REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1624 OF 2013

TAILORS AND TEXTILES WORKERS UNION ……..……. CLAIMANT

VERSUS

NEW WIDE GARMENTS KENYA (EPZ) LIMITED ……. RESPONDENT

RULING

The claimant filed the application dated 7th October 2013 by Notice of Motion under the provisions of section 49(1) and (3) of the Labour Relations Act, seeking for orders that the respondent has refused and or failed to comply with section 49 of the Labour Relations Act with regard to the deduction of Agency fees from 3,015 union sable employees and are covered by the collective bargaining agreement (CBA) No. 32 of 2013 and that the court should direct the respondents to effect the deductions of Agency fees and effect payment by crossed cheque into the claimants account No. 0013194009 at Trans-National Bank Ltd, city hall Way Branch, Nairobi in accordance with Gazette Notice No. 9073 of 5th July 2013. This application is supported by the annexed affidavit of Rev. Joel Chebii on the grounds that the respondent has failed and or refused to comply with the requirements outlined in section 49 of the Labour Relations Act which require them to deduct Agency fees from 3,015 ununionisable employees in they employ and with regard to Gazette Notice No. 9073 of July 2013.

This court on 11th October 2013 gave an interim order directing the respondent to effect deductions of Agency fees. These directions were not complied with.

The respondent on 17th October 2013 filed their Replying Affidavit sworn by Rudolf Isinga, the General Manager of the respondent on the basis that the claimants failed to disclose to the court all material facts to enable the court arrive at a decision that is just to both parties. That when the respondent deceived the notice for the deduction of agency fees they invited the claimant union to a discussion noting that the respondent had not been consulted before requesting the Minister to direct payment of the agency fees by the respondent, this meeting took place on 14/8/13 and the respondent agreed to look into the issue of payment of agency fees but the claimant wrote to the respondent head office with a complaint that the respondent was engaging in bad labour practice. The respondent then wrote to the Minister to vary the order as provided for under section 49(4) of the Labour Relations Act noting that the list submitted by the claimant is flawed as it was not prepared by the respondent, the benefit accruing to employees under the CBA is 2% salary increment on basic pay whereas the agency fees deduction is 2.5% of basic pay and the employees will be disadvantaged if the deductions are effected as per Gazette Notice No. 9073July 2013. That the list of the claimant has 3,015 employees, and this list has employees in management, and some have left employment.

On the grounds of the flaws in the list of ununionasabe employees, the respondent seek that there be a proper audit to ascertain the legitimate employees to facilitate the deduction of agency fees.

Further to this Replying Affidavit, the Respondent filed their application dated 16th October 2013, brought under the provisions of section 12(3) of the Industrial Court Act, and Rule 16 of the Industrial Court Procedure Rules seeking to set aside and or stay the orders of the court granted on 11th October 2013 an in the alternative there be a stay of proceedings pending a decision by the Minister for variation of agency fees. This application is supported by the annexed affidavit of Rudolf Isinga on the grounds that the claimant has served the respondent with a penal notice requiring them to comply with the orders issued herein on 11th October 2013 and noting that deductions of agency fees can only be effected from the employees' pay at the close of the payroll on 25th October 2013 but the list of 3,015 is flawed. That the orders granted by the court are final yet the application has not been heard. That the claimant did not consult the respondent before requesting the Minister to direct the respondent to pay agency fees of 2.5% and the affected employees will be disadvantaged because the CBA provides for 2% and not 2.5% and the respondent has thus asked the Ministry to vary the gazette Notice No.9073 of 5th July 2013. That the respondent's ununionisable employees have threatened to dispute operations if the said deductions are effect.

Under the provisions fo section 48 and 49 of the labour Relations Act, the law recognise the fundamental role played by trade unions in securing employee gains with regard to negotiated agreements. These gains not only benefit the union members but also go beyond the union membership to other employees. Where there are benefits that are secured through the efforts of the representative trade union in collective bargaining and are passed on to other employees who are not members f the representative trade union such employees should make contribution towards the costs which the representative union incurs in connection with its collective bargaining work. If they do not pay that is unfair because members of the representative union pay for those costs. An agency fees seeks to make them pay without compelling them to join the representative trade union. The fact that such workers may be members of another union in the work place to which they pay union dues does not turn them into paying riders. They remain free riders because they make no contribution towards the collective bargaining costs of the representative union.

It has not been contested that by the respondent that the agency fees and the CBA does not comply within the requirements of the law especially section 48 and 49 of the Labour Relations Act. In short the respondent does not contend that the CBA as between them and the claimant is invalid. What they do contest is that the agency fees, although lawful and binging in terms of section 48 of the Labour Relations Act, it should be 2% and not 2.5% and for them to make the 2.5% deduction would be unfair to the employees.

However, only employees can object to being burdened with agency fees and not an employer and when such employees do object, that or the stated objections must be tested as to whether the expenditures of a union in this respect as to have the agency fees is necessary or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labour related matters. Any objecting employee can be compelled to pay a fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining table. Thus, this role to object is left to an employee and not an employer. For an employer to act in a manner that frustrate the efforts of a union with which there exists a Recognition Agreement, and have a step further to have a CBA would be to an unfair labour practice and against the good labour relations regime expected of an employer and union that they have recognised as the employees representative body. In this regard, I agree with the submissions of the claimant counsel that the interests of the respondent in this case are not clear, they have not acted in good faith and by the refusal to make the agency fees due and by pursing the Minister to have the Legal Notice No.9073 of 2014 revoked, it is clear that they are not keen to effect the agency fees deductions and fail to recognise the role of the union with regard tot eh provisions fo section 48 and 49 of the Labour Relations Act.

The respondents have already identified the flaws in the list submitted by the claimant and even where they are to be taken in good faith so as to enjoy in equity, they have not done the needful to supply their list with the correct number of ununionisable employees. The respondent was aware of these facts and the flaw well in advance to 25th October 2013 when their payroll close. They have not made any effort to effect the agency fees deduction in this regard.

There is no evidence of the alleged threats by the ununionisable employees of the respondent that in the event the agency fee is deducted they will disrupt the respondnet's operations, if this were the case, the respondent who is now seeking to protect the rights of their ununionisable employees would have readily found this evidence.

Parties coming to this court are taken in good faith and when there is an outright demonstration that a party before this court is not acting in good faith, this court will frown but proceed and direct that which is right and just and go beyond and ensure the objectives of the Industrial Court as set out under section 3 of the Industrial Court Act are not lost in the process. Further it is of paramount importance that parties in an employment relationship respect fair labour practices between themselves, and to be found by the court with hands that are not seen as clean, that is an unfair labour practice. If the respondent felt that there was injustice being committed by a union with whom they have a recognition agreement with, nothing stopped the respondent from proceeding to this court to seek a restraining order in that respect. That is what a diligent employer does. The consultations with the Minister are healthy but the same should be mutual, open and democratic. I will nto state much in this regard. This courts exist to give a fair chance to all parties before it. This court is not in competition with the Minister or any other body for that matter, this court has a mandate that it must ensure and protect in an independent and impartial manner.

In this regard, I make the following directions with regard to the application dated 7th October 2013 and the application dated 16th October 2013;

a. **The respondent is to have a proper record of the ununionisable employees in their service within the next seven (7) days that will be shared with the claimants;**
b. **Upon service the claimant will take the record in confirmation and within three (3) days report their approval or disapproval to the respondent.**
c. **The respondent will convene a meeting with the claimant on or before the expiry of fourteen (14) days from this date to agree on this list;**
d. **In the event there is no agreement, the respondent will use their list to effect agency fees deduction of 2% from the ununionisable employees in their employ on the date the November payroll is due; and**
e. **The claimant to take a mention date herein to confirm compliance or non-compliance on the 28th day from today, where the court will give directions as to the hearing and outstanding issues herein.**

Dated and delivered at Nairobi this 1st day of November 2013.

M. Mbaru

Judge