

- A and who, from the discovery of new important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for review of judgement to the court which passed the decree or made the order. [emphasis supplied]
- B
- C It is evidently clear from the court's records that the judgment from which the instant application is brought was in respect of court proceedings before the court of the Resident Magistrate, at Moshi and not before the High Court. It is not, therefore, the High Court which passed the decree or made the order and for that reason, the application for review of the order or decree of the court of the Resident Magistrate could not be filed before this court in terms of Order XLII, rule 1 – (1)(a) of the Civil Procedure Code 1966.
- D
- E As a result, the application has to be struck out for being incompetent before this court. Accordingly, I strike out the application with direction that the applicants, if they so wish, may file the application before the competent court and to be heard by a Principal Resident Magistrate with extended jurisdiction. It is so ordered and I make no order for costs.
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PASINETTI ADRIANO v. GI RO GEST LIMITED AND ANOTHER

HIGH COURT OF ZANZIBAR
AT VUGA
(Kannyeye, J.)

CIVIL CASE No. 17 OF 1998

Labour Law - Quantum Meruit - Circumstances under which quantum meruit is payable.

Civil Practice and Procedure - Pleading - Whether courts can make decision on issues not pleaded.

The plaintiff was by written contract employed as Technical Director of Works by the first defendant. On oral instructions by the first defendant, he also worked for the second defendant as manager of a hotel for which he was not paid any wages or any fringe benefits. Two individuals were shareholders and directors of both the first and second defendant companies. The plaintiff's claim against the defendants is that his Contract of Employment was unlawfully terminated by the first defendant, and for payment for services rendered to the second defendant. In his final submissions the defense counsel raised a new issue of non registration of the contract with the first defendant executed in Italy and therefore non-compliance with section 46 of the Labour Act 1997 which provides for attestation by the Labour Office in Zanzibar of the Contract of Employment to give it legal force thereunder.

Held: (i) Termination of the Contract of Employment between the plaintiff and the first defendant was unlawful and in breach of the Contract of Employment;

(ii) In civil cases, the court may decide on those issues which have been raised in the pleadings and not otherwise; thus the question of non-registration of the contract is accordingly rejected for incompetence;

(iii) The plaintiff is entitled to remuneration for his services at the second defendant's hotel on the basis of *quantum meruit*.

A *Judgment for the plaintiff*

Cases referred to:

- (1) *Zalkha Mohamed v. Juma Mazige* [1970] HDC n. 132
- B (2) *Shah v. Patel* [1961] EA 397
- (3) *Hussein Bhanjee v. NIC* [1977] LRT n.26
- (4) *Joseph Marco v. Paschal Rweyemamu* [1971] HCD n. 59
- C (5) *Venance Kiboko v. Meneja Mkuu, ZSTC High Court (Z)* Case Number 7 of 1996 (unreported)
- (6) *Ahmed Said Omar v. Mazsons Hotel Ltd* Civil Appeal Number 41 of 1996 (CA)
- D Statutory provision referred to:
- (1) Civil Procedure Decree, Order XVI, rule 2
- E *Dr Lamwai*, for the Plaintiff

JUDGMENT

(Delivered 18 November 1999)

- F **Kannyonyele, J.:** The plaintiff, one Passinetti Adriano was, by written contract Exhibit P1, employed as Technical Director of works by the first defendant, a limited liability company. In that capacity, his
- G duties constituted supervision or management of construction works at the Reef Village Hotel project at Pwani Mchangani, Zanzibar Island. The project was under construction between 1997 and 1998 if it is not still to date. Salary attached to this employment contract was
- H Italian Lire 2 700 000 per month, plus other fringe benefits. The contract was to last for a minimum of two years effective from 3 May 1997.

- I On 29 May 1998, however, the plaintiff's Contract of Employment was unceremoniously orally terminated by one of the first defendant's

directors, one Mr Fulvio Frigerio. The plaintiff claims (vide plaintiff paragraph 10) that this premature termination of his employment constituted breach of the contract and (therefore) unlawful resulting in loss of earnings amounting to Lire 41.1m or the equivalent of USD 23 480 being salary for one year, leave pay and the value of return air tickets between Zanzibar and Italy. A B

The plaintiff further alleges (plaint paragraph 9) that on instructions by the first defendant, he also worked for the second defendant as manager of the hotel for which he was not paid any wages nor any fringe benefits. The plaintiff does not, however, specify for how long he so worked as manager of the hotel but contends that the plaintiff is entitled to a salary therefore on the basis of *quantum meruit* and that the second defendant be estopped from denying the fact in view of the fact that he never protested against his services *pro tanto*. However, the plaintiff is also silent as to how much salary he is entitled on the said *quantum meruit* basis. In any case, the total claim is assessed at lire 68 970 500 or USD 39 406 per plaintiff paragraph 4 and 10(a) plus 5 and 10(b). C D E

The plaintiff ended up his plaintiff with the usual prayers for any other relief as the court might deem fit, plus costs of and incidental to the suit. F

In their joint statement of defence, the defendants came up with a Preliminary Objection to the suit on an alleged point of law namely, that the plaintiff did not aver that either of the defendants would abide by the other's liability be it severally or jointly together were the suit to succeed in favour of the plaintiff. In the alternative, they prayed that the plaintiff be directed to bring separate suits against either of the defendants. By consent of the parties counsel with leave of the court, however, ruling on the alleged point of law was agreed to be deferred and consolidated with the ultimate judgement of the court after hearing evidence for and or against either of them, as the case may be. G H I

A On the merits of the claims as a whole, the defendants completely
denied the contents of paragraphs 4, 5, 9 and 10 of the plaint, admitted
with qualifications contents of paragraphs 6, 8 and 11 while the rest
B three issues were ultimately agreed as follows:

1. Whether the contract between the plaintiff and the first defendant
was lawfully terminated, and if not, whether the first defendant is
C in breach of the Contract of Employment.
2. Whether there was a Contract of Employment between the plaintiff
and the second defendant, and if so, at whose instance and on what
terms?
3. To what reliefs are the parties entitled?

D The following facts were agreed by the parties' counsel namely, that
the two defendants are separate (and distinct) companies but that
both are managed by one Andrea Novasconi; that there was a Contract
E of Employment between the plaintiff and the first defendant and that
this contract (between the plaintiff and the first defendant) was to
be for a minimum period of two years effective from 3 May 1997.
It was further agreed that under the said contract the plaintiff was
F supposed to be the technical director of works for the first defendant
company and that he was to be paid a monthly salary of Italian Lire
2.7 million to be paid in Italy. It was lastly agreed that the contract
as thus stated was terminated by the first defendant one year after it
G had come into effect, on 29 May 1998.

In his evidence at the trial, the plaintiff started by producing as
an Exhibit (P1) an officially translated version (into English) of the
copy of the contract between himself and the first defendant. And
H he started working as per contract with effect from 3 May 1997. He
went on further to say that the first defendant was both owner and
contractor of the buildings constituting the Coral Reef Village, a
tourist resort with hotel facilities at Pwani Mchangani on the east
I coast of the island of Zanzibar. According to the plaintiff, there was
no manager of the hotel when he took up employment with the first

defendant. Hence in October of that year (1997), the directors of
the first defendant company asked him to manage the hotel as well,
in addition to his (contract) work as technical director of the first
defendant company. According to the plaintiff, however, it was the
second defendant company, managing the hotel (*sic*). The plaintiff
B produced letters Exhibit P2 and P3 by which he contends that the
two brothers, directors of the defendant companies had recognized
him as hotel manager as well. However, his management of the hotel
notwithstanding, the plaintiff says that he was paid no salary, therefore
C inspite of earlier oral discussions and assumed understandings that
he would be paid the same in that respect as well. The plaintiff argues
that this was extra work over and above that in his Contract of Employment
and, therefore, he expected as much extra pay as well. He stated
D that he expected an additional monthly salary of Lire 2 million for
this additional work as manager of the hotel.

The plaintiff further apprised the court that the contract Exhibit
P1 provided for 9 days leave for every four months of service. On
E this basis, he claims he had acquired 15.75 days of leave for the
period between 4 May 1997 and 25 March 1999 which would earn
him some ITL 1 417 500 of leave pay at 90 000 liras a day. He
claims this amount to his credit. However, the plaintiff does not
F liase between this claim and his subsequent assertion by which he
reveals that in March 1998 he went home to Italy on 25 days of
leave for which he was given a one way (non-return) air ticket. He
completed that leave in April 1998 but makes no disclosure of
G commencement nor ending dates thereof.

It was just verbally agreed (with Fulvio Frigerio – one of the
company directors) that I should go for about two or three weeks
leave.

Anyway, he got the single journey ticket on 25 March 1998. We
may therefore assume that it was thereabout that he commenced his
25 days of leave. We probably may also safely count back to find
out for which period were the 25 days of granted leave earned from
I

A at the earlier stated rate of 9 days of leave for every four months of service.

B There was, in the contract Exhibit P1 also a provision for a return air ticket each time the plaintiff went on leave. Hence when in March 1998 he proceeded on 25 days leave he was given an air ticket to Italy. But this was a single journey ticket. The plaintiff said he thought it was because return air tickets issued in Zanzibar were not acceptable in Europe. He therefore expected to get his return air ticket from C Italy. However, although he contacted his employers immediately he completed his leave in April 1998 and asked them for his return air ticket to Zanzibar, his employers always back-pedalled each time asking him to wait until they contacted new investors. He said he D could not prolong his leave any further indefinitely. He therefore bought his own return (one way) air ticket at ITL 1000 300 (about USD 764) and spent another USD 200 with which to renew his work permit.

E Exhibit P1 also provides for two months prior notice as a condition for termination of the contract (article 8). However, he was given no notice nor any prior warning for wrongs committed at work before his employment was terminated on 29 May 1998. The plaintiff said F Exhibit P6 was incompetent to affect the contractual relations as per Exhibit P1 (clause 10.02). If at all, the plaintiff said Exhibit P6 could only affect his oral engagement as manager of the hotel. He emphasized that even if it was true that he had occasioned cash losses G at the hotel which is owned by Ngalawa Ltd., the same could not affect the contractual relations as per Exhibit P1. In any event, he denied any prior admission by him of the purported cash losses at the hotel at least in so far as he was concerned. He only inquired H for details of the alleged losses but never admitted them as I suggested.

I Elaborating in his evidence the plaintiff stated that the two defendant companies are closely related by the fact that some, if not all, shareholders have their shares in both companies but more importantly, is that it was the first defendant company who is not only one of the co-share

A holders but is also the one constructing the second defendant company. Moreover, directors of the two companies are not only the same but also are two Frigerio brothers, Fulvio and Paolo respectively. Hence distinction between the two companies is not very real and for that reason, he could not quite tell for who Fulvio Frigerio was B negotiating with him on the question of salary for his (plaintiff) services as manager of the hotel. He said that the negotiations led to a mutual understanding between them that there was to be salary C for the managerial post at the hotel although they had not yet quite agreed as to what that salary should be although he expected a salary of Lire 2 million per month by virtue of the on going negotiations. The plaintiff claimed he started to work as manager of the hotel in D October 1997 and the same month and the coming November, there were the letters part of whose contents in effect recognized him as manager of the hotel. He went on leave in March, 1998 upon return from which the services were terminated as stated earlier.

E The plaintiff further claimed that despite some demands, payment of salaries as per contract also were not as smooth as they ought to have been. They allegedly accused him of idling in Italy before he returned to Zanzibar after his leave and this notwithstanding that he had always contacted them and demanded for his return air ticket F while in Italy (vide Exhibit P4). It was obvious that their relations had turned sour culminating in termination of his employment on 29 May 1998 which, however, he thought it was for the hotel management only. It was not until he realized the defendants were not willing to G pay him anything nor deal with him in any other manner that he realized it was all over. It is then he contacted his lawyers.

H To summarise his claims, the plaintiff produced as part of his evidence summary sheet with the title "Economical Situation". In it every individual claim is itemized with the amounts due to each as he believes he is entitled to same. Ultimately, the plaintiff also produced the Italian copy of the contract as a sister copy of Exhibit P1 after I it was earlier inadvertently withheld when the English translation

A thereof was produced as Exhibit P1. It is the Italian copy which was executed by the parties in Italy.

There were also references to payments made to his wife in Italy. These include payment of one salary at a monthly rate of ITL 2.7 million on 12 June 1997 and two more salaries of the same amount both made on 24 July 1997. The plaintiff acknowledges these payments and they are, respectively, the first and second items in the Economical Situation Sheet. Indeed there were other payments made through his wife in Italy. The plaintiff acknowledges these as well in the Economical Situation Sheet. Finally, the plaintiff confirmed in a reply to me that they did not introduce the contract agreement Exhibit P1 to the Government here in Zanzibar for the purpose of evading taxation. He said, however, that in so far as he was concerned, he had nothing to do with the non-disclosure of the terms of the contract as per Exhibit P1 in that there was provision in the contract that his salary was to be paid tax-free. So much for the plaintiff's case.

E The defendants had two defence witnesses namely, Mr Seif Omari (DW1 and Mr Paolo Roberto Frigerio (DW2). The latter is an engineer and building contractor in the business name of Ngalawa Limited which owns and runs the hotel business at the Coral Reef Hotel Village. F On the other hand, Seif Omar Said DW1 is as so-called local manager of the second defendant company Ngalawa Ltd in the hotel business. Both the defendant companies have common investors, two brothers, namely Messers Fluvio and Paolo Frigerio. However, Gi-Ro Gest, G the first defendant company was only responsible for the construction of the infrastructure at the hotel village no more.

H Giving his evidence at the trial, Seif DW1 said he knew the plaintiff to be technical director of the first defendant company whose proprietor is Fulvio Frigerio. However, Seif knew the plaintiff to be also manager of the hotel business owned by Paolo Frigerio in the business name of the second defendant company. The plaintiff came to Zanzibar in May 1997, then only as technical director of the first defendant I company. However, Seif DW1 said he was not conversant with the

terms of the employment contract between the plaintiff and his employers except for the fact that the plaintiff started working as technical director from May 1997 and that he was being paid in Italy by the first defendant company. He did not say how he came by the details as to payments of salaries made in Italy were being made by the first defendant company. According to Seif however, in October 1997, the first defendant through its proprietor asked the plaintiff to manage the hotel business as well.

C Seif DW1 said that construction of the hotel village was completed by October 1997 as and when the plaintiff was assigned the hotel management post. Also according to Seif, the plaintiff was assigned to manage the hotel on the same contract terms and salary as was the post of technical director. According to Seif, the plaintiff had two options on completion of construction work. He either had to take up the new assignment as manager of the hotel or, in the alternative, return back home to Italy. These new arrangements, however were only by oral directives by Fulvio Frigerio, owner of the first defendant company. According to DW1, the plaintiff had allegedly agreed with Fulvio on the new assignment, including salary thereof and other contract terms. Seif DW1 said he was not aware of any defaults of payment of salary for the new assignment as hotel manager by the first defendant company.

Seif said the plaintiff managed the hotel from October 1997 up to April 1998 when he allegedly proceeded on leave to Italy. DW1 said he could not comment on anything as listed in the Economic Situation Sheet nor on any payments effected abroad as per Exhibit P7. Later in cross-examination, Seif DW1 said he worked under the plaintiff when the latter was still with the hotel, one as general manager and the other as local manager respectively. He also admitted he never participated in negotiations nor in creation of any of the agreements between the plaintiff and his employers, either in the creation of the technical director post and all that went with it, or the other in respect of management of the hotel. He claimed he came to know

A details or the much he knew of the plaintiff's terms of employment agreements by going through record of the defendant companies available at office. Thus he knew Exhibit P1 provides in paragraph 2.01 for minimum period of two years services with effect from 3
 B May 1997 up to 1999. But he knew of no letter from the defendants to the plaintiff either to terminate his employment in accordance with Exhibit P1 or to transfer him from the employment of the first defendant company to that of the second. But neither has he ever
 C seen any new letter of appointment from the second defendant company to the plaintiff.

But Seif DW1 acknowledged of the existence and contents of Exhibit P3. Thus he confirmed there was still the post and duties of
 D technical director as on 10 November 1997 according to Exhibit P3 and that the plaintiff was thereby still recognized and required in that capacity by the defendant companies. Subsequently a little later, however, the witness shamelessly countermands his own evidence
 E as to that effect. In fact DW1 confessed he had no evidence to offer so as to contradict the plaintiff in terms of his claims as per Economical Situation sheet, his adherence to the shameless countermands notwithstanding.

F In his evidence Paul DW2 said he is a co-share-holder in both defendant companies. The first defendant is a building contractor whereas the second defendant manages the Coral Reef Hotel Village. The first defendant company constructed the infrastructure for the
 G second defendant company. Whereas there is a third share holder in the first defendant company they are only two in the second defendant company, two brothers namely Fulvio Frigerio and Paul Roberto Frigerio who between them have 50% shares each in the second defendant
 H company. Paolo DW2 acknowledged that at one time the plaintiff entered into a Contract of Employment as per Exhibit P1 with the first defendant company for the construction of the second defendant's infrastructure. Both the Frigerio brothers signed the contract Exhibit
 I P1 on the one hand, and the plaintiff on the other, executed at Milan

in Italy. Although he had acknowledged Exhibit P1 and the *modus operandi* ensuing therefrom he could not say when exactly the plaintiff
 A started and or ceased to work for the first defendant as per Exhibit P1. After march last year (1998) the plaintiff was allegedly required
 B to return home to Italy because there were no more construction work at the Coral Reef Hotel Village.

Paolo DW2 said there were no employment relations between the plaintiff and the second defendant company. However, he acknowledged the contents and effect of Exhibit P3 in relation to
 C the plaintiff's employment contract especially to the extent that it required the plaintiff to continue with maintenance work at the Coral Reef Village. The witness said he never saw the plaintiff again since
 D he left his employment at the Coral Reef Hotel Village. He also was not aware if the plaintiff ever met with Fulvio while he was on leave in Italy. However, he was aware that the plaintiff had not taken
 all of his last salary.

Paulo also claimed that the plaintiff had stolen some money
 E from a safe of the hotel and said this was enough to terminate his employment according to article 6.01 of the contract Exhibit P1 but subject to prior notice of no fixed time. As regards to holidays,
 F Paolo DW2 claimed that he had come over to Zanzibar, with agreement with the plaintiff, his wife at the defendants expenses and that this he said substituted any leave claims that might be due to the plaintiff.
 G In the alternative, he said the plaintiff should first pay them his wife's hotel expenses and likewise they will pay him over his leave entitlements.

When cross-examined, Paolo denied he was also a director but only shareholder of the first defendant company. He appraised the
 H court that the plaintiff worked with the first defendant company exactly between and from 19 May 1997 to 19 March 1998 inclusively. He also confirmed that for his period of service with the first defendant
 I company the plaintiff was entitled to a total salary of ITL 29.7 million as per the Economical Situation Sheet. However, he said he had no evidence to offer in a documentary form to prove that the plaintiff

A was in fact paid so much of the salary as was due to him. Instead he admitted it was true the plaintiff had received only ITL 23.9 million salary paid either directly to himself or through his wife in Italy. Hence the deficit of ITL 5.8 million and now due to the plaintiff
 B was acknowledged albeit with deductions. He claimed there was to be deducted from the plaintiff's salary of some USD 2548 which he said was an equivalent of ITL 4.4 million being the sum the plaintiff had allegedly lost from the safe of the hotel as allegedly earlier
 C admitted by him in a letter written to the defendants. At the insistence of the court, the letter was subsequently produced as part of evidence herefore (vide Exhibit D1 and 2) although it had allegedly been handed to their counsel for that purpose. In another stance, however, Paolo said the plaintiff was merely making inquiries (about the alleged losses) through the said letter.
 D

Elsewhere the witness DW2 purported not to know why messages like Exhibit P 2 and 3 were routed through the plaintiff who was a mere technical director for construction and had nothing to do with management of the hotel about which those letters dealt with. Yet in another instance, Paolo claimed that such letters were routed through, and other hotel workers (e.g. Hilario) required report to the plaintiff
 F only allegedly because Gi-Ro Gest for whom the plaintiff was working was spending money from Ngalawa (second defendant) resources and income. Also, he acknowledged one Ms. Passinetti, the plaintiff's wife, having come to work at the hotel's kitchen on about two or three different phases although he does not know of what exact duration thereof severally or all cumulatively together. Mr Paolo DW2 appraised the court that during her stay in Zanzibar, the plaintiff's wife stayed at the hotel rendering free services *in lieu* of her stay in the hotel free of any charges. Yet, he said they decided to deduct the plaintiff's
 G unpaid salaries being expenses for his wife's accommodation at the hotel on one of the occasions she stayed there.
 H

I At another stage, the witness admitted that one Andrea Novasconi who came to work as manager of the hotel started so to work in the

absence of the plaintiff while the latter was away in Italy. However, he denied Fulvio was in Zanzibar and had the key for the security while the plaintiff was away in Italy. B "If it is true that Fulvio was in Zanzibar at the Coral Reef Hotel Village during the plaintiff's absence there, then it is possible that he (Fulvio) had the key for the security room with him", he said. Paolo suspected signature of the addressor in Exhibit P6(a) could be Fluvio's as it is presumed. He doubted if it is. (Exhibit P6 is the one which for the first time talks of heavy financial losses caused by the plaintiff at the hotel and goes on to terminate the plaintiff's employment with Gi-Ro Gest because of those losses). Paolo also admitted that the plaintiff was entitled to ITL 90 000 per day of leave entitlement.
 C

I would in the first place, like to begin with the Preliminary Objection to the suit on an alleged preliminary point of law raised by the defendants paragraph of their joint written statement of defence. The defendants have alleged that the plaint does not disclose an averment that the one defendant would abide by the other's liability either severally and or jointly together should the plaintiff succeed in the suit. They pleaded in the alternative that the plaintiff should be directed to file separate suits against the defendants. In essence, this is a plea of either mis-joinder or non-joinder of parties in a suit and the defendants would want to see a remedial measure although they do not say so in quite clear terms.
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In my understanding, it is Order XVI, rule 2 of The Civil Procedure Decree, in *pari materia* to Order 14, rule 2 of the Indian Code of Civil Procedure before it was substituted by Amendment Act 1976, which gives power to the court to deal with an issue in a case as a preliminary issue of law. The rule provides as follows, namely:
 G

Where issues both of law and of fact arise in the same suit; and the court is of opinion that the case or any part thereof may be disposed of on the issue of law only, it shall try those issues first, and for that purposes may if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.
 H
 I

A In my opinion, issues of law are raised in pleadings as preliminary points to be determined with the object that they should be disposed of first before the suit proceeds to be determined on the merits of its factual issues. It is thereby intended that when and if an objection
 B to the suit is allowed upon determination of the issue of law, either the suit collapses as a whole or else the particular issue of law is thus determined once and for all and it shall not be open in future to re-open any further arguments on it in that case. Thus for example,
 C a party may raise that the suit is unsustainable on account of limitation or lack of cause of action or complete lack of jurisdiction by the court. If the issue is determined and the objection as to that effect is ultimately allowed, then in relation to that court, the suit is determined
 D once and for all. That is to say, the suit will be finally disposed of on the issue of law as raised in the Preliminary Objection and unless such an issue is not finally conclusive of the whole case, that would normally be the end of the matter.

E In this case the issue raised in the Preliminary Objection is as indicated earlier, either it is mis-joinder or non-joinder of parties. I respectfully concur with Dr Lamwai, learned advocate for the plaintiff, that the issue cannot and could not be finally disposed of as a preliminary
 F point of law. If anything, mis-joinder or non-joinder of parties, as the case may be, constitutes both issue of law as well as issues of fact. It needs to hear the evidence on the matter so as to appreciate whether or not there is indeed mis-joinder or non-joinder of the
 G parties and this could not be properly dealt with as a preliminary point of law. It was therefore just proper that it was agreed to defer determination on the objection raised purportedly on a point of law so that the same could be dealt with together in the final judgment of the case. I now hold that the objection was unsustainable in the
 H circumstances of this case and the same is hereby accordingly overruled.

I Next, I wish to point out here at the outset, that if cogency of testimonies and veracity of witnesses were the only criteria to be considered in determining cases, then I would straightaway here and

now state that the plaintiff has won the suit at least by about seventy
 A five per cent of the arguments if not the issues to be determined by the court. To a greater extent the plaintiff succeeded in convincing
 B the court as to how the contract between the parties (Exhibit P1) was executed in Italy and as to what extent it bound who among the
 C litigants in this case. *A fortiori* he also succeeded in leading as much convincing evidence showing how as between them were the defendants related to each other both the form of natural persons of the major
 D players or participants involved in the conflict and also the legal persons implicated in this suit.

Quite pertinently, the plaintiff appeared to be more truthful in his words such that even when and where he floundered in his answers, he appeared more natural and genuine and, therefore, equally more
 D convincing. Take production of the original (Italian) version of the contract Exhibit P1 for example, it was not produced early in time when it should. Only the translated English copy thereof was produced
 E (on 4 December 1998). When he was later accosted to comment on the omission, the plaintiff (PW1) appeared genuinely confused to state why it was not. He thought he had handed it over to his counsel
 F for use as potential evidence in the case and he believed it was lying somewhere either in the counsel's file or among the documents already presented to the court (as one of the appendices to the pleadings)
 G with a view to its ultimate production as an exhibit herein. Otherwise, he said he did not know where it was lying among his possessions and why it was inadvertently left behind if indeed he had not already
 H handed it over to his counsel. I believed him *pro tanto*, his demeanour taken into account. In fact the original copy of the contract executed in Italian was left behind at home in Italy, his counsel having apparently
 I been contented with the English version thereof whose production was not even contested by the defence counsel albeit not signed by his clients. Surprisingly, however, production of the signed original document was by the defence counsel contested not until the court overruled the objection and ordered for its production. In conclusion, therefore, I would simply say, that the plaintiff appeared to be more

A genuine and as much truthful in his evidence. For that reason, he was more convincing and captivating to the court.

In contrast to the foregoing, most of the defence evidence, both by Seif DW1 as well as that by Paolo DW2, appeared to be much of a make-shift and, for that reason less convincing. Moreover, even the witnesses themselves appeared to be apparently less informed of the requisite details and in a number of instances they admitted as to that effect. In essence, these witnesses appeared to be more strangers in the dispute. Hence their lack of the much needed compelling will power and cogency of most of the matters they averred.

Now, we saw that the first issue is whether the contract between the plaintiff and the first defendant was lawfully terminated and if not whether the first defendant is in breach of the contract. First of all I wish to express the view that the manner in which this issue was framed is repetitive and, therefore, superfluous. In my opinion, if a party to a contract unlawfully terminates the contract he is automatically in breach of that contract. *A fortiori* and to put it affirmatively and more meaningfully in the manner the issue was framed, the contract was lawfully terminated by the first defendant he cannot at the same time be considered to have been in breach of that contract as it is being questioned. For he will have acted lawfully after all and, therefore, free from any blemish, legally. Or was the second part of the issue aimed at addressing the question as to whom exactly was responsible for the unlawful breach of the contract when and if it is held that it was? Perhaps. Be that as it may, I will now address my mind to answering the twin issues as it ought to be.

As will be recalled from the evidence, article 8 of the contract Exhibit P1 was cited as providing for two months prior notice before termination of the contract can be effected. According to the English version of the contract Exhibit P1, the substance of which was uncontested by the parties during the trial, article (8) provides as follows:

8 Recess From The Contract. Each party can withdraw from the contract at any time, giving to the other, two months notice.

(May be there is the word "by" between the words "time", and "giving" below where I have marked with an asterisk. However, this is not quite clear from the exhibit itself due to inking by a rubber-stamp. At any rate, I am satisfied the true intent of the article can be deduced and easily understood). There is also article 6 of the agreement Exhibit P1 It provides:

6. Anticipated Resolution of The Contract

6.01 The conclusion of the work to which the employee is assigned and also to the fact that the duties entrusted to the employee are no longer considered necessary will constitute, through previous notice, a justified reason to cancel the terms of the contract.

6.02 The company can terminate the present contract even before the expiry term, as for example, in the following cases: (The particular instances and then particularized in paragraphs (s) to (j)).

Reading the two articles closely together, it is my opinion that article 8 anticipates those situations where a party to the contract of his own accord decides to withdraw from the contract for any reason whatsoever, negative or positive. It is the party himself who, for his own reason, on his own opts to step aside from the contract. He will be permitted to do so provided he gives two months prior notice to the other remaining party or parties, as the case may be. In such case, the party withdrawing from the contract is not kicked out by the others. It is himself who opts to step aside from it.

In this case, the plaintiff nor any other party, did not of his own opt to step aside from the contract. Rather, the plaintiff was pushed out from it against his will. Hence, assuming that my interpretation of article 8 above is correct as I believe that it is, then that article cannot apply in the circumstances of this case. It is for that reason accordingly ruled out.

Article 6.01 on the other hand, anticipates those situations where the contract is determined due to completion of the work for which the employee, in this case the plaintiff, was first employed. Hence,

A determination of the contract can only come about only if the work for which one was employed is no more, any case, it must be preceded by prior notice. It is not stated how long the notice should be. However, judging from the spirit of article 8 discussed above, is just reasonable to assume that here also the parties had in mind two months notice. B It is held accordingly. However, it is important that completion or anticipated completion of the work precedes the issue of the notice. It is a condition precedent to issuing of the notice. If there is still work and or its completion is not within the foreseeable future, a notice would be incompetent. In this case, the evidence as materially uncontested indicates that termination of the plaintiff's employment was not proceeded by any prior notice as provided under article 6.01 of the work agreement. Moreover, the sentence: C

D It is essential that the bedroom next to the office should be usable and occupied by Ilario and Peter reading in Exhibit P2 but particularly the other.

E For Adriano: to start work in the villa number 13. To paint all bedrooms which show fungus, to start all maintenance general works eventually engaging daily new personnel found at page 2.

F Exhibit 2 and Exhibit P3 indicate that as of the time those letters were written on 31 October 1997 and 10 November 1997 respectively, there was still construction work for which the plaintiff was employed as a technical director.

G But, by those very letters namely, Exhibit P2 and P3, the plaintiff was being asked or rather instructed to supervise operations of the hotel. For example, Exhibit P2 addressed to Mr Adriano reads in part:

H Mr Adriano on 2 November 1997 with this letter, Peter and Ilario are arriving in the village to help you in management of the hotel

Peter will attend the customers and Ilario the reception.

I We have received some complaints for the quantity of food, which must always be plentiful, and for the change of linen, towels in the bedroom.

This is as clear as it is that the plaintiff was already managing operations of the hotel and Peter and Ilario were arriving merely to assist him in this work at the hotel, the one in attending to customers and the other at the reception. However, his management of hotel operations notwithstanding, the plaintiff was still the technical director. Hence the directives that he should start work at the villa number 13, paint the bedrooms and start general maintenance. What is clear from this is that although he was now managing the hotel operations over and above Peter and Ilario, the plaintiff had not relinquished his original work as technical director. It is therefore not correct to say that plaintiff took up management of the hotel because there was no more construction work to be done nor that he had since abandoned his post as technical director. Evidence available in the record simply does not support these claims. D

We revert to article 6 of the Contract of Employment as per Exhibit P1. Defence counsel argued in his final submissions that since article 6.01 is silent on the period of notice, then even one day notice would suffice. With due respect, this is unsustainable for two reasons. Not only is the suggestion unreasonable but there is also practically no evidence at all even to suggest much less to show that even the said one day's notice was given to the plaintiff before article 6.01 of the contract Exhibit P1 was implemented. Hence article 6.0 does not apply here for want of prior notice being issued to the plaintiff. Article 6.01 of the agreement is accordingly ruled out. F

G Article 6.02 of the agreement as per Exhibit P1 presupposes proof of or at least the laying of clear charges against the employee mentioning those vices as are listed in paragraphs 9(a) to (j) of the article. In this case, no such vices had been proved against the plaintiff. Yes, there were the allegations mentioning loss of funds at the hotel being leveled against the plaintiff. No charges much less clear charges had been laid against the plaintiff neither in any criminal court nor adequate disciplinary charges in that regard. Even when the plaintiff tried to make inquiries on the alleged loss of funds, he got no reply I

A to clarify the claims as he had requested. He got dismissed instead and so against the rules of natural justice. But if for the alleged loss of funds at the hotel, it was incompetent for two reasons. First, misconduct by the plaintiff while in the discharge of duties of and
 B at the hotel (hence in the employment of the second defendant company cannot competently be ground for terminating his employment with the first defendant company in terms of the contract Exhibit P1 because the second defendant who runs the hotel is no party to that contract
 C notwithstanding that the two Frigerio brothers who as directors of the first defendant, are signatories thereto on behalf of the employer (First defendant) are interested parties in the affairs of the hotel managed by the second defendant company being the sole shareholders thereof. Secondly, the plaintiff was entitled to be heard before he
 D was fired from his work not only as technical director as per contract but also for the hotel management post in which his services had already been recognized at least by conduct.

E In relation to the alleged loss of hotel funds, however, not only are the allegations weak for the aforementioned reasons alone; the source of such allegations is also dubious. I have in mind the evidence of Paolo DW2. Exhibit P6 which makes the first claims alleging
 F loss of funds of a doubtful origin. There was also the possibility that someone whose true identity is not quite revealed by the evidence could have had an access to the safe keys in the absence of the plaintiff as the latter was away in Italy. Who that someone could be is not easy to establish by the evidence available. Whereas Seif DW1 is
 G not quite a reliable witness in this regard due to the fact that much of his evidence is reported information (hence hearsay evidence) acquired from his reading of the office records as he stated himself. Paolo DW2 on the other hand clearly stated he suspected the letter
 H Exhibit P6 was authored by Fulvio Frigerio indeed as the same is purported to be signed by him. In particular Paolo suspected the signature appearing there at the same time doubting if Fluvio could have been in Zanzibar indeed at the time when that letter was authored.
 I On the other hand, is conceded that another Andrea Novasconi who

replaced the plaintiff in managing hotel operations started to work A in that capacity in the absence of the plaintiff. That means that there was no handing over of the hotel's operations between the plaintiff and Andrea Novasconi. When therefore it is conceded that someone B had had an access to the hotel's safe key in the absence of the plaintiff there at the hotel, when also it is not clearly established who is that somebody who had such access to the key in the absence of the C plaintiff, whether Andrea Novasconi or Fulvio Frigerio. The alleged loss of funds cannot with certainty be leveled against the plaintiff. In any case, he should not, under the rules of natural justice, be D condemned unheard, neither criminally nor disciplinarily as is intended here. By the way, is it not possible in the circumstances that the letter Exhibit P6 whose originating signatory is now doubted by Paolo DW2 and which alleges loss of massive funds for the first time is E nothing but a forgery? If it be a forgery as is now doubted by DW2, by who and for what purpose could it have been so forged? In any case, would the circumstances thus obtaining in relation to the alleged F loss of hotel funds justify condemning the plaintiff unheard to the extent of terminating his employment in the manner as proposed by the defendants here? I think not, at least not in accordance with the G law. Hence the first leg of the first issue in the series is answered in the negative. That is to say, termination of the Contract of Employment H between the plaintiff and the first defendant company was, in the obtaining circumstances as revealed by the evidence as accepted by the court, unlawful. I

As regards to the second leg of the first issue, both Paolo DW2 and Seif DW1 came to testify as defence witnesses in the interests of the two defendant companies in this case. They both maintained that the defendant was properly terminated from the services, not only as hotel manager for the second defendant company but also H as technical director of the first defendant company in terms of the contract Exhibit P1. None of them, namely, neither Seif DW1 nor Paolo DW2 disclaimed or disowned the letter Exhibit P6 and D1 I (B). These were, respectively the letter alleging loss of funds and

A purporting to invoke article 10.02 of the contract Exhibit P1 on the one hand, and the plaintiff's response thereto in which he inquires for details of the alleged loss of funds on the other. That notwithstanding, the two defence witnesses also affirmed the plaintiff's purported oral termination of his services with either of the two defendant companies. However, I have, I think, sufficiently demonstrated how unlawful the purported termination of the plaintiffs services both as manager of the hotel but with the first defendant company in particular.

C It follows, therefore, that the second leg of the first issue is answered affirmatively namely, that the first defendant company is in breach of the Contract of Employment as per Exhibit P1.

I note with disappointment that at the end of his final submissions, defending counsel raised a new issue of non-registration of the contract executed in Italy and therefore non-compliance with section 46 of the Labour Act 1997 which provides for attestation by the Labour Office in Zanzibar of the Contract of Employment to give it legal force thereunder. I say "with disappointment" because it is stale law that in civil cases, the court may only decide on those issues which have been raised in the pleadings and not otherwise: Order VI, rule 7 of the Civil Procedure Decree (q.v.) hence it was held in *Zalkha Mohamed v. Juma Mazige* (1) (Seaton, J. as he was citing *Shah v. Pate* (2) (slightly paraphrased) thus:

The whole object of pleading is to bring the parties to an issue, and the meaning of the rules is to prevent the issues being enlarged which would prevent either party from knowing when the cause of action came on for trial, what is the real point to be discussed and decided ... [I]t is for the (party) to plead the (issue or fact) ... (so as to give the other party) an opportunity ... to call evidence (thereon) ... [I]t was too late to rely on in final address when evidence had been closed.

In another case: *Hussein Bhanjee v. NIC* (3) (as per Mustafa, Ag VP) the Court of Appeal held:

[T]he question whether the appellant was entitled to the value of the lorry never became an issue in the pleading or in the trial itself, nor was it

canvassed or left to the judge for decision. A last minute attempt by (counsel ... to include such an issue was rejected (on appeal) ...

In yet another case: *Joseph Marco v. Paschal Rweyemamu* (4) Mfalila, J. (as he then was) was more pertinent when he held that:

In civil cases, it was extremely important for a trial court to limit its findings to the issues as revealed by the state of the pleadings, and no party should be allowed to go outside his pleadings ... Order VI, rule 7. The purpose ... is to prevent parties from introducing new matters without giving adequate time to the opposite party to answer. Pleadings are meant to clarify and identify the areas of dispute between the parties. The way each side is afforded sufficient opportunity to prepare its case on the point in dispute

This question of attestation of the contract under the labour law introduced so late in final submissions by counsel after close of evidence by the parties is rejected for consideration here, because it is incompetent when and as it comes in this case. We can never tell what the plaintiff would have said in reply to it. He might have had sufficient and quite convincing evidence to defeat it only if he was afforded with the necessary opportunity to prepare his defence there against. Regard is particularly had in mind to his evidence that when the defendants dragged their feet, he had to spend his own money (USD 200) in order to renew his work permit for his continued residence in Zanzibar in honour of the contract Exhibit P1. He probably would not have done this if he was privy to the concealment of the contract and therefore its (alleged) non-registration under the Zanzibar Law. It is therefore emphasized that the question of non-registration of the contract thus lately raised in final submissions by defence counsel is accordingly rejected for incompetence.

I will now turn to the second issue: whether there was a Contract of Employment between the plaintiff and the second defendant, and if so, at whose instance and on what terms. According to the plaintiff, they were still negotiating the terms of this contract, particularly regarding salary, when their relations turned sour. However, according

A to his evidence, it was directors of "my company" who asked him to
 B manage the hotel as well. According to the contract, Exhibit P1,
 "my company" in this sense should mean the first defendant company,
 and therefore directors of the first defendant company who, according
 C to the plaintiff asked him to manage the hotel. However, according
 to that same evidence, directors of the first defendant company are
 the two Frigerio brothers, Fulvio and Paolo respectively. Paolo, DW2
 D conceded that both he and his brother Fulvio were directors of the
 first defendant company. He also conceded that they both signed
 the contract, Exhibit P1 on the one hand and the plaintiff on the
 other definitely as employee according to that contract. On the other
 E hand, whereas the plaintiff stated that the two Frigerio brothers are
 joint shareholders in both defendant companies, Paolo DW2 said
 this was not correct. According to Paolo DW2, he and his brother
 Fulvio each has 50% of the shares in the second defendant company
 and are the sole proprietors thereof. In the first defendant company,
 F however, he said that while he (Paolo) bought one per cent of the
 shares there, Fulvio his brother has none. Paolo said another John
 Fanko Marte also has one per cent shares in the first defendant and
 that the rest of the shares there are held by an Overseas United Trust.
 G However, Paolo does not know whether or not his brother Fulvio
 has any shares in the said Overseas United Trust. As regards to directorship
 of the two defendant companies, Paolo said he was not a director of
 the second defendant company himself. Meanwhile, the letter Exhibit
 P2 was signed by Fulvio while Exhibit P3 was signed jointly by Fulvio
 and another Andreas. These are the letters which the plaintiff contends
 and earlier accepted herein above that they contain evidence of directors
 of the two defendant companies recognizing the plaintiff as manager
 of the hotel effective from October, 1997.

H It will be found from this analysis that the relationship of the
 two companies between themselves, their shareholders and their directors
 or managers generally is so complex such that one may not easily
 I discern their boundaries. Whether this is by design or by sheer accident
 is anyone's guess and that is not what I am required to canvass here.

Complex as it may be, what is clear is that in relation to the first A
 defendant company, the two Frigerio brothers, Fulvio and Paolo are
 co-directors thereof and, in relation to the second defendant company,
 they are joint but sole shareholders at parity, each with fifty per B
 cent of the total shares thereof. Hence where they acted jointly together
 in relation to the affairs of the first defendant company, it would
 seem they were doing so in their capacity as directors of that company
 and, in relation to the second defendant company, it seems likely
 C that they were acting in their respective capacities as shareholders,
 in each case either in their joint positions as such or severally, as
 the case maybe. But what of the companies inter-relationship in
 connection with such dealings? What would be the legal effect of
 such actions where and when they affect either of them one way or D
 the other, or those whom they deal with when and if these actions
 affect both companies? Where does one draw the line of demarcation
 to say this is in the legal province of one and that is not, both the
 individual natural persons performing those actions and the respective
 E individual companies affected by the actions of those natural persons?
A fortiori how does a third party as was the plaintiff here make the
 distinction? I bet it is not easy. And that the position the plaintiff
 found himself in when he dealt with the defendants and the natural
 F persons connected with them either as shareholders and or actions
 giving rise to the dispute must be allocated one way or the other so
 that in the end legal remedy, if any, may also be possible to allocate
 to whoever is ultimately considered as liable therefore whether by
 G himself alone or jointly together with the other. I shall now attempt
 to do this on the balance of probabilities and the preponderance of
 the evidence in relation to the second of the issues in the series.

H I am satisfied with the evidence as it obtains that Paolo DW2
 and his brother Fulvio are sole proprietors of the second defendant
 company each with fifty per cent of the shares therein. I am also
 satisfied, at least on the balance of probabilities, that both Paolo
 DW2 and Fulvio, his brother are joint directors of the first defendant
 I company whereas full membership of directorship in the second

A defendant company has not been fully established by the evidence available just as much as has not full ownership of the shares in the first defendant company, is therefore possible, going by the evidence in record, that Paolo DW2 is not but only Fulvio is director in the second defendant company but these cannot as facts be ascertained by the evidence available in the record. Likewise, it is possible that Fulvio has no shares in the first defendant company but he possibly may be having his shares in the Overseas United Trust which in turn is the majority shareholder in the first defendant company. However, this also cannot be ascertained by the evidence available on record. So also is the exactitude of the influence which either Paolo and or Fulvio as such natural persons can exercise in either of the two defendant companies. This also cannot be ascertained by the evidence available in record albeit it is abundantly clear that both of them had a certain amount of influence in either of the two companies. It is only the exactitude of such influence which cannot be ascertained by the evidence available.

E On these premises, one can hold with impunity, I think, that the plaintiff was entitled to assume that both Paolo DW2 and his brother Fulvio had and could speak with equal force and authority in the affairs of the two defendant companies and further that any deal struck with either of them severally or jointly together would equally bind either of the two defendant companies. Which is why I hold that in the circumstances of this case, then whoever the plaintiff discussed with concerning his appointment as manager of the hotel, be it Paolo or Fulvio, the same had the full impact of convincing the plaintiff that he was dealing with the right authority regarding the affairs of the second defendant company in the same way as both or either of them were/was a party to the contract Exhibit P1, formally hold accordingly.

I But were there any such discussions indeed between the plaintiff with either Paolo and or Fulvio (severally or jointly together) which were designed to engage the plaintiff as manager of the hotel? There

A may be scant direct evidence with which to answer this question in the affirmative. It is only the plaintiff who claims there were such discussions or negotiations except that they had not quite agreed on the terms but the salary in particular. The defence, however, seems to deny this either expressly so or by inference. In this respect the learned defence counsel submitted that the plaintiff's acceptance of extra work against his contract with the first defendant and so without any more ado should be interpreted to mean that either he had agreed to work for the second defendant on the same but only salary as he earned from the first defendant or that he had displayed an obvious agreement to substitute a new contract for the former one, or to rescind same or to alter it.

D The learned counsel advanced these theories arguing that there was no evidence with which even to infer the existence of a Contract of Employment between the plaintiff and the second defendant. To support the validity of his argument the learned defence counsel cited section 62 of the Contract Decree which prescribes what is known as the principle of novation in contract. In reply, Dr Lamwai for the plaintiff argued that the principle of novation cannot apply in this case because, he said, there is no evidence of discharge of the former party to the contract Exhibit P1 nor is there any evidence of taking over by the second defendant the duties of the first defendant. To support his argument, learned counsel for the plaintiff Dr Lamwai cited paragraphs 460 and 464 of **Halsburys Laws of England**, Volume 8 (ed) (Sin at pages 262 and 265 respectively to support his arguments on the principle of novation. Other than **Halsburys Laws of England** (which I have not been able to refer to due to the poor state of the library in this High Court) other authorities have also defined "novation" to mean:

H ... a generic term which signifies that there being a contract in existence some new contract is substituted for it, either between the same parties or between different parties; the consideration mutually being the discharge of the old contract. In particular, however, it denotes the rescission of

A one contract and the substitution of another in which the same acts are performed by different parties ... "**Chitty on Contracts (General principles)**, (22 ed) (1961) at paragraph 949 on page 421.

B Earlier on, the author emphasized at paragraph 946 on page 419 that:

B Novation takes place where the two contracting parties agree that a third shall stand in the relation or either of them to the other. It is a new contract and therefore essential that the consent of all parties shall be obtained, and in this necessity for consent lies the essential difference between
C novation and assignment ...

D Some thirty years later, Cheshire, Fiffot and Furmston in the **Law of Contract**, (12 ed) (1991) at page 518 retain the essential of the definition for novation thus:

Novation is a transaction by which, with consent of all the parties concerned, a new contract is substituted for one that has already been made ...

E In each of these texts, the authors both emphasize on the essentiality of the existence of consent by all the parties concerned in the novation of the particular contracts, namely, the new agreement substituting the old one with a third party with his consent replacing one party in the former thereby completely discharging the latter from the old
F contract now replaced by a new one.

G In the instant case, there is practically no evidence at all to show that there was consent, express or implied, between the plaintiff and the first defendant company on the one hand and between the plaintiff and the second defendant company on the other, so that a new contract is created between the latter two parties whereby the second defendant replaces the first defendant standing in the relation of the two contracting parties as per contract Exhibit P1. In other
H words, just as there was no evidence on record showing the existence of a contract or agreement of employment between the plaintiff and the second defendant on the one hand, so also was there none to show that the plaintiff had agreed to work for him (second defendant)
I on only that salary of the first defendant company other than the

plaintiff's own testimony and version of the story in that regard. So much the more on the alleged display of agreement to substitute, rescind or alter the contract Exhibit P1 dated the 3 May 1997. Quite to the contrary, we have on record only the plaintiffs own evidence that there were on-going negotiations with a view to paying him (plaintiff) extra wages for his services as hotel manager for the second defendant and that as early as October 1997, the two defendants severally and or together had recognized him as such manager of the hotel while on the other hand there was still some construction work to be done as per contract Exhibit P1 vide the defendants' own letters Exhibit P2 and P3 respectively. Such other than the plaintiff's own testimony on this, there can be no basis of rejecting his version of the story except and unless the same is made outside of the judicial mind.

I rule out novation for lack of evidence to prove mutual consent between the parties concerned, to create a new contract in substitution of the old one as per Exhibit P1. Rather, it seems probably true to me that there probably were some on-going negotiations designed to engage the plaintiff for extra work at the hotel on new wages other than what had earlier been agreed as per Exhibit P1. I am fortified on this view by the evidence which shows that the plaintiff was already managing the hotel while there was still more construction work to be done as per Exhibit P1. I am also fortified in this view by the failure by the defence witnesses to show by what evidence the said novation can be proved. We need clear evidence as to that effect, certainly not by inferences to be made in that regard while there is in existence contrary evidence from the plaintiff.

But was there created any Contract of Employment between the plaintiff and the second defendant company and, if so, at whose instance and on what terms? Considering all the historical background of this case, I am constrained to have to answer this first leg of the question in the affirmative. And for the second part of the question, I say it is the two Frigerio brothers who, either as director of the first defendant company or as co-owners of the second defendant company, or both, by their conduct ascertainable in writing vide Exhibits P2 and P3,

A had led the plaintiff into believing that he had secured new but additional job or additional new pay, the latter having not been agreed as yet when the relations turned sour. The evidence is just too convincing that this was the case although perhaps only intended to last as a temporary measure. Otherwise, after Fulvio had written (Exhibit P2) to the plaintiff that:

Mr Adriano ... Peter and Ilario are arriving in the village to help you in the management of the hotel ... [emphasis supplied]

C And again, by Exhibit P3, that:

D The duty of the last (Mr Ilario) ... is (a long list of hotel duties) and, if eventually should he need more help he will have to speak to Adriano in order to obtain authorization of engaging new people. Furthermore we specify, that only Mr Adriano can go to town ... if, for his duties he should require further personnel, the authorization for the new engagement shall be given by Mr Adriano.

E It is abundantly clear that the plaintiff was being entrusted with senior management duties of the hotel. These are the affairs of the second defendant company. However, at the same time, the plaintiff was, by the same letters, also being told that:

F It is essential that the bedroom next to the office should be usable and occupied by Ilario and Peter ...

and, further, that:

G ... he is responsible for the maintenance at the village of all civil and plumbing works.

For Adriano: to start works in the Villa number 13, to paint all bedroom which show fungus, to start all maintenance general works...

H As clearly it shows, these latter are civil works; the province of the first defendant company and for which the plaintiff was employed as Director of Works by the defendant company. The defendants Fulvio and proprietors of the second defendant company in particular cannot deny they had instructed the plaintiff to perform senior

A management duties of the hotel of the second defendant while at the same time retaining his duties as Director of Works of the first defendant company. And the plaintiff performed both duties until he left to go on leave sometime in March, 1998. With this display by their conduct, the defendants are now estopped to deny the fact. B

However, in this new assignment, the plaintiff could not have been working for charity and we have seen it could not have been on the same old salary as per contract Exhibit P1. I believe it is true that the plaintiff performed this extra new job in the hotel strongly believing that he would in the end be remunerated by an extra new salary, the amount of which they were still negotiating when their good relations were strained on these premises. I am satisfied there was oral agreement established by the parties' conduct towards each other. Natural persons inextricably dealing and or with the affairs of either of the two defendant companies had by their conduct, led the plaintiff into believing that he had struck a new deal for which he would be paid for working extra in the hotel as well and he did so. C D E

However, as I said recently in another case, *Venance Order Kiboko v. Meneja Mkuu* (5), that the problem with oral contracts is that they are difficult to ascertain the exactitude of their terms when and if disputes arise as is now the case here. In such cases, the contending parties usually tend to capitalize on the fact that the contract is unwritten and their unrecorded terms are not available for cross-checking and as an aid in settling the dispute. But that is not to say that oral contracts are not provable or enforceable. In yet another unreported case, *Ahmed Said Omar v. Mazsons Hotel Ltd* (6) the Court of Appeal had this to say: F G

Upon close examination of the history, circumstances of the case and the law of contract which gives room for unwritten agreements as binding contracts, the conduct of the defendant in the handling of this matter is relevant. In this connection, the provisions of section 8 of the Contract Decree, Chapter 149 of the Laws of Zanzibar would ... apply. It provides for the performance of a contract by conduct ... From the exchange of H I

- A letter between the (parties) it is common ground that the appellant was in the employment of the respondent ... He worked for a period exceeding six months ... and this was to the knowledge of the respondent who, upon the appellant's inquiry on the delayed confirmation, assured the appellant
- B not to worry about it ... It is also apparent that even though the Contract of Employment had not been signed, persistently the behaviour and conduct of the respondent was such that it encouraged the appellant to believe that he was already employed ...
- C In this case, natural persons closely connected with the two defendant companies and whose mutual relations are inextricable had made the plaintiff perform extra work as manager of the hotel of the second defendant company while at the same time negotiating with him on
- D the remunerations for which this extra work should carry over and above what the plaintiff was already earning in term of the contract Exhibit P1. I do not believe the plaintiff was rendering these new and extra services at the hotel on that same salary as per contract
- E whereas the contractual assignment was still going on as the letters Exhibit P2 and P3 have shown to us. Arrangements will most likely have been paid work on a temporary basis but, after ruling out novation, I cannot entertain the view that it was on the same and only salary as
- F per contract Exhibit P1. According to the evidence, particularly the economical situation list, the plaintiff indicates that he worked at the hotel for period six months from October 1997 to 25 March 1998. His claim against the second defendant according to the same
- G economical situation list is for payment of salary for those six months only. In his final submissions, Dr Lamwai argues that the plaintiff is entitled to salary from the second defendant company on the basis of *quantum meruit*. This is the principle that where someone has
- H expressly or impliedly requested another to render him services without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, there is implied promise to pay *quantum meruit*, i.e. so much as the party doing the service deserves. A claim on a *quantum meruit* also arises when work has
- I been done and accepted under a void contract believed to be valid.

[Osborn: A **Concise Law Dictionary**, (5 ed) (1964) at page 261]. In this case, there were directives requiring the plaintiff to serve in the management of the hotel belonging to the second defendant company made in writing (vide Exhibits P2 and 3) by at least one of its proprietors (Fulvio) if not by all shareholders thereof. Believing in on-going negotiations that the services he was being instructed to carry out at the hotel would be paid for, the plaintiff worked at the hotel for a good six months and this is not disputed. With great respect to the learned counsel for the plaintiff, I fully concur with him that the plaintiff is entitled to extra pay for his services at the hotel on the basis of *quantum meruit*. Decent and reasonable claim I think. It is held accordingly.

It follows, therefore, that the first part of the second issue as well is answered in the affirmative and the contract thus created was at the instance of the two defendants as such legal persons. Otherwise, it was the creation of at least Fulvio who was the signatory of the letters Exhibit P2 and 3 and who is both of director of the first defendant company and also a co-owner of the second defendant company, persons (both natural and legal) whose relations are inextricably complex indeed.

Rule 9(2)(b) I will begin with the principle claims against the second defendant and the economical situation list is my best aid in that regard. It provides such an invaluable summary of the reliefs claimed. The plaintiff is claiming six months salary against the second defendant company. It is specifically for the period from October, 1997 to 25 March 1998 to a total LIT 13 667 000 at the rate of 2 million LIT per month. I have already demonstrated how justified is this claim particularly on the basis of *quantum meruit*. For a person already earning LIT 2.7 million per month from a sister company of the second defendant, a claim of LIT 2 million per month for management work of the second defendant's hotel is in my opinion decent and reasonably fair. They had not reached an agreement for same as yet but it was for that amount that their negotiations were based on as I believed the evidence I am not persuaded by the reasons advanced

- A in defence for refusing to pay the amount claimed as salary on *quantum meruit* basis from the second defendant company. I enter judgment for the plaintiff and against the second defendant on the principle amount claimed as salary for six months service which the plaintiff rendered as manager of the hotel. It is LIT 13 667 000 awarded here, or its equivalent in (USD) United States dollars.

- C As against the first defendant, I am satisfied that as at the time he was unceremoniously terminated from his employment as per contract, there were outstanding earned but unpaid salaries in the sum of LIT 5.8 million due to the plaintiff. I was convinced on the balance of probabilities by the plaintiff's account on how this has come to and, as already pointed out earlier in this judgment, the defence had nothing to offer to counter the claim in this regard. D Difference of salary arrears in the sum as stated (LIT 5.8 million) claimed (out of a total of LIT 29.7million) is hereby awarded to the plaintiff.

- E There is a claim for LIT 41 000 000 (equivalent of USD 23 480) as per paragraphs 10 and 12(b) of the plaint. The plaintiff says this is anticipated earnings for a year (at a monthly salary of LIT 2.7million), three return air tickets and leave pay. I have no problem picking the damages in terms of expected salary earnings for one year now that the contract Exhibit P1 has been prematurely albeit unilaterally terminated by the defendants. Salary claimed in these terms should be LIT 32 400 000 (for example 2.7 million x 12 months). In line with what I have stated hereinabove, a claim to that extent in the form of damages as anticipated lost earnings is understandable and fair I think.

- H However, I have some difficulties in allocating the claim in respect of the other two items as they are listed under the two paragraphs so as to raise the total claim to some LIT 41 100 000. Pertinently, I am referring to the claims for return air tickets and leave pay. To begin with the right to return air tickets, article 2.01 of the contract Exhibit P1 provides that:

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A ... The periodical air fare is recognized, provided a further effective and continuous stay of at least 4 months is foreseen after the return. If the ticket is not utilized, it will, however, be refunded.

B So the right to or recognition of periodical air fare, hence the return air tickets, is conditional upon an expected further effective and continuous stay of at least another four months being foreseen or expected to place of work. However, note that there is foreseen no further stay at place of work following termination of the contract, recognition of the right to return air ticket does not arise. I am fortified in that view C by article 2.03 of the contract, which gives the company the right to withhold the travel expenses in anticipation to premature maturation of the contract for a number of reasons, including advanced resolution. D In my considered opinion, I think it is improper to award the claim for travel air tickets as demanded in the circumstances that obtain here. The claim as to that effect would accordingly be rejected.

E So much the more with regard to the claims on leave pay as the same is claimed under paragraphs 5, 10(c) and 12(b) of the contract Exhibit P1. I can read nothing in article 4 which provided for holidays on the basis of which the plaintiff could also claim entitlement to cash payment *in lieu* of anticipated leave one which was, in fact, not yet due and will never be now that the contract is terminated F albeit unilaterally and prematurely so. There is nothing on record to liase between the claim for cash payment *in lieu* of anticipated but as yet unearned leave entitlement. I would accordingly reject the claim in that regard. G

H While I am still on this topic regarding leave generally, maybe I should also seize the opportunity to comment on another claim for leave in the sum of LIT 1 417 500 which the plaintiff alleged to be entitled allegedly as earned leave for services rendered from 3 May 1997 upto 25 March 1998. Again, I can see no contractual basis for this claim particularly taking into account the fact that the plaintiff managed to go on leave from 25 March 1998 for services rendered hitherto. Incidentally, other than the economical situation list, I have I

A not been able to locate from the plaint anywhere where cash payment is claimed in respect of leave entitlement for services duly rendered. Accordingly, a claim for LIT 1 417 500 for leave pay is refused.

B However, I will award to the plaintiff some USD 200 being the amount he paid from his own pockets for renewing his work permit here in Zanzibar, and another USD 764 also paid from his pocket for his return ticket to Zanzibar after his employers back-paddled to issue one without any much less adequate and or clear explanation.
C It is a total of USD 964 being awarded here being renewal of work permit and return air ticket from Italy as detailed in the Economic Situation List.

D In the Economic Situation List, there is also a claim for LIT 7 020 000 said to be stand-by days in Italy and kin Zanzibar from 9 April 1998 to 26 June 1998. I am not sure if I properly grasped the gist of this claim. If I did, then I cannot trace anywhere in the pleadings (plaint) nor does the evidence sufficiently reveal its basis. The plaintiff
E should at least have shown how the amount as claimed is arrived at. He has not done so in this regard. The claim as to that effect is therefore refused and accordingly dismissed.

F The plaintiff also prayed for interest on the decretal amount from the date of judgment to full payment. It is a reasonable claim. I award ten per cent (10% interest on the decretal amount in terms as prayed by the plaintiff (plaint paragraph 12(c) refers).

G It is also usual that costs should follow the event. The same is awarded to the plaintiff in terms of paragraph 12(d) of his plaint.

In the upshot therefore, this court now decreeth in summary as follows, namely:

- H 1. That the first defendant shall pay to the plaintiff a sum of Italian Lire 32 400 000 (say thirty two million for hundred thousand of Italian Lires) (or its equivalent in USD) being contractual damages for loss of expected earning (one year salary at the rate of LIT 2.7
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- million per month) but for the unilateral premature termination of the contract by the first defendant (or his agents). A
2. That the first defendant shall also pay to the plaintiff another Italian Lire 5 800 000 (say five million eight hundred thousand Italian Lires) (or its equivalent in USD) being the deficit of salary arrears due but unpaid from the first defendant. B
3. That the second defendant shall pay to the plaintiff Italian Lire 13 667 000 (say Italian Lire thirteen million, six hundred and sixty seven thousand) (or its equivalent in USD) being unpaid salaries due for services rendered as hotel manager of the second defendant company on the basis of *quantum meruit* principle. C
4. That the first defendant shall pay to the plaintiff another (a) USD 200 (say two hundred United States dollars) being the amount to plaintiff spent from his pocket in renewing his work permit in Zanzibar and (b), another USD 764 (say seven hundred and sixty four of United States dollars) being an amount the plaintiff paid from his own pocket for buying his own return ticket to Zanzibar. D E
5. That the defendants shall also pay to the plaintiff ten percent (10%) interest on the decretal amount from the date of judgment to full payment in terms of the prayer at plaint paragraph 12(c) (q v). F
6. Defendants also to pay costs of the suit (plaint paragraph 12(d) to be taxed by the Registrar.
7. Claims for Italian lires 7 020 000 said to be for stand-by days in Italy and Zanzibar (from 9 April 1998 to 26 June 1998), and also claims for return air tickets and another Italian Lire 1 417 500 for an alleged leave pay as per Economic Situation List and paragraph 10(b) and (c) of the plaint are refused and dismissed as unsubstantiated. G H