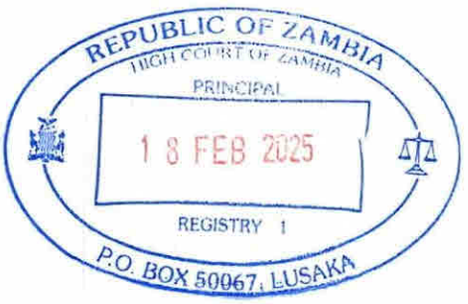
IN THE HIGH COURT FOR ZAMBIA **2022/HP/0904**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



HARRIET DAISY NYAMASAMBU **PLAINTIFF**

AND

FQM TRIDENT LIMITED **DEFENDANT**

Before the Honourable Lady Justice S. Chocho, on 18th day of February, 2025.

For the Plaintiff: *Mr. S.M Lungwebungu of Messers Lungwebungu Legal Practitioners.*

For the Defendant: *Mrs. P Mwansa-Chisha of Messers B & M Legal Practitioners. & Mrs. Wamulume of Messers Ndemanga Wamulume Legal Practitioners.*

J U D G M E N T

Cases referred to:

1. ***Reid v Thompkins Group Plc (1989) 3 ALL ER 228.***
2. ***Kennedy v Cordia (services) LLP Scotland (2016) UK SC 6.***
3. ***Wilson Masautso Zulu v Avondale Housing Project Limited (1982) ZR 17.***
4. ***Donoghue V Stevenson (1932) AC 562.***

5. *Anderson Kambela Mazoka v Mwanawasa and 2 Others (2005) Z.R. 138.*

6. *Tiger Chicks (T/A) Progressive Poultry Limited v Tembo Chrisford and Another Appeal No. 6 of 2020.*

7. *Robert Panicco v Techserve Logistics and Car Hire Limited and others 2022/HPIR/0995.*

8. *The Tourism, Hospitality and Sport Education and Training Authority v TMS-Shezi Industrial Services JS 1037/06.*

9. *Blyth v Birmingham Waterworks Company (1856) 11 Ex 781.*

10. *Faindani Daka v the Attorney general HP 730 of 1998.*

11. *Kunda v Konkola Copper Mines Appeal 48 of 2005*

Legislation and other authorities referred to:

1. *Section 16(2)(a) and (c) of the Occupational Health and Safety Act.*

2. *Section 3 of the Employment Code Act No. 3 of 2019.*

3. *Workers Compensation Act No. 10 of 1999.*

4. *Percy Henry Winfeild, J.A. Jolowiz, and W.V.H Rogers, Winfeild and Jolowiz on Tort, London, Sweet and Maxwell, 2002.*

5. *Technical Education, Vocational and Entrepreneurship Training Authority (TEVETA) guide for training.*

7. *Halsbury's Laws of England Vol. 34 4th Edition.*

1. **INTRODUCTION**

1.1. This Judgment is in respect of the Plaintiff's claim against the Defendant. The Plaintiff by way of Writ of Summons and Statement of Claim dated June 13th, 2022 claimed the following:

i) An Order for damages and/compensation for the injury, pain and suffering, loss of amenities, permanent disability, loss of prospects of earning;

ii) An Order for special damages under paragraph 12 of the Statement of Claim;

iii) An Order that the Defendants meets the Plaintiff's pending surgery and other medical expenses and cost incidental thereto;

iv) An Order for compensation under paragraph 11 of the Statement of Claim;

v) Interest on all amounts found due,

vi) Any other relief the Court may deem fit in the circumstances and;

vii) Costs incidental to the proceedings.

1.2. The Defendant by appearance and defence dated July 15th, 2022 denied the Plaintiff's Claims stating that the Plaintiff was never an employee of the Defendant.

1.3. The Defendant further averred that it provided the Plaintiff access to Personal Protective Equipment (PPE) including earplugs to enable her learn in a safe environment.

1.4. The Defendant further averred that the Plaintiff suffered from pre-existing medical conditions/complications before the training program.

1.5. The Defendant denied any negligence on its part.

2. **TRIAL COURSE**

2.1. Trial was scheduled and heard on May 7th and May 27th, 2024.

2.2. The Plaintiff called two witnesses in aid of her case. PW1 was the Plaintiff herself who filed a witness statement dated October 10th, 2022.

2.3. The Plaintiff testified in chief that she entered into a 3 year learnership contract with the Defendant. The contract is on page 1 of the Plaintiff's bundle. Having being selected after medical examination, which included audiometry tests and full blood count. The results were never shared with her and the Plaintiff testified that she was told all was fine and she could proceed to work.

2.4. The Plaintiff testified that she would spend 4 months in school and the rest of the year at the Defendant company, earning a gross pay of ZMW 2000. The Plaintiff referred this Court to an employee pay statement on page 2 of the Plaintiff's Bundle of Documents.

2.5. The Plaintiff testified that she underwent mine safety inductions and was issued with Personal Protective Equipment (PPE) to be worn both at school and at the mines which included; a work suit, safety boots, hard hat, safety googles and gloves.

2.6. The Plaintiff testified that after 4 months of being in school, she went to the Defendants mine and based on her course of study was placed to work at the processing plant placed at the mills area which is very noisy.

2.7. The Plaintiff testified that she was also instructed to work in the ventilation fans, vibrating screens, excavators, stage loaders, crushers and grinding mills.

2.8. The Plaintiff further testified that the noise could not be prevented by the earmuffs given to the Plaintiff by the defendant as the ear muffs are soft foams that do not completely cover the opening of the ear.

2.9. The Plaintiff testified that on certain days, ear muffs were not availed to her but she would still be instructed to proceed with work as the earmuffs were being organized and would be given later.

2.10. The Plaintiff testified that sometime in 2019, she fell sick and would have severe headaches. She testified further that the doctor informed her that she developed a condition of loss of hearing and that the personnel from occupational work would go and assess her work environment.

2.11. The Plaintiff testified that she was referred to Lusaka Ear, Nose and Throat (ENT) clinic where it was discovered that she suffered from chronic bilateral effusion otitis media and bilateral sinusitis and was put on treatment.

2.12. The Plaintiff testified that after treatment, the was no improvement and she was advised that there was need to under go surgery to improve her hearing and during the subsistence of her illness, she was required to report for work at the Defendant's mine.

2.13. The Plaintiff testified that every time she was exposed to noise, she would experience severe headaches and when she sought medical attention, a medical certificate was issued recommending that she should work in less noisy places pending referral to the ENT specialist.

2.14. The Plaintiff testified that when she handed the certificate to the school, she was exempted from doing courses such as metal fabrication and grinding but when she handed the certificate to the Defendant, she was instructed to continue working in the same environment. The Plaintiff testified that her condition worsened and her surgery was scheduled for some time in 2020 but she could not go through with the surgery as the Defendant did not agree with the quotation from the hospital despite the Defendant deducting medical insurance from her monthly earnings.

2.15. The Plaintiff testified that due to the Defendant, her surgery delayed and she only under went surgery sometime in February 2021.

2.16. The Plaintiff testified that after the surgery, she was advised to start using hearing aids and to stay away from noisy places. She testified further that during her exit medical exams, the person conducting the medicals was instructed to conduct audiometry tests on the Plaintiff with

her hearing aids on but the person conducting the medical refused as per the Defendant's instructions.

2.17. The Plaintiff testified that one Dr. Mulenga who was attending to her while she was at the Defendant's mine indicated that her problem was as a result of the area in which she worked and that he had experienced similar issue with other employees of the Defendant who worked in the area the Plaintiff worked in because of exposure to constant hazardous noise cause by heavy noise machinery.

2.18. The Plaintiff avers that as at her last review, the condition kept worsening and there was need to undergo another surgery and that the reports for the hospitals contracted by the Defendant to treat employees from diseases contracted during the course of employment confirm that the is still suffering from chronic bilateral effusion otitis media and bilateral sinusitis.

2.19. The Plaintiff testified under cross examination that she was an employee of the Defendant under the Apprentice Scholarship Programme which entailed that she was on a job on training.

2.20. The Plaintiff conceded under cross examination that the agreement she signed was not an employment contract, but a learnership agreement describing her as a learner.

2.21. The Plaintiff testified that she did not agree that a stipend was different from a salary.

2.22. The Plaintiff conceded under cross examination that she was on a scholarship awarded to her by the Defendant to undergo Power Electrical Engineering training at Kwaumbula an institute set up by the Defendant Company.

2.23. The Plaintiff testified that she attended about three hospitals and the diagnosis was Otitis Media Externa from all. She admitted that she did not understand fully but was advised that noises could have caused the disease.

2.24. The Plaintiff testified under cross examination that she was advised that bilateral otitis media is a disease that comes about because of fluids that accumulate in the eardrum as a result of some particles that could have caused an allergy or excessive noise that triggered the eardrum which led to loss of hearing.

2.25. The Plaintiff further testified that she underwent surgery paid for by the Defendant Company to install gromets in her ears and was advised to keep her ears dry to allow for healing.

2.26. The Plaintiff conceded under cross examination that failure to observe safety regulations was an offence and knowing that it was an offence, she

did lodge complaints on several occasions when PPE was not availed to her.

2.27. The Plaintiff further testified under cross examination that she did not withdraw from the program after being advised that her problem was due to exposure to the mine site because she was still undergoing medical checkups.

2.28. The Plaintiff testified in re-examination that she was on a scholarship in form of a job on training hence the few months at school and more on site.

2.29. The Plaintiff further testified under cross examination that she was under a supervisor whom she lodged complaints with regarding insufficient PPE. She also testified that on several occasions, if there were no earmuffs, they would be told to go and work and that they would follow them later.

2.30. The Plaintiff testified that there was nothing on the Court record in form of documentary evidence to prove the special damages as claimed in paragraph 12 of the Statement of Claim.

2.31. Under re-examination, the Plaintiff testified that she was on a scholarship in form of job on training having more time at the Defendant Company than school.

2.32. The Plaintiff testified that due to her condition, she requested for modernized aids but she was told she does not have an account at the warehouse and they could not be purchased. She was issued with ear-muffs instead.

2.33. PW2 was one Wilfred Nyamasambu who is the father to the Plaintiff, filed a witness statement on October 10th, 2022.

2.34. PW2 testified in chief that the Plaintiff who was born on July 18th, 1990 joined the Defendant company in 2018 as a trainee in power electrical for three years and sometime in 2019, he came to learn that the Plaintiff was diagnosed with a hearing problem.

2.35. PW2 testified that the Plaintiff informed him that the Defendant had referred her to Lusaka for surgery and that all expenses would be paid for by the Defendant.

2.36. PW2 testified that later in 2021, the Plaintiff informed him that her contract ended and the Defendant will not pay for any further medical expenses.

2.37. PW2 testified that since birth, the Plaintiff has never suffered from any ear medical condition until the time she joined the Defendant's mine.

2.38. PW2 testified under cross examination that as the Plaintiffs biological father, he is not aware of any headaches suffered by the Plaintiff prior to the Plaintiff joining the Defendant company.

PW2 conceded that he never accompanied the Plaintiff to any hospital visits.

2.39. The Defendant called one witness in aid of its case. DW1, Kayula Lombe, the Acting Employee Relations Superintendent at Defendant Company filed into Court a witness statement on June 5th, 2023.

2.40. DW1 testified in chief that the Defendant runs a learnership program intended to impart skills in the residents of the communities were the Defendant's mine is located.

2.41. DW1 testified that the individuals selected to undertake the learnership program are not employees of the Defendant and it is an express term of the learnership contract they sign.

2.42. DW1 testified that when the Plaintiff joined the learnership program, she was a student at Kwambula Solwezi Trades Institute and only attended the learnership program during her semester breaks.

2.43. DW1 testified that the Plaintiff under went an induction training on health and safety which included an introduction to all PPE which the Plaintiff was expected to use at all times.

2.44. DW1 further testified that the use of PPE is extremely critical in the Defendant's operations and its use is emphasized daily there is signage placed throughout the Defendant's mine.

2.45. Further to the above, DW1 also testified that health and safety are expressly indicated as duties of the Plaintiff in the learnership contract and failure to use PPE is an offence in the Defendant's Disciplinary Code.

2.46. DW1 testified that the Defendant's stores department was open all the time to give the Plaintiff PPE if she required it and that even when any of the PPE was lost, it could be replaced at no cost upon production of a police report.

2.47. DW1 testified that it was the Plaintiff's obligation to ensure she obtained all the PPE from the stores department which were available to her at all times.

2.48. DW1testified under cross examination that the Plaintiff was not an employee of the Defendant Company but under learnership contract as per page 1 of the Defendants bundle of documents. He conceded that the heading of the document read Employment Agreement.

2.49. DW1 further testified that the Plaintiff did get Nhima or Napsa deductions but she was not registered under the Workers Compensation Fund because she was not an employee.

2.50. DW1 testified under cross examination that it was the Defendant's statutory obligation to ensure that employees contributions to workers compensation are made.

2.51. DW1 further testified that medical tests were carried out to determine fitness of applicants and those that failed were not picked for the learnership program.

2.52. DW1 testified under cross examination that the Plaintiff suffered from her hearing condition before she joined the Defendant Company. He conceded that he did not have the Plaintiffs medical report/results to show this even though the medical reports are in the custody of the Defendant.

2.53. DW1 further report conceded that the Defendant Company communicated to the Plaintiffs about the contents of the medical report showing she had a medical/ hearing problem at the point of recruitment to the learnership program.

2.54. DW1 testified that the Plaintiff underwent an exit medical test and she was availed a copy of the results.

2.55. DW1 conceded that he never saw the Plaintiff on a daily basis to confirm that she had PPE or not.

2.56. DW1 further conceded that pages 5-9 of the Defendant's Bundle of Documents did not show that the Plaintiff was issued with and signed for all relevant PPE.

2.57. Under re-examination, DW1 confirmed that the Plaintiff's medical reports in the Defendant's possession were not before Court as they can only be released on request by the Plaintiff.

2.58. DW1 further confirmed that he did not personally see Plaintiff everyday wearing the right/correct Personal protective equipment but Plaintiff's supervisor and workmates saw her.

2.59. DW1 testified that the learnership contract reads on heading as "Employment Agreement" because the learners are subjected to Defendant Company's policies and disciplinary code whilst on site.

2.60. DW1 testified that safety concerns are inherent from the nature of the business and the Defendant regularly stocks PPE to void running out as it has new users of PPE every day.

2.61. DW1 testified that the Plaintiff had no designated place of work and was rotated among various departments and this was only done during her academic breaks.

2.62. DW1 testified that the Defendant carries out noise assessments on different areas of the mine site and none of the areas were the Plaintiff was attached has ever recorded high noise recordings to the extent that earmuffs were needed.

2.63. DW1 testified that notwithstanding 2.60 above, earmuffs were always available to the Plaintiff if she experienced any discomfort.

2.64. DW1 testified that the Plaintiff claimed that she contracted a disease during her learnership and demanded compensation from the Defendant who denied liability but proceeded to pay the Plaintiffs medical and other associated expenses, out of good will.

2.65. DW1 testified under cross examination that there are other staff members who have suffered from a similar problem as that of the Plaintiff and employees were sent to ENT specialist in Lusaka.

2.66. DW1 testified under cross examition that the Plaintiff suffered from the hearing condition before she joined the Defendant company. He conceded that he did not have the Plaintiff's medical reports results to show this even though the medical reports are in the possession of the Defendant Company.

2.67. A Subpoena was issued to one witness named Dr. Harrison Phiri who gave evidence at trial. Dr. Phiri testified that he has been consulting for the Defendant Company since 2017. The patients being referrals from Doctors.

2.68. The Subpoenaed witness testified that after assessing the Plaintiff, he came to the conclusion of chronic rhino sinusitis with a fusion and bilateral sensonuero hearing loss.

2.69. The subpoenaed witness testified that the Plaintiffs major problem was reaction to irritants in her nasal cavity and that the cause of the hearing loss was fluid accumulating behind the ear drum and middle ear space

usually triggered by changes in weather, viral infections and viral sinusitis.

2.70. The subpoenaed witness further testified that the kind of hearing loss the Plaintiff suffered from also happens to people who do not work in the same conditions as the Plaintiff.

2.71. The subpoenaed witness testified that the Plaintiff did not exhibit occupational rhinitis and that none of the patients from the Defendant company have been diagnosed with occupational rhinitis.

2.72. The subpoenaed witness testified that the special equipment, controlled environment test for determining occupational rhinitis was not available in the country and he came to conclusion of allergic rhinitis based on the features in history and tests on the Plaintiff.

2.73. The subpoenaed witness further testified that he has not come across a patient from the Defendant Company whose diagnosis was occupational rhinitis.

2.74. The subpoenaed witness testified that it was possible that the particles at the Defendant Company site can cause exacerbation of the Plaintiff's symptoms. He testified that Rhinitis is hereditary, the environment made it worse in the Plaintiff. The particles at the mine could be a risk and trigger the Plaintiff's allergies.

2.75. The subpoenaed witness further testified that he is in constant commotion with the Defendant Company and they need to ensure employees are given protective gear such as masks and ear plugs.

2.76. The subpoenaed witness testified under cross examination that he did not tell the Plaintiff that her condition was as a result of a reaction from the particles from the mines but that she had an over reaction to irritants and counselled her to identify the irritants and avoid them.

2.77. The Doctor further testified that he was not availed the Plaintiff's pre-employment medical test results and the Plaintiff did mention that she did not have hearing problems before employment with the Defendant Company.

3. **LAW AND SUBMISSIONS.**

3.1. Both Parties filed their written submissions. The Plaintiff filed on June 24th, 2024 and the Defendants on August 9th, 2024.

3.2. The Plaintiff submits the Plaintiff was an employee of the Defendant due to the Defendant's control of the Plaintiff. The Defendant determined when the Plaintiff was to be at his premises for work and when to be in school and this was in consideration of a monthly wage which was subject to a statutory deduction only applicable to those in an employer-employee relationship.

3.3. The Plaintiff submits that in order to prove negligence, the law requires the Plaintiff to prove that the Defendant owed her a duty of care, also to prove that the Defendant breached this duty of care and as a result of the breach, the Plaintiff suffered injury or damage.

3.4. The Plaintiff drew the Court's attention to the definition of negligence by the Learned Authors of **Winfield and Jolowiz on Tort, 13th Edition at page 45 & 46** were it was stated:

> **"...Negligence as a tort is the breach of a legal duty of care which results in damage, undesired by the Defendant, to the Plaintiff. The ingredients necessary to prove negligence are stated as;(a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls with the scope of duty; (b) breach of that duty;(c) consequential damage to B. The three ingredients on the tort of negligence must be established:**
>
> i) **There must be a duty of care owed by the Defendant to the Plaintiff:**
> ii) **There must be breach of the duty of care owed to the Plaintiff by the Defendant; and**
> iii) **The Plaintiff must suffer damages as a result os such breach by the Defendant.**
>
> **"...duties of affirmative action are imposed across a much wider range of relationships, in at least some of them probably because the Defendant gains some benefit from the relationship with the Claimant. Thus, an employer must not on take proper steps to ensure safety in the work place but must look after a worker who is injured of falls ill at work".**

3.5. The Plaintiff submits that the Defendant was required and was under a duty to provide the Plaintiff with a safe working environment and conditions at all times. The Plaintiff further relies on the case of **REID V THOMPKINS GROUP PLC (1989) 3 ALL ER 228**[1] in which it was held as follows:

"The duty has for many years always been referred to in terms of the physical safety and well-being of the servant".

3.6. Placing reliance on the authority in the case of **KENNEDY V CORDIA (SERVICES) LLP SCOTLAND (2016) UK SC 6**[2] and **Section 16(2)(a) and (c) of the Occupational Health and Safety Act**, the Plaintiff submits that the Defendant breached its duty to the Plaintiff by failing to provide a safe environment and conditions which in turn caused the Plaintiff to develop Chronic Effusion Bilateral Otitis Media and Bilateral Sinusitis.

3.7. The Plaintiff further submits that the Plaintiff has suffered damage as a result of the Defendant's breach of its duty to provide a safe working environment and conditions therefore, the Plaintiff is entitled to damages.

3.8. The Plaintiff also submits that it is not in dispute with the evidence on record that the Defendant did not register and contribute to the Workers Compensation Fund and this has caused the Plaintiff to lose out on the compensations that should have been availed to the Plaintiff due to her sickness and that the Plaintiff should be compensated accordingly by the Defendant.

3.9. In response, the Defendant submits that the Plaintiff has a duty to prove its case on a balance of probabilities as per **WILSON MASAUTSO ZULU V AVONDALE HOUSING PROJECT LIMITED (1982) ZR 17**[3] but the Plaintiff has failed to lead substantial evidence to prove its case.

3.10. The Defendant submits that the Plaintiff was never an employee of the Defendant but a student who visited the mine for purposes of practicals in connection with her training.

3.11. The Defendant referred this Court to the definition of an employee in **Section 3 of the Employment Code Act** and submits that the Plaintiff never provided any service to the Defendant and the Defendant never paid any wages in return and that what was paid was a stipend and not a wage.

3.12. The Defendant further submits that it was in fact the Defendant offering a service to the Plaintiff by paying for her education and expending resources in giving her practical skills training.

3.13. The Defendant submits that the mislabelling of the learnership agreement as employment agreement does not alter its nature as established by its content and that although the document is labelled employment agreement, it is not an employment agreement.

3.14. The Defendant further submits the evidence on record shows that the Defendant did not cause the Plaintiff's condition and that the Plaintiff has failed to demonstrate a causation link between the Defendant's actions or inactions and the Plaintiff's condition.

3.15. The Defendant submits that the Plaintiff alleges that duty of care was breached by the Defendant's failure to provide adequate ear protection equipment to the Plaintiff and that the Plaintiff conceded at trial that she was given earmuffs but contends that the earmuffs were not sufficient to protect her from the amount of noise she was exposed to.

3.16. the Defendant further submits that the Plaintiff conceded under cross examination that she went through safety induction at the beginning of her program and that she was given PPE when she started her program and that she could obtain replacements whenever she ran out.

3.17. The Defendant submits that the Medical Doctor and ENT Specialist who performed the surgery on the Plaintiff, Dr. Phiri testified at trial and explained what the Plaintiff's condition is and testified that the Plaintiff suffered from inflammation of the nasal turbinates which is a reaction to things in the environment and triggered by allergies, changes in weather, bacterial or viral infections as well as rhinosinusitis.

3.18. The Defendant submits in light of Dr. Phiri's testimony that the Plaintiff's condition is as a result of allergies and not noise.

3.19. The Defendant submits that the Plaintiff has failed to link any act of the Defendant to the damage she has suffered. Therefore, the claim for negligence must fail. in making this submission, the Defendant relied on the case of **DONOGHUE V STEVENSON (1932) AC 562**[4], in which the Court stated as follows:

> ***"I think that this sufficiently states the truth that if proximity be not contained to mere physical proximity, but as I use to think it was intended to, extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."***

3.20. The Defendant further submits that even assuming there was any negligence on the part of the Defendant, which there wasn't, the actions

or inactions of the Plaintiff amount to contributory negligence and the Plaintiff cannot successfully recover any damages from the Defendant.

3.21. The Defendant submits that the Plaintiff was free to withdraw from her scholarship at any time as the Plaintiff owes herself a greater duty to protect herself from harm and that it was negligent for the Plaintiff to insist on an education program that was harmful to her health.

3.22. The Defendant further submits that it is not in dispute that the Plaintiff was not registered as an employee under the Workers Compensation Fund and that even if the Plaintiff was registered, she would have not qualified for compensation from the fund because the condition did not arise out of and in the course of employment as required by the **Workers Compensation Act.**

3.23. The Defendant submits that the Plaintiff's unfortunate circumstances have nothing to do with the Defendant aside from the fact that the Plaintiff suffered the condition while she was a beneficiary of the Defendant's scholarship.

3.24. The Defendant further submits that the relief for severance pay cannot be entertained at the stage of submissions because the Plaintiff is bound by her pleadings. The Defendant referred this Court to the cases of **ANDERSON KAMBELA MAZOKA V MWANAWASA AND 2 OTHERS (2005) Z.R. 138**[5] and **TIGER CHICKS (T/A) PROGRESSIVE POULTRY LIMITED V TEMBO CHRISFORD AND ANOTHER APPEAL NO. 6 OF 2020**[6] which I have taken note of.

4. **COURTS ANALYSIS/DECISION**

4.1. I have considered the testimony and documentary evidence on record. I must state that I found the Plaintiff and DW1 to be rather untruthful witnesses. They appeared to have been coached and recited what they thought would benefit their position.

4.2. I have had occasion to consider both parties arguments and below are the main issues for determination.

i) Whether there was an employer- employee relationship between the Plaintiff and the Defendant;

ii) Whether the Plaintiff has a claim in negligence as against the Defendant; and

iii) Whether the Defendant is liable to compensate the Plaintiff for its failure to register the Plaintiff with the Workers Compensation Fund.

4.3. The **Employment Code, Act No. 3 of 2019** defines an employment relationship as follows;

"employment relationship" means a relationship between employer and employee where work is carried out in accordance with instructions and under the control of an employer and may include—

a) the integration of the employee in the organisation of the undertaking where the work is—

i) performed solely or mainly for the benefit of an employer; and

ii) carried out personally by the employee; or

b) work—

i) carried out within specific working hours or at an undertaking specified by the employer;

ii) which is of a particular duration and has a certain permanency;

iii) that requires the employee's availability;

iv) which requires the provision of tools, materials and machinery by the employer; and

v) that is remunerated and constitutes the employee's sole or principal source of income;

4.4. This provision was interpreted in the case of **ROBERT PANICCO V TECHSERVE LOGISTICS AND CAR HIRE LIMITED AND OTHERS 2022/HPIR/0995**[7] as follows:

> ***"I have studied the definition of 'employee', together with related terms such as 'employment relationship' in both the Employment Code Act of 2019 and the now repealed Employment Act, cap 268, as amended by Act No. 15 of 2015, which the Complainant's counsel wrongly cited as cap 269 in his submissions. The two definitions are quite similar. Both exclude independent contractor from being an employee. Both define employment relationship, to paraphrase, as a relationship where work is carried out in accordance with instructions and under the control of an employer (underlining mine for emphasis)".***

4.5. The Defendant contends that the relationship between the Plaintiff and the Defendant was not an employment relationship but rather that they entered in a learnership agreement.

4.6. The **Employment Code Act** does not define or provide for a learnership agreement. However, the **Technical Education, Vocational and**

Entrepreneurship Training Authority (TEVETA) guide for training although speaking to the TEVETA learnership defines a learnership as follows:

> ***"...a training method that combines theoretical training at a college or training centre with relevant work experience..."***

4.7. For Persuasive value, I shall make reference to the South African case of **THE TOURISM, HOSPITALITY AND SPORT EDUCATION AND TRAINING AUTHORITY V TMS-SHEZI INDUSTRIAL SERVICES JS 1037/06**[8] in which the South African Labour Court stated as follows:

> ***"...The employer is obliged to employ the learner for a period specified in the learnership agreement. In addition to providing a learner with practical experience, the employer is obliged to release the learner to attend the education and training, which has to be specified in the learnership agreement".***

4.8. I am of the considered opinion that a learnership agreement is a fixed term agreement entered into between a learner and an employer and in certain instances the skills development provider under which the employer provides work experience and the learner is under a learnership after which the learner attains a recognised qualification.

4.9. In answering whether or not there was an employment relationship between the Plaintiff and the Defendant, I am inclined to strictly look at the terms of the contract and upon review and consideration of the what the Plaintiff purports to be an employment agreement, nothing seems to suggest that there was an employment agreement and by no stretch of imagination can an intention to create an employment relation be

inferred. Further, it is common adage in contract law that in the absence of any vitiating factors, parties are bound by the terms of contracts they enter into. The agreement entered into by the Plaintiff and defendant is in my considered opinion a learnership agreement regardless of the heading.

4.10. Having established that there is no employment relationship between the parties, I shall now proceed to determine whether the Plaintiff has a claim in negligence against the Defendant.

4.11. The learned authors of **Winfield and Jolowiz 13th Edition at page 102** define negligence as:

> ***"Breach of legal duty to take care which results in damage or injury to the Plaintiff".***

4.12. Furthermore, In the case of **BLYTH V BIRMINGHAM WATERWORKS COMPANY (1856) 11 EX 781**[9] negligence is defined as:

> ***"An omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

4.13. In order to prove negligence, the following elements must be proved:

i) That the Plaintiff was owed a duty of care;

ii) The Defendant breached its duty of care; and

iii) As a result of the Defendants breach, the Plaintiff has suffered damage/injury.

4.14. This position was stated in the case of **FAINDANI DAKA V THE ATTORNEY GENERAL HP 730 OF 1998**[10] in which the Court stated as follows:

> ***"In order to address this question one has to examine the common law action in negligence. It is needless here to go into details of the elements of the tort of negligence which are clear and well established. There must, of course, be:***
>
> ***i) A duty of care owed by the Defendant to the Plaintiff;***
>
> ***ii) A breach by the Defendant of this duty;***
>
> ***iii) Damage to the Plaintiff;***
>
> ***iv) Which is caused by the breach of duty".***

4.15. The learned authors of **Charlesworth and Percy on negligence 12th Edition at page 19-20** state as follows:

> "***the word duty connotes a relationship by which an obligation is imposed upon one person for the benefit of another to take reasonable care in all circumstances. Whether or not a duty exists on given facts is a question of law. Unless the existence of such duty can be established, an action in negligence must fail".***

4.16. Where duty of care exists, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen as likely to cause injury/damage to persons to whom the duty of care is owed.

4.17. The learned authors of the **Halsbury's Laws of England Vol. 34 4th Edition at page 8 Paragraph 5** state that:

> ***"Prima facie a duty of care is owed to those whom the Defendant could reasonably contemplate may be harmed by his action..."***

4.18. The case of **DONOGHUE V STEVENSON 1932 A.C 562**[4] established the neighbour principle. Lord Atkin realised that there had to be a general criterion of relation giving rise to duty and stated as follows:

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

4.19. In light of the above authorities, it can be concluded that the general criterion in determining whether a duty of care is owed is reasonable foresight.

4.20. The Plaintiff and Defendant were in learnership relationship and, the Plaintiff was owed a duty of care by the Defendant. The Defendant could have still owed the Plaintiff a duty of care as the Plaintiff is one such person the Defendant ought to have had in contemplation as per **DONOGHUE V STEVENSON**[4] by virtue of having a relationship which required the Plaintiff to be in the Defendant's premises and carry out works.

4.21. Having established that the Defendant owed the Plaintiff a duty of care, the question to be determined is whether the Defendant breached its duty towards the Plaintiff.

4.22. It is the Plaintiff's contention that the Defendant was in breach of its duty of care towards the Plaintiff by failure/neglect to provide the Defendant with PPE, earmuffs to be precise which caused the Plaintiff injury/damage.

4.23. It is trite that the burden of proof lies on the party making an assertion. The Supreme Court in the case of **KUNDA V KONKOLA COPPER MINES APPEAL 48 OF 2005**[11] stated as follows:

> ***"He who alleges must prove that allegation. This principle is so elementary, the court has had on a number of occasions to remind litigants that it is their duty to prove their allegation, of course it is a principle of law that he who alleges must prove the allegations."***

4.24. The Plaintiff has made assertions that the Defendant failed to provide her with earmuffs and on several occasions, she was asked to go and work without earmuffs. The Plaintiff has however not provided any evidence to show that she actually requested for the earmuffs and on several occasions, the Defendant failed/neglected to provide, the earmuffs over a period of 3 years.

4.25. On the other hand, and as the evidence on record will show, the Plaintiff under went a safety training and was provided with PPE. Additionally, the Defendant has exhibited issue record cards on pages 5 to 10 of the

Defendant's Bundle of Documents which shows that there was a a laid down procedure to request for PPE, and in an event that any of the items were lost, the Defendant could also replace upon production of a police report.

4.26. The Plaintiff has not produced any such evidence to show that indeed a request was made and the Defendant neglected to provide the earmuffs. I am of the considered view that the Plaintiff has failed to prove its allegation that the Defendant breached its duty of care owed to the Plaintiff and I cannot therefore, find that the Defendant was in breach in the absence of proof.

4.27. Furthermore, Dr. Phiri's (subpoenaed witness) testimony that the Plaintiffs condition was called by allergic reactions has discredited the Plaintiff's testimony that her condition was caused by noise from the mines. The Plaintiff has not proved that the allergic reactions suffered emanates from the Defendant's environment. It is Dr. Phiri's testimony that the Plaintiff's condition of allergic rhinitis is actually hereditary and such allergies may be triggered by change in weather, irritants in environment and viral infections. I therefore, find that the Plaintiff's claim that the allergies are as a result of the Defendant's failure to provide proper working conditions/environment is speculative and not substantiated.

4.28. It is clear that the Plaintiff has suffered injury however, the injury/damage caused is not attributable to any acts or omissions of the Defendant and I do not find the Defendant liable in negligence.

4.29. It is not in dispute that the Defendant had an obligation to contribute to the Workers Compensation Fund as the definition of a worker in the **Workers Compensation Act** includes persons under a learnership. The question I am faced with is whether the Defendant is liable to compensate the Plaintiff for its failure to contribute to the Workers Compensation Fund.

4.30. A worker can be paid under the Workers Compensation Act when they suffer a disability due to an accident that occurred in the course of their employment. In order for a worker to be compensated, the injury should happen while a person is performing their employment duties.

4.31. The Plaintiff has failed to prove that the injury happened in the course of carrying out her duties at the Defendant's mine. In the absence of proof, I cannot find the Defendant liable to compensate the Plaintiff.

4.32. In dealing with the issue to do with severance pay raised by the Plaintiff in its submissions, I concur with the Defendant's argument that this claim by the Plaintiff at submission stage is misconceived and misplaced as the scope of the dispute before this Court is defined by the pleadings.

5. **CONCLUSION**

5.1. In light of the foregoing, the Plaintiff's case fails based on the grounds advance above.

5.2. Each party is to bear its own costs.

5.3. Leave to appeal is granted.

Delivered at Lusaka on the 18th day of February, 2025.

S. CHOCHO

HIGH COURT JUDGE