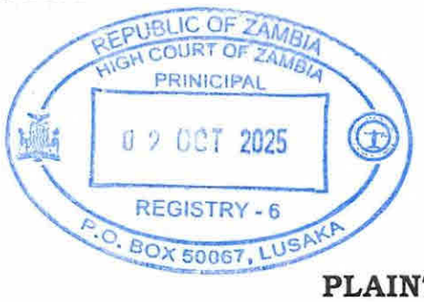
IGH COURT FOR ZAMBIA **2016/HP/305**
HE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
LUSAKA
(*Civil Jurisdiction*)



BETWEEN:

NATHAN MUMBA **PLAINTIFF**
AND
FIRST QUANTUM MINING AND
OPERATIONS LIMITED **DEFENDANT**

Before Mr Justice MD Bowa on the 2nd of October, 2025

For the Plaintiff: Mrs C. B Kainga Legal Aid counsel Legal Aid Board.
For the Plaintiff Mr E Siatwambo of Charles Siamutwwa and Company

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JUDGMENT

Cases referred to:

1.Wilson and Clyde Coal Company Limited v English (1938) AC 57

2.Konkola Copper Mines PLC and Zambia State Insurance Corporation Limited vs John Mubanga Kapaya and Others SCZ No. 26 of 2004

3.Betty Kalunga (suing as administrator of the Estate of the late Emmanuel Bwalya (Appellant) v Konkola Copper Mine PLC SCZ No 5 of 2004 Appeal No 147/2002

4.Naismith v London Film Productions Ltd (1939) 1 All ER p 794 at 798

5.Bossington Cashings Ltd v Wardlaw (1956) AC 613

6.MC Williams V Sir William Arrol & Co (1962) 1 WLR 295 .

7.In Attorney General vs Phiri and 10 others,

Other authorities referred to:

1. RA Percy & Walson C.T. Charlesworth & Percy on Negligence *London Sweet & Maxwell 1997*

Legislation referred to:

1.Workers Compensation Act 1999

2.The Mines and Minerals Development Act of 2008.

1.0 Background

1.1 The Plaintiff commenced this action by writ of summons and statement of claim dated 19th February 2016 seeking reliefs couched in the following terms: -

(i)Damages for personal injuries sustained by the Plaintiff as a result of emission arising from the drilled copper oil at an open mining resulting into the Plaintiff contracting health hazard in form of contraction of the terminal illness disease styled as Koch's/ atypical intestinal pneumonia.

(ii)Damages for loss of expectation of life borne out of the contract of terminal disease contracted at the Defendant's working premises.

(iii)Damages for the inconvenience caused by the Defendant.

(iv)Costs and any other damages or relief the Court may deem fit.

1.2 The Plaintiff later amended the writ of summons and statement of claim on 28th August, 2018, appropriately describing the

Defendant as First Quantum Mining Operations but maintained the claims as initially pleaded.

1.3 The Defendant earlier filed a defence on 27th August, 2017 disputing the claims or that the Plaintiff is entitled to any of the prayers in the statement of claim. Attempts at mediation failed and the matter was finally set down for trial on the 21st April 2021.

2.0 Trial

The Plaintiff's case

2.1 The Plaintiff testified as PW1. He testified that he had commenced this action because he was wrongfully discharged from employment where he was engaged as a driller by the Defendant. He explained that on the 30th March 2015, he was given a discharge letter indicated to be on medical grounds. The letter stated he has been discharged from employment because he had a condition that could not permit him to continue working in the Mine. The letter did not disclose the disease that he allegedly had.

2.2 He went to seek further clarification from the Defendant's Human Resources Manager. He specifically wanted to request for a letter from the Doctor to establish what type of disease he was alleged to have had. The Human Resource Manager refused to avail it to him and maintained that he was not entitled to the

letter. He testified that the letter originated from the Occupation Health Board Institute (OHSI) and was addressed to the Defendant instructing the Mine to discharge him from employment on medical grounds.

2.3 He eventually saw the letter in the Defendant's bundle of documents. He added that after he was denied access to the letter, he conducted his own inquiry to establish what type of illness he was alleged to have had. He went to the University Teaching Hospital (UTH) and presented the medical discharge letter . The Hospital recommended that some tests be undertaken. He had an Xray and a CT scan done. The scan revealed that he had Tuberculosis (TB). He was then put on treatment immediately. He was on treatment for 7 months and was told he had recovered when he went for a review.

2.4 Afterwards, the Plaintiff informed the Defendant he had been diagnosed with TB. He questioned how the company could discharge an employee with such a condition. The Defendant told him they would get back to him but by date of his testimony had not done so.

2.5 He testified that the procedure for the treatment of an employee that is unwell is as laid out in the contract of employment and section 6(c) in particular, that stipulates that if a person is found

to be sick he is put on treatment for 3 months with full pay. If he is not cured after 3 months, the employee is put on half pay and if the condition does not change, that employee may then be discharged on medical grounds. He testified that this procedure was not followed in his case. He received the letter of discharge on the 3rd of March 2015.

2.6 It was his further evidence that a prospective employee in the mines had to undergo a test with the OHSI also known as a Silicosis test. He explained that miners are expected to undergo a medical check-up every year to determine their fitness to work in a mine. If one is found to be fit, no feedback would be given. Instead a certificate would be handed over to the mine seeking to employ the candidate.

2.7 In the event of illness, the Board would also inform the concerned mine. He added that the letter written by the OHSI in this case was instructing the Defendant to discharge him on medical grounds. He did not know when the letter was written but reading through it, he noted that he was supposed to be discharged in 2013. However, that the Defendant kept using him until 2015 when they were reminded by the Institute to act on their instruction.

2.8 He added that the letter he saw was the second letter which stated that if the Defendant did not comply with the OHSI's instruction, they would incur a penalty in terms defined in the Workers Compensation Act. The letter further stated that it was an offence to continue using him. He testified that he worked for two years from the date of recommendation of his discharge to the point he was finally discharged without any disclosure being made to him. He was availed a report after his discharge which he took to the UTH that revealed that he had a chronical lung disease.

2.9 He added that prior to this, he had not been on any treatment. He was therefore surprised and failed to understand why he was being used when he had that type of disease. However, the UTH investigations did not find that he had a chronical lung disease as stated by the Defendant but TB. He added that as far as he is aware, TB is a curable disease. He was therefore supposed to be put on treatment by the Defendant and after such treatment to continue working.

2.10 He testified that he had exhibited his contract of employment in his bundle of documents. He also referred the Court to his letter of discharge on page 10 of the agreed bundle of documents. He repeated that the letter did not disclose the nature of the condition

that he is alleged to have had. It just stated that his employment was being terminated on medical grounds with immediate effect.

2.11 He testified further that the evidence he has that confirms that what UTH found was TB and not a chronic lung disease was at page 5 of the Plaintiff's bundle of documents. That the treatment card on page 7 of the agreed bundle of documents shows that he was cured of the disease. He added that on page 11 of the agreed bundle of documents is the letter he had sight of when the matter was commenced. The letter was addressed to the Defendant from the OHSI. That this was a letter of reminder that he mentioned earlier in his testimony. It was written on 21st January, 2015.

2.12 He testified further that the termination of his employment was not done in terms of the contract that he executed in August 2017. He stated that he was employed by the Defendant after they were satisfied with his medicals. Both parties signed the contract. He testified that he is presently unemployed. He was receiving a salary and allowances which are no longer forthcoming due to his discharge from employment.

2.13 It was his evidence that his situation would not have been the same had he worked up to retirement. He is presently unable to meet his children's needs and life has been generally difficult for

him. All attempts to engage the Human Resource department over his grievances were not accommodated.

2.14 He prayed for damages for personal injuries, loss of expectation of life, inconvenience resulting from the loss of employment and costs as set out in the writ of summons. He summed up his grievance as residing in the fact that the Defendant did not tell him he was sick until 2015 in spite being aware that he should have been discharged in 2013. Further, that the Defendant did not follow the terms in the contract in the manner he was discharged as well as the conditions for notice as laid out in section 1 of the contract of employment.

2.15 When cross-examined, the Plaintiff testified that he underwent some tests at UTH and was informed he had TB. He confirmed that he told the Court he had been cleared of the disease. He started his employment in 1992 when about 33 -34 years old. He was first employment by a mine in 2006. He agreed as standard practice that before being employed by a mine one had to go for a silicosis test. He did undergo such test.

2.16 He agreed that he had worked as an assistant driller. In performing that role, he was expected to be outside the drilling machine when the drilling was being done and to direct the driller

where to go. The driller as the operator of the machine would be inside the cabinet.

2.17 He agreed that it was the assistant driller that would be more exposed to dust. He agreed that drillers would be given disposable masks as protective clothing which was changed every two hours. He worked for this mine for 3 years. Afterwards, he worked for Konkola Copper Mines. He testified that he did do the test before employment as a driller there. He was working from the Cabinet as driller, he worked for one year there.

2.18 He then went on to work for Minolman Mine as a driller. He did do the test before joining and worked there from 2009 to 2012. He then went to Lumwana and joined the Defendant. In total, he worked for different mines for about 8 years and a few months before joining the Defendant.

2.19 Questioned further, he testified that he had not brought to court any of the test results he obtained from the other mines. He added that he did present his silicosis test to the Defendant before it employed him. He agreed that the test was supposed to show the status of his health before he was employed. He did not however have a copy of the test results he presented before he joined the Defendant. The first test he was subjected to was in 2013 followed by one in 2014.

2.20 He was aware that upon doing a test, a candidate is supposed to be given a member bureau number(MB) that is linked to one's National Registration Card (NRC) number. He further agreed that a tested person is only supposed to have one MB number.

2.21 When referred to the letter at page 11 of the agreed bundle of documents, the Plaintiff acknowledged that it does state that he failed his 2013 test as he was found to be sick. Further, that he was unfit to work. Another test was done in 2014 and he agreed that according to the letter, this test also confirmed that he was unwell. He agreed that he had only worked for a year between the test he presented and the one done by the Defendant in 2013.

2.22 He agreed that in terms of clause 6 (c) of the contract, he was supposed to produce a medical report from a medical practitioner to the Mine to qualify for sick leave. He agreed that he did not produce a medical report to inform the Mine how he was feeling. He acknowledged that he did not go to a public hospital but disputed that this was because he wanted to conceal his condition in fear of being discharged. He agreed that silicosis was done once a year.

2.23 Questioned further, he testified that he was not aware that his file had gone missing at the OHSI. He further testified that he did not have 2 MB numbers. He agreed that according to the

letter on page 2 of the Defendant's supplementary bundle, an employee is only supposed to have one number. He disagreed that the letter stated that it's the same number that is maintained regardless of the change of employment status.

2.24 He acknowledged that the number is meant to track the health history of an employee in spite of the change of employers. He denied as incorrect that the Defendant had a hard time to track his medical history because he allegedly had 2 MB numbers.

2.25 He was not aware that the 2013 results went missing. He was further not aware that the first time the Defendant knew he was unwell was when they received the letter on page 11 of the agreed bundle as alleged. He contended that the same letter was the evidence that the Defendant was aware of his condition.

2.26 Questioned further, the Plaintiff testified that he was employed as a driller by the Defendant and assigned an assistant. He confirmed that he was working from a cabinet that was air conditioned. He further confirmed that the Defendant gave him a disposable mouth bag. According to the Plaintiff, this was the only protective clothing he was given. He however also confirmed the miners were given safety boots and a hard hat. He maintained that both he and his assistant were exposed to dust.

2.27 He acknowledged that he did have workmates that had worked longer than him some of whom had TB and were discharged. He did not on any occasion write to Workers Compensation Fund. He agreed that it was the Defendant that did so with his input. He was not aware that the Workers Compensation Fund refused to pay because the disease he was said to have was not an occupational health disease.

2.28 Questioned further, it was the Plaintiff's position that he did feel it was better for the Defendant to place him on sick leave because TB is a curable disease. He agreed that based on the letter on page 11 of the agreed bundle, the Defendant was instructed to relieve him of his employment.

2.29 He further agreed that he was discharged based on the advice of a Medical Practitioner. He agreed that the Defendant did pay him his severance pay and leave days. He stated that he was not praying for re-employment by the Defendant.

2.30 In continued cross-examination, the Plaintiff testified that the first time he was employed, the grading of his MB was B1. This he explained, was because he was the first-time applicant. He denied as untrue that he went back to the OHSI to try to get another test after he was discharged. He agreed that a score of B5 means that an Applicant has been rejected.

2.31 He stated that according to the letter at page 1 of the Defendant's supplementary bundle, the number B5 appears at the end of MB number which meant that the test was rejected. He disputed the suggestion that he forged the second MB number. He confirmed that the first MB number is the same one as in his contract of employment.

2.32 When re-examined, the Plaintiff testified that he did not go for a medical because he did not think his condition was serious.

He testified that the 2 paragraphs on page 2 of the Defendant's supplementary bundle of documents explains how a person might end up with two MB numbers. He concluded from the wording of the letter at page 11 of the agreed bundle of documents that the Defendant was aware of the first recommendation made for his discharge.

2.33 He clarified further that both he and his assistant were at risk of exposure to dust.

That was the case with for the Plaintiff.

3.0 The Defendant's case

3.1 DW1 was Moses Mulenga a specialist human resource officer in the Defendant's employ. He testified that amongst his duties include manpower planning, recruitment and selections, industrial relations and human resources compensation. He

explained that when recruiting staff, the first thing the Defendant does is to ensure that the recruiting department avails an approved job requisition detailing the number of employees to be employed and the positions to be filled.

3.2 The position is then advertised on the HR System and the department selects individuals they feel are the best suited for the position who are brought in for interviews. The successful applicants are then invited on site. That since the Defendant is a mine , it is a requirement by law that anyone who is going to join its ranks needs to be certified fit to work in a mining environment. He stated that everyone who is successful is required to be examined by the OHSI through the Defendant's Safety Department.

3.3 He testified further that previously when there was demand for production, the Defendant had to allow exposed candidates who worked for other mines that had a rated silicosis certificate which was considered to be an added advantage, to join them.

He explained that as the certification is done by the OHSI which is a Government agency, the Defendant would consider it a valid document and such candidate would not be required to be subjected to a further test.

3.4 However, the Defendant later came to realise that even when it did consider the documents to be valid, it was established that some were not obtained in a proper manner. Therefore, presently even when one submits what may be deemed a valid silicosis certificate, the Defendant still insists that the OHSI re-examine the candidate through the Defendant's Safety Department to be sure such candidates are fit to work in a scheduled area.

3.5 He went on to testify that before candidates are allowed on site, they are taken through an induction process introducing them to the new environment. That key to this process is safety and the "dos' and don'ts" instructions that they are exposed to.

The employees are then given offer letters and all personal protective clothing (PPE's). In this regard, that employees are issued with safety boots, reflective suits, a hard hat, safety goggles disposable dust masks and depending on the area they work from are also given respirators and ear plugs.

3.6 He added that since the Defendant places primacy on safety, it has coined a slogan which states that, *"no job is so important that it cannot be done safely"*. He testified that the Defendant ensures that all the safety gadgets are given to an employee before the job is done.

3.7 He testified further that he is also involved in discipline administration. He explained that the Defendant had a disciplinary code. Among the many offences that are related to safety is sanction for failure to put on appropriate protective clothing attracting a written warning .

3.8 Turning to the case before the Court, he testified that the Plaintiff was employed by the Defendant in August 2012 as a driller. DW1 was already in the employ of the Defendant at the time and recalled that this was the period in which there was a boom and demand for production. The Defendant therefore needed a lot of experienced manpower. The Plaintiff was considered to be one with such experience which he demonstrated with his curriculum vitae having worked in different Mines and he also had a rated silicosis certificate.

3.9 He explained that this certification is done by OHSI for all the miners in Zambia. He added that the certification issued by one Mine can still be considered valid by another Mine. Therefore, the Defendant considered that the Plaintiff's possession of a certificate was an added advantage in the sense that the Defendant was not going to subject him to another test as explained earlier in his testimony.

3.10 DW1 testified further that the certification is only valid for a year. What this meant was that every year an employee would have to be examined. That in the Defendant's case, the members of staff for the OHSI are invited to their site to do the examination on its premises. Its Mine's Safety department acts in liaison with the OHSI to facilitate this and the obtaining of results. He stated that the results would typically take long to be obtained.

3.11 He testified that the Plaintiff Mr Mumba joined the Defendant in August 2012. The following year in 2013, just like any other employee, he was subjected to re-examination referred to as periodical medicals. This also happened in 2014 for all employees that included DW1.

He testified that the results were delayed and follow-ups were made by the Defendant's Safety department. The Defendant later received a letter dated 21st January 2015 on page 3 of the Defendant's Supplementary Bundle of Documents and also page 11 of the agreed bundle of documents. No other results were received.

3.12 He testified that the Defendant was taken aback by the content of that letter which informed them that the Plaintiff had actually failed his test. That his certification was rejected in 2013 barely a year after being employed by the Defendant Company.

3.13 They made inquiries on why it took so long to be informed about this. Unfortunately, the Defendant did not receive a satisfactory explanation. He stated that one explanation given was that Mr. Mumba's file at the OHSI was actually missing and that was the probable reason it took long for the Institute to formerly validate the results.

3.14 It was DW1's further evidence that acting on this letter, his Department went ahead and discharged the Plaintiff on Medical grounds in March 2015 and in the same month paid him all his benefits in line with the collective agreement at the time.

3.15 It was DW1's further evidence that the Plaintiff was expected to operate a small rig in the course of his employment. He explained that before drillers could start operating a machine, they are required to do a pre-start check list. One of which is that the driller has protective clothing and that the machine was in good working condition. This also entailed ensuring that the air conditioning was working.

3.16 Any driller or miner who considered the machine was not in good working order were not supposed to operate such machinery. He added that the machine also has a tank filled with water so that a driller was required to discharge water whilst working as a way of suppressing the dust.

3.17 He testified further that in addition to the protective clothing provided, the drillers work from a cabin and with the water used for dust suppression, the exposure of drillers to dust is very minimal. That due to the nature of the work, a driller works with an assistant driller who directs him. That the assistant driller in contrast are more exposed to dust as they don't work from a cabin and operate outside a cabin and in a pit. That the only protection they have is the protective clothing and dust masks that the Defendant issues to them.

3.18 He testified further that although the results from OHSI take long, there has been a notable change in light of advances in technology and electronic filing which was not there before. DW1 testified further that he had no recollection of the Plaintiff ever having visited the Human Resource office to indicate that he was unwell.

3.19 He added that in any event the Defendant runs a clinic to attend to general complaints for employees. He explained that in terms of the Defendant Company's Medical Policy, when it comes to the employer's attention that an employee is unwell and unable to discharge his duties through the clinic doctors, the policy states that such employee may be granted sick leave. This leave is for 3 months on full pay.

3.20 If the employee does not recover on recommendation of a medical provider, the Company does grant a further 3 months sick leave but on half pay. At the end of the 3 months if such an employee does not recover then they are discharged on medical grounds. He testified that the Plaintiff's contract of employment is on page 1 of the agreed bundle. That clause 6 (2) spells at what he had just explained above.

3.21 He testified that in the Plaintiff's case, his treatment was determined by a legal requirement on instruction from the OHSI that informed the Defendant that he had failed the Medical examination to be granted a silicosis certificate. Further, that it was a legal requirement under the Workman's Compensation Act that once found in such status, he could not continue working in a scheduled area. He added that the notification was quite instructive and as a company the Defendant was required to oblige. Failure to do so would be a breach of the law.

3.22 He testified further that there was no time when the Plaintiff had sought for medical attention from the Defendant's Clinic or any other hospital for that matter that showed that he was unwell to warrant the invocation of clause 6 of the contract of employment for sick leave.

3.23 It was DW1's further evidence that the policy of compensation for any employee who is injured or sick like any other company is that the mine subjects the claims to Workman's Compensation Fund. The company pays annual premiums for all its employees that included the Plaintiff at the time he was in active service with the Defendant. He explained that any employee that suffers any occupational illness or injuries is compensated by Workman's Compensation Fund.

3.24 The Plaintiff thus presented an application which he brought to the Human Resource Department to be assisted processing a claim for compensation. This was done and later the Department initially learnt that he was not compensated due to the lapse in time.

3.25 DW1's department was concerned about this development and approached Workman's Compensation Fund to establish the position. The Defendant was availed with a letter addressed to the Plaintiff dated 28th February 2017 in the notice to produce authored by the Manager benefits. The letter was explaining the reasons for the refusal to compensate the Plaintiff.

3.26 The witness stated that it was his understanding that Workers Compensation Fund did not compensate the Plaintiff

because of the medical condition that he had that was not considered not to be occupational related.

3.27 He testified further that before the Plaintiff had joined the Defendant, he worked with other companies. It was his further evidence that throughout a person's mining career, such person is required to have only one MB number for reference purposes. When making a follow up on the Plaintiff's medical history with OHSI, his department presented the MB number given to the Defendant by the Plaintiff. They were surprised to learn that the records at OHSI had vanished. The documents could not be traced.

3.28 The Defendant further established that the Plaintiff had made a fresh application and had a valid silicosis certificate as a new entrant. He testified that on page 1 of the Defendant's supplementary bundle is a letter dated 14th May 2018 from the Defendant's Manager requesting for the medical history and seeking clarification on the existence of 2 MB numbers.

3.29 He testified that on page 2 is a letter from a Doctor Ngosa from OHSI in response to their letter. It advised that it was not possible for a person to have 2 MB numbers. That this could only occur from human error during data entry or a change of NRC number without the OHSI's knowledge.

3.30 It was DW1 's further testimony that it was shocking to the Defendant to learn that the number that the Plaintiff presented to it to gain employment did not have any associated records of medical history linked to it. Even more shocking was the realization that the Plaintiff had a new number in 2016 which certified him fit with No. B1 for a new entrant who had never worked in any mining environment against normal practice.

He testified that ordinarily, he should have been given a B6 which is a periodical certificate.

3.31 When cross-examined, it was DW1's evidence that the Plaintiff had worked for other companies before he joined the Defendant. From his recollection, the Plaintiff had worked for as many as 3 companies. The Defendant neither engaged those companies to establish the MB number he was using, nor did they go to the companies to establish why he stopped work. He agreed that it can be assumed he had a valid silicosis certificate at the time or else he would not have been employed.

3.32 He testified that he could not tell why the Defendant did not receive the notification that the Plaintiff was unfit in 2013. That the records would merely be sent to their Safety Department and if necessary forwarded to the HR department. He testified that the notification was received in 2015. Further that immediately they

received the notification the Plaintiff was, in following the legal requirements, discharged on medical grounds and paid his full benefits.

3.33 He disclosed that the Defendant did not let the OHSI know they had not received the earlier letter. He disagreed with the suggestion that they had received the letter and continued using the Plaintiff regardless. It was his testimony that the Plaintiff did not possess special skills to warrant the Defendant to hold on to him in such manner.

3.34 That it was actually the Plaintiff who had benefited by drawing a salary despite being unwell. He testified that it did not occur to the Defendant that perhaps the reason the Plaintiff had a new MB number was because the record was missing. He agreed that based on the letter on page 1 of the Defendant's Supplementary bundle of document, the first MB number is dated 29th November 2013. He agreed that as at that date the Plaintiff was still working for the Defendant.

3.35 Questioned further, the witness testified that he was aware that the Plaintiff went and sought a second medical opinion from UTH after he was discharged from employment. He was not aware he was later found with TB and treated for it. He agreed based on the letter on page 2 of the Defendant's supplementary bundle that

there was a possibility the Plaintiff could have been given a second MB number from human error.

3.36 He agreed that it was not the Plaintiff who issues the MB numbers. That this the preserve of the OHSI who takes responsibility for such errors. He agreed that the Plaintiff was engaged on 8th August 2012 based on a valid silicosis certificate. He agreed that the Defendant did not subject him to another medical examination although it was a condition in his contract. However, that the failure to do so was not a breach of the contract.

3.37 Questioned further, he agreed that the Plaintiff was at some point subjected to medical examination and would not have been maintained if anything was found wrong with him. He testified that as a driller, the Plaintiff was supposed to check an area before he starts drilling. He would have to come out of the cabinet of the rig to refuel the machine, to put water in it or to change the drill bits. He was not aware the Plaintiff would have to come out of the machine after blasting to check for misfiring. He agreed that there would be dust but explained that this was suppressed by water from the machine.

3.38 Questioned further, he testified that the Plaintiff was not subjected to an independent medical examination after the Defendant received the report dated 21st January 2015 from OHSI.

He agreed that the Plaintiff had worked for the Defendant for 2 years and 6 months at the time of the receipt of the letter.

3.39 Questioned further, he agreed that the silicosis certificate must be renewed every year. The Plaintiff was described not to be fit in 2013 so did not have a valid certificate then. He further did not have a valid certificate in 2014. The witness therefore agreed that to that extent the Plaintiff was allowed to work without a valid certificate for 2 years. He further agreed that it was an offence to have allowed him to work for 2 years without a valid certificate. Further that the burden was placed on the employer to ensure that there is a valid silicosis certificate.

3.40 He testified that no inquiry was made on the 2 years the Plaintiff worked because it was assumed he had a valid certificate. He did not agree it was negligence on the Defendant's part not to have followed up the issue. The Plaintiff was informed the moment the Defendant received the 2015 report from the OHSI.

3.41 The witness was in the HR department in 2015 but was not the one who communicated the content of the letter from OHSI to the Plaintiff. He testified that the Defendant did not ensure that the Plaintiff got proper medical attention before discharging him nor did it pay for his medical expenses when he went for a second

opinion at UTH. He disagreed with the suggestion that the Defendant did not care about the Plaintiff's life.

3.42 When re-examined, he testified that there was no obligation on the Defendant's part to pay medical expenses after the Plaintiff was discharged. He repeated his assertion that the Plaintiff did not have a special skill to warrant the Defendant to keep him even after learning he was unfit to perform his duties.

3.43 He clarified that there are 2 tests required before the Defendant employs a candidate. The first is possession of a valid silicosis certificate issued by the OHSI. If the candidate has a valid certificate there is no need to subject him for a re-test. However, that there is a subsequent medical test within the Defendant's confines which only looks at the fitness of the candidate.

3.44 He was in a position to know the Plaintiff's history in spite not having been in Human Resource at the time of his employment based on the employment records kept with Human Resource. The only letter received from OHSI was dated 21st January 2015 which pointed to a test date in 2013 and 2014 respectively.

3.45 He testified further that the Defendant is a big company and ensures that all employees are given protective equipment and clothing before posting them to their work areas. At the time of his employment the Plaintiff was not subjected to a silicosis test as he

presented a valid one. There was therefore no need for a re-examination.

3.46 DW2 was Doctor Kingsley Ngosa a Medical Practitioner working at OHSI. He testified that he is specialized in occupational health and is an occupational health physician. At date of his testimony, he had worked at OHSI for 18 years and held the position of Deputy Director in the Institute.

3.47 He explained that the OHSI is a statutory body under the Ministry of Health whose sole mandate is to look after the welfare of workers throughout the country. That it was established by an Act of Parliament No 36 of 2010. The Institute's major function is to conduct medical examination for workers in all industries. He explained that the Institute has been in existence since 1945 established by different legislation and under a different name before the 2010 Act was enacted. Before the present Act, the mandate only covered Miners but now extended to other categories of workers in other sectors.

3.48 He testified that the medicals conducted for miners are mandatory. No one is allowed to be employed as a miner without conducting pre-employment or initial medical examination. This is prescribed under the Workers Compensation Act No 10 of 1999. The Act also prescribes that after 1 year the miner should renew

the certificate and pass the medical test to continue working. Further that any miner who leaves employment or has his contract terminated is still required to undergo a medical examination. This is to ascertain whether the work he was doing in the Mine had an effect on his health.

3.49 He testified that the purpose of periodic medical examination is to make sure the miner is fit to continue working. He testified further that another function the OHSI was created for was to ascertain if the worker qualifies to be compensated after it is discovered the worker has acquired an occupational health disease. The Institute then recommends compensation.

3.50 He explained that an occupational health disease is a disease arising out of exposure in work environment that has affected the health of a worker. He testified that on first approach a candidate's details of age, sex and residential address are taken and details of the company he intends to join. After paying the prescribed fee the prospective employee is given a bureau number which is a unique number linked to the candidates NRC.

3.51 He testified that that the number is given once in a lifetime. The employee can use the assigned number regardless of the company that he intends to join. This, he explained, helps to track

the work history, and likely exposures in various companies the candidate has worked.

3.52 After the medicals, the doctor examining the employee comes up with an opinion on whether he/she is fit or not and after that everything is sent to a medical panel to make decisions. Reports are then generated and communicated to the prospective employers. He explained that the OHSI conducts the medicals throughout the country. Work overload is therefore a reality for the Institute.

3.53 He explained that TB is a health challenge that once found with a candidate is not supposed to continue working in regulated or scheduled areas because of the exposure to silica dust found in the Mines from the ore where the copper is extracted and is toxic. This suppresses the immunity of the miner. Therefore, that to protect the miner he is supposed to be removed. He testified further that work related TB is prescribed for compensation under the Workman Compensation Act. The money given for this condition is, he qualified, very low.

3.54 He testified that he came to learn about the issue before Court when the Defendant wrote to the OHSI's director requesting for information on a Mr. Nathan Mumba concerning his medical

records at the Institute. They also learnt that Mr. Mumba had taken the Defendant to Court.

3.55 He explained that once a decision has been made by a panel of doctors, various certificates are issued depending on whether someone is fit or not to work in a mine area. The first certificate is called B1 issued to a prospective employee undergoing pre-employment medical examination that have passed medicals and hence fit to work.

3.56 The other certificate issued by the panel is the B5 which is given to someone who's deemed not fit to work after the medical. He testified that the validity of the certificates is 1 year after which the Miner is supposed to undergo a second medical examination. If the candidate passes, he gets a B6 certificate which is also a periodical certificate.

3.57 He explained that only a miner who has received a B6 certificate is eligible for compensation. That miners with B1 and B5 certificates are not eligible according to the Workers Compensation Act No 10 of 1999. He testified that miners are identified using their NRC and Company identification cards.

3.58 He repeated the evidence given by DW1 on the issuance of the MB number that he used as uniquely linked to a candidate's

NRC and of the candidate moving from one company to the next using the same number attached to him/her for life.

3.59 When referred to the Plaintiff's endorsement in the statement of claim asserting his contracting of a terminal illness, the witness testified that a terminal illness is one that cannot be cured and leads to death. That the disease referred to in the claim as kochs is another word for Tuberculosis and atypical interstitial pneumonia is an infection of the chest. He explained that both conditions are different and treatable. That they cannot as such be termed as terminal illnesses from a medical point of view.

3.60 He testified further that the Plaintiff never presented these two conditions to the OHSI as laid out in his claim. That he had come for medical examination and was found not to be fit and issued with a B5 certificate in 2013. He confirmed this to be on page 9 of the agreed bundle of documents. He testified that it was issued to the Plaintiff with bureau number 374633.

3.61 He clarified that the Plaintiff was rejected due to what was established to be a chronic lung disease or chest infection for which the onset is gradual and takes 3 months or more to manifest. The conclusion therefore arrived at was that the chest was not good enough for the institute to allow the Plaintiff to continue working in a hazardous environment.

3.62 He confirmed the letter in the Defendant's supplementary bundle of documents at page 3 to be the one authored by the late doctor Eboma who was at the time Deputy Director Administration at the Institute. The letter advised the Defendant that the Plaintiff was rejected on 2 occasions being in 2013 and 2014 and was therefore, not supposed to continue working because of his chest condition. He had scars in the chest as he healed.

3.63 Therefore, the Defendant was being reminded through this letter of the condition and advised to remove the worker from where he was working in line with the Workers Compensation Act. He testified further that on page 1 of the supplementary bundle is a letter from the Defendant requesting for more information from the Institute that was said to have issued two MB numbers and 2 different certificates in 2013 and 2016 to the Plaintiff.

3.64 He explained that this happened because the first record bearing number 374633 was completely deleted from the system. This was how the Plaintiff got a new number in 2016. He stated that he could not rule out that this was fraudulently done. He testified further that the Institute findings on the first record is not in the system. In the second, the Plaintiff was given a B1 certificate

to show different information from what was in the system previously.

3.65 That the Plaintiff gave a presentation that was a completely different occupational history. This time around he stated he was a businessman for 10 years and had never worked in a mine and had no history of ever suffering from any chest condition. This was how the Plaintiff ended up with a B1 certificate which is a pass.

3.66 The Institute therefore concluded there had been an element of concealment of the past record. He concluded that the validity of the B1 certificate is rendered null and void on account of concealment of information. He testified further that the Plaintiff has never been issued with a B6 certificate which is a pass for a second medical examination. Therefore, that the position of the OHSI is that he is not eligible for compensation. That this is also in line with what the Workers Compensation Act says.

3.67 When cross-examined, the witness confirmed that no miner is allowed to be employed without a pre-examination. He testified as correct that the Plaintiff was fit at the time of his employment by the Defendant in 2012.It was also true that the miners are subjected to a yearly test after their first employment. He confirmed that the Plaintiff was subjected to such examination. He added that the OHSI does send the reports to the employers after

examination and did so in this case to the Defendant Company. He testified that the reports are ready a day after the examination for collection by officers from the various companies.

3.68 He testified that if one is examined on the outreach programme, it would take up to 3 weeks to obtain the results. That it is not possible a report would take longer than that to be communicated. He confirmed that the letter on page 3 of the Defendant's supplementary bundle was written to the Defendant as employers. According to the letter the Plaintiff was not supposed to work from November 2013.

3.69 He confirmed that in spite of this, the Plaintiff continued work and this was after he had been found to have a frambrotic lung condition. He agreed that this was very dangerous to the Plaintiff's health. He testified further that it was the duty of both employer and employee to ensure that the second medical is done. Questioned further, he agreed that a party discharged is supposed to be given an exit certificate and after they have been examined. He was not aware that the Plaintiff had sought a second opinion after his discharge.

3.70 When referred to in the Plaintiff's bundle of documents and a treatment card exhibited, the witness agreed that the document shows that the Plaintiff had TB in 2015.He agreed that Koch's is

also referred to as TB and does affect the lungs. He agreed that inhaling of cycler dust and fumes can also affect lungs. He agreed that any organization can approach the OHSI for a medical examination that extends to walk in clients, miners or non-minors that came in to have their fitness to work assessed.

3.71 He stated that there was therefore nothing wrong with the Plaintiff approaching the Institute for examination after being discharged. He maintained that the first MB was deleted. That if it was still there, the system would have rejected any attempt to register a second number imbedded to the same NRC number.

3.72 He confirmed that it was only the Institute's members of staff that have access to the system but added that they may connive with outsiders. Questioned further, he testified that the Institute did not know who deleted the first record relating to the initial MB number assigned to the Plaintiff. Pressed further on this, the witness confirmed that an outsider cannot generate an MB number themselves.

3.73 He insisted that the proof of the fraud he alleges lays in the fact that the record could not just disappear on its own unless tempered with. That the new record had information that allowed the Plaintiff to work and had replaced the information not consistent with the first.

3.74 He added that the applicant declared it as correct information hence bringing in the evidence of the concealment. That the representation of Mr. Mumba not having worked as a miner before and being a businessman in the same period the Institute were aware he had worked at KCM as a truck driver was false.

3.75 When re-examined, DW2 testified that at the time of examination of the Plaintiff he had a compromised chest and this was the reason he was rejected. He testified that it is the duty of the employee to remind the employer when their certificates are due to expire. He clarified that an exit certificate is issued when an employee is leaving employment. That the employee undergoes an exit examination to ascertain whether what they were doing in the company had an effect on their health or not. The employer and employee hence ensure this is done to establish if a condition he may present is traceable to his work or something else.

3.76 DW3 was Simushi Libone a supervisor employed by the Defendant. He testified that as supervisor, his duties are to supervise all drilling activities at the Mine and had worked in the industry for 13 years by the date of his testimony. He joined as assistant driller in 2008 and trained as a driller in 2012 using an RC Machine that had no cabin. He later moved to Kalumbila Mine and was given another position as supervisor.

3.77 He testified that there are a lot of hazards involved in drilling. That the Defendant therefore, provides personal protective equipment to protect employees from dust and other hazards. These include a hard hat, reflective work suit, safety boots, safety glasses, ear plugs and N95 dust masks. He added that the N95 is the recommended dust mask because it filters about 95% dust particles.

3.78 It was DW3's further evidence that the Plaintiff was a driller at the Defendant Mine. He operated a Drill rig called Tech which is the most advanced Drill rig and one of the safest to work with in an open pit mine. He added that the rig has an airconditioned cabin so that while the driller is working, he is not in direct contact with dust particles.

3.79 In addition, that the rig is mounted with a water tank to ensure that whilst the machine is working, dust is being suppressed. He added that drillers are not involved in blasting operations. That a driller's job is to drill and then hand over the drilling block to the blasters. The driller then moves the machine away from that point to permit the blasters to come in with their explosives after the driller has vacated the area.

3.80 He testified that he has had a medical examination done every year and has always passed the test in the 14 years he has worked

there. He testified further that there are chances of inhaling dust or blasting fumes in the event of removal of the dust mask. The chances of such dust getting to a driller working in an air-conditioned rig are slim because the dust does not enter the cabin.

3.81 In addition, that the drillers are given personal protective equipment that he had referred to. He did not directly supervise the Plaintiff but confirmed that he worked with him in the same department.

3.82 When cross-examined, the witness testified that the Defendant was discharged in 2015. He did not supervise the Plaintiff but knew he was a driller. He agreed that it was one of the Plaintiff's role to come out of the rig to refuel the machine. He was also required to top up or refill the water. It was not his role to do any blasting as this was the responsibility of another unit or section.

3.83 DW4 was Maxwell Banda a Human resources officer in the Defendant Mine. His evidence was that he knew the Plaintiff that had worked for the Defendant but was discharged on medical grounds. That he had a condition which rendered him unable to work in scheduled areas, a position they learnt after receiving a medical report from the OHSI.

3.84 He testified that the discharge was effected by way of a letter the department wrote to the employee, clearly stating that upon receipt of the medical report he was unable to continue as an employee. He identified the letter written to the Plaintiff to be on page 10 of the Plaintiff's bundle of documents.

3.85 After the Defendant wrote the Plaintiff this letter, he acknowledged receipt and completed the exit formalities. The Defendant paid him his entitlements as per letter in line with existing conditions of service enshrined in the collective bargaining agreement. According to the witness, the Defendant's position was that it had cleared off all that the Plaintiff was entitled to when he left employment. That whatever the Defendant was obligated to settle was paid.

3.86 He was aware that the Plaintiff was claiming damages for the condition he asserts he got whilst in employment. He testified that the Defendant denies those claims. That the Defendant run an open pit Mine and by law was required to insure its employees through the Workers Compensation Fund. To this end that premiums were paid. Therefore, that in the event that any employee contracted or was found to have an occupational illness or involved in an occupational injury or accident, the Defendant's

obligation as a business was to sign the form 6 from Workers' Compensation.

3.87 That this form is given to the employee so that they can pursue any compensation through the Fund. He confirmed that the Plaintiff's claim was submitted to Worker's Compensation Fund. He was however not in a position to state whether the Plaintiff was paid or not.

3.88 He testified that the form filled in by the Defendant in favour of the Plaintiff referred to is on page 12 of the agreed bundle which was signed off by the Defendant as confirmed on page 14 of the same bundle. He testified further that the position that the Plaintiff held at the Mine entailed that he would sit in a machine that had a cabin with proper ventilation and air-conditioned.

3.89 He added that employees are also provided with ear protection, dust masks and any other basic personal protective equipment. That the Defendant provides all the equipment to ensure that its employees are protected against any harm or injuries.

3.90 He testified that the Plaintiff's role was to drill and did not take part in blasting. All employee would be evacuated when the blasters with their explosives came in to do their blasting. The drillers would not handle explosives.

3.91 He added that during the drilling water to suppress the dust would be applied so there would be no dust to harm anyone. Further that the drillers are in an enclosed cabin with proper ventilation. As far as the Defendant was concerned, the claim for compensation was the responsibility of Workers' Compensation Fund to consider and was as such not supposed to be brought to Court.

3.92 When cross-examined, DW4 confirmed that it was a standard requirement for miners to go for medical checkups. He further confirmed that the Plaintiff received his report of the medical examination in November 2013.He disagreed that the Defendant continued using the Plaintiff in spite the letter on page 11 of the agreed bundle of documents. He agreed that the Plaintiff worked up to 2014. Further that the Plaintiff did go for a medical checkup in 2014 as per requirement.

3.93 When re-examined, he testified that the Defendant received notification of the Plaintiff's condition in 2015 when he was medically discharged. That the Defendant did not continue using the Plaintiff when it received the notification of his condition.

3.94 That was the case for the Defendant.

4.0 Submissions

4.1 the Plaintiff's submissions

4.2 The Plaintiff filed into court submissions dated 28th December 2021. It was argued in support of the first claim laid out in the statement of claim relating to damages for personal injuries that the record would show the Plaintiff was at his initial employment with the Defendant company fit for work as he had a valid silicosis certificate.

4.3 Further, that after a year of working, he was subjected to the yearly medical examination where the OHSI found him with a fibrotic lung disease in 2013 but the Defendant did not inform him the results of the medical examination or discharge him from employment. Instead, that the Defendant continued to have him work for over year thus causing his health to deteriorate. Reference was made to section (6) (1) (2) of the Workers Compensation Act No 10 of 1999 that states:

"6. (1) Where any injury is caused or disease contracted by a worker by the negligence, breach of statutory duty or other wrongful act or omission of the employer, or of any person for whose act or default the employer is responsible, nothing in this Act shall limit or in any way affect any civil liability of the employer independently of this Act.

(2)any damages awarded to a worker in an action at common law or under any law in respect of any negligence, breach of statutory duty, wrongful act or omission, under subsection (1), shall be reduced by the value, as decided by the Court, of any compensation which has been paid or is payable to the Fund under this Act in respect of injury sustained or disease contracted by the worker."

4.4 It was argued that the evidence will show that the nature of the environment the Plaintiff worked in was such that he was susceptible to inhale dust particles that could have resulted in the fibrotic lung disease which affected him. That the mask provided only minimized the risk and did not rule out the fact that he could not inhale dust particulars .That the Defendant should thus compensate the Plaintiff for not having informed him he was unfit for work and allowing him to continue in spite knowing he had a B5 certificate.

4.5 In making submissions relating to damages for loss of expectation of life and for inconvenience, it was argued that the record would show that the Plaintiff could have contracted the fibrotic long disease and TB as a result of inhaling silica dust during the course of his employment and continuous engagement beyond 2013 when he was found unfit to work .

4.6 Further, that he continued to work until 2015 because his safety was not considered a priority by the Defendant which was why his condition was concealed from him. It was submitted that had the Plaintiff not sought a second opinion from UTH, he would have lost his life. Reference was made to the case of **Wilson and Clyde Coal Company Limited v English**[1] in which the House of Lords observed that:

"The whole authority consistently recognizes a duty which vests on the employer and which is personal to the employer to take reasonable care of the safety of his workers, whether or not the employer takes any share of the conduct of operations..."

4.7 Also relied on was the case of **Konkola Copper Mines PLC and Zambia State Insurance Corporation Limited vs John Mubanga Kapaya and Others**[2] in which the Supreme Court held inter alia that:

"The Appellants knew of the dangerous situation created by the natural movements of the rocks but allowed the employees to remain in danger zone and that amounted to negligence."

4.8 Also relied on was the case of **Betty Kalunga (suing as administrator of the Estate of the late Emmanuel Bwalya**

(Appellant) v Konkola Copper Mine PLC[3] in which the court held that:

"The courts have been conscious of the fact that the protection intended to be given to employees must not be emasculated by the window of appointment although there is a height of authority for the view that both causation and blameworthiness must be taken into account. At the end of the day, courts must send a signal to employers to ensure safe working conditions to employees. We make remarks against the background that there is no task remarks and task rule which, has been laid down."

4.9 It was therefore submitted that by concealing the 2013 results and having the Plaintiff continue to work for a period over a year past receipt of the results, the Defendant cannot escape liability to compensate the Plaintiff and were in breach of the law under the Workers Compensation Act No. 109 1999.The Plaintiff prayed that the court grants the reliefs sought in the originating process accordingly.

4.10 The Defendant's submissions

4.11 There were no submissions filed by the Defendants in this case

5.0 Court's consideration

5.1 I have carefully considered the evidence before me and the only filed submissions on record. I am grateful to the Plaintiff for the effort in that regard. The case centers on the Plaintiff's claim of a breach of the Defendant's duty of care to him as employee in the work place that resulted in his getting unwell. Further that in spite of the knowledge that he was unwell, the Defendant kept him at work exposing him to further harm for over a year post the receipt of the results of his medical condition from the OHSI which they concealed from him. The question to be resolved therefore, is whether there was such duty and breach established on the facts and if so, what if any, was the extent of the Defendant's liability in this case?

5.2 The learned authors of **Charlesworth & Percy on Negligence RA Percy & Walson C.T London Sweet & Maxwell 1997** write that:

"At common law the duty of the employer to his employees is to take reasonable care for their safety."

Without necessarily suggesting an exhaustive list, the authors opine that the duty extends to provision of safe place of work.

5.3 Quoting Lord Goddard in **Naismith v London Film Productions Ltd**[4] that this duty is explained to be:

"Not merely to warn against unusual dangers known to them... but also to make the place of employment ...as safe as the exercise of reasonable skill and care would permit."

5.4 Other duties include the duty to employ competent workmen; under para 10-34 provision of adequate plant and applications; para10-38 inspection and maintenance; and under 10-44 provision of protective device or clothing with or without advice warnings or orders.

5.5 The authors write further that:

"If the nature of the work is such that a reasonable employer would provide his workmen with some protective device clothing while doing the work, there is a duty to provide it and to take reasonable care to see that it is used. The extent of such duty necessarily depends on a number of factors that include (i) the risk of injury (ii) The gravity of potential injury (iii) The difficulty of providing protection (iv) The availability of protection clothing (v) The distance which an employee may have to go to fetch such clothing; and (vi) the employees skill and experience."

5.6 That duty may of course also arise out of statutory provisions a breach of which may lead to a claim in damages. In **Bossington**

Cashings Ltd v Wardlaw[5] the House of Lords held that unless the statute or regulation provided to the contrary, the burden rested on the Plaintiff to prove on a balance of probabilities that the breach of statutory duty caused or materially contributed to his damage.

5.7Lord Reid summed up the position of the court thus:

"It would seem obvious in principle that a pursuer or Plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is a breach of statutory duty. The fact that parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that parliament intended that on employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it".

5.8 Hence clear as the position the law, is that there must be a causal connection established between a breach by an employer of his duty at common law or under a statute and the damage

suffered by the employee Per Viscount Simonds in **MC Williams vs Sir William Arrol & Co.**[6]

5.9 The Plaintiff's claim in this case discernable from the writ of summons and statement of claim appears to be that the Defendant was in breach of its duty to provide a safe working environment and exposed him to harm leading him to contract a respiratory infection. Further that in breach of the Workman's Compensation Act, the Defendant kept him in employment and continued using him in spite of its knowledge that he was unwell for well of a year after it had received notice from the OHSI as stated earlier above. Lastly, that the Defendant did not follow the terms of the employment contract in the manner it discharged him from employment leading to his claim for damages.

5.10 The Defendant's position on the other hand is that it duly performed all its duties by firstly providing the Plaintiff with the necessary personal protective clothing as it did all other workers that worked in its scheduled areas in the open pit mine. Further that the Plaintiff worked as a driller and therefore operated a drill rig that had an air conditioned cabin where he worked from and water tanks meant to suppress the dust.

5.11 This with the dust mask that the Plaintiff was given significantly reduced his exposure to dust or the illness he claimed to have obtained from the work environment. The Defendant further disputed having either knowledge of the Plaintiff's B5 result disqualifying him from continued employment and of using him nonetheless for a period of over a year after such discovery.

5.12 As far as the Defendant was concerned, the Plaintiff had no skills that would have prompted it to insist on such continuous engagement. In any event, that it was actually the Plaintiff that benefited by earning an income in that period. It was the Defendant's further position that it could not rule out fraud in the manner the Plaintiff's previous record was deleted that would have shown his medical history and replaced with a B1 test traditionally assigned to fresh entrants.

5.13 The questions arising from the above contrasting positions are:

- ✓ Was there a duty placed on the Defendant by common law or statute in their relationship?
- ✓ Was the Defendant in breach of that duty?

- ✓ Has the Plaintiff established a link between a breach of that duty and the resulting damage that he has claimed in this case?
- ✓ Did the Defendant breach the terms of the contract in the manner the Plaintiff was discharged from employment?
- ✓ Is the Plaintiff entitled to the claims that he seeks?

5.14 Peripheral issues to be determined include questions surrounding the manner the Plaintiff was able to obtain a B1 certificate after the B5 had been issued and alleged deletion of his previous record of employment. I proceed to consider each of these questions in turn.

5.15 Was there a duty imposed at common law or statute on the Defendant.

5.16 It is common cause that the Defendant is first Quantum Mining Minerals Ltd and operates an open pit mine at which mining activities take place. It is needless to say a scheduled area at which drilling and blasting activities are undertaken. I entertain no doubt that a duly was placed at common law for the mine to provide a safe working environment for its miners that extended to the provision of personal protective equipment. Further, the Mines and Minerals Development Act of 2008, the applicable law at the

time of the Plaintiff's engagement, prescribed regulations that placed an obligation on Mines to ensure safety for its miners .That there was a duty imposed by both the common law and statute for the Defendant to provide a safe working environment is therefore beyond debate.

5.17 *Was the Defendant in breach of that duty?*

5.18 There is on record irrefutable evidence presented by DW1, DW2 and DW4 of the provision of personal protective equipment at the mine for its employees. This included safety boots, reflective suits, a hard hat, safety goggles disposable dust masks and depending on the area one worked from, are also given respirators and ear plugs. This was availed to the Plaintiff as well.

5.19 I am further satisfied that the Plaintiff was employed as a driller and hence almost exclusively confined to the machinery he was operating that had an air conditioned cabin and water tanks to suppress the dust from the drilling. I do not find that the Defendant was in breach of its common law or statutory duty to provide the necessary safe environment and PPE's to minimize the risk of harm to its employees that included the Defendant.

5.20 In fact, the court also learnt that penal sanction is included in the Defendant's disciplinary code for an employee's failure to wear the PPE when in the scheduled area. Undoubtedly this demonstrates the Defendant's commitment to safety concerns for its employees in the Mine complimented by its coined slogan "*"no job is so important that it cannot be done safely"* as testified by DW1.

5.21 No evidence was presented to demonstrate a contrary prevailing environment.

5.22 *Has the Plaintiff established a link between a breach of that duty and the resulting damage that he has claimed in this case?*

5.23 The evidence of damage in this case is the illness the Plaintiff contends he acquired that he attributes to the Defendant's work environment. There was absolutely no evidence led by the Plaintiff to suggest that the illness that he acquired was a direct result of the breach of the Defendant's duty or let alone that he acquired the disease from his work environment.

5.24 The only evidence that the Plaintiff leans on is that he presented a past silicosis test when he was engaged in 2012 and

the Defendant was later in 2015 reminded of a failed test that he supposedly took in 2013 and should have been discharged. By implication therefore that he obtained the illness whilst working for the Defendant.

5.25 However, the Plaintiff's evidence raises a lot of questions as it is open to conclude he acquired the illness long before he joined the Defendant, became aware he had failed the test, concealed the result and somehow got to obtain a new MB number and B1 result. It is a rather odd coincidence that his previous medical record had been deleted from the OHSI records that showed he was unwell and the only one subsisting gives him a B1 certificate with no history of ever having worked in a mine environment.

5.26 This smacks of suspicion pointing to nothing more than a fraud and collusion to present a new record that would enable him to work. I would therefore disregard the suggestion that he acquired the illness due to any fault attributable to the Defendant.

5.27 *Did the Defendant breach the terms of the contract in the manner the Plaintiff was discharged from employment?*

5.28 The Plaintiff's contract of employment is exhibited at page 1 of the agreed bundle of documents. His assertion is that the illness he was established to have had after a second opinion from UTH,

was curable TB which should have seen clause 6 (c)of the contract kick in. The clause provides:

"C. Sick leave

In the event that you are unable to execute your normal duties due to illness or accident , you shall , on the production of a medical certificate from a registered medical practitioner, be granted sick leave at full pay during the first three months. Thereafter, at half pay for the next three months.

Should you then not be able to report for duty, your contract of employment will be reviewed and may be terminated on medical grounds"

5.29 That contrary to that provision, rather than put the Plaintiff on 3 months paid sick leave and an additional 3 months in the event of failed recovery before a discharge could be considered, the Defendant in breach of the contract went ahead to discharge him summarily on medical grounds upon receipt of the letter from OHSI.

5.30 **In Attorney General vs Phiri and 10 others,**[7] the Supreme Court commenting on the approach courts must take in claims of breaches of employment contracts stated the following.

"It is trite that employment relationships and the payment of salaries, dues benefits and allowances are anchored in contract, with clear terms governing such contracts. Where the terms of the contract are not clear, the court has power to ascertain the intention of the parties and give effect of the contract by enforcing the provisions of the contract when called upon to do so by a dissatisfied party through litigation...Where the contract is deemed repudiated, the court must decide on the rights of the parties including what the employee must be awarded as a result of unilateral repudiation of a contract of employment."

5.31 There is no question that the contract of employment that includes the clause referred to formed a part of the employment relationship between the parties.

5.32 I however accept the Defendant's account of the steps that it took in the circumstances of this case. The OHS1 letter was a directive reminding the Defendant that it had among its ranks an employee whom it had earlier communicated had failed its test and hence unfit to continue working in terms of the Workers Compensation Act. He was thus expected to be discharged forthwith. A failure to do so would amount to a breach of the law.

5.33 I have no reason to accept that the Defendant were aware of the earlier correspondence in which it was informed of the

Plaintiff's condition that it disregarded. I am more inclined to accept the Defendant's position that the Plaintiff had no special skills that would warrant it to take such drastic step.

5.34 I accept that the Defendant acted on the letter when it was brought to its attention and proceeded to discharge the Plaintiff on medical grounds and proceeded to him pay all of his dues. In any event the Plaintiff admitted in cross examination that he did not at any point submit a medical report from a medical practitioner to the Defendant informing it of an illness to warrant the grant of sick leave in terms of part 6 (c) of the employment contract. There was no breach of the contract of employment in that regard.

5.35 *The call for compensation*

5.36 The Plaintiff's call for compensation was always pursuant to the claim of breach of the Workers Compensation Act although I quite deliberately considered and spent some time discussing the law of the duties of the employer under common law and statute that I considered indispensable in the circumstances of this case. The specific provision cited by the Plaintiff as being the basis of his claim is section 6 (1) (2) of the Workman's Compensation Act referred to earlier above.

5.37 In his unshaken testimony before the court, DW4 the Human Resources officer in the Defendant's employ testified that the Defendant being a Company that run an open pit Mine was by law required to insure its employees through the Workers Compensation Fund. In this regard that all the premiums were paid. Therefore, that in the event that any employee contracted or was found to have an occupational illness or involved in an occupational injury or accident, the Defendant's obligation was to sign the prescribed form 6 from Workers' Compensation Fund to enable the affected employee pursue any compensation through the Fund. He confirmed that the Plaintiff's claim was submitted to Worker's Compensation Fund.

5.38 DW1 informed the court that it was his understanding that Workers Compensation Fund did not compensate the Plaintiff because of the medical condition that he had that was considered not to be occupational related.

5.39 DW2 the director of the OHSI that gives recommendations for compensation of workers, gave damning evidence against the Plaintiff. His very firm position was that the Plaintiff when obtaining a second silicosis certificate following "the convenient deletion of the previous record" gave a presentation that had a completely different occupational history. That on the second

appearance, the Plaintiff stated that he was a businessman of 10 years, had never worked in a Mine and had no history of ever suffering from any chest condition and this was how the Plaintiff ended up with a B1 certificate which is a pass.

5.40 It was DW2's testimony that the Institute invariably concluded there had been an element of concealment of the past record. Therefore, that the validity of the B1 certificate is rendered null and void on account of concealment of information. He testified further that the Plaintiff has never been issued with a B6 certificate which is a pass for a second medical examination. Therefore, that the position of the OHSI is that the Plaintiff is not eligible for compensation. That this is also in line with what the Workers Compensation Act says.

5.41 DW2 further gave evidence of what the OHSI considers to be occupational health disease and importantly, that the conditions presented by the Plaintiff are not terminal illnesses as claimed but in fact curable.

5.42 From the above evidence that I accept as credible, I conclude that there was no obligation placed on the Defendant beyond the remittance of the insurance premiums to the Workers Compensation Fund. It is not the Plaintiff's contention that premiums were not being paid. The failed compensation was on

account of the Plaintiff's condition at discharge not qualifying to be an occupational disease attributable to the work environment. The Plaintiff's concealment of his past employment history did not aid in mustering the support he might have received from the OHSI for his call for compensation. There is certainly no basis to consider a claim of loss of expectation of life included in this writ.

5.43 In stating the above, I am of course mindful that section 6 (1) and (2) of the Workers Compensation Act of 1999 does not absolve an employer found to have been negligent and in breach of its duty and where resulting damage can be established, from being sued in a claim for damages notwithstanding the compensation offered under the umbrella of the Act. Any award ordered by the court in a suit is to be less whatever compensation is awarded by the Fund is what the law says.

5.44 In this event, my conclusion is that there was no breach of duty established or proof of damage attributable to the Defendant's negligence or breach of contractual obligation that would warrant consideration of the Plaintiff's prayer for relief.

6.0 Conclusion

6.1 On the whole I find that the Plaintiff has not discharged his burden of proving any of his claims in this suit. The Defendant was not in breach of any of its duties whether grounded in the common

law, by statute, the contract of employment and collective agreement between the parties. The Defendant paid the Plaintiff all his dues following his discharge and are not indebted to him. I dismiss the suit for want of merit. As the Plaintiff is a legally aided litigant, I order that each party will bear their own costs.

6.2 Leave to appeal is granted

Dated at Lusaka this 3rd day of October 2025

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HON. JUSTICE M.D BOWA