FOR YOUR SIGNATURE

MAMBILIMA, CJ..... 4/04/16 .....

HAMAUNDU, JS..... 4/4/16 .....

WOOD, JS..... 5/4/2016 .....

IN THE SUPREME COURT OF ZAMBIA **APPEAL 147/2013**
HOLDEN AT LUSAKA/NDOLA
(CIVIL JURISDICTION)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

LASTON CHIPULU **RESPONDENT**

CORAM: MAMBILIMA CJ, HAMAUNDU AND WOOD, JJS;
on the 1st December 2015 and 1st April 2016

For the Appellant: **Mr. M. Z. ZAZA in-house Counsel.**
For the Respondent: **Mr. C. CHALI of G M Legal Practitioners.**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172**
2. **KHALID MOHAMMED V THE ATTORNEY GENERAL (1982) ZR 49**
3. **EAGLE CHARALAMBOUS TRANSPORT LIMITED V GIDEON PHIRI (1993-1994) ZR 52**
4. **VICTOR NAMAKANDO ZAZA V ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED (2001) ZR 107**
5. **HAY OR BOURHILL V YOUNG [1942] 2 ALL ER 396**
6. **DONOGHUE V STEVENSON (1923) AC 562**
7. **ZESCO LIMITED V JUSTINE CHISHIMBA APPEAL NO. 131 OF 2013**
8. **BALL AND ANOTHER V LONDON COUNTY COUNCIL [1949] 1 ALL ER 1056**

WORKS REFERRED TO:

1. **CHARLES WORTH AND PERCY ON NEGLIGENCE, 12TH EDITION, Paragraph 6-23 page 414**

LEGISLATION REFERRED TO:

1. **ELECTRICITY ACT CHAPTER 433 OF THE LAWS OF ZAMBIA**

This is an appeal from the Judgment of the High Court, delivered on 26th April, 2013, in which the Appellant was found liable in damages in an action for negligence.

The brief, undisputed facts of this case are that on 24th August, 2011, the Respondent's bull and pregnant heifer were electrocuted when they came into contact with the Appellant's overhead power lines which had collapsed at Kangwenya farm in Mufulira. The Respondent alleged that the Appellant was negligent by causing or permitting loose cables to be on the ground leading to the electrocution of his animals; by failing to take adequate precaution to ensure that the cables did not cause harm to any humans or animals; and by failing to take adequate measures to secure the cables.

The Respondent invoked on the doctrine of ***res ipsa loquitur***, on the ground that the cable which electrocuted his animals was

under the control and management of the Appellant. He claimed damages for the loss of the bull and heifer; for mental torture, anguish and inconvenience occasioned to him upon the loss of the animals. He also claimed interest and any other relief the Court would deem equitable.

In his testimony in the Court below, the Respondent told the Court that when he was informed that two of his nine cattle had been electrocuted, he rushed to the scene, in the company of police officers from Chambishi. Upon reaching the farm, they found that a ZESCO pole and cables had collapsed and two cattle were lying dead beneath sagging cables. A report of the incident was made to the Appellant's Mufulira Office.

Jordan SAMAKAI, a farm worker, who testified as PW 2, told the Court that the cattle began making noise as he was leading them to graze. When he went to check, he found that two of them had fallen to the ground. He also saw that there were some electricity cables which were dangling.

The Respondent accused the Appellant of negligence and breach of duty, in that they permitted loose cables to be on the ground leading to the electrocution of the animals and failing to

take adequate precautions to secure their cables and ensure that they did not cause harm to animals or humans.

In defence the Appellant denied that it had been negligent or had been in breach of its duty. Its only witness, DW1, Enock CHISHIMBA, a Maintenance Engineer, stated that he received the message of a burnt pole on the Appellant's high voltage Triple S 11 KV overhead line. That he, thereafter, switched off and isolated the affected line. He visited the site of the incident and he found that a pole which supported one of their conductors had been burnt. He also noticed that the overhead lines were hanging about 1.5 metres above the ground and beneath them lay a bull and about six metres away, there was a pregnant cow. They were both dead.

The Appellant's position is that the Respondent's animals were electrocuted as a result of a bush fire which had been ignited by unknown vandals, causing the Appellant's pole and the high voltage overhead lines to sag. Further, that the Appellant was unable to detect the fault and cut supply automatically because the cables did not touch the ground when the pole collapsed.

After considering the evidence that was before her and the submissions of the parties, the learned trial Judge made a finding

of fact that the Respondent's animals were electrocuted when they passed near or under the Appellant's overhead lines which had sagged from a visibly burnt pole. The Judge further found that it was not clear from the available evidence, how or why the fire was ignited. That the extent of the fire was also unclear as no photographic evidence of the scene was availed.

Although the Court found that the Respondent had failed to prove that the Appellant caused or permitted the cables to hang, it found that the Respondent had proved on a balance of probabilities, that the Appellant was liable as it had failed to take adequate precautions to ensure that the cables did not harm humans or animals. According to the Judge, it was clear from the evidence that the cables were not insulated. She also found that there was vegetation around the pole and there was no fire guard around it.

The Court rejected the Appellant's evidence that there was no need to insulate the cables relying on Regulations 35(1) and 37 (1)(3) of the **ELECTRICITY SUPPLY REGULATIONS**. The regulations in question state as follows -

> **"35. (1) A cable shall be fully insulated for the normal operating voltage and shall be of a type and construction and shall**

be laid or installed in a manner suited to its particular environment and having regard to-

(a) the provisions of paragraphs (a), (b) and (c) of sub-regulation (1) of regulation 20;
(b) the normal usage of the ground in which any part of it is to be laid;
(c) foreseeable risk of damage to the cable and danger to persons, property and to other electrical services, water, gas, sewerage and telegraph services, railways and constructional works at or below ground-level.

37. (3) A cable shall be subjected to an insulation test after being laid or installed before being connected to a supply of electricity but it shall not be so connected if the connection would result in an electrical leakage which might be a danger to persons or property."

The learned trial Judge held that since the provisions of the afore-stated Regulations were couched in mandatory terms, it was incumbent upon the Appellant to insulate a cable for normal operating voltage and install it having regard to the environment and foreseeable danger to persons or property. That it was also incumbent upon the Appellant, to subject the cable to an insulation test after being connected to the supply of electricity and not to connect it if the connection would result in an electrical leakage that would cause danger to persons or property. That since there was an electrical leakage, the Appellant was liable both under common law and statute law.

The Appellant has appealed against this judgment and has advanced three grounds of appeal. These are:-

"

1. **That the learned trial Judge in the Court below having found that the Plaintiff had not proved the particulars of negligence alleged against the Appellant, she erred both in law and fact by deciding that the Appellant was negligent.**

2. **That the learned trial Judge in the Court below erred in law and facts by relying on the principles of *res ipsa loquitur* to decide that the Appellant was negligent.**

3. **That the learned trial Judge in the Court below erred in law and fact by relying on Regulations 35(1) and 37(3) of the Electricity (Supply) Regulations of the ACT which did not apply to overhead lines in arriving at her Judgment."**

Counsel filed written heads of argument on behalf of the Appellant and argued the three grounds of appeal in turn. The gist of the arguments on the first ground of appeal is that the learned trial Judge contradicted herself, in the sense that after finding that the bottom of the pole was burnt, and, concurring with Mr. CHIWALA, Counsel for the Appellant, that the Respondent had failed to prove his allegation, she went on to find as follows -

> **"However, I am of the view that the Plaintiff has proved on the balance of probabilities that the defendant failed to take adequate precautions to ensure that the cables did not harm any humans or animals as it is clear from the available evidence that the cables were not insulated, there was no fire guard around the pole and there was vegetation around the pole."**

Counsel argued that since the Respondent had not adduced any evidence relating to inadequate precautions or lack of a fire guard, he was not entitled to Judgment and the learned trial Judge was in error to have found in his favour. To support his argument, Counsel relied on the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[1] where we held that-

> **"A Plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

He also referred us to the case of **KHALID MOHAMMED V THE ATTORNEY GENERAL**[2] where NGULUBE DCJ, as he then was, held-

> **"I would not accept the proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly, a defendant in such circumstances would not even need a defence"**

On the second ground, Counsel argued that the learned trial Judge erred in basing her Judgment on the principal of ***res ipsa loquitur*** when the Respondent had pleaded particulars of negligence. He relied on the case of **EAGLE CHARALAMBOUS TRANSPORT LIMITED V GIDEON PHIRI**[3] where it was held –

> **"If a Plaintiff knows the cause or alleges particulars of negligence it is inappropriate for him to plead *res ipsa loquitur*."**

Coming to the third ground of appeal, Counsel for the Appellant submitted that since the matter before Court related to the Appellant's overhead lines and not cables, Regulations 35(1) and 37(3) of the **ACT** were in applicable to the case in *casu*.

Counsel argued, in the alternative, that private action could not lie against a breach of the Regulations in issue. According to Counsel, the Regulations under the **ACT** criminalised failure or breach on pain of a fine or imprisonment. He referred us to the case of **VICTOR NAMAKANDO ZAZA V ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED**[4] where we said -

> **"Although he agreed that the appellant had at trial neither pleaded nor canvassed a possible breach of statutory duty, Mr Sikatana drew our 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."**

In response to the Appellant's heads of argument, Counsel for the Respondent, submitted that the learned trial Judge did not err when she found as fact, that the Respondent had proved on a balance of probabilities that the Appellant failed to take adequate precautions by not insulating the cables. He submitted that the

Appellant owed a duty of care to the Respondent, which duty was breached when the cattle was electrocuted. He further submitted that had the Appellant taken adequate precaution, the electrocution would not have happened.

Counsel invited us to look at the case of **HAY OR BOURHILL V YOUNG**[5] where Lord MACMILLAN said-

> **"... the duty to take care is the duty to avoid that which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."**

Counsel also referred to the most recited words of Lord ATKIN in the celebrated case of **DONOGHUE V STEVENSON**[6] where he said:-

> **"...you must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbour; who then in law is your neighbour? The answer seems to be persons who are closely and directly affected by your acts that you ought reasonably to have them in your contemplation to be affected, when you have directed your mind to the acts or omissions that are called in question."**

Counsel for the Respondent contended that the standard of proof, in this instance, was not of perfection but reasonableness.

In response to the second ground of appeal, Counsel urged us to dismiss the ground of appeal as it was misleading. He submitted that it was clear from the Judgment, at page 18 of the record of

appeal that the learned trial Judge had not relied on the principle of ***res ipsa loquitur*** when she said -

> **"As regards the issue of *res ipsa loquitur*, I have considered the authority of EAGLE CHARALAMBOUS TRANSPORT LIMITED V GIDEON PHIRI and I am of the view that it was inappropriate for the plaintiff in the present case to plead *res ipsa loquitur* because he knew the cause of the accident and gave particulars of negligence. Quite clearly, the maxim does not apply to this case."**

Responding to the third ground, Counsel submitted that Regulations 35(1) and 37 (3) were applicable to all cables, regardless of whether they were overhead. That, consequently, the learned trial Judge was on firm ground to rely on the cited provisions. He submitted, further, that as the said provisions were mandatory, the Appellant had a statutory duty to insulate the cable, conduct an insulation test and not to connect if the connection would result in an electrical leakage that would be a danger to persons or property.

At the hearing of this appeal Mr. ZAZA, the learned Counsel for the Appellant, augmented the Appellant's submissions orally, starting with the third ground of appeal. He submitted that Regulations 35, 36 and 37 under Part VI of the **ACT,** only applied to cables, and not overhead lines. That what was applicable to overhead lines were Regulations 38 to 47 under Part V.

Mr. ZAZA further submitted that Regulation 20 of the **ACT** only applied to switch gears and fuses but upon reading the provision, Mr. ZAZA conceded that the regulation referred to design and protection of works. He also referred us to Regulation 61 to buttress the alternative argument that it was wrong for the trial Court to base its judgment on regulations which were not applicable to civil matters.

On the first ground of appeal Mr. ZAZA submitted that as the fallen pole was burnt by unknown people, the matter was beyond the Appellant and thus it could not be held liable. That onus was on the Respondent, as customer, to report the fault and not to expect the Appellant as supplier, to be an insurer against all possible accidents. He went further to state that it was the responsibility of the Respondent to secure his animals. He cited the case of **VICTOR NAMAKANDO ZAZA V ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED**[4], where we held-

> **"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 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-existent with the customer's own duty."**

Responding to Mr. ZAZA's oral submissions, Mr. CHALI, for the Respondent, submitted that the trial Court made a finding of fact, on a balance of probabilities, that the cables were not insulated; that there was no fireguard and that there was vegetation around the pole. He urged us not to lightly interfere with the findings in this case in line with our observation in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[1]. We held in that case that –

> **"Before this Court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make."**

Mr. CHALI also referred us to our decision in the case of **ZESCO LIMITED V JUSTINE CHISHIMBA**[7] where we held that -

> **"..at law, an electricity generating company which places a high voltage electric line owes a duty to take reasonable care to avoid acts or omissions which it can reasonably foresee would be likely to injure persons who are closely and directly affected by its acts or omissions that it ought to have had them in contemplation."**

From the same case, he cited a passage where we said -

> **"In view of the authorities, negligence was attributable to the Appellant in this case, since it failed to ensure that the live electric cable did not dislodge from its pole."**

In conclusion, Mr. CHALI submitted that the very fact that the cable dislodged from the pole rendered the Appellant culpable in negligence. It was his submission that the **VICTOR NAMAKANDO ZAZA**[4] case was inapplicable because it related to a power failure and not an accident, as in the present case.

We have considered the evidence on record, the submissions of Counsel, and the Judgment appealed against. It is common cause that the Appellant's pole supporting high voltage conductors was burnt and collapsed causing overhead lines to sag a few metres above the ground. It is also common cause that the Respondent's bull and pregnant heifer were electrocuted as they passed near or under these sagging power lines.

At the outset, we shall discount the second ground of appeal because, as Mr. CHALI rightly pointed out, the learned trial Judge did not rely on the principle of ***res ipsa loquitur*** to find the Appellant negligent. The Judge was categorical that it was inappropriate for the Respondent to plead ***res ipsa loquitor*** because he knew the cause of accident. The second ground of appeal, therefore, lacks merit.

We shall deal with the first and third grounds of appeal together because they both raise one issue, and this is whether, the Appellant was negligent in view of the provisions of Regulations 35(1) and 37(3) of the **ACT**.

Mr. ZAZA spiritedly argued that the burnt pole which resulted in the sagging of the lines was as a result of an act of vandals thereby absolving the Appellant from any liability in negligence. On the other hand, Mr. CHALI contended that the Appellant was still culpable in negligence because its pole dislodged from the cable and the electricity company failed to take precautions to avoid causing harm to people and animals.

It is trite that there is a duty of care imposed on those who send forth or deal in dangerous articles and this duty is much higher. This was clearly stated in the case of **BALL AND ANOTHER V LONDON COUNTY COUNCIL**[8] which cited **DOMINION NATURAL GAS LIMITED V COLLINS AND PERKINS[1909] AC 646** where it was held -

"It has, however again and again, been held that the case of articles dangerous, in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed on those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take

> **precaution it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter."**

In our view, **"articles dangerous in themselves"** also includes electricity. We echoed this position in our decision in the case of **ZESCO LIMITED V JUSTINE CHISHIMBA**[7] when we stated:-

> **"We stress here that, at law, an electricity generating company which places a high voltage electric line owes a duty to take reasonable care to avoid acts or omissions which it can reasonably foresee would be likely to injure persons who are closely and directly affected by its acts or omissions that it ought to have had them in contemplation."**

The Appellant, being a dealer in dangerous substances, owes, not just a duty of care, but also a peculiar duty to take precaution to ensure that no harm is caused to people, animals or property that come within the proximity of their electricity installations, irrespective of whether the act or omission complained of is caused by a third party or by vandals as Mr. ZAZA suggests.

From the circumstances surrounding this case, the Judge concluded that the burning of the pole and the area around it caused the lines to sag. This, she was entitled to do. As the learned authors of **CHARLESWORTH AND PERCY ON NEGLIGENCE**[1] stated:-

> **"....the approach to causation in an accident case generally starts with the reasonable application of common sense. With this guide there is freedom to choose one or more causes out of a solution of factors which contribute towards the happening of the event in question."**

On perusal of the record of appeal, it is clear that the learned trial Judge made a finding of fact, that the Appellant had failed to take adequate precaution to prevent harm to human beings and animals from their installations. She based this finding on the unchallenged evidence of DW1 who stated, during cross examination, that-

> **"There was no fire guard around the pole. When I went to (the) site, I found that the only area which was burnt was a small area within Mr Nyirenda's farm where the pole was..."**

Being a finding of fact, it should not be lightly overturned in line with our decision in the case of **WILSON MASAUSO ZULU VS AVONDALE HOUSING PROJECT**[1] in which we held that an appellate court will only reverse findings of fact by a trial court if it is satisfied that the finding in question is perverse or made in the absence of relevant evidence, or upon a misapprehension of facts.

Coming to the case in casu, the evidence established that the fire which burnt the pole was started by unknown people. In cross-examination, DW1 told the lower Court that the Appellant also

carries out vegetation management ***'meaning bush clearing along our lines'*** (page 64 of the record). He went on to state that there was no fire guard around the pole. The inescapable inference from these facts is that when the fire was started by vandals, it engulfed the vegetation around the pole leading to its burning, thereby causing the lines to sag. In these circumstances, we do not find that the finding of fact by the Court below, that the Appellant failed to take adequate precaution to prevent harm to animals and human beings, was perverse, or not supported by relevant evidence, or made upon a misapprehension of facts. We, therefore, see no basis to interfere with this finding of fact.

We now move to the issue of Regulations 35 (1) and 37 (3) of the **ACT**. We have perused through the **ACT** and we agree with Mr. ZAZA that Regulations 35 (1) and 37 (3) are in Part IV which specifically deals with cables. Overhead lines are provided for under Part V. According to the evidence of DW 1, the overhead lines in this case were aluminium conductors which do not require to be insulated. It was therefore a misdirection for the learned trial Judge to have relied on these provisions and conclude that the overhead lines ought to have been insulated.

Be that as it may, Regulation 39(a) under Part V governs overhead lines, states:-

> **"39. The construction requirements of an overhead line shall comply with-**
>
> **(a) the provisions of sub-regulation 1 of regulation 20."**

The said regulation 20(1) provides, inter alia, as follows:-

> **"20(1) The undertaker's works shall:-**
>
> **(b) be designed, constructed, installed, protected where necessary and be of such quality to prevent danger;**
>
> **(c) be specifically designed and constructed or additionally protected where exposed to –**
>
> **(v) inflammable surroundings**
> **so as to prevent danger from such exposure.**

Regulation 35(1), which the Judge referred to, also requires compliance with Regulation 20(1).

Both Part IV and V of the **ACT,** therefore, make it mandatory for any undertaker to, among others, ensure that its facilities are protected and, where necessary, be of such quality so as to prevent danger. The whole essence of these regulations is to protect property, human and animal life. Consequently, much as Regulations 35 and 37 do not apply in this case, Regulation 39(a) does place a statutory obligation on the Appellant to ensure that its

installations are safe. That aside, we echo our sentiments in the case of **ZESCO LIMITED V JUSTINE CHISHIMBA**[7] that at law, an electricity generating company which places a high voltage electricity line owes a duty to take reasonable care to avoid acts or omissions which it can reasonably foresee would be likely to injure persons who are closely or directly affected by its acts or omissions that it ought to have had them in contemplation. Its installations should not endanger life and property. The Appellant shoulders both criminal liability under the ACT and civil liability in tort, regardless as to whether the damage emanated from an overhead or underground line. The Respondent, in his statement of claim, pleaded both negligence and breach of duty.

The learned trial Judge herself found that the Appellant was liable both under statutory law and common law. While it could be said that the aluminium conductors in this case did not need to be insulated, there was unchallenged evidence that there was vegetation around the pole which caught fire thereby burning the pole. It was the duty of the Appellant to carry out vegetation management and ensure that there was a fire guard around the pole to prevent fires from engulfing their installation.

From the foregoing, we find no merit in this appeal. It is dismissed with costs to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

E.M. Hamaundu
SUPREME COURT JUDGE

A.M. Wood
SUPREME COURT JUDGE