

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT KABWE  
(Civil Jurisdiction)

APPEAL Nº 19 OF 2019

BETWEEN:

**MUSONDA MUTALE**

APPELLANT

AND

**AFRICAN BANKING CORPORATION LIMITED**

RESPONDENT

CORAM: **Chashi, Mulongoti and Lengalenga, JJA**  
On 16<sup>th</sup> October, 2019 and 25<sup>th</sup> October, 2019.

For the Appellant: In person

For the Respondent: Mr. C. Hamwela – Messrs Nchito & Nchito

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## **J U D G M E N T**

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**LENGALENGA, JA, delivered the Judgment of the Court.**

Cases referred to:

- 1. WESTERN EXCAVATING (ECC) LTD v SHARP (1978) QB 761**
- 2. KITWE CITY COUNCIL v WILLIAM NGUNI (2005) ZR 57**
- 3. CHILANGA CEMENT PLC v KASOTE SINGOGO (2009) ZR 122**
- 4. ROGERS CHAMA PONDE & 4 ORS v ZAMBIA STATE  
INSURANCE CORPORATION LTD (2004) ZR 151**

5. **COMBE v COMBE (1951) 1 ALL E R 767**
6. **MWAMBA v NTHENGE & 2 ORS (2013) ZR 5**
7. **NATIONAL MILLING CO. LTD v GRACE SIMATAA & ORS (2000) ZR 91**
8. **AB v SA BREWERIES LTD (2001) 22 1 L J 495**
9. **NDLELA v SA STEVEDORES LTD (1992) 13 1 L J 663 (IC)**
10. **FAIDECY MITHI LUNGU v LONRHO ZAMBIA LTD (SCZ APPEAL Nº 182 OF 2000)**
11. **BUCKLAND v BOURNEMOUTH UNIVERSITY HIGHER EDUCATION CORPORATION (CA FEB 2010) IRLR 445**
12. **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LTD (1982) ZR 172 (SC)**
13. **LUBUNDA NGALA & ANOR v ANTI CORRUPTION COMMISSION (2017/CC/R002) SELECTED JUDGMENT Nº 4 OF 2018**
14. **MIKE MUSONDA KABWE v BP ZAMBIA LTD (SCZ APPEAL Nº 115 OF 1996)**
15. **TOWNAP TEXTILES ZAMBIA LTD & ANOR v TATA ZAMBIA LTD (SCZ JUDGMENT Nº 17 OF 1988)**
16. **ANDERSON KAMBELA MAZOKA & ORS v LEVY PATRICK MWANAWASA & ORS (2005) ZR 138**
17. **WILLIAM DAVID CARLISLE WISE v E. F. HERVEY LTD (1985) ZR 179**
18. **FARBER v ROYAL TRUST CO (1997) 1 SCR 846**

Legislation referred to:

1. **THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT, Nº 2 OF 2016**

Other works and materials referred to:

1. **JOHN WALTER JONES, BRIAN D. STEFFY & DOUGLAS WESTON BRAY – APPLYING PSYCHOLOGY IN BUSINESS: THE HANDBOOK FOR MANAGERS AND HUMAN RESOURCE PROFESSIONALS (1991, Lexington Books) at page 426**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against Hon Justice M. K. Chisunka's judgment of 14<sup>th</sup> August, 2018.

## **2.0 BACKGROUND TO THE APPEAL**

- 2.1 The background to this appeal is that the Appellant filed a Complaint on 14<sup>th</sup> September, 2016 against the Respondent in the High Court, Industrial Relations Division. In the said Complaint, he alleged that he was unlawfully demoted and constructively dismissed from employment by the Respondent as his conditions of service were unilaterally changed by the Respondent.
- 2.2 The Appellant's contention was that he was employed as Country Head of Corporate Banking on 1<sup>st</sup> April, 2015 and that he reported directly to the Managing Director and, functionally to the Head Corporate and Investment Banking. However, between July and October, 2015, there was some restructuring that resulted in the creation of the position of Regional Head of Corporate and Investment which fell between the Group Head of Corporate and Investment Banking. Consequently, the Appellant's position was relegated and the reporting structure changed so that he was no longer reporting directly to the Managing Director.

He was aggrieved by the turn of events and considered himself to have been demoted and his contract of employment to have been unilaterally changed.

2.3 That was the basis of his Complaint in the High Court Industrial Relations Division where he sought the following reliefs:

- (a) An order and declaration that the Respondent unilaterally changed his conditions of service.**
- (b) Damages for wrongful and unilateral change of conditions of employment.**
- (c) Damages for unlawful demotion.**
- (d) Damages for constructive dismissal.**
- (e) Compensation for loss of employment.**
- (f) Compensation and payment for remedies provided under the laws of Zambia.**
- (g) Damages for mental anguish.**
- (h) Interest on all amounts found to be due.**
- (i) Costs.**
- (j) Any other relief the Court may deem fit.**

2.4 The Respondent in its Answer to the Complaint denied the Appellant's

allegation that the Appellant's conditions of service were unilaterally changed or that he was demoted in the manner alleged and instead contended that he voluntarily resigned from his employment. It further contended that, therefore, the Appellant is not entitled to the reliefs sought.

2.5 The learned trial judge found that the two key issues for determination were:

- (i) **Whether the Appellant was constructively dismissed and/or**
- (ii) **Whether the Appellant was entitled to any of the remedies outlined in the Notice of Complaint.**

2.6 For the purposes of evaluating the evidence before him, the learned trial judge reviewed the general principles relating to constructive dismissal by looking at few authorities for guidance.

2.7 He cited the case of **WESTERN EXCAVATING (ECC) LTD v SHARP<sup>1</sup>** where Lord Denning, MR dealt with the legal position of constructive dismissal and described it in the following terms:

**"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is**

entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

- 2.8 He also relied on the Zambian case of KITWE CITY COUNCIL v WILLIAM NGUNI<sup>2</sup> in which the principle in the WESTERN EXCAVATING case was adopted with approval by the Supreme Court when it was held that:

**"The test for constructive dismissal is whether or not the employer's conduct amounts to a breach of contract which entitles an employee to resign."**

- 2.9 The learned trial judge also relied on the later case of CHILANGA CEMENT PLC v KASOTE SINGOGO<sup>3</sup> where the Supreme Court held that:

**"An employee can claim to have been constructively dismissed if he resigned or was forced to leave employment as a result of his employer's unlawful conduct, which conduct amounts to a fundamental breach of contract of employment. It is the employee who makes the decision to leave."**

2.10 In considering the Appellant's assertion that he was constructively dismissed by the Respondent, the learned trial judge noted that the Appellant had strongly maintained that he did not resign. He further noted that when he proposed a mutual separation on the basis of his disagreement to the proposed change in the reporting line, the Respondent's Chief Executive Officer wrote to him and an excerpt of the said letter states that:

**"Reference is made to your letter dated 31<sup>st</sup> May, 2016 in which you proposed a mutual separation with the bank based on your understanding of the implications of the implementation of the new Target Model for Corporate and Investment Banking and the change in your reporting lines.**

**Please be advised that management does not see a basis for a mutual separation as your fundamental role has not changed.**

**Your contribution to Banc ABC is greatly valued and we trust that you shall continue to add value to the bank  
....."**

2.11 The learned trial judge observed that by a letter dated 27<sup>th</sup> July, 2018, the Appellant wrote to the Chief Executive Officer insisting on a mutual separation but he did not resign, that it was the Appellant who suggested that if the Respondent did not agree to his proposal, he

would consider his contract as having been terminated by the Respondent.

2.12 The learned trial judge consequently found that since the Appellant did not resign, the circumstances of his separation from employment did not accord him the test required to sustain a finding for constructive dismissal.

2.13 He further found that the Appellant had failed to demonstrate that the Respondent committed a fundamental breach of the employment contract in implementing the reorganisation of the company in readiness for the acquisition of Finance Bank.

2.14 He also did not accept the Appellant's suggestion or allegation that he was demoted as his remuneration package remained intact even after the restructuring.

2.15 He consequently dismissed the Appellant's claim for constructive dismissal in total and found that he was not entitled to the relief sought.

2.16 He made no order as to costs.



### **3.0 APPELLANT'S GROUNDS OF APPEAL**

3.1 Dissatisfied with the judgment, the Appellant now appeals to this Court and has advanced the following grounds of appeal:

- 1. The learned trial judge misdirected himself and therefore fell into grave error when he evaluated the evidence before him in an imbalanced manner and without having regard to the totality of the evidence before him.**
- 2. The learned trial judge erred in fact and law when he failed to consider that the variations made by the Respondent to the Appellant's contract and conditions of service amounted to a demotion.**
- 3. The learned trial judge erred in law and fact when he glossed over and failed to pay due regard to all the issues put before him for determination in the Court below.**
- 4. The learned trial judge erred in law and fact when he held at page J16 of the judgment that the circumstances of the Appellant's separation did not meet the test to sustain a finding for constructive dismissal.**

### **4.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

4.1 The Appellant's heads of argument and second amended heads of argument were filed into Court on 30<sup>th</sup> January, 2019 and 9<sup>th</sup> July, 2019 respectively. The Appellant also relied on his submissions made

in the Court below which are found at pages 127 to 139 of the record of appeal.

- 4.2 The Appellant argued grounds one, two and four together and ground three on its own.
- 4.3 In support of grounds one, two and four, the Appellant argued that the Court below erred when it failed to take certain facts into consideration. He identified those facts as the appointment of a new Country Head, Corporate and Investment Banking which entailed that the Appellant no longer sat on the Respondent's Management Committee (MANCO) as that position was assumed by one Mr. Betsy Nkhoma who was hired as the new Country Head – Corporate and Investment Banking to whom the Appellant was required to report. He submitted that all that amounted to a failure by the Court below to consider relevant evidence.
- 4.4 He argued that the Court below further erred when it made a finding that the Appellant's contract of service with the Respondent did not provide for his membership to MANCO as it was at the discretion of the Managing Director. It was contended that it was an express term of the Appellant's job description that he would represent the Corporate

Banking Department at all senior executive country fora and that as such, that contractual relationship could not be amended or altered by the exercise of anyone's discretion. To support that argument, he relied on the case of **ROGERS CHAMA PONDE & 4 ORS v ZAMBIA STATE INSURANCE CORPORATION LTD**<sup>4</sup> where the Supreme Court held that:

**"Parol evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties."**

- 4.5 The Appellant further submitted that he relied on the job description he was given on the date of engagement, which was incorporated into the contract of employment. To fortify his submission, he called in aid the English case of **COMBE v COMBE**<sup>5</sup> where the Court of Appeal held that:

**"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he, himself has so introduced, even though it is not**

**supported in point of law by any consideration, but only by his word."**

- 4.6 In the present case the Appellant argued that had the Court below gleaned the surrounding circumstances and the factual background, including the Appellant's job description, it would have got clarification on his direct reporting to the Managing Director and Group Head, Corporate Banking. He buttressed his argument by relying on the case of **MWAMBA v NTHENGE & 2 ORS**<sup>6</sup> where the Supreme Court held that:

**"It is therefore that the factual background leading to the execution of these agreements is an important part when considering the meaning of the agreements as it has been repeatedly stated that an agreement is not made in a vacuum."**

- 4.7 Based on the cited case, this Court was urged to reverse the findings of fact.
- 4.8 In his arguments in support of ground two, the Appellant relied on the case of **NATIONAL MILLING CO. LTD v GRACE SIMATAA & ORS**<sup>7</sup>, where the Supreme Court held that:

**"If the employer, varies in an adverse way, a basic condition or basic conditions of employment without the consent of the employee, then the contract of**

**employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate as at the date of the variation and the benefits are to be calculated on the salary applicable."**

4.9 In support of ground two, the Appellant contended that by removing the Appellant from the position of Country Head Corporate and Investment Banking, the Respondent, therefore, curtailed all his contractual functions and responsibilities and significantly or materially reduced the importance, rank and status of his position, resulting in what constituted a demotion.

4.10 To support this position, he relied on the authority of **AB v SA BREWERIES LTD**<sup>8</sup> where the South African Industrial Court found that a demotion can mean a reduction or diminution of dignity, importance, responsibility, power or status even if the salary, attendant benefits and rank are retained.

4.11 Reliance was further placed on the earlier case of **NDLELA v SA STEVEDORES LTD**<sup>9</sup> where it was held that:

**"A demotion occurs if the change to the employee's terms and conditions of employment is such that they result in a material reduction of the employee's remuneration, responsibility or status."**

4.12 The Appellant also buttressed his argument with the case of **FAIDECY MITHI LUNGU v LONRHO ZAMBIA LTD**<sup>10</sup> where the Supreme Court held that a reduction in rank and status was capable of constituting constructive dismissal, provided that the employee did not consent to it.

4.13 In the present case, the Appellant after being removed from sitting on the Respondent's MANCO, refused to take part in the process of appointing new members to the said committee, as he thought that attending the interview would have amounted to acquiescing to a prejudicial selection process.

4.14 It was further submitted that it is a settled position of the law that an employer who has committed a fundamental breach, cannot cure it by subsequent actions and this was buttressed by reliance on the case of **BUCKLAND v BOURNEMOUTH UNIVERSITY HIGHER EDUCATION CORPORATION**<sup>11</sup> where it was observed that:

**"Once an employer had repudiated the employment contract, it was not open to it to cure that repudiation."**

4.15 With regard to ground four, it was submitted that it is trite law that for a claim of constructive dismissal to be upheld, the following elements must be present:

- (i) The employer committed a serious breach of the employment contract.**
- (ii) The employee did not accept the breach.**
- (iii) The employee was forced to resign because of that breach and**
- (iv) The employee resigned following the breach.**

4.16 The Appellant submitted that he had demonstrated that there was a serious breach of his employment contract and conditions of service, which breaches he did not accept, and that following the failure to have his grievances resolved, the Appellant deemed his contract to have been terminated.

4.17 The Court below was faulted for finding that the test for constructive dismissal had not been met because the Appellant did not resign and Counsel for the Appellant called in aid the case of **CHILANGA CEMENT PLC v KASOTE** where the Supreme Court held that:

- "1. In constructive dismissal, an employee leaves employment promptly or by notice, as a result of the conduct of his employer;**

4.18 Based on the cited case, the Appellant submitted that he had satisfied the requirements for the test for constructive dismissal when he deemed his contract to have been terminated and left employment.

4.19 In arguing ground three that the learned trial judge misdirected himself when he glossed over and failed to pay due regard to all issues placed before him for determination in the Court below, the Appellant relied on the case of **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LTD**<sup>12</sup> where the Supreme Court held that:

**".....the trial court has a duty to adjudicate upon every aspect of the suit between the parties, so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."**

4.20 It was submitted that a perusal of the record of appeal discloses that among the reliefs sought by the Appellant in the Court below, was compensation and payment for remedies provided under the laws of Zambia. The Appellant submitted that pursuant to Article 189(1) and (2) of the Constitution of Zambia (Amendment) Act, No 2 of 2016, he claimed for two months' salary following his departure from



employment with the Respondent, because the Respondent had not paid him his pension benefits on his last working day.

4.21 He further submitted that the Constitutional Court has pronounced itself on pension benefit payment and held that a pension benefit is triggered by retirement due to age or other circumstances. It further stated that pensioners and retrenchees are entitled to protection under Article 189(1) and (2) of the Constitution (see **LUBUNDA NGALA & ANOR v ANTI CORRUPTION COMMISSION**<sup>13</sup>).

4.22 The Appellant contended that owing to the Respondent's unilateral variation, which terminated his employment contract, he was thus deemed to have been declared redundant or to have gone on early retirement, as may be appropriate. He submitted that he was by law deemed to be a retrenchee or pensioner.

4.23 He fortified his argument by relying on the case of **MIKE MUSONDA KABWE v BP ZAMBIA LTD**<sup>14</sup> where the Supreme Court observed that:

**".....that it is not legally tenable for an employer to vary a basic condition of employment to the detriment of an employee without the consent of such an employee. In such cases, we have held that it is trite law that the contract of employment terminates and the employee is**

**deemed to have been declared redundant or to have gone on early retirement."**

4.24 The Appellant submitted that the Court below erred in law when it elected not to pronounce itself on his claim for payment of two months' salary even though the claim was not contested by the Respondent in the Court below. He further submitted that therefore, the Respondent is precluded from submitting new evidence on appeal. He supported his submission by relying on the authority of **TOWNAP TEXTILES ZAMBIA LTD & ANOR v TATA ZAMBIA LTD**<sup>15</sup> where the Supreme Court observed that:

**"In view of the fact that the matter was not raised in argument in the Court below nor was there any evidence towards the situation, we consider this matter to be irrelevant to the issues before us."**

4.25 Further reliance on the same issue was placed on the later case of **ANDERSON KAMBELA MAZOKA & ORS v LEVY PATRICK MWANAWASA & ORS**<sup>16</sup> where the Supreme Court held that:

**"In a case where any matter not pleaded is led in evidence, and not objected to by the other side, the Court is not and should not be precluded from considering it."**

4.26 The Appellant finally submitted that the failure by the learned trial judge to consider his claim for compensation of two months salary for the delay of payment of pension benefits was a misdirection on his part, as the matter was left hanging and unresolved.

4.27 In conclusion, the Appellant prayed that the appeal be allowed in its entirety and that he be awarded the following reliefs:

- (a) 48 months basic pay plus interest for constructive dismissal, unlawful demotion and mental anguish;**
- (b) 2 months salary plus interest for late payment of pension benefits;**
- (c) costs in this Court and the Court below; and**
- (d) any other relief the Court may deem fit.**

## **5.0 RESPONDENT'S ARGUMENTS IN RESPONSE TO THE APPEAL**

5.1 The Respondent's heads of argument in response to the Appellant's appeal, on which the Respondent relied were filed into court on 27<sup>th</sup> September, 2019.

5.2 Counsel for the Respondent also addressed grounds one, two and four together. He submitted that the Appellant's three grounds of appeal raise three cardinal legal issues for this Court's determination. He

identified them as constructive dismissal, fundamental breach and demotion.

5.3 He submitted that the Court below was on firm ground when it found that:

- (i) there was no constructive dismissal because the Appellant did not resign from employment;**
- (ii) there was no fundamental breach of the employment contract between the parties; and**
- (iii) the Appellant had not been demoted in the manner alleged or at all.**

5.4 He further submitted that the Court below rightly set out the principles that apply to a claim for constructive dismissal.

5.5 It was contended that the Appellant did not specifically plead a variation to a fundamental or basic condition of employment but he merely stated that there had been a unilateral change of his conditions of employment.

5.6 Counsel for the Respondent submitted that the changes that the Appellant complained of relating to his reporting structure and membership of the Respondent's Management Committee (MANCO) are not basic conditions of employment that affect the essential

character of the contract of employment. It was further contended that the Appellant conceded in cross-examination that those two items were not even in his written contract of employment or conditions of service. Counsel for the Respondent submitted that the membership to the Management Committee, in particular, was at the Managing Director's discretion. To support their argument, they drew this Court's attention to the Appellant's testimony at page 201, lines 10 to 15 of the record of appeal where he stated that:

**"My relationship with the Respondent was governed by a contract of employment. I am familiar with the contents of the contract. My contract did not specifically provide that I would report to MD specifically."**

- 5.7 Counsel for the Respondent submitted that, therefore, there was no breach of any conditions of employment when the Respondent changed the Appellant's reporting lines or process and his membership to the Management Committee. It was further submitted that although the Appellant contends that his job description was part of the contract of employment and that unilateral variation of his job description was a breach of contract, that argument was not canvassed in the Court below. It was further submitted that the job

description is not part of the contract of employment as was demonstrated by the Appellant's testimony referred to earlier.

- 5.8 With regard to the issue of demotion, Counsel for the Respondent submitted that the Appellant was not demoted in the manner alleged or at all. To support that argument, he submitted that, that was demonstrated by the fact the Appellant retained all his emoluments and he remained Head of Corporate Banking Department, giving that department the necessary strategic direction. He further submitted that the Appellant retained his responsibilities, whilst his status remained the same and there was no reduction in his responsibilities or remuneration as confirmed by the Appellant in his testimony at page 201, lines 16 to 17 of the record of appeal where he stated that:

**"My conditions of service remained the same after the restructuring."**

- 5.9 Counsel for the Respondent submitted that, therefore, the Court below cannot be faulted for finding that there was no constructive dismissal, no unilateral variation of any fundamental or basic conditions of service and further that the Appellant was not demoted as alleged.

5.10 This Court was urged to dismiss grounds one, two and four for lacking merit.

5.11 In response to ground three, Counsel for the Respondent submitted that the Court below duly considered all the Appellant's claims as contained in the Notice of Complaint. He further submitted that in the reliefs sought therein, there was no claim for two months salary on account of the Respondent's failure to pay the Appellant his benefits on his last working day.

5.12 He argued that, therefore, the Appellant cannot claim at this stage that his claim in the Notice of Complaint for **"compensation and payment under the laws of Zambia for remedies provided thereunder"** amounted to a claim for two months salary for the delay in paying his benefits. He submitted that the Appellant should have specifically pleaded it so that the Respondent would have had distinct notice of his claim and so that he could defend it appropriately. He fortified his argument by placing reliance on the case of **WILLIAM DAVID CARLISLE WISE v E. F. HERVEY LTD**<sup>17</sup> where the Supreme Court gave guidance that:

**"Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give**

**each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended."**

5.13 Counsel for the Respondent noted that the Appellant has also argued that he tendered evidence to support his claim for **"compensation and payment."** He submitted that a perusal of the Appellant's affidavit in support of Notice of Complaint in the record of appeal reveals that the Appellant did not make any averments relating to the claim for two months salary for delayed payment of benefits. He further drew this Court's attention to the Appellant's oral testimony exhibited in the record of appeal and he submitted that the Appellant did not say anything regarding that particular claim. He added that the mere filing in of the Notice to Produce in the record of appeal was not sufficient.

5.14 Counsel for the Respondent submitted that the Court below was on firm ground by not making any determination on the claim as it was neither pleaded nor proved in the Court below as the Appellant led no evidence on it.

5.15 He submitted that ground three lacks merit and should be dismissed.



5.16 In conclusion, it was submitted that on the totality of their submissions, the entire appeal should be dismissed for being devoid of merit.

## **6.0 THIS COURT'S CONSIDERATION AND DETERMINATION OF THE APPEAL**

- 6.1 We have considered the grounds of appeal, respective arguments and authorities cited, the evidence on record and judgment appealed against.
- 6.2 Grounds one, two and four were argued together even though in our view the three grounds of appeal deal with different issues. We have nevertheless addressed the issues in all the three grounds.
- 6.3 With regard to ground one, we had occasion to peruse the evidence on record and the judgment complained against. We note that upon the Corporate Banking portfolio being merged into the expanded Corporate Banking and Investment department, it entailed that the Appellant was no longer the Country Head of the said department and that he was required to report to the new Country Head. We note that another of the Appellant's grievances was that he did not report directly to the Managing Director and that he had lost membership on the Management Committee (MANCO).

- 6.4 After considering the Appellant's arguments in relation to ground one, we opined that they are clearly misplaced and misconceived. A perusal of the judgment of the Court below shows that the trial judge reasoned that the Corporate Banking portfolio headed by the Appellant continued to exist under the merged Corporate Banking and Investment department except that he was required to report to the Country Head as opposed to reporting directly to the Managing Director.
- 6.5 We are of the view that a change in the reporting procedure cannot be considered to be a fundamental breach of contract when it was not contained in the Appellant's contract of employment. From the evidence on record we are satisfied that the Respondent bank's merger with Finance Bank and Atlas Mara necessitated a reorganization of the bank structure, resulting in new departments being created and reporting lines being changed.
- 6.6 Upon further perusal of the judgment it is clear that the Court below considered all the evidence and submissions before it in a balanced manner contrary to the Appellant's allegation in ground one.
- 6.7 We note that the Court below identified the key issues for

determination as being, whether or not the Appellant was constructively dismissed, demoted and therefore entitled to the remedies set out in his Notice of Complaint.

6.8 For the reasons we have advanced, we find that ground one lacks merit.

6.9 We turn to ground two. Under this ground the learned trial judge is faulted for failing to consider that the variations made by the Respondent to the Appellant's contract and conditions of service amounted to a demotion. We have considered the authorities cited on the definition of demotion. We found the South African case of **NDLELA v SA STEVEDORES LTD** to be appropriate as it describes a demotion as a change in the employee's terms and conditions of employment, such as to result in a material reduction of the employee's remuneration, responsibility or status.

6.10 The Appellant argued that by being made to report to the Head, Corporate and Investment Banking instead of the Managing Director and losing membership on the Management Committee (MANCO), he was demoted. From the evidence on record, we note the fact that the

Appellant retained his position as Head, Corporate Banking and his salary in accordance with his contract of employment.

- 6.11 In order to determine whether or not the Appellant was demoted as alleged, we considered whether there was a variation to his contract of employment and his terms and conditions of service.
- 6.12 With regard to the issue of the Appellant's change from reporting to the Managing Director to the Country Head, Corporate Banking and Investment, Counsel for the Respondent drew our attention to the Appellant's testimony at page 201 of the record as earlier stated. We observed that he stated that his contract did not specifically provide that he would report to the Managing Director.
- 6.13 Similarly, we note from the evidence on record and particularly the re-examination of the Appellant at page 201, lines 12 to 14 of the record of appeal that he stated that his contract did not provide for membership to MANCO.
- 6.14 In the circumstances, can the Appellant be said to have been demoted as alleged? The authors, John Walter Jones, Brian D. Steffy and Douglas Weston Bray in the book, **APPLYING PSYCHOLOGY IN BUSINESS: THE HANDBOOK FOR MANAGERS AND HUMAN**

**RESOURCE PROFESSIONALS (1991, Lexington Books) at page**

**426** define demotion as:

**"..... a compulsory reduction in an employee's rank or job title within the organizational hierarchy of a company, public service department, or other body, unless there is no reduction in pay."**

- 6.15 Therefore, considering the foregoing definition of demotion and the evidence on record, we find that the Appellant has not substantiated his allegation that he was demoted.
- 6.16 We, accordingly, find that ground two is devoid of merit.
- 6.17 In ground four, the Appellant challenges the finding of the Court below that his separation did not meet or satisfy the test of sustaining a finding for constructive dismissal.
- 6.18 Before we proceed to consider this ground of appeal, we wish to add to the authorities cited by Counsel on constructive dismissal by referring to the Canadian Supreme Court case of **FARBER v ROYAL TRUST CO**<sup>18</sup>, where the Court defined constructive dismissal in the following terms:

**"Where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment – a change that violates the contract's terms – the employer is committing a fundamental**

**breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed."**

6.19 We note that the above cited case also refers to an employer making a fundamental or substantial change to an employee's contract of employment and thereby committing a fundamental breach of the contract as forming some of the ingredients leading to an employee's constructive dismissal. In the present case, we note from the Appellant's arguments that reliance was placed on the case of **CHILANGA CEMENT PLC v KASOTE SINGOGO**. However, from the evidence on record, we have difficulty in finding how that case relates to him.

6.20 A perusal of the judgment on record also clearly documents the manner of the Appellant's exit from the Respondent's employ. According to the evidence on record, the Appellant did not even follow the guidelines laid down by the Supreme Court decision in the **CHILANGA CEMENT** case. As observed by the learned trial judge he tried to pressurize the Respondent into allowing him to exit through a mutual separation but the proposal was rejected as he was informed that his contribution to the Respondent was greatly valued and that

they trusted that he shall continue to add value to the bank. As rightly observed by the learned trial judge he did not resign and he failed to demonstrate that the Respondent fundamentally breached his contract of employment by unilaterally varying his terms and conditions of service. As we observed from the evidence on record, what he was aggrieved with were not part of his contract of employment.

6.21 Based on the arguments advanced by Counsel and the evidence on record, we find that the learned trial judge was on firm ground in finding as he did in ground four. We find ground four to be devoid of merit.

6.22 We turn to ground three where the learned trial judge is alleged to have glossed over and failed to pay attention to all the issues presented for determination.

6.23 We had occasion to peruse the record of appeal at page 27 containing the Notice of Complaint and paragraph 5 relating to the relief sought by the Appellant and page 201 where the Appellant in his testimony in the Court below at lines 3 to 5 stated that:

**"I was paid pension benefit in October 2016. I am asking the Court to grant me relief as per paragraph 5 of the Notice of Complaint."**

6.24 At page 27, paragraph 5.6, the Appellant sought:

**"Compensation and payment under the Laws of Zambia for remedies provided thereunder."**

6.25 We opine that from the foregoing, it is not clear what relief the Appellant was seeking as it is not apparent that he was claiming two months salary for the delay in paying his benefits. We agree with Counsel for the Respondent that the Appellant should have specifically pleaded what he was claiming, as a claim for **"compensation and payment under the laws of Zambia for remedies provided thereunder"** is vague and would not have given the learned trial judge an opportunity to understand what was being claimed.

6.26 We further note that the Appellant argued that he tendered evidence in support of his claim and we agree with Counsel for the Respondent that we have seen nothing on record to that effect. We opine that the Appellant cannot purport to introduce a claim for a relief that was not pleaded at the appeal stage by alleging that the learned trial judge glossed over and disregarded issues presented to him for determination.

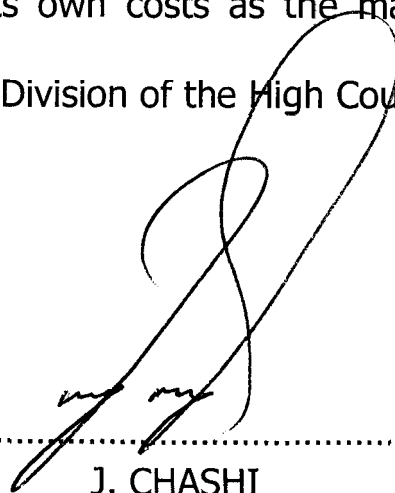


6.27 We, therefore, find that the learned trial judge was on firm ground by not making any determination on the claim as no evidence was led on it.

6.28 Consequently, we find that ground three also lacks merit.

6.29 In conclusion, the Appellant being unsuccessful in all four grounds, the net result is that the appeal fails and it is, accordingly, dismissed.

Each party to bear its own costs as the matter emanates from the Industrial and Labour Division of the High Court.



J. CHASHI

**COURT OF APPEAL JUDGE**



J. Z. MULONGOTI

**COURT OF APPEAL JUDGE**



F. M. LENGALENGA

**COURT OF APPEAL JUDGE**