



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 693 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 2nd June, 2015)

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

VERSUS

HENKEL CHEMICALS (E.A) LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The claim before court was filed by the Claimants herein on 17/6/2014 through their national General Secretary. The Claimant is a Labour Organization registered on 11th August 1958 to represent the interest of Kenyan workers engaged on working in the Chemical and Allied Industry. The Respondent on the other hand is a Manufacturing Company situated in Ruiru Nairobi engaged in the business of manufacturing Fibre Glass Products. The Claimant and Respondent have a recognition agreement and have negotiated other Collective Bargaining Agreements prior to the one in dispute.
2. The issue in dispute in this case concerns wage increase and effective date of a Collective Bargaining Agreement. The Claimant's case is that they have engaged in negotiations with the Respondent and send proposals for amendments of the outgoing Collective Bargaining Agreement through a letter dated 28th February 2012 (Appendix 1). The Respondents responded to the Claimants proposals stating that at the time the management was not in a position to enter into any talk with the Claimants until some internal problems were sorted out.
3. The Claimants submitted that as a result of Respondents stand, the Claimants reported the existence of a trade dispute to the Minister of Labour on 14/5/2012 (Appendix 3). A conciliator was appointed on 22/6/2012 vide letter (Appendix 4).
4. Before the conciliation could take place, the parties agreed voluntarily to negotiate as confirmed by the Respondents letter dated 24th August 2012 (Appendix 5). Several meetings were held on 11th December 2012 where certain issues were agreed upon as per the Claimants claim. It is the Claimants position that the parties agreed that the Claimant should prepare a draft Collective Bargaining Agreement which they did and forwarded to the Respondent on 19/12/2012 Appendix 7). The Respondents failed to sign it prompting the Claimants to send a reminder (Appendix 8).
5. Vide a letter Appendix 9, however on 21/3/2013, the Respondents wrote back stating their inability to sign the draft due to their succession problem at the factory. Efforts made to have the Respondent sign the Collective Bargaining Agreement bore no fruit and this promoted the Claimants to ask the conciliator to proceed and convene a meeting to iron out the problem. The

conciliator failed to concile the parties and wrote his report with his recommendation on 16/9/2013 referring the dispute to the court.

6. The Claimants have submitted that the issue in dispute is wage increase and effective date of the Collective Bargaining Agreement which the parties had initially agreed upon. The Claimants want the court to order that the matter negotiated upon be reduced into a Collective Bargaining Agreement taking into consideration the cost of living and general economic trends. They want Respondents compelled to sign the Collective Bargaining Agreement as drawn by the Claimants.

Respondent's case

7. The Respondents filed their Memorandum of Response on 21/8/2014 through the Federation of Kenya Employers, FKE. It is the Respondents position that they are a company who manufacture and distribute fibre glass products, glues, adhesives, care products, pool chemicals and accessories and their main customers are hotels and general hospitality industry at the coast region. The Respondents further aver that they had previously signed a Collective Bargaining Agreement with the Claimants which expired in February 2006. That on 28/2/2012, the Claimant served them with their proposals for amendment of the Collective Bargaining Agreement where they made several proposals amongst them a 30% general wage increase.

The Respondents contend that the proposal was not acceptable to them considering the hard economic times that they were going through at the time.

8. The Respondents further aver that the Claimants reported a trade dispute but it was not resolved due to the Claimants hard-line stand. They further content that they were affected by the hard economic conditions facing the hospitality industry at large and are in bad financial standing hence unable to meet the huge wage increment that the Claimant is claiming for.
9. The Claimants aver that only 3 clauses are in dispute being basic minimum wage, general wages, increase and effective date for which they have made their proposals. They also aver that they have been increasing the salaries of its employees even without the involvement of the Claimant, the last increment being from September 2013 (Appendix 11).

It is also their submissions that Kenya Revenue Authority has made a tax demand of Kshs.4,334,467/= and payment of this money will obviously leave the Respondent in further financial distress. The Respondents attached the demand notice from KRA as their Appendix 11.

The Respondents therefore have submitted that they are in poor financial standing and have so far acted in good faith. They urge this court to adopt their proposals herein and for the benefit of the employees.

Economic Planning Department (EPD) Report

10. This claim being of an economic nature, this court directed the Central Planning and Monitoring Unit of the Ministry of Labour and Social Service to make a report on the proposals of the parties and parameters to guide this court. Mr. Peter Mulwa of Economic Planning Department (EPD) did the report dated 17/4/2015 and submitted it to court on 21/4/2015.

The report submitted analysed the employment and labour cost trends in Respondents concern for the years 2010 to 2014. The trend show that the number of unionisable staff fluctuated during the period under review. The number was 51 in 2011. The staff increased by 570 to stand at 621 in 2012, then decreased by 72 in 2013 and thereafter decreased by a further 65 to stand at 484 in 2014. The labour cost on the other hand maintained a declining trend upto 2014 from 12.52 in 2012 to 11.80 in 2014.

As for Management Staff, the same stood at 1698 in 2010 and increased by 138 in 2014 to stand at 1205. The labour costs of this category also increased from 37.13 million in 2012 to 48.59 million in

2014.

11. From the same report Employment and Annual Wage Bill Funds 2010 to 2014 were analysed and there is evidence that this rose for Management Staff from 5,976,369.52 to 54,917,429.50 and from 1,183,885 to 13,901,401.60 for unionisable staff.

12. On the Respondents financial position the report showed that the annual revenue stood at 381.07 million in 2010 and rose to 428.29 million in 2014.

The profits made on other hand were 1,768,169 in 2010, 9,464,287 in 2011, 8,169,447 in 2012, 2,772,620 in 2013 and 3,729,450 in 2014.

13. From the analysis herein, the Economic Planning Department (EPD) report made an observation that the Respondents financial performance over the period under review has been healthy through net profits have been fluctuating.

The report consider that the wage demand and entitlements proposed by the Claimants would result in an additional wage bill of Kshs.1,731,221,34, Kshs. 28,094,381.28 and 30,949,377.86 respectively and this one will be on wages alone without putting into consideration other clauses with financial implications in dispute.

Issues of determination

14. Upon consideration of the submissions of both parties and the report by the Economic Planning Department (EPD) the issues for consideration are as follows:

1. ***Should the court force parties to certain clauses in the intended Collective Bargaining Agreement.***
2. ***What orders should this court grant.***

15. In the case of **Kenya Union of Commercial Food and Allied Workers Union (K.U.C.F& A.W) vs Sanpac Africa Limited**, (Nairobi ELRC No.722/12) this court considered issues similar to those in the current case where negotiations for a Collective Bargaining Agreement hit a dead end.

The court analyzed the provisions of Section 54 of the Labour Relations Act 2007 which states that:

“(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. ***An employer, group of employers or employers’ association may apply to the Board to terminate or revoke a recognition agreement.***

6. ***If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.***
7. ***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.***
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.”***

and Section 58(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.”

16. Further provisions of Article 41(5) of the Constitution states that:

“Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.”

17. The Court made a finding that the court would not unduly interfere with Collective Bargaining Agreement negotiations of parties and insert certain provisions for the said parties. This, the court stated:

“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 been challenged? This is tantamount to being a Judge in your own cause”.

I declined to the parties proposals and insisted that they must agree on the unresolved issues.

18. This is the position of this court even today that parties should be allowed to freely negotiate contents of a Collective Bargaining Agreement.

However where it is apparent that one party is taking a hard line stand, the best the court can do is to have minimum supervision of the negotiation by for instance setting timelines within which they must conclude the negotiations.

19. From the proposals and counter proposal made, it is apparent that the Respondents took a hard position and failed to cede ground from 2012 when the Collective Bargaining Agreement expired. They remained adamant that their financial position would not allow them to negotiate. It is therefore this court’s duty to ensure that a Collective Bargaining Agreement is negotiated and registered without any delay based on the economic conditions, of Respondent, inflationary trends and costs of living currently being experienced. The proposals made by the Claimants could be on the higher levels but parties must strike a middle ground.

20. I therefore order that the Claimant and Respondent must proceed and renegotiate and sign a Collective Bargaining Agreement within 60 days from today based on the parameter set by the

Economic Planning Department (EPD) report and report back to court accordingly. The Respondents to meet costs of this suit.

Read in open Court this 2nd day of June, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mueke for Claimant - Present

Opolo holding brief Ouma for Respondent