IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 27/2008

B E T W E E N:

CHILANGA CEMENT PLC — APPELLANT

AND

KASOTE SINGOGO — RESPONDENT

CORAM: MAMBILIMA, DCJ, CHITENGI, MWANAMWAMBA, JJS
On 5th November, 2008 and 12th June, 2009

For the Appellant: Mr. M. SAKALA of Copper's Globe Practitioners
For the Respondent Dr. F. SUMAILI of Mumba Malila & Partners

JUDGMENT

MAMBILIMA, DCJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. WESTERN EXCAVATING (ECC) LTD VS SHARPE (1978) IRLR
2. MUGOFORM VS MIDLANDA BANK PLC (No Citation)
3. ZAMBIA CONSOLIDATED COPPER MINES LTD VS MUTALE (1995-97) ZR 144
4. ANTHONY KHETANI PHIS VS WORKERS COMPENSATION CONTROL BOARD (2003) ZR 9
5. BARCLAYS BANK PLC VS ZAMBIA UNION OF FINANCIAL INSITUTIONS AND ALLIED WORKERS SCZ APPEAL NO. 17 OF 2007
6. SWARP SPINING PLC VS CHILESHE & OTHERS : (2002) ZR 23
7. CHITOMFWA VS NDOLA LIME COMPANY LTD. SCZ NO. 28 OF 1990
8. LYONS BROOK LTD VS ZAMBIA VS ZAMBIA TANZANIA ROAD SERVICES (1977) ZR 317
9. CHARLES PEARSON DAKA VS ZCCM LTD; APPEAL NO. 12 OF 2004
10. JONATHAN MSUIALELA NGULEKA VS FURNITURE HOLDINGS LTD: SCZ No. 6 of 2006
11. GILBERT VS GOLDSTONE (1977) 1 ALL ER 423

12. LABOUR LAW IN BRITAIN (EDITED BY ROY LEWIS, PAGE 419
13. COURTAULDS NORTHERN TEXTILES LTD VS ANDREW (1979) IRLR 84
14. ATTORNEY-GENERAL VS MPUNDU (1984) ZR 6

Legislation referred to:

1. Section 26 B – Employment Act: - Act No. 15 Of 1997

This is an appeal against the judgment of the Industrial Relations Court which was in favour of the Respondent. The Respondent had moved the Court seeking a declaration that the termination of his employment by the Appellant was unlawful and therefore null and void. He sought reinstatement or in the alternative, payment of full salaries and fringe benefits which he would have received at the age of retirement or damages for termination of employment. The Industrial Relations Court, in its judgment, ordered:

(a) That the Respondent be compensated for the abrupt loss of employment and be paid twenty four months' salary based on his last pay;

(b) That he be paid damages for the manner in which the employment was terminated, the embarrassment he endured and the physical and mental torture he suffered and that he be paid six months' salary based on his last pay;

(c) That he be given an option to purchase the motor vehicle he used and mobile phone;

(d) That monies due to him should attract interest at Bank of Zambia short term lending rate from the time of filing the complaint up to the date of judgment and thereafter at the current lending rate until settlement.

The Court also awarded costs to the Respondent.

The brief facts of the case, which were not in dispute, were that the Respondent was employed by the Appellant Company in March 1988 as a Credit Controller. On 17th December, 1999, he received a letter from the Appellant, advising him that he had been declared redundant with effect from that date. The said letter which appears on page 51 of the record of appeal, states in part that the redundancy was due to the company's decision to rationalize its manning levels. The Respondent was to be paid one month salary in lieu of notice, and would be entitled to a redundancy package comprising two months basic salary for each completed year of service; gratuity, transport or in lieu repatriation expenses to his registered home district, and, pension benefits to which the Respondent would be entitled under the rules of the pension scheme.

The Respondent told the Court below that he was shocked to receive this letter, more so that he was in possession of a car which was given to him under a self liquidating loan for a period of 5 years. He went on to state that he believed that the redundancy emanated from the events of 3rd December 1999 at offices of TAP Limited. According to the Respondent, on that day, he had visited the premises of TAP Limited in the normal course of his duties as a Credit Controller to follow up a debt. TAP Limited had obtained cement from the Appellant on

credit. The Respondent went to see a Mr. SRINIVASAN, to find out about the statement he had sent to them. The Respondent alleged that during the meeting the said Mr. SRINIVASAN made racist remarks which irked and annoyed him. He told the Court that he challenged the Mr. SRINIVASAN over the remarks and later reported him to the police station at Chilanga. Thereafter he went to inform his immediate boss, a Mr. MUMBA, about the incident and report which he made to the police. Mr. MUMBA told him that he would wait for the police investigations on the matter.

On 7th December 1999, the General Manager of the Appellant Company sent the Respondent an e-*mail* under the subject **"TAP/SRINIVASAN."** In the said e-mail the General Manager stated; ***"Since you have failed to inform me of this rather messy situation, I have found out by the back door, would you kindly by Thursday lunch time please carefully document the events of last seven days i.e. since 1st Dec, as they relate to your relationship with this man. E-mail or paper. You choose. DJT"*** The Respondent replied to this e-mail the next day on 8th December. In this e-mail he stated:

> **"The Holy Scriptures say somewhere in Proverbs 'that he who speaks first seems right until the other persons speaks'. David, the truth regarding my relationship with Mr. Srinivasan is that it is so messy that for the sake**

of myself and the people of Zambia I am prepared to go the full mile. My dignity was injured to its very core by the words Mr. Srinivasan said to me, the temptation to beat him physically was very high on the 3rd of December 1999 when I suffered the injury. David, may I say this, the black people in the country are very poor including myself but to practice the wicked, cruel and subtle crime of racism on them is unacceptable. Mr. Srinavasan insulted me to the face. He said things to me which I have reported to the relevant authorities in the land namely the Zambia Police and other appropriate people, the matter may have to go to court at my own expense of course but whatever it takes to maintain dignity and respect even though I am poor, I am prepared to do."

The General Manager replied on 9th December 1999 in the following terms:-

"I wish you had not sent me this crap. It does not explain why you did not see fit to tell me you had reported a customer to the authorities over some personal issues, and it does not tell me what was said or what the history of it is, hence I may not objectively judge the merits of the case. Frankly I find the style of your reply arrogant and insulting.

It is not the first complaint I have heard about you from a customer, and it follows my warning you about persecuting TAP selectively.

My conclusion is that you may not be appropriate for the position you hold. I have to investigate this situation, and have to know the facts. Please therefore make an appointment with Connie for tomorrow (Friday) pm.

David"

In line with the invitation that he should meet him, the Appellant did meet the General Manager on 15th December 1999. He told the Court that at that

meeting, the General Manage requested him to narrate what had transpired. The Respondent explained and also told him that the matter was reported to the police. The General Manager then requested him to give a detailed account of what contribution he had made to Chilanga Cement since joining the company in *March 1998*. The Respondent explained and gave details of the systems which he had introduced in the company on the management of credit and also pointed out the impressive performance of both the domestic and international credit sales. The General Manager however told him that he had received unconfirmed adverse report about him.

It was the Respondent's further testimony that during the same period, he received an invitation to attend a Christmas party for the employees of the Company. On the date of the party, he was called by a Mr. NANAVAT, using the General Manager's phone, telling him not to attend the party. On 17th December he received the letter of redundancy. The Respondent told the Court below that while he was aware of a redundancy exercise going on in the company, he did not receive any notice and neither was he aware that he was on the list of those to be declared redundant. His position was that the termination of his employment through redundancy was done in bad faith and was in fact constructive dismissal.

He stated further that the redundancy was contrary to the Employment Act and his terms and conditions of service.

The Appellant on the other hand contended, in the Court below, that the Respondent was properly declared redundant in a restructuring exercise. According to their witness who gave evidence in the Court below, the employees who were declared redundant were those whose jobs were seen as not being necessary or those who elected to be declared redundant. This witness told the Court below that while the Respondent did not apply to be retrenched, his job was made redundant in that his position of Credit Controller was no longer necessary in the organization. He went on to state that this position is not available up to date. The witness told the Court that he was not aware of the differences between the Respondent and the General Manager of the Appellant Company. He also said that the General Manager did not propose to him and his team that the Respondent's job be made redundant.

In evaluating the evidence before it, the Court below started by looking at the elements of constructive dismissal. The Court observed that a key element of constructive dismissal is that an employee must have been entitled to leave without notice because of the employer's conduct. The Court observed further

that constructive dismissal occurs where, although it is the employee who appears to terminate the employment by walking out, it can be said that the real reason for termination was in some way the prior conduct of the employer. In this respect, it referred to the words of Lord DENNING in the case of **WESTERN EXCAVATING (ECC) LTD VS SHARPE(1)** where he stated:

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

The Court observed that the theory behind constructive dismissal is that although it is the employer who terminates the contract, in practice, it will usually be the employee who takes the final step by resigning and walking out, thus showing that he has accepted the employer's repudiation as concluding the contract.

The Court also referred to the provisions of Section 26(B) of the Employment (Act No. 15 of 1997) and in particular, Section 26B(1) and (2). The

Court was of the view that the applicable Section is 26 B(1)(b). Under this provision:

> **An employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to:**
>
> **(b) The business ceasing or reducing the requirement for the employee to carry our work of a particular kind in the place where the employee was engaged and the business remains a viable going concern:"**

The Court also alluded to the provisions of Section 26 B(2) which state:

> *Wherever an employer intends to terminate a contract of employment for reasons of redundancy the employer shall:*
>
> *(a) Provide notice of not less than thirty days to the representative of the employee on the impending redundancies and inform the representative on the number of employees to be affected and the period within which the termination is intended to be carried out.*
>
> *(b) Afford the representative of the employee an opportunity for consultations on:*
>
> *(1) The measures to be taken to minimize the termination by and the adverse effects of the employees*
>
> *(2) The measures to be taken to mitigate the adverse effects on the employees concerned including finding alternative employment for the affected employees.*
>
> *©Not less than sixty days prior to effecting the termination notify the proper officer of the impending terminations by reason of redundancy and submit to the officer information on:-*

(i) The reasons for the termination by redundancy
(ii) The number of categories of employees likely to be affected
(iii) The period within which the redundancies are to be effected; and
(iv) The nature of the redundant package."

On how redundancies should be handled, the Court listed three ways:-

(a) Consideration of alternatives: a reasonable employer considers whether it is necessary to act on redundancy or whether there is some other way of dealing with the problem.

(b) Lack of consultation: To dismiss without warning or proper consultations or without considering the recommendations of any terms and conditions relating to redundancies may also result in a finding that a dismissal is unfair. Consultation must be fair and genuine.

(c) Proper selection procedures.

The Court then referred to the case of **MUGFORD V MIDLAND BANK PLC (3)** in which Courts are guided inter alia, that if there is no consultation with trade unions or individuals when redundancies are contemplated, a dismissal will normally be unfair, unless a reasonable employer would have concluded that consultation would be an utterly futile exercise. The Court went on to state that if a dismissal is unfair because of a failure to consult, the Court must consider whether consultation would have made any difference or whether any employee would have had a chance of being retained in his employment.

On proper selection procedures, it was the Court's view that unfair selection for redundancy may also amount to unfair dismissal. The Court found in this case, that there was no evidence before it to suggest that there was any consultation before the Respondent was declared redundant and also no evidence of a proper selection procedure. The Court was of the opinion that in the absence of consultation, a transparent selection procedure; and consideration of alternative ways in dealing with the redundancy; the Respondent had a point to conclude that the termination of his employment was not by reason of redundancy but a constructive dismissal. In reaching this conclusion, the Court alluded to three factors; the e-mail from the General Manger of 9th December 1999 in which he stated that the Respondent may not to be appropriate for the position he held; the action of stopping the Appellant from attending the company Christmas party; and, the redundancy letter of 17th December 1999 which terminated the Respondent's employment with immediate effect.

Relying on the case of **ZCCM VS MATALE (3)** the Court was fortified that it had power to delve into or go behind the reason given for the termination of the

Respondent's employment. It held that the Appellant Company had failed to show the Court, the real reason for the termination of the Respondent's employment. The Court found that in this case, the real reason for the termination of the Respondent's employment was to be found in the e-mail from the General Manager. The Court was of the view that the Respondent should have been charged and given an opportunity to defend himself instead of being made redundant when it was clear that the redundancy was used as an excuse to get rid of him. The Court also found that the termination of employment in this case, was in bad faith.

Dissatisfied with the judgment of the Court below, the Appellant has now appealed to this Court, advancing a total of five grounds of appeal. The last two are in the alternative. The three main grounds of appeal are that:-

1. **The Court below erred in law and fact when it held that the termination of the Respondent's contract of employment amounted to constructive dismissal when there was clear evidence of redundancy.**

2. **The Court misdirected itself both in law and fact when it held that there being no evidence of adherence to redundancy procedure on the part of the Appellant was indicative of the fact that the termination of the Respondent's contracts of employment amounted to constructive dismissal.**

3. The Court misdirected itself when it held that notice of redundancy was never given to the Respondent and by that reason inferred that the termination amounted to constructive dismissal when in fact a payment in lieu of notice was given to the Respondent.

In the alternative the Appellant has advanced the following grounds of appeal:-

2. **That the Court erred both in law and fact when it ordered 24 months compensation for loss of employment contrary to well established principles for awarding of damages in cases of wrongful or unlawful termination of employment.**

3. **That the Court erred both in law and fact when it awarded 6 months' salary payments as compensation for embarrassment, physical and mental torture when these matters were neither pleaded nor an issue before the Court.**

Submitting in support of the first ground of appeal, the learned Counsel for the Appellant stated that the Respondent was just one of the many employees who were declared redundant by the Appellant Company when it was going through a restructuring and reorganization process. He argued that the Respondent's position in the Appellant Company had been declared redundant and that this is reinforced by Section 26 (B) (1) (a) (b) of the Employment Act. Counsel submitted further that in this case, the question of redundancy had arisen as a matter of fact and the decision to declare the Respondent redundant was made in good faith and had nothing to do with the Respondent's encounter

with Mr. SRINIVASAN. He referred us to our decision in the case of **ANTHONY NKETANI PHIRI VS WORKERS COMPENSATION CONTROL BOARD, (4)** in which, according to Counsel, this Court decided on the effect of Section 26 (B) of the Employment Act and confirmed that redundancy occurs when an employer completely ceases to operate; or remains a going concern but ceases or reduces the requirement for the employees to carry on work of a particular kind. He submitted that the lower Court therefore erred in both law and fact when it held that the Respondent had been constructively dismissed when both the law and the facts before it supported the fact that the Respondent's position at the Appellant Company had been redundant.

On the 2nd ground of appeal it was submitted that redundancy being a question of fact, its existence or otherwise can only be established from a factual situation. Counsel argued that the question as to whether redundancy procedure was adhered to is also a question of fact and should be discerned from a factual situation. He went further to state that the Respondent's employment with the Appellant was regulated by a written contract of employment and therefore the provisions of Section 26 (B) of the Employment Act were therefore not applicable. In support of this submission we were again referred to our decision in the case of

BARCLAYS BANK PLC VS ZAMBIA UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS (5) in which according to Counsel, this Court held that in enacting Section 26 (B) of the Employment Act, Parliament intended to safe guard the interest of employees who are employed on oral contracts of service, which, by nature would not have any provision for termination of employment by way of redundancy. Counsel submitted that the Respondent was declared redundant according to his terms of employment and the law; and that he was given notice by way of payment in lieu thereof and; he was paid all his redundancy benefits according to the law. The learned Counsel for the Appellant submitted that since the Appellant adhered to both the law and the terms of employment; the Respondent's redundancy could not be said to have amounted to constructive dismissal.

It was the Appellant's further submission that the Respondent was given notice of the redundancy through the payment in lieu of notice. He went on to state that a key element in the definition of constructive dismissal is that an employee must have been entitled to leave without notice because of the employer's conduct. He went on to state that constructive dismissal occurs where, although it is the employee who appears to terminate the employment by

walking out, it can be inferred that the real reason for termination was, in some way, the prior conduct of the employer. To this effect, it was Counsel's argument that the Court below erred in law and fact, when it held that a notice of redundancy was not given to the Respondent and by that reason, inferred that the termination of his employment amounted to constructive dismissal. Counsel reiterated that the Respondent in this case was paid in lieu of notice and the effect of such payment was to treat the termination as if proceeded by the actual notice. In support of his submission Counsel referred us to the case of **ZAMBIA PRIVATISATION VS JAMES MATALE (3)** in which this Court stated that: ***"the payment in lieu of notice was a proper and a lawful way of terminating the Respondent's employment on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice."***

In the alternative the Appellant has advanced the fourth and fifth grounds of appeal should we hold that the Respondent's employment was wrongfully or unlawfully terminated. Under the fourth ground of appeal, the Appellant's Counsel has submitted that as a general rule the normal measure for damages in cases of this nature will usually relate to the applicable contractual length of notice or notional reasonable notice where the contract is silent. Counsel

referred us to another of our decision in the case of **SWARP SPINNING PLC VS CHILESHE AND OTHERS (6)** in which we held that in assessing damages to be paid and which are appropriate in each case, the Court does not forget the general rule, that the normal measure of damages relate to the applicable length of notice. Counsel submitted that in the SWARP case, we distinguished it from our decision in the **CHITOMFWA VS NDOLA LIME COMPANY LIMITED** (7) by stating that in the latter case of **CHITOMFWA,** we had departed from our recent decisions where damages equal to one year's salary and perks had been awarded and awarded two years benefits, after taking into account the scarcity of jobs of the kind that the Plaintiff had been doing. Counsel argued that in this jurisdiction, since the **CHITOMFWA** case was decided, the job situation had remarkably improved. He stated that the Respondent himself told the Court below, that he had found alternative employment. Counsel submitted that the payment of a salary in lieu of notice was sufficient in this matter and the Respondent should therefore not be entitled to any further damages.

In support of the fifth ground of appeal it was Counsel's submission that the award of 6 months' salary compensation for embarrassment, physical and mental torture was never pleaded nor was it an issue before the Court below.

Counsel referred us to the case of **LYONS BROOK BOND LIMITED VS ZAMBIA TANZANIA ROAD SERVICES (8)** in which we held that the functions of pleadings is to assist the Court by defining the bounds of the action. They cannot be extended without the leave of the Court and without amendments to pleadings. He went on to state that there was no evidence adduced in this case with respect to embarrassment, physical and mental torture suffered by the Respondent and there was therefore no basis on which the learned trial Court awarded damages in respect of the said claim. He prayed that this Court should quash the judgment of the Court below and allow the appeal with costs.

In response to the submission on behalf of the Appellant, Dr. SUMAILI stated that he was in full accord with the judgment of the Court below in favour of the Respondent, as the Court properly and fully addressed its mind to all the issues raised at the trial. Referring to Section 26(B) of the Employment Act, Dr. SUMAILI submitted that its provisions are mandatory and a failure to adhere to them makes any purported redundancy null and void. He submitted that the Appellant did not comply with its provisions and that the Respondent only came to know about the redundancy on 17th December 1999 at 1700 hours when he

was handed the purported letter of redundancy. The letter was with immediate effect.

Dr. SUMAILI further submitted that notice of redundancy under the Employment Act is mandatory and it could not therefore be argued that since the Respondent must have known of an ongoing redundancy exercise in the Appellant's Company that was sufficient notice for him to know and assume that he was placed on the redundancy list. He went on to state that the Employment Act properly and deliberately did not provide for payment in lieu of notice in respect of redundancies. According to Dr. SUMAILI, this is so because a redundancy is a planned for activity. He stated that termination by notice or by payment in lieu of notice was properly provided for in Sections 20 and 21 of the Employment Act. He submitted that these provisions do not apply to matters of redundancy. Dr. SUMAILI argued that if they were to apply, it would render null and void all the provisions under Section 26 (B) of the Employment Act. Dr. SUMAILI urged us to distinguish between the two areas, where termination is by notice and; where in the case of redundancy payment in lieu of notice was not part of the law.

Dr. SUMAILI submitted that in this instance case, there was no notice given to the Respondent, neither was there any consideration of alternatives nor consultations. The selection procedures as to who was to be declared redundant were also not known. He agreed with the reasons advanced by the Court based on the case of **MUGFORD VS MIDLAND BANK PLC** that in the absence of consultations, a transparent selection procedure and the lack of consideration for alternative ways in dealing with the redundancy, the Respondent had a point to consider that the termination of his employment was not by reason of redundancy but a constructive dismissal.

Dr. SUMAILI further stated that none of the safe guards provided for in the laws governing redundancies in Zambia or other related laws were complied with by the Appellant. According to Dr. SUMAILI, the issue in this case is not whether or not there was evidence of redundancy; but whether termination by redundancy as defined by law, was fully and properly adhered to. His view was that the answer in this case is in the negative. Alluding to the events from the time that the Respondent was employed up to the date that his services were terminated by reason of redundancy, Dr. SUMAILI submitted that it is evident from these events that the Appellant used the altercations that the Respondent

had with Mr. SRNIVASAN as a basis for termination and cloaked them in the guise of redundancy. He went on to state that redundancy is a child of statute and it cannot be done in an arbitrary manner as was the situation in the instant case.

On the issue of the damages that were awarded to the Respondent by the Court below, Dr. SUMAILI submitted that the common remedy for breach of contract is damages and that in this case the Court awarded two kinds of damages. First, it compensated the Respondent for the abrupt loss of his employment and ordered that he be paid 24 months' salary based on his last pay and secondly, that he be paid six months' pay based on his last pay in view of the embarrassment, physical and mental torture which the Respondent suffered. He pointed out that this Court has dealt with the issue of damages in several cases one of which was the case of **CHITOMFWA VS NDOLA LIME LIMITED (7)**. He also referred us to the case of **CHARLES PEARSON DAKA VS ZCCM, (9)** in which we stated that in these days of shrinkage of jobs, the award of 12 months' salary in that case was inadequate. In that case, we awarded 24 months' salary as damages for wrongful dismissal. Dr. SUMAILI referred us to another case of **JONATHAN MUSIALELA NGULEKA AND FURNITURE HOLDINGS LIMITED, (10)** in which we yet again awarded 24 months' salary as damages. Dr. SUMAILI

submitted that while the Court always adheres to judicial principles in deciding cases, it also pays attention to review each case in its own merit. According to him, it was misleading for the Appellant to argue that the job situation in this jurisdiction had remarkably improved when hundreds of young university graduates are still roaming the streets. He argued that the Court below was perfectly in order to order that the Respondent be paid 24 months' salary by way of damages.

On the award of 6 months' salary as damages to the Respondent for the embarrassment, physical and mental torture he endured, Dr. SUMAILI submitted that the Respondent did state in his affidavit in support of the complaint in the Court below that he had suffered mental anguish, disrepute, and that his family had undergone serious agony as a result of the Appellant's act. He went on to state that the Industrial Relations Court is a Court of substantial justice and that it is not fettered by pleadings in the way that the High Court is. For this submission, he referred us to the case of **ZCCM VS MATALE (7).** He also referred us to Section 3 of the Industrial Labour Relations Act which empowers the Industrial Relations Court to grant damages or compensation for loss of employment. He submitted that the judgment of the Court below cannot therefore be impeached. On this

premise, he prayed that the appeal should be dismissed in total with costs to the Respondents.

We have considered the judgment of the Court below, the submission of Counsel and the issues raised in this appeal. We are indebted to Counsel for their elaborate submissions in support of their respective clients. We propose to deal with the grounds of appeal in the order in which the Appellant has argued them before us.

In the first ground of appeal, he contends that the Court below was wrong to have held that the termination of the Respondent's contract amounted to constructive dismissal. The argument of the Appellant in the main, is that the Respondent was declared redundant after his position of Credit Controller was scrapped or abolished and that up to now, this position does not exist in the Appellant's establishment. The Respondent's counter argument seems to be that the Appellant used the Respondent's altercation with Mr. SRINIVASAN to terminate the Respondent's employment and, to use Dr. SUMAILI's words; ***'...cloaked them in the guise of redundancy in total disregard of the law on redundancy.'***

There are a plethora of authorities on what actually constitutes constructive dismissal. In trying to define the concept, the Court below referred to the words of Lord DENNING (reproduced above) and Lord LAWTON in the case of **WESTERN EXCAVATING (ECC) LTD VS SHARP** (1). We agree entirely with the expose of Lord DENNING. What stands out clearly is that in constructive dismissal, an employee leaves employment promptly or by notice, as a result of the conduct of his employer. In the case of GILBERT VS GOLDSTONE (11) the Employment Appeal Tribunal came up with a test to be applied in determining whether an employee had been constructively dismissed. It held that where an employee claimed that he had been ***'constructively'*** dismissed, the proper approach was to apply the test in the Trade Union and Labour Relations Act, i.e. having regard to the equity of the case, the employee had acted reasonably in deciding that the circumstances were such that he could no longer work for an employer. Contributing to a book on Labour Law in Britain (12), Steven ANDERMAN defined constructive dismissal as ***'....where the employee resigns with or without giving notice, in circumstances such as he is entitled to do so without notice because of the conduct of the employer.'*** He alludes to the notion that the conduct of the employer that forces an employee to leave amounted to a

contractual repudiation. The employer renounces the terms of the contract as a whole. The notion of constructive dismissal is anchored on the concept that an employer must treat his employee fairly and should not act in a manner that will compel the employee to flee his job. As was stated in the case of **COURTLANDS NORTHERN TEXTILES LTD VS ANDREW** (13) by the Employment Appeal Tribunal:

'An employer must not, without reasonable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.'

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.

In this case, the circumstances which led to the termination of the Respondent's contract of employment are common cause. It was through a letter of redundancy written on 17th December 1999. The termination was by the Appellant (Employer) and not the Respondent (employee). The termination was with immediate effect. The Respondent did not resign and neither did he walk

out of his job. He was terminated and one of the reliefs which he sought in the Court below was that of reinstatement. These facts do not fit into the straight jacket of constructive dismissal. Perhaps LAWTON LJ had a point, when he stated, in the case of **WESTERN EXCAVATING LTD VS SHARP** (1) that:

> **"I appreciate that the principles of law applicable to the termination by an employee of a contract of employment because of his employee's conduct are difficult to put concisely in the language Judges use in Court. Lay members of industrial tribunals, however, do not spend all their time in Court and when out of Court they may use, and certainly will hear, short words and terse phrases which describe clearly the kind of employer of whom an employee is entitled without notice to rid himself."**

One thing is clear in this case; and this is that the Respondent did not want to rid himself of the Appellant. We therefore hesitate to stretch the concept of constructive dismissal to such an extent as to cover the termination of employment in this case. We therefore agree with the Appellant's assertion that the termination of the Respondent's employment did not amount to constructive dismissal. The critical issue in this case, in our view, was whether the termination of the Respondent's employment through redundancy was lawful. This will inevitably lead us to consider the issues raised in the second and third grounds of appeal. We propose to deal with these two issues together.

In the second ground of appeal, the Appellant is questioning whether it can be inferred from a failure to adhere to the redundancy procedure that the Respondent's termination amounted to constructive dismissal while in the third ground of appeal, the question is whether failure to give notice of redundancy in this case amounted to constructive dismissal when payment in lieu of notice was done. We have already found that the circumstances in which the Respondent's services were terminated did not constitute constructive dismissal. As we have stated above, the critical issue in this appeal is whether the manner in which the Respondent was declared redundant was lawful. In considering this issue, we will look at the procedure adopted when the Respondent was declared redundant, including the failure to give notice of redundancy.

It has been canvassed on behalf of the Respondent that in declaring the Respondent redundant, the Appellant breached Section 26B of the Employment Act. Dr. SUMAILI argued that the provisions of Section 26 B are mandatory and failure to observe the same rendered the redundancy unlawful. In its judgment, the Court below found that Section 26 B was applicable and vitiated the redundancy on the ground that the Appellant breached these provisions of the law.

The Appellant on the other hand has argued that Section 26 B of the Employment Act did not apply to the Respondent because his employment was regulated by a written contract of employment. For this submission, the Appellant has relied on our decision in the case of **BARCLAYS BANK PLC VS ZAMBIA UNION OF FINANCIAL AND ALLIED WORKERS** (5).

From the documents produced in the Court below, it would appear that the Respondent's terms of employment were governed by a written contract. The conditions of service enjoyed by the Respondent have been produced on pages 53 to 68 of the record of appeal. The portion dealing with redundancy is Clause 22 on page 68. It is entitled **'Redundancy Payments.'** The section starts by outlining the formula to be used when calculating redundancy benefits. In paragraph 2 it is provided inter alia that:-

> **"The Company will comply with any necessary statutory requirements and take reasonable measures to minimize the impact of such redundancies as are deemed appropriate by the Company...."**

The last two paragraphs provide:

> **"3. The redundancy payment is in addition to the statutory terminal benefits and any other terminal benefits and gratuities. The redundancy payment will reduce by one fifth on each anniversary of an employee's birthday after 49 years of age.**

4. **The company will use its best endeavours, to place those employees who wish to continue in jobs with other employers."**

Our understanding of these conditions is that they do not divorce statutory requirements but instead incorporate them.

We have perused through the Employment Act. The only provision dealing with termination of employment by way of redundancy is Section 26 B. This is found in Part IV of the Act under the heading **'Oral Contracts of Service.'** Section 16 of Part IV States that, **'The provisions of this part shall apply to oral contracts.'** In our decision in the case of **BARCLAYS BANK ZAMBIA PLC VS ZAMBIA UNION OF FINANCIAL AND ALLIED WORKERS** (5) we held that Section 26B did not apply to written contracts. LEWANIKA, DCJ, as he then was stated; referring to Section 26 B, that:-

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

We still maintain that that is the correct position at law. We therefore uphold the Appellant's position on this point that Section 26B was not applicable in this case. This leaves Clause 22 of the Terms and Conditions for Non Unionized Employees to govern the redundancy of the Respondent.

Under Clause 22, the Appellant undertakes inter alia, to **'take reasonable measures to minimize the impact of such redundancies as are deemed appropriate..'** This means that redundancies are planned activities and the Appellant has an obligation to minimize the impact that such redundancies may have on employees. Being a planned activity, the employee needs to be prepared for the loss of a job. Reasonable measures which should be taken will inevitably include notices and consultations which are so vital to the planning process. Fairness and good faith demands that an employee should not be ambushed in a redundancy exercise because such an ambush would not mitigate the negative impact of a loss of a job. Instant loss of a job should be relegated to the realm of instant dismissal for erring employees or those who have misconducted themselves but even then, the grievance code is invoked and usually, the employee is put on notice through the grievance procedure. It is our view that the Appellant certainly did not honour its duty to minimize the impact of the redundancy on the Respondent contrary to the undertaking in the conditions of service. This, in our, view was a breach of its duty.

The Appellant has argued that failure to give notice of redundancy was not fatal because the Respondent was paid in lieu of notice. We did hold, in the case

of **ZCCM VS MATALE (3)** that payment in lieu of notice was a proper and lawful way of terminating employment since every contract of service is terminable by reasonable notice. In that case, we were referring to an ordinary notice to terminate a contract of service. Ordinary termination of a contract of service by notice cannot be equated to a notice of redundancy. Redundancy, as we have stated above is planned, with clear and transparent selection procedures. To accept that a payment in lieu of notice would suffice in a redundancy would be to negate the whole process of planning and consultation which an employer has to engage in, in order to take effect redundancies. The conditions of service in this case do not make provision for a redundancy to be effected through payment in lieu of notice when there has been no consultation.

The judgment of the Court below shows that the Court went behind the redundancy and came up with the conclusion that the termination of the Respondent's employment was done in bad faith. We do not fault the trial Court for arriving at this conclusion. The events leading to the termination of the Respondent's employment laid bare, the true intention of the Appellant, through the General Manager, to get rid of the Respondent. It is clear from the e-mails from the General Manager that he took great exception to the encounter

between the Respondent and Mr. SRINIVASAN. He even questioned the competence of the Respondent. The final act, of stopping the Respondent from attending the Company Christmas party, clearly demonstrated that the Respondent had fallen out of favour of the General Manager. Instead of invoking the Grievance Code; or even invoking the ordinary termination procedure; the easy way out for the Appellant was to shove the Respondent into an ongoing redundancy exercise and terminate his services with immediate effect. These events clearly show that this was not an ordinary termination of employment and the Appellant cannot hide its bad faith even under normal termination of employment by notice or payment in lieu of notice. We therefore hold that the Respondents employment was wrongfully, terminated.

Regarding the fourth ground of appeal, whereby the Appellant is contending with the lower Court's decision to award the Respondent 24 months compensation for loss of employment, various authorities including those cited to us show that a Court can, depending on the facts of each case, award compensation for loss of employment. It has been argued by the Appellant, that as at the time of trial, the Respondent had found another job and that the job situation had tremendously improved in our jurisdiction. The Respondent does

not share this view. Dr. SUMAILI argued that even as at now, university graduates are roaming the streets jobless.

When awarding damages for loss of employment, we are always mindful that the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, depending on the circumstances of each particular case, we have awarded more than the common law damages as compensation for loss of employment. A case in point is the **CHITOMFWA VS NDOLA LIME COMPANY (7)** referred to us by the Appellant. We have considered the portion of the judgment of the Court below when it awarded 24 months pay as damages to the Respondent. There is no indication in the judgment as to the consideration it took into account to arrive at the 24 months pay save for a reference to ***'abrupt loss of employment.'***

With regard to the submissions by the parties on the job situation in the country, we are not in a position to state whether that situation has improved. From the record however, it is clear that at the time of giving evidence, the Respondent had found a job. We are alive to the fact in the **CHITOMFWA** case, the rationale for awarding two years salary as damages was due to the Appellant's grim future job prospects. We are of the view that when each case is

considered on its own merit, future job prospects may not be the only consideration for enhanced damages in wrongful or unlawful dismissals.

As we have stated above, it would appear that in this case, the Respondent was compensated for ***'abrupt loss of a job.'*** We are not inclined to interfere with this award because we wish to underline the indignation we share with the lower court in the harsh and inhuman manner in which the Respondent was treated. Like the lower Court, we do not believe the Appellant's story that the event at TAP had nothing to do with the Respondent's alleged redundancy. If anything, the Appellant was completely oblivious to the Respondent's feelings on the alleged racist slurs in his encounter with Mr. SRINIVASAN. Instead of following up the matter with the said Mr. SRINIVASAN, the Appellants looked for an excuse to terminate the Respondent's employment. Hapless and weak employees like the Respondent need to be protected from the whims and caprices of powerful elements in large conglomerates such as the Appellant, who might be tempted to use their positions to antagonize employees.

On the award of 6 months' salary as compensation for embarrassment, physical and mental torture, we are mindful that in a proper case, damages for loss of employment may be awarded for embarrassment and mental torture. We

held, in the case of **ATTORNEY-GENERAL VS MPUNDU (14)** that damages for mental distress and inconvenience may be recovered in an action for breach of contract. In that case, the Respondent claimed damages for mental distress and inconvenience suffered as a result of unlawful suspension from employment. The Court awarded him damages after accepting that the Respondent had suffered some mental distress and inconvenience as a result of the wrongful termination.

We are of the view, however, that such an award for torture or mental distress should be granted in exceptional cases and certainly, not in a case where more than the normal measure of common law damages have been awarded; the rationale being that the enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of the job. In the circumstances of this case, where the Respondent admitted that he was already in employment, no exceptional circumstances could arise to justify an award of a further 6 months pay as damages. The fifth ground of appeal therefore succeeds. We hereby set aside the award of six months pay granted by the lower Court.

From the foregoing, three out of the five grounds of appeal have failed. In the net result the appeal is dismissed. In the circumstances of this case, in which we have found that the Respondent's employment was wrongfully terminated through redundancy, we award costs to the Respondent, to be taxed in default of agreement.

I.C. Mambilima
DEPUTY CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

M.S. Mwanamwambwa
SUPREME COURT JUDGE