Kenya Union of commercial Food and Allied Workers v National Social Security Fund (Cause E083 of 2022) [2023] KEELRC 2254 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2254 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E083 OF 2022

K OCHARO, J

SEPTEMBER 18, 2023

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS .... CLAIMANT

AND

NATIONAL SOCIAL SECURITY FUND .... RESPONDENT

JUDGMENT

Introduction

1. The Claimant Union instituted the instant Claim *vide* its Memorandum of Claim dated, and filed in Court, on the 9th February 2022 against the Respondent seeking the following reliefs:

    a. A declaration that the Respondent's action to outsource the management of their unionisable employee's Self-Funded Medical Scheme violates clause 10 of the parties Collective Bargaining Agreement and it is null and void.

    b. Declaration that the contract signed by the Respondent and Minet Kenya Insurance Brokers Limited dated the 25th January,2020 is null and void ab initio this being in violation of the parties Recognition and Collective Bargaining Agreements.

    c. An order directing the Respondent to withdraw all the offending circulars dated 30th November 2020 and the 29th December 2020 and any other circulars on the appointment of Minet Kenya Insurance Brokers Limited in respect to the management of the Respondent's unionisable employees Self-Funded Medical Scheme

    d. An order restraining the Respondent from any further or continued engagement with any other insurance-based company on the management of the unionisable employee's self–funded Medical Scheme.

c) An order directing the Respondent to observe Clause 2(b) of the parties' Collective Bargaining Agreement in the event they intend to review Clause 10 of the parties' Collective Bargaining Agreement.

f) A Declaration that the Respondent's unilateral and arbitrary change in the management of their unionisable employees' Self-Funded Medical Scheme is an outright violation of the Award and Consent in cause No.60 of 2012 whose orders are alive and binding and whose violation is in disobedience of the Court.

g) Any other relief the court deems fit and just to grant.

h) An order for payment of the costs of the suit in quantified terms in favour of the Claimant since the Claimant cannot be aided by the *Advocates (Remuneration) (Amendment) Order* (2014).

2. The Memorandum of Claim was filed contemporaneously with a witness statement of Joyce Wairimu Ndungu Karanja, and a number of documents under a list dated 9th September 2022.

3. Upon being served with summons to enter appearance, the Respondent entered appearance on the 22nd March 2022 and filed its Statement of Response on the same day. In the statement, the Respondent denied the Claimant's cause of action and its entitlement to the orders sought.

4. On the 26th May 2022 when the suit came up before this Court for directions, the parties agreed that the Court proceeds to render itself on the matter upon the basis of the pleadings, witness statements, and documents filed by the parties herein. Consequently, the Court directed the parties to file written submissions on their respective cases within specified timelines. The Submissions are on record.

The Claimant's case.

5. It was the Claimant's case that it has a valid Agreement relative to Recognition and negotiating procedure which came into force on 16th August 1991 and was amended in the year 2010. Further that it has a valid and registered Collective Bargaining Agreement governing terms and conditions of service of its members. The Collective Bargaining Agreement dated 23rd July 2020 took effect on 1st July 2019 for two years.

6. The Claimant contended that under Clause 10 of the Collective Bargaining Agreement, its members as employees of the Respondent were entitled to medical benefits as per the existing medical scheme, which was open to review by the Respondent from time to time in consultation with the union.

7. According to the Claimant, the scheme was and as was agreed between the parties, a self-funded scheme in which all medical expenses incurred including ex-gratia medical requirements could be paid directly to the medical provider by the Respondent.

8. By a letter under reference number SF/EST/45 VOL.XVI (23) dated 30th November 2020 the Respondent claimed that its Board of Trustees at its 181st meeting held on the 22nd January 2020 had approved the outsourcing of medical services to a firm that specialized in managing self-funded medical schemes.

9. It was contended that following the said unilateral and arbitrary decision by the Respondent's Board of Trustees, the Respondent engaged Minet Kenya Insurance Brokers Limited to carry out the management of medical services on their behalf with effect from 1st January 2021. Subsequent to the decision, the Respondent's Managing Trustee/Chief Executive Officer communicated to the Respondent's staff on the decision and matters of Fund Management of the Medical Scheme.

10. The Claimant stated further that internal dispute resolution mechanisms didn't resolve the dispute on the change in the management of the Self-Funded medical scheme. Consequently, a report of a trade dispute was made to the Ministry of Labour on 7th January 2021. Consequently, a Conciliator was appointed. Eventually, he did his report.

11. The Claimant contended in violation of Clause 10 of the Collective Bargaining Agreement, the Respondent proceeded to sign a contract with the Minet Kenya Insurance Brokers Limited on the 25th of January 2020, for the management of the management of the self-funded Medical Scheme.

12. The execution of the stated contract didn't sit down well with the Respondent's employees. As a result, the employees wrote a letter dated 12th April 2021, to the Managing Trustee, raising a number of issues and concerns over the management of the Medical Scheme by the outsourced entity. The concerns raised didn't attract any response or action from the Respondent.

14. Moreover, the internal meetings at the shop floor level that were geared to resolve this issue, did not realize any fruit. The Respondent was not convinced to rescind its decision.

15. The Claimant further stated that in his Report, the Conciliator found that on the subject matter, the Respondent dealt directly with employees without involving the Claimant yet the Medical Treatment was a negotiable item in the Collective Bargaining Agreement. Further, prior to outsourcing the services, the Claimant was not consulted and or involved at all and its interventions were ignored.

16. The Conciliator further found that the Collective Bargaining Agreement bound both parties. He resultantly recommended that they engage in further deliberations to resolve the issue.

17. The Claimant asserted that it accepted the findings and the recommendations of the Conciliator. Consequently, on the 11th of November 2021, it wrote to the Respondent seeking their cooperation to revert back to in-house management of the scheme pending further deliberations. The Respondent refused to accede to the proposal.

18. and clause 10 of the parties' Collective Bargaining Agreement which was ignored. The Respondent failed to indicate their position on the conciliator's findings and recommendations and declined to convene an internal meeting between the parties to subject this issue to further deliberations.

19. The Respondent totally failed to intimate its position on the Conciliator's findings and recommendations. Worse still, they declined to convene an internal meeting between the parties for deliberations on the issue as was advised by the Conciliator.

20. The Conciliator on its part refused, failed, and ignored to issue a Certificate of conciliation to pave the way for any aggrieved party to approach the Court for an appropriate remedy [ies]. Its letter dated 11th January 2022, was ignored by the Conciliator.

21. The Claimant stated that between July 2011 to 3rd January 2012, the Respondent had made similar attempts to arbitrarily interfere with the medical treatment clause in the parties' Collective Bargaining Agreement by attempting to involve, AON Kenya Insurance Brokers Limited and Madison Insurance Company, in the management of the employee's medical scheme, constraining it to seek legal redress. It filed suit in the Industrial Court of Kenya, Cause No. 60 of 2012, seeking *inter alia* injunctive orders.

22. The Claimant stated that the Industrial Court rendered judgment in its favour on the terms inter alia;

> " I] That the respondent is hereby restrained from implementing medical insurance entered between them and AON Kenya Insurance Brokers Ltd

and Madison Insurance Company Ltd. On 1st January 2012 and any other subsequent date thereafter pending the hearing and determination of this suit.

II] That the foregoing order applies only to the Respondent's unionisable employees.

III] That the Parties may fix the main suit for hearing."

23. It was further stated that the Respondent did not appeal against the decision foretasted. Consequently, the decision remains unreversed. Further that subsequently, the parties recorded a consent which fully settled the matter.

24. The Claimant stated that parties exchanged proposals and counter-proposals for the review of the Collective Bargaining Agreement to cover the period of July 2021 to 30th June 2023. In its proposal, the Claimant proposed the review of clause 10 whereas the Respondent proposed to have it retained as it is without any proposal for the inclusion of the outsourcing aspect.

25. The Claimant further stated that outsourced management of the medical scheme set in with numerous negative effects which include; the approval to get treatment and discharge of patients take too long; insufficient hospitals in Marsabit, Busia, and other areas providing services under the scheme; employees with alcoholic content in their bodies are forced to pay for the treatment from their pockets as the outsourced manager does not recommend this service; breach of patient's confidentiality, inter alia.

26. Lastly, the Claimant contends that the introduction of the outsourced entity, Minet Kenya Insurance Brokers Limited, to manage the medical scheme has ended up not being beneficial to its members, but frustrating. With this, the Court should order the Respondent to revert to the old management system of the scheme.

Respondent 's case

27. On the 25th April 2022, inter alia, that the replying affidavit filed herein by the Respondent, sworn on the 22nd March 2022 be deemed as the witness statement of the deponent, Carolyne Onyango Okul, and therefore the Respondent's evidence in support of its case.

28. It was the Respondent's case that it is a creature of Section 3 of the *National Social Security Fund Act*. Section 5 creates the National Social Fund Board of Trustees vested with the mandate of directing and managing the Fund.

29. The Respondent asserted that over the years it has had in place a medical scheme designed to serve the Fund's staff and their dependants. The most recent medical policy was adopted by the Board of Trustees on the 8th of September 2016. The same was shared with the Respondent's staff through a letter dated 7th November 2016.

30. The Respondent's witness further stated that the Medical Policy was adopted in the Collective Bargaining Agreement that was executed between it and the Claimant. The Medical Policy set out the extent of financial cover for the staff, the nature of treatment they were at liberty to receive and the dependants who were covered by the policy.

31. It was further asserted that the implementation of the Fund's Medical scheme, caused the Respondent to incur a huge expenditure, as hereunder;-

No.	Period	KShs.
1.	July 2009 to June 2010	158,704,668.00
2.	July 2010 to June 2011	175,537,424.00
3.	July 2011 to June 2012	152,977,132.00
4.	July 2012 to June 2013	234,270,296.00
5.	July 2013 to June 2014	210,318,441.00
6.	July 2014 to June 2016	224,972,776.00
7.	July 2015 to June 2016	234,178,798.50
8.	July 2016 to June 2017	249,124,778.25
9.	July 2017 to June 2018	252,091,679.73
10.	July 2018 to June 2019	248,808,551.02

32. It became apparent from the expenditure trend for the years hereinabove mentioned that the Respondent was spending an average of KShs. 214, 000,000 annually on staff medical costs. The trend was unsustainable and not in the best interest of the Respondent and its members.

33. Considering this enormous expenditure that it was incurring, the Respondent decided to explore the option of adopting a Self -Managed Medical Scheme. The nature of this scheme was that no cover could be purchased, but rather the employer sets aside a fund for payment of medical expenses incurred by staff and their dependants. The expenditure is spread throughout the year rather than an upfront premium payment being made.

34. The decision was anchored on the fact that various Insurance Companies offer administration services to Self-Managed schemes at a fee. In such an arrangement, the Respondent pays a deposit to the Insurance Company administering the medical scheme and the insurance company settles the medical bills. The partnership was geared toward ensuring not only that medical expenses are contained but also that medical bills are adequately and professionally interrogated, and competitive pricing attained since the underwriters have experience and capacity.

35. It was stated that the Respondent submitted a proposal to its Board of Trustees for the outsourcing of the manager of its Medical Scheme. In the exercise of its powers under the Act, the Board in its 181st meeting held on 22nd January 2020 approved the outsourcing of an underwriter to manage the scheme.

36. In its decision of 27th January 2020, the Board explicitly provided that the Respondent was to continue with the in-house medical scheme and was only procuring a service provider to manage the in-house scheme. Therefore, there was no alteration whatsoever of the medical scheme that had been consented to in the Collective Bargaining Agreement. The decision was in line with the provisions of Section 10 of the *NSSF* Act.

37. After the Board's approval of the management of the medical scheme, the Respondent commenced tendering for the service in accordance with the *Public Procurement and Asset Disposal Act* 2015. Out of the procurement process, Minet Kenya Insurance Brokers emerged as the successful bidder, and execution of a contract for the outsourcing of the management of the Respondent's Medical Scheme ensued.

38. It was further asserted that outsourcing the management service for the Medical Scheme has hugely and in various ways benefited both the Respondent and its staff, inter alia;

    a. The medical costs being incurred by the Fund have reduced from an average of KShs.20,833,333.00 per month to KShs.12,664,611.00 per month. This is evident from getting an average of the monthly costs from the table shared with the same over the years.

    b. Minet Kenya has flagged various fraud cases whereby staff made unjustified demands, colluded with doctors and attempted to utilize a cover which was not allowed. See pages 8-10 of the Respondent's bundle.

    c. Minet Kenya has widened the hospital and doctors network allowing the Fund's staff to access over 600 facilities all over the country. This is significant considering the previous arrangement only allowed for 170 facilities.

    d. Minet Kenya Limited has arranged for extra services to be offered to the Fund's staff and their defendants. These new services are:

        i. Concierge drug delivery services which enables drugs to be delivered to the homes of the Fund's staff.

        ii. Daktari Msafiri which is a Covid-19 support initiative which has so far ensured the Fund's staff who had tested positive for Covid-19 were attended to while recuperating at home.

        iii. Employee assistant – Counselling support which ensures the Fund's staff are offered psychological and tele consulting by qualified professional counsellors.

        iv. Chronic Disease Management which is a client specific program aimed to offer interventions for staff with chronic conditions.

        v. SASA Doctor which is a scheme whereby doctors and hospitals provide online services o patients who may not access hospitals due to various challenges.

        vi. Health/Wellness talk a program that allows for virtual talks to the Fund's staff on various topical issues that enhance confidence.

        vii. Maternity and Newborn value adds which is a program that assist young babies by buying for their infant's necessities such as diapers.

39. The current arrangement adopted by the Respondent is distinctively and inherently different from the arrangement that was the subject matter in Cause No. 60 of 2012. As can be discerned from the Court's ruling in the matter, the Respondent had rolled out a new scheme that was insurance based. In the instant matter, the scheme is in-house and managed by an outsourced entity.

40. The Respondent is only obligated to consult with the Claimant in situations where the existing medical cover was being reviewed. The scheme applicable to the Respondent's staff has not been reviewed; the rates captured under clause 10 of the Collective Bargaining Agreement are still applicable; and

the medical policy agreed upon and shared with its staff has not been altered and all benefits captured therein are still in force.

41. The fact that the Respondent has not sought to have Clause 10 amended in the ongoing negotiations is a testament that the Self-Managed Medical Scheme is not a deviation from the Clause.

42. Lastly, it was asserted that the Respondent's decision to outsource the service for the management of the Medical Scheme was in line with the dictates of Article 201 of the *Constitution* which commands prudent and reasonable use of public funds.

The Claimant's Submissions.

43. The Claimant filed its submissions on 10th June 2022 raising four issues for consideration thus:

    a. At what time were the employees engaged on this matter before the contract was signed and before addressing employees on the change which apparently began in January 2020?

    b. This being a negotiable issue, why did the Respondent ignore the Workers' Trade Union and left it in the dark?

    c. At what point would workers have raised their concerns over the change in the management of their self-Funded and Self-Managed Medical Scheme?

    d. Was it not necessary to allow workers' participation since they are the consumers of the services to be offered by Minet Kenya Insurance Brokers?

44. The Court notes that the Claimant has substantially reiterated the factual matters raised in its, pleadings and, witness's statement. However, comfort should be taken that I have considered. The Court will do the best it could to discern the key legal factual matters that the4 submissions raise in the fortification of its case.

45. The Claimant submitted that there is no dispute that the Medical Scheme that was agreed in the Collective Bargaining Agreement was in nature Self-Funded and self-managed. It was therefore operated and managed by the Respondent itself. The Respondent was to meet Medical bills incurred by its employees. Outsourcing of services for the management of the scheme was not contemplated in the Collective Bargaining Agreement.

46. The Claimant further argued that public participation was absent in the process leading to the decision to outsource the service and execution of the agreement in regard thereof. According to the Claimant, public participation is an aspect of good governance that has taken root in Kenya. The public has to be involved in decisions making processes that affect their daily lives. In the instant matter, the Respondent's employees were denied a chance to have a conversation with the management to understand the shift in the management of their self-funded scheme which would also allow them an opportunity to raise their concerns.

47. Further, it only dawned on the Respondent's members of staff that the management of the Scheme had changed long after the decision had been made and an agreement between the Respondent and the outsourced party executed.

48. The Claimant submitted that the aspect of Medical Treatment under Clause 10 of the Collective Bargaining Agreement was a negotiable issue, by outsourcing the management of the Scheme, without involving the Claimant in the process, the Respondent undermined the agreement.

49. It is submitted that the Collective Bargaining Agreement having been registered under section 60 of the *Labour Relations Act*, 2007 has the force of law whose provisions cannot be interfered with without following the right procedure.

50. The Claimant contended that the matter was subjected to a conciliation process. At the end of the day, the Conciliator recommended *inter alia* that the parties in further deliberations on the matter. In its understanding, the Conciliator meant that the Respondent's Medical Treatment clause had no room for the outsourcing of a 3rd Party to manage the Scheme in regard thereto.

51. The Respondent having made a commitment to the Outsourced service provider, neglected to come down and engage the Claimant on the issue further as was recommended by the Conciliator. Correspondences by the latter over the issue didn't receive any response from the former.

52. The action by the Respondent was an affront to the ruling and subsequent consent judgment in the earlier matter, cause no. 60 of 2012, hereinbefore mentioned.

53. The Claimant submitted that the Respondent had a chance to propose changes to Clause 10 of the Collective Bargaining Agreement in their counter-proposals aimed at reviewing the Collective Bargaining Agreement for the period 1st July 2019 to 30th June 2021 but chose not to do so, a calculated move to give them room to arbitrarily introduce changes to medical treatment which only suits their interest without considering the interest of the employees.

54. On the Respondent's assertion that the management of the scheme through an outsourced entity has birthed efficiency and professionalism, the Claimant argues that as much as that may be true, the Respondent must also take care of the interest of its employees to ensure that the employees do not suffer in the hands an outsourced Company whose interest profit is to make savings without caring about the effects it may have on its workers.

55. The Claimant submits that discounted prices may be good to the Respondent but have a far-reaching medical consequence on employees particularly if they cannot access certain services because of the need to save funds.

56. Lastly the Claimant submitted that Confidentiality between the patient and a doctor is undermined by submitting medical records to a third party, the Insurance Broker who is not a party to the employees' employment contracts.

The Respondent's Submissions.

57. The Respondent filed its Submissions on the 4th of July 2022 distilling two issues for determination thus:

    a. Whether the Minet Agreement violates Clause 10 of the Collective Bargaining Agreement.

    b. Whether the Respondent was entitled to adopt a self-managed medical scheme.

58. On the first issue the Respondent submitted that the question to be answered is whether the terms of the contract between it and Minet Insurance Brokers in any way violated Clause 10 of the Collective Bargaining Agreement. Definitely, the answer is in the negative. The Clause simply provides for the following; the medical benefits that employees shall be entitled to and the rates for outpatient, inpatient, and optical & dental; occupational health and safety issues and how they are to be dealt with; the applicability of *Ex- Gratia* Medical assistance with approval of the Managing Trustee.

59. The Respondent further argued, whether Clause 10 of the Collective Bargaining was violated and how the burden lay upon the Claimant to prove by dint of section 107 of the *Evidence Act*. The Claimant was under an obligation to demonstrate that the agreement was an affront to the Clause above mentioned. It was under duty too to show how the Minet agreement affected the rights of the Respondent's employees to enjoy medical benefits under the Collective Bargaining Agreement. All these it failed to demonstrate.

60. The Minet Agreement was merely designed to facilitate the implementation of the above medical benefits and the Agreement did not impose obstacles to clause 10 of the Collective Bargaining Agreement.

61. The Respondent submitted that the terms of the Minet Agreement and the Collective Bargaining Agreement are distinct and independent from each other. The two Agreements operate simultaneously without impacting the implementation of each other.

62. On the second issue the Respondent submitted that it is a statutory body and by dint of section 4 of the Act, it is required to operate and manage the scheme in a manner that ensures it and the Social Security systems are sustainable and affordable.

63. The Respondent submitted that by dint of section 5 of the *NSSF Act,* the Board of Trustees was vested with the mandate of directing and managing the Respondent. Further by virtue of section 10(2) (c) of the same *Act* the Board of Trustees has the power to lay down such policies and guidelines for the proper operation and management of all the contributions and funds collected, by the Respondent. It is in quest of this that the decision to outsource a manager for the Respondent's self-funded medical scheme was made.

64. It is submitted that the said decision was not made without necessity. The fact that the Respondent was spending the enormous and unsustainable sum of Ksh.214, 000,000 annually on staff medical costs, prompted the decision. There was a need that the cost to be kept at optimal levels for sustainability purposes. The Board had a duty to and was justified in their decision to safeguard the funds of the Respondent.

65. The Respondent further submitted that it had and has an obligation to ensure that public finances are properly utilized and expenses incurred are sustainable. The net effect of outsourcing was geared toward achieving this goal. The Respondent has on the one hand upheld the terms of the CBA and has on the other hand ensured the implementation of the CBA does not Burden the public with unnecessary costs. To buttress this point, reliance was placed on the case of *Kenya Union of Domestic, Hotel, Education & Allied Workers vs Salaries & Remuneration Commission* (2014) eKLR.

66. The Respondents submits that the Collective Bargaining Agreement by dint of section 2 of the *Labour Relations Act* is a contract and thus the Claimant is bound by the precise terms contained therein. Reliance was placed on the case of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2011) eKLR where it was held:

> " A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

67. The Respondent submits that the nature of consultations contemplated under the Collective Bargaining Agreement are those in relation to changes to the outpatient, inpatient, and optical & dental terms. The Collective Bargaining Agreement didn't extend to cover matters management of the self-funded scheme.

68. Addressing the Claimant's assertion that the Respondent breached the terms of the consent order in Cause 60 of 2012, the Respondent argued that the issues in contest in the matter were radically different from those that are in the instant case. The event that led to the earlier case was that the Respondent had rolled out a new scheme that was insurance based. However, the scheme, the subject agreement subject matter in the current suit is an in-house scheme managed by Minet Kenya.

69. That what the consent order restrained was an alteration of the medical scheme without consulting the Claimant.

70. The Claimant was under a duty in this matter to demonstrate with precision the breaches that the Respondent committed on the postulations of the Collective Bargaining Agreement, only proof of such breach would justify the intervention of the Court. The Claimant didn't manage to demonstrate. That the Claimant was legally burdened to demonstrate this, reliance was placed on the case of *Kipkebe Limited vs Peterson Ondieki Tai* (2016) eKLR where it was held:

> It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favor in support of what he claims.

Section 107 of *evidence Act* succinctly states:

> "Whosever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

And Section 108 of the *Evidence Act*, further states thus:

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

71. Lastly the Respondent submitted that the Conciliator's findings cannot be relied upon in impugning the Minet Agreement. The Respondent relied on the case of *Janet Mwacha Mwaboli vs Modern Soap Factory Limited* (2019) eKLR.

72. In summation, the Respondent submitted that the decision to execute the Minet Agreement was premised in law. Further, the said decision was not in contravention of the Collective Bargaining Agreement and did not require the input of the Claimant and was informed by distinct circumstances to those in Cause 60 of 2012.

Analysis and determination.

73. From the pleadings by the parties herein, their evidence on record as well as their respective submissions, the following issues present themselves for determination thus:

    a. Whether the Minet Agreement violates Clause 10 of the Collective Bargaining Agreement.

    b. Whether the suit herein was prematurely filed.

    c. Whether the Claimant is entitled to the reliefs sought.

    d. Who should bear the Costs?

Whether the Minet Agreement violates the Collective Bargaining Agreement entered between the Claimant and the Respondent.

74. There is no doubt that at all material times, the Claimant and the Respondent had a Collective Bargaining Agreement that was entered into on the 23rd of July 2020 and that the Agreement was later registered on the 5th of March 2021, pursuant to the provisions of the *Labour Relations Act*. Clause 2 (a) of the Recognition Agreement between the parties did put forth negotiable matters over which the Claimant Union was recognized to have a mandate to negotiate on behalf of the Respondent's workers, thus;

> " [a]. The National Social Security Fund affords full recognition of the Kenya Union of Commercial, Food and Allied Workers as a properly constituted and representative body and sole labour organization representing the interest of workers who are in the employment of the National Social Security Fund in all negotiable matters concerning, rate pay, overtime, hours of work, method of wages and salary payment, paid leave, duration of employment, medical benefits, principles of promotion, terms of redundancy and all other negotiable conditions of employment for all employees who are in employment of the National Social Security Fund as defined from time to time by the Government, the Federation of Kenya Employers and Central Organization of Trade Unions [Kenya]. Such recognition should take account of the principle of industrial trade unions."

75. The Collective Bargaining Agreement flowed from the Recognition Agreement. At the Center of controversy in this matter, in my view, is the interpretation of Clause 10 of the Agreement, which the parties herein have given rival and too parallel interpretations. The Clause is captioned "Medical Treatment" and it reads;

> " Employees will be entitled to the medical benefits as per the existing Medical Scheme and as may be reviewed from time to time by the Fund in consultation with the Union. The rates are as follows.
>
> [a]. In- Patient - 100% subjected to a maximum Of Kshs. 900,000 per annum
>
> [b]. Out-Patient - Kshs. 150,000 per annum
>
> [c]. Optical & Dental - 100% subject to a maximum of 60% of the outpatient entitlement.
>
> 10.1 Occupational Health and Safety
>
> Occupational Health and Safety issues will be dealt with in accordance with the *Occupational Health and Safety Act* and *Work Injury Benefits Act*, 2007.
>
> 10.2 Additional Medical Expenses/Ex-Gratia
>
> (a) Ex-Gratia medical assistance may be considered by the Managing Trustee on recommendation from a medical committee where a shop steward will be co-opted.
>
> (b) Where recommended by an approved medical practitioner, treatment of an employee outside the Country shall be considered for approval by the Fund within the employee's medical entitlement.

76. The suit herein was prompted by one event, the execution of an agreement between Minet Kenya Insurance Brokers Limited of 25th January 2021. I have carefully considered the contract between these two entities, and I have no doubt in my mind that the contract was a service outsourcing contract, the Respondent procuring the services of Minet Kenya Insurance Brokers Limited, to manage its Self-Funded Staff In–House Medical Scheme. Having said this, then the question that comes up is whether it was mandatorily necessary that the Claimant be consulted before execution of the agreement. If there was a failure to consult, was the failure in breach of clause 10 of the Collective Bargaining Agreement?

77. Although Collective Bargaining Agreements are in nature statutory contracts, at their core they embody consensus between employers and trade unions. The central purpose in interpreting collective agreements, like other contracts, must be to ascertain what the parties had intended, and to this end, the common-law canons of contractual interpretation may set in aid, thus; where the wording of the agreement is clear and unambiguous, the parties may not rely on external evidence to demonstrate their intention at the time it was concluded; the words in the agreement must be given their ordinary grammatical meaning and must be interpreted in the context of the agreement as a whole; and where the words are unclear or ambiguous, regard may be had to the circumstances surrounding the agreement such as previous negotiations between the parties, correspondence, between them and the manner in which they acted on the document.

78. In the South African case of *KPMG Chartered Accountants v Securefin Ltd & Another* 2009 [4] SA 399 [SCA], on the canon of contractual interpretation the Supreme Court of Appeal, aptly expressed itself, that;

    i. "The integration [or parol evidence] rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning.

    ii. Interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not the witnesses.

    iii. The rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent.

    iv. To the extent that evidence may be admissible to contextualise the document [since 'context is everything'] to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'. The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances 'and surrounding circumstances. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or factual matrix' ought to suffice."

79. I have carefully considered the wording of Clause 10 of the Collective Bargaining Agreement, and I find, it is sufficiently clear. The Clause was intended to provide and provides for, the benefits under the Medical Scheme to be enjoyed by the workers of the Respondent. Apparently, the clear intention of the parties to the Collective Bargaining Agreement was to establish the benefits. From the clear wording of the Clause, I am totally unable to discern that management of the scheme was intended to be covered under the Clause. The Claimant's argument that it was covered and that therefore the Respondent wouldn't enter into an outsourced agreement with a third party, as it did with Minet Kenya Insurance Brokers Ltd, for the management of the scheme without consulting it, must be rejected.

80. The Claimant argued that the contract between the Respondent and the Claimant had shortcomings, which they raised on numerous occasions but were not addressed, by the Respondent. Having found as I have hereinabove, that management of the Medical Scheme was not an item contemplated in the Collective Bargaining Agreement, in my view the only avenue open to the Claimant Union was and is for it to negotiate for inclusion of the item in the Agreement. Otherwise, the time has arrived when the Claimant must realise that they shall either Agreement the way it is or negotiates as stated.

81. To hold otherwise shall be to diminish the principle that maintaining the primacy of collective agreements is quintessential to sustaining a viable and vibrant bargaining system.

82. Further, it is imperative to state that an elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. The bargain stands unless it is manifestly unconstitutional, a contention not made in these proceedings.

Whether the suit herein was prematurely Filed.

83. There is no contest that the subject matter herein was at some point on the desk of a Conciliator for conciliation. Too, the Conciliator recommended to the parties to engage in further negotiations on the point in contention. The Claimant contended before this Court that the Respondent didn't embrace the recommendation and that it frustrated its attempts to give recommendations effect. It is here that I pause to ask, in the circumstance was the Claimant right to move to Court direct without having any further reference to the Conciliator or at all?

84. Section 69 of the *Labour Relations Act*, 2007 provides for when a trade dispute is deemed unresolved thus, if the Conciliator issues a certificate that the dispute has not been resolved; or thirty days period from the appointment of the conciliator, or any longer period agreed to by the parties, expires. The Conciliator didn't issue a certificate of an unresolved dispute. The Claimant alleged that despite frantic efforts to have him issue the same, nothing was achieved. This notwithstanding, considering the provisions of Section 69[b], I hold that the Claimant had the right to approach the court.

Whether the Claimant is entitled to the reliefs sought.

85. Having found that the Management of the Respondent's Self-Funded In-House Medical Scheme was not contemplated under Clause 10 of the Collective Bargaining Agreement, and therefore not a negotiable item thereunder, and further that therefore the execution of the contract between the Respondent and Minet Kenya Insurance Brokers was not an event in violation of the Clause, I hold that the Claimant is not entitled to the reliefs sought, considering the centrality of the issue in the suit herein.

Who should bear the costs of this suit?

86. This Court is alive of the principle that costs follow the event. In the ordinary run of things, I could therefore grant costs in favour of the Respondent. However, considering that the parties herein have a Recognition and Collective Bargaining Agreement, I am inclined not to award the costs to the winning party.

87. In the upshot, the Claimant's case is hereby dismissed. Each party to bear its own costs.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER, 2023.

OCHARO KEBIRA

JUDGE.

In Presence of

Mr. Munda for Claimant

No appearance for Respondent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE