REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 199 OF 2020

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

-VERSUS-

TUSKER MATTRESSES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2020)

RULING

The claimant filed a notice of motion on 19.05.2020 under section 12 of the Employment and Labour Relations Court Act, 2011, sections 19 and 94 of the Employment Act, 2007, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all the enabling provisions 0f the law. The claimant prayed for the following orders:

a) That the Court do direct the conciliator to conclude conciliation within 30 days of the date of the order and file a labour report in court with copies to the parties.

b) That pending the hearing of the claim filed herewith, the Honourable Court do grant an order of temporary injunction restraining the respondent from effecting any further wage or salary reduction in respect of its unionisable employees.

c) That the Honourable Court do grant an order of mandatory injunction compelling the respondent to refund to its unionisable employees all the amounts already deducted from their salaries or wages.

The application was based on the attached supporting affidavit of Mike O. Oranga and upon the following grounds:

a) The parties are in a valid recognition agreement signed on 19.10.2012 and a collective agreement effective 01.03.2017 duly registered by the Court. Parties have negotiated and agreed on wages, housing allowance, commuter allowance, and overtime for unionisable employees payable on monthly basis.

b) By the letter dated 28.04.2020 the respondent informed the claimant that it was in the process of reducing working hours from 45 to 36 hours per week and invited the claimant to a meeting on 30.04.2020. The notice was short and the claimant requested the meeting be rescheduled. No subsequent meeting was scheduled until 08.05.2020 when the claimant learned that salaries for unionisable employees had been reduced without due consultation or mutual agreement in circumstances of the prevailing Covid 19 situation with serious detriment to the workers.

c) Covid 19 situation which has been experienced by the workers should not be used by the respondent to unilaterally alter the terms of service in breach of the recognition agreement, collective agreement (CBA), and rights of employees per Article 41 (1) and (2) (a) and (b) of the Constitution and the Employment Act, 2007.

d) By letter dated 05.05.2020 the respondent informed the claimant about reduction in salaries as follows, staff earning Kshs. 49, 999.00 and below 20% reduction; staff earning Kshs. 50,000.00 to Kshs. 99, 000.00 25 % reduction and staff earning Kshs. 100, 000.00 and above 30% reduction. In that letter the respondent invited the respondent for further consultations. The reduction in salaries, per the letter, was due to effect of Covid 19 situation under which containment measures by the Government such as curfew regulations and other measures had impacted negatively on the respondent's enterprise. The salary reduction was effective April 2020 and the respondent invited the claimant to consult further on the matter on a convenient date.

e) The employees were not notified of the looming pay cuts during the Covid 19 situation.

f) The dispute was reported by the claimant on 11.05.2020 to the Ministry of Labour and a conciliator appointed and a conciliation meeting convened for 20.05.2020. The suit was filed on 19.05.2020. On 19.05.2020 the Court ordered the parties to continue in conciliation proceedings pending further orders by the Court.

On 08.06.2020 the respondent appointed Kanchory & Company Advocates to act in the matter. The respondent filed the replying affidavit of Francis Kimani, the respondent's General Manager, Human Resource. The respondent urged as follows:

a) The respondent is in the business of retail stores. It employs over 6,000 employees with a monthly wage bill of about Kshs.200 Million. Due to hard economic times, the business of retail stores in Kenya has been struggling and some supermarkets have already collapsed. The outbreak of Covid 19 pandemic in early 2020 has made the industry situation worse due to reduced working hours in Malls and Shopping Centers since March 2020 when the government imposed the pandemic containment measures.

b) The respondent's sales have dropped by 35% (in April and May 2020) due to the Covid situation and when compared to similar period in 2019. The respondent projects further declining sales as Covid 19 effects persist. Working hours and general output of the respondent's employees has equally proportionately reduced due to drop in sales, reduced shopping hours and diminished purchasing power in Kenya.

c) Dropped sales and projected poor performance has rendered the respondent's huge wage bill untenable and unless the respondent takes urgent remedial measures it will find itself staring an economic crisis right in the face. The respondent has closed some of its branches and is renegotiating its wages or salaries and other overheads to reduce its recurrent expenditure to a sustainable level. The cost cutting measures target all employees and not merely the unionisable staff. Sustainability measures are in the best interests of both the respondent and the employees. If the measures are not implemented more branches will close and more workers rendered redundant.

d) The Covid 19 situation is unforeseeable and unavoidable act of God or *force majeure* having the effect of legally frustrating any contract including the CBA between the parties herein and indeed the individual contracts of service.

e) The matter should not be brought directly to Court under section 74 of the Labour Relations Act, 2007 and it is prematurely filed.

f) The application and claim is unreasonable and unjustified and should be dismissed with costs.

The parties filed their respective submissions. The Court has considered the parties' respective cases and makes findings as follows:

1) As submitted for the respondent, under section 73 of the Labour Relations Act, 2007, reduction in pay or pay-cut and need to consult or negotiate variation in pay (being the issues in dispute) are not one of the matters that a trade union may move the Court on urgency basis without exhausting the statutory conciliation proceedings as provided in the Act (sections 62 to 72 thereof). As submitted for the respondent, section 73(1) of the Act provides that trade disputes may be referred to the Court only if they are not resolved after conciliation. To that extent the respondent was sound in submitting that the suit was premature. Upon the application coming up for the first instance, the Court directed parties to conclude the conciliation process. In the circumstances and in view of Article 159 on priority by Courts to do substantive justice, the conciliation procedure is since concluded and it is no bar to the Court's consideration of the matters in the application on merits as set out in the application.

2) In particular, it is not in dispute that parties appeared before the conciliator one Grace Mweresa on 28.05.2020 and no resolution was arrived at. On 02.06.2020 the conciliator suggested that the claimant should support the management during the Covid 19 time and forgo refund for April and May 2020. Further, as way forward, the measures taken by the respondent should be revisited for the purpose of engaging all the parties and register the consent according to the tripartite memorandum of understanding dated 30.04.2020. After conciliation the parties failed to resolve the dispute amicably and the Court considers that the suit is no longer premature as urged for the respondent as that argument is overtaken with conclusion of the conciliation proceedings.

3) There is no dispute that parties have agreed in clause 2 (a) of the recognition agreement that they will negotiate matters, inter alia, concerning rate of pay, over time, working hours, method of wage and salary payment, paid leave, duration of employment and other stated matters. Clause 4 of the recognition agreement provides that either party wishing to amend or modify the agreement shall give three (3) month's written notice to the other party with details of the proposed amendment. It is not in dispute that parties have equally negotiated a CBA setting out the terms of service including working hours and salary or wage payable to unionisable employees.

4) As submitted for the claimant section 17 of the Employment Act provides that an employer shall pay the entire amount of the wages earned or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly in the currency of Kenya and in the modes prescribed in the section and it is an offence to fail to do so. Further section 19 of the Act prescribes permissible deductions and the current pay cut is not one such deduction. Under section 10(5) of the Act, a change in terms of employment shall be effected by the employer in consultation with the employee. It appears that in view of Covid19 situation and the difficult economic times for supermarkets industry the respondent is desirous of renegotiating salaries or wages as well as working hours. The Court returns that in the circumstances of the present case the respondent has effected the pay cut upon the salaries or wages of the unionisable staff without consultation or renegotiation with the claimant and contrary to the cited statutory provisions and provisions in the recognition agreement on negotiation and the terms set in the CBA. It is clear that under section 59 (3) of the Labour Relations Act, 2007, the terms and conditions of service as agreed upon by the parties are automatically incorporated into the contract of employment of every employee covered by the CBA. Thus the statutory provisions as cited and applying to variation of the salaries or wages apply. Consultation and negotiation between the parties was mandatory by statute and by contract per recognition agreement.

5) It is submitted for the respondent that the Covid 19 pandemic and its effects were an act of God amounting to frustration of the

contracts of service and therefore the principle of *force majeure* applies to frustrate the contracts. *Force majeure* refers to unforeseeable events that prevent a party from fulfilling a contract. The Court has considered the submission against the issue in dispute. Whereas the Covid 19 pandemic was unforeseeable, it is clear that the collective and recognition agreements had no *force majeure* clause. Further, the clause subject of performance is the statutory and contractual clause that the respondent negotiates and consults the claimant if salaries, wages and other benefits are to change. The respondent has not shown how the Covid 19 situation has made it difficult for it to negotiate and consult with the respondent towards altering or varying, as may be necessary, the wages or salaries of unionisable employees and other terms of service such as working hours in light of the emergent Covid 19 situation or even the alleged difficult times in the supermarkets industry. The Court therefore returns that the submission invoking *force majeure* will collapse as there is no established unforeseeable circumstance that prevented the respondent from fulfilling the contractual (which was also a statutory provision) clause to consult and negotiate with the claimant prior to effecting the change by way of reduction of wages or salaries. The Court finds that the contractual clause to consult and negotiate was mandatory and was at all material times capable of being specifically performed and indeed the respondent set in motion the performance but along the way, the same aborted.

6) The Court follows the holding in **Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, **"The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."** In the instant case the claimant has established that the respondent is engaged in pay or salary reduction in breach of the recognition agreement and the cited relevant statutory provisions. Accordingly, the Court returns that the claimant has established a *prima facie* case for grant of the temporary restraining order to temporarily stop the pay cut. While making that finding the Court considers that if the restraining order is not granted, negotiation and consultation which is the foundation of the recognition agreement would be undermined and which amounts to an irreparable injury incapable of being remedied by damages in the circumstances of the case. The Court further considers that the respondent would be so restrained from effecting pay cut in future subject to parties' negotiation and consultation as appropriate and as the agreed and statutory mechanisms for varying terms of service including salaries.

7) The Court has considered the prayer for a mandatory injunction that the amount already withheld by reason of salary cut or reduction be released. The Court considers that the claimant is willing to negotiate and consult on pay alterations as may be necessary during the Covid 19 situation and in view of the alleged tough economic times for the industry. Thus Court considers that the amount to be released with respect to past pay cuts is not contestable in terms of quantum and in terms of the fact that it was withheld without due renegotiation or consultation as had been agreed between the parties. The Court therefore returns that in the circumstances of the case the respondent has established a case for grant of the mandatory temporary injunction. For the future due salaries or wages, the Court considers that the parties should be able to negotiate or consult and the amount payable will be depended on the outcome of the negotiation and consultations between the parties. Thus a mandatory injunction would issue as prayed for with respect to amounts of pay withheld only up to the date of this ruling and for the future, parties should negotiate payment due as may be appropriate and to do so prior to next monthly payment being for July, 2020. While making that finding the Court considers that the tripartite social partners (Ministry of Labour and Social Protection; Central Organization of trade Unions - COTU (K); and Federation of Kenya Employers (FKE) signed a memorandum of understanding on 30.04.2020. Clause 3 (b) and (c) provides that employers and workers are encouraged to rely on the existing mechanisms for social dialogue in building resilience and making commitment to painful but necessary policy measures aimed at mitigating the effects of Covid 19 and the measures include but are not limited to suspension of negotiation of collective bargaining agreements (CBAs); suspension of implementation of concluded CBAs whose effective date falls within Covid 19 period; review of some terms negotiated in existing CBAs; and freezing of wage increments during the period of the pandemic. The tripartite agreement in clause 3 (d) encourages the parties herein to actively participate in planning, implementing and monitoring measures for recovery from Covid 19 pandemic. Within that framework the mandatory injunction as prayed would be declined with respect to future payments and instead, pending the hearing and determination of the suit, the respondent to negotiate and consult with the claimant in good faith towards amicable resolution of the dispute herein as per the recognition agreement and the tripartite agreement dated 30.04.2020 and to do so in 30 days and all monies agreed to be due to the unionisable employees to be paid according to the agreement between the parties as may be appropriate starting end of July 2020. The Court further considers that in the process of that negotiation or consultation, relevant information shall be disclosed as envisaged in section 57 of the Labour Relations Act, 2007 towards facilitating the necessary good faith for desired outcomes for both parties in a process that embraces a factual approach to resolving the issues.

8) As submitted for the Respondent, the claimant invoked alleged section 94 of the Employment Act, 2007 but which does not exist.

9) In furtherance of the spirit of negotiation and consultation in good faith towards a lasting solution to the current dispute, costs of the application shall be in the cause. While making that finding, the Court further encourages the parties to embrace a give and take attitude to ensure a balanced outcome that is not drastically out of possibility or unacceptably adverse or prejudicial to interests of both the respondent and the affected employees.

In conclusion, the application by the notice of motion filed herein on 18.05.2020 is hereby determined with orders:

1) Pending the hearing and determination of the suit herein or further orders by the Court the respondent by itself, its directors, its agents, or employees is hereby restrained from effecting any further wage or salary reduction in respect of its unionisable employees except in accordance with the renegotiation and or consultation agreement as will be agreed between the claimant and the respondent in line with the recognition agreement and the relevant law.

2) Pending the hearing and determination of the suit herein or further orders by the Court but subject to such agreement on renegotiated salaries between the parties as may be reached appropriately in 10 days from today, the respondent to release to the claimant's members the withheld salaries as at the date of this ruling and flowing from the respondent's letter dated 05.05.2020

whose implementation is hereby stayed pending renegotiations between the parties.

3) Pending the hearing and determination of the suit herein or further orders by the Court, the respondent to renegotiate and consult with the claimant in good faith towards amicable resolution of the dispute herein as per the recognition agreement and the tripartite agreement dated 30.04.2020 and to do so in 10 days from the date of this ruling with the view that the rate of agreed monthly pay or salary to be due to the unionisable employees to be paid according to the renegotiation agreement between the parties as may be appropriate and starting end of July 2020; and failing such agreement parties are bound by the terms in the CBA and the applicable law.

4) For avoidance of doubt and towards realization of the orders herein, the parties will convene not later than on Monday 13.07.2020 to embark on renegotiation and consultation accordingly.

5) Costs of the application in the cause.

Signed, dated and delivered by the court at Nairobi this Friday, 10th July, 2020.

BYRAM ONGAYA

JUDGE