



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW CASE NO 5 OF 2013**

**[ORIGINALLY HIGH COURT JUDICIAL REVIEW CASE NO 399 OF 2013]**

**IN THE MATTER OF AN APPLICATION BY ISAAC G.M. ANDABWA THE NATIONAL  
GENERAL SECRETARY OF KENYA NATIONAL PRIVATE SECURITY WORKERS UNION**

**FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF LABOUR INSTITUTIONS ACT**

**AND**

**IN THE MATTER OF MINIMUM BASIC WAGES ORDER, 2012/2013**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26**

**LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COMMISSIONER FOR LABOUR....RESPONDENT**

**AND**

**BOB MORGAN SERVICES LIMITED.....INTERESTED PARTY**

**EX PARTE ISAAC G.M. ANDABWA NATIONAL GENERAL SECRETARY OF KENYA**

**NATIONAL PRIVATE SECURITY WORKERS UNION**

**JUDGMENT**

1. This matter which was initially filed in the High Court seeks an order of Mandamus compelling the

Commissioner for Labour to inspect private companies offering security services and to enforce compliance with the minimum wages contained in the Wages Orders published in 2012 and 2013.

2. In his affidavits in support of the case, the Ex Parte Applicant, Isaac G.M. Andabwa depones that the Respondent has failed in his statutory duty to enforce compliance with the minimum wage applicable in the sector.

3. Andabwa adds that the Respondent's failure has led to an uneven field where compliant employers are unable to operate profitably due to undercutting by non-compliant ones. This has had the direct effect of killing collective bargaining in the sector.

4. The Interested Party, Bob Morgan Services Limited supports the Ex Parte Applicant. In a replying affidavit sworn by its Human Resource and Administration Director, Joseph Ng'etich, he confirms that failure to enforce compliance with the minimum wage has led to an uneven playing field giving unfair advantage to non-compliant employers.

5. The Respondent's response is contained in a replying affidavit sworn by the Assistant Labour Commissioner, James Ndiho. He concedes that Section 35(1) of the Labour Institutions Act gives the Commissioner for Labour power to carry out inspection at the work place for monitoring and enforcing compliance with labour laws. Section 35(1)(k) gives Labour Officers power to prosecute employers who contravene the provisions of the Act.

6. Ndiho further concedes that it is an offence under Section 48(2) for an employer to fail to pay the statutory minimum wage provided in a Wages Order.

7. He states that field visits by Labour Officers had confirmed gross underpayment of wages and non-implementation of Wages Orders in the protective security sector. There was also failure to provide basic rights provided under Part V of the Employment Act.

8. According to Ndiho, the security firms visited had cited competition by small briefcase security firms, high unemployment rate and unfavourable business climate as major challenges in the quest to comply with minimum terms and conditions of employment.

9. In his written submissions the Respondent reiterates that under Section 35(1) of the Labour Institutions Act he is empowered to carry out inspection at the work place for monitoring and enforcing compliance with labour laws. He further submits that inspection was an ongoing process with various steps being taken to ensure that the security firms comply with the law.

10. According to the Respondent, the case at hand involves the rights of individuals that are enforceable by way of ordinary civil claims rather than judicial review. In this regard, the Court was referred to the case of *Ex Parte Waldron (1986) 1 QB 824 G-825H* where it was held that it is not in every case that the court will grant an order for judicial review.

11. In his written submissions filed on 18<sup>th</sup> December 2013, the Ex Parte Applicant cites the decision in *Rashid Odhiambo Aloggoh & 245 others v Haco Industries Limited (Civil Appeal No 110 of 2011)* where the Court stated that in considering an application such as the one now before me, the Court should consider whether or not the allegations of facts made are true, whether those facts amount to a violation of the law and finally the appropriate remedy in light of the particular circumstances of the case.

12. It is pleaded by both parties that there are indeed cases of wage underpayment by some employers in the private security sector. Both in the replying affidavit and the submissions, the Respondent makes general statements on the conduct of some inspection and goes ahead to make excuses for non-compliance with the minimum wage requirements by some employers in the sector.

13. Section 48 of the Labour Institutions Act provides that the minimum rates of remuneration or conditions of employment contained a Wages Order constitute a term of employment and may only be

varied by agreement. Further, any underpayments are recoverable from the employer.

14. The facts in this case are not in dispute. Indeed the Respondent himself admits that there are cases of violation of the minimum wage requirements. He also admits that he not only has a statutory duty to carry out inspection for compliance but he has also been given the requisite instruments for enforcement.

15. In light of this I find no reason why the Respondent opposes the Ex Parte Applicant's plea. I therefore issue an order of Mandamus directing the Commissioner for Labour to carry out inspection of private companies offering security services with a view to confirming compliance with minimum wage requirements and to file a report in this Court within the next one hundred and twenty (120) days from the date of this Judgment.

16. The Deputy Registrar of this Court is directed to serve a copy of the Judgment on the Commissioner for Labour.

17. Each party will bear its own costs.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wati for the Ex Parte Applicant

Miss Chesinya for the Respondent