IN THE COURT OF APPEAL OF ZAMBIA APPEAL No.14/2019

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

STANDARD CHARTERED BANK PLC **APPELLANT**

AND

CELINE MEENA NAIR **RESPONDENT**

CORAM: **Chashi, Mulongoti and Lengalenga, JJA**

On 16th and 25th October, 2019

For the Appellant:	*Mr. N. Nchito, SC of Nchito & Nchito*
For the Respondent:	*Mr. M.Z. Mwandenga of M.Z. Mwandenga & Company & Mr. J.C. Kalokoni of Kalokoni & Company*

J U D G M E N T

Mulongoti, JA, *delivered the Judgment of the Court*

Cases referred to:

1. ***Chilanga Cement PLC v Kasote Singogo SCZ No. 13 of 2009***
2. ***Western Excavating (ECC) Limited v Sharp (1978) IRLR***
3. ***WA Goold (Pearmak) Ltd v McConnell (1995) IRLR 516***

4. ***Wilson Masauso Zulu v Avondale Housing Projects Limited (1982) ZR 172 at 175 (SC)***
5. ***Maamba Collieries Limited v Godfrey Mudenda Ng'andu SCZ Appeal No. 79/2005***
6. ***Attorney General v Marcus Kapamba Achiume (1983) ZR 1 (SC)***
7. ***Bahamas Air Holdings Limited v Messeir Dowty Inc-(2019) 1 ALL ER 285***
8. ***Kitwe City Council v William Nguni (2005) ZR 57 (SC)***
9. ***Michael Kahula v Finance Bank (Z) Limited SCZ Appeal No.96 of 2012***
10. ***Engen Petroleum Limited v Willis Muhanga and Jeromy Lumba SCZ Appeal No. 117 of 2016***
11. ***National Milling Company Limited v Grace Simataa and others (2000) ZR 91 (SC)***
12. ***Elias Tembo v Florence Chiwala Salati and two others SCZ Appeal No. 200 of 2016***
13. ***Lewis v Motorworld Garages Ltd [1986] ICR 157, 167***
14. ***Isle v Wight Tourist Board v Coombers (1976) IRLR 413***
15. ***Council of Scientific and Industrial Research v Figen (1996) 17 1LJ 18***
16. ***Gab Robins (UK) Ltd v Triggs [2007] UKEAT***
17. ***Amiran Limited v Robert Bones SCZ Appeal No. 42 of 2010***
18. ***Zambia Telecommunications Company Limited v Mirriam Shabwanga & 5 others SCZ Appeal No. 78 of 2016***
19. ***Nevers Mumba v Muhabi Lungu SCZ Appeal No. 200 of 2014***

Legislation referred to:

1. ***The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia***

Other works referred to:

1. ***Halsbury's Laws of England /Employment Volume 39 of 2014 paragraph 48***
2. ***Singapore Academy of Law Journal (2013)***
3. ***Criag Bosch, "The Implied Term of Trust and Confidence in South African Labour Law" in Industrial Law Journal 27, 2006***

1.0 **Introduction**

1.1 This is an appeal against the Judgment of Musaluke, J in the High Court Industrial Relations Division (as his Lordship then was) which found that the complainant, now respondent, Ms. Celine Meena Nair, had been constructively dismissed by Standard Chartered Bank Zambia (appellant). The trial Judge awarded 36 months gross salary as damages for constructive dismissal. Aggrieved with this decision the appellant lodged this appeal.

2.0 **Background**

2.1 By notice of complaint and affidavit in support filed in the High Court Industrial Relations Division, Ms. Nair sued the appellant alleging that she had been constructively dismissed as a result of acts and words of abuse by the appellant's Managing Director and Chief Executive Officer, Mr. Okai. She sought the following reliefs:

> ***"(a) Declaration that the complainant was constructively dismissed;***
>
> ***(b) Payment of 36 months' salary with all allowances as damages for constructive dismissal;***
>
> ***(c) Damages for loss of earnings;***
>
> ***(d) Damages for mental torture;***
>
> ***(e) Damages for loss of expectation of remaining in employment***

(f) Payment for leave days; and

(g) An order for payment for the 3 months' pay in lieu of Notice."

2.2 The appellant filed an Answer denying the respondent's allegations and that the same were unfounded.

3.0 **Evidence Adduced in Court Below**

3.1 Ms. Celine Meena Nair testified that she was employed by the appellant on 17th July, 2006, as Head Legal/Company Secretary.

3.2 On 28th July, 2015, she resigned from her position and alleged that she had been constructively dismissed by the appellant on account of the acts and words of abuse suffered over the last 20 months (October 2013-July 2015) at the hands of the Managing Director and Chief Executive Officer, Mr. Brian Okai, which acts and words were clearly meant and succeeded to frustrate, victimize, and get rid of her.

3.3 The respondent testified that she worked well with the previous Managing Directors and Chief Executive Officers except with Mr. Okai who became Managing Director on 1st October, 2013. Mr. Okai victimized and harassed her and forced her to resign on 28th July, 2015.

3.4 Prior to her resignation, she informed the appellant of the acts of abuse by the Managing Director by email on 9th June, 2015. She stated that some of the acts of abuse and harassment were that at her inaugural meeting with Mr. Okai, during a one on one session, he told her that he could not work with her based on information given to him by confidants in the Executive Committee (EXCO).

3.5 In March, 2014, at a team building of EXCO, the team builder asked the participants to write on a flip chart what they did not like about the new Managing Director. She did not participate in this exercise but the Managing Director attributed all the negative things written about him to her. She was also accused of pushing payments for law firms because she was getting commission when the legal bills were paid on time.

3.6 The major incident was that on 22nd May, 2015 she underwent wisdom tooth extraction, which also led to removal of the root. She subsequently developed an infection in her jaw and had unbearable pain. During one of the meetings of EXCO one of the members Mr. Sonny Zulu arrived late, and in a bid to rush and sit, he slammed the door behind him. This resulted in the respondent experiencing excruciating pain. Her two colleagues

who sat on each of her side, asked what was wrong. When the Managing Director noticed them talking, he asked what it was about. She was unable to speak and so her colleague Mr. Koni explained that she experienced pain when the door was slammed.

Then Mr. Okai got up and began to slam the door repeatedly saying *"did that pain, did it hurt?"* He even asked Mr. Sonny Zulu to join him in banging the door repeatedly in full view of the EXCO members.

3.7 The other incident occurred on 29th May, 2015, when she had a cannula as she was being treated for the jaw infection. At 14:00 hours she had to leave for her antibiotic treatment at CFB Hospital. As she left the meeting she met the Managing Director in the lift, who said he wished he knew someone at CFB so he could administer her treatment. She responded that as he was not a doctor he would kill her, then he said that would be the idea.

3.8 On 5th June, 2015, Mr. Okai called her into his office and accused her of rushing into State House that morning to reveal the status of the Board meeting and that she was trying to have him deported. She denied and demanded for proof. He said by

16:00 hours a CCTV footage of her visit to State House would be availed. However, by the date of her resignation, the CCTV was never availed.

3.9 After the appellant received the respondent's email of 9th June, 2015 about her abuse and mistreatment by the Managing Director, she was approached and told to have a telephone conference with her line manager. She was told that a grievance process would be commenced and was told to stay home. A panel of two was appointed to hear her complaint. These were Ms. Sharon Heather from the UK and Mr. Ferdie Pieterse from South Africa.

3.10 On 2nd July, 2015, she was interviewed by telephone and a transcript of the hearing was prepared. She sent the transcript of the hearing to Ms. Sharon Heather by email. Ms. Heather, in a follow up email of 23rd July, 2015 told her that they had spoken to some witnesses but could not interview Mr. Okai because he would be away for two weeks.

3.11 On 27th July, 2015 she responded to the email from Ms. Heather expressing concern that she would stay away from the office for too long if she had to wait for his interview and return to the office. She also discovered that Mr. Okai only took one day off

i.e 28th July, 2015 and would be back in the office on 29th July, 2015. She took this to be a lie to protect him and felt that he too could have been interviewed by phone as they did with her. It was then that she decided to resign on 28th July, 2015.

3.12 The respondent also testified that the Managing Director had become aware of the grievance against him as he stopped answering her phone calls or emails and urgent work was left to pend.

3.13 In cross examination, she testified that even though she was free to text Mr. Okai, there was nothing in writing about the abuse or way he was treating her. Even at the time of resignation, she never spoke to him about it. She also conceded that though she testified in chief that the Managing Director did nothing for her, he pushed for the final letter of her promotion and that she thanked him for it. She said she never sent any email complaining about her boss until the last moment.

3.14 Under further cross examination, the complainant stated that initially she had wanted a quiet separation from the appellant and that the appellant proposed a figure on a without prejudice discussion.

3.15 She further testified that when she had a miscarriage, the Managing Director told her that he wished she was the one who had died. Regarding the door slamming incident, she said it was slammed for about 5-11 times. She agreed that the following day she was joking with Mr. Okai.

3.16 She said she finally decided to resign because the grievance process was not going anywhere. She admitted that she asked the investigators to keep the investigation tight looped as she did not want people in the Bank to be discussing the issue.

3.17 Mr. Kalunga Lutato (CW2) confirmed the incident about Mr. Okai wishing he would administer the respondent's drip and that the idea would be to kill her. The witness said he was present when the comment was made. Others present apart from the respondent and Managing Director were Akapelwa Kamona and Loise Gobelar. He also said he was aware of the door banging incident although he was not present.

3.18 RW1 Sonny Zulu, confirmed the door slamming incident which started after he arrived at the meeting five minutes later. He also testified that the meeting discussed the issue of legal bills being delayed.

3.19 In cross examination, the witness stated that he banged the door repeatedly after someone asked him to, but it was not Mr. Okai. He said people present laughed about it but he saw the respondent get up and leave the meeting.

In re-examination he testified that he later learnt that Mr. Okai had earlier slammed the door but he was not aware how many times he did so.

3.20 RW2 Ruth Kampamba Chanda Simuyemba, the appellant's Head Human Resource, testified that the duration of the grievance process varies from one month to six months depending on the urgency. She conceded that the respondent's complaint against the Managing Director Mr. Okai deserved to be handled urgently. She admitted that the respondent was interviewed telephonically on 2nd July, 2015 while Mr. Okai was never interviewed. The witness recalled the door banging incident but said it was done in a light moment.

4.0 **Evaluation of the evidence and decision of the lower court**

4.1 After analyzing the evidence before him, the trial Judge reasoned that according to the Supreme Court decision in the case of **Chilanga Cement Plc v Kasote Singogo**[1] where an employer

fails to investigate the employee's complaint or grievance, malice on the part of the employer would be implied. The trial Judge observed that when the respondent realized that the process was moribund and that the appellant had breached the employment contract she decided to leave. The trial Judge opined that based on the evidence before him, the appellant was no longer intending to be bound by the Grievance Procedure Code which was an essential term of the employment contract.

4.2 The court below followed the leading case on constructive dismissal of **Western Excavating (ECC) Limited v Sharp**[2] that the failure to investigate a grievance did constitute a breach of an implied term of the contract that management should investigate complaints promptly and reasonably. The trial Judge further quoted Morrison, J in **WA Goold (Pearmak) Ltd v McConnell**[3] that:

> ***"There was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have."***

Accordingly, that the failure by the appellant to timely act on the complaint by the respondent and the telling of fallacious

tales as regards the stage of the process was enough to conclude that there was breach of contract as the appellant did not behave in a reasonable manner as would a reasonable employer. The Judge concluded that this breach was sufficiently important for the respondent to discharge herself from any further pursuance of the employment contract.

4.3 The Judge, found further that the *last straw* principle was equally applicable in the respondent's case. He noted that there were a series of abuse and mistreatment which the respondent outlined and were not controverted by the appellant at trial, and which triggered the grievance process. And, that at that stage the respondent was willing to give the appellant chance to remedy the breaches. The *last straw* that caused her to leave was the deteriorating relationship and the failure to conclude the grievance process promptly and reasonably.

4.4 Furthermore, that the grievance process had stalled as evidenced by the email of Ms. Heather of 22nd July 2015 and the respondent's response of 23rd July 2015. The trial Judge found that after the *last straw* breach, the respondent repudiated the contract and resigned on 28th July 2015 and the appellant accepted the resignation on 9th August 2015. Thus, she

resigned promptly without delay and met the constructive dismissal test. The trial Judge awarded 36 months gross salary as damages for constructive dismissal.

5.0 **The Appeal**

5.1 Dissatisfied with the Judgment, the appellant appealed to this Court on nine grounds of appeal:

> "1. ***The court below erred in law and fact when it shifted the burden of proof to the appellant by holding that the respondent's claims succeeded merely because the appellant allegedly failed to refute her claims.***
>
> 2. ***The court below erred in law and fact when having properly found that the test applicable for constructive dismissal in Zambia was the contract test, it went on to find that there was a breach of the complainant's Employment Contract against the weight of the evidence without showing a single specific term of the contract that was breached by the respondent.***
>
> 3. ***The court below erred in law and fact when it failed to evaluate and analyse the evidence on record in a balanced manner resulting in the court making findings of fact which were perverse and unsupported by any evidence.***
>
> 4. ***The court below erred in law and fact when it found for the respondent when her testimony on her claims of abuse was discredited in cross-examination.***
>
> 5. ***The court below erred in law and fact when in coming to its decision it failed to take into account the binding decision of the Supreme Court in the case of***

Kitwe City Council v William Nguni cited by the appellant.

6. *The court below erred in law and fact when he found at J46 that the fact that the respondent accepted the complainant's resignation showed that there was a repudiation of the respondent's contract of employment when the appellant had no contractual duty to not accept the respondent's resignation.*

7. *The court below erred in law and fact when it found that the alleged delay in the investigation amounted to breach of contract when the judgment shows at J16 that there was no specified period for the investigation in the Grievance Code and there was evidence on record that the respondent had requested that the grievance should be tight looped and should be handled by people from Standard Chartered Bank Group based outside Zambia and the respondent herself had taken at least three (3) weeks off work during the investigation period.*

8. *The court below erred in law and fact when it held that the appellant breached the contract of employment by failing to investigate the grievance when the appellant adduced evidence that the grievance was being investigated and the respondent resigned before the same was concluded and in any case, the complainant's resignation letter, her complaint and the evidence before the court all showed that she resigned because of alleged abuse and not delay in the investigation process.*

9. *The court below erred in law and fact when it failed to make a finding on the complainant's own admission that when she wrote her complaint dated 9th June, 2015 to her immediate supervisor she was looking for*

a payment before any of her claims of abuse were investigated. "

6.0 **The Arguments:**

6.1 Both parties filed heads of argument for and against the grounds of appeal. In their heads of argument, the appellant's counsel contend in ground 1 that the court below shifted the burden of proof when it held that "***the failure to call Mr Okai to come and testify as regards the allegations levelled was inexcusable and fatal to the respondent's case***". According to the appellant the burden of proof lay with the respondent who had a duty to prove her allegations in accordance with the case of **Wilson Masauso Zulu v Avondale Housing Projects Limited**[4].

6.2 In response to ground 1 the respondent's counsel submitted that the respondent made specific allegations against the Managing Director Mr Okai and it was encumbered upon the appellant to have called him as held in **Maamba Collieries Limited v Godfrey Mudenda Ng'andu**[5]. In that case the Supreme Court in affirming the decision of the Industrial Relations Court (IRC) held that:

> ***"The Industrial Relations Court considered the evidence of the employee who said that he reported the theft of coal to the Appellant's General Manager and the Chief Security Officer. The Lower Court in arriving***

at its decision relied on the fact that the Appellant did not call their General Manager and the Chief Security Officer to rebut the evidence of the employee that he reported the matter to them. Neither did the Appellant advance explanations for the failure to call their General Manager and Chief Security Officer to give evidence on the crucial issue."

6.3 According to the respondent, the crucial question in *casu*, is did the Managing Director of the appellant deny the specific allegations that were brought against him by the respondent? The trial court in answering the question stated at page 57 Volume 1 of the Record of Appeal line 11 that:

> ***"all allegations of abuse and mistreatment of the complainant by Mr. Okai were never rebutted by the Respondent's witnesses. To make matters worse for the Respondent, they chose not to call Mr. Okai whom I consider to be a key witness since he was the centre of the allegations."***

Further at page 58 Volume 1 line 3 it stated that:

> ***"The failure to call Mr. Okai to come and testify as regards the allegations levelled was inexcusable and fatal to the Respondent's case. This was why at trial it was difficult for the two witnesses to rebut the allegations as they did have little or no personal knowledge of them."***

6.4 It is the further submission of counsel that these findings of fact were made by the trial court who had the advantage of seeing the witnesses. The trial court did not shift the burden of proof to the appellant but that they failed to adduce evidence to rebut

the allegations which the respondent brought against the Managing Director. Even the appellant's second witness testified at page 1021 Volume 2 of the Record of Appeal lines 1-9 that all allegations brought by the respondent against the Managing Director were not denied. Thus, the findings by the trial court were supported by the evidence and the Court did not find that the respondent's case succeeded merely because the appellant failed to refute her allegations. Rather, the Court wrestled with the issues such as whether the appellant's actions amounted to breach of contract which was sufficiently important for the respondent to resign, whether she resigned as a result of the breach and whether she delayed the termination of the contract.

6.5 On ground 2 the appellant is contending that the court below erred when it found that the appellant breached the contract without showing a specific term of the contract they breached, despite it finding that the test applicable for constructive dismissal in Zambia was the contract test. It is the appellant's submission that the respondent based her case on acts and words of abuse suffered at the hands of the Chief Executive

Officer which were meant and succeeded to frustrate and get rid of her.

6.6. That the respondent did not plead any other grounds and did not allege breach of contract or adduced evidence to prove breach. However, the court below attributed breach of an implied term of the contract to the appellant by its failure to follow its own grievance procedure. It is argued that the Court did not cite what provisions of the grievance procedure were flouted. And, that the respondent by asking that the investigation be tight looped and be conducted by people from outside Zambia caused the delay of the investigation. The respondent also took leave during the investigations and resigned less than two months after she first raised the allegations. The period was not inordinate. The Court erred when it found that it took seven weeks and yet she was interviewed on 2nd July and resigned on 28th July 2015.

We were urged to interfere with the finding that there was breach of contract as it was not supported by the evidence.

6.7 In response, the respondent's counsel argued that, the finding of breach of contract was supported by evidence. The Court's

finding that the appellant failed to follow its own grievance procedure was demonstrated by the slow pace of the investigations process per email at page 62 Volume 1, which the Court accepted as showing the respondent's frustration and desperation. The Court also accepted the respondent's testimony that the appellant lied to say that the Managing Director could not be interview because he was on block leave when in fact not and that this vital evidence was not rebutted by the appellant.

6.8 The respondent's counsel further argued that the appellant lied that they were almost through with investigations when in fact not as testified by RW2 at page 1024 Volume 2 of the Record of Appeal lines 6-15. Furthermore, the appellant also lied that they had interviewed several people contrary to their witness RW2 who stated at page 1026 lines 4-9 that there was no evidence that Ferdie had interviewed anybody. According to the respondent the Bank also lied to the Board about the investigations report being ready when not as confirmed by RW2 at page 1028 Volume 2 of the Record that the Board chair was concerned about the slow pace of investigation and that no report had been given to the Board.

6.9 On grounds 3 and 4, the appellant submitted that the trial court did not review the evidence in a balanced manner. The cross examination of the respondent showed that her claims of abuse and victimisation were baseless. Instead, the communication between her and the Managing Director showed that the relationship was not as she sought to portray it. The text messages exchanged between the two over the 20 months (pages 603 to 717 of the Record of Appeal) show that the communication was very free and expressive. For instance, that on 19th December 2013 at 20:38 hours out of the blue she wrote to him:

> ***"She says: Boss are you ok?***
> ***He responds: Very good.***
> ***She then says: Very good."***

6.10 According to the appellant the question that begs an answer is, why would someone who was abused by the Managing Director contact him at such an hour? It is submitted that she seemed to wish to communicate with him for any reason, which is inconsistent with her allegation of being abused. The appellant reproduced two more text messages between the two and argue that the failure to call the Managing Director was not fatal to the appellant's case because it produced communication

between the two, which showed that the relationship was cordial and harmonious. The respondent even conceded to the fact that the Managing Director pushed for her promotion, which flies in the teeth of her allegations of abuse and victimisation. And, that the court below even wrote on its Record that she was lying on the abuse allegations (pages 918 – 925 of the Record of Appeal). Surprisingly, the court below failed to take this into account and centred on the fact that Mr Okai did not testify. Had it done so, it would not have found for the respondent as she failed to prove her allegations of victimisation and abuse.

6.11 The findings ought to be reversed in accordance with the case of **Attorney General v Marcus Kapamba Achiume**[6] that:

> "***In my opinion, the learned trial Judge had made findings favourable to the plaintiff which on a proper and well-balanced view of the whole of the evidence, no trial court, acting correctly, could reasonably make. It follows from the foregoing, and, for the reasons that I have stated, that I would reverse the findings below. I would allow this appeal and find for the defendant appellant, with costs both here and below, such costs to be taxed in default of agreement.***"

Furthermore, that the respondent testified that when she had a miscarriage the Managing Director told her that it was a pity it was not her that had died. The Court noted on its Record that

she was lying and her demeanour was questionable. The respondent also lied about the reason for the resignation of Kalunga Lutato (RW2) from the appellant. Thus, the Court below having made findings that the respondent was lying was duty bound to make a finding regarding her credibility as a witness. In light of the discredited testimony, the only finding open to the Court was that she was not a credible witness on whose evidence the Court could place any reliance. Thus, this is a proper case for us to set aside the findings of the lower court as it failed to analyse the evidence in a balanced manner. And, it failed or neglected to address its findings that the respondent lied on the stand.

6.12 In response to grounds 3 and 4, the respondent is contending that the two grounds are misconceived as they are fighting the findings of fact made by a trial court, and ought to be dismissed. The case of **Bahamas Air Holdings Limited v Messeir Dowty Inc**[7] was referred to, where the Privy Council, dealing with appeals attacking findings of fact, held:

> ***"Although the Judicial Committee of the Privy Council had the power to review factual findings, it would only review findings of fact based on oral evidence with great caution and would not normally depart from concurrent findings of***

fact reached by the Courts below. The basic principles on which the Judicial Committee would act were as follows; Firstly, any appeal Court had to be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration had to be given to the weight to be attached to the Judge's findings and position; and in particular the extent to which the trial Judge had an advantage over any appellate Court. The greater that advantage, the more reluctant the appellate Court should be to interfere.

Secondly, duplication of the efforts of the trial Judge in the appellate Court was likely to contribute only negligibly to the accuracy of fact determination.

Thirdly, the principles of restraint did not mean that the appellate Court was never justified, indeed required; to intervene. The principles rested on the assumption that the Judge had taken proper advantage of having heard and seen the witnesses, and had in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.

The court went on to state the law and concluded:

"In the instant case, the Court of Appeal should have operated in accordance with those principles in reviewing the Chief Justice's findings of fact made at first instance... There had been material before the Chief Justice on which he could have made the factual findings that he had, and the inferences that he had drawn from them could properly have been drawn, and the Court of Appeal should not have conducted its own analysis."

6.13 Therefore, counsel contends, that essentially grounds 3 and 4 raise two major issues. First, that there was a cordial relationship between the respondent and the Managing

Director. The general question in this regard is: "does the respondent's unrebutted evidence of abuse, victimisation, and mistreatment support the existence of a cordial relationship between the appellant's Managing Director and the respondent?" Counsel answered the question in the negative and submitted that the particulars of abuse and victimisation are at page 238 to 241 of the Record of Appeal where the Managing Director accused the respondent of being (i) a traitor who went to State House to have him deported, (ii) a fraudster who was conniving with lawyers to inflate legal bills in order to defraud the Bank as she was getting a commission and (iii) the Managing Director refusing to sign documents from the respondent.

6.14 Quoting **Halsbury's Laws of England/Employment Volume 39 of 2014 paragraph 48** that:

> ***"In a contract of employment there is an implied term that the employer will not without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The term can, in appropriate circumstances, impose positive obligations on the employer.***

The kinds of behaviour which may breach the term of trust and respect are, in each case, a question of fact for the tribunal, and entirely variable, but may include:

(1) ***Undermining the self-esteem and dignity of the employee***

(2) ***Abusive and false accusations***

(3) ***Failure to tell an employee of complaints made against him***

(4) ***Intolerable behaviour and bad language"***

6.15 It is argued that the emails on record do not dispute the facts alleged by the respondent and the trial Judge made a finding of fact that all the respondent's allegations were not rebutted by the Bank. That in the **Maamba Collieries Limited v Godfrey Mudenda Ng'andu**[5] case, both the Supreme Court and IRC did not accept the evidence of defendant witnesses trying to testify on behalf of the General Manager and Chief Security Officer. Similarly, we should do the same.

6.16 The evidence on record does not paint a picture of a cordial relationship. The Managing Director even stopped signing documents from the respondent's department arguing that he did not want to be defrauded. CW2 testified to this fact at page 970 lines 24-25 that ***"I drew the conclusion that the relationship was bad because the documents were being brought back."***

6.17 This evidence is contrary to the appellant's argument and that even assuming that there was a cordial relationship, the revival doctrine applies, as the law on constructive dismissal has been restated thus:

> ***"An employee who claims constructive unfair dismissal because of a continuing cumulative breach of the implied duty of trust and confidence was entitled to rely upon the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act, "the last straw" formed part of the series. The effect of the final act was to revive their right to terminate their employment based on the totality of conduct."***

6.18 This is in line with the *last straw* finding made by the trial court. Second, that in grounds 3 and 4, the appellant's argue that there was no need to call the Managing Director because the emails spoke for him. It is the respondent's submission that this is shocking argument which is completely antithetical to the established law in the **Maamba Collieries Limited v Godfrey Mudenda Ng'andu**[5] case. The Managing Director should have testified and presented the emails personally and to deny the allegations which were brought against him, personally.

6.19 In ground 5 it is the appellant's contention that the learned trial Judge failed to take into account the binding decision of the

Supreme Court in the case of **Kitwe City Council v William Nguni[8]**, cited by the appellant. According to counsel, in that case the Supreme Court established that frustration, victimisation and harassment are not essentials in law that might render a dismissal to be constructive. According to counsel the Supreme Court followed its decision in the **Kitwe City Council v William Nguni[8]** case in **Michael Kahula v Finance Bank (z) Limited[9]**, where the claim for constructive dismissal failed where the employee alleged that five transfers in a period of three months as a result of a deterioration in his working relationship with one of his supervisors amounted to constructive dismissal. The Supreme Court observed that the respondent had contractual powers to transfer the appellant to any department.

6.20 Learned counsel, argued that even if it were true that the respondent in *casu*, had resigned because of the alleged acts and words of abuse and mistreatment by the Managing Director, she would still not be constructively dismissed going by the decisions in the **Kitwe City Council v William Nguni[8]** and **Michael Kahula v Finance Bank (z) Limited[9]** cases. As applying the breach of contract test, it is clear that she failed to prove that the appellant was guilty of conduct which constituted a

significant breach going to the root of the contract of employment or which showed that the employer no longer intended to be bound by one or more of the essential terms of the contract.

6.21 In response, the respondent submitted that in **Kitwe City Council v William Nguni[8]** case the Supreme Court affirmed the contract test as the right test to use in constructive dismissal cases in accordance with **Western Excavating (ECC) Limited v Sharp[2]** case. The Supreme Court held that Mr. Nguni resigned to avoid dismissal because the charges he was facing were serious and were likely to lead to dismissal. Furthermore, that ***"by laying charges against the plaintiff, the defendant's conduct cannot be said to amount to breach of contract evidence which entitled the plaintiff to resign. In fact it was conduct or furtherance of the performance of a contract of employment because the employer was entitled to discipline any erring officer under its conditions of service."***

6.22 According to counsel, Mr. Nguni based his claim for constructive dismissal on the fact that he was being investigated and charged. Learned counsel amplified that the **Kitwe City Council v William Nguni[8]** case is distinguishable from

the respondent's case in *casu* in that while Nguni resigned to avoid being disciplined, the respondent claimed for constructive dismissal on account of acts of harassment, victimization and mistreatment which amounted to breach of the implied duty of mutual trust and confidence. Secondly, that the appellant had an anti-victimisation policy, which they clearly breached.

6.23 In ground 7(ground 6 being abandoned) the appellant argue that the trial Judge was wrong to hold that the delay in the investigation amounted to breach of contract. That the evidence was that the process began on 9th June, 2015 and the respondent resigned on 28th July 2015. At page 934, the respondent admitted that she went on sick leave twice during the period of investigations. She took three weeks leave and also requested that the investigations be handled by people external to the appellant (Standard Chartered Bank Zambia). Thus, the period from commencement of the grievance procedure to date of resignation was neither inordinate nor unreasonable given the demands by the respondent. Additionally, the respondent admitted that there was no specified time frame for the conclusion of a grievance. It was therefore wrong for the appellant to have been found in breach.

6.24 In response, the respondent submitted that, the respondent was interviewed by telephone. Then the appellant stopped the process as the Managing Director was never interviewed and earlier they said Sharon Heather was coming to Zambia, but later as testified by RW2, it was changed and Sharon never came. RW2 also conceded that there was no evidence that the Bank interviewed EXCO members or any other employees of the Bank. RW2 agreed that on that basis the employee was not treated fairly. Thus, in a space of seven weeks only the respondent was interviewed and investigations were stopped.

6.25 It was the further submission of counsel that the request to keep the investigation tight looped was not dictated by malice but rather to have the matter handled maturely and not to humiliate the Managing Director who was still her boss. The eternal/foreign panel which the respondent requested for interviewed her by teleconferencing and informed her that they had interviewed several witnesses, when not. If anything, the foreign panel was a mere charade. We were urged to disregard the argument that the respondent's sick leave contributed to the delay, as it is intended to mislead the Court.

6.26 In ground 8, the appellant argue that it was not true that it failed to investigate the grievance. The evidence clearly showed that the grievance process had begun. The respondent never mentioned anything about the investigations into the grievance. Thus, one would wonder how the court below arrived at the conclusion that the respondent resigned because the appellant failed to investigate her grievance.

6.27 The respondent's argument in ground 8 is that indeed the appellant failed to follow its own grievance procedure as found by the trial court that they started telling mendacious statements about the process.

Learned counsel reiterated arguments in paragraph 6.24 that RW2 said the evidence before Court showed that no one was interviewed. Additionally, that even the Board of Directors expressed concerns at the fact that the Bank had not concluded the matter (per email from the Board chairman at page 1 of the Notice to Produce). RW2 agreed that the chairman was expressing concern about the slow pace of the inquiry in the email.

Learned counsel repeated the arguments in paragraph 6.25 about the foreign panel and teleconferencing. He reiterated that

the foreign panel sat on the complaint. He repeated also his arguments in paragraph 6.25 on the matter being kept tight looped.

6.28 Ground 9 was argued on the basis that the respondent's case was all about money as she admitted that she initially wanted a quiet separation. She also admitted at page 921 of the Record of Appeal that she never raised the issues about the Managing Director for 20 months. According to the appellant, this admission proved that she was only looking for a payment and was not interested in a solution because the complaint was ill contrived. This fact should have been considered by the court below.

6.29 In response the respondent expressed shock as ground 9 is predicated on discussions for an ex curia settlement which were priviledged. In addition, that the proposal for an ex curia settlement came from the appellant's former advocates.

6.30 At the hearing of the appeal, Mr. N. Nchito SC, who appeared for the appellant relied on the appellant's Heads of Argument. He briefly augmented the Heads of Argument. On grounds one, two and three he submitted that the court below seems to have shifted the burden of proof to the appellant as he did not

evaluate the respondent's evidence at all. The Court only evaluated the appellant's evidence and accepted the respondent's evidence as a given. Additionally, that despite making comments on the margin of the record (pages 918 line 16-20) that the respondent was telling lies and her demeanour was questionable, the trial Judge did not address these issues or made any findings. Yet he made findings about credibility of RW2.

6.31 Mr. Nchito SC further submitted that at page 915 line 13 the respondent changed her story when she said ***"I made sure that he knew"*** then at page 916 line 25 she said ***"I have never spoken to him"***. State Counsel reiterated his arguments in paragraph 8.8 about there being no delay in the grievance procedure and the respondent contributing to the delay by taking sick leave.

6.32 Mr. Nchito SC also raised the issue of when costs can be ordered by the High Court in the Industrial Relations Division, even though it was not a ground of appeal. He contended that in **Engen Petroleum Limited v Willis Muhanga and Jeromy Lumba**[10] the Supreme Court addressed a similar issue even though it was not a ground of appeal and found that in employment cases

costs are only awarded against a party if they misconducted themselves during the trial of the matter.

6.33 Mr. Kalokoni who appeared as co-counsel for the respondent equally relied on his Heads of Argument. In response to Mr. Nchito's oral arguments, he submitted that the lower court did not shift the burden but that the appellant's witnesses failed to dispute the respondent's allegations and the Managing Director did not come to testify, while some of the allegations were corroborated. He reiterated that the grievance process

stalled and witnesses were not interviewed. He amplified that the appellant's counsel is attacking findings of fact. On the issue of costs he insisted that costs follow the event.

6.34 In reply, Mr. Nchito SC submitted that nowhere in the Judgment did the court below evaluate the respondent's evidence contrary to the Supreme Court decision in **National Milling Company Limited v Grace Simataa & others**[11]. He amplified that an appellate Court can interfere with findings of fact if they are perverse and where the Court evaluated the evidence in a one sided manner.

7.0 **Issues on Appeal**

7.1 We have considered the arguments by counsel and the Judgment appealed against. The cardinal issue the appeal raises is whether in constructive dismissal cases, in relation to the contract test, the clause breached should be stated. Key to this issue is the question whether the breach should be of express terms only or could it also be of implied terms. This question cuts across almost all the grounds of appeal.

7.2 We shall also consider whether the trial Judge shifted the burden of proof from the respondent to the appellant.

8.0 **Consideration of Issues on Appeal**

8.1 The law on constructive dismissal is as stated by the trial court and also as submitted by both counsel. The leading case of **Western Excavating (ECC) Limited v Sharp**[2], established that constructive dismissal is where an employer has committed a serious breach of contract, entitling the employee to resign in response to the employer's conduct. And, that the employee is entitled to treat him or herself as having been dismissed due to the employer's repudiatory breach or conduct. The case also established that unreasonable conduct will not suffice, as a

repudiatory or fundamental breach must be established. The conditions or test to be met as to whether an employee has been constructively dismissed are as discussed in the Judgment (the subject of the appeal) at pages 52 (J43) to 56 (J46) of the Record of Appeal. These are that there must be breach of contract by the employer, the breach should justify or entitle the employee to resign, the employee must resign and not take long to leave. The trial Judge found that the respondent met the above conditions and that the appellant had breached an implied term by failing to follow its own grievance procedure code. He found this to be the *'last straw'* in the series of acts of abuse and mistreatment of the respondent.

8.2 We are alive to the arguments by Mr. Nchito SC that the trial Judge did not evaluate the evidence tendered by the respondent and simply accepted it as a given. In addition that he did not state his findings on the comments/notes he made in the margin of the Court 's record that she was lying and her demeanour was questionable.

Much as we would agree with Mr. Nchito that the trial Judge should have addressed his comments on the witness lying and on her demeanour and generally evaluated the evidence

tendered on behalf of the respondent, we are of the considered view that in making his findings of fact the trial Judge did take into account the respondent's evidence. Importantly, his findings of fact were based on the evidence that was adduced before him. The fact that the Managing Director pushed for her promotion, does not rebut the evidence on the door slamming incident or even the lift incident.

8.3 The contradictions about whether the respondent told Mr. Okai that she felt mistreated and the fact that she did not disclose or lied about him pushing for her promotion do not go to the root of the case nor do they actually deal with the issue before the learned trial Judge being whether she had been constructively dismissed. The trial Judge found that based on the evidence adduced before him she had been. He evaluated the evidence adduced by both parties. The finding of fact that she was constructively dismissed was not perverse as it was supported by the evidence. We as an appellate Court cannot overturn such a finding as guided in **Wilson Masauso Zulu v Avondale Housing Project**[4], supra.

8.4 The evidence tendered on behalf of the respondent was such that in May, 2015 at a meeting of EXCO, the Managing Director

repeatedly slammed the door of the boardroom upon learning that she was in pain when the door was slammed. RW1 and RW2 confirmed the door slamming incident. RW1 confirmed the respondent's testimony that he too participated in the door slamming exercise and that the Managing Director did so as well per paragraph 2.18. RW2 said the Managing Director did slam the door but it was a light moment per paragraph 2.19.

8.5 CW2 confirmed the incident in the lift where the Managing Director said he wished he could administer the respondent's drip and that the idea would be to kill her. He said everyone in the lift went quiet when he said it, the respondent mentioned the Managing Director, CW2, Akapelwa, Louise and himself as the people who were in the lift. CW2 confirmed it.

8.6 The trial court took issue with failure by the appellant to call the Managing Director, who was at the center of the allegations. We cannot fault the trial court for this stance. We are guided by the **Maamba Collieries Limited v Godfrey Mudenda Ng'andu**[5] case cited by Mr. Kalokoni. The Managing Director was a crucial witness in this matter and failure to call him was fatal as found by the trial Judge.

The appellant equally failed to call witnesses to disprove the allegations and it sought solace in the text messages exchanged between the respondent and the Managing Director, which is not sufficient. The trial court did not shift the burden when it resolved that it was fatal not to call the Managing Director. It is trite that during trial the burden does shift as observed by the Supreme Court in the case of **Elias Tembo v Florence Chiwala Salati and two others**[12].

8.7 It is well settled that the plaintiff initially bears the burden of proving facts and if no rebutting evidence is presented by the defendant, the plaintiff is entitled to win the case. According to the Singapore Academy of Law Journal, having the burden means the party alleging must prove its case to the trier of fact (court below), who is weighing the evidence. That once the party upon whom the burden of proof initially rested has brought evidence that tends to prove a particular fact or issue, the other party then takes on the duty to rebut such fact or issue through the use of defensive or contradictory evidence.

8.8 In the appellant's Answer at page 114 of the Record of Appeal at clause 3, the appellant denied the respondent's allegations and averred that the same were unfounded. It is only logical

that to prove that the allegations were unfounded, the appellant needed to adduce evidence to support its averments and rebut the respondent's allegations. The least it could have done was to have Mr. Okai swear the affidavit in support and not RW2 who was not the one accused of acts and words of abuse. The respondent named witnesses to these acts and words of abuse and proved her case on a preponderance of probabilities as the door slamming and lift incidents were confirmed by other witnesses.

8.9 We would therefore not fault the trial Judge when he found that the acts and words of abuse were part of a series of breaches for which the respondent was entitled to resign. It is trite law that even one act of breach is sufficient for the employee to resign and succeed on a claim of constructive dismissal. In *casu*, the door slamming incident instigated by the whole Managing Director of the appellant was appalling and sufficient to entitle the respondent to resign. He shamelessly participated in it and asked others to join. We are of the view that this act disrespected the respondent and inflicted pain on her and entitled her to not trust the appellant because of the Managing Director and to leave. He also accused her of reporting to State

House about the board meetings and that she wanted to have him deported.

8.10 CW3 equally testified how the respondent confided in him about her poor work relationship with Mr. Okai. CW3 also attributed to the fact that one other board member, had stated that Mr. Okai would not last at the helm of the appellant after a few interactions with him. Thus, it was crucial for the appellant to have put Mr. Okai on the stand. Obviously, the bank was vicariously liable for his actions but the allegations were specifically about him. The appellant had to rebut the allegations by calling witnesses as the respondent did. The door slamming incident was confirmed by both the respondent and appellant. It was not enough just to aver in the Answer that the allegations were unfounded without adducing evidence to prove that they were indeed unfounded. Accordingly, we find no merit in grounds one, three and four.

8.11 We are alive to the arguments by Mr. Nchito SC that the court below erred by not stating which specific clauses of the employment contract were breached by the appellant. In the case of **Lewis v Motorworld Garages Ltd**[13] it was observed that "repudiatory conduct may consist of a series of acts or incidents

some of them perhaps quite trivial which cumulatively amount to a repudiatory breach of the implied term of the contract that the employer will not, without reasonable and proper cause conduct himself in a manner calculated to destroy or damage the relationship of confidence and trust between the employer and the employee".

8.12 In **Isle v Wight Tourist Board v Coombers**[14] it was held that there was a breach of an implied term of mutual trust and respect. It was observed that the relationship between a director and personal secretary was one that demanded complete trust, and respect was owed on both sides. The relationship was destroyed when the director called the personal secretary a bitch and subjected her to abusive language. The personal secretary's claim for constructive dismissal was allowed.

8.13 The Supreme Court of Appeal in South Africa endorsed the English principle of trust, respect and confidence in the case of **Council of Scientific and Industrial Research v Figen.**[15] it was held thus:

> ***"In every contract of employment, there is an implied term that the employer will not, without reasonable or probable cause, conduct itself in a manner calculated or likely to***

destroy or seriously damage the relationship of confidence and trust between the parties."

8.14 In *casu*, we agree that the door slamming incident spearheaded by Mr Okai to inflict pain on the respondent was a breach of the implied term that the parties especially the employer will treat the employee with respect. The door slamming was an act of disrespect towards the respondent. The incident in the lift was equally disrespectful, so were the accusations about visiting State House, which the appellant never challenged. The three incidents occurred in late May 2015 and early June 2015. Though no abusive words were spoken, the conduct of Mr. Okai was an abuse which could lead an employee to lose trust and confidence in the employer. Ms. Nair was disrespected, she felt victimised by Okai. She said she was scared, her office was broken into, Mr. Okai stopped taking her calls and approving work from her department. These acts were sufficient to force her to leave or resign.

8.15 We also agree in *toto* with Mr. Kalokoni that the Nguni case is distinguishable from this case as highlighted in his arguments. Mr Nguni was charged and to avoid dismissal he resigned claiming he had been constructively dismissed which is not the

case with the respondent. She was never charged. She simply resigned following breach of implied terms by the appellant.

8.16 It is well settled that implied terms are not expressly stated in the contract. They are those terms which are so obvious that they need not be stated. For instance, treating employees with respect and not to abuse them physically or otherwise is implied in every contract of employment. The courts, custom or statute can assume that such terms were intended to be included in the contract or though not expressly stated. It has been observed by several legal authors that the purpose of implied terms is often to achieve fairness between the parties or to relieve hardship or to make the deal effective for the purpose of business.

8.17 Regarding the *final straw* being the failure to follow the grievance procedure, we opine that this too was supported by the evidence. It was not a perverse conclusion which no reasonable tribunal could make. The evidence both oral and documentary demonstrated that the appellant though it begun the grievance process it did not go through with it. The witness RW2 categorically stated that the documentary evidence showed that no other Bank employees were interviewed apart

from Ms Nair who was the complainant. The respondent neglected to call Sharon Heather to testify as to which employees were interviewed. This it could have done even by asking her to state so in an email, which it could have produced like all the other numerous emails it produced which were authored by her. Consequently, the only evidence adduced by the appellant in this regard was from RW2 who was not involved and could only speak to the documents before her. RW2 a human resource personnel admitted that the respondent's case was urgent and should have been treated as such.

8.18 Therefore, the finding by the trial court that the appellant failed to follow its grievance procedure code and therefore breached the implied term to promptly handle grievances by the employees was supported by the evidence. Though the respondent was interviewed on 2nd July 2015, the process began on 9th June 2015 when she made the complaint of abuse and mistreatment by Mr. Okai hence the finding by the trial judge that the appellant failed to go through with process for seven weeks. This finding was not perverse nor a misdirection by the trial court such that we could overturn it. We are of the firm view that the findings of fact made by the trial court were

supported by the evidence and we cannot reverse or overturn them. The trial court was on firm ground when it held that this was a *final straw* in a series of breaches as the evidence revealed that the door slamming incident was sometime in May 2015, the lift incident was on 29th May 2015 and the State House accusation on 5th June, 2015. On the totality of the evidence before it, the trial court was entitled to reach the conclusion that there was a series of breaches and that the failure to conclude the grievance procedure was a *final straw* which entitled her to resign and she did so promptly.

8.19 Be that as it may, in the English case of **Gab Robins (UK) Ltd v Triggs**[16] it was elucidated that a *final straw* need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust, respect and confidence. In addition that the *final straw* viewed alone need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. Thus, the *final straw* in *casu* was the failure to handle the grievance with urgency, which entitled the respondent to resign bearing in mind the other words and acts of abuse by the respondent.

8.20 We are of the considered view that the fact that the respondent took leave and requested that the process be tight looped cannot reasonably be held to have caused the delay. As argued by her counsel, the Managing Director and others could have equally been interviewed by telephone. Furthermore, the foreign panel actually started the grievance process but took long to investigate as only the respondent was interviewed. RW2 admitted that the grievance could have been handled urgently. It is clear that the two worked closely together and this demanded respect from either party. Consequently, grounds two, five, seven and eight are therefore bereft of merit and dismissed.

8.21 We note the gravamen of ground 9. The evidence on record revealed that the appellant and not the respondent, initiated the talks on the payment or exit package and that the same were privileged. We would therefore not hesitate to dismiss ground nine. Perhaps this ground would have seen the light of day if the respondent had been paid what she proposed, then u-turned to sue for more money. All in all we find no merit in all the grounds of appeal.

8.22 We now turn to consider the issue of costs which were awarded in the court below. Mr. Nchito SC submitted that though there is no ground of appeal in this regard, the Supreme Court in the case of **Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba**[10], was faced with a similar situation and it set aside the order of costs made by the court below (industrial relations division). We read that case and the Supreme Court per Mambilima CJ elucidated that in matters decided in the Industrial Relations Division, costs are awarded in line with the provisions of Rule 44 (1) of the **Industrial and Labour Relations Act** which is couched as follows:

> ***"Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him".***

8.23 The Supreme Court observed that the effect of Rule 44 (1) is that the IRC (now a division of the High Court) can only make an order for costs against a litigant if they had been guilty of unreasonable delay, or had taken improper, vexatious or unnecessary steps in the proceedings, or is guilty of other unreasonable conduct. The Court followed its earlier decisions in the cases of **Amiran Limited v Robert Bones**[17] and **Zambia**

Telecommunications Company Limited v Mirriam Shabwanga & 5 others[18] in which it explained the rationale behind Rule 44(1) being that the IRC was initially established as an employment tribunal and the Rules were intended to guard against the abuse of the court process through unreasonable delays, unnecessary or vexatious applications while ensuring that genuine litigants are not discouraged from asserting their rights on account of cumbersome rules of evidence and litigation costs to which they could be condemned.

8.24 The Supreme Court found that none of the parties in the **Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba**[10] case were guilty of unreasonable delay, or taking improper, vexatious or unnecessary steps in the proceedings nor were they guilty of other unreasonable conduct as stipulated in Rule 44 (1). It concluded that there was therefore no basis for the court below to have awarded costs to the respondent. The order on costs was set aside. And the Supreme Court then directed each party to bear its own costs on appeal and in the court below.

8.25 In pronouncing itself on costs the Supreme Court reasoned that it was because both parties had prayed for costs on appeal that

it was compelled to consider the issue of costs in the industrial relations division. In *casu* we note that not only have the parties prayed for costs on appeal, the issue is on a point of law and could be raised at any time. We are not precluded from considering such issues even though it is being raised first on appeal or is not appealed against as elucidated in the case of **Nevers Mumba v Muhabi Lungu**[19].

We note that in condemning the appellant to costs, the court below did not state if it was guilty of contravening Rule 44 (1) of the **Industrial and Labour Relations Act**.

Our perusal of the record reveals no such evidence. Guided by the Supreme Court decision in the **Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba**[10] case, we set aside the order on costs. We direct each party to bear own costs in this Court and in the Court below.

J. CHASHI
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE