



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
INDUSTRIAL COURT AT NAIROBI
Cause 1180 of 2011

**KENYA CHEMICAL & ALLIED WORKERS
UNION.....CLAIMANT**

Vs.

BAMBURI SPECIAL PRODUCTS.....RESPONDENT

JUDGMENT

What is before court is a dispute between Kenya Chemical & Allied Workers Union and Bamburi Special Products Ltd. The Claim by the Union is dated 7th July 2011. The Claim sets out in sequence the genesis and breadth of the dispute. Evidence has been attached to the Statement of Claim as Appendixes 1-10. The Respondents on the other hand filed a Response to the Claimant's Claim and attached 3 annexes to the Response.

Mr. Were Ogutu addressed the Court at length on the matter. He submitted that the dispute was properly before the Court. He stated that the Respondent had refused to deduct union dues from the staff of the Respondent who had consented to the check-off system as provided for under S. 48(2) of the Labour Relations Act of 2007. The dispute covered some 35 employees as indicated in Appendix 1 of the Statement of Claim. The Claimant has exhibited evidence of efforts to resolve the matter including the Conciliation under the Ministry of Labour appointed Conciliator in August 2010. The conciliation culminated in an Agreement dated 4th October 2010. The Agreement was to the effect that the Respondent was to implement the check off and deductions made as required. He submitted that the question of a new employer as set out in the letter at Appendix 9 did not arise as the Agreement of 4th October 2010 was between the Claimant and the Respondent. He stated further that the agreement had been entered into voluntarily and therefore the Respondent could not now raise issues of a new employer. He urged the Court to find that the Respondent breached the law by failing to deduct and remit the union dues as agreed.

The Response by the Respondent was urged by Mr. Njeru Advocate. The same is dated 20th September 2011. The Response sets out in paragraph 3 the gravamen of the Respondents position. It is submitted that of the 35 employees, 22 are employed by a company known as Career Directions. This is stated to be a fact the Claimant was aware of. Some 6 employees are stated to have left employment and of the balance, 5 are said to be members of the Union and 1 is non-unionisable. The Respondent has submitted 3

Annexures two of which are common. The only new document is the schedule which is Annex 1 in the Response to the Claim.

Mr. Njeru submitted that the totality of Section 48 of the Labour Relations Act would fall for consideration as regards who is a member of a trade union. He referred the Court to Section 59 of the Labour Relations Act. He submitted that there can be no doubt as to who is a member of a trade union. He submitted that the issue of collective bargaining agreement is a question of contract. He averred that to claim dues from a person who is not a member of the union is illegal and unsustainable. In his submissions he stated that what the Claimant was seeking was a renegotiation of contract to bring in other people who were not in its membership. He asserted that the Claimant was seeking an order that is untenable. He urged the Court to disallow the Claim and dismiss it with costs.

Having heard both sides of the dispute and reading the documents in the case, this Court can safely state that the dispute is properly before the Court. The issues to be determined are related to the remittance of union dues. The questions which this Court has to answer are whether the law was followed and if it was not followed what remedy is available.

At the onset, the Court notes that of the computations made on the 35 employees subject of this dispute, one is unaccounted for going by the totals in Para 3 of the Response to the Claim. This may have been oversight or the non-inclusion of one of the staff who fall into one of the 3 categories identified by the Respondent.

The Constitution of Kenya has brought to the fore the rights of workers in Part 2 which deals with the Bill of Rights. The importance of this Part cannot be over emphasized. In order to bring forth the realization of the Vision 2030 and the economic growth postulated in policy declarations of the Ministry of Finance, the role of employers, employees and unions take centre stage. Under Article 41 of the Constitution, the Constitution makes some detailed provisions as regards the rights and roles of employees, employers, unions and employers organizations. Article 41 provides (in the relevant parts) as follows:-

Article 41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right -

- (a) to fair remuneration;
- (b) to reasonable working conditions;
- (c) to form, join or participate in the activities and programmes of a trade union; and
- (d) to go on strike.

The employees of the Respondent who qualify to join a union are clearly permitted to do so.

The parties have placed great reliance on some provisions of the Labour Relations Act 2007. The Act was in a slew of statutes passed in 2007 trying to re-align the legislation on labour issues. The other statutes passed concomitantly were the Labour Institutions Act, Occupational Safety and Health Act, Employment Act, Industrial Court Act, Work Injury Benefits Act and the Industrial Training Act.

The Labour Relations Act 2007 provides in Section 48(2) as follows-

48 (2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—

- (a) deduct trade union dues from the wages of its members; and
- (b) pay monies so deducted—

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

In this case, the Claimant made the request to the Minister who proceeded to make the order. It was complied with until the decline to make deductions from the 35 employees precipitating this dispute. It is not denied by the Respondents that the Ministry of Labour Conciliator one Kisurulia Kuloba conciliated the parties leading to the Agreement of 4th October 2010. This is exhibited as Annexure 8 on the Statement of Claim. Mr. Henry Ondieki signed on behalf of the Respondent while Mr. James Obura and Mr. George Gwako signed for the Claimant. The Respondent seems to have resiled from the position contained in the negotiations and agreement as evinced by its letter of 28th October 2010. The letter is produced by both parties and is signed by Henry Ondieki the HR Officer of the Respondent. The letter states, in the material part *regarding the deduction of union dues that was the subject of a trade dispute between your union and the company.*

As you are aware, most of these employees are now working with a different organization.

It would seem that after the negotiations or during the pendency of the same, there were changes in status relating to the members of the Claimant. It is indicated by the Respondent that the employees are now employed by Career Directions. No documentation other than a schedule is annexed. It is not also known when the employees ceased to be employed by the Respondents. The terms of their engagement are unknown and in the absence of proper explanation, it would seem that there was breach of the Agreement of 4th October 2010. The author of the letter is the very same person who signed the agreement on 4th October 2010. Was the agreement a poisoned chalice offered to the Claimant to hoodwink? The change in status of the members of the Claimant could not take place overnight. There must have been some degree of foreknowledge on the part of Mr. Henry Ondieki.

The relevant parts of the Labour Relations Act Section 59 cited in support of the Respondents submissions provides as follows-

Section 59. (1) A collective agreement binds for the period of the agreement—

(a) the parties to the agreement;

(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

It would follow therefore that the collective agreement entered into subsists in terms of Section 59(2). The Court surmises that the attempt to recant membership of the Claimant is not proper. While realizing that realignments take place at the workplace all the time, it would be a failure on the part of this Court if I did not point out that in proceedings before any arbiter the best course to adopt is one where the principle of

uberima fides is shown. If indeed at the time of negotiation there was a proposed change in status, the best course would have been for the Respondent to openly state so.

In view of the foregoing and the law now obtaining, the order that commends itself to me to make, is to allow the Claim and Order the Respondent to remit the dues that fell due from 20th March 2010 as per the check-off list. The only exception is the non-unionisable employee.

For avoidance of doubt this sum is payable regardless of whether actual deductions were made by the Respondent.

The proof on commission of an offence in terms of Section 50 (8)(i) is well set out in the Statement of Claim. The Respondent admits the conciliation took place but has declined to implement the same on the argument that the employees are no longer their staff. This led to the reference of the matter to the Conciliator. In the premises this Court finds that the failure to comply with the order of the Minister was in contravention of the law and hereby orders the Respondent to pay a fine of Kshs. 100,000/-. This should serve as a warning against future breaches which the Court will not hesitate to punish with more severe fines.

It is so ordered.

Dated and Delivered at Nairobi this 30th day of July 2012

Nzioki wa Makau

JUDGE