REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 421 OF 2017

(Formerly Mombasa ELRC 497 of 2015)

Before Hon. Lady Justice Maureen Onyango

KENYA CHEMICALS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

MILLY GLASS WORKS LIMITED…….....……RESPONDENT

JUDGMENT

The Claimant is a trade union representing workers engaged in the Chemical and Allied industries in Kenya whereas the Respondent is a limited liability company engaged in the business of glass manufacturing in East and Central Africa.

The parties signed a Recognition agreement following an order of the Court of 15th December, 2013, which paved way for the negotiation a Collective Bargaining Agreement which has not been concluded to date. On 16th April 2018, the parties were directed by the Court to negotiate on the contested clauses in the CBA and so far the parties have agreed on almost all the issues save for 2:

1. The Respondent maintains that working hours per week are 48 which is informed by the current contracts of employment which fact is not contested and is within the law as the General Wages Order allows for 52 hours of work. The Claimant on the other hand is of the stand that 45 hours are sufficient.

2. The parties have also failed to agree on the effective date of the proposed CBA. The Claimant is of the view that the CBA should be effective from the year 2013 for a period of 2 years as their proposals were sent to the Respondent in 2013 which the Respondent is yet to adopt and sign the CBA. The Respondent on the other hand holds the position that the CBA is effective from the date it is signed and the reason they have not signed is that there were contested issues most of which have been settled save for the issue of working hours.

Respondent's Evidence

RW1 the Human Resource Manager of the Respondent stated that on their employees which includes all unionisable employees are currently doing 48 hours a week as stipulated in the employment contracts. That the Respondent operates 24 hours every day including public holidays. That adjusting the working hours downwards will affect their continued business.

On effective date of CBA, she stated that they received proposals on CBA after which the Respondent took some time before responding and that is when the Claimant reported a dispute to the Labour Minister on refusal to negotiate. A conciliator was appointed and conciliation began on 9th July 2014. A 2nd dispute was reported on 4th August 2014, on unwillingness to negotiate which led to conciliation on 20th August 2014. A certificate of disagreement was issued which led to the current case being filed in Mombasa.

That the parties met on 7th October 2014, and agreed on some items on the CBA – a memorandum of agreement (App. 9 of Claimant's bundle of documents) has been filed outlining the same. She denied that the employer was unwilling to negotiate. That the Claimant has never reduce the issued agreed on into a CBA and thus the delay in signing the CBA was not the fault of the Respondent. She urged the Court to adopt the date of signing the CBA as the date of commencement of the CBA.

Claimant's Submissions

The Claimant submits that the working hours proposed by the Respondent are those they had been using before the claimant's members

joined the Respondent. The Claimant urges the court to consider reviewing the said working hours to 45 which in their view is reasonable. That to maintain industrial peace the court should allow the 45 hour work week.

On the effective date of the CBA it is submitted that the journey towards having a CBA dates back to 3rd February, 2013 when they sent their documents to the Respondent. They want the CBA to be effective from that date for a period of 2 years. That the delay in signing the CBA has been occasioned by the lack of cooperation by the Respondent.

Respondent's Submissions

On working hours it is submitted that the current contracts of employment provide for 48 hours of work per week. That the Claimant's proposal for less working hours contradicts the terms of employment agreed between the workers and the Respondent. They cite the case of ***National Bank of Kenya Vs Hamida Bana & 103 others (2017) eKLR*** where it was held:

> *"A concomitant of the doctrine of freedom to contract is the binding force of the contracts. See Chitty on Contracts (Supra) para 1-036. As such, the learned judge by holding otherwise re-wrote the terms of VER contrary to the intention of the parties. If did not matter that the respondents got less favourable terms than those that were provided for under the HR Manual or CBA. What matters is that parties voluntarily agreed on the terms of the VER which ought to have been enforced. We agree and adopt the reasoning of Lord Hoffman in* ***Attorney General of Belize vs Belize Telecom Ltd (2009)UKPC 10*** *to the effect that:*
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> *"The Court has no power to improve upon the instrument which it is call upon to construe, whether it be a contract, a statute, or articles of association. It cannot introduce new terms to make it fairer or more reasonable. It is concerned only to discover what the instrument mans… it is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would be reasonable available to the audience to whom the instrument is addressed."*

On effective date of the CBA it is submitted that section 59 of the Labour Relations Act (Cap 233 Laws of Kenya) stipulates that a collective agreement shall be effective from the date agreed by the parties. Further section 59(2) stipulates that a collective bargaining agreement binds an employer as at the time of its commencement.

That to backdate the CBA to 1st December, 2013, would be unconstitutional as it impairs the obligations of the parties under contract and hence would be untenable. They urge the Court to dismiss the suit with costs.

Determination

Issues:

1. What hours of work are applicable in the instant case

2. What should be the effective date of the CBA

Hours of work

The General Order provides for 52 working hours per week. The claimant proposed 45 hours against 48 hours that the respondent has been applying at the place of work. The claimant did not give any compelling reasons why the respondent who is already applying hours of work of 4 hours below the statutory maximum should be changed. On the other hand the respondent explained that it works in shifts and if this charged it would destabilise the shift system.

I find the current number of hours of work reasonable and award that the same be retained at 48 hours per week.

What should be the effective date of the CBA?

The Claimant prays that the Court adopts the effective date of the CBA to be the date they had hoped for the negotiations to have been completed being 1st December, 2013. The Respondent on the other hand is of the opinion that the CBA should be effective from the date of signing which is yet to be done. In the Court of Appeal case of ***Teachers Service Commission Vs Kenya National Union of Teachers (KNUT) and 3 Others (2015) eKLR*** where the Court in overturning the decision of the trial court of backdating the CBA had this to say:

> *"In law, an inchoate claim is a right or entitlement that is in progress and is neither ripe nor vested nor crystallized – it is a future claim which is in preliminary stage and is yet to develop into a full right.*
>
> *Inchoate rights are unenforceable since they have neither crystallized nor vested. It is only vested rights, acquired rights or rights under legitimate expectation that are enforceable. The trial court by backdating the 50% to 60% basic salary award was enforcing an inchoate right for a period when the rights had neither crystallized nor vested. If the award by the trial court is to stand, the same can only be prospective from the date of judgment because it is from this date that the inchoate claim by the teachers crystallized, vested and became enforceable.*
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> *There is a general presumption against retroactivity and the law frowns on retrospectivity in contract unless it is by consent of the parties. In the instant case, there is no consent of parties but an order of the trial court. In the case of* ***Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, Supreme Court App. No. 2 of 2011 (2012) eKLR,*** *the Supreme Court at*

para. 61 expressed itself as follows on retrospectivity albeit in statute law:

"A retroactive law is not unconstitutional unless it:

i. is in the nature of a bill of attainder;

ii. impairs the obligation under contracts;

iii. divests vested rights; or

iv. is constitutionally forbidden."

Using the analogy of statute law, what is in issue is whether the backdating of the award by the trial court impaired TSCs contractual obligations or if backdating divested TSC any of its vested rights. Prior to the judgment of the trial court, the contractual and vested right of TSC was to pay teachers existing salaries and allowances. In backdating the basic salary increment award, the trial court not only created a debt for TSC, it altered and impaired TSCs existing contractual obligations to the teachers. The backdating is a nullification and impairment of TSC's contractual rights. The trial court created a debt where none existed in contract or in law. Prior to the judgment of the trial court, TSC and the teachers derived their rights and obligations from their existing contracts. By backdating the award, the trial court re-opened and inserted terms to an existing contract. One cannot re-open a contract that has been performed, insert a term in it, create a debt therein, backdate the debt, enter judgment and execute for the debt – this is not the law. Guided by the dicta in ***Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, Supreme Court App. No. 2 of 2011 (2012) eKLR****, the backdating order of the trial court is unconstitutional as it impairs the obligations of the parties under contract and divests TSC its vested contractual rights and creates a retroactive debt where none existed."*

In view of the above decision, and taking into account that this is the first CBA between the parties, further taking into account the time lapse from the time the parties started negotiations to date, it is not practical to backdate the CBA to the dates proposed by the claimant. I find that 1st January 2019 is reasonable and will not burden the respondent with a debt that was not anticipated

The upshot of the matter is that the court finds that the hours of work to be adopted is 48 hours and the effective date of the CBA should be 1st January 2019.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE