

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA

APPEAL NO. 135 OF 2005  
SZ/8/125/2005

**(Civil Jurisdiction)**

**BETWEEN:**

ODYS WORKS LIMITED  
And  
FRED MATIPA

APPELLANT  
  
RESPONDENT

Coram: Lewanika DCJ, Chitengi JS, Kabalata AJS

On 19<sup>th</sup> October 2006 and 29<sup>th</sup> November, 2007

For the Appellant: J.P. Sangwa of Simeza Sangwa and Associates

For the Respondent: F. Chishimba for Fraser Associates

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**JUDGMENT**

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**Kabalata, AJS, delivered the judgment of the court**

This is an appeal against the High Court judgment dated 17<sup>th</sup> December 2004 in which the learned trial judge found the appellant liable in damages for negligence.

The particulars for the alleged negligence on the part of the Appellant were:-

- (a) failing to take any or any adequate or effective precautions for the safety of the Plaintiff while he was engaged upon the work.
- (b) Failing to warn and caution the Plaintiff on the defectiveness of the front-end-loader which the Defendants knew or ought to have known to have developed a power failure
- (c) In the circumstances, providing an unsafe system of work.

In this judgment, we shall continue to refer to the Respondent as the Plaintiff and the Appellant as the Defendant as this is what they were in the court below.

The evidence in support of the Plaintiffs' case was that the Plaintiff Fred Matipa, a mechanic or caterpillar operator used to drive the Defendants' caterpillar alias Front-end-loader. It was his evidence that he got injured as he worked on the caterpillar and the cause of the accident was its recurrent mechanical defects which he often attended to and the same were known to the defendant. It was Plaintiff's position that the caterpillar was an unsafe machine whose condition was repeatedly reported to the Defendant but the Defendant ignored all the reports.

The Defendant's position in his defence of the claim was that the Plaintiff was a mechanic who would go to working sites with another worker, Lackson Bundabunda, the operator or driver. The Defendant further states that it was never Plaintiffs' duty to drive the front-end-loader as his duties were strictly to check temperature, check any small leakages and checking overheating of oil but never to drive the front-end-loader.

At the end of the trial, the learned trial judge found for the Plaintiff and this is what he said:-

***“In my opinion, the facts do not support the defence of volenti non fit injuria; the Defendant is liable for the injuries the Plaintiff sustained in the accident. This caterpillar was a waiting industrial hazard and that it was a matter of time and the time did come.”***

Earlier in his judgment, the learned trial judge had expressed his opinion that these foreseeable and repeated faults of the front-end-loader resulted in Plaintiffs' accident. He further went on to say that given the condition of this machine, the foregoing was foreseeable and this is the only reason the Defendants under paragraph 5 of the defence pleaded as follows:-

5. *Further and in the alternative the Defendant will aver that the Plaintiff knew or ought to have known that repairing and removing the defective vehicle involved a risk of injury and the Plaintiff in so accepting to repair and remove the vehicle consented to running the risk.*

With regard to the issue whether the defendant owed a duty of care to the Plaintiff to ensure that the machine was safe in the circumstances of the case, the learned trial judge had this to say:-

*"In this Republic Section 41 of Act No. 10 of 1999, The Workers Compensation Act certainly imposes that duty but that apart, an employer has the duty at common law not to expose one's employee to foreseeable risks....."*

Dissatisfied with the judgment of the High Court, the Appellant appealed to this court. The appeal is based on four (4) grounds and these were:

1. *The court below misdirected itself on a point of law by finding the Appellant liable for negligence without establishing in the circumstances of the case the nature of the duty owed by the Appellant to the Respondent and how the said duty was breached;*



2. *The court below misdirected itself on a point of both law and fact by holding that the foreseeable and repeated faults of the machine resulted in the Respondents' accident, without making a finding of fact that the Respondent was negligent, that the Appellant's negligence was responsible for the damage the Respondent suffered and that the injury that is the amputation of the Respondent's leg was foreseeable.*
3. *The court below misdirected itself on a point of law by holding that in Zambia Section 41 of the Workers Compensation Act, Act No. 10 of 1999 imposes a duty of care.*
4. *The court below misdirected itself on a point of law by holding that an employer has a duty at common law not to expose ones' employees to foreseeable risks.*

We have carefully considered the evidence on record and submissions by both learned Counsel to whom we are grateful for their spirited arguments.

In the view that we take of this appeal, we do not intend to discuss the arguments canvassed by both Counsel. Suffice it to say that despite the evidence on record, the learned trial judge made no specific findings. For example, what was the job of the Plaintiff? Was he a mechanic or operator. As regards the relationship that existed between the Plaintiff and the Defendants namely that of master and servant, the learned trial judge made no findings neither did he make any finding as to the nature of the duty owed by the Defendant to the Plaintiff and how the said duty was breached. Further more, the learned trial judge made no finding that the Plaintiff was negligent or that the Defendant's negligence was responsible for the damage the Plaintiff suffered and that the injury, that is the amputation of the

Plaintiff's leg was foreseeable. Further still, does Section 41 of Act No. 10 of 1999, the Workers Compensation Act, impose a duty of care on an employer towards an employee. Did the Plaintiff, in his pleadings, allege any breach of statutory duty as a basis for his action for the said Act to be an issue in this case? Finally, was it correct for the learned trial judge to hold that an employer has a duty at common law not to expose one's employee to foreseeable risk. In our considered view, the breach of duty of care of which would found a claim for negligence has to be recognized by law. Not all relationships impose a duty of care to the parties. Those were issues which required specific findings to be made by the learned trial judge.

For the foregoing reasons, we find that the learned trial judge made no specific findings with regard to important issues of fact and law. We would therefore allow this appeal and order a retrial of the case before another judge. Costs to be in the cause.

**D.M. Lewanika**  
**DEPUTY CHIEF JUSTICE**

  
**P. Chitengi**  
**SUPREME COURT JUDGE**

  
**T.A. Kabalata**  
**ACTING SUPREME COURT JUDGE**