IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 209/2008
SCZ/8/268/08

BETWEEN:

ZAMBIA BOTTLERS LIMITED **APPELLANT**

AND

DICKSON MASIYE **RESPONDENT**

Coram: Mambilima, CJ, Kaoma and Mutuna, JJS.
On 1st October, 2019 and 23rd October, 2019

For the Appellant: N/A
For the Respondent: Prof. M.P. Mvunga, SC of Mvunga Associates

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Michael Chilufya Sata v Zambia Bottlers Limited (2003) Z.R. 1**
2. **Continental Restaurant and Casino Limited v Aridah Mercy Chulu (2000) Z.R. 128**
3. **Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
4. **Khalid Mohamed v The Attorney General (1982) Z.R. 42**
5. **Donoghue v Stevenson (1932) A.C. 562**
6. **Duncan Sichula and Muzi Transport Freight and Forwarding Limited v Catherine Mulenga Chewe (2000) Z.R. 56**
7. **Zambian Breweries PLC v Josias Kayungwa - Appeal No. 82/2006**
8. **Zambian Breweries PLC v Reuben Mwanza (2000) Z.R.**
9. **Kapansa Mwansa v Zambian Breweries PLC - Appeal No. 153/2014**
10. **Zambian Breweries PLC v David Chibwe - Appeal No. 199/2014**
11. **Zambia Bottlers v Joseph Mwamba - Appeal No. 95/2016**
12. **Attorney General v Marcus Achiume - Appeal No. 3 of 2011**

Legislation and works referred to:

1. **High Court Rules, Cap. 27, Order 36 Rule 8**
2. **Charlesworth and Percy on Negligence (2010), 12th Edition, Christopher Walton and others, Sweet and Maxwell and Thomson Reuters London, pages 405-406.**

2.2.4 Failure to inspect the bottle before filling it with the coca-cola

2.3 The appellant in its defence denied any negligence or that the matters complained of were caused as alleged in the statement of claim.

3.0 Evidence in the court below

3.1 The respondent testified that he bought the bottle of coca-cola on 2nd June, 2003 around 14:00 hours but only opened and drunk the contents in the evening. Before he opened the bottle, it was properly sealed. He took two sips but the taste was unusual. When he lifted the bottle, he noticed some floating particles. Later, he felt dizzy and started vomiting. Later still, he took the bottle back to Lloyd. Lloyd wanted to replace the bottle but he refused.

3.2 Later at work, he started coughing and felt dizzy. He went back home and was taken to Chipata Clinic. This was on 4th June, 2003. At the clinic, he complained of coughing, chest pain and headache. They checked his blood pressure. It was 180/90. He was given some medicine. Since his blood pressure was high, they

referred him to the University Teaching Hospital (UTH). On checking his blood pressure at UTH, it was 230/130. He was given some medicine and he went back home. This was on 5th June, 2003. He stayed home for two weeks without going for work and he took the medicines for a month.

3.3 It was further the respondent's testimony that he made a report to the police and obtained a report. He was asked to take the bottle to the appellant. Instead, he took it to the health authorities at the Civic Centre. He was advised to go back after two weeks, as they would take it for inspection at the Food and Drug Control Laboratory. They collected the Public Analyst report, three weeks later, which revealed that the coca-cola contained foreign matter identified as fungal growths mixed with fine soil making the liquid colloidal.

3.4 In his evidence in cross-examination, he denied that he had lunch that day or anything to eat or that he had a medical condition. While admitting that no samples of his body fluids or stool were taken, he insisted that he

suffered injury to his health because of the coca-cola and that he still had a headache.

3.5 The respondent called Lloyd Chaika as a witness. According to Lloyd, the respondent bought three drinks from his shop on 3rd June, 2003. After six minutes, the respondent went back claiming there were particles in one of the drinks. He wanted to replace it but the respondent refused. He saw the particles in the drink, which was half but did not see the respondent drink or vomit and only heard that he was going to the clinic.

3.6 According to PW2, he had been buying drinks at the City market container for six years; the coca-cola was from the appellant. He did not buy coca-cola from anywhere else. The appellant took the drinks there every day and he used to see the vehicle.

3.7 The appellant's witness Allan Bwalya, the quality assurance supervisor, testified that there were other companies from within the country [Copperbelt Bottling and Invesco] and out of the country [Malawi, Zimbabwe and Angola], who manufactured similar products to the

appellant's and in 2003, there was an influx of Zimbabwean products at City and COMESA markets.

3.8 His testimony was further that the condition in which the appellant's products were produced could not allow fungal growth. He explained in detail how the bottles were washed, cleaned, sterilized, checked for any biological contamination, and screened before filling them with the product. He also explained that the bottles coming from the filler were date coded, plant coded, and the expiry date and time of production indicated. According to DW1, had the bottle in issue been produced he could have looked at the history of the production.

3.9 In cross-examination, he agreed that they had arrangements to deliver coca-cola crates to containers and their fleet had their trademark. He agreed that the fungal growth that made the liquid colloidal could harm someone. However, he insisted that a bottle that passed through their process could not be contaminated. He agreed that he remembered the case of **Michael**

Chilufya Sata v Zambia Bottlers[1] but was not aware of the judgment.

4.0 Consideration of the matter by the court below and decision

4.1 The judge considered the evidence and submissions by the parties and without haste, rejected DW1's testimony that it was impossible for the appellant to produce an adulterated drink. In the words of the judge, to accept such proposition was to override the findings of fact in the **Sata**[1] case, which the Supreme Court affirmed.

4.2 The judge refused to assume that the manufacturing process was one hundred per cent perfect and found that the evidence of PW2 was credible in so far as the source of the drink was concerned. The judge found as speculative the evidence that the bottle might have been sourced from neighbouring countries in light of direct evidence from PW2 who sold the bottle to the respondent and testified that the said bottle of coca-cola was a product of the appellant.

4.3 According to the learned judge, there was a food analyst report as to the content of the bottle and medical evidence of how harmful the drink had become to the respondent's health. Hence, he found as a fact that the appellant produced a contaminated drink negligently, which caused harm.

4.4 Applying the case of **Continental Restaurant and Casino Limited v Arida Mercy Chulu**[2], where an award of K2,000 (rebased) was made, [although damage was not proved], the judge awarded K10,000 (rebased). He pointed out that in this case there was damage as the respondent was hospitalised for a few days, rested for two weeks and was on drugs for a month.

4.5 The judge also awarded interest on what he termed as Bank of Zambia determined long-term deposit rate from date of issuance of the writ until judgment, and thereafter, short term deposit rate until payment. Costs were to follow the event.

5.0 Grounds of appeal and arguments by the parties

5.1 Dissatisfied with the decision, the appellant brought this appeal on three grounds as follows:

5.1.1 The Honourable court below misdirected itself in law and in fact when it found as a fact that the appellant produced a contaminated drink negligently, which caused harm.

5.1.2 The Honourable court below misdirected itself in law and in fact when it awarded as damages a sum of K10,000,000.00 to the respondent.

5.1.3 The Honourable court below misdirected itself in law when it awarded interest on the said K10,000,000.00 at the Bank of Zambia determined long term deposit rate from issuance of the writ until judgment and thereafter at the short-term deposit rate until payment.

5.2 Learned counsel for both parties filed heads of argument in support of their respective positions. However, the appellant's counsel did not attend the hearing of the appeal, file a notice of non-appearance or excuse their absence. Nevertheless, we have taken into account the appellant's heads of argument.

5.3 In ground 1, the substance of the appellant's arguments is that, the respondent did not adduce any credible or relevant evidence in the court below, which identified it as the manufacturer of the coca-cola drink he consumed. That although the court relied heavily and exclusively on PW2's evidence, PW2 did not buy the disputed coca-cola from the appellant or testify to that. Counsel observed that the evidence did not support the

statement by the judge that PW2 said they bought drinks at City market container and coca-cola from Zambia Bottlers.

5.4 Counsel argued further that the court dismissed, as speculative [without giving reasons], DW1's testimony that the disputed coca-cola might have been sourced from neighbouring countries and failed to consider DW1's unchallenged evidence that there were other companies that manufactured coca-cola in Zambia.

5.5 Counsel cited the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**[3]and **Khalid Mohamed v The Attorney General**[4], which set out the conditions that must be met before an appellate court could reverse or interfere with findings of fact made by a trial judge.

5.6 Furthermore, counsel contended that the bottle of coca-cola, which [according to DW1], would have been key in identifying the source of the drink and the manufacturer [as these were coded], was not produced either to the appellant or before the trial judge.

5.7 Learned counsel argued that since PW2 did not purchase his stock from the appellant, it was only the persons from the container at City market who would be competent to explain where the coca-cola was purchased. In the absence of that evidence, counsel submitted, and considering DW1's evidence as to the existence of alternative manufacturers of coca-cola in Zambia, it would be unsafe to find or infer [as the learned judge did], that the appellant was the manufacturer of the coca-cola.

5.8 According to counsel, on a proper view of the evidence, no trial court acting correctly would reasonably make such a finding. Counsel invited us to reverse the finding of fact by the trial judge.

5.9 In response, learned counsel for the respondent submitted that PW2 was quite clear when he testified that they bought drinks at the City market container; that the coca-cola was from Zambia Bottlers; and that they had been buying from the container for 6 years. To emphasis his point, he referred to PW2's evidence in re-examination that the appellant used to take drinks to

the City market container daily and that he had been seeing its vehicle.

5.10 Learned State Counsel cited the case of **Donoghue v Stevenson**[5] on the duty of care of a manufacturer of a product and submitted that to suggest that the appellant must escape liability since the drink was not bought from the factory would result in absurdity.

5.11 State Counsel submitted that the appellant was under a duty of care to take reasonable steps to ensure that the drinks supplied to the public and consequently to the respondent would not cause harm. That this duty was breached [as evidenced by the public analyst report] and the respondent was taken ill and suffered damage [as evidenced by the medical report]. Thus, the court properly found that the appellant negligently produced a contaminated drink and as a result, the respondent suffered harm.

5.12 In support of ground 2, counsel for the appellant submitted (without prejudice to ground 1), that the award was not only excessive and unconventional but was also wrong in principle as it was predicated on the

wrong premise. He quoted the **Chulu**[2] case where we said the following:

> **"The important point to stress, however, is that in cases of this nature, the basis of awarding damages is to vindicate the injury suffered by the plaintiff. The money was to be awarded in the instant case not because there was a cockroach in the soup. Thus, in the Donoghue v Stevenson case, the plaintiff was hospitalised. Mild condition is generally not a basis for awarding damages."**

5.13 Counsel argued that although the judge said there was medical evidence of how harmful the drink had become to the respondent's health, he did not specify the nature of the harm or injury the respondent suffered because of consuming the drink. According to counsel, the finding of the harm or injury sustained by a plaintiff is of utmost importance and crucial in determining whether the compensation by the court is fair.

5.14 Counsel noted that the court appears to have based its award on an erroneous understanding of our decision in the **Chulu**[2] case. The premise being that since there was no damage proved in that case but a sum of K2, 000 (rebased) was awarded, it should follow that where damage in a similar case is proved, the quantum of

damages should be more. On the contrary, we placed a caveat that nothing would be awarded if no proper evidence of a medical nature were adduced in future cases of a similar nature.

5.15 On the other factors the judge considered, counsel argued that in the **Chulu**[2] case, we held that the amount to be awarded was because of the harm and injury done to the health, mental or physical of a plaintiff. Therefore, the court should not have based its award on those factors because there was no credible evidence to show the cause of the hospitalisation, the illness that necessitated the taking of drugs for a month, or the rest period.

5.16 Further, the respondent did not call as a witness, the medical officers that allegedly attended to him. Counsel quoted the case of **Duncan Sichula and Muzi Transport Freight and Forwarding Limited v Catherine Mulenga Chewe**[6], regarding when an appellate court would interfere with an award. He also cited a number of other cases, including **Zambian**

Breweries PLC v Kayungwa[7] and **Zambian Breweries PLC v Mwanza**[8].

5.17 It was counsel's contention, that the respondent claimed to have suffered injury because of the coca-cola he took but no bodily fluids or stool were taken.

5.18 Further, there was no medical evidence linking the coca-cola to the respondent's condition or the symptoms he suffered, or the hospitalisation for two days. The alleged poisoning remained a suspicion. Neither was there evidence of the prescription or name of the drugs he allegedly took for a month. Hence, it could not be said the compensation was reasonable. We were invited to set aside the award.

5.19 In response, learned State Counsel supported the award of K10,000 (rebased) by the court based on the factors the judge referred to and taking into account inflationary trends. He also referred to the case of **Zambian Breweries PLC v Kayungwa**[7] and argued that this case is a 2008 decision while the former was earlier.

5.20 He further submitted that based on the **Sata**[1] and **Chulu**[2] cases, this case met all the required elements in a negligence case against a manufacturer by a consumer of a defective product. That there was evidence linking the coca-cola to the appellant in form of a police report, public analyst report, Lusaka City Council Public Health report and medical evidence.

5.21 Therefore, it cannot be said that the judge misapprehended the facts or that the award was illegal or that the damages awarded were arrived at on a wrong principle or mistaken facts, to require our intervention. State Counsel urged us to dismiss the appeal with costs. In respect of ground 3, learned State Counsel conceded that the interest be at the usual rates.

6.0 Consideration of the matter by this court and decision

6.1 We have examined the evidence on record, the judgment appealed against, and the arguments by learned counsel. As we see it, there is one main issue raised by this appeal, whether the High Court judge erred when he found the appellant liable in negligence for the

manufacture of the coca-cola that allegedly caused harm to the respondent.

6.2 We must state immediately that ground 1 attacks a finding of fact by the trial judge that the appellant produced a contaminated drink negligently. We have said in a plethora of cases, such as **Zulu v Avondale Housing Project Limited**[3] and **Khalid Mohamed v Attorney General**[4] that we do not lightly interfere with findings of fact made by a trial court, which had the benefit of hearing and seeing the witnesses. Exceptions are where we are satisfied that the court, in its evaluation of the evidence, was wrong in principle or did not consider certain evidence or did in fact consider evidence it ought not to have considered.

6.3 In this case, the appellant's argument is that there was no credible or reliable evidence linking the appellant to the coca-cola consumed by the respondent, especially that the bottle that would have been key in identifying the source and manufacturer of the drink was not produced to the appellant or the trial judge.

6.4 We have, between 9th May, 2017 and 24th July, 2019 dealt with three cases, similar to the current case, involving consumption of contaminated lager and or soft drinks. These cases are **Kapansa Mwansa v Zambian Breweries PLC**[9], **Zambian Breweries PLC v David Chibwe**[10] and **Zambia Bottlers v Joseph Mwamba**[11].

6.5 In the **Kapansa Mwansa**[9] case, the appellant's main argument was that the trial judge failed to properly balance, the evaluation of the evidence, which showed that the contaminated beer was bought from the respondent's dealer. We affirmed the principle in the **Donoghue**[5] case, that for an action in negligence to succeed, it must be shown that the defendant owed a duty of care to the plaintiff; that the duty had been breached; and that the plaintiff had suffered damage by that breach. We affirmed also that the law of negligence places a duty on a manufacturer of products to take reasonable care and that it places the burden on the claimant to prove every element of the tort of negligence.

6.6 We accepted in that case that there were some foreign particles in the bottle of castle beer the appellant

purchased from Titanic bar, which the public analyst identified as fungal growth. Although there was no evidence for the fungal growth in the appellant's mouth, we observed from the medical report that the appellant suffered discomfort. We concluded that whoever was responsible for the manufacture, packaging and distribution of the beer owed a duty of care to the appellant, they breached that duty, and consequently the appellant suffered damage.

6.7 However, we found that the failure by the appellant to produce the actual bottle containing the fungal matter and the resultant failure to establish if the beer was a product of the respondent were fatal to the appellant's case, as they went to the root of the claim, especially in light of the respondent's unchallenged evidence that they found foreign brands of castle in Titanic bar and counterfeit castle lager on the market in Kapiri Mposhi.

6.8 In the **David Chibwe**[10] case, we repeated the principle that the law of negligence places a duty on a manufacturer of products to take reasonable care and

it places the burden on the claimant to prove every element of the tort.

6.9 In that case too, the difficulty the appellant faced was proving that the bottle and its contents [castle lager] were produced by the appellant as the latter's defence was that the beer could have been produced by another brewer or was a counterfeit or was contaminated with the diesel after it had left the appellant's production line.

6.10 We stated that the respondent could have [even if he was appearing in person], obtained an order for discovery of the appellant's product code of its bottles and compared it with the bottle in dispute in order to prove that it was indeed the appellant's product.

6.11 We went on to say that at the very least, the barman who sold the respondent the castle beer could have testified on his behalf that he obtained all his stock from the appellant and no other source, which would have established some connection with the beer in dispute. That it was not enough for the learned trial judge to make a general assumption that since it was a castle

beer, it was reasonable to assume that the appellant manufactured it.

6.12 We stated further that having alleged that the appellant's beer was contaminated, it was incumbent upon the respondent to prove that the appellant's manufacturing process was not what it claimed to be but was one, which was susceptible to contamination.

6.13 The appellant in that case had also argued that no medical officer was called to testify on the link between the alleged negligence and the disease and the casual and extent of the alleged alcohol poisoning. Further, that the judge glossed over the seriousness of adducing credible evidence of a medical nature as we directed in the **Chulu**[2] case. We put the matter as follows at pages J16-J17:

> **"The medical reports in the record of appeal are extremely brief and do not help this Court at all. More importantly, no medical practitioner was called to testify as to the causal link between the drinking of the beer and the illness suffered including a prognosis of the illness. We note that the summaries given by the medical practitioners in this case are not uncommon in the appeals heard by this court concerning medical evidence but this should not stop a litigant from obtaining a more detailed medical report for purposes of proving his case or from asking a medical practitioner from testifying on behalf of his patient. We**

> **are of the view that the medical report which the learned trial judge relied on that the respondent was treated for alcohol poisoning does not constitute sufficient evidence of damage as a consequence of the beer the respondent consumed because it is not proper evidence of a medical nature. He therefore fell into error when he relied on it as sufficient evidence of damage.**
>
> **It follows from what we have said above that there was therefore no basis for awarding the respondent the sum of K20,000.00 as damages. We had indicated in the *Aridah Chulu* case that in future nothing will be awarded if no proper evidence of a medical nature has arisen. That time has now come. There was no proper evidence of a medical nature in this case to persuade us to award any damages".**

6.14 Likewise, in the **Joseph Mwamba**[11] case, we emphasised that it is not enough for a public analyst report to simply state that "the foreign matter was identified as fungal growths" without indicating the nature of the fungal growths. We further observed that the medical report that was produced in that case was not helpful as it just made reference to the fact that the respondent was being treated for a chronic fungal infection but no details were proved as to what could have caused the fungal infection. We concluded that there was no clear link established between the drink and the injury to the respondent's health and wellbeing.

6.15 Coming back to the present case, there can be no dispute that the burden rested on the respondent to prove that he suffered injury because of the appellant's breach of duty in the manufacture of the coca-cola drink that he consumed. In our view, the respondent did not discharge this burden.

6.16 The evidence on record established that the respondent bought the disputed coca-cola drink from PW2 at Soweto market and that the drink contained some foreign matter, which the public analyst identified as fungal growths mixed with fine soil making the liquid colloidal. According to the respondent, he became sick after consuming part of the contaminated drink and was attended to at Chipata Clinic for suspected food poisoning and thereafter, referred to UTH.

6.17 We accept that if a manufacturer distributes any drink meant for human consumption containing foreign matter or fungal growths, that manufacturer is in breach of the duty of care and is liable to the consumer if injury or damage occurs. However, as we said in the **David Chibwe**[10] case, the difficulty the respondent

faced was to prove that the appellant produced the disputed coca-cola.

6.18 In this case too, the appellant adduced evidence that other local manufacturers such as Copperbelt Bottling Company and Invesco Limited could have produced the disputed coca-cola and that there was an influx of similar products from Zimbabwe. The learned trial judge dismissed this evidence, without much thought. He relied heavily on PW2's evidence that he used to buy coca-cola from a container at City market and that the appellant used to deliver the coca-cola to the container. The judge considered PW2's evidence as credible.

6.19 Although we rarely interfere, with findings of fact based on the credibility of witnesses. we do not agree with the finding by the learned trial judge that PW2's evidence was credible as far as the source of the drink was concerned.

6.20 As submitted by the appellant, PW2 did not buy his stock of coca-cola from the appellant's delivery vans, which he said used to supply the container at City market. He bought the coca-cola from the container.

The respondent did not call the owner of the container to confirm that he bought the disputed coca-cola, which he in turn sold to PW2, from the appellant and nowhere else.

6.21 Besides, PW2's evidence that the respondent bought three drinks on 3rd June, 2003 and that it took only six minutes between the time he bought the drink and the time he returned it did not agree with the respondent's testimony that he bought a bottle of coca-cola from PW2 on 2nd June, 2003 at about 14:00 hours and only opened and consumed part of the contents of the bottle in the evening.

6.22 The evidence on record shows that the respondent resided in Chipata compound and was a marketeer at Soweto market, which is not anywhere near the said compound. Therefore, if the respondent consumed part of the coca-cola in the evening of 2nd June, 2003 he could not have taken it back to PW2 within six minutes or on the same day. The respondent said he later took the bottle to Lloyd but did not say when exactly he did so.

6.23 We hold the view, that the learned judge was wrong to accept as credible, PW2's testimony regarding the source of the coca-cola without resolving the apparent contradiction in the evidence of the two witnesses. As we said in the case of **Attorney-General v Marcus Achiume**[12], the trial judge had glossed over the weaknesses in the respondent's case, with the result that the full significance of certain aspects of the evidence was apparently not appreciated when he found as a fact that the appellant produced a contaminated drink negligently which caused harm.

6.24 Furthermore, as we said in the **Kapansa Mwansa**[9] case, the public analyst report did not establish whether the appellant produced the disputed coca-cola. It only identified the foreign matter as fungal growths. The report did not even state whether the fungal growths and fine soil in the drink could cause the symptoms complained of by the respondent. The same applies to the letter written to the respondent by the Lusaka City Council Public Health and Social Services Department.

6.25 In addition, as submitted by the appellant, the respondent did not submit the coca-cola bottle to the appellant, even after the police advised him to do so nor did he produce the bottle in the court below. Clearly, the appellant was denied the opportunity to confirm whether it manufactured the disputed coca-cola.

6.26 Further still, the respondent did not call as witnesses, the public analyst or the medical officers that attended to him at both Chipata clinic and UTH to explain the causal link between the consumption of the coca-cola and the injury to the respondent's health.

6.27 Consequently, there was no credible medical evidence to show the cause of the various symptoms the respondent experienced, the hospitalisation (if any), or what ailment required the taking of drugs for a month, the rest for two weeks or what medication the respondent was on or why the headache persisted. We are also alive to the fact that the respondent consumed the coca-cola on 2nd June, 2003 and experienced the symptoms almost immediately but only went to the clinic two days later, on 4th June, 2003.

6.28 We also agree that there was no proper link between the coca-cola containing the fungal growths and the alleged injury suffered by the respondent. We wish to reiterate what we said in the three cases, which we have referred to in paragraph 6.4 above that litigants must obtain comprehensive medical reports and reports from public analysts because sketchy reports are of no use to the courts.

6.29 Moreover, the failure by the respondent to produce the actual bottle of coca-cola containing the foreign matter was fatal to his case.

6.30 We conclude that the learned trial judge made a finding of fact on liability favourable to the respondent that the appellant produced a contaminated drink negligently which caused harm, which on a proper and well-balanced view of the whole of the evidence, no trial court acting correctly, could reasonably make as there was no reliable evidence showing that the coca-cola was a product of the appellant. Hence, we allow ground 1 and reverse the above finding of fact.

6.31 The success of ground 1 means that there was no basis for the award of K10,000 (rebased) damages for negligence. As we have said in the preceding paragraph there was no credible evidence explaining the symptoms suffered by the respondent or linking the coca-cola to the appellant. Ground 2 equally succeeds and we set aside the award. As for ground 3, State Counsel had conceded. However, this ground has become otiose.

7.0 **Conclusion**

7.1 In all, we allow this appeal. Although costs usually follow the event, considering that this is a 2008 appeal, which we had to rehear, we order the parties to bear their own costs here and below.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

N.K. MUTUNA
SUPREME COURT JUDGE