



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1801 OF 2003**

BETWEEN:

SACHA'S BAKERY LIMITEDPLAINTIFF

- AND -

ESCOM LIMITEDDEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Dzonzi, of Counsel for the plaintiff

Mr Msowoya, of Counsel for the defendant

Mrs Katunga – Official Interpreter

J U D G E M E N T

Manyungwa, J

INTRODUCTION:

The plaintiff, namely Sacha's Bakery Limited by its Amended Writ of Summons claims damages and loss of business and costs of this action following a fire that broke out at the plaintiff's bakery which resulted in the building completely burning out including the property in the said bakery. The defendant namely, Escom Limited denies any such claim. The plaintiff is a limited company situate in Limbe, Blantyre and was, engaged in the business of making confectionery using electricity supplied by the defendants. The defendants are a limited company engaged in the business of generating, transmitting and distributing electricity throughout Malawi. The plaintiff was represented by Mr Dzonzi of Kainja and Kadwa while the defendants were represented by Mr Msowoya, of Wilson and Morgan.

PLEADINGS:

The plaintiff by its Amended Statement of Claim pleaded as follows:-

AMENDED STATEMENT OF CLAIM

1. The plaintiff is a Limited Company situate in Limbe, in the City of Blantyre, Malawi engaged in the business of confectionery using electricity supplied by the defendant.
2. The defendants are a Limited Company engaged in the business of generating, transmitting and distributing electricity throughout Malawi.
3. By a written Agreement the plaintiff entered into an Electricity Supply Agreement with the defendant for the supply of electricity with a stable supply save for acceptable fluctuations.
4. That the said agreement was also governed by the Electricity Supply Regulations.
5. That in breach of the said Agreement the defendants negligently allowed excessive voltage to be supplied to the plaintiff's bakery thereby causing a fire that destroyed the entire bakery.

PARTICULARS OF NEGLIGENCE

- a) Failure to note and correct the loss of one phase on their three phase supply system.
 - b) Failure to constantly inspect the plaintiff's premises to ensure compliance with safety standards. In the alternative the plaintiff shall plead
 - (i) Breach of Part 1 Section 6(b) of the Electricity Regulations and Part II Section 15(i) (a)(ii) of the Electricity Wiring Regulations
 - (ii) **Res Ipsa Loquitor**
6. That by reason of the matters aforesaid, the plaintiff has suffered damage and loss.

PARTICULARS OF DAMAGE

- (i) Burnt Building.
- (ii) Burnt bakery ovens
- (iii) Burnt bakery accessories
- (iv) Burnt and damaged motor vehicles spares

WHEREFORE the plaintiff claims:

Damages to be assessed
Loss of business

Costs of this action

The defendants in their defence pleaded as follows:

DEFENCE

1. Paragraphs 1 and 2 of the Statement of Claim are admitted
2. The defendant refers to paragraph 3 of the Statement of Claim and State that the Supply Agreement was subject to Section 19 of the Electricity Act 1998 whereby the defendant is excused from constant supply of electricity where the defendant cannot maintain such constant supply of electricity to causes beyond its control.
3. The defendant refers to paragraph 5 of the Statement of Claim and denies being negligent as alleged or at all. The defendant also denies being in breach of any regulations as alleged or at all. The fire was wholly caused or contributed to by the negligence of the plaintiff and its servants.

PARTICULARS OF NEGLIGENCE

- 3.1 Failure to note and/or report loss of supply (if there was any loss of supply, which is denied) on one of the phases in time.
- 3.2 Continuing to run the subject oven when in fact only two supply phases were working at the time.
- 3.3 Covering the subject oven with spongy acoustic flammable material.
4. The alleged loss and damage are not admitted.
5. Except as hereinbefore expressly admitted the defendant denies each and every allegation of fact contained in the plaintiff's Statement of Claim as if the same were herein set out and traversed seriation.

THE EVIDENCE:

Both the plaintiff and the defendants called their witnesses to testify during the trial of this matter. The plaintiff called 4 witnesses whilst the defendants called 2 witnesses.

THE PLAINTIFFS CASE:

PW1 was Mr Anderson Milli of Mpumila Village, T/A Mpama, Chiradzulu District. The witness adopted his written statement in which he stated he was employed by Sacha's Bakery, the plaintiff herein, as an overall supervisor in the bakery, and that he commenced his work with the plaintiffs in 1993 and then stopped working for the plaintiffs in 1999 before he rejoined in 2000. On 6th January 2003 the witness stated that, he reported for works at 17:00 hours. He further stated that his shift would start at 18:00

hours but that he used to come early to facilitate handover with his colleagues who had been working during the day. Further, PW1 stated that the plaintiffs had an electrical technician who was working from 06:00 hours to 18:00 hours everyday. On the material day, PW1 said, he found the said technician and that before commencing his shift PW1 checked all the machinery and found that the said machines were in working condition. That PW1 then informed the technician that all was well and the technician left.

The witness said from 17:00 hours, on the material day they started their shift till 19:20 hours when he noticed that the lights were dim, and that it was raining outside. PW1 said then the machines stalled for about 5 minutes and PW1 went to switch off all power points except the lights. After 10 minutes the witness switched on the mixer, and when he noticed that it was working, he switched on all the ovens which worked properly. At this juncture, PW1 stated, that he started to smell a strange smell like a burning cloth. The witness said he checked the oven and saw that everything was on fire. The witness stated that he noticed the cable that brought power from the Escom board was burning with the fire moving towards the motor on the oven. The witness said that he rushed to switch off the machines including the main switch. By this time it was still raining outside, and the whole oven was on fire. PW1 said that they had fire extinguishers but they were unable to use them, and that they did not have any means of communicating with the electrician at night, but that they could communicate with the Managing Director, through a telephone at the BP Filling Station. The witness added to say that it was not the first time for the machines to stall in the factory and that sometimes it would go on for 3 hours and that the technician used to come inspect the system.

In cross – examination by Mr Msowoya PW1 told the court that as a bakerman he was working at the bench, but that later he was promoted to a bakerman (supervisor). When asked as to what his responsibilities were, the witness told the court that he was supervisor and that he was responsible for baking bread, and that there were two shifts and there were two supervisors. The witness said as a supervisor he was supposed to oversee that everything in the bakery was in order. PW 1 told the court that after the accident he gave a statement, but that he could not remember the person he made the statement to. The witness said that he could not remember giving a statement to a representative of the Malawi Electricity Council because different people were coming at different times. The witness told the court that after the accident most of the staff including himself were at their homes

and that sometimes when people came to the premises they found different people. PW1, however admitted that he was one of the sources. The witness further admitted that it be recorded that fire begun from one of the ovens, and that this particular oven was covered by something like cotton or wool. PW1 explained that the use of this sponge - like material that looks like cotton or wool was to reduce the heat. Further, the witness admitted that in his witness statement he had said that the machines stalled for about 5 minutes on the material evening and that he then went to switch off all the mains (power points) except the lights. When asked whether he found out what the problem was with the machines, the witness told the court that the reason was that there was low voltage and so after 10 minutes, he switched the said machines on, checked the mixer, which according to him, consumes a lot of power and he found it to be working properly. The witness further told the court that it took him 5 minutes to realise that the machines had stopped. PW1 further told the court, when asked as to what changed in those minutes to switch on the machines again, that the lights came out forcefully. When asked whether he was familiar with electricity gadgets and whether the mixer was a single phase or three phase, he said it was three – phased. The witness said when he switched on the mixer, it did start working.

PW2 was Mr Helmoth G. Mliner, Managing Director of Power – Co Engineering (PVT) Limited, P.O. Box 2351, Blantyre, and that he told the Court that he resided at NY 360, Nyambadwe. The witness told the court that he did conduct investigations at the plaintiff's premises at Sacha's Bakery in 2003. He adopted his witness statement in which he said: That the main business of his company, Power – Co Engineering (PVT) Ltd is Consultancy in electrical and Electro – Mechanical and Industrial Contracts, and that as a company they had done a lot of work and undertaken a lot of assignments for and on behalf of the electricity Supply Company of Malawi Limited, which dated as far as 20 years ago. The witness also stated that they had also undertaken assignments for Ilovo Limited and other small clients. That their job, also involved carrying out investigations into electrical or electro – mechanical fire accidents.

The witness further stated that on 8th February, 2003 his company was engaged to investigate and produce a report on the fire accident that gutted down Sacha's Bakery in Limbe. The accident occurred on 6th January, 2003 at about 19:00 hours. The witness stated that their report, which came out one month after the accident only covered facts as observed on that day. That the main purpose of their investigation was to establish the main cause

of the electrical fire. The witness stated that they reached the conclusion that the cause of the fire was external, and that the electrical oven connected to the three phase and neutral system of ESCOM Limited showed to have received very high current thereby causing loss of one phase to the grid. That this in turn caused the cooling fan to overheat creating a short circuit as the amperage increased and set it on fire. The witness further stated that all the other details and particulars observed were contained in their factual report, which was submitted to Sacha's Bakery.

The said report was admitted in evidence and marked as exhibit "P1". The said report read as follows:-

**POWER – CO ENGINEERING (PVT) LIMITED
BOX 2351
BLANTYRE, MALAWI
SURVEY
CONDUCTED
AT SACHA'S BAKER
LIMBE PREMISES
PROPERT OWNERSHIP BY MR RIAX JAKHURA**

...

Evaluation after survey into the possible cause of the privately owned company premises which burned on the 6th January, 2003 at approximately 19:00 hours in normal weather conditions. This property was purchased several years ago and is situated along the Limbe road, opposite the Okhai Shopping Centre

DATA/FACTS

The property is connected to the Escom LV Grid which is the standard four wire overhead line secured to ESCOM's wooden poles and tapped off from this three phase and neutral line by means of armoured PVC cable to the properties by a four core cable leading to the cut out and meter in the meter Board (Standard type). From there, the supply is routed to the mains distribution Board which is positioned in the same switch room prior to the fire. This distribution Board was semi – locked within one metal enclosure.

The wiring within the premises seems to have been in an average working condition prior to the fire. No hot melting points could be found in the wiring system which leads to the

conclusion, that no act of sabotage or deliberate setting of the fire was done by man. The electric oven however connected to the three phase and neutral system seemed to have had a very High Current flowing through the system and seemed to have caused the loss of one phase to the grid, which in turn seemed to have made the cooling fan motor to over heat, creating a short circuit as the amperage increased, and set it on fire. This in turn seemed to be the cause of the outbreak of the fire in the surrounding area (consequential action + consequential loss of the sub – structure and property within)

FINDINGS

The line tap connecting the live wires from the tumble wire with the 16mm single core supply were leading to the cut – out fuse unit was found burned off but otherwise no damage could be found to the cut – out fuse unit or the Escom meter except faint traces of extreme heat presence to the exterior of the two units. The distribution board on the same side of the same wall was however partly and the rest completely destroyed of the electrical appliances and internal wiring of the premises. No preconditioned heat spot could be found inside the premises which should eliminate the suspect of a present and or staged fire.

It is however traceable, that a very high external current has passed through the electrical system which should be the possible cause, which led consequently to the fire.

CONCLUSION

Considering all the above, it appears that a very high external current has passed through the system and started the fire at the systems weakest spot which consequently led to the total destruction of the premises inclusive of all its contents, a detailed list to be provided by the owner.

Surveyed, tested, examined, prepared and certified and believed to be a true and correct report by:

Signed
Mr H. G. Mliner,
Managing Director

Power – Co Engineering (PVT) Ltd
P.O. Box 2351
Blantyre
8th February 2003

The witness explained that when he talks of LV grid he means Low Voltage Grid i.e. C 380 – 400, and that this is standard Escom supply to premises requiring three – phase connection, and talking of three – phase he said it meant that you have three live wire(s) plus a neutral. PW2 further explained that ‘armoured’ PVC means the insulating sheet, a mechanism to protect the cables from damage. When asked to explain how the supply is routed the witness explained that the supply is routed to the mains distribution board, that the armoured PVC takes the power to the Escom meter and then to the consumers Distribution Board. Further the witness explained that when he says in his report that there were no hot melting points which could be found, he simply meant that he did not find any sign of sabotage. As to the probable cause of the accident, PW2 that it could be as a result of Escom wires touching, lightening or tree branches.

In cross – examination by Mr Msowoya PW2 told the court that he is a holder of a degree in Electrical Mechanical Engineering which he studied in Austria. The witness told the court that although he did not bring such certificate to court, he had been in employment with Illovo for 14 years. When asked whether, if there is a short circuit that would mean that there will be a high current, the witness answered in the negative. He however explained that when there is a short circuit then current increases. When it was put to him that if there is a short circuit like in a pressing iron, the fuse will blow out because the said fuse can not bear the high current, the witness answered in the affirmative. PW2 admitted that if there was a short circuit in the oven the current was going to increase. When asked how the supply is connected to the premises, the witness explained that from the 4 wire overhead line the supply is routed through the tumble wire which takes the supply to the premises, and then the underground cable (armoured cable) which takes the supply to the metering board, and then from the metering board to the distribution board. When asked as to where the transformer was situated, the witness told the court that there was no transformer anywhere near the plaintiff’s premises. The witness however admitted that power, or supply is sourced from a sub – station, but in this scenario he did not consider where the transformer was, and that his report was complete, without considering the transformer serving the premises. The witness further explained that the transformer was irrelevant because according to

his expertise, Escom was responsible for the supply of the mains (electricity) up to the meter, and further that there was no cause to check for the transformer since power at the time of his investigation had been switched off, and as he was investigating Sacha's bakery, the transformer was irrelevant. The witness admitted that his investigation therefore was from a narrow perspective. When it was put to him that the underground line is not in any way connected to the overhead line, and that instead it was connected straight to the sub – station, the witness replied that he was only investigating Sacha's Bakery. The witness told the court that looking at the report he however did find melting conductors, but when asked as to why he did not include this finding in his report, there was no answer.

When asked further, as to whether in a situation where if Escom loses one phase on a three phase supply, whether that would only affect one customer, the witness replied that it would depend on the circumstances, and went on to explain that if the said one phase is lost on the transformer, then it would affect other customers or consumers. PW2 further told the court that if you have a three phase machine and one phase is lost, and electricity is switched off, then after 10 minutes the machine is switched on again and the lost phase is not replaced, the machine would not start. PW2 admitted that he went to the plaintiff's premises after one month but explained that that was the date of the request by the plaintiff. The witness told the court that the wires in the premises were standard wires, and that to him it meant there was nothing wrong. When asked whether he was able to establish the loss of a phase, the witness told the court that he was not at the scene before, so he could not establish the cause of the fire. However when asked to explain the last part of the report, and what made him to think that there was high external current, PW2 told the court that it was the condition of the mortar, and the way it was damaged that indicated that there was high external current. When asked why, the witness said it was assumed, and when pressed further that yet there was a fire and fire begun at the mortar and whether that would have an effect as to what started the fire, the witness flatly said no.

In re – examination, when asked as to what were his terms of reference, and why he did not inspect the transformer, PW2 said since Escom power is coming from the transformer through the over head wire (lines), then there was no need to inspect the same, and that he could only have been compelled to inspect the transformer if the over head wire(s) were damaged or the tumble wires were damaged, but that in the instant case, they were not. PW2 further told the court that if there was a short circuit within the

premises it would have the effect of a high current, and if there was high current, the mortar protection equipment would trip – off and if that protection fell – off, then the Escom fuse would rapture. PW2 said that he arrived at the conclusion that there was high external current because the mortar ruptured and that from his knowledge, this would not have been caused by any other cause other that there was high external current. The witness further told the court that in his investigations he found melted conductors, but that this was so because, they were caused by the external fire(s).

PW3 was Mr Mike Palmer, Managing Director of Glow – Lite Electrical, a firm of Electrical consultants, of care of Box 31287, Blantyre. The witness adopted his own witness statement, in which he said. That on 6th January, 2003 there was a fire accident at Sacha’s Bakery in Limbe. After one week, on 13th January, 2003, he was requested to investigate and file a report on the cause of the fire as requested by the Managing Director of Sacha’s Bakery. The witness stated that he investigated the cause of the accident and concluded that there was a power surge on one phase of the three phase wire supply to Sacha’s Bakery. Escom lost this one phase, consequently the three phase mortar started drawing more amps causing a short circuit and a heavy spark that led to the fire. The witness stated that it was external over – supply of power that caused the fire.

The witness also stated that he inspected the wiring of the building and found it to have been done professionally and safely. Lastly the witness stated that he did not include this in his report because it was not part of his mandate.

The report Exhibit P2 which PW3 issued after his investigations read as follows:-

Glow – Lite Electrical
P.O. Box 31287
Blantyre
Malawi
Central Africa

To: Harlod Chiwaya
Insurance Loss Assessors

Dear Sir

REPORT OF ELECTRICAL FINE DAMAGE AT SACHA'S BAKERY

I have inspected the whole Bakery machine and have found out the cause of the electrical fire on the particular oven which have destroyed the whole building and Speedy's ware house.

1. Escom had lost one phase where the oven was working and the 3 phase motor had starting to draw more amps and the fire caught the ceiling board and it was very uncontrolled that the fire broke loose and the whole building was on fire and the damage is very extensive. I therefore conclude my report that the cause of the fire was power lost on one phase.

Signed

Mike Palmer
Managing Director

In cross – examination by Mr Msowoya PW3 said that he was an electrical man, and that he had City and Guilds Part II which he obtained at Lilongwe Technical School, and also that he was a certified contractor by Escom. The witness told the court that the plaintiff asked him to go and survey the place and if he could then give a report as to the cause of the fire, and that when he finally came up with the report he sent it to the Insurance Loss Assessors. He however denied that he did not know that the report was for insurance purposes, and also said he did not know a company known as Burco Engineering (Pvt) Limited. PW3 however said he knew the owner of plaintiff bakery as Riaz Jakhura, but that he did not know a company known as Power – co Engineering. When asked as to what he meant when he said that he investigated the cause of the accident and concluded that Escom had lost one phase, PW3 explained that in a three phase mortar you have three phases, and when you lose one phase, the mortar can still run on two phase albeit slowly, and when it continues to run it just explodes. So when PW3 checked thoroughly, he found out that one phase was gone and the mortar just blew off its end cover and then it sparked. The mortar was totally blown – off.

The witness further explained when asked that a spark ignites, and the difference between a spark and a fire was that before you get a fire you get a

spark, and that this was evident from the way the mortar was burnt, and that you could tell whether there was a short or a fire. The witness further explained that a fuse could blow – off, if a phase is overloaded, and that if you have a three phase mortar and then one phase is lost, the mortar would blow – off. In case of a three phase mixer, if it is on load, it would be easily cut or you burnt - off. The witness, when asked whether in the case of a three phase, the mixer would operate normally said that it depends. The witness told the court when asked as to how he did his investigations that he went to the scene of the accident and found the winding and saw that it was a three phase and that he drew his conclusions from the winding because according to him, anyone can draw conclusions from the way the winding looks so he could tell depending on the winding. PW 3 further explained, when asked how a high current could cause a short circuit that, the winding, say of a motor, only has a certain amount of amps or amperage it can cope with, otherwise the motor blows – off. The witness said a high current could cause a shorting. The witness repeated that the motor started the fire. When asked whether he inspected the sub – station, the witness said that he did not because he had nothing to do with Escom, he added to say that there was no phase on the motor and that the motor was using two phase, hence the subsequent fire.

In re – examination, the witness told the court that a high current would cause a short circuit and went on to explain that if for example, you pass a high current on a conductor of say 5 amps and the current is more than 5 amps, the conductor begins to overheat, or it may immediately begin to overheat. PW 3 further explained that he concluded that the motor exploded because of high current and for the reason that if one phase was lost, the motor would move slowly, as a result, it would start drawing a high current because there is a high resistance, and so the motor would explode. This he said is what happened in the instant case. When asked as to what led him to say that the witness said it was experience. The witness said that the phase that was lost belonged to Escom and that it was not possible for a motor to generate its own power because the motor feeds on the power which drives it mechanically.

The witness further explained that he did not inspect the sub – station because on that particular day there was no power, but that when he inspected the mortar, the way it was split, it showed that it run a very high current.

PW4 was Mr Oswin Kamangira an employee of the National Electricity Council. The witness told the court that he works as Council Inspector and that his job description included inspections of electricity accidents, and monitoring electrical contractors. The witness told the court that he was aware of the accident at the plaintiff's premises and that he became aware of the same because of an announcement that was made on the radio and also in newspapers. The witness said that when he heard this, in accordance with his mandate, he went to Sacha's Bakery in Limbe to do some investigations. PW 4 said he went to the scene the morning following the accident and that the objective of his investigations was to investigate for purposes of his employer's official records, so that if there were any disagreements between the consumer and the supplier his office could always come in to solve the same. The witness told the court that they usually check the extent of the burning, the type of insulation, and if the building or the wiring was in compliance with the electricity wiring. The witness said they also check to see what was affected, they also check the type of installation, i.e. if the building had earthing system. PW4 said his findings on the installation of earthing was that the earthing was there and that everything was done correctly. The witness also said that they check for break – circuits or tripping – off and that his findings were that the isolator tripped – off. The witness also told the court that they check for the condition of the incoming power – supply which is also part of the undertaker which is Escom. The witness told the court that he found out that all the devices for the undertaker were completely burnt. The witness also said that he checked on the eye witnesses, because he wanted to find out the behaviour of the witnesses before the accident. The witness said that the building was supplied with a three – phase and on the three phase supply, the witnesses told him that one side of the building had lost supply the previous night while the other side had abnormal brightness of the lights, and later the witnesses said they saw some smoke coming on top of the oven. PW4 told the court that when he checked the top of the oven he found there was a mortar, which had blown – off. The witness said this mortar was being used by one of the ovens and that the blowing – off of this mortar was as a result of intensive heating through the motor itself (the winding inside the motor). This mortar was fixed on one of the ovens and that this is where the smoke begun. The witness said this mortar was originally fixed with three strands, but that due to the blowing – off one strand was struck – off. The witness tendered in court some of the pictures that he took from the scene. The witness said amongst other things the pictures especially picture 4 showed that the cut – outs did not operate normally, and that the Escom meter was a three phase meter and because of the failure of the cut – outs to disconnect power

supply, the meter itself and the said cut – outs were burnt. The witness told the court that they found out that the fire was caused because the defendant had violated National Electricity Council's regulations as undertaker because the defendant did not give constant supply, and that the cut – outs failed to isolate the fault inside the building. The witness said that one of the regulations requires an undertaker to provide constant power supply. The witness said the blowing – off of the motor begun after the plaintiff had lost power on one side of the building and that if the defendant had given constant power, the fire would not have been caused.

In cross – examination by Mr Msowoya, PW4 told the court that he is the Council's Inspector and that he does investigations of electrical accidents, and electrical installations. The witness told the court that he holds a Diploma in Electrical Engineering from the Polytechnic, University of Malawi and a Malawi School Certificate in Education. The witness repeated that when he investigated the wiring at the plaintiff's bakery, he found that the wiring was done correctly and that there was earthing and that the isolator tripped. The witness said that his conclusion after the investigations was that the installation and wiring was properly done as required by the regulations. The witness further told the court that according to his knowledge, apart from the wiring, there are protective devices that should be in an installation, like each circuit has to have a protective device called Miniature Circuit Breaker, and that all circuits are protected by an ELCB at the distribution board. It is called ELCB meaning Earth Leakage Circuit Breaker, and when the load is big MCCB is used, which means Modern case Circuit Breaker. Then on the equipment itself there is supposed to be an isolator (This is a circuit breaker near the equipment). The witness further explained that indeed he had said that the isolator tripped, and that this was on the oven which was used for cooking bread, and that it was at the mortar. When asked which of the protective devices would act first if they are all working normally the witness told the first and if it fails then the ELCB has to break – off and if this fails then the MCCB has to trip – off. The witness further explained that if the isolator nearest to the equipment has successfully tripped, the ELCB and MCCB would only trip if the problem inside is severe, otherwise no ie if there is a leakage, then the ELCB would trip. The witness further told the court that if a circuit breaker nearest to the equipment trips it means there is a problem regarding the equipment like the system in a case where there is shorting or sometimes it depends on the design but normally it is on these short circuits. The witness said that his findings were that the installations of the undertaker were completely burnt which he explained as meaning that the cut-out from the meter was

completely burnt. The witness explained that this cut out is a fuse, which has to disconnect supply when there is a problem within the building itself. The witness told the court that cut – outs are placed before the meter. The witness further explained that cut – outs are not transparent except when its small (small fuses) but that when it is the cartilage type it is not.

PW4 maintained his earlier statement that the cartilages (cut – outs) were completely burnt. He further told the court that the said cut – outs failed to operate to isolate the fault, which as a consequence, led to the blowing – off of the motor. When asked how, if the cut – out, was completely burnt, the witness testified that if there is a severe problem through the distribution, the fuse or cut – out is supposed to isolate the problem. PW 4 further told the court that when he looked at the cut – outs he found that they were completely burnt due to the fire that emanated from the inside. He further said when he arrived at the scene, the fire had died down but that the cut – outs and the meter were completely burnt, which led him to the conclusion that since the fire begun from inside, then if the cut – outs were working properly, they would have isolated the problem from the rest of the building, which was not the case in the instant case.. The witness admitted that he knew that a mixer rotates to make the dough and that it draws a lot of electricity. However PW4 explained that on some other equipments there are isolators which are placed closer to the equipment and that these do trip –off whenever there is a problem, and that this is true of any electrical equipment that draws a lot of power. The witness told the court that according to his investigations the mixers and the ovens at the plaintiff’s premises were properly loaded, since he was assured that the plaintiff had declared the load to the undertaker. The witness repeated that his finding was that the fire had started at the mortar, which was specifically for the oven. The witness when shown a fuse explained that the said fuse was similar to the ones at the plaintiffs premises except the ratings. He further explained that there is a link inside the fuse which, if disconnected successfully, is broken and that then means that no current would pass through it. That this link cannot readily be seen from the outside. Further, the witness told the court that the mortar has windings of amateurs which provides the poles which then in turn energises the motor, and that a motor therefore, is a driving device. (it drives something). The witness further said the windings are conductors inside a motor. PW4 said that when he examined the motor he discovered that the windings, meaning the conductors, were burnt. The witness explained that the conductors would therefore burn if they are not receiving enough power supply, and that in a

rear case of power supply, and that in a rear case of the conductors touching, there would also be burning, and that this is called a short – circuit.

In cross – examination, PW4 told that if the oven is overloaded and the isolator trips, then the motor would be isolated, and that the motor would not explode except in a case where the neutral is still leaking supply. The witness said that usually the isolation is on supply. Further, the witness explained when asked on that leakage in a three phase wiring where you have red, blue and black wires, and a fourth wire, called a neutral, and that if current goes through this neutral then that is called a current leakage. PW4 said that there a number of things that cause leakage like loss of a neutral from incoming supply, or if the equipment is causing short circuit and current goes through the neutral cables, or the loss of one of the connectors and if the cables are overheating and they lose the sheath. PW4 explained, when asked as to what would have happened if the cut out had successfully worked, that the problem from outside the plaintiffs building would have been isolated and the fire would have been prevented. Put simply, that if all the cut – outs had worked, the building would have been isolated as there would not have been supply of electricity to the building, or the building would not have been energized. The plaintiff then closed its case.

The defence called 2 witnesses. DW1 was Mr Patrick Jumbe, of care of Escom Limited Box 2047, Blantyre. The witness adopted his witness statement in which he stated that he resides at Nyambadwe in Blantyre and that he worked for the defendant as its Safety Liason Officer and that his duties included the following.

- i. Conducting safety training for staff
- ii. Conducting public safety awareness
- iii. Carrying out investigations into accidents involving staff, or members of the public or their properties.

At the time of the hearing, the witness stated that he had worked for the defendant as a Safety Liason officer for 8 years. The witness further stated that he holds a Diploma in Electrical Engineering from the Polytechnic and a Malawi School Certificate of Education. The witness further stated that he had also participated in several seminars and workshops relevant to his job. DW1 stated that on 6th January, 2003 at about 19:15 hours he received a telephone call from the defendant’s Limbe Faults office, informing him that they had received a report of Fire at the plaintiff’s bakery in Limbe, and that the plaintiff’s bakery was receiving power from the defendant’s supply line.

Upon receipt of this report, the witness went to the plaintiff's bakery in Limbe and upon his arrival at about 19:40 hours, he found that the fire was still smouldering and that he quizzed the people around who were mainly employees of the plaintiff at the bakery as to what had transpired. The witness further stated that he also conducted a physical inspection of the premises and that the following were his findings:-

- a) That the fire started at around 18:30 hours.
- b) That at the time the fire begun, there was baking in progress and that the employees had been locked up inside the bakery and that it was customary for them to be locked up in the evenings.
- c) That the fire had started from one of the ovens in the bakery.
- d) That there had been no high voltage in the area.
- e) That there were no electricity burns or short-circuit marks on the meter and distribution board.
- f) That the distribution board, which was located outside the plaintiff's bakery, was burnt with flames from the burning refuse under it.

The witness further stated that after his investigations, he prepared a report for the defendant's Regional Manager. The said report, entitled 'Fire accident at Sacha's Bakery' was tendered and marked as exhibit D1, and was in the following terms:-

From: Safety Liaison Officer
To : The Regional Manager (SES)
CC : Chief Safety Officer
: Legal Services Officer
: Senior Engineer (Limbe)
Date: : 11th April, 2003

FIRE ACCIDENT AT SACHA'S BAKERY

There was a fire accident at Sacha's Bakery in Limbe in which the bakery materials were burnt. The fire started at around 18:30 hours and I was at the site at around 19:40 hours where I found the following.

FINDINGS AND OBSERVATIONS:

- There was baking in progress when the fire started.
- Employees of the bakery were locked inside and were rescued by security guards upon noticing the fire.
- The fire begun from one of the ovens inside the building

- There was no high voltage around the area.
- There was no electricity burn or short – circuit marks on the meter or distribution board.
- The meter and distribution board, which is located outside the bakery, was burnt from the physical fire that caught up with the material wasters dumped under it.

CONCLUSION

Escom is not liable for the fire accident.

In cross – examination by Mr Dzonzi for the plaintiff, the witness agreed that it was true that before the defendant connects power to any consumer, the defendant has to be satisfied that the said consumer has satisfied safety standards, and that to ensure this the defendant usually carries out a pre – connection inspection, and if it is found that the wiring does not comply with the pre – connection inspection then the defendant does not connect power. The witness told the court that in the instant case, the plaintiff’s bakery qualified for power connection. The witness told the court that in a place like the plaintiff’s bakery, the wiring system provides a protection at least in three places and that in case the protection system fails to work there is a second protection at the distribution panel and that if the protection at the distribution board does not work, the defendant installs cut – outs which is the third protection.. When asked as to what was the status of the fire when the witness visited the plaintiff’s bakery on the material day, the witness told the court that the fire was inside the building and that he saw the fire in the building and that the building was on fire. He told the court that he arrived about 50 minutes after the fire started. DW1 told the court that he revisited the plaintiff’s bakery the next day, and that it was on the 1st day, the day of the fire that he found smouldering because on the 2nd day most of the fire had been put out. The witness told the court that the fire was put out on the 1st day of the fire, and that the power was disconnected at the source meaning the transformer that supplied power by removing the fuses. The said fuses at the transformer were intact DW1 further testified when asked whether sometimes a situation arises where such fuses would blow – up, and he replied in the affirmative and gave the example where there exists overload conditions. The witness explained that on overload is when the limit of fuses is surpassed i.e. when the consumer’s power connection is more than the fuses can permit. The witness explained that if you lose one phase and only two phases were working, the fuse would remain intact. DW1 said that under normal circumstances the motor protection system should have worked if there was a problem but that in this instance he never

checked whether it had worked or not. The witness said he only checked the distribution board as this is where the defendant's supply ends, and that it was possible to come up with a conclusive report without checking the distribution board. The witness told the court that the cause of the fire was an internal problem as fire was seen burning in the building, though this was not included in his report. He also admitted that his conclusion was different from that of the National Electricity Council. The witness told the court that according to his report there was not high voltage and that he measured the voltage using a voltmeter after the fire, but that he was unable to say as to what the state of the fire was. DW1 however told the court that if high voltage occurred, and then normalizes, you could tell because there would be damage to the consumer equipment, i.e in the case of a transformer it would cease. The witness said that he knew that the defendant was not liable because the transformer, quite apart from the plaintiff's bakery, also feeds other consumers. The witness said that he measured voltage because it is one of parameters of electricity.

The witness when asked as to what would happen to a three phase motor when one phase is lost, said that resistance would increase, and thereby generating heat, and that this heat depending on the amount would eat into the insulation and that would cause a short circuit. The witness told the court that an electrical fire would be caused by short circuit and voltage leakage. The witness then said where there is a short circuit, the motor would be isolated, the protection mechanism would trip, and that there are also situations where the motor would blow up due to an electrical fault, such as where there is a short circuit and there is a continuous supply to that motor. The witness told the court that the loss of one phase in a three phased motor would not lead to a motor blowing up. DW1 told the court that the three phase starts from the transformer and that if there was a problem with one phase, the fuses would not blow. The witness admitted that he therefore would not know as a fact what caused the fire as he never investigated the inside of the building but he only heard from witnesses. He however went on to say that the fuses on the motor tripped. The witness further said that if there is an internal fault, the fuses on the distribution board will blow up whilst if there is an external fault, the fuses on the transformer will blow up. The witness said the fuses will only blow up if there is excessive current.

In re – examination, the witness said if a motor is placed inside a burning charcoal, while it is still receiving supply, it would burn, its insulation will burn and because it is still receiving supply, it will blow and that the same

scenario would apply if the mortar is put in an oven. The witness explained that a phase can be lost like when you lose a fuse, because of faults in front of it like short circuit or overload. The witness said you would have a phase lost if a fuse at the cut out is blown, or at the transformer and vice – versa. When you have a fuse loss at the transformer, the witness said, you lose a phase on the line in front of it. The witness said the defendant supplies power up to the cut – out and the distribution board while the main switch and the circuit breaker is the responsibility of the owner.

DW2 was Peter Chisuse Mtonda, who at the time was the defendant's Regional Manager for the South. The witness adopted his statement in which he stated that he resides in Nyambadwe. The witness stated that it was part of his work to receive reports on claims made by customers and to process the claims so received by referring them to a Technical Committee which investigates and assesses the claims. If, after the meeting, the Committee finds that Escom is not liable on a particular claim and the customer still insists that Escom is liable, the matter is referred to him for review with a view to determining whether Escoms is liable or not. The witness stated that in April, 2003, he received a report prepared by the defendant's safety Laison Officer (DW1) Mr Patrick Jumbe on the plaintiff's 'bakery incident'. The witness said he referred the matter to the Technical Committee for investigations and assessment when the plaintiff indicated that it was of the view that the defendant was liable. The said technical committee concluded that the defendant was not liable. However on 27th May, 2003 the defendant received a letter from the plaintiff's lawyers Messrs Kainja and Kadwa, claiming that the defendant was liable. The said lawyers relied on two reports one prepared by Mr Mike Palmer of Glow-Lite Electricity Council. That both of these reports attempted to determine the cause of the fire.

The witness stated that he had worked for the defendant for 20 years, and that he is an Electrical Engineer by profession. He holds a Diploma in Engineering which he obtained in 1979, a Bachelor of Science (Electrical Engineering) which he obtained in 1984 and a Masters in Business Administration which he obtained in 1997. The witness further stated that after going through all the reports, his final assessment was that the defendant was not liable for the accident because no 'fault report' was received from the area on that day, and that no replacement of fuses at the sub-station from which the plaintiff's bakery was supplied, was done. The witness stated that the substation serves a lot more customers apart from the plaintiff's Bakery

and that this shows that the problem at the plaintiff's bakery if at all, was not as a result of abnormality in power supply from the defendant.

The witness explained in court that the report compiled by PW2, Mr Mliner left out a lot, like it did not mention that the defendant was at fault, and it suggested that the plaintiff's premises were supplied or connected through an overhead line yet the premises are connected through an underground cable. Further the witness said that although the report mentions fuses, the said fuses were not blown. As regards the last paragraph of PW1's report which was to the effect that 'a very high external current had passed through the electrical system which should be the possible cause, which led consequently to the fire', the witness said that that could only have happened if there was an abnormality in the power supply. However, the witness admitted in court that if there is a high current, the fuses would blow. The witness explained that when they talk of grid, it meant the defendant's network and that a phase is one of the lifeline that supplies a single phase system or a three phase. The witness further told the court that in Electrical Engineering, when they talk of losing a phase, it means that either a fuse is blown or there is a physical break along the line. So when a phase is lost to the grid it means either the fuses at the meter board or the transformer are blown out. The witness said that there is a fuse before the meter board or at the transformer and if a fuse is blown after the meter board that is not a loss in phase. The witness explained that if there is a phase loss on a low voltage line, there will be total black – out whilst if the system is supplied with a three phase system there would be black – out on one part of the building but if it is a fuse on high voltage, then you get low voltage such as dim lights, and the lights would remain dim until the problem is sorted out. The witness further said only when you have a problem with a neutral would the lights dim and then become brighter. The witness stated that PW1 told him that they noticed the lights becoming dimmer, and then back to normal and when the witness asked PW1 why he has switched on the mixer, PW1 told him that it was because the lights had returned to normal. This, the witness said, was not consistent with a phase loss, because in a situation where a phase is lost, the mixer being three phase, when switched on should not have started. When asked whether the same would apply if a phase is lost whilst the three phase mixer is running, the witness testified that the motor would continue to run by drawing in more current, so either the fuse will go-off or the isolator would go off. The witness however agreed that if a phase is lost the motor would draw up more current, and as a result its speed would get reduced, and that the motor would then try to get to normal speed by drawing more current as a result of which it may heat up in the process.

Where a motor blows up, it does so with an audible sound, a bang and if you are in a room you would not miss it.

The witness further told the court that if a phase is lost through the grid, in order to recover it, technicians have to physically come and reconnect, and if it is a fuse that is blown then technicians from Escom faults have to replace it, but it does not recover on its own. The witness testified that excessive voltage does not cause dim lights, but rather that where you have excessive voltage the bulbs, or the lights become brighter since the voltage is a primary function of the current, so the higher voltage the brighter the bulbs.

The witness told the court that it did not necessarily follow that the very fact that there was a fire meant that the defendant was negligent as the plaintiff's bakery had ovens which are sources of heat, and that fire is caused by heat, and fire could be caused by that. The witness said that as far as the defendant was concerned it never received any complaint from any of its consumers fed on the same grid as the plaintiff.

The witness told the court that an electrical equipment like an oven can start a fire, because an oven must generate heat so as to be able to bake, and heat causes fire. Thus if you put things around it that can burn it can cause a fire, so too a motor.

In cross – examination, by Mr Dzonzi the witness admitted that he never personally undertook any investigation, but he denied that the decision to refer the matter to the technical committee, which subsequently found that the defendant was not liable was based on DW1 Mr Jumbe's, findings. DW2 further said when asked whether the said committee investigated the incident, that he was not 100% sure if they did. The witness said the case was referred to him in writing, and yet when asked as to where the said report was, the witness told the court that it was difficult as he only saw the report of the technical committee immediately the case was referred to him. He however agreed that the defendant would keep a record of such a report. The witness told the court, when asked that when the matter resurfaced as stated in paragraph 6 of his statement, whether he went back to verify, he said that it was at that point that it was referred to him, as a referral case. That is when Mr Jumbe investigated and submitted a report against which the plaintiff appealed. The witness said that he concurred with the defendant's technical committee that the defendant was not liable. The witness further testified when cases such as the instant one occur, the defendant usually carries on an independent investigation depending on the

complexity of the case. When asked whether it would not have been necessary for him to visit the scene, the witness replied in the negative. The witness told the court that their investigations did not tell him personally as to what caused the fire, and that he was not sure if the said investigations revealed to the defendant as to what caused the fire.

The witness however agreed that it is possible to establish the cause of the fire by examining the equipment inside the building as opposed to stopping at the meter board. When asked that Mr Palmer, Mr Milner and Mr Oswin Kamangira of the National Electricity Council all came to the same conclusion that the motor must have been subjected to high voltage, yet the defendant's Mr Jumbe came to a different conclusion, the witness only said Mr Jumbe must have been right. He did not explain why. The witness said that if a wire touches an object i.e. a tree branch there is a high resistance, but the voltage may not get to zero, the voltage will be changing. Thus there will be flickering of supply, but the lights would not go out, instead they will go dim, to normal to brightness. The witness said in the case of a motor, you would hear differing sounds as the motor would be receiving fluctuating power supply. The witness however admitted that in a case where one phase is lost, the motor would be forced to draw power from the other two phases, and so the motor will continue to run, drawing more current, the motor will attempt to attain its normal speed which it will not and it will slightly heat up. The witness explained that residents normally do have a one phase supply, whilst the plaintiff's bakery was supplied by three phase, and that it was possible that there were others connected to the phase that was lost, but loss of a phase should make somebody complain.

The witness told the court, that it is surge arrestors or lightning arrestors that seek to protect electrical equipment from problems from the outside, and that these are not fuses as they operate differently. The witness further told the court that if a tree branch touches a wire, current will go up, while voltage goes down, and that the cut – out (fuses) at source will see an increase in current, and it may blow depending on the rating whilst the one at distribution will not react. The witness agreed therefore that the fuses at Escom meter boxes will be intact and that if you examined them, you would not find a fault, and the circuit breaker at the distribution board will not trip because current will not have increased. The witness agreed that what he told the court came from other peoples' reports, and that the three people who investigated and testified for the plaintiff are probably right.

In re – examination, the witness told the court that it could not be possible to say that a tree was touching the wires because the plaintiff's bakery was supplied by an underground cable except if it was the portion between the plaintiff's bakery and the transformer. Further, the witness said the purpose of an isolator is to isolate the problem. When an isolator trips it indicates where the problem is, which in this case was beyond the motor and the oven. If the problem was coming from the grid, the witness said the isolator would not have isolated the problem.

This was all the evidence that was heard by the court and from this evidence there are certain facts that are not disputed. It is not disputed and this I find as fact that on 6th January, 2003 the plaintiff's bakery known as Sacha's bakery at Yiannkis in Limbe, near the BP Filling Station caught fire, which fire caused damage to the bakery and the machinery inside. What is in dispute however is what caused the fire. And it is this that will pre-occupy the court for the rest of this judgement.

ISSUE(S) FOR DETERMINATION

The main issue(s) for determination by this court are (a) whether the defendant's negligence was the cause of the accident which led to the destruction of the plaintiff's bakery and the equipment (b) whether, if the defendant was negligent, it is liable to compensate the plaintiff in damages.

Before I proceed to venture into my analysis of the law and the evidence, let me place my gratitude on record to counsel for their research and industry which was of immense assistance to the court. I may not however in the course of my judgement be able to recite every submission they made, this will not be out of disrespect, to counsel but it will be due to reasons of brevity.

THE LAW:

A well settled principle of ancient application is "*ei incumbit probatio qui dicit not qui negat*". This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter or fact must prove but he who denies it need not prove it. The party on whom lies the burden must adduce evidence of the disputed facts or fail in his contention. Simply put, he who alleges must prove.

The burden of proof intimately is connected with the standard or quantum of proof. When it has been ascertained where the burden of proof lies, it is necessary to know what evidence is required to discharge it. In contested

actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability in his favour. It is clear that the burden to adduce evidence relates to disputed facts and not those which have been admitted.

And speaking of the degree of cogency which evidence must reach in order to discharge the burden of proof in civil cases Denning J, as he then was, said in the case of *Miller V Ministry of Pensions*¹,

“That degree is well settled. It must carry a reasonable degree of probability, not so high as in a criminal case, but if the evidence is such that a tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not”

The question that one may therefore ask is, has the plaintiff in the light of the evidence proved its case to the requisite standard or was the defendant negligent in the circumstances. According to the learned authors of *Clerk and Lindsell on Torts*²

“The tort of negligence is committed when damage, which is not too remote is caused by the breach of duty of care owed by the defendant to the plaintiff”.

Thus the tort of negligence is committed when the damage is established. The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Put simply, there must exist a duty of care breach of which results in damage being suffered by the plaintiff. In the case of *Blyth V Birmingham Waterworks Company*³- Anderson B defined negligence in the following terms:-

“Negligence is the 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”.

And Lord Wright in *Lochgelly Iron Coal Company V M’Mullan*⁴, talking about negligence, he stated as follows”-

¹ *Miller V Ministry of Pensions* [1947] 2 AllER 794

² *Clerk Lindsell on Torts*, 16th Edition, Butterworths, P247

³ *Blyth V Birmingham Waterworks Company*(1856) 11EX 781, 784

⁴ *Lochgelly Iron Coal Company V M’Mullan* [1943] AC 1 at 25

“In strict legal analysis negligence means more than heedless or careless conduct, whether in omission or Commission; it properly connotes the complex of duty, breach and damage thereby suffered by the person to whom the duty was owing”.

Further, the learned author WVH Rodgers in his *Winfield and Jolowicz on Tort*¹ has defined negligence as follows:-

“Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant”.

Thus, it is not enough for the plaintiff to allege that the defendant has been careless; he must establish that the defendant has been careless in specific legal duty to take care. It is therefore a question of law whether in any particular circumstances a duty of care exists. The leading authority on this aspect of the law is the celebrated case of *Donoghue V Stevenson*². The facts in that case were that the plaintiff averred that she had suffered injury as a result of seeing and drinking contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by the owner of a café, from whom in turn, it had been bought by a friend of the plaintiff. The house of Lords, by a bare majority, held that if the plaintiff could prove that which she averred, then she could have a good cause of action. The decision in the above case by the House of Lords, established two propositions (1) that negligence is a distinct tort and (2) that the absence of privity of contract between a plaintiff and a defendant does not preclude liability in tort. It is also, of course, an undisputable authority for the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user. Although it has sometimes been said that the *ratio decidendi* of the case is limited to this proposition, it is now clear however, the case is an authority for something more. As Lord Normand said in *London Graving dock Company V Horton*³ that:

“The argument for the defender [in the *Donoghue V Stevenson case*] was that there were certain relationships such as physical proximity or contract which alone give rise to duties in law of *quasi – delict* or tort, and that the relationship between the defender and the pursuer [the plaintiff] was not one of them. The decision was that the categories of negligence are not closed and that the duties of care are owed, not only to physical neighbours but

¹ *WVH Rodgers, Winfield and Jalowicz on tort* 17th Edition Sweet and Maxwell, 2006 at 132

² *Donoghue V Stevenson* [1932] AC 562

³ *London Graving Dock Company V Horton* [1951] AC 737

anyone who is ‘my neighbour’ in the wider sense as stated by Lord Atkin”.

Thus, the case of ***Donoghue V Stevenson*** is an authority for opening up new categories of liability but not for disregarding existing ones. The ‘neighbour principle’ was formulated by Lord Atkin as a proposition, but has now become widely accepted as the bench mark on the tort of negligence. Having referred to examples of specific situations or relations in which a duty had been held to exist Lord Atkin stated in ***Donoghue V Stevenson***’.

“In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of a judge...There must be and is, some general conception of relations giving rise to a duty of care of which the particular cases found in books are but instances...The liability for negligence, whether you style it such, or treat it as in other systems as species of ***culpa*** is no doubt based upon the general public sentiment of moral wrongdoing for which the offender must pay. ***But acts or omissions which any moral code would censure can not in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complains and the extent of their remedy. 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. The answer seems to be – persons who are 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”. (***emphasis supplied by me***)

The law further requires that the plaintiff must show that the defendant was actually in breach of his duty to the plaintiff and further that the breach must take the form of an act or omission on the part of the defendant which falls

short of the expected standard of discharge of such duty. In the case of **J. Tenet and Sons Limited V Mawindo**¹ Banda, J as he then was stated:

“Negligence as a tort is only actionable if actual damage is proved. As it was held in the case of **J. R. Munday Ltd V L.C.C.**² by Lord Reading C. J.

‘Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co – exist’

Accordingly, the essential elements of actionable negligence are as follows:-

- a) There must be a duty to take care owed to the plaintiff
- b) There must be a breach of that duty
- c) There must be damage suffered by the plaintiff resulting from the breach of duty”.

See also: **Kachingwe V Mangwiwo Transport Motorways Company Limited**³

In order for a plaintiff to succeed on the tort of negligence against a defendant he or she must prove that the damages he or she suffered was or were a direct result of the defendant’s negligence. See **Kalako V Njoloma**⁴.

Where the action is founded on breach of statutory duty, the plaintiff must prove the existence of the exact statute, which he alleges the defendant breached, and further the plaintiff must also prove that the defendant is guilty of the statutory duty by the defendant and further that the plaintiff is within the ambit of persons envisaged by the statute. See **Murfin V United States Companies Ltd and Power Gas Corporation Limited**⁵, **Harley V Mayoh and Company Ltd.**⁶

In the instant case the evidence on record by the plaintiff is that on 6th January, 2003 a fire broke out at the plaintiff’s premises which resulted in

¹ **J. Tenet and Sons Limited V Mawindo** 10 MLR 366

² **JR Munday Ltd V L.C.C.** [1916] 2 KB 334

³ **Kachingwe V Mangwiwo Transport Motorways Company Limited** 11 MLR 362

² **Kalako v. Njoloma** 9 MLR 389

³ **Martin V United States Companies Ltd and Power Gas Corporation Ltd [1957]** IWLR 104

⁴ **Harley v Mayoh and Company Ltd [1954]** 1 QB 383

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extensive damages to the plaintiff's bakery and machinery. This has already been found as an undisputed fact. PW1 in his testimony told the court that on the material day he had reported for work at about 17:00 hours and after a thorough check, he informed the resident technician that all was well and then the electrician left. Sometime after 19:20 hours on the same day, PW1 saw that the lights in the bakery had gone dim, whilst there was a total black out on the other part of the building. This piece of evidence was not disputed by the defendant and in the absence of any explanation to the contrary it can safely be stated, and I hereby find that black out on one part of the building and the dimming of the lights on the other was caused by lack of sufficient of power supply to that part of the building and loss of the required power supply for the equipment in the bakery to properly function. It must be noted that PW2, PW3 and PW4 were professionals in their field, who conducted their investigations to establish the cause of the fire independently of each other, and yet they all arrived at the same conclusion. PW2, Mr Helmoth Mliner told the court that his company Power – Co Engineering (PVT) Limited was engaged to investigate and produce a report on the fire accident that gutted down the plaintiff's bakery. The witness testified that after their investigation they reached the conclusion that the cause of the fire was external. The witness told the court that the electrical oven was connected to a three phase and neutral system of the defendant which showed to have received very high current thereby causing loss of one phase to the grid, which in turn caused the cooling fan to overheat thereby creating a short – circuit as the amperage increased setting he oven it on fire. Even in cross – examination, PW2 said he arrived at the above conclusion looking at the condition of the mortar and the way it was damaged indicated that there was external current. The witness also told the court that the wiring of the building was done professionally. A similar conclusion was also reached by PW3 Mr Mike Plamer, of Glow – Lite Electrical, a firm of Electrical consultants. His conclusion was that there was a power surge on one of three phase wire supply by the defendant to the plaintiff's bakery and that the defendant lost one phase and consequently the three phase mortar in the plaintiff's bakery begun drawing more amps causing a short circuit and heavy spark that led to the fire. The witness said it was external over – supply of power that caused the fire. Similarly PW4 Oswin Kamangira who carried out the investigation on behalf of his employers the National Electricity Council came to a similar conclusion. The witness told the court that his findings were that the isolator tripped off, and further that all the devices for the defendant were completely burnt out. The witness said that he found that the fire was caused because the defendant had violated the National Electricity Council Regulations as undertaker because the

defendant had failed to give out constant power supply and that the defendant's cut – out failed to isolate the fault inside the building. As a consequence the meter itself and the cut – outs were burnt completely. The witness said if the defendant had given constant power supply, the fire would not have been caused. Further, it is worth noting that while PW2 and PW3 were engaged by the plaintiff PW4 was independently engaged by his employers The National Electricity Council to do the investigation and this testifies to his independence, yet his findings are similar to those of PW2 and 3. The plaintiff's evidence is clearly unlike that of the defendant's witness whose conclusions were only based on one report of an investigator DW1, Mr Patrick Jumbe, who never investigated the cause of the fire and who never went beyond the distribution board. This he admitted in court, DW2 never visited the scene, and so his testimony is based on the report of DW1. Both DW1 and DW2 admitted in their testimonies that they neither established nor attempted to establish the cause of the fire at the plaintiff's bakery. In fact it was only DW1 who went to the scene but never went inside the building nor beyond the meter and board, which according to evidence on record had been burnt completely. Thus, DW2 clearly could not independently, in my view, form an opinion from that of DW1 because he never investigated the incident himself. Unlike PW2, PW3 and PW4, DW1 and DW2 who are the defendant's witnesses did not attempt to establish the cause of the fire, and were both employees of the defendant. Their testimony, especially that of DW2 that merely because the defendant did not receive any report of a fault around the area therefore means that the defendant was not liable is not comprehensible as it is unconvincing. In my view, the mere fact that nobody reported a fault from the area surrounding the plaintiff's bakery cannot in any way disprove the finding of the witnesses for the plaintiff who have enough expertise in electrical matters. In the circumstance of this case, I do find, that the defendant's case is not plausible, no probable. I am however satisfied on the basis of the evidence before me that the fire was caused as a result of the faulty electricity supply by the defendant and I so find. In my most informed opinion the fire did not result from any faulty equipment in the plaintiff's bakery. All witnesses P2, P3 and P4 arrived at the same conclusion, and I am therefore fortified that their explanation as to the cause is probable than that of the defendant. If there was an internal fault as the defendant would have liked the court to believe, the main switch would have tripped, for which I find no evidence. Consequently it is my finding that the cause of the fire was external, and that there was no faulty equipment within the plaintiffs premises nor was there any act of sabotage; the expert witnesses thus agree that there was loss of

one phase, which consequently led to the fire that caused damage to the plaintiff.

In these circumstances and by reason of the foregoing I am satisfied that the plaintiff has proved its case on a balance of probability and I find for the plaintiff. Further, it should be noted that under Regulation 6(1) of the Electricity (Supply) Regulations, made under the Electricity Act it is provided that an undertaker (supplier) of electricity has a duty to declare in writing to the consumer the standard type of current, number of phases, the standard frequency and the voltage at which the undertaker proposes to deliver the electricity to the supply terminals. Further Section 7 requires an undertaker to provide constant supply to the consumer.

The evidence in the instant case is that the plaintiff's bakery was gutted by fire due to loss of one supply phase of electricity, what the experts called 'loss of one phase' to the plaintiff's premises. This consequently led to the three phase motor to draw more power from the remaining two supply phases. This point was indeed conceded by the defendant's witnesses that a three phase motor, upon losing one phase would draw more current. This caused the motor to heat up and eventually set the motor on fire. This evidence, in my judgement, shows that the defendant's power supply was inconsistent, and the fact that nobody reported a fault from the area surrounding the plaintiff's bakery can not in any way disprove the findings of the three witnesses for the plaintiff who have enough expertise in matters electrical. In the circumstance of this case, it is my finding, that the defendant's case is not plausible, nor is it probable. I am however satisfied on the basis of my analysis of the evidence before me that the fire was caused as result of the faulty electricity supply by the defendant as the fire, in my In my most informed opinion, the fire did not result from any faulty equipment in the plaintiff's bakery. All, witnesses PW2, PW3 and PW4 arrived at the same conclusion, and I am therefore fortified that their explanation as to the cause of the fire is probable than the defendant would have liked the court to believe, the main switch would have tripped, for which I find no evidence. Consequently it is my finding that the cause of the fire was external, and that there was no faulty equipment within the plaintiffs premises nor was there any act of sabotage; the expert witnesses thus agree that there was loss of one phase, which consequently led to the fire that caused damage to the plaintiff.

Further the defendant breached its statutory duty to provide the plaintiff with constant power supply as required by the electricity regulations. As it has

been shown by the evidence of the plaintiff it is clear that all the protection gadgets like the cut – outs whose function it is to cut – off power supply in the event of electrical faults completely failed to operate normally, and this again is the evidence of the defendant’s failure to comply with its duty(ies) as is required under Section 19 under Electricity Act. The testimony of PW4 in this regard is very clear, and the defendant never offered any explanation as to why to rebutt the same. The essence of Section 19 of the Electricity Act is to place a positive duty on the defendants otherwise known as the undertaker under the Act to maintain constant supply. In these circumstances, I therefore find, that the defendant is guilty of its statutory duty which failure occasioned loss to the plaintiff.

Lastly, the nature of power supply and its distribution and transmission is the exclusive domain of the defendant and no customer or consumer of the defendant could have in any way avert or remedy the loss of power than the defendant itself. Thus when fire accidents occur due to faulty power supply no person is indeed better placed to explain what exactly happened other than the defendant. Thus, given the plaintiff’s evidence in this case and the nature of the fire accident, it surely is incumbent on the defendant to explain, or at least give an alternative explanation as to the cause of the fire. The defence witnesses told the court that at no point did they attempt to ascertain the cause of the fire. This in my view, is an appropriate case where the doctrine of *Res Ipsa loquitar* would apply as the plaintiff has in my view shown that the nature of the accident clearly suggests both negligence and the defendant’s responsibility. As was stated by Lord Morris, L.J. in the case of *Bennett V Chemical Construction (GB) Ltd*¹ that:

“This convenient and succinct formula posses no magic qualities; nor has it any added value, other than that of brevity, merely because it is expressed in Latin”.

Thus, it is only a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any act or omission producing the result. This doctrine which stems from the judgement Earle C.J. in *Scott V London and St Katherine Docks* applies where:

- 1) The occurrence is such that it would not have happened without negligence and

¹ *Bennet V Chemical Construction (GB) Ltd*[1971] IWL R 1571

- 2) The thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has right to control.

If these two conditions are satisfied it follows on a balance of probability, that the defendant or someone for whom he is responsible must have been negligent.

In the final analysis therefore, it is my considered judgement that the plaintiff has proved on a balance of probability that the fire accident herein was caused as a result of the negligence of the defendant, and I so find. Consequently I dismiss the defendant's case, and I therefore find that the defendants are liable in damages to the plaintiff, and also damages for loss of business which the plaintiff has suffered. I also order that the said damages be assessed.

On the issue of costs, these normally follow the event and since the plaintiff has succeeded in its claim against the defendant, I consequently award the costs of this action to the plaintiff.

Pronounced in Open Court at Principal Registry, this 24th day of July, 2008.

Justice J S Manyungwa
JUDGE