



IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
CIVIL CAUSE NO. 163 OF 2013

BETWEEN

STAFFORD BONDERA NYIRENDA..... CLAIMANT

AND

CARLSBERG MALAWI LIMITED..... DEFENDANT

CORAM: Honourable Justice T.R. Ligowe  
E. Mbotwa, Counsel for the Claimant  
W. Kaluwa, Counsel for the Defendant  
F. Luwe, Official Interpreter  
J. Chirwa, Recording Officer and Court Reporter

JUDGMENT

Ligowe J,

1 After hearing the evidence in this case, I have found that the facts are not really in dispute. On or about 20<sup>th</sup> September 2012, the plaintiff bought a bottle of Cocopina, a beverage manufactured by the defendant, from a bottle store at Mzimba Boma. As he drunk, it tasted sour contrary to his usual experience with the drink. Moments after, he felt very nauseous and started vomiting. He had consumed half of the bottle. He took the rest home so that he could report the problem to the manufacturers. He did not eat anything else that evening. In the night he developed sores in the mouth and throat area and had a severe stomach ache. He did not eat breakfast before he reported to the defendant's depot at Mzimba the following morning where he was advised to seek medical help at the District Hospital. He was informed at the hospital that his ailment was the result of the drink. He was treated as

an out-patient for five months with various antibiotics and gut medicines but the problem persists as he still has sores in the mouth. He exhibited medical reports and his health passport for this.

- 2 He also went to report at the defendant's factory at Luwinda in Mzuzu with the half full bottle that was left. After it was examined, Abel Chanje the Chief Executive of the defendant wrote him stating that they could not clarify the occurrence because the bottle was delivered to them open, but their laboratory analysis showed that it contained a foreign object in the form of a deformed crown. The Chief Executive however explained that bottles in which their products are sold are subjected to a rigorous washing process with detergents and hot water. They are also subjected to several mechanical and visual inspections before and after washing that only bottles of satisfactory quality leave their plants for consumption.
- 3 In view of this response the claimant commenced the present action claiming that his injuries were caused by the defendant's negligence because they knew or ought to have known that the drink contained extraneous or deleterious substance the consumption of which would cause damage or injury to a consumer. They failed to take any or any adequate or necessary precautions in the manufacture of the said Cocopina so as to prevent any injurious or deleterious substances being contained therein. They failed to take any or any adequate measures whether by way of examination, inspection, test or otherwise to ensure that the said Cocopina contained no injurious or deleterious substances. And that the claimant would rely on the doctrine of *res ipsa loquitur*. So he claims damages for pain and suffering and shock, K1 000 special damages for the medical report plus costs of the action.
- 4 The defendants denied that the claimant consumed Cocopina or Cocopina manufactured by them. That if it was manufactured by them it did not contain any deleterious substances as the bottle could not have contained any foreign objects at the time it left their factory.

They took all reasonable care in the manufacturing and bottling process to prevent it from containing any injurious, extraneous and deleterious substances. At the time the claimant consumed the said Cocopina the defendant's control over the bottle had ceased. And that if the bottle of Cocopina contained any foreign objects, they were not poisonous or injurious as alleged by the claimant. So the deny the loss and damage alleged by the claimant.

5 For their evidence in defence the defendant took this court on a tour of their manufacturing plant at Luwinga in Mzuzu by their Quality Assurance Manager, Blessings Gama. The first place to visit was the water treatment area. There is a reaction tank in which raw water from the Northern Region Water Board is dosed with Ferric Chloride to coagulate any small particles that may be in the water and Chlorine to kill or inactivate any microorganisms in the water. After this the water goes through sand filters to remove any remaining particles in the water. And then it gets into carbon filters to remove the Chlorine. At the end is a polishing filter which removes any breakthrough of activated carbon. At this point the water is considered treated up to the defendant's specifications ready for production.

6 The next process to go through was the syrup preparation. Sugar is weighed according to the desired syrup and conveyed into a tank where it is dissolved with the treated water to make what is called simple syrup which is 60% sugar. The syrup is filtered through 20 micron filters and then moved to other tanks where it is blended with various concentrates of flavours according to the product intended. This can be Coca Cola, Fanta, Sprite Fanta, Cocopina, etc. After the blending is the final syrup. The final syrup is diluted with the treated water to brix, a concentration of 10% and dosed with food grade carbon dioxide to come up with the product ready for packaging.

7 The next was the bottle washing process in the bottling hall. There is a big machine called a bottle washer. Bottles collected from the market are fed into this machine in chunks of 40 on a conveyer belt. It takes 40 to 50 minutes for the bottles to come through the machine.

In the machine the bottles are first soaked in warm water with a concentration of 1% to 3% caustic soda. Then a caustic projectile is directed inside the bottles using spray jets. With this pressure foreign material in contaminated bottles including crowns, the witness said, are removed. The temperature in the bottle washer ranges from 40°C as the bottles are fed into it to 80°C and then 40°C again. After about 40 minutes the bottles come out to two sighting stations one after the other. There is a person at each station to inspect the bottles under a fluorescent light to remove any bottle that looks improperly washed. An inspector works 20 minutes before they are given 40 minutes to rest their eyes.

- 8 After inspection the bottles go to the filler to be filled with the beverage and crowned. 72 bottles are filled and immediately crowned at a time. After filling the bottles are printed with the expiry date, batch number, and time of production and the character of the plant with the video jet. After this is another sighting station to check that every bottle is indeed filled up to 300 ml and crowned with the proper crown. The final products are crated and taken on pallets to the warehouse for distribution.
- 9 Blessings Gama emphasized that the whole bottling hall area has a positive pressure system to keep it under high pressure so that no air comes in from outside. He also emphasized that the production process is constantly inspected by the internal quality assurance team and audited by Malawi Bureau of Standards, SGS from South Africa and the Coca Cola Company.
- 10 When he was cross examined he stated that the bottle in question in this case was tampered with after it left the defendant's premises because it was delivered to them open for examination. He further said that caustic cannot dissolve a crown and neither can the temperature in the bottle washer. He admitted that the individuals at the sighting stations could have different capacities of endurance and that there are some defects that still go through the process, but the bottle in question in this case is not one.



- 11 The claimant's main argument is that the defendant owed him a duty of care which they breached and he suffered damage. He depends on the statement of Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 at 599 that:

"A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care."

- 12 The defendant's main argument on the other hand is that their standard of care as a manufacturer is not absolute to ensure that their goods are perfect, without any defect, but to take reasonable steps aimed at preventing such defects. They have cited *Daniels and Daniels v. R. White & Sons and Tarbad* [1938] 4 All ER 258 where Lewis J. said at 260:-

"I have to remember that the duty owed to the consumer, or to the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury."

- 13 Luckily there have been several other cases before against the defendant on the same point. In *Kunje v. Southern Brothers Co. Ltd* [1996] MLR 154 the plaintiff drunk Sprite which tasted so bad and there was a mucous like substance sticking to the bottom edge of the bottle. In *Edward Salima v. Southern Bottlers* [2007] MLR 89 the Fanta the plaintiff drunk tasted bad and it had a foreign body at the bottom. In *Chipiliro Banda v. Southern Bottlers Ltd* [2012] MLR 53 the plaintiff drunk Fanta which had a strange substance at the bottom. In *SMG Chimaliro v. Southern Bottlers Co. Ltd. Civil Cause No. 232 of 1997 (LL)* (unreported) cited in *Edward Salima v. Southern Bottlers* (supra) it was also a case of Fanta. In all these cases the defendant's defence was to explain the meticulous process for

cleaning their bottles and taking the Judges on a tour to appreciate the same. The findings were the same. As admitted by Blessings Gama the Judges found that at the end of the rigorous process there are still some bottles which come out unclean and that is why there are visual checks by people to remove them.

14 At the time this court visited the Luwanga plant, production was not in process. But in *In Kunje v. Southern Brothers Co. Ltd.* (supra) at p. 159 Nyirenda J. made the following observation.

“As a matter of fact, the brief moment I had at the visual check point in the factory, I observed several bottles removed from the rail. The visual inspectors will do their part but human nature being what it is, it cannot be said their checks can never be faulted.”

15 Regarding the burden of proof for the negligence on the part of the plaintiff the courts found that because the production and packaging of the beverages took place away from the consumers they would have to rely on *res ipsa loquitur*.

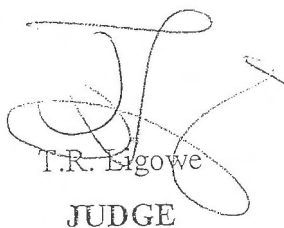
16 This court finds that the deformed crown in the bottle of Cocopina in the present case could not have been as a result of tampering after it left the defendants premises. The least that could happen if at all is probably is to open and immediately close the bottle as the common joke of a man used to drinking Fanta with a bun. The man asked a grocer to open a bottle of Fanta for him and then told him to close it because the shop had no buns in stock. The defendant's witness in *Chipiliro Banda v. Southern Bottlers* (supra) had tested this and found that such a bottle grew moulds after two weeks.

17 Yes the defendant's duty of care is not absolute care to ensure that his goods are perfect but reasonable care to see that no injury is done to the consumer or ultimate purchaser. A crown is big enough to be seen in an empty bottle if it failed to be flushed out by the spray

jets in the bottle washer. The facts can only speak of negligence on the part of the defendant.

18 I find the defendant liable to pay the damages claimed plus costs. There has not been sufficient evidence given as regards the assessment of damages and counsels' arguments were restricted to liability. I leave the assessment of the damages to the Registrar.

19 Made in open court this 16<sup>th</sup> day of March 2018.

  
T.R. Ligowe  
JUDGE