



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil Cause No. 3844 of 2002

BETWEEN

W.S. KALONGA PLAINTIFF

AND

ESCOM..... DEFENDANT

Coram: The Hon. Justice H.S.B. Potani

Tukula, of the Counsel for the Plaintiff

Msowoya, of the Counsel for the Defendant

Jere, Official Interpreter

JUDGEMENT

Potani J,

The plaintiff, Watson Swaleyi Kalonga, a resident of Kawale township in the city of Lilongwe commenced this action against the defendant, the Electricity Corporation of Malawi (ESCOM), a body corporate in the business of generating and supplying electricity power to various consumers countrywide. The plaintiff's claim is for replacement his damaged electrical appliances. He

alleges that the damage was accastined by the negligence of the defendant; the particulars of the alleged negligence being failing to warn the plaintiff of an imminent power failure to take any or adequate steps to prevent interruptions in the power supply. It is the plaintiff's further pleading, supposedly in the alternative, that the defendant is liable in negligence by the doctrine of **res ipsa loquitur**. The plaintiff further claims 15 percent of the replacement value of the damaged appliances being collection charges and costs.

The gist of the defendant's defence is a denial of any negligence on its part and that the doctrine of **res ipsa loquitur** would not apply in this case. The claim for 15 percent collection charges is also denied on the ground that the claim herein is not for a liquidated debt but one for damages.

The evidence upon which the case would have to be decided is from the plaintiff himself and that of Alexander Kamanga on the defendant's side.

It is not in dispute that on the evening of March 7, 2002, at about 7:30pm there was electricity power interruption at the house of the plaintiff at Kawale township in the city of Lilongwe. According to the plaintiff a banging noise and some electrical power sparks heralded the power interruption which was also experienced at his neighbour's house. As a result of these occurrences, various electrical appliances belonging to the plaintiff got damaged, that is, a Mercury TV screen, a TV deck, a telephone receiver, a Blaupunkt CD Player circuit breakers and a hotplate. The plaintiff immediately reported the matter to the defendant and on the next day its officials came, did some inspection and effected some repairs notably replacement of a cut out which had burst due to the heavy spark and power was restored. The defendant's officials then advised the plaintiff to lodge a formal written complaint regarding the damaged items which he did but in response the defendant denied liability saying the accident was due to natural causes, that is, lightening. Not satisfied with the response, the plaintiff wrote the

defendant again on July 3, 2002, pleading for compensation but no response came forth prompting him to commence this action.

According to Alexander Kamanga who works as a power linesman for the defendant, there were intense rains accompanied by heavy winds and lightening on March 7, 2002. On the next day he attended to a fault at the plaintiff's house. He first, as a routine, checked on the voltage and noted that there was no electricity power supply to the house. He then checked the cut out fuse whereupon he discovered that it was blown out. He further checked on the power supply wires and found that one was broken. Dutifully, he rectified the problems noted and power was restored. He left and heard no complaint from the plaintiff regarding any damaged appliances. Later he prepared a report Exhibit AK1. Then on or about March 15, 2002, he was shown a letter Exhibit D2 from the plaintiff complaining that his items were damaged due to the thunderstorm of March 7 and asking the defendant to compensate him. It is the evidence of Mr Kamanga that the cause of the damage was the adverse weather, especially the heavy winds and lightening. Lightening, according

to the witness induces high voltage when it strikes on electricity supply wires which may result in the wires getting broken and appliances getting damaged. He stressed that the problem could not have been avoided by the defendant as it could not forewarn its customers since such occurrences are not anticipated and beyond its control.

The plaintiff's action against the defendant is one based on the tort of negligence. What constitutes negligence is well defined by a compendium of case authorities the leading one being Donogue V Stevenson (1932) AC 562. In essence three essential elements must be proved for a defendant to be held liable in negligence. First and foremost the defendant must owe a duty of care to the complaining party. Secondly the defendant, by his act or omission must be in breach of such duty of care. Thirdly the defendant's breach of duty must be the cause of the damage complained of and such damage must be foreseeable and not remote.

It is conceded by the defendant that being a supplier of a potentiality hazardous commodity, it owes a duty of care to its customers/consumers the plaintiff inclusive. What the defendant disputes vehemently is that it was in breach of such duty in this case. The plaintiff alleges breach of duty of care by the defendant in two respects, that is, failing to warn him of an imminent power failure and failing to take any or adequate steps to prevent interruptions in the power supply.



In the determination of the matter, the court looking at the evidence in totality would find that the electrical power sparks and the resultant power interruption which led to the damage to the plaintiff's property was caused by adverse weather, that is, rain accompanied by lightening and thunder. The adverse weather occurrence is also acknowledged by the plaintiff in his letter of complaint to the defendant tendered as Exhibit D 2. Further, the plaintiff in his letter to the defendant dated July 3, 2002, which was a response to an earlier letter of April 30, 2002, from the defendant denying liability the plaintiff agreed that the cause of the damage was an act of God as pointed out by the

defendant. He however, pleaded with the defendant to assist him as, according to him, the damage could not have happened without electricity. The evidence also shows that the damaged items included a telephone receiver which was not connected to the defendant's electricity power supply. This only goes to confirm that the causative agent to the damage to the plaintiff's items was the heavy rains accompanied by lightening and thunder. The evidence of Alexander Kamanga (DW1) amply explains the disastrous effects lightening causes when it strikes electricity power supply lines. According to the witness, lightening carries with it some electricity power such that when it strikes on electricity power supplying lines, it induces high voltage into the supply with the result that the wires and appliances connected to the supply are easily exposed to damage which is what happened in this case.

Lightening is indisputably an act of God and occurs abruptly. It is an occurrence that is not within the control of the defendant or indeed any human mortal. Surely, therefore, the defendant could not have been expected to forewarn the plaintiff of the power

upsurge or interruption occasioned by the lightening. The allegation by the plaintiff that the defendant was negligent in failing to warn him of an imminent power failure resulting in damage to his property has therefore not been made out or proved.


Then there is the allegation that the defendant failed to take any or adequate steps to prevent interruptions in the power supply. The cause of the power interruption in this case, as earlier observed was occasioned by factors beyond the control of the defendant. The defendant therefore can not be said to have failed to take any or adequate steps to prevent interruptions in the power supply. The evidence actually shows that for eventualities like unexpected high voltage induced by a strike of lightening, the defendant had provided a cut out and surge divertors as a preventive measure to protect consumers and their gadgets.

The plaintiff has made an alternative plea that the court should find the defendant liable on the basis of the doctrine of res ipsa loquitor. The latin maxim res ipsa loquitor loosely means the

thing speaks for itself. What the doctrine entails is that negligence on the part of defendant may be inferred on proof of the mere happening of some occurrence or accident. For the doctrine to come into play three basic pre-requisites must be satisfied. To begin with there must be no explanation for the occurrence. Secondly the thing causing the occurrence or damage must have been under the sole control or management of the defendant and thirdly the occurrence must be such that it cannot happen without negligence. The need to have all these three elements satisfied was echoed in **Phekani V Automotive Products Limited** 16 (1) MLR 427. In the case at hand, as earlier found, the sudden electricity power upsurge resulting in the damage to the plaintiff's items was caused by lightening which struck the defendant's electricity power supply lines. There is therefore an explanation for the unfortunate occurrence as such the defendant cannot be held liable on the basis of the doctrine of **res ipsa loquitor**. Besides, the causative agent of the occurrence, that is, lightening, was not under the control or management of the defendant as such the case falls outside the ambit of the doctrine of **res ipsa loquitor**.

At the end of it all. The plaintiff has failed to establish a case of negligence on the part of the defendant for the damage his household items suffered following electricity power interruptions at his house. The plaintiff's action is therefore abortive with costs to the defendant.

Pronounced in Open Court this day of March.....^{29th}..... 2011, at
Blantyre.


H.S.B Potani
JUDGE