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IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 7/2016
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

HAMILTON MULENDEMA

AND

ZAMBIA BREWERIES PLC



APPELLANT

RESPONDENT

CORAM : Mchenga DJP, Chishimba and Sichinga, JJA
On 17th January, 2017 and 21st March, 2017

For the Appellant : Messrs I. Ngonga and Company

For the Respondent: Mr. R. Ngulube of Messrs. Tembo Ngulube & Associates

J U D G M E N T

CHISHIMBA JA, delivered judgment of the Court

CASES REFERRED TO:

1. J.R. Munday Ltd Vs. London C.C. (1916) 2KB
2. Donoghue Vs. Stevenson (1932) AC 562
3. Zambia Railways Limited Vs Pauline S Mundia, Brian Sialumba
(2008) Z.R. 287 Vol. 1 (S.C)
4. Michael Chilufya Sata Vs. Zambia Bottlers Limited (2003) ZR 1
5. Continental Restaurant and Casino Limited Vs. Arida Mercy Chulu
(2000) ZR 128
6. Zambian Breweries Plc. Vs. Reuben Mwanza (2001) ZR 12
7. Zambia Consolidated Copper Mines Limited Vs. Patrick Mulemwa
(1995) SC
8. Bolam Vs. Friern Hospital Management Committee [1957] 2 All ER
118

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. Halsbury's laws of England, Volume 97, 5th Edition at paragraph 401**
- 2. Charlesworth and Percy, on Negligence 9th Edition**
- 3. Halsbury's laws of England, Volume 97, 5th Edition.**
- 4. Winfield and Jolowicz on Tort, Tenth Edition.**

This is an appeal against the Judgment of the High Court dated 23rd August 2016 dismissing the Appellant's claims for damages in respect of pain, mental torture, abdominal pains, inconvenience and special damages suffered as result of the Respondent's alleged negligence and breach of statutory duty. The facts of the case as per statement of claim are that, whilst attending a church function at Andrews Motel, the Appellant was served with a sealed bottle of a Sprite drink manufactured by the Respondent. Unknown to the Appellant, the said drink contained foreign material. The appellant had consumed part of the drink prior to his wife bringing to his attention the adulterated contents in the drink. After consuming the drink, the Appellant felt nauseated, failed to eat his supper that evening and subsequently fell ill. Later in the night he started vomiting. The following morning the Appellant developed diarrhea. For two consecutive days the Appellant could only take in fluids. The Appellant initially sought medical attention at the Adventist

Clinic. He then proceeded to Levy Mwanawasa Hospital where he was given medicine.

The contents of the sprite bottle were examined by a Public Inspector from Lusaka City Council. The report indicated that the drink contained foreign material namely ants and fungal growth. The appellant further stated that he suffered trauma and mental torture. In addition he had diarrhea and that his family had been inconvenienced.

The Appellant argued that he suffered injuries due to the Respondent's negligence, hence his demand for general and special damages.

The Respondent denied the allegation of fault on its part and argued, in a nutshell, that the ants and fungal growths found in the contents of the sprite bottle could have been introduced into the drink after the bottle was opened.

The Respondent, at trial, called its Trade and Quality Manager who narrated the process implemented in the packaging of its drinks and sale. The Respondent placed emphasis on the best known technological equipment used in the packaging and cleaning

of the bottles. He added that since the said bottle of sprite was not before Court it was difficult to establish whether or not it was in fact manufactured by the Respondent because there are a lot of different companies in the region that manufacture the said product.

The trial Court found that the Respondent owed a duty of care to the Appellant as there is a standard of care owed in respect of the manufacture, production and packaging of drinks to be consumed by the public generally. Further, that the Respondent breached the duty it owed to the Appellant as a consumer.

On actual damage suffered by the Appellant, the trial Court found that the Appellant had failed to adduce conclusive evidence to the effect that his illness was as a result of the drink consumed on the fateful day. The trial Court relied on the case of **J.R. Munday Ltd Vs. London C.C.** ⁽¹⁾ where Lord Reading opined as follows;

“Negligence alone does not give a cause of action, damage alone does not give a cause of action, and the two must co-exist.”

The Appellant raised 3 grounds of appeal namely that;

- 1. The Court below erred in Law and in Fact by failing to find that the resulting breach of duty of care by the Respondent caused damage to the Appellant.**
- 2. The Court erred in Law and Fact by failing to find that the Plaintiff had suffered damage after consuming adulterated contents of sprite and the Plaintiff should have been awarded damages.**
- 3. The Court below erred in law and Fact by relying on distinguishable case law to the Appellant's case and come to a finding that the Appellant did not suffer damage to be awarded damages.**

The Appellant relied on the written heads of arguments dated 17th of November 2016. It was submitted that though the learned trial court was on firm ground when he held that the Respondent was negligent by selling a sprite drink containing adulterated matter consumed by the Appellant, the Court had failed to apply the neighbor principle espoused in the case of **Donoghue Vs. Stevenson** ⁽²⁾.

The Appellant further argued that the trial Court fell in error by holding that the Respondent was not liable for negligence despite having earlier found that the Respondent had breached its duty of care.

The Appellant maintained that he suffered damage as a result of consuming the contaminated drink, as evidenced by the illness suffered namely; diarrhea, vomiting and abdominal pains. Further, that there was evidence on record in the form of medical reports from the Adventist Clinic and Levy Mwanawasa Hospital that the Appellant had undergone medical treatment. Counsel contended that the Court erred when it found that the injury suffered by the Appellant could not be confirmed in the absence of the toxicology report.

In the third ground of appeal, the Appellant argued that though the cases relied upon by the Court elucidate the correct position of the law on negligence, the facts therein are distinguishable from the case at hand. Further, that in the Appellant's case there is proof of damage as he had fallen ill after having consumed the contents of the adulterated sprite.

The Respondent in its heads of arguments dated 11th January, 2017 submitted on the essential elements needed to prove negligence, as discussed by the learned authors **Charlesworth and**

Percy, On Negligence 9th Edition at page 16, where it was stated that;

- 1. There must be a duty of care owed to the Defendant by the Plaintiff;*
- 2. There must be a breach of the duty owed to the Plaintiff by the Defendant and;*
- 3. The Plaintiff must suffer damage as a result of such breach by the Defendant.*

The Respondent argued that the Appellant had failed to prove that it suffered damage to the standard of proof required in civil cases i.e. on a balance of probabilities as was held in the case of ***Zambia Railways Limited Vs. Paulins S. Mundia and Another***⁽³⁾.

The Respondent further drew our attention to the cases of ***Michael Chilufya Sata Vs. Zambia Bottlers Limited*** ⁽⁴⁾ and ***Continental Restaurant and Casino Limited Vs. Arida Mercy Chulu*** ⁽⁵⁾ where the Supreme Court discussed instances when an award of damages arising from negligence may be awarded and the emphasis placed on the requirement for the Plaintiff to prove damage or injury by

way of medical evidence. In addition the English case of **J.R. Munday Limited Vs. London Country Council** (*supra*) was cited as authority.

The Respondent argued that the medical reports and letters dated 23rd July, 2013, 11th December, 2013 and 20th December, 2013 respectively did not conclusively show that the Appellant had suffered illness as a result of consuming the adulterated drink. Further, that the medical letter dated 11th December, 2013 is inconsistent with the medical document appearing at page 79 of the record of appeal in terms of when exactly the Appellant was treated.

The Respondent contended that the Appellant's medical documents were obtained as a scheme to manufacture evidence to bolster his claim. Further, that the medical report failed to state what medical examinations were conducted on the Appellant and the results of the examinations. It was further contended that the conditions complained of by the appellant i.e. nausea, diarrhea and abdominal pains existed as a matter of diagnosis.

In response to ground 3, the Respondent argued that a Plaintiff is only entitled to damages arising from negligence where there is proof of injury. We were referred to the case of **Zambian**

Breweries Plc. Vs. Reuben Mwanza ⁽⁶⁾ where the Supreme Court emphasized the need to adduce proper medical evidence. Counsel submitted that Supreme Court decisions are binding on lower courts as stated in the case of **Zambia Consolidated Copper Mines Limited Vs. Patrick Mulemwa** ⁽⁷⁾, therefore that we are bound by their decision until such a time when it is overturned.

The Respondent submitted that the cited cases of **Michael Chilufya Sata Vs. Zambia Bottlers Limited** ⁽⁴⁾ and **Zambian Breweries Plc. Vs. Reuben Mwanza** ⁽⁶⁾ are on all fours with the case *in casu*, therefore the trial court was bound to follow the decision of the Supreme Court and correctly refused to award damages to the Appellant.

The Respondent urged the Court to dismiss the appeal for lack of merit.

We have considered the appeal before the court, the judgment subject of appeal, the evidence adduced in the lower court, the authorities cited and the submissions by the Learned Counsel for both Parties.

This is an appeal against the judgment of the learned trial judge dismissing the appellant's claims for damages in respect of

pain, mental torture and abdominal pains, inconvenience and special damages suffered as a result of the Respondent's alleged negligence and breach of statutory duty.

The facts not in dispute are that the Appellant whilst attending a Church Luncheon at Andrews Motel was served a sealed bottle of a Sprite drink manufactured by the Respondent. The Appellant consumed part of the contents of the drink. The contents of the sprite was adulterated or contaminated with foreign material. The appellant alleged that he subsequently felt nauseated, developed diarrhea and fell ill.

The learned trial court held that though there was breach of duty owed by the Respondent, there was no proof of actual damage suffered by the Appellant as a result of the breach.

The Appellant advanced three grounds of appeal, two of them are interrelated or the same and will be dealt with as one. It was contended that the Court erred in law and fact by failing to find that the resulting breach of duty of care by the Respondent caused damage to the appellant; and by failing to find that the Appellant suffered damage after consuming adulterated contents of the sprite and ought to have been awarded damages.

The issues for determination raised in the first two grounds of the appeal in our view are simply whether the Appellant had suffered damage after consuming the adulterated sprite drink and whether damages ought to have been awarded.

The nature of the appeal before us relates to the law of Negligence in respect of product liability which is liability for damage, loss, and injury sustained caused by a defect in the product of a manufacturer consumed by a consumer. In a nutshell, a duty of care is owed to consumers by manufacturers of products to take reasonable care. This is basically manufacturer's liability for its products. The leading authority is the House of Lords decision in the case of ***Donoghue Vs. Stevenson***⁽²⁾ where a the plaintiff alleged injury on account of consuming part of the contents of a ginger beer containing decomposed remains of a snail. The Court held that a person owes a duty of care in tort in respect of defective products.

Negligence or tortious liability according to the learned authors of the **Halsbury's laws of England, Volume 97, 5th Edition at paragraph 401** is described as follows;

".....civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts or omissions of others in breach of duty or

contravention of right imposed or conferred by law rather than by agreement.”(Our Emphasis).

In the case of ***Bolam Vs Friern Hospital Management Committee*** ⁽⁸⁾ negligence was defined as;

“...Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action...”

It is trite law that for a Defendant to be held liable in tort, the Plaintiff has to prove that a Defendant owes him a duty of care; that the owed duty of care has been breached and that as a result of that breach, the Plaintiff has suffered damage. We refer to the case of ***Zambia Railways Limited Vs. Pauline S Mundia, Brian Sialumba***⁽³⁾ in which the Supreme Court endorsed the position stated by the learned author of ***Winfield and Jolowicz on Tort, Tenth Edition***, at Page 45, that;

“... Negligence as a tort is a breach of a legal duty to take care, which results in damage, undesired by the defendant, to the plaintiff. The ingredients necessary to prove negligence are stated as: (a) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (b) Breach of that duty: (c) consequential damage to B. The three ingredients, according to the learned author, cannot always be kept apart in

their application as they are simply three different ways of looking at one and the same problem.”

In our view, the issue of duty of care and breach thereof is not in issue. The findings of the Court below in respect of duty of care being owed to the Appellant and breach thereof by the Respondent are not in issue and we agree with his findings therein.

The issue is whether the appellant suffered damage as result of the breach of duty; whether the consumption of the adulterated sprite occasioned or caused damage to the Plaintiff i.e. whether the Plaintiff suffered as a result of consuming the sprite in issue. We refer to the Supreme Court decision in the case of **Sata Vs Zambia Bottlers Limited** ⁽⁴⁾ where it was held that;

“For the Plaintiff to be entitled to damages in the tort of negligence, it has to be established that he or she has suffered some injury, failure to which damages will not be awarded”.

We have analyzed the evidence in the Court below in respect of injuries / damages allegedly suffered by the Appellant as a result of consuming the adulterated sprite drink. The appellant testified that upon consuming the drink with floating substance in it, he become nauseated, the condition continued throughout the evening, he did not eat supper, he then started vomiting. The next

day the appellant developed diarrhea and could only take fluids for the next two days. Upon going to Adventist Clinic, he was given drugs to take for two days. Though his condition stabilized, two days later, the condition flared up again. The appellant was advised by the clinic to continue the medication. Upon the problem persisting, he went to Levy Mwanawasa Hospital where he was again advised to continue the earlier medication.

The content of the bottle of sprite was taken to Lusaka City Council for examination. The findings contained in the Report stated that the drink contained foreign material identified as ants and fungal. We refer to pages 83 and 84 of the record of proceedings namely letters from the Public Analyst and the Director of Public Health at Lusaka City Council in respect of the results of analysis.

The Medical Report from Adventist Church Clinic appearing at page 90 of the record of proceedings stated that the Appellant had been treated with Trolox medicine as an outpatient.

The Medical Report issued by Levy Mwanawasa General Hospital stated that;

“On examination, no obvious anomalies were found and patient was sent for toxicology test”.

The said toxicology report was not produced before the Court. Reverting back to the issue of whether the Appellant was injured or suffered damage as a result of consuming the adulterated sprite in issue, we are of the firm view, from the evidence adduced in the lower court, that there was no injury occasioned or suffered. There was no sufficient evidence adduced to the effect that the suffering i.e. vomiting and diarrhea were directly caused by the presence of the ants and fungal growth found in the bottle. We therefore find that the learned trial court did not err in law or fact by holding that the appellant had not suffered damage from the breach of duty of care.

This is because no medical evidence was adduced in support of the Appellant's claims connecting or linking the consumed drink to the injuries; there is no nexus whatsoever between the results contained in the medical reports stating that no obvious anomalies were detected and the contaminated drink. Further, despite the report stating that the Appellant was sent for toxicology tests, the results of the toxicology tests were not produced before Court.

There was no medical report or evidence stating that the cause of the illness suffered was as a result of the adulterated drink consumed by the Defendant. We refer to the case of **Continental Restaurant & Casino Limited Vs. Chulu** ⁽⁵⁾ in which the Supreme Court stated that:

“The important point to stress; however is that in cases of this nature, the basis of awarding damages is to vindicate the injury suffered by the plaintiff. The money was to be awarded in the instant case not because there was a cockroach in the soup, but on account of the harm or injury done to the health, mental or physical, of the plaintiff. Thus in the Donoghue case the plaintiff was hospitalized. Mild condition is generally not enough a basis for awarding damages. The plaintiff has, therefore, a duty to bring credible evidence of illness. The award in this instant case comes to us with a sense of shock as being wrong in principle and on the higher side. We want to take advantage of this case to point out that in future nothing will be awarded if no proper evidence of a medical nature is adduced.”[Our Emphasis]

In product liability, it is trite that the issue of causation is an important ingredient and without it no finding of liability can be made at all. Negligence alone does not give rise to a cause of action, it must be accompanied by damage or injury suffered as a result of that negligence. This is compounded by the evidence that the Appellant had in addition to taking the drink also consumed food

on the date of the incident. The full nature of the chemical particles was never analyzed *vis a vie* its linkage to the injuries suffered. The toxicology test results, had they been produced would have established conclusively whether the vomiting and diarrhea were caused by the ants and fungal growth found in the bottle of the sprite. Simply put, no medical or scientific evidence was adduced to the effect that the contents of the consumed adulterated drink had caused the illness suffered.

In this appeal, the foreign matter was never chemically analyzed to establish its potential to bring about the Appellant's alleged injury. The report by the Public Health Analyst that the contents were not fit for human consumption, constituted a mere statement in terms of the required medical evidence as the foreign particles were never stated or found to have potential to cause the particular damage alleged or chemically established.

The burden of proof was on the Appellant to prove the causal link between the Respondent's negligence and his injuries which he failed to do. We find no merit in grounds one and two.

The appellant in the lower court had claimed damages in respect of mental torture and inconvenience. Mental torture or

Psychological torture is a type of torture that relies primary on psychological effects and only secondary on any physical harm inflicted. The appellant did not prove this claim and the lower court was on firm ground to refuse to award damages therein. This equally applies in respect of the claim of special damages. It is trite that a party claiming a special loss must prove that loss and do so with evidence which make it possible for the court to determine the value of the said loss.

The last ground of appeal is that the learned trial court erred in law and fact by relying on distinguishable case law to the case in casu and finding that the appellant did not suffer damage. This was to the detriment of the appellant.

We have perused the cited cases relied upon by the trial judge. In as much as the facts in the case of **J.R Murray v. London County Council**⁽¹⁾ are distinguishable, the case dealt with the issue of damages and the principle that there are not recoverable without proof of actual damage. The case of **Sata Vs. Zambia Bottlers Limited** (*supra*)⁽⁴⁾ dealt with the liability of Manufacturers. In **Sata Vs. Zambia Bottlers Limited** (*supra*)⁽⁴⁾, the plaintiff had not consumed the adulterated drink; the court held that negligence is only actionable

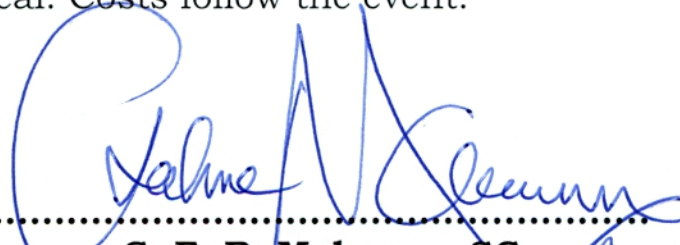
if actual damage is caused to the appellant. There is no right of action for nominal damages. The Court declined to award any damages to the Plaintiff because there was no proof of damage. The Plaintiff merely argued that he was nauseated having seen a cockroach in the drink. This case is distinguishable from the case *in casu* as the Plaintiff had not consumed the drink in the **Sata case**.

In the case of **Zambian Breweries Plc. Vs. Reuben Mwanza**⁽⁶⁾ the plaintiff had partially consumed a beer containing a dead lizard. In the above cited case no proper diagnosis was made because the plaintiff had not revealed to the clinic that he had consumed a beer containing a dead lizard hence the illness complained of. The damages awarded by the High Court were reduced on appeal. The Supreme Court made reference to the case of **Continental Restaurant & Casino Limited Vs Chulu**⁽⁵⁾ where they had stressed the need for a plaintiff to bring credible evidence of illness.


In our view, the above cited cases relied upon by the lower court all dealt with the principle of law that in tort, in a claim of negligence, aside from showing a duty of care owed and breach thereof, proof of actual damage suffered must be adduced.

We cannot fault the lower court for holding that the appellant had not shown that he suffered damage. The point that the Appellant seems not to comprehend is that the ingredients necessary to prove negligence namely a duty of care owed, breach of that duty and the consequential damage must be proved and are not separate from each other. The breach or negligence must be shown to have caused the injury. There must be credible medical evidence showing that the appellant suffered the injury as a result of the consumed contaminated drink, failure to which damages will not be awarded.

We find no merit in the grounds of appeal and accordingly dismiss the appeal. Costs follow the event.


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C. F. R. Mchenga, SC
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


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F.M. Chishimba
COURT OF APPEAL JUDGE


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D.Y Sichinga, SC
COURT OF APPEAL JUDGE