REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 440 OF 2013

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS & HOSPITALS WORKERS **CLAIMANT**

v

MOMBASA SPORTS CLUB **RESPONDENT**

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (Union) filed a Memorandum of Claim against Mombasa Sports Club (Respondent) on 11 December 2013, and the issue in dispute was expressed as *unfair intended redundancy of employees in the service of Mombasa Sports Club*. Together with the Memorandum of Claim was a motion under certificate of urgency.
2. The Motion was placed before Court on the same day and it was certified urgent, and further the Respondent was ordered to stop any redundancy pending *inter partes* hearing and determination of the motion.
3. On 18 December 2013 both parties appeared for the *inter partes* hearing but the motion was adjourned to 27 February 2014 to allow the Respondent file its papers. The interim order stopping the redundancy was extended. The Respondent filed its Memorandum of Reply on 20 December 2013.
4. On 24 February 2014 the Respondent filed a motion under urgency seeking that the Cause do proceed to full hearing on the merits and the motion was allowed by consent of parties by Makau J on 25 February 2014.
5. Under the circumstances, when the Cause came up on 27 February 2014, it proceeded to hearing on the merits and the motion was not urged.
6. It appears from the record that the Respondent had earlier on filed another motion dated 16 January 2014.The supporting affidavit of Samuel Ouma sworn on 16 January 2014 indicates at paragraph 3 that the affidavit is in reply to the Union's application dated 11 December 2013 and Albert Njeru's affidavit in support thereof.
7. The Respondent in its Motion dated 24 February 2014 indicated that the Motion dated 16 January 2014 stood withdrawn. The withdrawn motion had attached to it, documents which appear to be relevant to the determination of the Cause but these were not mentioned in testimony.

Union's pleadings/case

8. According to the Union, it has a Collective Bargaining Agreement with the Respondent which sets out the terms and conditions of employment for unionisable staff and that on 16 November 2013, the Respondent issued to it a notice of intended redundancy, but the reason(s) for the redundancy were not clear and that the Works Committee and workers had not been informed. It was also pleaded that the local Labour Officer was not notified
9. It was further pleaded that on 26 November 2013, the Union and Respondent met, but the Union was not convinced that the Respondent was financially constrained to justify redundancy, and that the Union was denied access to the Respondent's financial statements.
10. Further, the Union pleaded that the Respondent had failed to indicate the names of affected employees and date of redundancy and that the Respondent had other options apart from redundancy and that the redundancy was in bad faith.
11. The Union called one witness, Joseph Okesa Orengo. The witness stated that he was a cook in the employ of the Respondent since 2005 and that sometime in November 2013, a Manager by the name of Nganga informed the employees from the kitchen unit to attend a meeting in the boardroom.
12. In the meeting were the Respondent's Management Board chair and vice chair among others. The employees were informed that the kitchen unit was not making profits and therefore the function would be outsourced to a Rosina House with effect from 1 December 2013.
13. During cross examination, the witness confirmed that the Respondent met the employees and the Union concerning the question of redundancy and that the employees were informed they would be paid their terminal dues and that the Respondent wrote to the Union on 16 November 2013 and that the letter was copied to the Labour Office among others.
14. The witness also stated that the Respondent did not employ workers to replace them but that the entity to whom the kitchen facilities had been outsourced to, Rosina House, came with its own staff.
15. On shortages incurred by staff, the witness testified that the staff would be surcharged.

Respondent's pleadings/case

16. In its Reply, the Respondent contended that the suit was a non-starter because it was not instituted against the trustees as required (this issue was not pursued).
17. Further, it was pleaded that the redundancy was in compliance with the provisions of the Collective Bargaining Agreement and statute and that the Union was notified and tripartite meetings held in November and December 2013, and that only 10 out 72 employees were affected.
18. On the substantive reasons for redundancy, it was pleaded that the kitchen unit was not self sustaining; had consistently made losses culminating in a cumulative loss of Kshs 1,910,626.40 and that the kitchen operations had been outsourced with effect from 1 December 2013.
19. According to the Respondent, the redundancies were in good faith.
20. The Respondent called two witnesses. The first witness, Sam Ouma informed the Court that the Respondent is a non-profit making members club run on subscriptions and that the kitchen unit had a deficit of Kshs 1,501,287/- as of October 2013.
21. As a consequence the Respondent took a decision to close the kitchen unit and outsource the services to Rosina House to enable the Respondent remain afloat.
22. Regarding the process/procedure followed in declaring the redundancies, the witness stated that a meeting was held with the affected employees on 20 November 2013 in the boardroom and that the Union was informed of the redundancies through a letter, and two meetings were held and that the Union was provided with the Respondent's financial statements/audited accounts.
23. On cross examination, the witness testified that the affected employees were informed about and ought to have known about the impending redundancies through their manager Mr. Nganga who used to attend monthly meetings. He further stated that he informed the Union in writing of the impending redundancies.
24. Further, the witness stated that the Respondent had a surplus of Kshs 45,611/- in 2012 and that net current assets were Kshs 455,759,042/- and cash Kshs 22,649,107/-.
25. Respondent's second witness was its Treasurer, Mr. Shaban Yusuf. He stated that the Respondent had been making losses over several years and that to sustain the Club, it was decided to lease out kitchen services to Rosina House and that Rosina House had agreed to take on board 6 out of the

10 employees affected by the redundancy but those selected did not turn up. The witness more or less corroborated what the first witness stated that the kitchen was making losses, that the kitchen unit was represented in management meetings and that the Respondent was not acting in bad faith. The Respondent was ready to pay all the terminal dues of the affected employees.

26. In cross examination, the witness testified that the Respondent considered other options to redundancy such as changing suppliers to reduce costs.

Issues for determination

27. Based on the parties' pleadings, documents, testimony and submissions and authorities cited, the broad issues arising for determination are broadly three. These are whether the intended redundancy was in compliance with the procedural safeguards outlined in the Employment Act and the Collective Bargaining Agreement between the parties, whether the Respondent has justified the reasons for the redundancy (substantive justification) and lastly the Court must consider appropriate relief, if it finds in favour of the Union.

Whether the intended redundancy was in compliance with the procedural safeguards (contractual and statutory)

28. The parties have a valid Collective Bargaining Agreement for the period 2013-2014. It was annexed to the Memorandum of Claim.
29. Clause 23 of the Collective Bargaining Agreement provides for redundancy. The Clause has outlined some applicable principles (one principle is not really a principle but definition of management) and it behoves the Court to examine each of the principles to ensure they were complied with. The Court notes that the language used is inelegant and that some of the principles appear to overlap.
30. The first principle is that the Union must be informed in writing at least one month in advance of the reasons and extent of redundancy. This requirement is mirrored in section 40(1)(a) of the Employment Act, except that the Act obligates an employer to notify the local Labour Officer as well.
31. There are four aspects to section 40(1)(a) of the Employment Act as well as clause 23(a) of the Collective Bargaining Agreement. These are notification to the union, setting out the reasons for the intended redundancy, setting out the extent of the intended redundancy and effective date of redundancy.
32. The Respondent wrote a letter to the Union on 16 November 2013. The subject of the letter was **Notice to Carry out Redundancy** and it was copied to the Labour Officer, Mombasa and 2 others. The letter gave the reason for the redundancy as *financial constraints coupled with losses* and the extent as *members of our staff serving in the kitchen department* and the time was given as *in one month's time*.
33. It is not in dispute that the Respondent notified the Union of the intended redundancy through a letter dated 16 November 2013.The letter set out the reasons for the intended redundancy as stated in paragraph 32 herein above. The extent of the intended redundancy was stated as the staff/employees working in the kitchen unit. The effective date was given as in one month's time from the date of the letter. In effect the redundancy should have become effective around 15 December 2013.
34. On the surface it appears that the Respondent complied with the letter of section 40(1)(a) of the Employment Act and clause 23(a) of the Collective Bargaining Agreement. The Court will revert to this issue while discussing the last principle.
35. The Court also needs to note that although it is not explicitly provided for in the statute, in industrial relations practice, one of the purposes of notification is to enable consultations to be carried out to consider possible alternative solutions such as finding alternative employment for the affected staff with a view to causing minimal hardship to affected employees and this practice has now hardened as to take the status of an obligatory requirement (consultative meetings appear to have been held).
36. The second principle is that the principle of Last In, First Out should be considered but having regard to skill, merit, ability and reliability. This condition is also found in section 40(1)(c) of the

Employment Act.

37. The Respondent's notice of intention to carry out redundancy stated that members of staff serving in the kitchen staff were affected. Evidence before Court is that 10 employees in total were affected though their names were not indicated in the notice. The Union did not dispute this fact. The whole kitchen staff was affected and therefore this second principle may not be substantially relevant for the determination of this particular case.
38. The third principle in the Collective Bargaining Agreement is that the affected employees should be given appropriate period of notice or pay in lieu of notice and other terminal dues. This principle is given statutory underpinning in section 40(1)(d) and (f) of the Employment Act.
39. The material and evidence placed before Court is that the Respondent had been willing and ready to comply and pay all the terminal dues, and any notices. Clause 21 of the Collective Bargaining Agreement has set out the relevant notice periods. This principle appears to suggest that each affected employee should be given notice and or paid in lieu of notice. The Respondent's first witness testimony was that the affected staff did not report to work on 15 December 2013 and that the Respondent was ready to pay the dues.
40. The fourth principle is the requirement that the incoming Management undertakes to continue the employment of employees with full benefits of past service. This principle is not explicitly provided for in the Statute. But it is closely associated with the argument advanced by the Union that alternatives to redundancy, or other options should have been considered.
41. Fifth principle is the requirement to pay severance pay at the rate of 28 days for each completed year of service. The Respondent case was that it had prepared and was ready to pay all the terminal dues to the affected employees, and though the Respondent did not produce such calculations, at this juncture this is not a live issue. The Court hopes the Respondent had shared with the Union these calculations (this principle overlaps with the third principle).
42. The last principle in the Collective Bargaining Agreement is that notice must be given to the affected employee in accordance with the termination of employment provision in Clause 21. The Court made has already reference to the statutory aspect of the requirement to notify the employees of an intended redundancy under the first principle.
43. Clause 21 of the Collective Bargaining Agreement requires written notice. In actual fact, clause 21(c) envisages written notice to the employee with a copy to the Union in cases of termination of service or summary dismissal. In my view redundancy would fall under the termination of service category.
44. In its submissions, the Union suggested that redundancy affects workers directly and it is usually a painful experience losing employment involuntarily and there ought to be early communication and further that the Respondent should have communicated with the employees according to clause 21 of the Collective Bargaining Agreement.
45. To counter the submissions, the Respondent suggested that relying on the Court of Appeal decision in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR it was in compliance. According to the Respondent, it had met and was in the process of complying with the provisions of section 40 of the Employment Act, but the Union prematurely rushed to Court.
46. But the real issue is whether the Respondent/employer is under a duty (legal and/or contractual) to notify employees who are members of a union individually about the redundancy as apart from the Union. The Court notes however that the legal requirement only constitutes the irreducible minimum standard.
47. The legal aspect of the notification was answered in the Thomas De La Rue decision where the Court held that *where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date……where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the union…. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee.*
48. In so far as the legal requirement is concerned, the Court is of the view that the notification to the Union was not adequate.
49. In the humble view of the Court, on a proper and correct construction of the *extent, of intended redundancy,* a notice under section 40(1)(a) of the Employment Act to the Union must set out the names and other particulars of the employees who have been targeted for redundancy to be in substantial compliance.

50. In the instant case, the notice to the Union did not set out the names and other particulars of the affected employees such as designation and this coupled with the fact that the Respondent did not give out the individual notices referred to in clause 23(g) of the Collective Bargaining Agreement leave no doubt that the Respondent was not in compliance with both legal and contractual requirements on procedural fairness. This failure cannot, in the view of the Court be cured by or because of the meeting held in the boardroom or meetings with the Union.
51. In the view of the Court, and in the circumstances of this case, and without laying out any general principles or guidelines, there was no substantial compliance with the procedural fairness requirements as provided in both the Statute and the Collective Bargaining Agreement of the intended redundancy.

Whether the Respondent has justified the reasons for the redundancy (substantive justification).

52. While section 40 of the Employment Act provides the procedural safeguards on termination through redundancy, it is section 45(1), (2) and (4) of the Act which are applicable when the Court is considering the fairness of the substantive reasons for declaration of redundancy. The section provides, as may be material for this discussion as follows

> 45.(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer ***is unfair if the employer fails to prove-***
>
> (a) ***that the reason for the termination is valid;***
>
> (b) ***that the reason for the termination is a fair reason-***
>
> (i) …….
>
> (ii) ***based on the operational requirements of the employer***;..
>
> (4) A termination of employment shall be unfair for the purposes of this Part where-
>
> (b) it is found in the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

53. It is clear from the cited statutory provisions that an employer is required to prove that the reasons given for the redundancy are valid and fair, and that the reasons are based on the operational requirements of the employer. It is within these parameters that the discussion must now turn.
54. The notice by the Respondent to carry out redundancy was dated 16 November 2013 and was addressed to the Branch Secretary of the Union. The reasons given in the letter were

> *that the expenditures incurred from our kitchen facility has continuously shot above the income generated…….. due to financial constraints coupled with losses we have been forced to consider closing the facility hence wish to notify you of our intention to declare the employees in that department redundant.*

55. It is these reasons that the Respondent was expected to prove as being valid and fair, and that they fell within its operational requirements.
56. In the Response filed on 20 December 2013, the relevant portion to the question at hand are paragraphs

> *4. The kitchen has made losses consistently and as at October 2013 the Club had made losses of Kshs 1,910,626.40 and thereby was a drain on the Club resources.*
>
> *9. The statement of operation account have been provided in which each unit has to be self sustaining a component the kitchen has failed to meet. 10. The Management is acting in good*

faith as the Club being a private members club relies on members subscription and patronage to the services offered at the club and the kitchen has failed.

57. In testimony, the Respondent's Secretary stated that the kitchen had become a drain on the other units for close to three years and therefore a decision to outsource was taken in October 2013. The witness also referred to the Respondent's Kitchen Income and Expenditure Account 2013 and the Financial Statements for the year ended 2012 (the second witness more or less confirmed what was stated by the first witness).
58. The Income and Expenditure Account 2013 indicated a loss of Kshs 1,501,287/- as of October 2013. The expenses were more than the Income.
59. The financial statements for the year ended 2012 indicated that there was an income of Kshs 48,021,431/- from bar and catering, services and investments' while administrative expenses were Kshs 29,534,101/-, and other operating expenses were Kshs 15,057,625/- of which staff costs were about Kshs 20,631,387/- leading to a surplus deficit of Kshs 45,611/-. In 2011, there had been a surplus deficit of Kshs 1,709,827/-.
60. The same financial statement indicated that the Respondent had net current assets worth Kshs 455,799,042/- and Kshs 22,649,107/- cash at end of 2012.
61. From the evidence on record, the Court needs to examine whether the Respondent has proved that

the expenditures incurred from our kitchen facility has continuously shot above the income generated…….. due to financial constraints coupled with losses…

62. The audited financial statements at page 22 show that kitchen sales for 2012 were Kshs 8,400,044/- while the cost of the sales was Kshs 7,682,704/- thus leading to a gross profit of Kshs 717,340/- for the unit. The previous year, 2011 the kitchen sales were Kshs 7,699,413/- and costs of sales Kshs 5,967,988/- thus leading to a gross profit for the unit Kshs 1,731,425/-.
63. The figures in the audited financial statements are more or less mirrored in the Income and Expenditure Account for 2013. The sales for the period up to October 2013 was Kshs 7,314,440/- while the cost of sales were Kshs 5,095,651/-.
64. Total income for 2012 was Kshs 48,021,431/- while total administrative expenses were Kshs 29,534,101/-. In 2011, the total income was Kshs 41,635,220/- while total administrative expenses were Kshs 26,881,095/-.
65. The expenses, according to the Income and Expenditure account which led to a surplus deficit were electricity,spoilage,gas and charcoal, salaries for chefs,cooks,cleaners,waiters and housekeeping expenses which totaled Kshs 3,720,076/-.
66. The Court was not informed of what comprised cost of sales and whether in accounting/financial statement practice and terms there is a distinction between the cost of sales and what have been indicated in the preceeding paragraph as expenses.
67. The Respondent sought to rely on the decision by Rika J in Nairobi Cause No. 1357 of 2010, *Samuel Gachomo Chege v Roof Top Owner* to advance its submissions that a finding of unfair termination would be unwarranted where termination is due to a substantive economic reason.
68. In my view, the submission cannot stand and the facts in that case are distinguishable from the facts in the case at hand. In that case, the business collapsed unlike here where the Respondent is still running and only one unit was affected.
69. It cannot be disputed that termination through redundancy is stated to be based on operational requirements. The grounds covered under operational requirements are very broad and would include economic reasons and these must be subjected to the test required by sections 43 and 45(1) and (2) of the Employment Act like any other termination or dismissal. An employer is under an obligation to prove the economic reason(s), and that the reason(s) are valid and fair. And where a Court makes a finding of unfairness, it is open to it to make an award of compensation in addition to the dues stipulated in section 40 of the Employment Act.
70. In my view, the Respondent has failed to prove that the declaration of redundancy on the basis of financial constraints in relation to the kitchen unit were valid and fair reason(s) based on its operational requirements or that it was in accord with justice and equity. The terminations were therefore unfair.

Appropriate relief

71. The Union sought some 5 orders in the Memorandum of Claim. The Court repeats that there was some inelegance in the way the Memorandum of Claim was drafted but it notes it was not drafted by a trained legal practitioner.
72. Among the final orders sought was one certifying the matter urgent. The only substantive order sought was to the effect that the *Court be pleased to order the Respondent stop forthwith any redundancy until this case is heard and determined.* In the final submissions, the Union sought for an order that the affected staff resume their work with no loss of benefits or privileges.
73. The Court had granted restraining orders and the Court was informed from the bar that the Respondent has continued to pay the Grievants their monthly wages. The Court was also informed that the kitchen function has already been outsourced to an entity called Rosina House.
74. Considering what is narrated in the preceeding two paragraphs, the Court is under an obligation to fashion or forge an appropriate order. An appropriate order in a case such as this within the industrial relations/employment sphere is one which is effective to vindicate the rights of the Grievants while also putting into perspective the economic interests of employers.
75. The Employment Act at section 49 has provided primary remedies where a finding of unfair termination is reached. These are pay in lieu of notice, proportion of earned wages, the equivalent of a number of months gross wages not exceeding twelve months (compensation), reinstatement and or re-engagement.
76. The Respondent had also indicated that it had calculated and was ever ready to pay the Grievants their terminal dues on redundancy in accordance with the Collective Bargaining Agreement.
77. An appropriate order in this case would be an award of compensation equivalent to three months gross wages to each of the Grievants in addition to wages upto 21 March 2014 and the terminal dues payable in accordance with the Collective Bargaining Agreement.

Costs

78. The parties have an intimate relationship as social partners which commenced with the signing of a recognition agreement and are consummated in Collective Bargaining Agreements agreed from time to time. The relationship is an ongoing one and as has been the practice of the Industrial Court it would not be just to award costs.

Conclusion and Orders

79. The Court finds and holds that the Respondent has failed to prove that the expenditure of the kitchen unit was continuously above the income generated and that financial constraints coupled with losses were valid and fair reason(s) to justify the declarations of redundancy and therefore the redundancies were unfair.
80. The order which commends itself to the Court in the circumstances is to award each Grievant the equivalent of three months gross wages. The Grievants are also entitled to wages upto 21 March 2014.
81. To avoid litigation by installments, the parties are further ordered to agree on the computations of terminal benefits payable to each Grievant and file such computations in Court within the next 7 (seven days) for adoption by the Court.
82. Each party will bear its own costs.

Delivered, dated and signed in open court in Mombasa on this 21st day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Alex Thuita, Industrial Relations Officer,

KUDHEIHA for Union/Grievants

Mr. Mogaka instructed by

Mogaka Omwenga & Mabeya, Advocates for Respondent