

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

MISCELLANEOUS CIVIL APPLICATION NO. 499 OF 2023

(C/f Civil Case No.145 of 2023 in the High Court of the United Republic of Tanzania, Dar es Salaam sub-registry)

THE BOARD OF TRUSTEES OF THE KAMPALA

INTERNATIONAL UNIVERSITYAPPLICANT

Vs

THE BOARD OF TRUSTEES OF THE PUBLIC

SERVICE SOCIAL SECURITY FUND..... RESPONDENT.

RULING

Date of Ruling: 19-4-2024

Date of last order:24-5-2024.

B.K. PHILLIP, J

This Ruling is in respect of an application for leave to defend Civil Case No. 145 of 2023 filed under Order XXXV (Summary Procedure) of the Civil Procedure Code ("CPC"). The application is made under Order XXXV Rules 3(1) (b) and (2), and section 95 of the CPC, supported by the affidavit sworn by Mr. Peter Kaahwa, the applicant's principal officer. The learned State Attorney Paulina Msanga filed a counter affidavit in opposition to the application.

A brief background to this application is that the applicant and respondent herein are the defendant and plaintiff in Civil Case 145 of 2023 (henceforth "the suit") respectively. It is alleged in the suit that the plaintiff's/respondent's core business

is *inter alia* to provide a scheme for payment to its registered insured persons. The applicant was a registered employer with the respondent whose statutory duty was to ensure that it deducts from every insured person's salary and remits to the respondent a sum equivalent to 20% of statutory monthly contributions ought to be contributed for each insured person in every monthly salary. The applicant failed to honor its statutory duty since it failed to remit to the respondent the insured persons' contributions. The respondent by way of a letter coupled with oral reminders and several follow-ups, demanded the applicant to perform its statutory obligation, but the applicant did not heed the respondent's demands. Thus, in the suit, the respondent claims against the applicant for payment of a total sum of Tshs. 552,167,083.11 for a period of 152 months reckoned from April 2014 to January 2019, Tshs.188,413,787/= being unremitted principal amount and Tshs. 363,753,296.11 being a statutory penalty. The respondent's prayers in the suit are reproduced verbatim hereunder;

- i. Payment Tshs.552,167,083.11 being a debt arising from unremitted statutory contributions and accrued penalty.
- ii. Payment of accrued statutory penalties from the claimed amount from April 2014 until the debt is fully paid plus the accrued interests.
- iii. Interests on the decretal sum at the court rate from the date of institution of the case to the date of delivery of judgment.
- iv. Interests on the decretal sum at the court rate from the date of judgment to the date of final payment.
- v. Costs of the suit.

Back to the application in hand, the learned Advocate Florence Tesha appeared for the applicant whereas the learned State Attorney Anna Shayo appeared for the respondent. The application has been disposed of by way of written submissions.

Mr. Tesha started his submission by pointing out that in an application for leave to defend a summary suit like the one in hand, the applicant is required to demonstrate the existence of triable issues. He cited the case of **Makungu Investment Company Ltd and Petrosol (T) Limited, Civil Appeal No. 23 of 2013**, (unreported), to support his stance. He went on to submit that in paragraph 4 of the affidavit in support of the application the applicant has stated that the pleadings in the suit do not show the full breakdown of the claimed sum and the amounts of contributions that were duly submitted, penalties, and interests. He contended that under the circumstances the applicant has a fair and reasonable defence against the respondent's claims. To fortify his argument he referred this court to the case of **Prosper Paul Massawe, Hilda John Mushi, and Wilerick Paul Massawe Vs Access Bank Tanzania Limited Civil Appeal No.39 of 2014** (unreported). He argued that the respondent's claims in the suit are highly inflated, the penalty calculations are faulty and the parties herein have never been engaged in any negotiations to establish the real and proper claim if any. The nature of the respondent's claims against the applicant requires reconciliation to establish the correct due payments, thus in the suit filed against the applicant, there are triable issues that warrant the applicant to be allowed to defend the suit.

Furthermore, Mr. Tesha faulted the respondent for instituting the suit in court

without the authorization of the respondent's Board. He maintained that the amount claimed by the respondent in the suit is not the actual amount that the applicant is indebted to the respondent. Referring this court to paragraph 7 of the affidavit in support of the application, he argued that there are several payments for the contributions made by the applicant that are not reflected in the suit to wit; the sum of Tshs. 1,240,000.00 contribution for May 2014 deposited on 24th June 2014 at CRDB Bank through transaction number BRFDAP6M0286801, the sum of Tshs. 29,448,348.00 contribution for June 2018 deposited on 30th January 2019, the sum of Tshs. 28,361,998.00 for July 2018 deposited on 30th January 2019, the sum of Tshs. 27,853,748.00 for August 2018 deposited on 19th February 2019, the sum of Tshs. 82,216,962.00 paid through CRDB Cheque No. 159280 dated 28th January 2019 received by the respondent (PSF) on 30th January 2019 for September 2018 and October 2018, which in total makes a sum of Tshs. 169,121,106.00 being amount of contribution paid to the respondent. To cement his argument he referred this court to annexure "B" to the affidavit in support of the application.

Moreover, referring this court to paragraph 8 of the affidavit in support of the application, Mr. Tesha pointed out the following; the applicant has deponed that the penalties charged (a sum of Tshs. 266,175,408/=) for May 2014, October 2014, June 2018, July 2018, August 2018, September 2018 and October 2018 per the sheets attached in the plaint have been wrongly calculated. The penalties for the period between June 2024 to January 2019, to the tune of Tshs 363,753,296.11 were wrongly computed since the principal amount claimed is only Tshs. 188,413,787.00. The applicant has already serviced the whole principal

amount claimed, thus, the outstanding amount alleged in the suit to the tune of Tshs. 552,167,083.11 is not correct. The alleged principal amount to the tune of Tshs. 188,413,787.00 is not correct too on the ground that, for only four months out of seven months the amount paid by the applicant is a sum of Tshs. 169,121,106.00 hence, out of Tshs. 188,413,787.00 claimed by the respondent in the suit the remaining amount due based on the respondent's wrong calculations ought to be Tshs. 19,292,681.00, though there is no pending claim because all due contributions have already been paid by the applicant, contended Mr. Tesha. He went on to submit that the suit involves claims for colossal sums (Tshs. 552,167,083.11) hence, this court has to receive evidence from both parties to make an informed decision.

Additionally, Mr. Tesha pointed out that the reason behind the inconsistent cash flow and delay of payment by the applicant is that the applicant was restricted by the directives of non-admission of new students by the Tanzania Commission for Universities (TCU). This, in turn, caused financial constraints to the applicant as it was required to pay its workers as well as remit contributions on time without being affected and to run the institution with the same number of staff but with limited students yet the contributions were submitted properly as required. To fortify her arguments referred this court to paragraph 11 of the affidavit in support of the application and annexure 'C' to the said affidavit which are TCU announcements to the general public and a letter sent to the applicant in that respect.

In conclusion of his submission, Mr. Tesha implored this court to grant this

application. He was of the view that the suit raises crucial issues of facts and law in paragraphs 7, 8, 9, 10, 11, and 12 of the affidavit in support of the application hence requiring proof of all the alleged facts and illegalities in the computation of penalties and claiming of interest. The Applicant has been humble and obedient to all social funds including the respondent since the date of becoming a member thus no way he can jeopardize the strong relations and bond duly entered and established between the two.

In rebuttal, the learned State Attorney started her submission by adopting the contents of the counter affidavit in opposition to the application. She went on to submit that the suit is concerned with the recovery of statutory contributions and it was filed under the requirement of sections 62 and 64 of the Public Service Social Security Fund Act no 2 of 2018. (Henceforth "PSSSF Act") which is read together with Order XXXV Rule 3 of the CPC. The same provides for the procedure applicable in summary suits. She pointed out that section 62 (2) of the PSSSF Act provides for conditions under which the Court can grant the defendant in a summary suit leave to defend the suit, to wit; *before granting leave, the trial court has to order the defendant to deposit a sum equal to the contributions being claimed in the suit as a security for the due performance of the decree that may be entered against the defendant.* To cement her arguments she cited the case of **Classic Professional Caterer versus The Board of Trustees of the Public Service Social Security Fund; Misc. Civil Application No.250 of 2019** (unreported), in which this court held as follows;

"...guided by the principles, I grant the application and order the applicant to

deposit in court a total amount of TZS 73,700,000 being an outstanding contribution. The amount shall be deposited prior to entering an appearance in court..."

Further, the learned State Attorney argued that section 95 of the CPC relied upon by the applicant in this application is not applicable in the application in hand, since it is a general provision whereas there is a specific provision of the law applicable in applications of this nature.

Moreover, she pointed out that the respondent annexed to the plaint copy of the assessment schedule setting forth the names of 161 employees (insured persons) and their details of unremitted statutory contribution for a period of one hundred fifty-two (152) months, from April 2014 to January 2019 to substantiate its claims. The learned State Attorney contended that before the institution of the suit, the respondent wrote a letter to the applicant plus a verbal reminder on the matter demanding the applicant to perform its statutory obligation, so if the applicant had the intention to negotiate with the respondent the claimed amount he would have done so. She refuted Mr. Tesha's assertion that penalty calculations are faulty and argued that the same is an unreasonable afterthought.

On Mr. Tesha's contention that the respondent rushed to file the suit without authorization from the respondent's Board, the learned state Attorney submitted that the said argument is misconceived since the Board Resolution is not a requirement in filing a summary suit by the respondent in the recovery of unpaid statutory contribution under section 62(1) of the PSSF Act No 2 of 2018 which provides as follows;

"...every statutory contribution payable under this Act shall be a debt due to the Board, and may be recovered by way of the summary suit at the instance of Director general at any time within the period of twelve years after the date on which it is due"

The learned state attorney argued that the requirement for authorization to institute a suit is not expressly stated in CPC or any other written laws dealing with the institution of actions in this country. Order XXVII Rule 1 of the CPC simply requires that in a suit by or against the corporation, the pleadings have to be signed or verified on behalf of the corporation by the Director or other principal officer of the corporation who can depone to the facts of the case.

On Mr. Tesha's contention that this court must hear both sides, the learned State Attorney submitted that the decision to hear both parties is within the court's discretion. She maintained that the respondent had already established its case. The condition imposed by the law is to make sure that no delaying tactics can be applied by the parties.

In conclusion of her submissions, the learned State Attorney maintained that the applicant has not adduced sufficient grounds to move this court to grant this application. She prayed for the dismissal of the application

In rejoinder, Mr. Tesha reiterated his submission in chief and contended that the case of **Classic Professional Caterer** (supra) relied upon by the learned State Attorney in cementing his arguments that the applicant herein has to

deposit an amount equivalent to the claimed unpaid contributions and penalties under the provisions of Section 62(1) & (2) of the NSSF Act is not applicable in the matter in hand on the reason that in the former case the wrong calculations and claim for Tshs.93,530,000/= were rectified and the amount claimed was changed from Tshs.93,530,000/= to Tshs.73,350,000/=. The amended plaint was duly filed hence the claimed sum of Tshs. 73,350,000/= in the amended plaint was not disputed by the defendant. He explained further that in the case in hand the applicant strongly disputes the whole amount claimed by the respondent in the suit and has annexed to the affidavit in support of this application documents evidencing the payments of the statutory contributions claimed by the respondent.

Further, Mr. Tesha submitted that the condition for deposit of the claimed amount provided in sections 62(1) & (2) of the PSSF Act, is required to be considered when the parties are not at issue about the claimed amount of contribution which has not been remitted to the respondent. He contended that in the case in hand the applicant has remitted to the respondent all the contributions as stated in paragraph 9 of the affidavit in support of the application which has not been disputed by the respondent. He insisted that the provisions of Section 62(1) and (2) of the PSSF Act are inapplicable in the circumstances of the case at hand.

Moreover, Mr. Tesha argued that the respondent does not dispute the existence of the triable issues raised by the applicant in his affidavit in support of the application and the position of the law laid down by the Court of Appeal in the case of **Makungu Investment Company Ltd** (supra) and **Prosper Paul**

Massawe (supra).

Mr. Tesha expressed his surprise at the learned state attorney's non-response to what is deponed in paragraph 7 of the affidavit in support of the application and the documents annexed thereto as Annexure B. He beseeched this court not to impose unto the applicant the conditions stipulated in section 62 of the PSSSF Act as the applicant has shown that all statutory contributions were remitted to the respondent. He pointed out that in the counter affidavit, the learned State Attorney has failed to account for all payments that were duly made by the applicant as deponed in paragraphs 7 and 8 of the affidavit in support of the application. He maintained that the penalty charges are faulty and gave details to justify his stance, however, I do not think that I need to give those details here as the same goes to the merit of the respondent's claim in the suit. In conclusion, Mr. Tesha insisted that the applicant is not indebted to the respondent. He prayed this application be allowed without any condition to enable the applicant to defend the suit.

Having dispassionately analyzed the competing submissions made by the learned State Attorney and learned Advocate Tesha, let me point out at the onset that in the determination of an application for leave to defend a summary suit like the one in hand the applicant is duty-bound to demonstrate the existence of triable issues. That is the position of the law. In the case of **Prosper Paul Massawe**, (supra) cited by Mr. Tesha in his submission, the Court of Appeal held as follows;

"... It is common ground that the underlying factor for grant of that leave is the existence of triable issues, a matter of fact which has to be demonstrated by the

applicant. The court's determination on whether or not there are triable issues has to be based on the affidavit, obviously because as of that stage, there is yet a statement of defence from the defendant. This is a settled position from our previous decisions, such as; Makungu Investment Company Ltd (supra). We also endorse the first holding of the High Court in Mohamed Enterprises (T) Ltd v. Biashara Consumer Services Ltd [2002] T.L.R 149, which the learned counsel for the appellants cited to us. The holding states: -

"(I) In deciding whether a defendant should be granted leave to appear and defend a summary suit the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go to trial"

Thus, from the foregoing, the task of this court in this application is to determine whether or not the applicant has demonstrated the existence of triable issues. In paragraphs 7 and 8 of the affidavit in support of this application, the applicant has indicated that in May 2014, January 2019, February 2019, September, and October 2018 he paid contributions to a total sum of Tshs.169,121,962/= and annexed documents thereto to substantiate his assertion. In the counter affidavit, the respondent made a general denial by just stating that the contents of paragraph 7 of the affidavit are disputed and the applicant is put to strict proof thereof, thus, did not properly controvert the applicant's assertion. In the case of **East African Cables (T) Limited Vs Spencon Services Limited, Misc Application Case No. 61 of 2016**, (unreported) this court, (Hon Mruma, J) held as follows;

"When a fact is stated on oath it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn or affirmed is not controverted then, it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact the best way to challenge him or her is to swear a fact which tends to show what he has sworn was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed amounts to an admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (i.e. plaint, Written statement of defence, reply, etc) and not to affidavit and counter affidavit which are as said earlier evidence".

In addition to the above, the applicant also alleged that the penalties claimed by the respondent are erroneous as they have been calculated based on the wrong principal sum.

There is a plethora of case laws giving guidance on the determination of whether or not an applicant has established the existence of triable issues; for instance, in the case of **Makungu Investment Company**, (supra), it was held as follows;

This dispute of fact presents itself as a triable issue by any definition..... *The role of the court was to decide whether or not there was a factual dispute to resolve which arose from the affidavital evidence presented to him by the defendant. Going further to require the defendant to show a good defence against the summary suit was going beyond the requirement of the law in an application to defend a summary suit. We say so because, after the*

application for leave to defend, the applicant is normally granted leave to file his/her written statement of defence.... We are satisfied that a triable issue is disclosed in the application for leave to defend and the applicant should have been given the leave to defend"

(emphasis is added)

From the foregoing, since the affidavit in support of the application and the counter affidavit in opposition to the application reveal that there is a dispute on the amount of the statutory contributions remitted to the respondent by the applicant, it is the finding of this court that in this matter there are triable issues, in particular, about the computation of unpaid statutory contributions and penalties claimed by the respondent in the suit. The same has to be determined by this court upon receiving evidence from both sides.

I have noted that Mr. Tesha has submitted extensively on the amount of contributions paid by the appellant in an endeavor to show that there are no outstanding contributions. With due respect to him, his argument went beyond the scope of the application for leave to defend a summary suit as it touched the merit of the suit. Thus, I will not deal with that aspect of his arguments, instead the same have to be presented through the written statement of defence and shall be dealt with in the suit since I have made a finding that there are triable issues.

I have read the provisions of section 62(2) of the PSSSF Act which provides for the requirement for deposit of the claimed amount as security upon granting an

order for leave to defend a summary suit filed by PSSSF, and the case of **Classic Professional Caterer** (supra) cited by the learned State Attorney. I am certain that the decision of this court in the case of **Classic Professional Caterer** (supra) is not binding to me but highly persuasive. First of all, I agree with Mr. Tesha that the facts of this case are different from the facts of the case of **Classic Professional Caterer** since, in the former case, the applicant agreed that he was indebted to PSSSF to the tune of Tshs. 73,530,000/= which led to the amendment of the claim to reflect the undisputed amount. Secondly and most importantly, as indicated at the beginning of this Ruling, this application is made under Order XXXV Rules 3(1), (b) and (2) of the CPC which confers power to this court to grant the leave to defend a summary suit and the same does provide for a mandatory requirement for a deposit for security. Order XXXV Rules 3 (2) of the CPC provides as follows;

*"Leave to defend **may be given unconditionally** or subject to such terms as to payment into court, giving security, framing and recording issues or **otherwise as the court thinks fit**"*

(emphasis added)

From the above-quoted provision of the law, it is obvious that this court has discretional power to either grant leave to defend a summary suit with a condition for deposit of a security or unconditionally. What I have noted here is that section 62 (2) of the PSSSF Act does not incorporate the discretional power of the court provided in Order XXXV Rule 3(2) of the CPC. The pertinent question here is; between the PSSSF Act and the CPC which one prevails? To my understanding

the CPC prevails since it is the main statute that provides for the procedure in handling civil cases including suits filed under the Summary Procedure, that is why the application in hand is made under Order XXXV Rules 3 of the CPC, not the PSSSF Act and part III of the PSSSF Act which provides for legal proceedings, offenses, and penalty, in particular, section 62 and 64 refer to Order XXXV of the CPC.

Having considered the circumstances of this matter, for the interests of justice, I hereby grant the applicant leave to defend the suit unconditionally under Order XXXV Rule 3 (2) of the CPC.

Dated this 24th day of May 2024




B.K.PHILLIP

JUDGE