In the premises, in exercise of powers conferred upon me by section 373 of the Civil Procedure Act 1985, I quash the proceedings and set aside conviction and sentence and order for a retrial of the respondent.

TANZANIA PHARMACEUTICAL INDUSTRIES LIMITED *v.* DR. EPHRAIM NJAU (NUMBER 2)

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 6 OF 1998

(From the decision of the High Court of Tanzania at Arusha, Munuo, J., dated 23 August 1996, in Civil Case No.3 of 1993)

Labour Law – Appointment in subsidiary companies – Subsidiary company only recommends appointment but actual appointment is made by the Holding Corporation – Whether contract of employment was made with the subsidiary company.

Labour Law – Holding Corporation which is the appointing authority transfers an employee from its one subsidiary company to another – Whether transfer is implicit – Whether transfer constituted breach of contract of employment.

Labour Law – Damages arising out of termination of contract of employment – Whether payable by a subsidiary company with which employee worked.

The respondent, Mr Ephraim Njau, successfully sued the appellant company in the High Court at Arusha. Before the High Court, it was contended by Mr Njau that the appellant company's Board of Directors appointed him the company's general manager with effect from 3 October 1983. That he worked in this capacity until 30 November 1992 when the National Chemical Industries Limited, the holding corporation of the

appellant company purported to transfer him to Keko Pharmaceutical Industries Limited, another subsidiary company of the said holding corporation. Mr Njau challenged the purported transfer and removal from his present employment labeling it unlawful and that it constituted breach of contract between him and the appellant company. On this account he claimed for special and general damages. The appellant company denied all Mr Njau's claims against the company. The trial court found in favour of Mr Njau. On appeal;

Held: (i) The respondent in this case was appointed and employed by the holding corporation, namely, NCI. The contract of service as is evidenced by the letters of appointment and confirmation were between the respondent and NCI not the appellant;

(ii) The respondent sued a party, the appellant company, which had no contractual relationship with him;

(iii) In the absence of an undertaking not to transfer a particular employee (and this undertaking would be very rare indeed) a transfer order can never ever constitute a breach of contract of employment. The respondent's transfer to Keko Pharmaceutical Industries was lawfully made and, therefore, could not constitute a breach of contract of employment.

Appeal allowed.

Cases referred to:

(1) *Southern Highland Tobacco Ltd v.David Mcqueen* [1960] EA 490

(2) *Board of Internal Trade v. Yonah Mapenzi* [1998] T.L.R 306

Mr. Lobulu, for the Appellant

Mr. Ngalo, for the Respondent

JUDGMENT

(Dated 21 May 1999)

MFALILA, J.A.: The respondent, Mr Ephraim Njau, successfully sued the appellant Company, Tanzania Pharmaceutical Industries Limited in the High Court of Tanzania at Arusha for the following reliefs:

(a) TZS. 43 732 800 representing salary, fringe benefits and other emoluments from the 30 November 1992 till retirement.

(b) TZS. 176 000 being payment for annual leave for 8 years.

(c) General damages for breach of contract of service.

(d) Payment of pension.

(e) Interest at 25% per annum on the decretal amount from the date of suit till payment in full.

(f) Costs.

(g) Any other relief which this Honourable Court may deem fit to grant.

In his plaint which he filed in the High Court, the respondent, alleged, and it is these allegations which were the basis of his claim that on or about 3 October 1983, he was appointed by the appellant company's Board of Directors to be the General Manager of the appellant which appointment he duly accepted. That he worked in this capacity until 30 November 1992 when he received a letter from the National Chemical Industries Limited, purporting to transfer him in the same position to Keko Pharmaceutical Industries Limited. He went on to allege that this purported transfer and removal from his present employment was unlawful and constituted a breach of the contract of employment between him and the appellant and that in consequence of such breach he suffered loss and damage enumerated above. It was on this account that he claimed for special and general damages.

In its Written Statement of Defence, the appellant company denied the existence of any contract of employment between it and the respondent adding that at all material times, the respondent worked for the National Chemical Industries which posted him to it as General Manager. In the circumstances, there being no privity of contract between it and the respondent, there could not be any breach of contract between them. It added that the act of transferring the respondent to another company could not be regarded as unlawful and in any case the respondent had consented to the transfer in writing, he was therefore estopped from alleging otherwise.

It is obvious from these accusations and counter accusations that the respondent's case was rooted or anchored on the allegation that there was a contract of employment between him and the appellant company and that the respondent's purported transfer to another company by a stranger to this contract of employment i.e. the National Chemical Industries was a breach of this contract and therefore unlawful as it sought to remove the respondent from his present position as employee of the appellant company.

At the beginning of the trial, the following issues were drawn up and agreed upon:

1. Was the plaintiff (present respondent) appointed General Manager by the National Chemical Industries hereinafter referred to as NCI or by defendant?
2. Did the plaintiff work for NCI or for the defendant?
3. Was the plaintiff's transfer to Keko Pharmaceutical Industries unlawful as alleged in the plaint?
4. Did the plaintiff have a contract of employment with the defendant and if so did the defendant breach the contract?
5. Were the plaintiff's services with the defendant terminated with plaintiff's consent?
6. What damage if any did the plaintiff suffer, and if so did the plaintiff mitigate his damages?
7. To what reliefs are the parties entitled?

In support of his claim, the respondent told the trial court the story of his career, which without any doubt is an illustrious one. He said that he is a Chemist/Pharmacist registered with the Pharmaceutical Society in England. He studied pharmacy in England at the University of Sunderland and later took a Master of Science degree in pharmacy at Auston University, Birmingham, and the same University awarded him a Ph.D. degree in Medicinal Chemistry in 1975. With these qualifications, he returned to Tanzania in 1975 and was posted to

Muhimbili University College of Health Sciences as a lecturer and head of the School of Pharmacy. He added that in 1978 he switched from teaching to an industrial career with the multi national Chemical and Pharmaceutical Company CIBA-GEIGY where he was appointed as a Research and Development Chemist and posted to their major factory in Basel Switzerland. In 1979 he returned to Tanzania where he was employed by the appellant company as Chief Chemist rising through the ranks until he became General Manager in 1983. He worked in this position until 1993 when he was transferred to Keko Pharmaceutical Company – the genesis of this claim. Apart from being a member of the pharmaceutical professional bodies both in England and Tanzania, the respondent said, he is also a member of other international bodies in the pharmaceutical field. We think that by any standards, the respondent was a successful manager at the appellant's factory in Arusha. He told the trial court that within a space of ten years or so, he had transformed the appellant company into a vibrant going concern manufacturing 18 different products such as capsules, tablets, syrup, injectables etc., with an annual turnover of TZS. 765 million up from TZS. 18 million in 1980. On the physical side, the company was able to invest over TZS. 140 million of profits in blocks of flats for workers at Arusha and the factory building was expanded. All these achievements, the respondent said, were appreciated by the appellant's Board of Directors which gave him a commendation. The respondent added that in the light of these great successes, it was a sort of anticlimax to receive a letter Exhibit P5 transferring him to Keko Pharmaceutical Industries in Dar es Salaam. This letter stated in part:

RE: INTER-COMPANY TRANSFER

In an effort to improve efficiency in the management of the two Pharmaceutical Companies in the NCI Group, and after consultations with the relevant parties, formal approval by the Board of Directors in their meeting held on 24 November 1992 and subsequent detailed discussion (*sic*) held in our offices on 25 November 1992, it has been decided to transfer you to Keko Pharmaceutical Industries in the same position of General Manager w.e.f. 1 January 1993.

It is our sincere hope that the change in environment will bring about the desired improvement in the management efficiency in the two companies. We shall give you all the support and assistance you will need and feel free to consult us when the need arises.

This letter was written by the Managing Director of National Chemical Industries. The respondent said that after receiving this letter, he sought and obtained audience with the Chairman of the Board. He did not say the Chairman of which Board, but it can be gathered from the answers that the audience was with the Chairman of the appellant company who told him that his Board had nothing to do with the transfer and referred him to National Chemical Industries (NCI) the body which effected the transfer. Following this audience, the respondent said, he wrote a letter Exhibit P6 addressed to the Managing Director, National Chemical Industries (NCI). The letter said:

RE: INTER-COMPANY TRANSFER

I am in receipt of your letter NCI/OP/8/B/92 of 30 November 1992 transferring me to Keko Pharmaceutical Industries in the same position of General Manager. I accept this new assignment and I shall report for duty as directed.

However following our discussions at your office, I pointed out that I am due to retire from my present employment in the next 24 months. This raises a number of issues which I wish to request you to take at the next TPI Board for the Board's consideration and ruling:

(i) Due to the brevity of time I have for the new assignment, it is technically not feasible for me to relocate my family to Dar es Salaam during this period. As such I would like to request in the meantime to retain the company house I have in Arusha.

(ii) The time available for this new assignment is going to be very brief, taking into account the fact that I shall need time to settle down in a new environment.

(iii) In view of the foregoing I wish to beg the indulgence of the esteemed PTI Board to consider it to be within public interest that I go for early retirement.

The respondent continued with his evidence and told the trial Court:

> KPI (Keko Pharmaceutical Industries) did not appoint me their General Manager and I never applied for the post. Vide Exbt. P8 my appointment as General Manager Keko Pharmaceutical Industries was revoked.
>
> I considered my removal from defendant company unlawful. My contract of employment was between me and the defendant company who paid all my emoluments. The purported transfer was therefore a breach of contract as that was to force me to take on a new employer without my volition.

The letter Exhibit P8 which the respondent refers in this passage was addressed to him by Keko Pharmaceutical Industries. It stated as follows:

> **RE: YOUR TRANSFER TO KPI**
>
> It is regrettable to note that you have not reported for duty since you were transferred to this company more than four months ago. Furthermore, you have not informed us of your whereabouts or the reason of your failure to report for duty to-date.
>
> In view of the foregoing, the company's Board of Directors has directed me to inform you that the position of KPI General Manager is no longer open for you. The post is now going to be offered to another candidate.

This letter is dated 20 April 1993. On his claim for damages the respondent told the trial court:

> I am claiming salary arrears up to the age of 55 years because I have not found a job commensurate with the position I was occupying at the defendant company, I am not disabled but I have not been able to locate a job commensurate to the position I was removed from. I will continue looking for a job but the chances are very narrow indeed.

Regarding his removal from office as the appellant's General Manager, the respondent, told the trial court:

> I committed myself to retire within two years under duress which means I would have been retired last year. After talking to Mr Pareseoi about my transfer, I was under the impression that he wanted to effect the transfer at any cost so I suggested an early retirement which he said the boardof the defendant would decide on my retirement. So, I opted to retire after 2 years rather than be transferred to Keko Pharmaceutical Industries which I never wanted to work for. The NIC (*sic*) pushed me to offer the early retirement within 2 years. When a cat is (*sic*) to a corner, it has to respond so I had to offer an early retirement which would have been more favourable to me than to proceed to Keko Pharmaceutical Industries. The defendant's Chairman did not hear me on the transfer issue at all. The NIC (*sic*) pushed me on the transfer and it is the NIC (*sic*) which initiated the transfer, not the boardof my employer the defendant. The defendant Board was my employer not then NCI who was not my employer. I was to report to the defendant's Board, not to the NCI. I did not challenge the authority of NCI in transferring me to Keko Pharmaceuticals. I would to protest (*sic*) to NCI because that was the authority which was purporting to transfer me to Keko Pharmaceutical Industries. I accepted the transfer but refused to report because I was consulting my lawyer. I had to buy time to sue the defendant after the defendant Chairman Professor Kongola advised me to proceed on transfer because the defendant's Board had resolved that I be transferred and the Keko Pharmaceuticals Industries had resolved to appoint me as General Manager. That was resolved within 24 hours so I decided to solve the problem by legal action. Vide Exhibit P7 I requested that the issue of the transfer in dispute be tabled before the defendant's Board but the NCI refused. NCI did not employ me but they purported to transfer me. My terms of service with the defendant stipulate that I am entitled to a pension per this letter Exhibit P4 – Item 6 Scopo Regulations are applicable. Item 6 on Exhibit P4 relates to pensions under the Scopo Regulations which is why I am claiming pension. The defendant as my employer would calculate the pension I am entitled to under the Scopo Regulations.

> A Under Paragraph 7(2) of the amended plaint I listed the benefits I lost
> when I was removed from employment. The benefits are not listed in
> their letters of employment.

This was the totality of the evidence in support of the respondent's
B case that he was unlawfully removed from employment and that in
consequence he suffered the damage which he listed in the plaint.

Like the plaintiff, the defence also called only one witness in
C the person of Mr Michael Ole Pareseoi the Managing Director of
NCI and Chairman of the Board of Directors of the defendant company
during the relevant period. He told the trial court that among the
responsibilities of NCI, was to oversee the staffing of the subsidiary
companies and that it was in fulfilling this responsibility that NCI
D appointed and confirmed in his post the respondent as General Manager
of the appellant company. That it was in the same capacity that NCI
effected inter-company transfers between the appellant company
and the Keko Pharmaceutical Industries at the end of 1992. To this
E end, Mr Pareseoi told the trial court:

> In 1992 we evaluated the Keko Pharmaceuticals and Tanzania Pharmaceutical
> Industries. It was decided to swap the General Managers of the two companies.
> F I then transferred the plaintiff to Keko Pharmaceutical Industries so that
> the Keko General Manager would go to be General Manager of the defendant
> company. That was in order to improve the performance of (*sic*) efficiency
> of the two companies. I signed the transfer letter P5 as Managing Director
> of NCI. The transfer was to improve the management of the two companies.
> G The plaintiff accepted the transfer vide his letter Exhibit P6 of 18 December
> 1992.

On fringe benefits, Mr Pareseoi said that these are paid from the
profits of the company, hence they are not part of the contract of
H service as they would not be due if no sufficient profits were generated.
They are therefore transient, cannot be claimed.

On retirement benefits, he said that these are paid to the employee
I by the Parastatal Pensions Fund (PPF) at the end of service due to
retirement or termination. That Exhibit P4 contains the terms of

the contract of service. Paragraph 6 of Exhibit P4 relates to Scopo A
Regulations which also applied to the respondent as General Manager.
That the Keko Pharmaceutical Industries were ready to receive the
respondent as General Manager, but since he did not follow up the
transfer, the post was filled by somebody else. B

On the question of removing from or terminating the respondent's
employment, Mr Paresesi denied to have terminated the respondent's
employment or removing him from his post as General Manager.
Rather, he said, he used his authority which he had and which the C
respondent did not question to make inter-company transfers against
which the respondent never protested apart from asking to be allowed
to retain the company house at Arusha and for an early retirement.

On the relationship between NCI and its subsidiaries, he said D
that these including the appellant company were supposed to pay
management fees to the parent company NCI. That being a subsidiary
company did not mean it could get free services from the parent
company, but he added, it was because of this relationship that it E
was required to pay only if it had resources. This laxity could not
have been exercised if there was not in existence this relationship.

On this evidence, learned counsel on both sides made their final
submissions. Mr Ngalo learned counsel appeared for the plaintiff F
while Mr Lobulu learned counsel appeared for the defendant. Mr
Ngalo addressed the court on three points. First, who appointed the
plaintiff to the post of General Manager and for whom did he work?
On this point, Mr Ngalo submitted that on the evidence, the plaintiff G
was clearly appointed by the defendant company. He added that the
plaintiff was offered the post by the defendant company following
their advertisement and that nowhere is it indicated that the NCI
Board was called upon to ratify this appointment. He submitted further H
that NCI could have resolved to employ the plaintiff and then post
him to TPI or KPI, but they did not do this. Therefore on the basis
of the plaintiff's evidence as well as on the documentary Exhibits
P1 – P4, Mr Ngalo concluded, the plaintiff was clearly employed I
by the defendant company.

The second point was on the lawfulness of the plaintiff's transfer from the defendant company to Keko Pharmaceutical Industries. Mr Ngalo submitted that the plaintiff's purported transfer to Keko Pharmaceutical Industries was wrong, unlawful and unprocedural because none of the three companies NCI, TPI and KPI had the competence to effect such transfer. NCI could not do this because they were not the plaintiff's employers. In any event, there was no resolution by its Board of Directors to transfer the plaintiff. TPI could not do this because they had no authority to post its employee to another company, and KPI could not do so because they never employed the plaintiff, who was an employee of another company. In any case he added, there was no stipulation in any of the letters of appointment written to the plaintiff that the plaintiff would work for another company or that he was subject to transfer. According to Mr Ngalo, the defendant company clearly abdicated its responsibility when it allowed the Managing Director of another company NCI to write a letter of appointment to its employee, the plaintiff.

The third point was on damages and pension rights due to the respondent following the breach of contract of employment by his employers, the appellant company. On this point, Mr Ngalo told the trial court that damages follow a breach of contract and that in this case the plaintiff had proved that his services were terminated prematurely and that therefore he was entitled to damages as claimed. He cited the decision in *Southern Highland Tobacco v. David Mcqueen* (1) in which an employee was awarded his full salary and emoluments for the entire period of his contract. With regard to pension rights, Mr Ngalo submitted that these are clearly shown at paragraph 35G of the Scopo Regulations.

On his part, Mr Lobulu submitted that the evidence which was led, clearly shows that the plaintiff was employed by the NCI because he applied to them for the job and it is NCI who issued the letters of appointment and confirmation. In matters of travel and leave, NCI processed them. It is for these reasons that it was NCI, not the defendant company, which transferred the plaintiff to KPI, the transfer which

was accepted by the plaintiff. With regard to *the Southern Highland Tobacco* case, Mr Lobulu submitted that case was not relevant because unlike in that case, the present case is dealing with a person who was not terminated but was transferred to Keko, accepted the transfer in writing and later went to Court to claim damages.

In her judgement, the learned trial judge found that the plaintiff was appointed General Manager by the defendant company because all the documents Exhibits P3 and P4 state clearly that the plaintiff was employed by the defendant company, in that except for their letter heads, nowhere in these documents of employment is there a mention of the National Chemical Industries Ltd. That therefore the plaintiff was employed by and worked for the defendant company. That since the contract of service of the plaintiff was between him and the defendant company, the plaintiff's transfer to Keko Pharmaceutical Industries by NCI was ill-founded because it was neither initiated nor effected by his employers and that there was no provision for transfers in the employment letters Exhibits P2 to P4.

She held further that there was a contract of employment between the plaintiff and the defendant company which contract was breached by the defendant company as employer by conniving at the transfer while aware that the plaintiff had never been employed by Keko Pharmaceutical Industries, and that the termination of the plaintiff's employment was contrary to paragraph 5 of the contract of employment to the effect that termination of appointment will require three months notice on either side or one month's salary *in lieu* of notice.

Lastly, the learned judge held that the services of the plaintiff were terminated without his consent. Accordingly, she gave judgment for the plaintiff. With regard to damages, the judge found that the plaintiff lost the job of General Manager along with salaries, fringe benefits and allowances he would have earned for eight years remaining before retirement at the age of 55 and that therefore he was entitled to TZS. 43 732 800 being salary and fringe benefits which he would have earned from 30 November 1992 for eight years, that the plaintiff was also entitled to his pension under the Parastatal Pensions Fund for the eight years he contributed to the Fund. There was also an order to pay interest at 10% on the decretal amount from the date of judgment to the date of settlement.

The appellant company was aggrieved by this decision and it lodged this appeal. A ten point Memorandum of Appeal was filed on its behalf, but in our view, all these grounds deal basically with four main issues: First, with whom did the respondent have a contract of service, was it the National Chemical Industries, or the appellant company? Second, was the respondent's transfer from the appellant company to Keko Pharmaceutical Industries lawful and valid? Third, was there a breach of the contract of service? Fourth, is the respondent entitled to any damages? We shall dispose of this appeal by addressing ourselves to these four points.

1. With whom did the respondent have a contact of service, was it with the National Chemical Industries or the appellant company?

This point refers to ground one of the Memorandum of Appeal. On this point Mr Lobulu learned counsel for the appellant company, submitted that while the decision to engage the respondent was made by the appellant's Board of Directors as the Minutes of the 16th Meeting of that body show, the actual engagement of the respondent was made by National Chemical Industries. That the Minutes of the 16th Board Meeting of the appellant indicate that engagement and control of Senior Staff in the subsidiary companies was vested in the Holding Company i.e. NCI. That is why, Mr Lobulu contended, the letter of appointment Exhibit P3 was also copied to senior officers of NCI.

On the other hand Mr Ngalo submitting for the respondent stated that the respondent's employment was sanctioned by the Board of Directors of the appellant company which was the lawful and proper authority.

We think the position in the present case is analogous but in reverse to that which obtained in *Board of Internal Trade v. Yonah Mapenzi* (2). In that case, the respondent was engaged by the appellant

as an Accountant and was then posted or seconded to one of the companies in the Group, namely, Tanga Regional Trading Company Limited. Later, the appellant Board dismissed the respondent from employment for misconduct, whereupon the respondent sued the appellant Board for wrongful dismissal. One of the defences raised by the appellant Board, though belatedly at the appeal stage, was that it was wrongly sued because it was not the respondent's employer, that the respondent should have sued the Tanga RTC which was his actual employer. This court rejected that contention on two grounds, namely, first that the matter was admitted in the pleadings and secondly that the evidence on record does not support the appellant's contention. To this end, this court stated:

> In ground one, the appellant complained that the learned trial judge erred in law and in fact in holding that the respondent was an employee of the appellant Board and/or that the respondent was on secondment to the Tanga Regional Trading Company Ltd.

We are satisfied that this complaint has no substance. In the plaint the respondent stated in paragraph 5 as follows:

> That the plaintiff (present respondent) was at all material times the employee of the defendant (appellant) as the Chief Accountant to the Tanga Regional Trading Company. A copy of his letter of appointment is annexed hereto as Annexure "A", and the plaintiff craves leave to refer to it as part of the plaint.

In its own Written Statement of Defence, the appellant Board admitted in paragraph 5, the truthfulness and correctness of the above claim by the respondent, accordingly this was not made an issue and the case proceeded on that basis. In their respective evidence, both the General Manager of RTC, Mr Jacob Bushiri (DW1) and Sylvanus Hyera (DW3) (from the Board) confirmed this position that Senior Personnel in the Group Companies are appointed by the boardand then posted to the Group Companies. The Chief Accountant is one of such officers.

A Regarding the relationship between the Boardof Internal Trade
and the Group Companies on the control and disciplining of staff
posted to the Group Companies, this court had the following to say:

> It is true that the appellant Board was the respondent's employer, but this
> B does not necessarily mean that it was his disciplinary authority or even
> the only one. According to the evidence, the appellant Board is the controlling
> and unifying authority for all Regional Trading Companies. To ensure the
> effectiveness of its controlling and unifying role, all Senior Personnel for
> C all Regional Trading Companies were appointed by the appellant Board
> and then after consultations with the relevant Management Boards of the
> Trading Companies, posted them to the Trading Company concerned. Thus
> from that stage, the employee came under the control of the company to
> D which he was posted and according to Mr Hyera (DW3), it was the duty
> of the Regional Trading Companies to interdict and take disciplinary measures
> against employees posted or seconded to them and that this is what happened
> in this case.

E The effect of this judgement is that Holding Companies or Corporations
remain employers of staff posted to Group Companies or Corporations.
In the present case, the whole exercise of the respondent's employment
as General Manager started with a resolution of the 16th Meeting
F of the Board of Directors of the appellant company. At this meeting
it was:

1. **RESOLVED** that Mr E Njau the present quality Control Manager
be and is hereby appointed to the post of General Manager counter
G part with effect from 4 October 1983 with a probationary period of
six months.

2. **ADVISED** that the candidate should be informed by NCI about his
weakness and be advised to improve on his public relations with his
H colleagues and subordinates and avoid cliques and groups.

3. **RESOLVED** that the General Manager counterpart should be sent
on training in order to be exposed to managerial skills.

I

These resolutions and advice were passed at a meeting of the appellant A
Board on 4 October 1983, and from this point in time, the following
sequence of events took place. On 12 November 1983 (more than a
month after the 16th Board Meeting of the appellant), a letter of
appointment was written to the respondent by NCI. The letter Exhibit B
P2 was in the following terms:

> **RE: LETTER OF APPOINTMENT**
>
> Resulting from the deliberations of the 16th Board Meeting held on 4
> October 1983, I am pleased to inform you that it has been decided to C
> appoint you to the position of General Manager Counter-part of the Tanzania
> Pharmaceutical Industries, a subsidiary of this Corporation with effect
> from 1 November 1983. D
>
> Your terms and conditions of services will be as follows:
>
> 1. Your initial salary will be TZS. 4 945 per month (fixed) in the MSU
> 10 scale of TZS. 59 240 per annum.
>
> 2. As General Manager counter-part, you will be in probation for a E
> period of six months after which subject to your work and conduct
> being found satisfactory, you will be confirmed in your position.
>
> 3. All other terms and conditions remain as before and as amended by F
> Scopo from time to time.
>
> I take this opportunity to offer you my sincere congratulations for having
> been selected to take up a key position in the company. I do hope that you
> will keep this honour to the best of your ability and zeal. G
>
> Yours sincerely,
>
> NATIONAL CHEMICAL INDUSTRIES

The respondent then signed at the bottom of the letter his acceptance H
of the terms and conditions in the above letter. The contract of employment
between the respondent and NCI was thus complete. NCI had made
the offer and the respondent had accepted it. Less than two months
later NCI wrote another letter of appointment to the respondent to I

the substantive post of General Manager. This letter Exhibit P3 is dated 6 January 1984:

> **RE: LETTER OF APPOINTMENT**
>
> Further to my letter Ref. Number NCI/1 June 1983 of 12 November 1983, I am pleased to inform you that it has been decided to appoint you to the position of General Manager of the Tanzania Pharmaceutical Industries a subsidiary of the Corporation with effect from 1 January 1984.
>
> Your terms and conditions of service will be as follows:
>
> 1. Your initial salary will be TZS. 5 065 per month MSU 11 scale of TZS. 60 780 per annum.
> 2. You will be on probation for a period of six months after which subject to your work conduct being found satisfactory you will be confirmed in your position.
> 3. All other terms and conditions of service remain as before and as amended from time to time.
> 4. If you accept the above terms and conditions, please sign the enclosed copy of this letter as an indication of your acceptance.
>
> I take this opportunity to offer you my sincere congratulations for having been appointed to the top-most position in the company. I do hope that you will keep this honour to the best of your ability and zeal.
>
> Yours sincerely
>
> NATIONAL CHEMICAL INDUSTRIES

As requested, the respondent signed the letter indicating that he accepted the offer of appointment and the terms and conditions attached to it.

It appears that the respondent successfully completed his probationary period, because on 3 September 1984 NCI wrote him a letter confirming him in his post. This is Exhibit P4:

> **RE: LETTER OF CONFIRMATION**
>
> Further to my letter Ref. Number NCI/1/b/84 and your satisfactory work performance, I am pleased to inform you that it has been decided to confirm

> you in your position as General Manager for the Tanzania Pharmaceutical Industries Ltd. with effect from 1 July 1984.
>
> Your terms and conditions of service will be as follows:
>
> 1. Your initial salary will be TZS. 5 065 per month (fixed) in the MSU 11 Scale of TZS. 60 780 per annum.
> 2. This confirmation is subject to your satisfying the conditions of leadership as outlined in the Arusha Declaration.
> 3. You and your family (wife and children) will be entitled to free medical treatment.
> 4. You will be entitled to 28 days earned leave per annum.
> 5. Termination of appointment will require three months notice on either side or one month's salary *in lieu* of notice.
> 6. All other terms and conditions of service will be in accordance with Scopo directives and the Corporation Code of Regulations as amended from time to time.
>
> I take this opportunity to offer you my sincere congratulations for having been confirmed to the top-most position in the company. I do hope that you will keep this honour to the best of your ability and zeal.
>
> Yours sincerely,
>
> NATIONAL CHEMICAL INDUSTRIES

Although the respondent did not sign this letter indicating his acceptance of the confirmation and the terms and conditions attached, he did not dispute it or that he received it.

All these letters show clearly who between the appellant company and NCI wielded real power over the respondent's employment. The Board of the appellant company at its 16th Meeting on 4 October 1983 purported to appoint the respondent to the post of General Manager with effect from 4 October 1983 i.e. the day of the resolution, but in its letter of appointment Exhibit P2, NCI changed the effective date to 1 November 1983 and set down the terms and conditions of employment. The letter made it clear that the respondent was being appointed General Manager counter-part of the appellant company a subsidiary of NCI.

Yet again in its letter Exhibit P3 NCI appointed the respondent substantive General Manager of the appellant company apparently without reference to the appellant company's Board. Similarly, the respondent's confirmation in his position of General Manager was done without reference to the Board of the appellant company and NCI set down the terms and conditions of this appointment in their letter Exhibit P4 Paragraph 6 of this letter tells it all as to who is the real appointing and employing authority. It states that all other terms and conditions of service will be in accordance with the Scopo directives and the Corporation Code of Regulations as amended from time to time. From this scenario, it is clear that the Board of the appellant company could only recommend to the appointing authority, the Holding Corporation NCI, which then actually appointed the respondent and as it were posted him to the appellant company as its General Manager.

The role of the appellant company ended with recommending the candidate. After this, all the subsequent steps i.e. appointment and confirmation of the candidate were out of its hands. These were done by NCI without reference to the appellant company. If Mr Ngalo's submission that the appellant's Board of Directors was the only lawful and proper authority to appoint the respondent, and that NCI was incompetent to do so is correct, then the conclusion that the respondent's confirmation which was made by NCI without reference to the appellant was incompetent becomes inescapable. If this is so, then the obvious further conclusion is that the respondent had never been confirmed in his position as General Manager with all the ugly consequence. It is for this reason that we think with respect that the finding of the trial judge on issue one is surprising. Perhaps this is so because she made this finding without analyzing the evidence and the contents of the letters in Exhibits P2-P4. This is what she said in connection with this issue:

> The reply to issue one has to be affirmative because although the headed paper used for correspondence is that of National Chemical Industries Ltd., the resolution of the defendant's company's Board Members on the appointment of the plaintiff Exhibits P3 and P4 and the confirmation letter Exhibit P4 state clearly that the plaintiff was employed by the defendant as a General Manager. In the said employment documents there is no mention of the National Chemical Industries Ltd. save for their letter heads.

The underlined sentences show the factual errors in which the trial judge fell, for the two letters say nothing of the sort. But the more serious factual error was the judge's assumption that the confirmation in Exhibit P4 was made by the appellant when in fact it was made by NCI without consulting the appellant. The respondent also fell into the same error but on his part perhaps deliberately. He told the trial court:

> Exhibits P2 to P4 have letter heads reading "National Chemical Industries" but I was not appointed by NCI. I was appointed by the defendant's Board. The General Manager of NCI was the Chairman of the defendant so he used the letter heads of NCI, his office. I was never employed by NCI.

We do not know with what seriousness the respondent uttered these words, because the contents of these letters are very clear, namely, that the respondent was being appointed General Manager of one of the subsidiaries of NCI. If the respondent is denying that he was appointed by NCI but by the Board of the appellant at its 16th Meeting, then as we have already stated, he must also say that his confirmation which was made by NCI without reference to the appellant company is illegitimate: It was therefore not just the use of NCI letter heads but that NCI had the authority and legitimacy to do what it did as a Holding Company.

Accordingly, we are satisfied for the above reasons that like the respondent in the case of the Board of Internal Trade referred to earlier in this judgement, the respondent in this case was on the evidence, also appointed and employed by the Holding Company, namely, NCI. The contract of service as is evidenced by the letters of appointment and confirmation were between the respondent and NCI not the appellant company.

We now turn our attention to the second and third points or issues apparent from the Memorandum of Appeal namely whether the respondent's transfer to Keko Pharmaceutical Industries was unlawful in that it constituted a breach of the contract of service. This is in relation to grounds two and three of the Memorandum of Appeal. In paragraph six of the plaint, the respondent stated that the purported transfer and removal of the plaintiff from his present employment was unlawful and constituted a breach of the contract of employment between the plaintiff and the defendant.

The appellant denied this in its Written Statement of Defence stating:

> The contents of paragraph 5 and 6 of the amended plaint are denied in so far as they allege unlawful transfer and removal of the plaintiff from the defendant's factory. The defendant states that it is not in breach of any contract of employment with the plaintiff and puts the plaintiff to strict proof.
>
> The defendant further states that the services of the plaintiff had been dispensed with the consent of the plaintiff who had accepted the appointment of General Manager of KPI.

In this connection, Mr Ngalo submitted that since the only competent authority to appoint the respondent was the appellant company, then NCI had no authority to transfer the respondent from the appellant company, and that therefore the purported transfer of the respondent by NCI was unlawful and incompetent for being a breach of the respondent's contract of service with the appellant. The learned judge agreed with him and stated:

> With regards issue four, the answer is positive in that the plaintiff had a contract of employment with the defendant as a General Manager which agreement the defendant breached by conniving to the transfer in dispute well knowing that the plaintiff had never been employed by Keko Pharmaceutical

> Industries Ltd. As per the minutes, Exhibit P1, the defendant employed the plaintiff as their General Manager. There is no provision for transfer in the employment letters Exhibits P2-P4. To control executive abuse of power, the terms of appointment and services as per Exhibits P2 to P4 should have been adhered to particularly Exhibit P4 which states:
>
> Termination of appointment will require three months notice on either side or one month's salary *in lieu* of notice.

We would like to state even in passing that all the letters P2 to P4 referred to by the trial judge as constituting the contract of employment between the respondent and the appellant company have nothing to do with the appellant company. They were not even copied to the appellant company. They are communications between NCI and the respondent in which NCI set down the terms and conditions of employment of the respondent. Exhibit P1 only contained a resolution by the appellant to employ the respondent, it is therefore not clear how this can be regarded as a letter of appointment. The respondent could not sue on that resolution. He could only sue on the letters of appointment Exhibit P2-P4 which are between him and NCI. The trial judge said there is no provision for transfers in Exhibts P2-P4. This is surprising, the power and right to transfer an employee is implicit in the act of employment, in any case, many other things were not put in Exhibits P2 to P4 such as payment of fringe benefits, did the respondent refuse to accept them simply because they were not stated in the letters? However, we have already held that NCI was the appointing and employing authority of the respondent in its capacity as a Holding Corporation for both TPI and KPI. It was NCI which ordered the respondent's transfer to one of its subsidiaries. If this constituted a breach of contract, then that was between it and the respondent. The appellant company cannot be held accountable for the sins of its Holding Company.

The next question then is whether the respondent's transfer to Keko Pharmaceutical Industries constituted a breach of contract of employment. NCI's Managing Director, Michael ole Pareseoi, (DW1) gave detailed reasons why NCI ordered this transfer. These were set out at the beginning of this judgement. These reasons were neatly summarized in the letter of transfer Exhibit P5 that:

> In an effort to improve efficiency in the management of the two Pharmaceutical companies in the NCI Group, and after consultations ...

So, the main object was to improve efficiency in the management of the two pharmaceutical companies, bearing in mind that the respondent had proved highly successful in managing the appellant company. The NCI was entitled as employer to utilize the respondent's high calibre managerial skills to upgrade the performance of its other establishment at KPI. We do not see how this move can be regarded as a breach of contract of employment. In any event, the respondent accepted the order of transfer in his letter Exhibit P6 in which he stated categorically that he accepted the new assignment and that he would report for duty as directed. This was a clear commitment on his part. Following this transfer to KPI and its acceptance by the respondent, the Board of Directors of KPI sat and resolved to accept the appointment of the respondent by way of transfer from Tanzania Pharmaceutical Industries. It was therefore a matter of surprise to us to note the following statement by the respondent in his evidence:

> KPI (Keko Pharmaceutical Industries) did not appoint me their General Manager, and I never applied for the post.

It is revealing that in the same paragraph, the respondent stated that later his appointment as KPI's General Manager was revoked vide letter Exhibit P8. If, as he stated, he had never been appointed KPI General Manager, what was Exhibit P8 revoking? Be that as it may, the respondent never reported at KPI to take up his new assignment. When at the end of six months the respondent had not reported, the KPI management on the directions of the Board of Directors, revoked his appointment, telling him in their letter Exhibit P8 that the post of General Manager at KPI was no longer available to him. At this stage the respondent went to Court to claim damages for breach of contract telling the trial court:

> I considered my removal from defendant company unlawful. My contract of employment was between me and the defendant company who paid all my emoluments. The purported transfer was therefore a breach of contract as that was to force me to take on a new employer without my volition.

The question is, was the respondent removed from the defendant company? The letter Exhibit P5 told him clearly that he was being transferred to Keko Pharmaceutical Industries in the same position of General Manager. He accepted the transfer and undertook to proceed to his new station. But contrary to this undertaking, he refused to go and report at his new duty station. This refusal and change of heart must have been due to the legal advice which he said he sought before deciding whether to proceed to take up his new assignment. He rejected the advice of his employer NCI to report at his new duty station and tackle all his problems real and perceived from there. He said that he had accepted the transfer out of duress. But in our view, unless stated that it is a free transfer i.e. it is open to the employee to proceed or not, every transfer is compulsory and therefore under duress. We have held that NCI were entitled to effect transfers which they considered to be in the best interests of the companies in their groupage In the absence of an undertaking not to transfer a particular employee (and this undertaking would be very rare indeed) a transfer order can never ever constitute a breach of contract of employment. If the respondent acted in this way following the legal advice which he said he had been seeking, then it is a pity that such a brilliant scientist and administrator as the respondent, should have had his career ended in this way.

To summarise then the position is this: The respondent sued a party, the appellant company, which had no contractual relationship with him, he should have sued the company (NCI) which appointed him and with which he had signed a contract of employment. On this basis alone the suit against the appellant company had to fail. If there was any breach of contract, then the person to pay damages, must be the person who breached the contract. The appellant company if given the choice, could not have agreed to release the respondent to another company. It cannot therefore be made liable in damages for someone else's action. But even if the NCI had been sued, the same evidence would have been led and as we have already stated, the respondent's transfer to KPI was lawfully made and therefore could not constitute a breach of contract of employment. The respondent refused to proceed on transfer as he had earlier undertaken to do, he cannot turn round and claim damages for his own acts of insubordination.

For these reasons, we allow the appeal and set aside the judgement and orders of the High Court. We also make an order for costs in favour of the appellant both in this court and in the court below.

BLASS MICHAEL *v.* SAIDI SELEMANI

HIGH COURT OF TANZANIA
AT ARUSHA

(Msoffe, J)

CIVIL REVISION No. 1 OF 1999

(From the ruling of the District Court of Arusha at Arusha, A.A. Shakale, D.M. in Civil Case No. 7 of 1998)

Civil Practice and Procedure – Revisional powers of the High Court under section 79(1) of the Civil Procedure Code 1966 – Application raising matters proper in an appeal – When an application for revision should be made.

In a case between the parties, the learned District Magistrate entered a judgment in default of filing a Written Statement of Defence. The defendant then filed a miscellaneous civil application to set aside the judgment. The advocate for the decree holder then filed a "notice of objection" arguing that the application was misconceived and, in the alternative, that the application was out of time. The District Court overruled

the preliminary objection. The respondent's advocate then filed an application for revision in the High Court raising the same grounds as those he raised in the District Court.

Held: (i) The provisions of section 79(1) of the Civil Procedure Code can be invoked only where the issue is one of jurisdiction, that is, the irregular or non-exercise of jurisdiction, or the illegal assumption of it. The provisions have nothing to do with conclusions of law or fact.

(ii) In this case there was nothing to suggest that there was an irregular exercise or non-exercise of jurisdiction or the illegal assumption of it. The District Magistrate was properly vested with the necessary jurisdiction to deal with the matter before her.

(iii) The High Court will not exercise its revisional powers under the section merely because a Lower Court misapplied the law.

(iv) In the instant case the order by the Subordinate Court was interlocutory and there was no basis for saying that it was "a case decided".

Application dismissed.

Case referred to:

(1) *Matemba v. Yamulinga* [1968] EA 643

Statutory provision referred to:

(I) Civil Procedure Code, 1966, section 79(1), Order VIII, rule 14(1)

Mr. Makange, for the Applicant

Mr. Mughwai ,for the Respondent

RULING

(Dated 25 May 1999)

MSOFFE, J.: This is an application filed under the provisions of section 79(1) of the Civil Procedure Code 1966. The application is supported by an affidavit sworn by Mr Makange learned advocate