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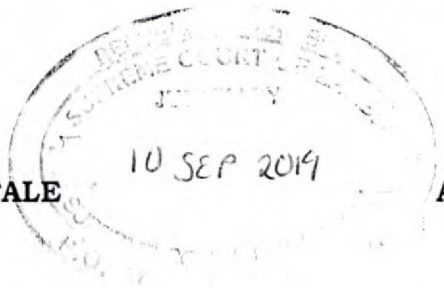
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 189/2016
SCZ/8/103/2016



BETWEEN:

JACQUELINE CHIPASHA MUTALE **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: MUSONDA, DCJ, KAOMA AND KAJIMANGA, JJS.

On 3rd September and on 10th September, 2019.

For the Appellant: N/A

For the Respondent: Mr. M. Nchito, SC, Nchito & Nchito

JUDGMENT

Kaoma, JS, delivered the Judgment of the court.

Cases referred to:

1. Chilanga Cement v Kasote Singogo (2009) Z.R.8.
2. Gerald Musonda Mumba v Maamba Collieries Limited (1988-89) Z.R. 217.
3. Attorney General v Marcus Achiume - Appeal No. 3 of 2011.
4. Zambia Consolidated Copper Mines v Matale (1995-1997) Z.R. 144.
5. Redrilza Limited v Abuid Nkazi and others - SCZ Judgment No. 7 of 2011.
6. Mukuma and another v Finance Bank Zambia Limited – Appeal No. 3 of 2011.
7. Peter Ng'andwe v Rex Ngoma – SCZ Appeal No. 94 of 2004.
8. Mike Musonda Kabwe v B.P. Zambia Limited (1995-97) Z.R. 18.
9. Wilson Tembo v William Kapembwa - Appeal No. 110 of 2015.
10. Southern Water and Sewerage Co. Limited v. Sandford Mweene - Appeal No. 14 of 2007.
11. Josephine Mwaka Mwambazi v. Food Reserve Agency - Appeal No. 128 of 2009.
12. Sydney Mugala and another v Post Newspaper Limited - Appeal No. 133 of 2013.
13. Giles Yambayamba v Attorney General and National Assembly of Zambia - SCZ Judgment No. 26 of 2015.
14. James Zulu and others v Chilanga Cement - Appeal No. 12 of 2004.
15. ZESCO Limited v Ignatius Muleba Sule - SCZ 170 of 2002.

Legislation referred to:

1. **Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia; section 85(5), Section 97;**
2. **The Supreme Court Rules, Cap 25 of the Laws of Zambia, Rule 58(2) and Rule 68(2).**

INTRODUCTION

1. This appeal is from a judgment of the Industrial Relations Court (IRC) (now Industrial Relations Division of the High Court), handed down on 21st March, 2016 in favour of the respondent, the former employer of the appellant.

BACKGROUND FACTS

2. The appellant was employed by the respondent on 11th December, 1997 as Corporate Account Manager, with effect from 12th January, 1998. She rose through the ranks and on 16th July, 2012 she was appointed to head Personal Banking. She served under conditions of service for management staff implemented on 1st January, 2010, clause 22 of which provided for termination of employment by giving three months' notice or payment of salary in lieu of notice.

3. In early 2014, the respondent requested Deloitte and Touche, an external consultant, to review its organisational structure in terms of effectiveness and efficiency. In that regard, on 3rd

July, 2014 a report was submitted by Deloitte and Touche. According to the appellant, the report recommended, *inter alia*, removing and or downgrading the post she held, of Head, Personal Markets, from EXCO (Executive Committee) to Senior Managerial Grade (SMG1).

4. On 27th February, 2015 the respondent terminated the appellant's employment by invoking the termination clause in her conditions of service namely payment of three months' basic salary in lieu of notice.

5. Three days later, that is, on 1st March, 2015 the respondent introduced new terms and conditions of service for managerial staff, which included, a redundancy clause similar to the one in section 26B of the Employment Act, Cap 268 of the Laws of Zambia.

PLEADINGS AND EVIDENCE IN THE COURT BELOW

6. On 27th May, 2015 the appellant took out a complaint in the IRC contending that the respondent unlawfully terminated her employment and that the termination was, in fact, a redundancy for which the respondent should have followed

the redundancy procedure as provided for under the law. She sought the following reliefs:

i. **A declaration that her separation from the respondent was not a termination by notice but in fact a redundancy;**
ii. **An order that the respondent should pay her full redundancy benefits;**
iii. **An order to compel the respondent to pay damages for wrongful and illegal termination of employment;**
iv. **Interest and costs.**

7. In her affidavit in support of Notice of Complaint, the appellant disclosed, among other things, that despite the respondent indicating that her termination was by notice as stipulated in the terms and conditions of employment, the termination was in fact a re-organisational act in the structure of the respondent. The real reason for her termination was the implementation of the recommendations by Deloitte and Touche to reorganise the respondent's organisational structure, to enhance the efficiency of the organisation and to streamline the span of control and reducing the layering in the internal structures of the respondent, particularly in her unit.

8. Further, that in analysing the cost of employment per unit the findings of Deloitte and Touche were that her unit had a

staff cost of 57% of total cost, and was the second most costly unit in the respondent's operations. According to her, the respondent effectively reduced the requirement for her to carry out the work of the kind for which she was engaged but the respondent's business had remained viable and a going concern.

9. In addition, she averred that she was never consulted throughout the process and was completely unaware that the respondent was reviewing its structures and during that time, she was never offered any alternative employment or position and her termination came as an utter and complete surprise. She also averred that at the same time, seven other employees had their employment terminated in similar circumstances as hers following the recommendations by Deloitte and Touche; and the respondent continued with the process of restructuring albeit employees were now being paid terminal benefits in line with the redundancy clause implemented on 1st March 2015.

10. In its answer to the notice of complaint, the respondent asserted that the appellant's employment was properly and lawfully terminated by way of payment *in lieu* of notice in

accordance with the terms and conditions of her employment. The respondent denied that the termination was wrongful, illegal or unfair.

11. In its affidavit in support of answer, the respondent averred that the termination had nothing to do with any reorganisation of the respondent's structures as it was a mere termination by payment *in lieu* of notice as provided for in the terms and conditions of employment. The respondent denied that there was a recommendation by Deloitte and Touche for the removal or downgrading of the position that the appellant held; the position still existed and was occupied by another person.

12. At the trial the appellant simply relied on her complaint and affidavit in support. In her evidence in cross-examination she conceded that her employment was terminated under the notice clause and that she was paid three months' salary *in lieu* of notice. She also conceded that the position she held, was still existing, as SMG1 and that the structure was what was proposed. At the same time, she said the position she held was recommended for a lower grade from EXCO to SMG1.

13. The respondent called one witness, Ronald Chupa, the deponent of the affidavit in support of the answer. He too relied on his affidavit. He confirmed that the position the appellant held still existed in the structure of the bank but was downgraded from EXCO to SMG1.

CONSIDERATION OF THE MATTER BY THE COURT BELOW

14. The court below found as a fact that the respondent went through a process of organisational review which was undertaken by Deloitte and Touche; that some posts were abolished whilst others were downgraded; and that the appellant's post, was downgraded from being in the executive committee (EXCO) to that of a managerial grade (SMG1), in line with the Bank's practice.

15. The court also found as a fact that the conditions of employment were amended with effect from 1st March, 2015 and included a provision on redundancy, which however, did not cover the appellant since the conditions came into effect three days after the termination of her employment.

16. Nevertheless, the court went on to examine the redundancy clause and concluded that even if the contract had not been

terminated by payment in *lieu* of notice, it did not meet the minimum criteria of the respondent's redundancy clause for the appellant to benefit. The case of **Chilanga Cement v Kasote Singogo**[1] was quoted where we held that payment in *lieu* of notice is a proper and lawful way of terminating employment, since every contract of service is terminable by notice.

17. The case of **Gerald Musonda Mumba v Maamba Collieries Limited**[2] was also cited where we said that it is the giving of notice or payment *in lieu* that terminates the employment.

18. According to the court below the primary consideration for redundancy to hold was that the post of Head, Personal Banking was abolished after the organisational review. However, the appellant's post continued to exist though downgraded and the appellant would have continued with the executive status on personal to holder basis. In that regard, the court noted that RW1 testified that the person currently occupying the post is an executive employee on personal to holder basis.

19. Consequently, the claims for a declaration that the appellant's separation from employment was not a termination by notice

but a redundancy and the claim for payment of redundancy benefits failed.

20. The claim for an order to compel the respondent to pay damages for wrongful and illegal termination of employment also failed on the basis that the respondent exercised its right to terminate the contract by paying three months' salary in *lieu* of notice, in addition to an *ex gratia* payment of 12 months of basic salary and an annual bonus of ZMW134, 546.33.

GROUNDS OF APPEAL TO THIS COURT

21. Dissatisfied with the above decision, the appellant filed this appeal advancing seven grounds as follows:

21.1 The trial court erred in law when it made the following finding that the separation of the complainant from the respondent was a termination by findings of facts:

(a) That the respondent Bank went through a process of Organisational Review;

(b) That the process was undertaken by an external consultant, Deloitte and Touche. That in fact, this exercise was embodied in a report dated the 3rd of July, 2014 entitled Organisational Review Organisational Effectiveness/ Organisational Framework; AND that in fact some positions were abolished, others were downgraded and others merged following on this review process.

(c) That the complainant's position, as Head of Personal Markets, was downgraded from EXCO which is Executive

Committee Grade down to Senior Manager Grade 1 (SMG1) a lower position in the organisational structure.

(d) That the conditions of employment were amended from 1stMarch, 2015, three (3) days after the complainant's employment was terminated to include the relevant Redundancy Clause, it was a finding which no court, properly addressing the facts, would reasonably have arrived at.

21.2 The court below erred in fact when it stated that the position that the complainant held continued to exist and was merely downgraded from EXCO/Executive Committee Grade to Senior Management Grade 1 (SMG1).

21.3 That the court below misapprehended the facts by stating that the respondent testified that the person currently occupying the post is an EXCO/Executive employee on a personal to holder basis when in fact the witness testified that he was not aware whether the complainant's position had been filled by another person or was in the process of being filled AND it was a finding which no court on a proper and well balanced view of all the evidence could have reasonably arrived at.

21.4 That the trial court misdirected itself in fact when it glossed over the evidence of Ronald Chanje, who affirmed under cross examination that the appellant was the Head of Personal Markets and that she was in EXCO while he confirmed that the same position was described as SMG1 and not EXCO in the report submitted by Messrs. Deloitte and Touche.

21.5 That the learned trial court erred in fact, when it failed to take into account the unchallenged evidence of the appellant that Messrs. Deloitte and Touche were engaged by the respondent in early 2014 to undertake a review of the organisational structure of the respondent company. That Messrs. Deloitte and Touche went on to recommend that the

respondent streamline the span of control and reduce the layering in the internal structures of the respondent company.

21.6 That the learned trial court erred in fact when it failed to take into account the unopposed evidence of the appellant that the banking unit to which the appellant belonged has a staff cost of 57% of the respondent's total cost and that the appellant believed that the real reason for her termination was an implementation of the recommendations to reorganise in order to reduce costs by the respondent company as recommended by Deloitte and Touche.

21.7 That the trial court misdirected itself in fact when it failed to take into account the respondent's evidence that a Lwatula who was part of Corporate and Investment Banking had his position dropped from the respondent's structure about 2014/2015 and was declared redundant and paid off.

PRELIMINARY OBSERVATIONS

22. We wish to state that the way ground 1 is framed offends **Rule 58(2)** of the **Supreme Court Rules, Cap 25**, which requires that the memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively (underlining ours for emphasis only).

23. Paragraphs (a) to (d) of ground 1, specify findings of fact, which are not alleged to have been wrongly decided by the court below. Therefore, they should not have included them in the ground of appeal. We reiterate the need for appellants to frame grounds of appeal in accordance with the Rules of Court to avoid appeals being dismissed on a technicality.

24. Grounds 2 to 7 seem to challenge findings of fact contrary to section 97 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia and our various decisions that a party to an appeal from the Industrial Relations Court can only appeal on points of law or on points of mixed law and fact.

25. However, while ground 2 is merely stating a finding of facts, which finding is supported by the evidence, grounds 3 to 7 attack perceived misdirections by the court below in making conclusions not supported by the evidence and failing to take into account unchallenged evidence by the appellant. However, there is only one real issue arising from all the grounds of appeal, which we shall come to shortly.

ARGUMENTS PRESENTED BY THE PARTIES

26. Counsel for both parties filed written heads of argument. However counsel for the appellant did not attend the hearing of the appeal having filed a notice of non-attendance under Rule 69 of the Supreme Court Rules, Cap 25. The kernel of the arguments in ground 1 is that due weight was not given to the evidence adduced by the appellant in the court below and that the court glossed over the weakness that characterised the respondent's case.

27. Counsel for the appellant argued that the court based its decision solely on the termination clause in the appellant's conditions of service. He referred us to the case of **Attorney General v Marcus Achiume**[3] where we stated that an unbalanced evaluation of evidence where only the flaws of one side but not the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere.

28. The case of **Zambia Consolidated Copper Mines v Matale**[4] was also cited in which we stated that:

"In the process of doing substantial justice, there is nothing that stops the court from delving behind the real reasons given for the

termination in order to redress the injustice discovered such as termination on notice or payment of pensionable employment on a supervisor's whim without any rational reason at all."

29. In the same vein, the case of **Redrilza Limited v Abuid Nkazi and others**[5] was quoted where we stated that:

> **"In appropriate cases where an employer is found to have invoked the termination by notice and payment in *lieu* of notice in bad faith or maliciously, the court is entitled to displace the termination, however, care must be taken that the case is a deserving one."**

Section 26B of the **Employment Act,** was also referred to.

30. Counsel for the appellant argued grounds 2 and 3 together. The short argument was that the respondent's witness testified that he was unsure whether the appellant's position had been filled. He cited the case of **Mukuma and another v Finance Bank Zambia Limited**[6] where we stated that it is highly injudicious to evaluate the evidence before the trial court in an unbalanced way and that the court is duty bound to evaluate all the relevant issues to be determined in a balanced manner.

31. In ground 4, counsel for the appellant simply cited a passage from the case of **Attorney General v Marcus Achiume**[3] where it was stated, inter alia, that the learned trial judge had

glossed over, even turned a blind eye to the weaknesses in the plaintiff's case, with the result that the full significance of certain aspects of the evidence was apparently not appreciated and that the learned trial judge had made findings favourable to the plaintiff which, on a proper and well-balanced view of the whole of the evidence, no trial court, acting correctly, could reasonably make.

32. Concerning ground 5, counsel once again cited the case of **Attorney General v Marcus Achiume**[3] where we explained the circumstances in which an appellate court will reverse findings of fact made by a trial judge.

33. It was submitted that throughout the proceedings, the appellant had divulged that Deloitte and Touche had been commissioned to do a process of organisational review of all the structures and the overall findings made, included eliminating one on one reporting lines, delayering the organisation, combining teams and removing of certain team leader roles. According to counsel, this evidence was not rebutted or contradicted by the respondent.

34. In support of ground 6, counsel referred to the appellant's testimony that in analysing the cost of employment per unit,

the findings by Deloitte and Touche were that the unit that she belonged to, had a staff cost of 57% of the total cost, and that this was the second highest value in the respondent's operations. Counsel argued that this evidence too went unopposed by the respondent.

35. In ground 7, counsel argued that it is an established principle that where the court is presented with uncontroverted evidence on an issue, it is duty bound to rely on that evidence unless there is a good reason not to do so. The case of **Peter Ng'andwe v Rex Ngoma**[7] was relied on for that proposition.

36. It was counsel's contention that if all the facts as presented were considered by the court below, it would have found that the termination by notice was in fact an attempt to disguise what was in effect the implementation of a restructuring exercise by the respondent and that the appellant was conveniently terminated and thereby excluded from enjoying redundancy benefits that were incorporated into the terms and conditions of employment only three days after she was separated.

37. In response to ground 1, learned counsel for the respondent submitted that the court's finding that the separation was a

termination was on firm ground and supported by the law and the evidence on record. That the court addressed its mind to the law on termination of employment contracts when it referred to the cases of **Chilanga Cement v Kasote Singogo**[1] and **Gerald Musonda Mumba v Maamba Collieries Limited**[2].

38. Counsel further contended that the court below cannot be faulted at all for finding that, despite the Deloitte and Touche report and its recommendations, the separation of the appellant was a mere termination and not a redundancy. According to counsel, the court rightly focussed on the effect of the report on the appellant's position, that is, the appellant's position was not abolished after the organisational review, and this was supported by her own evidence that her position was still existing as SMG1.

39. In response to ground 2, learned counsel contended as in paragraph 38 above that the appellant's position continued to exist even after the report of the organisational review as it was maintained in SMG1.

40. Concerning ground 3, learned counsel submitted that the grade of the person who replaced the appellant is not relevant

to the issue at hand. That what is relevant is that the position remained in the structure of the respondent and the fact that the position was not abolished defeats the argument of the appellant that she is entitled to a redundancy package.

41. In answer to ground 4, learned counsel took the view that though the appellant had not proffered any argument under this ground, there was no misdirection at all as the evidence was clear that when the appellant occupied her position, she was EXCO but that the current grade of that position is SMG1.

42. In response to ground 5, after quoting a passage from the judgment of the court below where the court made the findings of fact that are captured in paragraphs (a) to (d) in ground 1 in paragraph 21.1 above, counsel submitted that the court properly took into account the evidence of the appellant regarding the organisational review by Deloitte and Touche and cannot be faulted in any way. That in any event, the finding regarding the organisational review does not prove that the appellant's position was declared redundant.

43. In relation to ground 6, learned counsel repeated that the court properly considered the evidence of the appellant

regarding the report of Deloitte and Touche and its recommendations and went further to even consider the effect of the report on the appellant's position; that the post continued to exist though downgraded.

44. Counsel submitted that the court analysed the evidence before it in a balanced manner and there was no failure to take into account any evidence relevant to the issues before it.

45. In response to ground 7, counsel contended that Lwatula's position was dropped off the respondent's structure, therefore, he was declared redundant. However, the appellant's position still existed and as such, she was not entitled to be declared redundant or paid a redundancy package in the manner claimed. Learned counsel observed that the court in fact considered the new redundancy clause and found that the appellant did not qualify. Hence, there was no basis for the court to treat the appellant's departure from employment as a redundancy. We were urged to dismiss the appeal with costs.

46. In his oral submissions at the hearing of the appeal, learned State Counsel Mr. Nchito contented that the appellant could

not be deemed to have been declared redundant in light of the case of **Mike Musonda Kabwe v BP Zambia Limited**[8] because she was not offered the downgraded job or demoted.

47. Learned State Counsel further submitted that during the same exercise of restructuring, there were people whose jobs were done away with and were therefore, declared redundant while the recommendation by Deloitte and Touche was that the position the appellant held would continue to exist although downgraded. The employer subsequently decided to do away with the appellant. That in itself did not disclose bad faith or malice on the part of the respondent as there was nothing that motivated the respondent to invoke the termination clause.

48. To buttress his point, he referred to the case of **Wilson Tembo v William Kapembwa**[9]**,** where he submitted, we took the position that the employer was entitled to exercise its right to terminate by notice. He argued that equally, in an environment where there is a reorganisation, that does not take away the relationship between the parties to an employment contract or the rights that subsist under the contract.

49. Concerning the finding by the court below that there was someone holding the appellant's position on personal to holder basis, learned State Counsel conceded that there was no evidence on record to that effect.

CONSIDERATION OF THE MATTER BY THIS COURT AND DECISION

50. We have considered the record of appeal and the arguments by learned counsel on both sides. There are seven grounds of appeal the thrust of which is that the court below erred by basing its decision solely on the termination clause in the appellant's conditions of service when the appellant's evidence disclosed that the organisational review undertaken by Deloitte and Touche adversely affected her position.

51. As we see it, the real issue in this appeal is whether a redundancy situation existed in the respondent Bank at the time of termination of the appellant's employment, particularly concerning her unit and her position; and whether the court below should have delved behind the termination by payment *in lieu* of notice to discover the real reason for the termination.

52. The appellant's contention is that the court below reached the conclusion that the respondent exercised its right under the contract despite making the findings of fact that are captured in paragraphs (a) to (d) in ground 1 in paragraph 21.1 above.

53. It is the appellant's contention that the respondent invoked the termination clause in bad faith or maliciously and that the court below should have delved behind the termination clause to discover the real reason for the termination in order to redress any injustice.

54. On the other hand, the argument by learned State Counsel Nchito is that the respondent was entitled to exercise its right under the termination clause in the conditions of service and the fact that there was reorganisation did not affect that right. It is also the respondent's contention that the appellant's position continued to exist although downgraded and there was no evidence of bad faith or malice on the respondent's part when it terminated the contract.

55. As stated by the court below, it is trite that payment in lieu of notice is a proper and lawful way of terminating employment, since every contract of service is terminable by notice **(Chilanga Cement v Kasote Singogo[1])**; and it is the

giving of notice that terminates the employment **(Gerald Musonda Mumba v Maamba Collieries[2]).**

56. However, the IRC in terms of section 85(5) of the Industrial and Labour Relations Act has a mandate or authority to dispense substantial justice. In **Zambia Consolidated Copper Mines v. James Matale[4]**, we said there is nothing that stops the Industrial Relations Court from delving behind the real reasons given for the termination in order to redress the injustice discovered.

57. In **Redrilza Ltd v Abuid Nkazi[5]** we said that in appropriate cases where an employer is found to have invoked the termination by notice and payment in lieu of notice in bad faith or maliciously the court is entitled to displace the termination.

58. Similarly, in **Southern Water and Sewerage Co. Limited v. Sandford Mweene[10]**, we stated that the fact that there is a notice clause for termination of a contract without giving reasons does not deter the Industrial Relations Court from looking behind the termination to ascertain if some injustice was done by the employer when invoking the termination clause.

59. Again, a similar point was made in **Josephine Mwaka Mwambazi v. Food Reserve Agency**[11] when we observed that:

> **"Where evidence is led that brings to the fore ulterior motives behind the termination of employment, the court can go behind the notice to ascertain the real reason behind the termination."**

60. Ulterior motive simply means a hidden reason for doing something.

61. However, in a number of cases, including **Sydney Mugala and another v Post Newspaper Limited**[12] and **Giles Yambayamba v Attorney General and National Assembly of Zambia**[13], we guided that two considerations are cardinal when the IRC has to decide whether or not to look behind a termination provision to discover, as it were, the real reason for the termination. The first is that there should be sufficient evidence laid before the court to suggest that the termination of the employment was motivated by factors quite apart from the employer's power and right to terminate as denoted by the contract of employment. The second is that the court exercises discretion when it pierces the veil, and this discretion should be exercised judicially and judiciously. This

entails that the exercise of the same should not be left to the whims and caprices of a party to an action. As regards the first consideration of laying sufficient evidence before the court to enable it to form the decision whether or not to pierce the veil, the issue is largely factual.

62. We turn now to the real issue of whether a redundancy situation existed in the respondent bank at the time of termination of the appellant's employment and whether her unit and position were affected. The court below took the view that for redundancy to hold the post of Head Personal Banking should have been abolished after the organisational review, but the post continued to exist though downgraded and the appellant would have continued with the executive status on personal to holder basis.

63. Whilst it is true that the appellant's position continued to exist in the structure of the bank, as correctly found by the court below, the position was downgraded from EXCO to SMG1. It is clear to us that the downgrading of the appellant's position was as a result of the organisational review conducted by Deloitte and Touche and the downgrading was done whilst the appellant was holding that

position and not subsequent to the termination of her employment as argued by learned State Counsel Nchito.

64. The respondent cannot argue that there was no evidence that it invoked the termination clause in bad faith or maliciously because the appellant was terminated and not offered the downgraded position or demoted. As we have said above, the action that triggered the redundancy situation in the Bank was the review of the organisational structure and the recommendations by Deloitte and Touche in the report issued on 3rd July, 2014 seven months before the termination clause was invoked by the respondent.

65. The evidence before the court clearly showed that the termination of the appellant's employment was motivated by bad faith or other considerations since it is clear that the recommendations by Deloitte and Touche resulted in the restructuring of the appellant's unit and the downgrading of her position, without her consent. There was no evidence that the appellant would have continued with the executive status on personal to hold basis as found by the court below. That was a serious misapprehension of facts and the evidence by the court.

66. The appellant's undisputed evidence was that she was never consulted throughout the organisational process or offered an alternative job. In **Mike Musonda Kabwe v B.P. Zambia Limited**[9] referred to by learned State Counsel Nchito, we stated that if an employer varies a basic or basic conditions of employment without the consent of its employee, then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment.

67. Therefore, we find and hold, in agreement with the appellant that the termination clause was invoked by the respondent to disguise the implementation of the restructuring exercise thereby excluding the appellant from enjoying redundancy benefits that were introduced three days after her termination. We are satisfied that this was a proper case for the court below to have delved behind the termination by pay in lieu of notice to discover the real reason for the termination.

68. Having found that a redundancy had arisen as a consequence of the downgrading of the appellant's position from EXCO to

SMG1, as we said in the **Mike Musonda Kabwe**[9] case, the appellant was supposed to be deemed to have been declared redundant on the date of the downgrading of her position and must have received a redundancy payment just like Mwenya Lwatula whose position was done away with or dropped from the respondent's structure in Corporate and Investment Banking and was declared redundant about 2014 and 2015.

69. The fact that the conditions of service did not provide for redundancy pay before 1st March, 2015 is inconsequential because Mwenya Lwatula was paid redundancy benefits when there was no provision for such in the applicable terms and conditions of service.

70. We have held in cases such as **James Zulu and others v Chilanga Cement**[14] and **ZESCO Limited v Ignatius Muleba Sule**[15], that similarly circumstanced employees ought to be similarly treated unless there is a valid reason justifying different treatment.

71. Therefore, the formula that was used to pay Mwenya Lwatula his redundancy benefits must be used to pay the appellant her redundancy package. We believe that this was two months basic salary for each year served.

72. The award shall carry interest at the average of the short-term bank deposit rate from the date of complaint to the date of this judgment, and thereafter at the average lending rate as determined by the Bank of Zambia.

CONCLUSION

73. The appellant had received an ex gratia payment of twelve months basic salary. This was paid purely at the discretion of the respondent bank. There was no argument that this amount must be deducted from any award made by this court. Since ex gratia payment is a sum of money paid when there was no obligation or liability to pay, (see businessdictrionary.com) we find no basis to order that this be reimbursed.

74. In all, we find merit in this appeal. Each party shall bear own costs here and below.

M. MUSONDA
DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE