DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

[PERMOHONAN SEMAKAN KEHAKIMAN NO: R1-25-123-05]

Dalam Perkara Permohonan oleh NSG (Malaysia) Sdn Bhd mendapatkan kebenaran Perintah *Certiorari*

Dan

Dalam Perkara Keputusan Y.B. Menteri Sumber Manusia di bawah Sek. 9(5) Akta Perhubungan Perusahaan 1967 bertarikh 10hb Mei 2005

Dan

Dalam Perkara Akta Mahkamah Kehakiman 1964 dan Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980

ANTARA

NSG (Malaysia) SDN BHD ... PEMOHON

DAN

1. **Y.B. MENTERI SUMBER MANUSIA, MALAYSIA ... RESPONDEN PERTAMA**
2. **KESATUAN PEKERJA-PEKERJA PERUSAHAAN LOGAM ... RESPONDEN KEDUA**

GROUNDS OF DECISION

1. The Appellant/Applicant NSG (Malaysia) Sdn. Bhd. ("the Applicant"), has appealed against the Order of the Court dismissing the Applicant's application for judicial review with costs to be taxed unless otherwise agreed.

1.1. The Applicant has applied essentially for an order of certiorari to quash the decision of the 1st Respondent, the Honourable Minister of Human Resources ("the Minister/1st Respondent") dated 10.5.2005 made under s. 9(5) of the Industrial Relations Act 1967 ("the IRA").

2. The relevant cause papers are:-

(a) Application for Judicial Review *(ex parte)* dated 27.6.2005 (Encl. 1);

(b) The Statement pursuant to Order 53 Rules of the High Court 1980 dated 24.6.2005 (Encl. 2);

(c) The Applicant's Supporting Affidavit affirmed by Ravendran a/l Thuraisamy on 24.6.2005 ("the Applicant's Affidavit) (Encl. 3);

(d) Notice of Application for Judicial Review (Form 111B) dated 25.1.2006 (Encl. 11);

(e) The 1st Respondent's Reply affirmed by Datuk Seri Dr. Fong Chan Onn on 28.9.2007 ("the 1st Respondent's Affidavit) (Encl. 19);

(f) The Applicant's Reply to the 1st Respondent's Affidavit affirmed by Ravendran a/l Thuraisamy on 27.12.2007 ('the Applicant's 2nd Affidavit) (Encl. 20);

(g) The 1st Respondent's Affidavit in Reply affirmed by Datuk Seri Dr. Fong Chan Onn on 11.8.2008 to the Applicant's 2nd Affidavit ("the 1st Respondent's Affidavit in Reply) (Encl. 20A);

(h) The 2nd Respondent's Affidavit affirmed by Samsudin bin Usop on 21.10.2005 ("the 2nd Respondent's Affidavit in Reply") (No encl. no.).

3. Essentially the facts are as follows. On 7.6.2001 the 2nd Respondent sought official recognition from the Applicant in Form A dated 7.6.2001 (Exh.NSG-1). On 12.6.2001, the Applicant received an application from the 2nd Respondent, Kesatuan Pekerja-Pekerja Perusahaan Logam. On 22.6.2001 the 2nd Respondent informed the the Director General for Industrial Relations Malaysia ("the DGIR") that the Applicant still refused to accord recognition and the 2nd Respondent lodged a report to the DGIR for action to be taken under s. 9(4A) of the IRA (Exh.FCO-1). On 27.6.2001 the Applicant wrote to DGIR requesting for membership verification under s. 9(3)(c) of the IRA (Exhs.NSG-1 and NSG-2). On 15.7.2001, the Applicant received the letter from the DGIR requesting for a list of employees to be furnished as per Borang B for membership check purposes (Exh.NSG-3). Before acceding to the request of the DGIR, the Applicant studied the constitution of the 2nd Respondent relating to membership *ie*, rule 3 (Exh.NSG-4) and realised that the 2nd Respondent was not competent to represent its employees. On 24.7.2001 the Applicant sent Form B to the JPPM (Jabatan Perhubungan Perusahaan) and informed that their products are rubber-based (more of a rubber industry), nevertheless the list of employees requested by the DGIR was also submitted (Exh.NSG-5).

3.1. On 4.12.2001, the DGIR requested the Director General for Trade Unions ("the DGTU") to establish the membership status of the 2nd Respondent in accordance with reg. 4(1)(c) of the Industrial Relations Regulations 1980 (Exh.NSG-6). On 17.12.2001 the Applicant received a letter from the DGTU stating that a membership verification would be conducted shortly, and in early 2002 the DGTU, Selangor/Wilayah Persekutuan & Pahang informed the Applicant a membership verification would be conducted on 8.6.2002 at the office of the 2nd Respondent (Exhs.NSG-6, NSG-7, NSG-8). On 29.1.2002 the DGTU informed the DGIR that the membership percentage is 62.55% after membership check by way of verification was conducted. The Applicant received a letter dated 3.6.2002 (Exh.NSG-9) from the DGIR stating that 62.55% of the employees were members of the 2nd Respondent as at 7.6.2001 and the Applicant was therefore advised to recognise the 2nd Respondent. The Applicant was then advised that the DGIR had committed an error of law in not obtaining the opinion of the DGTU on the competency of the 2nd Respondent (Exh.NSG-10). On 12.6.2002 the Applicant made an application to postpone the claim for recognition as it had doubts on the 2nd Respondent's competency to represent the Applicant's employees on the ground that the Applicant's activities are more of rubber component and not metal. On 25.7.2002 the DGIR requested the DGTU to decide on the issue of competency of the 2nd Respondent: to represent the Applicant's employees in accordance with s. 9(4B) of the IRA (Exh.NSG-11). On 31.7.2002 the DGTU directed the branch office to carry out investigation on the Applicant's business activities to determine whether the 2nd Respondent was competent to represent the Applicant's employees (Exh.FCO-4).

3.2. On 21.8.2002, the DGTU Penang, Kedah & Perlis (Madam Tan Hooi Tin) visited the premises of the Applicant to investigate whether the Applicant's business activities were in accordance with regulation 3 of the 2nd Respondent's Regulations. The Applicant alleged that it provided all the necessary information and written details about the activities of the Applicant (Exh.NSG-13) but the said Director was not interested and only advised the Applicant to grant recognition to the2nd Respondent. On 5.11.2002 the DGIR informed the 2nd Respondent that the issue of competency had been referred to DGTU. On 14.11.2002, the Assistant Director for industrial Relations, Penang, Mr. Hoe Lean Fatt, visited the premises of the Applicant (Exh.NSG-14) and also advised the Applicant to grant recognition to the 2nd Respondent.

3.3. On 8.4.2003 the DGTU informed the DGIR that investigation on the Applicant's activities had been carried out and assistance from a panel of advisors from MIDA and the chemist department was sought (Exh.FCO-6). On 8.5.2003 the DGTU informed the DGIR that the 2nd Respondent was competent to represent the Applicant's employees (Exh.FCO-7).

3.4. On 12.6.2003, the Applicant received a letter from the DGIR stating that the DGTU has decided that the 2nd Respondent was competent to represent the Applicant's employees and that 62.55% of the employees of the Applicant were members of the 2nd Respondent, and hence the Applicant should grant recognition to the 2nd Respondent and if it did not do so, action under s. 9(4c) of the IRA would be taken (Exh.NSG-15).

3.5. On 25.6.2003 the Applicant appealed to the DGIR to postpone the claim for recognition as there were some doubts that needed to be clarified. The Applicant appealed to the 1st Respondent under

S. 71A of the Trade Unions Act 1959 ("the Trade Unions Act") regarding the decision conveyed by the DGIR and the appeal was submitted on 16.7.2003 (Exh.NSG-17) and a copy of the appeal was given to the DGIR on 24.7.2003 (Exh.NSG-19).

3.6. On 27.2.2004 the DGIR invited the Applicant to attend a discussion on 10.3,2004 to discuss further on the claim for recognition. On 5.5.2005 the DGIR informed the 1st Respondent about the dispute of the claim for recognition in accordance with s. 9 (4C) of the IRA and sought the 1st Respondent's decision. On 10.5.2005 since the dispute between the Applicant and the 2nd Respondent could not be resolved, the 1st Respondent then made his decision in Form D pursuant to s. 9(5) of the IRA. On 16.5.2005 the 1st Respondent's decision was communicated to the Applicant (Exh.NSG-21). On 20.5.2005, the Applicant received a letter signed by Mr. Kesavan informing that the 1st Respondent had made a decision under s. 9(5) of the IRA ordering the Applicant to grant recognition to the 2nd Respondent (Exh.NSG-21).

4. The Court has considered the Written Submissions of the learned Counsel for the Applicant (Encl.31), the learned SFC for the 1st Respondent (Encl.27) and of the learned Counsel for the 2nd Respondent (Encl.29). The Court's findings include the following.

5. Summarily the Applicant's contentions are:-

(a) that the 1st Respondent has committed a serious error of law when he failed to comply with s. 71A of the Trade Unions Act which requires him to consider any appeal made to him and give such decision on the appeal and

in failing to do so, the 1st Respondent has acted *ultra vires* and in excess of his power (1st ground);

(b) that the 1st Respondent committed a jurisdictional error when he failed to consider the appeal containing the details of the nature of the Applicant's business which were submitted to him by the Applicant under s. 71A of the Trade Unions Act. It is contended that instead the 1st Respondent only considered the DGIR and DGTU's recommendations and did not provide any reasons for arriving at the decision to order the accordance of recognition (2nd ground); and

(c) that the Applicant purportedly cannot in any way be construed to be involved in the metal industry (3rd ground).

6. Before proceeding with the merits of the Applicant's appeal it is necessary to state the law applicable to the issue before this Court which has been spelled out in paragraphs 6.3 to 6.15 of the 1st Respondent's Submission as follows:

"6.3. Section 9(2) of the IRA, Act 177 provides for the trade union to serve on the employer in writing a claim for recognition.

6.4. Section 9(3) of the IRA, Act 177 provides that an employer who has been served with such a claim may after 21 days after service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded notify the trade union concerned in writing the grounds for not according recognition; or

(c) apply in writing to the DGIR to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union.

6.5. If the trade union received a notification under subsection (3)(b) of the IRA, Act 177 or where the employer concerned fails to comply with subsection (3) of the IRA, Act 177 the trade union may report to the DGIR in writing (section 9(4)).

6.6. Section 9(4A) of the IRA, Act 177 provides that when the DGIR received an application under section 9(3)(c) or a report under section 9(4) the DGIR is empowered to take steps or make inquiries necessary to resolve the matter.

6.7. In order to perform his function under section 9(4B)(a) the DGIR is vested with the powers to require the trade union, the employer or trade union of employers to furnish any information he deems necessary.

6.8. The DGIR is also given the discretion by section 9(4B) (b) of the IRA, Act 177 to refer to the DGTU for the DGTU's decision on any question of the competence of the trade union to represent any workmen in respect of whom recognition is sought.

6.9. Section 9(4C) of the IRA, Act 177 provides that if the DGIR cannot resolve the matter pursuant to section 9(4A) of Act 177 he shall notify the Minister.

6.10. The Minister is required by section 9(5) of the IRA, Act 177 to give his decision either to accord recognition or otherwise.

6.11. Whereas in the Trade Unions Act, Act 262, **section 26(3)** states that in a situation where a trade union has served a claim for recognition, the DGIR may request the DGTU to carry out a membership check in the manner prescribed by **Regulations 63, 64, 65 and 66** of Trade Unions Regulations ("TU Regulations). This is for the purpose of ascertaining the percentage of workmen in respect of whom recognition is being sought, who are members of the union making the claim.

6.12. The DGTU may in writing notify the trade union making a claim for recognition that a membership check would be conducted either by membership verification or by a secret ballot. A copy of such notification shall be sent to the employer (**Regulation 63 of TU Regulations**).

6.13. Both the employer and the trade union are to assist the DGTU with information as he may require to enable the DGTU to conduct the membership check (**Regulation 64 of TU Regulations**).

6.14. **Regulation 65** of the TU Regulations prescribes the formula to ascertain the percentage of membership as follows:

(a) Membership Verification

$$\frac{\text{Total number of valid members as at the date of the claim}}{\text{total number of workmen in respect of whom recognition is being sought at the date of the claim}} \times 100\%$$

(b) Membership check by secret ballot

$$\frac{\text{number of votes indicating membership}}{\text{number of workmen entitled to vote}} \times 100\%$$

6.15. The DGTU shall notify the DGIR the result of the membership check (**Regulation 66 of TU Regulations**)".

1st ground

7. The 1st Respondent contends that the appeal provision in s. 71A of the Trade Unions Act does not relate to a claim for recognition under the IRA. I find there is merit in this contention. S. 71A of the IRA, *inter alia*, states:-

(1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, director or decision, as the case may be, given, made or effected by the Director General under any of the following provisions:

(a) section 2(2);

may, within thirty days from the date of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

7.1. Section 2(2) of Trade Unions Act is with regard to definition of "trade union" in subsection (1) and sections 32 (Amalgamation), 33 (Transfer of engagements), 72 (Formation of Federation of Trade

Unions) and 74 (Affiliation with registered federation of trade union) and is not related with issue of competency of the trade union.

7.2. The DGTU is empowered by s. 26(3) of the Trade Unions Act to carry out a membership check. S. 71A(1) does not state that an appeal can be made to the 1st Respondent for decision under s. 26(3)of the IRA.

7.3. Further I agreed with the 1st Respondent's contention there is no provision under the Trade Unions Act on competency check. Under s. 9(4B) of the IRA, the DGIR can refer to the DGTU to determine the issue of competency. When the DGTU carries out the competency check, it is exercised under the IRA and the DGTU shall be deemed to carry out the duties and functions relating to the registration of trade unions. The 1st Respondent in paragraphs 32, 34, 38-41 of the 1st Respondent's Affidavit has stated in arriving at his decision on 10.5.2005 he has taken into consideration all the relevant facts and the impartiality of the DGIR and DGTU in the matter. The membership check was conducted by the DGTU, an independent third party. I agreed with the 1st Respondent's submission that the membership check by verification is more authentic as it reflects the actual number of the employees of the Applicant who have become members of the 2nd Respondent at the time recognition was sought and was made on the basis of the documents in the possession of the 2nd Respondent, the genuineness of which has not been disputed by the Applicant. Thus I find the Applicant's contention on the 1st ground is without merit.

2nd and 3rd grounds

8. These two grounds are dealt with together as they are linked. I find the1st Respondent has given his reasons for his decision. This

is evident from the 1st Respondent's Affidavit and 1st Respondent's Affidavit in Reply. In relation to the Applicant's contention that the Applicant did not raise the issue of the competency of the 2nd Respondent to represent the employees of the Applicant and the failure of the DGIR to discharge his duty in accordance with law (paragraphs 3 to 5 of the Applicant's 2nd Affidavit), the 1st Respondent averred *"Ketua Pengarah Perhubungan Perusahaan (selepas ini disebut "KPPP") tidak gagal dalam menjalankan tugas-tugasnya mengikut undang-undang. KPPP akan meminta Ketua Pengarah Kesatuan Sekerja (selepas ini disebut "KPKS") untuk menentukan isu kelayakan apabila diminta oleh Pemohon. Pemohon telah meminta KPPP menentukan isu kelayakan Responden Kedua melalui surat bertarikh 12 Jun 2002. Seterusnya KPPP telah memohon kepada KPKS untuk menentukan isu kelayakan Responden Kedua"*.

8.1. The Applicant alleged in paragraph 11 of the Affidavit that Madam Tan Hooi Tin failed to consider the explanation and the document (Exh.NSG-13) given on the business activities of the Applicant as "pengeluaran Pemohon iaitu "Castor Wheel & Rubber Wheel" kedua-duanya adalah pengeluaran getah" where at p.2 Exh.NSG-13 it is stated *"Castor Wheels consist of mounting unit which is called Body Castor and rubber wheels. Body castors are made of parts and components. Some of the major parts are manufactured in NSG (M) at Metal unit whilst other small unit parts are sub-contracted to local contractors. Raw material for parts production steel coils of SPHC or SPCC type that is purchase locally. Rubber wheels consist of 2 types - entire rubber wheels and center wheel type. Raw material for manufacturing rubber wheels comprise of natural and synthetic rubber and chemicals.*

The processing of the rubber as to manufacture rubber wheels will be carried out at rubber unit. Assembling of parts and component to make body castor will be done at Assembly unit. Components are purchased locally and imported from overseas mainly Japan, Taiwan & China. Components are ready made to assemble to our product with no other additional process is required. Rubber wheels will be assembled together with the body castor to become castor wheels - finished product"; her conclusion that the Applicant's product "dari besi (56.25%), getah asli (2.8%), plastik kimia dan synthetic rubber (34.86%) dan lain-lain (6.09%)" is illogical; and Exh.NSG-13 at p.3 states under heading "Analysis of Raw Material Input" that the raw material used is rubber (36.1%), metal (24.1%) and the balance are "assembly and packing" (36.0% and 3.8%) whilst at p.6 under heading "Processes", *"On the average of manufacturing series of castor wheel and rubber wheels at NSG(M) facility constitute of 51% of involvement of rubber activities, 24% of metal processes, 20% of assembling and 5% of packing"*.

8.2. In response to paragraph 11 of the Applicant's 2nd Affidavit, the 1st Respondent averred *"berdasarkan kepada maklumat yang diperolehi sewaktu siasatan dijalankan, didapati bahan mentah yang digunakan terbahagi kepada bahan mentah untuk rubber processing, metal stamping process, assembly process dan packing process. Seterusnya saya menyatakan bahawa JHEKS (Jabatan Hal Ehwal Kesatuan Sekerja) memutuskan Responden Kedua layak mewakili Pemohon berdasarkan kepada fakta bahawa 56.25% bahan mentah yang digunakan adalah besi dan 87% barangan keluaran akhir Pemohon adalah castor wheel dan 13% sahaja rubber wheer.* In the light of the reasons proffered by the 1st

Respondent, I am of the view that the Applicant's contention that the 1st Respondent did not give reasons for his decision is misconceived.

8.3. The 2nd Respondent has basically adopted the contentions of the 1st Respondent. In relation to the 3rd ground to reiterate I am of the view that the claim of the Applicant is flawed for the reasons stated in paragraphs 8.1 and 8.2 above. In addition, I find the 1st Respondent's decision is not unreasonable in the *Wednesbury* sense because as correctly submitted by learned Counsel for the 2nd Respondent if one compares the pricing for "Raw Material for Rubber Processing" (RM8,056,181), "Raw Material for Metal Stamping Process" (RM5,376,853), it appears that metal component is less based on pricing. However "Raw Material for Assembly Process" where all the components in the schedule are metal comprising "axle, nut, washer, truck rivet, steel ball, brake plate, stopper pedal, ball race, spacer & supporting pipe and other accessories" except for "plastic wheels" and J & P stem", the pricing is RM5,027,331 and therefore if one looks at the overall picture, it is not unreasonable for the 1st Respondent to conclude that metal was the main component. Further based on the averment in paragraph 18 of the 1st Respondent's Affidavit, *"JHEKS mendapati keluaran Pemohon ialah 87% castor wheel dan 13% rubber wheel untuk digunakan dalam pengeluaran kenderaan untuk mengangkut mesin, peralatan dalam kiiang atau dalam rumah. Dan siasatan tersebut juga didapati bahan mentah yang digunakan untuk menghasilkan produk terdiri daripada besi (56.25%), getah asli (2.8%), plastics/chemicals/synthethic rubber (34.86%) dan lain-lain (6.09%)",* I agreed with the 2nd Respondent that it is not unreasonable for the 1st Respondent to conclude that the

appropriate union is the 2nd Respondent. Furthermore Exh.SU-11 in the 2nd Respondent's Affidavit, is a true picture of the castor wheel illustrates the 1st Respondent's averment that the 2nd Respondent is competent to represent the Applicant based on the fact that *"56.25% bahan mentah yang digunakan adalah besi dan 87% barangan keluaran akhir ... adalah castor wheel dan 13% sahaja rubber wheel"*. In addition, another factor which is relevant to the Minister's consideration is from the perspective of the number of employees involved found in paragraph 17 of the 2nd Respondent's Affidavit *"[S]eramai 133 (73.48%) orang dari jumfah 181 orang pekerja Pemohon adalah terlibat dalam pemasangan barang* logam. *Manakala hanya 48 (26.5%) pekerja terlibat dalam pemasangan komponen roda castor di mana roda tersebut terdiri dari komponen-komponen getah dan logam"*.

8.4. The Applicant took objection that the investigation by JHEKS on the business activities of the Applicant was assisted by a Panel of Advisors from MIDA and the Chemist Department by querying why the Panel did not get in touch with the Applicant or visit the Applicant's premises to see the processes involved. I agreed with the learned Counsel for the 2nd Respondent that it is entirely within the power of the DGTU to seek their help. Support for this proposition is found in *Tanjong Jaga Sdn Bhd. v. Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 at p. 129 H-I right where the Supreme Court stated *"In exercising his functions in this regard, the Registrar had an unfettered discretion which was subject to a duty to act responsibly in the Wednesbury sense ... that is to say, if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then the*

courts will interfere." Further support is found in the case of *Foh Hup Omnibus Co. Berhad v. Minister of Labour and Manpower & Anor.* [1973] 2 MLJ 38. In this case, a trade union had claimed recognition and when the appellant company refused to accord recognition, the Minister directed the Registrar of Trade Unions to carry out a membership check and thereafter decided to accord recognition to the trade union. On appeal to the Federal Court by the appellant company against the refusal of its application for certiorari to quash the Minister's decision, in dismissing the appeal, the Federal Court held *"The Minister had a complete discretion as to the manner in which he was to act in settling a dispute as to recognition and in the circumstances of this case, there had been no breach of the rules of natural justice"*.

8.5. To reiterate on the factual matrix of this case I find there is nothing unreasonable in the conclusion arrived at by the 1st Respondent. To conclude I also agreed with the 1st Respondent's argument that even if castor wheels are rubber products, the rubber industry workers union has not made a claim for recognition against the Applicant. In any event the "raw material" test is one of the methods by which competency may be determined and which as discussed has been fulfilled, hence the decision of the 1st Respondent "looked at objectively, [is not] so devoid of any plausible justification that no reasonable body of persons could have reached [it]." (per Abdoolcader S.C.J. in *Tanjong Jaga Sdn. Bhd. (supra)* at p. 130 A-B).

9. For the foregoing reasons I find that the grounds canvassed by the Applicant in urging this Court to allow the Applicant's application for an order of *certiorari* to quash the 1st Respondent's

decision do not warrant the Court to intervene and accordingly the Applicant's application is dismissed with costs to the 1st and 2nd Respondents to be taxed unless otherwise agreed.

Date: 24 JULY 2010

SGD
(LAU BEE LAN)
Judge

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