

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

**2012/HP/1572**

**BETWEEN:**

**SILVESTER M SHIPOLO**

**AND**

**MASSTORES (PTY) LIMITED (MASS  
DISCOUNTERS ZAMBIA GAME)**

**CHARLES AKUN EGAN**



**PLAINTIFF**

**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**BEFORE HON. MRS. JUSTICE M.S MULENGA ON 10<sup>TH</sup> DAY OF JULY 2014**

FOR THE PLAINTIFF : IN PERSON  
FOR THE DEFENDANT : MR. P.K. CHIBUNDI – MESSRS CHIBUNDI & COMPANY

---

## **J U D G M E N T**

---

**Cases cited:**

1. Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172
2. Chilufya Kusensela vs Astridah Mvula Appeal no. 32 of 2011
3. Miller v Minister of Pensions [1947] 2All ER 372
4. E. Suffolk Rivers Cathment Board vs Kent [1941] AC 74.
5. Michael Chilufya Sata MP and Zambia Bottlers Limited (2003) ZR 1 (SC)
6. Donaghue v Stevenson [1932] AC 562

**Works referred to:**

1. Halsbury's Laws of England (2010) 5<sup>th</sup> Edition Volume 78
2. Clerk and Lindsell on Torts, 19<sup>th</sup> Edition, Sweet and Maxwell

This matter was commenced by way of Writ of Summons and Statement of Claim dated 21<sup>st</sup> December 2012 claiming the following reliefs:

- i. *Damages for negligence*

- ii. Aggravated damages for lack of remorse*
- iii. Any other relief the court may deem fit*
- iv. Costs.*

The Plaintiff states in his Statement of Claim that on 9<sup>th</sup> October 2012, he purchased slippers namely Reebok Coast Caliber, at the sum of K86,000.00 (now K86.00 in rebased currency) from the Defendant at its Game Stores at Manda Hill Lusaka. The slippers were purchased for the purposes of his travel to Uganda as part of the advance party on behalf of Football Association of Zambia (FAZ) in preparation of the AFCON qualifier games between Uganda and Zambia. That by reason of the said purchase, a simple contract was created by the Plaintiff and Defendant with the implied condition that the slippers were fit for the purpose.

That when the Plaintiff was at the Defendant's shop, he approached one of its workers who directed him to the sportswear section where he found half a pair which fitted him well upon trying it on. Thereafter he was told to wait while the said worker proceeded to the store room to collect a full pair, whereupon on his return he told the Plaintiff that there was only one last pair of slippers remaining of his size, leaving the Plaintiff with no option but to purchase the same.

Furthermore, when the Plaintiff opened the box with a view to wear the slippers on the plane on his way to Uganda, he discovered that the said slippers were both meant for the left foot. The slippers were never utilized for their intended purpose of refreshing the feet on the plane and at the hotel in Uganda while relaxing, seated or going to the toilet or to the

shops to purchase groceries. As a result of the Defendant's negligence, the Plaintiff was inconvenienced and suffered embarrassment, anguish and pain.

That the Defendants were on two occasions asked for a redress in writing but never responded, showing a clear indication of lack of remorse to their action complained of. The Plaintiff then states the particulars of the said negligence as follows:

- a) Failing to give the Plaintiff a full pair.*
- b) Failing to notice the slippers given to the Plaintiff were of the same side, being left foot.*
- c) Selling to the Plaintiff slippers of the same side.*
- d) Failing to show remorse to their action.*

Further, the Plaintiff states the particulars of injury as follows:

- a. The Plaintiff was laughed at on the plane and that he could not refresh himself the way he wanted but he ended up stepping on the floor of the plane and in Uganda at the hotel where he was lodged.*
- b. The Plaintiff suffered ridicule and humiliation pain and anguish.*
- c. The Plaintiff was inconvenienced as he could not do what he wanted to do with the slippers when he made up his mind to purchase them.*

It is in the premises that he claims the reliefs outlined above.

The Defendants filed a Defence dated 10<sup>th</sup> January 2013 wherein it was stated that the 2<sup>nd</sup> Defendant is wrongly sued and ought to be removed as a party.

The Defendants then stated that the transaction was subject to established trade practices requiring the Plaintiff to inter alia satisfy himself to the quality and state of items purchased prior to concluding

the sale and leaving the 1<sup>st</sup> Defendant's premises. Further that the purpose of the purchase of the slippers was not made known to the Defendants who would in any case not be concerned with the purpose of the purchase provided the items purchased were fit for use to the satisfaction of the customer at the time of concluding the transaction.

The Defendants averred that the Plaintiff had every opportunity as per trade custom to satisfy himself of the state and condition of the purchased items before departing the 1<sup>st</sup> Defendant's premises. Further that the circumstances of the purchase would not obliterate the Plaintiff's duty to satisfy himself of the state and condition of the items he was purchasing. That the Plaintiff duly satisfied himself of the items purchased being to his liking before leaving its premises. Further that the Plaintiff does not need slippers to relax his feet on the plane and if he was really in need he would have purchased slippers in Uganda for his use.

It was further averred that he 1<sup>st</sup> Defendant sells manufacturer pre-packed products for which it cannot be held liable for mistakes in contract if any. The Defendants denied any negligence, failure to notice, selling of slippers of the same side or failure to show remorse. That the Plaintiff's claim is wholly without merit and he is not entitled to any relief for his claims.

In his Reply dated 6<sup>th</sup> May 2013, the Plaintiff stated that the documents from Patents and Companies Registration Agency indicated that the 2<sup>nd</sup> Defendant was a trustee of the 1<sup>st</sup> Defendant Company.

That the Plaintiff after fitting half a pair which was on the display and after being satisfied of the quality as per trade practices, the Defendant's worker proceeded to collect the other half after which he came back with a box. That there was no reason to check again since the box was not sealed the time it was handed over to the Plaintiff confirming the fact that it was the only one remaining in the shop. That the Plaintiff did not deserve to be given slippers of the same side because whether there was a trip to Uganda or not, he would still not have utilized the slippers of the same foot.

The Plaintiff's testimony at trial was basically a repeat of the contents of his Statement of Claim and Reply. He added that since he had moved in his shoes the whole day, he decided to wear the slippers on the plane with the hope of relaxing his feet but discovered that the slippers were both meant for the left side of the feet and that he could not use them.

That he was traumatized it being his first time on the plane. That his neighbours started laughing at the fact that he had slippers for the same side of the feet. His feet were heated up and he suffered pain in his feet and continued feeling pain, anguish and embarrassment. This was both in the plane and in Uganda. That the ridicule was extended to the media where he was made subject of cartoons. He approached Game Stores for

redress. He personally and through his lawyers wrote the two letters which appear on pages 7, 8 and 9 of his bundle of documents but there was no response.

Under cross examination the Plaintiff stated he became aware of his trip a week prior to the same. His flight was at 11:05 hours. After he was given the slippers he then proceeded to the counter to pay. He could not remember the time he exited the store.

He was seated on the isle side on the plane when he removed his shoes and opened the box he realized that the slippers were of the same side. He did not announce that the slippers were of the same side. He put them back in the box and told his friend and colleague Silwamba, who sat next to him, about it who laughed. He told him he intended to sue Game Stores after continued laughter. He admitted that the box is not parked by Game Stores and that it has a label for Reebok.

Furthermore, the Plaintiff stated that he stepped on the floor of the plane and went to the toilet bare footed. The floor has a smooth surface. There was nothing inconveniencing on the plane as it was smooth and clean. He started feeling discomfort even before he boarded the plane. The pain continued even after he removed his shoes. He could still feel some stiffness in his feet. That he was demanding K80 million old currency (now K80,000.00) as he was made to step on the floor of the plane and the hotel. His colleague, Silwamba, informed the other officers about the incident and without him they would not have known.

DW1 Mweemba Kamela, a Sales Manager at Game Stores testified on behalf of the Defendants. He stated that the 1<sup>st</sup> Defendant is a retail company which sells consumer goods to customers. Most of the goods sold come from South Africa from the regional depot warehouse. The warehouse is supplied by local suppliers who get their products from manufacturers. His duties include ensuring that goods or stock received are put on shelves in a presentable manner and sold to customers.

He got to meet the Plaintiff around 13<sup>th</sup> October 2012 after the purchase when he presented a complaint that he bought Reebok slippers and that both were meant for the same side of the foot. The Plaintiff did not take the slippers but only the slip. When asked, the Plaintiff stated that he was not going to take them.

DW1 offered him a solution that as Game Stores, they have a company policy on the return of defective products and refunds. He advised him to bring the slippers to the store so that they could exchange them with another pair or refund him after confirmation. The Plaintiff refused to return the slippers and demanded K80 million as damages. The store was prepared to give him another pair of slippers or his money back. The returned slippers would have then been sent back to the manufacturers.

DW1 confirmed that there was a sale on 9<sup>th</sup> October from the receipt which he photocopied. He went to the stock management system, which is a computer record of all stock on any day and confirmed the same from the stock movement report. The system also confirmed the stock on

hand of any particular item in store and in this case it confirmed that there was one last pair which was sold and later brought the stock to zero. He printed the two reports produced in the Defendant's bundle of documents. The reports have a description, bar code, the sales and the date. He did not get any complaint from any other customer having two right sided slippers. The slippers come in packages and they do not repack at Game Stores.

The Plaintiff returned on 15<sup>th</sup> October explaining his grievance and put forward his demand for K80 million but still did not bring the slippers. Under cross examination DW1 testified that he met the Plaintiff on or about 13<sup>th</sup> October before he took the letter. He brought with him a receipt and refused to return the slippers.

DW1 admitted that they display half pair of slippers or shoes on the shelves which they get from a full pair and leave half a pair in a box. They have a return policy or guarantee as they care about their clients. The store has over 52,000 different items and so if there is any defect, they refund or exchange the item. It is not possible to check each and every item. The packers can notice a defect. What happened was not out of negligence. The apology he extended was that if the slippers were defective then he regretted the inconvenience.

Both parties filed written submission. The Plaintiff in his submissions basically repeated his testimony and contents of his Statement of Claim and argued that the Defendants' Defence is without merit.



The Defendants in their submissions cited a number of cases including that of **Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172**, which basically outlined the principles of the burden placed on the Plaintiff to prove any allegation made in his claim and that if he fails to prove a claim he is not entitled to a Judgment no matter the opponent's case. Further that negligence for which damages can be awarded is best described as the breach of a duty of care resulting in injury or damage and the onus was on the Plaintiff to prove this.

Further counsel cited the case of **Chilufya Kusensela vs Astridah Mvula SCZ Appeal no. 32 of 2011** wherein it was held that a case must be decided as pleaded because parties are guided by their pleadings and judgments should be confined to the claims as parties pleaded. That Plaintiff's evidence as per the decision in **Miller v Minister of Pensions [1947] 2All ER 372** must be so tangible and reliable that it will create on a balance of probabilities the judicial conviction that he is entitled to the claims he has made.

It was argued that the Plaintiff needs to prove that there was a duty of care owed to him by the Defendant, that it was breached and in consequence he suffered injury, loss or damage. Negligence alone does not give a cause of action, damage alone does not also give a cause of action; the two must co exist as per the decision in **E. Suffolk Rivers Cathment Board vs Kent [1941] AC 74**. Further the case of **Michael Chilufya Sata MP and Zambia Bottlers Limited (2003) ZR 1 (SC)** was cited wherein it

was held that **"negligence is only actionable if actual damage is proved, there is no right of action for nominal damages."**

It was finally submitted that the Plaintiff is not entitled to the damages in negligence or any relief as he has failed to prove his claims and that the action should be dismissed with costs.

I have considered the pleadings and testimony of the parties. Considering the evidence adduced, I find as facts that the Plaintiff bought Reebok coast caliber slippers from the 1<sup>st</sup> Defendant store, namely Game Stores at Manda Hill Shopping Mall, on 9<sup>th</sup> October 2012 for K86.00. The time on the receipt shows that the Plaintiff made the purchase at 11:09 hours whilst he was rushing to the airport to board a plane to Uganda whose departure time as reflected on his ticket was 11:05 hours. From the times on the purchase slip, the ticket and boarding pass, it is apparent that the Plaintiff was in a hurry and thus did not check the contents of the box and took it for granted that they were the right size and correct pair he needed. The 1<sup>st</sup> Defendant on the other hand has also shown that the box the Plaintiff got was the last pair of size 11 slippers of that type that they had in store on that day prior to the sale. The Plaintiff approached the officers at the 1<sup>st</sup> Defendant who included DW1, Mweemba Kamela, on his return from Uganda. He did not present or show them the slippers but only the purchase slip. The Plaintiff was advised by DW1 that according to their policy, he had two options namely to return the slippers with the purchase slip and be either given another pair in exchange or be refunded his money. The Plaintiff declined both options

and opted to write demand letters and later commenced this action seeking for damages.

The Defendants' in their submissions have argued that they are not even sure that the Plaintiff was sold slippers of the same left foot because the Plaintiff never showed them the same. I note that the Plaintiff brought the subject slippers in their original package box to Court during trial and wanted to present them as part of his evidence but the Defendant's counsel objected. The Defendants therefore cannot argue otherwise and I find in line with the Plaintiff's evidence that in the box there were two left foot slippers instead of a normal pair.

Indeed the authorities cited by counsel for the Defendant on the burden placed on the Plaintiff to prove his claims is the position at law. The Plaintiff as per holding of the Supreme Court in **Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172** is required to prove the allegations that he suffered damages as a result of the Defendant's negligence and that the same was aggravated by lack of remorse.

Halsbury's Laws of England volume 78 (2010) 5<sup>th</sup> edition in paragraphs 2 and 3 discusses negligence, duty of care and causation in the following terms:

**"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all..."**

**"The Defendant must owe a duty of care in relation to the general class within which the claimant and the type of damage that has arisen fall before there can be any question of liability to the claimant in question. Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence. However strong the facts of the claimant's particular claim, it will fail unless the defendant owes a duty to take care in the kind of relationship in question..."**

**"The claimant must also prove that the defendant's wrongdoing was a cause, although not necessarily the sole or dominant cause, of his injuries ..."**

**"It is a question of fact whether the defendant has failed to show reasonable care in the particular circumstances. The legal standard is objective; it is not that of the defendant himself, but that which might be expected from a person of ordinary prudence, or person of ordinary care and skill, engaged in the type of activity in which the defendant was engaged..."**

The Halsbury's Laws of England volume 78 (2010) 5<sup>th</sup> edition in paragraph 802 defines damage as the disadvantage which is suffered by a person as a result of the act or default of another. When determining the damage suffered by a plaintiff, the Courts have to look at the reality of the situation to assess the loss which has in fact been sustained.

This shows that what has to be considered are the facts and circumstances of each particular case. Further in issues of negligence the issue of common sense or the standard of a reasonable man test is what is usually used to review the facts before the determinations.

The Defendants' counsel has cited the case of **Donaghue v Stevenson [1932] AC 562** which dealt with the issue of negligence against a manufacturer. In the case of **Michael Chilufya Sata MP v Zambia Bottlers Ltd** the Supreme Court restated the fact that there is negligence on which a cause of action does not arise and actionable negligence on the other

hand. Further that for actionable negligence actual damage must be proved as well as the cause of action.

The learned authors of **Clerk and Lindsell on Torts** 19<sup>th</sup> Edition, Sweet and Maxwell at paragraph 11-19 on negligence under product liability and consumer protection state that:

**“The action under *Donoghue v Stevenson* lies for physical damage only; that is (1) personal injury and (2) damages to property other than that alleged to be defective. A person suffering financial loss because he was supplied with defective goods cannot claim.”**

Thus the proof of damage is cardinal to sustain and prove negligence under product liability or consumer protection. The Plaintiff herein has the burden of proving the same.

On the issue of the duty of care, paragraph 8-05 of **Clerk and Lindsell on Torts** states

**“...The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Since damage is the gist of the action, what is meant by “duty of care situation” is that it has to be shown that the courts recognize as actionable the careless infliction of the kind of damage of which the claimant complains, on the type of person to which he belongs, and by the type of person to which the Defendant belongs.”**

This duty not to inflict careless damage is what assists the court in arriving at a decision on whether in the given facts, the Plaintiff has proved that there was a duty of care owed to him which was breached.

Paragraph 11-02 in **Clerk and Lindsell on Torts** regarding defective and dangerous products states:

**“There are two kinds of complaint that can be made against a product. One is that it is dangerous and has actually injured the claimant or damaged other property of his.**

**The other is that it cannot be used to full advantage, either because if used it is likely to cause damage, or because it simply does not work, and that the claimant has suffered loss as a result. There is no reason on principle why the law of torts should not cover both. As a broad rule, however, the approach of English law has been to limit it to claims of the former sort, and to leave victims of the latter to their rights ( if any) in contract. This approach is also that of the Consumer Protection Act 1987, which specifically limits the types of loss claimable thereunder to personal injury and discrete property damage.”**

The Act applicable in Zambia is the Sale of Goods Act 1893. The Plaintiff has not pleaded statutory negligence under the said 1893 Act and I will thus not comment on this case in relation to the Sale of Goods Act.

The paragraph quoted above is clear that on the facts in this case, which fall under the second category, the appropriate action is for the Plaintiff to claim for his rights, if any, under the contract governing the sale. This however has not been done by the Plaintiff.

The last issue for consideration is that of damage. As already stated above, the Plaintiff would normally be entitled to compensation in form of general and aggravated damages only when personal injury is proved. In **Micheal Chilufya Sata v Zambia Bottlers Limited** the Supreme Court held that suffering nausea as a result of finding a dead cockroach in the soft drink bottle did not amount to injury. In this case the injury the Plaintiff said he suffered was that he was laughed at by his colleague and that he stepped on the floor of the plane and hotel room with bare feet. Further that he suffered embarrassment, ridicule, humiliation, pain and anguish. The pain and anguish has not been proved in this case or that the same amounts to physical injury or damage. The other emotional things

suffered do not also amount to physical injury or damage to sustain an action for negligence.

The Plaintiff's claim is for K100,000.00 as damages for negligence. His evidence on the damage suffered is that his friend Silwamba laughed at him when he informed him that he bought slippers which were both meant for the left foot and that he could not relax his feet on the plane. That he was compelled to walk bare footed on the plane and in the hotel room. He admitted that the floor on the plane was smooth and clean and that he did not suffer any inconvenience. The Plaintiff also testified that the Defendant did not respond to his demands.

The Defendants' witness on the other hand testified that when it was brought to their attention that the Plaintiff had bought slippers meant for the same foot, they advised him to bring them forward so that the pair could be replaced and or refund given to him but the Plaintiff declined to do so. The Defendant did admit having sold the Plaintiff the slippers on the material day but they denied having been negligent.

On the totality of the evidence tendered by the Plaintiff it is not possible to state that he suffered any damage warranting him being awarded damages. The Plaintiff has not adduced evidence to show this Court what kind of duty of care he was owed to avoid the damage which, if any, resulted. The Plaintiff has failed to show on a balance of probability that he suffered any damage or physical injury worth pointing at on which the claim for negligence could be sustained.

I am sure it was upsetting for the Plaintiff to discover that he bought a pair of slippers which were both meant for the left foot and that made him opt to walk bare footed on the plane which plane was smooth and clean instead of keeping on his shoes and socks. This however did not result in any injury as he has failed to show what kind of injury he sustained.

Indeed as held in the case of **Michael Chilufya Sata MP v Zambia Bottlers Limited**

**"negligence is only actionable if actual damage is proved. There is no right of action for nominal damages."**

This case fails and is dismissed as misconceived and lacking merit.

On the facts of this case, I order that the Plaintiff should forthwith return the defective slippers in their packaging with the purchase slip or receipt for a refund of K86.00 that he paid.

Costs of this action are for the Defendants to be taxed in default of agreement.

Leave to appeal is granted

**Dated this 10<sup>th</sup> day of July, 2014**



.....  
**M.S. MULENGA**  
**HIGH COURT JUDGE**