THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 0094 OF 2009

NATIONAL SOCIAL SECURITY FUND::::::::::::::::::::PLAINTIFF

VERSUS

1. MTN UGANDA LTD}
2. UNISIS INVESTMENTS UGANDA LTD}::::::::::DEFENDANTS

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGEMENT

The plaintiff first sued the 1st defendant for its alleged failure and or neglect to remit contributions for employees seconded by the 2nd defendant to it under a Recruitment Services Contract (hereinafter referred to as the Contract) dated 18th June 2007. Subsequently, the 1st defendant applied and was allowed to add the 2nd defendant to the suit and the plaint was accordingly amended such that the 1st and the 2nd defendants were sued jointly and severally for the recovery of Shs. 144,321,866= being the social security contributions due for the said employees plus the statutory interest and penalties and costs of the suit. The 2nd defendant did not file a written statement of defence so a default judgment was entered against it.

The background of this case is that on the 18th June 2007, the 1st defendant and the 2nd defendant signed the Contract by which the 2nd defendant under clause 3.1.1 was to *"provide skilled and competent temporary staff hereinafter referred to as* "UNISIS contract staff*" for assignments required by MTN Uganda, under MTN Uganda's control and direction".*

The obligations of each of the parties were clearly stated in the Contract. UNISIS was required to execute a placement contract with UNISIS Contract staff. A template of that contract was attached as appendix B to the Contract.

In July 2007, the parties started implementing the terms of the Contract by UNISIS recruiting and placing staff with MTN Uganda while the latter on its part would remit the

money for paying the staff salary, NSSF, PAYE and management fees to the former. Things appeared to have been going on well between the parties until some UNISIS Contract staff complained to NSSF that their NSSF contribution was not being remitted.

This led to an audit being conducted at the UNISIS offices. On 10th October 2008, the NSSF Audit Task Force Nakasero wrote to the Compliance Enforcement Manager/Field Audit Coordinator a memo showing that an audit had been done at UNISIS which showed that arrears for UNISIS Contract staff for the month of July 2007 to September 2008 was shs.77,079,075/= and the total penalty on that amount was Shs. 58,562,314= making a total outstanding amount of Shs. 135,641,389/=. A breakdown of how this figure was arrived at per month was given in the memo and the payroll showing details per staff was attached.

NSSF returned to UNISIS with a view of discussing the main points that were raised in the audit report but found UNISIS offices closed. The phone contact of the Managing Director of UNISIS was also switched off. NSSF then turned to MTN Uganda for whose benefit the staff were recruited but was informed that UNISIS contract staff were employees of UNISIS and not MTN Uganda hence this suit.

Both at the scheduling and hearing, Mr. Albert Byamugisha appeared for the plaintiff and Mr. James Kyazze for the 1st defendant. At the scheduling, two issues were raised for determination namely;

(1) Whether or not the defendants are jointly or severally liable to pay NSSF contributions.
(2) Remedies, if any.

At the hearing, the plaintiff produced two witnesses, the plaintiff's Manager Nakasero Office and the Compliance |Audit Officer. The defendant produced only one witness; the defendant's Senior Manager Commercial, Legal and Litigation. There were documents that were admitted for identification and marked as DID1-DID5 subject to production of their originals. The 1st defendant's witness undertook to look for the originals and submit to court.

At the conclusion of hearing evidence, both counsels agreed to file written submissions and the matter was fixed for mention and setting a date for judgment. The submissions were filed as per schedule and when this matter came up for mention, counsel for the 1st defendant reported that the witness had failed to trace the originals of DID1-DID5. He pointed out that it was clear that they could not be found because the files containing them were closed and put in the archives and efforts to trace them had failed.

He prayed that the photocopies be admitted in lieu of the originals under sections 64 (1) (c) and (2) of the Evidence Act which allows admission of copies where the originals are destroyed or lost or could not be produced in reasonable time.

Counsel for the plaintiff objected on the ground that from the time the plaintiff closed its case on 24/03/2010 to the time the defence case was heard on 3/02/2011, the defendant had ample time to look for the documents and produce the original. That if they had failed at that time then it should have been the witness to testify that they had failed to get the original. He also challenged counsel for producing evidence from the bar that the originals could not be found.

Counsel for the 1st defendant in rejoinder clarified that since both parties had closed their case, his understanding was that if the originals were found the witness would not be recalled to tender them but he as counsel would be the one to submit them. That it was in that context that he had relayed the information to court as an officer of court. He prayed that copies of the documents be admitted in accordance with the provisions of the Evidence Act.

After listening to both counsels I reserved my ruling so that I could deliver it together with the judgment and I now do so before determining the substantive issues.

The documents in dispute are five correspondences between the defendants with the following particulars;

1. DID1 is a letter from the 2nd defendant to the 1st defendant dated August 07, 2008 on the subject: **NSSF CONTRIBUTION FOR CONTRACT STAFF WORKING WITH MTN UGANDA LIMITED.**
2. DID2 is a letter from the 2nd defendant to the 1st defendant dated 25th August 2008 on the subject: **NSSF PAYMENT PLAN.**
3. DID3 is a letter from the 1st defendant to the 2nd defendant dated September 18, 2008 on the subject: **NON-PAYMENT OF NSSF CONTRIBUTION FOR CONTRACT STAFF WORKING WITH MTN UGANDA LIMITED.**
4. DID4 is a letter from the 1st defendant to the 2nd defendant dated October 16, 2008 on the subject: **NON-PAYMENT OF SALARY AND NSSF CONTRIBUTION FOR CONTRACT STAFF WORKING WITH MTN UGANDA LIMITED CUM NOTICE OF BREACH.**
5. DID5 is a letter from the 1st defendant to the 2nd defendant dated November 13, 2008 on the subject: **NOTICE OF TERMINATION.**

The contents of all these letters relate to the terms of the contract that both parties are relying on. The witness had already testified about them and court allowed the copies to be admitted for identification subject to the originals being produced. Since counsel reported that the original could not be traced, I do not see why the copies could not be admitted under sections 64 (2) of the Evidence Act which makes admissible any secondary evidence of the contents of a document in cases provided for under section 64 (1) (c) like in the instant case where the original cannot be traced and produced in reasonable time. I believe it would be in the interest of justice to admit the copies as it would not in any way occasion prejudice to the plaintiff's case. I would have thought otherwise if the documents were introducing new matters which are not part of the terms of the contract.

In the circumstances, I rule that copies of the documents marked DID1-DID5 be and are accordingly admitted as exhibits D1-D5.

I now turn to consider the first issue, that is, *whether or not the defendants are jointly or severally liable to pay NSSF contributions*.

In their submissions, both counsels relied on the Contract which was admitted as exhibit P1 during scheduling. On issue number one, counsel for the plaintiff, quoted portions of clauses 3.1,3.1.1, 3.1.3,3.1.13,3.1.19 and 4.1.4 and concluded that these provisions showed that at all material times, the UNISIS Contract staff were working at the 1st defendant's premises, they had to comply with its rules and regulations, they had to work under its control and direction. That the 1st defendant was managing them and they were under obligation to follow all the reasonable directions and advice of the 1st defendant's employees.He referred to the definition of *"employer"* under section 2 of the Employment Act No. 6 of 2006 to the effect that';

"Employer means any person or group of persons, including ….., for whom an employee works or has worked or normally worked or sought to work, under a contract of service, and includes the heirs, successors, assignees and, transferors of any person or group of person for whom an employee works, has worked or normally works". (Emphasis added).

He also referred to ***Garrard v. Southey & Co. And Another Davey Estates Ltd (1952)1 All ER 597 at 599***, where ***Lord Parker*** quoted the statement of ***Lord Porter*** in the case of ***Mersey Docks & Harbour Board v. Coggins &Griffith (Liverpool), Ltd*** as follows:

> ***".. but among the many tests suggested that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is***

engaged. If someone other than the general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must control the method of performing it". (Emphasis added).

Lord Parker also referred to the statement by ***Lord Uthwatt*** who said:

> ***"To establish the degree of control requisite to fasten responsibility upon him [the hirer] the hirer must in some reasonable sense be shown to have authority to control the manner in which the workman does his work".*** (Emphasis added).

Counsel for the plaintiff then submitted that when the contract staff were assigned by the 2nd defendant to the 1st defendant, a master-servant relationship between the 1st defendant and those employees was established, and the 1st defendant became their employer and it became liable to remit the monthly statutory contributions in accordance with the National Social Security Act, Cap. 222 (NSSF Act).

He contended that sub-clauses 1.1.3 and 3.1.13 provided that the 2nd defendant's staff would be seconded to the 1st defendant and submitted that this kind of arrangement was confirmed by PW1, Mr. Isaac Nsereko who testified during re-examination concerning secondment of employees when he stated as follows:-

"I have come across a situation where an employee has 2 employers. I have come across it in Ministry of Health where a person is recruited by Ministry of Health and then seconded to the private sector. When an employee is seconded, they take over all obligations of payment of salary, etc. In such a situation where a person is seconded to private project, he becomes an eligible employee and he pays…The project remits the money". (Emphasis added).

He then concluded that similarly, the 1st defendant was under an obligation to remit statutory contributions for the contract staff to the plaintiff in line with subsection 11(3) of the NSSF Act which provides that:

"If an eligible employee is employed successively or concurrently by two or more employers, each of such employers shall pay the fund in respect of such employee a contribution corresponding to the wages he or she pays such eligible employee." (Emphasis added).

Counsel referred to page 2 of the Contract where it was stated as follows:-

"WHEREAS UNISIS is a recruitment and placement agent, experienced in the business of providing recruitment services is able to provide the services to MTN Uganda….."(Emphasis added).

"WHEREAS MTN Uganda and UNISIS wish to record their respective rights and obligations pertaining to the provisions of the services by UNISIS to MTN Uganda in accordance with this agreement". (Emphasis added).

He contended that those provisions showed that the services which were provided by UNISIS were strictly recruitment and placement agency services. Further that as clearly shown in appendix D on page 22 of exhibit P1, the 1st defendant itself paid the gross pay, including NSSF contributions and PAYE due to every individual UNISIS Contract staff.

In conclusion on this issue, he submitted that UNISIS was a mere conduit of those payments, but the obligation to pay them both in fact and in law was on the 1st defendant. He argued that if the 1st defendant who had the primary obligation to pay chose to pass the NSSF payments through the 2nd defendant which did not pass over those payments to the plaintiff, the defendant was not discharged from its obligation and it must pay.

Counsel for the 1st defendant in response submitted that the arrangement between the defendants was very clear as to who the employer of the UNISIS Contract staff was. He contended that Exhibit P1 read as a whole but with specific regard to the following clauses clearly shows that the 2nd defendant was the employer of the UNISIS Contract staff.

(*Clause 1-Definitions*)
"1.1.2: "UNISIS Contract staff shall mean an applicant and employee of UNISIS who shall be vetted and where successful, deployed to work at MTN Uganda in terms of an employment agreement signed between the said UNISIS Contract staff and UNISIS, a template of which is attached hereto as Appendix B".

(Clause 3-obligation of UNISIS)
"3.1.6: Remunerate the UNISIS Contract staff for the duration of the assignments, at a rate at or above the minimum wage prescribed for the UNISIS Contract staff by MTN Uganda and invoice MTN Uganda at the pre-adviced rate, each calendar month".

"3.1.7: Ensure the payment of all government taxes (i.e.) Pay as you earn (PAYE) and social security contributions (i.e.) National Social Security Fund, to the accounts of the appropriate bodies for any required deductions and/or employee contributions"

"3.1.11: Ensure that the UNISIS Contract staff wages are paid promptly at the end of the assignment, or every calendar month, whichever is sooner"

"3.1.12: Ensure that all UNISIS Contract staff are aware that they are not permitted to wander onto un-attended parts of the MTN Uganda Premises, or to handle any case, scripts, credit cards, valuables or other similar property, operate vehicles, equipment or machinery, other than office equipment on which they have been trained, without the prior specific agreement of MTN Uganda".

"3.1.14: Permit MTN Uganda to make a permanent offer to any UNISIS Contract staff at a conversion fee rate, based on the UNISIS Contract Staff's basic salary per annum as follows:-……"

3.1.15: Comply with relevant laws and agreements, which relate to the employment of contract staff and indemnify MTN Uganda and hold it harmless against any claim, demand and , or cause of action, liability, loss or expense arising by reason of non-compliance with the provision of any relevant laws.

3.1.20: Be liable for all loss, damage, theft or expense arising as a consequence of any act of, or omission by any UNISIS Contract staff during the assignment or soon thereafter and all incidences of death, disability or injury sustained by any UNISIS Contract staff, shall be the responsibility of UNISIS.

"3.1.21: UNISIS acknowledges that it is liable for all contraventions of relevant minimum standards by the UNISIS Contract staff, referred to in any relevant law of Uganda"

"3.1.24: Indemnify MTN Uganda, its employees, agents and directors against any and all claims, actions, suits, or any other matter of whatever nature, whether brought by an employee of UNISIS, or any other third party, arising from, or in relation to this Agreement".

"3.1.25: Provide MTN Uganda with one Account Executive for every fifty (50) UNISIS Contract Staff. That Account Executive shall be MTN Uganda's point of contact and also be responsible for ensuring that all of MTN Uganda's needs as defined herein, are met by UNISIS.

Issues for which the Account Executive shall be responsible shall include but not be limited to:-

- *Monitoring the timely completion of tasks and the preparation of all deliveries.*
- *Managing risk and escalating issues to MTN Uganda in a timely manner.*

- *Planning assignments and coordination of the activities of UNISIS Contract Staff;*
- *Managing UNISIS Contract staff and their progress by measuring success against their defined objectives.*
- *Presentation of proposals to MTN Uganda where required;*
- *Providing reports and updates to MTN Uganda.*
- *Coordinating between MTN Uganda and UNISIS*
- *Meet with the UNISIS Contract staff on a periodic basis to address, or resolve any requirements, or problems that may arise;*
- *Visiting the MTN premises at least once every fortnight to ensure that the UNISIS perform in accordance with this Agreement.*

He also referred to other clauses on the obligations of UNISIS namely; 3.1.27 on general development of UNISIS Contract staff, 3.1.30 on the UNISIS Contract staff's health and well being, 3.1.33 on bi-weekly reports to MTN Uganda detailing absenteeism, resignations, disciplinary and labour issues, 3.1.34 on maintenance of a sufficient pool of staff for ease of replacement within a two (2) hour period after the start of the shift, 3.1.35 on adherence to statutory provisions pertaining to paid leave of the UNISIS Contract staff and arrangements to ensure that suitable substitutes are assigned to MTN Uganda for the period of leave.

Counsel further referred to clause 3.1.36 that relate to UNISIS signing an employment contract with all UNISIS Contract staff as envisaged by Appendix B and 3.1.38 on UNISIS complying fully with all obligations of an employer of the UNISIS Contract staff during the period of the respective assignments. He also referred to the joint obligations in clause 5.1.5 which relate to administering of the payroll by UNISIS as well as clauses 7 on insurance and 10.2 which provided that MTN Uganda would be invoiced by UNISIS for the contract staff at the end of any applicable calendar month.

Counsel also invited court to look at Appendix B of Exhibit P1 (pages 17 and 18 of the contract of employment that would be executed between the 2nd defendant and the UNISIS Contract staff. He submitted that the entire document and particularly clauses 2.3, 2.4 and 3 thereof were very clear as to who the employer and employee were. That the employer was clearly indicated as "UNISIS (the 2nd Defendant) while the "UNISIS Contract staff were clearly indicated as the employees.

He further submitted that the fact that the UNISIS Contract staff were availed by the 2nd defendant to work on certain assignments for the 1st defendant did not mean that they became employees of the 1st defendant. The UNISIS Contract staff were at all material times employees of the 2nd defendant and that arrangement of that nature is recognized under section 1 (k) of the NSSF Act which defines "employer" as:

> ***"Includes the Government, manager or a sub-contractor who provided employees for the principal contractor, but where a person enters into a contract by which some other person is to provide employees for any lawful purpose of the first mentioned person and it is not clear from the contract which of the two persons is the employer, the first mentioned person shall be deemed, for purposes of this Act, to be the employer".*** (Emphasis added).

Counsel submitted that from the above definition, the 2nd defendant could be viewed in light of a sub-contractor who provided employees for the principle contractor (the 1st defendant) further, the 1st defendant entered a contract (exhibit P1) by which the 2nd defendant provided its employees (the UNISIS contract staff) for a lawful purpose, and the contract (exhibit P1) is very clear that it is the 2nd defendant who was the employer of the said employees.

He argued that the 2nd defendant by not contesting the claim brought against it by the plaintiff, in law admitted the claim by the plaintiff. Further that it was also clear from the correspondences between the defendants (D1-D5) that the 2nd Defendant expressly admitted its obligation to remit the social security contribution of its employees and undertook to pay the same. He submitted that breach of this particular obligation by the 2nd defendant under the Contract was one of the main reasons why the 1st defendant terminated the Contract.

He further submitted that both PW1 and PW2 did confirm and admitted during their respective testimonies to court that indeed in accordance with exhibit P1 the employer of the UNISIS contract staff was UNISIS (the 2nd Defendant).

He submitted that it was the 2nd defendant as the employer and not the 1st defendant who was responsible and liable to pay the social security contributions stipulated under section 11 (1) of the NSSF Act and prayed that this court finds so.

In rejoinder, counsel for the plaintiff reiterated his submission that the 1st defendant was the employer because it provided the work to be done by the contract staff, supervised and controlled them and provided the money for paying them. He referred to some provisions of the Employment Act No. 6 of 2006 particularly in relation to definition of the term "contract of service" and "the duty of an employer to provide work to its employee". As regards the 2nd defendant's failure to file a defence, he explained that by the time it was joined as a party, its offices had been closed and its principal officer had already left the country. That consequently, service was effected by registered post and that is why it did not defend the suit.

From the evidence adduced by the parties and the submissions, the dispute in this suit is really a matter of interpretation of the Contract entered into by the defendants. The question to be answered is: who was the employer of UNISIS Contract staff for purposes of making it liable for paying the NSSF contribution of the said staff?

The difficulty presented by agency workers akin to the kind of arrangement the defendants entered into is pointed out in ***Chitty on Contracts Volume 2 Paragraph 39-026 at page 803*** in the following words:-

> ***"Where, as now happens in an increasingly wide range of occupations, employment is obtained via an employment agency, radically divergent analyses of the legal relationships may occur. The worker may be held to have contracted with the agency and not with the client under whose control he is placed. In other cases, the worker may be held to have contracted with the client and merely to have received an introduction from the agency. On either view, it has then to be decided whether the worker is an employee. …… and both systems can raise problems in so far they can involve the avoidance of the ordinary legal consequences of employment under contracts of employment".*** (Emphasis added).

In determining the dispute in this case, I have been guided by the provisions of the NSSF Act as well as the principles that govern interpretation of contracts.

Section 11(1) of the NSSF Act obliges every contributing employer to pay to the fund a standard contribution of 15% calculated on the total wages paid during that month to an eligible employee.

Under S.12 the contributing employer may deduct from the monthly wage payment for his or her employee the employee's share of a standard contribution of 5% calculated on the total wages paid to that employee. This I believe would form part of the 15% to be remitted to the fund under S.11 (1) of the Act.

Both the phrase *"employee"* and *"employer"* are defined under section 1 of the Act. The definition of the phrase "employee" is that the person must be under a "contract of service".

The definition of *"employer"* recognizes an arrangement where a person enters into a contract by which some other person is to provide employees for any lawful purpose. The section provides that where it is not clear from the contract which of the two persons

is the employer then the person to whom the employee is provided shall be deemed for purposes of the Act to be the employer.

The long established principle on interpretation of written documents including contracts is that courts must give effect to the intention of parties. To this end, ***Kim Lewison*** in his book entitled ***"The Interpretation of Contracts, 2nd Edition"*** at page 4 states as follows:-

> ***"For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning".*** (Emphasis added).

Similarly, ***Chitty on Contracts Volume 1 paragraph 12-044 at page 604*** states that:-

> ***"The common and universal principle ought to be applied, namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent"***. (Emphasis added).

However, a caution is made in ***Paragraph 12-043*** at page 604 that:-

> ***"The task of ascertaining the intention of the parties must be approached objectively. The question is not what one or other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties".*** (Emphasis added).

Further at ***paragraph 12-070 at page 615*** that:-

> ***It is not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties really intended or ought to have intended. But if, from the***

> ***document itself and the admissible background, the intention of the parties can reasonably be discerned, then the court will give effect to that intention even though this involves departing from or qualifying particular words used".*** (Emphasis added).

Lord Morris in ***L Schuler AG v Wickman Machine Tools Sales Ltd [1974] A.C. 235, HL*** **(**as reported in ***Contract Law: Cases and Materials, First Edition by Geoffrey Samuel*** at page 329**)** stated that:-

> ***"Subject to any legal requirements businessmen are free to make what contracts they choose but unless the terms of their agreement are clear a court will not be disposed to accept that they have agreed something utterly fantastic. If it is clear what they have agreed a court will not be influenced by any suggestion that they would have been wiser to have made a different agreement".*** (Emphasis added).

Bearing the above principles in mind, I now embark on the task of interpreting the Contract in the instant case and its appendices wherein I suppose the solution to the puzzle lies. Looking at the Contract in its entirety and the appendices, my interpretation is that MTN Uganda intended to relieve itself of the burden of recruiting, maintaining and paying the temporary staff and hence the Contract whereby UNISIS under clause 3.1.1 was to provide skilled and competent temporary staff referred to as UNISIS Contract staff for assignments required by MTN Uganda. UNISIS was to be the employer as clearly indicated in the Contract.

Under clause 1.1.2, UNISIS Contract staff was defined as *an applicant and employee of UNISIS* who shall be vetted and where successful; deployed to work at MTN Uganda in terms of an *employment agreement signed between the said UNISIS Contract staff and UNISIS.*

In clause 2.1 of the template of the employment agreement which was attached as Appendix 'B" placement contract was defined as, *"a contract between the Employer and MTN Uganda in terms of which the employee shall be seconded to MTN Uganda.* The *"employer"* was defined in clause 2.3 as *"UNISIS"* and the *"employee"* in clause 2.4 as *"UNISIS Contract staff/Temp/Employee". MTN Uganda* was defined as, *"the third party in terms of the placement contract to whom the employee is seconded"*.

From the above provisions in both the Contract and Appendix "B", the intention of the parties insofar as who the employer was, was clearly stated. The term employer was clearly defined and as cautioned by ***Chitty on Contract*** (Supra), it is not open to this court to revise the words used by the parties, or to put upon them a meaning other than that

which they ordinarily bear. I completely agree with the submission of counsel for the 1st defendant that the contract is explicit as to who the employer was and in my considered view there is no need to apply the tests this court was invited to apply because they are only applicable where court is in doubt as to who the employer is.

In addition, clause 3.1.7 of the Contract clearly spelt out that it was the obligation of UNISIS to pay all government taxes (i.e.) Pay As You Earn (PAYE) and social security contributions (i.e.) National Social Security Fund to the accounts of the appropriate bodies for any required deductions and/or employee contributions. The Rates and Cost structure was attached to the Contract as appendix "D". The breakdown in the rates included hours worked, gross pay, NSSF, PAYE, net pay and management fee per staff.

In compliance with the provision of the Contract, MTN Uganda remitted the money to UNISIS for onward transmission to the respective bodies. Failure by UNISIS to pay the money does not make MTN Uganda liable to pay again particularly in view of the fact that section 1 (k) of the NSSF Act recognizes the arrangement whereby some other person can provide employees to another person for any lawful purpose as it was in this case.

In arriving at this conclusion, I found very instructive the statement by ***Lord Jessel MR*** in ***Printing and Numeral Registering Company v. Sampson (1875) L.R. Eq 462 at 465,*** to the effect that:-

> ***"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that contracts, when entered freely and voluntarily, shall be held enforced by the courts of justice".*** (Emphasis added).

I was also persuaded by the decision of ***Hon. Lady Justice Stella Arach- Amoko*** (as she then was at the Commercial Court Division) in the case of ***Atom Outdoor Limited v Arrow Centre (U) Limited [2002-2004] UCLR 67 at pages 69-70***, where she quoted from ***LS Sealy & RJA Hooley*** in their book, ***TEXT AND MATERIALS IN COMMERCIAL LAW, Butterworth's, pages 14-15*** in the following words:-

"…….there is only one principle of construction so far as commercial documents are concerned and that is to make, so far as possible, commercial sense of the provision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual metrix". (Emphasis added).

She further quoted a passage at page 391 as follows:-

> ***"In commercial transactions, the duty of the court is simply to give effect to the contract, and not to dictate to the parties what the court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which, in the outcome has arisen".*** (Emphasis added).

The reason for this approach was stated by ***Lord Steyn*** in the case of ***Mannai Investment Co.v Eagle Star Life Assurance [1997] A.C. 749, HL*** (as reported in ***Contract Law: Cases and Materials*** (supra) at page 344) as follows:-

"***……The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them…"*** (Emphasis added).

To interpret the Contract in the instant case in such a way that MTN Uganda would again be found liable after it had discharged its obligation under the Contract, by remitting NSSF contribution to UNISIS, would not make any commercial sense and that could not have been the intention of the parties.

I also wish to note the fact that was brought out in the evidence of PW2 during cross-examination that when they prepared the audit report, they sent it to UNISIS in its capacity as the employer of the Contract staff. Similarly, according to the evidence of PW1, he only went to MTN Uganda after finding the offices of UNISIS closed and trying the telephone contact of its proprietor which was switched off. Both evidence in my opinion confirm that the plaintiff knew the party that had the obligation and responsibility to pay NSSF contributions for the UNISIS Contract staff but chose to turn to MTN upon realizing that it could not get UNISIS.

For the above reasons, I find and hold that UNISIS was the employer of the Contract staff who had the obligation and responsibility to pay their NSSF contribution to NSSF and as such it is responsible and liable to pay the social security contributions stipulated under section 11 (1) of the NSSF Act. I find no case against the 1st defendant which discharged its responsibility in accordance with the terms of the Contract. Since a default judgment had already been entered against UNISIS the plaintiff can execute the same in accordance with the remedies that I shall hereinafter determine.

Before I take leave of this issue, I wish to point out for emphasis purpose that the tests this court was invited to apply to determine who the employer was and the clauses in the Contract that were referred to by counsel for the plaintiff to show that the 1st defendant was the employer would have guided this court only if the Contract was not explicit on

the issue. The case of ***Garrard-vs-Southery & Co and Another Davey Estates Ltd*** (supra) is distinguishable from the instant case both in the facts and the context in which the test was applied.

As regards the facts, that was a case of personal injury of an employee who was lent to another company (temporary employer) to carry out some specific assignment. The accident took place within the premises of the company where he was lent and he brought an action for damages against his permanent employer (first defendants) as well as the temporary employer (second defendants) for negligence and/or breach of their duty at common law to take reasonable care to provide proper plant and equipment for the plaintiff to work with, (against the first defendant) for breach of the building (Safety, Health and Welfare) Regulations, 1948 and (against the second defendants) for breach of duty under the Factories Act, 1937. The first defendants brought in the second defendants as third parties and the second defendants counterclaimed against the first defendants for an indemnity and brought in the third parties against whom also they claimed indemnity.

The first defendants contended that the duty of a master to his servant to provide proper plant and equipment was owed to the plaintiff by the second defendant, while the second defendants contended that it was owed to him by the first defendant.

The context in which the tests stated by ***Viscount Simon*** and ***Lord Porter*** in ***Mersey Docks & Harbour Board v. Coggins & Griffith*** (supra), (where the hired employee injured a third party) were applied was based on the question that was considered which was stated by ***Lord Parker*** as follows:-

> ***"The question has arisen many times, usually where an employee who has been lent has negligently injured a third party. The question is, then: Who is liable for his negligence-the general employer or the person to whom he has been lent?"*** (Emphasis added).

Lord Porter as quoted by ***Lord Parker*** in ***Garrard-vs-Southery & Co and Another Davey Estates Ltd*** (supra) at page 599, stated that the expressions used in any individual case must always be considered in regard to the subject matter under discussion. I believe ***Lord Parker*** had this statement in mind when he stated at the same page 599 that:-

> ***"I am not all together convinced that the approach is necessarily the same in a case where a workman who has been lent has injured a third party as in a case where, as here, the workman has been injured".*** (Emphasis added).

In that context, I hasten to add that the subject matter under discussion in the instant case is quite different from the one in that case, hence my conclusion that it is distinguishable.

Having disposed of the first issue as above, I now turn to consider the second issue, that is, remedies available to the plaintiff as against the 2nd defendant.

Counsel for the plaintiff contended that on 24th March 2010, counsel for the 1st defendant informed court that there was nothing contested as to what is payable. He then submitted that PW2 who carried out the audit testified that according to the audit report, exhibit P2, the arrears outstanding as at September 2009 were Shs. 77,079,075= for the period July 2007 to September 2008. That statutory penalty was Shs. 58,562,314= while the statutory interest was Shs. 8,680,477= all totaling to Shs. 144,321,866=.

As regards the statutory interest, he submitted that the rates were fixed by the following Legal Notices:

1. The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 8 of 2008 fixed the rate at 14%;
2. The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 14 of 2009 fixed the rate at 3%;
3. The National Social Security Fund (Interest on Benefits) Notice, Legal Notice No. 17 of 2010 fixed the rate at 7%.

He also submitted that section 14 of the NSSF Act provides for penalty for delay of payment of contribution.

He prayed that judgment be entered for the plaintiff against the defendants jointly and/or severally for:

a) Shs. 144,321,866/=;
b) Statutory interest on (a) above at 14% or such other rate as may be declared from time to time per annum from 30th September 2008 when the amount in (a) above was last computed until payment in full;
c) Statutory penalties on (a) above at 10% per month from 30th September, 2008 when the amount in (a) above was last computed until payment in full;
d) Cost of the suit.

Counsel for the 1st defendant in response submitted that it is not entirely true that counsel for the 1st defendant informed court on 24th March 2010 that there was nothing contested as to what is payable. He quoted what counsel specifically stated as follows:

> ***"…And at the start, I need to restate this, some social security contribution is payable, the only issue is who of these 2 defendants should pay. There is nothing being contested as to what is payable. My client is saying; he entered into an arrangement, the other party is responsible".*** (Emphasis added).

He then submitted that the proceedings of 24th March 2010 clearly indicated that figures were an issue and that they needed to be addressed while handling the second issue.

He further submitted that if the 2nd defendant did not remit the social security contributions in respect of the UNISIS Contract staff to the plaintiff, then the correct figures should be computed so that it is paid by the 2nd defendant.

Counsel further submitted that the plaintiff's claim in respect of statutory interest was totally misconstrued as there was no legal basis for the said claim. He contended that the interest claimed was the interest that the plaintiff itself was supposed to accord towards members' benefits. He submitted that according to the testimony of PW2, the interest claimed was Shs. 8,680,477= but when pressed further he stated that:

> ***"We are claiming the outstanding amount of penalty and arrears only… interest is done internally for our own benefit. The report that we sent to UNISIS does not have interest in it".*** (Emphasis added).

He prayed that this court should decline to award this claim which (in any event) had no legal basis at all in the current circumstances and no evidence was brought to justify it.

As regards the claim for statutory penalties at the rate of 10% per month counsel submitted that it should be enforced against the 2nd defendant. He concluded that the Plaintiff was not entitled to any of the reliefs claimed as against the 1st defendant and prayed that the suit against the 1st defendant be dismissed with costs.

I do agree with the submission of counsel for the 1st defendant that there is no legal basis for claiming statutory interest on unpaid NSSF contribution. The interest rate declared by the Minister by Legal Notice in accordance with section 35 of the NSSF Act is in respect of accounts of members as clearly stated in that section particularly in sub-section (2) which provides that:-

> ***"……,the Minister shall after consultation with the board declare the rate of interest for the financial year which shall be the rate applicable to every account in respect of which no benefit has been paid***

out during the period between the end of that financial year and the date of the declaration of the rate of interest". (Emphasis added).

I have perused the entire NSSF Act and I have not found any provision for interest chargeable on delayed or unpaid NSSF contributions. In the circumstances I decline to award any interest.
What is provided for in section 14 is the penalty which this court will be pleased to award in accordance with the law.

Since the amount claimed at the time of filing this suit of Shs. 144,321,866/=included both penalty and interest, I order that the interest of Shs. 8,680,477= be deducted from that amount leaving a balance of Shs. 135,641,389= which is comprised of Shs. 77,079,075= (being NSSF contribution arrears for the period of July 2007-September 2008) and Shs. 58,562,314= (being the penalty that was calculated).

A penalty to the original amount of contribution shall continue to be added at 10% in accordance with Section 14 of the NSSF Act until the whole sum including the penalty is paid into the fund.

In the final result, I dismiss the suit as against the 1st defendant with costs and confirm the judgment entered for the plaintiff against the 2nd defendant for;

(a) Shs. 135,641,389= being the unpaid NSSF contribution plus penalty as at 30th September 2008;
(b) Further penalty of 10% on the original amount calculated in accordance with section 14 (1) (b) of the NSSF Act;
(c) Costs of the suit.

I so order

Hellen Obura
JUDGE

Judgment delivered in draft in chambers at 2.30 pm in the presence of Mr. Albert Byamugisha for the plaintiff and Mr. Byrd Sebuliba holding brief for Mr. James Kyazze for the 1st defendant.

Ms. Ruth Naisamula-Court Clerk.

13/07/2011