

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
CIVIL SUIT NUMBER 440 OF 2011

NATIONAL SOCIAL SECURITY FUND]... PLAINTIFF

VS.

KISUBI HIGH SCHOOL LTD]..... DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Plaintiff sued the defendant for recovery of Uganda shillings 46,713,700/= being a claim for arrears of standard contributions plus penalty of Uganda shillings 76,865,560/=. The total claim arising being Uganda shillings 123,479,260/= for the period September 2005 to July 2009. The plaintiff further claims arrears and penalties from August 2009 to the date of payment, interests and costs of the suit. The interest claimed are interests declared by the Minister from time to time, under the National Social Security Fund Act.

The plaint was filed on 23rd of November 2011 and summons issued on 24 November 2011. The affidavit of service filed on court record is sworn to by Robert Ibanda an authorised court process server of the High Court of Uganda. The affidavit shows that on 2nd December 2011 he proceeded to Kisubi High School the defendant herein about 22 km along Entebbe road from Kampala. He served the summons and plaint on the Deputy Headmaster one Mr Twinomuhwezi Deus who acknowledged service by appending a signature to the summons confirmed by the seal of Kisubi High School dated 2nd of December 2011.

In a letter dated 5th of December 2011 National Social Security Fund wrote to the court which letter was filed on the court record on the 11th of January 2012

applying for interlocutory judgement under the Civil Procedure Rules. The Deputy Registrar upon being satisfied with service and all relevant matters entered judgement on 16 January 2012. The suit was fixed for hearing under order 9 rule 8 of the Civil Procedure Rules. At the hearing of the suit the plaintiff was represented by Ms Josephine Nabisinja Kimbe. The plaintiff called one witness PW1 Mr Sam Mukasa, the compliance relations manager of the plaintiff. Learned counsel for the plaintiff then put in written submissions in support of the plaintiff's case.

Written submissions of the plaintiff

The Plaintiff's suit against the Defendant is for recovery of UGX 46,713,7001= being arrears of standard contributions plus penalty of UGX 76,865,5601= for the period September 2005 to July 2009, further arrears and penalties from August 2009 to the date of payment, interest and costs of the suit.

- (i) Whether the Defendant is liable to the Plaintiff in respect to Social Security Contributions for the period September 2005 to March 2012?
- (ii) What remedies are available to the Parties?

Whether the Defendant is liable to the Plaintiff in respect to Social Security Contributions for the period September 2005 to March 2012?

Section 11 (1) of the NSSF Act provides:

*Subject to this section, on and after the appointed day, every contributing employer shall, for every month during which he or she pays wages to an eligible employee, pay to the fund, within fifteen days next following the last day of the month for which the relevant wages are paid, a standard contribution of 15 percent calculated on the **total wages** paid during that month to that employee*

In his testimony PW1 stated that in accordance with Section 43 of the NSSF Act, he carried out an inspection on the Defendant and found that the Defendant was not complying with the provisions of the NSSF Act. PW1 tendered into Court his

findings as Exhibits p1 and p2 for the periods September 2005 July 2009 and August 2009 - March 2012 respectively.

Further by a letter dated 13th May 2011 (part of Exhibit P3), the Defendant's head teacher stated as follows "... the institution acknowledges that it has outstanding arrears to clear." When served with summons to appear and defend this suit, the Defendants ignored the same.

Counsel submitted that that the defendant is liable to the Plaintiff for failing, refusing and/or neglecting to pay social security contributions in respect to its employees for the period September 2005 to March 2012.

What remedies are available to the parties?

Learned Counsel prayed that the plaintiff be awarded arrears, penalty, interests and costs. Referring to the plaint and its prayers (a) and (b), the Plaintiff is entitled to judgment for UGX 46,713,700/= as arrears of standard contributions for the period September 2005 to July 2009 and UGX 76,865,560/= as penalties for the period September 2005 to July 2009 respectively. In addition, the Plaintiff is entitled to judgment for further arrears, further penalties, interest and costs under (c), (d), (e) and (f) of the plaint respectively.

Learned Counsel relied on the decision of this Court in **Valery Alia Vs Alionzi John HCCS No 157 of 2010**, and submitted that the Plaintiff was entitled to final Judgment in respect to prayers (a), (b), (e) and (f) under 0.9 r.6 and an interlocutory Judgment in respect to items (c) and (d) of paragraph 6 of the plaint under 0.9 r.8. Counsel further referred to the case of **Abbey Panel & Sheet Metal Co Lid vs. Barson Products (a firm) [1947] 2 ALL ER 809** cited with approval in the **Valery case (supra)**. She prayed that the court includes the liquidated demand in its final judgment.

Arrears:

As far as arrears are concerned learned counsel submitted that under Section 11 of the NSSF Act, the Defendant is liable to pay 15% of the total wages paid to his employees. PW1 in his evidence stated that the Defendant was making under

remittances in respect to some of his employees and non remittances in respect to others. Exhibits P1 and P2 show that the Defendant is in arrears on standard contributions totalling UGX 46,713,700/= (as pleaded in the Plaintiff) for the period September 2005 to July 2009 and UGX 46,819,200/= for the period August 2009 to March 2012.

Counsel prayed for the court to find the Defendant liable to pay arrears of standard contributions to the Plaintiff in an aggregate sum of **UGX 93,532,900/=** for the period September 2005 to March 2012.

Penalties:

Concerning penalties learned counsel submitted that under S.14 of the NSSF Act, where an employer fails to pay into the Fund a standard contribution, he is liable to pay a penalty of 10% for each month in which he remains in arrears.

Exhibit P1 proves a penalty amount of **UGX 76,865,560/=** (as pleaded in the Plaintiff) for the period September 2005 - July 2009 as at 2nd March 2011 (at the time of making the report). As submitted above, the penalty calculation increases for each month in arrears by 10%. Accordingly Exhibit p4 indicates the penalty calculation as at 30th March 2012 in the amount of **UGX 226,349,400/=** for the arrears of September 2005 - March 2012.

Further, Exhibit P2 shows the penalty calculation for the arrears of August 2009 - March 2012 in the amount of **UGX 72,569,760/=**.

Counsel submitted that the Defendant is liable to pay penalties to the Plaintiff in an aggregate sum of **UGX 298,919,160/=** (as at 30th March 2012) for the period September 2005 to March 2012.

Interest:

On interest learned counsel relied on section 26 (2) of the Civil Procedure Act cap 71 which provides:

Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be

paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged in such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit

Under Section 35 of the NSSF Act, members' accounts shall be credited with an interest rate declared by the Minister on the balance standing to the credit of that members account. The Minister has declared the rate of interest for the period in default as follows:

- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 59 of 2004 fixed the rate at 7%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. of 2005 fixed the rate at 7%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 47 of 2006 fixed the rate at 7%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 54 of 2007 fixed the rate at 7%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 8 of 2008 fixed the rate at 14%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 14 of 2009 fixed the rate at 3%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 17 of 2010 fixed the rate at 7%
- The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 13 of 2011 fixed the rate at 6%

Learned Counsel submitted that the interest rates declared by the Minister from time to time are reasonable to be paid on the principal sum to enable the Plaintiff credit the members' accounts both with the standard arrears and the interest.

Exhibits P4 and P2 show the interest calculations of UGX 14,557,026/= and UGX 4,427,341/= for the period September 2005 - July 2009 and August 2009 - March

2012 respectively. Accordingly learned Counsel for the defendant prayed for judgment as follows:

- a. Arrears of UGX 93,532,900/= (Uganda Shillings Ninety Three Million Five Hundred Thirty Two Thousand Nine Hundred only) for the period September 2005 to March 2012.
- b. Penalties of UGX 298,919,160/= (Uganda Shillings Two Hundred Ninety Eight Million Nine Hundred Nineteen Thousand One Hundred Sixty only) (as at 30th March 2012) for the period September 2005 to March 2012.
- c. Interest of UGX 18,984,367/= (Uganda Shillings Eighteen Million Nine Hundred Eighty Four Thousand Three Hundred Sixty Seven only) (as at 30th March 2012) for the period September 2005 to March 2012.
- d. Further Penalties at the rate of 10% per month from 30th March 2012 to the date of payment in full. Further Interest at the rate declared by the Minister from 30th March 2012 to the date of payment in full.
- e. Costs of the Suit.

Judgment

I have carefully read through the written submissions of learned counsel for the plaintiff, and considered the testimony of PW1, the exhibits on record and the pleadings of the plaintiff. As noted above this suit proceeded under order 9 rules 8 of the Civil Procedure Rules. Learned counsel for the plaintiff referred me to the decision of this court in **Valery Alia Vs Alionzi John HCCS No 157 of 2010**. I only need to re-emphasise the principles stated in that case. In cases where a plaintiff's action includes a liquidated demand as well as a claim for pecuniary damages and the defendant does not file a defence to the action, the plaintiff would be entitled to final judgement under order 9 rule 6 of the Civil Procedure Rules with respect to the liquidated demand and interlocutory judgement with respect to the claim for pecuniary damages. The plaintiff obtains judgment upon

compliance with order 9 rule 5 of the CPR by filing an affidavit upon the court record to prove that service was made on the defendant and that the defendant failed to file a written statement of defence within the time limited by the summons. I quoted from **Stroud's Judicial Dictionary** where the term "liquidated demand" was defined to include an amount on a bill of exchange, definite interest on a contract or a statute, a sum certain in money, a statutory demand for payment of a total debt or an amount due on a judgment. A final judgment may be obtained on the liquidated demand in the same suit where there is a claim for pecuniary damages. Therefore a final judgement is entered for the liquidated demand and an interlocutory judgement is entered for the pecuniary damages which would then be set down for formal proof. I agreed with the judgement of **Evershed LJ** in the case of **Abbey Panel & Sheet Metal Co Ltd v Barson Products (a firm)** [1947] 2 All ER 809 at page 810:

“The intended scope and purpose of RSC, Ord. 13, rr. 3-7 inclusive, appear to me to be reasonably plain. They provide that where a plaintiff has in his writ made a claim against a defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.”

Order 9 rules 6 and 8 of the Civil Procedure Rules provide for just such a situation. Order 9 rule 6 deals with a liquidated demand and provides as follows:

“Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to rule 5 of this order, pass judgment for the sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8% per year to the date of judgment and costs.”

The rule does not restrict a plaintiff to a claim for liquidated demand only for it to be applicable. In other words, a liquidated demand even if coupled with other claims in the plaintiff, may attract rule 6 for a final judgment to be entered without prejudice to the other claims in the same plaintiff. Order 9 rule 8 on the other hand provides as follows:

Order 9 rule 8 of the Civil Procedure Rules provides that:

"Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the plaintiff may, subject to rule 5 of this order, enter an interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only as the case may be in respect of the amount found to be due in the course of the assessment."

The rule, allows the court to enter interlocutory judgment against the defendant where there is a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages where no defence has been filed by the defendant. The words "pecuniary damages only" seem to suggest that interlocutory judgment may only be entered where there is a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. This rule does not encumber order 9 rule 6 which permit the entering of a final judgment with regard to the liquidated demand. Even if it did restrict the entering of an interlocutory judgment to cases where there is a claim for pecuniary damages only, the rule can be strictly interpreted to mean that interlocutory judgment may only be entered with respect to "a claim for pecuniary damages" or in the case of "detention of goods with or without a claim for pecuniary damages". In other words the rule does not restrict other kinds of claims in the same plaintiff where there is also a claim for pecuniary damages. It is only in respect of the pecuniary damages that interlocutory judgment may be entered (of course also with regard to a claim for detention of goods as specified in the rule).

It follows therefore that the plaintiff is entitled to a final judgement for the liquidated demand as prayed for by learned counsel for the plaintiff in respect to paragraphs 6 (a) being a claim for Uganda shillings 46,713,700/= as arrears of standard contributions for the period September 2005 to July 2009. Secondly, the plaintiff is entitled to final judgement with respect to the claim in paragraph 6 (b) of the plaint being a claim for Uganda shillings 76,865,560/= penalties for the period September 2005 to July 2009 under the National Social Security Fund Act.

Notwithstanding the plaintiff's entitlement to final judgement on the basis of the liquidated demand in the plaint, PW1 proved the plaintiffs case. According to exhibit P1 and in a letter dated 2nd of March 2011, and addressed to the Director Kisubi High School, the plaintiff wrote to the defendant notifying it to pay outstanding sums of Uganda shillings 46,713,700/= as arrears and a penalty of Uganda shillings 76,865,560/=. The letter carefully tabulated the claim under several heads and included all the years claimed in the suit. Exhibit P3 is a batch of correspondence between the plaintiff and the defendant. Several letters were written to the Defendant notifying them of the claims of the Plaintiff. In a letter dated 13th of May 2011 the defendant wrote to the plaintiffs and the letter was signed by the Head Teacher Mr Male Dennis S. The letter is captioned in the reference line as "Payment of Outstanding Arrears". It reads as follows:

"In respect of the final audit report dated second of March 2011, the institution acknowledges that it has outstanding arrears to clear. However, in the absence of the Executive Director of the institution, management sat and agreed that the arrears be cleared in instalments of three million (3,000,000/=) shillings per term. This arrangement should start with the second term of 2011.

We shall be grateful for your positive response."

The above letter unequivocally acknowledges indebtedness of the defendant. Exhibit P2 tabulates the arrears from August 2009 up to March 2012. Exhibit P4 is a compilation of the interest for the period September 2005 to July 2009.

As far as the law is concerned I am satisfied that the defendant is a contributing employer as defined by section 1 (f) of the National Social Security Fund Act cap 222. Secondly, where there is a delay in the payment of contributions, section 14 of the Act prescribes a penalty in the following words:

14. Penalty for delay of payment of contribution.

(1) Subject to subsection (2), if a contributing employer fails to pay into the fund a standard or special contribution which he or she is liable to pay under this Act by the end of the month following the month for which the relevant wages are paid, there shall be added, until the whole sum including the penalty is paid into the fund—

(a) a penalty to such contribution of a sum equal to 10 percent of the amount of that contribution; and

(b) on and after the sixteenth day of each month, a penalty to the original amount of that contribution of a further sum equal to 10 percent, calculated in all cases where there is a fraction of a shilling to one shilling, and any such penalty may be recovered in the same way as the contribution to which it is added, and when recovered, shall be paid into the reserve account.

(2) The managing director may remit the whole or part of any penalty under this section subject to such conditions as he or she may determine.

As far as interest is concerned, interest on the members account is declared by the Minister. The fund was set up for the benefit of employees. The Board of National Social Security Fund administers the fund for the benefit of and in trust for the contributing employees on whose behalf employers make a monthly contribution to the fund. These contributions are credited on the employee's individual accounts. The Board therefore has a duty to every employee who is a contributor to ensure that the money is paid on their account and continues to earn interest. Section 4 (3) of the Act places a duty on the Plaintiff's Board to ensure that it makes profit out of these contributions of the employees for their own benefit and for the benefit of society. It provides that:

4. General functions and duties of the board.

(1) The board shall operate and manage the fund and exercise such functions, powers and duties as are conferred upon it by this Act. ...

(3) The board shall ensure that there is secure, profitable and effective financial management of the fund for the benefit of the workers in particular and the country at large. ...”

The plaintiff therefore does not collect the funds for its own benefit but does so as a trustee for the benefit of the actual beneficiaries or in other words the contributing employees on whose behalf the defendant ought to have been remitting money. Failure to remit monies is an offence under section 44 of the Act. Interest on the contributors account is imposed by statute under section 35 of the Act which provides as follows:

35. Interest on account.

(1) Subject to this section, interest at the rate declared by the Minister calculated on the balance standing to the credit of the account of the member of the fund on the first day of the financial year shall be added to the account of every member of the fund for each financial year throughout which it has been open if no benefit has been paid out.

Last but not least a great deal of the plaintiffs claim is based on penalties and interest under the National Social Security Fund Act. As far as penalties and interest under the National Social Security Fund Act are concerned, the plaintiff has proved that the sums are due under a statute. Sums specified under a statute can be calculated and claimed as liquidated demands. This is clear from the definition of "a liquidated demand" by **Halsbury's laws of England volume 12 (1)** 4th edition reissue page 267 and paragraph 808 which provides:

"The parties may agree by a contract that a particular sum is payable on the default of one of them. If the agreement is not obnoxious as a 'penalty', such a sum constitute 'liquidated damages' and is payable by the party in default. *The term is also applied to sums expressly made payable as*

liquidated damages under a statute. In every other case, where the court has to quantify or assess the damages or loss, whether pecuniary or nonpecuniary, the damages are 'unliquidated'." (Emphasis added)

The claims advanced by the plaintiff in the suit are sums made expressly payable under a statute. Once the court is satisfied with the sub strata or foundation of the principal claim as a liquidated demand (i.e. the accumulated contribution amount), the penalties and interests are provided for in the statute at a definite rate. Failure to pay is penalised by the Act. The court has no jurisdiction to apply a different rate than that stipulated in the Statute itself. Secondly, the National Social Security Fund Act, section 35 thereof, allows the Minister to set the rate of interest for money payable on a contributors account. The interest on the money has been defined by the Minister under statutory instruments 2004 No. 159 namely the National Social Security Fund (Interest on Benefits) Order, 2004; the National Social Security Fund (Interest on Benefits) Order, 2005. Other yearly interests were declared by statutory instruments 2006 No. 47; 2007 No. 54; The National Social Security Fund (Interest on Benefits) Notice, 2008; The National Social Security Fund (Interest on Benefits) Notice, 2010 and the National Social Security Fund (Interest on Benefits) Notice 2011. This money accrues when the member's money is contributed to the NSSF fund and credited to his or her account. The money is paid in trust for the member or members on whose behalf the defendant is supposed to contribute money to the fund. In other words once the contribution is due the member employee is entitled to earn interest on it at the rate set by the minister. It is against the intention of the Act for them not to earn this money hence the liability of the employer.

In the premises, the plaintiff has proved its case against the defendant and judgment is entered for the plaintiff in the following terms:

1. Arrears of monthly contributions of **UGX 93,532,900/= (Uganda Shillings Ninety Three Million Five Hundred Thirty Two Thousand Nine Hundred only)** for the period September 2005 to March 2012.
2. Statutory penalties under section 14 of the NSSF Act, of **UGX 298,919,160/= (Uganda Shillings Two Hundred Ninety Eight Million**

- Nine Hundred Nineteen Thousand One Hundred Sixty only**) (as at 30th March 2012) for the period September 2005 to March 2012.
3. Statutory interest at rates yearly declared by the Minister as payable by Statutory Instrument on accounts of contributing employees of UGX **18,984,367/= (Uganda Shillings Eighteen Million Nine Hundred Eighty Four Thousand Three Hundred Sixty Seven only)** (as at 30th March 2012) for the period September 2005 to March 2012.
 4. Further Penalties under section 14 of the NSSF Act at the statutory rate from 30th March 2012 to the date of payment in full.
 5. Interest at the rates declared by the Minister from 30th March 2012 to the date of payment in full.
 6. Costs of the Suit.

Judgment delivered in open court this 13th day of April 2012

Hon. Justice Christopher Madrama

Judge

Ruling delivered in the presence of:

Josephine Nabisinja for plaintiff

Plaintiff's legal Officer Ms Rachel Nsenge

Ojambo Makoha Gaetano

Hon. Mr. Justice Christopher

Judge

13 April 2012.