VICTOR NAMAKANDO ZAZA *v* ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED

Supreme Court

Ngulube, C.J, Lewanika, D.C.J. and Chibesakunda, J.S.

27th September, 2001 and 13th December, 2001

(SCZ Judgment No. 18 of 2001)

Flynote

Tort – Negligence – Breach of duty – The supplier's duty is co-existent with the consumer's own duty.

Civil procedure - Appeals – Court's powers – right of appellate court to interfere with or reverse the findings of the lower court.

Headnote

On 29th September, 1996, there was a power failure during which two of the three phases supplying power to the appellant experienced an outage. The appellant's submersible pump got damaged; he had to spend K450,000 in repair costs, he was inconvenienced when he had to fetch water for domestic use from a distant neighbor; his tomato and onion crops dried up. He attributed all this to the negligence of the respondents in not ensuring that when their fuse tripped, all three phases shut off instead of one phase continuing to supply low voltage which damaged the water pump whose motor got burnt. The defence was that there was an unforeseeable failure of the equipment, with a witness opining at the trial that the appellant's motor got burnt because the amperage was set on high.

The learned trial judge held that the respondent did not breach its duty of care and it was not negligent when a fuse which should blow when there is something the matter, in fact blew up, lowering or cutting off the voltage. The Judge found that the damage to the pump was not attributed to negligence of the defendant but failure by the manufacturers to guard against power failures. The respondent was held not to have breached their duty of care. The appellant appealed.

Held:

(i) It seems wholly unrealistic to expect the supplier of power to guarantee that it will never fail or it will not fluctuate or it will cut off completely.

(ii) The supplier is not an insurer. The supplier's duty has in some respects to be co-existent with the consumer's own duty.

(iii) The findings made by the trial court should not lightly be interfered with, in

keeping with what this court has said on numerous occasions in the past.

Cases referred to:

(1) *Rylands v Fletcher* [1861-73] All E.R. Rep. 1;
(2) *British Celanese Limited v A.H. Hunt (Capacitors) Limited* [1969] 2 All E.R. 1252.
(3) *Zulu v Avondale Housing Project* (1982) Z.R. 172.

M.F. Sikatana of Messrs Veritas Chambers, for the appellant.

Mrs Vukovic Legal Counsel for Zambia Electricity Supply Corporation Limited for the respondent.

Judgment

NGULUBE C.J. delivered the judgment of the Court.

On 29th September, 1996, there was a power failure during which two of the three phases supplying power to the appellant experienced an outage. The appellants submersible water pump got damaged; he had to spend K450,000 in repair costs; he was inconvenienced when he had to fetch water for domestic use from a distant neighbour; his tomato and onion crops dried up. He attributed all this to the negligence of the respondents in not ensuring that when their fuse tripped, all three phases shut off instead of one phase continuing to supply low voltage which damaged the water pump whose motor got burnt. The defense was that there was an unforeseeable failure of the equipment, with a witness opining at the trial that the plaintiff's motor got burnt because the amperage was set too high.

The learned judge held that the respondent did not breach its duty of care, and it was not negligent when a fuse which should blow when there is something the matter in fact blew up, lowering or cutting off the voltage. It was a lawful protective device and the damage to the water pump would not be attributed to any alleged negligence by the respondent. The learned Judge rejected a submission on behalf of the plaintiff that the defendant had an obligation to create foolproof preventive measures so that three phase power should all cut off when the fuse tripped in order to prevent equipment operating on three phase from receiving low voltage from a single phase. We can hardly disagree with the Judge when in effect he rejected the suggestion that the defendant should assume the absolute obligation of an insurer; and this in respect of unexpected failures by equipment such as fuses and other safety breakers. The learned Judge also agreed with a submission on behalf of the defendant that if the pump itself lacked the necessary protective mechanism, then the power failure would not be the direct cause of the damage in any sense of a breach of the duty of care. The Judge found that the damage to the pump was not attributed to negligence of the defendant, but the failure by the manufacturers to guard against power failure. The defendant was held not to have breached their duty of care.

In this appeal, the upshot of Mr Sikatana's submissions and arguments was this: ZESCO supply electricity to consumers who include the appellant, a peasant farmer who has had a submersible pump since 1993. When the power failure occurred, the respondent did not come to look at it until after a month.

They found a fault on their main line which had an overload. They had a fuse on the yellow link which was supposed to cut off power completely; but the power was not in fact cut off completely; the one line continued to supply power. When the link dropped, it caused low voltage to be delivered to the customer which caused the pump motor to burn. On these

facts, it was Mr Sikatana's submission that ZESCO should have ensured that the power cut off completely; they had a duty to ensure a complete power failure. It was argued that the learned trial Judge was wrong to say that the respondent had not breached their duty of care. They deal in a dangerous product. Thus, he argued, a fuse is useless if it does not cut off electricity completely. Although he agreed that the appellant had at trial neither pleaded not canvassed a possible breach of statutory duty, Mr Sikatana drew attention to Regulations 21 and 22 of the Electricity (supply) Regulations under the Electricity Act which place on any electricity undertaker the duty to install efficient switchgear and fuses and which criminalizes any failure to do so, on pain of a fine or imprisonment. We can immediately discount breach of statutory duty which was not discussed below. The Regulations create obligations a breach of which is punishable as an offence. There is no suggestion that the regulations mentioned would also found a private cause of action. However, as already stated, we do not dwell on this nor do we come to a conclusion since this was not canvassed below and cannot be sprung on the opponent now.

Mr Sikatana did propose that because electricity is dangerous per se, there must be strict liability and judgment ought to be entered for the appellant. We do not see how the principle of strict liability as formulated in the famous case of *Rylands v Flectcher* (1) can apply on the facts when there are no issues of containment or the escape of electricity as such. There can be no question of faultless liability so that the claimant has the task of proving some wrong doing or some breach of a duty of care, such as in nuisance or negligence: see for instance *British Celanese Limited v A.H. Hunt (Capacitors) Limited* (2) where the party responsible through negligence and/or nuisance for causing the power failure was held liable.

Mrs Vukovic for the respondent argued forcefully that there was no negligence and that the fault which occurred when the fuse link blew did not result from any negligence on the part of the respondent. She submitted that the protective measures which were in place satisfied their duty of care. She pointed out that what caused the motor to burn was that the amperage was set too high and it was these wrong settings which were to blame. She urged that the findings of fact made by the learned trial judge should not lightly be interfered with, in keeping with what this court has said on numerous occasions in the past: For instance see *Zulu v Avondale Housing Project*(3) which counsel cited.

We have considered the facts and the submissions and arguments, including those in the heads of argument. We take judicial notice that power failures do occur in this country from a variety of causes. It seems to us to be wholly unrealistic to expect the supplier of power to guarantee that it will never fail or it will not fluctuate or it will cut off completely. The supplier is not an insurer and in our considered view the supplier's duty has in some respects to be co-extensive with the customer's own duty. The customers can take their own precautions with sensitive equipment knowing that power does fail sometimes. The loss here of two phases out of three which affected the equipment was one in which a prudent customer would have remembered his/her own duty of care. There are a variety of surge protectors which are readily available to electricity consumers and to those who manufacture equipment. It is simply unthinkable that each time a branch or a snake or lightning or whatever short circuited the mains and a power failure occurred – causing all sorts of damage to all sorts of equipment and electricity using processes – the supplier must be held liable. On a strict liability or higher duty of care basis as suggested, ZESCO would be liable to every customer for damaged computers, fridges, pumps, TVs, and sundry equipment and, with perhaps less serious consequences, for ruining people's meals because the power went off half way through the cooking! The appeal cannot succeed.

For the reasons we have summarized herein, we consider that the learned trial judge was not wrong when he found for the respondent. Although costs normally follow for the event, the unsuccessful appellant has raised an important point for the consumers at large which has not previously been tested in this court and for that reason, each party will bear their own costs.

Appeal dismissed