



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 722 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 13th May, 2015)

KENYA UNION OF COMMERCIAL FOOD & ALLIED

WORKERS (K.U.C.F & A.W)CLAIMANT

VERSUS

SANPAC AFRICA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein is a registered Trade Union registered under the Law of Kenya. The Respondent on the other hand is a company registered in Kenya and registered under the companies Act Laws of Kenya. Upto year 2007, the Respondent traded as Santowels Limited and were engaged in production of packaging materials.

Vide a statement of claim filed in court on 30/4/2012 the Claimant avers that the Respondent has refused to negotiate a Collective Bargaining Agreement hence this claim.

2. The Claimant avers that they have a valid recognition agreement pursuant to which several Collective Bargaining Agreements have been concluded the last one being one that expired on 31st December 2010 **Appendix SK 1**.

On 24th February 2011, the Claimants forwarded to the Respondents its proposals for the review of the agreement aforementioned to cover the time of service for the period 1st January 2011 to 31st December 2012 (**Appendix SK 2**).

The Claimants further avers that the Respondent on their part failed to make their counter proposals as envisaged and several attempts by the Claimants to engage them in negotiations were unsuccessful.

3. The Claimants avers that on 21st June 2011, they reported the existence of a trade dispute to the Minister for Labour on “refusal by the employer to negotiate a Collective Bargaining Agreement” as provided for under Section 62 of the Labour Relations Act 2007 as per **Appendix 3**. This prompted the Respondent to forward counter proposal – **Appendix 4**.

4. Conciliator was appointed by the Minister on 24th June 2011 as per **Appendix SK 5**. An attempt by the conciliator to resolve the dispute however failed promoting this cause where Claimants want their proposals in the proposed Collective Bargaining Agreement be found reasonable by this

court and so be ordered to apply.

The Respondent's Case

5. On the 27th February 2013, the Respondents filed their Memorandum of Response through the Federation of Kenya Employers. Their evidence was that there were various attempts to negotiate the Collective Bargaining Agreement and various issues were agreed on and concluded including items listed under paragraph 17 of their defence vis preamble, application, probation, acting allowance, promotion, hours of work, maternity leave, sick leave, injury at work, transfer, summary dismissal, staff uniforms, warning for minor offences, certificate of service, leave travelling allowance, redundancy, retirement, night shift allowance, substance allowance and suspension.

That the issues that were left outstanding were general wages increase, house allowance, death of an employee, meals allowance and commuter allowance.

6. The Respondents further aver that they have not refused to negotiate the Collective Bargaining Agreement and are now ready and willing to negotiate the remaining issues.

They contend that the negotiations were hampered by various factors including use of abusive language by the General Secretary, slow take off, absence of parties and even resignation of one member from the union at one point.

They submit that the claim is bad in law and against the spirit of Industrial Relations which lacks good faith in negotiations. They want the claim dismissed accordingly.

7. In the meantime the Central and Planning and Monitoring Unit filed a report on this matter on 3/4/2014 for which the parties have made their submissions. Each party has proposed what they wish this court to adopt though.

Issues of determination

8. Having considered the submissions of the parties, it is apparent that the parties had considerably negotiated their Collective Bargaining Agreement but the negotiations stalled at one point due to various reasons.

From the proposals and counter proposals several issues had already been agreed upon. The agreed upon issues as per the minutes of 1/11/2011 were as follows: - Collective Bargaining Agreement title applications, clause 2 on the law, probationary period, acting allowance, promotion, hours of work and overtime.

9. Issues not agreed upon include termination of service period, payment of wages, annual leave, house allowance, night shift allowance, redundancy notice, medical benefit, death of employee, retirement age and terms of service.

The Claimant also proposed new clauses to be introduced touching on meals allowance, commuter allowance, pension scheme, job evaluation, general wages, shift from Mavoko to Nairobi, constitution of occupational safety and health committee, maternity/paternity, leave travelling allowance and subsistence allowance. On these last allowances, the Respondent proposes 3 months maternity leave, 2 months paternity leave, leave travelling allowance 3,000/= and subsistence allowance of 700/=.

10. Under Section 54 of Labour Relations Act states as follows:-

“ (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple

majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

(4) The Minister may, after consultation with the Board, publish a model recognition agreement.

(5) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency."

11. This dispute has been referred to court by virtue of Section 54(7) of Labour Relations Act as the parties have failed to agree after conciliation.

Under Section 54(8) of Labour Relations Act:

"(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister."

Under Section 57(1) of Labour Relations Act:

"(1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement."

12. The negotiations having stalled, this court has a duty to aid the parties to reach a reasonable settlement. This court is however alive to the provisions of Article 41(5) of the Constitution:

"Every trade union, employers' organisation and employer has the right to engage in collective bargaining."

This right of Collective Bargaining Agreement is a right given to the parties wherein they have negotiated and agree without courts interference. This right which is a right for every party entering a contract is a right the parties should exercise without coercion/force.

13. The parties must voluntarily but with minimum supervision agree on the terms of the contract.

14. In this case, the parties herein have asked this court to insert certain provisions in the agreement they are negotiating as they have failed to agree. To do this is to ask this court to decent in the arena of sitting in the parties boardrooms and telling the employer and the employees what to do or not do. How then will the court sit again and register a negotiated Collective Bargaining Agreement having been part of the boardroom negotiations. How will this court adjudicate in any dispute where the Collective Bargaining Agreement has to be negotiated? This is tantamount to being a Judge in your own course.

15.I therefore decline to insert any provisions in the Collective Bargaining Agreement as submitted.

16.However it is this court's duty to ensure that negotiations do proceed. The parties having agreed considerably on most aspects of the intended Collective Bargaining Agreement, they must progress and complete the stalled negotiations and agree on the unresolved issues.

17.I therefore order that the Claimant and Respondent do hence forth negotiate and conclude a Collective Bargaining Agreement within 60 days from the date of this judgment and report back to court accordingly.

It is so ordered.

Dated and delivered in open Court this 13th May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

Nyumba for Claimant

Opolo for Respondent