**IN THE SUPREME COURT OF ZAMBIA** **Appeal No. 211/2016**
**HOLDEN AT KABWE**
**(Civil Jurisdiction)**

**B E T W E E N :**

**BULK TRANSPORT LIMITED** **APPELLANT**

**AND**

**MOPANI COPPER MINES LIMITED** **RESPONDENT**



**Coram:** **Malila, Kajimanga and Kabuka, JJS**
**On 5th November, 2019 and 28th November, 2019**

*For the Appellant:* Mr. M. M. Sianondo, Messrs Malambo & Company

*For the Respondent:* Mr. A. Gondwe, In-house Legal Counsel, Mopani Copper Mines Plc.

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# J U D G M E N T

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**MALILA, JS** delivered the Judgment of the Court.

**Cases referred to:**

1. *Nkata and 4 Others v. Attorney General (1966) ZR 124*
2. *Antonio Ventriglia and Manuela Ventriglia v. Eastern and Southern African Trade and Development Bank (SCZ Judgment No. 13 of 2010)*
3. *Justin Chansa v. Lusaka City Council (2007) ZR 256*
4. *Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) ZR 96*
5. *Communications Authority v. Vodacom Zambia Ltd. (SCZ Judgment No. 21 of 2009)*
6. *Khalid Mohamed v. Attorney General (1982) ZR 49*

7. *Wilson Masauso Zulu v. Avondale Housing Project Ltd (1982) ZR 172*
8. *Zambia Revenue Authority v. Dorothy Mwanza & Others (2010)(2) ZR 181*
9. *Simwanza Namposya v. Zambia State Insurance Corporation Ltd (2010)(2) ZR 339*
10. *Examinations Council of Zambia v. Reliance Technology (2014)(3) ZR 171*
11. *Attorney General v. Kakoma (1975) ZR 216*

**Legislation referred to:**

*Evidence Act, chapter 43 of the Laws of Zambia*

## 1.0 Introduction

1.1 The dispute, which in its legal bearing we are being called upon to determine in this appeal, concerns structural damage suffered by the appellant's buildings located at Farm No. 839, Kitwe (the property). The appellant alleges that the said damage was occasioned by mining and related activities undertaken by the respondent.

1.2 The respondent denies most emphatically that its mining activities or any activities attributable to its operations caused the damage alleged, or at all.

## 2.0 Factual background

2.1 The appellant owns the property at which are office buildings, a shed, a substation, a workshop, a guard house, an ablution

block and a canopy for a filling station. It is bordered by a two-meter-high humpty-dumpty wall fence, with a double opening steel gate. It also has a tarred driveway and a parking area.

2.2 The respondent is a mining company which, at all material times, was executing its expansion program of open pit mining in an area known as Area E, (the proposed mining area) situated in the vicinity of, or proximate to, the appellant's property.

2.3 In furtherance of its desire to expand its mining activities, the respondent was obliged by an environmental impact assessment directed by the Zambia Environmental Management Authority (then Environmental Council of Zambia (ECZ)), to undertake a geotechnical and structural assessment the purpose of which was to ascertain the susceptibility of dwellings and structures in the proposed mining area, to premature failure or damage as a result of increased vibrations from blasting. To this end the

respondent engaged Messrs JKL Associates, Geotechnical and Piling Engineers, to undertake the exercise.

2.4 The appellant alleged that the geotechnical and structural assessment undertaken by JKL Associates involved underground blasting and other explosive related activities with dire consequences to the structural integrity of its property as particularized at paragraph 2.5 below.

2.5 The appellant claimed that the blasting and explosive related activities done by or at the instance of the respondent caused cracking and partial sinking of some structures at its property, a fact the appellant alleges was confirmed in a professional report furnished to the appellant by Messrs Mak Associates, Registered Valuation Surveyors and Asset/Property Managers.

2.6 The said report recommended the demolition of all existing structures on the property and the construction of new buildings with expensive reinforcement, the cost of which construction was at that time estimated at US$1,005,000=00 (One Million and Five Thousand United States Dollars).

**3.0 Legal action in the High Court and the judgment**

3.1 On the basis of the foregoing facts, the appellant (then plaintiff) was aggrieved by the damage to its property which it attributed to the respondent's mining operations. It thus commenced court proceedings in the High Court, claiming: (i) damages; (ii) loss of business; (iii) rental charges for leasing of offices; (iv) an order directing the respondent (then defendant) to demolish and reconstruct the structures at is expense; (v) special damages; (vi) interest and (vii) any other relief the court may deem just.

3.2 For its part, the respondent rejected the notion that the geotechnical and structural assessment undertaken by JKL Associates, involved any underground or explosive related activities as alleged by the appellant. According to the respondent, what that assessment did in fact involve, was an evaluation of the appellant's and third parties' buildings so as to assess their state and structural integrity before the mining operations in Area E were commenced.

3.3. The respondent thus denied that either it, or its commissioned agent, was responsible for the cracking and partial sinking of the appellant's building structures at the property. Not only did the respondent gainsay the appellant's claim, it also averred that the geotechnical and structural assessment by JKL Associates revealed that prior to the respondent's commencement of mining activities in Area E, the appellant's buildings, as well as those in the vicinity of the proposed mining area, were already in a state of cracks, partial sunkeness, or were otherwise showing signs of having undergone stress.

3.4 According to the report by JKL Associates, the area in the vicinity of the appellant's buildings furthermore revealed structural, foundational problems owing to the existence of collapsible earth in the nature of altered aeolian soils and poor or complete lack of storm water drains in the area, possibly accounting for water ingress beneath foundations with the resultant weakened foundation soil structure, leading to collapse and hence the cracks.

3.5 Mulongoti J (as she then was) tried the matter in the High Court. Having assessed the evidence deployed before her, and bearing in mind the issues as defined by the pleadings, concluded in a judgment covered in 74 folios, that the appellant's (then plaintiff's) claim must fail. She dismissed it accordingly.

3.6 The reason for her decision was summed up in the peroration of her judgment where the learned judge pertinently remarked as follows:

> **On the totality of the evidence, I find that the plaintiff has failed to prove its claims. Let me also state that I accept the defendant's submissions that the plaintiff needed to plead negligence and special damages specifically and to set out the particulars.**
>
> **In the net result, I find that the plaintiff has failed to prove its case to the required standard. I accordingly dismiss it.**

3.7 It is this decision of the lower court judge that has so beleaguered the appellant that it has now taken up the cudgels on appeal to us.

## 4.0 The grounds of appeal

4.1 Before us, the lower court judgment is being assailed on eight grounds formulated as follows:

1. **The learned trial judge erred in law and in fact when she found, contrary to the overwhelming evidence on record, that the appellant failed to prove that the respondent's mining activities, including blasting, cracked the appellant's buildings in March, 2008.**

2. **The learned trial judge erred in law and in fact when she opined that if the appellant's guard house withstood the defendant's blasting and mining activities, most likely the main offices did so too and consequently when she held on a balance of probabilities that the appellant's buildings were already cracked at the time.**

3. **The learned trial judge misdirected herself when she attributed cracking of the appellant's buildings to aging.**

4. **The learned trial judge fell into error when she held, in the absence of any evidence to support her holding, that the guard house which was nearer the charge point would not have survived the blasting by the respondent and when she consequently held that this clearly proved that the cracks to the appellant's buildings were already there at the time of mining activities.**

5. **The learned trial judge erred in law and in fact when, despite finding that blasting activities could lead to damage to the appellant's building and notwithstanding the evidence to that effect that was before her, she failed to consider the impact of**

**the "egg-shell-skull" principle of the law of tort on the matters in issue before her.**

6. **The learned trial judge misdirected herself when she failed to consider the overwhelming evidence before her which shows that the mining and blasting activities conducted by the respondent had a detrimental and damaging effect on the appellant's buildings.**

7. **The learned trial judge misdirected herself when she failed to distinguish between mining and blasting activity that occurred within a distance of 40 meters of the appellant's buildings and that which occurred outside that distance and when she consequently failed to consider the detrimental and damaging of such mining and blasting activities effect on the appellant's buildings** [sic!].

8. **The learned trial judge misdirected herself in law and in fact when she consequently held that the appellant had failed to prove its case to the required standard and when she dismissed the appellant's claim with costs.**

4.2 There was, of course, no cross appeal filed by the respondent.

## 5.0 The appellant's arguments in support of the appeal

5.1 In support of the foregoing grounds of appeal, fairly copious heads of argument were filled. Mr. Sianondo, learned counsel for the appellant, intimated at the hearing of the appeal that he chiefly relied on those heads of argument, which he reinforced and supplemented orally.

5.2 The filed heads of argument were divided and argued under two clusters as follows: cluster one comprising three grounds, namely, grounds two, three and four; and cluster two made up of five grounds, that is to say, grounds one, five, six, seven and eight.

5.3 In respect of grounds two, three and four, it was submitted that these grounds center on the broad question whether or not the appellant's buildings on the property were already cracked at the time mining operations were commenced by the respondent in Area E.

5.4 Counsel argued that the learned judge in the court below had misdirected herself in holding, as she did, that they were already cracked at the time mining operations commenced. While admitting that the appeal premised on the grounds in cluster one largely sought to assail findings of fact, the learned counsel for the appellant contended that the challenge of those findings of fact could properly be situated within the exceptions to the rule so clearly enunciated in authorities such as *Nkata and 4 Others v. Attorney General*[1].

That rule is simply that as a court that did not have the advantage to listen to the witnesses testifying in the trial court and to assess their demenour, an appellate court is ill-positioned to disturb findings of fact by a trial court.

5.5 The learned counsel was not unmindful that this rule admits of limited exceptions principally where the findings are perverse or not borne out of the evidence adduced, or the findings are so blatant in their defiance of logic that a reasonable tribunal, properly directing itself cannot arrive at the conclusions those finding carry or imply.

5.6 In developing his argument further, counsel expressed discomfort with the questions which the learned judge had posed for herself as being determinative of the issue in dispute. These were whether the cracks to the appellant's buildings were as a result of blasting and mining activities; whether the respondent had complied with mining regulations and other requirements such as those set out in the Environmental Impact Statement (EIS) before embarking on the mining and blasting activities; whether the appellant's

buildings on the property were cracked at the time the property was purchased from Zambia Consolidated Copper Mines Limited (ZCCM) in 2000; and finally whether the appellant had provided sufficient evidence before the court to show that the respondent's activities cracked its building.

5.7 These questions, according to counsel for the appellant, encompassed issues not raised in the pleadings but introduced merely through the tendered evidence. Counsel singled out the question of the buildings having already been in a cracked state at the time of the appellant's purchase from ZCCM of the property in 2000, as having arisen in the evidence of DW3, Millington Mambwe, the admission of which evidence counsel for the appellant had objected to, but that the objection was overruled flippantly by the trial judge.

5.8 The learned counsel observed that in overruling his objection to the admission of DW3's evidence, the learned judge below found comfort in the phraseology employed in paragraph 9 of the Defence to the effect that:

**Clearly even before the Defendant commenced mining operations in Area E, the Plaintiff's buildings were already in a state from a combination of external factors and not as a result of mining or blasting activities by the Defendant as those had not yet even began.**

5.9 In counsel's estimation, the court was wrong to take the view that it took because the burden of proving the assertion as regards the state of the buildings at the time of the purchase of the property from ZCCM lay with the respondent. No evidence having been presented in support of the claim as regards the state of the buildings at the time of purchase that burden had not, according to the counsel been discharged.

5.10 Counsel submitted that the lower court judge adopted a very unceremonious approach in dealing with the major issue relating to the state of the buildings before the commencement of blasting and mining activities in their immediate vicinity. This, according to counsel, contradicted the attitude recommended by this court as articulated in the case of *Antonio Ventriglia and Manuela Ventriglia v. Eastern and Southern African Trade and Development Bank*[2].

5.11 Counsel for the appellant contended that in reaching the conclusion that the appellant's buildings were already cracked at the material time, the lower court judge relied heavily on the evidence of DW3 without explaining why she preferred that evidence to all the other contradictory evidence adduced on the issue. The judge did not, in counsel's submission, even consider some parts of DW3's evidence pertinent to the issue. This consequently explains why she fell into error and thus brought her findings of fact within the purview of the exception to the rule against interference by an appellate court with factual findings of a trial court as set out in the *Nkata*[1] case.

5.12 The learned counsel further submitted that an examination of the evidence given by DW3 shows that the witness, as regards prior damage to the buildings, testified in respect of one building only that was originally built by ZCCM. That witness also testified that there was a completely new office block which was built parallel to the old one. The witness made no mention that the new building ever suffered cracks

or other damage during the period of his employment. The short point counsel made was that there was no evidence on record to support the lower court's finding to the effect that all the appellant's buildings were already cracked at the time they were purchased from ZCCM in the year 2000. The learned judge should thus never have made a global finding based on evidence that was not laid before her.

5.13 It was counsel's further submission that the lower court judge ignored the evidence of PW1 as it related to the state of the buildings at the date of the purchase of the property by the appellant. Referring us to the case of *Justin Chansa v. Lusaka City Council*[3], counsel submitted that as that case guided we should in these circumstances, interfere with the findings of fact in the present case.

5.14 Counsel for the appellant also attributed misdirection to the lower court judge for expressing, in her judgment, the opinion that given that the wall fence and the guard house - which were nearer to the respondent's area where mining activities were taking place - were not cracked or damaged,

considering also that the guard house withstood the mining and blasting activities, the other buildings must have been already cracked at the time.

5.15 In counsel's submission, the judge's opinion was not only without a factual basis; it contradicted the evidence of PW1 that the wall fence was intact because it had been rebuilt three or four times. Counsel also submitted that there was a scientific explanation given by PW3 as to why the wall fence had no cracks. The lower court judge ignored all this without any explanation.

5.16 To buttress the submission at paragraph 5.14, the learned counsel for the appellant cited the case of *Wesley Mulungushi v. Catherine Bwale Mizi Chomba*[4] where we stated, *inter alia*, as follows:

> **Our concern is: where did the learned judge get the evidence that the respondent did not own the property in the absence of her own testimony? Since we have not come across any evidence by the respondent that she did not own the property, we can safely say the learned judge seriously misdirected himself by taking into consideration evidence that was not before him.**

Drawing an analogy between this case and our sentiments in the *Wesley Mulungushi*[4] case, counsel submitted that there was a sound legal basis upon which the lower court judge in this matter should have her findings of fact reversed.

5.17 The appellant's counsel then went on a different trajectory with a view to persuading us to accept that the appellant's buildings were not cracked or sunken prior to commencement of the alleged blasting and mining activities by the respondent.

5.18 Counsel submitted that the Evidence Act, chapter 43 of the Laws of Zambia and the best evidence rule, enjoined the court to accept the evidence of the witnesses who were best placed to observe the matters in issue in this case, that is to say, whether or not the buildings were cracked and damaged prior to commencement by the respondent of blasting activity; that DW3 testified as to what he observed in 1998 including the fact that the buildings had undergone renovation.

5.19 DW3's testimony was confined to part of the property – not all the buildings. On the contrary PW1 gave not only a more current account of the state of the buildings; he also testified on the state of the buildings at the time of the purchase of the property from ZCCM.

5.20 It was also contended that the respondent was in breach of the duty to conduct a baseline survey before undertaking any blasting activity; that it only did the said baseline study in November 2008, after blasting activity had already began.

5.21 Counsel further submitted (in the alternative) that other than PW1's testimony that the buildings were 100% intact when they were bought from ZCCM, neither party adduced evidence as to the state of the buildings before the commencement of the mining and blasting activities. It should thus have followed, having regard to the burden of proof, that the issue was not proved. As it turned out the court below contradicted itself when it held that none of the parties had adduced evidence as to the state of the buildings before the commencement of the blasting and mining

activities. We were urged to uphold the appeal in respect of grounds two, three and four.

5.22 The arguments in respect of grounds one, five, six, seven and eight of the appeal were principally focused on impugning the lower court's assessment of the evidence before it as it relates to the effect on the buildings of the blasting activities near the property.

5.23 The learned counsel for the appellant quoted extensively from the judgment of the lower court before submitting that the court had, before her, all the material necessary to reach a decision that was consistent with what counsel considered as the correct findings contrary to what she made – findings that should have confirmed that the blasting activities undertaken by the respondent caused damage to the appellant's buildings.

5.24 In specific terms, the learned counsel for the appellant called our attention to the observations which the court below recorded in its judgment to the effect that the EIS conditions were to be met before mining operations commenced –

including a baseline study to assess buildings at the property and those of neighbouring third parties *before* any mining and blasting activity was done and for settlements such as buildings to be protected from blasting effects.

5.25 We were also invited to consider the finding of the lower court that the appellant had not been given notification before mining activities began, and more pertinently that the respondent engaged in mining activities in Area E within 40 meters of the appellant's buildings contrary to the applicable regulations. Also, that the respondent engaged in mining and blasting sometime in June or November, 2008 and not in March, 2009.

5.26 The learned counsel for the appellant also grumbled that the learned lower court judge did not reveal her mind as to whether she was inclined to reject evidence to the effect that vibration from mining operations would cause damage to surrounding structures.

5.27 According to counsel for the appellant, the lower court judge rejected the evidence of PW1 to the effect that mining operations began in March, 2008 but found as a fact that mining and blasting began by June 2008. Having so found, the learned judge did not specifically address her mind to the full import of that finding, and thereby misdirected herself. She also wrongly referred to a document which reflected the dates of blasting as being from March 2009 to July 2010, contrary to her other finding of fact.

5.28 Counsel also observed that the learned trial judge had made two contradictory findings of fact: first that mining and blasting activities were undertaken within 40 meters of the buildings and later that blasting took place at a distance of 100 meters or more. These findings, according to counsel, were erroneous and amenable to reversal on appeal.

5.29 The appellant's learned counsel next argued the point about the burden of proof. According to him it was the respondent which, in its defence, had averred that as at the date of the geotechnical and structural assessment in November 2008,

mining and blasting activity in Area E had not yet commenced. In these circumstances, all the appellant needed to do to discharge its own burden was to show that contrary to the respondent's claim, mining and blasting activities began prior to the undertaking of the geotechnical and structural assessment and not, as wrongly determined by the lower court, to demonstrate that it began in March 2008.

5.30 Counsel submitted that compliance with the conditions imposed under the EIS and by the Director of Mines and Safety were intended to ensure that mining was undertaken safely. The evidence before the court showed that the respondent was in breach of those conditions by commencing mining and blasting in June 2008. Exemption was only granted in October 2008, some good four months after the blasting and mining had commenced.

5.31 The learned counsel dispelled the lower court judge's conclusion that the buildings could have succumbed due to aging, submitting that this was contrary to the evidence on

record which confirmed the violent effect of blasting activities admitted by the respondent and as testified to by PW4.

5.32 Counsel submitted that at the very least, the court ought to have applied the egg-shell-skull principle in considering the appellant's claim even if it, like negligence, was not expressly pleaded. It was nonetheless clear that what the appellant sought is relief for a tortious act committed by the respondent in breach of its duty not to cause harm to the appellant's buildings.

5.33 The justice of the case, submitted the learned counsel, demanded that the lower court judge looked beyond nuances of the words 'negligence' and 'egg-shell-skull' whether or not they were expressly used in the pleadings. Counsel prayed that we uphold the appeal on grounds one, five, six, seven and eight as well.

5.34 In his oral augmentation, Mr. Sianondo rehashed and reiterated the written arguments. He fervidly prayed that we uphold the whole appeal.

**6.0 The respondent's arguments against the appeal**

6.1 The respondent's learned counsel stoutly opposed the appeal and in response to the appellant's heads of argument, filed opposing heads of argument. It is those heads of argument that Mr. Gondwe, learned counsel for the respondent, adopted and orally supplemented them at the hearing of the appeal.

6.2 In responding to grounds two, three and four of the appeal, it was submitted on behalf of the respondent that the appeal premised on those grounds should fail as those grounds challenged findings of fact by the lower court. He relied for that submission on the case of *Communications Authority v. Vodacom Zambia Ltd.*[5] where it was held that an appellate court will not reverse findings of fact unless certain exceptional conditions exist.

6.3 The learned counsel for the respondent contended that on the basis of the submissions he had made at paragraph 6.2, this court should not reverse the lower court's findings as the appellant had clearly failed to bring their case and the

findings of the court within the permissible exceptions to the rule against interference by an appellate court with findings of fact by a trial court.

6.4 The alternative submission of counsel was that the lower court judge was right to hold that, on a balance of probabilities, the appellant's buildings were already cracked at the time of any blasting activities undertaken by the respondent as testified by DW3.

6.5 The learned counsel suggested that there was a contradiction between the pleadings of the appellant and the evidence adduced before the lower court in that in the statement of claim, the appellant averred that in or about September 2008, the respondent engaged JKL Associates to undertake a geotechnical and structural assessment involving underground blasting activities. In the further and better particulars furnished by the appellant at the request of the respondent, the former alleged that the blasting activities started in or about September or early November, 2008.

6.6 PW1's testimony, on the other hand, was that he had information that the heavy explosions occurred in March 2008. Additionally, while the pleadings refer to JKL and Associates as having undertaken the blasting activities, the evidence tendered was that it was the respondent that did. A JKL and Associates' representative, DW2 denied in his evidence that he ever used explosives for the geotechnical assessment.

6.7 In the face of these contradictions, the learned judge in the court below was, according to counsel, correct to make the assessment she made to come to the conclusion that she did. Counsel reiterated that on the evidence, it was a legitimate conclusion she arrived at that the appellant's buildings were already cracked and/or damaged at the time that any blasting activities could have started.

6.8 The learned counsel for the respondent referred us to the testimony of DW1 to the effect that JKL and Associates were engaged to do a structural baseline survey, which is so called because it is done before the project starts. This evidence,

submitted the learned counsel, is corroborated by that of DW2 to the effect that his firm was engaged by the respondent to do the baseline survey before the commencement of the project. This was in October 2008 and work was concluded in November 2008 with the report being submitted in December 2008.

6.9 The testimony of this witness was that at the time of undertaking the survey the appellant's buildings were already cracked and that these structures had in the past experienced stress and were at some stage underpinned.

6.10 According to counsel for the respondent, the evidence of DW2 was reinforced by that of DW3 who testified that the buildings, which had originally been owned by ZCCM, his previous employer, were cracked and had suffered structural failures which was noticed as early as 1990. At that time, according to that witness, it was noticed that the buildings' foundations were sinking.

6.11 The learned counsel also placed much reliance on other parts of the testimony by DW3 to buttress his submission that the lower court judge was right in her conclusion. According to counsel the submission by the appellant that the baseline survey was undertaken after the mining activity had commenced in Area E, was at best a misrepresentation of the evidence given in court and at worst mischievous.

6.12 The learned counsel then dealt with another evidentiary issue, namely the exemption the respondent had sought from a mining regulation which required mining activities to be carried out outside a 40 meters radius. He pointed to a letter in the record of appeal showing that exemption was only granted after the 14th October 2008, meaning that blasting activities, if any, could only lawfully have commenced after that date.

6.13 According to counsel, this was corroborated by the seismograph reading in the vibration monitoring report which showed all the readings of each blasting activity. The report indicated that the first reading was recorded on 14th

March 2009. The conclusion to be drawn from all this is that the baseline report was done before the blasting commenced in March 2009.

6.14 Counsel for the respondent then set out the possible causes of the cracks to the appellant's buildings as set out in the baseline report to include the construction of the appellant's buildings on a conventional strip foundation; poor construction of the buildings; extensions to the buildings; and the presence of collapsible aeolian soils. He also pointed to previous attempts to underpin the structures and grouting as testified to by PW4, DW2 and DW3.

6.15 It was also contended that the reason other structures within the vicinity of the appellant did not suffer any stress was because they were robustly built on piles and were designed to withstand differential settlement, if it were to occur.

6.16 As regards the appellant's argument that the learned judge below held without any legal or factual basis that the guard house and wall fence were intact, counsel for the respondent referred us to the evidence of PW3 where the witness

conceded that he had noticed that the perimeter wall did not have cracks. He also referred us to the witness' concession that the wall fence was closer to the respondent's open pit than were the offices. The witness is also recorded to have testified that the gate part of the wall fence, where the guard house sits, was unaffected though it was closer to the open pit. According to counsel, it was on the basis of all this that the court made a finding and in the process expressed an opinion on the matter.

6.17 Turning to grounds one, five, six, seven and eight, the learned counsel for the respondent divided the arguments under separate argument points of response as follows:

6.17.1 It was contended that the impression created by the appellant that blasting activities in Area E was within 40 meters of the appellant's buildings, was totally false. The letter by the respondent applying for an exemption to conduct mining activities within prescribed limits stated that the appellant's buildings were within 40 meters of the Pit Limit – essentially

informing the Department of Mines Safety that the limit of the pit were within 40 meters and not that blasting would be carried out within the said 40-meter limit.

6.17.2 Counsel also pointed out that from the report by African Explosives Limited (AEL) it was evident that blasting was conducted at more than 100 meters from the appellant's property. The different distances recorded in the report show that the blasts were only being conducted at over 100 meters. Counsel posited that the lower court had thus revealed its mind to the evidence before it. There was therefore no misdirection as alleged.

6.17.3 The respondent's learned counsel also dispelled the argument that it was incumbent upon the respondent to show when mining activities began. Counsel contended that it was wrong for the appellant to attempt to shift the burden of proof on to the respondent. The case of *Khalid Mohamed v. Attorney*

*General*[6] was cited to buttress the point that a party who makes a claim must prove it in order to succeed. Counsel reiterated that mining activities only began in March, 2009 and not in March, 2008 as alleged by the appellant.

6.17.4 Counsel finally contended that the egg-shell-skull principle, which the appellant had invoked in its argument, was not available as it was not part of the appellant's case in the lower court. The appellant neither pleaded nor proved negligence either. The egg-shell-skull principle thus had, according to counsel, no application whatsoever to the present dispute.

6.18 Like his learned counterpart for the appellant, Mr. Gondwe in his oral augmentation, rehashed while reiterating the heads of argument.

6.19 Counsel ended by praying that we dismiss the whole appeal for lacking merit.

**7.0 Consideration of the arguments of the parties and the decision of the court.**

7.1 Upon careful consideration of the issues raised in this appeal, it is clear to us that the appeal either challenges the lower court's findings of fact or disputes the lower court's assessment of the evidence.

7.2 All the grounds of appeal assign error to the lower court judge in its assessment of the evidence deployed before it and in coming up with findings of fact following such assessment.

7.3 Yet the law is fairly settled that an appellate court should not ordinarily disturb or tamper with the trial court's findings of fact especially if those findings and conclusions reached are supported by credible evidence. This rule of thumb is premised on the fact that the trial judge had the opportunity to hear the witnesses testify and to assess their demeanor.

7.4 This court has consistently explained in numerous case authorities that as an appellate court we are loath to interfere with a trial court's findings of fact save in very limited circumstances. In the case of *Nkata and 4 Others v. Attorney*

*General*[1], which was referred to by counsel for the appellant, we guided that:

> **A trial judge sitting alone without a jury can only be reversed on questions of fact in (i) the judge erred in accepting evidence, or (ii) the judge erred in assessing and evaluating the evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the judge erred in assessing the manner and demeanor of the witnesses.**

7.5 Similar sentiments were strongly carried in cases such as *Wilson Masauso Zulu v. Avondale Housing Project Ltd*[7] *(1982)* and reiterated in others such as *Zambia Revenue Authority v. Dorothy Mwanza & Others*[8], *Simwanza Namposya v. Zambia State Insurance Corporation Ltd*[9] and *Examinations Council of Zambia v. Reliance Technology*[10].

7.6 Much as Mr. Sianondo ably addressed us on the perceived merits of this appeal by way of elucidation and elaboration on the grounds of appeal, complete with authorities, and his learned counterpart (Mr. Gondwe) also addressed us on the respondent's opposition to the appeal, all their efforts were

coloured and subject to our finding on whether the appeal raises any points of law.

7.7 While the point is conceded that facts are the fountain head of law and that often one can hardly separate law from its factual milieu, the dichotomy between law and fact in a ground of appeal must always be borne in mind. And so, we ask the question whether indeed the grounds of appeal in the present case are solely based on findings of fact by the lower court.

7.8 In order to succeed, a party calling upon an appellate court to reverse findings of fact of a trial court must demonstrate that the court below made findings of fact which were – to use the common language employed in this connection – perverse, or in the absence of relevant evidence, or upon a misapprehension of facts, or that on a proper view of the evidence, no trial court acting correctly could reasonably make.

7.9 Mr. Sianondo was in general agreement that the first cluster of grounds, that is to say, grounds two, three and four sought to challenge findings of fact. His argument was, however, that those findings could properly be located in the permissible circumstances for interference as set out in the *Nkata*[1] case and others. Mr. Sianondo particularly complained about the court's heavy reliance on part only of the evidence of DW3 as regards prior damage to the buildings. In doing so, the judge, according to counsel, ignored the evidence of PW1 as it related to the state of the building at the time the property was purchased.

7.10 The gamut and premise of Mr. Sianondo's submission as far as we understand it, is that the court below made a poor job of assessing the evidence before it; that in some instances the evidence before the court contradicted each other and yet the court preferred some and not the other versions of the evidence availed to it.

7.11 The duty of appraising the evidence given at a trial is pre-eminently that of the trial court which saw and heard the witnesses. That responsibility does not lie with an appellate court. In *Attorney General v. Kakoma*[11], we stated that:

> **[a] court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence.**

7.12 Our view is that the learned counsel is faulting the lower court on the basis of its own assessment of the evidence by the witnesses who testified before it. To that extent counsel's efforts are unavailing.

7.13 Mr. Sianondo also took issue with the questions that the learned judge posed as constituting the crux of the dispute between the parties. We have set out those questions at paragraph 5.6 of this judgment. The learned counsel's grievance was that the issues raised touched on matters that were not raised in the pleadings but arose only in the evidence, especially that of DW3.

7.14 Our considered view is that the real issue for determination in this matter was whether or not it was the activities of the respondent that caused the damage to the appellant's buildings located at the property. In order to address this overarching question, the trial judge was entitled to raise such subsidiary questions around that key issue as would assist the court address it. The saying that there are many ways to skin a cat would in the present circumstances translate into the fact that there is more than one way of reaching the desired conclusion. In the present case that conclusion resides in answering the overarching issue for determination. We thus think the appellant's argument in this regard is bootless.

7.15 In assessing the evidence of the appellant with regard to the cause of the cracks to the appellant's buildings and roughly when, in the chronology of events that occurred, the learned lower court judge observed at J63 as follows:

> **I note also the contradictions in the plaintiff's witnesses as to when the mining, including blasting activities started. Whereas, PW1 testified it was in march 2008, in its statement of claim the plaintiff alleged that mining and blasting activities**

**began in September 2008. PW4 stated that the plaintiff told him that the defendant started mining in April 2008.**

7.16 The contradictions pointed out by the court as specified above were by no means the only ones. Elsewhere in her judgment (J69) the learned judge observed that:

**PW3 further testified in cross-examination that blasting permission was granted in October 2008. This not only contradicts his own testimony in chief but that of PW1 as well.**

7.17 Taken in the round we are of the considered view that the lower court judge did record her reasons for preferring the evidence of DW3, who was not only a former employee of ZCCM from whom the buildings were purchased, but was also in the Management Buy Out Team that had initially purchased the property. That witness testified that at the time of the sale of the property the buildings were damaged and already had cracks. This led the court to conclude as follows (at J72):

**I thus am inclined to find, on a balance of probabilities that the buildings were already cracked at the time as testified by DW3. And that the cracks could be due to aging as stated by PW3 and PW4 who attributed the cause to other causes apart from blasting just like the defendant's witness, DW2.**

7.18 In our estimation, the trial judge did subject the evidence which was laid before her to a proper quantitative and qualitative assessment and arrived at proper findings of fact and conclusions. The appellant has not demonstrated sufficient reason to justify the impugning of those findings. We accordingly find no merit in grounds two, three and four of the appeal and dismiss them accordingly.

7.19 Turning to grounds one, five, six, seven and eight of the appeal, the grievance of the appellant which is not very different from that in respect of the other cluster of grounds, is that the conclusions of the court were contrary to the evidence adduced before it. We have already stated that the lower court properly discharged her responsibility of assessing the evidence to come to the conclusion that she did.

7.20 In regard specifically to the argument that the respondent had not given notification before the mining activities began and that those activities were done within 40 meters of the appellant's buildings, we can do no, better than quote a

whole passage from the judgment of the lower court to show the exact finding of the court on these issues. At J67 the court stated thus:

> **I am also inclined to find that the defendant did engage in mining activities in area E where the plaintiff's buildings are situated within 40 meters of the pit. The experts (both plaintiff and defendant's witnesses) especially PW3 and DW1 testified that mining activities were to be conducted at least 150 to 200 meters away from third party's building. The evidence is clear that the defendant obtained clearance from ECZ and mining safety department in order to engage in mining blasting. The defendant was even exempted from mining regulation 602 as testified by DW1 and to an extent DW3...**
>
> **The defendant thus engaged in mining and blasting sometime in July or November 2008 and March 2009 as testified by its witnesses.**

7.21 The statement sets out the court's finding unambiguously. Our view is that the appellant's complaint is without basis.

7.22 We must also state that we find the criticism of the judge below for expressing an opinion in her judgment regarding the possibly more robust structural position of the guard house relative to other buildings on the property, rather unwarranted. In the course of determining disputes, judges

do indeed have the liberty to express opinions and views over many issues. Many such opinions may be entirely harmless comments made in passing and should not normally be a basis for a grievance in an appeal unless they are inextricably related to the overall decision.

7.23 In the present case, the issue was whether the mining activities of the respondent caused the damage to the appellant's buildings and not whether damaged buildings were weaker than the guard house.

7.24 We perceive the appellant's grievance under the second cluster of grounds of appeal as being purely evidentiary. The appellant claims that it adduced sufficient evidence to prove its claim. The court, however, held in the passage we have reproduced at paragraph 3.6 of this judgment that the appellant failed to adduce sufficient evidence to discharge its onus.

7.25 Our view is that the lower court directed itself to all the evidence bearing on the key issues to be determined in this

case. Consequently, we find no merit in the second segment of the grounds of appeal either.

**8 Conclusion**

8.1 The net result is that the whole appeal collapses and is dismissed with costs to the respondent to be taxed in default of agreement.

.....

M. Malila

**SUPREME COURT JUDGE**

.....

C. Kajimanga

**SUPREME COURT JUDGE**

.....

J. K. Kabuka

**SUPREME COURT JUDGE**