IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 47 OF 2015

BETWEEN

CIVICON LIMITED ..... APPELLANT

AND

AMALGAMATED UNION OF KENYA METAL WORKERS .....RESPONDENT

(An appeal against part of the Judgment of the High Court of Kenya at Mombasa (Makau, J.) dated 6th December, 2013

in

MSA. E.L.R.C No. 124 of 2013)

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The sole question before the court below was whether the respondent, a registered trade union had satisfied the requirement under ***section 54*** of the Labour Relations Act to warrant its recognition by the appellant. Recognition under the Act is a term of art which refers to the process whereby an employer or employers' organization, formally, through a written agreement, acknowledges a trade union as the representative of the interests of unionisable employees of the employer or the employer's organization. ***Section 54(1)*** of the Act provides that;

> ***"An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."*** (Our emphasis)

The respondent claimed that despite meeting this threshold the appellant had failed or neglected to accord it recognition status; that by the time the claim was filed the respondent had recruited 475 unionisable employees out a work force of 500, constituting 95% thereby satisfying the requirement of a simple majority; and that instead the appellant embarked on intimidating and coercing members to withdraw from the union. The respondent asked the court to declare that it had met the requirement for recognition and to order the appellant to execute a recognition agreement, start the deduction and remittance of union dues and to be restrained from victimizing any member of the union on account of these matters.

The appellant denied the claim insisting that the respondent had not satisfied the threshold of a simple majority since out of 1050 employees the respondent had recruited 475 unionisable employees

constituting only 45% of unionisable employees.

In a rather difficult to understand decision, the court (Makau, J.), found that the appellant had 580 unionisable employees; that although at the time of filing the suit the respondent had not recruited a simple majority of the appellant's unionisable employees, it subsequently did so by first recruiting 475 and later on additional 252 members; that at the time the latter recruitment was effected the appellant had 1050 unionisable members of staff. The learned Judge then concluded that;

> ***"The court will however not fail to appreciate that the claimant has the right to continue to recruit new members as she did after filing the suit. She will also be free to continue to recruit after this suit .... The court has therefore established from the reports filed by the parties dated 30/7/2013 that the respondent has a total of 580 unionisable staff of which 120 were permanent and the rest on renewable fixed term contracts. The parties also signed and filed a consent dated 22/7/2013 confirming that they had verified that 345 of the respondent's unionisable staff were members of the claimant.***
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> ***Indeed by the said consent the respondent undertook to deduct and remit union dues in respect of the 345 union members. In view of the fact that 345 out of 580 were found to be members of the union as at 30/7/2013 which represents approximately 60% of the unionisable staff, it is obvious that the simple majority threshold prescribed by section 54 supra was met. Even if that was not the case at the commencement of the suit, the court is of the view that substantive justice demands that the unionisable staff of the respondent ought to be granted their constitutional right to have a trade union of their choice to represent them in their labour relations."***

We shall be saying something about the apparent muddle in the above passage and finding.

With that the learned Judge granted the prayer for recognition and for deduction and remittance of union dues. The learned Judge, however found no merit or evidence to warrant the grant of restraining orders against victimization of the staff. Each party was ordered to bear its own costs.

The appellant now challenges that decision in this appeal on three grounds which, in effect as noted earlier, raises only one issue. Being a first appeal our primary role is to proceed by way of a rehearing through analysis and re-evaluation of the evidence recorded by the trial court so as to draw our own independent conclusion but bearing in mind that we did not see or hear the witnesses testify. See Kenya **Ports Authority V. Kinston (Kenya) Ltd** [2009] EA 212.

Both ***Article 41(1) (c)*** of the Constitution and ***section 4(1)*** and ***(2)*** of the Labour Relations Act provide for freedom of association guaranteeing every worker a right to form, join or participate in the activities and programs of a trade union and to leave it. Like the Constitution and the aforesaid Labour Relations Act, the International Labour Organization (ILO) Convention Nos. 87 and 98 recognize employees' freedom to join and participate in a trade union. It is from such freedom to join and to leave a trade union at will that the issue raised in this appeal must be seen.

We reiterate that only a registered trade union that has been recognised can engage in collective bargaining on behalf of its members. The dominant consideration for an employer to grant recognition status to a trade union is the proof that the union represents a simple majority of unionisable employees. Unionisable employees must not be confused with the total work force engaged by the employer. Only members of staff who are eligible for membership (unionisable members) are targeted. In terms of a tripartite agreement, the Industrial Relations Charter (1984), certain categories of employees are not unionisable. According to the Charter, the following categories of employees are excluded from being unionisable, Executive Chairman; Managing Director; Deputy Director; Departmental Heads; Branch Managers; persons in charge of operations and their deputies; person with power to transfer, hire, appraise, suspend, promote, reward, discipline, and handle grievances; persons under training for the above positions; personal secretaries to the foregoing persons; persons whose functional responsibilities are of confidential nature or any other person who may by mutual agreement be excluded from being a member of the trade union. These are generally speaking management staff. Under ***section 32*** of the

Act and subject to certain limitations a minor cannot be a member of a trade union.

The determination of the question of existence of unionisable employees is therefore one of evidence. As more employees are engaged by an employer, some leave employment while others, through natural attrition cease being employees. For this reason and for purposes of recognition, the number of unionisable employees is not expected to remain constant. Because of this the process requires full cooperation, honest disclosure and utmost good faith especially on the part of the employer to state a true and accurate reflection of the details and particulars of its work force, specifying those who are unionisable and those who are not. No difficulty is posed by any change that increases the number of unionisable employees. However any changes that reduces that unit below the simple majority will affect the recognition agreement. There are clear inherent risks where this happens. An employer can deliberately provide inaccurate data of its staff regarding their job titles, and description with the potential objective of blurring the actual staffing situation in the organization in order to bring the number of unionisable employees below the simple majority and ultimately to terminate a recognition agreement.

But where the reduction of members arises as a result of a genuine factor, ***section 54(5)*** of the Labour Relations Act allows an employer, or group of employers or their association to apply to the National Labour Board established under ***section 5*** of the Labour Institutions Act to terminate or revoke a recognition agreement. Because of the intrigues around the whole question of simple majority, ***section 54(6)*** requires any dispute regarding the right of a trade union to be recognised for the purposes of collective bargaining or the cancellation or revocation of a recognition agreement to be referred for conciliation. It is only when the conciliation fails that the dispute can be referred to the Employment and Labour Relations Court. It is not clear to us from the pleadings and submissions whether conciliation was attempted before the matter was taken to court.

The learned Judge, faced with competing figures presented as representing the number of unionisable employees and those already recruited by the respondent, and conscious of the impediments of obtaining accurate staff information, directed the parties to reconcile their respective staff information and file a report. It will be recalled that at the time the claim was instituted in June 2012 the respondent's position was that it had recruited 475 unionisable staff out of a unionisable work force of 500, constituting 95%. The appellant in response, and while not disputing the respondent's assertion that it had recruited 475 employees, maintained that it had a unionisable work force of 1050, representing only 45%.

Pursuant to the order for verification a consent dated 22nd July 2013 and signed by the parties and a representative of the Federation of Kenya Employers (FKE) Coast Region, was filed. In it, it was agreed;

> ***" 1. That deduction and remission of trade union dues to commence immediately in regard to 345 unionisable employees who signed check-off form subject to scrutiny.***
>
> ***2. That recognition agreement execution to be determined thereafter subject to section 54 of the Labour Relations Act, Law of Kenya.***
>
> ***3. That the union to drop pursuit of court contempt in good faith."***

Apparently on the same date the respondent's representative alone signed another report also said to be pursuant to the order for verification in which it is indicated that there were in the appellant's branch in Naivasha 80 unionisable employees and 5 management staff. None of the 80 unionisable employees, according to that report had joined the union. The report further found that in Mombasa, the appellant had 200 employees and in Kwale 300, making a total of 580 unionisable employees, clearly in excess of a simple majority.

There is yet a third report, this time signed only by the Regional Manager of FKE, Coast similarly made pursuant to the aforesaid verification order. The report confirmed the number of unionisable staff at Naivasha as 80, Kwale 300 and 200 in Mombasa, confirming the total of 580. It further confirmed that 345 employees had been recruited by the respondent subject to scrutiny because some members had left

the employment; that **"after scrutiny, 239 employees out of 560 employees confirmed their membership to the union"**, below the threshold of 50% and that the appellant agreed to effect deduction of union due in respect of the 239 unionisable employees.

Weighing this evidence against what we have observed earlier regarding the elastic and impermanent nature of membership of the unions, and bearing in mind that only one report was filed on 22nd July 2013 by both parties along with FKE, we have no doubt whatsoever, going by the report, that 345 unionisable employees had joined the respondent. On a prepondence of evidence we are persuaded also that the eligible employees were 580 thereby meeting the threshold. It must be borne in mind that the trial court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in the claim against that asserted by the employer. That, in our view, is the reason why ***section 54(7)*** requires that if dispute is not resolved by conciliation it must be referred to the court under a certificate of urgency before conditions change.

The claim was filed in June 2012. One whole year later, on 11th July 2013 the court directed the parties to verify the staffing status in the appellant company and those employees who had in the meantime been recruited by the respondent. When a preliminary report was made to the court on 30th July 2013 there were uncontested 200 unionisable employees out of the established membership of 345. At that stage the learned Judge found that that situation satisfied the requirement for recognition as it constituted a simple majority and ordered the appellant to remit the union dues of those eligible to the respondent as the verification went on. That order was complied with, with the only outstanding issue being that of the recognition agreement. The judgment on the matter was rendered on 6th December 2013. In view of the length of time taken between the filing of the claim, the verification exercise and the judgment, it is apparent that the number of eligible employees had dwindled. The appellant now claims that the court below erred in failing to take into account the fact that there were 1050 unionisable employees, yet this evidence was not availed for verification. It also contradicts reports compiled upon visits to the appellant's offices in Naivasha, Kwale and Mombasa.

Whereas the reports were unanimous that 345 out of 580 unionisable employees had been recruited by the respondent, the appellant appears, in its written submissions, to have a different explanation, that after the scrutiny it was found that some members had left its employment while 167 had contested their membership, 159 withdrawn membership and 17 had their contracts of employment with the appellant expired.

We cannot help, looking at these averments, but find mischief on the part of the appellant, by a deliberate effort to diminish the numbers of eligible employees in order to frustrate the recognition process. How else can one explain the numerous identical letters purportedly written on more or less the same dates by eligible staff members withdrawing membership?. Those purported withdrawals were of no consequence in light of the court's factual finding, on evidence presented at the time that ***section 54(1)*** aforesaid had been satisfied by the respondent by demonstrating that 345 unionisable employees had joined the respondent. At that stage the appellant ought to have signed the recognition agreement as it dutifully continued to remit union dues of the recruited members to the respondent.

Although there are some conclusions of the learned Judge with which we do not, with respect, agree, we think his final orders were correct. We do not, for example understand how the learned judge, after finding that the respondent had not, at the time the claim was brought, attained a simple majority of unionisable members, made about-turn to suddenly hold, on those very facts, that, in the interest of substantive justice, it had met the requirement. Substantive justice cannot be used to override specific Provisions of the law.

We reiterate that the question of a simple majority threshold is one of evidence on a balance of probability and not guesswork.

We come to the conclusion that the appeal lacks merit. It is accordingly dismissed. We make no orders as to costs.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR