IN THE HIGH COURT FOR ZAMBIA **2013/HP/0050**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PASCAL CHISANGA **PLAINTIFF**

AND

LUCKY BEENE **1ST DEFENDANT**
ATTORNEY GENERAL **2ND DEFENDANT**

Before the Hon. Mrs. Justice J.Z. Mulongoti

on the 1st day of September, 2016.

For the Plaintiff:	*Mr. S. Mambwe of Messrs Mambwe, Siwila and Lisimba Advocates*
For the 1st Defendant:	*Mr. M. Munasangu of Messrs AMC Legal Practitioners*
For the 2nd Defendant:	*N/A*

JUDGMENT

Cases referred to:

1. Rylands v. Fletcher (1865) 3 H and C 737
2. Goldman v. Hargrave and Others (1966) 2 All ER 989
3. J.Z Car Hire Limited v. Malvin Chaala and Scirocco Enterprises Limited (2002) ZR 112 (SC)
4. Mohamed v. Attorney General (1982) ZR 49 (SC)
5. Zambia Electricity Supply Corporation Limited v. Redlines Haulage Limited (1990-92) ZR 170 (SC)

This is an action for damages arising from the 1st defendant's action of burning of the electric fence mounted on the plaintiff's property. The plaintiff also sought a declaration that he is entitled to be offered the remainder of stand number 313 Chilanga and an order for cancellation of the first defendant's certificate of title for stand number 313, which he later abandoned during trial. An injunction, costs and any further or other relief.

The plaintiff alleged in the amended statement of claim that he is the registered owner of the property known as stand number 314 Chilanga while the first defendant resides in the near vicinity of the said property. The said number 314 is next to the remaining extent of number 313 Chilanga referred to as the disputed property. The plaintiff further alleges that the disputed property was cancelled by the authorities for being too small to be a plot on its own. However, he applied for extension of his property into the disputed property. He alleged that while this was going on the first defendant who lives across the road opposite number 313 and has no immediate proximity, moved into the disputed property in or about October, 2011 and

commenced works in preparations of putting up a structure. In the process of these works, the first defendant started a fire which burnt the electric fence mounted on the plaintiff's perimeter wall fence, resulting in a short circuit which rendered the security cameras on CCTV malfunctional. As a result he has suffered great inconvenience and expense in replacing the energizer of the electric fence and the recorder for the camera. The first defendant had also blocked the main road used by the plaintiff and other members of the neighbourhood. The plaintiff further alleged that in the course of these proceedings he came to learn that the first defendant was issued with a certificate of title number 166668 relating to stand number 313 Chilanga. That the certificate of title could only have been issued by fraud since stand number 313 was cancelled by the authorities for being too small to be a plot on its own.

For its part, the first defendant filed a memorandum of appearance and amended defence. He averred that he is the legal owner of stand number 313 Chilanga and that the lack of proximity to it did not bar him from owning, possessing and developing the said stand. He denied

starting a fire which burnt the plaintiff's electric fence and blocking the main road used by the plaintiff and other members of the neighbourhood. He denied each and every allegation by the plaintiff as if the same were set out and traversed seriatim.

The second defendant also filed its memorandum of appearance accompanied by its defence. However, during trial the plaintiff abandoned his claims against the second defendant. Consequently the learned state advocate applied to have the second defendant struck out from the proceedings. The plaintiff's counsel did not object and the application was granted as prayed.

At trial, the plaintiff testified and called one witness. It was the plaintiff's (PW1) testimony that in 2008, he acquired his property number 314 Longridge, Chilanga and took up residence the same year. In 2009 the surveyor general undertook an exercise to renumber the area. Two new roads were created. It was his testimony that this entailed that plot number 313 having not been allocated to anyone at the time would be cancelled to pave way for road reserve. Consequently, a small portion of 313 remained between his

property 314 and the road reserve. He engaged the Ministry of Lands and Kafue Council to request if his property number 314 could be extended to the remainder of number 313. To that effect he wrote to the Lusaka planning office in September, 2009. The planning office visited the site in 2010. In 2011, they wrote to inform him that they had no objection to his application and advised him to take the documents to the surveyor general to confirm cancellation of number 313. As he was following up on his application, at Ministry of Lands, he was informed that there was another applicant a Mr. Lucky Beene (first defendant) for the same number 313. The Court heard that the first was defendant being his opposite neighbour, was fully aware of his (plaintiff's) application. He approached him but he was uncooperative and said he does not give out land.

A few weeks later, his worker John Banda told him that the first defendant had set fire to the electric fence. He reported to the police at Chilanga. They instituted investigations and summoned the first defendant. He readily admitted and promised to restore it as advised by the officer in charge. However, to date nothing has been

done. When referred to the first defendant's certificate of title for number 313, PW1 testified that he only got to know of it while the matter was in court. Neither the first defendant nor the Ministry of Lands advised him about it. He went on to state that he would not have claimed for the remaining portion of number 313 and for cancellation of the first defendant's certificate of title if he had known it existed in 2009 when he applied. Accordingly, the claim for cancellation of the certificate of title was withdrawn.

Regarding the claim for damages for the electric fence, he reiterated that the first defendant has wilfully neglected to pay for it. He referred to page 12 of the plaintiff's bundle of documents which is a letter from the police over the electric fence. He testified that the electric fence was valued at K14,000.00 in 2013.

When cross examined by the first defendant's counsel, PW1 testified that the letter from the police does not state that the first defendant was advised to restitute. However, he insisted that the first defendant was found guilty and that the letter states that the police confirmed the crime. He

admitted that he had no idea whether the matter was prosecuted.

When re-examined he testified that there was no other suspect apart from the first defendant who damaged his electric fence, as he was seen by his worker and the first defendant's worker. Both workers gave statements to the police.

PW2 was Moses Shoko, 30, the plaintiff's former garden boy. He testified that in September, 2012 he used to work for the plaintiff. His main duty was cleaning the yard. It was his testimony that on 14th September, 2012 he was on duty at the plaintiff's residence, when he saw flames of fire along the wall fence where the guava trees are. The fire was outside the fence but flames were going up and burnt the wall fence, the leaves of the guava trees and the electric wire fence. When he went outside to check, he saw the first defendant coming from where the fire was. PW2 identified the first defendant in court by pointing. He further testified that after that he went back inside and called his boss, the plaintiff. He was advised to report to the police which he did. The defendant was summoned

and questioned. And he admitted putting up the fire in the presence of the plaintiff and himself.

In cross examination, PW2 reiterated that he saw the first defendant coming from where the fire was. He conceded that he did not see him put up the fire. And that he wouldn't know if the first defendant was ever charged by the police.

That was the evidence on the behalf of the plaintiff.

The defendant testified and called no witness. It was his testimony that it is correct that he set fire to the debris at plot number 313 Chilanga. He monitored the fire to the end. He did so to ensure that it did not destroy his neighbour's property. However, the plaintiff later complained that the fire had destroyed his property (electronic equipment), affected the wire and affected his electronic goods.

The plaintiff never showed him the property that was allegedly destroyed by the fire. The Court heard that a criminal case was opened at Chilanga police but it was not prosecuted for lack of evidence.

In cross examination, he testified that he set fire next to the plaintiff's fence. He burnt grass inside the whole plot which was like a dumping site where the plaintiff used to throw debris. When further cross examined, he testified that it was not possible that the fire damaged the plaintiff's electric fence because he controlled it. He said he could not remember the date he set the debris on fire but that it was not the same day of the police report. He conceded that he admitted to police that he set the fire. He denied admitting to settling as a civil matter.

He read aloud the letter from the police and testified that the sentence that 'crime was confirmed' is the same as there is no evidence.

When re-examined on the letter, he testified that he was not charged with any offence.

That was the evidence on behalf of the first defendant.

Mr. S. Mambwe learned counsel for the plaintiff submitted that in his defence the first defendant denied starting the fire but admitted it in court. He also denied damaging the electric fence but in cross examination he admitted that he told the police that he caused the damage to the electric fence. That the inconsistencies go to show his credibility.

It was further submitted that the issue the Court is called upon to determine is whether or not the defendant is liable for causing damage to the electric fence mounted on the plaintiff's property and as a result liable to pay damages. Learned counsel submits, relying on the case of **Rylands v. Fletcher**[1] that it is a well established principle of law that where a person brings something into his land for non natural purposes, and that thing escapes and causes damage, the person that brings that thing into his land is liable for that damage.

In addition that the tort of negligence is founded on the premise that if one owes a duty to his neighbour, and there a breach of that duty; and as a direct consequence there is damage caused by the breach which is reasonably foreseeable, then such a person is liable in negligence.

Furthermore, that according to Regulation No. 11 Statutory Instrument (SI) No. 112 of 2013 of the Environmental Management Act number 12 of 2011;

> *"A person shall not conduct open air burning of waste from industrial, commercial operations or domestic or community activities except with the written consent of the Agency".*

The defendant did not provide any form of written consent as required under Statutory Instrument number 112 of 2012.

It was further submitted that the police report is sufficient evidence to connect the fire started by the defendant to the damage caused to the plaintiff's electric fence. Thus, the plaintiff's claim for negligence must succeed on the following particulars;

a) starting a fire without due regard to the proximity of the plaintiff's property

b) failing to take precautions to prevent the fire from crossing on to the plaintiffs property

c) allowing the fire to cause damage to the plaintiff's property

According to counsel on these particulars the negligence can then be factually summarized thus:

i. There was a duty that the defendant owed to his neighbour not to do anything that would be harmful to him;

ii. This duty was breached when he set fire to his property which escaped; and

iii. Caused damage to the electric fence and this was reasonably foreseeable.

That for these reasons it is abundantly clear that the first defendant is liable.

It is the plaintiff's prayer that the Court finds the first defendant liable for the damage he caused and order that the plaintiff be compensated in damages in the sum of K14,000.00 with interest and costs.

Learned counsel for the first defendant submits that the only claim before Court is for damages arising from the first defendant's burning of the electric fence mounted on the plaintiff's property. According to counsel the principles applicable to a case of this nature are summarized by Lord Wilberforce in **Goldman v. Hargrave and Others**[2] that:

> *"Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interest should not have to do so much as one with larger interest of his own at stake and greater resources to protect them... He should not be liable unless it is clearly proved that he can't and reasonably in his circumstances should have done much".*

In casu, the evidence is that the first defendant controlled and supervised the fire to avoid damage to his neighbour. As such he satisfied the principle in the Goldman case. The plaintiff has failed to demonstrate if at all the first defendant failed to avoid a hazard which he had the means and power to abate.

It was further submitted that the plaintiff has not proved his case for damages. The Supreme Court decision in **J.Z Car Hire Limited v. Malvin Chaala and Scirocco Enterprises Limited**[3] was relied upon that *"it is for the party claiming any damages to prove the damages"*.

Learned counsel contended that the plaintiff has not adduced any evidence before this Court to indicate the level of damages to be quantified. The mere indication of the value of the electric fence and the indication of the involvement of the police to reconcile the parties is not proof enough to warrant damages. The plaintiff has left the

Court at large and has placed it in a position where it cannot make any meaningful intelligent assessment of damage.

After considering the evidence and submissions by counsel, I note that there are very few factual disputes in this case.

It is a fact that the plaintiff is the owner of stand number 314 Chilanga while the first defendant owns stand number 313 Chilanga which is adjacent to the plaintiff's property. It is further common cause that the first defendant set fire to debris on stand number 313.

The plaintiff contends that the fire escaped from the first defendant's property to his wall fence and in the process damaged his electric fence. The first defendant has denied causing damage to the plaintiff's electric fence though he admits setting the debris in his land on fire.

The issue that arises for determination is whether the fire started by the first defendant at his property number 313 Chilanga, damaged the plaintiff's electric fence at number 314 Chilanga.

The first defendant does not deny starting the fire but has denied damaging the plaintiff's electric fence as a result of the fire. The case of Rylands v. Fletcher cited by Mr. S. Mambwe, imposed strict liability in such cases, as one is prima facie answerable for all the damage which is the natural consequence of the escape of something collected and kept at his land, which is likely to do mischief. I am of the considered view that the rule in Rylands v. Fletcher, is applicable in this case as submitted by Mr. Mambwe.

The question is did the first defendant's fire damage the plaintiff's electric fence?

In the case of **Mohamed v. Attorney General**[4] in which the Supreme Court considered the Goldman case cited by Mr. Munasangu, the brief facts of the Mohamed case were that the respondent's servant a fire ranger set fire to some vegetation several hundred yards away from the appellant's farm without giving notice to him. The fire spread onto the appellant's farm and destroyed maize crop and a field of star grass. The trial court found that the respondent could neither foresee nor abate the hazard.

On appeal the Supreme Court observed that "*the principles applicable to a case of this nature are summarised by Lord Wilberforce in Goldman v. Hargrave and Others, where after reviewing the authorities, he said at page 995*:

> ""*All of these endorse the development, which their lordships find in the decisions, towards a measured duty or care by occupiers to remove or reduce hazards to their neighbours. So far it has been possible to consider the existence of a duty, in general terms: but the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable" since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast, has, ex-hypothesi had this hazard thrust on him through no seeking or fault of his own. His interest, and his resources whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. Moreover in many cases, as for example in Scrutton, L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and not expenditure, no problem arises; but other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances.*

Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. This approach to a difficult matter is in fact that which the courts in their more recent decisions have taken"".

The Supreme Court then noted that the appellant who had done everything that could be done could not be penalised and the respondent remained responsible for the consequences of the fire. Further that the respondent's servant's conduct in failing to give prior notice and burn in the proper manner amounted to negligence. He did nothing to alert his neighbour, the plaintiff. The appellant and his workers had tried to combat the fire to no avail.

In casu, the first defendant testified that he controlled and supervised the fire to avoid damage to his neighbour's property. The first defendant did not adduce any evidence to show how he controlled and supervised the fire. PW2's testimony that he saw flames of fire from the first defendant's land spread along the plaintiff's fence and guava trees went unchallenged. In my judgment the first

defendant failed to control the fire. The first defendant had the ability to foresee the consequences of the fire, hence his testimony that he supervised and controlled it but failed to show how. I find that he was negligent. I note that negligence was not pleaded but it was established in the facts as testified by PW1 and PW2 and the first defendant did not object. I am fortified by the Supreme Court decision in **Zambia Electricity Supply Corporation Limited v. Redlines Haulage Limited**[5]. I equally note the inconsistencies alluded to by Mr. Mambwe where in his defence he denied starting the fire but admitted during trial. The Goldman case cannot aid him as argued by his counsel. He did nothing to alert his neighbour, the plaintiff. Clearly, he did not inform the neighbour of his intention to burn the debris and violated the Statutory Instrument number 112 of 2013 as submitted by the plaintiff's counsel. I am fortified by the Mohamed case, where the Supreme Court further observed that the respondent did not give any prior warning by common sense but also by section 28 of the Natural Resources Conservation Act. In the case in hand the first defendant admitted to starting the fire near the plaintiff's fence and

this being a case of strict liability, I am inclined to find him liable for the consequences of the fire.

The plaintiff testified that the incident was reported to the police a fact acknowledged by the first defendant. This is even confirmed by the letter from the police at page 12 of the plaintiff's bundle of documents. Though the plaintiff testified that his electric fence was damaged and the letter alludes to him reporting that his electrical energizer unit worth K14,000.00 was damaged, I note that no evidence was led about the energizer unit. The plaintiff's testimony was simply that the fire damaged his electric fence. Apart from this letter, no receipts or quotations were produced to prove the cost of replacing the fence. Neither was the cost or the K14,000.00 specifically pleaded.

I am inclined therefore, to award general or nominal damages for the damage to the electric fence. As submitted by Mr. Munasangu, the plaintiff has left the Court in a position where it cannot make any meaningful intelligent assessment of damages. Be that as it may, I have discretion to either refer the matter for assessment by the Deputy Registrar or award nominal damages as held in the

case of Philip Mhango v. Dorothy Ngulube and Others also cited by Mr. Munasangu.

Accordingly, I award K5,000.00 as damages to be paid with interest from date of writ to judgment at short term deposit rate. Thereafter at Bank of Zambia current lending rate until full payment. I award costs of, and incidental to the action to the plaintiff, to be taxed failing agreement.

Delivered at Lusaka this 1st day of September, 2016.

J.Z. MULONGOTI
HIGH COURT JUDGE