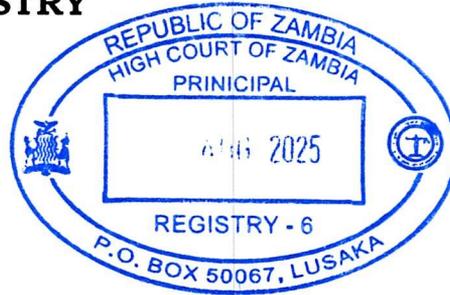


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HP/1185

BETWEEN:

JIMMY CHIFITA PHIRI



PLAINTIFF

AND

CITIZENS ECONOMIC EMPOWERMENT COMMISSION **DEFENDANT**

Before the Honourable Justice S. Chocho, on 18th August, 2025 in chambers.

For the Plaintiff: Mr. J Kayula of Messers Lewis Nathan Advocates.

For the Defendants: Mr. G Hakainsi and Ms. C Kaliwile of Messers LM Chambers.

J U D G M E N T

Cases referred to:

- 1. Consolidated Copper Mines Limited v Emmanuel Sikanyika
Judgement No. 24 of 2000.***
- 2. Swarp Spining Mining Plc v Sebastian Chileshe SCZ/6/2002.***
- 3. African Banking Corporation v Lazarous Muntete Appeal No. 51
of 2021.***
- 4. Chansa v Barclays Bank Zambia Plc SCZ/8/128.***

5. *John Mumba and 150 Others v Council of the University of Zambia Appeal No. 94 of 2020.*
6. *Hajra Import and Export Limited v Zambia Revenue Authority Appeal No. 48 of 1998.*
7. *Khalid Mohammed v Attorney General (1982) ZR 49.*
8. *Friday Mwamba v Sylvester Nthenge SCZ Judgement No. 5 of 2013.*
9. *Mike Musonda Kabwe v B.P. Zambia Limited SCZ Appeal No. 115 of 1996.*
10. *Grace Simaata v National Milling SCZ Judgment No. 21 of 2000.*
11. *Chembo v National Pension Scheme Authority Appeal No. 183 of 2020.*
12. *FSG Zambia Limited v Tami Daka Appeal No. 43 of 2023.*
13. *Chilanga Cement v Kasote Singogo SCZ Appeal No. 27 of 2008.*
14. *Fridah Kabaso Phiri v Davies Tembo Appeal No. 4 of 2012.*
15. *Youjun Zhuang and Others v Bumu General Trading FZE CAZ Appeal. No. 57/2021.*
16. *Zambia Railway Limited vs Pauline S. Mundia, Brian Sialumba (2008) Z.R.287.*
17. *Kitwe City Council v Willian Nguni Appeal No. 57 of 2003.*

18. *Wilson Masauso Zulu v Avondale Housing Project (1982) ZR*

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Legislation referred to:

1. *Section 23 of the Employment Code Act, Act No 3 of 2019.*

1. INTRODUCTION

1.1. This Judgment is in respect of the Plaintiff's action commenced by way of Writ of Summons and Statement of Claim dated August 3rd, 2022 in which the Plaintiff claims:

- i) Payment of ZMW 383,200.91 being salaries for the unexpired period of the contract;
- ii) Payment of ZMW 309, 103.20 being gratuity for the three-year contract period;
- iii) Payment of ZMW 30, 867.20 being accrued acting allowance in the position of Director Credit Control and Risk Management from November 2020 to January 2022 at the rate of ZMW 2,204.80;
- iv) Damages for breach of contract of employment;
- v) Damages for constructive dismissal;

- vi) Damages for mental anguish inflicted on the Plaintiff in the manner of dismissal;
- vii) Costs of and incidental to these proceedings; and
- viii) Any other relief that the Court may deem fit.

1.2. The Defendant entered Appearance and filed a Defence on August 18th, 2022 in which it denied the Plaintiff's claim.

1.3. The Plaintiff filed a reply on October 25th, 2022.

2. EVIDENCE/TESTIMONY

2.1. In aid of its case, the Plaintiff called one Witness and filed a witness statement dated November 9th, 2022, deposed by one Jimmy Chita Phiri who is the Plaintiff herein.

2.2. PW testified in chief that he was employed by the Defendant as Credit Manager and his fixed term contract was for a term of 3 years, starting November 8th, 2023.

2.3. PW testified that when he was employed as Credit Manager, there was no Director Credit control in the Defendant institution therefore, the Plaintiff started reporting directly to the Director General and assumed roles of Director Credit Control and Risk Management without being paid any monetary benefits.

- 2.4. PW testified that on September 22nd, 2021, he queried the issue of carrying out additional roles without being paid any additional emoluments and that Management responded through a memorandum dated September 22nd, 2021 which reaffirmed that the Plaintiff was indeed carrying out additional roles and that he was not going to be paid any additional emoluments.
- 2.5. PW testified that the decision not to pay him additional emoluments was discriminatory as other staff except him performing senior roles were being paid acting allowance.
- 2.6. PW testified that his relationship with the Defendant worsened and became sour when he refused to unlawfully approve and pay a loan and gave a professional opinion that the said loan was not in order with the documentation and that disbursing the loan would be against the law and credit practices.
- 2.7. PW testified that through the Acting Director Corporate Services, the Director General asked the Plaintiff to resign if the Plaintiff refused to carry out his instructions.
- 2.8. PW further testified that in January 2022, the Defendant's Management was pushing the Plaintiff to continue paying irregular loans for the Aquaculture seed fund to the beneficiaries without following procedure which the Plaintiff refused.

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- 2.9. PW testified that on January 19th, 2022, he received a letter of transfer to remove him from Credit Manager position to Planning, Monitoring and Evaluation Manager position without being given any reason; a decision which he appealed.
- 2.10. PW testified that Management replied to his appeal in a letter dated January 28th, 2022 standing their ground to maintain the position that the Plaintiff was transferred to.
- 2.11. PW testified that at the time Management was responding, he had already been replaced as Credit Manger even before his appeal process was exhausted, going against the Defendant's grievance procedure.
- 2.12. The Plaintiff further testified that he replied to Management's response in a letter dated February 1st, 2022 to maintain his grounds that his transfer was not done in good faith.
- 2.13. PW testified that since the parties failed to resolve the matter, the Plaintiff declared a dispute in accordance with the Zambian labour laws and reported the matter to labour office of the Labour Commissioner sometime in February, 2022.

- 2.14. PW avers that the parties were called for a round table discussion where they were both heard and the Labour Commissioner gave guidance in a letter dated March 24th, 2022.
- 2.15. PW further testified that the Defendant then wrote to the Plaintiff in March 2022, asking the Plaintiff for his choice of actioning in line with the guidance given by the Ministry of Labour.
- 2.16. PW testified that he responded to the defendant by stating that he stuck to the option highlighted by the Labour Commissioner's office but the Defendant refused to take the Plaintiff's choice of preferences.
- 2.17. PW testified that at the time the Defendant was refusing to take the Plaintiff's choice of preferences to resolve the dispute in March 2022, the Plaintiff's work environment had become so toxic such that other employees and subordinates were being threatened for associating with the Plaintiff resulting the Plaintiff into having a miserable experience at the place of work with a lot of mental torture as he was sidelined and left with no people to talk to.
- 2.18. PW testified he suffered mental anguish and was ever disturbed and the place of work due to bad treatment and mental torture.

- 2.19. PW testified that he could see that he was not wanted and he decided to resign on May 16th, 2022 on the grounds that he had been constructively dismissed as the Defendant went mute on deciding the Plaintiff's case even after being guided by the Labour Commissioner's office.
- 2.20. PW testified under cross examination that he was claiming about K30,000.00 as acting allowance but there as no evidence before Court to prove the same.
- 2.21. PW testified under cross examination that he willingly signed the contract of employment and at the time of signing the contract of employment, he understood the terms of the contract.
- 2.22. PW testified under cross examination that his understanding of **Clause 5.1.1** of his employment contract, is that the employer reserved a right to change his job description but under mutual consent between the parties as provided in **Clause 16.1** of the contract which prohibited the Defendant from making alterations to the contract without mutual consent.
- 2.23. PW further testified under cross examination that for any change to be made to the contract, the Defendant ought to have sought consent from the Plaintiff which they did not do.

- 2.24. PW testified under cross examination that nowhere in clause 5.1.1 does it say that they should be consent and that it is a stand-alone paragraph not subject to any other paragraph in the contract or should be read together with another paragraph.
- 2.25. PW testified under cross examination that **Clause 16.1** of the contract deals with amendment of the contract.
- 2.26. PW testified under cross examination that the contract of employment was for the period of three years from November, 2020 to November, 2023.
- 2.27. PW further testified that in the period between November 2020 to 2023, he was supposed to work as Credit Manger as he was experienced in this field and his qualifications were related to Credit Manager functions.
- 2.28. PW testified that he was disturbed by the Defendant's actions of transferring him to a position in which he had no experience and job description was not consistent with his status.
- 2.29. PW testified under cross examination that he was only paid leave days when he resigned and he was only paid gratuity a year later.
- 2.30. The Plaintiff testified in re-examination that **Clause 5.1.1** is on making amendments and is subject to **Clause 16.1**.

- 2.31. The Defendant called one witness in aid of its case. DW was one Walusungu Banda who filed a Witness Statement dated January 23rd, 2022.
- 2.32. DW testified in chief that the Defendant's contracts of employment with its employee's are regulated by the contracts of employment executed with the employees and the Terms and Conditions of Service.
- 2.33. DW testified that According to **Clause 10 of the Terms and Conditions of Service**, an employee may be transferred within Commission to wherever his/her services are required.
- 2.34. DW testified that a number of the Defendant's employees have been previously moved.
- 2.35. DW testified that the Plaintiff's transfer was consistent with his position of Manager.
- 2.36. DW further testified that in order for anyone to be paid additional allowances for additional responsibilities, there is need for an appointment letter.
- 2.37. DW testified that by a letter dated May 16th, 2022, the Plaintiff tendered his resignation notice which he attempted to

rescind/withdraw but this could not happen as the Defendant had already accepted the resignation letter.

2.38. DW testified under cross examination that the Plaintiff was not entitled to acting allowance.

2.39. DW testified under cross examination that he was not aware that the Plaintiff performed the functions of the Office Director Credit Control and that he was not aware that at the time the Plaintiff joined the institution, there was no one to head Directorate of Credit Control and Risk Management.

2.40. DW testified under cross examination that the Plaintiff was moved from the position of Credit Manager to the position of Monitoring and Evaluation Manager.

2.41. DW testified under cross examination that the Plaintiff refused to take up the position of Monitoring and Evaluation Manager.

2.42. DW testified under cross examination that he was not aware that the Plaintiff complained that the changes made to the Plaintiff's contract of employment affected the Plaintiff adversely.

2.43. DW testified under cross examination that his understanding of the contents of the paragraph iv in the letter dated January 20th, 2022 appearing at **page 15 of the Plaintiff's bundle of documents** is

that the skills of the Plaintiff do not match with were he was transferred to.

2.44. DW testified that the Plaintiff would not be subjected to dismissal for poor performance.

3. LAW AND SUBMISSIONS.

3.1. Both Parties filed their written submissions. The Plaintiff filed on December 12th, 2024, the Defendant filed on January 30th, 2024 and the Plaintiff filed a reply on February 20th, 2025. I have read and considered the parties respective submissions and I will not reproduce them in their entirety as the same are on record.

3.2. The Plaintiff submits that **Clause 5.1.1** of the contract vests in the Defendant the substantive power to change the Plaintiff's contract of employment and that the procedure is provided for under **Clause 16.0** which procedure is to the effect that consent must be obtained from the Plaintiff.

3.3. The Plaintiff submits that it is not legally tenable for an employer to unilaterally alter an employee's terms of employment and that such a change is only possible if consent of the employee is sought and obtained.

- 3.4. The Plaintiff submits that the provisions of the **Employment Code Act** in **Section 23** requires consent to be obtained whenever there is change or variation of the employee's contract of employment. **Section 23(2) of the Employment Code Act** provides as follows:
- “Where the terms of a written contract of employment change, the employer shall, with the consent of the employee, revise the contract to reflect the change and provide the employee with a copy of the revised contract of employment”.*
- 3.5. The Plaintiff submits that the Defendant has not specifically denied the allegation that it failed to obtain consent from the Plaintiff.
- 3.6. The Plaintiff further submits that it is not in dispute that the Defendant breached **Clause 16** of the contract of employment and the mandatory provisions of **Section 23(2) of the Employment Code Act**.
- 3.7. Placing reliance of the case of **Consolidated Copper Mines Limited v Emmanuel Sikanyika Judgement No. 24 of 2000¹**, the Plaintiff submits that any variation which is non consensual and unacceptable to an employee would justify an employee to treat the contract as repudiated, as the Plaintiff herein did.
- 3.8. The Plaintiff submits that he was transferred to a role that was completely outside his career path in which he had no knowledge

or experience and he feared that if he failed to perform, his poor performance would be used as a reasons or basis to dismiss him.

- 3.9. The Plaintiff submits that the issue of transferring or assigning a position to someone who has no skill, knowledge or experience of the same is detrimental to the employee.
- 3.10. The Plaintiff submits that he was asked to perform the roles of Director Credit Control and referred this Court to correspondence between the parties. The Plaintiff submits that the contents of the correspondence were not challenged in cross examination and the fact that the Plaintiff performed the role of Credit Director stands unblemished in record.
- 3.11. The Plaintiff submits that the Defendant having acknowledged the functions performed by the Plaintiff in his acting capacity, the Plaintiff is entitled to the claimed acting allowance.
- 3.12. Placing reliance on the case of **Swarp Spining Mining Plc v Sebastian Chileshe SCZ/6/2002**² the Plaintiff submits that the principle is that normal measure of damages is one equivalent to the length of the notice period in the contract, or where the contract period is silent reasonable notice will apply. Further, that where the loss of employment by an employee has been effected in a traumatic manner that yields distress and anguish, the normal

measure of damages is departed from and the Court is at liberty to award enhanced damages.

3.13. The Plaintiff also relied on the case of **African Banking Corporation v Lazarous Muntete Appeal No. 51 of 2021³** in which it was held as follows:

“It is evident from a plethora of cases, that our Courts have awarded enhanced compensatory damages or exemplary damages far and above the notice period. This has been done in cases where there has been mental distress, mental torture, and inconvenience or severe distress and hardship and any other distress”.

3.14. The Plaintiff submits that this is a proper and fit case in which this Court should exercise its power to depart from the normal measure of damages and instead, grant enhanced damages as manner of termination of the Plaintiffs contract was traumatizing and agonistic. Reliance was placed on the case of **Chansa v Barclays Bank Zambia Plc SCZ/8/128⁴** which I have taken note of.

3.15. In response, the Defendant submits that the Plaintiff has not justified why he should be paid for a period he never worked and that Courts have made pronouncements to the effect that awarding salaries to someone for a period not worked for amounts to unjust enrichment. Reliance was placed on the case of **John Mumba and**

150 Others v Council of the University of Zambia Appeal No. 94 of 2020⁵ in which the Court stated as follows:

“There is plethora of authorities which say that during the period an employee is on termination there is no consideration to justify paying the employee and doing so would amount to unjust enrichment”.

- 3.16. The Defendant submits that there will be no justification for this Court to award the Plaintiff salaries for the unexpired period of the contract when he did not work in that period.
- 3.17. The Defendant submits that the Plaintiff’s claim for gratuity automatically falls upon the Plaintiff’s own admission that he was in fact paid gratuity.
- 3.18. The Defendant submits that the Plaintiff is not entitled to his claim for accrued acting allowance as he has failed to prove his appointment as acting Director as Credit Control and Risk Management Director and the claim should fall.
- 3.19. The Defendant also submits that the Defendant has failed to prove his entitlement to damages for breach of contract, damages for constructive dismissal and damages for mental anguish inflicted on the Plaintiff in the manner of dismissal.
- 3.20. The Defendant submits that the Plaintiff’s claims for damages are as a result of the wrong interpretation of **Clause 16.1** of the

contract of employment. Further, that **Clause 16.1** deals with amendments to the contract of employment to change the terms and conditions of employment and does not deal with the issues of transfers or reassignment of employees to other duties or departments. **Clause 16.1** provides as follows:

“If at anytime during his/her employment the Employee and the Employer wish to make any change to the terms and conditions of this contract, it shall be made by mutual written consent of the parties and shall come into effect on the date which both parties have signed to covenant”.

3.21. The Defendant submits that **Clause 16.1** of the contract of employment does not stop the Defendant herein from assigning the Plaintiff to work in a different department as **Clause 5.1** confers such powers on the Defendant. **Clause 5.1** provides as follows:

“The employer reserves the right to change the employee’s Job description or to require him/her to perform a different job consistent with his/her status.”

3.22. The Defendant submits that **Clause 5.1** of the contract is a stand-alone provision and is not subject to any other provision. Further, that according to **Clause 5.1**, the Defendant was within its rights and powers to transfer to Plaintiff to work in another department within the same organisation while maintaining the position of manager.

- 3.23. The Defendant submits that the terms and conditions of the Defendant's organisation in **Clause 10** allows for the Defendant to transfer an employee wherever his/her services are required by the institution.
- 3.24. The Defendant further submits that the Plaintiff has heavily relied on the letter from the labour office in which the Labour Commissioner gave his opinion. The Defendant submits that the opinion of the Labour Officer contained in the letter is purely an opinion of the Labour Commissioner which is not binding on this Court.
- 3.25. The Defendant submits that the Plaintiff has also relied on **Section 23 of the Employment Code Act** and that the said provision does not favour the Plaintiff's case in anyway as the Plaintiff's Terms of the contract were not revised or changed as the Plaintiff was simply being transferred to another department while maintaining his entitlements, privileges and benefits.
- 3.26. The Defendant submits that there was neither breach of contract nor constructive dismissal as the Plaintiff claims.
- 3.27. The Defendant further submits that **Section 23 of the Employment Code Act** is intended to protect Employees from unilateral variation of their employment contracts and this is not

the case in this matter and there was no unilateral variation of the Plaintiff's contract of employment.

3.28. The Defendant submits that the Plaintiff's argument that he has no experience in the Department he was transferred to and that the Defendant made the transfer so that the Plaintiff can fail to perform and be dismissed for incompetence is baseless and speculative.

3.29. The Defendant submits that the Plaintiff's claim for damages for breach of contract of employment and constructive dismissal is baseless as the Plaintiff has not proved his entitlement to the damages. The Defendant placed reliance on the authority in the cases of **Hajra Import and Export Limited v Zambia Revenue Authority Appeal No. 48 of 1998⁶** and **Khalid Mohammed v Attorney General (1982) ZR 497** which I have taken note of.

3.30. In reply, the Plaintiff submits that the real issue for determination before this Court is whether or not the Defendant breached the Plaintiff's contract of employment when the Defendant decided to effect changes to his contract of employment without the Plaintiff's consent.

3.31. The Plaintiff submits that the Defendant has failed to show this Court in what circumstances **Clause 5.1.1** would be invoked

without triggering the need for compliance with **Clause 16.1** of the contract of employment.

3.32. The Plaintiff submits that the fulfilment of the conditions of obtaining consent as per **Clause 16.1** is a condition precedent to the invocation of **Clause 5.1.1**.

3.33. Placing reliance on the case of **Friday Mwamba v Sylvester Nthenge SCZ Judgement No. 5 of 2013⁸**, the Plaintiff submits that it is the duty of this Court to interpret the contract subject of dispute with an objective lens.

3.34. The Plaintiff submits that the Defendant breached the Plaintiff's contract of employment when it changed the Plaintiff's Terms and Conditions of Service by assigning him another department to perform completely different duties and the said change was without the consent of the Defendant contrary to **Clause 16.1** of the Plaintiff's contract of employment.

4. **COURT'S ANALYSIS AND DECISION**

4.1. I have considered the evidence on record and the Parties respective submissions. Having considered the arguments advanced by the parties, the issues for determination are as follows:

- i) Whether the Defendant breached the Plaintiff's contract of employment by unilaterally varying the terms of the Plaintiff's contract of employment;
 - ii) Whether the Defendants actions amounted to constructive dismissal; and
 - iii) Whether the Plaintiff is entitled to the claims in i, ii and iii.
- 4.2. It is a general principle of law that unilateral variation of a contract will amount to breach of a contract. With regards employment contracts, unilateral variation occurs when an employer varies the basic conditions of service without the employee's consent this amounts to a breach of contract. The Supreme Court in the case in the case of **Mike Musonda Kabwe v B.P. Zambia Limited SCZ Appeal No. 115 of 1996**⁹ in which the Court held as follows:

“We respectfully agree with that decision that if an employer varies a basic or basic conditions of employment without the consent of the employee then the contract then the contract of employment terminates and the employee is deemed to have been declared redundant”

- 4.3. Furthermore, the Supreme Court in the case of **Grace Simaata v National Milling SCZ Judgment No. 21 of 2000**¹⁰ stated as follows:

“If an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of

the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable”.

- 4.4. The Plaintiff contends that the Defendant unilaterally varied the Plaintiff’s contract of employment when the Defendant moved the Plaintiff from the position of Credit Manager to the position of Planning, Monitoring and Evaluation Manager.
- 4.5. I am of the considered opinion that the Defendant’s actions did not amount to variation of the terms and conditions of the Plaintiff’s contract of employment. The terms and conditions of the contract remained unchanged as the Plaintiff was still entitled to the same conditions of service and his benefits under the contract were not changed/altered.
- 4.6. The Court of Appeal in the case of **Chembo v National Pension Scheme Authority Appeal No. 183 of 2020**¹¹ stated as follows:

“The case of Kabwe v BP Ltd which the Appellant has cited among other authorities lays down the principle that where the employer varies a basic condition of employment without the consent of the employee, in fact, terminates the contract of employment and the employee is deemed to be redundant. The point to note is that the condition(s) of employment so varied should be basic. In

the Kabwe case, the employer reduced the employee's salary without the employee's consent. In this case, the changes that were made to the Appellant's conditions of employment were, the nature of the job, the place of work and the scope of his jurisdictional area. There is no evidence that his emoluments were diminished and neither was evidence led to show that he lost some of the allowances he received as Director of Internal Audit. There is therefore, no case for termination of Contract by variation of a basic condition(s) of employment without the Appellant's consent when the Appellant was re-designated as Regional Director-South".

- 4.7. In light of the above authority, I find that there was no unilateral variation of the Plaintiff's contract of employment and therefore, the Defendant did not breach the contract. The Plaintiff's re-designation as Planning, Monitoring and Evaluation Manager did not amount to unilateral variation of the contract.
- 4.8. On further perusal of the evidence on record, **Clause 10** of the Defendants Terms and Conditions of Service appearing at **page 6 of the Defendant's bundle of documents** allows for the transfer of an employee within the Defendant's institution. **Clause 10** of the Terms and Conditions of Service provides as follows:

"An employee may be transferred within the Commission to wherever his/her services are required by the Commission".

4.9. Furthermore, **Clause 5.1.1** of the contract of employment appearing at **page 4 of the Plaintiff's bundle of documents** reserves the Defendant's right to change the Plaintiff's job description and require him to perform a different job consistent with his status. I consider the Defendant's actions as being consistent with the terms of the contract.

4.10. I have also addressed my mind to **Clause 16.1** of the contract of employment, the said provision prohibits unilateral variation of the contract of employment. I have found that there was no unilateral variation of the Plaintiff's contract of employment in casu and therefore, the Defendant did not contravene **Clause 16.1** of the contract.

4.11. The next question for determination is whether the Defendant's act of transferring the Plaintiff to the position of Planning, Monitoring and Evaluation Manager amounted to constructive dismissal.

4.12. There is of a plethora of authorities on what amounts to constructive dismissal. In explaining what is meant by constructive dismissal, the Court of Appeal in the case of **FSG Zambia Limited v Tami Daka Appeal No. 43 of 2023**¹² stated as follows:

"We quickly turn to the law pertaining to constructive dismissal, which stipulates that it occurs when an employee resigns due to the employer's conduct, which

fundamentally breaches the employment contract, making the continued employment untenable”.

4.13. I am of the view that in order for a Defendant who is the employer to be found wanting for constructive dismissal, the employer must conduct itself in a way which breaches the employment contract and forces the employee to leave the employment. I am fortified by the authority in the case of **Chilanga Cement v Kasote Singogo SCZ Appeal No. 27 of 2008**¹³ in which the Supreme Court stated as follows:

“It can thus be discerned, from the various authorities on constructive dismissal, that an employee can claim to have been constructively dismissed if he resigned or was forced to leave employment as a result of his employer's unlawful conduct, which conduct amounts to a fundamental breach of the contract of employment. It is the employee who makes the decision to leave”.

4.14. On perusal of the record and the evidence before me, I am of the considered opinion that the actions of the Defendant of transferring the Plaintiff from the position of Credit Manger to the position of Planning, Monitoring and Evaluation Manager was done in a lawful manner and did not amount to any breach. The Plaintiff claims that he was moved to a position that he was not qualified for and this would lead to dismissal for failure to perform. The Plaintiff has not

produced before Court evidence to show what his qualifications are in order to enable this Court determine whether the new role he was assigned is one that the Plaintiff cannot be reasonably expected to handle or perform in a satisfactory manner.

4.15. Furthermore, the Supreme Court in the case of **Fridah Kabaso Phiri v Davies Tembo Appeal No. 4 of 2012**¹⁴ had occasion to pronounce itself on the determination of qualifications and job description for particular job positions. The Court held as follows:

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

4.16. In light of the above authority I am of the considered view that it is not in the place of the Plaintiff to determine what amounts to sufficient/requisite qualifications for the position of Planning, Monitoring and Evaluation Manager and it is for the Defendant to determine the qualifications/description for the position in its institution. If at all or the case be that the Defendant availed the

Plaintiff with the required qualifications and job description and bases his claim on the same; the Plaintiff has not produced the evidence of the job qualifications and description before Court. It is a trite principle of law that Courts make decisions based on the evidence produced before them. the Court of Appeal in the case of **Youjun Zhuang and Others v Bumu General Trading FZE CAZ Appeal. No. 57/2021**¹⁵ had the following to say:

“We say this because Courts decide cases based on the evidence or material before them, and not on extraneous material. If the document was indeed relevant to the determination of the matter, the Respondent would have taken the necessary steps to obtain it and produce it before the trial court”.

4.17. It is trite that in civil cases, he who alleges must prove on a balance of probabilities that the other party is liable and I am fortified by the authority in the case of **Zambia Railway Limited vs Pauline S. Mundia, Brian Sialumba (2008) Z.R.287**¹⁶. The Plaintiff ought to have produced evidence of his full qualifications for the job and descriptions of the two positions to prove to this Court that he was indeed not qualified for the new role/position.

4.18. In the absence of such evidence, I find that the Defendant acted within the provisions of **Clause 5.1.1** of the Plaintiff's contract of employment and in accordance with **Clause 10** of the Terms and

Conditions of Service. The Defendant's actions did not therefore, amount to constructive dismissal.

4.19. I further find that the Plaintiff did not lead/show evidence pointing to the toxic work environment.

4.20. In light of the above findings, the Plaintiff's claims for; damages for breach of contract, damages for constructive dismissal and damages for mental anguish fail.

4.21. The Plaintiff also claims for the payment of the sum of ZMW 383, 200.91 being salaries for the unexpired period of the contract. The law is clear that a salary cannot be paid for a period not worked for as such has not been earned. The case of **Kitwe City Council v Willian Nguni Appeal No. 57 of 2003**¹⁷ is instructive; the Court stated as follows:

“We have said in several of our decisions that you cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment”.

4.22. In light of the above authority, the Plaintiff's claim for salaries for the unexpired period of the contract fails.

4.23. Coming to the Plaintiff's claim for accrued acting allowance, I find that the said claim is bound to fail as the Plaintiff has not shown the basis of his claim and he has not proved his entitlement to the

same. It is a trite principle of law that he who asserts a fact must prove, the case of **Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172**¹⁸ refers.

4.24. I shall not deal with the issue as relates to gratuity as the Plaintiff admitted having being paid gratuity under cross examination. I however, award interest on the sum paid as gratuity, from the date the action was commenced to the date the gratuity was paid to the Plaintiff. The interest is to be calculated at the current bank lending rate.

5. CONCLUSION

- 5.1. For the foregoing, I find that the Plaintiff's action fails.
- 5.2. Interest on the gratuity.
- 5.3. Each party to bear its own costs.
- 5.4. Leave to appeal is granted.

Delivered at Lusaka on 18th August, 2025.



S. CHOCHO
HIGH COURT JUDGE

