IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO.1/2012**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

KONKOLA COPPER MINES PLC **APPELLANT**

AND

JAMES NYASULU AND 2,000 OTHERS **RESPONDENTS**

Coram: Mwanamwambwa, A/DCJ, Hamaundu, JS and Lisimba, A/JS

On 5th February, 2015 and 2nd April, 2015

For the Appellant: Mr. Nchima Nchito, SC, Messrs Nchito and Nchito.

For the Respondents: Mr. K. Shepande, Messrs Shepande and Company.

JUDGMENT

Lisimba, Ag/JS, delivered the judgment of the Court.

Cases referred to:

1. **Grant vs. Australian Knitting Mills LTD (1936) A.C. 85.**
2. **Wilson Masauso Zulu vs. Avondale Housing Project(1982) Z.R.172.**
3. **Donoghue vs. Stevenson (1932) A.C.562.**
4. **Continental Restaurant and Casino Limited vs. Arida Mercy Chulu (2000) Z.R. 128.**

5. **Times of Zambia Limited vs. Lee Chisulo (1984) Z.R. 83.**
6. **Prudential Assurance Co. Ltd vs. Newman Industries Ltd [1981] Ch. 229.**
7. **Georgina Mutale (T/A G.M. Manufacturers Limited) vs. Zambia National Building Society (2002) Z.R. 19.**

Legislation referred to:

1. **The Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, 1999.**

Other works referred to:

1. **Clerk and Lindsell on Torts, 20th Edition, Sweet and Maxwell.**
2. **Odgers on Civil Court Actions, 24th Edition.**

This is an appeal against a judgment of the High Court awarding each of the Respondents the sum of K4,000.00 (rebased) as general damages and the sum of K1,000.00 (rebased) as punitive damages, for the injury suffered by the Respondents after consuming water polluted by the Appellant.

The brief facts of this case are that the Respondents were residents of Chingola District in the Copperbelt Province, whose source of water was a stream in which the Appellant was discharging effluent from its mining activities. On 6th November,

2006, one of the Appellant's tailings pipeline raptured, leading to the discharge of effluent which was high in acidic content into the Chingola and Mushishima streams. This consequently led to the pollution of the water source which feeds into the Kafue River. On 8th November, 2006, the Environmental Council of Zambia (now Environmental Management Agency) wrote to the Appellant instructing it to cease operations of its tailings leach plant in view of the pollution of the Kafue River. After consuming the polluted water, the Respondents suffered from varying illnesses such as indicated in the Statement of Claim.

In his judgment, the learned trial Judge found that the Respondents had proved their case against the Appellant both in common law and under statutory law. He found that the Appellant had polluted the water source and that the Respondents had consumed the polluted water. He also found that the medical evidence produced by the Respondents was consistent with the finding that the Appellant had polluted the water source. The learned trial Judge relied heavily on the evidence of Joseph Sakala, a Manager for the Inspectorate at the Environmental Council of Zambia, whose testimony was that the Appellant breached the provisions of the license issued to it by

the Environmental Council of Zambia, on the discharge of effluent into the aquatic environment. The learned trial Judge found that there was gross recklessness on the part of the Appellant as it had deprived the Chingola community of the right to life, which is fundamental in our Constitution. He further found that by its act, the Appellant had disregarded the Environmental Legislation and must, therefore, shoulder the moral, criminal and civil liability. The learned trial Judge ordered the Appellant to pay each of the Respondents general and punitive damages. It is against this judgment that the Appellant is appealing. The Respondents also filed in a cross appeal, which they have since abandoned.

The Appellant filed in four grounds of appeal and argued grounds one and two as one. Grounds three and four were argued seriatim. We, however, propose to deal with grounds one and three of the appeal together as the arguments raised in these two grounds are interrelated. We will deal with grounds two and four together for the same reason.

The first ground of appeal was that the Court below erred in law and fact when it ordered the Appellant to pay damages to the Respondents herein without making a finding on the ingredients

of the Respondents' claim, which claim was in negligence. The third ground of the appeal was that the Court below erred in law and in fact when it held that the Appellant had disregarded Environmental Legislation, a finding not supported by evidence.

Counsel for the Appellant, Mr. Nchito, SC, submitted that it is a requirement of the law that a plaintiff establishes the elements of negligence before a Court can find the defendant liable. State Counsel Nchito referred us to the authors of **Clerk and Lindsell on Torts, 20th Edition**, in which the requirements for the tort of negligence are listed at page 415 paragraph 8-04 as follows:

> **"Requirements of the tort of negligence. There are four requirements namely:**
>
> **(i) The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of persons to which the defendant belongs is actionable;**
>
> **(ii) Breach of the duty of care by the defendant; i.e. that he failed to measure up to the standard set by law;**

(iii) **A casual connection between the defendant's careless conduct and the damage;**

(iv) **That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.**

He submitted that unless the existence of such a duty can be established, an action for negligence must fail. He cited the case of **Grant vs. Australian Knitting Mills Ltd**[1], in which Lord Wright said the following:

> **"All that is necessary as a step to establish the tort of negligence is to define the precise relationship from which the duty to take care is deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no cause of actionable negligence will arise unless the duty to be careful exists."**

State Counsel Nchito argued that the Court below did not make any findings in respect of any of the above indicated elements of negligence before making a ruling in favour of the Respondents. He observed that the Respondents drew water supplied by Mulonga Water and Sewerage Company from their taps, but the Court did not make a finding on whether the

Appellant owed the Respondents a duty of care not to injure them. Consequently, the question as to who owed a duty to the Respondents to supply them with wholesome water was not answered. He submitted that even assuming that the Appellant owed the Respondents a duty of care, the Court below did not address the issue of whether the Appellant breached that duty of care, how the alleged duty was breached and whether the Respondents suffered any injury as a result of the breach. In so doing, the Court below negated its duty to adjudicate upon all matters in contention between the parties.In support of his argument, State Counsel Nchito cited the case of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**[2], in which we held that:

> **"The trial Court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."**

State Counsel Nchito also submitted that at the time of the incidence, the Appellant did not owe the Respondents a statutory duty to take care because it was exempted from complying with the statutory limits set out under the **Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia**

(now repealed and replaced by the **Environmental Management Act, No.11 of 2011**) on the amount of effluent it could discharge into the environment during the course of the period 30th June, 2006 to 31st December, 2006. He contended that there was no basis for liability as the slurry pipes in issue broke out of their own inanition and the pollution found itself in the water ways by sheer chance, by virtue of the topological disposition of the Chingola district.

In response, Mr. Shepande, who was counsel for the Respondents submitted that the Court below made findings of negligence based on the evidence on record and in particular, the report on the pollution by the Environmental Council of Zambia at pages 114 to 129 of the record of appeal.

We have considered the submissions in respect of ground one and three of the appeal. We have also considered the judgment appealed against. The issues that stand to be determined in respect of grounds one and three of the appeal are whether the learned trial Judge properly found that the Appellant owed the Respondents a duty of care and if so, whether that duty of care was breached by the Appellant. **Section 24 of the**

Environmental Protection and Pollution Control Act reads as follows:

> **"No person may discharge or apply any poisonous, toxic, erotoxic, obnoxious or obstructing matter, radiation or other pollutant or permit any person to dump or discharge such matter or pollutant into the aquatic environment in contravention of water pollution control standards established by the Council under this Part."**

To test whether a notional duty exists between parties, the neighbour principle was formulated by Lord Atkinson in the celebrated case of **Donoghue vs. Stevenson**[3], in which he stated the following:

> **"The rule that you are to love your neighbor becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."**

From the provisions of **Section 24 of the Environmental Protection and Pollution Control Act**, we are satisfied that the Appellant owed the Respondents a Statutory duty of care. This

provision clearly forbade any person from discharging pollutants into the aquatic environment. In his judgment at page J21, the learned trial Judge found that the **Environmental Protection and Pollution Control Act** was sufficient to deal with the issue at hand and further that the Respondents had proved their case both under Common Law and under Statutory Law.

We, therefore, do not find merit in the Appellant's argument that the learned trial Judge did not make a finding on whether the Appellant breached the duty of care it owed to the Respondents. The evidence on record shows that the Appellant, who is a mining company, held a licence issued to it on the 25th September, 2006, by the Environmental Council of Zambia for the discharge of effluent pursuant to the **Water Pollution Control (Effluent and Waste Water) Regulations of 1993**. The relevant portion of the licence reads as follows:

> **"The quality of effluent discharged into the aquatic environment shall not exceed the following standards for each of the listed parameters:**

PH	Total suspended solids	Total dissolved solids	Dissolved Sulphates	Total Copper	Total Iron	Total Iron	Total Cobalt
6-9	100mg/l	1500mg/l	1.5mg/l	1.5m/l	2.0m/l	1.0m/l	1.0m/l

In case of any abnormal discharge of effluent into the aquatic environment, practical measures to safeguard the environment should be taken and notify the ECZ within 24 hours."

The evidence of a Mr. Joseph Sakala, a Manager for the Inspectorate at the Environmental Council of Zambia, was thata report was produced by the Environmental Council of Zambia in November, 2006, detailing their findings after investigating the pollution of the Chingola and Mushishima streams as well as the Kafue River. He stated that the licence given to the Appellant allowed it to discharge mine water waste with a PH level between 6-9, but that the Appellant discharged effluent whose PH level was 2.8 and therefore, highly acidic. His further testimony was that as a result of the high acidity levels, the water turned bluish with copper sulphate precipitates being found along the edges of the river. He said the polluted water was harmful to the aquatic environment, infrastructure such as boats and could not, therefore, be used for agricultural purposes or human consumption.

The Appellant did not object to the production of the report by the Environmental Council of Zambia, which showed *inter alia* that the daily readings taken by the Appellant fourteen days prior

to the incidence showed that the effluent it discharged had dangerously low PH levels. This report also shows that the Appellant had run out of lime, which supports the finding by the learned trial Judge that no lime was added to the effluent to neutralise it as claimed by Moses Munkondya, the Appellant's environmental coordinator. This report also revealed that the pollution mostly affected the residents of a place known as Hippo Pool village, whose source of water was the raw water from the Kafue River. The report further revealed that a number of people from this village suffered from diarrhoea and vomiting after consuming the polluted water. This supports the evidence of Siku Nkambalumwe and Davies Mponesha, residents of Hippo Pool Village, that they fell ill after consuming the polluted water. The report also confirmed that in order to protect the residents of Chingola, Mulonga Water and Sewerage Company and Nkana Water and Sewerage Company suspended the water supply for about ten days in view of the pollution. This gives credence to the Respondents claim that even the water from the service providers was affected by the pollution. If that was not the case, the utility companies who provided water to the residents of Chingola would have continued with uninterrupted water supply.

We, therefore, find no merit in the Appellant's argument that it did not owe the Respondents a statutory duty of care at the time of the incidence because it had been given an exemption from the statutory limits on the amount of effluent it could discharge into the environment at the time. The licence issued by the Environmental Council of Zambia to the Appellant gave clear guidelines on the contents of the effluent the Appellant was allowed to discharge into the aquatic environment and the Appellant was clearly in breach of the licence. The PH level of the effluent released into the aquatic environment was 2.8, which was lower than that recommended in the licence. The report by the Environmental Council of Zambia, which the Appellant did not object to, showed that the Appellant had been operating in contravention of the licence issued to it and the bursting of the slurry pipes was only but the final straw. We find no merit in grounds one and three of the appeal.

The second ground of appeal, which was stated as an alternative ground, was that the Court below erred in law and fact in holding that the documents at pages 25 to 30 of the Respondent's bundle of documents amounted to medical evidence

that proved all of the Respondents' cases. The fourth ground of appeal was that the Court below misdirected itself in law and fact when it made a uniform award of damages to all the 2001 Respondents on the basis of the un-identical testimony of six (6) Respondents and without proof of each and every Respondent's extent of injury suffered.

In his submissions, State Counsel Nchito argued that in the event that this Court finds that the Appellant owed the Respondents a duty of care not to injure them, then it should also find that the Court below erred when it accepted that the documents at pages 170 to 187 of the record of appeal amounted to medical evidence which proved all of the Respondents' cases. State Counsel Nchito further argued that the Court below was precluded from making a finding of damages or injury for the entire group based on the evidence of six witnesses that testified in this matter, as this action did not proceed as a representative action, but as a group action. He argued that in an action for negligence, a plaintiff must show how the accident happened and how, as a result of that accident, he sustained the personal injuries or damage. He stated that by virtue of the numerous

degrees or varying types of injury purportedly suffered by the Respondents, the learned trial Judge could not make a global finding in respect of all of them.

State Counsel Nchito also observed that while the incident happened in 2006, there is a doubt created on the credibility of the medical reports as they are dated 2010. He contended that there was no causal connection between the medical reports admitted into evidence and the alleged pollution incident as the Respondents did not prove that the water they had consumed contained copper sulphate and that this is what caused the stomach pains and the vomiting. The evidence showed that the witnesses suffered stomach pains, but did not show that it was as a result of drinking the alleged polluted water. State Counsel Nchito cited the case of **Continental Restaurant and Casino Limited vs. Arida Mercy Chulu**[4], in which we held that:

> **"The basis of awarding damages is to vindicate the injury suffered by the plaintiff and no damages will be awarded if no proper evidence of a medical nature is adduced."**

Even assuming that the evidence of the six witnesses was sufficient, the learned trial Judge should have made a declaration as to liability, then ordered that each Respondent carries out an individual assessment to ascertain the quantum of damages due to each one of them. He urged us to interfere with the award for damages on the authority of **Times of Zambia Limited vs. Lee Chisulo**[5], in which we held that:

> **"An appellate Court will not interfere with an assessment of damages unless the lower Court had misapprehended the facts, or misapplied the law or where the damages are so high or so low as to be an entirely erroneous estimate of the damages to which a plaintiff is properly entitled."**

In response, Mr. Shepande submitted that the Court below properly admitted the medical evidence before it as the pollution caused by the Appellant was widespread and all the residents of Chingola depended on the same water source. He submitted that this was a collective action as shown by the Respondents' statement of claim and therefore, the testimony of the witnesses who appeared before Court was representative of the effects of the pollution which was widespread. Further that State Counsel Nchito could not raise an objection with regard to the capacity of the parties as the issue was not raised in the Court below.

We have seriously considered the arguments advanced in respect of grounds two and four of the appeal. With regard to the nature of the action brought by the Respondents, our view is that this was a representative action as clearly shown by the contents of the Statement of Claim. The following is stated in **Odgers on Civil Court Actions, 24th Edition, at page 39** with regard to representative actions:

> **"A representative action is one that is brought by a self-appointed representative plaintiff or plaintiffs on behalf of himself and some or all other members of a group having the same interest in the proceedings for the vindication of a common right or the redress of a common grievance. Alternatively, the proceedings may be instituted against a named defendant or defendants as representing a number of others who have a common interest in resisting the suit. It is essential that the person named as a representative of the group should have the same interest in the matter as the persons represented................ Neither the leave of the Court nor a representation order is required before a representative action can be instituted by a plaintiff."**

On the evidence on record, it is apparent that the Respondents had the same interest in the proceedings for the redress of a common grievance. In this case, the common grievance amongst the Respondents was that the Appellant had

polluted their water source as a result of which they suffered varying ailments for which they were seeking redress.

We also do not agree with the argument advanced by State Counsel Nchito that the medical evidence produced before Court does not show that the stomach pains were a result of drinking the polluted water. Eleven of the twelve medical reports appearing at pages 158 to 185 of the record of appeal indicate that the patients fell ill after consuming polluted water. This is with the exception of one medical report in respect of one Lister Simbeye dated 28th August 2008, which shows that she was diagnosed with a rectal tumour. This medical report does not indicate that she developed this tumour on account of consuming the polluted water.

Furthermore, the concern raised by State Counsel Nchito on the dates on the medical reports lacks merit as Mr. Nyasulu, the main Respondent in this appeal, clarified in his evidence at page 261 of the record of appeal that although the medical reports are dated for much later than the day when some of the Respondents were treated, they were based on the Respondents' medical

records at the date of the treatment in November, 2006. In any event, the medical reports were admitted into evidence in the Court below without any objection from the Appellant.

We, however, agree with State Counsel Nchito that the learned trial Judge should have ended at making a declaration as to the Appellant's liability and then ordered that each of the Respondents carries out an individual assessment to ascertain the extent of the injury suffered and the quantum of damages due. **Order 15/12/4 of the Rules of the Supreme Court, 1999**, reads as follows:

> **"A representative action can be brought by a plaintiff suing on behalf of himself and all the members of a class, each member of which including the plaintiff, is alleged to have a separate cause of action in tort, e.g. damages for conspiracy, subject however to three overriding conditions, namely:**
>
> ***(1) that no order will be made in such an action if its effects might, in any circumstances be to confer a right of action on a member of the class represented who would not otherwise be able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in such a separate action, and therefore the only relief which will normally, if not invariably be capable of being obtained by the plaintiff in a representative capacity***

will be declaratory relief, e.g. a declaration that all the members of the class represented are entitled to damages for conspiracy from the defendants, ...

(2) that all the members of the class represented shared an interest which was common to all of them, so that there must be a common ingredient in the cause of action of each member of the class; and

(3) that the Court must be satisfied that it is for the benefit of the class that the plaintiff should be permitted to sue in such a representative action, e.g. that the issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim."

See **Prudential Assurance Co. Ltd vs. Newman Industries Ltd and Others**[6].

It was a serious misdirection on the part of the learned trial Judge to award damages to 2001 Respondents on the basis of 12 un-identical medical reports. Having established that the Appellant had polluted the Respondents water source the learned trial Judge should have referred the matter to the learned Deputy Registrar for assessment. Our considered view is that the award for damages made by the learned trial Judge has the danger of conferring a benefit on other Respondents, who would not otherwise have been entitled to such damages depending on the

extent of the injury suffered. In the case of **Georgina Mutale (T/A G. M. Manufacturers Limited) vs. Zambia National Building Society**[6], we held that:

> **"In the absence of specific evidence of the value of the loss, justice would have been better served by referring the matter to the Deputy Registrar for assessment of damages instead of giving a figure which bears no relationship to anything in particular in the case."**

In the case of **Continental Restaurant and Casino Ltd vs. Arida Mercy Chulu**[4], we emphasised that in future, we would not award damages for personal injuries in the absence of credible medical evidence. The twelve medical report forms that were admitted into evidence were produced by the main Respondent in this matter, Mr. James Nyasulu who should have equally produced the medical report forms for the remainder of the 1, 989 Respondents. There was, therefore, no credible medical evidence showing that the 1,989 Respondents suffered any injury as a result of the pollution.

On the authority of **Times Newspapers Zambia Limited vs. Lee Chisulo**[5], we hereby set aside the award for damages in favour of the Respondents and order that the matter be sent back

to the Deputy Registrar in the Court below for assessment of damages in respect of the Respondents whose medical reports were admitted into evidence. The appeal succeeds in so far as the order for damages is concerned. The parties shall bear their respective costs.

M. S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

E. M. HAMAUNDU
SUPREME COURT JUDGE

M. LISIMBA
AG. SUPREME COURT JUDGE