



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 102 OF 2013

(Formerly Nairobi Cause No. 792 of 2011)

**KENYA CHEMICAL AND ALLIED WORKERS
UNION.....CLAIMANT**

-VERSUS-

RUBY M.W.F. & FLOUR MILLS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2013)

JUDGMENT

The claimant Kenya Chemical and allied workers Union filed the memorandum of claim on 24.05.2011. The claimant prayed for orders that:

- a. **the respondent to recognize the claimant union within seven days from the date of the award;**
- b. **the respondent to immediately implement deduction of union dues and remit them to the claimant and COTU (K) as contained in the Minister's Order and Kenya Gazette No. 5914 served to the respondent; and**
- c. **costs be provided for.**

The respondent's memorandum of reply was filed on 18.07.2011 through R.M. Muthanga, Executive officer at the Federation of Kenya Employers. The respondent prayed that the court rejects the claimant's demand and order that:

- a. **the claimants have not satisfied the provisions of section 48(2) of the Labour Relations Act, 2007 and therefore union dues deductions cannot be implemented;**
- b. **section 54(1) and (8) of the Labour Relations Act, 2007 has not been met and therefore recognition be denied; and**
- c. **the claimant to pay costs of the case.**

The case came up for hearing on 18.06.2013 when Mr. Jackson Mweke appeared for the claimant and Mr. Robert Muthanga for the respondent.

For the claimant it was submitted as follows:

- a. The dispute about recognition and deduction and remission of union dues was reported to the Minister for labour and parties failed to arrive at an amicable settlement.
- b. The claimant's constitution shows that the respondent's business of processing spices and mixing food substances is within the claimant's sector of employees entitled to be represented by the claimant. In particular, clause 2 (ii) of the constitution provides that the representation will cover workers in the trade and industry of manufacturing of vegetables, animal oil, fats and allied and it expressly states:

“The products of crude oil, cake and meal, by crushing or extraction from oil seeds or nuts, the extraction of fish and other marine animals oils, the rendering of inedible animal oils and fats, the refining and hydrogenation (or hardening) of such oil and olive oil, marine animal oils, the rendering and refining of animal oils and fats. The products of margarine, compound cooking fats and table or salad oils, and manufacturing of food preparation and allied etc.”

- c. On 8.06.2010, the claimant recruited five employees of the respondent and forwarded the details to the claimant on 9.06.2010 and subsequently recruited two more employees.
- d. The respondent has confirmed that it had employed eight workers eligible to join the union. By the prevailing staff of eight eligible employees, it was submitted, the claimant had met the threshold in section 54(1) of the Labour Relations Act, 2007. Section 54 on recognition of the trade unions provides as follows:

“54. (1)An employer, including an employer in the public sector, shall recognise a tradeunion for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

2. **A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.**
3. **An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.**
4. **The Minister may, after consultation with the Board, publish a model recognition agreement.**
5. **An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.**
6. **If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.**
7. **If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.**
8. **When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.”**

- e. On deduction of union dues, the claimant had served the respondent the relevant forms for the check-off system for effecting and deducting the union dues as provided for in section 48 of the Labour Relations Act, 2007 which states as follows:

“48. (1) In this Part, “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership. (2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to?

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted –

(i) into a specified account of the trade union; or

ii. in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

8. An employer shall forward a copy of any notice of resignation he receives to the trade union."

f. The claimant further submitted that the respondent was under the statutory duty to deduct and failing which, criminally liable under section 50(8) (i) of the Act.

g. The claimant referred the court to appendix 7 on the memorandum of claim being an agreement between the parties to implement the check-off forms served upon the respondent on 25.6.2010 to deduct the union dues and further appendix 8 on the claim being a certificate of the subsequent disagreement between the parties.

h. The claimant submitted that it was the correct union for the respondent's sector of undertaking and the respondent should comply with the law and honour the employees' rights to associate by joining the union as per Article 41(2) (c) of the Constitution.

For the respondent, it was submitted as follows:

a. The philosophy on industrial relations and trade unionism is founded on section 54(8) of the Act which provides that when determining a dispute relating to recognition of a trade union, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister. The respondent in this case produces tea masala, pilau masala, garam masala and mixed spices being products from inputs of black paper, cloves, cardamom, cinnamon, cumin, bay leaves, herbs, pop cones, ginger, chillies, garlic powder, turmeric powder and desiccated coconut. Clause 2 (ii) of the claimant's constitution (as quoted

- earlier in this judgment) relates to a manufacturing chemical process whereas the respondent merely grinds, mixes the raw materials of spices and is not a chemical process at all. The respondent, it was submitted, deals in a physical process and not a chemical process and is therefore outside the claimant's sphere of the chemical manufacturing sector.
- b. There was no service as provided in the law and the respondent came to receive the documents on the check-off system at the conciliation meeting at the labour office.
 - c. The claimant as per the agreement to deduct had only three members recruited and subject to the deductions in issue. The three members did not meet the threshold for implementing the deduction because the claimant had failed to meet the requirement for at least five members prescribed in section 48(2) of the Act. It was submitted that for deduction at least five members were required to have been recruited and for recognition at least 50% plus one member were required to have been recruited by the claimant. As at time of hearing, the union had recruited only four members of the respondent out of the respondent's ten employees eligible for the recruitment.

The court has considered the pleadings on record; the documents filed for the parties; and the submissions and makes the following findings on the issues in dispute:

1. The first issue for determination is whether the claimant covers the sector of the respondent's undertaking. The respondent's case is that it undertakes a mere physical process as opposed to a chemical process and therefore the business falls outside the chemical manufacturing sector whose employees are represented by the claimant. A physical process is one where the constituent compounds or elements do not undergo a permanent change and on the other hand, a chemical process entails the permanent change of the constituent compounds or elements. The court finds that the claimant's undertaking generally brings about products in a physical and not a chemical process.

However, the main issue before the court is whether the claimant's sector of representation is about chemicals manufacturing sector or chemical processes. **Black's Law Dictionary 9th Edition** defines "**manufacture**" to mean to bring about by a human being or a machine as opposed to a product of nature, and manufactures being things capable of being statutory inventions and therefore subject of being patented. The claimant has submitted that in its constitution it is entitled to represent employees in the sector of "**...manufacturing of food preparation and allied...**" There is no doubt, whether by chemical or physical process, the respondent is involved in manufacturing of food preparations that are capable of being patented entailing human interventions as the output or products are not naturally occurring in their true image of natural creation.

Accordingly, the court finds that the claimant is entitled to represent the employees of the respondent eligible to join a trade union as the respondent's undertaking falls within the claimant's registered constitutional sector of such representation.

2. The second issue for determination is whether the claimant has met the threshold for implementing the deduction prescribed in section 48(2) of the Act. The respondent has submitted that the claimant had failed to meet the requirement for at least five members prescribed in section 48(2) of the Act as the claimant must demonstrate that it has recruited at least five employees. The claimant has opposed the submission and stated that the section requires that the employer employees at least five workers eligible to become union members for the section to apply and not that at least five members to be recruited for the section to so apply. The court has considered the submissions and finds that the union seeking an employer to deduct union dues will, "**...request the Minister to issue an order directing an employer of more than five employees belonging to the union....**" Thus, the Minister cannot issue the order unless there are at least five employees recruited by the union applying for the order. Thus, in issuing the relevant gazette notice No. 5914 of 21.07.2006 for collection of union dues, the order was directed to every employer who employs not less than five (5) members of the claimant union. The court holds that section 48(2) of the Act requires the trade union to have recruited at least five employees of an employer for a ministerial order for union dues to issue. The claimant has demonstrated that as at 9.06.2010, it had recruited

at least five employees of the respondent and the court finds that as of that date, the claimant had satisfied the requirement of the section.

3. The next issue for determination is whether the claimant has satisfied the provisions of section 54(1) on recognition. The section provides that an employer “...**shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees...**” The court is satisfied that as at 9.06.2010 the claimant had recruited at least five employees of the respondent’s total of eight employees eligible to join the trade union. The court finds that as of that date, the claimant had attained the statutory threshold of simple majority and was therefore entitled to recognition by the respondent. In making the finding, the court holds that the duty imposed upon the trade union under section 54(1) of the Act is to recruit at least simple majority of the employer’s unionisable staff and once that duty is satisfied, the trade union’s obligation is thereby exhausted and recognition becomes due. It is the opinion of the court that thereafter, the trade union is not obligated to sustain the threshold failing which the recognition lapses or becomes untenable. Thus, the duty for a trade union to recruit simple majority of eligible employees for recognition purpose is not a duty due from time to time but one exhaustible one attained. In the opinion of the court it is a precondition which once satisfied, recognition becomes due despite the actions the employer may subsequently invoke, such as dismissing the recruited staff, probably in the misconceived design to defeat the due recognition. Further, it is the opinion of the court that subsequent intervening circumstances such as death, retirement, resignation or promotion of the recruited employees thereby reducing the otherwise already attained simple majority by the trade union does not in any way vary the union’s entitlement to recognition in view of its prior satisfaction of the statutory condition. The simple majority recruitment of staff by the union under the section, in the opinion of the court, is an event, a statutory condition, and said better, a statutory promise that if the recruitment threshold is attained, recognition by the employer must follow.

In this case, there is no dispute that at the time the claimant recruited five employees the respondent’s eligible employees for joining the trade union were only eight and the court finds that the statutory threshold under the section was satisfied.

4. The final issue for determination is whether the claimant is entitled to recognition and deduction of union dues as prayed for. In view of the findings already made, the court finds that the union is entitled as prayed for. The respondent’s counterclaim and prayers will fail.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. the respondent to recognize the claimant union within seven days from the date of the award;
- b. the respondent to immediately implement deduction of union dues and remit them to the claimant and COTU(K) as contained in the Minister’s Order and Kenya Gazette No. 5914 of 2006 as prescribed in the law; and
- c. the respondent to pay the costs of the case.

Signed, dated and delivered in court at Nakuru this Friday, 28th June, 2013.

BYRAM ONGAYA

JUDGE