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

In the matter of an appeal under and in terms of Section 31DD of the Industrial Disputes Act, as amended, read together with Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended.

SC Appeal No. 46/2020
SC Spl LA Application No. 311/2018
High Court of Colombo Case No.
WP/HCALT/COL/27/2017
Labour Tribunal Case No. 33/970/2011

Arangalage Sandya Damayanthi,
No. 189, Madelgamuwa,
Gampaha.

APPLICANT

vs.

1. Arpico Homes Ltd

2. Richard Peiris & Company PLC

Both of No. 310, High Level Road,
Nawinna, Maharagama.

RESPONDENTS

And between

1. Arpico Homes Ltd

2. Richard Peiris & Company PLC

Both of No. 310, High Level Road,
Nawinna, Maharagama.

RESPONDENTS – APPELLANTS

vs.

Arangalage Sandya Damayanthi,
No. 189, Madelgamuwa, Gampaha.

APPLICANT – RESPONDENT

And now between

1. Arpico Homes Ltd

2. Richard Peiris & Company PLC

Both of No. 310, High Level Road,
Nawinna, Maharagama.

RESPONDENTS – APPELLANTS – APPELLANTS

vs.

Arangalage Sandya Damayanthi,
No. 189, Madelgamuwa, Gampaha.

APPLICANT – RESPONDENT – RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Faisz Musthapha, PC with Keerthi Tillekeratne for the Respondents – Appellants – Appellants

Viran Fernando for the Applicant – Respondent – Respondent

Argued on: 25th October 2022

Written Submissions: Tendered on behalf of the Respondents – Appellants – Appellants on 13th June 2020

Tendered on behalf of the Applicant – Respondent – Respondent on 4th August 2020

Decided on: 28th May 2024

Obeyesekere, J

The 2nd Respondent – Appellant – Appellant [the 2nd Respondent] is a public listed company. The 1st Respondent – Appellant – Appellant [the 1st Respondent] [collectively, the Respondents] is a subsidiary of the 2nd Respondent. By letter dated 13th February 2006 [**R1**] signed by the Chief Executive Officer of the 2nd Respondent, the Applicant – Respondent – Respondent [the Applicant] was appointed as a Legal Officer of RPC Homes (Pvt) Ltd [the predecessor of the 1st Respondent], with effect from 6th March 2006. The Applicant was assigned to the Legal and Secretarial Division of the 2nd Respondent on 1st June 2007, where she was required to report to her immediate superior officer, that being the Head of the Legal and Secretarial Division [Head/LSD].

First show cause letter and suspension of the services of the Applicant

On 13th August 2009, the Applicant was served with a show cause letter [**R2**] containing six charges, numbered as 1(a), (b), (c), 2(a), (b) and 3, alleging *inter alia* that the Applicant had failed to attend to the duties entrusted to her by the Head/LSD and that the conduct of the Applicant had undermined the authority of the Head/LSD. The Applicant had responded to R2 by her letter dated 28th August 2009 [**R3**] denying the allegations contained therein. The explanation in R3 having been rejected, the services of the Applicant were suspended with half pay by letter dated 7th September 2009 [**R4**].

Clause 15 of R1

There are two clauses in the Contract of Employment R1 that are the focus of the question of law that needs to be determined in this appeal, and hence I shall refer to them at the outset. The first is Clause 15(a), which reads as follows:

> "*You shall serve the company **exclusively**, faithfully and diligently and shall obey, observe and perform all lawful directions, whether written or oral, that may be given to you from time to time on behalf of the company*." [emphasis added]

The second is Clause 15(c), which provides as follows:

"*You shall not either* ***directly or indirectly, engage or be concerned in any other employment*** *or in any advisory capacity* ***or otherwise or in any commercial or business pursuit or undertaking****, corporate,* ***private or otherwise, in any form or capacity whatsoever*** *either in your own name as principal or agent or otherwise save and except the business concern or concerns of Richard Peiris & Company Limited and its subsidiaries or associate Companies although investment in shares quoted in the open market shall not be deemed as contravening the aforementioned conditions*." [emphasis added]

<u>The second show cause letter</u>

Having suspended the services of the Applicant, the 2nd Respondent had issued an amended show cause letter on 17th November 2009 [**R5**], containing the following additional charges numbered as 4(a) and (b), 5(1), 5(2)(a) and (b), and 6:

"*4(a) You have in violation of Clause No. 15 of your letter of appointment dated 13th February 2006 engaged in private Notarial practice during the subsistence of your contract of employment in this company and utilised your duty hours and working time in order to make a monetary gain to yourself.*

4(b) By engaging in private Notarial practice whilst in employment of this company, you have abused facilities provided to you by the company for official purposes by utilising them for your personal benefit to engage in private Notarial practice and to derive an income therefrom.

5(1) You have engaged in the aforementioned improprieties as an Attorney-at-Law and Notary Public and also in the capacity of Legal Officer of the Company and acted to the prejudice and detriment of the Management by devoting your working hours to engage in private work for your personal benefit.

5(2) You have acted to the detriment of the Company both as to its credibility and image and further attempted to cause financial loss by committing the following acts of misconduct:

(a) You have acted rashly and negligently by your improper performance of duties with regard to your failure to register the Mortgage Bond bearing No. 585 dated 1st March 2009 attested by you and thereby acted to the detriment of the Management.

(b) You have also failed and neglected to hand over the Supplementary Agreement – RPC Polymers (Pvt) Limited dated 20th August 2009, attested by you, despite the undertaking given by you to hand over a copy to the Board of Investment of Sri Lanka and thereby acted to the prejudice of the Management.

6 As an Attorney-at-Law holding a pivotal post of trust and confidence cum loyalty and fidelity you have acted in an inconsistent and unbecoming manner thereby forfeiting the trust and confidence reposed in you."

Charge Nos. 4 and 5(1) arise from Clauses 15(a) and (c) of R1 and can be summarised as follows:

(a) The Applicant had engaged in a notarial practice in violation of Clauses 15(a) and (c) of her contract of employment [Charge No. 4(a)];

(b) Such notarial practice had been carried out during duty hours [Charge Nos. 4(a) and 5(1)];

(c) In the process, the Applicant had abused the facilities provided to her by the 2nd Respondent [Charge No. 4(b)];

(d) The Applicant has made a monetary gain [Charge No. 4(a)], derived an income [Charge No. 4(b)] and benefitted personally [Charge No. 5(1)] by engaging in such notarial practice. I must state that although different terminology has been used, the allegation was that the Applicant had derived an income by engaging in a notarial practice outside of her employment with the Respondents;

(e) The conduct of the Applicant is detrimental to the interests of the Respondents [Charge No. 5(1)].

These charges too were denied by the Applicant by her response dated 27th November 2009 [**R6**]. A domestic inquiry was accordingly conducted on the charges referred to in R2 and R5.

Termination of the services of the Applicant

By letter dated 30th August 2010 [**R7**], the Applicant was informed by the 2nd Respondent that:

(a) The Inquiry Officer has found her guilty of Charge Nos. 1(a),(c) and 3 in R2, and Charge Nos. 4(a), 5(2)(a) and (b) and 6 introduced by R5;

(b) She had *"forfeited the trust and confidence reposed in you which is the pivotal foundation of the contract of your employment."*;

(c) Her services are being terminated with effect from the date of her suspension, having "*considered not only the seriousness of your conduct but also the standing and reputation of the company and the fact that you held a highly responsible post involving trust, confidence, loyalty and fidelity*."

The report of the Inquiry Officer was not made available to the Applicant, nor tendered in evidence at the Labour Tribunal. Although the findings of the Inquiry Officer were contradictory to one another and is a matter that I would refer to later, it must be noted that being exonerated of Charge Nos. 4(b) and 5(1) meant that the allegations that, (a) the Applicant carried out a notarial practice during office hours, (b) she abused the facilities granted by the Respondent, (c) she gained monetarily, and (d) her conduct was detrimental to the interests of the Respondents, had not been proved before the Inquiry Officer.

Labour Tribunal and the High Court

Aggrieved by the termination of her services, the Applicant filed an application in the Labour Tribunal in terms of Section 31B of the Industrial Disputes Act, alleging that the said termination of her services was unfair, unreasonable and disproportionate. The answer of the Respondents having been filed, the Respondents led the evidence of six witnesses, while the Applicant gave evidence on her behalf and led the evidence of one other witness. At the conclusion of the inquiry, the Respondents informed the

Labour Tribunal that they would not pursue Charge Nos. 1 – 3 but instead limit their case against the Applicant to Charge Nos. 4(a) and (b), 5(1) and 5(2) arising from R5, even though the Applicant had not been found guilty of Charge Nos. 4(b) and 5(1) by the Inquiry Officer.

Having carefully evaluated the evidence, the Labour Tribunal by its Order delivered on 24th July 2017 found that the termination of the services of the Applicant was unjustified, and ordered that a sum of Rs. 900,000 amounting to four months' salary for each year of service or part thereof, be paid to the Applicant as compensation. The appeal lodged by the Respondents to the Provincial High Court of the Western Province holden in Colombo [the High Court] was dismissed by the High Court by its judgment delivered on 1st August 2018.

Question of law

Dissatisfied with the judgment of the High Court, the Respondents sought and obtained from this Court special leave to appeal on the following question of law:

> "Did the Labour Tribunal and the High Court err in law by failing to appreciate that the Applicant violated the express conditions stipulated in her letter of appointment and had acted in breach of her contract of employment which justified termination?"

There are three matters that I must mention at this stage.

The first is that although Charge No. 6 related to a loss of confidence and fidelity, and the letter of termination had stated that the Respondents had lost confidence in the Applicant and formed part of the reasons for the termination of the services of the Applicant, the Respondents had not pursued this matter either before the Labour Tribunal or the High Court. Furthermore, even though the Respondents sought special leave to appeal on eight questions of law, none of those related to the termination possibly being justified on the basis that the Respondents had lost confidence in the Applicant.

The second is that the above question of law relates only to one aspect of Charge No. 4(a), namely that the Applicant had acted in violation of Clauses 15(a) and (c) by engaging in a private notarial practice.

The third is that in terms of Clauses 15(a) and (c), during her employment with the 2nd Respondent, the Applicant could not work for anyone else, either directly or indirectly, or be engaged in any business or pursuit, private or otherwise in any form or capacity, whatsoever. The language used to explain the intention of the Respondents could not have been clearer than this. To do so would be to act in violation of the contract of employment. Subject to certain reservations to which I shall advert to later in this judgment, both the Labour Tribunal and the High Court have concluded that the Applicant had acted in breach of Clauses 15(a) and (c) of her contract of employment by engaging in a private notarial practice. Thus, the scope of the above question of law can be narrowed down to a consideration of the circumstances in which the Applicant is said to have breached Clauses 15(a) and (c) of her contract of employment, and whether the termination of her services was justified in such circumstances.

Background to the issuance of the first charge sheet R2

Mr. Viran Fernando, the learned Counsel for the Applicant, submitted that the issuance of the two charge sheets R2 and R5 were actuated by malice and for that reason the background circumstances that culminated in R2 and R5 are relevant in determining whether the termination of the services of the Applicant was justified.

On 2nd June 2009, just two months prior to the issuance of the first charge sheet, there had been a verbal altercation between the Applicant and the Head/LSD. The Applicant had reported this incident to the Chief Operating Officer of the 2nd Respondent through the Group Human Resources Officer by an internal memorandum dated 4th June 2009 [**A79**], which reads as follows:

> "*I refer to the discussion I had with you on the evening of Tuesday 2nd June 2009 and my subsequent reminder made on 3rd June 2009 in this regard.*
>
> *I reported for work around 8.30 am on Tuesday 2nd June 2009. Around 9.45 am I left the Secretarial Department and was unable to keep [the Head/LSD] informed*

of my leaving the office room as she was not in her seat at the time. I was however remaining within the Company premises.

I returned to my seat around 10.15 am and noticed that there was a missed call on my mobile from the [the Head/LSD]. The first question she asked me was 'where were you?' Instead of giving me a chance to talk and listen to my explanation, she started scolding, insulting and cursing me, raising her voice while criticising my day-to-day work and self discipline which finally turned out to be a very personal and vicious attack on me. I too was compelled to raise my voice. She used many degrading words and continued her scathing attack against me for about an hour. I eventually kept silent.

As a result of this unpleasant incident mentioned above, I am undergoing mental agony and trauma and personal embarrassment as a result of the unprofessional and unbecoming behaviour of [the Head/LSD] which was not only witnessed by Ms. Champa who was seated in the room but was also heard across Commercial, Accounts and the Treasury Divisions of the Company as well."

On the same day, the Head/LSD issued a memorandum to the Applicant, with copy to the Group Human Resources Officer [**R27**], alleging that the Applicant had failed to attend to certain duties entrusted to her, and requested that a copy of the said letter be placed in the personal file of the Applicant. Mr. Fernando submitted that until this incident on 2nd June 2009, there had been no complaints with regard to the work of the Applicant, either by the Head/LSD or by any other person within the Respondents. While the Applicant had denied the contents of R27 by a memorandum dated 15th June 2009 [**A80**], she had assured the Management that, "*I will attend to any other work assigned to me*" and "*will do my best for the company in the future, too*." Such assurances do not seem to have calmed the waters, so to say, for the Head/LSD by a further memorandum dated 7th August 2009 [**A81**] controverted the contents of A80, made several other allegations, and concluded as follows:

"*In the circumstances, it is quite clear you have failed to comply with my advice and instructions given to you in my memo of 4th June 2009 which has to be dealt with severely. I wish to bring the above to the notice of the Head of Group HR for him to take appropriate action.*"

Although the contents of A81 were replied to by the Applicant's memorandum dated 9th August 2009 [**A82**], it appears that the damage had already been done, as the first show cause letter R2, incorporating the incidents of insubordination and dereliction of duty complained of by the Head/LSD in R27 and A81, was issued by the Head, Group Human Resources of the 2nd Respondent on 13th August 2009. This was followed by the letter of suspension R4 on 7th September 2009.

Mr. Fernando drew the attention of this Court to a legal opinion dated 27th June 2011, tendered by an external Counsel of the 2nd Respondent [**A75**] while the inquiry before the Labour Tribunal was proceeding. Mr. Fernando submitted that A75 confirms the allegation made by the Applicant that the issuance of the show cause notices and the charge sheets were done in bad faith. While it is only an internal document, I must refer to it as, as correctly submitted by Mr. Fernando, it gives context to his submission that the Respondents acted in bad faith.

The relevant parts of A75 read as follows:

> "*This case comes up for inquiry on 5th July 2011. I need not emphasise to you the importance of this case which if not handled diplomatically would boomerang on the company and the Chairman himself.*
>
> *In this case, we have hardly a leg to stand on.* ***The inquiry officer who held the disciplinary inquiry has adverted to the fact that Sandya Damayanthi is the victim of a vendetta arising out of a personal feud****.*
>
> *Should the disciplinary proceedings including the inquiry officer's report [be] summoned by the applicant Sandya Damayanthi, or the Inquiring Officer is called upon to give evidence the management would be in an embarrassing position where its entire bona fides and credibility would stand impugned.*" [emphasis added]

A75 probably explains why the Respondents did not provide a copy of the report of the Inquiry Officer either to the Applicant or to the Labour Tribunal. Taking into consideration the totality of the above circumstances, and in particular the decision of the Respondents at the end of the inquiry before the Labour Tribunal not to pursue Charge Nos. 1 to 3 in R2, which were based on the above incidents in R27 and A81, I

am inclined to accept the submission of Mr. Fernando that the entire exercise that culminated with the termination of the services of the Applicant was actuated by bad faith.

But, that by itself does not exonerate the Applicant from the allegation that she engaged in an independent notarial practice whilst being employed by the 2nd Respondent. Prior to examining in detail the transgression of Clauses 15(a) and (c) by the Applicant, I would like to consider two judgments of this Court on whether an employee could have multiple employers, or offer one's professional services to a third party whilst being employed.

The Ceylon Bank Employees Union v Bank of Ceylon

The first is the judgment in **The Ceylon Bank Employees' Union v Bank of Ceylon** [79(1) NLR 133]. Before referring to the findings reached by Sirimane, J, I shall briefly refer to the facts of that case in order to give context to the said findings. The employee in that case, on whose behalf the Union instituted action, was N. Devarajah. In terms of Clause 3 of the service agreement, Devarajah had undertaken that he "*will give **my whole time and attention** to the discharge of my duties and will observe the rules and regulations from time to time made by the Bank for the guidance of its employees*." It was alleged that Devarajah operated a money exchange business called 'Om Parasakthi Exchange' that was engaged in the business of encashing Government, Corporation and post-dated cheques. Devarajah was interdicted for the alleged breach of his contract of employment on 13th February 1966, and after a domestic inquiry, his services were terminated.

Although Devarajah stated that the business was owned by his wife and two others and not by him, the Labour Tribunal found that, "*The totality of the evidence suggests that the workman actively participated in the business of the Om Parasakthi Exchange. Alabdeen, Thambirajah and the workman's wife were all figureheads. **The workman had abused his position by using confidential information before cashing of cheques**. The workman had also employed himself in some other occupation while in the services of the bank, what is more, **in an occupation which has violated the secrecy concerning customers' accounts***." [emphasis added]

In these circumstances, the Labour Tribunal held that the respondent bank was justified in terminating the services of Devarajah as there was overwhelming evidence which proved that the workman had committed acts of serious misconduct by violating the terms and conditions of his contract of services.

Sirimane, J observed that, "*there was overwhelming evidence that the business Om Parasakthi Exchange though registered in the name of the appellant's wife was really his business and it was he who actively ran the said business, his wife having nothing whatever to do with it and being merely his nominee. The appellant had even admitted in a Magistrate's Court case that it was his business registered in the name of his wife. On the evidence led the finding that the business 'Om Parasakthi Exchange' was that of the appellant and run by him was irresistible and the President could have come to no other conclusion*."

This Court thereafter went on to hold as follows, at page 137:

> "*There can be no doubt that the words 'My whole time and attention' must be read subject to an implied limitation, but* ***I am unable to agree with learned counsel for the appellant when he submits that this clause does not prevent the appellant from, carrying on another occupation outside normal office hours****, i.e. the whole time required for bank work (like overtime, etc.). If this contention is correct it means that 'My whole time and attention' in the above clause must be read 'My whole time and attention during normal office hours,' the whole of the time required for bank work as stated above.* ***It is an implicit condition of service in any contract that the workman must devote the whole of the normal office hours to his work.*** *I think clause (3) referred to above goes far beyond that and it seems to me that it lays down that the workman will not engage himself in any other gainful employment. In any ordinary contract of service without a condition like clause (3) the workman must devote the whole time for which he is paid (that is his normal working hours) in furtherance of his master's interest and not his own. This was indeed what was held in the case of Wessex Dairy Limited vs. Smith (1953) 3 K.B. 80, cited by learned counsel for the appellant. This case does not help in the decision of the instant case as the condition imposed by clause (3) goes beyond the normal contract of service and stipulates something more.* ***In my view a reasonable construction of the words in this clause would mean that the***

workman must not devote any part of his time to any other gainful employment. *This does not mean that the workman, for instance, cannot have a poultry run at his home and sell some eggs or grow flowers for sale as a hobby during his spare time, but it* ***certainly prevents him from engaging himself in some parallel business profession or other employment. The question whether any such engagement falls into the former or latter category is one of fact and must depend on the circumstances of each particular case.*** *This type of stipulation is not uncommon as the same type of condition applies even to public servants who are prohibited from engaging in any other business without permission. The respondent Bank has made the conditions of this clause quite clear when it sent out a circular (R3) in 1952 to be brought to the notice of all its employees. This circular recited clause 3 and prohibits any gainful employment except with the sanction of the Board of Directors. The circular also required every employee to make a declaration that they were not so gainfully employed or if they were how long it would take to discontinue such employment*." [emphasis added]

The rule that once in employment, an employee cannot engage in any other business or employment has been made crystal clear by Sirimane, J. In that case, the fact that Devarajah carried out a business similar in nature to and in competition with that of his employer during office hours, giving rise to a possible conflict of interest, and in the process breaching secrecy and confidentiality provisions, had weighed heavily in arriving at the conclusion that the termination of the services of Devarajah was justified.

The above judgment was delivered in 1976 at a time when, as referred to by Sirimane, J a person may have used his spare time to rear poultry or engage in gardening etc., more as a hobby and the sale of its produce was not seen as that person engaging in a business. 50 years later, the list of activities that a person could engage in his spare time has certainly expanded to persons in employment plying taxis or carrying out delivery or similar services outside their working hours. While such activity may appear harmless on the face of it, it may not be so if, for example, the primary employment of such person is with a delivery or courier company and the private business is derived as a result of his work with his primary employer.

The list of examples that I could think of where a conflict of interest can arise as a result of having multiple employers is endless. One may even say that it is permissible for a software developer working for a software development company to engage on a freelance basis and offer his services in developing software during his non-working hours, little realising that the software developed as a freelancer may have been for a competitor whose software was developed by such person or another developer working for such persons' employer.

Thus, I must emphasise that, as stated by Sirimane, J the facts and circumstances of each case, including factors such as whether the secondary employment can give rise to a conflict of interests or a breach of secrecy or confidentiality provisions, would certainly be the determining factor in deciding if the termination of the services of an employee who engages in parallel employment without having obtained the approval of the primary employer is justified.

Coats Thread Lanka (Pvt) Limited v Samarasundera

A view different to that expressed by Sirimane, J was expressed by this Court in **Coats Thread Lanka (Pvt) Limited v Samarasundera** [(2010) 2 Sri LR 1]. In that case, the respondent was employed by the appellant company as a work study assistant at the time his services were suspended on allegations of fraud, pending a full inquiry being conducted. During the course of the inquiry, it transpired that **while under suspension**, the employee had obtained employment elsewhere. Clause 16(c) of the contract of employment provided that, '*You will not be able to enter into any activities similar to that for which you are employed by this company or obtain employment elsewhere while in service with us*.' Upon this revelation the employer considered the employee as having repudiated his contract of employment on his own accord and volition.

This Court, while observing that the extent of the prohibition and the time period within which the prohibition is operative are important considerations in ascertaining the reasonableness of this clause, held as follows, at pages 7 and 8:

> "*Covenants of this nature are upheld where they operate to protect the legitimate interests of the employer, for instance where there is a risk of trade secrets being divulged by an employee.*

Does clause 16(c) withstand the test of reasonability? Clause 16(c) envisages a blanket prohibition whilst the worker is in the service of the employer.

Our courts have dealt with a similar issue in The Ceylon Bank Employees' Union v. The Bank of Ceylon. In the said case Sirimane, J in interpreting a clause to the effect that "I will give my whole time and attention to the discharge of duties" held the clause to mean that the workman must not devote any part of his time to any other gainful employment, except with respect minor dealings in his spare time.

In the said case the worker concerned was one holding a responsible position and who was privy to confidential information. In light of the above clause it may be justified in limiting his employment and his sources of income. However I do not think that Sirimane, J intended this to be the general rule. ***A person is entitled to seek employment with multiple employers so as to maximize his monthly income.*** *Where such employment impacts adversely on the quality of his work, appropriate action may be taken at that stage. Therefore I am of the view that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments.*

Selwyn's Law of Employment (9th Ed page 381) offers assistance on the point of an employee taking additional employment. ***He too suggests that it may be a ground for dismissal if such employment has an adverse effect on the employers business.*** *The cases of Nova Plastics Ltd v. Frogat and Hall Fire Protection Ltd v. Buckley are illustrative of this point.*

Hence I hold that the second limb of clause 16(c) prohibiting employment elsewhere as being void. *This position is further justified as the appellant in this case was employed as a mere work study assistant as opposed to a manager or a similar high position in the organisational hierarchy. …*

… As noted earlier, the right to seek secondary employment is subject to the important condition that such employment takes place outside the usual working hours of his primary place of employment." [emphasis added]

In reaching its conclusion that the latter part of Clause 16(c) which prohibited employment elsewhere while still in employment with the primary employer was void, this Court appears to have been influenced by the fact that the employee took up employment elsewhere after his services were suspended, and the fact that the employee was only holding the post of a work study assistant.

I regret that I am unable to agree with the view expressed in **Coats** that the second limb of Clause 16 is void, for the reason that its conclusion is based on the judgment in Nordenfelt v Maxim Nordenfelt [(1894) AC 535]. That was a case on restraint of trade in its classic sense, dealing with **possible future employment** with a competitor or in competition with the former employer. Clause 16 from **Coats** was not such a clause and had an important qualification, in that the prohibition applied *only while* the employee was in service with the employer, and not *after* the employee had left the employer. Clauses 15(a) and (c) of R1 in the present appeal are not restraint of employment clauses, and were applicable only while the Applicant was employed with the Respondents.

I am also unable to agree with the view expressed in **Coats** that a person is entitled to seek employment with multiple employers, as it can give rise to a plethora of issues including conflict of interest, breach of confidentiality and secrecy. It is paramount that each and every employee, irrespective of the post he or she holds, be loyal to his or her employer. In **The Associated Newspapers of Ceylon Limited v M.S.P. Nanayakkara** [SC Appeal No. 223/2016; SC minutes of 6th December 2022], this Court held that while "*trust is one of the core features of an employer – employee relationship … the trust and confidence that an employer must have in an employee is encapsulated in the duty of fidelity that an employee owes his employer. As observed in Finlay Rentokil (Ceylon) Ltd v A. Vivekananthan [(1995) 2 Sri LR 346], an employee owes a duty of fidelity to his employer during the period of his contract of employment. This duty is one of good faith and loyalty, and will require the employee to serve his/her employer faithfully and to avoid situations of conflict or any appearance of any conflict between their own interests and that of their employer*."

I am therefore inclined to follow the view expressed by Sirimane, J that whether a breach of a clause that prevents an employee from having multiple employers would justify termination or not, even where such person did so after his services were

suspended, would depend on the facts and circumstances of each case, leaving it to a Court or Tribunal to consider the breach of such a clause in the background circumstances of that particular case.

Transgression of Clauses 15(a) and (c) by the Applicant

This brings me to the most important aspect of this appeal, that being the nature of the transgression that the Applicant had committed.

Charge No. 4(a) related to the Applicant engaging in a private notarial practice, in violation of Clauses 15(a) and (c) of R1, and **utilising her duty hours and working time** in order to make a monetary gain to herself. There were two connected charges to Charge No. 4(a), namely:

(a) Charge No. 4(b), which alleged that the Applicant had '*abused facilities provided to you by the Company for official purposes by utilising them for [her] personal benefit to engage in private Notarial practice and to derive an income therefrom*,' and

(b) Charge No. 5(1), which alleged that the Applicant devoted her '*working hours to engage in private work for [her] personal benefit*.'

Importantly, the Applicant was not found guilty of these two connected charges, thus narrowing down the scope of Charge No. 4(a) to one of acting in breach of Clauses 15(a) and (c). The question of law that is now before us leaves out the financial gain aspect of the said charge. Therefore, what remains of Charge No. 4(a) is that the Applicant engaged in private Notarial practice during the subsistence of her contract of employment, in violation of Clauses 15(a) and (c) of R1. Bearing that in mind, I shall now consider the explanation offered by the Applicant with regard to Charge No. 4(a) in order to determine if the transgression of Clauses 15(a) and (c) would justify termination.

The Applicant stated that she was admitted as an Attorney-at-Law in the year 2000 and had executed around 500 deeds of transfer, mortgages and other instruments [collectively referred to as instruments] at the time she joined the 1st Respondent in March 2006. She stated further that she had executed another 100 instruments or so

during her period of service with the Respondents, most of which were for the Respondents or related transactions of the Respondents.

The Respondents produced four instruments that the Applicant had executed between 4th June 2009 and 31st July 2009 [R9 to R12] for parties not connected with the Respondents, and cross examined the Applicant on similar instruments that the Applicant had executed during the period of her employment with the Respondents that were referred to in the monthly lists [R13 to R16] submitted by the Applicant to the Land Registry.

The Applicant admitted that she executed deeds and other instruments for parties other than the Respondents during her employment with the Respondents. The above documents relied upon by the Respondents establish that fact. The Labour Tribunal and the High Court have also held so, thus leading to the conclusion that the Applicant acted in breach of Clauses 15(a) and (c) of R1.

Not being in a position to controvert the fact that she had in fact engaged in a notarial practice without having obtained the approval of the Respondents, the Applicant in her evidence took up the position that Clauses 15(a) and (c) do not prevent her from engaging in her profession as a notary while being employed, and for that reason there was no breach of Clauses 15(a) and (c). The Labour Tribunal appears to have taken the view that the Applicant had no choice but to have agreed to Clauses 15(a) and (c), as it formed part and parcel of the contract of employment, and that in any event, the knowledge that she had gained was by virtue of her being an Attorney-at-Law, and not by virtue of her employment. The High Court appears to have agreed with the Applicant when it stated that while Clauses 15(a) and (c) had been breached, the Applicant cannot be prevented from exercising her professional right by a contract of employment where such activity does not affect the business and commercial interests of the Respondents.

I am afraid I cannot agree either with the Applicant, the Labour Tribunal or the High Court on this issue. A person is offered employment in view of the expertise, knowledge and qualifications that such person already possesses, and is renumerated accordingly. Once a person assumes employment with a particular employer, he or she must devote their working hours for the benefit of the employer, and cannot utilise the remaining time to serve another employer or to engage in any other business or

professional activity of whatever nature, unless of course he or she has obtained the consent of the employer or unless such activity is in furtherance of a hobby, as referred to by Sirimane, J. To hold otherwise would mean for example that a legal officer attached to a legal firm, company or corporation could engage in his or her profession as an Attorney-at-Law, while also being employed.

Both the Labour Tribunal and the High Court have failed to appreciate that employment with the Respondents was not forced on the Applicant, and that as admitted by the Applicant, the effect of Clauses 15(a) and (c) was explained to her by the Head of the Human Resources Division at the time of execution of the Contract of Employment. R1 therefore reflects a meeting of minds and is a consensual agreement to the terms thereof. While in terms of Section 41(1) of the Judicature Act, "*Every attorney-at-law shall be entitled to assist and advise clients*", R1 embodies a choice that the Applicant made that her professional services as an Attorney-at-Law be engaged by the Respondents and no one else, as long as the Applicant was in their employment. Serving two employers or multiple employers or paymasters can lead to a possible conflict of interest, a breach of loyalty, confidentiality and secrecy that an employee must maintain at all times, and can even lead to an allegation of unethical conduct on the part of an employee. In this background, the Applicant ought to have sought and obtained the consent of the Respondents to engage in a notarial practice outside her employment. Her failure to do so cannot be condoned.

I should perhaps refer to the judgment of this Court in **Land Reform Commission v Grand Central Limited** [(1981) 1 Sri LR 250] where the then Attorney General appeared in the Court of Appeal and marked his appearance for the Land Reform Commission as a private Counsel and not in his official capacity as Attorney General. He was denied a right of audience as the Court of Appeal was of the opinion that the Attorney General cannot appear for a litigant in his private capacity and can only enter an appearance, if at all, in his official capacity as Attorney General. Chief Justice Samarakoon having stated that, "*I cannot but agree with the judgment of the Court of Appeal that there are constraints on the Attorney-General engaging in private practice in the civil law as well as the criminal law*" stated further that, "***No man can serve two masters. For either he will hate the one and love the other or he will hold to one and dispose the other***." [emphasis added]

Mitigating factors urged by the Applicant

This brings me to the aforementioned question of law, and more particularly whether the breach of R1 demands that the services of the Applicant shall be terminated.

The Applicant took up the following positions in her evidence before the Labour Tribunal:

(a) At least one party to each transaction was known or related to her or her husband, and she executed the said instruments as a favour to such friend or relative;

(b) There were two instruments which she had executed on behalf of her previous employer as she had been paid for such services prior to her joining the 1st Respondent;

(c) She did not receive any payment for the above instruments that she executed, but she did charge for instruments executed after her services were suspended in September 2009. Although the Applicant had been cross examined extensively by the Attorney-at-Law for the Respondents, no suggestion had been made that she received payment for the services rendered by her in attending to the instruments executed up to the suspension of her services;

(d) None of the above instruments were executed during office hours and were attended to by her either in the evenings after 6.30 or during the weekends, without causing any obstruction to her regular work with the Respondents;

(e) She did not visit the Land Registry to carry out a title search and that work was carried out by independent third party legal clerks;

(f) She has not disclosed any confidential information to a third party while executing the said instruments;

(g) None of the said instruments were executed for competitors of the 2nd Respondent.

Findings of the Labour Tribunal and the High Court

Having held that the Applicant had breached Clauses 15(a) and (c), the Labour Tribunal had gone on to hold that the Applicant was not guilty of any misconduct that justifies termination, for the following reasons:

(a) The Respondents had failed to demonstrate that the Applicant utilised her working hours with the Respondents to execute the said instruments;

(b) The smooth and efficient functioning of the Legal Division of the Respondents has not been affected by the Applicant engaging in such notarial work;

(c) There is no evidence that the Applicant has divulged any confidential information of the Respondents, to a third party.

These findings of fact are supported by the evidence that was available to the Labour Tribunal, and it is for this reason that the High Court had affirmed the said Order.

Having carefully considered:

(a) The evidence led before the Labour Tribunal, and more particularly the above evidence of the Applicant which the Respondents failed to contradict;

(b) The above findings of the Labour Tribunal;

(c) The fact that the Applicant was not engaged in an exercise which was in competition with or parallel to the business of the Respondents, but was only executing instruments mostly for friends and family;

(d) The fact that her notarial practice had not given rise to any conflict of interest or that she had not divulged any confidential information of the Respondents to any third party;

(e) The circumstances of this case, and in particular the background to the issuance of the first charge sheet R2;

(f) The explanation of the Applicant as to the circumstances in which the impugned instruments were executed;

(g) The fact that the Applicant had a clear record of 4 ½ years of service with the Respondents; and

(h) The fact that the Respondents did not question the integrity, loyalty, and honesty of, and trust in the Applicant, and did not pursue this appeal on the basis that it had lost confidence in the Applicant,

I would answer the question of law as follows – "Even though the Applicant had breached Clauses 15(a) and (c) of her contract of employment, in the given circumstances of this case, such breach does not justify the termination of her services by the 2nd Respondent."

I must also state that this dispute could have been resolved by the issuance of a simple letter of warning but was blown out of proportion and escalated to the termination of the services of the Applicant, due to the animosity between the Head/LSD and the Applicant.

The order of the Labour Tribunal and the judgment of the High Court are accordingly affirmed, and this appeal is dismissed. I make no order for costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT