



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1255 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

INSIGHT MANAGEMENT CONSULTANCY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Kenya Chemical & Allied Workers Union, filed a Memorandum of Claim dated 23/07/2015 against the Respondent, Insight Management Consultancy Limited for refusal to sign a Recognition Agreement and failure to implement check-off deductions as per the check off forms.
2. The Claimant Union states that this employment dispute arose from 21/05/2014 after it submitted check off lists to the Respondent consisting of 284 members procedurally recruited and who had voluntarily consented union membership by filling and signing Form S thus giving authority to the Respondent to deduct Union dues and remit the same to the union and giving the Claimant Union at that time, 71% overwhelming majority.
3. That on 05/06/2014, it further forwarded to the Respondent two copies of duly signed proposed model Recognition Agreement documents for the Respondent to sign its part in accordance with **Section 54(1) of the Labour Relations Act 2007** and return one copy to the Claimant Union for its records. That it attached to the said documents a signed notice, Minister's Order, Kenya Gazette Notice No.7316 and an extract of its registered Constitution which indicates its scope of representation.
4. That the Respondent failed to respond and it thereafter formally reported existence of a trade dispute on 18/07/2014 pursuant to **Section 62(1) of the Labour Relations Act** and a Mr. S.N.Mwaniki of Nyayo House Labour Office was appointed as a conciliator on 04/09/2014.
5. That despite the Claimant union's officers requesting for a meeting, the said conciliator regrettably never convened any meeting for 7 months and his appointment was withdrawn on 02/03/2015 when the Ministry appointed Mr. J. Twanga to act as conciliator. That three meetings were then convened on 28/04/2015, 09/06/2015 and 18/06/2015 where parties' representatives attended except on the last meeting where the Respondent did not attend.
6. Further, that the Respondent's Managing Director in attendance pleaded for more time to consult with the company lawyers but never reported on the disputed issues and that it instead brought new issues every other meeting, prompting the Claimant Union to write to the conciliator asking him to proceed and produce his report as is required by law.
7. The Claimant Union avers that during the pendency of this dispute, it vigorously recruited from among the Respondent's employees working in Orbit Chemicals Industries Limited factory and progressively forwarded the additional check off forms to the Respondent as follows: on 23/07/2014 (23 employees/members); on 14/03/2015 (7 employees/members); on 04/05/2015 and 21/05/2015 (9 employees/members); and on 19/06/2015 (1 employee/member).
8. That since it attained the mandatory threshold of simple majority required by law with 81% membership being 324 members, the Respondent should have signed the Recognition Agreement and implemented deduction of union dues as authorised through the submitted check off lists. That it has instead contravened **Section 48(1) (2) and (3) and Section 50(8) (i) of the Labour Relations Act** being the law on deduction of union dues and that it has no legal power whatsoever to refuse, fail, disregard or ignore to effect implementation of the check off deductions served upon it.
9. Further, that the Respondent has committed an offence under **Section 50(10) of the Labour Relations Act** and urges this Honourable Court to find the same and states that the claimant union had thus far lost Kshs. 1,307,460/= up to and including the month of June 2015 due

to the Respondent's intentional disregard of the law.

10. It avers that it is the right Union constitutionally mandated to represent the interests of the Respondent employees who are involved in manufacturing detergents and other chemicals in terms of its registered Constitution in Rule 2(iii) and that there is no rival Union seeking recognition with the Respondent.

11. It prays that this Honourable Court order/directs the Respondent to recognize the Claimant Union, to immediately effect deduction of union dues and remit the same to the Claimant Union, to pay such union dues from its own resources totalling to Kshs. 1,307,460/=, commencement date being when such check off forms were submitted to the Respondent and to meet costs of this suit.

Respondent's Case

12. The Respondent filed its Memorandum of Reply dated 13/08/2015 stating that it has no knowledge that the Claimant Union has a Recognition Agreement with Orbit Chemicals and admitting that it received copies of the check off forms together with recognition agreement documents from the Claimant and that conciliatory meetings were indeed held between them but denies missing any meeting or raising any issues.

13. It denies that the Claimant attained a simple majority because many of the check off lists purporting to contain names of union members are inconsistent with the requirements under the Labour Relations Act 2007 in terms of the format and information required of a Form S; including lacking membership numbers, signatures and dates signed.

14. That this discrepancy is sufficient to invalidate all the check off forms presented by the Claimant thus invalidating the whole claim as it brings into doubt the membership of 134 individuals and putting the Union members at 190, which is 33.5% and which in turn is below the mandatory threshold required.

15. It avers that even if the Court was to accept the forms as genuine, many of its employees are stationed at Unilever Kenya and meet the criterion for unionisable employees in relation to the Claimant Union and since those employees are not members of the Claimant Union, the Claimant cannot claim to have met the legal threshold.

16. The Respondent avers that it has a legal duty of due diligence before deducting any funds from the salaries of its employees and that because it had genuine misgivings about the validity of the check off Forms, it is not guilty of an offence under Section 50(10).

17. That the amount claimed for May 2014 is not valid as **Section 48(3) of the Labour Relations Act** requires that deductions are made within thirty days of service of the check off forms and since the first forms were made on 21/05/2014, the Claimant Union cannot claim deductions for the said month.

18. That the third prayer has no basis in law because the only instance an employer may be ordered to pay dues from its own resources is under **Section 19 (6) of the Employment Act and is a penalty that only applies where the employer makes deductions but fails to remit the same to the union** and that no evidence has been presented to prove that it deducted any union dues and failed to remit the same to the appropriate Union. It urges the Court not to grant the Claimant Union's prayers and that the suit against it should be dismissed with costs.

Evidence

19. CW1, a Plant Operator with the Respondent testified that he has been a member of the Claimant Union since 2014 paying union dues and that the number of staff who are union members are over 300. He states that he has not benefitted as a union member because the Respondent has not recognised his union and there is no CBA and that he wants his union recognised by the Respondent.

20. In cross-examination, he stated that the Respondent has its own plant making soap and chemical sulphuric acid and packaging products for various companies and that it has a signage at the gate of Orbit Chemicals but Orbit has no contract with the Respondent to supply workers. In re-examination, he confirmed that the Respondent made products for Orbit.

21. CW2 testified that she works for Orbit Chemicals Ltd and has been a member of the Claimant Union from 2014. In cross-examination, she stated that she works at Orbit under the Respondent as the Respondent is the contractor supplying Orbit with workers and that it also has workers in other companies for example Unilever.

22. In re-examination, she confirmed that she works for the Respondent who allocate work to her daily and that they are issued with uniform and work implements. That the Supervisor of Orbit gives her the work and the Respondent pays her salary.

23. RW1 testified that he works for the Respondent as an Operations Manager in charge of several clients and has worked there from 2008 and that the Respondent supplies labour to different companies. That the Respondent has about 5,000 employees across the board and that the Respondent has annexed in its documents labour returns for its employees.

24. In cross-examination, he stated that the Respondent had about 210 employees at Orbit Chemicals and that he is aware employees of Orbit Chemicals joined the Claimant Union in 2016 and are paying dues to the union. In re-examination, he stated that 84 out of 210 employees of Orbit joined the Union.

Submissions

25. The Claimant submits that it forwarded the Recognition Agreement to the Respondent and followed the law as laid down in **Section 54(1) of the Labour Relations Act 2007** and that the Respondent should therefore not be allowed to continue contravening the same law. That the Respondent's refusal to sign the Recognition Agreement with it is denying its employees their rights as they are the ones who consented to be members of the Claimant as required by law.

26. The Respondent submits that the issue is whether it is obligated by law to enter a Recognition Agreement with the Claimant. That it is not disputed that some of its less than 300 employees outsourced to Orbit Chemicals Ltd are members of the Claimant while it has employed in general in excess of 400 employees and thus from a numbers perspective, the legal threshold for recognition has not been met. That a similar situation was reported in the case of **Kenya Petroleum Workers Union vs Giefcon Limited & Another (2015) eKLR** at paragraph 21 where the Court observed:-

“The Claimant appears to have misperceived the nature of the 1st Respondent, which is a manpower outsourcing company, not aligned to any industry. It would not be possible to order the 1st Respondent to sign the Recognition Agreement with the Claimant Union....There should be a trade union specifically engaging the outsourcing industry.”

27. The Respondent urges the Court to follow the aforesaid position and dismiss this case.

28. I have examined evidence of the parties and submissions filed herein. From the Respondent own description of who they are, they are an outsourcing company with a labour force of over 5,000 workers supplying labour to various companies including Orbit Chemicals who are the company that the Claimant members worker for.

29. The CW2 in her evidence told Court that she actually work for Orbit Chemical Limited and is a member of the Claimant union and that the Respondent supplies labour to Orbit Chemicals. She confirms that she is supervised by a supervisor of Orbit who gives her the work to do and the Respondent pays her her salary.

30. CW1 on the other hand testified that he is employed by the Respondent who has their own independent company that makes soap and chemical sulphuric acid and packaging products for various companies. This evidence corroborates the Respondents own evidence that show that the Respondent is an outsourcing company that supplies labour to various companies including Orbit Chemicals.

31. The concept of outsourcing is indeed an acceptable modern day enterprise. From the evidence of CW2 indeed she is even supervised by a supervisor from Orbit Chemicals and not the Respondent. It would therefore not be possible to order the Respondent to sign a recognition agreement with the Claimant union as sought by the Claimant.

32. As to remission of union dues as sought, indeed the law is clear under Section 48 of Labour Relations Act 2007 that:-

(1) “In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to:-

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted:-

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

33. The Respondents obliged by virtue of this Section to commence deductions of union dues and remit to the Claimant notwithstanding that there is no recognition agreement between the Claimant and the Respondent.

34. I therefore order that the Respondent should henceforth commence union dues deductions as sought by the Claimant from the check off forms submitted and remit immediately.

35. Each party will bear its own costs.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wafula holding brief Ogude for Respondent – Present

Opiyo for Claimant – Present