IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

Appeal No. 269 of 2021

BETWEEN:

SOKWANI PETER CHILEMBO Appellant

AND

FINANCE BANK ZAMBIA PLC 1st Respondent
AFRICAN BANKING CORPORATION ZAMBIA LIMITED 2nd Respondent

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA
on 19 June 2024 and 30 September 2024

For the Appellant: Mr. M. Mando of Mando Pasi Legal Practitioners,
Mr. C. Chungu of Nsapato Advocates, and
Mrs. S.M. Kalima-Banda of J&M Advocates
For the Respondents: Ms. N. Simachela and Ms. N. Nalomba of Nchito & Nchito Advocates

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J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Legislation referred to:

1. *The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia*
2. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
3. *The Employment Act, Chapter 268 of the Laws of Zambia (Repealed)*

Cases referred to:

1. *Herwitt Chola and 154 Others v Dunlop Zambia, SCZ Appeal No. 108 of 2001*
2. *Mike Musonda Kabwe v BP Zambia Limited, SCZ Appeal No. 115 of 1996*
3. *Kitwe City Council v William Ng'uni (2005) Z.R 57*
4. *Johnson v Nottinghamshire Combined Police Authority (1974) 1 All E.R. 1082*
5. *Citi Bank v Suhayl Dudhia SCZ Appeal No. 6 of 2022*
6. *Phinate Chona v ZESCO Limited Appeal 66 of 2019 (CA)*
7. *Indo Zambia Bank Ltd v Muhanga (2009) ZR 266 (SC)*
8. *Celestini v. Shoplogix Inc., 2023 ONCA 131.*

9. *Frida Kabaso (Sued as Countr rida Kabaso (Sued as Country Director of V or of Voluntary Services Overseas Zambia) v. Davies Tembo SCZ Appeal No. 04/2012*
10. *Musonda Mutale v Africa Banking Corporation [2023] ZMCA 309*

Other works referred to:

1. *Collins English Dictionary*
2. *Black's Law Dictionary, 11th Edition edited by Bryan A. Garner*
3. *Colinvaux's Law of Insurance by Professor Robert M. Merkin*

1.0 INTRODUCTION

1.0 This appeal relates to a judgment rendered by Judge Chisunka (as he then was) of the Industrial Relations Division of the High Court on 30 March 2021.

1.1 The history of the matter before the lower Court is that the Appellant, Sokwani Peter Chilembo, as Complainant, instituted an action on 11 December 2017, against Finance Bank Zambia Plc and African Banking Corporation Zambia Limited, the 1st and 2nd Respondents, respectively.

1.2 For the purposes of this judgment, the parties will be referred to as designated herein.

2.0 BACKGROUND

2.1 In his complaint and supporting affidavit before the lower Court, the Appellant outlined the following facts: He was employed by the 1st Respondent as Assistant Legal Counsel – Debt Recovery on 3 January 2011.

2.2 The Appellant asserted that in 2012, he assumed the role of sole Head of the 1st Respondent's Legal Department, a position of considerable responsibility. He was subsequently promoted to Assistant Director – Legal and Company Secretary, a position he held until his separation from the 1st Respondent.

2.3 On or about 30 June 2016, the 2nd Respondent acquired 99.999% of the 1st Respondent's shares through a share purchase agreement, to be executed via a corporate restructuring in accordance with Section 29 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia. This restructuring entailed that the assets and liabilities of the 1st Respondent would be transferred to the 2nd Respondent, the surviving entity post-restructuring.

2.4 Despite the restructuring, both Respondents continued to operate independently, each maintaining its own board, management, and individual banking licenses.

2.5 In or about August 2016, the Respondents undertook a human capital integration process. The Appellant was informed that the role of Head of Legal and Compliance would be advertised publicly, and that he would be offered the position of Legal Counsel.

2.6 Prior to the acquisition, the 2nd Respondent had employed Mrs. Chirwa as its Head of Legal and Company Secretary. Mrs Chirwa, separated from the 2nd Respondent on 31 January 2017, by way of redundancy, as her role had been diminished.

2.7 The Appellant further alleged that numerous employees of the 1st Respondent who refused the new roles offered by the 2nd Respondent were declared redundant. He sought formal clarification of his role and responsibilities under the 2nd Respondent.

2.8 On 27 February 2017, the 2nd Respondent informed the Appellant that he would receive an offer of employment and would be consulted on any proposed changes to his employment conditions. Meanwhile, the 1st Respondent employed Mr. Mbewe as the Head of Legal and Compliance on 14 June 2017, prompting the Appellant to begin handing over the responsibilities he had held for over six years to Mr. Mbewe.

2.9 On 4 August 2017, the 2nd Respondent offered the Appellant the position of Legal Counsel – Litigation and Corporate Investment Banking, with the option to accept or decline. The Appellant considered the offered position inferior to his prior role with the 1st Respondent, which was being abolished. On or about 11 August 2017, he declined to transfer his contract from the 1st Respondent to the 2nd Respondent, asserting that he had been made redundant due to the reduction in his responsibilities.

2.9 On or about 18 August 2017, the Head of Legal instructed the Appellant to hand over all bank equipment, take paid leave pending his exit, and refrain from handling any bank-related matters while on leave. His email address was also disabled by the 1st Respondent on the same day.

2.10 The Appellant stated that the 1st Respondent credited his monthly salary on or about 21 August 2017, without any adjustments for salary increments or

arrears for 2017, in line with the 1st Respondent's terms and conditions of service.

2.11 The Appellant further asserted that his request to be declared redundant was denied, and he was expected to report for work on 5 September 2017. He informed the 1st Respondent that there was no position for him to return to and that he was awaiting payment of his terminal benefits by the 1st Respondent.

2.12 On or about 14 September 2017, the 1st Respondent informed him that he had effectively resigned and that his benefits would be calculated accordingly. On 29 September 2017, the 1st Respondent provided him with a computation of his terminal benefits, which he contended was significantly less than what was owed to him, especially as the 1st Respondent's conditions of service did not provide a formula for computing redundancy benefits.

2.13 The Appellant surrendered his access control card on 20 September 2017 and completed his clearance from the 1st Respondent on 4 October 2017.

2.14 The Appellant maintained that his separation from the 1st Respondent was due to redundancy and that he was entitled to be formally declared redundant and receive a redundancy package.

2.15 In the alternative, the Appellant alleged that the conduct of the 1st Respondent constituted a breach of a fundamental term of his employment contract, forcing him to resign, thus entitling him to damages for constructive dismissal.

2.16 The Appellant specifically sought the following reliefs in the lower Court:

i. **A declaratory Order that his separation from the 1st Respondent was on account of redundancy;**
ii. **A declaratory Order that the Complainant was entitled to a salary increment for the year 2017 in line with the 1st Respondent's terms and conditions of employment;**
iii. **An Order for payment of redundancy package at the rate of 6 months' salary for each year served;**
iv. **Payment of salary arrears from 1 January 2017 to 31 August 2017 amounting to K38,389.68 being the difference between K61,340.10(2017 salary) and K56,541.39 (2016 salary)**
v. **Payment of continued monthly salary at the rate of K61,340.10 per month from 19 September 2017 to the date of payment of the redundancy package pursuant to Article 189(2) as read together with Article 266 of the Constitution of the Republic of Zambia as amended by Act No. 2 of 2016;**
vi. **In the alternative, damages for constructive dismissal; and**
vii. **Interest, costs and any other relief the Court may deem fit.**

2.17 In response, the Respondents relied on their Answer and supporting affidavit filed before the lower Court on 13 February 2018. They asserted that, in or about June 2016, the 2nd Respondent acquired the 1st Respondent through a merger of two banks, effectively making the Appellant an employee of the 2nd Respondent.

2.18 The deponent, on behalf of the Respondents, stated that the Appellant was required to integrate into the new organizational structure, which involved being assigned a position similar to the one held with the 1st Respondent. It was further asserted that the 2nd Respondent offered the Appellant the position of Legal Counsel, which the Appellant accepted and signed on 27 January 2017.

2.19 By letter dated 28 July 2017, the 2nd Respondent informed the Appellant that his years of service with the 1st Respondent would be carried over to the 2nd Respondent. The Appellant was also notified of his new salary structure.

2.20 On 9 August 2017, the Appellant declined to transfer his employment contract to the 2nd Respondent and indicated his intention to separate from employment by way of redundancy, despite having previously accepted the 2nd Respondent's employment offer.

2.21 The 2nd Respondent rejected the Appellant's request to be declared redundant, assuring him that his services were valued by the bank and that his position remained available. Nevertheless, on 8 September 2017, the Appellant informed the 1st Respondent that he would not return to his position. The Respondents regarded this as a resignation, asserting that the Appellant had unreasonably declined the employment offer from the 2nd Respondent.

2.22 In their Answer before Court, the Respondents contended that the Appellant was not entitled to redundancy, as he had effectively resigned by unreasonably refusing the 2nd Respondent's employment offer, as

communicated in his letter dated 9 August 2017. The Respondents further disputed liability for any salary arrears, maintaining that such arrears would only have become effective had the Appellant accepted the new employment offer. Additionally, they contended that the Appellant was not entitled to any salary increment, as this was conditional upon his acceptance of the new employment offer, which he had declined.

3.0 DECISION OF THE LOWER COURTT

3.1 The matter proceeded to hearing before the lower Court, where, upon deliberation, the trial Judge identified the following undisputed facts:

i. The Appellant was employed by the 1st Respondent as Assistant Legal Counsel – Debt Recovery on 3 January 2011 and was later promoted to the position of Assistant Director – Legal and Company Secretary.

ii. On or about 30 June 2016, the 2nd Respondent acquired the 1st Respondent through a merger, necessitating a corporate restructuring and the integration of the 1st Respondent's employees into the 2nd Respondent.

iii. The Respondent informed the Appellant that the position of Head of Legal and Compliance in the merged entity would be publicly advertised.

iv. By a letter dated 28 July 2017, the 2nd Respondent offered the Appellant the position of Legal Counsel – Litigation and Corporate Investments Banking.

v. In a letter dated 9 August 2017, the Appellant declined the 2nd Respondent's offer of employment, refusing to transfer his employment contract and notifying the Respondents of his intention to separate from the 1st Respondent by way of redundancy.

vi. On or about 18 August 2017, the Appellant was advised by the 2nd Respondent to proceed on paid leave while his request for redundancy was considered.

vii. The Respondent, by letter dated 4 September 2017, declined the Appellant's request for redundancy and directed him to report declined the Appellant's request back to work.

viii. On 14 September 2017, the 2nd Respondent informed the Appellant that his refusal to transfer would be treated as a resignation.

ix. The Appellant formally cleared out of the 1st Respondent on 4 October 2017, after which the 1st Respondent made payment of its computation of his terminal benefits.

3.2 Based on the evidence presented, the trial Judge framed the following issues for determination:

1. *Whether the Appellant was entitled to redundancy?*
2. *Whether the Appellant had established a case of constructive dismissal against the Respondents? and*
3. *Whether the Appellant was entitled to the relief sought in his Notice of Complaint?*

3.3 In addressing the issue of redundancy, the trial Court observed that the Appellant's claim rested on two main arguments: firstly, that the restructuring undertaken by the Respondents resulted in the cessation of the 1st Respondent's operations, thereby rendering the Appellant's services redundant; and secondly, that the 1st Respondent unilaterally altered the terms of the Appellant's employment by attempting to transfer his contract to the 2nd Respondent, which offered employment on terms inferior to those under the 1st Respondent.

3.4 The trial Judge noted that since the Appellant's employment was governed by a written contract of service, the redundancy provisions under **Section 26B of the repealed Employment Act** did not apply, as they were relevant only to oral contracts of employment.

3.5 However, the Judge acknowledged that Clause 32.6 of the Appellant's employment contract specifically provided for redundancy, stating:

> ***"Where through force or circumstances, it is necessary to reduce the number of employees; the bank shall declare employees redundant. In such an event, the employees affected shall be notified..."***

3.6 In paragraph 28 of the judgement, as reflected on page 26 of the record of appeal, the trial Judge opined that the 1st Respondent was only obligated to declare employees redundant if it became necessary to reduce staff, and such affected employees would be notified accordingly.

3.7 The Judge further stated that clause 32.6 implied that not all employees would be declared redundant, and the affected employee would be notified. Since the Appellant had not been specifically identified for redundancy and was instead offered alternative employment as Legal Counsel – Litigation and Corporate Investment Banking, the Judge concluded that the restructuring did not render the Appellant redundant.

3.8 The trial Court also noted that the 1st Respondent did not cease its operations but rather merged with the 2nd Respondent, and its business continued under the merged entity. As such, no redundancy situation arose, as established in the case of **Herwitt Chola and 154 Others v Dunlop Zambia**.[1]

3.9 The Judge also found that there was no unilateral variation of a major term of the Appellant's employment contract, as had been alleged, nor was a case for redundancy established, as seen in **Mike Musonda Kabwe v BP Zambia Limited.**[2] The evidence indicated that the Appellant had been offered a higher salary by the 2nd Respondent had he accepted the employment offer. The Court further observed that the restructuring was intended to allow the Appellant to assume a new role in the restructured entity, which included a salary increase, and that the Appellant's position had neither been abolished nor downgraded.

3.10 The Court held that the Appellant's refusal to accept the alternative employment offered, which included a higher salary, was unreasonable, and thus, he was not entitled to a redundancy payment.

3.11 Regarding the alternative claim of constructive dismissal, the Judge referred to the case of **Kitwe City Council v William Ng'uni**[3] which established 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."***

3.12 Additionally, the Judge relied on the English case of **Johnson v Nottinghamshire Combined Police Authority,**[4] which upheld the principle that an employer has the right to restructure or reorganize its business, provided that the employee's terms and conditions of employment are not adversely affected.

3.13 The Court found that the only change resulting from the 2nd Respondent's offer of employment was related to how the Appellant would manage the litigation for the 2nd Respondent, and as the offer included superior terms, particularly a higher salary, there was no breach of a fundamental employment contract term. Consequently, the Appellant had failed to establish the elements necessary for a claim of constructive dismissal. The trial Judge concluded that the Appellant was not entitled to any of the reliefs sought.

4.0 THE APPEAL

4.1 Being dissatisfied with the judgment rendered by Judge Chisunka on 30 August 2021, the Appellant lodged a notice and memorandum of appeal on 30 September 2021, advancing the following five grounds of appeal:

i) **The learned trial Judge erred in fact and law when he adjudged on the matter after the lapse of the statutory one-year period within which matters ought to be disposed of in the Industrial Relations Division of the High Court thereby being in breach of the provision under the Section 85(3)(b)(iii) of the Industrial and Labour Relations Act as amended by Act No. 8 of 2008.**

ii) **The learned trial Judge misdirected himself by overlooking the contra proferentem rule and holding that clause 13.3.2 of the Employment contract merely places an obligation on the 1st Respondent to review salaries and not to increase salaries.**

iii) **The learned High Court Judge erred in law and fact when he found that the complainant did not separate from the 1st Respondent by way of redundancy and was not entitled to be retained on the payroll for the purposes of payment of a continued salary.**

iv) **The learned High Court Judge erred in law and fact when he found that the Complainant alternatively failed to prove the essential elements that constitute constructive dismissal and that there was no breach of a fundamental term of the Complainant's employment contract by the Respondents.**

v) **The learned trial Judge erred in law and fact when he overlooked the greater interests of justice and found that the Complainant was not entitled to any of the reliefs sought by the Complainant.**

5.0 ARGUMENTS OF THE PARTIES

5.1 The parties' arguments were submitted on 9 November 2021, 10 December 2021 and 22 December 2021 respectively. These arguments will not be reiterated herein but will be referenced in the subsequent analysis section, where appropriate.

6.0 HEARING OF THE APPEAL

6.1 The appeal was heard before this Court on 19 June 2024. The Appellant and the Respondents were represented by their respective counsel, as reflected in the record above. Counsel relied on their heads of argument filed on 9 November 2021, 10 December 2021 and 22 December 2021, and supplemented these with oral submissions. The arguments of the respective parties will be highlighted in the latter part of our judgment where appropriate.

7.0 OUR DECISION ON THE APPEAL

7.1 We have thoroughly reviewed the five grounds of appeal presented before this Court and will proceed to address each ground individually as argued by the parties.

7.2 The first ground of appeal raised by the Appellant asserts that the learned trial Judge in the Industrial Relations Division of the High Court erred in law and fact by adjudicating the matter after the expiration of the statutory one-year period within which cases must be concluded. The Appellant contends that the learned Judge contravened **Section 85(3)(b)(iii) of the**

Industrial and Labour Relations Act as amended by **Act No. 8 of 2008.** The Respondent did not offer any response to this ground, leaving the determination to the Court.

7.3 During the hearing, counsel for the Appellant, Mr. Chungu, formally withdrew the first ground of appeal, which claimed that the Industrial and Labour Relations Court had lost jurisdiction after the one-year period elapsed. This ground was abandoned in light of the Supreme Court's decision in **Citi Bank v Suhayl Dudhia**,[5] where it was held that the mere passage of one year does not divest the Industrial Relations Division of the High Court of its jurisdiction to conclude matters before it, thereby emphasizing the need for expeditious justice.

7.4 In relation to the second ground of appeal, the Appellant argued that the trial Judge erred by failing to apply the *contra proferentum* rule in interpreting clause 13.3.2 of the employment contract. The trial Judge had found that the clause merely obligated the 1st Respondent to conduct a salary review, without necessitating a salary increase. Counsel for the Appellant contends that this interpretation was incorrect.

7.5 Counsel for the Appellant emphasized that clause 13.3(ii) of the employment contract expressly required an annual salary review. The Appellant argued that this review should imply a salary increase, particularly in light of the uncontroverted evidence that his salary had been increased annually since the commencement of his employment with the 1st Respondent in 2011. The Appellant submits that the lower Court failed to consider this historical pattern of salary increases and the broader context of the term "review."

7.6 Furthermore, the Appellant contended that while the salary increments were applied generally to all employees, he did not benefit from such increases because he declined to transfer his contract to the 2nd Respondent. He argues that the 2nd Respondent deliberately withheld his salary increment as an inducement to encourage employees to transfer their contracts, resulting in an unfair disparity between those who transferred and those who did not.

7.7 Counsel for the Appellant criticized the lower Court's narrow, literal interpretation of the term "review." He argued that the Court should have taken a more comprehensive approach by considering the contractual context, background information, and industry practices. In support, Counsel referred to the decision in **Phinate Chona v ZESCO Limited**,[6] where this Court emphasized the need for a holistic interpretation of contractual provisions, including implied terms and relevant industrial practices.

7.8 In response, the Respondents contended that the salary arrears were granted to employees who agreed to transfer their contracts, which the Appellant declined. The Respondents further asserted that the Appellant failed to produce evidence demonstrating that his salary had been increased annually since the beginning of his employment.

7.9 Ms. Simachela, Counsel for the Respondents, argued that the trial Court correctly declined to apply the *contra proferentem rule* because clause 13.3.2 of the contract of employment was clear and unambiguous. The term 'review' could not reasonably be interpreted to mean 'increase.'

7.10 Ms. Simachela further submitted that the Appellant failed to provide any evidence, oral or documentary, to substantiate the claim of annual salary increases. The trial Judge had addressed the issue solely because it was raised in the notice of complaint.

7.11 The Respondents referenced the **Collins English Dictionary**[1] definition of a *salary review,* which describes it as an *'often-annual assessment or review of the salary paid to an employee, where decisions are taken on whether the employees pay should be increased'*. Based on this definition, they maintained that the trial Judge correctly concluded that the 1st Respondent was not obligated to increase salaries annually but was only required to review and assess salaries.

7.12 In reply, the Appellant contended, that the term *'review'* in clause 13.3.2 should be interpreted as meaning 'increment.' The Appellant argued that a salary reduction or unilateral variation of employment terms to the detriment of the employee would constitute a breach of contract. Accordingly, the term *'review'* should be understood as implying an improvement, consistent with the principle that contractual terms should not be construed to disadvantage the employee.

7.13 We begin by examining clause 13.3.2 of the 1st Respondent's Terms and Conditions of Service for Management Staff, as referenced on page 234 of the record of appeal. The clause states:

> ***"The salary scale for the job for which a candidate applies will be communicated at the time of the interview and the actual***

recruitment salary point will be included in the letter of offer. Salaries will be reviewed annually with effect from 1st January".

7.14 The Appellant urged the Court to apply the *contra proferentem* doctrine, as recognized by the Supreme Court in **Indo Zambia Bank Limited v Mushaukwa Muhanga,**[7] when it held that:

"If the insertion of the words, "permanent and pensionable", was a result of careless drafting, then under the doctrine of 'contra proferentem" the document has to be construed against them and in favour of the respondent".

7.15 However, the Appellant appears to selectively invoke the doctrine, as the Supreme Court in the same case also cautioned that:

"Courts should be reluctant to accept that linguistic mistakes have been made unless it can be clearly shown that the parties did not have the intention ascribed to them".

7.16 According to **Black's Law Dictionary,**[2] *contra proferentem* is the principle that ambiguities in a document should be construed against the drafter. Similarly, the learned authors of **Colinvaux's Laws of Insurance**[3] at page 37 stated with reference to the doctrine as follows:

"A policy of insurance has to be construed like any other contract; it is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary, and popular sense. The meaning of a word in a

policy is that which an ordinary man of normal intelligence would place upon it, it is to be construed as it is used in the English language by ordinary persons."

7.17 This authority further states at page 42 as follows:

"In such cases the rule is that the policy, being drafted in a language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it."

7.18 In analyzing clause 13.3.2 of the 1st Respondent's Terms and Conditions of Service for Management Staff, which provides for an annual salary review, we find that the language of the clause is clear and unambiguous, making the application of the *contra proferentem* doctrine unnecessary. The clause requires an annual salary review, which does not inherently mandate an increase but rather a reassessment of salaries. The ordinary meaning of the word 'review' supports the trial Judge's interpretation, which is consistent with industry standards and legal precedent.

7.19 We further agreed with the Respondent's argument that the Appellant failed to provide sufficient evidence to demonstrate that his salary had been increased annually since his employment began. Consequently, we uphold the trial Judge's decision on this ground, and the second ground of appeal is dismissed.

7.20 Turning to the third ground of appeal, the Appellant submits that the learned trial Judge erred in concluding that the Appellant was not separated from the 1st Respondent by way of redundancy, and, consequently, was not entitled to remain on the payroll for continued salary payments.

7.21 Counsel for the Appellant, Mr. Chungu, argued that the determination of whether the Appellant was declared redundant must be assessed based on the actual duties performed by the Appellant during his employment with the 1st Respondent. He submitted that the Appellant was originally employed as Assistant Legal Counsel - Debt Recovery and was later promoted to Assistant Director Legal and Company Secretary in 2014. Following the acquisition of the 1st Respondent by the 2nd Respondent in 2016, the Appellant assumed additional responsibilities, effectively acting as Head of Legal for the 1st Respondent.

7.22 Supplementing Mr. Chungu's arguments, Mr. Mando contended that although the Respondents claimed a merger under **Section 99 of the Banking and Financial Services Act**, they had previously maintained that they were distinct legal entities, with no transfer of employment liabilities between them.

7.23 Counsel further argued that even in the absence of a formal contract recognizing the Appellant's additional duties as Head of Legal, the Court should invoke the doctrine of *changed substratum.* This doctrine posits that when an employee is assigned materially different and additional duties, these changes may override the original job title and the associated terms and conditions of employment. Counsel acknowledged that this doctrine has not been applied in Zambia but urged the Courts to consider it in this

instance, referencing the Canadian case of **Celestini v Shop Logix**[8] as persuasive authority. Although no specific job description for the Appellant's additional roles was submitted to the Court, Counsel argued that these roles were effectively taken away from the Appellant when other employees, Bonaventure Mbewe and Sandra Wakulani were appointed by the 1st Respondent. He also referred to **Fridah Kabaso Phiri (sued as Country Director of Voluntary Services Zambia) v David Tembo**[9] to bolster his argument.

7.24 On the issue of alternative employment in the context of redundancy, Mr. Chungu submitted that this was not applicable to the Appellant, as the 1st and 2nd Respondents were separate entities at the time of the Appellant's separation. Furthermore, the alternative employment offered to the Appellant was inferior in terms and conditions compared to his existing position with the 1st Respondent. He cited **Musonda Mutale v African Banking Corporation,**[10] wherein the Court suggested that demotion only occurs when there is a reduction in salary, and referred to **Black's Law Dictionary**'s definition of demotion, which encompasses a reduction in rank, grade, or status, even if the salary remains unchanged.

7.25 Counsel further referred to a redundancy notice issued by the 2nd Respondent to an employee, Twambo Chirwa, found at page 139 of the record of appeal. He contended that this employee was offered a similar package to the Appellant but was granted a redundancy package after declining the offer. Counsel submitted that since the Appellant also declined a similar offer, as evidence at page 144 of the record, he should likewise be entitled to a redundancy package equivalent to that of Mrs. Chirwa.

7.26 In response, Ms. Simachela argued that the trial Court had correctly considered all relevant factors in concluding that redundancy was not applicable to the Appellant's case. She emphasized that the Appellant had accepted the initial offer of employment as Legal Counsel, with the only condition being that any changes to his employment terms would be formalized in a new contract by 1 March 2017. Since no changes were made to the contract, and the Appellant had accepted the reporting structure, redundancy could not be claimed. She referred to the Appellant's offer of employment, located at page 60 of the record of appeal, to support this position.

7.27 Counsel further distinguished the Appellant's case from that of Mrs Chirwa's, noting that Mrs. Chirwa had been explicitly informed by the 2nd Respondent that her position was no longer available, leading to her being declared redundant, as evidenced by the termination letter at pages 139 to 140 of the record of appeal. In contrast, the Appellant's claim for redundancy was based on his refusal of an offer of employment, which, Counsel argued, did not meet the threshold for redundancy.

7.28 In addressing this ground of appeal, Mr. Mando contended that the timeline of events was crucial. He pointed out that at the time the offers of employment, as reflected at pages 60 and 52 of the record of appeal, were made to the Appellant, the 1st and 2nd Respondents were still operating as separate entities, as confirmed by the Bank of Zambia in the document found at page 224 of the record of appeal. Counsel contended that the offer of employment from the 2nd Respondent constituted a transfer of employment from one entity to another, and therefore, the Appellant's rejection of this offer did not entitle him to redundancy.

7.29 We begin by noting the trial Court's correct finding that **Section 26B of the repealed Employment Act,**[3] which governs redundancy, did not apply to the Appellant, whose employment was governed by a written contract. However, the trial Judge nonetheless considered the redundancy claim based on clause 32.5 of the 1st Respondent's Terms and Conditions of Service, as referenced earlier and found at page 247 of the record of appeal.

7.30 Furthermore, we observe that the Respondents operated within the regulated framework of the banking and financial services sector, as governed by the **Banking and Financial Services Act. Section 29(2)(b) and (c) of the Act** addresses the rights and obligations arising from corporate restructuring, which are pertinent to this case. The provision clearly establishes that:

> ***"(2) When the corporate restructuring transaction takes effect-***
>
> ***...***
>
> ***(b) the new entity shall have the same rights and shall be subject to the same obligations as were, immediately before the transaction took effect, binding upon the old entity or, in the case of a transfer of assets and liabilities, the same rights and obligations as were applicable to the old entity with respect to the assets and liabilities transferred;***
>
> ***(c) all agreements, appointments, transactions and documents relating to the subject-matter of the transaction and made, entered into, drawn or executed by, with or in favour of the old entity, and in force immediately before the transaction took effect, shall remain of full force and effect and shall be***

deemed to have been made, entered into, drawn or executed by, with or in favour of the new entity;"

7.31 Pursuant to the provisions in question, it is clear that the restructuring of the 1st Respondent did not necessitate any workforce reductions or declarations of redundancy, as stipulated in clause 32.5 of the Terms and Conditions. The evidence on record indicates that at the time of the proposed merger, when the 2nd Respondent acquired 99.99% shareholding in the 1st Respondent, the Appellant held the position of Assistant Director – Legal and Company Secretary. This is reflected in the Appellant's oral testimony, found on pages 391 and 392 of the record of appeal. The Appellant testified that he assumed additional responsibilities after his colleague, Mary Bwalya Katai, separated from the 1st Respondent, leaving him to manage a larger portfolio with the assistance of a manager-level subordinate, whom he had recruited.

7.32 The Appellant further testified that with these additional responsibilities, he was reporting to the Managing Director of the 1st Respondent and its Board. As reflected on pages 398 and 399 of the record, the 1st Respondent later employed Mr. Bonaventure Mbewe as Head of Legal and Compliance, to whom the Appellant then reported. The Appellant also stated that he handed over the secretarial role to Sandra Malupande, who joined the 1st Respondent on 3 May 2017. The Appellant testified that he was informed that no in-house Counsel would actively handle litigation, which had formed part of his portfolio. He, however, conceded that he had been offered the position of Legal Counsel with the 2nd Respondent, an offer he declined.

7.33 Additionally, as shown on pages 400 to 401 of the record of appeal, the Appellant conceded that both Mr. Mbewe and Mrs. Malupande were also selected to join the 2nd Respondent to continue their roles, as previously assigned to the 1st Respondent. Based on the evidence on record, we reject the Appellant's submission that the Court should apply the doctrine of changed substratum, which contends that when an employee is assigned materially different and additional duties, such changes may supersede the original job title along with the corresponding terms and conditions of employment.

7.34 In view of the foregoing, it is our view that the Appellant has failed to demonstrate how the restructuring resulted in any material adverse changes to his employment status, rank or grade, aside from minor adjustments necessary for his integration into the restructured entity. The Appellant did not substantively take over the position of Head of Legal and Compliance at the 1st Respondent but merely assumed additional duties as Assistant Director of Legal following the departure of Ms. Katai. The role was ultimately assigned to Mr. Mbewe in 2017, during the restructuring process of the 1st and 2nd Respondents.

7.35 Moreover, the Appellant declined an offer of employment with the 2nd Respondent, which included favourable terms, such as an increased salary. Consequently, the Appellant cannot successfully assert a claim of redundancy against the 1st Respondent. For these reasons, this ground of appeal is dismissed.

7.36 Regarding the fourth ground of appeal, the Appellant argues that the learned High Court Judge erred in law in finding that the Appellant failed to establish constructive dismissal. Counsel for the Appellant did not advance any additional arguments on this ground of appeal, as it was raised as an alternative to the third ground of appeal.

7.37 In addressing this ground, we reiterate conclusion that there was no substantial variation to the Appellant's employment contract during the restructuring process. The Appellant was offered a position with superior terms, which he declined. As held in **Kitwe City Council v William Ng'uni,**[3] '*the test for constructive dismissal is whether the employer's conduct amount to a breach of contract entitling the employee to resign'*. No such breach has been established in this case.

7.38 In light of our determination that no breach of contract resulted from the restructuring, there is no foundation for this ground of appeal. To succeed in a claim for constructive dismissal, the employee must establish that the employer's conduct created condition so intolerable as to justify the employee's resignation – a burden that has not been met in this instance. Accordingly, this ground of appeal is dismissed.

7.39 In light of the failure of the previous grounds of appeal, the fifth ground of appeal, which is contingent upon the success of the earlier grounds, also fails.

8.0 CONCLUSION

8.1 In view of the dismissal of the appeal in its entirety, we make no order as to costs, given that this matter originates from the Industrial Relations Division of the High Court.

J. Chashi
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE