



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 119 of 2012

Kenya Shoe & Leather Workers Union **Claimant**

Macquin Shoe Limited **Respondent**

JUDGMENT

Issues to be determined

1. The key issues for determination relate to the failure by the parties to reach agreement on some 6 items of the Collective Agreement which was supposed to come into effect from 1 May 2011 and to remain in force for two years. The 6 items in dispute are:

- (i) General Wage increase
- (ii) House allowance
- (iii) Medical treatment
- (iv) Termination of employment
- (v) Redundancy and
- (vi) Retirement benefits.

2. On 16 November 2012, the Court on the application of the Claimant Union ordered a report on the 6 contested items to be prepared by the Central Planning and Monitoring Unit of the Ministry of Labour. The report was prepared by Mr. F.K. Nganga and filed in Court on 6 February 2013.

3. The parties made their submissions on 6 February 2013. I have considered these submissions and the Claim filed in Court on 2 May 2012 and the verifying affidavit of Julius Ndombi Maina sworn on the same day and the annexures thereto and also the Memorandum of Reply by the Federation of Kenya Employers on behalf of the Respondent filed in Court on 15 November 2012 and the annexures thereto.

Submission of parties and Analysis.

General Wages increase.

4. The Claimant Union proposed a general wage increase of 40% for the first year and another 40% for

the second year during the life of the Collective Agreement in the Memorandum of Claim but reduced this during conciliation to 17% spread over two years thus translating to 8.5% per year. The Claimant Union's ground in support of the wage increase is generally one, that inflation rates were fluctuating from 16% to 17%.

5. On its part the Respondent submitted that it could not sustain a wage increase of 17% as sought by the Claimant Union and further that it was withdrawing its previous proposal of 6%. The grounds asserted by the Respondent were that the Respondents audited accounts which had been annexed to its Response indicated the company had made losses over the years and that the mitumba shoe business had adversely affected the whole new shoe sector. Further it was urged that the Respondent had decreased its unionisable workforce from a high of 16 employees to only 8 as of 2011.

6. The Respondent acknowledged that employees have a stake in the profits of the employer but strongly urged the Court to consider the issue of profitability of the Respondent in making an award of increase of wages.

7. The report by the Central Planning & Monitoring Unit notes that there are two major factors to consider in determining compensation and these are the rise in the cost of living which it reports rose by 18% for Nairobi lower income group which is comparable to the position of the Claimant Unions members herein between May 2009 and April 2011 and, secondly labour productivity. The reports' analysis of the Respondent's situation is that there was no improved productivity during the period under review. In fact it is reported that the Respondent currently works only to order and these have averaged 50 pairs of shoes per day, a very low number.

8. The Central Planning & Monitoring Unit in its analysis of the general wages proposal from both the Claimant Union and the Respondent indicates that if the Unions proposal for 17% wages increase spread over two years were to be adopted, the Respondents wage bill would go up by Kshs 230,000/- over the two years and if the Respondents pleaded proposal of 12% spread over two years were to be adopted the wage bill would increase by Kshs 160,680/- over the two years. The report also indicates that the increase over two years would be Kshs 216,300/- , were an award of 16% to be made.

9. However, the report also notes that the Respondent had made loses of Kshs 2,324,722/- in 2011 and that over the past four or so years, generally the Respondent has been incurring net losses and that financial ability as provided for Wage Guideline No. 7 should be a factor to be taken into account. It also notes that the Respondent may be on its deathbed if concrete strategic measures are not put in place.

10. Considering the submissions of the parties and the Central Planning and Monitoring Unit report, it is clear that the Respondent is tottering on the verge of shutting shop and therefore it is incumbent upon the Court to give due consideration to its financial position vis-a-viz the need to give a decent living wage to the employees. The Court also notes that the cost of living rose by about 18% during the period 2009 to 2011 as captured in the Central Planning and Monitoring Unit report.

11. Bearing all these factors in mind, and balancing the interests of both the Claimant Union's members and the Respondent I do order that the wages remain at the current rates.

House Allowance

12. The Claimant Union proposed a house allowance of Kshs 5000/- per month from the current Kshs 2400/- per month. The Respondent proposed that the current levels be maintained.

13. The Central Planning & Monitoring Unit report indicates that acceding to the proposal by the Claimant Union would lead to an extra cost of Kshs 250,000/- annually on the Respondent. The report also notes half of the rise in compensation flowing from inflation should be applied towards house allowance and if this were to be, it would translate to Kshs 2,616/-. But this is on paper. A survey carried out by the Unit revealed that one bed roomed houses where a majority of the employees reside cost an average of Kshs 3000/- per month, not considering the transport costs to reach the place of work.

14.The primary responsibility of an employee as respects employee housing is in section 31 of the Employment Act and is to the effect that an employer shall provide at its own expense reasonable housing or to pay such sum as shall enable an employee to obtain reasonable housing.

15.I note that the current house allowance paid by the Respondent to its unionisable employees is more than the customary 15% but again the report notes that this sum does not enable the employees to secure reasonable accommodation.

16.This Court in dealing with a case such as this one must carry out a delicate balancing act. The Court must consider the statutory requirements such as section 31 of the Employment Act, it must also consider the financial status of the employer and the impact any award would have on the employer and also consider the real value of the allowance paid to an employee to enable the employee secure reasonable accommodation. Being alive to the financial status of the Respondent as shown by the accounts annexed to the Response and the report by the Central Planning & Monitoring Unit, it is my considered view that setting this particular award in the sum of Kshs 3000/- per month would be fair and reasonable balancing the constitutional and statutory right of the employees to reasonable housing and the need to ensure the Respondents financial survival is not endangered. This increase essentially means that the housing allowance bill for the 6 unionisable employees will go up by about an extra total of Kshs 3600/- per month or Kshs 43,200/- annually. I have also considered the fact that I have declined to review the general wages rate.

17.For the purpose of clarity the house allowance of Kshs 3000/- per month will be backdated to 1 May 2011 when the Collective Agreement in issue was to become effective.

Medical treatment

18.The Respondent currently covers the medical expenses of its employees. The Claimant Union proposed that this cover be extended to the spouses of the employees' and four children under the age of 18 years.

19.The Respondent counter proposed that this cover be maintained at the current rates and it strongly argued that because the employees are contributors to the National Hospital Insurance Fund, the dependents can be adequately covered under the Fund.

20.The Claimant Union did not respond on the impact or implications of the cover the spouses or dependents of the employees currently enjoy under the National Hospital Insurance Fund. Considering that the Respondent currently covers the medical expenses of the employees and that the employees are contributors to the National Hospital Insurance Fund and enjoy certain benefits together with their dependents, I do not accept the invitation by the Claimant Union to extend medical cover to spouses and dependents.

Termination of employment.

21.The Claimant Union also sought a review of the service pay payable by the Respondent to its employees on termination of the employment relationship from 16 days to 30 days for each year of service. This, it was argued, was to cushion the terminated employees.

22.The Respondent on the other hand argued that the 17 days pay for each year of service was adequate and that this was reasonable if considered against the provisions of sections 35 and 36 of the Employment Act.

23.The Claimant Union did not lay any valid foundation on why the payment of service pay should be increased to 30 days for each year of service. No data or comparable information from other segments of industry was availed to enable me find in favour of the Claimant Union.

Redundancy.

24.The Claimant Union further sought that redundancy pay be increased from the current 17 days for each year served to 30 days. The Claimant Union also made reference to section 40 of the Employment Act.

25.The Respondent on its part asserted that the law provided for 15 days pay for each year of service while the Respondent had agreed to 17 days pay for each year of service and urged the Court to maintain the current levels.

26.Declaration of redundancy is always a painful experience for an employee. The statute and in many instances Collective Agreements entered into by an employer and the union set out elaborate procedures to be followed in case of an declaration of redundancy. Although the parties did not lay any information before me on the trends in the market/economy on the average figures/days for calculating redundancy benefits I am satisfied that leaving the figure at 17 days for each year of service would be fair in the circumstances of this case.

Retirement benefits

27.The last issue placed before Court was payment of retirement benefits. The Claimant Union had proposed that this be increased from 21 days to 30 days of each year served because a retiring employee had provided faithful service and was leaving in good terms. The Union also requested for a baggage allowance of Kshs 20,000/-.

28.The Respondent submitted that the retirement benefits be maintained at the current levels. The parties did not address me on what factors are considered by the parties when pegging the number of days to be used in setting the payment of retirement benefits nor on the factors or circumstances the Court should consider. It was not argued by the parties or clarified whether the wages guidelines or inflation are relevant factors.

29.Considering the financial position of the Respondent as captured in the Central Planning & Monitoring Unit report and the audited accounts of the Respondent I would maintain the payment of retirement benefits at the current 21 days for each year of service. However, I must admit that the financial position of an employer may change fundamentally in the course of time and therefore parties before Court should attempt as much as possible to lay before Court sufficient material to enable it make a fair determination. I make no determination regarding the baggage allowance as it appears to me it was more of an afterthought.

Orders

30.The Court therefore orders as follows:

[a] The Claim for general wage increase is declined

[b] The Claim for increase of housing allowance from the current Kshs 2,400/- is allowed and the same is set at Kshs 3000/- per month backdated to 1 May 2011.

[c] The Claim for extension of medical benefits to spouses and 4 dependent children under 18 years is declined and the current benefit to be maintained.

[d] The Claim to increase from 16 to 30 days pay for each completed year of service in cases of termination of employment is declined and the same to be maintained at 16 days pay for each completed year of service.

[e] The Claim to increase from 17 to 30 days pay for each completed year of service in cases of redundancy is declined and the same to be maintained at 17 days pay for each completed year of service.

[f] The Claim to increase from 21 to 30 days pay for each completed year of service in cases of retirement benefits is declined and the same be maintained at the current level of 21 days for each completed year of service.

[g] There will be no order as to costs.

Dated, delivered and signed in open Court at Mombasa this 22nd day of February 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Julius Maina instructed by Kenya Shoe

& Leather Workers Union

For Claimant Union.

Mr. Ambenge instructed by Federation of Kenya Employer

For Respondent.