



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 340 OF 2014

BETWEEN

TAILORS AND TEXTILES WORKERS UNIONCLAIMANT

VERSUS

ASHTON APPARELS [EPZ] LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Wycliffe Omondi and Mr. Bwonyote, Industrial Relations Officers for the Claimant

Mr. John Makokha Advocate instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: TRADE UNION DUES, IN A UNION SHOP AGREEMENT

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. This Claim was initiated by the Claimant Union as Industrial Court at Nairobi, Cause Number 1597 of 2011. It was transferred to the Court at Mombasa and given the present registration. The Claimant states the Respondent has failed to deduct Trade Union Dues from the Respondent's Employees, and remit the same to the Claimant.
2. Parties signed a Recognition Agreement on 5th November 2010. The Agreement states under clause 2 [a] that the Respondent affords full recognition to the Union, as the properly constituted and representative body, and sole Labour Organization, representing the interests of Workers who are in the Company employment.
3. Clause 2 [c] contains a provision for Union Security. The Parties agree to enter into Union Shop System, which shall mean any Employee, employed by the Company, after completion of probation, automatically becomes a Member of the Union.

4. The Claimant states it wrote to the Respondent demands for Trade Union dues on 15th November 2009, 30th June 2010, 24th November 2010 and 13th May 2011 requesting the Respondent to give effect to check off system. The Respondent did not honour the request. Parties did not resolve the dispute at their own level. The Claimant reported the existence of the dispute to the Labour Minister. The Parties were not able to agree upon conciliation, and the Conciliator issued the Certificate of Disagreement dated 1st August 2011, paving way for referral of the dispute to the Court.

5. The Claimant prays for orders compelling the Respondent to deduct Trade Union Dues from the Union Members and remit to the Claimant; costs of the Claim ; and any other suitable relief.

6. The Respondent filed its Statement of Response on 1st November 2012. It argues that the Parties have no valid Recognition Agreement. The Recognition Agreement attached to the Claim was obtained through fraudulent misrepresentation by the Claimant. The fraud is under the investigation of the Police at Changamwe in Mombasa. The names submitted by the Claimant to the Respondent as being Union Members were inauthentic. Signatures were forged. Recognition followed an ex parte Award in **Industrial Court at Nairobi Cause Number 40[N] of 2008** between the Parties. Had the Respondent participated in the proceedings in that Cause, recognition would not have been granted, as the Claimant has no Members in the Respondent Company to satisfy Section 54 of the Labour Relations Act Number 14 of 2007. The instant Claim is made solely to harass the Respondent Company.

7. On 6th February 2015 the Parties agreed the dispute be considered and decision of the Court made, on the strength of their Pleadings, Documents and Submissions. Mr. Makokha informed the Court the Respondent has been paying Trade Union Dues. The only problem hindering the resolution of the dispute at the Parties' level is the Claimant's Union insistence that deductions be made and remitted to the Claimant, with regard to Non- Union Members. If this is done, it would result in the Non- Union Members being forced into compulsory Membership, which is unconstitutional. Mr. Omondi argues such deductions must be made and remitted in accordance with the Recognition Agreement, which embraces Union Shop System.

8. The Respondent filed its Closing Submissions on the 9th March 2015. The Claimant does not seem to have filed its Closing Submissions.

9. The Respondent submits that Clauses 2 [a] and 2 [c] of the Recognition Agreement, purporting to confer automatic Membership of the Claimant Union to all Employees, without their consent, and therefore allow for deduction of Trade Union dues from their salaries, are not valid.

10. Section 4[1] [b] and [c] of the Labour Relations Act 2007 allows every Employee the right to join or leave a Trade Union. The Recognition Agreement takes away this right. To force an Employee to join a Trade Union is an infringement of the Employee's constitutional right to fair labour practices and violates freedom of association.

11. The submission is based on Industrial Court of Kenya at Nairobi case between **Scientific Research International Technical & Allied Workers Union v. Kenya Agricultural Research Institute & Another [2013] e-KLR**, where the Court stated:

“Recognition of Trade Unions rests on freedom of association. Employees have the right to join and leave Trade Unions. Recruitment is a continuous process. Even where an Employer has formally granted Trade Union recognition, Employees belonging to that recognized Trade Union are not barred by any law from shifting allegiance to another Trade Union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; Just as the right of recognition includes the right of de-recognition. Employees look at the Trade Union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one Trade Union.”

12. This the Respondent submits was reiterated by the same Court in **Aviation & Allied Workers Union v. Air Kenya Express Limited & Another** where the Court concluded:

“The law acknowledges that freedom of association includes the right of an Employee to belong, or not belong to a Trade Union. An Employee can associate and dissociate. It is stated that the right to belong to the Union must be accompanied by the right not to belong, just as much as freedom of expression, must include the right to silence.”

13. The Respondent urges the Court to find clause 2 [c] of the Recognition Agreement unconstitutional, invalid and void *ab initio*, with no legal effect, and therefore unenforceable.

14. With regard to acknowledged Unionized Members, the Respondent submits it has been deducting and remitting their Trade Union dues. The numbers of Unionized Members varies, because some of them work on fixed term contracts. It is unlawful to demand the Respondent deducts from Non- Union Members Trade Union dues, and pays the same to the Claimant Union. The Court should order the Respondent to continue deducting and remitting Trade Union dues, only in respect of the signed up Union Members.

15. The prayer for costs to the Claimant has no merit as the Claimant has not established its case to the required standard. Under the prayer for any other suitable relief, the Respondent submits the Court should invoke its inherent powers under the Industrial Court Act 2011, and declare clause 2 [c] of the Recognition Agreement unconstitutional, invalid and void, for violating the Employees’ fundamental rights guaranteed and protected under the Constitution.

16. The issues raised in this dispute may be summarized as follows:-

I. Whether there is in place a valid Recognition Agreement between the Parties.

II. Whether that Agreement violates the Employees’ freedom of association under the Labour Relations Act 2007 and the Constitution of Kenya, and whether the offensive clause should be declared unconstitutional, void and unenforceable.

III. Whether the Respondent should be compelled to deduct and remit Trade Union dues, with regard to Employees who are not signed up Members of the Claimant Union.

The Court Finds:-

17. The Court gave an Award in the **Industrial Court at Nairobi Cause Number 40[N] of 2008** directing the Respondent to grant the Claimant Union recognition. That decision has not been shown to have been overturned. It is inappropriate for the Respondent to argue that if it was heard in that Cause, recognition would not have been granted. The opportunity was given to the Respondent to challenge the Claim, and to appeal. The decision stands.

18. The Parties went on to sign a Recognition Agreement. The Court found this Agreement was executed by the Parties’ representatives, although signed not in very clear circumstances after the Award was made in Cause Number 40 [N] of 2008.

19. There is a formally valid Recognition Agreement in place. It is executed by the Parties, and has the fundamental clauses required of a Recognition Agreement. It is dated and signed, and provides for the modification and termination of the Recognition Agreement.

20. The Respondent’s position that the Agreement was obtained through fraud, and is under the investigation of the Police, does not affect the formal validity of the Agreement. If the Respondent feels the Recognition Agreement it has with the Claimant lacks formal validity, or resulted from fraud, it would have sought the Court to revoke or terminate the Agreement at the first instance or at the very least, approached the National Labour Board for termination or revocation, rather than engage in unending police investigations. There is a valid Recognition Agreement between the Parties.

21. Clause 2 [a] confers the Claimant Union the right of a Sole Collective Bargaining Agent. It mandates

the Claimant to represent the interest of Employees who are in the employment of the Company. The clause is not restricted to representation of Union Members; it is a broadly structured clause, covering all the Unionisable Employees, as opposed to the Unionized Employees.

22. Clause 2 [c] adopts the Union Shop type of Union Security Agreement. Under the **Union Shop**, the Employer agrees to hire either Union or Non- Union Members. All Non-Union Employees however, must become Union Members within a specified period, or lose their jobs. The clause states that on completion of probation, an Employee automatically becomes a Member of the Union.

23. Other forms of Union Security Agreements include the **Agency Shop, the Closed Shop and the Open Shop**.

24. The **Agency Shop** allows an Employer to hire Union and Non- Union Members. Employees need not join the Union, to remain employed. Non- Union Members may however, be required to pay agency fees, to cover the costs incurred by the Trade Union, in negotiating the Collective Bargaining Agreement. It must be noted that Trade Unions in most cases negotiate CBAs which cover all the Unionisable Employees at the workplace, and not merely those who are signed up Members of the Union.

25. The **Closed Shop** requires the Employer to hire Union Members only. Employees must remain as Union Members, to retain employment. Union Membership is a prequalification for employment, and a condition for continued employment.

26. The **Open Shop** is also known as the merit shop. Employees are not required to join or remain in the Trade Union, as a condition of hiring or continued employment.

27. Union Security Agreements are meant to distribute fairly, the costs incurred by Trade Unions in collective bargaining. Since CBAs benefit Members and Non- Members, it is argued there should be no free- riders. The basic rationale for Union Security Agreements is to ensure every Employee who benefits from CBAs, meet their fair share of the costs of representation. Employers, who support these arrangements, also argue such Agreements help in ensuring Employers are not compelled to have multiple negotiations on the terms and conditions of employment of similarly situated Employees.

28. The legality and constitutionality of Union Security Agreements, in particular the Union Shop and the Closed Shop have been raised in many labour jurisdictions. They are thought to infringe the right to work and freedom of association. Courts have held that the Union Shop distributes fairly the costs of the representative activities, among those who benefit, and counteracts the incentive that Employees might otherwise become free-riders, and refuse to contribute to the Union, while obtaining benefits of Union representation that accrues to all Employees.

29. Section 4 [1] of the Labour Relations Act 2007 grants every Employee the right to participate in the forming of a Trade Union or Federation of Trade Unions; join a Trade Union; or leave a Trade Union.

30. This law is anchored on Articles 36 and 41 of the Constitution. Article 36[1] grants every Person the right to freedom of association, which includes the right to form, join or participate in the activities of an Association of any kind. Article 36 [2] states that, no Person shall be compelled to join an Association of any kind. Article 41 [2] [c] grants every Worker the right to form, join or participate in the activities and programmes of a Trade Union.

31. As submitted by the Respondent, the Industrial Court in the 2 decisions cited in paragraphs 11 and 12 above, held that freedom of association encompasses the freedom to dissociate.

32. Union Shop Agreements tend to compel Employees into compulsory Trade Union Membership. They are in violation of the Constitution and the Labour Relations Act. They limit freedom of association and the Employee's right to work.

33. Section 5[2] of the Labour Relations Act prohibits Union Shop Agreements. It provides that:-

“No Person shall do, or threaten to do any of the following:

[a] require an Employee or Person seeking employment not to become, or become, a Member of a Trade Union, or to give up Membership of any Trade Union.”

34. Clause 2[c] of the Recognition Agreement between the Parties requires Employees taken in by the Respondent, to become automatic Members of the Union on completing probation. It in effect requires Employees to take compulsory Membership of the Claimant Trade Union. All Employees become Members and are obliged to pay Membership subscription fees through check off system.

35. Our law, while creating room for the Agency Shop, does not allow for Union Shop and Closed Shop Agreements.

36. Trade Union Security is guaranteed through Agency Shop, under Section 49 of the Labour Relations Act. This law states that Employees who are not Members of the Union, but who are covered under the CBA, may be required to pay agency fees. This is done after the Labour Minister has issued an order for agency fees. Agency fees shall not exceed the rates payable as Trade Union dues.

37. The protection granted to the Trade Union under Section 49 aims at combating the problem of free-riders. Under Section 49 [5] where a Member of a Trade Union resigns from the Trade Union, he becomes liable to pay agency fees to the Trade Union.

38. There is no need for Parties to resort to Union Shop and Closed Shop Agreements. Under the Labour Relations Act, the problem of free riders is combated through agency fees.

39. The law distinguishes between Trade Union dues and agency fees. It is an important distinction, which recognizes the need to respect freedom of association and the right to work, while at the same time, encouraging the right of the Trade Unions to have the costs of their representative activities shared out fairly amongst all the beneficiaries.

40. Section 48 of the Act regulates payment of Trade Union dues, while Section 49 as seen above deals with agency fees. Section 48 allows for deduction of Trade Union dues from the wages of Trade Union Members, and for the payment of these dues to the Trade Union. Section 48 [1] defines Trade Union dues as the regular subscription required to be paid to a Trade Union by a Member of the Trade Union, as a condition of Membership.

41. Section 48 [6] stipulates that Trade Union dues are not to be made in respect of an Employee who has resigned from the Trade Union in writing. As seen under the law on agency fees, such an Employee however, becomes liable to pay agency fees, as opposed to membership subscription fees.

42. The Parties therefore had no justifiable reason to dabble in Union Shop and Closed Shop, compelling Employees into Trade Union Membership, while the mischief sought to be addressed through such an arrangement, is adequately addressed under the Agency Shop.

43. The Claimant can recover the costs of collectively representing Unionisable Employees of the Respondent, who are not its signed up Members, through an order for agency fees. The resort to Union Shop or Closed Shop clearly violates the fundamental rights of the Employees of the Respondent. It would indeed make no sense for the Claimant Union to recruit Members and prepare Check-Off Lists, if Union Membership is automatic. ***The Claimant is at liberty to enforce an order for agency fees, rather than enforce a Union Shop Agreement. It is declared clause 2[c] of the Parties' Recognition Agreement is unlawful, unconstitutional, void and unenforceable.***

44. That said, there is evidence the Claimant Union has submitted more names than the number acknowledged by the Respondent in the lists contained in the Respondent's Further List and Bundle of Documents filed on 5th February 2015. The lists show an average of about 175 Employees, a number highly inconsistent with the Check-Off Lists. The Respondent explained this stating that many

Employees are on fixed term contracts. Trade Union Dues must be remitted, irrespective of whether Employees are on fixed term contracts. ***The Respondent shall deduct and remit Trade Union dues with respect to all signed up Members of the Claimant Union. No order on the costs.***

IT IS ORDERED:-

a) The Claimant is at liberty to enforce an order for agency fees, rather than enforce a Union Shop Agreement.

b)It is declared clause 2 [c] of the Recognition Agreement is unlawful, unconstitutional, void and unenforceable.

c)The Respondent shall deduct and remit trade union dues with respect to all the signed up Members of the Claimant Union.

d)No order on the costs

Dated and delivered at Mombasa this 29th day of May 2015

James Rika

Judge