

**IN THE SUPREME COURT FOR ZAMBIA**

**APPEAL NO. 194/2015**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

**Chintu Kanga** (*Suing as administrator of the  
estate of Godfrey Locha*)

**Appellant**

**AND**

**ZAMBIA REVENUE AUTHORITY**

**RESPONDENT**

**Coram : Wood, Musonda and Mutuna, JJS**

**On 11<sup>th</sup> July 2018 and 20<sup>th</sup> July 2018**

**For the Appellant : N/A.**

**For the Respondent : Mr. K. Wishimanga and Mr. R. Mwala of  
Messrs A.M. Wood and Company**

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

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Mutuna, JS. delivered the judgment of the Court.

Cases referred to:

- 1) **Western Excavating (ECC) Limited v Sharpe (1978) IRLR**
- 2) **Kitwe City Council v William Nguni (2005) ZR 57**

- 3) **Chilanga Cement v Kasote Singogo SCZ judgment No.13 of 2009**
- 4) **Bank of Zambia v Joseph Kasonde (1995-97) ZR 238**
- 5) **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**

Legislation referred to:

- 1) **Industrial and Labour Relations Act, Cap 269**

Works referred to:

- 1) **W.S. Mwenda, Employment Law in Zambia - Cases and Material Revised Edition, 2011 UNZA Press**

## **Introduction**

- 1) This appeal arises from a dispute in the High Court which addressed the question of what constitute constructive dismissal. It contests the decision of the Industrial and Labour Division of the High Court (erstwhile Industrial Relations Court) which found that, one Godfrey Locha, the deceased former employee of the Respondent was not constructively dismissed from the Respondent's employment.

- 2) In addressing the question posed by the appeal we have interpreted the provisions of section 97 of the ***Industrial and Labour Relations Act*** which set out the grounds upon which an appeal can be launched in an appellate court from a decision of the Industrial and Labour Division of the High Court.

### **Background**

- 3) The backdrop to this appeal is that the deceased, who was the Complainant in the Court below, was employed by the Respondent on 11<sup>th</sup> April 2004 as legal officer. The contract of employment was for a tenure of five years.
- 4) During the life of the contract of employment, the Respondent employed two other legal officers in 2007 by the names of Diana Bunting and Demetria Mudenda. These employees were junior

to the deceased in terms of their practical experience at the Bar and as such, worked under the supervision of the deceased.

- 5) The two new legal officers' employment was governed by contracts of employment which they individually executed with the Respondent. These contracts of employment provided for salaries which were higher than what the deceased was receiving.
- 6) In the course of his employment, the deceased was from time to time requested to render opinions on matters concerning the operations of the Respondent. On one or two occasions, the Respondent through the deceased's supervisor, one Nana Mudenda, the corporation secretary, (RW1 in the Court below), sought second opinions in respect of the opinions he rendered.



- 7) At one point in his career with the Respondent, the deceased was appointed to act as legal counsel when the position fell vacant. He was, for this reason, allowed by the Respondent to use a personal to holder vehicle allocated to the office of legal counsel. The vehicle was subsequently withdrawn.
- 8) Later, the Respondent ran an advertisement in the press inviting applicants for the vacant position of legal counsel. One of the conditions set out in the advertisement was that applicants should have at least six years post-admission experience. The Respondent also allowed the deceased and the other legal officers to apply. The deceased and Diana Bunting accordingly applied for the position and were both invited for interviews.

- 9) The interviews for the vacant position were conducted by a panel of interviewers appointed by the Respondent's Board of Directors and after it conducted the interviews, it selected Diana Bunting to fill the position of legal counsel. This infuriated the deceased prompting him to resign on 28<sup>th</sup> April, 2011 after he gave a month's notice.
- 10) Following from this, the deceased instituted proceedings in the Industrial and Labour Division of the High Court against the Respondent. He contended that, the treatment the Respondent exposed him to amounted to constructive dismissal.

**The Appellant's claim and contentions in the Court below**

11) In the notice of complaint filed by the deceased in the Court below, the relief sought was as follows:

**11.1 That the Court deems him to have been constructively dismissed by the Respondent;**

**11.2 That the Court finds that such constructive dismissal was wrongful;**

**11.3 That the Court orders the Respondent to pay the Complainant damages for wrongful dismissal in form of a salary and all other allowances for the un-expired term of the Complainant's contract of employment, including all gratuities and other benefits thereof;**

**11.4 Refund of the sum of K1,503,000.00 (un-rebased) deducted from the Complainant's February 2011 salary as unretired imprest when all imprest was retired by the Complainant;**

**11.5 Interest on all monetary claims from the date of lodging of the Complainant to until payment at bank lending rate; and**

**11.6 Costs.**

12) The evidence at the trial led by the deceased was by way of the affidavit in support of notice of complaint and *viva voce* evidence. It referred to

the incidences we have set out in the background and alleged that they were calculated at forcing him out of employment.

- 13) The deceased contended that despite the two Legal Officers being his juniors at the Bar and recruited later in time, they were employed on higher salaries than his. This, he contended was not only highly illogical, insincere, and deceitful but also unfair especially that he was more experienced in the affairs of the Respondent than they were.
- 14) According to the deceased, the actions by the Respondent aforementioned, were a violation of established principles, virtues and etiquette of the legal profession and provisions of the law in the legal fraternity.



- 15) The deceased went on to catalogue events that occurred during his employment which he allegedly were calculated at frustrating him. The first of such events was what he termed the unceremonious withdrawal of the personal to holder vehicle by the Respondent under what he called, very suspicious, unclear, bizarre and embarrassing circumstances. He concluded that the withdrawal of the vehicle was a confirmation that the Respondent was not happy with him acting as legal counsel.
- 16) The second incident the deceased referred to related to RW1, as his superior, giving instructions to the two legal officers directly, thereby ignoring him as departmental head and supervisor of the two legal officers. He also alleged that there appeared to have been a tendency by

RW1 to prefer the legal opinions of the two legal officers over his.

- 17) In addition, the deceased contended that the worst moment of this episode was when he was invited to attend the interviews for the position he was acting in of legal counsel along with Diana Bunting and other lawyers from outside the Respondent. He considered the interviews a sham and a smoke screen because Diana Bunting was already identified by RW1 as the eligible candidate for the position. She, therefore, influenced the decision of the other members of the interview panel resulting in Diana Bunting being employed as legal counsel despite her lacking in the requisite six years post admission qualification and work experience.

- 18) The last event the deceased referred to was the cancellation of his trip to Tanzania by the Respondent without giving him reasons.
- 19) These events, it was contended, prompted the deceased to give notice of his resignation as he now feared that the Respondent would deliberately frame up false charges against him and dismiss him.
- 20) In the evidence led under cross examination, the deceased's testimony revealed that after the Respondent employed the two legal officers it did not alter his conditions of service and his contract of service continued on the same terms. He also stated that the two tenures of his contract did not provide for a salary higher than the two legal officers. Further, the conditions of service he enjoyed were not subject to his practical



experience as a legal practitioner. He, in this regard, confirmed that there are instances in the profession where junior counsel has been known to earn more than senior counsel.

- 21) The deceased also testified that the only benefit which accrued to a person serving in an acting position is an acting allowance which he was paid by the Respondent. He, therefore, conceded that the personal to holder vehicle was not an entitlement because whilst acting he maintained his substantive position of legal officer. Here, the deceased stressed the point that his grievance was in the manner the vehicle was withdrawn from him.
- 22) In relation to his contention on the manner RW1 reacted to legal opinions he tendered, the deceased testified that there were no guidelines in



his contract of employment as to how his legal opinions would be considered and that the Respondent retained the discretion to accept or reject a legal opinion rendered by any of its legal officers.

- 23) On the issue of termination of employment, the deceased testified that his contract of employment permitted him to exercise an option to resign upon giving the Respondent a month's notice.
- 24) In conclusion, the deceased testified that it was in the entire discretion of the Respondent to decide whom to appoint to fill the vacancy of legal counsel and the criteria to be considered for such appointment. As such, there was no breach of any law when the Respondent appointed Diana Bunting to the position of legal counsel. He

however, reiterated that the interview panel had conspired to deny him the appointment, though he did not have evidence to prove the allegation. It was his position also that in effecting the appointment the Respondent breached corporate governance principles.

- 25) The affidavit and viva voce evidence in opposition on behalf of the Respondent was led by RW1 and one Elijah Chola Banda SC, RW2. RW1 testified that the termination of employment by the deceased did not amount to constructive dismissal because the deceased resigned on his own volition in accordance with the provisions of his contract of employment. She also denied the allegation that the Respondent refused to acknowledge the deceased's seniority at the Bar in regard to the salary he was paid and

consideration for promotion. In doing so she testified that the deceased's contract of employment with the Respondent was independent of the contracts of employment between the Respondent and the other two legal officers. Further, the deceased's experience at the Bar was not the determining factor for the salary offered to him which he was at the material time at liberty to reject.

- 26) In addition, the Respondent did not at any time adversely alter the deceased's conditions of service.
- 27) In relation to entitlement to the personal to holder vehicle whilst acting in the position of legal counsel, the evidence revealed that an employee serving in an acting capacity was not entitled to a new salary or conditions of service but only an



acting allowance. The evidence also revealed that in considering the person to appoint in the position of legal counsel, the Respondent was not obliged to give preferential treatment to an applicant based on his seniority at the Bar. The practice was to advertise the vacant positions and short list the candidates to be interviewed who would include members of staff of the Respondent. The evidence denied the allegation that the interviews were a sham and mockery of the process or that one person influenced the outcome. It revealed that they were conducted by persons of integrity.

- 28) The evidence also disputed the allegation that the Respondent frustrated the supervisory role of the deceased by ignoring him and sending instructions for legal opinions directly to the other



two legal officers. It revealed that instructions were only sent directly to the other two legal officers when the Appellant was not present at the time of issuance of the instructions. Further, it denied the allegation that the legal opinions rendered to management by the Appellant were rejected as a way of frustrating him. It was in the entire discretion of management to accept or reject legal opinions from the legal department.

- 29) In concluding her evidence, RW1 revealed that the deceased's trip to Tanzania was cancelled by the legal counsel who had been recruited after the Appellant stayed away from work and later applied for leave.
- 30) RW2's evidence revealed the composition of the panel of interviewers and the scoring system adopted during the interview. It also rebutted the

contention by the deceased that the interviews were a sham because the panel allegedly, had a pre existing disposition to employ Diana Bunting. According to RW2, Diana Bunting did well in the interviews and scored better than the other candidates. He explained further that the experience she had acquired working for the Respondent compensated for her lack of the requisite six years professional experience for the position of legal counsel. This was acknowledged by the Respondent and was a deliberate policy on its part when it invited its members of staff for interviews.

**Consideration of the evidence and decision of the Court  
below**

- 31) The Court began its consideration of the matter by setting out the law on constructive dismissal. In

doing so it referred to Lord Denning's decision in the case of ***Western Excavating (ECC) Limited v Sharpe***<sup>1</sup> at page 4 as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates his 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 notice at all, or alternatively, he may give notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

- 32) In addition the Court referred to the learned author W.S. Mwenda in her book ***Employment Law in Zambia, Cases and Material*** at page 184 where the author defines what constitutes constructive dismissal which is in line with the holding by Lord Denning aforestated.



- 33) The Court then referred to our decisions in the cases of ***Kitwe City Council v William Ng'uni<sup>2</sup>*** and ***Chilanga Cement v Kasote Singogo<sup>3</sup>***. In regard to the former decision, the Court found that we adopted the test laid down by Lord Denning by holding that for a claim of constructive dismissal to be upheld the employer's conduct must be such that it amounts to breach of contract prompting the employee to resign.
- 34) In relation to the latter decision, the Court referred to the observation we made that in constructive dismissal the employee leaves employment promptly or by notice as a result of the conduct of the employer. This conduct must be unlawful and amount to a fundamental breach prompting the employee to leave. Further, there



can be no constructive dismissal where an employee's service is terminated by the employer.

- 35) After setting out the law the Court examined in detail the conduct by the Respondent alleged to have prompted the deceased to terminate his services and dismissed the deceased's allegations that the conduct amounted to breach of contract leading to constructive dismissal. The basis for this was the deceased's evidence under cross examination which contradicted his affidavit evidence and evidence in chief, thereby negating the contentions. It accordingly dismissed the claim.

**Grounds of appeal to this Court and arguments by the parties**

36) The deceased is aggrieved by the decision of the Court below and has launched this appeal on four grounds as follows:

**35.1 The Court below erred in law and fact by not evaluating the evidence before it correctly;**

**35.2 The Court below erred both in law and in fact when it held that the Appellant was not constructively dismissed because the Respondent did not breach the contract of employment yet there was abundant evidence of unreasonable conduct by the Respondent which forced the Appellant to resign;**

**35.3 The Court below erred in law and fact by holding that the employer had discretion to vary the qualification criteria for candidates for the interview to fill the position of legal counsel ignoring the fact that the Respondent is a public body legally bound to uphold the principle of fairness and to follow its own internal regulations;**

**35.4 Further and/or any other grounds either of law or fact as may be advanced at the hearing.**

- 37) Prior to the hearing of the appeal the parties filed heads of argument. The deceased's representative did not attend the hearing of the appeal as he had filed a notice of non attendance pursuant to our rules and, therefore, relied entirely upon the heads of argument. The Respondent, on the other hand, was represented by counsel at the hearing who relied upon the heads of argument.
- 38) The deceased's representative argued grounds 1 and 2 of the appeal together. These two grounds alleged a failure by the Court below to properly evaluate the evidence before it and a misdirection by failing to hold that there was constructive dismissal in the light of the unreasonable behavior by the Respondent.
- 39) The two grounds of appeal essentially contested findings of fact by the Court below and concluded



by setting out what the Appellant termed undisputed evidence of adverse conduct by the Respondent through RW1.

- 40) In relation to ground 3 of the appeal, the deceased's representative questioned the exercise of discretion by the Respondent to employ Diana Bunting as legal counsel notwithstanding the fact that she had not attained the requisite six years practical experience. It was argued that the Respondent as a public body is bound to adhere to the principles of fair play as we held in the case of ***Bank of Zambia v Kasonde***<sup>4</sup>. The position taken by the deceased's representative was that the conduct of the Respondent confirmed his allegation that it had already made up its mind to elevate Diana Bunting.



- 41) Responding to the arguments advanced under grounds 1 and 2 of the appeal, the Respondent argued that the conduct complained of fell far short of the test laid down in the cases of ***Western Excavating (ECC) Limited v Sharpe***<sup>1</sup>, ***Chilanga Cement Plc v Kasote Singogo***<sup>3</sup> and ***Kitwe City Council v William Nguni***<sup>2</sup>. According to the Respondent, the Appellant terminated his contract of employment with notice by way of resignation and that there were no acts committed by the Respondent which would justify a finding that he was constructively dismissed.
- 42) In relation to ground 3 of the appeal, the Respondent's arguments were similar to those made under grounds 1 and 2 of the appeal.

**Consideration of the appeal by this Court and decision**

- 43) We have considered the record of appeal and arguments advanced by the parties. Our determination of the appeal will begin with grounds 1 and 2 of the appeal. We have decided to consider these two grounds of appeal together not only because they were argued together by the parties but because they raise the same question.
- 44) The two grounds of appeal as presented seek to challenge findings of fact by the Court below. In doing so the deceased's representative catalogues the evidence presented before the Court below in the form of events he alleges were unreasonable behavior on the part of the Respondent which prompted the deceased to terminate his employment. The deceased's representative sought our review of the said evidence and a

holding that indeed the Respondent's actions amounted to unreasonable behaviour and thus, the deceased was justified in terminating his contract of employment.

- 45) The approach taken by the deceased's representative as we have outlined in the two preceding paragraphs essentially reveals that the appeal, as it relates to the two grounds of appeal, is against findings of facts rather than points of law or mixed law and facts. We have stated in a plethora of authorities that an appeal cannot lie to this Court from that particular Division of the Court below on findings of fact pursuant to section 97 of the ***Industrial and Labour Relations Act*** which states as follows:

**"Any person aggrieved by any award, declaration, decision or judgment of the Court may appeal to the**



**Supreme Court on any points of law or any point of mixed law and fact.**

To the extent, therefore, that grounds 1 and 2 of the appeal are on points of fact, the appeal is misconceived.

- 46) Further, even assuming that an appeal could lie to this Court from the Court below in the manner it is presented in grounds 1 and 2, we would still not have upheld it because we are of the firm view that the Court below did not misdirect itself in the evaluation of the evidence and conclusion that the deceased was not constructively dismissed. In order for us to reverse findings of fact by a trial Court the findings must be such that they are not supported by the evidence or are perverse. This is as per our decision in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***<sup>5</sup>.



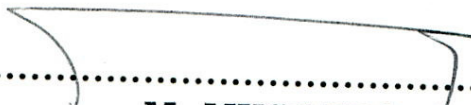
- 47) In the instant case the deceased challenges various findings of fact which were arrived at by the Court below as a consequence of his evidence under cross examination. The view we have taken is that the findings did not meet the test in the ***Wilson Masauso Zulu*** case because, and as is evident from the summary of the evidence we have given, they were supported by his evidence.
- 48) Coming to ground 3 of the appeal, the view we have taken is that the issue raised of the Respondent being a public body and as such bound by the principles of fair play was not raised in the Court below and is being canvassed for the first time on appeal. We consequently cannot entertain it on appeal.

## **Conclusion**

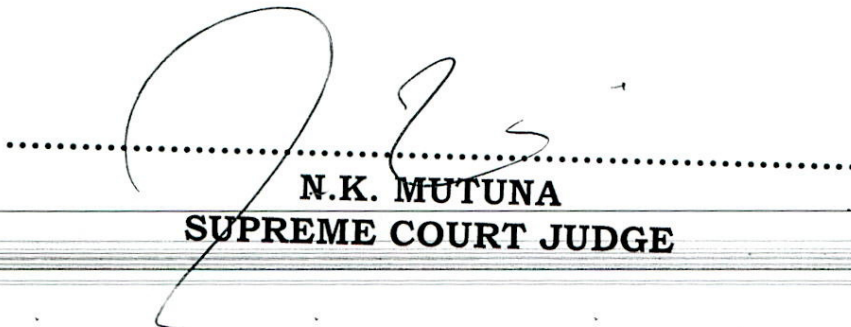
- 49) Arising from our determination, the appeal as a whole fails and we dismiss it. As to the costs, we order that the parties bear their respective costs.



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**A.M. WOOD**  
**SUPREME COURT JUDGE**



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**M. MUSONDA, SC.**  
**SUPREME COURT JUDGE**



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**N.K. MUTUNA**  
**SUPREME COURT JUDGE**