



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYAS AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 326 OF 2014**

**KENYA SHOE & LEATHER WORKERS UNION.....CLAIMANT**

**v**

**KENYA SUITCASE MANUFACTURERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Kenya Shoe & Leather Workers Union (Union) filed a Memorandum of Claim against Kenya Suitcase Manufacturers Limited (Respondent) on 18 July 2014 and the issue in dispute was stated as *signing Collective Bargaining Agreement*.
  2. Simultaneously with the Memorandum of Claim, the Union filed a Notice of Motion seeking various orders. The substantive order sought was an order compelling the Respondent to sign a Collective Bargaining Agreement with the Union in terms of an agreement signed by the parties on 27 February 2014.
  3. The Respondent was served with both the Motion and Claim and on 31 July 2014 it filed a Defence through the Federation of Kenya Employers.
  4. The determination of the substantive prayer sought in the motion would also resolve the main prayer sought in the Memorandum of Claim.
- Union's case**
5. The Union, represented by Ms. Macnanta Mbala, its National Women Coordinator made submissions. She relied on the supporting affidavit of Julius Ndombi Maina and documents exhibited to the motion and Claim
  6. She submitted that the parties commenced negotiations on a Collective Bargaining Agreement but could not reach agreement. A trade dispute involving some 30 issues was thus reported to the Cabinet Secretary for Labour as required by law. The Cabinet Secretary appointed a Conciliator.
  7. According to the Union, after conciliation the parties agreed on all the issues which were up for negotiation and an agreement was signed on 27 February 2014 and the agreement was meant to be the foundational framework for signing a Collective Bargaining Agreement but the Respondent has declined to execute the Collective Bargaining Agreement, contrary to the provisions of section 57(1) of the Labour

Relations Act.

### **Respondent's case**

8. The Respondent relied on its Defence and documents exhibited thereon and the authority of Nairobi Cause No. 96 of 2008, *Kenya Shoe & Leather Workers Union v Suitcase Manufacturers Ltd.*

9. The Respondent submitted that it had not signed the Collective Bargaining Agreement because of intervening statutory changes brought about by National Social Security Fund Act, 2013 and the Regulations on member contributions gazetted in June 2014.

10. According to the Respondent, the changes had established a mandatory pension contributory scheme for all employees thus the proposed clause on payment of gratuity on termination of employment had been revised by operation of statute.

11. The Respondent further contended that to maintain a clause on payment of gratuity despite the establishment of a mandatory pension scheme under the new National Social Security Fund Act under which it is obligated to make contributions as an employer as well as commit to a gratuity scheme as proposed in the Collective Bargaining Agreement would lead to employees getting double payments, pensions and gratuity.

### **Evaluation**

12. The parties agreed and signed an agreement on 27 February 2014 on some 30 items to be included in a Collective Bargaining Agreement. Among the agreed items was a clause providing for payment of 16 days gratuity for each completed year of service. Payments for the gratuity normally come from the resources of the employer without a contribution from employees. The pension fund created by the National Social Security Fund Act, 2013 has provided for mandatory contributions from both employers and employees.

13. The Respondent submits this arrangement of gratuity has been overtaken by the provisions of the new National Social Security Fund Act, 2013.

14. It is in the public knowledge that various interested parties have challenged the constitutionality of several provisions of the National Social Security Fund Act, 2013 in Court. None of the parties can tell the eventual outcome of the challenges.

15. The parties did not clarify whether Regulation 20 of the National Social Security Fund (Member Contributions) Regulations, 2014 which provide that

*Where a contract of service provides for gratuity, the employer shall deduct and remit contributions in accordance with the Act,*

*Provided that an employer may deduct its portion of contribution from the gratuity amount payable to the employee.*

was one of the provisions under challenge.

16. The Respondent contended on the basis of the decision in Nairobi Cause No. 96 of 2008, *Kenya Shoe & Leather Workers Union v Kenya Suitcase Manufacturers Ltd* that the previous Collective Bargaining Agreements between the parties did not have a clause on payment of gratuity on termination of employment.

17. The Union did not controvert this contention nor produce any evidence that the parties or individual employment contracts between the Respondent and employees had provision for payment of gratuity. But a right to social security has now been given constitutional normative underpinning by Article 43(1) (e) of

the Constitution.

18. Regulation 20 of the National Social Security Fund (Member Contributions) Regulations, 2014 seems to suggest that where there is a gratuity arrangement in place, an employer is expected to contribute the 6% or such other applicable *per centum* of the wages and then reduce or deduct the said contribution from the gratuity arrangement. To my mind this suggests that if the monthly pension contribution from the employer is less than the exposure to gratuity calculated at the agreed days per year of service, the balance would be provided for as gratuity. This means it would be superfluous to maintain a gratuity scheme if the agreed rate would be less than the amount contributed by the employer to the pension fund.

19. This Court is not aware of the exact parameters of the challenge already alluded to, but it is obvious that with the stay which was granted, employees of the Respondent may stand exposed, in that in the interim, there is no gratuity arrangement in place and the Respondent is currently not making any contributions as an employer to the pension fund or deducting and remitting the employees contributions.

20. The constitutional right of the Respondent's employees as to social security needs to be secured, at least in the interim pending the outcome of the court challenge and in the circumstances, and on the basis of the material placed before Court, the order that appears appropriate is to order the Respondent to sign a Collective Bargaining Agreement with the Union on the basis of the agreement reached on 27 February 2014.

21. Depending on the outcome of the challenges to the provisions of the National Social Security Fund Act, 2013 the parties should be at liberty to apply to Court on the potential double exposure of the Respondent to gratuity and pension fund contributions.

### **Conclusion and Orders**

22. In light of the foregoing, the Court orders the Respondent to sign a Collective Bargaining Agreement with the Union in terms of the agreement reached on 27 February 2014 within the next 30 days.

23. The Court grants the parties liberty to apply in case there is need, once the challenge to the constitutionality of the National Social security Fund Act, 2013 has been determined.

24. Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 8<sup>th</sup> day of September 2014.**

**Radido Stephen**

**Judge**

### **Appearances**

Ms. Macnanta Mbala, National Women Coordinator

Kenya Shoe & Leather Workers Union

for Union

Mr. Molenje, Senior Legal Officer

Federation of Kenya Employers

for Respondent