REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA.

(Before: Charles P. Chemmuttut, J.,

J.M. Kilonzo & D.K. Siele, Members.)

CAUSE NO. 94 OF 2005.

KENYA HOTELS & ALLIED WORKERS' UNION.....Claimants.

v.

TRAVELLERS (TIWI) BEACH HOTEL (Owned by DHANJAL INVESTMENTS LTD.) .....Respondents.

Issue in Dispute:-

"Refusal to sign Recognition Agreement".

Mr. Walter Musi for the Claimants (hereinafter called the Union).

Mr. Joshua Nyawara, Advocate, of M/S. Nyawara & Co., Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

The Union is registered under Section 11 of the Trade Union Act, Cap. 233, Laws of Kenya; and pursuant to Clause 1.1(iv) of its Constitution, it is allowed to seek "membership from employees engaged in hotels, restaurants, casinos, catering and similar establishments providing food and beverages or both and further categories of related establishments providing tourism services, clubs, guest houses, camping sites, lodges clubs and other institutions and projects associated with them provided that such employees are of apparent age of eighteen years." The Hotel is wholly owned by the Company and was registered as such by the Ministry of Tourism under the Hotels and Restaurants Authority Act, Cap. 494, Laws of Kenya, to engage in hotel business.

On 23rd October, 2000, the Union first sought recognition from the Company on the following grounds:-

(a) that it was the right or appropriate Union to represent the employees of the Company.

(b) that there was no rival union claiming recognition or representation, and

(c) that it had recruited 131 employees, i.e. more than a simple majority, 51%, of the unionisable employees as its members.

The Company refused to accord it recognition (see App. 2); and aggrieved by this decision, the Union consequently reported over 85 disputes on recognition to the Minister for Labour in accordance with Section 4 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act). The Minister accepted the dispute, and on 19th May, 2000, he constituted a Demarcation Committee consisting of Mrs. B.W. Mwai (Chairperson), Mr. J.N. Mwanzia (Secretary) and Messrs. G.N. Konditi and G. Odiko (Members) to act as the Investigators. On 13th February, 2002, the Minister released his report to the parties in which he found at pages 30-31, serial No. 17, that "KHAWU had recruited more than a simple majority, i.e 82, of the employees" in the Hotels' establishment, and at pages 46-47 of the said report he recommended, *inter alia*, as follows:-

"1. KHAWU and KUDHEIHA represent Hotel and catering establishment……..

2. Hotels and restaurants which are members of the Hotel Keepers and Caterers association to negotiate individual agreements with the union that has fulfilled the simple majority rule.

3. ……

4. The Minister……. should accept and process all disputes involving Hotels and Restaurants irrespective of the union which has reported.

5. Each union is to represent collective and individual disputes of workers who are members or were former members of Hotel establishments having recognition with them. However, representation of individual workers disputes in Hotel establishment where a union has no recognition will be allowed on condition that, the same dispute is not being pursued by a rival union.

6. Representation of workers employed in non Association Hotel members be undertaken by both unions ……. Principle of 'who gets where first' to apply.

7. Both unions should desist from interfering in any way with industrial relationship existing between a union and a particular Hotel establishment unless evidence of formal mass revocation of members is submitted and accepted by the Minister as provided in our Industrial relations machinery and the Trade Disputes Act Cap. 234.

8. Both unions should carry out their organization and recruitment of members in a peaceful and harmonious manner which does not threaten industrial relations existing in a particular establishment and the industry in general. Employers and management of the various Hotels as well as the Association should cooperate with each of the union in the spirit of Tripartism as enshrined in our Industrial Relations Charter and desist from actions that are injurious or are a hindrance to the exercise of legitimate union activities.

9. ……"

The Minister finally appealed to the parties to accept the recommendation as a basis of settling the dispute (see App. 4). The union accepted the recommendation, but the Hotel management rejected or ignored it (see App. 14).

As the Company declined to accept the report of the Demarcation Committee and also refused to sign the Notification of Dispute, Form 'A', the Minister for Labour invoked his powers vested in him by Section 8 of the Act and referred this dispute to the Court on 20th July 2005, for consideration and determination. The Minister's reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 27th July, 2005, and the dispute was listed for mention on 17th August, 2005. By his ruling, dated 21st September, 2005, S.M. Madzayo, J. ordered that the Union should submit its memorandum on or before 13th October, 2005, and the Company should file its reply statement thereto on or before 7th November, 2005. Mr. Joanes Okoth, Deputy Secretary General, submitted his memorandum, on behalf of the Union, on 11th October, 2005, and Mr. Joshua Nyawara, Advocate, filed his reply statement under protest, on behalf of the Company, on 7th November, 2005. The case was then heard in Mombasa on 28th February, 2006.

Mr. Musi submitted that on 16th January, 2002, the management of the Hotel complied with the provisions of Section 45 of the Act by remitting the union dues, amounting to Kshs.5,933/= for the period from the month of December 2001 (see App.5). Between 22nd July and 22nd August, 2003 the Union updated the list of its members in the Hotels' establishment; and on 16th September, 2003, the Managing Director of the Hotel, Mr. N.S. Dhanjal, assured the Union that "the ownership in the above captioned hotel remained unchanged" (see Apps. 6 & 6A). The management of the Hotel also remitted Kshs.9,155/=, being union dues for the month of October, 2003 (see App. &), and further remittances of Kshs. 9,137/= and Kshs.8,451/= for the months of December, 2003 and January, 2004 respectively, were made by the new management of the Hotel, M/S. Sucham Investment Ltd., and they subsequently changed the name of the Hotel from Travellers (Tiwi) Beach Hotel "to Tiwi Beach Resort". The Union continued to recruit more members and forwarded fresh check-off forms to the new management of the Hotel, e.g. in October 2004, the Hotel had a total of 163 employees (both unionisable and management), 92 of whom were union members, and in June 2005 it had a total of 166 employees, 101 of whom were union members (see Apps. 9, 10, 11, 11A, 12, 12A & 13). In the circumstances, the management of Tiwi Beach Resort forwarded a cheque for Kshs.55,785.40 to the Union on 15th August 2005, being union dues for three months.

Mr. Musi submitted further that the Hotel changed the business name or its management when the pre-Industrial Court proceedings were alive and in progress so as to deny their employees union representation; and its action was taken in bad faith or *mala fide* because no formal communication was forwarded to either the Minister for Labour and/or the Union on the aforementioned changes. He pointed out that Tiwi Beach Resort, through its letter, dated 9th August, 2005, to the Court expressly conceded "that we took over the management of the hotel on 4/12/2003 as a new management with a completely new Board of Directors." This meant that M/s. Sucham Investments Ltd. only took over the management of the Hotel without a break of the employees' contracts of employment. Mr. Musi asserted further that M/S. Sucham Investment Ltd. assumed the union membership and has never stopped remitting the union dues of its members.

In conclusion, Mr. Musi maintained that the Union has to-date complied with Section 5(2) of the Act because (a) it has recruited and maintained 139 members, or 83%, out of 166 unionisable employees; (b) there is no rival union claiming recognition or representation, and (c) it is the relevant Union whose Constitution covers the establishment of the Company.

For the foregoing reasons, Mr. Musi prayed that the Company accord formal recognition to the Union forthwith.

In a nutshell, the learned counsel for the Company, Mr. Nyawara, strongly opposed the demand mainly on the following grounds:-

(i) that M/S Sucham Investment Ltd. is a completely distinct legal entity, trading as Tiwi Beach Resort, with its separate legal personality, which is not and cannot be bound by previous arrangements and obligations made between the Union and M/S Dhanjal Investments Ltd., trading as Travellers (Tiwi) Beach Hotel;

(ii) that M/S. Sucham Investment Ltd. took over the management of the Hotel on 4th December, 2003, and the assumption by the Union that the Hotel has an obligation to recognize it (Union), based on the previous dealings with its predecessor, M/s. Dhanjal Investments Ltd., is completely misplaced and without any legal foundation;

(iii) that the Resort employed only a few of the employees of Travellers (Tiwi) Beach Hotel on new terms and conditions of employment;

(iv) that the Union has not recruited a simple majority of the unionisable employees from the Resort to warrant recognition as most of the persons in the check-off forms are no longer employees of the Resort and others are casual workers who are only occasionally engaged in and when there is work to be done on casual basis, and

(v) that the Minister's findings and recommendation are not binding on the Resort because it was not a party to those proceedings which involved its predecessor.

The learned counsel, therefore, urged the Court to find that the Union has failed to establish a case for recognition by the Resort; and in the circumstances, prayed that the demand by the Union be rejected.

There is no dispute that Dhanjal Investments Ltd. owned Travellers (Tiwi) Beach Hotel and traded as such until 4th December, 2003 when Sucham Investment Ltd., took over the management of the Hotel and changed its name to Tiwi Beach Resort. This is confirmed by its letter to the Court, dated 9th August, 2005, which stated, *inter alia*, that "…….. we took over the

management of the hotel on 4th December, 2003 as a new management with completely new Board of Directors". The learned counsel for the Company, Mr. Nyawara argued that Sucham Investment Ltd. is a distinct and separate legal entity which is not and cannot be bound by previous arrangements and obligations made between the Union and Dhanjal Investments Ltd., trading as Travellers (Tiwi) Beach Hotel. This argument is untenable because the change in the management, or even ownership, of the Hotel did not break the continuity of the employees' contracts of employment and did not also change the identity of the business. The same situation arises in connection with a "take-over": if all the shares in a company are sold, this would neither affect the company's existence as a legal entity nor the employees' contracts of employment. (see "*Law for Managers*", *2nd Ed. by David Faulkes at pages 20-22)* .

The jurisdiction of the Court to pass orders in relation to industrial matters is derived not so much from considerations as to the existence of contractual rights and obligations, as on considerations of equity, security of service of the employees, promotion of industrial peace and thereby of the larger interest of the community. It is settled by a large number of decisions that industrial law takes a different view about the duties and obligations of a successor-in-business, and if a successor decides to run the same business which was carried on by his predecessor the employees of the old concern are entitled to submit a dispute to the Court regarding their rights and obligations in the business of the old concern, and those rights and obligations must be regarded as continuing and enforceable against the new management and not affected by the substitution of the new management for the old. It is settled law that where there is a transfer of a business of one management to another, the rights and obligations which existed as between the old management and their employees continue to exist *vis-à-vis* the new management after the date of the transfer (see *Odeon Cinema v. Workers of Sagar Talkies, (1954) 2 LLJ.314: AIR 1954 Mad 1045).* Therefore, the employees of a business continue to be entitled to all the rights and privileges acquired by them by reason of past services even after a transfer of business, provided (i) there is continuity of service, and (ii) there is identity of business (see *New Gujarat Cotton Mills v. L.A.T., AIR 1957 Bom III).*

By continuity of service is not meant necessary legal continuity but continuity in fact, that is, the employees must continue to serve the business without a substantial break in service. Thus, if the transfeor gives notice of termination of service and the transferee makes a fresh appointment, this by itself, although it may in law amount to a break in continuity, will not affect the continuity of service for the purpose of industrial relations. Nor does it constitute a break in service if a short time elapses between such termination of service by the transferor and appointment by the transferee so long as the employees continue to serve the business even after the termination and before the re-employment.

Regarding identity of the business, what is required is that the same business, which was carried on by the transferor, must be carried on by the transferee. It is not sufficient that the business is similar or of the same nature, if the business is carried on by the transferee is new as was the case in *Odeon Cinema v. Sagar Talkies, AIR 1954 Mad: (1954) ILLJ 314,* where the transferee obtained a lease of the Sagar Talkies to carry on "their own business".

In this case, the employees were continuously employed in the Hotel by the two companies, i.e. Dhanjal Investments Ltd. and Sucham Investment Ltd., and for this reason a change in the management or ownership of the Hotel did not break the continuity of their employment contracts and did not also change the identity of the business. The take-over of the management of the Hotel by Sucham Investment Ltd. from Dhanjal Investments Ltd. had, therefore, no effect on the employment contracts of the employees and the identity of the business.

Having found as above the question for consideration in this dispute now is whether the Union has satisfied the three grounds at pages 2 and 3 hereinabove for the Company to accord it formal recognition. Under Section 5(2) of the Act, an employer or an organization of employers is bound to recognize a trade union if (i) it has in its membership a simple majority of the employees eligible by virtue of the union's constitution to join that particular union in a particular undertaking or a group of undertakings and (ii) that there is no rival trade union claiming to represent such employees. This provision and Part B(III) 1&2 of the Industrial Relations Charter envisage or guarantee a right to the employer or an organization or group of employers or establishments that he or it or they shall deal with only one trade union, or a collective bargaining agent, because more than one trade union, or a collective bargaining agent, for different categories of employees in a company's establishment or industry or group of establishments or industries, will be prejudicial to the interests and legal rights of the parties. It cannot be denied that the right of people to form associations and trade unions for any lawful purpose is one of the essentials of democratic community. The State or Government defines what purposes are unlawful and in this respect it may be liberal or restrictive according to circumstances. The purposes which are not declared unlawful are obviously lawful. Under Article 80 of the Kenya Constitution, the employees or citizens of this country have a right to organize or to form associations or unions and to bargain collectively or press their other demands through representatives of their own choosing, without any outside interference, restraint or coercion. The provisions of Section 5(2) of the Act are also not inconsistent with Section 80 of the Kenya Constitution and both do not debar the citizens or employees of this country from forming associations or unions, nor do they impinge on their equality before the law.

In the case at hand, the recruitment of members by the Union was a continuous process and the Company effected the check-off system by remitting the union dues without formally recognizing the Union. In his aforementioned report, the Minister found that the Union had secured more than a simple majority of the employees in the Hotel establishment and recommended thereon as stated hereinabove. One, therefore, wonders why the Company is reluctant to formally recognize the Union and yet it has been complying with the check-off system. In his book:

"***Industrial Court of Kenya": origin,development and practice, Chapter 12, at page 143, Saeed R. Cockar, J.*** observed, *inter alia,* as follows:-

"Unfortunately, ……. there are still some employers who literally fear the trade unions and will go to any length in order to avoid establishing a relationship or having any dealings with them. The obvious reason for this is that such shortsighted employers fear that starting a dialogue with the trade unions would mean the beginning of trouble in their undertaking and they would soon be faced with demands which would seriously cut into their profits. They have a further fear that the management will have to spent a lot of time in having meetings with the shopstewards, the branch officials and the national officials of the trade unions. Such reasoning is fallacious because once a proper relationship is established with a trade union in accordance with the current norms, then an employer has all the advantages of predictable behaviour from his workforce. It is seldom realized by such employers that while they are dodging the trade union that is seeking recognition from them (and this can go on for a number of years) there is constant friction between the management and the workers and their leaders who operate on behalf of the trade union. It is in fact advantageous to management and workers alike to establish procedures to be followed in the event of individual and collective claims."

We have given our careful consideration to the arguments and submissions addressed by the representatives of the parties, and in our view, Dhanjal Investments Ltd. handed over the management of the Hotel to Sucham Investment Ltd. so as to deny their employees union representation and this action was taken in bad faith, or *mala fide*. In *Cause No. 30 of 1991: Tailors & Textiles Workers'Union v.Bedi Investments Ltd*.I observed at pages 8 and 9 as follows:

"For the benefit of the employers and employees in general, one of the functions of this Court is to protect legitimate trade union activities; and the State which hold the balance between the employers and the employees has a duty to preserve peace within the industry. On the one had, it must discourage strikes by the employees, and on the other, put down any acts of victimization or unfair labour practices by the employers, which are a fruitful cause of industrial strife. The employees regard trade unions as essential to their welfare as without them they are not in a position to bargain collectively with the employers. They resist any attempt by the employers to weaken their unions and fight to win the right of collective bargaining through the unions. To-day the policy of our Government is, on the one hand, to prevent industrial strife between the employers and the employees, and on the other, to secure economic justice for the employees. Section 80 of our Constitution holds out a promise to any person of freedom of assembly and association, and in particular freedom 'to form or belong to trade unions or other associations for the protection of his interests'.

It is, therefore, a necessary corollary of this twin policy of industrial peace and economic justice that the Court shall discourage any attempt by an employer to undermine the strength of a trade union which enables the employees to negotiate with the employer from a position of equal strength. Without the trade unions there can be no collective bargaining or settlement of industrial disputes by conciliation or arbitration. In a national crisis, as in Great Britain during the last World War, a strong trade union commanding the loyalty of the employees can be a pillar of strength for the nation. Thus, it is against the public interest and provisions of the Trade Disputes Act (Cap.234) to permit any employer to harass, mistreat or undermine the trade unions which form a part of the most effective instruments of the Government policy of industrial peace through representative negotiations between them and the employers; and any systematic attempt by an employer to use his powers of management to disrupt the trade union of his employees will be condemned by this Court".
I also made the same observations in *Cause No. 20 of 2000: Kenya Building, Construction, Timber, Furniture & Allied Industries Employees' Union v. Hayer Bishan Singh & Sons Ltd.*

In the light of the foregoing discussion, we are satisfied that the Union has fulfilled the requirements under Section 5(2) of the Act for recognition by the Company. Accordingly, we uphold the Minister's recommendation, and award that the Company, i.e. Dhanjal Investments Ltd., and/or Sucham Investment Ltd. accord formal recognition to the Union as the sole and rightful representative of its unionisable employees. We also order that the parties should sign a formal recognition agreement within **two (2) months** from the date of this award for purposes of collective bargaining.

DATED and delivered at Nairobi this 28th day of September, 2006.

Charles P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo, D.K. Siele,

MEMBER. **MEMBER.**