REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 158 OF 2013

SAID NDEGE.....CLAIMANT

v

STEEL MAKERS LTD.....RESPONDENT

RULING

1. Said Ndege (Claimant) filed a Memorandum of Claim against Steel Makers Ltd (Respondent) on 19 June 2013 and the issue in dispute was stated as *non-payment of terminal and contractual benefits, unfair, unlawful and unjust dismissal.*
2. The Respondent filed a Response to the Memorandum of Claim on 19 August 2013 and after a few appearances before Court the Cause was fixed for hearing on 2 October 2013.
3. Before the date fixed for hearing, the Claimant filed a motion application seeking to be granted leave to refer to the Collective Agreement between Kenya Engineering Workers Union (the Union) and the Respondent dated 25 September 2011. There was a second prayer to amend the Memorandum of Claim and which is not opposed. The motion is the subject of this ruling.
4. The uncontested facts are that the Respondent used to deduct Kshs 338/- from the Claimant's wages and remit the same to the Union every month as union subscription. The Claimant was a member of the Union. Further the Union and the Respondent signed a Collective Bargaining Agreement on 23 September 2011 and which agreement was effective from 1 January 2011 for two years. The Collective Bargaining Agreement was not registered as required by section 60 of the Labour Relations Act.
5. The Claimant seeks to rely on the Collective Bargaining Agreement because he submits, the Collective Bargaining Agreement was in force at the material time and is binding upon the Claimant and Respondent, the Claimant was a member of the Union and it is necessary and just for the effective, fair and complete adjudication of the Claim before Court.
6. The Respondent opposed the motion. And the grounds for opposition are that the Collective Bargaining Agreement has provisions for handling disputes between the Respondent and the Union as the bona fide representative of unionisable employees, the Collective Bargaining Agreement was not registered by the union in the Industrial Court, it is the Union to litigate over terms of a Collective Agreement and that the Union should be joined as a party to the proceedings.
7. The parties filed their respective written submissions and authorities at the request of the Court and the Court has duly considered them.

Issues

8. The parties in their submissions although using different phraseology are conceptually in agreement on the issues for determination. These are whether an unregistered Collective Bargaining Agreement is legally enforceable by the parties or Court and whether an individual employee can seek to rely on a Collective Bargaining Agreement or its terms in litigation without involvement of the Union.

Whether an unregistered Collective Bargaining Agreement is legally enforceable by the parties or Court

9. Section 2 of the Labour Relations Act defines a 'collective agreement' to mean **a <u>written agreement</u> (emphasis mine) concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers** while sections 2 of the Employment Act and the Labour Institutions Act define a collective agreement to mean **a <u>registered agreement</u> concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employer's organisation.**
10. The parties did not address me on any legal impact of the slight variation of the definition of a collective agreement and therefore the Court will not belabor its significance save that it appears that for the purposes of the Employment Act and the Labour Institutions Act a collective bargaining agreement attains its legal status only upon registration.
11. But the variation appears nonmaterial because Section 59(5) of the Labour Relations Act is explicit that a collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court, but effective from the date agreed by the parties. Section 60 of the Act places a primary obligation upon the employer to submit the collective agreement within fourteen days of conclusion to the Industrial Court for registration. If the employer fails to submit the collective agreement for registration, the trade union is given the leeway to submit it to the Court for registration.
12. Similar provision is made in rule 35 of the Industrial Court (Procedure) Rules, 2010, but through the Minister and that the collective agreement shall not take effect until it is registered.
13. Although the Labour Relations Act itself has not provided for any role for the Minister in registration of collective agreements, the Industrial Court (Procedure) Rules, 2010 has given the Minister a significant role to play in that the Minister may object to the registration of the collective agreement. Again the Court was not addressed on this apparent conflict and it says no more except that the industrial relations is organised on a tripartite basis (employers, unions/employees and government).
14. On the main issue of non registration of the collective bargaining agreement, I wish to repeat and reiterate what I stated in the case of *KUDHEIHA v Impala Club*, Nairobi Industrial Cause No. 1256 of 2010
    28. Section 11 of the Trade Disputes Act required the then Industrial Court to maintain and register Collective Bargaining Agreements and that these agreements would not take effect until accepted for registration. The section also placed an obligation upon an employer or organisation of employers to ensure a copy of the Collective Bargaining Agreement was lodged with the Minister responsible for Labour within 14 days after which the Minister was to transmit the Collective Bargaining Agreement to the Industrial Court for registration. Failure by an employer or employers organisation to furnish the Minister with a copy of a Collective Agreement within 14 days was made an offence.
    29. In the case before me therefore I do hold that there was a statutory obligation upon the Respondent, Impala Club and or the Federation of Kenya Employers to furnish the Minister with a copy of the 1999 Collective Bargaining Agreement executed on 26 May 1999 and stated to be effective from 1 January 1999 for registration purposes and that any failure to furnish a copy thereof and any legal consequences must be examined within the obligation placed upon them.
    30. I say so because the Court is confronted with a situation where an employer urges the Court to ignore and not enforce an unregistered collective agreement without stating what steps or measures it took to ensure it complied with the law to ensure it was registered.
    31. This Court is both a Court of law and a Court of equity. Equity always moves in to

moderate and constrain unfair dealing consequences arising from the conduct of a party such as the Respondent herein where a statutory obligation was placed upon it but for unexplained reasons it failed to fulfill such statutory obligations.

32. Closely interlinked to the principles of equity, it is open to the Court to resort to the common law to provide an alternative to the statutory scheme with a view to meeting the ends of justice. Justice should not be disregarded at the expense of technicalities. In industrial relations, the parties are referred to as social partners who are expected to act in good faith towards and with each other. Being social partners the parties should not lightly go back on explicit promises made to each other whether registered or not. Although the parties did not address me on the issue, I would think that the general principles of law governing the enforceability of common law agreements could be invoked by any of the parties to non registered collective agreements. Statute law should not constrain such common law agreements relating to employment/labour relationship. The Collective Bargaining Agreement though not registered would remain valid based on the general common law principles.
33. I would further suggest that equity and common law would come into play because freedom of contract is a basic right in our constitutional system and it should not be taken as having been removed or excluded by statute. Article 41(4)(c) of the Constitution provides that *'every trade union and every employers' organisation and employer has the right to engage in collective bargaining'* while Article 36 enshrines the right of every person to freedom of association and therefore to completely shut out a party from relying on a Collective Bargaining Agreement as is suggested by the Respondent here because it did not cause it to be registered would lead to unfair consequences in as far as the rights of workers are concerned. Indeed the Labour Relations Act does not expressly prohibit or prevent a trade union and an employer or employers' organisation from concluding a common law agreement on employment matters.
34. Articles 20 and 259 of the Constitution also enjoin the Courts to develop the law to the extent that the law does not give effect to a right or fundamental freedom and to interpret the Constitution in a manner that promotes its values and principles and permits the development of the law.
35. Considering the foregoing I do hold that applying the principles of equity and the need to develop the law and indigenous jurisprudence, an employer or social partner who has failed or neglected to cause a Collective Bargaining Agreement to be registered cannot be allowed to plead or claim protection or statutory unenforceability of such Collective Bargaining Agreement.

15. I would adopt the reasoning in the above cited case on the basis that the primary responsibility to have the collective bargaining agreement registered is placed upon an employer (Respondent) and in any case the Respondent must have executed the collective agreement with an intention to be bound by its terms and that it would create legal relationships with the Union/employees and not merely as a matter of honour.
16. In any case there was no suggestion in the affidavit of Samuel Johnson that the Respondent was not complying with the terms of the collective bargaining agreement as regards such stipulations on productivity, working hours, overtime, house allowance, and transport among other provisions. The Respondent must have regularized through practice the terms of the collective bargaining agreement.
17. The answer to the question is in the affirmative.

Whether an individual employee can seek to rely on a Collective Bargaining Agreement or its terms in litigation without involvement of the Union.

18. The terms and conditions upon which the employer/employee relationship relies will primarily be the terms and conditions outlined in the contract document and those terms and conditions which are incorporated into the employment relationship by statute.
19. In Kenya, the statutes which have outlined terms and conditions of employment which are deemed to be incorporated into each and every employment contract by providing the irreducible(basic) minimums include the Employment Act, the Labour Institutions Act , the Labour Relations Act,

the Work Injury Benefits Act and the Occupational Safety and Health Act.

20. The answer to the question posed however is primarily located in the Labour Relations Act. Under section 59(1) of the Act, a collective agreement binds the ***parties to the agreement***, ***all unionisable employees employed by the employer,*** group of employers or members of the employers organisation party to the agreement, while section 59(3) of the Act provides that ***the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.***
21. Unionisable employee in relation to a trade union is defined in section 2 of the Labour Relations Act to mean **the employees eligible for membership of that trade union.**
22. In my view, a reading of section 59(1)(b) of the Labour Relations Act and the definition of unionisable employee in section 2 of the Act leads to an inescapable conclusion that the terms of a collective bargaining agreement bind and are incorporated into the contract of all unions members and unionisable employees of a particular employer who has entered into a recognition agreement with a union and concluded a collective bargaining agreement.
23. I am fortified in the view I have taken by the provisions of section 49 of the Labour Relations Act which empowers the relevant Minister to make an order for deduction of agency fees from unionisable employees of a particular employer but who are not members of the union. These unionisable employees in consideration of enjoying the terms agreed with the union are deducted an agency fee.
24. Further section 49(5) of the Act provides that a union member who resigns from the Union is liable to pay agency fee. It therefore cannot be that such a member who resigns would enjoy less favourable terms to those provided in the collective agreement and such a member would be legally entitled to rely on a term of a collective agreement to enforce or pursue his rights.
25. In my view, similar principles would be applicable and an employee can therefore legally rely on the term of a collective agreement without involving the union, though it is undesirable.
26. Because of the conclusion I have reached on the two issues, in my view it is not necessary to discuss the questions of applicability of Articles 35(1)(b) of the Constitution and of agency.
27. Prayers 2 and 3 of the Motion dated 25 September 2013 are therefore granted and the Claimant is allowed to file and serve an Amended Claim within 10 days from today with further leave to the Respondent to file and serve an Amended Response if necessary within 10 days of service.

Delivered, dated and signed in open Court in Mombasa on this 14th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Asewe instructed by Ms Nyagaka SM & Co. Advocates for Claimant

Mr. Alwenya instructed by Ms. Alwenya & Co. Advocates for Respondent