

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2010/HP/59**

**BETWEEN:**

**MILANGU KAMPATA**

**AND**

**BARCLAYS BANK ZAMBIAPLC**



**PLAINTIFF**

**DEFENDANT**

**Before the Hon. Mr. Justice M.L. Zulu in Open Court on the ..... day of  
....., 2017**

*For the plaintiff: Mr. B. Gondwe of Buta Gondwe and Associates  
For the defendant: Mr. Mr. R. Mwanza of Messrs Robert & Partners*

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

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**Cases cited:**

1. *Chilanga Cement Plc. v. Kasote Singogo* (2009) ZR 122
2. *Attorney General v. D.G. Mpundu* (1984) ZR 6
3. *McCall v. Abeles and another* (1976) 1 ALL ER 727
4. *Western Excavating (ECC) Ltd v. Sharp* (1978) I.R.L.R
5. *Kitwe City Council v. William Nguni* (2005) ZR 57
6. *Pretoria Society for the Care of the Retarded v. Loots* [1997] 6 BLLR 721 (LAC)
7. *London Borough of Waltham Forest v. Omilaju* (2004) CA
8. *Zulu v. Avondale Housing Project* (1982) ZR 179
9. *Khalid Mohammed v. Attorney General* (1982) ZR 49



**Works referred to:**

1. *Halsbury's Laws of England, 4<sup>th</sup> edition reissue, Vol. 16*
2. *Selwyn's Law of Employment, 13<sup>th</sup> edition, 2004, Lexis Nexis, UK*

This in an action for constructive dismissal. By amended writ of summons dated 7<sup>th</sup> May, 2012, the plaintiff sued the defendant seeking the following reliefs:

- (a) Damages for constructive dismissal;
- (b) Damages for destroying her future professional prospects;
- (c) An order that the plaintiff repays her house loan on the defendant's staff terms and all other charges and penalties exceeding the staff conditions be reversed;
- (d) Damages for emotional strain and stress;
- (e) Further and other relief as the court will deem fit; and
- (f) Costs

In the accompanying statement of claim, the plaintiff set out the facts giving rise to her claims in this action.

For its part, the defendant filed a defence dated 22<sup>nd</sup> February, 2010 denying the plaintiff's allegations and claims.

At trial, the plaintiff, Milangu Nchimunya Kampata (PW1), gave oral evidence in support of her case. She testified that she was employed by the defendant in May 2004 as assurance manager and rose through the ranks to the position of head of audit, the post she held as at 2009 when her employment ended. Her responsibilities included undertaking audits, preparing the audit plans and packs and presenting them at audit meetings, attending stakeholder

meetings with senior management and attending key meetings where the audit department was required to give input.

It was her testimony that sometime in 2009, she was placed on a performance improvement plan by her new supervisor, Akash Singh, on ground that she was underperforming. She disagreed because her previous appraisal conducted by her outgoing supervisor, Harry Van Cittert, in 2008 did not show that she underperformed. She referred to the appraisal on pages 26 to 36 of her bundle of documents. PW1 testified that in February, 2009, there was correspondence via electronic mail (email) between herself, and her supervisors, Harry Van Cittert and Darrel King in which she communicated to them that the defendant bank had failed to meet its target and recorded a loss. In March, 2009, she received an email on page 103 of her bundle of documents from Akash Singh requesting for a meeting to some issues including her performance. The meeting took place in mid-March, 2009 following which her supervisors insisted that she be placed on a performance improvement scheme. She continued working but around May, 2009, the work environment became uncondusive. Her audit team, was given unrealistic deadlines within which they were expected to work and deliver accordingly. They did the work and by 22<sup>nd</sup> May, 2009 they sent it to London for review. By this time, she (PW1) had flagged staffing concerns. Her team comprised three individuals, herself included. However, the issue of the improvement performance plan persisted. She requested for a transfer to another department but to no avail.

PW1 testified that in June, 2009, the head of human resources, Kelvin Sokuni indicated to her that Akash has been asking about her whereabouts. She expressed surprise because she had communicated with Akash in May. On 2<sup>nd</sup> June, 2009, she was asked to meet Darrel despite her being on leave. At the meeting, Darrel said he was not going to discuss her performance but indicated what seemed to be career prospects to her. She requested for a transfer to another department given the strained relations she had with her colleagues in the audit department. Darrel told her that she could not be considered for an internal transfer because she had underperformed and that she should consider external options. Darrel also told her that her mid-year performance was probably going to be the worst. He then presented a mutual separation agreement on pages 133 of her bundle of documents for her consideration. He was asked to propose an amount she could be paid upon separation. She proposed to be paid K850,000.00 and requested to continue paying off her loan at staff rate. Darrel counter-proposed four months' salary pay and insisted that the separation was not an ordinary one because it was linked to her performance. However, the separation fell through and was not concluded.

It was PW1's testimony that she continued working but the environment was hostile. She did her best to deliver despite limitations with resources. She raised a formal grievance regarding her performance appraisal with the managing director who delegated to the finance and human resource directors. The hearing took place on 15<sup>th</sup> July, 2009 as shown by the minutes on pages 167 to 179 of

his bundle of documents. The panel made a finding for her to continue on a performance improvement plan because there was no evidence of review after the 2008 plan. She appealed to the managing director but the appeal failed. The managing director said that other employees performed well under similar conditions. Thereafter, she was given a letter showing that her title had changed to audit manager. She continued working but her boss insisted on having an appraisal discussion with her and Akash which in her view showed that he had other intentions. The strain and stress she underwent was also experienced by her colleagues at the same level which became evident from their resignations in Botswana, Zimbabwe, Egypt and Mauritius among others. She resigned in November and left on 12<sup>th</sup> December, 2009. It immediately came to her attention that her position had been advertised through an internal advertisement. According to PW1, there was an attempt to frustrate her and her colleagues so that the defendant could fill up their positions with the individuals who were reviewing their work in London. In her view, the defendant basically restructured.

PW1 further testified that she lost her house because her loan was placed on a commercial rate of 20 percent per annum. The house was repossessed in 2012.

In cross examination, PW1 testified that the bank conducted appraisals at every level to ensure that employees performed against certain set standards. Her appraisal was conducted by her boss in South Africa who came up with ratings based on his knowledge of

how she worked and feedback he received from her colleagues in the bank. In 2007, she scored a rating of 'C' which she accepted after discussing it with her supervisor. In 2008, she received the same rating of 'C' and was recommended for a performance improvement plan. According to her, the 2008 plan was conclusive because the 2009 appraisal did not refer to it.

She testified that she had no personal problem with Akash her line manager was Akash and she had no personal problem with him. She was never rated by Akash but that she had an appraisal with him.

She stated that she was heard on her grievances and considered the panel fair. The panel found that her relationship with her supervisor was professional.

After the appeal failed, she continued working since she had exhausted her options. She later resigned by giving notice without stating any reasons. However, she disclosed that her reason was that she was unhappy with the way she was being treated and rated on her performance.

In re-examination, PW1 explained that she was surprised to receive the separation agreement which had already been prepared especially that it was not part of her contract. She clarified that Darrel was advised that he could not link a mutual separation to poor performance but he disagreed.

She explained that it was her supervisor's responsibility to ensure that the appraisal was completed. The panel found that the fact that

the rating was not stated in the report was an oversight. She was not happy with the 2009 appraisal because it referred to performance for which she had already been penalized. She felt as though he was being punished twice. There was no clear evidence as to why she needed to continue on the performance improvement plan in 2009. According to her, she had satisfied the previous plan of 2008 which concluded accordingly when the year ended.

She explained that she met Akash upon his appointment in February, 2009 and had a meeting with Darrel over her performance. The next time she met him was when he handed her the performance improvement plan.

She pointed out that she disagreed with the reporting lines and structure. She testified that she requested the panel to investigate the issues regarding quality of papers but the investigation was inconclusive. According to her, all other heads were facing similar challenges. Further, that she did not agree with the objectivity of the performance improvement plan but was asked to go back to the same people.

That was the case for the plaintiff.

The defendant called its employee relations manager, Cynthia Katongo Chanda (DW1), to testify on its behalf. Her testimony was that the plaintiff was employed in 2004 and that the annual performance appraisal was part of her contract. In the first two years, her performance was good and she was elevated to director level right under the managing director level. Later in 2007, she recorded a low

performance meaning that he was meeting some expectations but with room to improve. In line with policy, a performance improvement plan was recommended to her as an opportunity for her to improve before the rating. The plan was instituted in 2007 through to 2008. In the first quarter of 2008, her line manager made a recommendation that she had made improvements and should be removed from the plan. However, at the 2008 year-end review, the plaintiff was still rated 'C'. Such a rating needed her to continue on the plan. She testified that it is true that she was unhappy since according to her, she had made some improvements, but they were not enough to satisfy the set objectives.

Based on her 'C' rating, the plaintiff raised a grievance with the line manager. The plaintiff agreed that the poor performance was not in dispute. Being dissatisfied with the decision of the line manager, the plaintiff appealed to the managing director who found that his performance was low. Therefore, the plan was to be reviewed with the plaintiff's supervisor with whom she had a working professional relationship.

She testified that the plaintiff had hoped to change her substantive role to another. It was however not possible owing to her low performance as the defendant's policy on such arrangements are that one must be rated 'A' or 'B' in performance. The purpose of the plan is to support employees to improve performance and demonstrates the value the bank places on employees. The tool has been used successfully. The capability procedure, which was never initiated in



the plaintiff's case, is the last option for an employee that fails to improve and would usually include a warning.

It was DW1's testimony that the mutual separation agreement was 'without prejudice.' It was not a departure from the plaintiff's contract as the whole contract was not cast in stone. The separation was subject to agreement between the parties which is why the plaintiff was given time to consult. The agreement was done in good faith such that the plaintiff was even allowed to continue working after the agreement fell through.

She testified that the nature of audit is that it is periodic and there is no country with more than three people in audit and that no amendment or restructuring was done. The defendant ensured that the plaintiff was supported which is evident by the outcome of the appeals. The defendant's position is that the allegation that the plaintiff's ratings were meant to hound her out of the bank is false. The defendant supported her by placing her under the improvement plan.

DW1 testified that leave was subject to approval by the line manager depending on the work load.

Regarding the house, DW1 testified that the plaintiff no longer enjoyed the privileges of a staff loan. When she left employment, she was treated like any other customer. The house was repossessed under a mortgage action.

DW1 stated that the defendant did not destroy the plaintiff's career prospects as she had resigned on her own accord.

The plaintiff's claim for damages cannot stand because she resigned by giving notice and thanked the defendant.

She went on to testify that at the beginning of each year, the defendant sets targets on expected deliverables for employees which is assessed at the end of the year. The employee's input then determines the rating they receive.

In cross examination, DW1 testified that the panel agreed that mutual separation and poor performance were separate. That it would not be entirely wrong to introduce separation on account of poor performance. She denied that her statements were contradictory.

She stated that she did not witness the incident when Sokuni had to intervene for the plaintiff to go on leave.

DW1 testified that she was not aware of an occasion when the plaintiff had to drive to the Copperbelt at 23:00 for a meeting or that one auditor fell ill and was evacuated for treatment. She maintained that those responsibilities go with the strategic role of the office the plaintiff held. When further cross examined, she stated that she knew that the other officer called Foster was sickly but that she was not aware if that affected the plaintiff's work.

It was her testimony that although their colleagues at the bank give feedback or input on rating, the line manager made the final decision.

She acknowledged that if not objective, a performance improvement plan could be a problem.

She maintained that only employees with 'A' or 'B' ratings could be transferred within the bank despite not having proof of the policy before Court. When referred to the defendant's policy relating to performance on page 99, DW1 stated that an employee would only be considered for exit if they scored 'D.' She, however, denied that Darrel was attempting to do the same thing with the plaintiff who had not scored a 'D' when he offered her the mutual separation option.

In re-examination, DW1 explained that the defendant is a global bank such that the matrix reporting is not unique to Zambia. She also explained that the plaintiff's rating was not reviewed before she left. It remained a 'C'.

That was the evidence tendered on behalf of the defendant.

After the close of the trial, learned counsel for the plaintiff filed written submissions dated 30<sup>th</sup> January, 2017. The crux of the arguments is that the defendant breached the contract by failing to keep to its implied condition to give the plaintiff trust and confidence and created an atmosphere whereby it is the defendant's action which in fact forced the plaintiff to resign.

It was submitted the defendant through the plaintiff new supervisors were bent on ensuring that the plaintiff left the bank by offering her the mutual separation agreement. The mutual separation agreement was inconsistent and in disregard of the contract. The defendant did

not want the plaintiff because she was a poor performer. Therefore, they should have invoked the procedure under clause 3.6 of the contract.

Learned counsel submitted that the plaintiff was denied leave and when she went on leave, she was called back to work. In addition, that the defendant acknowledged that the plaintiff's department was understaffed but they continued putting extra strain on her and making the atmosphere uncondusive for work especially that she was to service the entire Barclays Bank in Zambia. Further, that in 2008, the defendant introduced a multiple reporting system which confused the reporting lines. Counsel submitted that the defendant treated the plaintiff unfairly and without objectivity.

Citing the authors of Employment Law and Practice, 1<sup>st</sup> edition, Sweet & Maxwell, 2007 at page 130, it was submitted that the plaintiff was seriously undermined in her role in the treatment she received from her supervisors and which treatment was surprisingly upheld on appeal to the managing director. Counsel further relied on the case of **Chilanga Cement Plc. v. Kasote Singogo**<sup>1</sup> on constructive dismissal and argued that the plaintiff was constrained to resign due to the treatment she received from the defendant. She tried to be stoic to ensure that the conditions and policies were upheld and applied to ensure objectivity in her case but to no avail.

Relying on the cases of **Attorney General v. D.G. Mpundu**<sup>2</sup> and **McCall v. Abeles and another**<sup>3</sup>, counsel argued that the plaintiff should be awarded damages for mental upset and distress caused by

the defendant's breach of contract. It was further submitted that the court had discretion to award the plaintiff damages in line with the holding in **Chilanga Cement Plc. v. Kasote Singogo**, supra. Counsel prayed that the Court should find merit in the plaintiff's case.

In response, learned counsel for the defendant submitted that the Court should find that the plaintiff was a high performer until she took up the lofty position of head of audit. The defendant is a global bank with a matrix reporting line across the globe. The plaintiff accepted her poor performance rating of 'C' in 2007. Additionally, no one person, including her line manager had unilateral authority to determine an employee's rating or remove them from a performance improvement plan other than make a recommendation. That the plaintiff confirmed that her relationship with Akash Singh was professional. Despite being rated 'C' the plaintiff did not launch the grievance procedure against Harry Van Cittert. The plaintiff was simply frustrated because she was not taken off the improvement plan.

Learned counsel submitted that the Court should find that the plaintiff did not refer to any provision of her contract that was breached and that the alleged breach of trust and confidence was not pleaded. The plaintiff's testimony did not make mention of breach of mutual trust and confidence. Further, that the plaintiff who said her disquiet over her performance appraisals began in February, 2009 only resigned in November, 2009. It was after being dissatisfied with the outcome of the grievance procedure that she resigned. She

launched the grievance procedure instead of resigning. She did not demonstrate that her relationship with her employer broke down as she continued to express willingness to continue working and improving her performance. Counsel relied on the cases of **Western Excavating (ECC) Ltd v. Sharp**<sup>4</sup>, **Chilanga Cement Plc. v. Kasote Singogo** and **Kitwe City Council v. William Nguni**<sup>5</sup> and argued that the plaintiff had failed to establish constructive dismissal because frustration, victimisation and harassment are not grounds for consideration.

Learned counsel further posited that the cases cited on damages do not apply to the facts of the plaintiff's case. The defendant prayed that the plaintiff's case be dismissed.

In reply, counsel for the plaintiff maintained that the plaintiff was constructively dismissed. It was argued that the issue of the mutual separation agreement went to the core of the relationship because the plaintiff was left with no option but to conclude that she was no longer welcome to work for the defendant.

Counsel cited the case of **London Borough of Waltham Forest v. Omilaju**<sup>6</sup> that the last straw that causes the employee to leave does not have to be similar to the earlier string of events or blameworthy conduct by the employer. It need only be related to the obligation of trust and confidence and enough that when added to the earlier events the totality is a repudiation.

In view of the above authority, counsel submitted that the defendant failed to apply its own conditions of service and introduced the

mutual separation agreement such that there was no mutual trust and confidence. The defendant failed to conduct an annual assessment properly or as expected; failed to grant the plaintiff leave; made her continue on the improvement plan which she had already been on for the same period; and her department though taxing was understaffed. The defendant undermined this relationship in a clear and definite way.

I have carefully considered the pleadings, the evidence on record and submissions by both counsel for the plaintiff and the defendant.

It is undisputed that that the plaintiff was employed by the defendant in 2004. In the first years of her employment, her performance was good and she rose to the position of head of audit. It is not in dispute that sometime in 2007 and 2008 the plaintiff performed poorly at work and was placed on a performance improvement plan. Sometime in June, 2009, the defendant offered the plaintiff an option to agree to opt out by mutual separation which nevertheless fell through. Aggrieved with her continued placement on the performance improvement plan, the plaintiff raised a grievance in July, 2009 which was dealt with administratively with the outcome being that she continues on the plan. She later resigned in November, 2009 by giving one month notice.

The plaintiff contends that the defendant in breach of her contract of employment was oppressive and frustrating and showed a complete lack of confidence in her which made the environment uncondusive for her to effectively carry out her work. She claims that as a result

of the hostility in the work environment, she was constrained to resign. On the other hand, the defendant contends that the plaintiff resigned on her own accord, frustrated by her low performance. The issue that arises for determination is whether the defendant was in breach of the contract to entitle the plaintiff to a claim for constructive dismissal.

The learned authors of Halsbury's Laws of England, 4<sup>th</sup> edition reissue, vol. 16 at paragraph 321 state that:

*“An employee who terminates the contract of employment, with or without notice may still claim to have been dismissed in the circumstances are such that he is entitled to terminate it without notice by reason of the employer's conduct. The employee must leave in response to the breach of contract and indicate that he is treating the contract as repudiated...”*

A similar position is taken by the learned author of Selwyn's Law of Employment, 13<sup>th</sup> edition, 2004, at page 383 as follows:

*“Where the employee himself terminates the contract, with or without notice, in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct: this is known as ‘constructive dismissal’, for although the employee resigns, it is the employer's conduct which constitutes a repudiation of the contract, and the employee accepts the repudiation by resigning. The employee must clearly indicate that he is treating the contract as having been so repudiated by the employer (Logabax Ltd v Titherley), and if he fails to do so, by*



*word or conduct, he is not entitled to claim that he has been constructively dismissed (Holland v Glendale Industries Ltd)."*

Further, at page 388 that *"whether an employer's conduct amount to a constructive dismissal is a question of fact for the employment tribunal to determine."*

In the case of **Chilanga Cement Plc. v. Kasote Singogo**, also cited by counsel, the Supreme Court held, inter alia, that

*"It can thus be discerned, from the various authorities on constructive dismissal, 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 the contract of employment. It is the employee who makes the decision to leave."*

In **Kitwe City Council v. William Nguni**, also cited by counsel, the Supreme Court held as follows:

*"We have said in this judgment that the reasons for resigning from the defendant could not have been frustration, victimization and harassment. We wish to go further, under the two grounds of appeal for purposes of putting the law in proper context, that the plaintiff could not have been constructively dismissed from employment as a result of frustration, victimization and harassment, because these are not the essentials in law that might render a dismissal to be constructive."*

In addition, in the English case of **Western Excavating (ECC) Ltd v. Sharp**, also referred to by counsel, an employee was dismissed for taking time off work. He appealed to the internal disciplinary board, which substituted dismissal with a penalty of five day's suspension without pay which he accepted. Being short of money, he asked for an advance on his holiday pay which was refused. He then asked for a loan which was also refused. He consequently resigned in order to get his holiday pay and brought a claim for unfair dismissal alleging that he was forced to resign. His claim was upheld by the tribunal. The decision was reversed by the Court of Appeal holding that the test for constructive dismissal was to be determined by the contract test, i.e. did the employer's conduct amount to a breach of contract which entitled the employee to resign. The 'unreasonable conduct' theory was dismissed as leading to a finding of constructive dismissal on the most whimsical grounds. Since there was no breach of contract by the employer there was no dismissal, constructive or otherwise.

Further, in the South African case of **Pretoria Society for the Care of the Retarded v. Loots**<sup>7</sup>, the Labour Appeal Court stated that:

*"The enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy it, or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract: the Courts function is to look at the employer's conduct as a*

*whole, and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

It went further to state that when any employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation shaped by the employer, he cannot continue to work, and has construed that the employer's conduct amounts to a repudiation of the employment contract. Therefore, in view of the employer's repudiation, the employee terminates the contract.

Thus, in order to succeed, the plaintiff has to show that she resigned in response to a fundamental breach of contract by the defendant. The decision to leave must be made by the employee by reason of the employer's conduct. The conduct in question must constitute repudiation and the employee must show either by words or conduct that the repudiation was accepted. The test is whether the defendant's conduct amounted to breach of contract as mere frustration, victimisation and harassment will not suffice. As claimed, the plaintiff must demonstrate that the defendant's behaviour has breached the term of mutual trust and confidence that is implied into all contracts of employment. The term basically requires employers to refrain from conducting themselves in a manner that is likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. She must also prove that the defendant was responsible for introducing the

'intolerable' condition such that there was no other way of resolving the issue except for her to resignation.

After perusing the record, I am of the considered view that the problems which the plaintiff faced during her employment between 2007 and 2009 were as a result of her poor performance. The question then is whether the defendant's response to her performance amounted to a fundamental breach to entitle the plaintiff to treat the contract as repudiated. It is, therefore, imperative to review the circumstances which led to the plaintiff's resignation.

The plaintiff did not dispute that she performed poorly in 2007 under the supervision of Harry Van Cittert as shown by the letter on page 14 of the plaintiff's bundle of documents informing her that her performance had been assessed and rated 'C'; nonetheless, her salary was increased. The plaintiff received the same rating the following year. During that period, she was placed on a performance improvement plan. According to DW1 the purpose of the plan was to support poorly performing employees in order to assist them to improve their performance as employees. This the plaintiff did not dispute.

The plaintiff claims that the offer to terminate her contract through a mutual separation agreement was indicative that she was not welcome at work. However, it is common cause that the agreement fell through. It is worth noting that despite the plaintiff's claim, she testified during trial that when the offer was made, she was invited to propose an amount she was to be paid upon separation she

proposed to be paid K850,000.00 which the defendant declined. It seems to me that the only reason the separation agreement was not concluded was because the plaintiff was unhappy with the amount the defendant proposed to pay her. In addition, the mutual separation agreement was offered to her on 2<sup>nd</sup> June, 2009 but she continued working and only resigned in November, 2009. Prior to that she invoked the grievance procedure in relation to her performance which was unsuccessful. She described the panel which heard her grievance as fair.

During the same period, the plaintiff had on occasions requested to be moved to another department citing her strained relationship with her new supervisor. Despite stating that she was being rated lowly in her performance because her new supervisor Akash Singh wanted her out, the first time her performance was rated 'C', she was still under the supervision of Harry Van Cittert. During cross examination, she (DW1) confirmed that her relationship with Akash was professional. Further, the evidence of DW1 was that the performance appraisal was a process which was not in the sole discretion of the officer's supervisor. The same process was applied across the board.

The plaintiff also raised an issue of staffing. This fact was clarified by DW1 which explained that every officer in the position the plaintiff held had similar staffing levels. Of course there was intense pressure of work owing to the nature of the position the plaintiff held. During

trial, the plaintiff stated that despite working under intense pressure, she did what she could to carry out her tasks.

Further, the plaintiff's resignation letter on page 198 of her bundle of documents discloses that she resigned by giving one month's notice in accordance with her contract. In the letter, she stated that: "it has not been easy to make this decision but circumstances obtaining in my employment constrain me and make it necessary that I resign and pursue other career opportunities". The plaintiff contends that she was forced to resign as a result of the defendant's conduct. The plaintiff has however not demonstrated the circumstances that ought to have entitled her to treat her contract as at an end. What comes out more clearly from the evidence on record is that she felt victimised by her new supervisor and frustrated by her continuous poor performance. These are not factors in law to consider in determining whether there was constructive dismissal.

In addition, the plaintiff expressed willingness to continue working for the defendant but could not be transferred to another department as requested owing to her poor performance. She has not proved on a balance of probabilities that the defendant was in breach of the implied obligation of trust and confidence in her as an employee. She performed poorly and the defendant made effort to support her in order to assist her to improve. Nothing was stopping the defendant from terminating her contract. Even after the mutual separation agreement fell through, the defendant allowed the plaintiff to continue working. I do not agree with counsel for the plaintiff that

the defendant should have invoked the capability procedure and this court cannot certainly order the defendant to do so. The parties had terms governing their relationship which they were bound by.

In view of the foregoing, I find that the whole conduct of the defendant did not amount to fundamental breach of contract to constitute repudiation so as to give rise to a successful claim for constructive dismissal in favour of the plaintiff. The plaintiff has failed to prove her case on a balance of probabilities as required. I am fortified in my finding by the cases cited earlier on in this judgment. Consequently, the reliefs sought for damages for constructive dismissal, damages for destroying her future professional prospects and damages for emotional strain and stress, are unsuccessful.

As regards the claim for an order that the plaintiff repays her house loan on the defendant's staff terms and all other charges and penalties exceeding the staff conditions be reversed, I find that the claim lacks merit. The plaintiff ceased to be an employee of the defendant when she resigned and left in 2009. The evidence of DW1 was that the privileges which the plaintiff seeks to benefit from ceased to extend to her upon her resignation as it was only available to the defendant's employees. It was also DW1's evidence that the house was repossessed in a separate mortgage action which this Court cannot comment on or indeed reverse. The plaintiff did not adduce any evidence to rebut the evidence of DW1 or show that she was still entitled to those privileges even after resigning. The position in civil cases is that he who alleges must prove his case. See: **Zulu v.**

**Avondale Housing Project<sup>8</sup> and Khalid Mohammed v. Attorney General.<sup>9</sup>**

In view of the foregoing, the plaintiff's case is unsuccessful. I award costs to the defendant to be taxed failing agreement.

Leave to appeal is granted.

Delivered at Lusaka this .....<sup>12<sup>th</sup></sup>..... day of .....<sup>June</sup>.....2017.



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**M.L. ZULU  
HIGH COURT JUDGE**