



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 900 OF 2015

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

- VERSUS -

TUSKER MATTRESSES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 26.05.2015 through Boniface M. Kavuvi, Secretary General. The prayers are that the respondent:

- a) Observes clause 28 of the collective bargaining agreement (CBA) and pay annual bonus as agreed between the parties.
- b) Pays interest accrued from employees' bonus for the year 2014 at Court rates.
- c) Pay costs of the claim in favour of the claimant.

The statement of response was filed on 23.10.2015 through Kanchory & Company Advocates. The respondent prayed for:

- a) A declaration that clause 28(a) of the CBA registered as RCA. No. 273 of 2013 is incapable of being implemented by the respondent for the year 2014 and amends the same to read: **“The company shall pay all unionisable employees an annual bonus equivalent to the employees’ non-variable salary (comprising of basic salary, housing allowance, commuter allowance and monthly bonus) to be paid half yearly. Provided the employer makes a profit in the previous financial year.”**
- b) A declaration that the respondent be exempted from implementing Clause 28(a) of the CBA for the year 2014.
- c) Costs of the claim.

The only issue in dispute is whether the respondent should pay annual bonus for 2014 to the unionisable employees as per the provisions of clause 28(a) of the CBA. The parties are in agreement that they concluded a recognition agreement and the CBA in issue. The dispute went for conciliation under the Labour Relations Act, 2007 but parties failed to reach an amicable resolution.

The claimant's submission is that the annual bonus was a negotiated benefit to the workers and as per section 59(1) of the Labour Relations Act, 2007 a CBA binds the parties to the agreement for the period of the agreement. The terms of the CBA are incorporated in the individual contracts of the employees and the terms are enforceable once the CBA is registered. The respondent's case is that any change to the CBA must be negotiated and registered and that having not happened in the instant case, the annual bonus must be paid as already negotiated and agreed upon.

The respondent's case is that it is financially constrained as it suffered losses in 2013 and 2014 rendering the company unable to pay bonus for the year 2014. It is the respondent's case that despite annual bonus being a negotiated benefit under the CBA at clause 28, the employer should not be compelled to pay the same if the respondent's business is not profitable and such payment would result in crippling the respondent's operations or lead to shutting down the respondent business. Further payment of bonus should be dependent on whether the respondent makes profit or not. The respondent's further case is that it continues to suffer losses and if it is compelled to pay the annual bonus it may be forced to downsize its operations by closure of its branches which will result in job losses. Finally, a CBA is a contractual agreement capable of performance or frustration and the respondent's performance of clause 28 for the year 2014 has been rendered impossible due to its financial situation and the same clause ought to be amended.

The claimant submits that the issue before the Court is not amendment or review of clause 28(a) of the parties' collective agreement for 01.03.13 to 28.02.15 but the issue is refusal to implement fully clause 28(a) of the CBA as duly concluded between the parties.

The Court has considered the material on record and makes findings as follows:

1) There is no dispute that the parties agreed that the respondent would pay the bonus as per clause 28 of the CBA in issue. It is not for the Court to rewrite the terms of the CBA and the CBA stands incorporated in the individual contracts of service as submitted for the claimant.

2) The Black's Law Dictionary 10th Edition defines "bonus" as "A premium paid in addition to what is due or expected, especially a payment by way of division of a business's profits, given over and above normal compensation. In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given. – Also termed bonus payment." In that sense the Court considers that bonus would have an element about division or sharing of the profits an enterprise achieves between the equity holders and the employees. Clause 28 of the CBA in issue would therefore be properly construed to mean that if the company did not make a profit then the respondent as an employer would be entitled not to effect the annual bonus payment and the respondent would validly plead frustration.

3) The Court has perused the witness statement by the respondent's witness (RW) and the documents exhibited in Court. While alleging that the respondent had not made profits for the period under review (2013 and 2014) to facilitate payment of the agreed annual bonuses for the 2nd year of the CBA, 01.03.2014 to 28.02.2015, the respondent has not exhibited its annual accounts or audited accounts for the period to support its allegation. Accordingly the Court returns that the respondent has failed to show that it was in financial difficulty and it did not make a profit as was urged. The Court returns that frustration to implement the clause on annual bonus will therefore fail as a defence in the instant case.

4) The Court has already found that the clause was binding as agreed upon and the claimant is entitled to its full implementation.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to observe clause 28 of the collective bargaining agreement (CBA) and pay annual bonus as agreed between the parties.
- b) The respondent to pay the employees' bonus for the year 2014 by 01.02.2019 failing interest to be payable thereon at Court rates from the date of filing the memorandum of claim till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE