IN THE SUPREME COURT OF ZAMBIA **SCZ/08/05/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MUSONDA MUTALE **APPLICANT**

AND

AFRICAN BANKING CORPORATION LIMITED **RESPONDENT**

CORAM: **Musonda, DCJ, Wood and Kajimanga JJS**

On 13th April 2021 and 1st April 2022

FOR THE APPLICANT: In person

FOR THE RESPONDENT: Mrs. N. Simachela, Messrs Nchito and Nchito Advocates

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (SC)**
2. **Bidvest Foods and Four Others v CAA Import and Export Limited – Appeal No.56/2017**
3. **Kitwe City Council v William Ng'uni (2005) Z.R. 57**
4. **Zambia Consolidated Copper Mines Limited v James Matale (1995-1997) Z.R. 144**
5. **Minister of Home Affairs, Attorney General v Lee Habasonda (2007) Z.R. 207**
6. **National Milling Company Limited v Grace Simataa and Others (2000) Z.R. 91**
7. **Mike Musonda Kabwe v BP Zambia Limited [1995-1997] Z.R. 218**
8. **Chilanga Cement Plc v Kasote Singogo [2009] Z.R. 122**
9. **R v Secretary of State for Trade and Industry Exp. Eastaway**

10. **Savenda Management Services Limited v Stanbic Bank (Z) Limited**
11. **Marriot v Oxford and District Co-operative Society (No. 2) [1970] 1 Q.B. 186**

Legislation referred to:

1. **The Supreme Court Rules, Supreme Court Act, Chapter 25 of the Laws of Zambia; Rule 48(4)**
2. **Court of Appeal Act No. 7 of 2016; section 13**

Other Work referred to:

Zuckerman on Civil Procedure; Principles of Practice, (3rd ed. Sweet & Maxwell, 2013 at page 1114 para 24.7

Introduction

[1] By this motion, the applicant seeks to reverse or vary the decision of a single judge of this court (Chinyama, JS), dismissing his application for leave to appeal to the Supreme Court.

Background

[2] The history of this case is that the applicant was employed by the respondent as country head of corporate banking in 2015. Following a restructure of the respondent bank, the applicant's position was relegated, and the reporting lines were changed in a way that he no longer reported directly to the managing director. The applicant, aggrieved by the turn of events,

considered himself to have been demoted and his contract of employment to have been unilaterally changed. He then took out an action before the Industrial Relations Division of the High Court claiming, among others, damages for wrongful and unilateral change of conditions of employment, unlawful demotion, and constructive dismissal. For its part, the respondent denied the claim and contended that the applicant voluntarily resigned from his employment.

[3] In its judgment, the trial court found that since the applicant strongly maintained that he did not resign, the circumstances of his separation from employment did not avail him the test required to sustain a finding for constructive dismissal. The court also found that the applicant had failed to demonstrate that the respondent had committed a fundamental breach of the employment contract in implementing the reorganisation of the company in readiness for the acquisition of another bank.

[4] It was further found that since the applicant's remuneration package remained intact even after the restructuring, the claim that he was demoted and constructively dismissed could not stand. Consequently, the trial court held that the applicant was not entitled to the relief sought and dismissed his action.

[5] Dissatisfied with the judgment of the trial court, the applicant appealed to the Court of Appeal on grounds that the evaluation of evidence by the trial judge was imbalanced and that he did not consider all the evidence before him; that the trial judge failed to consider that the variations made by the respondent to the applicant's contract and conditions of service amounted to a demotion; that the learned judge glossed over and failed to pay due regard to the issues put before him; and that the trial judge erred in law and fact when he held that the circumstances of the applicant's separation did not meet the test to sustain a finding for constructive dismissal.

[6] By a judgment dated 25th October, 2019, the Court of Appeal found that the learned trial judge had identified all the key issues in the matter, namely: whether or not the appellant was constructively dismissed or demoted and, therefore, entitled to the remedies set out in the notice of complaint. In its view, the trial judge had considered all the evidence and submissions before it in a balanced manner. It also found that since the applicant's contract did not specifically provide that he would be reporting to the Managing Director and that it did not provide for his membership to management committee meetings, it

could not be said that the applicant had been demoted. The Court of Appeal noted that the trial judge had reasoned that the corporate banking portfolio headed by the applicant continued to exist under the merged corporate banking and investment department although he was required to report to the country head as opposed to reporting directly to the managing director.

[7] On the issue of constructive dismissal, it was held that the applicant did not resign, and he had not demonstrated that the respondent had fundamentally breached his contract of employment by unilaterally varying his terms and conditions of service and it was noted that the applicant was aggrieved with issues that were not part of his contract of employment. Having so found, the Court of Appeal dismissed the applicant's appeal.

[8] Subsequently, the applicant sought leave from the Court of Appeal to appeal to this court. The application was denied by the Court of Appeal. The applicant then renewed his application before a single judge of this court. However, in his ruling dated 13th January, 2021, the learned single judge denied the applicant leave to appeal to this court. He held that the applicant had failed to establish either that there is a point of law of public importance raised in the proposed appeal; or that

the appeal would have a reasonable prospect of success; or that there is some other compelling reason for the appeal to be heard.

[9] The applicant is unhappy with that ruling and has now launched this notice of motion requesting us to reverse or vary the said ruling.

Affidavit evidence and arguments

[10] In his affidavit in support of the motion, the applicant sets out his proposed grounds of appeal to this court as follows:

[10.1] The Court of Appeal erred in law and fell into manifest error when it failed to take into consideration the Appellant's reply to the respondent's heads of argument in arriving at its judgment, which raises a point of law.

[10.2] The Court of Appeal's misdirection by failing to consider the totality of the Appellant's arguments raises a compelling reason for this appeal to be heard.

[10.3] The Court of Appeal misdirected itself and therefore fell into grave error when it held that the Appellant's contract did not specifically provide for reporting directly to the Managing Director and membership of MANCO and that the terms and conditions unilaterally varied were not part of the Appellant's contract of employment.

[10.4] The Court of Appeal erred in law and fact, and fell into manifest error, when it held that a change in the reporting procedure cannot be considered to be a fundamental breach of contract when it was not contained in the Appellant's contract of employment.

[10.5] The Court of Appeal misdirected itself, when it held at page J25 of the Judgment that the portfolio or department previously headed by the Appellant continued to exist under the merged Corporate and Investment Banking Department.

[10.6] The Court of Appeal erred in law and fact when it held at page J30 of the Judgment that the Appellant did not resign from his employment.

[10.7] The Court of Appeal erred in law and fact, when it held at page J28 paragraph 6.15 of the judgment that the Appellant had not substantiated his allegation that he was demoted.

[10.8] The Court of Appeal erred in law and fact, when it opined, at page J31 paragraphs 6.25 and 6.26 of the judgment that the Appellant did not plead for payment of two months' salaries on account of the delayed payment of his pension benefits following his separation from the employ of the respondent and that the claim was vague, as it would not have given the learned trial judge an opportunity to understand what was being claimed.

[11] He then reiterates the point that the learned single judge misdirected himself in law when he glossed over and failed to pay due regard to all the issues put before him for determination. He deposes further that the learned single judge did not properly apply his mind to the issues before him when he refused to grant him leave to appeal to the Supreme Court, which issues meet the threshold as set out in section 13(3) (a), (c) and (d) of the Court of Appeal Act No. 7 of 2016.

[12] In his skeleton arguments, the applicant contended that:

[12.1] Regarding the proposed ground 1, the applicant's fundamental right to a fair hearing protected under the Bill of Rights was breached by the court below, with the approval of the single judge of this court. As such the said violation of the applicant's fundamental rights meets the threshold set out in section 13(3) of the Court of Appeal Act for leave to appeal to the Supreme Court. The court below completely failed to take into account the applicant's heads of argument in reply dated 7th October 2019, which it was bound to take into account.

[12.2] In relation to the proposed ground 2, the single judge of this court glossed over and failed to pronounce on one of the basis on which the applicant sought leave to appeal namely, procedural impropriety, notwithstanding that the applicant put this issue before him for determination and reliance was placed on *Wilson Masauso Zulu v Avondale Housing Project Limited*[1]. This ground of appeal meets the threshold laid down in section 13(3) (d) of the Court of Appeal Act. He relied on *Bidvest and Four Others v CAA Import and Export Limited*[2] where we said:

> *"This subsection contemplates an appeal which may not necessarily raise a point of law of public importance or one contemplated in subsections (3)(a), (b) and (c). It could be exploited for other judicial exigencies as dictated by the interests of justice, having regard to all the circumstances of the case such as the manner in which the case was conducted, for example, where the hearing was demonstrably tainted by some procedural irregularity or was done in disregard of the tenets of due process."*

[12.3] In relation to the proposed grounds 3 and 4, the single judge held at page R23 of his Ruling that:

> *"My view is that if a party claims the wrong heads have been considered, the party must show in the application such as the one before me, the correct arguments and demonstrate how they would have benefited the party. In this case, the amended Heads of Argument, other than the consent order allowing the amendment to the Heads of Argument, were not exhibited. It has also not been demonstrated how they would have benefited the applicant. In the circumstances, it is not possible for me to assess how they impacted on the applicant's case to enable me to determine whether they have assisted the applicant in the intended appeal."*

[12.4] As can be discerned from his holding above, the single judge failed to comprehend the issues before him.

[12.5] The court below justified its omission of the applicant's heads of argument in reply dated 7th October 2019 on the basis of its understanding of the *Kitwe City Council*

v William Ng'uni[3] case, that it was not obliged to consider the said heads of argument in reply. The Supreme Court needs to pronounce on whether the lower court's understanding of the *Ng'uni*[3] case is at all legally sound.

[12.6] This case raises a compelling reason fit for consideration by the Supreme Court and to clarify the law in order to settle the contradictory position advanced by the court below. It is therefore necessary that the Supreme Court clarifies its position whether it is mandatory for courts to summarise or completely ignore litigants' submissions and arguments duly filed into court. These grounds therefore meet the threshold set out in section 13 (3) (d) of the Court of Appeal Act. In support of this argument, he quoted the following dictum in the *Bidvest*[2] case:

> *"We think this provision could also provide a pathway for the court to depart from existing precedents owing to the change in circumstances; to settle contradictory positions, or indeed to clarify the law where this becomes necessary. Indeed, there could be compelling reasons to allow an appeal to be heard even when prospects of success are not very high.*
> [Emphasis added by the applicant]

[12.7] Regarding the proposed ground 5, the applicant invited the single judge of this court to pronounce on the derogation by the lower court from the doctrine of *stare decisis* and judicial precedent on points of law in at least 10 of its holdings and its failure to provide reasons for the position it took. Notwithstanding the applicant's invitation, the single judge failed to adjudicate upon this issue so that the matter in controversy was determined in finality.

[12.8] The submissions under this ground raise a point of law of public importance fit for consideration pursuant to section 13(3) (a) of the Court of Appeal Act. The arguments under this ground also satisfy the three different facets of the qualifying criteria for leave to be granted namely (i) a point of law; (ii) of public importance; and (iii) raised in the appeal.

[12.9] Additionally, the foregoing arguments also provide a French window that could be deployed in the circumstances other than those envisioned in other subsections of section 13(3) of the Court of Appeal Act to

seek leave to appeal to the Supreme Court. Reliance was placed on the *Bidvest*[2] case where we said that:

> *"Section 13(3) (d) of the Court of Appeal Act creates a French window that could be used in circumstances other than those envisioned in other subsections of section 13(3)."*

[12.10] In relation to the proposed ground 6, the single judge misdirected himself when he held at page R26 of his ruling that:

> *"The second proposed novel issue speaks to whether the varied job description was an important component of the employee's job and went to the core of the employment contract. This was also determined in the negative by the court below. Again, I am satisfied that this is in accordance with the merits of the case. Ultimately, there is nothing novel in the appeal to require the Supreme Court to import the law in England and Wales in the manner proposed by the applicant. I see no merit in the second issue."*

[12.11] This appeal raises a novel question which has never been addressed by any known Supreme Court precedents. The Supreme Court should therefore, pronounce on the question whether the adverse unilateral variation of a job description of an employee by the employer is a fundamental breach of an employment contract entitling the employee to resign.

[12.12] The kernel of developing jurisprudence on this issue is public in nature and transcend the circumstances of this case. There is uncertainty in Zambian law where an employer unilaterally varies an employee's job description which is a term of the contract without cause. This issue is therefore, in the realm of public interest because it has the potential to affect many hard working and weak Zambian employees. The issue is not only novel but engages the wider public and thus fit for determination by the Supreme Court.

[12.13] The single judge of this court misdirected himself when he held at page R26 of the Ruling that:

> *"The first proposed novel issue presupposes that the case has been established as one in which constructive dismissal has taken place. In this case, the question whether the applicant was constructively dismissed was determined in the negative and I am satisfied that this is in accordance with the merits of the case. There is no science involved."*

[12.14] The single judge failed to appreciate that the applicant's claim for constructive dismissal was wrongly determined by the court below as the said court completely ignored the applicant's heads of argument in reply dated 7th

October 2019 from its judgment. The said omission was fatal to the applicant.

[12.15] Ground 7 also meets the threshold set out in section 13(3)(d) of the Court of Appeal Act. It provides a corridor for the Supreme Court to develop jurisprudence on this issue. He cited our *Bidvest*[2] decision where we stated that:

> *"Yet the provision may also be used in aid of the need for the development of jurisprudence as envisioned in article 125(3) of the Constitution of Zambia as amended by Act No. 2 of 2016."*

[12.16] Ground 8 meets the threshold set out in section 13(3) (a) of the Court of Appeal Act. It is in conjunction with other seven grounds which raise points of law of public importance.

[12.17] The court below as approved by the single judge derogated from the principle of *stare decisis* and the findings of fact were made in the absence of any relevant evidence, upon a misapprehension of the facts; and they were findings which, on a proper view of the evidence, no court acting correctly, could reasonably make. The

applicant further relied on the *Bidvest*[2] case where we said that:

> *"It should be clear that an appeal anchored on findings of fact alone, even if it can be demonstrated that those findings were perverse or not borne out of evidence, does not qualify as a 'point of law' in the first instance unless it can be shown that the specific finding of fact had also become a question of law as we articulated the position in Zambia Consolidated Copper Mines Limited v James Matale*[4]*. An ordinary finding of fact ipso facto fails the test on that account alone. Yet this can naturally apply only where a point of law and a point of fact are distinguishable and separate, but will not where a hybrid of some law and some facts are intrinsically interwoven."* [Emphasis added by the applicant].

[12.18] The intended appeal has high prospects of success on account of the above highlighted infractions of the law by the court below and endorsed by the single judge. The said infractions hinge on illegality, unconstitutionality, procedural impropriety, violation of basic principles of natural justice and derogation from the doctrines of *stare decisis* and judicial precedent.

[13] The applicant accordingly prayed that the decision of the single judge be reversed or varied with costs.

[14] The respondent's affidavit in opposition briefly discloses that the applicant's main claims in the trial court related to unilateral variation of contract and constructive dismissal. There is a plethora of authorities by the Supreme court on these points without the need to rely on cases from other jurisdiction which the applicant desires this court to do.

[15] Further, a perusal of the draft grounds of appeal reveals that the intended appeal has no prospects of success and is an abuse of court process. Moreover, the intended appeal does not satisfy the requirements of the law in relation to the grant of leave to appeal to the Supreme Court.

[16] The respondent contended, in its skeleton arguments, that:

[16.1] The applicant has put forth the following as novel questions raising issues of public importance fit for this court's determination:

> *"Whether it is appropriate for the Court of Appeal to deprive litigants of an opportunity to be fully heard contrary to the principles of natural justice and further, that the Court of Appeal failed to pronounce itself on whether the variation of a job description amounts to a fundamental breach of contract; and on whether the applicant's proposal of mutual separation vitiated his claim for constructive dismissal."*

[16.2] The point of law as framed by the applicant was not an issue that the court below had occasion to adjudicate upon and it cannot be raised as a point of law before this court. Alternatively, the Court of Appeal did not breach the applicant's human rights in the manner alleged as it was very thorough in its analysis of the issues before it.

[16.3] The applicant also appeared before the Court of Appeal on 16th October 2018 and was given an opportunity to argue his appeal *viva voce*. He was given a fair hearing and the mere fact that the Court of Appeal did not reference his heads of argument in reply cannot amount to a violation of human rights or raise an issue of public importance which can open the door to this apex court.

[16.4] The Court of Appeal did not fall short of the standard encapsulated in *Minister of Home Affairs, Attorney General v Lee Habasonda*[5] and there is therefore no issue of public importance that arises to justify the grant of leave to appeal under this head.

[16.5] On the question of fundamental breach of contract and constructive dismissal, there is a plethora of authorities on the points in issue which were cited by the applicant

himself. They include *National Milling Company Limited v Grace Simataa and Others*[6], *Mike Musonda Kabwe v BP Zambia Limited*[7] and *Chilanga Cement Plc v Kasote Singogo*[8]. The fact that the applicant is aggrieved by the Court of Appeal does not make it a novel issue.

[16.6] When the grounds of appeal are analysed closely, it is clear that only factual as opposed to legal issues arise.

[16.7] The applicant's grounds of appeal centre on findings of fact alone and raise no question of law.

[16.8] The findings of fact made by the Court of Appeal were borne out by the evidence and as such there are no prospects of the appeal succeeding and reliance was placed on the *Bidvest*[2] case.

[16.9] Given all the circumstances of the case, the hearing of the applicant's appeal was properly conducted and the Court of Appeal arrived at a decision after considering all the issues. There was no procedural irregularity in the manner suggested by the applicant so as to warrant the intervention of this court.

[16.10] The motion has therefore failed to satisfy the requirements of section 13(3) (a), (c) or (d) of the Court of Appeal Act and should be dismissed for lack of merit.

Consideration of the motion and decision by this court

[17] It is trite that leave is granted at the discretion of the court. As such, the grant or refusal to grant an application for leave would depend on the circumstances of each case. The question for our determination in this motion is whether the applicant's proposed grounds of appeal meet the stringent threshold set out in the Court of Appeal Act to compel us to grant the applicant leave to escalate his appeal to this court.

[18] Relevantly, section 13 of the Court of Appeal Act enacts as follows:

> *"(1) An appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.*
> *(2) ...*
> *(3) The court may grant leave to appeal where it considers that-*
> *(a) the appeal raises a point of law of public importance;*
> *(b) ...*
> *(c) the appeal would have a reasonable prospect of success; or*
> *(d) there is some other compelling reason for the appeal to be heard..."*

[19] The import of section 13 is that an applicant for leave to appeal from the Court of Appeal to the Supreme Court can only benefit

from the Court's discretionary power if compelling grounds are advanced. The principal considerations in such an application are: an appeal raising a point of law of public importance, the likelihood of an appeal succeeding, or there being some other compelling reason justifying the appeal to be heard. In the *Bidvest*[2] case heavily replied upon by the applicant, we gave the *raison d'etre* for restricting appeals to this court in the following terms:

> *"The reason for restricting the granting of leave to appeal to the limited circumstances set out in section 13 is founded on the same basis as the Supreme Court of England and Wales employs to restrict or limit appeals to that court. In that jurisdiction, Lord Bingham explained in R v Secretary of State for Trade and Industry Exp. Eastaway*[9] *in relation to the House of Lords (but which position applies as much to the Supreme Court) that:*
>
> > *"The House [of Lords] must necessarily concentrate its attention on a relatively small number of cases recognized as raising legal questions of general importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist."*
>
> *The learned authors of Zuckerman on Civil Procedure; Principles of Practice, (3rd ed. Sweet & Maxwell, 2013 at page 1114 para 24.7 articulate the philosophy for the restriction of appeals to the Supreme Court in the following passage:*
>
> > *"The policy of restricting appeals to a review of the lower court's decision is founded not only on the need to economise the use of resources. It is also founded on the belief that the lower*

courts should bear the main responsibility for the conduct of litigation and its outcome. Appeal courts must defer to lower courts' decisions, unless a decision is clearly wrong, in the sense that it is contrary to established principles or that no reasonable judge could have reached the conclusion in question."

In relation to our jurisdiction, we did allude to part of the rationale for the limitation of appeals coming to the Supreme Court in Savenda Management Services Limited v Stanbic Bank (Z) Limited[10] when [at paragraph 217] we stated as follows:

"The resources of the courts are overstretched and if it were otherwise the doors of justice would be open to busy bodies whose only aim is to delay the inevitable execution of a judgment..."

[20] In the present case, the grounds advanced by the applicant in his motion for leave to appeal are that the intended appeal has prospects of success, it raises points of law of public importance and that there are compelling reasons for the appeal to be heard by this court. The contention of the applicant is that the intended appeal has prospects of success on account of infractions of the law by the court below, endorsed by the single judge, namely:

Ground 1: failure by the court below to take into account the applicant's affidavit in reply amounted to a breach of the

applicants' fundamental right to a fair hearing; meeting the section 13(3) (a) threshold.

Ground 2: the single judge failed to pronounce on procedural irregularity; meeting the section 13(3)(d) threshold.

Grounds 3 & 4: the need for the Supreme Court to clarify the law on whether it is mandatory for courts to summarize or ignore litigants' submissions and arguments duly filed; meeting the threshold under section13(3)(d).

Ground 5: derogation by the lower court from the doctrine of stare decisis and judicial precedent; meeting the threshold under section 13(3)(a) and 13(3)(d).

Ground 6: the need for the Supreme Court to pronounce itself on whether the adverse unilateral variation of a job description of an employee by the employer is a fundamental breach of an employment contract entitling the employee to resign which issue is not only novel but also engages the wider public and thus fit for determination by the Supreme Court; meeting the threshold in section 13(3)(a).

Ground 7: the ground provides a corridor for the Supreme Court to develop jurisprudence on this issue, meeting the threshold in section 13(3)(d).

Ground 8: the court below derogated from principles of stare decisis and made findings of fact in the absence of evidence which raises a point of law of public importance; meeting the threshold in section 13(3)(a).

[21] Regarding the alleged infractions set out in grounds 1 to 5, the court below stated as follows at page R5 of its ruling of 29th April 2020 denying the applicant leave to appeal:

> *"We have carefully read our judgment and find that contrary to the applicant's assertions, we did in fact consider all the arguments and issues raised by the parties.*
>
> *It is trite that the Court is not obligated to reproduce all the parties' arguments in its judgment. We have read the Ng'uni case, supra, and our understanding of that case is that the Supreme Court's comment on submissions meant that even where submissions are filed in time, the court is not duty bound to consider them."*

We cannot agree more with this finding by the lower court. The principle set out in the *Nguni*[3] case that courts are not bound to consider the submissions of parties is one which is well-established. The argument that the applicant was not accorded a fair hearing because the Court of Appeal did not consider his heads of argument in reply is misplaced. More so that, as aptly pointed out by respondent's counsel, the applicant was given an opportunity to make oral arguments at the hearing of the

appeal before the Court of Appeal, which fact has not been disputed by the applicant.

[22] In these circumstances, we do not see how the alleged infractions advanced by the applicant under grounds 1 to 5 of his proposed grounds of appeal raise any issues of public importance or compelling reasons for his intended appeal to be heard by this court. Our firm view is that these grounds do not satisfy the provisions of section 13 of the Court of Appeal Act.

[23] We now come to the alleged infractions arising under grounds 6 and 7 of the intended appeal which, in the applicant's view, raise a point of law of public importance that has never been pronounced on by the Supreme Court, thus creating a void. The point of law in question relates to whether an adverse unilateral variation of an employee's job description by an employer amounts to a fundamental breach of an employment contract.

[24] We wish to posit immediately, that we do not agree with this proposition. In our view, there is a plethora of decided cases in which the effect of a unilateral variation to a contract of employment has been given due consideration by this court. The *National Milling Company Limited*[6] case is one such example. In that case, we held as follows:

"...just as in the case of any other contract, a contract of employment can be varied for better or for worse with a variety of consequences, depending on whether or not the variation is consensual or accepted or rejected. In the cases to which the principles in the Kabwe[7] case and the Marriot[12] case apply, the unilateral changes were adverse and unacceptable to the employee who became entitled to treat the breach by the employer as terminating the contract and warranting the payment of redundancy or other terminal benefits, as appropriate. Those cases dealt with changes to a basic condition and the issue which arose here was whether a redundancy benefit could be such a basic condition. In the first place, the reference to basic condition must surely be to a fundamental or essential term, one affecting the essential character of the bargain and the breach of which would justify the innocent party to treat the contract as repudiated or rescinded by the party in breach. The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract, different from the former. It is thus necessary to look at the nature of the condition breached and the consequences of such a breach in order to determine whether a condition is basic or one that is relatively minor and not crucial to the contract. Variations to non-basic conditions even if unilateral and disadvantageous would not affect the essential viability of the contract and would in all probability not discharge it or justify the innocent party to treat the breach as effecting a termination by repudiation or rescission or otherwise".

[25] It is clear to us that the issues arising from this proposed 'novel' issue have already been pronounced on by this Court and are well-settled principles of law. As such, it is unnecessary for the Supreme Court to restate its position. We therefore, accept the respondent's argument that there is a plethora of authorities on

the issue of constructive dismissal, and we may add, which make it otiose for this court to further pronounce itself upon.

[26] On the alleged infraction arising in ground 8 of the applicant's proposed ground of appeal, our view is that the ground in question does not in any way raise a point of law of public importance and therefore the same lacks merit.

Conclusion

[27] On the facts before us, it is our considered view that the likelihood of the proposed appeal succeeding is quite remote. Moreover, the proposed grounds of appeal do not reveal any other compelling reason which can persuade us to grant this application.

[28] We should also state that the applicant's proposed grounds of appeal are in the main, anchored on findings of fact; they do not raise any serious question of law worth entertaining by this court. Albeit extensively relied upon by the applicant, his proposed grounds of appeal fall far short of the principles we enunciated in the *Bidvest*[2] case.

[29] Consequently, we hold that this is not a proper case where we can exercise our discretion in favour of granting the appellant

leave to appeal to this court. We accordingly find no basis to reverse or vary the decision of a single judge of this court. We uphold his Ruling.

[30] The net result is that the motion is bereft of merit and we accordingly dismiss it with costs, to be taxed in default of agreement.

M. MUSONDA
DEPUTY CHIEF JUSTICE

A. M. WOOD
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE