

TANZANIA / JUDGMENT

PANONE

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM MISC. CIVIL APPLICATION NO.20742 OF 2024 (Arising from a CM!Case NoJ6576 of2024 of the High court of the united republic of Tanzania, Dar es Saiaam Sub-registry at Dar es Balaam) PANONE & COMPANY LIMITED APPELLANT VERSUS THE HON. ATTORNEY GENERAL.... RESPONDENT THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND 2^° RESPONDENT

RULING

S.M. MAGHIMBI.J: In Civil Case No. 16576 of 2024, the respondents herein sued the applicant herein for Specific Performance of Remittance of Members' Contributions. The original suit was lodged under summary procedure pursuant to the provisions of Order XXXV of the Civil Procedure Code [Cap 33 R.E. 2019] ("CPC") read together with section 74A (2) of the National Social Security Fund Act [Cap 50 R.E 2018]. In their plaint, the plaintiff claims from the defendant the defaulted remittance of members' principal contribution amounting to TZS 1,031,200,999.58 being the outstanding principal members' contributions which allegedly accumulated in various periods between June 2019 to February

2024. The plaintiff/respondent further claimed for penalties amounting to TZS f 83,073,319.34 which sum continues to accrue as long as it remains due. When served with the plaint, the applicant herein lodged this application under the provisions of Order XXXV Rule 3(l)(b) of the Civil Procedure Code to be granted leave to appear and defend the suit. The application was lodged by a Chamber Summons supported by an affidavit of Nasru Juma Ndama, Principal Officer of the applicant dated 04"^^ day of August, 2024. Disposal of the application was by way of written submissions. The applicant's submissions were drawn and filed by Mr. Engelberth Jonathan, learned advocate while the respondents' submissions were drawn and filed by Ms. Halima Omari, learned State Attorney from the 2"^ respondent's Directorate of Legal Services. In his submissions to support the application, Mr. Boniphace the prayer made by the Applicant in this court is for this court to be pleased to grant leave to the Applicant to appear and defend herself in Civil Case No.16576 of 2024 which is a summary suit pending in this court. That as per Order XXXV Rule 3(l)(b) of the Civil Procedure Code [Cap.33 R.E 2019], in order for the court to grant an Application for leave to defend if at all the court is satisfied that, the affidavit filed in

support of such Application discloses such facts as the court may deem sufficient to support the Application. That the position of the law was emphasized by the court of appeal in the case of Tanzania Telecommunication Company Limited Versus Timothy Lwoga [2002] T.L.R 150 the court of appeal of Tanzania held that; "...a defendant is entitled to leave to appear and defend a summary suit if it is shown that there is a triable issue" He went on submitting that the right to be heard or fair trial is among the fundamental rights enshrined under Article 13(6)(a)(ii) of the Constitution of the United Republic of Tanzania [Cap 2 R.E. 2002]. That the said provision states that: "when the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned" He submitted further that the same position of the constitution was repeatedly stated in the case of Mbeya-Rukwa Autoparts And Transport Ltd V. Jestina George Mwakyoma [2003] T.L.R 251. He then argued that although it is the requirements of the law which introduced some of the cases to be instituted by way of summary procedure but the same should be applied with caution and in case caution is not taken then, parties shall have their rights jeopardized. That in line with the above, the applicant has approached this court seeking leave of this court to defend in the main suit which was filed under summary procedure. On the triable issues in Civil case No. 16576 of 2024, Mr. Boniphace submitted that through paragraph 9 of the Applicant's affidavit, they deny the respondent's claims of Tsh. 1,114,274,318.92 as unremitted contributions by the Applicant. His argument is that the Applicant managed to make her contributions to the respondent since the June 2019 to February, 2024 as was claimed by the respondent via paragraph 9 and 10 of the respondent's Complaint in Civil Case No. 16576 of 2024. Further to that, he submitted, the Applicant has made contributions amounting to Tsh 227,834,848.02 to the respondent's accounts and receipts to that effect are well annexed to the Applicant's affidavit and referred to as annexure PA-1. He then pointed that the dispute here is as to whether the said and claimed amount of Tsh 1,114,274,318.92 excludes the already paid up amount of Tsh 227,834,848.02 as Paragraph 10.0 of the Complaint states categorically that the claimed amount as un-remitted contributions is Tsh 1,114,274,318.92 with 5% interest. He also pointed to the respondent's counter affidavit via paragraph 6 it was stated that: "That, the contents of paragraph 9 and 10 of the affidavit are denied, I state that the amount allegedly paid by the Applicant does not form part of the claims pending in court in civil case No. 16576 of 2024 between the parties herein. The Applicant is required to provide strict proof of the assertions thereof (The underlined words and sentences are for emphasis only). He then submitted that it is from the above paragraph that he conclude the fact that, since there is a dispute between the claimed amount between the one stated in the Complaint and the one stated in the Applicant's affidavit then there is a triable issue which has been demonstrated by the Applicant which needs to be ascertained. That the issue is whether Tsh 227,834,848.02 was paid during the period between June 2019 and February, 2024 or not and as to whether the claimed amount in the Complaint by the respondent which is Tsh 1,114,274,318.92 with 5% interest includes Tsh 227,834,848.02 or not. There was also another issue raised concerning annexure NSSF-4 (An inspection report) which states that,

the number of employees is 315. Mr. Boniphace argued that via paragraph 5 which annexed annexure NSSF-1 including among other things, the schedule of arrears, it shows that the number of Applicant's employees has raised to 414 for the month of January-February 2022 while the Applicant has never employed such a number of employees, thus the number of employees of whom are subject to contributions forming the claimed amount are of essence to be ascertained. He concluded that this by itself is sufficient to move this court to grant the craved leave for the Applicant to defend himself in the main suit pending in this court. In reply, Ms. Omary started by citing the case of Nasarisa Enterprises Company Limited and Others vs Diamond Trust Bank Limited, Misc. Commercial Cause No. 202 of 2015(unreported), whereby Hon. Mwambegele Judge (as he then was) set principles which need to be adhered to considering the question of granting leave to appear and defend a summary suit including that the defendant must satisfy the Court that he/she has a good defence to the claim on its merits. Two is if the defendant raises triable issues, the defendant must disclose such facts as may be deemed sufficient to entitle him/her to defend. The court has to also see if the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the defendant is not entitled to leave to defend and if the defendant has no defence or the defence set up is illusory or sham or practically moonshine the defendant may be denied leave. Further that alternatively, the Court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such conditions. She then argued that as per the Case of Nasarisa cited, for one to be granted leave he must satisfy the Court that there is triable issue, good defence, disclosure of facts sufficient to entitle him or her leave, and the defence should not be illusory or sham or practically moonshine. And if it is sham, practically moonshine and Illusory the Court may decide to proceed if the amount claimed is paid Into court as security and grant with conditions. Ms. Omary then submitted that the claimed amount by the respondent is true, and the applicant has defaulted remittance of members principal contribution amounting to TZS 1,031,200,999.58 and penalties amounting to TZS 83,073,319.34 and the applicant acknowledged the debt by signing and stamping the exit meeting report. That it is crystal clear that the applicant was well aware of the debt and that if the applicant was against the findings, then he could have refused to sign the exiting meeting report, but the act of signing and stamping shows that the applicant has agreed with the liability claimed by the respondent On the names of the employees of the applicant, Ms. Omary submitted that the names of the applicant's employees are all listed down in the scheduled of arrears which is annexed to the respondent's complaint. That the schedule of arrears of statutory contributions provides for the insured persons names, month and year of default to that effect and in this context, the scheduled of arrear of June 2019 when the applicant started defaulting to the year February 2024 are all annexed and form part of the respondents' claim to the applicant. On the issue of pandemic disease, she submitted that the same does not hold water, because the period the applicant was still paying salary to his employees and was conducting deduction to that effect. That the applicant ought to make payment of statutory contributions because it's the requirement of the law to comply with remittance of

statutory contributions and not an option. Ms. Omary then argued that it is without doubt that the Applicants affidavit does not contain any triable issue, it is illusionary, sham and practically moonshine thus the leave should not be granted as it does not meet the requirement of the law. Further that the affidavit does neither disclose any triable issue nor disclose that the amount in question was paid therefore the Applicants application should not be granted. In the alternative she argued that if the need arise, as long as the applicant has admitted the fact that he is indebted, then he should deposit the said admitted amount or follow the principle in the case of *Classic Professional Caterer vs PSSSF*, Mise. Civil Application No. 250 of 2019(unreported) as provided by Judge Masabo of depositing the outstanding contributions. She further cited the case of *Prosper Paul Massawe & 2 Others Vs Access Bank Tanzania Limited*, (Civil Appeal No. 39 of 2014) whereby the Court of Appeal held that; "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" She then submitted that for the applicant to be granted leave to appear and defend, the Court need to look only on the affidavits if there is any triable issue. That the only way to grant leave is through the affidavit disclosing the triable issues. She further submitted that on the principle advanced herein on granting leave, after taking into consideration the fact that the affidavit does not meet the requirement and it does not at all provide for any triable issue, the leave may be given if security is deposited as security or any other conditions as per Order XXXV Rule 3(2) of the Civil Procedure Code, Cap 33 R.E 2019 whereby the provision provides that leave may be given unconditionally or subject to terms as to payment into court or giving security. Ms. Omary also cited the case of *Maktech and Tel Co. limited vs The Board of Trustees of the National Social Security Fund*, Mise. Civil Application No. 627 of 2020(unreported), whereby Hon. Mlyambina Judge held that an admission of claim does not amount to serious triable issue. She then argued that the applicant does not dispute the respondents claim, and as for such fact there is no any triable issue, and in such context, leave cannot be granted. She then emphasized that these Contribution arrears in dispute are the statutory rights of his employees granted by the Law and all the employees are entitled to it. So, he should not as he did neglect/despise the rights of the employees. She then concluded that the affidavit in support of the Application does not suffice the requirement of the law to be granted leave praying that this Honourable Court should not to grant leave to the applicant to appear and defend the suit and proceed to dismiss the application with costs. In rejoinder, Mr. Boniphace started by reiterating his submission in chief. He then submitted that in his entire submission the respondent did not say a word on the contents of paragraph 9 of the applicant's affidavit which is all about the applicant paying Tsh 227,834,848.02 which was paid to the 2nd respondent between June, 2019 and February, 2024. Further that nothing was submitted by the respondent as to whether the claimed Tsh 1,114,274,318.92 includes or excludes Tsh 227,834,848.02 which was already paid by the applicant. His argument was that basically, the respondent's submission is a total admission of the said facts in the applicant's affidavit and this difference is a triable issue on which the applicant needs to defend herself before

this court in the main suit Mr. Boniphace also submitted that taking the schedule of payment as annexed with the plaint as claimed by the respondent, only Tsh 34,431,767/- is the only amount claimed contrary to what is stated in the plaint and this by Itself is a triable issue which need to be ascertained if at all leave is granted to 10 the applicant to defend herself. He also denied the applicant's admission of the claimed amount as alleged by Ms. Omary. He argued that there is nowhere neither in the applicant's affidavit nor in the applicant's submission in chief where the applicant concede as was falsely submitted by the counsel of the respondent at paragraph 4 of page 3 of the respondent's submission in reply to the applicant's submission in chief. He went on submitting that more so, it is through paragraphs 7,8,9,10 and 11 of the applicant's affidavit which discloses triable issues which needs to be ascertained and proved on balance of convenience. Further that payments can not be proved by exiting meeting minutes and or forms as was falsely submitted by the respondent's counsel. On the cited case of Classic Professional Cater Vs. The Board of Trustees of the Public Service Social Security Fund (Misc. Civil Application 250 Of 2019) [2020] TZHC 1405(20 JULY 2020) he argued that the same is distinguishable as the circumstances of this case can be applied where the applicant admits that fact that the stated amount is correct, but where the applicant disputes the same and the same has been demonstrated in the affidavit then the said case law does not apply. 11 He reiterated his prayed that leave to defend in the main suit be granted to the applicant (the defendant in the main suit) as triable issues have been sufficiently demonstrated by the applicant. Having heard the parties' submissions, I will be guided by the principles set in the cited case of Tanzania Telecommunication Company Limited Versus Timothy Lwoga whereby leave to defend may be granted if it is shown that there is a triable issue raised by the applicant in relation to the pending suit. In this case, the applicant's issue alleged to be arguable is on the amount claimed by the respondent/plaintiff. Mr. Boniphace argued that there is some remitted amount of money to the tune of Tshs. 227,834,848.02 paid by the applicant. According to him, that amount ought to have been less than what is claimed. On her part Ms. Omary argued that the amount claimed is the amount owed. This is already a triable issue that the defendant/applicant herein ought to have been afforded an opportunity to present his defence in avoidance of burdening him the claim that is partly offloaded. There is also an issue of the period of the pandemic whereby the applicant claims to have sized down operations, however, the plaintiff/respondent argues that the applicant's operations were ongoing and that there was no notification of downsizing. This is also a triable issue, whether the pandemic led to downsizing and whether there was a notification to the respondent on the act. 12 Having made those findings, much as I appreciate the aim of suits under summary procedure, however, the law under Order XXXV Rule 3(l)(b) of the CPC has given a leeway for a defendant sued under summary procedure to apply for leave to defend in a case where he intends to dispute the claim by a presence of triable issues which amount to a good defence to the claim on its merits. That being the case, what the court ought to do is to see whether the intended defence is on the merits of the suit. As for the case at hand, the issues raised by the defendant raise some triable issues and I find it just that the application is granted which I hereby so do. Dated at

Dar-es-salaam this Leave is hereby granted for the applicant who is the defendant in the main suit to appear and defend the suit. The defendant shall file his intended written statement within 21 days from the date of this ruling Q^Msy^sOovember, 2024.
s.mVmaghimbi JUDGE 13

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