

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 32 OF 2021

**THE BOARD OF TRUSTEES OF THE
NATIONAL SOCIAL SECURITY FUND PLAINTIFF
VERSUS
INDEPENDENT POWER TANZANIA LIMITED DEFENDANT**

JUDGMENT.

S.M. MAGHIMBI, J:

The suit beforehand was initially filed under summary procedure pursuant to the provisions of Order XXXV of the Civil Procedure Code, Cap. 33 R.E 2019 ("the CPC"), read together with Section 74A (2) of the National Social Security Fund Act, [Cap. 50 R.E 2018]. When served with the copy of the plaint, the defendant filed in this Court a Misc. Civil Application seeking for leave to defend the suit. On the 14th day of June, 2023, this court granted leave to the defendant and on 21st day of June, the defendant filed her Written Statement of Defence (WSD).

In this suit, the plaintiff's claim against the defendant is for payment of TZS 578,580,884.49 (Tanzania Shilling Five hundred seventy-eight Million, five hundred eighty Thousand, eight hundred eighty-four shillings

and forty-nine cents) being outstanding principal members' contributions plus accumulated penalties thereon which sum continues to accrue as long as it remains due as aforementioned. The amount claimed is due to the defendant's failure to perform her statutory obligation in accordance with the law establishing the plaintiff.

Under the NSSF Act, the defendant is required to remit each month, compulsory contributions at a total rate of 20% of the employee's (member) wage; 10% being from the defendant as the employer and 10% as the employees contributions. It is alleged by the plaintiff that the defendant is in breach of its statutory obligations, having defaulted remittance of members' principal contribution amounting to TZS 557,351,680/= (Tanzania Shillings Five Hundred fifty-seven million Three hundred fifty-one hundred thousand sixty hundred and eight shillings) being the outstanding principal member's contributions which covers the period of October, 2017 to December 2018, and accumulated penalties amounting to TZS 21,229,203.90/= for period November, 2008 to September 2017 (Tanzania Shillings Twenty-one Million Two Hundred twenty nine hundred thousand two hundred three shillings and ninety cents) which sum continues to accrue as long as it remains due.

On the above allegations, the plaintiff prays for judgment, decree and orders as against the defendant as follows:

- (i) The defendant to be ordered to pay sum of TZS 578,580,884.48/= (Tanzania Shilling Five Hundred seventy eight million, five hundred eighty hundred thousand, eighty hundred eighty-four shillings and forty-nine cents) being unremitted members' contributions plus accumulated penalties due and payable to the plaintiff by the defendant.
- (ii) The defendant pays interest on the decretal sum from October, 2017 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 this suit and any other incidental costs pertaining to the filing of the suit; and
- (v) Any other and further relief as this Honourable Court shall deem fit and just to grant.

In her Written Statement of Defence (WSD), the defendant denied the obligation on the ground that by a letter dated 30th August, 2017 from EWURA, they were notified that EWURA refused to grant extension of the Electricity Generation Licence. On that note, the defendant averred that she is not liable to pay what she termed as the legally and factually

unfounded contributions and penalties alleged. Her grounds for denial were that for the period between October, 2017 to December 2018 and up to today, the defendant, being the employer had already ceased operations and was not paying salaries to its employees following the expiry of the EWURA license for generation of electricity. Therefore, it is untenable and impossible for the plaintiff to require the defendant to remit statutory contributions when there were no funds since there was no production and where salaries were no longer being paid because of cessation of operations.

At the conclusion of the pleadings and upon failure of mediation, the following issues were deliberated and agreed to be framed for determination:

- (1) Whether the defendant owes the plaintiff the amount of Tshs. 578,580,884.49/= as statutory deductions from fees salaries to be remitted to the plaintiff between the joined October, 2017 to December 2018.
- (2) Whether the defendant was in a position to deduct from the fees and remit to the plaintiff the statutory contributions as claimed by the plaintiff.
- (3) If the answer to the 2nd issue is in the affirmative, whether the

defendant breached her statutory duty.

- (4) Whether the defendant owes the plaintiff a sum of Tshs. 21,229,203.90/= as accumulated penalties for the periods between November 2008 to September 2017.
- (5) To what reliefs are the parties entitled to.

In order to prove their case, the plaintiff tendered 9 exhibits and called three witnesses, PW1, was Juma Rashid Bowa, a Compliance Officer/Inspector with NSSF, PW2 was one Amina Hamisi Mmbaga, Principal Labour Officer from the Prime Minister's Office, Labour Department and PW3 was Hamza Abdallah Mboga, a former employee of the defendant between 2010 and 2018. On their part, the defendant had two witnesses, DW1, one Habinder Singh Sethi, Chief Executive Officer of the defendant and DW2, James Basil Yara who is a Director of the Company and the Company Secretary. As for representation, the plaintiff was represented by Mr. Keneth Kasongwa and Ms. Zainab Juma, both State Attorneys, while the defendant was represented by Ms. Abriaty Kivea and Ms. Subira Omari, learned Advocates.

Determination of this matter shall begin with the second issue on whether the defendant was in a position to deduct from the fees and remit to the plaintiff the statutory contributions as claimed by the plaintiff. The

issue emanates from the defence tabled by the defendant that at the alleged time of non-remittance, the defendant had ceased her operations following refusal to renew an electricity generating licence ("the licence") by EWURA. If it is proved that there was no operations and no salaries were paid to the defendant's employees, then the defendant would not be under obligation to pay the plaintiff any statutory contributions. It is important to note that seizure of operations following a non-renewal of licence does not mean that the defendant is automatically discharged from liability because the remittance are connected to deductions from employees salary and the defendant's statutory contribution divided at 10% on each of the employer and employee calculated from the employees' salary. Therefore, the defendant is under obligation to prove that no salaries were made while the plaintiff is under obligation to prove that those salaries were paid to employees, for her to justify the required remittance of statutory contributions.

Coming to the evidence adduced, the plaintiff's PW1 testified that at the beginning the defendant was complying with the law by remitting contributions and then after a certain period, she stopped. According to him, the last time she remitted contributions was in September, 2017 and thereafter she stopped the remittances. That from the time she stopped

paying, they inspected him in May 2018 and June 2020 and that the claim that is before this court is for the period between October 2017 to December 2018 along with the penalties which came from the delay in remitting the contributions.

As for the inspection, PW1 tendered EXP1, a Notice of Inspection, a letter with Ref. No. NSSF/MBZ/01/VOL 1/76 dated 17/06/2020 addressed to the defendant. Following that notice, PW1 tendered exhibit P2, EXP3 and EXP4 which were forms of schedule of arrears for the period of October 2017 to December, 2017, January 2018 to July, 2018 and August 2018 to December, 2018 issued on 24/06/2020. He also tendered EXP6, a demand letter with Ref No. NSSF/MBZ/587796/19/20 dated 1st July, 2020.

On cross examination by Ms. Kivea, the witness admitted that he was not given the audited financial reports. But he was received and conducted inspection with the Human Resources Manager of the defendant called Basila Elias. In their defence, the defendant denied to have an officer called Basila Elias working for them at that time.

Another evidence in relation to the 2nd issue is the evidence of PW3, who testified to be an ex-employee of the defendant. His testimony was to effect that the employment was officially terminated on 20/12/2018 by

a document that the employer issued to all her employees. The witness tendered EXP9 which was the termination letter and what he termed as the document he used to go and claim his contributions at the plaintiff. The letter was signed by Mr. Ambrose Lugenge who was the Director of the Company and Joseph Makandegé who was the Secretary of the Board and Corporate Lawyer. PW3 also testified that at the time of his termination, he also had several unpaid salary arrears with the defendant. The witness emphasized that the employees of the IPTL were in employment until 20/12/2018 which is the date of termination of employment.

On his part DW1 testified that Makandegé was on contract which terminated in December, 2017 when it expired. He tendered EXD1 to show the notification to Mr. Makandegé that his contract had expired. He was countering the evidence of PW3 that it was Mr. Makandegé who signed EXP9, a termination letter intended to prove that the defendants' employees worked till December, 2018.

Having analysed the evidence, I am inclined to agree with the plaintiff that initially, the defendant was under obligation to notify the plaintiff of the cessation of operations. In her closing submissions however, Ms. Kivea heavily relied on this argument arguing that the

Defendant had no liability to deduct statutory contributions in respect of her former employees since the employment relationship was automatically terminated after EWURA's denial to renew the Defendant's license since September 2017. Her claim was that this fact was not objected by the Plaintiff as per Paragraph 3 of the Plaintiff's Reply to the Written Statement of Defense. Further that upon public notice issued to the public including the employees, the Plaintiff was aware of this fact, the Plaintiff impliedly accepted the fact that the employment relationship between the Defendant and the employees ceased. Further that the plaintiff proceeded to pay the employees unemployment benefit in September 2017. That the unemployment benefit is payable only upon cessation of employment, thus there were no wages due from October 2017 to December 2018 for the Defendant to deduct.

She cited the provisions of Section 13 (1)(a) of the National Social Security Fund Act [CAP 50 R.E 2018] which provides that:

"13 (1) A contributing employer who is liable to make or has made a statutory contribution in respect of an insured person may deduct the employees' share of the statutory contribution-

(a) From the wages due from him to the employee in respect of the contribution period to which the statutory contribution relates;”

She argued further that during cross examination, PW1 admitted that the employees were paid unemployment benefits, and during re-examination PW2 testified that the employees were paid the unemployment benefit in September 2017. The unemployment benefit is payable at the time of ceasing employment and that the Plaintiff was aware that the employment relationship between the Defendant and her employees ceased and proceeded to pay unemployment benefit to the Defendant's former employees, thus the Defendant ceased to be the contributing employer from September 2017 when the unemployment benefit was paid on the ground that the benefit is payable only to those who ceased to be employed.

On my part, I don't agree with the defendant that non-renewal of generating licence by EWURA automatically discharged the defendant from her liability to remit employees contributions to the fund. The rationale behind is simply that non-renewal of licence to generate electricity cannot act as an automatic termination of employment of the defendant's employees. Therefore, much as there is no dispute that the defendant's

electricity generating licence was refused by the relevant authority (EXD6), the defendant was still under obligation to notify the plaintiff of the cessation of its operation. Short of that, the defendant was under obligation to adduce evidence to show that the operations of the company closed and the employees were terminated in the alleged period. Analysis of evidence did not establish in favour of the defendant that the two situations that would have established the plaintiff's awareness of the cessation of her operation existed. In the upshot the defendant was under obligation to notify the plaintiff.

On that finding, the second issue is answered in favour of the plaintiff; the defendant was in a position to deduct from the employees salaries and remit to the plaintiff the statutory contributions as claimed by the plaintiff. The second issue having been answered in favour of the plaintiff, it automatically determines the third issue in favour of the plaintiff because having been under obligation to remit the statutory contributions, the defendant breached her statutory duty to the plaintiff.

The next issue for determination is the first issue which is the main subject of claim. The issue is whether the defendant owes the plaintiff the amount of **Tshs. 578,580,884.49** as statutory deductions from fees and salaries to be remitted to the plaintiff between October 2017 to December,

2018. Since it has been established that the defendant did not cease operations immediately after refusal to renew his generating licence, the issue is whether the plaintiff has successfully established the claimed amount of Tshs. 578,580,884.49. The plaintiff relied on the evidence of PW1, PW2 and PW3 as to when the operations actually ceased. Analysed in affirmative by the second issue as to when operations ceased, the total sum owed remains in dispute.

I have thoroughly analysed the Exhibit P9 tendered by the plaintiff's PW3. This document is dated 18th December, 2018 and it shows that there was a notice of retrenchment issued to the employees which by 01st November, 2018 the employees had accepted their retrenchment letters and accordingly, ceased to be employees of the defendant. Therefore for the purpose of calculating the amount owed, the period of arrears at this point shall end in October 2018 because by 01st November, the employees had collected their termination letters.

As for the amount claimed, since there was dispute on the exhibits tendered as salary slips and no financial reports tendered, the documents cannot form the best evidence for the purpose of calculation of the amount of contributions owed. The best documents to be relied upon is EXP7 tendered by PW2 which shows that there

was a deed of settlement on adjusted salaries and accordingly it was agreed that the defendant pays his employees a total sum of Tshs. 254,998,929.68 as salary arrears for the month of June-October, 2018. Since this is the salary arrears, it shall be the amount upon which 20% of the salaries would be deducted. There is also EXP3 which shows the salary arrears from January to July 2018.

Since the months of June-July were already covered in EXP7, the salary total shall be from January to May, 2018 which is to be calculated for contribution arrears. EXP4 covers August to December, 2018. Since the EXP9 tendered by the plaintiff shows that the employees were retrenched by 1st November, then the period to be calculated in is August, September and October 2018. This is because the defendant did not bring any evidence to the plaintiff to show that he has ceased operations. That would still be the case even if the defendant did not make any admission of the debt vide EXP9 by entering a settlement deed agreeing to pay the employee's salary arrears for the year 2018. The deed implies that the office was in operation until that period agreed in the settlement deed hence the contributions were not remitted as shown. That being the case, the defence of denial to renew licence by EWURA cannot be used to defeat

the plaintiff's claim arising from the defendant's default to remit the contributions.

With the above in mind, the basis for calculating the amount claimed shall be based on the settlement deed (EXP7) as I have elaborated. The periods for calculations above. Since the plaintiff did not successfully prove the actual salaries of the employees of the defendant, the same amounts as contained in EXP7 shall be used to calculate the salary arrears for the month of January-June 2018 which is the same five months hence the amount of 20% of Tshs 254,998,929.68 and the period of July-December, 2017 which is six month, 254,998,929.8 divide by 5 equal to 50,999,785 plus the 254,998,929 will amount to Tshs. 305,998,714. The total amount is $254,998,929.68 + 254,998,929.68 + 305,998,714$ 20% of which shall be Tshs. 163,199,314/= . This is the amount the defendant owes the plaintiff as statutory contributions.

The fourth issue is whether the defendant owes the plaintiff as sum of Tshs. 21,229,203.90/= as accumulated penalties for the periods between November 2008 to September 2017. This issue should not detain me much, as for the penalties, as correctly argued by Ms. Kivea in her closing submissions, there is no evidence that the plaintiff issued a notice

to the defendant on the accumulated penalties and the EXP5 is not sufficient to be termed as a notice of default. The issue is decided in favour of the defendant, the plaintiff did not prove the penalties owed by the defendant for the claimed period.

Having made the above findings, the last issue is on the relief(s) sought. Having made the above findings on the framed issues, this suit is partly allowed to the extent that:

1. The period of arrears for purposes of payment shall end in October 2018 because by then the employees had collected their termination letters.
2. As per the EXP7 the amount to be used to calculate the unremitted contributions for the period of June-October 2018 shall be Tshs. 254,998,929.68 of which 20% shall be paid to the plaintiff as contributions.
3. For the sake of clarity, since the plaintiff did not bring the actual salaries of the employees of the defendant, the same amounts as contained in EXP7 shall be used to calculate the salary arrears for the month of January-June 2018 which is the same five months hence the amount of 20% of Tshs 254,998,929.68 and the period of July-December, 2017 which is six month,

254,998,929.8 divide by 5 equal to 50,999,785 plus the
254,998,929 will amount to Tshs. 305,998,714. The total
amount is $254,998,929.68 + 254,998,929.68 + 305,998,714 =$
Tshs. 163,199,314/=

4. The defendant shall pay the plaintiff a total sum of Tshs.

163,199,314/-.

5. The prayer for penalty on arrears is not granted.

6. The plaintiff shall have her costs for this suit.

Dated at Dar-es-salaam this 02nd day of November, 2023.




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S.M. MAGHIMBI
JUDGE