SCZ NO. 39 OF 2000

SCZ APPEAL NO 59 OF 2000

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIAN BREWERIES PLC	APPLICANT
AND	
REUBEN MWANZA	RESPONDENT

CORAM:	Ngulube, C.J., Chirwa and Chibesakunda, JJs., on 6th June 2000 and 12th December 2000
For the Appellant:	Mr. C.K. Banda, SC. Chifumu Banda & Associates Mr. C.M. Ngenda, Christopher Russell Cook & Co.
For the Respondent:	Mr. M. Mutemwa, Mutemwa Chambers.

JUDGMENT

Chirwa, J.S. rendered judgment of the Court: -

Cases referred to:

1. *Donoghue V Stevenson [1932] All E.R.1 (Reprint)*
2. *Evans V Triplex Safety Glass Co. Ltd. [1936] 1 ALL. E.R. 283*
3. *Daniels & Daniels V White & Sons Ltd. [1938] 4 ALL E.R. 258*
4. *Ndola Central Hospital Board of Management V Alfred Kaluba and Pricilla Kaluba SCZ judgment No. 9 of 1997*
5. *Continental Restaurant & Casino Ltd. V Arida Mercy Chulu SCZ judgment No. 28 of 2000*

This is an appeal by the appellant, ZAMBIAN BREWERIES PLC against the finding of the lower court that the appellant was negligent in the manufacture and sale of a castle beer containing a dead lizard. The Common facts are that the appellant are brewers of castle lager beer among other beers,they offer the beer to the general public. The respondent, REUBEN MWANZA on 7th October 1998 bought a bottle of a castle lager beer at Mweemba's bottle store and this bottle was opened in his presence. He drunk half of the contents and he then felt as if he was choking and an examination of the bottle he found that it contained a dead lizard. He saw the owner of the bottle store who advised him to go and see the breweries. At breweries he saw a Mr. Nigel Corrigan. Mr. Corrigan is said to have told the respondent where he suspected the lizard could have dropped into the bottle. Mr. Corrigan took the respondent around the plant and did point out the place where he suspected the lizard to have dropped into the bottle. He left the beer bottle containing the lizard with Mr. Corrigan. The following day he was offered 2 crates of castle beer, a castle T-Shirt and a cap but he declined to accept these items opting for money but he was not paid any money. The learned trial judge found as a fact that the appellants were negligent in the manufacture of the castle beer with a dead lizard in it and awarded the respondent K50,000,000 as damages. It is against the finding of liability and the award of K50,000,000-00 that the appellants have appealed. In arguing the appeal, four grounds of appeal were advanced.

Grounds 1 and 3 were argued together. Ground 1 was that the respondent failed to establish through credible evidence that the appellant was negligent or had breached its duty of care to the respondent in the manufacture of its products. Ground 3 was that the court was in a position to take judicial notice of the fact that a lizard exposed to high temperatures could have had its skin peeled off at the very least and that this did not require expert opinion evidence as suggested by the trial court. In arguing these grounds, the principle in the case of DONOGHUE V STEVENSON [1932] ALL E.R. (Reprint) was relied upon and it was argued that for the respondent to succeed in the action he must prove that the product was sold to him exactly in the same form and condition in which it left the manufacturer; that there was no reasonable possibility of intermediate examination; that there was absence of reasonable care in the preparation or manufacture of the product. It was argued that there was no evidence to show that the lizard was in the bottle before or after the bottle was opened. It was suggested that the lizard came into the bottle after it was opened and that this was supported by the fact that neither the respondent nor the bar lady saw the lizard until after the respondent consumed half the contents of the bottle. Further there was evidence that the lizard had not disintegrated which showed that it has not been in the bottle for a long time suggesting that it had been introduced after the bottle had been opened. The appellant was therefore not liable and the case of EVANS V TRIPLEX SAFETY GLASS CO. LTD [1936] 1 ALL E.R. 283 was relied upon.

On the question of reasonable possibility of intermediate examination, it was submitted that whereas in the DONOGHUE V STEVENSON case the

bottle was opaque, in the present case the lager bottle was transparent and light in colour and that any foreign element as large as a lizard ought to have been seen and a claim for negligence cannot be sustained. It was submitted that all the manufacturer has to do is to take reasonable care to see to it that there exists no defect in its products likely to cause injury and the case of DANIELS & DANIELS V WHITE & SONS LTD. [1938] 4 ALL E.R. 258 was relied upon and that taking into account the evidence of DW3 on the elaborate cleaning process of the bottles the appellant took all reasonable care to see that their product was reasonably safe. On ground 3 it was argued that the trial court ought to have taken judicial notice of matters with which men of ordinary intelligence are acquainted and in the present case a lizard exposed to high prolonged temperatures as described by DW3 would have had its skin peeled off and could not have remained intact in the bottle. Further the court should have taken advantage of the invitation to see the manufacturing process to properly evaluate the evidence of DW3.

In response to these two grounds of appeal, on behalf of the respondent, it was argued that the learned trial judge was on firm ground in finding that negligence had been proved. It was submitted that it was the duty of the appellant to see that its product was safe to consume and that in the present case there was no possibility of discovering the lizard in the bottle as the bottle is not transparent and if it were both the bar lady and the respondent could have seen it. Further the evidence of the respondent on remarks attributed to Mr. Corrigan that he knew where the lizard could have got into the bottle was not rebutted by calling Mr. Corrigan. The effect of

what is attributed to Mr. Corrigan and as supported by the evidence of DW3 is that there was an element of human error.

In dealing with these two grounds of appeal, we wish to remind the parties that their cases depend on the pleadings and the evidence adduced to support the pleadings. The defence as pleaded cannot support the submission that the lizard was introduced into the bottle after the product left the appellants factory. Further the appellants cannot benefit from their own conduct in this matter. The bottle containing the lizard was taken to the appellants. The appellants broke the bottle and threw away the lizard. The appellants cannot be asking the trial court to take judicial notice that the lizard ought to have had its skin peeled off because of the high temperatures when they had the opportunity of preserving the physical evidence itself. In the present case we are satisfied that the learned trial judge was on firm ground in finding negligence on the part of the appellant. It is not normal to find lizards in beer bottles and also to find that people carry dead lizards in order to throw them in beer bottles would require strong evidence. We are satisfied that on the facts of this case the finding of negligence was well founded and we cannot fault the learned trial judge. We would therefore dismiss these two grounds of appeal.

The second ground of appeal was that substantial miscarriage of justice was committed when the trial court declined to adjourn to the plant at the instance of the appellants as further evidence on liability was denied. It was submitted that the trial court denied itself the opportunity to receive further evidence on the condition of the plant, cleaning process of the bottles and the general standard of hygiene in place which evidence could have

assisted in resolving the question of liability in the matter. It was prayed that a re-trial be ordered.

In response, it was submitted for the respondent that no miscarriage of justice occurred taking into account the evidence of DW3 and the element of human error attributed to Mr. Corrigan. The failure by the appellants to call Mr. Corrigan to testify made the visit to the plant unnecessary.

We have seriously considered this ground of appeal. Although it is strongly advised that trial courts should visit scenes of events, it is not in every case that this would be necessary. In the present case, taking into account the facts and the defence as pleaded we cannot say the learned trial judge misdirected himself in declining to visit the plant. As we alluded to already, the defence as pleaded does not raise any issues at all; it merely puts on the respondent the burden of proof. We see no miscarriage of justice in the refusal by the learned trial judge to visit the plant.

Coming to the question of damages, it was fairly conceded by Mr. Mutemwa that the K50,000,000-00 awarded was on the higher side and we commend him for this. On behalf of the appellant it was argued that whereas in the DONOGHUE V STEVENSON case there was medical evidence of the victim being hospitalized, there is no such evidence in the present case. The respondent is said to have visited Chilenje clinic but he never revealed what had happened to him and no evidence of what treatment he received was adduced. Even the visit to the appellants' clinic does not assist the respondent. It was suggested that a token award of K50,000-00 (fifty thousand kwacha) would be adequate.

On behalf of the respondent, although conceded that K50,000,000-00 was on the higher side as already stated, it was suggested that this court follows the award given in the case of NDOLA CENTRAL HOSPITAL BOARD OF MANAGEMENT Vs ALFRED KALUBA AND PRICILLA KALUBA SCZ judgment No. 9 of 1997 where the respondents were awarded K10,000,000-00 (ten million kwacha) for shock.

We have considered the submissions on this head and we agree that the K50,000,000-00 awarded in this case is excessive. In doing so we take into account the conduct of the respondent after discovering a lizard in his beer. Although the respondent stated that he was shocked with the discovery of the lizard, it is shocking to us that when he was offered another beer, he quickly took it and consumed. There was no revolting reaction. Further, when he went to the Chilenje clinic he never revealed what had caused his "illness" so that proper diagnosis could be given. In the case of CONTINENTAL RESTAURANT & CASINO LTD V ARIDA MERCY CHULU SCZ judgment No. 28 of 2000 we stated that

> *"The important point to stress, however, is that in cases of this nature, the basis of awarding damages is to vindicate the injury suffered by the plaintiff. The money was to be awarded in the instant case not because there was a cockroach in the soup, but on account of the harm or injury done to the health, mental or physical, of the plaintiff. Thus in the DONOGHUE case the plaintiff was hospitalized. Mild condition is generally not enough a basis for awarding damages.*
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> *The plaintiff has, therefore, a duty to bring credible evidence of illness. The award in this instant case comes to us with a sense of shock as being wrong in principle and on the higher side. We want to take advantage of this case to point out that in future nothing will be awarded if no proper evidence of a medical nature is adduced."*

In that case we awarded K2,000,000-00 (two million kwacha) setting aside the award of K85,000,000-00. In the instant case, it has been conceded that the award of K50,000,000-00 was excessive, we therefore, set aside the award of K50,000,000-00 and we see no reason why the CHULU case cannot be followed. The respondent is therefore awarded K2,000,000-00 (two million kwacha) as damages.

As the appeal has partially succeeded, each party to bear its own costs in this court. Costs in the High Court to be as ordered in that Court.

M.M.W.S. NGULUBE
CHIEF JUSTICE

D.K. CHIRWA
SUPREME COURT JUDGE

L.P. CHIBESAKUNDA
SUPREME COURT JUDGE