

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP/IRC/LK/432/2016

BETWEEN:

MUSONDA MUTALE

AND

AFRICAN BANKING CORPORATION LTD



COMPLAINANT

RESPONDENT

BEFORE: JUDGE M. K. CHISUNKA

APPEARANCES:

For the Complainant: Ms. M. Siansumo – Messrs Malambo & Co.

For the Respondent: Mrs. N. Simachela & Ms. S. Kateka – Messrs Nchito & Nchito.

J U D G M E N T

Legislation Referred to:

Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

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.***

Introduction

1. **Mr. Musonda Mutale** (Complainant) filed a Notice of Complaint on 14th September, 2016 against **African Banking Corporation (Z) Limited** (Respondent) claiming that he was unlawfully demoted and was constructively dismissed by the Respondent on account of the unilateral change of his conditions of service by the Respondent.

Nature of the Complainant's claim

2. The Complainant contends that he was employed by the Respondent on 1st April, 2015 as Country Head of Corporate Banking, which position he agreed to and was reporting directly to the Managing Director and, functionally, to the Head-Corporate and Investment Banking. During the course of his employment, between July, October, 2015 the department was renamed as Corporate and Investment Banking as part of the Bank's restructuring under the Bank's Target Operating Model (TOM) in its effort to try and set up structures similar to that of large international Banks.
3. The said restructuring resulted in the creation of the position of Regional Head of Corporate and Investment which lay between the Group Head of Corporate and Investment banking and the position he held of Corporate Head of Corporate Investment Banking. This relegated his position and the

reporting structure changed, meaning that he was now not reporting to the Managing Director as before. He did not consent to this and considers this as a demotion and unilateral change of contract.

4. He now comes before this Court seeking the following relief:

- (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.

Respondent's Defence

5. The Respondent denies the claims by the Complainant that his conditions of service were unilaterally changed or that he was demoted in the manner alleged contending that the Complainant voluntarily resigned from his employment and is not entitled to any of the remedies listed in the Notice of Complaint.

The Evidence (by the Complainant)

6. Apart from himself, the Complainant called one other witness, namely, **Milimo Silenga**, a former Country Head – Human Capital of the Respondent. **She took the stand as CW1.**
7. CW1 testified that she was the Head – Human Capital for the Respondent from November 2013 to till July 2016. She recalled that the Complainant was recruited during the period she served in that capacity, as Country Head-Corporate Banking. reporting to Country Managing Director and to the Group Head of Corporate Banking at the Group's head office in Johannesburg.
8. She informed the Court that during the course of the Complainant's employment, the Bank Restructured the Management team. The Restructuring followed the Bank's acquisition of Atlas Mara and the prospective acquisition o

Finance Bank. The changes that were introduced implied that the Complainant's position was no longer reporting to the Managing Director and Group-Head in Johannesburg as before but now reporting to the Country Head of Corporate and Investment Banking. It also meant that the Complainant's position was no longer part of the Management Committee (MANCO). She explained that MANCO was made up of a number of senior positions in the Bank that headed departments or units and provided strategic directions for those departments or units. Each of the positions on the MANCO reported to the Country Managing Director and the Group Head of the function who would be based in Johannesburg.

9. Under cross-examination, CW1 confirmed that the Complainant's position was Country Head of Corporate Banking and that after the restructuring, the Complainant's conditions of service, in terms of remuneration and compensation, remained the same.
10. She confirmed further that under the new composition of MANCO, the Head of Internal Audit and Head Marketing were no longer members including the Complainant's position. Further, the Heads of IT, and Manager Investment Services were not part of the new composition.

11. **The Complainant took the stand as CW2**

He testified that at the time he was employed it was agreed that he would be reporting to the Managing Director and Group Head of Corporate Banking. He stated that, in his contract, there was nothing to say that the bank would vary his reporting lines during the course of his employment. That when the bank varied his reporting lines after the structuring, he considered it to be a breach of his contract for the reasons that it was unilateral and was a material variation of his role in the Bank.

12. The Complainant informed the Court that the restructuring resulted in his position being dropped from MANCO. By virtue of that he ceased to be Head of the unit and he no longer continued to enjoy overall supervision and strategic direction for his department. He took this as a demotion. He stated that this was the deciding factor for him to leave and he wrote to the bank that his contract had been terminated but did not resign. He explained that the letter he referred to as having terminated his contract was written to him by the Managing Director and was exhibited as "MM 14". That after he left employment he was only paid his pension benefits in October, 2016.

13. Under cross-examination, he confirmed that his employment relationship was governed by a written contract of employment signed between himself and the Respondent and that he was

familiar with the contents of the said contract. He confirmed that his contract did not provide for his membership to MANCO. He also confirmed that his contract did not specifically provide that he would be reporting to the Managing Director. He confirmed further that his terms and conditions of service remained the same after restructuring. He confirmed that the Respondent wrote to him in 2016 advising that he was a valuable member of the team.

14. He confirmed that he refused to take part in interviews that were being undertaken for consideration to positions after the restructuring. He maintained that he did not resign but that he left the bank as a result of the letter from the bank. He confirmed that he wrote to the bank that he would work up to September 2016 and that he would not be available after that. He confirmed that he proposed a mutual separation on 31st May, 2016. He further confirmed that by 30th June, 2016 when Finance Bank was acquired by the Group, he had already indicated that there be a separation and he turned down the invitation to participate in the vision of the bank.

The Evidence (by the Respondent)

15. The Respondent called one witness to the stand, **Christopher Mwelwa (RW1)**, the Head of Global Markets for BancABC and Finance Bank. He recalled that at the time he joined the Respondent's services, the Complainant was Head of Corporate Banking. He informed the Court that the

Restructuring that was implemented in the Bank was intended to prepare the Bank for the future in anticipation of the acquisition of Finance Bank. The process started in January 2016 and was eventually closed on 30th June, 2016. The Managing Director thus saw a need for the organization of the Management Committee which entailed that certain members of the MANCO. The three members affected by the re-organisation, were Head of Corporate Banking, Head of Compliance and Head of Internal Audit.

16. RW1 explained that there was nothing unusual about that because re-organising the MANCO was at the discretion of the Managing Director. He further told the Court that the Bank embarked on the process of intergrating the two banks, namely BancABC and Finance Bank, which involved people, processes and systems. The intergration started off at Board level, Managing Director, MANCO, Management and all the way to clerical level. He further explained that members of MANCO for both banks had to go through aptitude tests, psychometric tests and other interviews. He informed the Court that the Complainant did not go through the process of selection.
17. Under cross-examination, he confirmed that following the Restructuring, the Complainant's reporting lines changed but he did not know whether the Complainant consented to the change. He confirmed that the Complainant was invited to

participate in the selection process. He also stated that he was not aware that his contract was terminated and the document "MM 14" did not say that it was terminated.

Facts Established

18. The facts established, as I discern them from the evidence led before me, are as follows:

18.1 The Complainant was employed by the Respondent under contract and was employed in the capacity of Country Head Corporate Banking and later renamed Corporate and Investment Banking.

18.2 At the time he served in that capacity he reported to the Managing Director and functionally to the Group Head Corporate and Investment Banking based at the Group's head office in Johannesburg, South Africa.

18.3 Following a Restructuring of the Bank due to the acquisition of Atlas Mara and Finance Bank (Z) Limited, the intergration process resulted in changes to Management processes and systems.

18.4 The changes that were effected implied that the Complainant's position was no longer reporting to the Managing Director as before and his position was no longer part of MANCO.

18.5 Under the new composition of MANCO, the Head of Internal Audit, Head Marketing and Head Compliance were no longer members including the Complainant's position.

18.6 After the restructuring of the Bank and the re-organisation of the management, the Complainant retained his position as country Head of Corporate banking and his conditions of service, in terms of remuneration and compensation, remained the same.

18.7 The Complainant's contract of service with the Respondent did not provide for his membership to MANCO nor specifically that he would be reporting to the Managing Director.

18.8 Re-organisation of the MANCO was the preserve of and within the ambit of the Managing Director's discretion.

18.9 The Complainant did not specifically resign from the employ of the Respondent but deemed the alleged variation of his employment as a termination.

Issues to be determined by the Court

19. The Complainant submits that the question to be determined by the Court is whether the Respondent unilaterally varied the Complainant's contract and conditions of service to amount to the employment being considered wrongfully or unfairly

terminated. The Respondent on the other hand poses the following two questions: *Firstly* whether the Complainant's conditions of service were unilaterally changed and *secondly* whether the Complainant was demoted and if so, whether the demotion resulted in constructive dismissal.

20. Taking into account the facts established in this case and the submissions of the parties, I wish to state that the key issues that fall for determination are whether or not, on the evidence before me:

- (i) *the Complainant was constructively dismissed, and or;*
- (ii) *the Complainant is entitled to any of the remedies outlined in the Notice o Complaint.*

The Parties Respective submissions

21. The gist of **the Complainant's submission** is that the changing of the Complainant's reporting lines and the dropping of his position from MANCO were a unilateral change in the Complainant's conditions of service to his detriment as it resulted in a compulsory reduction in his rank or job title within the organizational hierarchy and was, therefore, a demotion and the Complainant was entitled to leave his employment and treat himself as having been constructively dismissed by the Respondent.

22. **The Respondent's submission** is anchored on the argument that the changes that the Complainant complains of, namely to his reporting structure and to membership of the management committee (MANCO) were not basic conditions of employment that affect the essential character of the bargain. Further that there was no demotion suffered by the Complainant because there was no change to his position in terms of the position being downgraded nor in terms of his duties or reduction in his remuneration. Consequently there was no constructive dismissal because there was no fundamental breach of the contract on the part of the Respondent.

Determining the Issues

23. The cause of action in this case is founded on constructive dismissal. It would be helpful at this stage to review the general principles that underpin constructive dismissal and then evaluate the evidence within that context.

The Law and General Principles of Constructive Dismissal

24. Constructive dismissal occurs where an employer has committed a serious breach of contract such that the employee is entitled to treat the contract as at an end. If the employee chooses to treat the contract as at an end by resigning, then he has been constructively dismissed.

25. An exposition of the position of the law on constructive dismissal was made by **Lord Denning MR in *Western Excavating (ECC) Ltd v. Sharp (1978) QB 761***, 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.”

26. In the Zambian case, ***Kitwe City Council v. William Nguni (2005) ZR 57***, the principle laid down in the ***Western Excavating*** case was adopted and the Court guided thus:

“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.”

And later on in ***Chilanga Cement Plc v. Kasote Singogo (2009) ZR 122***, 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.”

27. From the authorities cited above, it is plain to me that for one to successfully pursue a claim for constructive dismissal, one must show or prove that:

(i) the employer committed a serious breach of the employment contract;

(ii) the employee did not accept the breach; and

(iii) the employee was forced to resign because of that breach;

(iv) the employee resigned immediately following that breach.

Evaluation of the Evidence

28. In the case before me, can it be said that the Respondent, without reasonable and proper cause, conducted itself in a manner that amounted to a fundamental breach of contract that entitled the Complainant to resign?

29. **The Complainant's** contention is that there was a course of conduct by the Respondent that he considered to be a breach of contract. He relies in particular, as attesting to the conduct in question, on the events have been outlined in paragraphs 11 and 12 of this judgment. He asserted before this Court that all these events which began in 2015 resulted in his position being relegated and the reporting structure changed without his consent.

30. The Respondent, on the other hand, contends that the re-organisation of the management team and departments was a normal exercise and did not in any case result in the demotion of the Complainant as alleged, because membership to MANCO was at the discretion of the Managing Director. Further, the Complainant maintained all his benefits and conditions of service after the restructuring.
31. This Court has examined the circumstances that the Complainant has relied on in support of his claim with a view to determine whether they meet the test set by law.
32. I have also noted that the Complainant has strongly maintained that he did not resign. I am alive to the fact that prior to the Complainant's separation from the Respondent employ, he had previously written to the Chief Executive Officer seeking to leave employment on mutual agreement basis. The letter of the 31st May, 2016 reads in part:

“re: IMPLEMENTATION OF NEW TARGET OPERATING MODEL

I noted and appreciated your interpretation of the events that led to our discussions. My interpretation is different and it is clear that we cannot reach consensus or would my concern be addressed... I still maintain my position that I am not agreeable to the proposed change in reporting line...Against the foregoing, I propose that we consider a mutual separation...”

And on 16th July, 2016, the Respondent's Chief Executive Officer wrote to the Complainant in the following terms:

“Reference is made to your letter dated 31st 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 BancABC is greatly valued and we trust that you shall continue to add value to the bank...”

33. On 27th July, 2018, the Complainant wrote to the Chief Executive Officer maintaining that he was not agreeable to the proposed change in his conditions of service concluding that *“if I do not hear from you regarding our Mutual Separation, I will consider that you do not agree with my proposal and consider my contract as having been terminated by the Bank.”*
34. The two letters referred to (marked and exhibited as “MM 5” and “MM 6 (a)” to the Complainant’s Affidavit) appear to be self-explanatory. It is plain that the Complainant insisted on a mutual separation but did not resign. In fact he suggested that if the Respondent did not agree to his proposal he would consider that his contract is terminated by the Bank.
35. My finding in this case is that since the Complainant did not resign, then the circumstances of his separation from employment does not accord with the test required to sustain a finding for constructive dismissal.

36. It is also my finding that, the Complainant has failed to demonstrate that the Respondent committed a fundamental breach of the employment contract in implementing the re-organisation of the company in readiness for the acquisition of Finance Bank. I do not accept the suggestion by the Complainant that he was demoted when in fact his remuneration package remained the same even after the restructuring.

37. In the light of the foregoing, I dismiss the claim for constructive dismissal in total.

The upshot of this conclusion is that the Complainant is not entitled to the relief sought.

I make no order as to costs.

Delivered at Lusaka thisday of August, 2018.

