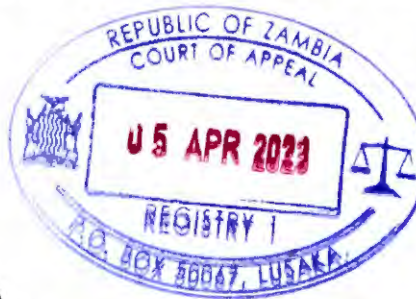


IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 52 OF 2021
HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

DAVID KABUKU MWITUMWA

APPELLANT

AND

AIRTEL NETWORKS ZAMBIA PLC

1ST RESPONDENT

PLESSY ZAMBIA LIMITED

2ND RESPONDENT

CORAM : SIAVWAPA JP, CHASHI and BANDA-BOBO, JJA

ON : 21st February and 5th April 2023

For the Appellant:

M. Mutemwa, Messrs. Mutemwa Chambers

For the 1st Respondent:

P. Chungu, Messrs. Ranchhod Chungu Advocates

For the 2nd Respondent:

N/A

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Shell & B.P Zambia Limited v Conidaris and Others (1975) ZR, 174**
- 2. Cobbet-Tribe v Zambia Publishing Company Limited (1973) ZR, 9**
- 3. Savenda Management Services v Stanbic Bank Zambia Limited – SCZ Selected Judgment No. 10 Of 2018**
- 4. D & F Estates Ltd v Church Commissioners [1989] AC 177**
- 5. Barclays Bank Plc v Various Claimants [2020] UKSC 13**

6. **WM Morrisons Supermarkets Plc v Various Claimants [2020] UKSC 12**
7. **Nkhata and Others v The Attorney General of Zambia (1966) ZR, 147**

Legislation referred to:

1. **The Information and Communication Technology Act, No. 15 of 2009**
2. **The Electronic Communications and Transactions Act, No. 4 of 2021**
3. **The Electronic Communications and Transactions Act, No. 21 of 2009**

Other works referred to:

1. **Clerk and Lindsell on Torts, 1995, 17th Edition, London: Sweet and Maxwell Ltd**
2. **Rogers W. V. H Winfield and Jolowicz on Tort, 1984, 12th Edition, London: Sweet and Maxwell Ltd**
3. **R. A. Percy, Charlesworth on Negligence, 1962, 4th Edition, London: Sweet and Maxwell**

1.0 INTRODUCTION

1.1 This is a partial appeal against part of the Judgment of Honourable Mrs. Justice P.K. Yangailo, delivered on 27th November, 2020.

1.2 In the said Judgment, the learned Judge upheld the Appellant's claims against the 2nd Respondent for damages for trespass on Subdivision A of Farm 2161, Chisamba and dismissed the claims against the 1st Respondent.

2.0 BACKGROUND

2.1 The brief facts are that, the 1st Respondent, a holder of a network licence and the 2nd Respondent, an independent contractor, entered into a Fibre Infrastructure Construction Agreement dated 17th November, 2014, for the construction of a world class optic fibre backbone between Lusaka to Kasumbalesa and Mpika to Kasama.

2.2 Sometime in March 2016 and in the course of executing its work, the 2nd Respondent entered Subdivision A of Farm No. 2161, Chisamba (the property), belonging to the Appellant. The 2nd Respondent proceeded to cut down trees and grade stretches of land on the property despite protests by the Appellant and in the process also caused damage to the gate and fence.

2.3 This prompted the Appellant to commence an action against the 1st and 2nd Respondents by way of Writ of Summons and Statement of Claim on 12th April, 2016 and amended on 20th April, 2017 seeking the following reliefs:

- (i) Damages for trespass against the 2nd Respondent;**
- (ii) Damages for trespass including aggravated damages against the 1st Respondent caused by the breach of statutory duty of the 1st Respondent;**
- (iii) A declaration that the Respondents are not entitled to enter or use the Appellant's property; and**
- (iv) Costs**

2.4 In the attendant statement of claim, the Appellant averred that the 2nd Respondent, acting on the 1st Respondent's instructions, wrongfully entered the property without the Appellant's consent. That the 2nd Respondent caused damage by cutting down trees, grading stitches of land and caused damage to the gate and fence.

- 2.5 That despite repeated requests and demands, the 2nd Respondent continued to trespass on the property and cause further damage. In the process, the Appellant has suffered loss and damage.
- 2.6 It was argued that by not seeking the Appellant's consent, the 1st Respondent contravened the provisions of section 63 of the **Information and Communication Technology Act** which places a duty on the 1st Respondent as a holder of network licence to give notice of proposed entry and obtain consent from a land owner before entering the land.
- 2.7 In its defence, the 1st Respondent denied having instructed the 2nd Respondent to enter the Appellant's property. The 1st Respondent insisted that, it could not be liable to the Appellant under the doctrine of vicarious liability as the the 2nd Respondent was engaged as an independent contractor and was not operating under the 1st Respondent's direction when it encroached the property.

2.8 The 1st Respondent contended that it did not contravene the provisions of **The Information and Communication Technology Act**, as it was not required to seek the consent of the Appellant to lay its fibre optic ducts as all necessary authorization had been obtained from the relevant authorities. Further that it had a pre-planned route for the fibre optic ducts, which route did not require entry onto the Appellant's property.

2.9 The 2nd Respondent denied having instructed its agents to enter the property but conceded that its servants entered the property erroneously. It further admitted having caused some damage to the property but insisted that the damage should be narrowed down to only uprooting of small trees, brush and bushels of secondary growth.

2.10 The 2nd Respondent denied causing aggravated damage and contended that the encroachment only covered about 1,702 meters in length and 8 metres in width.

3.0 DECISION OF THE LOWER COURT

3.1 After considering the evidence and the submissions, the learned Judge formulated the following issues as falling for determination:

- 1. Whether there was trespass committed on the subject property;**
- 2. Which of the parties is liable for the trespass, if any, on the subject property; and**
- 3. What is the extent of the trespass and damage, if any, caused to the subject property.**

3.2 In resolving the first issue, the learned Judge relied on the case of **Shell & B.P Zambia Limited v Conidaris and Others**¹ where the Supreme Court held as follows:

“Trespass to land is an unlawful entry on land in the possession of another.”

3.3 The learned Judge was of the view that the Appellant’s claim for trespass was consistent with the 2nd Respondent’s admission to the effect that its servants erroneously entered the property. There was further corroboration from the unchallenged report on site visit

which confirmed that there had been an encroachment on the property. As a result, the learned Judge found that trespass to the property was occasioned against the Appellant and therefore, the Appellant was entitled to damages for trespass.

- 3.4 Regarding the claim for aggravated damages, the learned Judge found solace in the case of **Cobbet-Tribe v Zambia Publishing Company Limited**² where it was held as follows:

“While awarding compensatory damages a court can award aggravated damages where the court feels that the Defendant’s conduct merits it, and where awarded, the essence of the aggravated damages is that they are compensatory on the highest scale”

- 3.5 The learned Judge was of the view that, the conduct of the 2nd Respondent after it was requested to cease causing further damage to the property warranted the award of aggravated damages. The learned Judge opined that the destruction that resulted on the property was due to the 2nd Respondent’s continued works and

presence, which worsened the state of the property compared to how it would have been had the 2nd Respondent stopped carrying out its works immediately on being notified of the Appellant's interest on the property.

- 3.6 In resolving the second issue, the learned Judge looked at the law on liability of independent contractors and stated that as a general rule a person who engages an independent contractor cannot be held liable for the torts committed by an independent contractor in the course of executing the said works but that there are various exceptions to the rule, one of which is where the employer has a statutory duty.
- 3.7 The learned Judge then proceeded to look at Section 63 (1) (a) and (b) of **The Information and Communication Technology Act** and stated that, based on the said provisions, any holder of a network licence seeking to provide any electronic communication to the public that involves entry on private land must obtain consent from the owner of the land.

- 3.8 The learned Judge opined that in the circumstances of the case, the 1st Respondent only needed to obtain consent of the Appellant, if it required to enter upon the property. That from the evidence, the Respondents did not require to enter upon the property and that the 2nd Respondent erroneously entered the property.
- 3.9 As a result, the learned Judge found that the 1st Respondent did not need to obtain consent from the Appellant as the scope of works did not require entry upon the property and that the 2nd Respondent, was solely liable for the trespass on the property.
- 3.10 In resolving the third issue, the learned Judge found that the Appellant had proved the extent of the damage caused to the property based on the Surveyor's report which gave sufficient indication of the extent of the 2nd Respondent's encroachment on the property. The learned Judge also relied on the pictorial evidence and the 2nd Respondent's admission to causing damage as sufficient to proving damage.

4.0 THE APPEAL

4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court advancing three grounds of appeal couched as follows:

- 1. The court below misdirected itself on points of fact and law by holding that the 1st Respondent did not need to obtain consent of the Appellant to enter upon the subject property.**
- 2. The learned trial Judge misdirected herself on points of law and fact by holding that the 2nd Respondent is solely liable for the trespass on the subject property.**
- 3. That by non - direction or misdirection or otherwise, the learned trial Judge did not properly assess and evaluate the evidence as she took into account some matters which she ought not to have taken into account and conversely failed to take into account matters which she ought to have taken into account.**

5.0 ARGUMENTS IN SUPPORT OF APPEAL

- 5.1 Mr. Mutemwa, Counsel for the Appellant, relied entirely on the filed heads of argument dated 26th March, 2021. Counsel argued grounds one and two together and attacked the lower court's finding that the 1st Respondent was not liable for the trespass and damage caused to the Appellant's property. It was submitted that Sections 63(1) (a) and (b) and 63 (3) of **the Information and Communication Technology Act** places a duty on any holder of a network licence intending to provide electronic communication service to the public and requiring entry on private land, to obtain consent from the owner of the land.
- 5.2 That in the present case, the 2nd Respondent was engaged by the 1st Respondent, who is the holder of the network licence, as such it was the duty of the 1st Respondent to seek the Appellant's consent prior to directing the 2nd Respondent to enter on the subject property.

5.3 The Appellant referred to the learned authors of **Clerk and Lindsell on torts** and **Winfield and Jolowicz on tort** for the principles on tortious liability for trespass to land and submitted that, contrary to the lower court's finding that the 2nd Respondent erroneously entered on the Appellant's property, entry upon another person's land is tortious whether or not the entrant knows that he is trespassing and that it is not a defence that the trespass was due to mistake of fact or law.

5.4 The Appellant further relied on **Winfield and Jolowicz on tort** at page 594 on independent contractors and provides as follows:

"it is submitted that the true question in every case in which an employer is sued for the damage caused by his independent contractor is whether the employer himself was in breach of some duty which he himself owed to the plaintiff. Such a breach of duty may exist if the employer has not taken care to select a competent contractor or has employed an inadequate number of men. It may also exist if the contractor

alone has been at fault, provided that the duty cast upon the employer is of a kind commonly described as "non-delegable."

5.5 That based on the above authority, where an independent contractor trespasses upon another person's land whilst in the course of performing a contract at the instance of the employer who has a statutory duty, the employer is liable for the contractor's acts or omissions. The employer cannot escape liability even if the contractor alone has been at fault or did so in error. According to Counsel, the lower court misdirected itself when it found that the 1st Appellant was not liable for the tortious acts of the 2nd Respondent.

5.6 Coming to ground three, it was argued that the learned Judge, in arriving at her decision, did not take into account relevant evidence such as the series of admissions by the 1st Respondent's witness under cross examination. That the learned Judge merely recited and reproduced the evidence of the Appellant's witness but did not properly assess and analyse it. In support

thereof, the case of **Savenda Management Services v Stanbic Bank Zambia Limited**³ was cited.

- 5.7 It was submitted that had the learned Judge properly evaluated the evidence of DW1, it would have arrived at a different decision and found the 1st Respondent liable for the tortious acts of the 2nd Respondent.

6.0 ARGUMENTS OPPOSING THE APPEAL

- 6.1 Mr. Chungu, Counsel for the Respondent, equally relied entirely on the filed heads of argument dated 21st February, 2023. Under ground one Counsel began by pointing out that **The Information and Communication Technology Act** relied on by the Appellant was repealed and replaced by **The Electronic Communications and Transactions Act No. 4 of 2021**. That the Appellant has not raised the issue of whether the provisions of the repealed Act which the Appellant intends to rely on are replicated in **The Electronic Communications and Transactions Act**.

- 6.2 Counsel contended that the evidence on record which the learned Judge relied on in its judgment and was

acknowledged by the Appellant is that the 2nd Respondent admitted that it entered the Appellant's property erroneously because the route for the intended fibre optic ducts was pre-planned and was not intended to transgress upon the Appellant's property.

- 6.3 It was argued that the statutory obligation imposed by the law under section 63 of **The Information and Communication Technology Act** would only arise if the 1st Respondent's approved routes required access to the Appellant's property but that was not the case. As such, the 1st Respondent did not need to obtain consent of the Appellant and it follows therefore that the Respondent did not owe a statutory duty to the Appellant, thus it did not fall within the exceptions to the general rule on liability of independent contractors.
- 6.4 That the Appellant had recourse to claim from the 2nd Respondent who conceded that they erroneously entered the Appellant's property and were accordingly found liable in the court below.

6.5 In response to ground two, it was submitted that contrary to the Appellant's argument, the learned Judge's decision that the 1st Respondent was not liable for the tortious acts of the 2nd Respondent does not amount to a finding of fact but is a final determination of the question before the court.

6.6 In response to ground three, it was submitted that contrary to the Appellant's argument, the learned Judge gave a detailed analysis of the law and facts before her leading to her decision. That the learned Judge was thorough in the manner in which she handled the matter and considered all the issues in detail. We were urged to dismiss the appeal in its entirety.

7.0 ANALYSIS AND DECISION OF THE COURT

7.1 We have considered the evidence on record, the arguments by Counsel for both Parties and the impugned Judgment of the lower court.

7.2 All the three grounds of appeal are in our view entwined and we will therefore address them together and the issue they raise is whether the 1st Respondent is

vicariously liable for the tortious acts of the 2nd Respondent, who is an independent contractor.

7.3 From the onset, it is imperative to state that the 1st Respondent appears to have been laboring under the mistaken belief that **The Electronic Communications and Transactions Act No. 4 of 2021** repealed and replaced **The Information and Communication Technology Act**, when in actual fact, it repealed and replaced **The Electronic Communications and Transactions Act No. 21 of 2009**. Therefore, **The Information and Communication Technology Act** is still in force and the Appellant is entitled to rely to it.

7.4 Coming back to the issue at hand, the Appellant heavily relied on Section 63 of **The Information and Communication Technology Act** and alleged that the 1st Respondent owed the Appellant a statutory duty to give notice of proposed entry and also to obtain consent before entry on the property. The Appellant argued that the law has imposed a strict statutory duty on the 1st Respondent, as such, the 1st Respondent as employer

cannot escape liability for the acts committed by the independent contractor. In other words, the Appellant attributed the occurrence of the trespass and the resultant damage to the breach of a statutory duty on the part of the 1st Respondent as the hirer/employer.

- 7.5 The Respondent on the other hand contends that it did not owe the Appellant a duty as it had a pre-planned route which did not require access to the Appellant's premises. That consent was obtained from the relevant authorities and that did not include the Appellant.
- 7.6 From the evidence on record, it is not in dispute that the 2nd Respondent was an independent contractor and the 1st Respondent was the hirer/employer. The law on liability of independent contractors is clear and has been espoused in various authorities such as **D & F Estates Ltd v Church Commissioners**⁴, **Barclays Bank Plc v Various Claimants**⁵ and **WM Morrisons Supermarkets Plc v Various Claimants**⁶ which is that an employer of an independent contractor is in general, not liable for the negligence or other torts committed by the contractor in

the course of the execution of the work. The learned author of **Charlesworth on Negligence** captures it this way:

“Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable.”

- 7.7 However, as correctly advanced by the Appellant and the authorities cited above, there are exceptions to this general rule that employers are not liable for an independent contractor's negligent acts such as where an employer was negligent in selecting or retaining the independent contractor or if the employer himself is in breach of a duty, which is non-delegable or an independent contractor's work is ultra-hazardous or inherently dangerous.

7.8 The above authorities have also guided that an independent contractor, for purposes of attaching vicarious liability to an employer, must show whether the employer has the right to control the manner in which the employee performs the job.

7.9 The question therefore, is whether the exceptions to the aforementioned general rule are applicable in this case so as to allow liability of the 2nd Respondent to attach against the 1st Respondent. The Appellant insists that the 1st Respondent owed a statutory duty to the Appellant in accordance with the provisions of the **Information and Communication Technology Act** to seek consent and give notice of possible entry on the property and that the said duty was not delegable. That these circumstances placed the matter under the exceptions and compelled a departure from the general rule.

7.10 We have carefully examined the provisions of Section 63 of **The Information and Communication Technology Act** and in our view the said provisions can only be invoked where the holder of the network licence requires

entry onto private land. In this case it is very clear from the evidence on record and as rightly found by the learned Judge that the 1st Appellant had a pre-planned route for the fibre optic ducts and that route which did not require entry into the Appellant's land was clearly communicated to the 2nd Respondent. This was confirmed by the evidence of the 2nd Respondent, who admitted that they had erroneously entered onto the Appellant's property.


7.11 The 1st Respondent further adduced evidence in the court below showing that it sought consent from the relevant authorities prior to the commencement of the works. In addition, as stated in paragraph 7.6, the 2nd Respondent was in law an independent contractor and the 1st Respondent had no power to and did not control the manner in which the 2nd Respondent executed its work. Therefore, the circumstances of this case did not compel a departure from the general rule on liability of independent contractors.

7.12 A consideration of the relevant factors leads to the inescapable conclusion that the 1st Respondent is not liable for the acts committed by the 2nd Respondent. We find that the learned Judge was on firm ground when she found that the 2nd Respondent was solely liable for the trespass on the Appellant's property.


7.13 Based on the case of **Nkhata and Others v The Attorney General**⁷, this is not an appropriate case in which we can interfere with the findings of fact of the lower court. All three grounds of appeal are devoid of merit and fail.

8.0 CONCLUSION

8.1 All the three grounds having been unsuccessful, we accordingly dismiss the appeal with costs to the 1st Respondent, to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
JUDGE PRESIDENT

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE