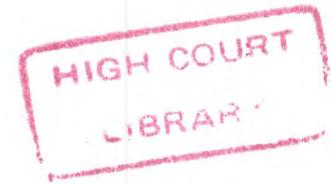




IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO. 1 OF 2014



BETWEEN

SYMON MPHANDE..... CLAIMANT

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED..... DEFENDANT

CORAM: Honourable Justice T.R. Ligowe

M. Chinkhuntha, Counsel for the Claimant

M. Chijere, Counsel for the Defendant

F. Luwe, Official Interpreter

R. Luhanga, Recording Officer and Court Reporter

JUDGMENT

Ligowe J,

Introduction

- 1 This case arises out of a fire accident that occurred on or about 5th August 2014 at the Claimant's house in Nkhata-Bay. The claimant was that time working as a watchman at the Ministry of Agriculture and Livestock Development at Nkhata-Bay. He was living in an institutional house within the premises of the Ministry's offices. On 5th August 2014, the claimant's wife was sitting on the veranda and she noticed fire from the inside part of the roof of the house. The house and all of the claimant's belongings got burnt. He therefore claims for the replacement of his belongings burnt by the fire worth K1 983 100, damages for loss of use, damages for distress and inconvenience suffered and costs of the action

- 2 The claimant's claim is that the fire was caused by the defendant's negligence in causing an upsurge of voltage into the electrical mains feeding his house, failing to take

all reasonable and effective measures to avoid the upsurge, and that he would rely on the doctrine of *res ipsa loquitur*.

- 3 The defendant's defence is that the claimant's house had no electricity supplied by the defendant. If the house caught fire, the same was occasioned without any negligence on the part of the defendant and in circumstances which the defendant had no control of and which they had no knowledge. The defendant also pleads that *res ipsa loquitur* does not apply in this case.

The Evidence

- 4 The claimant's testimony at trial was that his wife was sitting on the veranda listening to the radio on 5th August 2014, when it suddenly stopped playing, and she rushed into the house to disconnect it from power, only to notice that the house had caught fire. The radio was the only appliance that was on, before the lady switched it off. In cross examination by counsel for the defendant the claimant stated that electricity suddenly switched on and off and he supposes the fire was a result of a power upsurge, but he had not measured the voltage. He also admitted that the house was not supplied with power directly from ESCOM but through a conduit from the office.
- 5 David Chavula, a power lines man at ESCOM at Nkhata-Bay at the time, went to the scene after a report of the accident. He observed that the claimant's house was indeed not connected directly to ESCOM but through the Ministry of Agriculture offices. He described this connection as strange to ESCOM. He found that there was normal supply of power to the offices and they had not been affected.
- 6 Kondwani Yesaya, a Control Engineer at Electricity Generation Company of Malawi (EGENCO), who was at the time of the accident Control Engineer for ESCOM testified that he was responsible for issuing switching instructions for high voltage lines in the Northern Region and there was no high voltage work in Nkhata-Bay on 5th August 2014 and that the lines at District level are not his responsibility and so the ADD offices could not have been connected to high voltage power lines. He admitted that there can

be an upsurge in domestic lines but if it had occurred, it would not have affected only one customer.

- 7 Michael Mkandawire, the District Engineer for ESCOM at Nkhata-Bay at the time of the accident, testified that the house which caught fire was not connected to power directly. It had no service cable or meter. Power was connected to it through an underground extension using a twin flexible cable from Nkhata-Bay ETA (ADD) office instead of the required armoured cable. The extension was illegal, because it had not been sanctioned by ESCOM and the use of the twin flexible cable underground was substandard and could not have been approved by ESCOM. He further argued that if it was a power upsurge, the office would have been affected, as well as Alemekezeke Welding shop and Lake View Hall which are on the same blue phase supply as the ETA office. He further said that in any installation of electricity in a building, ESCOM's responsibility ends at the main switch. Anything else from the main switch to the rest of the building, is the responsibility of the owner of the building. He admitted in cross examination that other people use surge protectors to prevent their appliances from being damaged but that is the responsibility of the customer. And, if there was upsurge of voltage, the main switch at the ADD office should have tripped and there would not have been power getting to the claimant's house.

Analysis of the law and the evidence

- 8 I concur with the submissions made by both parties that negligence is established with breach of a duty of care, causing damage which is not too remote a consequence of the breach. Our understanding of the duty of care is as stated in *Donoghue v. Stevenson* (1932) AC 562 that everyone must take reasonable care to avoid acts or omissions which they reasonably foresee would likely injure other people who are closely and directly affected by their act, such that they ought to reasonably have them in contemplation as being so affected when directing their mind to the acts or omissions in question. And so, the issue for this case is whether ESCOM had a duty of care towards Mr Symon Mphande, which was breached, and as a result, he suffered damage.

- 9 From the evidence, it is not in dispute that the claimant's house and property were damaged by fire and that the fire emanated from the electrical installations in the house. The house was not connected directly to ESCOM but through a substandard underground cable from the ADD offices and this had not been approved by ESCOM.
- 10 In his submissions counsel for the claimant argues that ESCOM owes a duty of care to all, supplied with power by it. That is why it issued a prior warning to all clients and customers to switch off appliances in times of black out, in case power is restored at high voltage and cause damage to property. It gave no warning that electricity would go off that day, when it had the duty to notify customers of a possible upsurge. Counsel also argues that in observing its duty of care, ESCOM ought to inspect and keep a proper check on its equipment supplying power to client's houses, knowing that loose connections on roof tops can cause fire. And, to inspect and supervise installation of power to customers at least to the meter box placed on the wall. This is all counsel has, to argue for the claimant.
- 11 I notice that nothing has been said with regard to the doctrine of *res ipsa loquitur* pleaded in the statement of claim. Perhaps this is to agree with counsel for the defendant that the same does not apply to this case. I agree with counsel for the defendant that the doctrine only applies when the occurrence is such that the damage would not have happened without negligence; the thing that inflicted the damage must be under the sole management and control of the defendant; and there has to be no evidence as to why and how the occurrence took place. See *Tembo and others v. Shire Bus Lines Ltd* [2004] MLR 405. It has not been shown how these three elements have been satisfied in this case and I find that the doctrine cannot apply to this case.
- 12 The claimant's claim centres on an upsurge of voltage. Before we think of whether ESCOM sent any warning for a blackout and a possible power upsurge, the claimant needs to prove the upsurge. Surely it need not be because there was a power outage, therefore there was a power upsurge. This is a matter of fact. In a case where power supply was a problem, *Sachas Bakery Ltd v. ESCOM Ltd*, Civil Cause No. 1801 of

2003 (High Court, Principal Registry) (unreported), the bakery had a three phase supply of power, the lights were dim on one part and there was no power on the other part of the bakery, which was found to be a result of insufficient power supply. Three independent professionals assessed the cause of the fire and arrived at the same conclusion that there was a problem with power supply by ESCOM. The meter and cut out fuse were burnt. And, the defence witness had not examined the distribution board and the meter in his inspection.

- 13 The defendant's argument in the present case is that there was no such high voltage and if there were, the ETA office, Alemekzeke Welding shop and Lake View Hall would have been affected. It is an established principle of law that "the burden of proof lies on the party who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings placed it, and never shifts in any circumstances whatsoever." See *Tembo and others v. Shire Bus Lines Ltd* [2004] MLR 405 at 413 applying *Joseph Constantine Steamship Line v. Imperial Smelting Corporation Ltd* [1942] AC 154, 174.
- 14 The evidence given by the claimant does not show in any way that the house received higher voltage than normal. Taking it after *Sachas Bakery Ltd v. ESCOM Ltd*, this could probably have been determined from the examination of the cut out and fuse in the meter box, but the same were at the ETA office and intact because the office had not been affected with the fire.
- 15 There is the claimant's argument regarding the inspection of the equipment supplying power to the customer at least up to the meter box. This is also a matter of fact. No evidence has been given showing that there were no such inspections and the cables on the roof were loose. I find it rather misplaced however, considering the manner the house in issue was connected to power.

- 16 The defendant argues that the connection was illegal and unknown to ESCOM and it could not be responsible for it. Counsel refers to by-law 181 of the Electricity By-laws, 2012 which provides that electrical installation and maintenance on the customer premises from the point of supply, is the responsibility of the customer and the same has to be done in accordance with the Electricity By-laws and standards applicable to the wiring of premises. It also provides that no electrical installation may be extended from one customer premises to another or if the customers' premises comprises more than one building, from one building to another, without prior approval of the service provider.
- 17 Counsel for the claimant has countered this argument by saying that under s. 45 (2)(a) of the Electricity Act' an illegal connection is an offence for which a person found guilty of is liable to a fine of K5 000 000 and imprisonment for ten years. Counsel argues that the connection cannot be said to be illegal because the claimant was never charged and found guilty of it.
- 18 The provision is so clear. It states:-
“Without prejudice to the right of a licensee to recover for any illegal consumption of electricity, including costs associated with such recovery, a customer or any other person who
(a) Illegally connects electricity to any premises,
Shall be guilty of an offence.
- 19 So, apart from being an offence, there are other rights a licensee has over an illegal connection, such as to recover for any illegal consumption of electricity and the costs thereof. I would like to believe that the rights include the right not to be liable for any tortious claims arising out of the illegal connection, before it is legalised. These rights do not require prosecution and conviction first, to be exercised. After all, it is an executive decision to prosecute criminal offenders or not. An illegal connection could be established without a criminal conviction for purposes of recovering for any illegal consumption of electricity connected with it. It could also be established with regard to

the licensee defending against tortious liability arising out of the illegal connection. A conviction, the better, it would be conclusive proof of the illegal connection.

20 Because the extension of power to the claimant's house from the ETA offices was not authorized by ESCOM, ESCOM's duty of care did not extend that far. Besides, there has not been proof of an upsurge of voltage supplied to the ETA offices on the material day and no proof that ESCOM failed to inspect and maintain their equipment supplying power to the ETA offices. The present claim is dismissed with costs.

21 Delivered in open court this 4th day of February 2019.


T.R. Ligowe
JUDGE