



**Kenya Engineering Workers Union v Bhachu Industries Limited (Cause E014 of 2023) [2023] KEELRC 1851 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1851 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E014 OF 2023  
BOM MANANI, J  
JULY 13, 2023**

**BETWEEN  
KENYA ENGINEERING WORKERS UNION ..... CLAIMANT  
AND  
BHACHU INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. The application before me seeks the court's order to compel the Respondent to provide the Claimant with certain information pursuant to section 57 of the *Labour Relations Act* to enable the parties engage in meaningful collective bargaining. The information sought includes: audited financial statements for the years 2019 and 2020; the Respondent's wage bill; and the number of the Respondent's staff who are unionizable and in the management.
2. It is the Claimant's position that the Respondent has resisted sharing this information to enable the parties to conclude the collective bargaining process. The Claimant avers that because of the Respondent's reluctance to finalize the process, the dispute between the parties was referred to the Ministry of Labour for conciliation. However, this did not help matters as the Respondent failed to attend meetings convened by the conciliator to discuss the matter. The Claimant states that faced with this challenge, it has become necessary that the matter is referred to this court for adjudication.
3. On its part, the Respondent denies being a stumbling block to finalizing negotiations in respect of a new Collective Bargaining Agreement (CBA) between the parties. It is the Respondent's case that the process of negotiations has been hampered by the arrogance of the Claimant and acts of insurgency by employees who are members of the Claimant.



4. The Respondent suggests that it has supplied the Claimant with all the information required to enable the process of negotiations. The information that has not been shared is confidential employee information.

### **Analysis**

5. The law that regulates the relation between trade unions and employers is set out in the *Labour Relations Act* as read with *the Constitution* of Kenya 2010. Section 57(1) of the *Labour Relations Act* obligates employers to enter into and conclude collective bargaining negotiations with trade unions that they have entered into recognition agreements with. Section 57(2) of the Act requires employers to share with the trade unions all information that is relevant and necessary for the process. The subsection provides as follows:-

“For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.”
6. Section 57(3) of the Act requires trade unions to hold all information supplied to them in confidence and not to share it with any person that is not involved in the negotiations. Under section 57(7) of the Act, the court can order a withdrawal of the right to access confidential information if there is a breach of the confidentiality obligation by the trade union.
7. The Act also indicates the information which the employer is entitled to withhold on account of privilege. This includes:-
  - a. Information that is legally privileged.
  - b. Information which the employer cannot disclose without contravening a prohibition imposed on him by any law or an order of any court.
  - c. Information which if disclosed may cause substantial harm to the employer or employee.
  - d. Information which is private personal information relating to an employee, unless an employee consents to the disclosure of that information.
8. It is important to point out that where a party pleads privilege or confidentiality of information, the obligation to justify the claim of privilege is on him. Such party must indicate which information is privileged and how it is privileged. It is not enough for one to merely allege privilege or confidentiality as a bar to sharing the information that is called for (*Mercy Nyawade v Banking Fraud Investigations Department & 2 others [2017] eKLR*).
9. I have considered the application before me and the submissions by the parties. Although the application is supported by an affidavit that has not been accompanied by annexures, it is not lost to the court that the application was filed alongside the main claim. A perusal of the documents annexed to the Statement of Claim leaves no doubt that the parties have been embroiled in a dispute over negotiations of a CBA for quite some time. There is prima facie evidence that the matter has been referred to conciliation without resolution. There is prima facie evidence that the Respondent has not attended several meetings that have been called to resolve the outstanding issues between the parties.
10. Even though most of the documents evidencing the Claimant’s averments in the affidavit in support of the application were not annexed to the affidavit, they are nevertheless on the court’s record. This court is alive to its obligation under section 20 of the Employment and *Labour Relations Act* not to



be bogged down by undue procedural technicalities at the expense of substantive justice. Indeed, this requirement is reiterated under article 159(2)(d) of *the Constitution*.

11. The Respondent does not deny that it has a Recognition Agreement with the Claimant. With an existing Recognition Agreement, the Respondent has a statutory duty to negotiate and conclude a CBA with the Claimant. These negotiations must be undertaken in good faith and within reasonable timelines.
12. The reasons advanced by the Respondent to justify why the process has run into headwinds are not valid. The Respondent cannot hold off the negotiations because some employees who are members of the Claimant have been engaged in acts of gross misconduct. That is a matter that ought to be addressed separately.
13. The Respondent further argues that some information called for is confidential. Curiously, it does not provide particulars of the information it considers confidential and neither does it indicate how the information is confidential. The assertion that some information relates to private information relating to employees has not been supported by cogent evidence.
14. Further, the Respondent contends that the Claimant has previously breached the confidentiality obligation in respect of information that was supplied to it. That despite the Respondent raising this matter with the Claimant, the latter did nothing about it.
15. The procedure to follow in the event a trade union breaches the confidentiality obligation is provided in the *Labour Relations Act*. The employer or employers' union can apply to court to have the right to access the privileged information withdrawn. The Respondent cannot remedy such breach by electing to withhold the sharing of necessary information without the court's intervention.
16. Finally the Respondent has submitted that to grant the orders sought in the application will be tantamount to issuing final orders at an interlocutory stage. First, it is noted that this objection is not anchored on the Respondent's replying affidavit. Nowhere in the said affidavit is the issue alluded to. The matter was only raised in the final submissions by counsel. It is doubtful that a party is entitled to advance a defense to an application which is not founded in his pleadings or affidavits.
17. Second, the nature of the proceedings under section 57 (6) is that they are filed under certificate of urgency. This is what I understand the Claimant to have done. The Claimant has moved the court by way of an application under certificate of urgency for the orders that are sought. This is consistent with the dictates of sections 57(6) of the *Labour Relations Act* aforesaid.

### **Determination**

18. The upshot is that I find that the application dated 12<sup>th</sup> January 2023 is merited
19. I order the Respondent to furnish the Claimant with the information specified in prayer two (2) of the application to wit the following: the Respondent's audited financial statements for the years 2019 and 2020; the Respondent's wage bill; and the number of the Respondent's staff who are unionizable and in the management.
20. The Respondent to supply the Claimant with the aforesaid information within fourteen (14) days of this order.
21. I make no order as costs of the application

**DATED, SIGNED AND DELIVERED ON THE 13<sup>TH</sup> DAY OF JULY, 2023**

**B. O. M. MANANI**



**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**

