption Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."

24. There are a number of other authorities that espouse this principle of fairness.

25. The learned authors of De Smith's Judicial Review 7th Edition opined on this concept at paragraph 7- 003 where they said.

> "Procedural fairness as we have seen is no longer restricted by distinctions between "judicial" and "administrative" functions or between "rights" and "privileges". This "heresy was scotched" in **Ridge -v- Baldwin**. The term "natural justice" has largely been replaced by a general duty to act fairly, which is a key element of procedural propriety."

26. And at paragraph 7-009 under the heading "The recognition of a general duty of fairness", they opined,

> "There are, therefore, situations which are not covered by McInnes approach which, like the other attempts at classification, has its shortcomings. It is therefore

preferable to adopt a more comprehensive approach, recognizing that the duty of fairness cannot and should not be restricted by artificial barriers or confined by inflexible categories. The duty is a general one, governed by the following propositions.

- Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly.
- The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interest or when a person has a legitimate expectation of being fairly treated.
- Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural propriety."

27. And the Learned authors of Administrative Law 10th Edition at page 417 opined that the concept of a duty to act fairly ought to extend beyond procedural matter, they said "Acting fairly is a phrase of wide implications that it may ultimately extend beyond the sphere of procedure".

Issue 3

28. The third issue, one raised by the first and second Respondents is, whether the Applicants by participating in the Poll are estopped from challenging the validity of the Poll.

Counsel for the first and second respondents relied on the case of **Suneeta Aggarwal -v- State of Haryana and Ors on 11th February 2000.** In that case the court held that-

> "the appellant had disentitled herself to seek relief [fro] m the writ petition filed by her before the High Court. The appellant did not challenge the order of the Vice Chancellor declining to accord approval to her selection and, on the contrary, she applied afresh to the said post in response to re-advertisement of the post results any kind of protest. Not only did she apply for the post, but also she appeared before the Selection Committee constituted consequent upon re-advertisement of the post and that too without any kind of protest, and on the day she filed a writ petition against the order of the Vice Chancellor declining to accord his approval and obtained an ad-interim order. In the writ petition she also did not disclose that she has applied for a post consequent upon second advertisement. **The appellant having appeared before the Selection Committee without any protest and having taken a chance,** we are of the view that the appellant is estopped by her conduct from challenging the earlier order of the Vice Chancellor. The High Court was justified in refusing to accord any discretionary leave in favour of the appellant. The writ petition was rightly dismissed." **[Emphasis added]**.

29. Counsel also made mention of the case of **Om Prakash Shukla -v- Akhulesh Kumar Shukla and others 1986 AIR 1043.** A case in which the Petitioner appeared in the examination without protest and filed the petition when he realised that he would not succeed in the examination. The court found that, as a consequence he should not have been granted any relief by the lower court.

30. I agree with Counsel for the applicants' submissions that the foregoing cases are clearly distinguishable on the facts.

31. In both cases the Petitioners participated without protest. However, in instant case whatever participation the applicants may have had in the process was at all material times under protest. They have always protested the hosting of the Poll for a failure to be provided with a copy of the results of the survey required as a precondition. Evidence of the protestation may also be had from the filing of the instant proceedings together with an Application for interim orders to prohibit the hosting of the Poll the day before the Poll was conducted.

32. Further, it is my observation that at the meetings of the 29th November, 2020 when requests were made to be shown the results of the survey it was never disclosed to the applicants that survey was not being used as required by law as a precondition for hosting the Poll. Had this been revealed to the first applicant then it is reasonable to conclude that this information would have been included as another ground or reason for filing these proceedings and the Application for interim orders.

33. This Court has found that ignoring the survey had and making a decision to host the Poll was an act in excess of jurisdiction and ultra vires. In the circumstances this court finds it unreasonable and misconceived to argue that the Applicants are estopped from instituting the instant proceedings. There can be no estoppel of where, as here, the first and second respondents committed an illegality and breach of a statute such as to render their decision immune from judicial scrutiny

Conclusion

In the premises:

(a) It is declared that the decision of the Trade Union Recognition and Certification Board to hold a Poll pursuant to S. 21 of the Trade Union Recognition Act on the 11th day of December 2020 at the Guyana Rice Development Board, Burma Rice Research Centre without consideration of a survey as mandated by the proviso to S. 21 is ultra vires null and void.

(b) It is hereby declared that the Poll held on the 11th day of December 2020 at the GRDB Burma Rice Research Centre at which the Guyana Agricultural Workers Union was declared the winner is null and void.

(c) It is ordered that certiorari do issue quashing the decision of the Trade Union Recognition and Certification Board that a Poll be taken at the Guyana Rice Development Board, Burma Research Centre on the 11th December 2020 on the ground and for a reason that a survey as required as a precondition to a Poll by proviso to Section 21 of the Trade Union Recognition Act cap 98:07 was not effected.

(d) It is declared that the Certificate issued to the Guyana Agricultural and General Workers Union on the 22nd day of December 2021 by the first respondent recognising the added respondent as the majority Union in respect of workers employed by the GRDB (Burma Rice Research Centre) is null and void and is hereby set aside.

(e) It is further declared for the purpose of clarity that the first applicant remains the majority Union representing the workers at the GRDB (Burma Rice Research Centre) as per a Certificate issued on the 16th May 2000.

(f) It is further ordered that the respondents pay costs to be assessed to the applicants.

Application for stay is refused.

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Hon. Mr. Justice Franklin D. Holder