



**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI.**

(Coram: Charles P. Chemmutut, J.,

A.O. Wafula & J.M. Kilonzo, Members.)

**CAUSE NO. 21 OF 2006.**

**TAILORS & TEXTILES WORKERS' UNION..... Claimants.**

v

**T.S.S. SPINNING & WEAVING LTD..... Respondents.**

**Issue in Dispute:-**

1. **House Allowance.**
2. **Leave Travelling Allowance.**
3. **Sick Leave.**
4. **Death of an employee.**
5. **Shift Allowance.**
6. **General Wage Increase.**
7. **Protective Gear/Clothing.**
8. **Pension/Provident Fund Scheme.**

Mr. Charles N. Ngatia, Director of Industrial Relations and Research, for the Claimants (hereinafter called the Union).

Mr. Mathews Nderi Nduma, Head, Legal and Industrial Relations Division, F.K.E., for the Respondents (hereinafter called the Company).

**A W A R D.**

The Notification of Dispute, Form 'A', dated 25<sup>th</sup> August, 2005, together with the statutory certificate from the Labour Commissioner under Section 14(7) and (9)(e) of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 13<sup>th</sup> February, 2006, and the dispute was listed for mention on 21<sup>st</sup> March, 2006. On this occasion, the parties were directed to submit or file their respective memoranda or statements on or before 10<sup>th</sup> April and 10<sup>th</sup> May, 2006, and the dispute was fixed for hearing on 14<sup>th</sup> June, 2006. Mr. Ngatia for the Union submitted his memorandum on 13<sup>th</sup> April, 2006, and Mr. Nduma for the Company filed his reply statement thereto on 9<sup>th</sup> May, 2006. Consequently, the dispute suffered a couple of adjournments, and it was eventually heard on 5<sup>th</sup> October, 2006.

The Union is registered as such under Section 11 of the Trade Union Act, Cap. 233, Laws of Kenya, while the Company, which engages in the manufacture of textiles, is a limited liability concern, incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya. It is a conglomerate of companies, whose Head Office and the weaving factory are located in Nairobi on Lusneti Road, off Likoni Road, Industrial Area, whereas its spinning factories are situated at Dandora and Athi River.

The parties have a valid recognition agreement and have also negotiated and entered into several collective agreements which govern the terms and conditions of service of the unionisable employees of the Company. The present dispute, however, arose when the parties embarked on a review or renewal of their latest or outgoing collective agreement for the period 1<sup>st</sup> January, 2002, to 31<sup>st</sup> December, 2003. The parties exchanged proposals and counterproposals, and held several or series of meetings at their own level and during the course of reconciliation proceedings to resolve the issues, but eventually no settlement was reached or arrived at on the eight (8) issues now before the Court for adjudication or consideration and determination (see Union Apps. I to 15 B).

The case of the Union is that the Company has ability to meet the demands and urged the Court to find that its proposals are accommodating, fair and justifiable. On the other hand, Mr. Nduma for the Company pleaded inability to pay because the Union's demands were unreasonably high, considering that the Company has regularly remitted all the statutory deductions, including NSSF contributions, as required by the law. Furthermore, he said, the Company has, since it commenced operations in January, 1996, consistently awarded yearly increments to its employees despite the fact that the financial statements for the years 2002, 2003 and 2004 showed cumulative losses of Kshs.92.0 million, Kshs.150.7 million and Kshs. 160.3 million respectively, while the annual losses for the same years were Kshs. 9.8 million, Kshs. 58.4 million and Kshs.10.2 million respectively (see Company Anns. I and 2).

In his analysis and observations on the financial position of the Company for the relevant period under consideration, Mr. F.K. Ng'ang'a of the Economic and Planning Division (which is hereinafter referred to as the EPD) stated that the gross profit from total sales and other income stood at Kshs.19.9 million in 2001, but dropped to Kshs.6.5 million in 2002. However, it rose to Kshs.9.4 million in 2003 and drastically went up further to Kshs. 26.8 million in 2004. But the cost of sales has, over the period under review, surprisingly and without explanation, eaten up 82.5% to 91.6% of the sales. The Union has, therefore, cast some doubt on the Company's audited accounts in support of its performance. The report also shows that the expenditures have always been far above the gross profits, with the result that losses have always been incurred by the Company before taxation, which amount fluctuated between Kshs.4.8 million and Kshs. 16.9 million during the period under review. The administrative expenses also accounted for huge proportions of between 80% and 90%, instead of being used for processing, distribution and marketing costs which have a direct positive bearing on the profitability of the Company's business. In the result, except in 2001 when the accounts showed a profit of Kshs. 9.4 million, the Company incurred losses close to Kshs. 10.0 million in the subsequent years, apart from 2003 when the loss stood at Kshs. 58.4 million. Therefore, the accounts show that the Company has been doing very poorly over the four years' period under consideration.

On employment, annual labour costs and the wage bill for the period 2002 to 2004, the report shows that the management staff level has been almost stable between 17 and 19 during the period under review, with the corresponding annual labour costs of Kshs.5.7 million, Kshs.7.5 million and Kshs. 9.0 million in 2002, 2003 and 2004 respectively. The number of unionisable employees also remained almost stable during the same period, i.e. 146, 157 and 158 in 2002, 2003 and 2004 respectively, and their corresponding annual labour costs stood at Kshs.15.9 million, Kshs. 17.1 million and Kshs. 21.0 million respectively during the period under review. The relative steady increase in labour costs for both categories of employees is attributed to the improvement of their terms of service. During this period, the number of casual workers fluctuated haphazardly – it dropped from 76 in 2002 to 59 in 2003 but sharply rose to 106 in 2004. This steep rise, the report says, was triggered by the huge net loss of Kshs. 58.4 million in 2003. Overall, the annual labour costs steadily rose from Kshs.28.7 million in 2002 to Kshs.30.1 million in 2003 and again up to Kshs. 39.1 million in 2004.

As regards major compensable factors, the report states that the employees are entitled to full compensation during the two years period of the outgoing collective agreement as they earned less than Kshs. 10,000/= per month. This is meant to cushion them from inflationary effect on their incomes. The employees are also entitled to 13.6% wage increase for the two (2) years period, or 6.8% each year; and further compensation would arise too from the employees' levels of productivity because they are entitled to a share of the wealth which they have helped to create for the Company. However, there are no major wage differentials amongst the employees' basic wages.

With the foregoing observations in view, we will now take up the issues in the order in which they are given in the Notification of Dispute, Form 'A', at the commencement of this award.

### **1. House Allowance.**

Clause 7 of the parties' current collective agreement provides that:-

“The current salary be deconsolidated by 15% (house allowance). The amount on house allowance to go up by 7.5% (First year) and 7.5% (Second year).”

The Union demand that an increase of Kshs.323 each year, be awarded to the employees, based on the rates of Grade 3, or Kshs. 1,200/= per month, for Grades 1 to 6, and 5% increase on the existing rates for Grades 7 to 12, against the offer by the Company of 5% house allowance increase for the first year and a further 6% for the second year (see Company Anns. 3 and 4).

The EPD report shows that most of the employees live in Eastlands, Kayole, Umoja, Tena, Kariobangi, Dandora, Kahawa

West, e.t.c, where the average rates for 10'x10' single rooms in easily accessible areas vary between Kshs. 1,500/= and Kshs. 2,500/= per month, whereas rents for one-bed room house in easily accessible and safe areas range between Kshs. 3,000/= and Kshs. 4,500/=, and for two-bedroom houses go for between Kshs. 7,000/= and Kshs.14,000/=.

On careful perusal of the parties' submissions and the EPD report, we reiterate our observation on this item in a series of previous decisions that decent and reasonable accommodation is scarce and unaffordable, particularly in urban centres, and landlords have been quick to exploit the situation to the disadvantage of the public, especially employees of low income wages or earnings, and it is incumbent upon every employer to provide reasonable housing accommodation, or pay sufficient rent, to each of his employees. Section 9 of the Employment Act, Cap. 226, Laws of Kenya, provides, *inter alia*, as follows:-

“Every employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to his wage or salary, as will enable the employee obtain reasonable accommodation.....”

Keeping in view Wage Guideline 2(ii) and (iv) and the afore-quoted legal provision imposed upon every employer, we are inclined to improve the offer on this issue of 5% and 6% for the two years respectively by 2.5% and 1.5%, to make it 7.5% each year, or 15% for the two years' period, on the employees' basic monthly wage, and we award accordingly.

## **2. Leave Travelling Allowance.**

Clause 13(a) of the parties' outgoing collective agreement provides that an employee traveling on annual leave shall be entitled to Kshs.1,200/= each year.

However, the Union demand that the present leave allowance be hiked to Kshs. 1,500/= for the first year, and by a further Kshs.1,700/= for the second year, against the Company's offer of Kshs. 1,300/= each year.

Mr. Ngatia for the Union contended that owing to the prevailing strict rules on the roads, fares to and from various destinations have become so unpredictable to the extent that the current amount is insufficient for the majority of employees and their families of at least 3 members. Furthermore, the current provision has overstayed without review for offer five (5) years, while other firms in the same industry offer an average of Kshs.1,807/= on this item.

On the other hand, Mr. Nduma argued that the offer by the Company is most reasonable and justified in view of the fact that its performance has been shrinking owing to the flagrant and continuing dumping of cheap products in the market, mainly from the East, high cost of production, the opening up of the markets in terms of the WTO regulations and the changes in the AGOA regime in 2005. In any case, the rates as quoted by the Union to various destinations are within the Company's offer.

The EPD has established that majority of the employees in the Company's employment come from all parts of the country, the farthest areas being Busia, Kakamega, Moyale, Marsabit, Embu, Nyahururu e.t.c.

We have observed in several awards before that leave travelling allowance is personal to the employee himself or herself. In our considered opinion, however, and keeping in view the unpredictable and escalating transport costs or fares, we award that an employee be paid Kshs.1,400/= each year as leave traveling allowance when he or she proceeds on annual leave.

## **3. Sick Leave.**

The relevant provision under Clause 9(a) of the parties' collective agreement states that:-

“After the completion of probationary period, an employee shall be entitled to 40 days sick leave with full pay and subsequent 21 days with half pay in any one year.”

The Union demand 50 days sick leave with full pay and a further 50 days sick leave with half pay on the ground that other comparable firms or concerns in the same industry or sector offer an average of between 43 days sick leave with full pay and 41 days sick leave with half pay. For example, the Union has relied for this proposal on the following comparable enterprises:-

<b><u>Enterprise.</u></b>	<b><u>Full pay.</u></b>	<b><u>Half pay.</u></b>
Thika Cloth Mills.	45 days	45 days
Midco (Shirts).	45 ”	45 ”
Soma Wear.	50 ”	40 ”
Spinners & Spinners.	32 ”	35 ”
Bloomingdate.	40 ”	35 ”
Fine Spinners.	45 ”	45 ”.

Mr. Nduma for the Company has offered to improve the current 40 days sick leave to 45 days sick leave on full pay, but wishes to retain the 21 days sick leave on half pay. He contended that the demand by the Union of 50 days sick leave on full pay and 50 days sick leave on half pay is unreasonable and untenable, considering that most of the said comparable concerns have since collapsed.

The EPD has established that during the period 2002 to 2004, no employee was on sick leave with half pay. However, those employees on sick leave with full pay stood at 2 in 2002, 7 in 2003 and 9 in 2004; and any employee who falls sick is granted permission with full pay to go to hospital without taking it into account as sick leave.

It is not desirable that an employee should be required to fall back upon sick leave at times when he is really not ill, but only feels a little below par. Sick Leave is intended to cover absence on account of illness however minor or insignificant it may be. In our view, therefore, and in order to maintain almost some semblance or uniformity and standard in the industry, we are persuaded by the Union to improve the numbers of leave days as follows:-

45 days sick leave with full pay.

30 days sick leave with half pay.

We feel this improvement will meet the ends of justice and equity, and we so award.

#### **4. Death of an employee.**

Clause 20 (c) of the parties' collective agreement provides that:-

“The Company shall provide assistance of Kshs.7,000/=(Seven Thousand Shillings) towards funeral expenses.”

The Union demand that the current amount of Kshs. 7,000/ should be improved to Kshs. 30,000/= because the cost of coffins and transport has astronomically gone up over the years, and the average rate in the sector is Kshs. 35,600/=.

On its part, the Company has offered to improve the current amount of Kshs. 7,000/= to Kshs. 8,000/= only, in view of the fact that its business performance is bleak.

The EPD has established that the employees of the Company come from as far as Busia, Moyale, Wajir, Kakamega, Kisii e.t.c., and between 2002 and 2004, four (4) employees passed away.

In *Cause No. 66 of 1998: Kenya Chemical & Allied Workers v. Eveready Batteries Kenya Ltd.*, this Court observed, *inter alia*, as follows:

“It is human and important for the Company to show concern by sharing the cost of bereavement during the period of grief. Hence their contribution..... “

On serious consideration of this matter, we are inclined to enhance the Company's current contribution of Kshs. 7,000/= by a further Kshs. 3,000/=, to make it Kshs. 10,000/= towards funeral expenses of an employee who dies while in employment. We think this is a fair and reasonable amount for now and we award accordingly.

#### **5. Shift Allowance.**

The Union demand a rise of the shift allowance from the current amount of Kshs. 3/= to Kshs. 5/= per hour, or Kshs. 36/= per shift, against nil offer by the Company. The Union has cited the same provision of the same by other firms in the industry or sector, whose average is Kshs. 19.75 per shift, and maintained that, if granted, the shift allowance will act as an incentive and morale-booster to the employees who would in turn raise the levels of productivity to the Company's advantage.

But Mr. Nduma for the Company argued that the current rate is over and far/above those provided for by other firms in the industry and overtime payment paid at 1.5 times normal salary rate. He strongly contended that the shift allowance has been on the increase while employees' levels of productivity have been on the decline, and this has contributed immensely to rising manufacturing costs. If, therefore, the demand by the Union is allowed, it would lead to financial catastrophe and closure or mass lay-off of the employees.

It is purely the function of the management to regulate the number of shifts according to the requirement of the business. They are the best judge to decide what are the thin hours and busy hours of the business and what would be the number of shifts to cope with the business. In our opinion, the rate of Kshs.3/= per hour which is currently paid by the Company to the employees compares quite favourably with rates in other comparable concerns in this sector, and for this reason we reject the demand for the moment.

#### **6. General Wage Increase.**

This item is covered under Clause 29 of the parties' outgoing collective agreement which provide for current rates of 5% each year, or 10% for the two years' period.

The Union demand a general wage increase of 12% each year, or a total of 24% for the two years' period, of the incoming collective agreement due to inflationary rates of 9.8% and 11% in 2003 and 2005 respectively, or a total of 21.4%.

The Company has offered to hike the wages by 5% each year, or by 10% for the two years' period, of the collective agreement; and the factors which the management of the Company took into consideration for these offer are high cost of production,

liberalization of the market and stiff competition from cheap imports.

The EPD report shows that the relevant rise in the cost of living indices for the entire period under consideration for purposes of compensation is 13.6% for the two years' period, or 6.8% each year, of the collective agreement. If the Union's demand is granted it will translate to additional labour costs of Kshs. 2.5 million in the first year and a further Kshs. 2.8 million in the second year, or a total additional labour costs amounting to Kshs. 5.3 million during the period of the collective agreement; whereas the Company's offer will translate to additional labour costs of Kshs.1.1 million each year, or a total of Kshs. 2.2 million, for the entire period of the collective agreement. The percentage rise in the cost of living indices will translate to additional labour costs of Kshs. 1.4 million in the first year and a further Kshs. 1.5 million in the second year, or a total additional labour costs amounting to Kshs. 3.0 million, for the entire period of the collective agreement.

The EPD has observed that the Company has been incurring losses over the years, especially during the period under review, i.e. 2002 to 2004; and taking into account its offer of Kshs. 2.2 million, one wonders where these funds will come from. The EPD, therefore, opined that this perhaps renders credence to the Union's assertion that the audited accounts do not reflect the true financial status of the Company.

This Court has on numerous occasions previously observed that the primary objective in deciding trade or industrial disputes with regard to wage increase to the employees is and has to be the ability of the employer to pay and the restoration of peace, harmony and good will in the industry concerned so as to do justice to the interests of both labour and capital. This being the case, and considering the compensatory entitlement of 13.6% for the two years' period, or 6.8% each year, we are of the opinion that the demand by the Union is on a high side while the offer by the Company is a bit on the lower side. In the circumstances, it is our considered judgement that a wage increase of 7% each year, or 14% for the two years' period, will meet the ends of justice, and we so award and order accordingly.

#### **7. Protective Gear/Clothing.**

The Union demand that all the employees should be supplied with industrial boots as part of their protective gear in accordance with Section 53 of the Factories Act, Cap. 514, Laws of Kenya, which reads, *inter alia*, as under:-

Where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and covering shall be provided and maintained for use of such workers.

Mr. Ngatia prayed that the Court orders that a Factories' Inspector be sent to the Company's premises to assess the requirements of the employees.

Mr. Nduma submitted that the Company has complied with the requirements of the said Act in so far as the provision of protective gear to the employees is concerned. However, he conceded that the Company has not supplied employees working in the **Two For One** twister machine section with industrial boots as it has not regarded them as necessary in the circumstances.

The EPD recommends that an assessment of the said section by a Factories' Inspector is necessary.

As both parties' have mutually expressed the desire that a Factories' Inspector be sent to the premises of the Company to assess the needs of the employees, we order that the Labour Commissioner do dispatch a competent Factories' Inspector to the premises or factory of the Company to assess the requirements of the employees. The Factories' Inspector is directed to file his report with the Court within **three (3) weeks** from the date of this award for final decision on this issue.

#### **8. Pension/Provident Fund Scheme.**

This is a new clause whereby the Union demand that the employees' savings, through National Social Security Fund (NSSF), be enhanced further during old age and retirement by introduction of this benefit to them as it is the case with other textile industries in this sector.

Mr. Nduma urged the Court to reject the demand as untenable in view of the fact that the Company has been remitting all the statutory dues, including National Social Security Fund (NSSF) contribution, as required by law. He considers this demand as non-statutory and baseless.

In a large number of decisions of Industrial Courts or Tribunals, a principle has been laid down that the said benefit or scheme can be introduced only if the financial position justifies it. Having regard to the financial position of the Company, we are clearly of the opinion that time has not yet come to introduce this benefit or scheme as it would entail unbearable burden on the meagre resources of the Company. In the circumstances, prudence demands that we should wait a little longer till the financial position of the Company stabilized. We consider this demand a little premature and reject it for now.

**DATED** and delivered at Nairobi this day 29<sup>th</sup> of March, 2007.

Charles P. Chemmutut, MBS.,

**JUDGE.**

A.O. Wafula,  
**MEMBER.**

J.M. Kilonzo,  
**MEMBER.**