IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 110 OF 2020

THE BOARD OF TRUSTEES OF

THE PUBLIC SERVICE SOCIAL SECURITY ....PLAINTIFF

VERSUS

SYMBIONT POWER TANZANIA LIMITED .... DEFENDANT

JUDGMENT.

MKWIZU, J: -

The plaintiff, a social security provident fund established under the Public Social Security Fund Act, No. 2 of 2018, is suing the defendant a limited liability company incorporated under the laws of Tanzania, and a registered contributing member employer of the plaintiff in accordance with the law establishing the plaintiff with a Certificate of Registration Number 1011606 for among others, the sum TZS. 6,693,947,182.55 (say Tanzania Shilling Six Billion Six Hundred Ninety - three Million Nine Hundred Thousand Forty-Seven, one Hundred Eighty Two and fifty- Five Cents Only) being un-remitted member's contributions plus accumulated penalties thereon due and payable to the plaintiff by the defendant, interest and costs of and incidental to the filing of the suit.

The suit was instituted as a summary suit but the defendant was on 11/5/2021 granted unconditional leave to defend followed by the filing of a written statement of defence denying all the claims with a prayer for the dismissal of the suit with costs . Before the commencement of the hearing, three issues were framed as follows:

i. *Whether the defendant's employees were terminated on 30th November 2016.*

ii. *Whether the defendant was obliged to remit member's contributions to the plaintiff for the period of 2016 to January 2019.*

iii. *To what relief are parties entitled to.*

The trial was under rule 2(1) of Order XVIII of the civil Procedure Code (Amendment of the first Schedules) Rules of 2021 ordered to proceed through witnesses' statements. The plaintiff lodged three witness statements on 17th February 2023 while the defendants were lodged on 25th August 2023.

Testifying through her witness statement, PW1 Amina Hamisi Mbaga Principal labour officer from the Prime Minister's office, Labour, Youth Employment and Persons with Disability – Labour Department Dar es salaam said in 2020, the 42 employees of Symbion Power Tanzania Limited submitted a complaint regarding salary arrears from April, 2018 to June 2020 . The Company secretary of the defendant was summoned and through hearing and inspections, the employees claims were established and the defendant was issued with a compliance orders (exhibit P1)instructing her to rectify the anomalies and pay the salary arrears for the month of April 2018 to June 2020 within 30 days from the date of receipt of the Order. The defendant did not comply. She(PW1)filed an Application for Execution No. 405 of 2020. In August 2020 Symbion Power Tanzania Limited applied to the High Court Labour Division for consolidation of Misc. Labour Application No. 24 of 2020; Misc. Labour Application No. 580 of 2020 ; Execution No. 274 of 2020; Execution Application No. 405 of 2020 and Execution Application No. 60

of 2019 due to the reasons that circumstance in all the applications were similar . The applications were heard and on 13th November 2020 the court (honorable Ng'humbu Deputy Registrar) delivered the ruling(exhibit P2) in which the defendants employees were to be paid salary arrears to tune of TZS 12,249,890,439/=.

She said, subsequently, on 11th August 2021 Tanzania Electric Supply Company Limited wrote a letter (exhibit P3)to the Bank of Tanzania directing it to effect payment of TZS 12,326,309,438.00 to Tanzania Labour Court Account No. 9921169726 at the Bank of Tanzania to settle various employees' dues as per the High Court of Tanzania Labour Division execution order nos. 60, 405 and 504 of 2019 ,274 and 449 of 2020. The said letter was filed in Court and served to the Office of the Commissioner Officer. That, on 12th day of August 2021, the High court labour division was notified by the defendants counsel of the deposit made in the Court Account No. 99211669726 in compliance with the court order with a prayer to pay the employees.

PW2 is Martin Masawe one of the defendant's former employees. He was throughout the period of his employment paid monthly salaries by the defendant until March 2018 when the defendant stopped paying salary without any reason. That, in 2019 together with 41 defendants employees submitted a complaint to the commissioner for labour in relation to salary arrears for the period between April 2018 to June 2020 .The errors were identified and the defendant's Company secretary one, Mr. Emmanuel T. Mkakene was ordered to rectify the anomalies and pay the salary arrears within 30 days from the date of receipt of the order.

This witness said, the order was not complied with, dictating filing of an Application for Execution No. 405 of 2020 by the Labour Commissioner which was later consolidated and decided in Misc. Application 454 of 2019 where in his ruling dated 13th November 2020 the Deputy Registrar allowed the payment of TZS 12,249,890,439/= as salary arrears from April, 2018 to April 2020 .

PW2 said, after that payment they realized that their Social Security schemes contributions had not being remitted from December 2016. They on 22nd April 2020 wrote a letter of complaint (Exhibit P7) to the Director of Public Service Social Security Fund enquiring about their statutory contributions. That in 2021 their former employer through Mr. Moses Mwandenga brought to them a PSSSF- Benefit Form No. 12 and affidavit for signature in order to process their terminal benefits with instruction to the date of termination in the forms would be filled by PSSSF Officers and that they signed affidavit with verification part only without other details on a promise that the affidavits would be brought to them for confirmation of the details after completion of the remaining part before they are submitted to PSSSF Regional Office the promise that was never fulfilled. And that they only became aware of the suit between the plaintiff and the defendant in 2022 when they were following up their payments.

Mordgard M. Kumbanga (Pw3), is the Plaintiff's principal compliance officer responsible for member registration and collection of contribution. His testimonies are that the defendant is a registered employer with the plaintiff Fund with 39 registered members as per exhibit P9 who is legally required to remit contributions of his employees. He tendered the

Certificate of registration as exhibit PI. He explained that the defendant was required to remit 20% of the employees' basic salaries whereby 10% was to be contributed by the defendant and the remaining 10% was to be deducted from the employees' salaries in a span of 30 days from the date of deduction.

It is in Pw3 evidence that, the defendant first honored its obligation by remitting all the required contributions up to November 2016 and did not remit the contribution of her employees from the November 2016 to January 2019 attracting penalty of 5% per month which is multiplied with the entire period the contributions remain unpaid. The 5% penalty was applied up to 31st July 2018 and thereafter from August 2018 the penalty was 1.5% of the contributions per month and the contribution remained unpaid to date despite several follow-ups by the plaintiff.

On 3rd July 2020 the defendant was served with a demand letter insisting on the remittance of TZS 6,267,465,047/= the unpaid contributions with penalty (exhibit P10).The defendant could not honor the demand notice hence this suit claiming for payment of TZS 1,855,151,050.03 and accrued penalty amounting to TZS 4,838,796,132.53 for the period of 26 months a sum which continues to accrue as long as it remains due. He also tendered the contribution scheduled as exhibit 11.

The defendant's case had only one witness, Emanuel Maria James Boniface Makene, a Company Secretary of the Defendant, responsible for all legal affairs of the Company .His evidence is categorical that Defendant is a company limited by liability incorporated under the laws of Tanzania and having its registered officer at Mlimani City Villa, House IB & 2B, P.O BOX 105571 within Dar es salaam City in Tanzania dealing with Electricity

Supply to TANESCO with several employees ,members of the Social Security Scheme in Tanzania.

This witness told the court that the Defendant's income was solely dependent of the PPA agreement with TANESCO terminated on 04th May 2016**(exhibit D1)** without a hope for renewal. On that a situation, they through a Special Board resolution (exhibit D2) made on 30th November 2016, resolved to terminate all the employment contract through operational requirement. That process attracted several legal proceedings by the employees at the Commission for Mediation and Arbitration at Ilala claiming for unlawful termination that ended in an execution proceeding by the Labour Commissioner.

This witness went further to disclose that during the pendency of the execution proceedings, and with good intention, he agreed with advocate Saulo Kusakala who was representing other employees at Commission for Mediation and Arbitration to file an Application to join other Defendant's Ex-employees in the Application for Execution filed by Labour commissioner, that is, Misc. Application No. 454 of 2020 which ended into an amicable settlement whereby the Defendant was to pay her employees a total of . 12,249,890,439/= as terminal benefits and other rights from DOWANS Tanzania LTD. He challenged the plaintiff's evidence for not containing the correct factual situation. He said, PW1's evidence is a lie because in 2017 the defendant's employees were all terminated and there was none who was still on payroll.

DW1 maintained that on 30th July 2020 the plaintiff claims were pegged at Tshs. 1,428,668,914 unremitted Principal amount and Tshs. 4,838,796,133 statutory penalties making a total claim of Tshs.

6,267,465,047.49 and on 6th December 2022 the plaint was amended to reflect a claim of 6,693,947,182.55 being Tshs. 1,855,151,050.03 unremitted principal amount and Tshs. 4,838,796,132.53 statutory penalty while on 1st September 2021 and 15th September 2022, Defendant was served with two letters **(exhibit D5)** from the plaintiff with a claim of the outstanding balance of statutory contributions of TZS 446,638,228.20, despite the fact that the Defendants' employees were already terminated since 30TH November 2016. This witness believed that, in any case, the amount of Tshs. 446,638,228.20 claimed in 2022 could not tally the amount claimed by the plaintiff in the plaint or Amended plaint filed in the Court.

Unrelenting, he said, in 2022 the defendant's Employees submitted to the plaintiff the PSSSF Application Forms (exhibit D4)with termination letter, bank statement, Affidavit(exhibit D3) and special board resolution describing 30th November 2016 as a date of termination. The payments were processed and made but halted shortly thereafter. He lastly prayed for the dismissal of the suit with costs.

Following the closure of evidence, parties were ordered to file their final submissions in support of their case. Plaintiffs' counsel submissions are in total support of the plaintiffs claim, that the defendant was a registered contributing member employer of the plaintiff with 26 months arrears of contribution to the tune of 1,855,151,050.03 unremitted amount and accrued penalty amounting to TZS 4,838,796,132.53.

The defendant's counsel is of a different view. He considers 30th November 2016 as the termination date describing the Tshs. 12,249,890,439/ paid through Misc. Application No. 454 of 2020 and

Execution No. 60 of 2019 in the High Court (Labour Division) as terminal benefit and not salary areas.

I have given the matter thorough scrutiny. It is not controverted that the defendant is the registered contribution member of the plaintiff and that her employees were terminated from employment. The ominous number one issue is on the date of termination. The analysis of the sequence of events between the two parties will indisputably resolve this issue.

The law places a burden of proof upon a person ***"who desires a court to give judgment"*** and such a person "***who asserts the existence of facts***" to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6R E 2022). Such fact is said to be proved when its existence is established in a preponderance of probability. The Court of Appeal in **Ernest Sebastian Mbele V Sebastian Sebastian Mbele Abdul Mhagama And Others**, Civil Appeal No. 66 of 2019(Unreported)had time to elaborate on what it means by ***a Proof on a preponderance of probabilities***. Citing with approval the decision from the Supreme Court of India, **in Narayan Ganesh Dastane v. Sucheta Nayaran Dastane** (1975) AIR (SC) 1534 the court said:

> *"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ...a* ***fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists****.* ***A prudent man faced with conflicting probabilities concerning a fact situation will act on the***

> ***supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact****. As a prudent man so the court applies this test for finding whether a fact in issue can be said to be proved. The* ***first step*** *in this process is* ***to fix the probabilities****, the* ***second to weigh them****, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."(emphasis added)*

As stated above, the onus of establishing a case in accordance with this standard is on the party who makes the assertion and not he who denies. This is so because a denial of a fact cannot naturally be proved. However, there are situations in which the defendant bears the onus. This ordinarily happens when the defendant is not content with a mere denial of the claim against him but sets up a special defence. In respect of the special defence the defendant becomes the claimant. For the special defence to succeed the defendant must satisfy the court that he is entitled to succeed on it. This position is well articulated under sections 111, 112 and 115 if the evidence Act, Cap 6 RE 2022.

> *"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

> *112. The **burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence**, unless it is provided by law that the proof of that fact shall lie on any other person.*
>
> *115. In civil proceedings **when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him**." (Emphasis supplied)*

In **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna), CAT-Civil Appeal No. 118 of 2014 (unreported)** citing with approval case of **RE B [2008] UKHL**, the Court of Appeal observed:

> *"If a legal rule requires a fact to be proved (a fact in issue), a Judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. **The law operates a binary system in which the only values are 0 and 1**. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. **If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened**." (bold is mine)*

Unearthed from the above authority is that the question to be decided will always be which of the versions of the particular witnesses is more probable considering all the evidence that was led by the parties and all their respective witnesses as well as all the surrounding circumstances of

the case. At the end, the Court must be satisfied that the story of the litigant upon whom the onus rests is true, and the other is false.

The kernel of the dispute in this case is failure to remit legal contribution to the plaintiff by the defendant for the period between December 2016 to January 2019. This claim presupposes that the defendant's employees' contracts were still valid to that period, a fact that is vigorously disputed by the defendant.

Testifying in court Pw2, former defendant's employee admits having been working with the defendants from 2012 to 2020 when his employment was terminated. Pw1 was categorical that he received salaries to 2017 and they resorted to the Labour Commissioner in 2019 after failure by the defendants to pay them salaries for the period of 2018 to 2020. The compliance order was issued, and all employees matter were consolidated, and they were all paid through the Labour Courts ruling dated 13/11/2020.

This evidence finds support from PW1, Principal Labour officer from the Labour Commissioner who dealt with the defendant's employees' complaint to the end. Unopposed compliance order (exhibit P1) is descriptive of the matter. The order was compelling the defendant to pay her employees listed in the document attached to it unpaid salaries from April 2018 to June 2020.The attachment to the compliance order is titled" "**LIST OF EMPLOYEES TO BE PAID UNPAID SALARIES FROM APRIL 2018 TO JUNE,** 2020". The defendant did not comply leading to the filing of execution application No 405 of 2020 and many other application by the defendant's employees leading to a subsequent consolidation to one application No 454 of 2020 and execution No 60 of

2019 at the High Court labour division extending the execution to all 42 defendant's employees that resulted into payment of a total sum of Tshs. 12,249,890,439.

DW1 affirms the above position. Paragraph 6 of his witness statement is an admission of the above fact that the Labour Commissioner filed the execution in the High Court (Labour Division) at Dar es salaam and was specific that during the pendency of proceedings in court, they filed an Application to join other Defendant's Ex-employees in the Application for Execution filed by Labour commissioner ie, Misc. Application No. 454 of 2020 which resulted into a settlement . The paragraph reads:

> *"That, the Labour Commissioner opted to file the execution in the High Court (Labour Division) at Dar es salaam while the matter was pending the Defendant with good intention agreed with advocate saulo Kusakala who was representing other employees at Commission for Mediation and Arbitration* ***to file an Application to join other Defendant's Ex-employees in the Application for Execution filed by Labour commissioner which is Misc. Application No. 454 of 2020****. The Defendant and other parties in the HIGH Court Labour Division agreed to settle the matter amicably. Whereby it was agreed that the Defendant will pay the Ex-employees the amount of Tshs. 12,249,890,439/= being the employee's terminal benefits* (calculated in glossy(sic) salary) *and other rights from DOWANS Tanzania ltd and the employees will not have any further claim."*

He asserted that the payment made was for terminal benefits and not salaries. He labeled 30th November 2016 as a date of the defendant's employees termination refuting the accrual of the claimed contribution by the plaintiff .

I have analyzed the evidence as presented. Pages 3 and 4 of the court's ruling in Application No 454 of 2020 reads:

> *"The issue for termination in this application are, under rule 45 (1) of the labour court Rules 2007, whether the applicants have any interest in the compliance order sought to be executed by Maganga Kadogoda in ranted in the compliance order so as to cover the applicants.*
>
> *From the facts which are **not in dispute that** the applicants, Maganga Kadogosa inclusive, were former employees of the same employer, the respondent and that **each of whom has a valid claim of outstanding salaries against the respondent,** it is clear the applicants were and are in the similar situations as those led to issuance of the compliance order by the Labour commission against the respondent in favour of Maganga Kadogosa. Thus , for avoidance of multiple compliance orders against the same former employer, the respondent, in favour of every individual former employee of the respondent arising from the similar cause, **that is outstanding salaries, compliance order issued in favour of Mr. Maganga Kadogosa, to Tshs. 12,249,890,439/= to cover all of the Applicants' outstanding salaries against the respondent**. On this*

basis I do hereby grant the Application and order that the awarded sum in the compliance order issued in favour of Mr, Maganga Kadogosa, which is sought to be executed in execution No. 60 of 2019 be extended to the awarded sum of Tshs. 12,249,890,439/= to cover all of the ***forty two*** *applicants against the respondent and be executed accordingly."(Bold is mine)*

This ruling has remained unchallenged to date and as agreed the defendants' employees were all paid as directed in that ruling.

This evidence has engaged my mind a bit. However, a thorough scrutiny reveals that though the ruling talks about salary areas, it is not specific as to the period on which the said salaries are in relations to. There was a temptation to connect the ruling dated 13/11/2020 with the compliance order (exhibit P1) just to realize that the ruling(exhibit P2) talks of a different Compliance order given in favour of Maganga Kadogasa and against the respondent without particulars of the salary areas claimed and the period covered.

And even assuming that exhibit P1 is the accurate document that was referred to in the ruling by the deputy Registrar, still, the interpretation of the same gives a different understanding of the what exactly was paid to the defendant employees .As conscripted, the compliance order (exhibit P1) was to be executed pursuant to section 27(1) of the Employment and labour relations Act, No 6 of 2004. This section states:

"27. -(1) An employer shall pay to an employee any ***monetary remuneration*** *to which the employee is entitled*

(a) during working hours at the place of work on the agreed pay day." (bold is mine)

The word remuneration is defined by section 4 of the same act to mean: -

*""**remuneration"** means the **total value of all payments,** in money or in kind, made or owing **to an employee arising from the employment of that employee**;"(Bold is mine)*

The definition is not restricted to payment of wages alone. It covers other payments arising out of the employment contract.

PW2's evidence is in total support of this definition. Answering questions during cross examination, PW2 said,

"I was later paid 163,383,795/= …this figure includes the amount from Symbion Power Tanzania Limited and other claims from DOWANS Company limited"

The amplification above is in a way in support of the defendant's evidence that the payment made through the Labour court was terminal benefits.

I am aware of the tendered salary slip by Pw2 showing that he was paid salaries to 2017. The admission of this document was highly challenged and was only admitted as exhibit P8 subject to verification of its authenticity. I have reviewed the said exhibit. Apparently, exhibit P8 is a print out documents falling squally on electronic evidence governed by section 64A (2) of the Evidence Act, Cap 6 R.E. 2019 and section 18 (2) of the Electronic Transactions Act. Section 64A (2) of the Evidence Act provides:

"(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act."

And section 18 of the Electronic Transactions Act states:

"18 (1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.

(2) In determining admissibility and evidential weight of a data message, the following shall be considered:

(a) The reliability of the manner in which the data message was generated, stored, or communicated.

(b) The reliability of the manner in which the integrity of the data message was maintained

(c) The manner in which its originator was identified; and

(d) Any other factor that may be relevant in assessing the weight of evidence."

Under section 18 (2) of the Electronic Transactions Act, the court is required to consider reliability of the manner in which the data message was generated, stored or communicated; the manner in which the integrity of the data message was maintained; the manner in which its originator was identified; and any other factor that may be relevant in assessing the weight of evidence.

PW2's evidence is silent on the reliability of exhibit P8. He could not state the originator of the document, the manner in which the data message was communicated to him and the manner in which the integrity of the

data message was maintained. The document was thus tendered contrary to the law, raising doubt to its authenticity. I will thus not accord any weight on it.

Proof of payment of salaries as a sign of the existence of an employment contract between the defendant and her employees would have been been established by the banks statement through which the salaries were paid. However, while acknowledging that the salaries were paid through bank,PW2 did not tendered before the court the bank statement to support his allegation leaving the issue of payment of salaries for the claimed period suspicious.

In addition to that, the Labour officer (PW1) who supervised the entire defendant's employees dispute insisted on the existence of a settlement agreement in relation to defendants' employee's salary claims. This agreement, in my opinion, would have assisted the court to ascertain the basis of the defendants' employees' claim and the agreement reached including the termination date. Surprisingly, neither the settlement agreement no details of the same were adduced in court .Instead when asked as to when exactly the defendant's employes were terminated PW1 she said : ***I don't know the precisely when the defendants employee were terminated.*** This evidence leaves a lot to be desired especially on the baseline of the paid salary arears.

Worse, the Labour Commissioner's letter (exhibit D6) dated 8/4/2021 characterized the settlement reached to include among other things the outstanding remuneration of ***ex-employee*** of the judgment debtor. Paragraph 3 of the said letter reads:

"With this letter we wish to inform the Honourable court that the Decree holder and the Decree Debtor ***have finalized negotiations for settlement*** *of this matter,* ***through the Office of the Attorney General****. Moreover, the Decree Holder and Decree Debtor are in the process of drawing Deed of Settlement which will include* ***among other things, payment of outstanding remunerations*** *to* ***ex-employees*** *of the Decree Debtor,* ***which is the subject matter of these proceedings****"(Emphasis added)*

This evidence supports the defendant's claim that the payment made to the defendants' employees were more than salary arrears.

Another confusion is brought by exhibit P6 and P11, notice of retrenchment and the contribution schedule. Exhibit P6 presupposes that the defendants' employees were terminated on 25/9/2020, however the claims on the unremitted contribution (Exh P11) covers only December 2016 to January 2019. Under normal circumstances I would have expected the plaintiff to bring a claim covering the entire period from December to the last date of the employment contract whether June 2020 envisaged by exhibit P1 or September 2020 the date indicated in the retrenchment notice(exhibit P6). This discrepancy raises doubt to the sincerity of the claim by the plaintiff.

I have as well assessed the defendant's evidence. The defendant's case hingers on documentary evidence. The defendant's employee's affidavit (exhibit D3) marking 30th November 2016 as the termination date. Two things are noticeable in these affidavits. ***One,*** all affidavits were signed on the same date irrespective of the years were made. For instance the

affidavits by Adam Yahaya Shemweta, Samwel Saimon Muhelezi, Graciano Throne Mwinuka, Martin Masawe Urio's and others in exhibit D3 were sworn on 30/11/2016, whereas the affidavits by Venant Mussa Hinguson; Venture Manase Shirima; Laurence Amon Sanga; Bon Nkya Nathan and others were sworn on 30/11/2021. ***Two,*** all affidavits were sworn before advocate Alfred Tukiko Okech who was enrolled to the role of advocate in 2018.

I have given deep thought to this matter. Advocates status and roll numbers are matters that the court can take judicial notice under section 59 (1) (i) of the Evidence Act (cap 6 RE 2022). The section reads:

> *"59- (1)* ***A court shall take judicial notice of the following facts****-*
>
> *(i) the names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process,* ***and of all advocates and other persons authorized by law to appear or act before it."(*** *Emphasis added)*

Admittedly, the Tanzania advocate Management system describes Mr. Alfred Tukiko Okech as an advocate with roll No.7615 enrolled into the advocate rolls in 2018. Dw1 concedes to these facts. If that is the case, then the significant question would be on the effect of his status to the affidavit taken before this advocate in 2016. The term affidavit was defined in the case of **Samwel Kimaro V Hidaya Didas**, Civil Application No. 20 OF 2012 (Unreported) to mean ***nothing more than a statement made by a person under oath***. Citing an extract from **MULLA on THE**

CODE OF CIVIL PROCEDURE, Seventeenth Edition, Volume 2, by B.M. Prasad, at page 849 the Court held:

> *"The essential ingredients of an affidavit are that the statement or declaration made by the deponent is relevant to the subject-matter and in order to add sanctity to it,* ***he swears or affirms the truth of the statement made in the presence of a person who in law is authorized either to administer oath or accept the affirmation****.*

Clarification was further sought from pages 849 to 850 of the same author that:

> *The affidavit must be enclosed.* ***It requires solemn affirmation or oath before the person authorized to administer the same****. (Emphasis supplied.)*

My understanding of the above decision and extract from Mulla is that the affidavit is a statement taken under oath before a person authorized to administer an oath. Apparently, the affidavits by most of the defendants' employees relied upon by the defendant were taken by Mr. Alfred Tukiko Okech before he was enrolled as an advocate/ Commissioner for oath rendering them mere statement taken without oath invalid and therefore incapable of forming valid evidence to be counted by the court. On the same strain, I find it challenging to place reliance on the affidavits taken before the same advocate in 2021 and 2022 given the level of integrity exhibited by Mr. Okech.

There is yet another crucial evidence by the defendant. A Special Resolution for termination of employees (exhibit D2) describing the date of termination as 30th November 2016. It is Dw1's evidence that

immediately after the cessation of the intended PPA between the defendant and TANESCO, the defendant and all employees through Special resolution (exhibit D2) resolved to end their employment relationship. The employees were contented and they all signed the termination letters, filled the PSSSF claim forms showing 30th Nov 2016 as a date of termination. This evidence was admitted without objection and no single question was raised against it during cross examination. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence. See **Shomari Mohamed Mkwama vs. Republic** (Criminal Appeal 606 of 2021) [2022] TZCA where the Court stated:

> *"It is now a settled position of the law that failure to cross examine the adverse party's witness on a particular aspect, the party who ought to cross examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross examined."*

I am thus convinced that the plaintiff accepted the fact that the termination of the defendant's employees was reached by the parties concerned on 30th November 2016.

To sum up, the assessment of the entire evidence finds the balanced weight in favour of the defendant. The defendant's evidence in the first issue is more plausible than that of the plaintiff. I thus return a value of 1 to the defendant in respect of the 1st issue and value of 0 to the plaintiff. The first issue is therefore answered in affirmative.

The second issue is whether the defendant was obliged to remit member's contributions to the plaintiff for the period of 2016 to January 2019.The

is no doubt that this issue is dependent on the conclusion in the first issue. And affirmative answer to the first issue automatically negates the second and subsequently the third issue. I will, however, for clarity analyze some few facts that I find pertinent to illustrate.

While capitalizing on the claim of TZS 6,693,947,182.55 as unremitted statutory contributions and provisional penalties for the period of December 2016 to January 2019 exhibited by the demand notice (exhibit P10) and the Contribution schedule (exhibit P11), the plaintiff is conceding to have issued exhibit D5, demand notices dated 1st September 2021 and 15th September 2022 claiming unremitted contribution of 446,638,228.20 for the period ending 30th June 2021 and 30th June 2022 respectively from the defendant acknowledging authorship of the said exhibits through her Zonal Manager. Responding to cross examination, PW3 was recorded to have said:

> *"It is true that Zonal manager had on 15/9/2022 and 1/9/2021 stated the unremitted contribution amount from the defendant as 446,638,228.20 requiring the defendant to pay."*

Certainly, the unexplained change of the outstanding amount from Tshs. 6,693,947,182.55 in January 2019 to Tshs. 446,638,228.20/- in September 2021, and September 2022 raises doubt as to the genuineness of the claim by the plaintiff. This is a serious contradiction, going to the root of the matter to the extent of dismantling the plaintiff's case.

Yet again, the weighting scale on the evidence in respect of this issue tilts in favour of the defendant that there was nothing to be remitted by the defendant after termination of her employees on 30th November 2016.

Consequently, the plaintiff has failed to establish her case to the required standard. The suit is hereby dismissed with costs.

Dated at **Dar es salaam**, this **15th December** 2023

E. Y Mkwizu

Judge

15/12/2023

COURT: Right of Appeal explained

E. Y Mkwizu

Judge

15/12/2023