



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 1223/2014

SWAZILAND NATIONAL PROVIDENT FUND BOARD

Applicant

And

RUBBERTECH (PTY) LTD SWAZILAND

Respondent

Neutral Citation: *Swaziland National Provident Fund Board v Rubbertech (PTY) Ltd (1223/2014) [2018] SZHC 201(29th September, 2017)*

Coram: **M Dlamini J**

Heard: **29th September, 2017**

Delivered: **29th September, 2017**

Ex tempore Judgement

Civil procedure : *Summary judgment application – Plascon-Evans Rule*

Summary: A summary judgement application served before me wherein the plaintiff claimed a sum of E399, 639.66 as penalties for defendant’s failure to make statutory contributions for its employees timeously. The defendant disputed that the persons it was said to be liable for were its employees. It asserted that they were however its contractors.

[1] **The Parties**

The plaintiff, albeit applicant in the present application, is **Swaziland National Provident Fund Board** responsible, *inter alia* for collecting monthly contributions on behalf of employees from employers in terms of the Kings Order in Council No. 23 of 1974.

[2] The defendant who is actually the respondent, is **Rubbertech (PTY) Ltd Swaziland**, a company duly registered and incorporated in accordance with the company laws of the Kingdom of eSwatini. Its principal place of business is at Matsapha Industrial Site, Manzini region.

[3] **The Parties’ Case**

The Plaintiff

Mr. Miccah Nkabinde, in support of the plaintiff’s application, referred the court to the declaration for the simple summons. The declaration revealed that in October 2005, the defendant in compliance with the Kings Order in Council No.

23 of 1974 (Order) registered as an employer for purposes of making monthly contribution for its employees.

[4] Plaintiff by correspondence advised defendant of the account number where the contributions ought to be deposited. The effective date was November 2005. Although plaintiff did deposit the monthly contributions, it however did so out of time. This attracted penalties which plaintiff demanded first by letter of demand and subsequently summons.

[5] **The Defendant**

In its affidavit resisting summary judgement application under the hand of **Mr. Gavin Adamson**, the managing director, the defendant denied that the persons referred to by plaintiff were its employees. They were however members of a cooperative called **Sinethemba Rubbertech Workers Association**. In as much as defendant did make contribution for the said individuals, it did so on a without prejudice basis.

[6] **Issue**

The question facing this court was whether on the totality of the pleadings serving before it, referring the matter to trial would shift the balance of preponderances. Was the *Plascon – Evans Rule*¹ in its all fours in this matter?

[7] **Determination**

The crux of plaintiff's claim was highlighted in simple terms as follows:

¹ 1984 (3) SA 620

- “8. *Although the defendant has been making deductions from its employee wages, defendant has not been forwarding same to plaintiff timeously. In fact from October 2005 to January 2013 the defendant has failed to pay monthly contributions to the Plaintiff, in spite of its duty to do so.*
9. *From October 2005 to January 2013 the Defendant failed to make the statutory contributions to the Plaintiff for its employees timeously. As a result of the above the Defendant incurred penalties in the amount of **E399, 639.66** (Three Hundred and Ninety Nine Thousand Six Hundred and Thirty Nine Emalangen. Sixty Six Cents).”*

[8] The defendants defence is formulated as follows:

- “5. *It was communicated to the Plaintiff that the Defendant’s contention is that the individuals in respect of who Plaintiff was demanding payment of SNPF dues were at all material times members of a co-operative called Sinethemba Workers Association.*
6. *The Defendant had contracted the said association to carry out certain works at its factory and the said Association in turn deployed its members to carry out such works on behalf of the Association, as it is, the defendant is left guessing as to which individuals the Plaintiff is referring to as their names and identity numbers are not set out in the declaration nor are they set out in the Affidavit supporting Summary Judgement.*
7. *Defendant admits that it is registered as an employer with the SNPF and admits that it deducts statutory contributions from its employees*

but states that these are paid over to the Plaintiff timeously and continuously.

9. *In the event the claims by Plaintiff relates to the employees of Sinethemba Workers Association, in or about October 2013, the Defendant employed the 19 individuals formerly employed by the Association as a result of an intervention by the Labour Commissioner and on a without prejudice basis paid the arrears of the statutory deductions in respect of the period that they were employed by Sinethemba Workers Association. This was not an admission of liability and this was communicated to the Plaintiff."*

[9] I must first point out that the plaintiff in its declaration stated that the defendant registered as an employer in October 2005. When registering, it advised the plaintiff that it had employed nineteen workers.²

[10] From the period 2005 to 2013 (date of demand), defendant did however, deposit the monthly contributions for its employees with the defendant albeit late. On this point, defendant admitted having paid the monthly contributions on behalf of the nineteen employees but asserted that it did so on a without prejudice basis.

[11] From the pleadings, it is common cause that the defendant registered for nineteen employees in 2005. It is also not in issue that defendant did pay for all the nineteen employees during the period spanning 2005 to 2013 although beyond the date due. It is also not in issue that the contributions made by defendant attracted penalties following that they were paid out of time.

² See paragraphs 4 & 6 page 5

[12] The defendant asserts that the payment for the nineteen “employees” were without prejudice to its defence that at all material times the said individuals were not his employees but contractors.

[13] Now should the court have referred the matter to trial to take its normal cause in the form of action proceedings based on the summons? Or should the court have ordered that each party adduce evidence to show that the nineteen individual were employees or not of the defendant. Out of abundance of caution, the court on the 28th July, 2017 ruled that the matter be referred to trial just on one issue and that was: Did the defendant contribute consistently and timeously for the nineteen individuals? Should the evidence establish that defendant contributed consistently for the nineteen individuals, it would indicate that the individuals were its employees.

Evidence that nineteen individuals were employees of defendant.

[14] The totality of the following points that the nineteen individuals were employees of defendant:

- (i) Defendant registered to make monthly contributions of nineteen employees with plaintiff in October 2005.
- (ii) Defendant failed to make any monthly contribution for any of the registered nineteen employees timeously November 2005 to 2013. This is not in issue.

(iii) Defendant however did make monthly deductions from the salaries of each individual.³ There were nineteen employees of the defendant that were registered with the plaintiff as eligible employees. This was not denied by defendant.

[15] Nothing was attached by defendant in its pleading as evidence that the nineteen individuals were members of the cooperative which was contracted to it. However, in its reply, plaintiff attached a document which it alleged to have been given by defendant as evidence of the cooperative. On perusal of the said document (S1) it reflected as follows:

*Sinethemba Rubbertech Workers Association
P. O. Box
Matsapha*

12 February 2013

*The Management
P. O. Box 1255
Matsapha*

Dear Sir

Re: Application to provide a service for the out source work

We are hereby applying to provide a service for the out source work of Rubbertech as a group of ladies called Sinethemba Rubbertech Workers Association.

Our leaders are *1) Busisiwe Hlatjwako*
 2) Thembi Vilakati

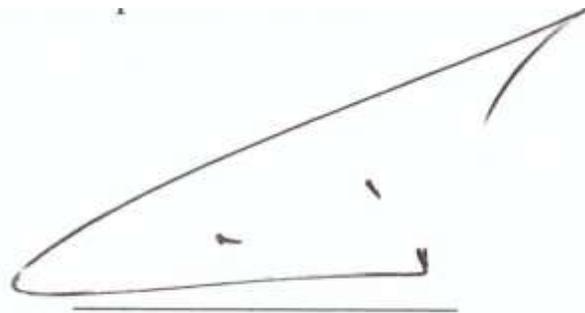
*Yours faithfully
Sinethemba*

³ See paragraph 6 page 5

*Rubbertech Workers Association
(signed by 19 individuals)*

- [16] The word “Sinethemba” was written with a different pen, an indication that it was inserted later. That point was taken by plaintiff’s counsel. However, nothing much turned on it.
- [17] What was glaring from that piece of evidence, S1, was that the application to be a contractor of defendant by the Association was made in February 2013 and not in November 2005, the date upon which defendant ought to have commenced making monthly contributions. In other words, if the evidence by the defendant was anything to go by that the nineteen individuals were members of an Association contracted by it, it was defeated by the date of the application, namely February 2013. A further scrutiny of S1 reflected the nineteen individuals’ signatures. They signed by initialling their first names and writing their surnames. When comparing their signatures to exhibit B, pages 1-10, a document handed without any objection from the defendant, it fortified the plaintiff’s evidence that defendant commenced contributing for the said individuals in 2005. Their full names appeared particularly at page 10 of Exhibit B. By February 2013, defendant had made a total contribution of E48 184.70. That evidence on behalf of plaintiff remained uncontroverted by the defendant. From the pleadings, it became unnecessary to enquire on whether defendant paid late as that was not disputed by it.
- [18] It was the totality of the above evidence that led the court to grant the summary judgement application on 29th September 2017. Following that defendant had employed a number of individuals, the court did not want to put it out of business

by ordering it to make payment of a lump sum of E399, 639.66. It then granted defendant the right to pay by instalments for a period not exceeding sixty months.

A handwritten signature in black ink, appearing to be 'M. Dlamini J', written over a horizontal line. The signature is stylized and somewhat cursive.

M. DLAMINI J

For the Appellant : **Mr. B. Gamedze of Musa Sibandze Attorneys**

For the Respondent : **Mr. W. Maseko of Waring Attorneys**