IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CIVIL JURISDICTION)

SCZ NO. 26 OF 2004
APPEAL NO. 95 OF 2003

BETWEEN

KONKOLA COPPER MINES PLC	**1st Appellant**
ZAMBIA STATE INSURANCE CORPORATION LTD	**2nd Appellant**
And	
JOHN MUBANGA KAPAYA (As Administrator of the Estate of the late Geoffrey Chibale) and 8 other Administrators	**Respondent**

Coram: Chirwa, Chitengi and Silomba JJS on 7th August 2003 and 7th December 2004.

For the Appellant: Mr M Nchito of MNB
Mr M Ndulo, General Counsel, KCM

For the Respondents: Mr F Kongwa of Messrs Kongwa & Co.

J U D G M E N T

Chirwa, JS delivered the judgment of the Court:-

Cases referred to:

1. **Nance V British Columbia Electric Railway [19510 2 All. E.R 448**
2. **Henwood v Naoumoff [1966] Z.R. 78**
3. **Litana v Chimba and Attorney General [1987] Z.R. 26**
4. **Zambia State Insurance Corporation & ZCCM v Andrew Muchili [1988-89] Z.R. 149**
5. **Kabanga & Kajema Construction Co. Ltd v Kasanga [1990-92] Z.R. 145**
6. **Attorney General v Jumbe [1995 – 97] Z.R. 105**
7. **Betty Kalunga v Konkola Copper Mines PLC, SCZ No 5 of 2004**

This appeal arises from the findings of the High Court of negligence on the part of the 1st appellant and an award of damages. Basically the facts leading to the action are not in dispute. The 1st appellant operates an open mining operation in Chingola known as Nchanga Open Pit. The deceased, represented in this action by their administrators, were all working for the 1st appellant. The 2nd appellant insured certain risks of the 1st appellant's operations. An accident happened at the Open Pit where the deceased were working and the deceased were all buried in the mudslung. The cause of this was the collapse of the wall of the Open Pit which was attributed to heavy rains. The respondents alleged that the 1st respondent was negligent in the management of the mine and as a result of the accident, the respondents brought an action under Law Reform (Miscelleneous Provisions) Act and Fatal Accidents Act.

The particulars of negligence were that the 1st Appellant failed :-

a) to make the working place safe and take precautionary measures regard being to the fact that the pit bottom was known to be potentially dangerous.

b) to keep the pit bottom in safe conditions with regard to installation of supports which to the 1st appellant's servants knowledge had cracks.

c) Recklessness of the 1st appellant's servants by continuing operational work at the pit bottom with little or no regard to the safety of the workers.

d) to immediately close that part of the mine where the accident occurred pending the restoration of the safe conditions.

The short defence is a complete denial of any negligence. It was pleaded that the accident was as a result of natural disaster as a result of the slope failure which was beyond the control of the appellants and that the slope was unforeseeable.

From the evidence, the following facts are common cause:- In mining operations, there are generally cracks that are caused by the mining operations. Prior to the accident, Zambia had experienced some drought and the year of the accident was the second year of some heavy rains. The management of the 1st appellant were aware of the soil being saturated with water as a result of the heavy rains and because of this the cracks were being monitored all the time. Two days before the accident, the cracks at the Open Pit, according to the agreed statements, were noticed to have enlarged. On the day of the accident, the observer, PW2 raised the alarm of exceptional movement of the ground twice and the area was visited by the Mine Captain and Safety Captain. On each of the two visits, these men did nothing to either warn the workers or do anything to arrest the ground movement. Workers continued working in or under the area where there was ground movement. From the time the last visit was made by the mine Captain and Safety Captain, it took only about 45 minutes and the wall collapsed burying the deceased and some equipment. Prior to the collapsing of the wall, instructions were issued to start evacuating some mining equipment. It is accepted that no accident of such magnitude had occurred before and this was not expected.

Having this evidence before him, the learned trial judge held that the 1st appellant owed a duty of care to its employees and that this duty was breached in that 1st appellant was aware of the cracks and the

way they were expanding on that day but did not evacuate the employees in time to avoid this unprecedented accident and that this delay was further compounded by the fact that the 1st appellant preferred the evacuation of equipment to its employees. Having found the 1st appellant liable in negligence awarded K4,000,000.00 to each deceased's estate as loss of expectation of life and then awarded various sums as damages under the Fatal Accidents Acts, which in total awarded to more than K350,000,000 with interest at 60% from date of writ if paid within 180 days from the date of the writ. It is against these findings and awards that the appellants have appealed.

There are two grounds, namely:-

1. The trial judge's findings of negligence on the part of the appellant is against the weight of evidence.

2. That the awards in the judgment are not supported by the Supreme Court precedent.

The parties filed written heads of arguments in support of the appeal. From the submissions, it is clearly argued that the findings of fact on the evidence are wrong. On behalf of the appellant that although this appellate Court can rarely reverse a finding of fact, this was a proper case to reverse the finding of fact that the appellant was negligent. It was submitted that the lower Court completely disregarded the evidence of DW1 and DW2. It was submitted that the evidence of these two witnesses clearly showed that the accident was due to the collapse of the ground caused by natural causes, namely, saturation of water, which the appellant could not have foreseen.

There was, it was submitted, evidence from experts on rocks to the effect that the cracks in a rock does not necessarily mean that the ground will fall. It was submitted that this was a mining activity and cracks do occur but this accident was not due to the cracks per se but because of the heavy rains in the two previous years and that the accident of this magnitude had never occurred and was never expected. The fall was so fast that the appellant had not been given sufficient chance to determine whether it was safer to continue the mining operation or not. It was submitted that the facts of the case do not establish negligence. Failure to evacuate personnel first from the danger area was not negligence, it was submitted.

On behalf of the respondents, it was submitted that there was a duty of care an employer owes to his employee. In arguing this ground, it was submitted that this ground was so broad and general and did not give specific findings of the learned trial judge which were faulty. It was submitted that the 1st appellant, having become aware of the rock movements, they should have moved the personnel first from the danger zone but instead they issued instructions to evacuate mining machinery first and this conduct was gross negligence as they totally disregarded the safety of the employees. It was submitted that from the time the 1st appellant became aware of the rock movement to the time there was the mudrush, there was ample time to evacuate the employees and failure to do so was negligence.

We have considered this first ground of appeal against the finding of fact by the learned trial judge that there was negligence on the part of the 1st appellant. It is undisputed from the evidence that the 1st appellant was aware of the cracks at the pit bottom. There is also

evidence that there had been some rock movements before where wall had collapsed but these were minor and no lives were lost. The evidence on record also shows that the 1st appellant became aware of the very dangerous state of the cracks about two days before the fateful day and the gravity of it was acknowledged by the 1st appellant as instructions were given to monitor the movements on 24 hour basis. There is evidence that on that fateful day the Mine Captain and Safety Captain were informed of the dangerous situation developing and they visited the site twice but no steps were taken to ensure the safety of the workers. It can be no defence that although they had such accidents before but they never expected an accident of such magnitude to happen. The magnitude of the situation manifested itself much earlier, in the eyes of an ordinary worker who had to send messages to his superiors and his superiors visited the site twice. Their misjudgment was fatal. There was no evidence that such movements had been experienced before and their failure to act, created a dangerous working environment for the workers. Even when it was obvious that a great calamity would befall, the 1st appellant, through its servants gave instructions for evacuation of machinery first before moving out the workers. That was negligence. The 1st appellants knew of the dangerous situation created by the natural movements of the rocks but they allowed the employees to remain in the danger zone. This is negligence and we cannot fault the finding by the learned trial judge, that the 1st appellant was negligent on the totality of the evidence in this case. The first ground of appeal is dismissed.

We now wish to consider the second ground of appeal and this is that awards in the judgment are not supported by the Supreme Court

precedents. The ground as stated does not make any sense but after reading the heads of argument and listening to Counsel, what is complained of is that the awards are wrong at law. The guiding principles on which an appellate court can interfer with the quantum were clearly given in the case of **NANCE V BRITISH COLUMBIA ELECTRICAL RAILWAY** (1) and followed by our Court of Appeal then in the case of **HENWOOD V NAOUMOFF** [2] and these are that the appeal Court must be satisfied either that the judge, in assessing the damages applied a wrong principle of law, or if he did not err in law, then that the amount was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

In the present case, as we already pointed out, the learned judge awarded K4,000,000 for loss of expectation of life to all the estates of the deceased. He then awarded various sums to the dependants under the Fatal Accidents Acts without giving a specific amount to each dependant. We agree that there is merit in this ground of appeal and we will not go into details of Counsel's arguments as these will come out in the judgment below. However, basically the awards fell under two heads, namely, **(a) loss of expectation of life** and **(b) loss of dependence.**

a) **Loss of expectation of Life.** Loss of expectation of life is a head of damage when claimed on behalf of the estate of the deceased and it is law that such an award is by a small sum (see Halsbury's Laws of England, Vol. 34, 4th Edition at Paragraph 80). In the case of **LITANA V CHIMBA AND ATTORNEY GENERAL (3)** where this court awarded K1,500 for loss of expectation of life, the court gave the following guide:-

> **"We feel it is our duty to give guidance to Courts dealing with awards after the 3rd October 1985. Without taking into account any future serious fluctuations in the value of the Kwacha after the date of this judgment (a matter which will have to be considered in future decisions), we recommend that the proper award of damages for loss of expectation of life, regardless of the age of the deceased, should be K3,000."**

In line with this guidance, this court has been increasing the amount of award under this head. In the case of **ZAMBIA STATE INSURANCE CORPORATION and ZCCM V ANDREW MUCHILI (4)**, we increased the award to K3,500. In the case of **KABANGA & KAJEMA CONSTRUCTION COMPANY LIMITED V KASANGA (5)**, we increased it to K25,000. In the case of **ATTORNEY-GENERAL V JUMBE (6)** we increased it to K300,000. In the case of **BETTY KALUNGA (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE EMMANUEL BWALYA V KONKOLA COPPER MINES PLC (7)**, we awarded K5,000,000 as loss of expectation of life.

In the present case the learned trial judge awarded K4,000,000 to each estate. In line with the **KALUNGA** case, we increase this to K5,000,000.

b) **Loss of dependency**. Under this head, the learned trial judge awarded various sums to the various dependants without apportioning specific amount to each dependant. This is wrong. The awards must be given to each specific dependant according to the dependency. In calculating this award, some factors have to be taken into account, bearing in mind that this is not a mathematical precision calculation. Factors such as the possibility of the deceased, if he had not died, dying when the dependants are still dependants; the dependants dying early;

> the possibility of the widow re-marrying; the ages of the minor dependants. From this award must be deducted such sums that came into the estate as a result of death, such as insurance payments but not insurance or pension which the deceased took for his own future comfort. Also to be deducted are the awards under Law Reform (Miscellaneous Provisions) Act. These guidelines were clearly outlined in the case of **ZAMBIA STATE INSURANCE CORPORATION & ZCCM V ANDREW MUCHILI [4].**

Further in calculating the award under this head, the multiplicand, ie. the monthly salary must take into account income tax and what the deceased could possibly spend on himself. The multiplier is the estimated life expected to have left of the deceased before he died. Here again the possibility of an early death should be considered; the possibility of leaving employment should also be considered. These are some of the factors to be taken into account when calculating damages under the Fatal Accidents Acts. In arriving at the figures that the learned trial judge arrived at, the formula is not indicated. As the calculation was wrong in principle, we set aside all the awards under the Act and as such we are at large to do our calculations. We will therefore proceed to calculate for each deceased's dependants. In doing this we will go by evidence and documents on record.

The particulars of the deceased are taken from pages 117 to 120 of the record. Particulars of the dependants are taken from pages 57-61 of the record. Particulars of salary per month and benefits paid to the estates are from pages 62 to 70 of the record. The full details of the

administrator of the estates of the deceased are per the statement of claim at page 17.

1. **Appellant No.1 – Administrator John Mubanga Kapaya**. The deceased was **Godfrey Chibale**. At the time of his death was aged 37 years and was married with 4 children aged between 9 years and 1 month. He was also keeping his mother aged 62 years. He was receiving K688,765.00 per month. Out of this should be knocked off tax and social security. For this we would deduct K60,000. Then we would deduct what he would spend on himself, say K200,000. He may possibly, having some savings, say K60,000. The balance is K368,765. This is what we would estimate he may have been spending on the family for rent, food, school requirements and the like and this would be the multiplicand and we put it at a round figure of say K360,000. Taking into account the mining industry where pre-mature aging is recognised and other contingencies like early death, we would give him 15 years as the multiplicand. Multiplier multiplied by multiplicand, ie. K360,000 x 15 x12 would give us K64,600,000 as the total dependency of all the 6 dependants, ie, the widow, 4 children and his aged mother. From this will be deducted K41,325,900 as the sum paid from insurance as this insurance was taken up by 1st appellant and was paid out to the dependants as a result of the death of the deceased. To the balance of K23,275,900 will be deducted the K5,000,000 awarded under Law Reform (Miscellaneous Provisions) Act. The total dependency award is therefore K18,275,900. The widow and deceased's mother get 5% each. We take note that the children are very young and will be dependant on their mother for a long time. As such will not

apportion to them specific percentage of the remaining 90%; this goes to all the children to be shared equally.

We wish to state that the insurance benefit has been deducted from the award because it was not taken up by the deceased of his own foresight. It was taken by the 1st appellant on behalf of all employees, and it became due on death.

Using the same formula, we award the following to the remaining estates,:-

2. **Cupwell Ng'ambi.** The deceased, **Nelson Ng'ambi** aged 47 years. Married with 8 children ranging from 18 to 5 years and survived by a father. His basic monthly pay was K512,851.00. From this we deduct one third as the deceased's personal expenditure, tax and socials security and we remain with a balance of K331,921. Giving him the multiplicand of 10 we have K331,921 x 10 x 12 and this gives us K49,788,150. From this we deduct K30,771,060 paid under insurance and K5,000,000 under Law Reform Act. The balance is K14,017,090. Widow and father get 5% each i.e, K75,0854. The balance should be shared by the children as follows:- the first 4 older children get 10% each and the last 4 younger children get 15% each.

3. **Appellant Isaac Pepe.** Deceased **Webbin Mwale** aged 50 years. Survived by a wife and 11 children and a father. The children are aged between 26 years and 5 years. We should

believe that the first 4 children are not dependants; and this gives us 7 dependent children. His monthly pay was K774,025. Deducting from this one third as his personal expenditure, tax and social security leaves us the balance of K516,021. Giving him multiplicand of 3, his total award is K516,021 x 3 x 12 = K18,576,756. His dependants was paid K46,441,500 from the insurance. His dependants, therefore get nothing under the Fatal Accidents Act.

4. Appellant Davies Katontoka as administrator of the estate of **Benson Nganuka**. Nganuka was on monthly pay of K513,893. He was aged 43 years. He is survived by a wife, 5 children aged between 22 years and 9 years and a mother. At the time of his death, his wife was expecting and we have no evidence on the results of the pregnancy but we will assume there was a child. Deducting one third from his monthly salary as his personal expenditure, income tax and social security we have a balance of K379,262. Giving him multiplicand of 8, this gives us K379,262 x 8 x 12 = K36,408,152 total dependence for his family. He was paid K30,833,580 under the insurance scheme leaving us a balance of K5,575,592 From this we deduct K5,000,000 under Law Reform Act leaving a balance of K575,572. The widow and the mother get 1% each. We should believe the first born was not dependent on the deceased. The balance of 99% to be shared by the dependent children equally.

5. Appellant No. 5, Christine Mwelwa administrator of the estate of **Obed Bwalya**. At the time of his death he was aged 37 years. He was in receipt of monthly salary of K513,546.00. He is survived by a wife, 3 children aged between 6 years and 3 years.

At the time of his death, his wife was expecting. He is also survived by his mother and father. Giving him a multiplicand of 15 and deducting one third as his personal expenditure, income tax and social security, the total pecuniary dependence is K375,697 x 15 x 12 = K67,625,460. From this will be deducted K30,812,760 as benefits paid under the insurance scheme and K5,000,000 under the Law Reform (Miscellaneous Provisions) Act leaving a balance of K31,812,658. The wife gets 10% and the parents 5% each. The balance of K25,450,137 will be shared by the children equally.

6. Appellant Monica Chikonde, administrator of the estate of **Tresford Mwewa**. Tresford at the time of his death was aged 53 years old. He is survived by a wife and 12 children aged between 25 years and 1 year. He is also survived by his mother. At the time of his death he was on K689,766.00 monthly salary. Deducting one third as personal expenses, income tax and social security we are left with a balance of K463,193. Giving him multiplicand of 3 the total dependence benefits for the family is K463,193 x 3 x 12 = K16,674,948. The estate was paid K41,387,160 under the insurance scheme. The dependants gets nothing, therefore, under the Fatal Accident acts.

7. Appellant Anderson Mwanza, administrator of the estate of **Zakalia Mwenda**. Zakalia at the time of death was 34 years old. He is survived by a wife, one child, mother and father. At the time of his death, he was in receipt of K512,156 monthly pay. Deducting one third as his personal expenses, income tax and social security, the balance is K378,116. Giving him

multiplicand of 15 the total dependence benefit to his dependants is K378,116 x 15 x 12 = K68,060,880. His estate was paid K30,729.360 under the insurance scheme leaving a balance of K37,331,520. We deduct K5,000,000 under Law Reform (Miscellaneous Provisions) Act leaving K32,331,520 as 8. total dependency award. The widow gets 10% and parents 5% each. The balance of K28,865,224 goes to the child.

8. Appellant Esther Mulenga, administrator of the estate of **Henry Mulenga**. Henry at the time of his death was 36 years old and in receipt of K688,765.00 as his monthly pay. He is survived by 5 children. At the time of his death, his wife was expecting, we assume she gave birth to a normal child, therefore there are 6 children. He is also survived by mother and father. The children are aged between 16 years and 3 years. Deducting one third as his personal expenses, income tax and social security the balance is K459,515 x 12 x 15 = K82,712,700. They were paid K46,441,500 under the insurance scheme leaving a balance of K36,271,200. From this we deduct K5,000,000 under the Law Reform giving a balance of K31,271,200. The parents get 5% each. The balance is shared as follows: John and Malvin get 5% each, Mwenya and Henry 10% of the balance. The remainder of the children share the balance.

9. Appellants Standford Chimwemwe, administrator of the estate of **Peter Mutila**. At the time of Peter's death, he was aged 49 years and was in receipt of K766,274 monthly salary. He is survived by 8 children and a father. The children are aged between 31 and 12 years. We do no want to believe that the children who were over 21 were dependants and therefore for

the purposes of awards under the Fatal Accidents Acts, the first four children, namely, Dorren, Chimwemwe, Estela and Memory get nothing as there is no evidence that they were dependent on the deceased. Deducting one third as his personal expenses, income tax and social security, the balance is K510,849. Giving 6 as multiplicand the dependency benefits are K570,849 x 6 x 12 = K36,781,128. The estate and dependants were given K45,976,440 under the insurance scheme. They therefore get nothing under the Fatal Accidents Act.

For avoidance of any doubt, appellants 3, 6 and 9, although we have indicated the dependency value, they will not be paid anything as their dependency has been satisfied under the insurance scheme and Law Reform (Miscellaneous Provision) Act.

The appeal succeeds to the extent outlined above. The various dependants have had their benefits re-calculated. All the awards carry 20% interest from the date of writ to date of our judgment. Thereafter at the bank lending rate until paid. On the question of costs, we feel each party to pay its own costs.

D K Chirwa
JUDGE OF THE SUPREME COURT

P Chitengi
JUDGE OF THE SUPREME COURT

S S Silomba
JUDGE OF THE SUPREME COURT