



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**COLLECTIVE BARGAINING AGREEMENT NO. 103 OF 2018**

**SOCIAL SERVICE LEAGUE, M.P. SHAH HOSPITAL**

**EMPLOYER**

**AND**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS AND ALLIED WORKERS**

**UNION**

**RULING**

1. This ruling is necessitated by a very unique situation.
2. The Social Service League, M.P. Shah Hospital (employer) and the Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers (Union) are social partners who have entered into collective agreements previously, the last such agreement having expired around 1 April 2017.
3. The parties commenced negotiations for a collective agreement to cover the period 1 April 2017 to 1 April 2019, and on 13 April 2018, Mr. Manoj Shah, Dr. S.R. Shah, Mrs Falguni Chudasama and Mr. Moses Ombok for the employer and Mr. Albert Njeru, Mr. Paul Kagotho and Mr. Samuel Mwinami for the Union appended their signatures to a collective agreement to cover the said period.
4. The Collective Agreement was presented to the Cabinet Secretary, Labour and Social Protection, and through a letter dated 25 April 2018, the Principal Secretary forwarded it to the Court for registration. The Ministry indicated in the forwarding letter that it had no objection to the registration of the collective agreement.
5. On 8 May 2018, the Deputy Registrar of the Court wrote to the parties to attend Court on 21 May 2018 for purposes of having the collective agreement registered.
6. When the file was called out on the scheduled date, only the representative of the employer was in Court and he indicated that the employer had no objection to the registration of the agreement.
7. The Court, as is the practice and having confirmed that all the social partners had appended their signatures to the agreement and that the Ministry had no objection, registered the agreement.
8. The Court would have thought that was beginning of a renewed happy social partnership between the parties, but alas, on 23 May 2018 the Union moved Court seeking orders
  - a). ...
  - b) That this Honourable Court be pleased to stay its orders issued on the 21<sup>st</sup> of May 2018 with regard to the registration of the Collective Bargaining Agreement herein (CBA) pending the hearing and determination of this application inter partes.
  - c) That this Honourable Court be pleased at the inter partes hearing of this application to set aside its orders of the 21<sup>st</sup> of May 2018 registering the CBA herein.
  - d) That upon hearing inter partes, the HonourableCourt be pleased to grant prayer no. (b) pending the hearing and determination of this matter.
9. On 13 June 2018, the Court directed the employer to file and serve a response to the application on or before 20 June 2018 but it filed a

replying affidavit only on 25 June 2018. The Court declined to admit it. The employer was however allowed to make oral submissions.

### **Case for the Union**

10. In seeking the setting aside of the registration of the collective agreement, the Union contended that Wasilwa J had on 21 March 2018 issued an order stopping the employer from retiring its unionisable employees at the age of 57 (years) in Nairobi Cause No. 402 of 2018, Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers v M.P. Shah Hospital; that the employer did not disclose the existence of the order to this Court when the registration of the collective agreement came up (it was contended that the Union representative was delayed in traffic on the material day); that some of the items in the registered collective agreement had not been agreed on particularly the retirement age; that there was discrimination on the retirement age as the employer's Handbook provided that management staff retire at 60 years and other employees at 57 years; that a Conciliator had recommended that retirement age be uniform for all category of employees and that the collective agreement had been signed pending determination of the dispute on the retirement age.

11. In a parting shot, the Union referred the Court to judgment by Ongaya J in Cause No. 402 of 2018, Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers v M.P. Shah Hospital on 8 June 2018 which stayed the clause on the retirement age and directed that the retirement age be set at 60 years until the social partners reached an agreement.

### **Arguments by the employer**

12. In opposing the application, the employer drew the attention of the Court to section 60 of the Labour

Relations Act which makes provision for registration of collective agreements, to urge that the Court registered the agreement in the form it was submitted by the parties.

13. According the employer, the collective agreement having been registered as submitted by the parties, the Court lacked the jurisdiction to set it aside.

14. The employer also contended that the collective agreement having been submitted while Cause No. 402 of 2018, Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers v M.P. Shah Hospital was pending, the Union was conscious of and fully aware of the litigation on the retirement age, but nonetheless went ahead to execute it, and therefore it could not reprobate and approbate on the retirement age question.

15. On the submission that the retirement age clause was to await further Court orders or the social partners agreement, the employer asserted that there were no agreed minutes or formal minutes either from the Conciliator (minutes filed by the Union in the view of the Court do not meet the test of formal minutes).

16. It was stated there was no stay order against registration of the agreement and that the judgment in Cause No. 402 of 2018 had been appealed against.

### **Evaluation**

17. Before examining the issues raised, the Court notes that the orders as proposed by the Union appear to have been casually drafted and more so orders (b) and (d).

18. In effect the substantive issue for the Court's determination is whether the registration of the collective bargaining agreement ought to be set aside.

19. A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clauses illegal.

20. Apart from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud or misrepresentation.

21. The Union did not allege fraud at the time it signed the agreement. It alleged that the employer did not disclose to the Court on 21 May 2018 that there were pending Court proceedings on the retirement age clause.

22. That may well be misrepresentation, but it is equally true that when the Union signed the agreement on 13 April 2018, it was fully aware and informed of the Court orders of 21 March 2018 in which Wasilwa J had stayed the implementation of the clause on retirement at 57 years.

23. And despite that knowledge, the Union executed the collective agreement with the clause it now wants to resile from.

24. It is also a fact, and the Court so finds that there was no mutual agreement that the collective agreement would be signed pending determination of the litigation on the retirement age question, otherwise the Union would have presented formal minutes from the Conciliator to that effect.

25. The Court further notes that the Conciliator and/or the Cabinet Secretary for Labour did not indicate in the letter forwarding the collective agreement for registration that there was a reservation or recommendation to make the retirement age uniform or that the collective

agreement submitted for registration was subject to a caveat which would await the outcome of other negotiations between the social partners and/or Court litigation.

26. In the view of the Court, the Union has not satisfied the legal test for setting aside the registration of the collective agreement. It merely signed an improvident contract it is now attempting to use the Court to run away from.

27. And even if the Union had met the test, the Court is of the view that the clause on retirement age could be severed from the other provisions on the agreement.

28. The Court also notes that the judgment by Ongaya J has made a determination on the retirement age question and that the determination is subject to appeal.

29. Having considered all the above, the Court comes to the conclusion that the application dated 22 May 2018 be dismissed with no order as to costs due to the social partnership between the parties.

**Delivered, dated and signed in Nairobi on this 20<sup>th</sup> day of July 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Union            Mr. Aduda instructed by Aduda & Co.

For Employer      Mr. Munyu/Ms. Weru instructed by Iseme, Kamau & Maema Advocates

Court Assistant    Salome