

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 71/2016

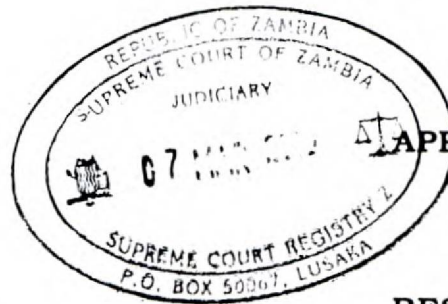
HOLDEN AT NDOLA

BETWEEN:

ZESCO LIMITED

AND

HARRISON TEMBO



APPELLANT

RESPONDENT

CORAM : Wood, Musonda and Mutuna, JJS

On 5th March 2019 and 7th March 2019

For the Appellant : Mrs. A. Chungu and Mr. K. Mweemba, in-house counsel for the Appellant

For the Respondent : N/A

J U D G M E N T

MUTUNA JS, delivered the judgment of the Court.

Cases referred to:

- 1) *Wilsons and Clyde Coal Co. Ltd v English* [1937] 3 ALL ER 628
- 2) *Wilson v Tyneside Window Cleaning Company* [1958] 2 QB 110
- 3) *Harris-v-Brights Asphalt Contractors* [1953] 1 ALL ER 395
- 4) *Ruben Nkomanga v Dar Farms International Limited* SCZ Judgment No. 25 of 2008
- 5) *Mhango v Ngulube and others* [1983] 61
- 6) *Attorney General v Achiume* [1983] ZR 1
- 7) *Zulu v Avondale Housing Project Limited* [1982] ZR 172

- 8) **Mohamed v The Attorney General [1982] ZR 49**
- 9) **Undi Phiri v Bank of Zambia [2007] ZR 186**
- 10) **Savenda Management Services v Stanbic Bank Zambia Limited**
SCZ judgment No. 10 of 2018

Legislation referred to:

The Rules of the Supreme Court, 1965

Other authorities referred to:

- 1) **Winfield and Jolowitz on Tort, 10th edition by W.V.H. Rodgers, Sweet and Maxwell, London**
- 2) **Halsbury 's Laws of England, volume 16, 4th edition by Lord Hailsham of St. Marylebone, Sweet and Maxwell, London.**

Introduction

- 1) This is an appeal against a decision of the Learned High Court Judge which found the Appellant negligent and awarded damages to the Respondent following injuries sustained by him in the course of carrying out his duties.
- 2) The appeal questions the award of damages on the grounds that the same were awarded in the absence of the Respondent pleading negligence and leading evidence alleging or proving negligence on the part of the Appellant.

Background

- 3) The facts of this case make very sad reading. The Respondent was employed by the Appellant as a casual worker in Mwinilunga to cut down trees in an area where the Appellant had pylons that distribute its power.
- 4) While the Respondent and other employees were carrying out this task he was involved in an accident. He was struck and trapped by a falling tree and sustained head and other body injuries which rendered him unconscious for a while. These injuries caused him pain.
- 5) After the accident, the Appellant's other workers took the Respondent to Mwinilunga general hospital where he was attended to. Subsequently he was referred to Solwezi general hospital for purposes of having an X-ray taken of his arm.
- 6) Despite the attention given to him at the two hospitals, the Respondent continued to experience pain as a result of his injuries and memory lapses. He, therefore,

travelled to Lusaka to seek further medical attention at University Teaching Hospital and Chainama hills hospital. At the former hospital, it was prescribed that he should undergo a CT scan to enable the doctor ascertain the extent of his head injuries.

- 7) The Respondent was not able to have the CT scan done because he could not afford the K9,000.00 cost attached to it. This was compounded by the fact that the Appellant declined to advance him the money notwithstanding that he had supplied the Human Resource department with a quotation he had obtained for the CT scan.
- 8) During this period, the Respondent performed light duties and stayed out of employment and eventually left the service of the Appellant. He later took on employment with Oriental Quarries.

High Court Judge's consideration and decision

- 9) At the hearing of the matter there was no dispute in the facts regarding the accident. The only dispute was in relation to who actually felled the tree which struck and

pinned down the Respondent, thereby injuring him. The Appellant's evidence was that it was the Respondent who cut it down whilst the Respondent's evidence was that it was cut down by one of his work mates.

- 10) The Learned High Court Judge found as a fact that the Respondent was employed by the Appellant and that he was a member of the team of casual workers deployed by the Appellant to cut down trees. She found further that on 19th October, 2012, whilst he was engaged in this activity, and in the course of his employment, a tree fell on him.
- 11) As a consequence of the accident, the Learned High Court Judge found that the Respondent sustained injuries to his head, left arm and right ankle. In addition, she found that he had attended the four hospitals where he was treated and that since he had not undertaken a CT scan the doctors could not determine the extent of his head injuries.
- 12) The Learned High Court Judge then set out the law by first holding that, based on the pleadings presented

before her, the case she was engaged in was an action for negligence. She arrived at this decision based on the contention by the Respondent that the accident occurred whilst he was carrying out his duties as an employee of the Appellant and that in so doing, he had not been provided with adequate protective clothing and equipment.

- 13) In addition, the Learned High Court Judge defined what constitutes negligence in accordance with the learned authors of ***Winfield and Jolowitz on Tort, 10th edition***, and set out the three ingredients which establish the tort. Following from this, she identified the issues for determination as being: whether the Appellant owed the Respondent (as its employer) a duty of care; if so, whether the Appellant or its servants breached the duty by failing to conform to the required standard of conduct.
- 14) Before determining the issues, the Learned High Court Judge set out the duties imposed on an employer as a result of the employee/employer relationship. This was the duty to take care for the safety of his employees in all

circumstances so as not to expose the employee to unnecessary risk. That is to say, an employer owes his employee a duty to take reasonable steps to ensure that the employee is not physically injured. She, in this regard, referred to the case of ***Wilsons and Clyde Coal Co. Ltd v English***¹.

- 15) The Learned High Court Judge went on to state that the employee's duty, aforementioned, is personal and as such, though an employer can delegate its functions it is liable for adverse consequences arising from its conduct. This, she stated, is in accordance with ***Halsbury's Laws of England, 4th, edition volume 16***.
- 16) In conclusion the Learned High Court Judge set out what she termed the employer's duty of convenience which is to provide: competent staff; adequate material; a proper system of work; and effective supervision. These she stated were set out by Parker L.J. in the case of ***Wilson v Tyneside Window Cleaning Company***². Lastly, the Learned High Court Judge discussed the employer's duty to carry out its operations so as not to subject the

employee to unnecessary risk with reference to the decision by Slade J, in the case of ***Harris v Brights Asphalt Contractors***³.

- 17) Having stated the law, the Learned High Court Judge applied it to the facts of the case. She held that as employer, the Appellant owed the Respondent a duty to take reasonable steps to ensure that he was not physically injured or harmed whilst executing his duties; and had a duty to ensure that it did not expose him to unnecessary risks.
- 18) The Judge concluded that the Appellant had a duty to devise a proper system of work or to provide effective supervision for its workmen. She analyzed the evidence which revealed the task the Respondent and others were given to undertake and the risk involved arising from the fact that the direction of the fall of the trees they were cutting down was unpredictable and the Respondent's failure to avoid the falling trees as a result of the number of fallen trees surrounding the area. She, however,

refused to accept the Appellant's evidence that the tree that caused injury to the Respondent was cut by him.

- 19) The Learned High Court Judge also took the view that the Respondent and his co-workers were not properly skilled for the works and neither were they properly instructed to ensure safety at the work place. For these reasons she held that the Appellant breached its duty to the Respondent not to expose him to unnecessary risks and was thus negligent.
- 20) In terms of the quantum of damages, the Learned High Court Judge was guided by our decision in the case of ***Ruben Nkomanga v Dar Farms International Limited***⁴. She, as a consequence, segregated the Respondent's claim for personal injuries in the following categories: pain and suffering; loss of amenities; permanent disability; loss of future prospects of earning; and special damages.
- 21) Under pain and suffering the Learned High Court discussed various decisions of this Court and nature of the Respondent's injuries and length of time he suffered

with the injuries. She concluded that the period was thirteen weeks and awarded him a total of K7,800.00 at the weekly rate of K600.00.

- 22) The Learned High Court Judge dismissed the claim for loss of amenities because, in her opinion, no evidence was led to prove the claim or that his injuries led to permanent disability.
- 23) Turning to the loss of prospective future earnings the Learned High Court Judge considered: the Respondent's inability to work as a consequence of the accident; the seven month period he was out of employment; and his monthly income of K1,175.00 with the Appellant. She, thus awarded him the sum of K8,225.00 as loss of earning for the seven months he was out of employment. The Court's rationale for this award was that the Respondent would have earned this amount if he had continued in employment.
- 24) Under the claim for special damages, the Learned High Court Judge considered the Respondent's claim in the sum's of K900.00.00 for the CT scan, K500.00 for

medication and treatment and K201.00 for transport costs at the rate of K30.00 per month for seven months. Although the evidence revealed that the Respondent did not undergo a CT scan, the Learned High Court Judge, nonetheless awarded him the amount of K900.00. The basis of the award was the quotation which indicated that the CT scan would cost that amount and the fact that the Respondent still complained of frequent headaches and loss of memory. He was thus, in the Court's view, in need of the CT scan.

- 25) The Learned High Court Judge reduced the claim for medication from K500.00 to K300.00. She made this award notwithstanding the fact that the Respondent's documentary evidence did not contain any receipts to prove that he had actually incurred the cost. The basis of the award was the evidence which revealed that the hospitals he had attended had given the Respondent a number of prescriptions for medication and he had undergone several x-rays on his left arm and right leg.

- 26) In considering the last claim for transport, the Learned High Court Judge noted that the Respondent did not produce documentary evidence to support the claim. Her finding was that this reacted against the Respondent in accordance with our decision in the case of **Mhango v Ngulube and others**⁵. She, however, surmised that since the Respondent attended at Mwinilunga general hospital and University Teaching Hospital, he must have incurred costs, and accordingly awarded him the sum of K180.00.
- 27) The learned High Court judge awarded simple interest at the rate of 12% per annum on the awards from the date of writ to date of judgment, thereafter at the bank lending rate as determined by Bank of Zambia, until full payment. She also awarded the Respondent costs, to be taxed in default of agreement.

Grounds of appeal by the Appellant to this Court and the arguments by the parties

28) The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this appeal fronting three grounds of appeal, as follows:

28.1 The Learned trial Judge erred both in law and fact when she held that the matter at hand was based on negligence when there was no negligence alleged by the Respondent against the Appellant and there being no particulars of negligence at common law or statutory, nor the principle of *res ipsa loquitur* having been pleaded by the Respondent;

28.2 The Learned trial Judge erred both in law and fact when she found that the Appellant breached its duty to the Respondent not to expose the Respondent to unnecessary risks when no evidence to that effect was led by the Respondent;

28.3 The Learned trial Judge in the Court below erred in both law and fact by awarding the Respondent damages under the heads of pain and suffering and loss of earnings as well as special damages and costs to which he was not entitled.

29) Prior to the hearing, counsel for the two parties filed heads of argument which they relied upon. Counsel for the Appellant augmented the said arguments with *viva voce* arguments at the hearing, while counsel for the Respondent was not in attendance, having filed a notice to that effect in accordance with our rules.

- 30) Arguing ground 1, counsel for the Appellant submitted that the Learned High Court Judge's finding that there was negligence on the part of the Appellant should be reversed because it is a finding that is caught up in the principle we set in the case of ***Attorney General v Achiume***⁶. The basis for counsel's argument was that negligence was not specifically pleaded by the Respondent which fact was confirmed in his verbal evidence that indeed he was not alleging any negligent act by the Appellant.
- 31) Counsel argued further that the Learned High Court Judge did, infact, make a finding of fact that the claim was not anchored on the tort of negligence, but in her determination of the matter contradicted herself that the action was founded in negligence.
- 32) In the *viva voce* arguments, Mrs. Chungu and Mr. Mweemba argued that, during trial, no evidence was led on the issue of negligence and that the issue only arose in the judgment of the Learned High Court Judge. Counsel also urged us to uphold the principles we have

restated in various authorities that a Court is bound to award only reliefs that are specifically pleaded.

- 33) Under ground 2 of the appeal counsel for the Appellant advanced lengthy arguments whose thrust was merely that, by the Learned High Court Judge's finding that the Appellant did not put in place a safe working environment to protect the Respondent, she shifted the burden of proof to the Appellant. This, he argued, was contrary to our decisions in the case of **Zulu v Avondale Housing Project Limited**⁷ and **Mohamed v The Attorney General**⁸. In these two cases we, among other things, restated that the burden of proof lies with he who asserts.
- 34) The Appellant's arguments under ground 3 of the appeal were a logical conclusion of the arguments under grounds 1 and 2. They were that since negligence was not claimed or proved, the awards by the Learned High Court Judge cannot be sustained.

- 35) In closing, counsel stated that if the appeal succeeds they would not insist on costs in view of the circumstances of this case.
- 36) We were urged to allow the appeal.
- 37) Responding to the arguments under ground 1 of the appeal, counsel for the Respondent argued that the Learned High Court Judge was on firm ground when she considered the issue of negligence because evidence was led and the Appellant referred to it in its defence. He drew our attention to our decision in the case of **Undi Phiri v Bank of Zambia**⁹ where we held that a Court is not precluded from considering evidence on unpleaded matters where the evidence is led and not objected to. For this reason, counsel contended, the findings by the Learned High Court Judge on negligence did not fall into the realms of the principle in the **Achiume** case.
- 38) In regard to ground 2 of the appeal, counsel argued that in view of the findings of fact made by the Learned High Court Judge she was on firm ground to hold that the Appellant exposed the Respondent to unnecessary risk.

He argued further, that the findings of fact were drawn from the evidence led in the matter, and that, consequently, the Respondent had proved his case to the required standard of balance of probabilities.

- 39) The arguments in response to ground 3 were that the ground should fail in view of the position taken by the Appellant.

Consideration of matter by this Court and decision

- 40) We have considered the record of appeal and arguments by counsel. In grounds 1 and 2 of the appeal, the Appellant's complaint relates to the consideration and findings by the Learned High Court Judge on the issues of negligence and breach of duty not to expose the Respondent to unnecessary risks which issues were not pleaded. The issue in our consideration of these two grounds of appeal, is, did the Learned High Court Judge err at law in considering these two issues in view of the fact that they were not specifically pleaded? This is the question posed because we have stated in a number of

cases that claims such as negligence must be specifically pleaded. Our practice rules are also very strict in this regard, specifically order 18 rule 12 sub-rule 29 of the ***Rules of the Supreme Court, 1965 edition*** which states that *"particulars must always be given in the pleading, showing in what respect the defendant was negligent. The statement of claim ought to state the facts, upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged."*

- 41) A perusal of the originating process filed by the Respondent in the Court below reveals his claim to be for *"personal injuries sustained in an industrial accident"*. It does not allege that the same were as a consequence of negligence on the part of the Appellant or exposure to unnecessary risk by way of an unsafe work environment. The Respondent merely stated that the Appellant failed to provide him with sufficient protective clothing and equipment to ameliorate the apparent risks of a bush clearing operation.

- 42) The Learned High Court Judge did infact acknowledge that the claim by the Respondent was not clearly stated to be founded in negligence.
- 43) The findings by the Learned High Court Judge which are of concern to us are those on: the common law duty imposed on an employer to take reasonable care for the safety of his employee and not to impose unnecessary risk; the duty of the employer to ensure that the employee is not physically injured or harmed whilst working for him; and the duty of the employer to provide competent staff, adequate material, a proper system of work and effective supervision. These issues were not pleaded and neither was evidence led on them.
- 44) Whilst we recognize that Section 13 of the **High Court Act** enjoins a judge of that Court in the exercise of his/her jurisdiction to grant all such remedies or reliefs whatsoever, to which a party may appear to be entitled, such exercise of jurisdiction should not create new reliefs or remedies for one party at the expense of another. The exercise of the jurisdiction under Section 13 is limited to


the Court investigating if alternative remedies and reliefs are available from the pleadings and evidence deployed before it. This is what we said in the case of ***Savenda Management Services v Stanbic Bank Zambia Limited***¹⁰. To this extent there was a misdirection on the part of the Learned High Court Judge.

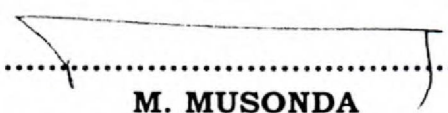
- 45) Consequently, since the two issues were not raised in the pleadings, there would appear to have been a departure by the Learned High Court Judge from her duty to only consider pleaded matters, evidence adduced and arguments presented to her in rendering her judgment.
- 46) The Respondent's predicament is compounded by the fact that the evidence he led in the Court below does not suggest a claim in negligence. To the contrary and as counsel for the Appellant has argued, he categorically stated that his claim was not in negligence. We thus agree with counsel for the Appellant that the issue of negligence only first arose in the judgment of the Learned High Court Judge.

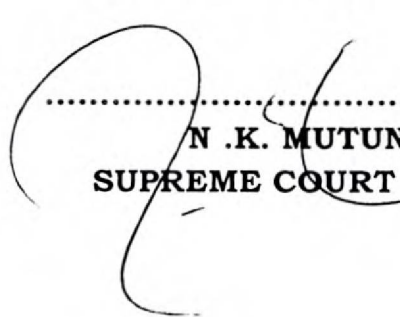
- 47) Coming to ground 3 of the appeal, it must succeed as a consequence of our holding in relation to grounds 1 and 2.

Conclusion

- 48) For the reasons we have stated in the preceding paragraphs, the appeal succeeds and we set aside the judgment of the Learned High Court Judge. As for the costs, the circumstances of this case are such that we are not inclined to award the Appellant costs despite allowing the appeal. We, therefore, order that the two parties will bear their respective costs.

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A.M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA
SUPREME COURT JUDGE

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N .K. MUTUNA
SUPREME COURT JUDGE