IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.

CIVIL APPEAL NO. 65 OF 2012

BETWEEN

THOMAS DE LA RUE (K) LTD …..……. APPELLANT

AND

DAVID OPONDO OMUTELEMA ...……..…… RESPONDENT

(Appeal from the judgment & award of the Industrial Court of Kenya at Nairobi (Rika, J) dated 19th April, 2011

in

I.C.C. NO. 390 OF 2010)

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JUDGMENT OF THE COURT

This is an appeal from a decision of the Industrial Court of Kenya at Nairobi. The central issue in the appeal is whether the appellant's declaration of the respondent redundant was in accordance with the ***Employment Act No 11 of 2007***. The respondent asserts that he was declared redundant irregularly, unlawfully and maliciously and is therefore, entitled to a declaration to that effect and compensation among other remedies. The appellant counters that in declaring the respondent redundant, it acted strictly in accordance with the law and the Industrial Court was in error to find otherwise and to award the respondent compensation.

The appellant is one of the subsidiaries of De La Rue, PLC, based in the United Kingdom. The other subsidiaries are in the United States of America, Malta, Sri-Lanka and South Africa. It specializes in secure printing of currencies, passports and other security documents. At all material times the appellant operated two passport production lines at its printing plant on Noordin Road, Ruaraka, in Nairobi.

In January 1994, the appellant employed the respondent as a packer in the security-finishing department. The appellant rose in rank to become a senior Kugler operator earning a basic salary of KShs.44,144/= per month as at the date his employment with the appellant ended. At all material times, the respondent was also a member of the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), a trade union recognised by the appellant under ***S. 54 of the Labour Relations Act, No. 14 of 2007*** and which had entered into a Collective Bargaining Agreement with the appellant.

What provoked the suit that culminated in this appeal was a decision of the appellant to close down one of the passport production lines in Nairobi. To increase efficiency and reduce production costs, the De La Rue Group modernized and upgraded its printing plant in Malta to manufacture the latest passports containing microchips, which the Nairobi plant could not do. The Group therefore resolved to shut down one of the lines in Nairobi and transfer passport printing to the new facility in Malta. The net effect of the closure was to render 35 workers, among them the respondent, redundant.

The redundancy aggrieved the respondent who on, 14th April, 2010, lodged a claim at the Industrial Court, which he amended on 26th August, 2010, contending that the redundancy was unlawful, irregular, and premature and without notice or justification. The respondent further contended that the redundancy was malicious and in disregard of his welfare and rights. He therefore prayed for a declaration that the redundancy was illegal and unlawful; reinstatement without loss of benefits; salary arrears for the period he had been out of employment; damages for unlawful redundancy; 12 months compensation for unlawful redundancy and costs and interest.

The appellant filed its memorandum of defence on 11th June, 2010, and amended the same on 4th October, 2010. It averred that there were genuine and compelling grounds for the redundancy; that all members of staff affected by the redundancy, including the respondent, were duly informed; that the respondent fully complied with the provisions of the Collective Bargaining Agreement and ***Section 40 of the Employment Act***; that the selection of the respondent for redundancy was done fairly and transparently after objectively taking into account all relevant factors such as seniority in time, skill, ability and reliability and that the respondent was paid in full all his terminal dues.

The parties proposed, and the Industrial Court acceded to the dispute being resolved through written submissions. Accordingly the appellant filed its submissions on 22nd March, 2011, after the respondent had filed his a week earlier on 15th March, 2011. The suit was heard by Rika, J learned judge of the Industrial Court, sitting with two members. On 19th April, 2011, the Court found that the respondent faced a genuine redundancy situation but it did not follow the procedure prescribed in the Employment Act and the Collective Bargaining Agreement and therefore the termination of the respondent's employment was an unfair termination. The Court awarded the respondent compensation of KShs.529,720.00/= being 10 months' gross salary.

Aggrieved by that award, the appellant lodged this appeal on 12th April, 2012, raising 9 grounds of

appeal as follows:

1. *The learned trial judge erred in holding that the provisions of section 40 of the Employment Act were not complied with;*

2. *By holding that the appellant should have ensured that the respondent and his trade union engaged it in consultations, the learned judge erred by arbitrarily and contrary to Art 50 of the Constitution imposing upon the appellant conditions which are not contemplated by section 40 of the Employment Act;*

3. *The learned judge erred in law by sifting to the appellant the burden of proving that the respondent and his trade union were given adequate time within which to engage it in consultations;*

4. *The learned judge arbitrarily abrogated the principle of freedom of contract by holding that the redundancy clearance form was of no effect;*

5. *The learned judge erred when he concluded, contrary to section 107 of the Evidence Act, Cap 80 of the Law of Kenya, that the appellant had long before 30th May, 2009 made up its mind to render the Respondent redundant and that it had acted mala fides in its granting leave to the Respondent;*

6. *The learned judge erred in law and acted contrary to the principles of natural justice by pronouncing on issues that were not raised by the parties;*

7. *The learned judge erred and abrogated the provisions of section 40 of the Employment Act when he held that there are two types of notifications contemplated under the law on redundancy;*

8. *The learned judge erred in awarding the respondent a purported compensation of Kshs 529,720 and contravened the provisions of section 49 (1) (c) and (2) of the Employment Act and section 15 (c) (now repealed) of the Labour Institutions Act; and*

9. *The learned judge erred in law in failing to appreciate the law and evaluate the evidence before him and consequently arrived at wrong conclusions.*

At the hearing of this appeal Mr G. Muchiri, learned counsel appeared for the appellant while Mrs J. Guserwa appeared for the respondent. Mr Muchiri abandoned ground No. 8 of the appeal. Grounds 1, 2, 3 and 7 were argued together as were grounds 5 and 6. Ground 4 was argued separately while ground 9

was subsumed in the arguments advanced in support of all the grounds.

Under ***Section 27 of the Labour Institutions Act, No 14 of 2007***, appeals lie to this Court on matters of law from final judgement, award or order of the Industrial Court.

The appellant contended that all the requirements relating to redundancy are set out in ***section 40 of the Employment Act*** and that it scrupulously complied with those requirements. The learned judge was criticized for misapplying the law and imposing on the appellant other requirements and conditions which are not set out in ***section 40*** or in any other law. For the respondent, it was submitted that the appellant did not comply with ***section 40 of the Employment Act*** and that the learned judge reached the correct decision.

Section 40 of the Employment Act sets out seven conditions which the employer must comply with before declaring an employee redundant. These are:

a. *if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*
b. *if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*
c. *in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*
d. *where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;*
e. *the employer must pay the employee any leave due in cash;*
f. *the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and*
g. *the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.*

As far as we can deduce, the requirements of ***section 40*** that the court found not to have been complied with by the appellant are those set out in ***section 40 (a) and 40 (c)***, leading to the further finding that the termination of the respondent was unfair within the meaning of ***section 45 of the Act***.

It is quite clear to us that ***sections 40 (a) and 40 (b)*** provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. ***Section 40 (b)*** does not stipulate the notice period as is the case in ***40 (a)***, but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

There must be a sound reason why there is a distinction in ***section 40*** based on whether the employee is or is not a member of a trade union. The right to form, join or participate in the activities and programmes of a trade union is underpinned by ***Art 41 (2) (c) of the Constitution***. That right is then actualized in the Labour Relations Act. Under that Act, membership in a trade union is voluntary. ***Section 57 of the Act*** empowers an employer and a trade union which the employer has recognized to enter into collective agreement setting out terms and conditions of service for all unionisable employees. Ordinarily those terms and conditions of service are better and more favourable to the employee than the terms in individual contracts of employment or the minimum conditions set in statutes. Under the Act the terms of the collective agreement are incorporated into the contract of employment of every employee covered by that agreement and under ***section 59*** a collective agreement is binding upon all parties including all

unionisable employees employed by the employer.

Where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the union. That is why ***section 40 (a)*** requires notification of the union in cases of redundancy of unionisable workers. Under ***section 56 of the Labour Relations Act***, officials or authorized representatives of a trade union are entitled to reasonable access to the employer's premises to; among other things represent its members in dealings with the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee.

In the present appeal, there is no dispute that the respondent was a member of KUPRIPUPA which had in force, at the material time, a valid Collective Bargaining Agreement with the appellant. Although, in respect of unionisable employees ***section 40 (a)*** requires at least one month's notice before the effective date of the redundancy, the Act allows parties, in a collective agreement, to agree on more favourable terms and such terms apply and take precedence. In consequence thereof, Clause 25 (ii) of the collective agreement provided for a two months redundancy notice.

The evidence on record shows that on 30th March, 2009, the General Manager of the appellant held a team briefing with all the employees, including the appellant and informed them of the impending redundancies and the reasons therefor. On the same day, the appellant wrote to the National General Secretary of KUPRIPUPA and the Labour Officer, Nairobi informing them of the intended redundancies. The trial Court found as a fact that the letters to the two offices were indeed delivered. The reasons for the redundancy were given and the number of employees affected was given as 35. In compliance with ***section 40 (a)*** as read with the Collective Bargaining Agreement, two months notice of the intended redundancies was given, meaning that all things being equal, the redundancies would be effective on 30th May, 2009.

On 6th April, the appellant wrote to the appellant a letter whose reference was *"Notification of Intended Redundancy"*. The appellant was informed that his role would be redundant with effect from 30th May, 2009. This letter does not appear to have impressed the trial Court at all and was in fact treated as evidence of lack of consultations and evidence of a pre-determined mind-set and bad faith.

The Court relied heavily on this letter and virtually ignored the letter of 30th March, 2009, thus treating the respondent as if he was an employee who was not a member of a union entitled to an individual notice under ***section 40 (b)***. The trial Court lampooned the appellant for not engaging the respondent in meaningful consultations before the redundancy. We are of the opinion that the Constitution, the Labour Relations Act and the Employment Act did not permit the appellant to ignore the trade union with which it had signed a collective agreement binding upon itself, the respondent and the union, and hold direct consultations with the respondent.

Having given the two months notice required under ***section 40 (a)*** to the Union, the appellant was not obliged to give another notice to the respondent personally under ***section 40 (b)*** because these notices are alternatives. Once the notice under ***section 40 (a)*** has been given, there are clear mechanisms under ***section 62*** of how the trade union should proceed if there is a dispute. In the scheme of things, the trade union has clear roles, duties and obligations under the law which the court did not pay regard to. There was no evidence on record that the appellant had obstructed or failed to hold negotiations with the trade union after issuing the redundancy notice. It is also instructive that the other 34 employees who were declared redundant with the respondent were not before the court. Much as the Employment Act makes it the responsibility of the employer to show that a termination was fair, the role that the respondent's trade union played or should have played was totally side-stepped.

In our opinion, contrary to the letter and spirit of ***section 40 (a) and 40(b)***, the Court imposed upon the appellant obligations that could only have arisen if the respondent was ***not*** a member of a trade union. Had the Court considered and appreciated the rationale behind the provisions of ***section 40*** relating to employees who are members of a union and those who are not, the Court would not have imposed upon the appellant the obligations it purported to impose. We find from the evidence that the appellant duly

complied with ***section 40 (a)*** and having so complied, the letter of 6th April, 2009 did not change that fact. We do not share Mrs Guserwa's view that under ***section 40 (a)*** the appellant was obliged to copy to the respondent the notification addressed to the trade union.

The second issue under ***section 40*** relates to the selection criteria. In determining the employees to be declared redundant, ***section 40 (c)*** requires the employer to consider seniority in time, skill, ability, reliability of the employees. Although Mrs Guserwa, learned counsel for the respondent argued that there was no evidence adduced by the appellant to show that it had applied the criteria set out in ***section 40 (c)*** to the employees who were to be declared redundant, Exhibits Resp 4 and Resp 5 showed that 12 Kugler operators, among them the respondent, were evaluated on 14 criteria covering skill levels, ability, performance appraisal record, attendance, reliability and dependability, length of service and disciplinary record. The respondent scored an average16.5 out of a possible 35 points. Two other Kugler operators, who had scored 17 and 14.5, were selected for redundancy with the respondent.

In dismissing the evaluation and the selection of the respondent, the court noted that one year earlier the respondent's manager had commended him for super performance on account of his output on a single night and that a performance review on 11th March, 2009 had concluded the respondent met all expectations. The court, therefore, concluded that the process had not been fair.

We are of the opinion that the learned judge attached undue weight to the commendation of the respondent based on a single night's performance. In the evaluation for purposes of redundancy, all the Kugler operators were evaluated on a wide range of criteria, not performance on a single occasion or single factor or skill. On the whole, virtually all those who were retained had better scores than the respondent. Secondly, the performance review of the respondent that the Court stated had been held on 11th March, 2009 was actually on 16th February, 2009 and was not an unqualified approval or endorsement of the respondent. On summary of overall performance, it was noted that the respondent was "*an average performer*" and that "*he should have consistency in outputs*", which ought to have rung a warning bell against putting too much weight on a recommendation based on a single night's performance. It was also observed in the review that "*unlike Kugler 1, he has challenges on Kugler 3 quality performance with several quality issues and takes longer period on make ready.*" There was nothing on record to suggest that in selecting the respondent, the appellant was actuated by any malice, ill-will or ulterior motives. Otherwise why would the court have stated as it did on page 9 of the judgment:

> *"We are equally prepared to go with the (appellant's) view that it considered alternative employment, and that the claimant could not suitably be reassigned to other departments."*

We are satisfied that had the Court considered all the evidence that was before it relating to the selection for redundancy, it could not have reached the conclusion that the selection of the respondent was unfair or contrary to ***section 40 (c)***. The court did not find any violation of the other limbs of ***section 40 of the Employment Act*** and we do not propose to take time considering them.

Mr Muchiri next argued ground 4 of the appeal relating to the redundancy discharge form. The appellant contended that on 11th June, 2009 the respondent signed a redundancy clearance form duly witnessed by one Grace Wanjiru Thuku in which he confirmed having received from the appellant "*in full and final settlement of all salary and benefits payable towards my redundancy package and all other claims arising from my employment with the company except for provident fund.*" In the same form the respondent also declared that "*I have no further claims whatsoever against De La Rue Currency and Security Print Limited*".

The appellant relied on the discharge voucher to paint the respondent's claim as an afterthought after he had received his due payment and absolved the appellant from future liability. The trial court gave the discharge voucher short shrift as follows:

> *"On the clearance form signed by the claimant, our opinion has always been that termination clearance forms do not discharge employees from statutory obligations. Fairness of termination is a matter that the court should always give its consideration to, notwithstanding the existence of the discharge of future obligations forms signed by the employee. We always make a presumption that there is no equality of bargaining strength after termination. The employee is desperate to receive his payment cheque and frequently appends his signature without any attention to details. His interest is in access to quick cash to alleviate his burgeoning family and social needs. We do not attach much weight to these discharge vouchers."*

We would agree with the trial court that a discharge voucher *per se* cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.

Whilst ***section 119 of the Evidence Act*** entitles a court to presume certain facts; what is involved is no more than presumption of fact, not presumption of law. The court cannot shut its mind to the fact that the presumption of fact can be rebutted. To rigidly presume a state of facts in all and sundry cases without willing to consider whether the presumption has been rebutted is erroneous. We find the suggestion that the court treats *all* cases involving discharge vouchers the same way a bit alarming. The industrial court is a court of law and in each case where the validity of a discharge voucher is in issue, evidence has to be led to support or disprove its validity. The court cannot abdicate its responsibility by adopting a general presumption and applying it rigidly in each and every case without considering whether the presumption has been rebutted or not. That may suggest a firm and closed mind-set which a court of law cannot afford to have.

As regards the relative bargaining strengths of the parties, the Court, once more fell into the trap of treating the respondent as if he was not a member of a trade union. If the court had considered the fact that the respondent had a trade union at his disposal whose bargaining power was considerably enhanced by the reality of collective bargaining, it could not have treated the respondent as a helpless party at the mercy of an omnipotent employer.

The essence of the last two grounds (nos. 5 and 6) taken for the appellant was that the learned judge addressed issues that had not been raised by the parties and erred in concluding that sending the respondent on paid leave pending the effective date of the redundancy was evidence of bad faith on the part of the appellant. It is true that none of the parties had raised that issue. Although the respondent had pleaded that his redundancy was malicious and had pleaded the particulars of malice in his statement of claim, the respondent's paid leave was not pleaded among the particulars of malice. It is a basic principle that a party is bound by its pleadings. The appellant had explained that due to lack of work, the respondent and others were sent on paid leave for two months pending the effective date of the redundancy. The respondent was paid KShs.108,465.92 for those two months. The court dismissed the leave in the following terms:

> *"The two month's leave was not something given in good faith. It seems to us to have been a safe way out for the employer to send the employees away, without risking a probable disruption of production from those among them who considered themselves aggrieved."*

We have already noted that there was nothing on record to indicate any disaffection on the part of the respondent's trade union. The payment to the respondent of two months leave had not been pleaded as a particular of malice or bad faith. In addition the appellant had explained its basis and the fact that the respondent had been paid for those two months. While we expect that when considering whether a

termination is unfair, the court will consider all the facts and the case in its totality, we think that the court erred in reading bad faith from facts which had not been pleaded as evidence of bad faith. Parties are required to specifically plead malice and to give particulars thereof to enable the opposite party know the specific case it has to meet and to respond appropriately. We do not think that it is open to the court to find malice, ill-will or bad faith on the basis of facts that were not pleaded. In ***CAPTAIN HARRY GANDY V CASPAR AIR CHARTERS LTD, (1956), 23 EACA, 139***, at 140, it was stated:

> *"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course."*

For all the foregoing reasons, we are satisfied that the trial court misdirected itself. We accordingly allow this appeal, set aside the award of the Industrial Court dated 19th April, 2011 and substitute therefor an order dismissing the respondent's amended statement of claim dated 26th August, 2010. Each party shall bear its own costs both in the High Court and in this Court. Those are our orders.

Dated and delivered at Nairobi this 5th day of July, 2013.

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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