

THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE CLAIM No. 243/2014
(Arising from HCT-CS No. 058/2011)

BETWEEN

AIJUKYE STANLEY..... CLAIMANT

AND

BARCLAYS BANK (U) LTD.....RESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha

PANELISTS

1. Mr. Ebyau Fidel
2. Ms. Susan Nabirye
3. Ms. Rose Gidongo

AWARD

Brief Facts

The claimant having secured a representative order from the High court, filed a Memorandum of Claim on behalf of himself and 14 others. It was alleged in the claim that by the time of their retirement from the employment of the respondent in 1993, there were negotiations about the increment of salaries and this was realized in 1994. They were not paid arrears until they litigated up to the Supreme Court which ordered payment of arrears from 1/1/93.

It was alleged that in the course of payment of the arrears, the respondent deducted PAYE but never paid it to URA and neither was it refunded to the tax payers as provided for in the budget speech of 30/6/2008/9. The same applied to NSSF contributions as well as pension funds. The claimant prayed for a total of

- (i) 222,281,315/- as NSSF contribution including interest at 25% to January 1993.
- (ii) Interest on deducted tax at 2.5% from January 2001-Oct 2014 amounting to 79,375,700/-
- (iii) Pension funds for 9 of the claimants
- (iv) General damages

(v) Costs of the suit.

In a memorandum in reply the respondent denied owing any monies to the claimants (and those he represented) in the form of PAYE or NSSF contributions. According to the respondent the claimant was paid all his dues following a staff circular No. 2 of 1991, about early retirement and the benefits payable were not wages and therefore they were not subject to NSSF deductions as per **Section 1 (2) of the NSSF Act**. The respondent also claimed in the reply that it dutifully remitted all statutory deductions including PAYE to URA.

REPRESENTATIONS

The claimant was represented by counsel Oging Joseph together with Counsel R. Tumwebaze while the respondent was represented by counsel Lugayizi Timothy with full brief from Counsel Masembe Kanyerezi.

ISSUES

In a joint scheduling memorandum the parties agreed to the following issued:

- (1) Whether 11 of the 15 claimants were former employees of the respondent.
- (2) Whether each of the claimants as were employees of the respondent left the employment under the early retirement scheme.
- (3) Whether payments made to the claimants under the early retirement scheme were wages within the meaning of the NSSF Act and subject to NSSF deductions and payments
- (4) Whether the respondent paid PAYE to URA in respect to payments under the early retirement scheme.
- (5) Remedies available.

EVIDENCE

Evidence in chief was by written witness statements from either party who were cross examined by either on the statements. The claimant adduced evidence from one other witness, one Tumushabe Wilfred while the respondent adduced evidence from one Connie Mbabazi; a relationship manager of the respondent.

The written statements of the witnesses on either side were all in support of the memorandum of claim and reply to memorandum of claim respectively. They were about what was contained in their pleadings as already summerized in the facts above.

SUBMISSIONS

In his submission counsel for the claimant contended that the court of Appeal, in its judgment, ordered the respondent to include the claimants in the revised salary scheme and this judgment was confirmed on Appeal by the Supreme Court. He submitted that as the respondent paid the arrears, it was obligated to deduct and remit to NSSF as required by **Section 2(1) and 12(1) of the NSSF Act** and that indeed for one Nanyonjo the NSSF contribution was remitted but in total

discrimination the respondent refused to deduct and remit for the others. It was his submission that the NSSF savings were a property right and was enforceable by the claimants and therefore it is not true according to counsel that only NSSF has a cause of action. He submitted that **Section 26 of the NSSF Act** was in conflict with **Article 26 of the Constitution** and therefore void. He argued that whereas the claimants could have sustained a claim against NSSF for failure to collect the savings, they chose not to do so.

In the same way counsel submitted that the respondent was under duty to deduct and remit PAYE to URA but it failed to do so and instead converted the money to its own use. According to counsel the tax waiver through **Finance amendment Act, 2008**, benefitted the claimants and PAYE having not been remitted to URA should have been credited to the accounts of the claimants.

In respect to pension, counsel argued that the claimants having served over 10 years were entitled to retirement package or pension. He argued that there was selective payment of pension which was discrimination prohibited under **Article 21 (2) of the Constitution**. On remedies, counsel argued that the illegal holding of dues of the claimants for more than 312 months made the families of the beneficiaries to suffer and therefore called for punitive damages as this constituted a gain by the respondent at the expense of the claimants. He relied on **Muyingo vs Lugemwa HCCS 24/2013** and **Betty Luiga Vs Bugema University**.

In reply counsel for the respondent submitted that 3 of the claimants, one **Babu**, one **Sendi** and one **Natabo** were dismissed as opposed to being voluntarily retired and therefore under **O1r8** the case should be dismissed in respect to these claimants as they are not entitled to benefits under the scheme. He argued that the claimants did not discharge their burden of proof that PAYE as NSSF were not paid and relied on **YAKOBO SENKUNGU VS MUKASA SCCA 17/2015**. At the same time counsel argued that even the gratuitous payment was not a wage as defined by **Section 12 of NSSF Act** and was not liable to deduction and remittance.

He argued that the court of Appeal decision relied on by the claimants in their pleadings was not attached and that even then it was filed by a union on behalf of unionized workers and there was no evidence that the claimants were part of this union. According to counsel the judgment did not even refer to a salary increment for the claimants.

Counsel submitted that the bank could only pay pension in accordance with what was in the retirement letters and other documents to be provided by the claimants but the claimants insisted on being paid as per enhanced salaries, yet there was no evidence of this in the judgment.

EVALUATION OF EVIDENCE AND DECISION OF COURT

(i) **Whether 11 of the 15 claimants were former employees of the respondent bank.**

From the evidence of the respondent through a written witness statement of one Connie Mbabazi, one Winnie Tumushabe, one Jane Mbabazi one Bbosa, one Francis Bogere were all former employees only that the former two refused the rate of calculation of their pension while the latter's date payment of pension are yet to come.

According to Connie (Resp. witness)

“The respondent therefore is not indebted to the claimant or anyone else the claims to represent as alleged and for any former employee of the respondent whose pension is due, the respondent is and has always been willing to pay the same.”

From the same evidence, we deduce that one Babu Tibaleke Richard, one Sendi Steven one Nantabo Milly although were former employees they were dismissed and therefore not entitled to pension.

Accordingly from the evidence of the respondents only Aijukye, Winnie Tumushabe, Jane Mbabazi, Semiti Bbosa, and Francis Bogere were the only former employees capable of claiming pension.

In cross-examination the claimant testified that those entitled to pension in the claim were: Himself, Mbabazi, Tumushabe, Kasozi, Semiti and Bogere.

We have perused exhibit **“B(i)”**, a dismissal letter of Sendi Steven. We form the opinion that Sendi Steven having been terminated by dismissal cannot be one of those entitled to benefit from the retirement scheme. Consequently it is our finding that the former employees who left under the retirement scheme were: Aijukye Stanley, Wilfred Tumushabe, Bogere Francis, Semiti Bbosa, Jane Mbabazi and any other person who as stated in the witness statement of Connie Mbabazi, would turn up with a retirement letter from the bank stipulating the pension benefits. Those who left as former employees but because they were dismissed were not entitled to retirement were: Babu Richard Tibaleke, Stephen Sendi, Milly Nantabo.

As a result of the above analysis in answer to issue No. 1, the total number of former employees of the respondent Bank was 9.

(ii) Whether each of the claimants as were employees of the respondent left under the retirement scheme.

As discussed above some of the claimants were dismissed and in our opinion were not entitled to benefits under the retirement scheme. A retirement scheme is ordinarily a scheme by the employer to show gratitude to his/her employee for the Labour put in the course of his employment over a period of time and therefore it would be superfluous if an employee dismissed for dishonesty (unless the dismissal is set aside by a competent tribunal) benefits under such a scheme. Therefore in answer of issue No. 2, none of the dismissed employees left under the early retirement scheme.

It was the case for the claimants that those who left under the early retirement scheme should have been paid at the retirement dates. The claimant in his testimony in cross-examination told court that the claimants should have been paid at time of departure.

In cross-examination, the second claimant witness, one Winfred Tumushabe testified that according to the respondent he attained pension status in 2016 but he did not explain why he was not paid although according to Connie Mbabazi, RW1, Tumushabe, wanted to be paid pension on terms other than in the retirement letter.

The evidence of each of the claimants’ letters of termination was in our view the only determination as to what pension each was entitled to and as to when it was due. This

court was not provided with any evidence to suggest that pension would be due to any of the claimant on a date other than the date mentioned in the termination letter.

Neither is there any evidence to suggest that calculation of pension due to any of the claimants was to be done by any other method except as provided in the termination letter. No alternative figures in pension dues in respect to any of the claimants was presented to this court in comparison to what was presented by the respondent.

Accordingly we find, as the respondent's witness testified, that the respondent will be obliged to pay pension to those entitled and on the due dates provided in the termination letters.

(iii) Whether payments made to the claimants who left under the Early Retirement Scheme were wages within the meaning of the NSSF Act and subject to deductions and payments.

It was argued for the claimants that it was discriminatory of the respondent to have deducted and remitted NSSF contributions on the salary arrears in respect only of one called Nanyonga Winnie as opposed to the others. Counsel stressed in his argument that NSSF savings were a property right enforceable by the claimant and that not only NSSF had a cause of action in respect to the same. He submitted that **Section 26 of the NSSF Act** was inconsistent with **Article 26 of the Constitution** and therefore it was null and void.

It was argued for the respondent that the payment having been a voluntary retirement scheme it was not a wage and therefore it was not deductible and not remittable under the NSSF Act. It was an enhanced payment to attract employees for voluntary retirement. It was argued in the alternative that even if it was a wage the claimants did not prove that it was not remitted.

A wage under the Employment Act and under the NSSF Act is a fixed, regular payment earned for work or services that is paid on a daily, weekly or monthly basis.

Under **Section 11 and Section 12 of the NSSF Act** an employer is obliged every month to deduct 5% from the wages of an employee and to contribute 10% and remit both to NSSF for the social security of the employee.

Under **Section 46 of the NSSF Act**:

“All criminal and civil proceedings under this Act may, without prejudice to any other power in that behalf, be instituted by any inspector or other public officer of the fund in a magistrate's court.”

We think that it is obvious that the 5% deducted from an employee as money earned by himself or herself constitutes personal property of the employee and this being the case the employee has a legal right to protect it from any party who may have an interest in snatching it from him/her. As such we agree with counsel for the claimant that such a right is enforceable by the claimant.

We do not subscribe to the contention that **Section 46** in providing that an inspector or other public officer of the Fund may prosecute or file civil proceedings in court expressly prohibits an employee from enforcing his right. The Section provides for officers of the Fund to prosecute

and/or file civil proceedings “**without prejudice to any other power in that behalf**”. It is our considered opinion that the other power referred to in this section includes the employee who owns and the property. We agree with counsel of the claimant that the NSSF is only a trustee of the money and an employee can successfully sustain a civil claim against his employer for recovery of the same. The same applies to the 10% contribution since by **Section 11 of the NSSF Act** this money also is transferred from the employer to the employee and it ceases to belong to

the employer as soon as it is due by virtue of this section. We must add, however, that the right of the employer will only accrue if the deduction is from “**a wage**” as properly defined in the employment Act and the NSSF Act and if it was deducted and not paid into the Fund.

In the instant case therefore the claimants had to satisfy this court that payment was a wage, and therefore deductible and that it was in fact deducted and not paid into the fund.

It is not disputed that the payment was a result of a voluntary scheme created by the respondent for enticing its workers to retire voluntarily. It was not a payment for the work ordinarily done in the course of employment as provided for under the contract of services between the employer and the employee. It was earned by the claimants simply because they opted to take early retirement. We therefore agree with counsel for the respondent that it did not constitute a wage for purposes of **Section 11 and 12 of NSSF Act**.

Even if the payment was taken to have been a wage under **Section 11 and 12 of the NSSF Act**, the claimants did not satisfy this court that they were paid less 5% for the purpose of NSSF.

We are firm in our conviction that in order for an employee to sustain a claim under **section 12 of the NSSF Act** he must prove that the 5% was deducted from his salary and that it was not remitted to the Fund, thereby depriving him of part of his own wage that he is entitled to. We are convinced that failure on the part of the employer to deduct the 5% and to contribute 10% therefore paying the 100% wage to the employer only constitutes a criminal offence under **Section 44 of the NSSF Act** but such failure does not create a cause of action against the employer by the employee, the latter having received all his emoluments.

Whereas one Nanyonjo’s NSSF statement was exhibited, it is just a statement without explanatory remarks. There are lots of **entries from 1992-1994** without clear indication which of those entries could have been reflecting a deduction from the retirement package as submitted by counsel for the claimant.

Counsel submitted that it was discriminative to remit NSSF contributions for Nanyonjo and fail to do for others. The failure to remit to NSSF did not in any way prove that the 5% was deducted from the payments made to the claimants. It is highly probable that the claimants received 100% of their retirement packages and were in court only to recover 10% of the contribution of their employer and thereby also get 5%. In the circumstances this could not be possible. Given that the retirement package did not constitute a wage for purposes of NSSF and given that it was not even deducted we find that, there was no cause of action created to enable the claimants claim the same.

(iv) Whether PAYE was paid by the respondent to URA in respect of the payment made to the claimants who left under the Early Retirement scheme.

It was the contention of counsel for the respondent that the respondent being a reputable bank remitted all payments regularly including PAYE. Although counsel conceded that there was a tax waiver, he was positive that PAYE in contention was remitted to URA.

The claimant relied on annexure “**B**” and “**D**” attached to the witness statement of C/W1, Stanley Aijukye, for an assertion that PAYE though deducted constituted a waiver from being remitted to URA. The claimants also relied on annexure “**C**” to show that the PAYE though deducted was paid into the URA coffers.

There is no dispute as to whether the **Finance Act 2008** created a waiver on PAYE. Both parties agree that this waiver existed. This being the case it is only logical that if by the time the waiver came into effect either no PAYE would be deductible or if it was then it would be refunded to the tax payer. We agree with the submission of the claimants that benefits of a tax waiver can only go to the tax payer and that URA would have no interest in the same following a waiver.

The burden of proving the deduction and none remittal to the URA would be on the claimants but such a burden as in any other civil proceedings keeps shifting from one party to the other. By providing the court with annexure “**B**” (to the statement of Stanley Aijukye) which was not contested by the respondent, the claimant discharged the burden to prove **that 20,617,065shs** was deducted as income tax and that it was from payments arising from the court Award from which the instant case also arises. By exhibiting **Exhibit “E”** a payment schedule to URA of the respondent’s tax obligation, the claimants established that the figure **20,617,065/=** was not part of the payment made to URA.

It is our considered opinion that given the shifting nature of the burden of proof in civil cases, after the claimants had produced the above evidence, it was up to the respondent to either produce another payment schedule reflecting the disputed income tax payment to prove that a certain bulk payment in **Exhibit “E”** included the disputed income tax payment. Therefore the mere fact that the respondent remitted payments in bulk without establishing which part of the bulk payment constituted the disputed income tax was not sufficient proof that in fact the PAYE tax in question was paid to URA. We find therefore that the disputed income tax was deducted from the claimants but was neither paid to URA nor to the claimants. The fourth issue is decided in the negative.

(v) What are remedies available?

From the above analysis of the evidence it clear that the claimants are not entitled to NSSF deduction and contribution as they claimed. The pension funds shall be payable as is due in accordance with the termination letters.

As for PAYE, we have found that it was deducted and ought to have been refunded to the claimants.

The waiver by the **Finance Act, 2008** was in respect of the taxes that were outstanding by **30th June 2008**. Although the claimants' tax was deducted in 1993, it was property of URA until the waiver was announced. This means that until the waiver was announced URA could claim the same from the respondent. It was upon the waiver that the said tax became the property of the claimants. The claimants claimed interest and in all fairness we grant an interest **of 20% per year** to each of the claimants **since June 2008** when the claimants legally owned the same until payment in full

We have considered the circumstances under which the respondent failed to pay the tax to either URA or the claimants. We agree with the claimants that this failure constituted dishonesty and illegally deprived the families of the claimants of using it for over 10 years. Consequently we are of the considered opinion that each of the claimants deserved general damages and we hereby grant general damages of 400,000/=; 800,000/=; 1,200,000/=; 1,700,000/=; 2,000,000/= and 2,500,000/= to those claimants whose tax liability was between 250,000/= - 500,000/=;- 500,000/= - 1,000,000/=;- 1,000,000/= - 1,500,000/=;- 1,500,000/= - 2,500,000/=; 2,500,000/= - 3,500,000/= and over 3,500,000/= respectively. For the dishonesty of keeping the taxes to its chest we think the respondent ought to pay punitive damages which we put to 500,000 for each of the claimants.

All in all the claim succeeds on both pension and PAYE but fails on NSSF payments. The Award for damages will carry an interest of 8% per year from the date of the Award till payment in full. No order as to costs is made.

SIGNED BY:

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha

PANELISTS

1. Mr. Ebyau Fidel
2. Ms. Susan Nabirye
3. Ms. Rose Gidongo

Dated: 05/04/2019