



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1078 OF 2014

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

VERSUS

ERNST & YOUNG LIQUIDATORS FOR

COATES BROTHERS EA LIMITED.....RESPONDENT

&

CAUSE NO. 1310 OF 2014

COATES BROTHERS EA LIMITED (UNDER LIQUIDATION).....CLAIMANT

VERSUS

KENYA CHEMICAL & ALLIED WORKERS UNION.....RESPONDENT

JUDGMENT

1. The Claimant sought resolution of the dispute between it and the Respondent regarding the payment of the final dues of the former employees of Coates Brothers EA Limited which was under liquidation. The Respondent in cause 1078 of 2014 also sued the Claimant in cause 1310 of 2014. In view of the cause of action being the same I consolidated the two matters for disposal as any decision in one will have a direct bearing on the other suit. In the two cases the parties are contesting the mode and effect of the termination of the employees. On one hand the Kenya Chemical and Allied Workers Union (hereinafter 'Claimant') averred that the termination was on account of redundancy and the employees were therefore entitled to payment of redundancy dues while Coates Brothers EA Limited (under liquidation) (hereinafter 'Respondent') asserted the termination was on account of insolvency hence not one to which redundancy dues could be paid.
2. The issues framed by the Claimant were as follows:-
 - i. Are the employees of the Respondent whose contracts of service was terminated entitled to severance pay in accordance with the Collective Bargaining Agreement?
 - ii. The Respondent having calculated and forwarded to the employees severance payment, are they estopped from refusing to pay the said severance pay?
 - iii. Who should meet the costs of this suit.
3. The Claimant and Respondent agreed to file submissions to have these issues resolved. The

Claimant filed final submissions on 12th January 2015 while the Respondent filed submissions on 22nd January 2015.

4. The Claimant submits that the Court should uphold the conciliators report and order the payment of redundancy dues of 39,000,000/- as per the CBA in force at the time of redundancy. The Claimant urged the Court to find that the Respondent has violated Section 276 of the Companies Act and compel the Respondent to pay the Claimant employee benefits with interest at Court rates. As way of giving background to the dispute the Claimants submitted that the Claimant union and Coates Brothers EA Limited entered into an Collective Bargaining Agreement registered before the Court on 8th December 2011 and the terms provided that the CBA would apply to all unionisable employees of the company. The Claimant submitted that the Respondent calculated the benefits accruing to each employee and notified each of the employees and the employees were surprised to see the Respondent purport to renege on the redundancy payments. The Claimants submit that on the basis of the calculations that they had legitimate expectation that they would receive the redundancy benefits. The renegeing caused the Claimant to refer the dispute to the Minister and the conciliator appointed in his report of 15th May 2014 made findings and recommended that the termination amounted to a redundancy and the company was willing and had intention to pay until it was advised otherwise. The Claimant submitted that the Conciliator held so having found the workers were rendered redundant by the winding up of Coates Brothers (EA) Limited and he recommended that the liquidator pays the redundancy dues as per the CBA. The Claimant submitted the employees lost their employment en mass through no fault of their own and as such were declared redundant and this was not a case of normal termination like in instances where employees are terminated for misconduct, absenteeism, intoxication etc. The Claimant submitted that to allow the nonpayment of the redundancy dues would amount to discrimination contrary to Article 27 of the Constitution as some employees had already received the terminal dues based on the calculations by the company. The Claimant submitted that to permit this would amount to bad labour practice contrary to Article 41.
5. The Respondent on its part submitted that in November 2011 Sun Chemical Group Cooperatiff U.A filed a winding up petition on account of inability to clear its indebtedness and a winding up order was issued in Winding Up Cause No. 32 of 2011 and a Liquidator appointed. It was submitted that the Liquidator informed the employees that dues would be paid either according to the existing labour laws or the Collective Bargaining Agreement and on 26th February 2013 an agreement was reached on 26th April 2013 and in August 2013 a dispute arose as to whether the employees were entitled to redundancy benefits. The Respondent submitted that the termination was on account of insolvency and hence the redundancy clause could not be invoked as far as these employees were concerned. The Respondent thus submitted that the Claimant was not entitled to the orders sought.
6. The Conciliator in his report of 15th May 2014 held the termination to be a redundancy and the Respondent was liable to pay the redundancy dues as per the CBA in force at the time. This is the main issue that is in contention.
7. In the Employment Act Sections 66 and 67 provide as follows:-
 - 66.(1) Where on an application made to him in writing by an employee or his representative the Minister is satisfied that-
 - (a) the employer of an employee has become insolvent,
 - (b) the employment of the employee has been terminated, and
 - (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.

67. An employer is insolvent for the purposes of this Part-

(a) if the employer is a person who?

(i) has been adjudged bankrupt or has made a composition or arrangement with his creditors, or

(ii) has died and his estate is to be administered in accordance with the Law of Succession Act;

(b) if the employer is a company?

(i) a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed, with respect to the company; or

(ii) a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

8. The Employment Act defines redundancy as follows:-

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

9. Clearly, the employees of the Respondent lost their employment involuntarily. Does this fit within the definition of redundancy? Are the employees entitled to severance pay if they were declared redundant? The Employment Act makes provision for severance pay as follows:-

40.(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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part IX in which case that Part shall be applicable.

10. In the United Kingdom redundancy is deemed to arise if the dismissal is wholly or mainly attributable to the fact that the [employer](#) has ceased or intends to cease carrying on the business for the purposes of which the employee was employed, or that the employer wishes to cease carrying on that business in the place where the employee was employed, or the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

11. Does termination on account of insolvency of the employees of Coates Brothers EA thus in effect amount to redundancy within the Kenyan context? I am inclined to think that the broad definition of the Employment Act which holds redundancy to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer or where the services of an employee are superfluous or the practice commonly known as abolition of office, job or occupation and loss of employment to encompass this meaning of the term. In the case before me, the Claimant alleges the Respondent began the process of declaring redundancies and after doing so issued notification of payments for the same. The company went as far as prepare payslips indicating the dues each employee was entitled to. In the attachments before the Court, it is clear a sum was factored in which took care of the redundancy payment set out in the collective bargain agreement. It is only later that this was stated not to be payable.

12. Section 40 of the Employment Act sets out what is payable and when this is payable. Section 40(1) is inapplicable where insolvency occurs and makes provision for such scenarios in Part IX of the Act. The reference to Part IX is erroneous as the applicable part of the Act is Part VIII headed INSOLVENCY OF EMPLOYER. Sections 66 and 69 of that part provide as follows:-

66.(1) Where on an application made to him in writing by an employee or his representative the Minister is satisfied that-

(a) the employer of an employee has become insolvent, ?

(b) the employment of the employee has been terminated, and ?

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, ?

the Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.

69.(1) The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt is referable to a period of time, shall not exceed?

(a) ten thousand shillings or one half of the monthly remuneration whichever is greater in respect of any one month payable; or ?

(b) in respect of a shorter period an amount proportionate to the shorter period based on

the amount payable under paragraph (a). ?

(2) The Minister may, on the advise of the Board, by Order in the Gazette, vary the limit specified in subsection (1).

13.The employer was thus right in holding the position supported by Section 40(2) of the Employment Act. Section 66 and 69 set out the instances when the payment can be made under the direction or order of the Cabinet Secretary. The payment should not exceed Kshs. 10,000/- and he can only exceed this amount on advice of the Board and upon gazettelement.

14.Though a legitimate expectation was raised on receipt of the final dues computation, the employee cannot compel the employer or the Minister to order the payment of severance pay. This Court is therefore unable to disturb the present stalemate relating to the severance pay dispute. The Respondent is thus not bound to make any payment on account of severance pay though the employees merit payment of their other dues. With respect, the Conciliator fell into error by decreeing that the severance pay was payable as there is no support for that position under the Employment Act.

15.Before I depart from this Judgment, the Cabinet Secretary for Labour has, as far as I could establish, not made any rules under Section 40(3) of the Employment Act. Section 40(3) of the Act provides as follows:-

40.(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

41.The Court directs that a copy of this decision be availed by the Registrar to the Cabinet Secretary for Labour for consideration granted the possibility of future insolvencies.

Orders accordingly.

Dated and delivered at Nairobi this **16th** day of **March** 2015

Nzioki wa Makau

JUDGE