REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2326 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION...CLAIMANT

-Versus-

G4S KENYA LIMITED...RESPONDENT

RULING

Before me for determination is an application dated 22nd November 2017 filed by Kenya National Private Security Workers Union, the Applicant, a trade union registered in Kenya, against G4S Kenya Limited, the Respondent, a limited liability company registered in Kenya carrying on business in the private security industry. The application which was filed under certificate of urgency seeks the following orders-

(i.) That this application be certified urgent and be heard on priority basis and ex parte in the first instance.

(ii.) That pending the hearing and determination of this application, this Honourable Court do issue stay orders restraining the respondent from executing its intention of unlawful termination.

(iii.) That pending the hearing and determination of this cause this Honourable Court do issue stay orders restraining the respondent from executing its intention of unlawful termination.

(iv.) That the cost of this application be awarded to the claimant/applicant

The application is supported by the grounds on the face thereof and the affidavit of ISAAC G. M. ANDABWA, the National General Secretary of the Claimant Union. The application was filed together with the Statement of Claim in which the Claimant seeks the following remedies -

a) Stay orders restraining the respondent from executing its intention of unlawful termination.

b) A declaration that the respondent's notices of intention to declare redundancy served on its employees from 7th November, 2017 onwards and/or to terminate their service of the claimant is unprocedural, illegal and unlawful.

c) Damages for unlawful termination to wit prorate leave, one months' salary in lieu of notice, 12 months' salary as compensation for unlawful termination.

d) Certificate of service

e) The respondent do meet the claimant's costs of this case.

I heard the application ex parte on 22nd November 2017 and ordered maintenance of status quo pending *inter partes* hearing of the Application.

The Respondent filed grounds of opposition and replying affidavit of ELIJAH SITIMAH, the Respondent's Human Resource Director, on 1st December 2017. In the Grounds of Opposition, the Respondent raised the following issues-

1. The application is an abuse of court process, made in bad faith and based on a misrepresentation of facts.

2. The claimant seeks to be involved in the management and the business affairs of the respondent.

3. The claimant has not disclosed any *prima facie* case to warrant the exercise of the court's discretion.

4. The respondent has complied with all the provisions of the law and the application seeks to frustrate the respondent to completing necessary re-organisation process for its own ulterior objective.

5. The claimant has been adequately consulted on the on-going redundancy process.

6. The application if granted will greatly prejudice the respondent. The balance of convenience tilts in favour of the respondent.

The application was argued on 5th December 2017. The Applicant was represented by Mr. Wati instructed by DB Wati & Company Advocates while the Respondent was represented by Mr. Makori instructed by Hamilton Harrison & Mathews Advocates.

Applicants Case

The Applicant relied on the grounds on the face of the application and the supporting affidavit of Isaac G M Andabwa. It is the applicant's case that it represents guards employed in the private security industry. The applicant avers that the Respondent has since 6th November 2017 served security guards in its employment with letters titled **NOTICE OF REDUNDANCY** advising the said employees that their positions will become redundant and their employment will stand terminated upon the expiry of the notices. The Applicant avers that the contemplated notification of redundancy is unfair, invalid and contrary to the requirements and procedures provided for under section 40(1) of the Employment Act, that there was no extensive consultation and the Applicant was not given enough time to respond and therefore there was no meaningful consultation. It is further the Applicant's averment that there were no reasons given to either the Applicant or the Department of Labour and the basic principles guiding redundancy such as first in last out (LIFO) was not applied as older and more experienced employees will be declared redundant. The Applicant avers that the Respondent has not declared loss of profit or business to justify the redundancy, that its members are wholly dependent on their jobs for livelihood and their unjustified ejection from employment will adversely affect not just the employees but their families as well.

In the affidavit in support of the application Mr. Andabwa deposes that on 31st October 2017 the Respondent invited the officials of the Applicant for a meeting at their premises and informed them that they intended to declare employees redundant. The officials requested to be supplied with background information and to be given time to make their own assessment. The request was followed by a letter the following morning reiterating the need for time and to be supplied with the list of the employees affected,

their assignment, payment package and criteria used to identify the affected employees.

Mr. Andabwa deposes that unknown to the Applicant the Respondent had already written to the Local Labour Office notifying it of the intention to declare its employees redundant without stating the reason for redundancy. Mr. Andabwa deposes that the Applicant was dismayed to learn that the Respondent had sent the notices of redundancy to its members from 6th November 2017 without supplying the information sought by the Applicant.

At the hearing of the Application Mr. Wati reiterated the grounds in support of the application and in the affidavit of Mr. Andabwa. He submitted that the application discloses a prima facie case and that the Respondent had not met the threshold section 40 of the Employment Act. He submitted that the information that the Applicant sought has been supplied in the Replying Affidavit of Elijah Sitimah, that had the information been supplied there would have been no need for the Applicant to come to court. He submitted that from the information supplied a total of 230 employees are affected and the Applicant is retained to negotiate on their behalf. He submits that there was no time for the Applicant to consult its members, that the Respondent was aware of the legal requirement but deliberately withheld information from the Applicant to deny it an opportunity to consult.

Mr. Wati further submitted that the notification of redundancy issued by the Respondent is also a notice of termination contrary to the provision of the law and that the Respondent is therefore in violation of section 40(1) of the Act.

Mr. Wati relied on the decisions of this court in **Kenya Union of Hotels Educational Institutions and Hospitals Workers (KUDHEIHA) v Aga Khan University Hospital Nairobi [2015] eKLR** and **Kenya Plantation and Agricultural Workers Union v Oserian Development Company Limited [2016] eKLR.**

Respondent's Case

Mr. Makori for the Respondent relied on the Replying Affidavit of Elijah Sitimah and grounds of opposition dated and filed on 1st December 2017. In the affidavit Mr. Sitimah he deposes that there is no collective agreement between the Applicant and the Respondent and therefore the terms of redundancy for Respondent's employees is as provided in section 40 of the Employment Act and the Protective Security Services Wages Order as amended from time to time. He deposes that the Respondent has 10564 private security guards whose services are based on demand for security services and that whenever demand reduces the Respondent adjusts its requirements accordingly. Mr. Sitimah deposes that in May 2017 the Government of Kenya increased minimum wages by 18% effective 1st May 2017 across all cadres defined in the minimum wage bracket which the Respondent had to comply with, resulting in substantial increase in wage bill. Owing to the increased operational costs the Respondent initiated price increases to pass on some of the costs to its customers.

Mr. Sitimah deposes that a number of the Respondent's customers resisted the price increases and terminated their contracts citing unaffordability and economic conditions. These include National Bank of Kenya whose contract was for 202 guards, Kenya Airways (78 guards), Mater Hospital (70 guards), Landmark (25 guards) and Jacaranda (30 guards).

He submitted that the Respondent has not breached any law as what the Applicant relied on to file the Claim and application herein are Notices of Redundancy issued to its employees in accordance with section 40(1) (a) and (c).

Mr. Makori submitted that the breach complained of is lack of extensive consultation which according to section 40(1) should come after the issuance of the notice of redundancy. He submitted that in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014]** quoted in the two authorities cited by the Applicant the Court held that consultation should follow the issuance of notification of redundancy. He submitted that the union admits meeting the Respondent and discussing the redundancy. He submitted that the employer issued notice after the discussion with the union from 5th

November 2017. He submitted that the notices in the 2 cases cited by the Applicant where there was no notice or consultation as provided for in section 40, unlike the Respondent who issued notice in accordance with the law.

Mr. Makori submitted that the Applicant has not disputed the fact in the Replying affidavit especially the loss of contracts and that section 40 envisages redundancy in such circumstances. He submitted that the Respondent has exhibited the names of the employees to be declared redundant together with the dates of their employment, starting with the last to be employed thus complying with last in first out principle in section 40(1). He submitted that the Respondent having complied with the Employment Act the Union cannot dictate to the employer, that the application is made in bad faith and intended to frustrate the employer as exhibited by the nature of the orders sought.

Mr. Makori submitted that even assuming the Respondent is in breach the principles in **Giella v Casman Brown** would favour the Respondent as the court has power to order reinstatement while at the same time the employees can be compensated adequately by way of damages. He urged the court to dismiss the application and allow the Respondent to carry out the redundancy according to the notices already issued.

Determination

I have carefully considered the grounds in support of the application as set out on the face of the motion and the supporting affidavit, I have further considered the averments in the Replying Affidavit and the submissions by counsel for the parties. The facts of the case are not disputed. What is in dispute is the interpretation of section 40(1) (a) and (c). The issue for determination is therefore whether the notices of redundancies issued by the Respondent to the employees who are to be declared redundant are in accordance with the law.

Section 40(1) provides as follows-

40. Termination on account of redundancy

> *(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*
>
> *(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
>
> *(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*
>
> *(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
>
> *(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
>
> *(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
>
> *(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
>
> *(g) the employer has paid to an employee declared redundant severance pay at the rate of not less*

than fifteen days pay for each completed year of service.

The opening words of section 40 are explicit, that an employer shall not declare employees redundant until the employer has complied with the provisions in (1) (a) to (g). On notification, (1) (a) is material as the employees are members of a union. The provision is that …***the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.*** My understanding is that the employer must give the union notice of one month and that the notice must expire before the employer can commence the process of redundancy. It is only where an employee is not a member of the union that an employer is required to give the notification directly to the employee. My further understanding is that it is during this period of notification that the union would have an opportunity to confirm if the other conditions have been met by the employer. These include the issue of seniority in time (commonly referred to as Last In First Out or LIFO), whether there has been discrimination based on union membership, whether the reasons for redundancy are genuine and whether the employer has complied with any other requirements of the law.

It is also my understanding that it is during this period that the union has the opportunity to consult with the employer and its members and, if necessary, re-negotiate the terms of redundancy with the employer. Such negotiations may be with regard to the redundancy package, the number of employees affected, the particular employees to be released such as requesting that union officials be spared, the timing of the redundancy and a host of all other issues relating to the redundancy. The nature of consultations and discussions are limitless.

My understanding is informed by the fact that the employer is required to disclose certain information to the union in the notification. Section 40(1) (a) provides for the minimum disclosure ***of the reasons for, and the extent of, the intended redundancy.*** This is the information that the Applicant sought in its letter dated 1st November 2017, which I will reproduce below for its full tenure and purport.

"1st November. 2017

Managing Director

G4S Kenya Limited

P. O. Box 30242, G.P.O

NAIROBI

Dear Sir/Madam

RE: NOTICE OF REDUNDANCY

*I acknowledge receipt of your letter dated **31st October 2017**.*

We appreciate your good gesture of inviting the Union on 31st October 2017 for the meeting. This is a clear indication of good working industrial relations that ought to exist between Employers and KNPSWU. We are happy to be partakers in the sector and we assure the G4S management that we will work together to manage any problems that may arise.

I wish to address two issues:

Firstly, we are not in objection of the redundancy exercise. However, the exercise must meet certain legal criteria before implementation. We need information on the list of the affected employees, the assignments they were undertaking, the payment package of those who are affected and the criteria used

to identify the affected employees. We hope fairness is a guiding principle in the whole exercise.

In reference to the meeting we held on 31st October 2017, we request for more time before implementation so that the management can conduct a free and fair exercise. As employers, your role is to create employment to our citizens and not rendering them jobless, we need to have good industrial relations and resort to other options, hence releasing 400 Kenyans into unemployment is a major concern for all stakeholders.

We seek for more meetings to find a lasting solution to the challenges facing the industry, so as to make sending worker home as the last avenue after all options are exhausted.

Secondly, the CBA is part of the solution to this problem. As agreed yesterday in our meeting, we need to move with urgency and give the CBA attention and conclude it in the shortest feasible time, in good faith. We urge the Cabinet Secretary in the Ministry of Labour, Social Security and Services to enforce the law on those employers who are not implementing the law. We are aware that the Government is doing business with employers in the Private Security Industry, who have disregarded the law in toto. They DO NOT abide by all the Government Acts, yet they are awarded contracts at the expense of compliant employers. This is not acceptable!

By a copy of this letter, I implore upon the Cabinet Secretary, Ministry of Labour, Social Security and Services to take necessary action in order to protect employers and workers who are threatened by such non-complying firms in the privet security industry.

Yours Sincerely,

Isaac G. M. Andabwa

GENERAL SECRETARY

Cc: Cabinet Secretary

Ministry of Labour, Social Security and Services

Labour Officer

Ministry of Labour, Social Security and Services"

The Applicant does not oppose the redundancy. It only sought certain information and reasonable accommodation to enable it carry out due diligence. Such accommodation was not given by the Respondent. The information sought was not supplied, even though the Applicant is by law entitled to the same. Instead the Respondent went ahead to issue termination notices to the employees affected. The information sought was only availed through the Replying Affidavit of Elijah Sitimah.

I have also looked at the few letters attached to the affidavit in support of the application. These are not notifications of intended redundancy as submitted by Mr. Makori. They are termination notices under section 40(1)(f) yet issued before expiry of the notification period. The letters further advise the employees that during the period of notice they will not be required to work but does not specify if this will be treated as annual leave. Sub section 40(1)(e) provides for leave due to be paid in cash and not to be served by the employee during the notice or notification period.

In the present case it would appear that notification was given to the union in a meeting called by the Respondent on 31st October 2017 and then to the employees immediately thereafter, before the minimum period of one month prescribed by law had lapsed, and before the Applicant had time to verify if the Respondent was compliant with the law. This was also in spite of the requests contained in the Applicant's letter of 1st November 2017 referred to above.

The law sets out a very elaborate process for redundancy at section 40(1) of the Employment Act. That process is fairly simple and easy to follow. Whichever way I look at the process of redundancy as undertaken by the Respondent, it appears to be faulty. The Respondent failed to give the minimum notification to the applicant before issuing letters to the affected employees. It failed to allow for consultations sought by the Applicant, it failed to make material disclosure of extent and reasons for redundancy and it failed to indicate the benefits payable to the employees affected to enable the Applicant confirm if the redundancy was in compliance with the law.

Redundancy is a very traumatising experience to the employees affected and is a matter that employers ought to handle with sensitivity. It is not only the employee and his/her family who stand to suffer but the union too, who would lose the subscriptions that come from the employees. The union must therefore also be treated with civility, the least being that the employer carries out the exercise within the confines of the law.

The authorities relied upon by the Applicant although distinguishable to the extent that in both cases there was a collective bargaining agreement (CBA) unlike in the present case, are relevant in so far as they define how a court would deal with a redundancy that is not compliant with the express provisions of the law or the CBA.

Mr. Makori referred the court to the principles in **Giella v Cassman Brown** on injunctions. In this case I find that there is a prima facie case as I have already demonstrated above. I do not think the consideration of damages or the power of the court of reinstatement would supersede the power of the court to stop the mischief before it is perpetrated. A person ought not be allowed to cause damage to another simply because that damage can be undone later or because the party can afford to pay damages. That would defeat the purpose of the very elaborate provisions of section 40 which in my opinion were intended to protect employees from the traumatic experience of sudden redundancy, which no money can compensate. It would also not be reasonable for the court to allow the redundancy because it can reinstate the employees as the circumstances for reinstatement are very specifically set out in Section 49 of the Employment Act.

For the foregoing reasons, I find that the Applicant has proved that it is entitled to the orders sought and hereby restrain the Respondent from continuing with the redundancy based on the notices issued to the employees which were in contravention of Section 40 (1) (a) of the Employment Act. The notice to the applicant is however valid but the respondent must give the applicant audience to discuss the redundancy in terms of the letter dated 1st November 2017 before issuing termination notice to the employees.

Having succeeded in the application, the Applicant shall have costs of the application.

Dated, delivered and signed in Nairobi this 11th day of December 2017

Maureen Onyango

Judge

In the presence of:

For Applicant................................

For Respondent............................

Court Clerk: Lindsay