

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM
CIVIL CASE NO. 111 OF 2020

THE BOARD OF TRUSTEES OF THE PUBLIC

SERVICE SOCIAL SECURITY FUND..... PLAINTIFF

VERSUS

MAXCOM AFRICA PLC..... DEFENDANT

JUDGMENT

Date of Hearing : 16/05/2023

Date of Judgment: 29/05/2023

MONGELLA, J.

The plaintiff, a social security provident fund established under the Public Social Security Fund Act, No. 2 of 2018, is suing the defendant for, among other reliefs, a total sum of TZS. 1,326,611,745.93 being unremitted member's contributions to the fund and accrued penalties thereof for a period of 21 months from November 2016 to July 2018. The defendant is a limited liability company incorporated under the laws of Tanzania, the Business Names Registration Act, Cap 213 R.E. 2002 to be precise, which used to provide electronic payment services. The defendant is a registered employer with the plaintiff Fund with the obligation to remit monthly contributions to the Fund.



Originally, the suit was filed under Summary Procedure, under Order XXXV of the Civil Procedure Code, Cap 33 R.E. 2002 read together with section 62 of the Public Service Social Security Fund Act, 2018. The defendant however, obtained leave to defend vide Misc. Civil Application No. 668 of 2020 and filed his written statement of defence accordingly.

In the Plaintiff, the plaintiff claims that the defendant defaulted in remitting compulsory monthly contributions for his employees at the rate of 20% of the employees' basic salaries. The debt is with respect to 349 employees of the defendant whereby 202 of them are insured persons and 147 are employees for MAXCOM. The period of default is 21 months from November 2016 to July 2018. The plaintiff claims further that the defendant has remained in default of his statutory obligation while knowing that the same is contrary to the law and despite several demands and reminders. In that respect he claims for the following reliefs:

- (i) *That, the defendant pays a sum of TZS 1,326,611,745.93 (Tanzania Shillings One Billion Three Hundred Twenty-Six Million, Six Hundred Eleven Thousand, Seven Hundred Forty-Five and Ninety-Three Cents only) being un-remitted member's contributions plus accumulated penalties.*
- (ii) *That, the defendant pays interest on the decretal sum from July 2018, when the sum accrued to the date of Judgment at the prevailing prescribed Court rate per annum;*



- (iii) *Interest on judgment debt at the prescribed Court rate from the date of delivery of judgment until the same shall be fully satisfied;*
- (iv) *Costs of and incidental to the filing of the suit.*
- (v) *Any other relief(s) that this court shall deem fit and just to grant.*

In the written statement of defence (WSD), apart from admitting being a registered contributing employer with the plaintiff Fund, the defendant vehemently denied the allegations in the plaintiff's *Plaint* and put the plaintiff into strict proof of the allegations. He averred that the amount claimed by the plaintiff is over calculated and exaggerated.

The Court (Mkwizu, J.) had initially ordered for the hearing of this case to proceed by witness statements in accordance with **Order XVIII Rule 2 (1) of the Civil Procedure Code (Amendment to the 1st Schedule) Rules, 2021**. In that respect, the plaintiff filed witness statement from his witness. However, the case was placed on special session whereby it was allocated two days to be completed. In the circumstances, the filing of witness statements by the defendant would no longer be possible. Therefore, it was agreed in consensus by the parties' counsels that the defence hearing proceed without witness statements. The order to file witness statements was therefore vacated with respect to the defence evidence. Both parties presented single witnesses.

The issues framed for guidance in this case were are follows:



- (i) Whether the defendant is indebted to the plaintiff the sum of Tanzanian Shillings 1,326,611,754.93 being outstanding unremitted contribution and penalty by the defendant.
- (ii) Whether there was a breach by the defendant for non-compliance to remit the contributions to the plaintiff.
- (iii) To what reliefs are the parties entitled to.

The plaintiff testified through one, Mordgard Lumbanga, Compliance officer of the plaintiff Fund. He stated that the defendant is a registered employer with the plaintiff Fund who is legally required to remit contributions of his employees. To that effect he tendered the Certificate of registration which was admitted without objection as "exhibit P1." He said that the defendant was required to remit 20% of the employees' basic salaries whereby 10% was to be contributed by the defendant and the remaining 10% was to be deducted from the employees' salaries. The remittance was to be effected within 30 days from the date of deduction.

Concerning the amount claimed, Mr. Lumbanga stated that, initially the unremitted contributions with accrued penalties thereof was TZS 2,383,292,291.10 whereby out of the total amount, TZS 713,425,178.80 was the principal sum and TZS 61,326,611,745.93 was the accrued penalty calculated at 5%. He said that the said amount was later reviewed and the penalty re-calculated at 1.5% which reduced the debt to TZS 1,326,611,745.93 and a demand notice served to the defendant in respect of the reviewed debt. That, the defendant never honoured the demand

notice rendering the institution of the case at hand by the plaintiff. The demand notice was admitted as "exhibit P3."

Regarding the unremitted contributions, the plaintiff tendered a document titled "Arrears of Contribution Analysis Sheet" which was admitted by the court as "exhibit P2" but with caution following an objection on point of law by the defendant's counsel, Ms. Bertha Bihondo. I shall consider the point of objection during my deliberations.

The defendant, on the other hand, testified through one Ahmed Lussasi who is one of the directors of the defendant company. Mr. Lussasi stated that the defendant does not recognize the amount claimed by the plaintiff in this suit as the defendant is not indebted that much. He said that the defendant is indebted TZS 354,361,388.30 only as the principal amount, though he never presented any documentation to that effect. He denied the defendant having received any copy of the demand notice "exhibit P3" or having communicated with the plaintiff in any way regarding the debt claimed in the amended plaint, or to have promised anything to the plaintiff. He added that the defendant has never received any complaints from his employees regarding their contributions to PSSSF. In that respect, he urged the court to dismiss the amount claimed.

On cross examination, he maintained that the amount the defendant is indebted is TZS 354,361,388.30, which is with respect to un-remitted contributions of some of the employees from the "Mwendokasi project" from 2016 to 2017. When questioned as to whether he had reported to the plaintiff Fund on his inability to remit the monthly contributions, he said that



he never informed the plaintiff on his failure to pay as he had sued UDART in the High Court-Commercial Division.

He further denied breaching any law blaming it to UDART saying that UDART terminated the contract with the defendant in 2018 leading to the employees losing employment. He said that he was not aware if defaulting leads to penalty. He added that the amount recognized by them shall be paid when the government pays them the amount of 3.5 billion which the defendant claims from the government and which was not paid for the services rendered before the contract was terminated.

After the hearing the counsels for both sides were accorded the opportunity to file final written submissions. The same were filed in accordance with the court order. For the plaintiff, the final submissions were drawn and filed by Ms. Anna Shayo, learned state attorney.

Addressing the 1st issue, Ms. Shayo first relied on "exhibit P2" "the Arrears Contribution Analysis Sheet" which she said shows the assessed outstanding contributions and penalty due from November 2016 to January 2019, which brings a total of TZS 1,326,611,754.93. She said that the plaintiff is a body corporate established under the Public Service Social Security Fund Act, No. 2 of 2018 thereby being transformed from the former Board of Trustees of PPF which was established under the repealed PPF Pensions Act, Cap 372 R.E. 2015. That the transformation carried along all the assets and liabilities, powers, rights, privileges, duties or obligations, including powers to pursue non-remittance of members' contribution claims which were exercisable under the defunct Board of Trustees of PPF Pensions Fund.



She continued to argue that the outstanding contributions by the defendant were before the PPF Pension Fund Act was repealed and continued to accrue when Act No. 2 of 2018 came into operation in July 2018. In the new Act, she referred to **section 18** (which is *parimateria* to section 8 of the repealed PPF Pensions Act), which obliges the employer to deduct from the employee's salary and remit to the plaintiff Fund. She further referred to **section 62 of Act No. 2 of 2018** which provides that every debt shall be a debt due to the Board of Trustees of the plaintiff's Fund.

As to the accrued penalties, she referred to **section 19 of Act No. 2 of 2018** which imposes a penalty of 1.5% on the delayed contributions. She said that Act No. 2 repealed the penalty of 5% on delayed contributions that was charged under the repealed PPF Pensions Act. That, the penalty claimed against the defendant was based on the percentage provided under Act No. 2 of 2018.

Submitting on the 2nd issue, Ms. Shayo relied on the oral and documentary evidence presented by PW1. She had the stance that the evidence from PW1 proved on balance of probabilities that the defendant failed to honour his obligations under **section 18 (1) and (2) of the Public Service Social Security Fund Act, No. 2 of 2018**. Referring to specific parts of PW1's testimony, she contended that the defendant, upon being registered with the plaintiff's Fund and issued a certificate of registration he was statutorily required to deduct and remit contributions of his employees to the plaintiff Fund. She proceeded to submit that the defendant failed to remit statutory contributions in respect of his employees from November 2016 to January 2019 despite several reminders, including the demand notice "exhibit P3"



under which a sum of TZS 2,383,292,291.10 for unremitted contributions. She said that the amount of T.shs. 1,326,611,754.93 claimed in the suit at hand resulted from reconciliation of the debt. She urged the court to be persuaded by the decision in the case of **John Lihava vs. Dominiscus Nyenzi**, Land Appeal No. 4 of 2022, which discusses proof of cases in civil matters. She thus considered the 2nd issue answered in the affirmative.

As to the 3rd issue, Ms. Shayo reiterated the reliefs prayed by the plaintiff in the amended Complaint, as I have already stated them earlier on in this judgment. I find no relevance in recapitulating the same.

The defendant's final written submissions were drawn and filed by his counsel, Ms. Bertha Bihondo, who generally submitted on the issues framed. Ms. Bihondo first challenged PW1's testimony that the plaintiff made several communications with the defendant regarding the outstanding debt and that the defendant promised to pay. She considered the information untrue relying on the testimony of DW1 who denied having any communication with the plaintiff or making any promises to pay the debt. She added that PW1 only tendered "exhibit P3" a demand notice, but failed to tender other letters which he claimed to have communicated through with the defendant to prove his assertions. She argued further that the demand notice, "exhibit P3" was the only communication to the defendant by the plaintiff but the same considered the amount of TZS 2,383,292,291.10. That, no communication was made to the defendant regarding the claimed amount of TZS 1,326,611,745.93.



Ms. Bihondo further found the plaintiff's claims contradictory. She contended that while in the Amended Complaint, it is stated that the defendant's delay is for a period of 21 months, in the witness statement, PW1 stated that the delayed period is 26 months. She added that when cross examined regarding the discrepancy, PW1 failed to provide a clear number of the exact period that was defaulted by the defendant. She had the view that in the circumstances, the court is left with uncertainty as to which document or record to rely on. She added that the uncertainty makes it clear that the amount claimed is also incorrect and if allowed by this court an injustice shall be occasioned to the defendant.

Ms. Bihondo further challenged "exhibit P2." She contended that PW1 tendered the documents which indicates names, salary, contributions, and penalty calculations, and discloses names and records of people claimed to be ex-employees of the defendant. That, the exhibit involves two persons being; one Justine Kassara, who is identified therein as the person who prepared the list, and one Mordgard M. Lumbanga (PW1) who approved the list, but the said Justine Kassara was never presented to testify in court. She argued that when cross examined on the failure to furnish the said Justine Kassara, PW1 replied that he did not see it crucial to furnish him. That, when cross examined further as to how the court and the defendant who is affected by the claims shall believe the record, PW1 stated that all the members to the Fund have registration forms and numbers, however he failed to furnish evidence of the names provided in the list as employees of the defendant.



Submitting further, she showed discrepancy between the claim stated in "exhibit P2" and the claim stated in the Amended Plaintiff. She contended that while "exhibit P2" provides a total debt of TZS 437,040,608.33 for principal amount and penalty from August 2018 to January 2019, the Amended Plaintiff provides the total debt of TZS 1,326,611,745.93. She had the stance that the plaintiff has failed to prove his claims against the defendant as he provided before this court contradictory documentary evidence. She specifically referred to the demand notice, Amended Plaintiff, and the Analysis Sheet List. She argued further that the plaintiff failed to furnish registration certificates or forms testified by PW1 to prove that all the names in the sheet list were true employees of the defendants and true registered members of the plaintiff; or any documents showing that there have been complaints from the employees on their unremitted amounts. She referred the case of **Berelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT at Mwanza) on burden of proof.

Referring to the defendant's evidence on the claim, she argued that DW1 denied the defendant being aware of any claim by the plaintiff, or complaints by employees, or making any promises. That he came to be aware of the claim when he was called to testify before this Court. She thus urged the court to dismiss the plaintiff's claims.

After considering the evidence by both parties and the submissions by the learned counsels for both sides, my task is to determine on whether the case has been proved to the required standard by the plaintiff. As argued by Ms. Bihondo, to which I subscribe, the position of the law is to the effect that the one who alleges bears the burden of proving the alleged facts. It is also trite



law that in civil cases, the onus of proof lies on the claimant. In that respect, the plaintiff bears the burden of proving the claims advanced in the Plaint. See: **The Attorney General vs. Eligi Edward Massawe**, Civil Appeal No. 86 of 2002; and **Ikizu Secondary School vs. Sarawe Village Council**, Civil Appeal No. 163 of 2018 (both unreported). See also **section 110 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019** which provides:

- "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

With regard to the 1st issue, that is, whether the defendant is indebted to the plaintiff the sum of TZS 1,326,611,754.93, being outstanding unremitted contribution and penalty; the plaintiff through PW1, one Mordgard Lumbanga, tendered exhibit P2. This was the "Arrears of Contribution Analysis Sheet" showing the number and names of employees and the remittance status of the defendant company. The court admitted "exhibit P2" with caution following an objection on point of law from Ms. Bihondo. Her point of objection was pegged on non-compliance with **section 18 (2) of the Electronic Transactions Act**. Ms. Bihondo contended that "exhibit P2" is an electronically generated data, thus the authenticity of the data ought to have been proved first before it being tendered. She contended that proof of authenticity is made either through a certificate of authentication or affidavit.



Mr. Haule in countering the point of objection argued that the document is authentic as it has been generated from their office system and the defendant's counsel has not disputed its contents. I reserved my deliberation on this point of objection to this moment of composing judgment, thus admitted the exhibit with caution.

Tendering of electronic evidence is governed under **section 64A (2) of the Evidence Act, Cap 6 R.E. 2019** and **section 18 (2) of the Electronic Transactions Act. Section 64A (2) of the Evidence Act** provides:

"(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act."

Section 18 of the Electronic Transactions Act provides:

"18 (1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message."

(2) In determining admissibility and evidential weight of a data message, the following shall be considered:

- (a) The reliability of the manner in which the data message was generated, stored or communicated;*
- (b) The reliability of the manner in which the integrity of the data message was maintained;*
- (c) The manner in which its originator was identified; and*



- (d) Any other factor that may be relevant in assessing the weight of evidence.

In my considered view, the above quoted provisions do not suggest in any way that proof of reliability or authenticity of electronic data must be provided through certificate of authenticity or affidavit. The said requirement is therefore a creature of the court, particularly, the High Court. Nevertheless, there are conflicting positions in this court regarding proof of reliability of data by affidavit or certificate of authenticity. While others find the affidavit or certificate of authenticity being mandatory (See for instance: **Reference Point Limited vs. Overseas Infrastructure Alliance (I) P. Limited**, Civil Case No. 71 of 2018), others do not find it mandatory mainly on the ground that affidavit substitutes oral evidence and therefore no need of affidavit if oral evidence is provided (see for instance: **Freeman Aikael Mbowe & Others vs. The Republic**, Criminal Appeal No. 76 of 2020; **EAC Logistic Solution Ltd. vs. Falcony Marines Transportation Ltd.** Civil Appeal No. 1 of 2021; and **Standard Chartered Bank Tanzania Ltd. vs. Justin Tineishemo**, Revision Application No. 184 of 2022).

Under **section 18 (2) of the Electronic Transactions Act**, the court is required to consider reliability of the manner in which the data message was generated, stored or communicated; the manner in which the integrity of the data message was maintained; the manner in which its originator was identified; and any other factor that may be relevant in assessing the weight of evidence. This, in my view, can be testified orally by a witness and the court is only obliged to assess the credibility of the testimony rendered.

The Court of Appeal, in the case of **Stanley Murithi Mwaura vs The Republic**, Criminal Appeal No. 144 of 2019 (CAT at DSM, found at www.tanzlii.go.tz) discussed the import of **section 64A (2)** and **78A (2) of the Evidence Act**, and **section 18 (2) of the Electronic Transactions Act**. The Court noted that the trial court never considered the criteria in **section 18 (2) of the Electronic Transactions Act**, but considered the testimony of the witness, who tendered the exhibits, on reliability of the electronic data, including the testimonies offered during cross examination. In the circumstances, the Court found the tendering of the exhibits complied with **section 64A (2) of the Evidence Act** and **section 18 (2) of the Electronic Transactions Act**. The Court concluded that:

"In the circumstances, we hold that tendering exhibits P10, P11, and P16 was proper in terms of sections 64A (2) and 78A (2) of the Evidence Act read together with section 18 (2) of the Electronic Transactions Act, especially after the banking officials had testified on the soundness of their respective banking computer systems from which the documents were electronically stored and mechanically generated from by printing."

Considering the decision as presented above, I find the Apex Court not settling the position that it is mandatory for reliability of electronic data to be by way of affidavit or certificate of authentication. What the Court suggests is that it suffices that a witness testifies orally on the reliability of the electronic data. See also: **Ami Tanzania Limited vs. Prosper Joseph Msele**, Civil Appeal No. 159 of 2020 (CAT at DSM, found at www.tanzlii.go.tz). However, in my view, the witness must testify to the reliability of the data before seeking to tender the exhibit in evidence and should maintain the veracity of the testimony during cross examination. The witness must also

be the one who generated/retrieved the electronic data or who is in control/supervision of the electronic device or system.

In the case at hand, it is clear on record that PW1 never testified in chief as to the reliability of "exhibit P2" in terms of **section 18 (2) of the Electronic Transactions Act**, before seeking to tender the same in evidence. He never stated if he is the one who generated or retrieved the data from the electronic device or if he is in control/supervision of the electronic device. His counsel as well never led him to testify on such details. Even during cross examination, he only stated that he is the one who approved the document. In my view, approval of the document is done when the same has already been printed out. It has no bearing with proof of the reliability of the electronic data in terms of **section 18 (2) of the Electronic Transactions Act**. In the premises, I shall accord no weight on "exhibit P2."

Further, I as well find discrepancy on the plaintiff's claims in the plaint, "exhibit P2," and PW1's testimony. Under paragraph 7.0 the plaintiff states that the defaulted period is from November 2016 to July 2018. However, in "exhibit P2-the sheet of contribution" the covered period is between August 2018 and January 2019. In the testimony by PW1 and the submission by Ms. Shayo, the period of default is stated to be from November 2016 to January 2019. I find the contradiction material and going to the root of the matter as it affects the claimed sum. In addition, the testimony of PW1 is on something not covered in the plaint, thus cannot be considered by the court because parties are bound by their own pleadings. See: **Astepro Investment Co. Ltd v. Jawinga Investment Limited**, Civil Appeal No. 8 of 2015



(CAT at DSM, found at www.tanzlii.go.tz). In that respect, the claim of TZS 1,326,611,745.93 stands unsubstantiated by the plaintiff.

With regard to the 2nd issue, that is, on whether there was a breach by the defendant for non-compliance to remit the contributions to the plaintiff; I will start by observing that, for a registered member with a providential fund, remittance of monthly contributions for registered employees is a statutory obligation. This is in accordance with **section 18 of the Public Service Social Security Fund Act, No. 2 of 2018**.

As pointed out earlier, the defendant through the testimony of DW1, never denied to be indebted at all. He admitted to be indebted a principal sum of TZS 354,361,388.30. Admission of the said amount proves that the defendant defaulted in remitting some contributions to the plaintiff Fund. Under **section 19 of the Public Service Social Security Fund Act, No. 2 of 2018**, a defaulting member is charged an interest of 1.5%. DW1 challenged the interest on the ground that he was not aware if an interest is charged on default. I find the same absurd. Being a contributing employer, the defendant was duty bound to understand his obligations and liabilities under the law establishing the Fund. His excuse cannot exonerate him from liability to pay the interest on the defaulted amount. The 2nd issue is therefore answered in the affirmative.

The 3rd issue is on reliefs entitled to the parties. As stated earlier, the plaintiff claimed for: the defendant to pay a sum of TZS 1,326,611,745.93 (Tanzania Shillings One Billion Three Hundred Twenty-Six Million, Six Hundred Eleven Thousand, Seven Hundred Forty-Five and Ninety-Three Cents only) being



un-remitted member's contributions plus accumulated penalties; the defendant pays interest on the decretal sum from July 2018, when the sum accrued to the date of Judgment at the prevailing prescribed Court rate per annum; Interest on judgment debt at the prescribed Court rate from the date of delivery of judgment until the same shall be fully satisfied; costs of and incidental to the filing of the suit; and any other relief(s) that this court shall deem fit and just to grant.

Given my finding on the 1st issue to the effect that the claim of TZS 1,326, 611,745.93 has not been substantiated, I am of the view that the reliefs claimed cannot be awarded to the plaintiff. However, considering the fact that the matter involves rights of employees to social security and the fact that the defendant does not dispute being indebted the monthly contributions, but only disputes the amount claimed, I am of the view that the parties should sit down and reconcile the records to ascertain the exact principal amount and accrued penalties the defendant is indebted and for which specific employees.

In the premises, the plaintiff's suit partly succeeds. That is with respect to the 2nd issue and as such, I order each party to bear his own costs of the suit.

Dated at Dar es Salaam this 29th day of May 2023.




L. M. MONGELLA

JUDGE