JAMES NYASULU AND OTHERS
v
KONKOLA COPPER MINES PLC
ENVIORNMENTAL COUNCIL OF ZAMBIA
CHINGOLA MUNICIPAL COUNCIL

HIGH COURT
MUSONDA, J.
10th November,2011
2007/HP/1286

[1] Tort - Negligence - Whether the defendants were negligent.

This action was initiated by 2000 plaintiffs who are residents in Chingola, and whose source of water is a stream in which the first defendant was discharging affluence from its mining operations.

Held:

1. There is a distinction between negligence where something escapes and does harm. And product liability where a product for consumption is released on the market and does harm.

2. There was gross recklessness, regardless whether human beings died or not. The residents of Chingola were deprived the right to life, which is a fundamental right in the Constitution.

3. The defendants disregarded environmental legislation at the time when there is concerted international effort, especially by the United Nations Environmental Program (UNEP) to protect the environment. Such disregard for human life was received by the Court with a sense of outrage.

4. The 1st defendant must bear moral, criminal, and civil liability for the appalling tragedy.

5. Courts have a duty o protect poor communities from the powerful, and politically correct.

Cases referred to:

1. Blyth v Birmingham Waterworks [1856] II Ex Ch. 781.
2. Rylands v Fletcher [1868] L.R. 3 H.C. 330.
3. Donoghue v Stevenson [1932] A.C. 562.
4. Greeman v Yuba Power Products 59 cal 257 [1963].
5. Alphawell Limited v Woodward [1972] A.C. 824.
6. Cambridge Water Company Limited v Eastern Countries Leather PLC [1993] ABC CR 12/09.

7. Continental Restaurant and Casino Limited v Chulu (2000) Z.R. 128.
8. Sata v Zambia Bottlers Limited (2003) Z.R. 1.
9. Galaunia Farms Limited v National Milling Corporation Limited (2004) Z.R. 1.

Legislation referred to:

1. Environmental Protection and Pollution Control cap 204 ss 22 and 24.
2 . Mines and Minerals Development Act No 7 of 2008, Regulation 23 (2) and 14.

K.F. Bwalya of Messrs KBF and Partners for the plaintiffs.
A. Chewe of Messrs MNB Legal Practitioners for the 1st defendant.
I.Z. Mbewe of Messrs Bemvi Legal Practitioners for 2nd defendant.
M. Chibangula of Messrs A.M.C Legal Practitioners for the 3rd defendant

MUSONDA J.: This was an action by 2000, plaintiffs who were residents of Chingola, whose source of water was a stream in which the first defendant was discharging the affluence from its mining operations. The second and third defendants were repositories of statutory duties. The second defendant it is alleged failed or neglected to carry out inspection or supervise the pipes in question, regularly to meet the required acceptable standards, and ensure that no leakage or spillage occurred.

The third defendant failed to take adequate measures to mitigate and control the effects of the pollution of water supply by maintaining sufficient water reserves. This caused great pain and suffering to the plaintiffs as the local authority collects huge amounts of rates from the first defendant which benefit the plaintiffs must enjoy.

On 13th December 2010, when the matter came up for trial, Mr. Chibangula in cross-examination of PW1, the witness stated that Chingola Municipal Council is not a supplier of water to Mulonga Water, which was a limited company. Mr. Chiteba graciously conceded. The Court disjoined the third defendant. The action therefore is against the first and second defendants.

PW1 was Daison Mulenga a retired miner. He testified that in November, 2006, there was no water supply for ten days in Kabundi. Mulonga Water, supplied them with water pumped from Kafue River. When he inquired from Mulonga Water, he was told that they had shut out water because of pollution which was caused by KCM. He had stomach pains and diarhorrea and chest pains when he drank the water and his sight was affected. He went to Nchanga Health Centre where the doctor prescribed Buscopan and he went back home. Later government set up a committee which recommended compensation which has not been paid. There was no medical report given and when he asked, he was told it was a company document, and he was not entitled to it as of right.

The evidence as laid by PW2 (plaintiff) was that sometime in November 2006, but before the 6th, when water was switched off there was a foul smell. When the water was boiled there were bubbles which could not go away when cooled. It was later realized that the water was contaminated by the first defendant. They were not informed by the third defendant why the water was stopped.

They relied on boreholes. When the witness travelled to Chililabombwe, he noticed that the stones had changed colour, which change was caused by oxides. When he and his family drank the water, they suffered from diarhorrea. The family received treatment from the clinic. He was not given a medical report. The water was used for cooking, drinking, and bathing. The fish in the Kafue River was dying. The witness had worked for KCM as a geological assistant for 34 years.

PW3 was Siku Nkambalume. He testified that in November, 2006, he went to the field. His wife went to draw water from Kafue River for cooking, bathing, and drinking. The following day he felt pain in his stomach and had a running stomach, including the children. He went to Kakoswe Clinic in Chililabombwe. He was later informed by Dr. Kabungo of Kakoso Clinic that the water was polluted. He was given white, orange tablets and oral dehydration salts. He however continued experiencing pain in the stomach. The clinic refused to give him a medical report. The medical staff told him they could be dismissed if they gave him a medical report.

PW4 was Davies Mponesha, a peasant farmer. He testified that he went to the field with his wife. The water tasted bitter, which was drawn
for drinking and cooking. When they went to the river, they found stones and reeds had changed their colour. He later had diarhorrea, vomiting and a running stomach. He was taken to Kakoswe Clinic. He was treated, but the hospital staff refused to give him a medical report as they feared to be dismissed.

PW5 was George Mumbi, currently a farmer, who worked for KCM in the analytical laboratory for 31 years. His duties were to analyze chemical, qualitative, quantitative and mineral analysis. It meant proving the quality of the chemical, or a particular mineral in the sample. In his opinion water fit for human consumption should contain 6.9 7.3 acidic or alkaline and is characterized as neutral. When pollution monitors are triggered, and the PH is low you add lime. In his opinion there was gross negligence to the environment to run operations without lime. When that happened in ZCCM and NCCM days, the Tailing Leach Plant and the Concentrator were shut to avoid damage to the environment and health. The fish and other marines died, crocodiles escaped. The first defendant was responsible.

PW6 was John Lungu, a professor in the Business School. He is a researcher in economics of public choice, that is the weighing of benefits and negatives of an economic activity. Pollution is termed as a negative externality. The pollution affected a number of people. The Environmental Council of Zambia did intervene, so did the Chingola Municipal Council. Some people suffered from skin diseases and diarhorrea. KCM continued producing their copper when people could not draw water or catch fish. Mulonga shut their operations for six days and the community was buying water. The first and second defendant's counsel did not cross-examine him.

PW7 was James Nyasulu a poultry farmer. He testified that due to pollution water was cut off from the service provider close to ten days and in some areas six days. The water was contaminated with mine affluence. He consumed the water and fell ill. Other consumers of this water were admitted to Konkola Hospital. He mentioned the names as Nora Kalosa, Siku Nkombalume, Thomas Kabaso, and

Teresa Mulenga. Later, a meeting was convened and the two thousand people decided to sue. That was the plaintiff's case.

DW1 was Assa Mulenga a Plant Manager Tailing Dam. He holds a BSC in Electrical and Mechanical Engineering. He has worked for ZCCM since 2007, meaning when the pollution took place he was not in employment. He gave evidence as to the current procedure of treating affluence. He admitted in cross-examination that he could not speak as an eye witness of the 2006 pollution when he was employed in 2007.

DW2 was Moses Munkondya, the environmental co-ordinator. He has worked for KCM since 2004. He worked with ZCCM in the geology department, later switched jobs and went into environmental management. He worked as an environmental officer until 2004, and in 2005, he was promoted as environmental co-ordinator for Nchanga and Chingola. In 2008, he was moved to corporate mining Head Office.

He is a craftsman in survey drafting from Copperbelt University. He manages waste air quality, he monitors resource conservation. He testified that on 6th November, 2006, there was a rupture of Mtimpa tailing pipeline number 3 near Mwaiseni trading area at final discharge point. There was little discharge and investigations were launched. The company discovered this within a few hours. The plant was shut as the first step to quickly stop the discharge. The material in the pipe was acidic and lime was mobilized and a team to fight pollution. Lime was added at strategic points.

He said it was unlikely that the affluence got into people's taps because they neutralized and copper sulphate was formed, blue in colour. He went on that they were operating on exempted parameters from Environmental Council of Zambia.

DW3 was Joseph Sakala, who was Environmental Council of Zambia Manager Inspectorate at the time. He holds a BSC in chemistry and post-graduate in management. On 6th November, 2006, he got a call that there was pollution of Kafue River. He rang his officers to go and check. The pollution occurred on the hill. It was flowing into Chingola. The Regulations say lower acid must be discharged. In this case it was 2.8 which was very acidic. From October the discharge had been highly acidic. He reported to his Director who wrote to the first defendant to cease operations. They had allowed Chililabombwe which was dewatering three million litres per day an allowance from 100 mg to 154 mg per litre, but for Chingola it still remained at 100 mg per litre. The witness gave allowable figures, dissolved sulphate between 6 9, 1,500 mg per litre copper, total manganese 1 mg, cobalt 1 mg, total suspended mg, iron 2 mg, sulphate 3,000 mg per litre.

Any excess of these levels will cause harm to fish, frogs, crocodiles, hippos, aquatic plants, and will harm people who use the water for drinking, washing, and agricultural purposes. The structures in the river, like boats, bridges, pipes may be corroded. On 6th November, 2006, what was found was beyond the statutory provision. The fish was dying and some people ate that fish. The water was bluish and greenish and along the edges there were precipitates of copper sulphate.

The water had contaminants beyond these limits. The Environmental Council had written to KCM, this is why they shortened the licence from one year to six months. Documentary evidence was produced without objection.

In cross examination the defence witness stated that the discharge was 6-9. The company had low stocks of lime, but continued discharging highly acidic substances in the environment. Other mines had no problem with the supply of lime. He went on that KCM, Ndola lime, non-ferrous metals of China were not compliant. They were supposed to be submitting samples of affluence every week. The Environmental Council did not receive the results. They therefore put these companies on monthly scrutiny. That was the defence's case.

It was submitted for the plaintiffs relying on the lead case in negligence Donoghue v Stevenson(3), in which Lord Atkin stated that:

"....you must take reasonable care to avoid acts or omissions which you can reasonably forsee would likely to injure your neighbour. Who, then, in law, is your neighbor?. The answer seems to be persons who are closely and directly affected by your act, that you ought reasonably to have them in your contemplation to be affected, when you are directing your mind to the acts or omissions that are called in question"

It was argued that the standard of care demanded by the law is that of a reasonable man and not of perfection. In the case of Blyth v Birmingham Waterworks(1) it was stated that:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. The standard demanded is thus not of perfection but of reasonableness. It is an objective standard taking no account of the defendant's incompetence he may do the best he can and still be found to be negligent."

In the case of Sata v Zambia Bottlers Limited(8), the Court said:

"For the plaintiff to be entitled to damages in the tort of negligence, it has to be established that he or she has suffered some injury, failure to which

damages will not be awarded."

Plaintiffs like in this case must have actually consumed the drink and in consequence suffered injury to succeed.

In the case of Continental Restaurant and Casino Limited v Chulu (7). The Court reiterated the fact that the plaintiff has a duty to bring credible evidence. It was Mr. Bwalya's submission that the plaintiffs have in fact credible evidence, proving that they did consume contaminated water and that they did get sick, as well as suffer from various skin diseases, stomach pains, eye irritations and general nervous diseases.

He went on to cite the Mines and Minerals Development Regulations 2008, issued pursuant to the Mines and Minerals Development Act No. 7 of 2008. Regulation 23 (2) and (4) states that:

"The holder shall be liable for any harm or damage caused by any mining or mineral processing operation and shall compensate any person to whom harm or damage is caused"

Common law places a strict duty of care on any person who brings onto the land anything which can cause harm if it escapes. Lord Blackburn in Rylands v Fletcher(2) said:

"The true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and he is prima facie answerable for all the damage which is the natural consequence of its escape"

It was further submitted that, the first defendant committed an offence under Environmental Protection and Pollution Act chapter 204 of the laws of Zambia. Section 2 states that:

"No person may discharge or apply any provisions, toxic, erotic, obnoxious or obstructing matter, radiation or other pollutant or permit any person to dump or discharge such matter or pollutant into aquatic environment in contravention of the water pollution control standards established by the council under this part."

The Water Pollution Control Regulations 1993, issued pursuant to the Environmental Protection and Pollution Act chapter 204 of the laws of Zambia, pollutant is defined as:

"Any substance or energy which if it enters or is discharged into water may cause discomfort to or endanger the health, safety and welfare of persons or

may cause injury or damage to plant or animal life or property, or which may interfere unreasonably with the normal enjoyment of life, or property or conduct or business and those objects or substance as may obstruct or divert the natural flow of water course when discharged or dumped into it"

In this particular case, the pollution was done in the water and was consumed by the plaintiffs.

In the case of Alphacell Limited v Woodward(5), where the defendants were charged with causing polluted matter to enter a river contrary to Section 2 of the Rivers (Prevention of Pollution) Act 1951. The river had in fact been polluted because a pipe connected to the defendant's factory had been blocked, and the defendants had not been negligent, Lord Salmon stated:

"If this appeal succeeded and it were held to be the law that no conviction be obtained under the 1951 Act unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished, undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognized that as a matter of public policy this would be most unfortunate. Hence section 2 (1) (a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution, but to do everything possible to ensure that they do not cause it."

It was valiantly argued that this particular case is materially similar with the present case. This Court was urged to hold the first defendants liable so as to deter future pollutions of our rivers.

In respect of the second defendant, it was argued by Mr. Bwalya that, it was neglect of duty for the second defendant failed to prosecute the first defendant. The second defendant failed to enforce the conditions of the licence. They failed to protect the community.

For the first defendant, it was submitted that the failure of the first defendant's defence notwithstanding does not entitle the plaintiffs to judgment. The case of Galunia Farms Limited v National Milling Corporation Limited(9), it was argued that there was no duty owed. There was no failure to attain the standard of care prescribed by the law thereby committing a breach of such duty, that there should be damage. Mr. Chewe cited Sata v Zambia Bottlers Limited (supra), and Continental Restaurant and Casino Limited v Chulu (supra). These cases laid legal principles regarding the law of negligence, and these principles have already been dealt with.

It was submitted that the Court's business is not to engage in administrative functions of policing the operations of industry. The House of Lords in Cambridge Water Company Limited v Eastern Countries Leather PLC(6). Lord Golf said:

"It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind: and public bodies, both national and international, are taking steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for the damage to the environment for which he is responsible-as can be seen from World Health Organization, European Community and national legislation. But it does not follow from these developments, that a common law principle, such as the rule in Ryland v Fletcher (supra), should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for Courts to develop the common law principle to achieve the same end and indeed it may well be undesirable that they should go."

There were no submissions for the third defendant as they were disjoined from the proceedings.

Let me from the outset draw a distinction between negligence where something escapes and does harm. And product liability where a product for consumption is released on the market and does harm. These are too different concepts. The case of Greenman v Yuba Power Products(4), cited on behalf of the plaintiffs is out of context.

The plaintiffs had called victims of the pollution and expert evidence to show that there was pollution. This fact was admitted by DW2, and DW3, though DW2 wanted to marginalize the extent of the discharge. There was medical evidence consistent with the evidence see PP. 25-30 plaintiffs' bundle of documents. DW3 gave damning evidence of first defendant's negligence and absorbed second defendant who according to him had warned the first defendant, and punished the first defendant by not giving them a year's licence. They had been asked to provide analytical reports of their discharge,

but did not comply. The second defendant could therefore not be said to have failed to perform their statutory duty. There was serious failing by the first defendant, in that they employed an ill-qualified environmental coordinator 'a craftsman in survey drafting', not schooled in environmental protection. He was an incredible witness. They did not add lime to the discharge, when lime was abundant on the market, when they very well knew that, that act or omission would harm human and animal life and aquatic plants.

There was gross recklessness, whether human beings died or not. They deprived the community in Chingola the right to life, which is fundamental right in our constitution. They disregarded environmental legislation at a time, when there is concerted international effort especially by the United Nations Environmental Program (UNEP) to protect the environment. Such disregard for human life was received by this Court with a sense of outrage.

The first defendant must bare moral, criminal and civil liability for this appalling tragedy. Here is a multinational enterprise, which has no regard for human life for the sake of profit and turned the residents of Chingola into “guinea pigs” and showed no remorse. In their countries of origin such recklessness would have been visited by severe criminal and civil sanctions.

Mr. Chewe cited the case of Cambridge Water Company Limtied v Eastern Countries Leather PLC (supra). He seriously misunderstood the tenor of Lord Goff's judgment. All what Lord Goff was saying was that “environmental protection” is a global issue, that most countries have domestically legislated and as members of the United Nations have signed the United Nations protocols. There is little room for judicial intervention, judges now have to interpret statutory provisions. In this case sections 22 and 24, the former defines a pollutant, the later creates an offence to discharge or application of any poisonous toxic, erotoxic, obnoxious or obstructing matter etc.

It is my view that the Environmental Protection and Pollution Control Act chapter 204 the laws of Zambia is self-sufficient to deal with the present situation. The plaintiffs have proved their case against the first defendant in common law and statutory law, that the first defendant was reckless and had no regard for human, animal and plant life. The only hypothesis for a powerful multinational to supposedly act with impunity and immunity, is that they thought they were politically correct and connected. These Courts have a duty to protect poor communities from the powerful and politically connected. I agree with the plaintiffs' pleadings in paragraph eight of the statement of claim, that the first defendant was shielded from criminal prosecution by political connections and financial influence, which put them beyond the pale of criminal justice.

This very pleading explains the difficulty Environmental Council of Zambia as Governmental Agency not insulated from political control operate and operated under difficult circumstances. They did the best they could by shutting KCM operations. I therefore hold that the case against second defendant is not proved as I find no negligence on their part. They were dealing with a truant investor. In my view it is not too late to prosecute KCM and set an example. INDENI was prosecuted in Ndola Principal Resident Magistrate Court for polluting Kaloko Stream. why not KCM?.

I order KCM to pay four million kwacha (K4m) to each plaintiff (2000 plaintiffs) as general damages. One Million Kwacha (K1m) as punitive damages, total ten billion Kwacha (K10 billion). This is to deter others who may discharge poisonous substances without diminishing their potency not to cause harm to the environment, human beings, animals, etc. I reiterate that this was lack of corporate responsibility and criminal and a tipping point for corporate recklessness. Costs will follow the event. This judgment may appear to be investor unfriendly, but that is having a dim view to KCM's don't care attitude whether human life which sacrosanct in our Constitution was lost or not. International investors should observe high environmental standards, that is a global approach. Some nations like China even criminalize the bringing into their countries' obsolete technology.

The fact that the host country (Zambia) is in dire need of foreign investment to improve the well-being of its people, does not mean its people should be dehumanized by 'Greed and Crude Capitalism', which puts profit above human life. The damages will attract Bank of Zambia long-term deposit rate from the issuance of the writ to the day of judgment, thereafter short-term deposit rate until payment. Costs will be taxed in default of agreement.

Judgment for the plaintiffs.