REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 26 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 11th February, 2019)

KENYA CHEMICAL WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

RULING

1. The Application before the Court is the Claimant's application dated 21st January, 2019, brought under enabling provisions of the law of section 40(1) of the Employment Act, wherein the Applicant seeks for orders:

> ***1. That this matter be certified urgent and the same be heard ex-parte in the first instance.***
>
> ***2. That pending hearing and determination of this application this Honourable Court be pleased to grant an order prohibiting/restraining the Respondents, its officials, their agents, assigns and or representatives from declaring 30 employees who are members of the Claimant/Applicant redundant, who are not producing or working in spreads(Blue Band) to Upfield Foods.***
>
> ***3. That pending hearing and determination of this application, this Honourable Court should order the Respondent to discuss the reasons and the extent of the intended redundancy of the 30 employees, yet no discussion had taken place.***
>
> ***4. That this Honourable Court at its discretion take into account that as regard to 30 employees, the Respondent has not followed the CBA Clause 24(c).***
>
> ***5. That costs of the application be provided for.***

2. The Application is premised on the grounds:-

> ***1. That, following the meeting that took place on 13th December, 2018, the parties agreed that if there is any need for redundancy, the parties involved should have a discussion or consultation as per the Collective Bargaining Agreement Clause 24(c), for the reason of stating the extent of the redundancy which has not been exhausted. That this Honourable Court should take note of that.***
>
> ***2. That the Applicant has been writing letters to the Respondent requesting for a meeting to solve the problem of the employees before they are declared redundant, but no further meeting has been held from 13th December, 2018.***
>
> ***3. That the members of the Applicant stand to suffer irreparable damage should the Respondent proceed with their redundancy or stopping Claimants membership as the applicant depend solely on contributions from its members and it is less than two months since other 38 employees were moved to a different Company.***

3. The Application is supported by the Affidavit of Were Dibo Ogutu, the National General Secretary of the Applicant who avers that the respondent dishonoured the agreement signed by both parties on 24th September, 2018, and the resolution of the meeting held at the Federation of Kenya Employers on 13th December, 2018.

4. He states that the parties have not discussed the extent of the intended redundancy as it was agreed, that if there will be any need of

redundancy parties will consult and discuss as stated in the Collective Bargaining Agreement.

5. The Application is opposed and the Respondent has filed a Replying Affidavit sworn by one Salome Nderitu, the Human Resource Director of the Respondent wherein she states that the Respondent has finalised the global sale of its spread business on 1st July, 2018. In this regard, they sold its spreads business (Blue Band) to Upfield Foods as part of a global initiative.

6. She avers that on 26th November, 2018, the Respondent wrote a letter to the General Secretary of the claimant union informing him that there was a need to discuss the impact of the sale of the spreads business and requested for meeting. So as to meet the requirement for consultations under clause 24(c) of the Collective Bargaining Agreement 2018-2021, under the chairmanship of FKE a meeting was convened on 5th December, 2018, wherein officials of the Union and the Respondent were present.

7. That at the said meeting the Respondent informed the Union that as a result of sale of the Spreads Business and after an analysis of the business the cost of production was very high thus making UKL one of the least competitive factories in the world. That the Respondent informed the union of their intention of conducting a redundancy program to reduce its production costs. It was agreed that the Respondent would issue a notice indicating the reasons and extent of redundancy.

8. Ms. Nderitu avers that on 10th December, 2018, the Respondent issued a formal notice to the Union indicating the reason for the proposed redundancies as the need for re-organisation and it would be affecting 30 unionised positions and 9 management positions in the supply chain function. The effective date was given as 10th February, 2019. That they gave the Union a two months' notice, which is a longer period than what is prescribed under the Employment Act. In addition to the notice to the Union, notice was issued to the District Labour Officer vide a letter dated 10th December, 2018.

9. That a further meeting was held on 13th December, 2018, in which the selection criteria that was to be used in the exercise was discussed. In line with the CBA in deciding which employee shall be declared redundant, the Company would assess the relative merits and ability of the affected employees, but when this factors are equal the discharge would be on the basis of "Last in First Out".

10. Further that as a result of selling the spreads business the Respondent had lost 35% of the volume and 26% of the turnover which was not commensurate with the number of employees being transferred to the Spreads business leading to high business costs and the need for the retrenchment exercise.

11. She averred that during consultations on 13th December, 2018, it was agreed by the parties that the Respondent considers inviting employees willing to take up voluntary separation option before redundancy notices were issued.

12. That on 14th December, 2018, employees were invited to make an application for voluntary separation and the deadline was set as 18th December, 2018. No employees came forward to take up the offer and thus on 19th and 20th December, 2018, letters were issued to the employees and the Union respectively indicating the employees who were impacted by the redundancy who had been selected on the basis of the Employment Act and Clause 24(d) of the CBA.

13. That on 20th December, 2018, the Claimant wrote to the Respondent in response to the notices of the intended redundancy and confirmed their approval for the redundancy exercise and sought that notices to be issued to the impacted employees. That on 10th January, 2019, the Respondent received another letter dated 20th December, 2019, in which the Claimant sought for the process to be put on hold and it was agreed that the parties have another meeting to discuss the issues raised which did not materialize as the Claimant filed the present application to pre-empt the meeting.

14. That in the meantime the Respondent proceeded to issue letters to the affected employees informing them that the contracts would be terminated on 22nd February, 2019.

15. That the allegations that there have been no consultations are not true as the business case for the redundancy has been discussed on various occasions. She avers that the Respondent at all times has acted in good faith. That the application has been brought pre-maturely as the notice period has not yet expired and all the requisite notices and consultations have been carried out in accordance with the law and the CBA.

16. That the Court should be slow to interfere with the managerial prerogative of an employer to run its business in a competitive manner through re-organization. Further that the Union has not made out a prima facie case with probability of success in view of the fact that the Respondents have complied with the Employment Act and the CBA and the employees can adequately be compensated under section 49 of the Employment Act after the dispute is dealt with substantively.

17. She avers that it will be highly prejudicial to the Respondent if the Court issues any injunctive Orders to the high labour costs the Respondent is experiencing. That it would be in the interest of justices that the interim orders granted herein are set aside.

Submissions

18. The Claimant submits that Clause 24(c) of the CBA has not been complied with, as consultations have not been done. That the Respondents are employing while declaring the Claimant's members redundant.

19. The Respondent avers that consultations were done and the Claimant is misleading the Court. Further, that the orders sought are similar to those sought in the main claim and can therefore not be granted at this time. That the Respondent has a right to conduct a redundancy as

was stated in the Court of Appeal case of **Agakhan University Hospital Nairobi Vs KUDHEIHA Civil Appeal No. 7 of 2016.**

20. That the notice of redundancy will expire on 22nd February, 2019, and thus the Application is premature and should be dismissed.

21. I have examined all the averments and submissions of both parties. It is apparent that the issues the Applicants are contesting involve consultation with the Respondent, which the Respondent have shown has been conducted or is on going.

22. The Respondent have explained why they are unable to retain the Claimant members due to selling their spread business to another entity since.

23. In the circumstances, it is my finding that the application is not warrant. I therefore dismiss this application and direct that the Applicants proceed with the main claim.

24. Costs in the claim

Dated and delivered in open Court this 11th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Opiyo for Respondent – Present

Applicant – Present