

A From the pleadings, it is clear that the defendant, by its counter-claim, is seeking relief from the consequences of a mistake. The mistake being crediting the plaintiff with USD 649 364-44 instead of USD 9 364-44.

B Section 26 of the Law of Limitation Act 1971 provides:

Where in the case of any proceedings for which a period of limitation is prescribed:

C (a) ...

(b) ...

D (c) The proceeding is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered it.

E In the instant case, the defendant can reasonably be taken to have discovered the mistake on 28 June 1991, the date when the defendant informed the plaintiff that it had wrongly credited the plaintiff with the said amount. Refusal, neglect or inability to refund the amount wrongly credited by a banker to a customer being breach of contract
F the period of limitation, by virtue of item 7 of the first schedule to the Law of limitation Act is six years. In terms of section 41 of the Law of Limitation Act any claim by way of set-off of counter-claim is deemed to be a separate action and to have been commenced on the same date as the suit in which the set-off or counter claim is pleaded. The instant suit was presented for filing on 11 June 1999,
G that is nearly eight years since the defendant discovered the mistake.

The counter-claim would, therefore, appear to be time barred.

H The end result is that the Preliminary Objection by the defendant to the effect that the suit has been instituted against a wrong party is overruled. The plaintiff's Preliminary Objection to the counter-claim to the effect that the counter-claim is time barred is upheld.

I Costs to abide the result of the main suit.

**PRINCIPAL LABOUR OFFICER ON BEHALF OF
LADZABIHO MWAMLWILO v. ZONAL DIRECTOR:
SOUTH WEST ZONE TANESCO LTD, MBEYA**

HIGH COURT OF TANZANIA
AT MBEYA

(Mackanja, J.)

DC. CIVIL APPEAL No. 19 OF 1999

(From Original Mbeya District Court Employment Cause No. 2 of 1998)

Labour Law – Contract of employment – Letter of offer setting conditions to be fulfilled by employee – Conditions not fulfilled – Whether there was a valid and enforceable Contract of Employment.

The Principal Labour Officer on behalf of one Ludzabiho Mwamlwilo instituted a suit against the respondent. It was claimed in the Lower court that the claimant was at first employed as a labourer but later employed on permanent terms as evidenced by the letter of employment which stated, *inter alia*, that the "offer is ... subject to your being medically fit" and that "the offer is also subject to the approval of the Board of Directors." The claimant never produced any evidence of medical fitness and neither was the approval by the Board obtained. Later, he was suspended from employment resulting in the suit filed in the lower, court which he lost. On appeal.

Held: (i) The two conditions set in the letter of employment constitute express terms of the contract; so the Contract of Employment remained inchoate to the day the appellant was discharged;

(ii) The letter of employment did not constitute a contract; it merely communicated the offer of employment to the appellant and could only be converted into a contract upon fulfilling the conditions set out therein.

Appeal dismissed

Cases referred to:

(1) *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497

A (2) *Short v. J and W. Henderson Ltd* (1946) 62 T.L.R. 427

Mr Jones Labour Officer, for the Appellant

Mr Mbise/Mr Mwakolo, for the Respondent

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JUDGMENT

(Delivered 18 February 2000)

C **Mackanja, J.:** The Principal Labour Officer instituted a suit on behalf of one Ludzabiho Mwamlwilo against the Zonal Director of the South West Zone of the Tanzania Electric Supply Company Limited, popularly known by its acronym Tanesco. It was averred in the claim that the claimant was employed by Tanesco as a labourer from 21 March 1993 to 31 November 1995. It was further alleged that on 1 December, 1995 the respondent employed the claimant on permanent terms as evidenced by a Contract of Employment in terms of annexure "B" to the plaint. By that contract, the claimant was to receive a basic salary of TZS. 41 000 per annum. It is the claimant's case that he performed his function from the date of employment until 15 July 1996 when he was verbally suspended from employment. It is averred that because he was not paid his salary as agreed in the Contract of Employment, he claimed a commuted amount of TZS. 1 271 000, thereafter, he be paid his monthly salary until the respondent formally terminates the Contract of Employment, less TZS. 62 810-50 he received as wages in his capacity as a casual labourer.

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The respondent denied liability, contending that the letter on which the claimant relied was no more than a letter of offer which set down conditions which had to be fulfilled before the contract became enforceable. Paragraph 9 of the said letter states that:

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9. The offer is also subject to your being medically fit.

Paragraph 10 states thus:

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10. The offer is also subject to the approval of the Board of Directors.

Indeed the opening part of that letter states that:

With reference to your recent interview, we have pleasure in offering you an appointment with this company as Electrical Technician on senior terms and conditions of employment as follows...

The respondent maintains, therefore, that the letter communicated nothing more than an offer of employment. The claim was, in the end, dismissed after a full trial. Hence this appeal.

Mr Geoffrey Jonas, a Labour Officer who prosecuted the claim before the District Court, has lodged a Memorandum of Appeal that contains four grounds, namely:

1. that the trial magistrate erred both in law and in fact when he believed that the claimant had been employed as a casual labourer despite a duly signed contract;
2. that the learned magistrate erred when he believed that it was necessary for the claimant to produce documentary evidence showing that he was medically fit despite the fact that the respondent never informed the claimant that he terminated the Contract of Employment due to the non-production of a medical report as required by the contract;
3. that the learned trial magistrate erred when he held that Exhibit "P1" was not a Contract of Employment despite the fact that the claimant continued to work with the respondent without the contract being revoked; and
4. that the decision of the trial court was not supported by the weight of the evidence on record.

The appellant prays, therefore, that the appeal be allowed. Thus the issue that flows from the appeal is whether there existed an enforceable Contract of Employment between the litigants.

Now in order for a Contract of Employment or call it a contract of service, to be binding there are pre-requisites and pre-conditions that must be fulfilled. In particular, and as it was held in the English case of *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* (1) per Mackenna, J.:

- A ... A contract of service exists if these ... conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master, (ii) He agrees expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master ...

C Those are but the most important conditions which, when applied, may lead to the conclusion that indeed a contract of service or employment does exist. There is yet another matter which must be considered, and that is the employer's right of the selection of his servant as was pointed out by Lord Thankerton in *Short v. J and W Hendrson Ltd* (2) at page 429.

D The selection of an employee is not one transaction. It is a process of several stages. There will be an advertisement of the existence of the job; the interview of those contesting to get it; and the choice of one of them. Ordinarily after the choice is made the successful candidate will be given pre-conditions to fulfill, including production of a report for medical fitness. And where the interviewer is not the employer, recruitment may be subject to approval by the employer. Finally the successful candidate must communicate his acceptance of the offer to the prospective employer.

F In the instant case, having succeeded the interview, the appellant was offered employment in terms of exhibit page L. In paragraph 9 of the letter of offer the appellant was informed thus:

G 9. The offer is also subject to your being medically fit.

H Necessarily, this implied that he had to undergo medical examination and he was required to pass that examination. It is abundantly clear that the appellant never produced any evidence for medical fitness. In paragraph 10, it is stated that the offer was subject to approval by the Board of Directors. No such approval was ever obtained. The two conditions constitute express terms of the contract. So the Contract of Employment remained inchoate to the day the appellant was discharged on 15 July 1996.

A There is, of course, the appellant's argument that he was employed as a technician and that medical examination was meant not for new employment but for continuation of it. He insists that the document he relies on is a contract of service. I think such an argument cannot be tenable because the evidence clearly shows that all along, including the time when he was interviewed, the appellant was working as a labourer. His status would have changed if he had fulfilled the pre-conditions for his permanent employment. In tandem with this argument, there is the contention that Annexure "B" to the plaint is a Contract of Employment. The opening part of that letter reads that:

With reference to your interview, we have pleasure in offering you an appointment with the company ...

Then there follow the several paragraphs:

1. Basic Salary Your basic salary will be ...
2. Probation The period of probation will be ...
3. ...
4. Leave The leave entitlement will be ... etc.

F The letter looks into the future. It could be converted into a contract subject to fulfilling the several pre-conditions I have covered. It does only one thing; it communicates the offer of employment to the appellant. Finally, let me say that the appeal was heard *ex parte* because the appellant defaulted to appear even though learned counsel was aware.

G I am satisfied, therefore, that the appeal is devoid any merit. It is dismissed with costs.

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