REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 517 OF 2014

BANKING, INSURANCE & FINANCE UNION (K) CLAIMANT

V

COSMOPOLITAN SACCHO SOCIETY LTD RESPONDENT

JUDGMENT

1. Banking, Insurance & Finance Union (K), (Union) filed a Memorandum of Claim against Cosmopolitan Saccho Society Ltd (Respondent) on 14 October 2014. The issues in dispute were stated as Refusal/Failure by Management to:

    1. Remit Union dues

    2. Sign Recognition Agreement.

2. The Respondent filed a Response on 4 December 2014, and on 5 December 2015, the parties sought a hearing date but also indicated that they were willing to negotiate.
3. The Court fixed the Cause for hearing on 18 March 2015. When the Cause was called up for hearing, the Union informed the Court that it would not call any witnesses but would rely on the record and submissions.
4. The Respondent also informed the Court that it would not call any witnesses.
5. The Court therefore, with the agreement of the parties directed the Union to file and serve its submissions before 25 March 2015, and the Respondent was to file its submissions before 8 April 2015.
6. The Union filed its submissions on 25 March 2015 but the Respondent's submissions had not reached the file by the time of preparing this judgment. No explanation has been offered for the failure.

Union's case

7. The Union's case is that it is registered to represent unionisable employees in Banks, Financial institutions, insurance, savings and credit societies and that the Respondent is a registered co-operative society.
8. On 29 January 2014, the Union wrote an introductory letter to the Respondent and this prompted the Respondent to issue a notice/ultimatum dated 1 February 2014 to its employees seeking to know whether they intended to confirm membership of the Union.
9. On or through a letter dated 4 February 2014, the Union forwarded to the Respondent check-off forms in respect of some 35 employees who had joined it.
10. Meanwhile from around 20 February 2014 to about 3 March 2014, there were a flurry of resignation letters from some 19 employees addressed to the Respondent.

11. The Union sent a recognition agreement to the Respondent on 13 February 2014, but the Respondent refused to grant it recognition and on 12 March 2014, the Respondent drew the attention of the Union to resignations by those employees who had been recruited.
12. The Union, seeing the turn of events reported a trade dispute to the Cabinet Secretary for Labour through a letter dated 17 March 2014.
13. The Cabinet Secretary accepted the dispute and appointed a conciliator. In the process of conciliation, the Union contends the Respondents hijacked a meeting it was holding with its members and another round of resignations ensued.
14. Ultimately, the Conciliator prepared a report dated 13 August 2014, and in which he made findings to the effect that the parties did not negotiate in good faith and he declared the dispute unresolved.
15. According to the Union, it had recruited more than a simple majority of the Respondent's unionisable employees and there was no rival union and it was entitled to recognition. It further submitted that the Respondent should commence deduction of union subscriptions.
16. Further, the Union submitted that the Respondent had forced, intimidated and coerced its members to withdraw from the Union and this was contrary to the law.

Respondent's case

17. As already alluded to, the Respondent failed to file its submissions. The Court will however consider its case as set out in the Response.
18. The Respondent contended that the Union had not demonstrated how it recruited its employees from its 3 branches and that the check-off forms included 10 management staff.
19. The Respondent denied receiving a copy of the recognition agreement and further contended that the Union had not forwarded to it a proper check-off list.
20. The Respondent further contended that the Union abandoned conciliation prematurely.

Evaluation

21. There are several disputed facts which merited presentation of evidence and the testing of such evidence, but the parties opted not to follow that route.
22. The Court has noted the report and findings of the Conciliator. It is apparent there were no good faith negotiations between the two parties.
23. Good faith is an essential ingredient of industrial/labour relations. Hardball tactics can never help the Union or the employer in industrial relations. Where it is proved that a party is playing hardball, the Court can always make appropriate and effective orders.
24. Article 41 of the Constitution has underpinned the right of all workers to form, join or participate in the activities and programmes of a trade union. Employees further have a right to freedom of association.
25. Trade Unions *qua* trade unions also have their rights. The embodiment of the right is the right to organise and engage in collective bargaining.
26. A trade union, as part of its right to organise has a right of access to an employer's premises in pursuit of its lawful activities which include recruitment and meeting of employees outside working hours. That is the import of section 56 of the Labour Relations Act.
27. Employers, such as the Respondent also have constitutionally guaranteed rights. These rights are not in any way subordinate to the rights of employees and or trade unions. The rights must be balanced harmoniously, hence the need for good faith.
28. The Court has been troubled by some events in the attempted relationship, and exercise of the rights of the Union and those employees who were allegedly recruited.
29. The events include the mass resignations from the Union around the same time that the Union was organising. It is not normal in industrial relationships for these type of resignations. Something or someone must have prompted the resignations and this merits investigations.
30. That investigation may not be carried out by the Court under the circumstances under which the parties herein pleaded and conducted their respective cases.
31. One of the principal objectives for the establishment of this Court (section 4 of the Employment and Labour Relations Court Act) was to further, secure and facilitate maintenance of good

employment and labour relations. In that regard, the Court has a role which transcends the role of other Court's in this jurisdiction.

32. The Commissioner of Labour has been vested by immense powers. The Court can use the Commissioner of Labour and or his delegate to carry out investigations.
33. The Court would in the circumstances of this case direct the Commissioner of Labour or his appointee to commence forthwith investigations into how the mass resignations took place and make a report which should be made available to the parties. The investigations should include whether and how many of the Respondents employees are desirous of joining the Union or any other union.
34. During such investigations, the Respondent should allow confidential interviews with the unionisable employees.

Conclusion and Orders

35. From the foregoing, the Court directs and orders the Commissioner for Labour to carry out investigations into how the mass resignations from the Union occurred and further establish the wishes of the employees as to their right to form, join or participate in the activities of the Union or any other union.
36. The report of the investigations should be furnished to the parties and the Court within 45 days from today.
37. The Union should serve a copy of this judgment upon the office of the Commissioner of Labour and this matter will be mentioned at a date convenient to the parties.
38. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 29th day of May 2015.

Radido Stephen

Judge

Appearances

For Union Mr. Mwaura, Banking, Insurance & Finance Union (Kenya)

For Respondent Mr. Mbeche instructed by Obura, Mbeche & Co. Advocates

Court Assistant Nixon