IN THE COURT OF APPEAL

IN NAIROBI

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 89 OF 2014

BE TWEEN

MICATO SAFARIS...APPLICANT

AND

KENYA GAME HUNTING AND SAFARI WORKERS UNION......RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the

High Court of Kenya at Nairobi (Nduma, J) dated 20th November 2013

in

H.C. I. C. No. 2437 of 2012)

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RULING

On the 30th April 2014, I declined to certify this matter as urgent having taken the view that there were no urgent circumstances apparent to necessitate the issuance of a certificate of urgency.

The matter before me related to a dispute in the Industrial Court where the respondent on 3rd December 2012 filed a Claim against the applicant wherein the applicant sought an order for the review of the Collective Bargaining Agreement (CBA) made between the applicant and the respondent; that the respondent be ordered to pay the respondent the unpaid union dues and Agency Fees, and that the applicant be restrained from terminating the Recognition Agreement.

Briefly, the applicant and the respondent entered into a Recognition Agreement on 14th August 2003, following an order of the Industrial Court. The parties also entered into a CBA which was the subject of renewal every two (2) years. With the impending expiry if the outgoing CBA on 30th April 2014, the respondent forwarded a draft CBA to the applicant to review, which the applicant refused to review or to renegotiate. On 24th August 2012, the respondent reported a trade union dispute to the Minister for Labour who appointed a conciliator. In response, the respondent stated that it would suspend the Recognition Agreement. On 4th August 2003, the conciliator concluded the conciliation report which found in the main that there was a Recognition Agreement in place, and that the parties had since entered into 6 CBAs; that the respondent had since unilaterally discontinued deducting union dues and

remittances contrary to the wishes of the union and the three union members; that the respondent had made a unilaterally decision to suspend the Recognition Agreement, which was unlawful and of no effect. The conciliator recommended that the parties conclude the CBA, and that the respondent commence deduction of the union dues from all employees who had joined the union and reinstate deductions of union dues for the existing members. The applicant was aggrieved with this decision filed a Memorandum of Response dated 15th March 2013 where it denied that its name is Micato Safaris, and that its proper name is Mini – CABS & Tours Company Limited trading as Micato Safaris. The applicant admitted that it had recognized the respondent, and had signed a Recognition Agreement in 2003. At that time, the respondent had a membership of 50% plus one. Between 2003 and 2006, the membership declined to three (3) members, and despite the applicant deducting Agency fees for thirty six (36) unionisable employees, by 2011 the membership of the union had been reduced to only three (3) members. In October 2011, the applicant issued a ninety (90) days' notice to the respondent and the National Labour Board of its intention to terminate the Recognition Agreement due to the fall in membership. At the same time, it issued the respondent with a thirty (30) days' notice of its intention to stop deducting and paying Agency fees in respect of the non unionisable staff and declined to negotiate a CBA.

The Industrial Court found that the termination of the Recognition Agreement was null and void, as the proper procedures had not been followed, and revoked the termination forthwith. The Industrial Court also found the refusal to negotiate the CBA unlawful and a violation of the provisions of the Labour Relations Act, and further ordered that the Agency Fees and union dues for the three (3) union members to be deducted and remitted to the respondent forthwith.

The applicant was further aggrieved with the Industrial Court's award, and filed a Memorandum of Appeal dated 12th March 2014. The applicant also filed a Notice of Motion dated 23rd April 2014, together with a Certificate of Urgency, dated 23rd April 2014, and supported by the affidavit of *Geoffrey Orao Obura*, which I declined to certify as urgent.

The application was referred back to me under ***rule 55*** of this Court's rules for hearing inter partes. Learned counsel for the applicant, *Mr Burugu* submitted that since the Industrial Court had delivered its award the respondent had by a Notice Of Motion dated 7th May 2014, sought for leave to have the applicant committed to civil jail. The application was to have been heard on 29th May 2014, but as the Industrial Court did not sit on the material day, the application was still pending. Counsel informed the Court that the threat of the contempt proceedings remained very real. Counsel continued that, an Appeal had been filed on the basis that the respondent had not attained the 50% plus one membership requirement to warrant the existence of a CBA. Currently only three (3) employees are members of the Union.

On his part, *Mr. Ndolo* representing the respondent as its Secretary General, submitted that all the respondent required was for the applicant to renew the CBA that had been in place for the last 10 years; that a simple majority membership had been attained, and a check off system had been submitted and signed by the applicant; that the respondent had failed to deduct and remit the union dues, and their actions were intended to frustrate the workers. The applicant had gone so far as to issue letters of termination of some of the employees.

In response *Mr. Burugu* stated that the check off system had been produced in court, but the number of members indicated by the applicant were inaccurate.

Having considered the pleadings and heard the rival submissions of counsel, I am still not persuaded that the application is urgent. The applicant has stated vide the affidavit of *Geoffrey Orao Obura* that the reason for the utmost urgency is:-

> "***because the Appellant will be forced to enter into negotiations, conclude and implement a Collective Bargaining Agreement with the respondent in fulfillment of the Industrial Court's award and in lieu thereof of the Applicant's officers may be forced to undergo contempt***

proceedings which may be commenced any time by the Respondent yet the Applicant has filed an arguable appeal."

The question that arises is whether this is a sufficient reason upon which to base an urgency certificate, particularly where, it is clear that the a Recognition Agreement had been in existence since 2003, and a CBA from 2003. The applicant had for the last nine (9) or so years deducted and remitted union dues on behalf of the union members. What therefore had changed? It would be different if this was the first Recognition Agreement and CBA that it was entering into, and therefore the trepidation in such circumstances would be understandable. But having already entered into these agreements, and remitted union dues over the years, executing yet another CBA, and resuming remittance of union dues again was not novel, or alien to the applicant, and is not in my view an adequate reason for declaring the application urgent. As for the contempt of court proceedings, my understanding of the situation is that the application for leave is still pending before the Industrial Court, and there does not appear to be any imminent threat to commit the applicant's officers to civil jail. Consequently, I am unable to see the urgency in this application.

For these reasons, I decline to alter my decision made on 30th April 2014. The costs of the application for urgency to be in the main application.

Dated and delivered at Nairobi this 27th day of JUNE, 2014.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR