THE HIGH COURT OF TANZANIA

LABOUR DIVISION
AT TANGA

LABOUR DISPUTE NO. 01 OF 2011

CHODAWU..... COMPLAINANT

VERSUS

MKONGE HOTEL..... RESPONDENT

JUDGMENT

9/10/20 & 4/4/2014

R.M. RWEYEMAMU, J:-

The complainant – Conservation, Hotels, Domestic social services and Consultancy Workers Union, best known by its acronym (CHODAWU) is a registered trade union exercising organizational rights at Mkonge Hotel, the respondent/ employer. The parties are herein after referred to as; the union and the employer or work premises, respectively. The union is represented by its Secretary General, Mr. C. Mollel, who was also the sole witness. The employer is represented by *a Personal Representative* one Mr, Christopher Kiemi. Trial was brief; parties chose to proceed without assessors, called one witness each and filed final submissions.

Key facts in this case are, on the main, undisputed. They are derived from the Certificate of Non Settlement (filed under Rule 10 of the Labour Court Rules, GN 106/2007), evidence in court and parties final submissions. These facts can be summed up thus:-

1. Following a Recognition Agreement (RA) signed between the union and the employer, the union became the *exclusive bargaining agent* (also known as, majority union) of employees in the work premises for purpose of negotiating and concluding Collective Bargaining (CB) agreements.

   An *exclusive bargaining agent* is defined under Section 67 of the *Employment and Labour Relations Act,* (ELRA) 6/2004 as:-

   > *"A registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognized as the* ***exclusive bargaining agent*** *of the employees in that* ***bargaining unit"***. (Emphasis mine)

2. Thereafter, parties held a couple of meetings with intention to agree on various aspects of the bargaining process.

3. In that process, the union submitted to the employer, a list with names of persons who would comprise its bargaining team. That list included employees who were members of the union, as well as non employees, but officials from the union's regional and/or national headquarter offices.

4. The employer objected inclusion of such officials and insisted that, only union members who are employees in the work premises were eligible to become members of the union's bargaining team.

The key contested issue relates to the right and limitation of each party to a CB agreement to choose members of its own bargaining team. Connected with that, the parties were also at issue on three other aspects involved in CB. The four issues, commencing with the key one, are:-

a. Who, in the CB process, has a right to choose composition of each party's bargaining team members, and whether there are any limitation to exercise of such choice:
b. What is the meaning of the term bargaining unit, under the ELRA:
c. Who are the parties to a CB agreement in a given bargaining unit:
d. Which parties, particularly which employees in a given bargaining unit are bound by terms of CB agreement reached between the union and the employer:

I will now summarize each party's position on the four contested issues, and give my decision on each, *seriatim.*

(a) Who chooses a *party's Bargaining Team Members*

Mr Mollel submitted that; each party to a CB agreement has a right to choose its own team of negotiators, and there are no limitations to such choice. A party, in this case the union, has a right to choose even persons who are not employees of the work premises, to be part of its bargaining team. He concluded that; it is/was improper for the employer to object the member's chosen by the union for its team. Mr. Kiemi was of different view. He reasoned that, and I quote; *"in our understanding, a **union field branch** is the proper entity to form part of the bargaining team. They have interest in the results of the CB agreement. The team should comprise union branch members and any other employees but non-members of the union. The employees have a right to CB even if they are not unionized"*

It seems to me a starting point to resolve the above question is to decide on, whether or not, the act of the employer choosing/deciding on composition of the union's bargaining team members, is in sync with the spirit and objectives of the ELRA.I have gone through the ELRA together with the Employment and Labour

Relations (Code of Good Practice) Rules, GN 42/2007. It appears to me that no direct answer is provided by the two.

Since the position is uncertain, but being aware that one of the objectives of the ELRA is *"...to give effect to..."* ratified ILO Core Conventions (Section 3 (g) of the ELRA), I feel it appropriate to seek guidance from principles and practice developed by the ILO supervisory bodies in interpreting relevant ILO Conventions including on the subject under consideration. These Conventions are; the twin Conventions- *Freedom of Association and Protection of the Right to Organize* Convention 87 of 1948, and the *Right to Organize and Collective Bargaining* Convention 98 of 1949. These are usually read together with the Collective Bargaining Recommendation 163 of 1981 and the *Collective Bargaining* Convention 154 of 1981 (a technical convention).

Now, it is trite fact that one of the key objectives of the above Conventions, is to enable employers and workers attain equal footing; have equal voice in negotiating matters affecting terms and conditions of employment. Such equal voice is fundamental to developing effective dialogue between employers and employees. Such effective dialogue is necessary in order to 'guarantee fair and equitable outcomes for both sides, in the world of work; outcomes which are at the core of the *ILOs' Decent Work Agenda*. With that understanding, it is clear that the act of an employer choosing composition of the union team with whom to bargain would negate the philosophy behind the Conventions.

I am fortified on my said position by the decision made on the issue of representation of parties in the CB process, by the Freedom of Association Committee. See *FREEDOM OF ASSOCIATION COMMITTEE: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* Geneva,

International Labour Office, Fifth (revised) edition, 2006 para 984, 985 and 986. The Committee's opinion is that:-

> "984. **Workers' organizations must themselves be able to choose which delegates will represent them** in collective bargaining without the interference of the public authorities. (See 307the Report, Case no. 1910, para 174)
>
> 985. Excessively strict prescriptions on such **matters as the composition of the representatives of the parties in the process of collective bargaining** may limit its effectiveness and this is a matter which **should be determined by the parties themselves.**
>
> (See 310the Report, Case No. 1931, para 331)
>
> 986. Organizations of employers and workers should have **the right to choose, without any hindrance, the persons from whom they wish to seek assistance during collective bargaining** and dispute settlement procedures. (See 306th Report, Case No. 1865, para 331)"

Further, the Committee of Experts' commenting on the ambit of Article 4 of Convention 98, noted that; "***...collective bargaining must be free and voluntary and respect the principle of autonomy of the parties***". See, Giving Globalization a human face, ILC 101 Session 2012 at page 82. By extrapolation, for CB to be free and voluntary, each party in the process must be free to choose composition of its bargaining team, without limitation or hindrance from the other party or public authorities. In my understanding of the Committee's opinion (para. 986 above), such freedom extends to being free to include in a party's bargaining team, persons of their own choice, even those who are not employees of the workplace, and even experts.

In the result of all the above, my decision on issue **(a)** is this: I agree with the union position, and decide that the employer had no right to decide on composition of the union bargaining team.

(b) *Meaning of the term- Bargaining unit.*

Mr. Mollel, basically adopting definition of the term by Section 66 (a) (i) of the ELRA submitted that the term means; *"... any unit of employees in respect of which a registered trade union is recognized, or is entitled to be recognized, as exclusive bargaining agent..."*. According to Mr. Kiemi however, a bargaining unit is; and I paraphrase, a group of employees working together, selected to bargain for their employment welfare. Therefore, in the present context, the bargaining unit refers only to employees, employed in a particular undertaking ....such employees need not be union members. He added that a bargaining unit may include employees who are non union members but who have more ability to bargain.

I have checked the dictionary definition of the term, Black's Law Dictionary defines bargaining unit as; again I paraphrase, a group of employees in one unit that work together in collective bargaining.' The Wikipedia -- free encyclopedia, explains that, *"...in labour relations, bargaining unit is a group of employees with a clear and identifiable community of interest who are **represented by a union in collective bargaining** and other dealings **with management**."*. (Emphasis mine).The common thread between the two definitions above and that under the ELRA; is that the term refers to a collective of employees or organized labour, identifiable by their common interest, which binds them together to bargain with an employer as in this case, or organization of employers. The form of organized labour recognized in Tanzania for purpose of CB, is that of a registered trade union.

That definition above is closer to Mr. Mollels' understanding of the term. On the other hand, Mr. Kiemi's submission reflects a conceptual mix up between the terms bargaining unit, bargaining team and coverage of a CB agreement in a given bargaining unit. While it s true the term includes all employees in a workplace where a registered union has been recognized as *the exclusive bargaining agent,* the term does not refer to parties' to a CB agreement, nor does it reflect composition of parties' bargaining team, as Mr Kiemi suggests that the term may 'include non union members but who have more ability to bargain'.

To sum up, my decision on issue (**b**) is that; the term bargaining unit means a group of employees with a clear and identifiable community of interest who are represented by a union. Where such a union is also "...*the exclusive bargaining agent,"* in a given workplace, the term would mean all employees in such workplace. By extension of reasoning, it is possible to have **several bargaining units** in one work place, **which has more than one registered trade union, and none is a majority union.** That conclusion partly answers issue (**c**).

(c) Parties to a CB agreement in a given Bargaining unit.

According to the union, parties to such agreements are, *"the workers, trade union officials and the employer"*. Elaborating, Mr. Mollel submitted that in a workplace where a union is also the recognized *exclusive bargaining agent, **it is the union and not its field branch which is party*** to the CB agreements. I hasten to point out that the union's submission reflects a mix up of concepts, but the employer's position reflects more confusion. According to Mr. Kiemi, parties to a CB agreement are the employer and its employees. He concludes that, and I paraphrase, 'the bargaining unit from the employees' side will meet with the employers' team and bargain raised issues'.

The term CB is not defined under the ELRA therefore, for reasons earlier explained I find guidance from the relevant ILO Conventions: That is; the *Collective Bargaining Convention* 154 of 1981). The term is defined under Article 2 of that Convention as *"...negotiations which take place between an employer.....a group of employers or one or more employers organization on the one hand, and one or more* ***workers organizations*** *, on the other hand."* (Emphasis mine).I have deliberately underscored the phrase ***workers organizations*** to stress the point that, the right to CB is given and exercisable by employees through their organizations on one hand, and an employer, group of or organization of employers on the other hand. The rationale thereof is not hard to find. Why do I say so?

It is hard to imagine successful CB between employers and their employees, without employees having collective power, the famous *solidarity.* It is trite fact that labour, a relatively weaker partner in production (represented by employees in an enterprise/workplace), is able to muscle the ability to bargaining as equals with capital (represented by the employer), only through collective power, conventionally, represented by trade unions. It is in line with that; that the **right to bargain** on behalf of employees in a given bargaining unit **is given to a registered trade union**, not a branch of such union, nor a loose collective of employees. Where such a registered trade union represents the majority of employees in a given workplace, the employer is bound to recognize that union as the *exclusive bargaining agent* for all employees in such a workplace, (Section 67 of the ELRA).

It is for that importance attached to the need to have organized labour in facilitating CB, that under Convention 87, workers and employers have a right to establish (organizations) and, subject only to rules of the concerned organization ...join organizations; and such organizations have a right to organize their administration and activities, where the term **organization** means "any organization

of workers or employers for furthering and defending interests of workers or employers. That furthering of interests is done mainly through Collective Bargaining, (Article 2, and 3 and 10 of Convention 87, respectively). The first two Articles provided:-

> *"2. Workers' and employers' organizations shall have the right to draw up their constitutions and rules to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.*
>
> *3. In this Convention the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers."*

In line with the above, Convention 98 encourages 'member states to promote employers....and **workers organization**, *to develop machinery for voluntary negotiations ...with view to regulation of terms and conditions of employment by means of collective agreements'.* See Article 4 thereof. The means, parties to a CB agreement are always employees through their registered trade union, and the employer, employers or organization of employers.

I am aware that it is possible for an employer to bargain with a collective of employees e.g. through workers representatives, instead of a registered union in a workplace. The extent to which that can happen however, is supposed to be determined by national law and practice (**Article 3(1),** Convention 154. In Tanzania, the manner in which such consultation with workers representatives can take place is provided for under **Section 73** of the ELRA. For ease of appreciation, I quote both provisions:-

> ***"Article 3 (1)*** *Where* ***national law or practice recognizes the existence of workers representation*** *as defined in Article 3, subparagraph (b) of the Workers' Representative Convention, 1971, national law or practice may determine the extent to which the term* ***collective bargaining shall also extend,*** *for purpose of this Convention,* ***to negotiations with these representatives"***

> ***"Section 73 (1)*** *(ELRA) A* ***recognized trade union and an employer*** *or an employers' association may conclude a collective agreement establishing a forum for workers' participation in a workplace."*

In this case, no evidence was led to suggest existence of such recognized workers' forum at the employer's work premises, with mandate to bargain with the employer. In view of that, my decision to issue (**c**) is this; parties to a CB are employers or their organizations, and registered trade unions. In the absence of evidence of existence of a workers forum, and where there is a majority union, as is the position in this case, parties to the CB agreement are the employer and the union.

Issue **(d)** need not detain me. After hearing submissions by the parties, it became obvious that the parties were basically in agreement. Mr. Mollel submitted that CB agreement binds all employees in a workplace where a registered trade union is also the *exclusive bargaining agent.* Like the union, the employer submitted that CB agreements bind all employees (unionized and non unionized) in the bargaining unit. The said parties' position is in line with the law, that is, the ELRA which specifically provides that: An agreement between an employer and a registered trade union which is also the *exclusive bargaining agent* binds the employer and all employees in the concerned bargaining unit (workplace). Such employees include members of such a union, members of a minority union and non unionized employees. Conversely, a CB agreement between an employer and a registered trade union, which is not the majority union, binds only the employer and employees who are members of such a minority registered trade union. To summarize, my decision on the three disputed issues is as follows:

1. Each party to a CB agreement has a Right to choose and compose members of its bargaining team, according to its own constitution and organization.

2. The meaning of the term bargaining unit is as per definition under section 66(1) of the Act and can be loosely viewed as a collective or union of employees, identifiable by their common interest which binds them together to bargain (in this case) with a particular employer.
3. Parties to CB agreements are employees represented by a registered trade union and the employer, employers or organization of employers. Such agreements can also be made with other workers representatives if conditions specified under section 73 of the Act, exist. Such was not the position in this case.
4. CB agreements binds employers and all employees in a specified bargaining unit if they are represented by a majority union, if not, the agreement binds the employer and employees who are members of a given registered trade union.

Before concluding, I wish to apologize to the parties for delay in delivery of this decision. Given the nature of the issues involved, delay was on the main caused by the need to consult necessary literature.

In the final result, I find the complaint merited. I accordingly order the employer to continue the bargaining process with the union, within a period of 14 days from today. In such process, each party should freely choose members of its bargaining team. It is so ordered.

R.M. Rweyemamu
JUDGE
21/3/2014

Judgment delivered to the parties in presence of their representatives, herein above mentioned, this 4/4/2014. Right of appeal explained.

R.M. Rweyemamu
JUDGE
4/4/2014