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IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 123/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

G4 SECURE SOLUTIONS (Z) LIMITED **APPELLANT**

AND

BRIAN LIBWESHYA **RESPONDENT**

CORAM: ***MAKUNGU, SICHINGA AND NGULUBE, JJA.***
On 20th February, 2019 and 29th May, 2019.

For the Appellant: *Mr. E.K. Mwitwa and Mr. A. Mumba, Messrs Mwenye, Mwitwa Advocates*

For the Respondent: *In Person*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Galaunia Farms Limited vs National Milling Company Limited and National Milling Corporation Limited (2004) Z.R.1*
2. *Charles Nyambe and 82 Others vs Buks Haulage Limited, Appeal Number 202/2014.*
3. *Chilanga Cement vs Kasote Singogo (2009) ZR 122.*
4. *Western Excavating (EEC) Limited vs Sharp (1978) ALL ER 713.*
5. *Time Trucking Limited vs Kipimpi, Appeal Number 25/2016.*
6. *Kitwe City Council vs William Nguni (2005) ZR 57.*
7. *Mutale vs Zambia Consolidated Copper Mines (1993-1994) ZR 94.*
8. *Scherer vs Counting Investment Limited (1986) I WLR 615.*
9. *ZESCO Limited vs Cyprian Chitundu and Attorney General, C.A Appeal Number 6/2017.*
10. *LM Wulfsohn Motors (Pty) Limited T/A Lionel Motors vs Dispute Resolution Centre and others, JR 1852/05*
11. *Costa Tembo v Hybrid Poultry Farm (Zambia) Limited, SCZ Judgment No. 13 of 2003.*

This is an appeal against a Judgment of the High Court, Industrial Relations Division delivered on 6th March, 2018. The Judgment followed a complaint and supporting affidavit filed by the respondent who was the complainant on 30th January, 2017, seeking the following-

(a) An order declaring his dismissal on 22nd August, 2016 null and void;
(b) Damages for unfair and wrongful dismissal;
(c) Damages for constructive dismissal;
(d) Terminal benefits;
(e) Commission underpayments for the period 1st January 2014 to 30th October, 2016;
(f) Acting allowance as Regional Sales Manager- North, for the period 1st September, 2015 to 30th October, 2016,
(g) Outstanding commission claims due as at 30th October, 2016;
(h) Damages for mental distress caused by the actions of the respondent;
(i) Interest and costs.

On 10th May, 2017, the appellant filed an Answer in which it opposed the respondent's complaint and stated that the

respondent was duly charged and subjected to a disciplinary hearing and that procedures pursuant to the appellant's Disciplinary Code were adhered to, and this made his claim for unfair or wrongful dismissal unfounded.

The evidence, which is common ground is that the respondent was employed by the appellant as sales executive for the Northern region on a permanent and pensionable basis on 22nd July, 2011. He was in the employ of the appellant for five years and averred that his work performance was very good, as evidenced by the performance appraisal reviews he received from the chief executive officer of the company. He also acted in higher positions, such as: Regional Sales Manager – North whenever the manager went on leave.

The respondent averred in his affidavit in support of the complaint that on 10th February, 2016, he had an altercation with the Operations Director-North, Mr. Gerhard Pretorius, over a routine daily sales activity report. His relationship with Mr. Pretorius deteriorated and that there was a lot of animosity between them such that on 13th May, 2016, he was presented with a notice of

disciplinary hearing by the Acting Sales Director, Mr. Witola. He was charged with wilful failure to perform work satisfactorily over an extended period of time despite being warned and counselled by management. The disciplinary hearing was eventually held on 7th June, 2016 and he was found with no case to answer. The charge was then dismissed but management appealed against the said dismissal and the appeal was heard on 25th July, 2016.

On 22nd September,2016, he was found guilty of ***"failure to perform work satisfactorily"*** and received a final warning as sanction. He was eventually dismissed but later reinstated and he resumed work on 28th September, 2016. On 30th September, 2016, he reported back to work but two days later, he requested for voluntary separation on the ground that the disciplinary and grievance procedure that he was subjected to was not well handled. He prayed that the Court finds in his favour as the process that was embarked on by the appellant to discipline him was illegal and null and void.

In support of his case, the respondent gave *viva voce* evidence and did not call any witnesses. The essence of his testimony was that

upon returning from leave on 18th January, 2016, he found that Mr. Gerhard Pretorius had been appointed Operations Director-North. He would greet Mr. Pretorius on a daily basis but would not get any response. On 19th February, 2016, he had an altercation with Mr. Pretorius over a sales report that he sent to Lusaka and was later informed by a Mr. Witola, the Sales Director that he was failing to meet sales targets. The respondent was subsequently served with a performance improvement plan that had new sales targets attached to it. Two sets of performance indicators with different sales targets were also given to him.

On 10th May, 2016, Mr Witola, requested him to exculpate himself for failing to meet the sales targets. On 13th May, 2016, he was accordingly charged. The disciplinary process resulted in his dismissal but he was later reinstated on 27th September, 2016.

When he returned to work, he was not given his working tools by the appellant and due to animosity, he gave notice of resignation which was accepted by the appellant. He stated that he suffered a lot of mental distress when he reported for work after his reinstatement.

In cross-examination, the respondent stated that Mr. Pretorius made the work environment unconducive and conducted himself in a way that showed that he was out to get him dismissed.

The appellant, in an affidavit sworn by Wilson Chola averred that the respondent was not under paid any commission for the period January, 2014 to 30th October, 2016 as his entitlement to commission was governed by the African Commission Plan Scheme Rules of 2011, which provides that an employee will not be paid commission post termination. It was averred that the respondent failed to meet his sales targets and was put on a performance improvement plan in February, 2016. He was later charged with "wilful failure to perform" and after a disciplinary hearing, he was found with no case to answer. When management appealed, the respondent was eventually dismissed. He appealed and was reinstated and placed on final warning. However, the respondent tendered his resignation a few days later and it was accepted by the appellant. It was averred that the respondent's complaints against Mr. Pretorius were unfounded.

On the basis if the foregoing evidence, the Court held that the respondent had proved his claim for constructive dismissal and awarded him damages of three months salary.

The Court further held that the respondent accrued his right to commission and that the claims for underpayment of commission from 1st January, 2014 to 30th October, 2016 were proved. He was awarded the said commission, which matter was sent to the Deputy Registrar for assessment. The Court found that the respondent could not be paid an acting allowance because he was not formally appointed to act and the claim was accordingly dismissed. The Court further found that respondent did not produce documentary evidence like medical reports to show the mental distress that he allegedly suffered, and this claim was also dismissed for lack of merit.

The Court stated that all the reliefs that were awarded to the respondent would attract interest at the short-term deposit rate from the date of the notice of complaint to the date of Judgment and thereafter at current Bank of Zambia lending rate until full

payment. The respondent was also awarded costs of the proceedings.

It is against the foregoing holdings that the appellant has appealed to this Court raising the following grounds-

1. The Court below erred in law and in fact when it held at J11 of the Judgment that the respondent had proved his claim and thereby granted it, in relation to the claim for the underpayment of the commission from 1st January, 2014 to 30th October, 2016, and outstanding commission claims due as at 30th October, 2016, without pronouncing itself on whether the appellant had unilaterally varied the commission structure.
2. The Court below erred in law and fact when it held at J11 of the Judgment that the respondent had proved his claim and thereby granted it, in relation to the claim for the underpayment of commission, from 1st January, 2014 to 30th October, 2016, and outstanding commission claims due as at 30th October, 2016, when the evidence on record shows that the complainant did not object to the change or

variation to the commission structure in 2014 and continued to get paid based on the 2014 commission structure up to 2016 when he resigned.

3. The Court below erred in law and in fact when it held at pages J8 and J9 of the Judgment that the respondent was not provided with his necessary working tools when he was reinstated on the 27th of September, 2016 and that the work situation became unbearable to such an extent that the respondent could not work, contrary to the evidence on record.
4. The Court below erred in law when it awarded the respondent costs of the action when the respondent had failed to prove his claims or in the alternative, when the Court erroneously found in favour of the respondent as argued in grounds 1 and 3 of the appeal.

Both parties filed written heads of argument. The respondent also brought to the attention of the Court corrections in the record of appeal that were effected.

In arguing grounds one and two, it was submitted that the respondent's claims were that he was entitled to a commission depending on the business he took to the appellant company. During the period 1st January, 2014 to 30th October, 2016, he was underpaid on all commissions, contrary to agreed commission scheme schedules. When the commission agreement of 10th January, 2013 was signed, it formed part of his contract of employment and any changes would need to be signed for but the appellant unilaterally changed and implemented commission schedules of 1st January, 2014 which resulted in his underpayments.

It was further submitted that the respondent signed a commission scheme structure on 10th January, 2013 and that the Court's holding that the respondent's commissions were underpaid from 1st January, 2014 to 30th October, 2016 was erroneous. The evidence on record showed that the respondent was paid based on the 2014 commission structure which was revised on 14th February, 2014 and became effective immediately. It was contended that the learned trial Judge misconstrued the

respondent's claim for commission underpayment and did not make an express finding of unilateral variation. It was further argued that the Court erred in finding that the respondent was underpaid his commission between 1st January, 2014 and 30th October, 2016.

We were referred to the case of **Galaunia Farms Limited vs National Milling Company Limited and National Milling Corporation Limited**[1] where the Court stated that-

> ***"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment."***

It was contended that the respondent did not prove the unilateral variation of the 2013 commission structure. The Court therefore erred in finding that the appellant was underpaid his commission for the period 1st January, 2014 to 30th October, 2016. The Court merely made a pronouncement that there was a commission underpayment and did not establish the basis for its finding. We

were referred to the case of **Charles Nyambe and 82 Others vs Buks Haulage Limited,**[2] where the Court stated that-

> "***Since the appellant continued to work and received the old salary, he is deemed to have accepted being paid such a salary.***"

The appellant submitted that by continuing to work, and making commission claims, the respondent accepted the revised 2014 commission structure which was not unilaterally varied. The appellant urged us to uphold grounds one and two of the appeal for the foregoing reasons.

In support of ground three, it was submitted that in a letter dated 26th September, 2013, the respondent was reinstated and paid in full for the period he was not working, to the date of reinstatement. He was given the company mobile phone and laptop as well as motor vehicle but opted to resign on 30th September, 2016, two days after he was reinstated. It was contended that the facts and evidence that were before the trial Court did not warrant a finding of constructive dismissal on allegations that the work situation was so unbearable that the respondent could not work.

We were referred to the case of **Chilanga Cement vs Kasote Singogo**[3] in which the Supreme Court affirmed the position in **Western Excavating (EEC) Limited vs Sharp**[4] where Lord Denning stated that-

> ***"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 these circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that 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."***

We were referred to the case of **Time Trucking Limited vs Kipimpi,**[5] where this Court cited the case of **Kitwe City Council vs William Nguni**[6] and stated that-

> ***"The Supreme Court arrived at the conclusion 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 thus, it is the employee who makes the decision to leave."

It was submitted that to establish a case of constructive dismissal, there must be breach or actual unreasonable conduct on the part of the employer and not perceived breach or unreasonableness. It was contended that the respondent's resignation on 30th September, 2016 did not amount to constructive dismissal. The appellant urged the Court to allow ground three of the appeal.

In arguing ground four, the appellant contended that the lower Court erred in law when it awarded the respondent costs of the action when he failed to prove his case. Reference was made to the case of **Mutale vs Zambia Consolidated Copper Mines**[7] in this regard. We were further referred to the case of **Scherer vs Counting Investment Limited**[8] where the Court stated that-

"The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another party before the Court or given another party cause to obtain his rights is required to recompense that other

party in costs, but the Judge has unlimited discretion to make what order as to costs he considers that the justice of the case requires."

We were also referred to the case of **ZESCO Limited vs Cyprian Chitundu and Attorney General,**[9] where we stated that a party that attracts some considerable amount of blame should bear the liability for costs. It was contended that the respondent commenced the action in the lower Court on fruitless grounds and should therefore incur costs for unnecessary litigation. We were urged to uphold the appeal in its entirety.

The respondent filed heads of arguments on 27th November, 2018. Responding to grounds one and two of the appeal, it was submitted that the Court below did make a finding pertaining to the unilateral variation of the commission structure by the appellant by way of a pronouncement that the unilateral variation of the commission structure by the appellant in 2014 was illegal. The said variation was done without consultation, contrary to the conditions of employment. The learned trial Judge was on firm ground when he found that the respondent was owed commission.

We were urged to uphold the lower Court's findings on grounds one and two.

In opposing grounds three and four, it was submitted that the Court below was on firm ground when it found that the respondent was not provided with necessary working tools such as a motor vehicle, printing and stationery facilities, laptop computer, G4S line connectivity and phone handset when he was reinstated on 27th September, 2016 and that the work situation became unbearable to such an extent that he could not work.

It was submitted that over the years that the respondent worked for the appellant, his work performance appraisal reviews were very good as he always exceeded expectations for his level of performance. It was contended that the respondent's achievements and outstanding work performance were obliterated with the arrival of the Operations Director-North, Mr. Gerhard Pretorius with whom the respondent had a verbal altercation on 10th February, 2016 over a daily sales activity report. That there was animosity between the respondent and Mr. Pretorius and the

respondent was threatened with dismissal for not meeting expected sales targets.

The respondent was eventually dismissed from employment after the disciplinary committee heard his matter. It was in evidence that when he was eventually reinstated, the sim card was returned to him but the phone was not and that the laptop was returned but it was not connected to the company local area network (LAN). He was not given any stationery and printing facilities and was also not given the company vehicle for use. As such, he was not given the working tools that he needed to execute his functions. The respondent then wrote a letter on 30th September, 2016 and made a request for voluntary separation from employment which the appellant accepted as a notice of resignation from employment. We were referred to the case of **LM Wulfsohn Motors (Pty) Limited T/A Lionel Motors vs Dispute Resolution Centre,**[10] where the Court stated that-

> "***There are three requirements for constructive dismissal to be established:***

(1) Whether the employee brought the contract to an end;

(2) Whether the reason for the employee's action was that the employer had rendered the prospect of continued employment "intolerable"; and

(3) Whether the employee had no reasonable alternative other than to terminate the contract.

The respondent submitted that he was made to leave his job due to the unbearable work situation. He prayed that ground three of the appeal be dismissed.

In responding to ground four of the appeal, it was submitted that the lower Court was on firm ground when it awarded the respondent costs as he had proved his case for constructive dismissal. He prayed that ground four of the appeal be dismissed and that the appeal in its entirety be dismissed for lack of merit.

We have carefully considered the evidence on record, the submissions by Counsel and the respondent as well as the Judgment appealed against. To dispose of ground one and two, we must decide whether or not the respondent was underpaid

commission from 1st January, 2014 to 30th October, 2016, and whether the appellant unilaterally varied the commission structure. From the outset, we highlight the fact that the question whether or not the appellant varied the commission scheme structure which affected the respondent is a question of fact.

Having considered all the evidence on record, we come to the conclusion that the revision of the 2013 commission structure did not amount to a unilateral variation as the respondent did not object to the said revision and accepted to be paid based on the 2014 commission structure and did not challenge the said variation when it was effected. We are of the view that the respondent acquiesced to the variation of the 2013 commission structure as he continued to receive commission for a period of two years, from 2014 to 2016.

We therefore form the view that the Court erred when it found that the appellant unilaterally varied the 2013 commission structure as it was not supported by the evidence on record. We accordingly set aside that finding. We find merit in ground one and two of the appeal and they accordingly succeed.

In determining ground three, the issue is whether the respondent was not provided with necessary tools when he was reinstated on 27th September, 2016 and whether the work situation became unbearable to such an extent that the respondent could not work.

It is trite law that the concept of constructive dismissal presupposes that an employer must have been guilty of conduct which constitutes 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 essential terms of the contract. If these circumstances exist and an employee terminates his contract of employment, the law will treat him or her as having terminated the contract as a result of the employer's fundamental breach of the contract. This is the position that was pronounced by the Court of Appeal in the Western Excavating case (supra).

In the aforementioned case, Lord Denning said at page 717 of his Judgment that-

> ***"....the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is***

justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal."

Taking a leaf from Lord Denning's pronouncement in the Western Excavating case, we form the view that the withdrawal of working tools from the respondent and the poor working relationship with his superior which resulted in his subsequent dismissal before he was reinstated on appeal constituted constructive dismissal. The soured relationship between the respondent and Mr. Pretorius as well as the manner in which he was given performance targets that were difficult to meet in our view constituted constructive dismissal. For the forgoing reasons, we do not find merit in ground three of the appeal. It accordingly fails.

Regarding ground four, whether the Court erred in awarding costs of the action to the respondent, it is trite law, as was held by the Supreme Court in the case of **Costa Tembo v Hybrid Poultry Farm (Zambia) Limited**[11] that in general, costs follow the event. Since the respondent succeeded substantially in his claims in the Court below he was entitled to an award of costs. Ground four of the appeal therefore fails.

Finally, as the respondent has succeeded in two of the grounds of appeal, assessment of the disputed amounts due to the respondent is to proceed before the Registrar of the High Court, Industrial Relations Division.

Each party will bear its own costs

C.K. MAKUNGU
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE