

**IN THE HIGH COURT FOR ZAMBIA
AT THE LIVINGSTONE DISTRICT REGISTRY
HOLDEN AT LIVINGSTONE**
(Civil Jurisdiction)

2017/HL/18

BETWEEN:

KUKAS LOGISTICS LIMITED



PLAINTIFF

AND

EZEKIEL SHAWA

DEFENDANT

***Before Hon. Mr. Justice Mathew L. Zulu, at Livingstone the
30th day of July, 2020***

For the Plaintiff:

*Mr. P. Mukuka of Messrs AMC Legal
Practitioners.*

For the Defendant:

*Mr. A. C. Nkausu of Messrs. AC Nkausu &
Company.*

JUDGMENT

Cases referred to:

- 1. Zambia Railways Limited v Pauline Mundia and Another
(2008) ZR 287.***
- 2. Donoghue v Stevenson (1935) AC 562.***
- 3. Fowler v Lanning (1959) 1 ALL ER 290.***

Legislation referred to:

1. ***Clerk and Lindsell on Torts, 19th Edition, at Paragraph 8-04.***

The Plaintiff commenced this action against the Defendant on 4th March 2017, by way of Writ of Summons accompanied by a Statement of Claim, and later amended, seeking these reliefs:

- (i) An order compelling the Defendant to pay to the Plaintiff K72,883.00 penalties incurred by the Plaintiff at the Zambia Revenue Authority due to the Defendant's negligence;***
- (ii) An order compelling the Defendant to pay a sum of K350, 000.00 to the Plaintiff for loss of business for causing the Plaintiff's clearing agent's license to be suspended;***
- (iii) An order compelling the Defendant to pay to the Plaintiff K82,450.00 expenses incurred in tracking him down;***
- (iv) Damages for negligence;***
- (v) An order of payment of sufficient security into court in the sum of K505,333.60 and in default thereof an interim attachment of property of the Defendant's property whose value is approximately K505,333.60;***
- (vi) Payment of storage charges for truck and trailer registration numbers ACG 4501/ALJ 1242 from 9th August, 2016 at K50 per day;***
- (vii) Damages for inconvenience, worry, anxiety and stress.***
- (viii) Interest on all sums found due;***
- (ix) Costs; and***
- (x) Any other relief.***

The Plaintiff in its statement of claim pleaded that on 11th February, 2016, it cleared a consignment of hardwood logs of Pterocarpus Chrysothrix (Mukula tree) at Kasumbalesa Border Post in transit to Namibia through Katima Mulilo Border Post, which logs the Defendant conveyed on his truck and trailer registration numbers ACG/4501 and ALJ/1242T respectively. It stated that the customs conditions at the Zambia Revenue Authority (ZRA) were that a transit entry should have been acquitted within 5 days and could not be offloaded in Zambia, otherwise the clearing agent was to incur penalties and lose their bond payment.

According to the Plaintiff, the Defendant did not transport the goods to Namibia and failed to acquit the transit entry of the Mukula logs within 5 days as was required by ZRA. It alleged that the Defendant negligently abandoned the Mukula logs in Lusaka, where the logs were pilfered thereby causing loss and damage to the Plaintiff.

The Plaintiff claimed that the Defendant undertook to clear the Mukula logs as a transit entry under a bond sum of K66, 582.60, which ZRA would have returned to the Plaintiff if the transit entry was acquitted within 5 days. It alleged that as a result of the

Defendant's negligence and breach of duty in failing to acquit the transit entry, the Plaintiff was penalized by ZRA and ended up forfeiting the bond sum as well as paying extra penalties of K6, 300.00. The particulars of negligence given by the Plaintiff were:

- a) Failing to acquit transit entry and not delivering the logs to the port of exit as per expectation;***
- b) Abandoning the container of logs in Lusaka thereby frustrating transit acquittal of logs; and***
- c) Allowing the logs to be pilfered to the Plaintiff's detriment and loss.***

The Plaintiff went on to allege that the Defendant disappeared with the goods even when the time for acquitting the transit entry expired, causing the Plaintiff to begin searching for him. It claimed to have engaged the Police in Lusaka to find the Plaintiff and incurred K6, 900.00 in logistical and travel expenses for the Police and its Director, Zakeyo Mwandila, but did not find the Defendant.

The Plaintiff was thereafter reliably informed that the Defendant was in Kapiri Mposhi with the goods on his truck, and its Director travelled there and incurred K3, 400 in travel expenses, but failed to find the Defendant.

The Plaintiff further pleaded that it was later informed that the Defendant was in Lusaka and it to engage a Legal Practitioner to find him, as a result of which it incurred K11,500.00 in expenses, but the Defendant was not found.

The Plaintiff also reported the matter to the Police in Livingstone, after which it was informed that the Defendant was in Chingola where his truck had broken down. The Police Officers from Livingstone travelled to Chingola to arrest the Defendant, and the Plaintiff incurred K7, 500.00 in travel expenses, food and accommodation. It was further pleaded that the Plaintiff bought motor vehicle spare parts, fuel, and acquired services of a Mechanic and a Driver who traveled to Chingola to repair and drive the truck to Livingstone, as a result of which the Plaintiff incurred K12, 150.00 in expenses, including labour charges and upkeep.

It was the Plaintiff's case that locating the Defendant took a period of 4 months, during which ZRA suspended its operations, and consequently the Plaintiff suffered loss of business estimated at K87,500.00 monthly income, totaling K350, 000.00 for a period of 4 months. The Plaintiff stated that on 9th of August, 2016, the

Defendant offered the Plaintiff his truck registration number ACG 4501 valued at approximately K50, 000.00, as a pledge or part payment of the claimed total amount of K505, 333.60.

It stated that despite several demands and reminders, the Defendant failed and/or neglected to indemnify the Plaintiff of the said amount. The Plaintiff pleaded that as a result of the Defendant's breach of duty, conduct, actions, omissions and negligence, the Plaintiff suffered loss and damage.

The Defendant filed into court a defence which he amended on 24th May, 2019. He pleaded that sometime in October, 2015, he was sub-contracted by Ernest Mutale who trades as Nest Transport, to transport a consignment of hardwood logs of Mukula from the Democratic Republic of Congo (DR Congo) to Namibia using his truck registration No. ACG 4501, and a hired trailer No. ALJ 1242 T. He stated that he did not know Ernest Mutale before that and was only introduced to him by one Mwanza.

According to the Defendant, it was a verbal agreement between him and Ernest Mutale that the sub-contract was worth the sum of US\$5, 800 which was to be paid to the Defendant, with demurrage

charges of US\$200 per day after the first 10 days of his arrival in DR Congo.

It was the Defendant's claim that he was in DR Congo for close to 3 months from November, 2015 to February, 2016, and only paid US\$2,900 out of the sub-contracted amount and no demurrage was paid. He alleged that Ernest Mutale was evasive and only made piecemeal payments through various individuals such as Nicholous.

The Defendant said he was owed a total sum of US\$18,000.00 under his sub-contract with Ernest Mutale. It was the Defendant's case that during some of his irregular communication with Ernest Mutale, he authorized him to sell some of the Mukula logs to defray his expenses and dues under the sub-contract.

The Defendant pleaded that he was surprised to have received a Writ of Summons and a Statement of Claim from the Plaintiff, with whom he had no contractual obligations and to whom the he did not owe any duty of care. He denied all the other allegations contained in the statement of claim.

When the matter came up for trial, Zacheyo Mwandila was the Plaintiff's sole witness who testified as PW1. He stated that he is a Director in the Plaintiff and testified that in December, 2015, the Plaintiff had a meeting with a company from DR Congo which transports hardwood logs of Mukula from DR Congo to Namibia, at which meeting the Plaintiff was engaged as a clearing agent.

He explained that in early January, 2016, Afrique Society called to inform him that it had transported 7 trucks of Mukula logs, one of which was the Defendant's truck registration number SCG 4501 and Trailer number AAJ 1242. PW1 testified that the trucks were at Kasumbalesa Border Post, where he was called to verify if it was the Plaintiff which was required to clear them. After confirming with the office in DR Congo, PW1 issued instructions to clear them.

It was his testimony that on 8th February, 2016, all the trucks were taken to the Ministry of Forestry for inspection, which issued an inspection sheet to ZRA to start clearing the trucks. ZRA inspected the Defendant's truck and sealed the container based on the inspection which was done by the Ministry of Forestry.

PW1 explained that on 11th February, 2016, ZRA gave the Plaintiff transit document No. D3673, which contained a condition that the truck was supposed to exit within 5 days. The Plaintiff gave the transit documents to the Defendant, but was able to check them on the Asycuda World System, which ZRA uses to collect revenue.

The witness told the Court that on the third day, he called the Defendant to advise him on the importance of the transit documents and the Defendant responded saying: "*who are you?*". PW1 introduced himself, but when he attempted to explain the conditions on the transit document, the Defendant interjected and told him that it was not his first time to load transit goods. He called the Defendant again on the fifth day, the last day when the goods should have exited Zambia, but the Defendant maintained that he knew what it takes to acquit a transit document.

It was PW1's further testimony that he received a call from ZRA on the seventh day, which sought an explanation as to why the Defendant's truck was late, but PW1 did not know where the Defendant's truck was. He called the Defendant who was not picking up his calls until his phone stopped ringing. He also called

Ernest Mutale to find out the whereabouts of the Defendant but he equally did not know.

The witness testified that on 29th March, 2016, he wrote a letter to the Director of Investigations in Lusaka to assist in finding the Defendant's truck. He also reported the matter to the Officer-in-charge at Libuyu Police Station in Livingstone, who told him that the Police had no money to investigate the matter but was willing to provide Police Officers to assist. He explained that the Plaintiff was however given the option of providing logistics and a subsistence allowance of K600.00 per night, which option the Plaintiff took. The Plaintiff was given 2 Police Officers who travelled to Lusaka and spent 3 nights but did not find the Defendant.

PW1 told this Court that ZRA suspended the Plaintiff's license until the truck was found.

It was his further evidence that Ernest Mutale directed the Plaintiff to Elijah Kampanga, who was the Defendant's lawyer. PW1 stated that Elijah Kampanga then directed the Plaintiff where the Defendant resided in Lusaka's Kabangwe area, after which the Police went and found the Defendant's wife who gave them the

phone numbers which the Defendant used to communicate with her. However, the Police still failed to find the Defendant.

The witness went on to testify that after the Police Officers went back to Livingstone, the Defendant's lawyer called a month later to inform the Police that the Defendant was at his farm in Kapiri Mposhi. It was his evidence that Police requested a sum of K3600.00 from the Plaintiff, to travel to the Defendant's farm in Kapiri Mposhi, to which they went with Elijah Kampanga but they did not find the Defendant.

PW1 told the Court that ZRA issued the Plaintiff with a demand letter for a bond of K158, 843.00, on the ground that the Defendant's truck did not exit Zambia.

The witness testified that he received a call from Ernest Mutale on 20th June, 2016, who said he had found the container of Mukula in Lusaka which the Defendant had carried. PW1 then travelled to Lusaka where ZRA assigned 2 Customs Officers, a Driver and 2 Police Officers, who were led by Ernest Mutale to Kachepe's garage in Kabangwe area where the container was found. The container was inspected by ZRA Officers who confirmed that, that was the

same container which had been loaded with Mukula logs. They ordered the Police to break the seal on the container and found that there was no nothing in it.

PW1 testified that the Plaintiff gave a report to the Director of Investigations and ZRA ordered the Plaintiff to pay a sum of K66, 852.66, for bond, penalties, interest and tax, which amounts were paid by the Plaintiff.

PW1 further testified that he received a call from Nicholous, one of the suppliers of Mukula who had also been looking for the Defendant. Nicholous told PW1 that he had found the Defendant's truck which had broken down in Chingola. The witness told the Court that he reported the matter to Libuyu Police Station in Livingstone, who requested their colleagues in Chingola to apprehend the Defendant. The Plaintiff then engaged a mechanic and a driver to go to Chingola, who charged the Plaintiff K12, 150.00 for labour. The Plaintiff also incurred K6, 900.00 in transport costs and K7,500 in fuel expenses and spare parts.

PW1 told the Court that the Defendant was apprehended and Police Officers from Livingstone went to pick him up from Chingola, and

took him to Libuyu Police Station in Livingstone. He said that was his first time meeting the Defendant, who confessed having sold the Mukula on the basis that he was not paid his fees.

The witness testified that while the Defendant was in custody, his lawyer, Elijah Kampanga, pleaded with the Plaintiff to settle the matter outside court. He told the Court that the Defendant agreed to pay all the expenses on 9th August, 2016, but the Plaintiff wanted security. Therefore, the Defendant signed an agreement and assured the Plaintiff that he would submit the White Book for his truck. He stated that the Defendant was given one month to clear the expenses but never did. Hence the Plaintiff commenced this action.

PW1 explained to the Court that the Plaintiff was seeking to recover the amounts paid to ZRA, including penalties, interest, legal costs, and the expenses the Plaintiff incurred in looking for the Defendant. It was also seeking damages for loss of business and forfeiture of the Defendant's truck as per agreement.

During cross-examination, PW1 testified that the Plaintiff had a meeting with a Congolese Company regarding the transportation of

Mukula from DR Congo to Namibia, after which Nicholous contacted him in January, 2016 to inform him that the Company had dispatched 7 trucks. PW1 stated that Ernest Mutale told him that he had been hired to transport Mukula using 3 of his trucks. It was his evidence that he knew all the 7 trucks that had been dispatched: 1 truck belonged to the Defendant; 3 were for Ernest Mutale; and the other 3 belonged to a Mr. Shupe.

The witness told this Court that he did not know the conditions on which Nicholas hired the Defendant and that Ernest Mutale never told him that he had sub-contracted the Defendant.

It was PW1's testimony that the Defendant had a duty to the Plaintiff to transport the goods to the port of exit and acquit the transit documents. The witness testified that the Plaintiff was suspended because it failed to prove that the transporter exited within 5 days.

In re-examination, PW1 told this Court that the Plaintiff commenced this action because the Defendant failed to meet his obligation to exit Zambia within 5 days. It was his evidence that Ernest Mutale made exit within the time set by ZRA and provided

proof of acquittal. In respect of Shupe, PW1 stated that he never exited Zambia and provided acquittal to ZRA, and the Plaintiff also learnt after following up that Shupe had sued. It was his evidence that the Defendant was engaged as the transporter and the Plaintiff was engaged as a clearing agent.

This marked the close of the Plaintiff's case.

The Defendant testified as the only witness in support of his case and was DW1. His evidence was that in October, 2015, his friend named Mwanza introduced him to Ernest Mutale, a transporter who hired his truck registration number ACG 4501 and trailer registration number ALJ 1242, which DW1 rented from Sable Transport. He said he had an oral agreement with Ernest Mutale, for the transportation of Mukula logs from DR Congo to Walvis Bay in Namibia under which the Defendant was supposed to be paid US\$5,800.00 per trip and if DW1 remained in DR Congo for over 10 days, he was entitled to a demurrage charge of US\$200.00 per day.

DW1 informed this Court that Ernest Mutale gave him instructions and money for fuel, after which the Defendant left Lusaka for DR Congo in October, 2015. The Defendant explained that when he

arrived in DR Congo, Ernest Mutale directed him to meet Nicholous who prepared Mukula logs for transportation and DW1 loaded them within a period of 10 days. He then started off and when he arrived at Kasumbalesa Border Post, he called Ernest Mutale to find agents to clear the goods. The witness testified that the agents who were instructed by Ernest Mutale collected the documents from him. He spent 3 days at Kasumbalesa Border Post after which he started off for Namibia using Katima Mulilo Border Post.

It was DW1's evidence that he called Ernest Mutale when he reached Katima Mulilo Border Post, who introduced him to clearing agents to whom the Defendant gave the documents. He spent 2 days in Katima Mulilo before proceeding to Walvis Bay in Namibia.

DW1 further testified that Ernest Mutale instructed him to go back to DR Congo in November, 2015, where the Defendant met Nicholous who organized Mukula and DW1 had to stay in DR Congo for over 30 days waiting for him. He explained that Nicholous loaded the Mukula in December, 2015 but DW1 remained parked for another 30 days when the documents permitting him to go to Lubumbashi were given to him. According to the Defendant, he

spent another 30 days in Lubumbashi as the documents for the border were not ready. DW1 said that he went to Kasumbalesa and spent 2 weeks waiting for the documents from the clearing agent.

The Defendant told this Court that he only left Kasumbalesa in January, 2016, and went to Lusaka where he parked his truck. He contacted Ernest Mutale to organize a sum of US\$5800.00 for transport and demurrage charges of US\$200.00 per day. DW1 remained in Lusaka for a month waiting for Ernest Mutale who had promised to give him the money.

It was DW1's further evidence that Ernest Mutale later told him to sell some of the Mukula in order to recover his money. After he had sold the Mukula, PW1 called him to ask the whereabouts of his truck. DW1 said he told PW1 that he did not know him and referred him to Ernest Mutale. But PW1 continued calling him until he stopped taking his calls.

The witness testified that after a month, Nicholas found him in Chingola, where his truck had broken down. He was arrested by Police Officers from Chingola and after spending 3 days in custody, the Police Officers from Livingstone went and transferred him to

Livingstone where he was detained for 15 days for the offence of theft. He stated that while in detention, the Police wanted him to sign an agreement handing over his truck, but he requested to be taken to court. He stated that he was forced to sign an agreement with PW1 because the Police refused to grant him police bond.

The Defendant maintained that he was contracted by Ernest Mutale to whom he owed a duty and did not know the Plaintiff. DW1 further insisted he was not paid his fees for transport and demurrage charges, otherwise he would have delivered the goods.

Under cross examination, DW1 told this Court that he sold the Mukula in May, 2016 and kept the ZRA documents for 2 months. He said although he was not familiar with customs documents, he knew how customs clearance is done. He was aware that ZRA documents have conditions, including that he was supposed to exit Zambia within 5 days. DW1 however stated that he was not aware of the penalties that the clearing agent faced for his failure to clear the goods within 5 days. He testified that he was aware that the Plaintiff's license was suspended as a result of his actions, but he did not know that it incurred expenses.

In re-examination, DW1 explained that he kept the ZRA documents after selling the Mukula because he was not aware that he was supposed to hand them over.

This marked the close of the Defendant's case.

After the close of trial, the parties were given time within which to file their submissions but the Plaintiff did not file any submissions.

The Defendant filed into court his brief submissions on 17th December, 2019, in which he opposed the Plaintiff's action. On behalf of the Defendant, Counsel referred this Court to the principles of negligence as espoused by the Supreme Court in the case of **Zambia Railways Limited v Pauline Mundia and Another**¹, where it was held, at Page 296, that:

“... negligence as a tort is breach of duty to take care, which results in damage, undesirable by the defendant, to the Plaintiff. The ingredients necessary to prove negligence are stated as (a) a legal duty on the part of A towards B, to exercise care in such conduct of A as falls within the scope of his duty; (b) breach of that duty; (c) consequential damage to B. These three ingredients, ... cannot be kept apart in their application as they are simply three different ways of looking at one and the same problem.”

He further cited the case of **Donoghue v Stevenson**², and the case of **Fowler v Lanning**³ where it was held that in an action based on negligence, the Plaintiff must prove negligence against the Defendant. The crux of Counsel's submission was that the Plaintiff had not established a legal duty on the Defendant to exercise care in his conduct towards the Plaintiff within the scope of his duty to drive the truckload of Mukula. According to him, the issue was whether the Defendant owed a duty of care to the Plaintiff to transport the Mukula. It was his contention that the Defendant did not owe the Plaintiff a duty of care as his duty was limited to driving a refueled truckload of Mukula.

According to Counsel, there was no evidence that the Defendant failed, refused and/or neglected his duty. He stated that the Defendant did not drive in good time not because of negligence, but because his truck was not refueled and he was not paid his hire and demurrage fees.

Counsel urged me to find that there was no legal duty on the part of the Defendant to exercise care in his conduct towards the Plaintiff. He also persuaded me to find that the Defendant owed no duty of

care to the Plaintiff to transport the Mukula logs within the period of 5 days. It was his submission that the Plaintiff failed to prove negligence against the Defendant and all his claims should be dismissed, with costs to the Defendant.

I have considered the pleadings in this matter, the oral evidence and the submissions by Counsel for the Defendant. From the evidence before me, the following facts are not in dispute. The Plaintiff is a clearing agent whose registered office is in Livingstone in Southern Province, while the Defendant is a transporter of Zani Muone Compound in Lusaka.

On 11th February, 2016, the Plaintiff cleared a truckload of Mukula at the ZRA office at Kasumbalesa Border Post, on transit entry number 3673, which truckload was in transit from DR Congo to Namibia via Katima Mulilo Border Post. The consignment was transported by the Defendant using his truck registration number ACG 4501/ALJ1241T. Among the requirements by ZRA was that the transit entry be acquitted within 5 days and not be offloaded in Zambia, otherwise the clearing agent was going to incur penalties and lose its bond payment.

The transit entry was not acquitted at Katima Mulilo Border Post within 5 days as was required by ZRA, because the Defendant did not transport the truckload to Namibia. The Plaintiff has accused the Defendant of negligence, alleging that the Defendant negligently abandoned the truckload in Lusaka where the container of Mukula was pilfered as a result of which the Plaintiff suffered loss and damage.

The Defendant has not denied that he did not acquit the transit entry within 5 days and that he did not transport the truckload to Namibia. What the Defendant disputes is that he negligently abandoned the truckload and that the Mukula was pilfered. His position is that Ernest Mutale sub-contracted him to transport the truckload from the DR Congo to Namibia at the price of US\$5, 800, with demurrage charges of US\$200 per day after the first 10 days of his arrival in DR Congo.

The Defendant claims to have been in DR Congo from November, 2015 to February, 2016, but after returning, Ernest Mutale did not refuel his truck and became evasive, such that he only paid him US\$2, 900 out of the sub-contracted amount. The pith and core of

his defence is that Ernest Mutale permitted him to sell the Mukula to defray his expenses and an outstanding sum of US\$18,000.00 which Ernest Mutale owed him pursuant to their sub-contract.

The question I have to determine, therefore, is whether the Plaintiff has proved that the Defendant is liable in negligence. It is trite law that the burden of proof in a claim for damages for negligence rests primarily on the Plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. The learned authors of **Clerk and Lindsell on Torts, 17th Edition, in Paragraph 8-04 at Page 383,** have set out the requirements of the tort of negligence stating that:

“There are four requirements, namely:

- (1) the existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be a recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;***
- (2) breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;***
- (3) a causal connection between the defendant’s careless conduct and the damage;***

(4) that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

When these four requirements are satisfied, the defendant is liable in negligence. Only then is it relevant to consider the assessment of damages, i.e. the compensation for the damage for which the defendant is responsible.”

I have reflected on whether, on the evidence that is before me, the four requirements of the tort of negligence have been satisfied and the Defendant is liable in negligence.

In respect of the first requirement, I have considered whether the Defendant owed a duty of care to the Plaintiff. The legal test for determining whether a duty of care exists in any given type of relationship was formulated by Lord Atkin in the case of **Donoghue v Stevenson**², who held that:

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being

so affected when I am directing my mind to the acts or omissions which are called in question.”

On the facts of this case, it is common cause that the Defendant was the transporter of the truckload of Mukula which the Plaintiff cleared at the ZRA office at Kasumbalesa Border Post. The Defendant in his own evidence during cross-examination confirmed to this Court that he was aware of the requirement by ZRA that a transit entry should be acquitted within 5 days. The evidence of PW1 also shows that when the Defendant was transporting the truckload, PW1 called to advise him to acquit the goods within 5 days but the Defendant interjected and said it was not his first time to deliver goods on transit entry. I therefore find that the Defendant was aware of the requirement that a transit entry should be acquitted within 5 days otherwise the clearing agent incurs penalties.

The fact that the Defendant was the transporter of the goods cleared by the Plaintiff, I take the view that the Plaintiff was a person closely and directly affected by the Defendant's conduct that he ought reasonably to have had the Plaintiff in contemplation when he was directing his mind. The Defendant was also aware of

the consequences the Plaintiff would suffer if he did not acquit the transit entry within 5 days. I accordingly find that the Plaintiff was the Defendant's neighbour in law as envisaged in **Donoghue v Stevenson²**, to whom the Defendant owed a duty of care. I do not think there is merit in the argument by Counsel for the Defendant that his client did not owe a duty of care to the Plaintiff.

The view I take is that the Defendant owed a duty of care to the Plaintiff irrespective of whether the Defendant was sub-contracted by Ernest Mutale who may have authorized him to sell the Mukula. I must add that I am disinclined to believe the Defendant's evidence that Ernest Mutale authorized him to sell the Mukula, because that is the person who assisted the Plaintiff and ZRA officers to find the container which the Defendant left at Kachepa's garage in Kabangwe after selling the Mukula.

Coming to the second requirement of the tort of negligence, I find that the Defendant breached his duty of care to the Plaintiff because he failed to transport the Mukula and to acquit the transit entry at Katima Mulilo Border Post within 5 days.

In respect of the third requirement, the evidence before me shows that the Plaintiff suffered loss and damage as a result of the Defendant's failure to acquit the transit entry within 5 days. The Plaintiff incurred tax penalties, interest and other charges. There are receipts in the Plaintiff's bundle of documents which show that the Plaintiff paid to ZRA a bond sum of K66, 583.60, interest and penalties. There is even a demand letter dated 8th September, 2016, in which the Station Manager at ZRA at Kasumbalesa Border Post informed the Plaintiff that the records showed that as at 31st August, 2016, a total of K158,843.00 in duties and taxes as guarantee amount, remained un-acquitted above five days.

Quite apart from the charges and penalties it paid to ZRA, the Plaintiff also incurred costs in searching for the Defendant who disappeared with the truckload of Mukula. The Plaintiff reported the matter to the Police who instituted some investigations, during which the Plaintiff provided transport logistics, food and accommodation to facilitate the investigations. The Plaintiff also engaged a Mechanic and a Driver, who travelled to Chingola at the Plaintiff's expense, to repair and drive the Defendant's truck to

Livingstone. The Plaintiff incurred labour and upkeep expenses for the Mechanic and Driver. The Plaintiff also purchased spare parts and fuel for the truck, thereby incurring more costs.

The third requirement of the tort of negligence has therefore been satisfied as there is a causal connection between the Defendant's negligent conduct and the damage the Plaintiff suffered.

The fourth requirement has also been satisfied, because it is abundantly clear from the evidence that the loss and damage which the Plaintiff suffered was foreseeable to the Defendant and was not too remote. The Defendant knew that the Plaintiff would incur penalties if he did not acquit the transit entry within 5 days.

I have not the slightest doubt that all the four requirements of the tort of negligence have been satisfied in this case and the Defendant is liable in negligence.

I have however addressed my mind to the specific reliefs sought by the Plaintiff. One of the reliefs are damages for loss of business on grounds that the Plaintiff's license to practice as a clearing agent was suspended by ZRA due to the Defendant's negligence. I cannot

sustain this relief because other than PW1's oral evidence, there is no other evidence to substantiate this claim. In my view, the Plaintiff should have adduced evidence of ZRA's communication to the Plaintiff suspending the license. In the absence of such evidence, I am not convinced that the license was suspended and I therefore dismiss the claim for loss of business.

The other relief sought is for the payment of K505,333.60 into court as security. This relief cannot be granted for the simple reason that the damages the Plaintiff is entitled to will need to be assessed by the learned Registrar, and the Plaintiff will be at liberty to enforce and execute this judgment.

The Plaintiff has nevertheless proved that it suffered loss and damage due to the Defendant's careless conduct. I award the Plaintiff damages for negligence and order that it should recover from the Defendant all the penalties, interest and expenses that it incurred at ZRA due to the Defendant's negligence. I also order that the Plaintiff should recover all the expenses that it incurred in searching for the Defendant. This shall include expenses the Plaintiff incurred in repairing and moving the Defendant's truck to

Livingstone. I also grant the Plaintiff's claim for payment of storage charges for the truck from the time it was taken to Livingstone.

The Plaintiff has further claimed damages for inconvenience, worry, anxiety and stress. I hereby grant this relief as it is clear from the evidence that the Plaintiff suffered inconvenience and was put to serious trouble by the Defendant who refused to cooperate when the Plaintiff reached out to him and even stopped taking his calls. The Plaintiff was left without a choice but to launch a manhunt in search of Defendant. I therefore have no difficulties in granting the Plaintiff damages for inconvenience, worry, anxiety and stress.

The net result of the foregoing is that the Plaintiff has proved its case on a balance of probability that the Defendant was negligent by failing to transport the Mukula and not acquitting the transit entry at Katima Mulilo Border Post within 5 days. I enter judgment in favour of the Plaintiff against the Defendant and refer this matter to the learned Registrar for assessment of the amounts due to the Plaintiff. The amounts due shall carry interest at the short-term bank deposit rate from date of writ to date of judgment and thereafter, at the current bank lending rate as determined by the

Bank of Zambia until full payment. I award costs to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 30th day of July, 2020.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

MATHEW L. ZULU
HIGH COURT JUDGE