

IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY  
TRIBUNAL AT WINDHOEK, REPUBLIC OF NAMIBIA

SADC (T) CASE No.1/2007

In the Matter between:

ERNEST FRANCIS MTINGWI

APPLICANT

VERSUS

SADC SECRETARIAT

RESPONDENT

Coram:

H.E. Justice Dr. L.A. Mondlane

President

H.E. Justice I.J. Mtambo, SC

Member

H.E. Justice Dr. R. Kambovo

Member

H.E. Justice Dr. O.B. Tshosa

Member

H.E. Justice F. M. Werema

Member

APPLICANT'S AGENT:

David Kanyenda,

RESPONDENT'S AGENT:

Dr. Teodosio Uate, SADC Secretariat,  
Legal Affairs Unit

Hon. Justice Mkandawire:

Registrar

Mr. Dennis Shivangulula

Court Clerk

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## JUDGMENT

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### **H.E Justice Frederick Mwita Werema delivered the judgment**

The facts of this case are not in dispute. Nevertheless, for comprehension, clarity and the record, we have deemed it fit to state them in some detail.

The applicant, Mr. Ernest Francis Mtingwi, is a citizen of the Republic of Malawi. The Republic of Malawi is a Member State of the Southern African Development Community (SADC), which is an economic regional block currently composed of fourteen Members States. Its headquarters are in Gaborone, in the Republic of Botswana. Its objectives are stated in Article 5 of the Treaty of the SADC. They include trade cooperation through elimination of tariffs and non tariff barriers, harmonization of trade policies, promotion of free movement of capital and labour; goods and services; and free movement of people within the region. The objectives target the establishment of a regional economic community, which thus require human resource in the implementation of these objectives.

Article 14 of the Treaty establishes the respondent as the principal executive institution of the Community. The Article confers responsibilities and duties which include strategic planning and management of the programmes of the Community. Thus, in order to execute these responsibilities and duties, the respondent has powers to recruit staff under the terms and conditions as determined by the Council of Ministers.

Pursuant to these powers, in 2005 the respondent advertised for the post of Senior Programme Manager, Customs Cooperation and Modernization. The 24<sup>th</sup> of June 2005 was indicated in the advertisement as the closing date. The successful candidate was to assume duties on 1<sup>st</sup> September 2005.

The applicant responded to the advertisement and was called for an interview in Gaborone on 2<sup>nd</sup> November 2005. He was successful. By a letter dated 1<sup>st</sup> December 2005, the respondent offered him the employment. He was advised that the letter, together with the SADC Administration Rules and Procedures Handbook, constituted the contract of employment. He was

further advised that the respondent was anxious to have the position filled by 1<sup>st</sup> January 2006, at the very latest.

The applicant responded to the offer by signing on the letter of offer and forwarding it together his own letter dated 20<sup>th</sup> February 2006, in which he indicated that he had not received the original letter, which he understood to have been sent by registered post. He further informed the respondent that he was ready to report for duties on 6<sup>th</sup> March 2006 and requested for an air ticket and financial assistance for his initial settlement costs in Gaborone. In response to his request, a PTA ticket was sent to him by the respondent showing his confirmed flights on 5<sup>th</sup> March 2005 from Lilongwe to Gaborone through Johannesburg. The other information availed to him was about accommodation in Gaborone.

There was no further communication between the parties until 5<sup>th</sup> April 2006 when the applicant sent an electronic mail to the respondent which read, in part, as follows:

*“I already informed you that I was preparing to report to the SADC secretariat in Gaborone. I was SUDDENLY CHARGED WITH THE OFFENCE OF LYING UNDER OATH IN A COURT OF LAW... I appeared in court on Tuesday 21<sup>st</sup> March 2006 where I pleaded not*

*guilty to the charge of perjury...I suggest that I come to Gaborone on Sunday 16<sup>th</sup> April 2006 I then will report to the secretariat on Monday 17<sup>th</sup> April 2006...*”

There was no response to this communication. The communication was followed with another letter dated 21<sup>st</sup> April 2006, which referred to the letter of offer dated 1<sup>st</sup> December 2005, and requested for permission to report for duties on 7<sup>th</sup> May 2006.

Meanwhile, by a letter dated 6<sup>th</sup> April 2006 the Government of the Republic of Malawi wrote to the respondent. The letter read, in part, as follows:

*“We would like to formally withdraw Mr. Mtingwi’s candidature for any possible consideration for the position in question and the use of quota points for Malawi.*

*I hope your good offices will take the initiative to reflect and abide by Malawi’s latest position in your decision...”*

By its letter dated 29<sup>th</sup> May 2006, the respondent notified the applicant of its wish to abide by the decision of the government of the Republic of Malawi

and advised him that it could not employ him against the will of the Government of the Republic of Malawi.

The applicant was aggrieved by the respondent's decision and as a result commenced the present proceedings, contending that the termination of his employment was unlawful and unfair. The contention was based on the following grounds:

- (a) that the decision violates principles of natural justice because the applicant was not accorded the opportunity to be heard and that no reasons were given for the termination;
- (b) that the respondent had no obligation to abide by the decision made by the Government of the Republic of Malawi and that both that decision and respondent's decision were illegal, arbitrary, capricious, unreasonable, made in bad faith, and therefore *ultra vires* and *void ab initio*; and
- (c) that the respondent's decision constitutes unfair industrial or labour practices under the International Labour Organization (ILO), Termination of Employment Convention, 1982.

Upon these grounds, the applicant seeks the following orders or declarations against the respondent:

- (a) an order or declaration that the decision of the respondent terminating the employment of the applicant was done in breach of the rules of natural justice;
- (b) an order or declaration that the respondent's impugned decision is contrary to the applicants' legitimate expectation;
- (c) an order that the respondent's decision is illegal, arbitrary, capricious, unreasonable, made in bad faith and therefore *ultra vires* and *void ab initio*;
- (d) an order or declaration that the applicant is still the Senior Programme Manager, Customs Cooperation and Modernisation of the Community;
- (e) an order or declaration of reinstatement of the applicant in the post of the Senior Programme Manager, Customs Cooperation and Modernisation or in the alternative;
- (f) punitive and/or exemplary damages for breach of contract or in the alternative ;

- (g) compensation covering non-taxable salary, gratuity, encashment of fringe benefits plus emoluments which the applicant would have earned during the four year contract period;
- (h) further or any other relief as the Tribunal may deem fit and necessary; and, finally
- (i) costs.

The respondent opposes this application. It denies any wrongdoing or liability. It has instead made a counter claim relating to costs incurred by it on account of the applicant's failure to report for duty, the PTA related expenses, delay in the implementation of customs programmes and the costs for the hiring of a new candidate to replace the applicant. The respondent has invoked the principle of promissory estoppel on the basis that the applicant breached his promise to report for duty which the respondent relied on to its detriment.

The applicant contests the counter claim arguing that he was prevented from reporting for duty because of an unforeseen event. This event was a criminal charge against him in Malawi. He argues that the

unforeseen events did not arise out of his negligence and that in any event he quickly informed the respondent about the event. As a result, the respondent ought to have made contingency plans to deal with unforeseen events and emergencies. This is all about the counter claim.

Other than the counter-claim, the respondent concedes that there was an offer of employment which it made to the applicant. It, however, contends that the offer was conditional on Rule 14.2.6 of the SADC Administration Rules and Procedures Handbook as revised in 2000, among other conditions. The Rule reads, in part, as follows:

*“The appointment shall take effect from the date of arrival in the country where the duty station is located, in the case of employees in regional posts. For local staff, the appointment shall take effect from the date of commencement of work.”*

In essence, the respondent argues that for the contract to become effective, the applicant’s physical presence in Gaborone, where his working station was located, was necessary. On the other hand, the applicant contended that the respondent cannot rely on the Rule because the respondent acquiesced in his late assumption of duties. In his view, his absence or lack of physical

presence at the duty station did not give the respondent unfettered power to terminate his contract of employment.

That is, to the extent we have demonstrated, the position of the parties on this matter.

We have considered all the circumstances of this case and are satisfied that we have jurisdiction to entertain the matter in terms of Article 18 of the Protocol and Rules of Procedures, which provides that:

*“Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.”*

Based on the above facts and submissions, we have identified the following issues for determination:

- (a) whether there was a contract of employment between the parties;

- (b) whether the respondent unlawfully terminated the contract; and
- (c) whether the remedies sought are available to the parties.

We are of the considered opinion that we must first decide whether there was a contract of employment between the parties because we are mindful that the other issues may only arise if this issue is resolved in the affirmative.

Eminent jurists in the area of labour law have described a contract of employment to include the following:

- (a) an agreement in terms of which one person (the employee) works for another (the employer) in exchange for remuneration;
- (b) a mutual agreement in terms of which one person (the employee) for remuneration, makes his personal services available to another person (employer), in such a manner that the former occupies a subordinate position towards the latter;

- (c) a reciprocal contract in terms of which an employee places his services at the disposal of another person or organization, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of his services;<sup>1</sup>

The common denominator of all these concepts is that there must be an agreement by which the employee must make his services available to the employer for a determined period and that the employer must provide remuneration. The agreement to render services and to remunerate for the services rendered is central to a contract of employment. We also observe that control of an employee by an employer through supervision is a requirement in a relationship between an employee and employer. These are reciprocal obligations which are necessary in any effective contract of employment. With this in mind, the question arises whether it can be concluded in the present case that a contract of employment existed between the applicant and the respondent.

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<sup>1</sup> SR Van Jaarsveld, JD Fourie & MP Oliver: (LexisNexis series); PRINCIPLES AND PRACTISE OF LABOUR LAW (June 2007)

The applicant's case is that there was a contract of employment between him and the respondent on the basis of the offer contained in the letter dated 1<sup>st</sup> December 2005, which he accepted. The respondent contends that the relationship between it and the applicant could be described as a promise by the applicant or a pre-contract to conclude a future contract. We have examined this letter and are satisfied that it sufficiently demonstrates an offer and acceptance of employment, but subject to other future events such as those contained in Rule 14.2.6 of the Handbook. In the circumstances, it seems to us that this was a conditional contract of employment in terms of which the applicant was to report at the duty station to make it effective.

The applicant did not report for duty on the date he had himself indicated and only notified the respondent on 5<sup>th</sup> April 2006 that he was charged with a criminal case in Malawi which prevented him from reporting for duty on 6<sup>th</sup> March 2006 as he had himself volunteered. We notice from the communication that his appearance in court was on 21<sup>st</sup> March 2006. But the applicant was not remanded or detained in custody in Malawi. We were not shown any order restraining him from traveling outside the

Republic of Malawi. The applicant had the opportunity to travel to Gaborone which he did not do. In our view this is inexcusable.

The applicant's agent argued that the provisions in the Rule only apply to reckon time of commencement of the contract. His view is that we should not impose new terms on the contract or go beyond the spirit of its letter. With due respect to learned Counsel, we do not agree with this contention because it is inconsistent with the clear and unambiguous provisions of Rule 14.2.6.

As a matter of law and practice, a contract of employment is not merely signified by a communication of offer by an employer and acceptance by an employee. Other reciprocal obligations by the parties must be demonstrated to make such a contract effective as we have indicated earlier. The alleged contract of employment in the present case did not take effect on account of failure by the applicant to report at the duty station. We agree with the respondent that the applicant was still a candidate as long as he did not report at the duty station for commencement of duties. As a candidate, therefore, he was neither an employee nor a staff member of the respondent. Consequently, he was not entitled to the rights that accrue to

employees or staff of the respondent under the Treaty and other instruments made thereunder. Naturally, conventional rights available to employees under International Labour Organization, Termination of Employment Convention, 1982 cannot apply to a person who is not an employee, as was the applicant.

We have considered the counter claim. The respondent has not demonstrated any tangible loss on its part. The counter claim is not supported by evidence and therefore it fails.

Having answered the issue whether or not there was a contract of employment between the parties in the negative, it is unnecessary to consider the remaining issues. They do not arise.

The application, therefore, fails and is hereby dismissed.

We make no order as to costs.

**Delivered in open Court this 27<sup>th</sup> Day of May, 2008 at Windhoek in the  
Republic of Namibia**

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H.E Justice Dr Luis Antonio Mondlane

PRESIDENT

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H.E Justice Isaac Jamu Mtambo, SC

MEMBER

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H.E Justice Dr Rigoberto Kambovo

MEMBER

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H.E Justice Dr Onkemetse B. Tshosa

MEMBER

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H.E Justice Frederick Mwita Werema

MEMBER