IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 04/2012
SCZ/8/252/2011

(Civil Jurisdiction)

BETWEEN:

FRIDA KABASO PHIRI **APPELLANT**
(Sued as Country Director of Voluntary Services Overseas Zambia)

AND

DAVIES TEMBO **RESPONDENT**

Coram: **Mwanamwambwa, Ag. DCJ, Muyovwe and Malila, JJS**
on 3rd March, 2015 and 19th August, 2015.

For the Appellant: Ms. Mwape Bwalya, Messrs. Mwenye & Mwitwa Advocates.

For the Respondent: Mr. Mwitumwa Mando, Messrs. M. L. Mukande & Co.

JUDGMENT

MALILA, JS, delivered the Judgment of the court.

Cases referred to:

1. *Chilanga Cement Plc. v. Kasote Singogo (2009) ZR 122*
2. *Zambia Airways v. John Musengule (2008) ZR .Vol 1:154*
3. *Shawkat v. Nottingham City Hospital Nits Trust (No. 2) (2001) EWCA Civ. 954*
4. *Pillinger v. Manchester Area Health Authority (1979) 1 RLR 430, EAT*
5. *North Riding Garage Limited v. Butterwich (1967) 2QB 56*
6. *Attorney General v. Marcus Kapumba Achiume (1983) ZR1*
7. *ZCCM v. Richard Kangwa and Others (2000) ZR 109*
8. *Chintomfwa v. Ndola Lime (1999) ZR 172*
   Attorney General v. D.G. Mpundu (1984) ZR 6

9. *Kitwe City Council v. William Ng'uni (2003) ZR 57*
10. *Ndongo v. Moses Mulyango, Roostico Banda (SCZ Judgment No. 4 of 2011)*
11. *Barclays Bank Plc v. Zambia Union of Financial and Allied Workers Appeal No. 17 of 2007 (Unreported)*
12. *Wilson Masauso Zulu v. Avondale Housing Project Ltd (1982) ZR 172*
13. *Western Excavating (ECC) Ltd. V. Sharpe (1978) 1 ALL ER, 713*

Other authorities referred to:-

1. *Section 85 (4) of the Industrial Relations Act, chapter 269 of the Laws of Zambia*
2. *Section 26 B of the Employment Act, chapter 268 of the Laws of Zambia.*
3. *Halsbury's Laws of England, volume 40, 5th edition, page 307*
4. *Black's Law Dictionary, 7th edition, page 425*

This appeal contests the judgment of the Industrial Relations Court given on 19th October, 2011 in which that court, upheld in part, the complaint by the respondent (the complainant in that court) against the appellant (then respondent). There is also a cross appeal against the refusal by the court to grant all the claims sought by the respondent in the lower court.

To the extent that they are relevant to accentuate the issues in this appeal, the background facts are as follows. The respondent was employed on permanent and pensionable terms by the appellant as Administrative Officer on 11th July, 1996. Six

months later, he was elevated to the position of Office Manager responsible for, among other things, asset management, security and recording of accounts. In 2001/2002, the respondent changed its employment policy from employing on permanent and pensionable basis, to employing on fixed term contracts. To this end, in September 2008, the respondent began its restructuring process and informed its employees accordingly.

The respondent's position was phased out and removed from the appellant's organizational structure. Two new positions were created out of it, one of them being that of Finance Manager. The appellant, considering himself redundant, sought a redundancy package from the respondent, who declined to offer the appellant any such redundancy payment, but instead offered the appellant the position of Finance Manager in the restructured entity - a position which did not exist prior to the restructuring. The appellant initially declined to take up the new appointment as he entertained the view that he was not qualified for that position. He surmised that the respondent's insistence that he takes up the position of Finance Manager was motivated by its desire to

performance manage him out of the organization in order to avoid paying, what would have been to the respondent, a substantial redundancy package.

After some initial reluctance to accept appointment to the position of Finance Manager, and given the appellant's decided position on the matter, the respondent, not without misgivings, accepted the new position. Not too long after the respondent assumed work in his new position, some disciplinary charges were laid against him, and he was suspended to avert, what the appellant alleged, was a conflict of interest. The respondent thereupon resigned his position. He then commenced proceedings under **Section 85 (4)** of the **Industrial and Labour Relations Act**, chapter 269 of the Laws of Zambia, claiming in the main, a redundancy package calculated at three months' salary for each year worked, and damages for mental distress and anguish.

In the judgment which caused annoyance to both the appellant and the respondent, the Industrial Relations Court, while accepting that there can be no redundancy where the

employee affected is offered alternative employment, held that the respondent in the present case was not offered a suitable alternative position, and that he took up the new alternative position under coercion from the appellant. The court ordered payment of a redundancy package to the respondent, calculated at two months basic pay for each completed year of service, interest and costs, but declined to award damages for mental distress and anguish because, "this court does not have jurisdiction to hear and entertain claims of damages for mental distress and anguish".

The appellant organization was disenchanted by the whole judgment of the lower court. It appeals to this court, fronting seven grounds of appeal. The respondent was equally discomposed by the part of judgment which dismissed the claim for damages for mental distress and anguish, and has cross appealed on two grounds. We propose to deal with the appeal first.

In ground one of the appeal, the appellant alleges a misdirection on the part of the trial court when it purported to

apply **Section 26 B** of the **Employment Act**, chapter 268 of the Laws of Zambia in considering the redundancy situation in regard to the respondent.

In ground two, the appellant decries the lower court's failure to refer to, or consider clause 21 of the relevant contract of employment which specified conditions on redundancy applicable to the respondent.

Under ground three, the appellant attacks the basis on which the lower court concluded that the respondent was not qualified for the new position of Finance Manager given to him after the restructuring of the appellant organization.

Ground four takes issue with the lower court for its alleged failure to consider that the respondent's previous position was not abolished but split into two portfolios.

Ground five contests the lower court's finding that the respondent was coerced to accept the new position of Finance Manager, following the restructuring.

Ground six disputes the lower court's holding that this was a proper case where the respondent ought to have been put on redundancy.

The final ground challenges the lower court's holding that the respondent be deemed to have been declared redundant, effective from the date of his resignation.

The counter appeal oppugns the lower court's refusal to hold that the respondent was constructively dismissed, and that he was entitled to, and should have been awarded damages for mental anguish and distress.

Detailed heads of argument were filed by both parties in support of their positions in regard to both the appeal and the cross appeal.

Ms. Bwalya, learned counsel for appellant, argued grounds one, four, six and seven of the appeal compositely, while the other grounds were argued individually.

Regarding the substantive ground one, the learned counsel for the appellant made a short point. She argued that section 26B of the Employment Act, chapter 268 of the Laws of Zambia falls under part 4 of the Act which relates to oral contracts and does, therefore, not apply to the respondent whose contract was written. She quoted our judgment in the case of **Chilanga Cement Plc. v. Kasote Singogo**[1], where we pointed out that section 26B of the Employment Act does not apply to termination by way of redundancy of written contracts. It was thus, according to the learned counsel, a misdirection on the part of the trial court to advert to and rely on a provision that related to oral contracts when it was dealing with a written contract in the present case.

In what we perceive to be arguments in support of ground six and seven, Ms. Bwalya submitted that a redundancy situation occurs when an employer decides that the employee's position and/or services are no longer required and, therefore, the employee's position is abolished. Counsel referred us to

paragraph 825 of **Halsbury's Laws of England**[1], 5th edition, page 307 to reinforce her submission.

It was furthermore, contended that in determining whether a redundancy has occurred or not, it is the requirements of the employer which are determinative. Equally, it is the fact of redundancy and not the reasons for redundancy that is material. Counsel submitted that in the present case, no redundancy occurred as the appellant did not abolish the position of the respondent, but rather merely split it into two. The role of Office Manager was not at any time extirpated.

In so many ways reminiscent of repetition and periphrasis, the learned counsel for the appellant made the point about the respondent's job not being made redundant but split into two to enhance efficiency. For reasons which are not immediately clear to us, the learned counsel cited and quoted a passage from the judgment in the case **of Zambia Airways v. John Musengule**[2]**,** which dealt with a Collective Agreement, before submitting that the law does allow employers latitude to organize and run their businesses profitably while protecting employees. In the present

case, according to the learned counsel, the employer did nothing outside its rights as a business. The case of **Shawkat v. Nottingham City Hospital Nits Trust**[3] was cited to buttress the point. Counsel further submitted that there is no redundancy where a position has been downgraded but the work remains the same. For this proposition, the learned counsel found comfort in the case of **Pillinger v. Manchester Area Health Authority**[4]. Ms. Bwalya contrasted the situation in the present case from one where the change in the employee's functions practically turns the work into another kind of job and the employee is unable to perform the new function. In the latter situation, there is a redundancy whereas in the current situation, no redundancy occurred. The learned counsel quoted the following passage from the case of **North Riding Garage Limited v. Butterwich**[5] **.**

> **"where however, the work functions remained the same and the employee is unable and unwilling to perform the new tasks, his inability will not constitute dismissal for redundancy where the overall requirements of the business have not changed."**

According to Ms. Bwalya, the respondent's work functions in this case remained substantially the same after the splitting of the respondent's position. The respondent, who was studying for

his Master of Business Administration degree was, according to the appellant, suitably qualified for the job. More pointedly, the learned counsel submitted that it was gross misdirection for the court below to have failed to refer to or take into account the provisions of **section 26B 4 (e)** of the **Employment Act**, chapter 256 of the laws of Zambia, which provides that:

> **"The provisions of this section shall not apply to-**
>
> ***(e) an employee who has been offered alternative employment and who has unreasonably refused the offer."***

The respondent continued in the employment of the appellant but in a different position. Therefore, according to the learned counsel, there was no redundancy situation here. We were urged on this basis, to uphold grounds one, four, six and seven.

As regards ground two, the appellant alleges a misdirection on the lower court's part when it failed to consider clause 21 of the relevant contract of employment as that is the provision that stipulated the conditions on redundancy applicable to the respondent. Counsel argued that clause 21 provides that the first

option to a redundancy situation was redeployment to another position within the employer's organization. The appellant was redeployed and he accepted such redeployment by electronic mail to the employer dated 17th November, 2009, which electronic was produced in the record of appeal.

In relation to ground three contesting the lower court's holding that the respondent was not offered a suitable alternative job because he was not sufficiently qualified for the position offered, the appellant argued that the respondent was a qualified accountant who was undertaking a post graduate programme and had previously performed the duties related to the position of Finance Manager. According to counsel for the appellant, the court below, therefore, demonstratably misdirected itself in coming to the conclusion that the position of Finance Officer was not a suitable alternative position for the respondent. The learned counsel referred us to comparative experience in the United Kingdom by citing the case of **North Riding Garages v. Butterwick**[5]. More purposefully, a passage from the judgment of Widgery J in that case was cited as follows:

> **"if the requirement for the business for the employees to carry out work of a particular kind increases or remains constant then no redundancy payment can be claimed by an employee, in work of that kind, whose dismissal is attributable to personal deficiencies which prevent him from satisfying the employer... For the purpose of this Act, an employee who remains in the same kind of work is expected to adapt himself to new methods and techniques and cannot complain if his employer insists on higher standards than those required.**

Applying this authority to the present case, the learned counsel submitted that the scope of the respondent's work, as well as the job description, remained the same. The respondent, added the learned counsel, had performed the job of managing the finances of the appellant organization for 10 years prior to the restructuring, and was therefore not at sea in the new position.

Under ground five, the learned counsel for the appellant impugned the trial court's holding that the respondent accepted the new position from which he later resigned, by reason of coercion. The main point taken by Ms. Bwalya on this ground was that the court below made a finding of fact which was against the weight of evidence on record. That evidence showed that there was no coercion or pressure of any kind exerted on the respondent to accept the new position he was assigned. In doing

so, the trial court failed in its responsibility of balancing judiciously, the evidence before it. The learned counsel quoted our judgment in the case of **Attorney General v. Marcus Kapumba Achiume**[6] where we stated that:

> **"an unbalanced evaluation of the 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."**

In the view taken by the appellant's learned counsel, the trial court did not evaluate the evidence in a balanced manner as it evaluated the evidence given by the respondent, but did not take into consideration carefully the evidence of the appellant.

We were urged to uphold this ground of appeal, too.

In his written heads of argument, Mr. Mando, learned counsel for the respondent, countered the arguments made on behalf of the appellant. In supporting the judgment of the court below, the learned counsel made two preliminary general points. He began by stating that the basis for the lower court's judgment was that the respondent was not offered a suitable job as he was

not sufficiently qualified, and should accordingly have been placed on redundancy.

The learned counsel referred us to the letter in the record of appeal from the Zambia Institute of Chartered Accountants (ZICA), clarifying the qualification of the respondent and confirming that the respondent did not have postgraduate qualifications. Counsel then quoted, *ipssismaverba*, the provisions of section 5(1) of the Accountants' Act No. 13 of 2008 dealing with the functions of ZICA, and submitted that ZICA, having confirmed that the respondent's qualifications were insufficient to justify his holding the position of Finance Manager, the court below was right in finding, as it did, that the respondent was offered a wrong position having regard to his qualifications. The learned counsel drew our attention to page 144 of the Record of Appeal, which reflects that the Finance Manager was required to have "a recognized accounting qualification or MBA etc."

The learned counsel adverted to some electronic mail correspondence from the appellant to one Jennifer, in which concern was expressed about the respondent's lack of

performance in his new role. With all these facts, the learned counsel for the respondent opined that the lower court could not be faulted for its finding that the respondent was not offered a suitable position.

As a second general point, Mr. Mando argued on the jurisdiction of the Industrial Relations Court, pointing out that such jurisdiction was not limited to common law reliefs or causes of action, but widely covered the need for the court to do substantial justice between the parties before it. Section 85A of the Industrial and Labour Relations Act chapter 269 of the laws of Zambia (as amended by Act No. 13 of 1994 and Act No. 30 of 1997) was quoted verbatim and relied upon. The learned counsel stressed that from a reading of section 85A, the test to be employed in regard to a complaint before the Industrial Relations Court, is whether such complaint was justified and reasonable. Once this is agreed, the court had power under subsection (c) of section 85A to *deem* the complainant or applicant as retired, retrenched or redundant.

After referring to **Black's Law Dictionary**[4], on the definition of the word 'deem', the learned counsel submitted that the lower court has power to treat the respondent as having been declared redundant even when the essential elements of redundancy had not been proved in the strict sense. What is material is that the complaint is justified and reasonable under section 85A. In the present case, this test was satisfied.

The learned counsel submitted that on the available evidence, the lower court was justified to hold that the respondent wasnot qualified to hold the position of Finance Manager. That finding was in any case, one of fact. According to counsel, that finding cannot be assailed since section 97 of the Industrial and Labour Relations Act chapter 269 of the laws of Zambia, provides that:

> **"Any person aggrieved by an award, declaration decision or judgment of the Court may appeal to the Supreme Court on any point of law or mixed law and fact."**

Mr. Mando cited the case of **ZCCM v. Richard Kangwa and Others**[7] to support both preliminary submission that the Industrial Relations Court is mandated to do substantial justice,

unfettered by legalistic niceties and that appeals therefrom lay to the Supreme Court only on points of law or mixed law and facts.

In response specifically to the seven grounds raised by the appellant, the learned counsel for the respondent started by alleging failure on the part of the appellant to highlight what he called the crucial aspects of the case, namely, that the Industrial Relations Court has jurisdiction to do substantial justice unfettered by legalistic niceties, and that under section 85A, all the court needs to ask itself is whether the complaint was reasonable and justified. Once this is answered in the affirmative, the court has the power to *deem* in the manner the learned counsel argued it, the employee to have been declared redundant.

Mr. Mando submitted that although the lower court made reference to section 26B of the Employment Act, that did not form the *ratio decidendi* of the judgment of the court and did not affect the outcome of the lower court's judgment, nor should it decide this appeal.

The real basis for the lower court's judgment, according to the learned counsel for the respondent, was that the two positions of Office Manager and Finance Manager were different and entailed different roles, with the respondent being qualified for the former position only. For the learned counsel, it was material that after the restructuring of the appellant organization, the respondent was required to be interviewed and was required to sign a fresh contract. This confirmed that the respondent's position was abolished and he was being offered a new one. We were referred to the letter on record from the Labour Commissioner which advised the appellant that even employees who had been given new offers, should be paid their packages "in order for them to enjoy a new contract whose conditions will be determined from the date of their reengagement."

Rather gratuitously, the learned counsel for the respondent adverted to section 4 of the Employment Act, chapter 268 of the laws of Zambia which establishes the office of the Labour Commissioner for purposes of administering the Act. He also quoted section 8 of the Act which makes it an offence for a person

to fail to comply with any lawful directions of a proper officer given under the provisions of the Act. According to the learned counsel, the Labour Commissioner gave the appellant lawful directives to pay redundancy packages even to the appellant's employees who had been reengaged after the restructuring.

As regards ground two of the appeal, the respondent's answer was short. It was contended that there are no conditions for redundancy under clause 21 of the contract of employment. Clause 21 should, according to the learned counsel, be read together with the VSO Reorganization Procedure which is in the record of appeal. According to Mr. Mando, the lower court made a finding of fact when it found that the roles of the Office Manager were different from those of Finance Manager. Those findings are, thus, unassailable.

On ground three, it was the argument of counsel for the respondent that the ground of appeal contradicted itself. In one breath, it alleged that the respondent was qualified and suitable for the new position of Finance Manager, and in another, that he was studying to qualify. The learned counsel again referred us to

the academic qualifications required for the position of Finance Manager and the actual qualifications of the respondent.

On the issue of damages for constructive dismissal, the learned counsel for the respondent complained that although these were claimed, the court did not award them. He argued that a contract of service, like any other contract, entails rights and obligations breach of which has legal consequences. Where the employer breaches any of the duties he owes to the employee, or breaches any of the terms of the contract of service, the employee is entitled to terminate the contract of employment and sue for constructive dismissal. In such a case, it is the breach by the employer that entitles the employee to terminate the contract. The learned counsel referred us to **Halsbury's Laws of England**, 4th edition, volume 16, paragraph 478. We were also referred to our decision in **Chilanga Cement Plc v. Kasote Singogo[1],** where we explained what constitutes constructive dismissal. In that case, after reviewing the authorities on the subject, we stated that an employee can claim to have been constructively dismissed if he resigns or was forced to leave employment as a result of his

employer's unlawful conduct, which conduct amounts to a fundamental breach of employment. We were on this basis urged to dismiss grounds one, four, six and seven of the appeal.

In his reaction to ground five of the appeal, the learned counsel for the respondent referred to various passages in the record reflecting the testimony and correspondence produced before the court to support the submission that the respondent was coerced into accepting the new position of Finance Manager. He argued that ground five of the appeal seeks to impeach a finding of fact which flies in the teeth of section 97 of the Industrial Relations Court Act and should be dismissed.

As indicated at the outset, the respondent was also disenchanted by part of the judgment appealed against. He accordingly lodged in a cross appeal through a notice of cross appeal which reads:

> **"The respondent intends to cross appeal to the Supreme Court against the judgment as far as**
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> **(1) It does not hold that the respondent was constructively dismissal and does not award the damages for constructive dismissal and (2) holds that the Industrial Relations Court has**

no jurisdiction to award damages for damages for mental anguish and distress."

It was counsel's argument that in the present case, it is evident that the respondent was constructively dismissed. According to Mr. Mando, the evidence on record shows that the relationship between the appellant and the respondent started to break down the moment the appellant made an inquiry over redundancy as is clear from the email exchanges; that the email dated 24th December, 2008 which is on the record of appeal evinced a desire on the part of the appellant to perform manage the appellant and others out of employment. When the respondent raised the option of proceeding on redundancy and his non qualification for the new position, the appellant, according to the learned counsel for the respondent, "in a very upper-handed manner, bulldozed the [respondent] into signing the offer of the position of Finance Manager".

Counsel further submitted that there was no justifiable reason for the respondent being indefinitely suspended without pay; that the appellant repudiated the terms of service by

suspending the respondent; that it is this conduct of the appellant that led to the respondent resigning.

The learned counsel then went on to consider the issue of damages for constructive dismissal, maintaining that constructive dismissal is like any other dismissal, entitling the employee to damages. The learned counsel invited us to apply our decision in **Chintomfwa v. Ndola Lime**[8], where it was decided that in considering what award of damages would be adequate, a court should consider the employees' prospects of finding alternative employment in a similar capacity. Counsel prayed that we award 24 month salary as damages as was awarded in **Chintomfwa v. Ndola Lime**[8].

As regards damages for mental anguish and distress, it was contended that these are awardable. Counsel relied on our judgment in the case of **Attorney General v. D.G. Mpundu**[9] where we stated that:

> **"There is now a chain of authorities to support the recovery of damages for mental distress or inconvenience. For example, damages for frustration, annoyance and disappointment could be recovered in an action for breach of contract. In *Mc Call v.***

***Abelesz and Another, it was held (per Lord Denning MR)* at page 731 that:**

> ***It is now settled that the court can give damages for the mental upset and distress caused by the Defendant's conduct in breach of contract."***

Counsel submitted that the respondent was entitled to damages for distress and inconvenience, particularly given the manner in which he was treated.

We were urged to uphold the counter appeal on this basis.

The learned counsel for the appellant filed in the appellant's heads of argument in response to the cross appeal. In rebutting the claim that the respondent was constructively dismissed, the learned counsel submitted that the lower court was on firm ground when it did not address the issue of constructive dismissal as the same was not proved.

According to the learned counsel for the appellant, part of the evidence adduced by the respondent in the trial court was the Tour Report which the respondent obtained illegally as it was confidential and not meant to be seen by the respondent. What was equally clear as far as the appellant's counsel was concerned,

was that the respondent had failed to manage the functions of his office (namely, by failing to reconcile the CT07 and CT08) from as early as 2009 when he was Office Manager – evidence that he had failed to perform. These two actions, according to the learned counsel for the appellant, did entitle the appellant to suspend the respondent from employment. The respondent himself was at fault and in breach of his duty. Counsel quoted the case of **Kitwe City Council v. William Ng'uni**[10] where we stated that:

> **"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."**

According to Mrs. Bwalya, on the facts of the present case, there was no breach of the employment contract by the appellant. She reiterated the arguments she already made in her earlier submissions.

As regards damages for mental anguish and distress the learned counsel rehashed the argument that there was no breach of the contract of employment in the present case and therefore that damages were not awardable, whether general or special for mental anguish and distress. We were further urged not to

reverse the findings of fact of the lower court on the holding that there was no evidence to support the claim in respect of mental distress and anguish. The case of **Ndongo v. Moses Mulyango, Roostico Banda**[11] was cited and relied upon.

We have carefully considered the pleadings and the evidence on record together with the rival arguments advanced before us by the learned counsel for the parties. Much as the parties have addressed us on the merits and demerits of the seven grounds of appeal, and the two in respect of the cross appeal, all their efforts were coloured and subject to our finding on one question only, which is the whole gamut of the issues in this appeal and cross appeal, namely: on the facts of the case, was the respondent declared redundant from the appellant's employment?

The lower court has been faulted for seemingly applying section 26B of the Employment Act to the facts of this case when the said provision is inapplicable. We note that at J5 of the lower court's judgment, the court clearly referred to the said section and quoted it in the following words:

> **"we have looked at S. 26B of the Employment Act cap. 268 of the laws of the Republic of Zambia. That section reads as follows:.....**
>
> **As can be seen from the above section of the law, redundancy is not an automatic phenomenon....."**

We note that the Employment Act sets out the provisions relating to termination of employment by way of redundancy in part IV of the Act headed 'oral contracts of service.' Section 16 of Part IV states that:

> **'The provision of this part shall apply to oral contracts.'**

In the case of **Barclays Bank Plc v. Zambia Union of Financial and Allied Workers**[12] we held that section 26B did not apply to written contracts. Lewanika DCJ, as he then was, in referring to section 26B of the Employment Act stated that:

> **"In enacting this provision Parliament intended to safeguard the interests of employees who are employed on oral contracts of service which by nature would not have any provision for termination by way of redundancy."**

We reiterated this position in **Chilanga Cement Plc v. Kasote Singogo**[1] which the learned counsel for the appellant referred to. Our perusal of the record of appeal shows that the respondent served at all material times, under a written contract

of employment. The letter of employment, as well as the employment contract are both in the record of appeal. In fact, a cross examination of the respondent at trial shows that when the respondent wrote to the appellant claiming a redundancy package, he had erroneously based his claim on section 26B of the Employment. We have no dubiety whatsoever in accepting the argument by counsel for the appellant that section 26B of the Employment Act was inapplicable to the present case. Reference by the lower court to that section was inappropriate, and consequently a misdirection. Ground one accordingly succeeds.

As regards ground two that the lower court should have, as a matter of course, considered the respondent's conditions of employment on redundancy, we note that the respondent's employment contract which is in the record of appeal contained a redundancy provision. Clause 21 of that contract reads as follows:

> **"In the event that it is necessary to make your post redundant, VSO will take all reasonable steps to redeploy you to a suitable alternative post within the VSO program in Zambia. If this is not practicable, you will receive two months basic salary per each completed year of service."**

This provision, in our view, rather than section 26B of the Employment Act, governed the respondent's redundancy questions if they became relevant. We do not accept Mr. Mando's submission that there are no conditions of redundancy under clause 21 of the contract of employment. To the extent that it stated what was to be done when a redundancy was contemplated, the provision was sufficient to deal with the issue as it arose between the parties. The court should have considered this provision in coming to its determination as to whether or not the facts justified the deeming of the respondent as redundant. We do not accept the submission of Ms. Bwalya that the court should have applied section 24B 4(e) of the Employment Act for the same reason that section 26B does not apply here. Through this submission, the learned counsel seeks to approbate and reprobate an issue. A perusal of the whole judgment of the court reveals that the court did not make reference, directly or indirectly to that provision. This was an incongruous omission and was a misdirection on the part of the trial court. Ground two accordingly succeeds.

As grounds three and five raise cross-cutting issues, we consider these two grounds globally.

As regards the holding of the court that the appellant was not offered a suitable alternative job because he was not sufficiently qualified for the position of Finance Manager, we have carefully considered the evidence on record to find the lower court's justification for the position it took. We note that on the record of appeal, is a letter dated 6th November, 2009 from the appellant to the respondent. The contents of that letter are not insignificant. The letter states, so far as is material, as follows:

> **"...As you are aware, the role of Office Manager has been split into two different roles... After discussion and investigation, I established that the role of Finance Manager is a suitable role for you as the duties and accountabilities contained within the post were already contained within your initial role of Office Manager. Furthermore, as a qualified accountant, in separating these duties, it was felt that the role most suitable for you was that of Finance Manager as your specific qualifications are that of accounts and finance. The role is further considered suitable because:**
>
> - **The pay grade is at the same level.**
> - **The status of the new job and level of responsibility is the same – it continues to report in to the Country Director, and part of the management team;**

- **The skill, experience and qualifications required by the new job were also required for your initial role**

- **The working environment including place of work and hours of work has not changed.**

... I would also like to take this opportunity to clarify that as you are changing roles within the office, there is no termination of contract. The VSO will therefore not pay you any end of contract pensions at this point Instead, this will be considered to be continuous service..."

To the letter as aforesaid, the respondent on the 17th November, 2009 endorsed on the said letter the following inscription:

"Received and I have accepted the offer for the post of Finance Manager. See attached email dated 17/11/09 for my response."

In the email of 17th November, 2009 addressed to Frida Kabaso of the appellant organization, the respondent wrote:

"I make reference to your letter dated 06th November, 2009, in which you have appointed me to the post of Finance Manager. I wish to thank you for the confidence you have in me to manage this challenging role. I further wish to assure you that, I will diligently carry out my duties in my new role in order for the organization achieve its intended objective of bringing in efficiency in the programme office operations. I am well prepared for the new challenge that my new role may bring and I am ready to overcome the challenges the new role may bring..."

In our view, the initial misgivings that the respondent had about his ability to handle competently the requirement of his new job, had by the correspondence we have quoted, been allayed. This correspondence clearly superseded the initial misunderstanding between the parties which Mr. Mando referred to in his submissions. We are unable to find any evidence on record suggesting that the respondent was coerced into taking up the new appointment. Nor are we able to accept the suggestion that the position of Finance Manager carried materially different responsibilities from the position of Office Manager previously held by the respondent (although the respondent referred to the position as "my new role").

In our estimation, determining the qualifications and job description for particular job positions in the appellant's establishment, lay squarely with the appellant as employer. It does not lie in the mouth of the respondent, as a mere employee, to determine what the qualifications for particular positions were. In saying this, we take full cognizance of the fact that the qualifications for a Finance Manager in one organization need not

be entirely identical with those of a Finance Manager in another organization.

Having carefully considered the evidence on record and the judgment of the lower court, we are of the considered position that the factual findings of the lower court that the respondent was not sufficiently qualified for the newly assigned position, and that the respondent was coerced into taking up the position of Finance Manager, were not borne out of the evidence on record. We are not unmindful of the guidance we have provided in numerous cases that an appellate court should not routinely interfere with findings of fact. In **Wilson Masauso Zulu v. Avondale Housing Project Ltd**[13], we guided that:

> **"before the court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that on a proper view of the evidence, no trial court acting correctly could reasonably make."**

We believe that in the present case, the lower court did not have before it, sufficient evidence of coercion by the appellant of the respondent to accept the new position offered to him, nor did

it have a sufficient evidential basis to hold that the respondent was not qualified to undertake the responsibilities of the new position which he readily accepted. The result is that we find merit in both grounds three and five. Accordingly, we allow them.

Under ground four the appellant's dissatisfaction arises from the court's failure to consider evidence to the effect that the respondent's previous job and functions ware not abolished but merely split into two. We perceive the appellant's complaint under this ground as one comprising a challenge of findings of fact or assessment of the evidence by the trial court.

We note from the record that evidence was led to the effect that the respondent's previous position of Office Manager was split into two positions in the restructuring. The court made absolutely no reference to this evidence in its judgment. In our view, whether the position previously held by the respondent was split into two or not, is not the factor determinative of this appeal. Indeed, it is possible for a redundancy to occur whether or not one's previously held position has been split into two or more positions. Splitting a position may arguably entail abolition of an

existing position. The real issue as we have earlier stated, is whether there was a redundancy or not. Ground four does not add any value to the appellant's case nor does it take anything away from the respondent's position

Under ground six, the appellant alleged a misdirection on the part of the court in holding that this was a proper case where the respondent ought to have been put on redundancy. According to the appellant, the facts of the matter and the law, did not support such a finding.

The facts before us present a somewhat interesting paradox in the prevailing employment environment in Zambia characterized by a dearth of employment opportunities, and where employees will do everything in their power to avert being declared redundant. The respondent offered to be declared redundant and asked the lower court to deem him as such. The employer positively affirms that the respondent is not redundant staff and his services are required even more in the restructured entity.

Ground six of the appeal, in our view, fully accentuates the real issue for determination in this appeal, namely whether or not there was a redundancy. The situation that presented itself in the present case was that the appellant was offered the position of Finance Manager, which he claimed he was not qualified to hold. He accepted the position after some initial hesitation. He was placed on suspension for some disciplinary issues unrelated to his qualifications for the job. He pressed to be declared redundant to no avail. He eventually tendered in his resignation. The court held that there was a redundancy here for two reasons; first, the respondent was offered an alternative position which he did not qualify for, and was therefore not a suitable alternative position. Second, that the respondent's acceptance of the new position was under coercion.

Guidance is given in **Halsbury's Laws of England**, 5th Edition, volume 40, paragraph 825 as at page 307 as quoted by the learned counsel for the appellant, on when a redundancy situation arises. It provides as follows:

> **"an employee who is dismissed is to be taken as to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:**
>
> > ***The fact that the requirements of that business for the employees to carryout work of a particular kind, or for employees to carry out work of a particular kind in the place where he was employed by the employer, have ceased or diminished or expected to cease or diminish.'***

In *casu*, the respondent was not dismissed by the appellant. As we have already stated, he resigned but takes the position that his resignation was induced by the appellant's conduct. In truth, the respondent claims to have been constructively dismissed in the manner described by Lord Denning in the case of **Western Excavating (ECC) Ltd. v. Sharpe**[14]that:

> **"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employer is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say 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."**

According to the respondent, his constructive dismissal amounted to a redundancy and was properly treated as such by the lower court.

We accept the submission of the learned counsel for the appellant that a redundancy takes place when an employer decides that the employee's position and/or services are no longer required and, therefore, the position must be abolished.

On the totality of the evidence, we are of the considered view that a redundancy situation in respect of the respondent did not occur in this case. An alternative position of Finance Manager was available and was indeed offered to the respondent. We are not satisfied that the fears that the respondent was ill qualified for the position, or indeed that the offer of that new position was a ploy on the part of the appellant to manage perform the respondent out of the job were well founded. We note that in declining to deal with the respondent's suspension the Industrial Relations Court observed that:

> **"We shall not concern ourselves with the issues of discipline which the complainant underwent because that was not part of the complaint in this case."**

We agree with that position. The disciplinary proceedings were divorced from the redundancy claim launched by the respondent. There is no basis, in our view, for the submission by the learned counsel for the respondent to argue that the indefinite suspension was part of the process of redundancy. Ground six has merit, and it is upheld.

In ground seven, the lower court is faulted for holding that the respondent was declared redundant from the date of his resignation. Having found that a redundancy situation never arose in this case in relation to the respondent, it follows that ground seven of the appeal should equally succeed. The net result is that the whole appeal succeeds.

We now turn to the cross appeal.

The kernel of the respondent's cross-appeal is that the respondent was constructively dismissed. *Sedquaere* whether an employee can claim both a redundancy package and damages for unlawful dismissal at the same time.

We have held in this judgment that there was neither constructive dismissal, nor a redundancy in the present case. It follows that the claims in the cross appeal cannot be sustained. The cross appeal accordingly collapses. It is hereby dismissed.

We make no order as to the costs.

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M. S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

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E. N. C. MUYOVWE
SUPREME COURT JUDGE

.....

M. MALILA, SC
SUPREME COURT JUDGE