

ELTON NYABUSHA
versus
ZIMBABWE ELECTRICITY TRANSMISSION
AND DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 14, 15 January and 25 February 2015

Civil Trial

M Mavhunga, for the plaintiff
V Muza, for the defendant

MATANDA-MOYO J: The plaintiff is a resettled farmer carrying out farming activities on Subdivision 1 of Eastworlds in Mazoe District. Such farm was offered to him on 21 February 2002 under the Government Resettlement Programme. On the farm is a 12 hectare lemon plantation under irrigation. There is a ZESA power line which passes through the lemon plantation. On 25 September 2011 fire broke out on the plaintiff's farm destroying the lemon plantation. The plaintiff attributed such fire due to the negligence of the defendant prompting him to file this claim. The plaintiff's claim is in the sum of \$238 253-00 for damages suffered as a result of the defendant's negligence. It is the plaintiff's claim that the defendant created a dangerous situation on his farm and the defendant had a duty of care towards the plaintiff and his property and was negligent in failing to protect the plaintiff's property from such harm.

The defendant denied liability for the destruction of the plaintiff's plantation and irrigation equipment. The defendant denied the conductor snapped due to any negligence by the defendant. Alternatively the defendant pleaded contributory negligence by the plaintiff. The defendant also put into issue the quantum of damages suffered by the plaintiff.

The plaintiff called four witnesses to testify on his behalf. Of the four only his caretaker was present on the day in question. His caretaker Collen Chadzika testified that he was relaxing at his home on the farm when he heard sounds of snapping conductor coming from the power line which cut across the lemon plantation. He proceeded to the scene and

observed that the lemon plantation was on fire. He observed some power cables which had fallen on the ground and were bursting and twisting inside the plantation igniting the mulching grass therein. When he got to the scene an area the size of a football pitch had already been destroyed by fire. The fire continued to spread across the plantation. Some people from the farm compound followed him and they together with Colen tried to extinguish the fire to no avail. He phoned the plaintiff and advised him of the situation. He was advised to make a report at the police station. He proceeded to the police station and made the report. Under cross-examination he stuck to his story that it was the ZESA cables that ignited the fire. He was however not very helpful on shedding light on what could have caused the snapping of the defendant's conductors. He however confirmed that a month earlier a tree had fallen onto the defendant's powerline causing the breaking of the defendant's conductor. The defendant's technician attended to the fault and joined the conductor.

The plaintiff testified that on the day in question he received a telephone call from his caretaker that the defendant's conductor had snapped and caused a fire that was burning his lemon plantation. He advised Colen to make a report to the police and the defendant. The plaintiff contacted the defendant's Mvurwi Office but was advised a team had already been dispatched to the scene. On 26 September the plaintiff proceeded to the farm where he observed that his 12 hectare lemon plantation had been completely destroyed by the fire. The irrigation equipment which serviced the plantation was also destroyed. He observed that the fire started from within the plantation. It was his testimony that the plantation was surrounded by a 9 metre fireguard which made it impossible for the fire to have crossed into the plantation from elsewhere.

The plaintiff engaged the Environmental Management Authority which referred him to the Forestry Commission. An official from the Forestry Commission attended on the farm and compiled a report on the extent of the damages. He also brought in Mighty Flow Irrigation Company which produced a report on the cost of replacing the irrigation equipment. The plaintiff testified that an official of the defendant who was the manager at Mvurwi admitted liability and requested him to file a claim for compensation. Such claim was filed and nothing materialised. It was the plaintiff's evidence that the lemon plantation was on 12 hectares with a total number of 9 360 trees aged between 16 and 17 years. He testified that all trees were destroyed and the only way forward was to remove the old trees and plant new ones. He put the cost of clearing land at \$4 680-00 and the total cost of

planting new trees at \$3 000-00, that is labour only. The trees cost \$5-00 each making a total sum of \$46 650-00. The price was as provided for in the report by the Forestry Commission. He said that the trees would take up to five years to harvesting and he wanted to be compensated for loss of income for those five years. He put his seasonal yield at 500 tonnes at a selling price of \$6-00 per kg, making a total sum of \$30 000-00 per season. As proof of yield he submitted a packing summary from Citifresh which showed that in 2003 he supplied Citifresh with 379 069.1 kgs of lemons. He also produced a receipt from Mazoe Citrus Estate which showed that on 3 July 2009 he supplied Mazoe Citrus with 15 560 kgs of lemons.

Under cross-examination he agreed he did not have proof of production for 2009, 2010 and 2011. His explanation was that he had relocated and could not find his papers. He also admitted he was not present when the fire started and only visited the scene the following day. He did not get three quotations for the irrigation equipment and for the replacement of trees. He based his claims on single quotations.

Mrs Chebanga testified that she is employed by the Forest Commission as a District Forest Extension Officer. She knows the plaintiff as a farmer in Mazoe District. She testified that on 11 October 2011 she received a complaint from the plaintiff that his plantation had been burnt by fire. She visited the farm to assess the damage. The plantation was a lemon plantation covering 12 hectares. She established the source of fire as having been caused by the defendant's cables. On being asked how she had come to such a conclusion she testified that she had been informed by the plaintiff.

She established that the whole plantation had been burnt. She counted the number of trees and found 9 360. She prepared a report which was admitted into evidence as Exh 6. In the report she put the number of trees destroyed at 9 360 with a replacement value of \$46 800-00 at \$5-00 each. The plantation was producing 500 tonnes per season sold at 6c per kg a total value of \$30 000-00. She said she got the price of \$5-00 from the Forest Commission nursery. It was her testimony that Forest Commission Nursery is the cheapest on the market as it is non-profit making organisation whose aim is to encourage farmers to grow trees. She also said in terms of s 78 (b) of the Forestry Act [*Chapter 19:05*] she is regarded as a fire expert. However, this witness did not fare well under cross-examination. She was rude and evasive. If she was not biased her testimony would have greatly assisted the court. I was convinced her report was a duplication of the plaintiff's story as narrated to her. She even put the yield at 500 tonnes per hectare without any formula of arriving at the figure. I do not therefore intend to place much reliance on her testimony. She failed to answer reasonably to

questions posed to her under cross-examination for example she was told that the plaintiff had admitted that he was not present on the day in question and she refused to accept that. Her unreasonableness led me to discard her evidence as invaluable.

The last witness for the plaintiff was David Bvunzawabaya from Mighty Flow Irrigation (Pvt) Ltd. He testified that he visited the farm to assess the irrigation equipment damaged by the fire. He testified that the cost of replacing the irrigation equipment was \$33 773-00. Under cross-examination he admitted that he did not prepare the quotation submitted in court. He produced his own report that he prepared after visiting the farm which said he observed that some trees were bunt whilst others were not burnt. He failed to defend the quotation of \$33 773-00. The plaintiff closed its case.

The defendant called two witnesses to testify on its behalf. Ozwel Kubvoruno testified that he is employed by the defendant as an artisan and is based at Mvurwi. He attended at the plaintiff's farm on the day that fire broke out. They had received a report that their conductor had broken causing a fire which burnt the plaintiff's fields. He had no reason to disbelieve the report. On arrival there was indeed a conductor lying across the road next to the plaintiff's lemon plantation. He also observed that the citrus trees were burning. He also observed burnt piles of cut Cyprus trees. This witness testified that he did not investigate the cause of the fire but it was his testimony that a conductor could break due to various causes amongst them veld fires, being hit by lightning and trees falling onto the lines. It was also his testimony that should a person require to cut trees which may interfere with the defendant's power lines, it was the duty of such person to liase with the defendant before hand. The defendant would on that day switch off the line and drop conductors to ensure safety of the public and their power lines. According to his knowledge the plaintiff had never requested for such authority. He had heard a month before from his boss Mrs Masaira that the plaintiff had cut a tree which had fallen onto the defendant's 11 kv line causing one of the conductors to break.

Mrs Masaira attended to that fault and fixed the conductor. A tree which was being cut by the plaintiff's workers fell on the powerline causing the conductor to break. It was the same conductor which snapped and broke on 25 September 2011. However, Mr Kubvoruno observed that the fixed part of the conductor was intact. That evidence destroyed the weak link issue. The question of weak link would have sufficed had the conductor snapped from the mended part.

Mrs Masaira testified that the cause of the fire was not established. Veld fires could cause the snapping of conductors and so do lightning or contact with the ground. The snapping of the conductor could have been caused by any of the above factors. She denied that she had accepted liability on behalf of the defendant, testifying instead that the plaintiff approached her and indicated his intention to lodge a claim for compensation to the defendant for his destroyed citrus plantation. She advised the plaintiff to submit his claim for onward transmission to the Bindura office for consideration. The plaintiff did so.

Under cross-examination she said she accompanied her boss Mr Mafoko to the plaintiff's farm after the plaintiff lodged the claim. She did not know what transpired thereafter. She agreed that when she mended the conductor the first time, a weak point was created but the repairs she carried out are acceptable in the field.

From the analysis of the evidence presented there is no doubt that the fire was caused by a broken conductor. What is not clear is what caused the conductor to break. All the witnesses got to the scene when the conductor was already on the ground and when the plantation was on fire. There were no eye witnesses who observed where and how the fire started. It is also common cause that the lemon plantation was burnt and that the lemon plantation was under 12 hectares. Some irrigation equipment was also burnt in the process.

It is also not in dispute that a month earlier a tree had fallen on to the defendant's powerline. The plaintiff opined that such tree was as a result of being blown by wind whereas the defendant insisted the plaintiff's employees were cutting trees and one of the trees fell onto the powerline causing the conductor to snap. For purposes of this case it is not crucial to determine what caused the tree to fall. The relevance of this evidence is on whether the defendant negligently repaired the conductor on the day in question and whether ultimately such repairs contributed to the caused the snapping of the conductor on 25 September 2011. It was plaintiff's evidence that the defendant, by joining the conductor, created a weak link on the conductor posing future dangers to his property. The defendant called in two of its technicians who testified that scientifically the joining of the conductors was an accepted method of repairs to a broken conductor. It was also the testimony of one of the defendant's witnesses that on inspecting the conductor on 25 September 2011, the joined part was intact. Such finding destroyed the probability that the joining of the conductor created a weak link. There was therefore no evidence that the conductor snapped due to the method of repair effected by the defendant a month earlier. The plaintiff could not prove that without calling expert evidence.

In the case of *Metallon Corp Ltd v Stanmarker Mining (Pvt) Ltd* 2007 (1) ZLR 298 (S) the court laid down what the plaintiff must establish in an Acquisition action for patrimonial loss, that is:

“That the defendant committed a wrongful act;

- (i) That the plaintiff suffered patrimonial loss, viz, actual loss capable of pecuniary assessment;
- (ii) The defendant’s act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- (iii) The responsibility for the plaintiff’s loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence).”

The plaintiff has not shown any wrongful act committed by the defendant. The mere fact that the defendant’s powerline pass through the plaintiff’s plantation is not per se a wrongful act. From the evidence there is no negligence through an act.

I turn to deal with the issue of negligence by omission. The plaintiff must give evidence on what it is that the defendant was supposed to do and failed to do resulting in the loss suffered by the plaintiff. I agree with the plaintiff’s submission that in general terms there is no dialectical liability for an omission unless the law recognises from the circumstances, that there was a legal duty to take positive action to prevent harm from occurring. See *Minister of Police v Ewels* 1975 (3) SA 759 A. The questions to be answered are;

- 1) Whether harm was reasonably foreseeable and
- 2) Whether a reasonable person would have taken action to prevent such harm from occurring.

The plaintiff’s argument is that by simply having its powerline cutting across the plaintiff’s lemon citrus and farm in general, the defendant created a source of danger to the plaintiff’s property and the defendant assumed a duty to prevent any such harm from occurring. What this court fails to understand is how the plaintiff could maintain a lemon plantation directly under electrical powerlines. The general policy world over is that trees are not to be allowed to grow under powerlines as that poses dangers when such trees come into contact with the fully charged powerlines. However I do not intend to waste time on this subject as there is no evidence that a tree came into contact with the defendant’s powerline causing the conductor to snap and thus causing a fire. If the facts were such, I would not have hesitated to find the defendant negligent. So the argument by the plaintiff does not take his matter any further.

In my opinion it would be going too far to say, so much care was required between the plaintiff and the defendant where as is in this case, the powerline is generally not dangerous, but may become dangerous by a latent defect entirely unknown to the defendant, even though it may be discoverable by the exercise of ordinary care, the defendant should be answerable to the latter for a subsequent damage arising from the unknown latent defect.

This is a matter where courts should try and avoid overkill. If this court were to find that the repairs made on the conductor, as submitted by the plaintiff caused a weak link which created a dangerous situation and resultantly caused damages to the plaintiff, the court might create a scenario where the defendant would simply stop effecting such repairs and thus causing severe suffering to the public at large. It is common cause that should it be expected that each time a conductor snaps, the defendant should replace it with a new one, an untenable situation would result. It is not in the public interest especially where no expert evidence was led to show that the sort of repairs done earlier on indeed created a hazard which caused fire on the day in question, to find the defendant liable. The plaintiff failed to prove the defendant's liability in the absence of such expert evidence.

It is trite that to hold the defendant liable in these circumstances, where there is no proof of negligence, is tantamount to making the defendant the plaintiff's insurer.

The standard of care should not be pitched too high. To allow liability in the present case to me would be tantamount to pitching the standard of care too high.

Ordinarily costs follow the cause. But due to the nature of the present case, I am not going to order the plaintiff to pay costs.

Accordingly the claim fails in its entirety and is dismissed with no order as to costs.

Mavhunga & Associates, plaintiff's legal practitioners
Muza & Nyapadi, defendant's legal practitioners