



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E078 OF 2021

BANKING INSURANCE & FINANCE UNION.....CLAIMANT /APPLICANT

VERSUS

SMEP MICROFINANCE BANK LIMITED.....RESPONDENT

RULING

1. Application dated 2nd February, 2021 by the Claimant/Applicant seeks for an order in the following terms *inter alia*:-
 1. Spent
 2. Spent
 3. That this Honourable Court does issue an ex-parte order restraining and/or prohibiting Respondent, themselves and/or by their recognized agents, assignees, officers and/or principals from proceeding with any review of terms and conditions of service as per Respondent's letter dated 25th January, 2021 pending hearing and determination of the application and claim.
2. The application is premised on grounds set out on the face of the Notice of Motion the nub of which is that the respondent by a letter dated 25th January, 2021 intends to review terms and conditions of Employment Contract, which letter is attached to the application.
3. The complaint by the Claimant/Applicant is that as a trade union representing employees intended to be affected by the review the said letter dated 25th January, 2021 purporting to review the medical scheme cover enjoyed by the employees was effected without consulting the union. The letter states "***This year, the Bank will not fund the staff medical cover.*** "
4. That the claimant was presented with a *fait accompli* without the respondent following the law in implementing the changes.
- 5, That it is in the interest of justice that the intended changes are stopped pending the hearing of the suit. The grounds are buttressed in the supporting affidavit of **Isaiah Munoru Mucheke**, the Research Economist of the applicant who is versed in the matter.
6. The application is opposed by a replying affidavit of **Rose Chepkemoi Bii**, Head of Human Resource and Administration of the respondent. The nub of the opposition is that the Covid –19 pandemic has adversely affected the Kenyan Economy including the financial sector in which the respondent operates.
7. That there is increased default in loan repayments and increased withdrawals of savings by customers.
8. That the respondent has not effected redundancies as a result but has taken other austerity measures including reduced salaries and sending employees on unpaid leave.
9. That on 16th January, 2021 the Respondent's Chief Executive Officer addressed all employees and informed them that the Respondent was considering more options to minimize operational costs. The measures considered included suspension of staff medical insurance cover for the year 2021. That the proposals were presented to all staff through their team leaders subsequent to which the respondent considered this option to be the best. The cover is to be suspended for a period of one year. That the Respondent spends an average of 25 million Kenya Shillings. in insurance premiums payments.
10. That a letter conveying the decision was to be sent to each employee. The claimant union was in the meantime notified of the decision. That this is a less painful option than curtailing employment of employees.
11. That the application has no merit and it be dismissed.

Determination

12. The Court has considered the rival arguments by the parties in their depositions and written submissions and following the decision in ***Giella –vs- Cassman Brown Limited [1973] E.A. 358***, the Court is of the considered finding that the claimant has established a *prima facie* case with a probability of success and that curtailing the medical cover of the employees during this COVID-19 pandemic period may occasion the claimant’s members irreparable harm that cannot be remedied by way of costs.

13. That in a unionized environment, collective consultations are best done directly with the union and not directly with employees vide their heads of departments or otherwise.

14. The balance of convenience also favours the grant of an injunction stopping the Respondent from suspending the medical cover of its employees in terms of the letter dated 25th January, 2021 pending the hearing and determination of the suit and the Court so orders.

15. Meanwhile it would be useful for the parties to engage in negotiations to see the best way possible to mitigate the financial hardships the Respondent may be experiencing vis a vis the Government COVID- 19 guidelines at the work place promulgated by the Ministry of Labour.

16. It is so ordered.

Dated and delivered at Nairobi this 22nd day of July, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consent. 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 the 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Munoru for Claimant/Applicant

Mr. Kilonzo for the Respondent

Ekale – Court clerk.