

**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO : 15/1-154/02**

**BETWEEN**

**AMPAC MARKETING SDN. BHD.**

**AND**

**JULIUS A/L J. ANTHONYSAMY (deceased)**

**AWARD NO : 40 OF 2006**

**Before** : **N. RAJASEGARAN** - **CHAIRMAN**  
**LIM WENG KHUAN** - **EMPLOYERS' PANEL**  
**HAJI ABDUL KHAIYOM** - **EMPLOYEES' PANEL**  
**BIN HAJI OSMAN**

**Venue** : Industrial Court Malaysia, Kuala Lumpur.

**Date of Complaint** : 14.3.2002.

**Dates of Mention** : 20.5.2002, 18.6.2002, 18.7.2002,  
5.9.2002, 14.10.2002, 6.1.2003,  
23.4.2004, 19.5.2004, 18.8.2005,  
19.10.2005.

**Dates of Hearing** : 24.9.2004, 29.9.2005 and 30.11.2005

**Representation** : Company absent.  
Complainant unrepresented.

**Amicus Curiae** : Mr. J. B. Ramdhari, advocate & solicitor.  
on 29.9.2005.  
Mr. V. K. Raj, advocate & solicitor,  
on 30.11.2005.

## **AWARD**

### **The Complaint**

1. Before me for resolution is a complaint ('the Complaint') made pursuant to s. 56(1) of the Industrial Relations Act, 1967 ('the Act'). Julius a/l J. Anthonysamy ('the Complainant') lodged the complaint in the Industrial Court ('the Court') by way of Form S prescribed under rule 24A(1) of the Industrial Court Rules, 1967 ('the Court Rules'). That form S dated 14.3.2002, is signed by the Complainant. The Complainant has since ceased to live. He drew his last breath on 12.11.2002 in the city of Los Angeles situated in the United States of America. This is confirmed by a certification dated 11.12.2002 made by the Ketua Pengarah Pendaftaran Negara Malaysia, Petaling Jaya. The puzzling part is that this nugget of information did not flow into the Court's domain until it was sluiced for the first time by Ms. S. Parimaladevi of Messrs. P. Kuppusamy & Co at the first date of hearing of the Complaint on 24.9.2004. With this release came a slew of ancillary issues that swept upon the Court. These will be dealt at the appropriate moments in this award.

2. Now for the Complaint. The Complaint is that AMPAC Marketing Sdn. Bhd. ('the Company') had not complied with an award of the Industrial Court, *to wit*, Award No. 69 of 2002 ('the Award') handed down upon conclusion of the hearing of a reference under s.20(3) of the Act involving the Company and the Complainant as parties.

### **The Award**

3. It all began on 9.9.1997 when the Company dismissed the Complainant from its employment. This the Company did after the Complainant had served as its Marketing and Sales Manager for a period

of one year and four months during which period he earned a salary of RM5,700.00 per month. The learned Chairman found the dismissal to be without just cause and excuse and in the result ordered the Company to pay the Complainant backwages of 48½ months plus one month's salary as compensation in lieu of reinstatement. This totalled RM282,150.00. It is necessary to repeat the order contained in the Award for it forms the crux of the Complaint. It reads :

*“ It is further ordered that the Company pay the Claimant the total sum of RM282,150.00 through his solicitors within thirty (30) days of the date of this award subject to EPF and other contribution, if any.*

*HANDED DOWN AND DATED THIS 20<sup>TH</sup> DAY OF JANUARY, 2002. ”*

The solicitors for the Claimant in that case was Messrs P. Kuppusamy & Co.

### **The Complaint's Flow**

4. The management and hearing of the Complaint flowed through a tortuous course. Tracing it here, except as fodder for the inquisitive, will not add any fertility to this award. Suffice it to say that it floated through nine mentions before the then learned Chairman, Lim Heng Seng and a further four mentions intermittent with three dates of hearing before me. It is also of interest to trace another sequence of events that occurred immediately succeeding the first date of hearing on 24.9.2004. This began with a letter dated 1.10.2004 withdrawing the Complaint from the Court. Then came a letter dated 19.11.2004. This letter sought to withdraw the withdrawal. Both these letters were written by Messrs P. Kuppusamy & Co. Both letters were incapable of any

impact upon the Court. For that firm of solicitors held no authority to deal with the Complaint as events that follow will shew.

5. One disturbing fact though deserves special mention. That is the absence of the Company on every single day that the case was mentioned or heard in the Court.

### **The Issues**

6. The issue *primer* before the Court is the Complaint which is non-compliance of the Award. But the demise of the Complainant and the appearance of Messrs P. Kuppusamy & Co. purporting to represent the Complainant, raised parallel issues. It would be appropriate at this juncture to name all the issues. Posed in question form and in order of progression, they are :

**First**, did the Complaint lodged by the Complainant under s.56(1) of the Act abate upon his demise?

**Second**, is the permission of the President/Chairman of the Industrial Court a prerequisite before an advocate may represent a party in a s.56(1) proceedings and if so is the seeking of such permission to be by way of Form A prescribed pursuant to rule 3 of the Court Rules?

**Third**, did the Company comply with the order in the Award?

### **First Issue**

7. Mr. J.B. Ramdhari, learned Counsel, on the second date of hearing on 29.9.2005, by special permission addressed the Court on the issue of whether the Complaint survived the Complainant's death. He took the

position that it did and in the process referred to s.8(2)(a) of the Civil Law Act, 1956 and s.32(1)(d) of the Act read with s.78 of the Interpretation Act, 1948 and 1967. He further referred to a passage from **N.M. Selwyn's Law of Employment** dealing with the position in England and to a passage from **Labour Law Notes 1992(2) L.L.N.** dealing with the same in India; both of which countries have legislative provisions on the subject of issue. The Court agrees with the position that Mr. J. B. Ramdhari took, that is that the Complaint survived the Complainant's death. But with respect, not with the web of arguments that Mr. J. B. Ramdhari attempted to weave in the pursuit of this position.

8. I find the Federal Court's decision in **Thein Tham Sang v. United States Army Medical Research Unit and Anor (1983) 2 MLJ 49** to be an appropriate launching pad to start the discussion. That case centred around the issue whether a proceedings in the Industrial Court began by a reference made under s.20(3) of the Act involving the dismissal of a workman abated upon the death of that workman. Seah FJ speaking for the apex Court held that it did. His Lordship referring to the Employment Protection (Consolidation) Act 1978 of the United Kingdom where express provision enabled a personal representative to institute or continue proceedings in the industrial tribunal, observed no such similar provision in the Malaysian equivalent, that is the Industrial Relations Act, 1967. This is what he said :

*“ If the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under section 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967. ”*

His Lordship then went on to pronounce the final verdict of the apex Court thus :

*“ Having regard to the abovementioned facts, we agree with the learned judge that proceedings under section 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short, the maxim **actio personalis moritur cum persona** applies to the facts of this case. In the result, we dismiss the appeal with costs. ”*

What I find of importance to the instant case is that the apex Court at every turn of its arguments and in its final decision too, had restricted itself to a proceedings involving section 20(3) of the Act. Nowhere did the apex Court purport to extend its decision to other proceedings under the Act. And correctly so too, for proceedings under section 20(3) of the Act seeking reinstatement as a remedy to a terminated contract of employment is pursuit of an action *in personam*. And it is this position of law that forms the sanctum within which is housed the ratio found in ***Thein Tham Sang (supra)***.

9. The Award does not make an order for reinstatement. Instead the Award is for the payment of a fixed sum of money to be paid to the Complainant through his solicitors. The Complaint which forms the proceedings before the Court is an action *jus in rem*. The principle of law propounded in ***Thein Tham Sang (supra)*** has therefore no application in a proceedings commenced under section 56(1) of the Act where reinstatement has not been granted as a relief.

10. In the upshot the answer to the question raised in the first issue is that the Complaint lodged in the Court under section 56(1) of the Act did not abate but survived the death of the Complainant.

## **Second Issue**

11. Mr. V.K. Raj, learned Counsel, on the third date of hearing on 30.11.2005, by special permission addressed the Court on the second issue, that is on whether appearance of an advocate or legal practitioner in proceedings under s.56(1) of the Act has to be with the permission of the Chairman/President. He took the position that obtaining the Court's permission and the completion of the Form A prescribed in the Court Rules does not apply to proceedings pursuant to a complaint made under section 56(1) *ibid.* All this, learned Counsel purported to read within the words of s.27(1) of the Act. Now, for a taste of that section :

***“ 27. Appearance and representation at proceedings before the Court.***

- (1) *In any proceedings before the Court a party may–*
- (a) *where the party is a trade union, be represented by an officer or employee of the trade union;*
  - (b) *where the party is an employer, appear himself personally or be represented by his duly authorized employee, or by an officer or employee of a trade union of employers of which he is a member;*
  - (c) *where the party is a workman [in proceedings under section 20(3)], appear himself personally or where he is a member of the trade union of workmen, be*

*represented by an officer or employee of the trade union.*

*(d) where the party is a trade union, or an employer, or a workman [in proceedings under section 20(3)], be represented with the permission of the President or the Chairman, by an advocate, or, notwithstanding anything to the contrary contained in any, written law relating to the registration of trade unions, by any official or an organization (not being a trade union) of employers or of workmen, as the case may be, registered in Malaysia. ”*

The opening line “(1) In any proceedings before the Court .....” laces the flavour of that entire section. The words are clear and unambiguous. Any proceedings includes all proceedings and a proceedings initiated by section 56(1) of the Act is no less a proceedings. And as for section 27(1)(d), it provides that a party who wished to be represented by an advocate, may do so with the permission of the President/Chairman. I am unable as urged by Mr. V. K. Raj, to read those words in brackets, that is “(in proceedings under section 20(3))” appearing immediately after the word “workman” to mean that that sub-section 27(1)(d) is restricted in as far as a workman is concerned, only to dismissal proceedings under section 20(3). Such a reading would effectively disqualify a workman from being represented by an advocate/legal practitioner in all proceedings other than those involving dismissal. That this is not the law has been unshakeably established by the Court of Appeal in ***Marathaei d/o Sangulullai (Menuntut bagi pihak Harta Pesaka Thangayah Aupulley) & Anor v. Syarikat JG Containers (M) Sdn.***



**Bhd. & Anor (2003) 2 AMR 660.** Gopal Sri Ram JCA speaking for the court held :

*“ First the construction of s27(1)(d) itself. The opening words of the section are very clear. And they are very wide indeed. They read : ‘In any proceedings before the Court’. These words must be taken to mean what they say. ‘Any proceedings’ must mean ‘any proceedings under the Act.’ So, they must include non-compliance proceedings under s.56 of the Act.*

*The next stage of the inquiry is to determine if there is anything in paragraph (d) of s27(1) that whittles down or cuts back on the width of the opening words of the section. We do not think that it does. In our judgement, paragraph (d) merely identifies proceedings under s20(3) of the Act as one of those cases in which there may be representation with leave. ”*

12. In the event, with respect, the Court finds Mr. V.K. Raj’s line of argument to be against the mould in which s.27(1) of the Act is baked and consequently unpalatable.

13. Now, for that part on the need to obtain the permission of the President/Chairman of the Industrial Court to be represented by a legal practitioner by way of an application made through the Form A prescribed in the Court Rules. Rule 3(1) reads :

*“ (1) Any party seeking, under the provisions of section 27 of the Act, the permission of the President to be represented at the proceedings before the Court by a legal practitioner **shall make application in triplicate in Part 1 of Form A.** ”*

The rule is precise on the mode of application for permission and is couched in words to make compliance mandatory. Non-compliance therefore renders the inaction more than a mere irregularity.

14. The synthesis of all that before stated is that representation by an advocate/legal practitioner in any proceedings before the Court is not of right and can only be allowed by permission of the President/Chairman. And an application for such permission is to be made by way of Form A prescribed in the Court Rules. So much for the second issue.

15. Springing from this position of law is that ruling of the Court made at the hearing of 30.11.2005 that the firm Messrs P. Kuppusamy & Co. had no *locus standi* to appear for the Complainant or his estate for the reason that no application for permission for representation by a legal practitioner had been made and obtained in respect of the Complaint.

### **Third Issue**

16. The Complaint is that the Company failed to comply with the Award. And as to what is the order in that Award, it has been stated earlier.

17. Did the Company comply with the Award? It is the Complainant's position, spoken through the prescribed Form S, that it has not been complied with. The maxim *affirmanti non neganti incumbit probatio* applies. The burden therefore falls squarely upon the Company to show that it had indeed complied with the terms of the Award. This the Company did not show. Its absence in the Court contributed no little to this inability. The Court therefore finds the Company not to have complied with the Award.

18. And where does this leave the Court in the peculiar circumstances of this case. On what the Court is empowered to do consequent to a complaint of non-compliance now becomes relevant. It is elucidated in section 56(2) of the Act. It goes like this :

- “ (2) The Court may, upon receipt of the complaint, -*
- (a) make an order directing any party –*
    - (i) to comply with any term of the award or collective agreement; or*
    - (ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;*
  - (b) make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement; or*
  - (c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement. ”*

19. At the hearing on 29.9.2005, Mr. J. B. Ramdhari submitted to the Court a copy of a certificate no. A002747 dated 7.7.2003 which is a declaration made under section 17(1) of the Public Trust Corporation Act 1995 by Amanah Raya Berhad to undertake to administer the property of the deceased Complainant. And property under that Act is defined :

*“ ‘property’ includes all property, movable or immovable, and all estates, interests, easement and rights, whether equitable or legal in, to or out of property, choses-in-action, money and goodwill; ”*

I find this definition of property to include that sum of money ordered for payment through the Award.

20. Section 30(6) of the Act enables the Court, when making an award, not to be restricted by the specific relief claimed by the parties. The Court thus not being shackled to the Complainant’s claim of non-compliance alone and in keeping with that which is behoved upon the Court by section 30(5) *ibid* to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the Court is able to venture outwards of the four corners of the Complaint.

21. In the given circumstances the Court, unanimous in decision, is disposed towards not limiting itself to ordering compliance of the Award alone but to make a necessary variation to enable the sum of money to be paid to Amanah Raya Berhad for the purpose of administrating it as part of the deceased Complainant’s estate. The Court will however leave undisturbed that part of the Award which requires the money to be channelled through the solicitors then on record.

### **Order**

22. The Court hereby orders the Company to comply with Industrial Court Award No. 69 of 2002 subject to variation as stated here :

*“ It is further ordered that the Company pay into the Claimant’s estate the total sum of RM282,150.00 through his solicitors within (30) days of the date of this award subject to EPF and other contributions, if any. ”*

**HANDED DOWN AND DATED THIS 12TH JANUARY, 2006**

**( N. RAJASEGARAN )  
CHAIRMAN  
INDUSTRIAL COURT**