REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 79 OF 2002

KENYA ENGINEERING WORKERS UNION ..... CLAIMANTS

AND

NALIN NAIL WORKS LIMITED (In Receivership)..... RESPONDENTS

# *AMENDED* A W A R D

**Coram**: Murtaza Jaffer, Judge

J.C. Odaga and A. Yarrow, Members

Mr. Joseph Omollo for the Claimant Union

Mr. Chacha Odera, Advocate for the Respondent

**Issues in Dispute: Redundancy of 51 employees.**

*At the time of reading this Award, the Court realized that a small portion of the Award had been omitted in the typing. We have therefore decided to include this section herein at it's appropriate place at pages 26-28 of the this Award. The added section only goes to clarify the arguments further and does not affect the final award in any way. The said amendments are all in italics and in a different font from the original version first read in open Court.*

*Section 16 of the Trade Disputes Act Cap 234 empowers the Court, on its own motion, to rectify any "clerical mistake, incidental error or omission without hearing the parties concerned".*

The Respondent has been in business since 1952. In 1999 it was placed under receivership by the Kenya Commercial Bank Ltd. and joint Receivers and Mangers appointed on 21st September 1999 under the terms of a debenture by the said bank.

The receiver/managers proceeded to declare employees redundant; hence this dispute.

The Claimant Union's case is that upon taking over the management of the Respondent, the said Receivers and Managers took precipitate action against the interest of the employees without due regard to the provisions of the CBA between the parties and the law in general. A chronology of the aforesaid actions complained of include the following:

1. Employees were forced to go on unpaid leave between January and September 1999, prior to the arrival of the Receivers;
2. Between August-September 1999, some 51 employees were terminated on grounds of redundancy without any notice or negotiation with the Claimant union;
3. Redundancy notices were subsequently extended to 257 employees;
4. The Receivers gave undertakings to the employees that another company, Combined Industries Ltd. had accepted responsibility for their annual leave payments;
5. The Grievants were declared redundant on 30th September 1999 and asked to report back on 3rd November 1999 and then again on 14th November when they were served with letters dated 3rd November 1999 detailing their terminal benefits;
6. Pursuant to meetings between the parties it was agreed that the Grievants would be paid Shs. 3,000/- each to facilitate their travel home. This and the statutory offer of Shs. 4,000/- per employee under the Companies Act has also not been paid fully.
7. Prior to the Receivers taking over, there existed a prior arrangement between the Respondent and one Combined Industries Limited to manage the business of the Respondent for six (6) months. The Receivers were aware of this arrangement and also approved of it.

When the parties could not agree on a settlement, the Claimant declared a trade dispute with the Minister and an investigator was appointed whose report is also

discussed in this Award. The Claimants therefore aver that the Receivers are now reneging on legally binding arrangements and are in any event acting contrary to the law. The labour laws take priority and must be implemented if there is not to be a mockery of the Trade Disputes Act and the CBA between the parties. There is spate of receiverships going on and rights of ordinary workers must be protected by the Courts.

The Claimants therefore seek reinstatement or alternatively that the Grievants be paid their terminal dues in accordance with the CBA between the parties including an appropriate notice; accrued leave pay; travelling allowance; severance pay; outstanding salary; outstanding house allowance and 12 months compensation for loss of employment.

The Respondent simply states that upon the appointment of the Receivers and Managers by the aforesaid Bank, the provisions of the Companies Act take priority and the Grievants are entitled to "a preferential claim for arrears of wages/salaries up to the date of appointment...but not exceeding KShs. 4,000/- or four months wages...in arrears, whichever (is) the lesser". The Respondent further argues that the provisions of the Companies Act apply *stricto sensu* and are binding on this Court, despite the provisions of the labour laws. This means that the Companies Act takes priority over the labour laws and if Parliament had intended to stop the application of the Companies Act in so far as it relates to the privileges of workers in the event of insolvency, it would have expressly stated so.

Furthermore, the Respondent argued that the agreement between the Respondent and Combined Industries Ltd. was made prior to the receivership and related solely to the provision of raw materials and payment of processing costs thereof. The Receivers merely sanctioned the continuance of the said arrangement and there is no merit in the argument that therefore "the Respondent has not consequently wound up nor become insolvent". The throughput from the aforesaid arrangement with Combined industries is "not sufficient to justify the staffing levels previously enjoyed hence validating the declaration of the named employees redundant".

The Receivers did notify the Grievants of their statutory rights as unsecured creditors over and above Shs. 4,000/- and the offer of an ex-gratia payment for travel by the Bank "was subject to release of the same from the Kenya Commercial Bank Ltd." The said funds were not received from the Bank and the Receivers are not obliged to pay the same to the Grievants.

In the alternative and as further argument, the Respondent claims that this dispute is *sub judice,* the Grievants having filed High Court Civil Case No. 2083 of 2000 seeking the same remedies sought in this dispute and by virtue of Section 14(9) of the Trade Disputes Act, this Court is barred from taking cognisance of this dispute as "such dispute/matter is in the process of being…determined by means of any other proceeding under Act or any other written law".

The Ministry's investigator's report dated 30th May 2002 (Appendix 10A, Claimant's Memorandum) shows that the claimant was informed by the Respondent on 15th December 1998 that since early 1997 that the Respondent was experiencing cash flow problems and as a result Standard Chartered Bank put it under receivership since May 1998, but giving the Directors an opportunity to continue operations instead of closing down the business. Thus started a set of events on he part of the Respondent leading to continuous redundancies of its employees, late payment, underpayment and non-payment of wages and benefits, offers of voluntary resignations, compulsory unpaid leave and other measures finally culminating in the appointment by Kenya Commercial Bank Ltd. of Receivers and Managers on 21st September 1999 and the declaration of redundancy of the Grievants herein on 30th September 1999. The receivership was over three sister companies that included the Respondent.

According to the Ministry's investigator, the Receivers were also negotiating with Combined Industries Ltd., to take over the assets of the Respondent and pay a substantial part of the debt owed by the three sister companies to the Bank. The investigator also found that Combined Industries Ltd. was an investor in an operational and joint venture arrangement with the Respondent. Hence "Nalin Nail

Ltd has neither been liquidated nor been wound up since M/s Combined Industries is only renting the premises" (Investigator's Report, page 6) and

> "Finally, investigations established that since the receiver manager has not shown the inability of the investor (combined industries) to run the factory with a view of paying the loan to the debenture holders on behalf of Nalin Nail Works Ltd., there is therefore no reason barring the Grievants from being paid their terminal dues, since the provisions of the companies Act can only apply in the case of a company being liquidated, a case which has not happened to Nalin Nail works".

The Investigator then went on to recommend that the Grievants be paid redundancy benefits of:

a. Severance and notice pay as per the parties' CBA;
b. Those declared redundant by 31st December 1998 be paid any outstanding salaries up to the date of redundancy in full;
c. The employees who were declared redundant between January 1999 and 30th September 1999 be paid any outstanding salaries at one third of their basic pay as was agreed by the parties up to the date they were declared redundant respectively;
d. Any outstanding house allowance should be paid in full up to the date the Grievants were declared redundant.

The Respondent did not accept these recommendation and finally the matter was referred to this Court by the Minister on 27th September 2002.

This is one more sad case in the current economic environment in the country. Redundancies and insolvency of businesses is on the increase and the lack of adequate and express statutory protection puts the employee at the front end of attack, resulting in serious loss and untold misery of the worker and his/her family the details of which do not feature in our daily media.

The other important area of concern is the lack of appreciation and regard by both employers and trade unions of the workers' right to adequate information on the state of the enterprise where the individual workers are engaged. The financial difficulties of the Respondent is certainly not new. It was spread over a number of years but the employees either were not aware or did not understand the implications. Neither did the employer make any attempts to notify the Claimant union of its potential difficulties in order to seek ways and means of mitigating the final impact of a closure of the business. The right to adequate and relevant information is an established one under the ILO Conventions.

At the first hearing of this dispute on 8th December 2003 the Respondent raised the issue of *sub judice* in respect of the 251 employees of the Respondent whose suit was pending before the High Court. After some argument, Mr. Omollo of the Claimant Union agreed to restrict the scope of this dispute to the 51 Grievants only and drop the claim on behalf of the 251 employees from the Respondent's Ruiru Plant who had gone to Court. We say no more on this issue. We are satisfied from a perusal of the names of the Plaintiffs in the High Court that they are not the same persons as the Grievants in this dispute. This dispute cannot therefore be sub judice in respect of the Grievants; only in respect of those who have a case pending in the High Court.

We now turn to the principal issue in this dispute. The Respondent does not deny that various sums are due in law to its employees in accordance with the CBA and for some of the employees whose rights extend for up to 20 years of dedicated service. However the Respondent, without denying the Grievants' claims made through the Claimant Union, states that as a result of a preferential debt owed to the Kenya Commercial Bank Ltd. and under the provisions of the Companies Act, the said Bank has exercised its powers in law to take over the management of the company and appoint Receivers and Managers whose responsibility is to ensure that the Bank's secured claim is discharged before other secured and unsecured creditors are paid out. The Claims of the employees are secured only in so far as it does not

exceed four months' wages or Shs. 4,000/-, whichever is the lesser. The matter is therefore out of the Respondent's hands.

Oraro & Co., Advocates appear for the Receivers and Managers who also do not deny the employees' claims and have indeed given the Grievants, and each of them, a written statement setting out their "Terminal Benefits Calculation per Company records" which contain the employees' respective duration of service, the amount of salary due in lieu of notice, leave pay, severance pay and other benefits all of which are to rank as unsecured creditors.

We would also safely state that the Receivers and Managers, acting for the Respondent's creditor, the aforesaid Bank, must discharge their responsibilities in accordance with the law whose ambit is wider than the Companies Act. They must not, in the exercise of their responsibility to safeguard the interest of the Bank, do any acts or omissions that would derogate from the interests of the other creditors, secured or unsecured, who also have a claim to the assets of the Respondent.

From the evidence before us, it is unclear what the state of affairs is with regards to the Respondent company and its sister organizations and their collective or individual debts to the Standard Charter Bank and the Kenya Commercial Bank, being the two banks named in the documents before us. We are satisfied however, that, for the purposes of this dispute, the Respondent is insolvent in so far as it is in difficulty with regards to the payment of its creditors which fact adversely affects the Grievants in that they too are unable to receive their wages and other dues. The issue before us for determination, therefore, is whether or not, in the light of the insolvency of the Respondent, the Grievants have a prior and/or preferential claim to be paid their terminal dues irrespective of or despite the appointment of the Receivers and Managers?

The initial and limited response in law is in the positive. The Grievants are entitled, on the face of it, to be paid up to Shs. 4,000/- each as secured creditors in the hierarchy of privileges established under the Companies Act in the event of insolvency of the Respondent company. The Claimant however demands more. They

seek full payment of all outstanding dues in accordance with the CBA between the parties plus damages for wrongful termination.

From the Investigator's report, it seems that the Claimant has accepted the investigator's recommendations to accept less than what they have demanded in Court. What seems to come out of all this is the following:

> THAT all the parties involved herein, the Claimant, Respondent, the Receivers and Managers and the Ministry for Labour accept the basic premise that where a company registered under the Companies Act becomes insolvent, the workers are to suffer a financial loss in that their claims over and above Shs. 4,000/- is not a privileged claim and thus such claims are treated as unsecured.

The investigator found that the insolvency of the Respondent was not real and hence ordered payment of dues in accordance with an agreement arrived at between the Receivers Managers and the employees' representatives, the shopstewards. It becomes this Court's task now to assess situation afresh and determine what, if any, claims do the Grievants have against the Respondent and its agents, the Receivers and Managers.

> The principle upon which our labour laws are based may be stated as follows: 'an employer/employee relationship is a contractual one, voluntarily entered into between the parties, without force or coercion in any manner; subject to the laws of the land including the respect of their fundamental rights; whereby the employer takes the labour of the employee in advance, thereby and as an automatic consequence of the taking of such labour, guarantees its compensation through the payment of a wage or salary at the end of an agreed period or upon completion of a fixed task, as the case may be. Both the non-performance of the contract by the employee and the non-payment of the wage by the employer constitute a breach that has consequences attached thereto'.

The contract of employment by an employee, be it oral or written, does not depend on availability of funds or the employer's capacity to pay. These issues are not negotiated in the said contract and given the imbalance of power between the parties and the lack of information or participation by the employee in the management of the employer's affairs or business, the employee cannot be said to have an agreement to work subject to the vagaries of the market, the employer's liquidity or (mis)management or other circumstances and conditions outside the scope, knowledge or power of an otherwise un-empowered employee. The law cannot be said to be so blind as to allow for a situation of structural discrimination against the employee.

In simple terms, an employee expects to be paid. An employer not only promises to pay but immediately upon the employee discharging his/her duties, the employer becomes both duty bound to pay and a trustee of the employee's dues for all the time that the employee has worked. It is the employer's duty to monitor and manage its business, knowing when to continue employing and when to stop, pay the employees and discharge them from further expenditure of their labour because the employer may no longer be able to pay the employee his/her wages.

The employees' dues relate not only to the current period of work but all dues that the employee is entitled to over the full period of employment. Hence items like severance pay, outstanding leave and allowances earned but not taken, notice pay, statutory deductions not remitted to the authorities and other related items all form part of the package of dues that an employee may rightfully claim. The employer is a trustee of the employee in respect of these rights of the employee. Given the power imbalance aforementioned, the employer takes responsibility to manage these payments. Some may create special funds like insurance policies for workmen's compensation in case of accident or injury, death or disability, severance pay, pension schemes, loan schemes and a host of other schemes and methods designed to safeguard the employees' dues and ensure the employer's capacity to make payment when due. The specific means an employer chooses to use in the

safeguarding of the employees' dues is up to the employer, the employee generally not having any say in it.

By employer, we mean all those responsible for the management of the employer's business, directly or indirectly, as long as they have an impact on the rights of the employees in the course of their involvement with the employer's obligations. Such persons may include the directors or partners of the company, employed managers and also, in our view, statutory interveners like Receivers and Managers (voluntary or imposed) and Executors and Administrators.

The principal issue in labour law is that there is a contract whereby the employee participates in the creation of wealth, indeed without whose participation the existence of the enterprise and its various business related 'partners' like suppliers and creditors including banks would be in doubt. However in the process of wealth creation, the employee does not participate in the management of the employer's business as does a bank or supplier who may impose conditions upon the employer before giving the employer a loan or other supplies. The employee is thus powerless and the law steps in to protect the employee in this relationship in order to correct the balance of potential inequity in the case of default. The Courts thus make it their business to seek the middle path between the right of the employer to conduct its business unhindered by employee interference and the right of the employee to be guaranteed a decent living wage and conditions of employment and the receipt of wages in time. The employer thus becomes a trustee of the employee for his/her outstanding dues; just like an administrator of an estate or next friend of a minor is presumed to be a trustee of those whose property they handle.

An employee, especially at the lower end of the scale who is on near minimum wages, more often than not, has no other property save is/her labour. Labour is her property or as the Kiswahili saying goes 'Nguvu ni Mali', Labour is property. Normally when the state acquires property compulsorily, it must pay compensation. It would be safe to say that in the context of Kenya, employees have no choice but to sell their labour (both physical and intellectual) on the market, often on terms unfavourable or not fully negotiable. Once sold they are in effect at the mercy of the

employer that they get paid or compensated for their property, the labour. That is why there are laws and regulations governing the payment of wages as well as the timing of the payment. That is why the law requires a maximum wage paying period of one (1) month in a normal contract that may be permanent and pensionable.

In the context of labour laws, in addition to the provisions of the Constitution of Kenya, the Trade Disputes Act Cap 234, the Employment Act Cap 226 and the Regulations of Wages and Conditions of Employment Act Cap 229, we are also obliged to implement the provisions of international law, especially the UN Charter and Conventions and more especially the Conventions of the International Labour Organization (ILO) of which we are a member. Kenya has ratified around 46 of the ILO Conventions and if the new Constitution under discussion is approved, we will automatically ratify all regional and international agreements and conventions.

In 2001 the government established a Task Force to review Labour Laws under the Chairmanship of Mr. Justice Saeed Cockar with the active participation at the highest policy levels of representatives of the three social partners namely the Ministry of Labour and Human Resource Development, the Federation of Kenya Employers and the Central Organization of Trade Unions Kenya). The Task Force's objectives were, *inter alia*, "to achieve a set of reformed, updated labour legislation".

In its report the Task Force states that "In re-affirming the social partners, recognition and commitment to uphold basic human values, which are vital to our social and economic lives, the Task Force focused on the 1998 ILO Declaration on Fundamental Rights at Work. As signatory of the Declaration and member of ILO, Kenya is obligated to domesticate the ILO and other UN Conventions as these are not only in conformity with the general principles of or Constitution but that, by virtue of membership of the UN, the State raises in the citizen a reasonable expectation that the State will, on behalf of the citizen, implement the Conventions through their domestication in our laws.

There are different ways to domesticate laws and agreements not passed by Parliament. The Constitution provides guidelines on incorporation of international

Conventions and agreements (directly or indirectly); the State enters into agreements with bi-lateral and multi-lateral agencies, thus taking on extra-statutory obligations; Parliament passes legislation or Minister's issue subsidiary legislation that incorporate the essence of international Conventions, Courts interpret legislation in the spirit of international Conventions and sometimes Parliament passes legislation directly incorporating UN Conventions. Whichever method is used based on the historical development of the jurisprudence in a particular country, the effect is the same: that there is an acceptance of the incorporation of norms into local jurisdictions. In the globalized village that we live in today, it would be difficult to say that domestication of international norms agreed to may only be domesticated in a particular manner, using specific forms and none other, merely because our jurisprudence at independence did not foresee the changes over time. We cannot be heard to argue that our constitutional order is static and fossilized at a cut off date of 12th December 1964, even if our inherited legal history and experience may have cut us off at 1897.

Kenya is a signatory to ILO Convention. Kenya has ratified seven of the eight core Conventions that form the backbone of the four fundamental principles. Kenya is now faced with the policy challenges, in the words of the Cockar Task Force, in "meeting international labour standards some of which are in conflict with country's traditions and cultural values" and in establishing "modalities of enforcing labour laws".

Amongst the policy recommendations made, the Task Force proposes that "government should introduce Unemployment Insurance Scheme which should benefit employees who have lost their jobs due to insolvency of the employer. The scheme should compensate employees by paying them terminal benefits equivalent to six months salary during the past insolvency period". It suggests that regulations requiring employers "engaging a certain number of employees to insure them against redundancy" be promulgated by the Minister.

The thrust of our national policy as well as citizen debate is towards adoption of international standards pursuant to our membership of the United Nations and

acceptance of the regional and international Conventions relating to human and peoples rights. We are moving towards ratification of all these Conventions and becoming full members of the international community.

Today we can therefore safely say that the ILO standards on the rights of employers and employees are well established, largely domesticated in our current legislation, in the process of being further domesticated in the proposed new legislation by the Cockar Task Force mentioned above and in any event substantially accepted by the social partners and severally implemented by the Industrial Court in its rulings and awards time and again over the past 40 odd years that the Court has been in existence.

We now turn to the ILO Conventions and the jurisprudence that has developed globally on labour standards in the context of said Conventions. Principally the ILO Conference, made up of all its members, Kenya included, propose and pass Conventions and Recommendations. These are then individually ratified by the member governments and thereafter, in some cases, domesticated in accordance with their respective laws. The ILO also has an Expert Group Committee made up of internationally renown experts on labour law from amongst the member countries who analyse the annual reports of members and pursuant to surveys and other reports, makes further recommendations on the proper implementation of the specific Conventions. These recommendations are then widely used by Courts around the world and form a part of the evolving jurisprudence around the ILO Conventions in particular and international human rights law in general.

The principal ILO Convention in the context of this dispute is Convention No. 95, the 'Protection of Wages Convention, 1949', the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) 1992 and Recommendation 85. Article 11 of the Convention states:

> 1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for

service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.

2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.
3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

The ILO General Survey 2003 on Protection of Wages [(Report III Part 1B) Session of the Conference:91 Chapter V. The preferential treatment of workers' wage claims in case of employer's bankruptcy] sets out a detailed discussion on the subject and we hereunder quote relevant parts thereof:

> 298. Article 11 of the Convention embodies one of the oldest measures of social protection, namely the priority accorded to wage debts in the distribution of the employer's assets in case of bankruptcy. To avoid a situation where wage earners are deprived of their livelihood in the event of the bankruptcy of their employer, provisions have to be made to guarantee the immediate and full settlement of debts owed by employers to their workers.
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> 299. It is broadly recognized that workers' wage claims deserve special protection, since the insolvency of an enterprise and consequently the suspension of payments directly threatens the means of subsistence of workers and their families. Moreover, as employees do not normally have a share in the profits of the enterprise, they should not share in its losses either. The preferential treatment of wage claims is by far the most widely accepted and most traditional method of protecting service-related claims in the event of the employer's bankruptcy or the judicial liquidation of an enterprise. The privilege system was first codified in the civil codes of the

nineteenth century, beginning with the Napoleonic Code, initially to protect the wages of domestic servants.

496. Labour legislation is in general developed around the question of wages. Wages are in the epicentre of labour relations, whether individual or collective; the principal aim of collective bargaining is to fix mutually acceptable wage rates, while remuneration is one of the two constitutive elements of the bilateral relationship which is established by the employment contract. Even matters that appear somewhat unrelated at first sight, such as social security regimes or the regulation of working time, are ultimately connected in one way or another to the question of wages. The right to decent remuneration is a corollary to the right to work as enshrined in Article 23 of the Universal Declaration of Human Rights, which provides that "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection".

The Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992 address the economic and social effects of insolvency by recognizing that workers are more vulnerable than other creditors in the event of insolvency and that they therefore deserve specific protection. The Convention is an instrument with two approaches, one for the protection of workers' claims by a privilege, and the other for protection by wage guarantee institutions. We have unfortunately not yet developed any guarantee institutions and the National Social Security Fund does not operate as one in the case of an employer's insolvency, although the Cockar Task Force has recommended establishment of a guarantee scheme. Secondly, the Convention (Article 7) offers safeguards in respect of what constitutes meaningful compensation by providing that whenever national laws or regulations set a ceiling to the protection by privilege of workers' claims, the prescribed amount may not fall below a socially acceptable level, which consequently has to be reviewed periodically so as to maintain its value.

The Companies Act provides for a guarantee of four months wages subject to a maximum of Shs. 4,000/- as a privileged debt in the event of insolvency. This is an old piece of legislation prior to the enactment of the Trade Disputes Act or any of the Conventions under discussion. The figure was perhaps aimed at providing a 4-month cushion to an employee when average wages were Shs. 1,000/- or less. Today Shs. 4,000/- does not constitute even a month's statutory minimum wage, making the figure sound ridiculous and manifestly unfair. Under the Trade Disputes Act the Industrial Court may grant damages for wrongful termination up to 12 months wages. The Cockar Task Force proposes a 6 month cushion in similar cases of insolvency of the employer.

Preferential treatment of workers in regard to their wages and other dues in the event of insolvency is not new to the world. An ILO survey shows that, for example, in Brazil, Burkina Faso, Colombia, Honduras, Mauritania, Panama, Senegal and Venezuela, the legislation expressly provides that for the purposes of the privileged treatment of wage debts in case of bankruptcy, the term "wage" is deemed to include the basic wage, irrespective of its denomination, wage supplements, leave allowances, bonuses, compensation and benefits of all kinds. In Croatia, the Czech Republic, Malaysia and Thailand, protected claims include severance pay and other termination benefits, while in Ecuador, Peru and Tajikistan, specific reference is made to the payment of retirement plans. Similarly, in Singapore, in addition to all wages or salaries, priority wage debts also include ex gratia payments or retrenchment benefits payable to an employee on the ground of redundancy or by reason of any reorganization of the employer, compensation, unpaid contributions to superannuation schemes or provident funds.

The ILO survey goes on further to show that in Zambia, in the event of a bankruptcy, the following are paid in priority to all other unsecured debts: (i) all amounts due by way of wages accruing to any employee within a period of three months before the date of the receiving order; (ii) all amounts due in respect of leave for the last two years before the date of the receiving order; (iii) all amounts due in respect of any paid absence within the period of the last three months; (iv)

recruitment expenses or other amounts reimbursable under any contract of employment; (v) an amount equal to three months' wages by way of severance pay; and (vi) all amounts due in respect of worker's compensation under any written law accrued before the date of the receiving order. Similarly, wage claims are also granted a first-rank privilege in Chad; Côte d'Ivoire; Democratic Republic of the Congo; El Salvador; Gabon; Guinea; Madagascar; Mali; Malta; Mexico; Norway; Oman; Panama; Romania; Rwanda; Saudi Arabia; Spain; Switzerland; Viet Nam; Yemen.

However, claims of managerial employees or other influential persons considered as having clearly contributed to the financial straits of the enterprise are granted no privilege. The assumption is that those accountable for business failure should not, by the mere fact of their legal status as employees of the insolvent enterprise, be allowed to benefit from the legal mechanism designed to protect the unintentional victims of the insolvency.

We would not hesitate to say that the maturity of our civilization is also expressed in the quality of laws and policies which are objective indicators of our collective respect for the individual and of our national consciousness regarding the rights of people and the responsibilities of those in power.

Courts have a vital role to play in the implementation of national legislation in its content and spirit, giving effect to the provisions of the law through an informed and equitable interpretation that is not so narrow minded as to be oblivious of the global reality around us and the availability of fine minds in other jurisdictions and Courts who have articulated the scope of justice through a broad defence of the Constitution that takes into account national, regional and international experiences and obligations. It is our function and responsibility as the Industrial Court to clearly state and enforce, as in this dispute, the right of a worker to receive wages owed in the event that the employer fails to pay all or part of the wages. The ILO Report aforementioned reminds us that “the efficacy with which the principles derived from the Convention are put into practice depends to a considerable extent on the existence of an accessible and effective judicial system. However, the judicial system

would not in itself alone be sufficient to ensure the effective application of legislation without the existence of officials or institutions distinct from the courts and responsible for the supervision and monitoring of national legislation".

We can safely say that our good fortune is that we in this country have both; an independent, accessible and effective judicial system and a system of industrial relations of unmatched quality and reputation whose officials from amongst the social partners are distinct from the courts and are responsible for the supervision and monitoring of national legislation.

Corporate bankruptcies and company closures are on the increase. So are 'fly-by-night' investors as in the EPZ sector. At the same time, some argue in favour of the elimination of statutory priorities in bankruptcy or insolvency laws. Under these conditions, only the legislature through express regulations and the Courts through innovative and equitable interpretation can be looked upon to reaffirm the principle of privileged protection of workers' wage claims in the event of the insolvency of their employer. The process of making insolvency laws more effective is not an attempt at stifling private sector initiative but merely making the economy more equity oriented and sensitive to the rights of all those who participate in the production process, thus affirming the fundamental principle of the ILO that labour is not a mere commodity but the sweat of human effort. As the ILO Expert Group Committee has put it

> "The designation of employees' wages and entitlements as a preferential debt is a keystone of labour legislation in practically every nation and the Committee would firmly advise against any attempt to question such a principle without proposing in its place an equally protective arrangement, such as a wage guarantee fund or an insurance scheme providing a separate source of assets to ensure the settlement of employees' claims".

We have made broad arguments for the domestication of International law into the interpretation of citizen rights. We accept the proposition that in the event of insolvency of an employer for whatever reason, an employee's wages and benefits

must be accorded privilege over and above other creditors. The law in Kenya does accord such privilege to the limit of Shs. 4,000/- which sum is not even equivalent to one month's minimum wage. Can it be said that the Court are therefore entitled to interpret a reasonable sum, in the context of the law, in order to give meaning to the spirit of the privilege? Can the Courts safely take on board interpretation of international law and learn from judicial decisions of similar jurisdictions elsewhere? We think that it is our responsibility to do so if justice is seen to be done. We therefore turn to assess how the Courts, here and elsewhere, view the place of international conventions in domestic cases.

The High Court in *Misc. Application 343 of 2000 Amenya Wafula & others v. Republic (Githinji, Mwera, Angawa JJ)* makes the following observations with approval. On fundamental rights, the Learned Judges state at page 26 that "...it all boils down to one thing: those rights are serious aspects of man's existence in his society that they are known. They are known and superior courts, as we are here assembled, are enjoined by the same law to guard and protect those rights and jealously do those courts execute that duty." In further approving the applicability of international conventions and treaties, the Learned Judges state at page 40:

> "Kenya is a democratic society. Not fully-fledged though, but on the way there. In fact there is no fully-fledged society on the earth surface. For that reason we have conventions and treaties binding states in blocks or otherwise to ensure that they adhere to and promote rights and freedoms of their individuals. For instance there is the European Court of Human Rights dealing with that aspect in Europe and we have the *African Charter on Human and Peoples' Rights* which came into force on 21st October 1986."

The Learned Judges then went on to quote Article 11 of the African Charter and Article 21 of the UN International Covenant on Civil and Political Rights and further stated that:

> "These two documents contain what in the spirit and substance is in Section 80 of the Constitution of Kenya. There need not be any repeating. Rights are to be enjoyed but subject to the laws passed to regard public interest and rights and freedoms of others.... The two codes reproduced above are continental and universal. If what they say on freedom of assembly and the limitations thereto is similar to what our Constitution says, and if in the implementation of the laws governing the exercise of the rights is right as we do not doubt it is, then the law and here the Public Order Act is surely justifiable law in a democratic society"

What clearly emerges from the above decision is the express approval of international obligations of the country entered into by the State and the test for validity of national legislation vis-à-vis the Constitution of Kenya in that (1) the international conventions be of a similar spirit as the Constitution of Kenya and (2) that the national legislation, in the words of Section 80 of the Constitution, "be reasonably justifiable in a democratic society".

Kenyan jurisprudence has unfortunately not yet extensively considered the implications and applicability of international law. In order to assist in the determination of this dispute, we turn to other jurisdictions with a similar judicial tradition as ours in order to seek the rationale behind the use of international obligations that the State has entered into on behalf of the citizen and which the citizen now reasonable expects to be implemented. In the case of the use of international law when rights are guaranteed by the national Constitution but no provision is made in national legislation, the Supreme Court of India in *Vishaka and Others v. State of Rajasthan and Others [1997] 3 L.R.C. 361,* dealing with the issue of gender equality in reference to the content of international agreements for the interpretation of rights and formulation of guidelines, stated that:

> "Each such incident results in violation of the fundamental rights of gender equality and the right to life and liberty. It is clear violation of the rights under art. 14, 15 and 21 of the Constitution".

> "In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international Conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, the right to work with human dignity in art. 14, 15, 19 and 21 of the Constitution. Any international Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee"
>
> "The international Conventions and norms are, therefore, of great significance in the formulation of guidelines to achieve this purpose".
>
> "It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing law when there is no inconsistency between them and there is a void in domestic law"

The Indian Supreme Court has also used the aforesaid argument in *Gaurav Jain v. Union of India and Ors. (1990) Writ Petition (C) Nos. 824 of 1988 and (CRL) Nos. 745-54.*

In England, the Court of Appeal, on a question of the interpretation of national legislation in conformity with an international convention stated, in *Rantzen v. Mirror Newspaper [1994] Q.B. 670* that:

> The question before the Court is to decide if the amounts of damages awarded violated the right of the Defendants to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although the Convention has not been incorporated into English Law, domestic courts should apply the common law in a manner which is consistent with the principles of the Convention [...]

> It is therefore clear that the Convention may be deployed for the purpose of resolution of an ambiguity in English primary or subordinate legislation, [...] and that when there is an ambiguity the Courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. It is clear that article 10 may be used when the Court is contemplating how a discretion is exercised. Where freedom of expression is at stake, however, recent authorities lend support for the propositions that article 10 has a wider role and can properly be regarded as an articulation of some of the principles underlying the common law".

Prior to the above decision, the House of Lords in *Ex parte Brind [1991] 1 A.C. 696* stated, per Lord Bridge, that:

> "the obligations of the United Kingdom, as a party to the [European] Convention, are to secure to everyone within its jurisdiction the rights which the Convention defines... It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts may nevertheless enforce it"

Lord Bridge's statement has subsequently been cited on many occasions to justify "harmonised" interpretation by the European domestic courts of rights protected by the European Convention. In Israel, the National Labour Court, in breaking new ground to safeguard the right of workers to information in the event of privatisation of an enterprise, cited with approval the ILO Declaration on Fundamental Principles and Rights at Work (1998) that:

> "in seeking to maintain the link between social progress and economic growth, the guarantee of Fundamental Principles and Rights at Work is of particular significance in that it enables the persons concerned, to claim

freely and on the basis of equality of opportunity, their fair share of the wealth they have helped to generate, and to achieve their full human potential".

In *State v. Makwanyane and another (6/6/1995) CCT/3/94*, the Constitutional Court of South Africa stated that courts should examine both "non-binding as well as binding law [...] as tools of interpretation". The Court went on further to state that in using public international law, the sources recognized by article 38 of the International Court of Justice be ones to be taken into account. These sources include international conventions; international custom; general principles of law recognized by civilised nations; judicial decisions of various nations and teachings of the most highly qualified publicists of the various nations. It then went to add a fifth source of interpretation, that is the decisions of regional and international tribunals addressing public international law issues, such as the UN Committee on Human Rights, the Inter-American Commission and Court on Human Rights, the European Commission and Court of Human Rights and the specialized agencies of the UN such as the ILO.

The use of international instruments to reinforce national legislation has been made in hundreds of cases all over the world that are too many to cite here. Many other instances have already been quoted hereinabove from the ILO reports. Suffice it to say that we are satisfied that the our jurisprudence being within the spirit of the international Conventions and being similar to those in the cases referred to herein, this Court, having the primary responsibility for enforcing labour rights, is properly within its mandate and jurisdiction to apply international instruments to the cases before it within the scope of the conditions therein[i].

The directors of the Respondent Company are responsible to the bank for the financial obligations under the Companies Act relating to the loans and debentures entered into by the Respondent. Similarly the directors of the Respondent Company are also responsible to its employees for the salaries, wages and other benefits under the Trade Disputes Act and other labour laws. These are independent obligations to different sets of creditors entered into by the Respondent at different

times. At the time of entering into the debenture the Respondent already had employees and existing obligations to them. It then took on additional obligations under the debenture well knowing that it had previous obligations to the employees.

These obligations do not cancel out or override each other. Under the Companies Act the employees are unsecured creditors beyond a guaranteed limit of Shs. 4,000/- per employee. This only confirms 4,000/- be set aside by the directors at the outset. However, an earlier privileged obligation to the full extent of the employees' rights have been incurred by the employer prior to the Bank exercising its rights under the debenture and in any event even prior to the bank agreeing to advance any monies to the respondent. This obligation must be met by the Respondent independently of the debenture obligations. When the Bank advanced monies to the Respondent, it did or ought to have been aware of the Respondent's then existing obligations to its employees under the CBA. Neither of the laws, in our view, cancel out the rights and obligations in the other. The intention of Parliament can only be that they operate simultaneously and in accordance with the legal rights, guarantees and obligations for the payment of debts.

When employees enter into an agreement with an employer it is not with the intention or understanding that they will not be paid. As we have stated hereinabove and indeed reiterate, their labour is taken in advance and payment made subsequently. The wages are only a small part of the payment as the employer retains a portion in terms of other benefits namely leave payments and allowances, maternity, pensions etc. Hence the employer is a trustee for these funds and cannot subsume them into its general business subject to the vagaries of the market and if the employer is to go under, it drags the employees too. The intention of the CBA is a partnership whereby the employer pays out certain agreed sums at agreed intervals and in the intervening period retains the rest of the funds in safe custody, shielded from its trading risks until the time for payment arises as for example in the case of pension funds which are invested. It is up to the employer to determine how it protects these funds that already belong to the employees and are a debt due long before any other obligations to banks and other trading partners arise.

Workers are not shareholders or investors or trading partners that in the nature of business take part of the risk and of the profit with the employer. Employees do not share in the profit and loss account and wages are due irrespective of the size of the profit or loss. The employees have to continue in production and have no say or control in the management process. The only risk that the employee takes is that of being dismissed for a variety of reasons. Upon dismissal an employee can only claim reinstatement (and sometimes damages) if the dismissal is wrongful. Otherwise an employee's claim is restricted to the pre-agreed wages and other benefits due and owing by the employer.

If labour were to be treated as an equal input into the production process as capital is, then the compensation for the living labour put into the production process by employees would be guaranteed by a 'labour debenture' or such similar instrument. Presently labour, given its availability in excess, is at the mercy of the owners of capital; hence the law steps in to provide labour with some protection. These measures are presently insufficient to fully protect the labour providers and given the nominal protection in the law, Courts have an obligation to guard these limited interests and ensure equity.

The banks and other investors and trading partners on the other hand have a direct interest in the profits of the company and make their respective profits in the course of trading. Trading laws have developed more fully, for reasons that we do not intent to go into here, and protection offered to limited risk takers in business is higher than the protection offered to employees who risk all if they were not to be paid their wages and other dues at the end of the statutory employment period.

We find that in the case of insolvency of the employer, the Court has a responsibility to both parties as there is a potential conflict between the Companies Act and the Labour laws. What is clear is that the Bank, as one of the creditors, has exercised its legal right. It has, through the appointment of Receivers and Managers, stepped into the shoes of the Respondent and taken up all its rights, privileges and obligations. The Bank's agents now have a duty to the Respondent, its employees, its other creditors and debtors. The Receivers will manage the business of the Respondent as

trustees and attempt to recover what is owed to the Bank and then withdraw. It is not before us to decide on the efficiency of management by the Receivers and Managers. It is before us to ensure that the Receivers and Managers discharge their legal obligations to the Grievants, the employees.

The Grievants have, as we have shown above, a priority claim which has a privilege attached to it under the labour laws and their interpretation in the context of our international obligations and the ILO Conventions that we have attempted to discuss extensively hereinabove. The Companies Act sets an upper limit of Shs. 4,000/- that the Receivers must pay prior to taking anything for the Bank. The Trade Disputes Act, the CBA, the Employment Act or the Regulation of Wages and Conditions of Employment Act do not set any limits. Most of these were passed after the coming of the Companies Act on our statute books. Parliament may be presumed to have known of the existence of the Companies Act and its restrictions and yet passed the labour laws that have no restrictions or limits on an employee's dues. Dare we say that Parliament, knowing this fact, continued to pass legislation that was clearly detrimental to the rights of employees? We think such a presumption today would be difficult to make. We presume that Parliament, being aware of the limits of privilege under the Companies Act, proceeded to pass legislation that allowed workers to make their full claims under the other labour laws that are generally implemented in the domain of industrial relations through negotiated CBAs, as in the case before us.

Must we assume that if the law is silent, then it has refused to grant privilege, as the Respondent has argued before us? If so, and as is the case now whereby the funds of the Respondent may be insufficient to pay all its creditors, the employees who have stuck it out with the employer, in complete ignorance of the financial state of the employer and indeed denied access to such information, must now be allowed to go under without a remedy in law? We cannot contemplate such a situation in the light of our Constitutional order, the laws made thereunder and interpretation and application thereof in the context of international law.

***Section 4(6)*** *of the* ***Employment Act Cap 226****, under Part II – Conditions of Employment, sub-part on the* ***Protection of Wages*** *states as follows:*

***4(6)*** ***Notwithstanding the provisions of any law for the time being in force, whenever at attachment has been issued against the property of an employer in execution of a decree against him, the proceeds realized in pursuance of that execution shall not be paid by the court to a decree-holder until a decree obtained against the employer in respect of the wages of his employees has been satisfied to the extent to a sum not exceeding four months' wages of those employees:***

***Provided nothing in this section shall prevent an employee from recovering any balance due on the last-mentioned decree, after such satisfaction as aforesaid, by ordinary process of law.***

*Whilst the foregoing section may not be directly applicable to the present situation before us as there is no decree against the Respondent by either the Bank or the employees, what is clear is that the law expressly intends to protect, through a 'super-privilege' arrangement, up to 4 months' wages of employees, irrespective of the circumstances of the employer and its creditors. This protection is in addition to any other the employee may have at law.*

*Furthermore, under Section 6(3), an employer is restrained from deducting any mount from the wages of an employee save for those expressly provided for. Section 6(3), for example, states that:*

> ***"6(3)Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any written law, the total amount of all deductions which...may be made by an employer from the wags of his employee at any one time shall not exceed one-half of such wages..."***

*If, despite a clear debt owed by the employee to the employer, the employer may not deduct more that one-half of the wages of an employee in recovery thereof, we find it difficult to appreciate the argument that some other law, not connected with the management of employer/employee*

*relationship may allow a stranger to the employment contract to refuse to pay an employee's dues at all. Such an interpretation of the law would be manifestly unjust and against the spirit of the law and its enforcement procedures.*

We find therefore that the Grievants and each of them are entitled to their just dues from the Respondent and/or their agents, the Receivers and Managers. The confusion on this issue needs to be urgently resolved through legislation that perhaps can be incorporated in the proposed bills from the Cockar Task Force. In the meantime we find that the law clearly accords a privilege to employee's wages and benefits by (1) expressing the intent to secure up to 4 months wages under the Companies Act; and (2) by remaining silent in the other labour laws and thus allowing the Courts to ensure that no impediments are placed in the way of the parties as they seek their respective rights in a court of law. The protection of the law must be both meaningful and socially acceptable.

A Shs. 4,000/- limit is clearly not meaningful in the current context. The Trade Disputes Act empowers the Industrial Court to grant up to 12 months wages by way of damages for wrongful termination. We take this ceiling as being both meaningful and socially acceptable, and it has been applied many times by the Industrial Court.

We further find, from the documents before us, that there was a clear and unambiguous offer from the Receivers Managers to the Grievants that the Bank had agreed to pay out to the Grievants a sum of Shs. 3,000/- by way of transport money. This was an ex-gratia payment and the Bank was not obliged to offer it. However, once offered and incorporated into an agreement, the Receivers Managers cannot now be heard to renege.

Given the ambiguity in the law and in order to balance the rights of both parties, we find that the Respondent and/or its agents, the Receivers and Managers must pay out to the Grievants and each of them, as a privileged debt, before paying any other debts, the following:

a. Shs. 3,000/- transport allowance promised by the Receivers Managers pursuant to agreement;

b. Up to Four (4) months' wages and benefits covering the period immediately prior to the declaration of redundancy;

c. All their benefits including severance pay, outstanding pay in lieu of accrued leave, housing and other allowances for the years of service with the Respondent as per the CBA between the parties SAVE THAT such sum in total does not exceed Twelve (12) months wages of the individual Grievant;

d. All other claims beyond the amounts paid under (c) above rank at the next level of privilege and immediately after the debenture holder has secured its debt;

e. The aforesaid sums be paid out within 60 days of the date hereof.

As the sitting members also agree, it is so ordered.

DELIVERED at Nairobi this 6th day of December 2004

Murtaza Jaffer
Judge

J. C. Odaga
Member

A. Yarrow
Member

[i] The cases referred to herein have been collected in a Background Paper entitled Use of International Law By National Courts by the International Labour Standards and Human Rights Programme of the International Training Institute of the ILO, Turin 2002.