

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

Appeal No. 126/2020

(Civil Jurisdiction)

BETWEEN:

FELIX MUBITA

AND

ZAMBIA BREWERIES PLC



APPELLANT

RESPONDENT

***Kondolo, Majula and Ngulube, JJA
On 19th January, 2022 and 10th February, 2022***

For the Appellant : *Mr. W. Mweemba of Mweemba & Co.*

For the Respondent : *Mr. M. Kasofu of Tembo Ngulube & Associates.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Attorney General vs Marcus Kapumpe Achiume (1983) ZR 1.*
2. *Kitwe City Council vs William Ng'uni (2005) ZR 57.*
3. *Catherine M. Kabika vs Bent Mumbuna Malamo (SCZ Appeal No.175/2009).*
4. *Minister of Home Affairs & Attorney-General vs Lee Habasonda (2007)ZR 207.*
5. *Donoghue vs Stevenson (1932) A.C. 562*

6. *Zambia Breweries vs Reuben Mwanza* (SCZ Judgment No. 39 of 2000)
7. *Continental Restaurant And Casino Limited vs Arida Mercy Chulu* (2008) ZR 128.
8. *London Passenger Transport Board vs Upson* (1949) AC 155.
9. *Michael Chilufya Sata vs Zambia Bottlers Limited* (2003) ZR 1.

Legislation referred to:

1. Food and Drugs Act, Cap 303 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 This appeal is against the judgment of Honourable Mr. Justice G.S. Phiri (High Court General List) delivered on 29th April, 2020. In the said Judgment, the learned Judge dismissed all the appellant's claims who was the plaintiff in the lower court.

2.0 BACKGROUND

- 2.1 The facts of the case are that the appellant commenced an action against the respondent by way of writ of summons claiming damages for personal injuries and consequential loss and damages for the negligence of the respondent in the manufacturing and bottling of one Mosi Lager beer that was partially consumed by the appellant that was found with foreign matter.
- 2.2 The appellant's case from his pleadings and evidence was that on 2nd August, 2004 at about 16.30 hours he purchased a bottle of Mosi Lager at Zambia Sugar Staff Club. He was served by the barman and after taking a sip he noticed solid

foreign matter in the bottle which rose from the bottom. He immediately experienced nausea and rushed out of the bar to vomit.

2.3 Later, the barman prepared an incident report. The appellant was taken to the clinic for treatment while the Mosi lager bottle was taken to the Food and Drugs laboratory for analysis of the contents. The results from the laboratory were that the foreign matter was identified as fungal growth. The preceding facts are what triggered the commencement of the action in the lower court.

2.4 The defendant settled its defence on 2nd December 2004 in which its main line of defence was that the injuries suffered by the appellant were not as a result of the respondent's negligence.

3.0 FINDINGS AND DECISIONS OF THE COURT BELOW

3.1 After considering the evidence by the parties, the trial Judge found that it was not in dispute that on the material day the appellant vomited once or three times after taking the subject Mosi lager and was attended to at the company clinic where he complained of feeling nausea and stomach pain. The Judge accepted the evidence of Dr. Sinyama that the appellant presented symptoms of gastritis, was given anti-acid and allowed to report back for work.

3.2 The learned Judge then formulated the issue for determination as being whether the injury suffered was caused by the respondent's negligence. In his determination, the learned Judge held that there were several gaps and inconsistencies in the plaintiff's case which reacted against him. The Judge held that there was no evidence from the appellant's club manager to explain where he sourced the Mosi lager for sale at the club. He further held that there was no evidence to establish how the fungal contamination could have entered the bottle. According to the Judge, the Mosi lager was the first food that the appellant consumed on that day which could have caused the gastritis he experienced. In conclusion, the court below held that there was no evidence linking the respondent to the alleged negligence.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the judgment, the appellant has appealed to this court advancing four (4) grounds couched as follows:

- “1. That the learned Judge in the Court below erred in law and fact when he failed to take note of the plaintiff's submissions and the authorities therein cited which were filed in the Court below on 5th March, 2009.*
- 2. That the learned Judge in the Court below erred in law and fact when he held that the respondent was not liable in negligence to the appellant.*
- 3. That the learned Judge erred in law and fact by venturing into speculation when he held that the beer bottle was*

improperly sealed and remained open for many days before the laboratory analysis.

4. *That the learned Judge erred in law and fact when he failed to award the appellant damages for breach of statutory duty.”*

5.0 APPELLANT’S ARGUMENTS

5.1 In support of ground one, Mr. Mweemba, Counsel for the appellant submitted that the appellant did file written submissions in the court below which were based on the relevant evidence and the law in support of the plaintiff’s case. He pointed out that it is clear that the learned Judge did not take this into account despite the fact that they were meant to guide him on the scope of the plaintiff’s case.

5.2 The gist of Counsel’s submission in ground 2 is that the learned Judge should have found the respondent liable in negligence on the basis that he owed the appellant a duty of care to ensure that the product was safe to consume. That this duty of care was breached when the respondent manufactured and caused to be sold and consumed by the appellant, a bottle of Mosi lager that was adulterated with fungal growth.

5.3 In this regard we were called upon to reverse the findings of fact that the respondent was not negligent as this was not supported by the evidence. Reliance was placed on the case of ***Attorney General vs Marcus Kapumpe Achiume.***¹

5.4 Pertaining to ground three, learned Counsel contended that it was improper for the trial court to venture into speculation by assuming facts existed which neither of the parties established to exist. In this regard, we were referred to page J14 where it was stated:

“Moreover in the absence of any evidence to establish how the beer bottle was secured before the laboratory analysis, we must assume that the beer bottle was improperly sealed and remained open for many days. According to PW3, this is one of the environments’ favourable for fungal adulteration.”

5.5 The contention in respect of ground four was that the respondent breached section 3(b) of the Food and Drugs Act, Chapter 303 of the laws of Zambia which is a strict liability provision. The section reads:

“Any person who sells any food that consists in whole or in part of any filthy putrid, rotten, decomposed or diseased substandard, foreign matter or is otherwise just for human consumption, should be guilty of an offence.”

5.6 Counsel argued that the injurious Mosi lager produced by the respondent was consumed by the appellant and the lower court should have found him liable.

6.0 RESPONDENT’S ARGUMENTS

6.1 In answer to ground one Counsel for the respondent submitted that Courts are not bound to take note of all submissions brought before it as they are only meant to assist

the court in arriving at its decision. For this proposition, Counsel called in aid the case of ***Kitwe City Council vs William Ng'uni***² which was affirmed in the case of ***Catherine M. Kabika vs Bent Mumbuna Malamo***³.

- 6.2 In response to ground two, it was submitted that the medical evidence of illness adduced by the appellant at trial was not credible and unsatisfactory. That this was so in view of the fact that the medical evidence did not state what medical examinations were conducted on the appellant and the results that came out. The long and short of the argument was that the appellant failed to prove that the damages he suffered were as a result of the Mosi lager beer that he consumed.
- 6.3 In response to ground 3, it was asserted that the bottle of beer in issue was not fully secured from the time it was opened on 2nd August, 2004 until the time it was analysed on 6th August, 2004. This gap shows that anything could have happened to the bottle and its contents. It was observed that there is further no record of how many people handled the bottle where it was kept and the mode of transport to Lusaka. Counsel contended that with these facts, there is no way of ascertaining at which point the beer could have been contaminated.
- 6.4 In response to ground four Counsel for the respondent reiterated that the appellant had failed to prove that he

suffered actual damage as a result of the respondent's actions. We were urged to dismiss the appeal with costs.

7.0 HEARING OF THE APPEAL

7.1 When the matter came up for hearing on 19th January 2022, both counsel intimated that they would rely on the respective heads of argument that were filed.

8.0 CONSIDERATION AND DECISION OF THIS COURT

8.1 We have thoroughly considered the record of appeal, the submissions of counsel and the authorities cited.

8.2 Submissions

In the first ground of appeal, the appellant is greatly displeased with the fact that the learned trial Judge stated that "the parties agreed to file written submissions but none were received on the file". It has been contended that comprehensive submissions were in actual fact filed on the 5th of March 2009 and were furnished to the court. The disappointment emanates from the court's failure to consider the submissions which were meant to guide the Judge on the scope of the appellant's case and on account of this, the Judge got misdirected. We have been urged to consider the submissions in determining the appeal.

8.3 We have analysed this ground and note that the Judge had not received the submissions. The critical question that arises

is whether the failure by the trial Judge to consider submissions is fatal to the outcome of the case. In our view, the fact that the Judge did not refer to the submissions is not fatal. We are mindful of the ***Minister of Home Affairs & Attorney-General vs Lee Habasonda***⁴ case in which the Supreme Court indicated that a judgment must contain a summary of the submissions. In *casu*, the Judge stated that the submissions were not on the record. He proceeded to deliver a reasoned judgment based on the evidence on record. Therefore as directed in the ***Habasonda***⁴ case the court did in fact reveal its mind on the evidence.

8.4 We stand guided by the foregoing and therefore find no merit in this ground of appeal and dismiss it.

8.5 **Negligence**

In the second ground of appeal, it is the appellant's contention that "the learned Judge in the court below erred in law and fact when he held that the respondent was not liable in negligence to the appellant". Counsel has adverted to the case of ***Donoghue vs Stevenson***⁵ which is the celebrated authority in tort in relation to negligence and clearly outlines the key elements that ought to be established for one to succeed.

8.6 It is the appellant's contention that he had established that:

- i. He was in a class of persons that the respondent ought to have had in his contemplation in its manufacture and sale of the Mosi lager in question;
- ii. That arising from i. above, the appellant was owed a duty of care by ensuring that the aforesaid product was safe for consumption and did not cause injury to himself; and
- iii. That the respondent breached that duty when it manufactured and caused to be sold to, and consumed by the appellant a bottle of Mosi lager that contained fungal growth.

8.7 It has been argued that the appellant suffered nausea and gastritis after consuming the Mosi lager and the learned Judge ought not to have exonerated the respondent given this set of facts. Further, it matters not that the Mosi lager was purchased from a club that does not belong to the respondent but that the product which was manufactured and sealed by the respondent was served on the appellant.

8.8 The appellant has further submitted that the standard of proof in civil matters is on a balance of probabilities and not that required in criminal matters and that the inconsistencies were inconsequential.

8.9 It has been pointed out that what was crucial is the fact that the appellant and his witnesses established that the former fell ill after consumption of the Mosi lager which contained fungal growth, he ended up being attended to at a medical facility. On

the foregoing basis, we have been urged to reverse the Judge's finding of fact that the respondent was not negligent in line with the principles enunciated in the case of **AG vs Marcus Achiume¹** as the findings were neither supported by the evidence nor could any court, on a proper view of the evidence, arrive at.

8.10 In our considered view, the Judge cannot be faulted for having arrived at the finding that there was no negligence. He clearly explained the distinction between the **Zambia Breweries PLC vs Reuben Mwanza⁶** case where a dead lizard was found in a castle beer and the facts in *casu*. In the **Mwanza⁶** case according to the Judge, the finding of negligence was based on facts at the production plant and not at the selling point at Mwemba's bottle store.

8.11 Judge Phiri went on to state that these facts were distinguishable from the case at hand because there was no evidence from the respondent's manager to indicate where he sourced the Mosi lager for sale to his customers and secondly there was no evidence to establish how the fungal matter entered the Mosi beer. We are inclined to agree with the observations by the trial court and from our perspective, the two cases i.e. the **Zambia Breweries vs Reuben Mwanza⁶** case and the present case are distinguishable. The finding of fact by the trial Judge was supported by the evidence on record.

8.12 There was evidence from the public analyst Margaret Sinkala that fungal growths grow in an environment where there is deterioration of the product. One of them could be when the container is not sealed properly. She went on to explain that if a bottle is opened and left open, there could be contamination.

The Quality Manager was DW1. DW1 equally explained the possibility of fungal growths once a beer has been frozen and it expands which can cause leaking. When this happens, air goes out after the ice has melted air will go in and fungus will grow.

8.13 From the evidence it is plain that there could be a number of causes of fungal growth including expiration. Armed with this evidence, we hold that the court below was on *terra firma* in discounting negligence on the part of the respondent.

8.14 **Speculation**

The criticism of the trial Judge in the third ground is in relation to the holding that the beer bottle was improperly sealed and remained open for many days before the laboratory analysis. It has been submitted that by so stating, the trial Judge erred in law and fact as he ventured into the realm of speculation. It has been asserted that it was improper for the trial court to fill in missing gaps with his speculation by assuming certain facts.

8.15 We have scrutinized the judgment, and are inclined to agree with the appellant that perhaps the trial Judge somewhat stretched his imagination and ventured into the realm of speculation. However, his remarks are neither here nor there as they do not affect the overall outcome of the judgment. This ground is therefore otiose in the view that we have taken.


8.16 **Damages**

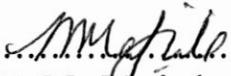
The fourth and final ground of appeal is attacking the trial Judge's failure to award the appellant damages for breach of statutory duty. The provisions of the **Food and Drugs Act Cap 303** of the Laws of Zambia in particular section 3B have been called in aid. This section criminalizes the sale of unwholesome food. The offence has been held to be a matter of strict liability and the appellant relied on the case of **Continental Restaurant And Casino Limited vs Arida Mercy Chulu**⁷ in this regard. It has been averred that arising out of this criminal offence is the common law remedy of damages. To buttress this point, the appellant has ridden on the coattails of **London Passenger Transport Board vs Upson**⁸ which was cited with approval in the case of **Michael Chilufya Sata vs Zambia Bottlers Limited**⁹ as follows:


"The statutory right has its origin in statute but that particular remedy for an action for damages is given by the common law in order to make it effective for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty."

8.17 In our view, there is no proof that the respondent sold the appellant or anybody else adulterated food. The respondent's arguments are to the effect that if any adulteration happened to the Mosi it was after it left the respondent's factory. In the evidence before us there is not proof that the Mosi was adulterated whilst in the possession of the respondent. In the circumstances no liability can be attached to the respondent under the Food and Drugs Act Cap 303 of the Laws of Zambia. The findings of the trial Judge cannot therefore be assailed on this score.

8.18 All in all, we find the four grounds of appeal to be bereft of merit and accordingly dismiss the appeal with costs to the respondent both in the court below and in this court. The same shall be taxed in default of agreement.


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M.M. Kondolo SC
COURT OF APPEAL JUDGE


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B.M. Majula
COURT OF APPEAL JUDGE


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P.C.M. Ngulube
COURT OF APPEAL JUDGE