IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 30/2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LLOYD NYIRENDA **APPELLANT**

AND

GRACE MINISTRIES MISSION INTERNATIONAL RESPONDENT

CORAM: **Mulongoti, Sichinga and Ngulube, JJA**

On 26th September, 2018 and 29th November,2018

For the Appellant: *Ms. I. Nambule, of Sharpe & Howard Legal Practitioners*

For the Respondent: *Mr. T. Chali, of HH Ndhlovu & Co.*

J U D G M E N T

MULONGOTI,JA, delivered the Judgment of the Court

Cases referred to:

1. **Western Excavating (ECC) Limited v Sharp (1978) IRLR**
2. **Chilanga Cement v Kasote Singogo SCZ No. 13 of 2009**
3. **Kitwe City Council v William Ng'uni (2005) ZR 57 (SC)**
4. **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party (1978) ZR 388 (HC)**

5. **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Geoffrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia, The Attorney General (2005) Z.R. 138 (SC)**
6. **Nkhata and four others v the Attorney General (1966) ZR 124**
7. **James v Smith (1891) 1 Ch 384**

Legislation referred to:

1. **Societies Act, Chapter 119 of the Laws of Zambia**

Works referred to

1. **Employment Law in Zambia Cases and Materials Revised Edition (2011) UNZA Press by W.S. Mwenda**
2. **Odger's Principles of Pleading and Practice, 22nd Edition, Stevens and Sons, D.B. Casson (editor)**
3. **Macgregor on Damages, 18th edition, Sweet & Maxwell (2009)**

This is an appeal against the decision of the High Court Industrial Relations Division which dismissed almost all of the appellant's claims against the respondent. Briefly the facts are that the appellant was employed by the respondent as a Pastor in 1999. He later rose to the rank of Reverend.

He served at Lubuto Mission Centre, Ndola from 1999 to 2001, High Praise Centre, Kafue from 2001 to 2007, then Jubilee Centre Overspill, Lusaka until 2012 when he was transferred by letter dated 9th November, 2012. The letter stated that the transfer would be effective 18th November, 2012 and that he had been placed on

working leave effective the same date of 18th November, 2012. The leave was supposed to go up to the first quarter of 2013 to enable the respondent deploy him to another centre.

On 25th March, 2014, the appellant was asked to pick a centre. He chose Chawama but this was not accepted by the respondent. On 13th May, 2014, the respondent wrote to the appellant requesting him to pick a new centre by end of June, 2014 failing which the respondent would do so.

The appellant also alleged that he was not receiving his salary and allowances during that period. So he engaged the Labour Office and a meeting was called. The parties agreed for the respondent to pay the appellant his dues and housing allowance in the sum of K8,800.00. On 4th January, 2015, the appellant was paid K4000.00 and on 22nd April, 2015, he was paid K1,000.00 totaling K5,000.00 and leaving a balance of K3,800.00.

Meanwhile on 26th March, 2015, the appellant was assigned/transferred to Lundazi Mission Centre in Eastern Province with effect from 1st May, 2015.

On 30th April, 2015, the appellant through a letter to the respondent declined to take up the assignment to Lundazi because he was not consulted and as a Reverend who had served for 16 years he could not be sent to a rural centre. He asked the respondent to reconsider its decision but to no avail.

The appellant then filed a Complaint against the respondent in the Industrial Relations Division of the High Court seeking the following reliefs-

1. *a declaration that he was constructively dismissed;*
2. *payment of net monthly salary of K5,000.00;*
3. *payment of the following allowances:*
    i. *housing -K1,000.00 per month*
    ii. *electricity – K200.00 per month*
    iii. *water - K300.00 per month*
    iv. *transport K200.00 per week*
    v. *talk time K200.00 per month*
    vi. *medical – K300.00 for each family member per month*
    vii. *annual leave at 2.0 days per month*
    viii. *Education allowance;*
4. *Damages for shock, mental torture and anguish;*
5. *Payment of salary in lieu of notice.*

The respondent filed an Answer and affidavit in support. The respondent averred that the appellant was not constructively

dismissed and that he was not entitled to the reliefs sought as he was paid all his salaries.

After analyzing the affidavit evidence the trial court found that the:-

1. *Claim for constructive dismissal failed as he had not resigned.*
2. *Appellant was entitled to salary arrears of K3,800.00 only which the parties agreed to*
3. *Claim for damages was dismissed because no evidence was provided.*
4. *Claim for payment of salary in lieu of notice was dismissed as the appellant was neither dismissed nor did he resign.*
5. *Each party ordered to pay own costs.*

Dissatisfied the appellant launched an appeal before this Court on the following grounds:

1. ***The learned court below misdirected itself on a point of law and fact when it dismissed the Complainant's claim for constructive dismissal and when it failed to award the Complainant's claim for payment in lieu of notice.***
2. ***The court below erred in law and fact when it found that the Complainant was transferred to Lundazi Mission and that he refused to take up the transfer. The court below did not take cognizance of the evidence before it which proves that the complainant who is a senior member of the respondent organisation should have been consulted before a decision to***

transfer him to a mission centre in remote areas could be arrived at.

3. ***The court below erred in law and fact when it held that salary arrears of K8,800.00 were agreed upon and the respondent have since paid the sum of K5,000.00 towards the said salary arrears leaving a balance of K3,800.00 as at 22nd April, 2015 when the complainant has never been paid a salary from 9th November, 2012 when he was placed on working leave to date.***
4. ***The court below erred in law and fact when it held that the complainant's claims for shock, mental torture and anguish are frivolous.***

The appellant through his counsel also filed heads of argument. It was argued in relation to ground one that constructive dismissal is a common law remedy whose roots are founded on the behaviour of the employer's ill treatment of an employee. Learned counsel submitted that according to the Zambian authoritative text on employment law, **Employment Law in Zambia Cases and Materials Revised Edition (2011) UNZA Press by W.S. Mwenda**, constructive dismissal arises when the employer through his behaviour makes the working environment so uncomfortable for the employee that it is impossible for the employee to continue working. Quoting Lord Denning, in the celebrated case of **Western Excavating (ECC) Limited v Sharp**[1] that:-

> ***"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 employer's 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."***

It is argued that the appellant was placed on *"working leave"* without the respondent explaining what working leave is for a person employed as a Pastor.

According to counsel, the respondent's behaviour of not inviting the appellant to the meeting of overseers mentioned in the letter of transfer dated 9th November, 2012, in which meeting a decision to place him on *"working leave"* was arrived at, is behaviour which no reasonable employee would be able to accommodate. Thus, the trial court erred when it dismissed the claim for damages for constructive dismissal.

In ground two it is argued that every time the appellant was transferred a consultative meeting was held. However, this was not done for the Lundazi transfer, a rural area normally given to junior pastors. This behaviour by the respondent was not only legally flawed but was so unreasonable that it destroyed the trust and confidence of the appellant. The trial court failed to take cognizance of this evidence and instead found that he refused to take up the transfer. It is argued that the important consideration was that he was not consulted.

In ground three it is argued that the appellant had entitlements such as housing allowance, electricity and water allowances which were never paid to him. The respondent committed to paying the salary arrears. Thus, the court erred when it held that he was only entitled to K3,800.00.

In ground four it is contended that the appellant is entitled to damages for shock, mental torture and anguish as held in a plethora of cases like **Chilanga Cement Plc v Kasote Singogo**[2].

The respondent filed its heads of argument in response. In ground one counsel contends that the appellant has argued that being

placed on working leave is what amounted to constructive dismissal. Yet in ground two, he argues that the transfer to Lundazi is what constitutes constructive dismissal.

According to counsel this is wrong because as correctly held by the court below in a case of constructive dismissal the employee must leave employment promptly or by notice which the appellant never did. The court below correctly held that the employee must resign and walk out to qualify for constructive dismissal.

Learned counsel quoted at length what the Supreme Court stated in **Chilanga Cement PLC v Kasote Singogo**[2] as follows:

> *"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 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.*
>
> *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 v Sharp (3). 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 v Goldstone (2), the Employment Appeal Tribunal came up with a test to be applied in determining whether an employee 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, Steven Anderman defined constructive dismissal as '..****where the employee resigns with or without giving notice****, in circumstances such as he is entitled to do without notice because of the conduct of the employer'. He alludes to the notion that the conduct of the employer forces an* ***employee to leave*** *amounted to a contractual repudiation. The employer renounces the terms of the contract as a whole...* ***it is the employee who makes the decision to leave****."*

And in **Kitwe City Council v William Ng'uni**[3] where it was held that the test for constructive dismissal is whether or not the employer's conduct amounts to breach of contract which entitles an employee to resign. Counsel concluded that in *casu,* the record shows that the appellant is still an employee of the respondent.

In ground two, it is argued that the appellant framed this ground to suggest that he was not consulted before being transferred to Lundazi and that it is for this very reason that he refused to take up the transfer to Lundazi.

It is the further submission of counsel that the appellant worked in various churches and yet he failed to prove that he was consulted before being transferred.

Learned counsel amplified that as the appellant rightly stated in his letter, of 30th April, 2015, Lundazi is a rural area with underprivileged people. This is why the respondent church was established there, to reach out to the underprivileged in society. The appellant, willingly, and on his own volition joined the respondent church thereby accepting to work with the poor in rural areas.

The respondent being registered under the **Societies Act,** is a club. As such members who do not like the rules of the club must leave and form their own as held by the courts in several cases.

Furthermore, that in the case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party**[5] it was held that an unincorporated body is not a legal entity and is therefore not capable of suing or being sued in its name. It could only sue and be sued in a representative capacity.

It is the further submission of counsel that clause 4.6 of the respondent's conditions of service for staff, states that ***"The presiding Bishop with council of overseers may, where necessary, and reasonably disengage, transfer, any pastoral staff provided that the affected staff would have been informed of the decision"***

According to counsel the clause does not state that the pastoral staff should be consulted, but rather that they should be informed of the decision to transfer them.

According to counsel, the evidence reveals that in the letter of 2nd April, 2015, the respondent categorically stated that the presiding bishop wanted to meet the appellant in person in January, 2015 as he went to collect his money (K4,000.00) so he could inform him of the decision to transfer him to Lundazi, but the appellant did not avail himself. Yet the Bishop personally phoned him in January, 2015 and insisted that the two meet as he collected the money from his office.

In ground three it is argued that the record clearly states that Pastors are not paid by the respondent church at headquarters but are paid by their local churches at which they preach. The

court, is bound to consider what is claimed as stated in the Complaint.

The appellant argues that he had an engagement letter of employment which entitled him to the conditions of service outlined in the Complaint. And that the letter of engagement is in the custody of the respondent. However, the respondent did not take out of court a notice to produce or any other Court order compelling the respondent to produce the said letter of engagement to prove that the said letter exists and contains the conditions as claimed. He therefore failed to prove his claim.

The court below ordered the respondent to pay the appellant only K3,800.00 which has been paid.

In relation to ground four, the respondent's counsel argued that the appellant has failed to prove that he suffered shock and mental torture.

The respondent's counsel also submitted that when filing the amended record of appeal, the appellant filed a supplementary heads of argument, which was procedurally wrong. According to

payment of a living allowance, and not a salary, is the responsibility of a mission centre or local church. As stated in the letter for working leave the headquarters undertook the responsibility to pay the appellant's accommodation and stipend while on working leave. He was to be paid a stipend of K500.00 monthly only up to June, 2014.

It was argued further that it is trite that this honourable court can only adjudicate on what has been pleaded. In **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Geoffrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia, The Attorney General**[5], it was held that the function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

The appellant, who was represented by counsel, took out a complaint in the court below on 23rd June, 2015 with totally different figures and periods. Even in the heads of argument, the appellant relies on the figures and periods in the Complaint. This

court, is bound to consider what is claimed as stated in the Complaint.

The appellant argues that he had an engagement letter of employment which entitled him to the conditions of service outlined in the Complaint. And that the letter of engagement is in the custody of the respondent. However, the respondent did not take out of court a notice to produce or any other Court order compelling the respondent to produce the said letter of engagement to prove that the said letter exists and contains the conditions as claimed. He therefore failed to prove his claim.

The court below ordered the respondent to pay the appellant only K3,800.00 which has been paid.

In relation to ground four, the respondent's counsel argued that the appellant has failed to prove that he suffered shock and mental torture.

The respondent's counsel also submitted that when filing the amended record of appeal, the appellant filed a supplementary heads of argument, which was procedurally wrong. According to

Mr. Chali, after leave of court was granted to file an amended record of appeal, leave to amend the heads of argument was impliedly given and there was no need to file a supplementary heads of argument with new grounds. For that reason we were urged to strike out the supplementary heads of argument.

In closing his submission Mr. Chali urged us not to entertain the appeal as the matter was statute barred *ab intio*. Having been filed outside the ninety day period from the date of the cause of action. Therefore, the court below had no jurisdiction to hear it.

At the hearing of the appeal Ms. Nambule, who appeared for the appellant relied on the appellant's heads of argument. She briefly augmented that the threshold for constructive dismissal is that an employee need not give notice but can stay away from work and qualify for constructive dismissal. She also contended that no new grounds were introduced in the supplementary heads of argument.

We have considered the arguments and submissions by counsel. We will consider the grounds of appeal in the memorandum. The pertinent issue this appeal raises is whether the appellant was constructively dismissed. We agree with both counsel on the

position of the law on constructive dismissal as stated in the case of **Western Excavating (ECC) Limited v. Sharp**[1] which was followed in our jurisdiction in **Chilanga Cement v Kasote**[2] **Singogo and Kitwe City Council v William Nguni**[3] that the employee must resign or give notice to resign on account of the employer's conduct. According to Selwyn's Law of Employment;

> ***"Since the employee is claiming that the employer has broken the contract, he must resign as a result of that breach..if he continues to report for work, he may be deemed to have waived the breach, and can hardly bring a claim subsequently based on the employer's repudiation, for the law does not allow him to have his cake and eat it."***

The learned authors of **Halsbury's Laws of England, 4th edition** reissue, vol. 16 at paragraph 321 put it this way:

> ***"An employee who terminates the contract of employment, with or without notice may still claim to have been dismissed if the circumstances are such that he is entitled to terminate it without notice by reason of the employer's conduct. The employee must leave in response to the breach of contract and indicate that he is treating the contract as repudiated. Delay in so doing may amount to waiver of breach and affirmation of the contract, though this will depend on the facts of the case, and a realistic approach must be taken, so that it may be reasonable for the employee to work for a period under protest, especially if trying to resolve the matter without leaving."***

Thus, constructive dismissal occurs where an employee terminates their employment or gives notice to terminate in response to their employer's treatment of them. The treatment may have been bad but the employee must have resigned or given notice, for constructive dismissal to apply.

In *casu* the appellant neither resigned nor did he give notice to resign. The court below was on firm ground in holding that the claim for constructive dismissal cannot stand. We are also not impressed by the claim for notice pay, as no notice to terminate was given by the respondent nor did they terminate, without notice, the notice in lieu of payment clause in the contract could therefore not be invoked. The appellant is still an employee. He only sued to recover money owed to him. He equally did not stop reporting for work but was simply transferred. We find no merit in the appellant's counsel's arguments in ground one.

Ground one therefore lacks merit and is dismissed.

Regarding ground two, we are inclined to agree with Mr. Chali's argument that the appellant failed to prove that he should have been consulted before he was dismissed. As submitted by Mr.

Chali, clause 4.6 of the conditions of service provided that the pastoral staff are to be informed of the decision to transfer them, it does not state that he should be consulted. There is also no evidence that transfers to rural areas are for newly trained pastors. The appellant failed to choose a new centre as he had been asked after his preferred centre Chawama was refused by the respondent, per letter dated 13th May, 2014. The respondent made it clear in that letter that it would place him anywhere and so it did by transferring him to Lundazi. The appellant wrote to the respondent refusing to go to Lundazi. The Court below was therefore on firm ground in finding that appellant refused to go to Lundazi.

This finding of fact cannot easily be reversed. It is trite that an appellate court can only do so where findings of a trial court are perverse or not supported by the evidence. This was elucidated in the case of **Nkhata and four others v the Attorney General**[6] that:

> ***"A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:***
> ***(a) by reason of some non-direction or otherwise the judge erred in accepting the evidence which he did accept; or***
> ***(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into***

account, or failed to take account of some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

Since the finding that he refused the transfer to Lundazi is supported by evidence, we cannot reverse this finding of fact by the trial court in the manner suggested by the appellant.

Ground two lacks merit and is dismissed.

We have noted the respondent's counsel's argument in ground two about the respondent being sued in a representative capacity. We note that this is being raised wrongly in ground two of the appeal. There is no cross appeal by the respondent. Be that as it may, we are of the considered view that this is an anomaly which does not go to the root of the case and could have been rectified by amendment or substitution, of the party without the case being dismissed.

We now turn to ground three that the court below erred when it did not order payment of salary arrears. It is a fact that the appellant was placed on working leave. When one is on leave, ordinarily, they are entitled to their pay in full. We are therefore, inclined to hold that during the period he was on working leave, the appellant was entitled to his monthly pay which he was getting while at his last station before the transfer.

The respondent did not dispute that he was entitled to monthly pay from the local church. Therefore, he should be paid from 18th November, 2012, when he was placed on working leave to April, 2015, when he was transferred to Lundazi and he rejected. The evidence was that he was getting K3,000.00 per month but after meetings at labour office it was agreed at K2,050.00 per month as deposed in the appellant's affidavit in support. In its Answer the respondent simply averred that he was paid his salaries. The appellant also deposed that it was during the labour meetings that housing allowance was agreed to be paid at K8,800.00 out of which K5,000.00 had been paid leaving a balance of K3,800.00 which the trial court ordered the respondent to pay. As argued by the appellant the respondent agreed to pay after meetings at labour.

Not only that the various documents and even the Answer and the respondent's counsel's arguments allude to the fact that the appellant was entitled to a monthly salary paid by the local church.

He should, therefore, be paid arrears at K2,050.00 per month from 18th November, 2012 to April, 2015 when he rejected the Lundazi transfer. He is not entitled to payment after that date. We have found merit in the claim for salary arrears, because after the appellant placed him on working leave, initially, they said he would be posted to a new centre by the first quarter of 2013 but they failed to do so. Then later he was asked to find a centre. He suggested Chawama which they refused until they transferred him to Lundazi on 26th March, 2015 which transfer he rejected in April 2015.

Regarding the other allowances, we find that these were not proved. The conditions of service, exhibited at page 81 of the record of appeal show that he was entitled to the allowances, when funds were available per clause 13. Ground three is therefore, partially successful. The monthly pay arrears be paid with interest at short term deposit rate from date of complaint to date of this judgment and thereafter at Bank of Zambia lending rate till payment in full.

The monthly stipend of K500.00 paid to him up to June 2014 or for whatever period, should be deducted from the amount due as arrears.

We are inclined to dismiss ground four as the appellant failed to prove that he suffered the damages. According to **Macgregor on Damages, 18th edition, sweet & Maxwell at page 3**

> ***"Damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort of a breach of contract, the compensation being in the form of a lump sum and awarded at one time, unconditionally and in sterling."***
>
> ***At page 12***
>
> ***"Before damages can be recovered in an action there must be a wrong committed, whether the wrong be a tort or breach of contract (or today, exceptionally, a breach of human rights."***

The appellant claims that he was embarrassed because he was placed on working leave. His engagement was not terminated. He is still a Pastor in the respondent's church. We note that actually the appellant had no problem with being placed on working leave but was aggrieved because he was sent to a rural centre.

We are of the considered view that there is no basis for granting these damages. He adduced no evidence that he had been ridiculed

in the manner suggested. The trial court was on firm ground that the claim for damages was unsubstantiated. Ground four equally lacks merit and is dismissed.

Before we leave this appeal, we wish to address the argument by Mr. Chali that the matter is statute barred and as such we have no jurisdiction to hear it.

We note that the issue is being raised for the first time on appeal. There is even no cross appeal. However, it being on a point of law, we shall consider it. In the English case of **James v Smith**[7] it was held that the objection that an action is brought too late must be raised by a special plea, even though it appears on the face of the statement of claim. According to **Odger's Principles of Pleading and Practice 22nd edition at page 186,** the defendant must specifically plead the Limitation Act and that this is a special defence.

In *casu*, the respondent did not plead or raise this defence in its Answer in the court below. This could have also been raised as a preliminary issue in the court below before trial. By so doing, the

appellant would have been availed an opportunity to respond to the defence that the action is barred by the Statute of Limitation. We are of the considered view that the respondent having failed to raise this defence, is considered to have waived its right. Therefore, the matter was properly heard and determined by the court below and is properly before us.

The appeal only having partially succeeded in part in ground three, we order each party to bear own costs in this court and the court below.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE