



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1882 OF 2014

CHEMILIL SUGAR COMPANY LIMITED.....;;;.....1ST CLAIMANT

MUHORONI SUGAR COMPANY LIMITED (In Receivership).....2ND CLAIMANT

SOUTH NYANZA SUGAR COMPANY LIMITED.....3RD CLAIMANT

VERSUS

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS..... RESPONDENT

RULING

1. By a motion dated 24th October, 2014 brought under certificate of urgency, the applicants seek in the main an order of stay of the implementation of the 2013-2015 Collective Bargaining Agreement pending the hearing and determination of the present cause. The applicants also ask the Courts to review and set aside its order of registration of 2013-2015 CBA to pave way for due compliance with the provisions of Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (hereinafter referred to as “SRC, 2013 Regulations”).

2. The application was supported by the affidavits of Jacinta Kipkering and Rachel Mayaka. It was further grounded on the fact that parties commenced, and finalized negotiations of a Collective Bargaining Agreement without the input and/or guidance of Salaries and Remuneration Commission and that the Collective Bargaining Agreement has since been registered by the Court and was awaiting implementation.

3. In her affidavit sworn on 24th October, 2014 Ms. Kipkering depones in summary that at the commencement of the negotiations, Federation of Kenya Employers wrote to Salaries and Remuneration Commission to seek approval and guidance before commencement of the negotiations to review salaries and other allowances. She depones that by the time the negotiations were concluded Salaries and Remuneration Commission had not written back to give guidance on the monetary issues in respect of the Collective Bargaining Agreement. The parties therefore finalized the negotiations in September, 2014 and signed the Collective Bargaining Agreement. This according to Ms. Kipkering was in compliance with due process regarding Collective Bargaining Agreements and the same had to be ultimately presented to the Court for registration.

4. She further depones that by a letter dated 29th September, 2014 the 1st applicant informed Salaries Remuneration Commission of the finalization of Collective Bargaining Agreement by which time the Collective Bargaining Agreement was awaiting registration by the Court. Salaries

and Remuneration Commission by a letter dated 13th October, 2014, and received by the 1st applicant on 17th October, gave new guidelines, some of which had far reaching implications on the substantive aspects of the concluded Collective Bargaining Agreement.

5. According to Ms. Kipkering, Salaries and Remuneration Commission's letter dated 13th October, 2014, goes to the root of the Collective Bargaining Agreement in that:-

(a) It changes the commencement period of the Collective Bargaining Agreement from 1st May, 2013 to 1st July, 2013 and the subsequent annual anniversaries thereafter.

(b) The cycle period of the Collective Bargaining Agreement is changed from 2 years to 4 years.

6. These directions by Salaries and Remuneration Commission, according to Ms. Kipkering, raises the issue whether they will be in consonance to the agreed terms and conditions as negotiated and signed by the parties. They also raise the question of the monetary dynamics including affordability and sustainability of a 4 year cycle Collective Bargaining Agreement vis-à-vis the financial performance of respective applicants. Taking the foregoing into consideration, Ms. Kipkering depones that it may be necessary to re-look, reconsider and negotiate the terms of the subject CBA taking into account the guidelines proposed by the Salaries and Remuneration Commission. Ms. Mayaka in her short affidavit fully associated with Ms. Kipkering's depositions.

7. In opposing the application herein, the Respondent filed a replying affidavit by one John Ogutu who stated he was the Secretary General of the Respondent Union. The affidavit is quite lengthy comprising of some 51 paragraphs but the gist of which are arguments in opposition to the orders sought by the applicant.

8. According to Mr. Ogutu the applicants have not approached the Respondents to change the recognition framework or to renegotiate the 2013-2015 Collective Bargaining Agreement on the basis of the directives from Salaries and Remuneration Commission. He accuses the applicant of instead seeking by way of the present suit to renegotiate the Collective Bargaining Agreement for 2013-2015 despite the fact that it is already registered.

9. Mr. Ogutu further admits that the applicants wrote to Salaries and Remuneration Committee way back on 20th November, 2013 seeking the latter's approval and guidelines before the commencement of the negotiations but Salaries and Remuneration Commission for reasons which have not been displayed opted not to respond until after the agreement had been registered thereby causing confusion in the whole process.

10. Mr. Ogutu further depones that the life of the group CBA for 2013-2015 commenced on 1st May, 2013 and therefore was not affected by Salaries and Remuneration Commission's directive which according to him, applied to Collective Bargaining Agreements effective 1st July, 2013 onwards.

11. According to Mr. Ogutu, the applicants are parastatal companies under the Ministry of Agriculture, Fisheries and Livestock Development and their operations are guided by budgetary approvals including salaries and wages, by the Board of Directors of the respective companies and the relevant ministry after thorough interrogation of the estimates and therefore cannot be disputed by another authority which did not participate in setting the estimates.

12. He contends further that the applicant had not shown that they did not adhere to Part III of the gazette notice supplement of 16th January, 2013 when submitting proposals to Salaries and Remuneration Commission and neither has Salaries and Remuneration Commission contended that the relevant factors were not considered especially in light of the fact that budgetary

provisions have been considered and approved by the parent ministry.

13. Mr. Ogutu further depones that by way of a legal opinion by the honourable the Attorney General dated 17th December, 2012 the Attorney General stated that the mandate of Salaries and Remuneration Commission extended only to cover public officers in the national government or public service whose remuneration is payable directly from the consolidated fund or directly out of money provided by parliament.

14. In the light of this legal opinion, Mr. Ogutu contends, the instant application as well as the entire claim was baseless and unsustainable both in law and fact as the Respondents members do not draw remuneration from the consolidated fund or from monies directly provided by parliament and neither are they employees of the county or national government and as such it follows that the Salaries and remuneration Commission had no mandate to interrogate their remuneration especially where parties have negotiated and agreed and consequently registered a Collective Bargaining Agreement.

15. In conclusion he contends that the orders sought if granted would contravene the Respondent's and its members rights enshrined in article 41 of the Constitution which comprise among others the right to fair remuneration, to join a trade union and to negotiate and enter into a Collective Bargaining Agreement.

16. Counsel for the parties in their oral submissions before me reiterated the foregoing factual and legal positions and I need not go over them again. However, Mr. Odhiambo for the Respondent raised the issue of the cause of action.

17. According to him, the claim as filed by the applicant discloses no cause of action since there is no dispute between the parties. According to Mr. Odhiambo both the applicants and the Respondent are in agreement over the Collective Bargaining Agreement except that there is a 3rd party in the name of Salaries and Remuneration Committee which demands of the applicant to renegotiate the registered Collective Bargaining Agreement.

18. According to Mr. Odhiambo the onus was on Salaries and Remuneration Commission to come to Court and challenge the Collective Bargaining Agreement.

19. Mr. Ouma in reply submitted that parties cannot implement a Collective Bargaining Agreement which is against statutory provisions. According to Ouma, Salaries and Remuneration Commission is a Constitutional body with the mandate to carry out rationalization programme in public service hence its advice must be taken into account in any Collective Bargaining Agreement concluded.

20. The issue for this Court to determine in the present application is whether the applicants as constituted and in their nature and operations qualify as state entities whose workers' remuneration are subject to regulation by Salaries and Remuneration Commission. However, prior to determining this question, Mr. Odhiambo raised a very important issue on the cause of action. That is to say whether in the light of the fact that the applicants signed the Collective Bargaining Agreement in issue and participated in the process of its registration, they are the correct party to seek its renegotiation especially when there is no complaint on their part over its terms. In other words is it the applicant or Salaries and Remuneration Commission who should have brought the instant application?

21. Section 59(1) of the Labour Relations Act provides that a collective agreement binds for the period of the agreement, the parties to it. Further Section 57(2) of the same Act provides that:-

“for the purpose of conducting negotiations under subsection 1 an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees”

22. The applicants are bound by the Collective Bargaining Agreement in issue in this application as per Section 59(1) of the Labour Relations Act. Further pursuant to section 7(2) the applicants made known to the respondents herein that in conducting the negotiations they needed the approval and guidance of the Salaries and Remuneration Commission before the commencement of negotiations to review salaries and other allowances.

23. By a letter dated 13th October, 2013 Salaries and Remuneration Commission informed the 1st Respondent that they noted that the Collective Bargaining Agreement as concluded did not follow the circular and regulations gazetted by the Commission which provided among other things that all Collective Bargaining Agreements should have a running cycle of 4 years with effect from July 2013. Salaries and Remuneration Commission therefore advised that the 1st Respondent renegotiates the Collective Bargaining Agreement taking into account the provisions of the circular and the regulations and resubmit the same to the Commission.

24. Section 11(a) of the Salaries and Remuneration Act provides that the Commission shall

“(a) inquire into and advise on the salaries and remuneration to be paid out of public funds.”

25. The applicants considered themselves bound by the Salaries Remuneration Commission Act hence taking the foregoing legal and factual background into account the Court is of the view that the applicant did have the locus standi and cause to bring the present application and claim as a party bound by the Collective Bargaining Agreement and in their view subject to Salaries and Remuneration Commission Act. What however is not clear is whether this action was brought to Court prematurely. That is to say, it seem not to be clear if the applicant attempted to renegotiate the Collective Bargaining Agreement with the Respondent and failed prior to filing the present claim. Further it is not clear if the dispute resolution mechanisms as provided under Part VIII of the Labour Relations Act were adhered to prior to filing of the present claim.

26. This brings me to the main question in this dispute that is:-

“are the applicants as currently constituted and in their nature and operations, qualify as state entities whose workers’ remuneration are subject to regulation by Salaries and Remuneration Commission?”

The Applicants are state corporations within the meaning set out in section 2 of State Corporations Act (Cap 446) which defines a state as corporation (in paraphrase) as:-

(a) state Corporation established by the President.

(b) a body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law.

27. The recently released Report of the Presidential Taskforce on Parastatal Reforms defines state Corporation as:-

“an entity howsoever incorporated that is solely or majority owned by the government or its agents for commercial purposes. A commercial function for the purposes of this policy is a function for the dynamics of which are governed by competitive profit, driven by market and that can be performed commercially but also serves a strategic socio-economic purpose”

28. State Corporations may be classified into three major types. Namely Commercial Corporations, Independent Regulatory Agencies and Research Institutions, Public Universities, Tertiary Education and Training Institutions. The applicants herein fall in the first category namely Commercial Corporations.

29. The Presidential Task Force Report gives the objective of commercial state corporations as intended to promote or accelerate economic growth and development. They are instruments for improving service delivery.

30. The motive behind commercial state corporations may therefore be said to be about achieving a positive place for proactive state where a state engages in business in the manner of state capitalism on a purely commercial basis. This imports the element of competitiveness. The notion of state corporatism therefore is to separate state corporations from mainstream government in order to minimize political interference in their management and decision making.

31. According to Presidential Taskforce Report, Commercial State Corporations ought to commercialize their operations in order to minimize dependence on National Treasury for funding.

32. To ensure efficiency and achievement of state development objectives, represented by the State Corporation concerned, Treasury from time to time carries out loan restructuring of individual State Corporations involving conversion of debt to equity to the extent that the assets of the corporations concerned can meet or debt-write off and subsequent discharge of corporations obligations to repay loan from government or a combination of both.

33. From the foregoing it emerges clearly that commercial state corporations are in essence government investments which although intended to achieve a set social-economic policy or goal are at the same time expected to pay back to the government funds loaned from the national treasury for their set up or development. It is the ultimate intention of the government that commercial state corporations be self-sustaining with minimal financial intervention from the National Treasury.

34. This then brings me to the next issue which is “Does Salaries and Remuneration Commission therefore have jurisdiction over commercial state corporations in the setting of salaries and remuneration for their workers?”

35. Salaries and Remuneration Commission is established under article 230 of the Constitution which provides in the relevant part that:-

230 (1) There is established Salaries and Remuneration Commission

(4) The powers and functions of the Salaries and Remuneration Commission shall be to (a) set and regularly review the remuneration and benefits of all state officers; and (b) advise the national and county governments on remuneration and benefits of all other public officers.”

36. The powers donated to Salaries and Remuneration Commission by the Constitution are further augmented by section 11 of the Salaries and Remuneration Commission Act No. 10 of 2011 which provides that the Commission shall have powers (among others).

(a) To inquire into and advise on salaries and remuneration to be paid out of public funds.

(b) Keep under review all matters relating to salaries and remuneration to be paid out of public funds.

37. In order to understand and acknowledge the role of Salaries and Remuneration Commission in the setting of salaries and remuneration of the applicants’ workers, there is need to seek the legal and ordinary meaning of the term “public officer” and “public funds”.

38. Article 260 of the Constitution defines a public officer as:-

(a) *any state officer; or*

(b) *any person, other than a state officer who holds a public office.*

The article further defines a public office as:-

“an office in the national government, a county government or public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by parliament.”

Public Office is further defined as:-

“the collectivity of all individuals other than state officers, performing a function within a state organ.”

Further, the Constitution defines a state organ as:-

“a commission, office, agency or other body established under the Constitution.”

“Public Fund” has the meaning assigned to it by the Exchequer and Audit Act (Cap 412) which includes; revenue, any trust or other moneys held whether temporary or otherwise by an officer in his official capacity either alone or jointly with any other person, whether an officer or not.

39. From the foregoing provisions of the Constitution and relevant statutes the following is deducible as concerns the applicant and its workers (the Respondents in this application); first, the applicants are not state organs within the meaning of article 260 of the Constitution. That is to say they are not commissions, offices, agency or other body established under the Constitution. The applicants derive their existence from the State Corporations Act as stated earlier in this ruling and not the Constitution.

40. Second, the applicants’ employees are not public officers within the meaning of article 260 of the Constitution. That is to say, their remuneration and benefits are not payable **directly** (emphasis mine) from consolidated fund or **directly** from money provided by parliament. Neither the National Treasury nor Parliament in the government Budget Cycle appropriate public funds for the direct payment of salaries and remuneration of the applicants’ workers.

41. The applicants are entirely responsible for their wage bill payable from income and revenue generated from their operations or borrowing from financial institutions and or National Government.

42. Whereas it may be true that the initial set up of commercial state corporation could be entirely from resources made available by the national treasury, it does not necessarily mean that salaries and remuneration will continuously be payable directly from these funds. The corporations once set up become bodies corporate capable of borrowing and carrying out commercial activities for profit like any other private company.

43. It therefore follows that commercial state corporations such as the applicants in which the government is mere investor lie beyond the mandate of the Salaries Remuneration Commission.

44. Consequently, the letter dated 13th October, 2014 from Salaries Remuneration Committee requiring the 1st applicant and by extension the 2nd applicant to renegotiate the Collective Bargaining Agreement registered by this Court on 17th October, 2013 was issued without jurisdiction and of no legal consequence on the Collective Bargaining Agreement voluntarily negotiated and signed between the applicants and their employees’ union.

45. Statutory bodies derive their powers and jurisdiction from the constitutive statute. They

have no inherent powers hence no amount of operational creativity or innovation can confer jurisdiction where none exists.

46. It is erroneous for Salaries and Remuneration Commission to assume that it was the intention of the Constitution and indeed Parliament to give it omnibus jurisdiction over any body or agency where public funds may have been invested even where such funds are repayable or not clearly discernible from other income or revenue generated by the operations of the body or agency concerned.

47. As stated earlier commercial state corporations although are usually formed to address specific social-economic needs are actually investments by the government solely or jointly with other investors in return for profits. Monies appropriated by the government to these corporations are usually loans which are repayable to the National Treasury.

48. Whereas the state of law may currently appear cloudy on the scope and breadth of Salaries and Remuneration Commission's jurisdiction over state corporations generally, this absence of clarity until addressed by Parliament cannot be construed to admit of Salaries and Remuneration Commission's jurisdiction over commercial state corporations especially when the Constitution as currently crafted provides that the mandate of Salaries and Remuneration Commission extends only to cover state officers and public officers whose remuneration is payable **directly** from the consolidated fund or **directly** out of money provided by parliament.

49. The Collective Bargaining Agreement in issue was voluntarily negotiated between the applicant's and the Respondents and agreement thereon reached. The Court presumes that the applicants must have exercised due diligence during such negotiations including consideration over its financial implication and were satisfied that it was fiscally sustainable hence signed it. They have so far no complaint about it except that Salaries and Remuneration Commission who is a third party is not happy with it.

50. Collective Bargaining Agreement is a fundamental right recognized both by the ILO Conventions and our Constitution. It concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment.

51. This right must be accorded equal protection as any other fundamental human rights. Its derogation must therefore be for good cause and deemed necessary in the context of an open and democratic society. In this respect Salaries and Remuneration Commission cannot by assumed jurisdiction purport to emasculate this right of the Respondents.

52. The Court therefore reaches the conclusion that the directive by Salaries and Remuneration Commission that the applicants re-open negotiations on the Collective Bargaining Agreement registered by this Court on 17th October, 2014 was made without jurisdiction with the consequence that the applicants' application dated 24th October, 2014 and indeed the entire claim is declared without merits and is hereby struck with no order as to costs.

53. It is so ordered.

Dated at Nairobi this 27th day of November 2014

Abuodha J. N.

Judge

Delivered this 27th day of November 2014

In the presence of:-

.....for the Claimant
and

.....for the
Respondent.

Abuodha J. N.

Judge