IN THE COURT OF APPEAL ZAMBIA Appeal No.89/ 2019

HOLDEN AT NDOLA CAZ/08/65/2019

(Civil Jurisdiction)

BETWEEN:

YENGATECH ENTERPRISES LIMITED APPELLANT

AND

NILKANT FILLING STATION RESPONDENT

Coram: Chisanga, JP, Sichinga, Ngulube, JJA

On 18th February, 2020 and 251h August, 2020

For the Appellant: Ms. K. Kaunda- Mmes. K. Kaunda and Company

For the Respondent: Mr. F. Chalenga- Messrs. Freddie and Company

JUDGMENT

Sichinga, JA, delivered the Judgment of the court;

Cases referred to:

1. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
2. *Donoghue v Stevenson [1932] AC 562*
3. *Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haruperi Selected Judgment No. 20 of 2015*
4. *Duly Motors (Z) Limited v Patrick Katongo and Livingstone Motor Assemblies [1986] ZR 61*
5. *Beauty Kayoba Kabinga v Euro Africa Bus Services (unreported)*

6. *Faindani Daka v Attorney General [1990-1992] ZR 132*
7. *Zambia Consolidated Copper Mines Limited v Goodward Entreprises Limited SCJ No. 7 of 2000*

S. City Council of Ndola v Colcom Co-operative (Z) Limited (1968) 182

9. *Edith Tshabalala v Attorney General SCZ No. 17 of 1999*
10. *Attorney General vAdministrator General (198 7) ZR 1*
11. *Khalid Mohammed v Attorney-General (1982) Z.R. 49*
12. *BJ Poultry Farms Limited v. Nultri Feeds (Z) Limited SCZ 166/2015 (2016) ZMSC 43*

Legislation referred to:

1. *Energy Regulation Board Act Chapter 436 of the Laws of Zambia*
2. *Sale of Goods Act 1893. 57 and 58 Vict. Ch 71*
3. *Competition and Consumer Protection Act, No. 24 of 2010, Laws of Zambia*

Other works referred to:

1. *Oxford Dictionary of Law, Jonathan Law, 8th edition, Oxford University Press*
2. *Black's Law Dictionary, Bryan A. Garner, 9th edition, Thomson Reuters*

1.0 Introduction

1.1 This is an appeal from the Judgment of the High Court (Makubalo J) delivered on 26 February, 2019 in which she held that the appellant,

Yengatech Entreprises Limited (the plaintiff) failed to prove negligence against the respondent, Nilkant Filling Station (the defendant) on a balance of probabilities and accordingly dismissed the appellant's claim. The central issue in this appeal is whether the appellant suffered damages as a result of the respondent's negligence as alleged, and was entitled to damages as claimed in the Writ of Summons.

2.0 Background

2.1 The plaintiff allegedly had its motor vehicle, Ford Ranger registration number ALR 7581, driven by its managing director (PW1), filled with diesel worth K380 at the defendant's filling station at Kitwe on 10th July 2015. Afterwards it was alleged, the fuel light on the dashboard of the vehicle went on, indicating that the fuel was contaminated. The engine of the vehicle ceased to function. As a result, the plaintiff commenced an action by way of writ of summons asserting that the defendant acted negligently in selling contaminated fuel and was liable for the damage caused to the plaintiff's motor vehicle.

2.2 The particulars of negligence alleged were as follows:

i. **Failing to ensure that the fuel sold to the plaintiff was not contaminated;**
ii. **Failing to prevent damage to the plaintiff's motor vehicle by not selling contaminated fuel;**
iii. **Failing to take responsibility for the damage caused to the plaintiff's motor vehicle.**

2.3 In its defense the defendant contended that in July 2015, a man approached it and described a situation similar to the one averred by the plaintiff. However, the man stated that after refueling at its filling station, he drove to Mufulira, where he experienced problems with his vehicle. He drained the fuel from his tank, refueled in Mufulira and drove back to Kitwe.

2.4 The defendant denied any negligence on its part, averring instead that the Energy Regulation Board (ERB) investigated the complaint and concluded that the defendant could not be held liable for the damage caused to the plaintiff's car as there was no proof that the diesel was purchased from the defendant and no samples were taken from the filling station.

3.0 The judgment below

3.1 After analysing the evidence before her, the learned trial judge considered that the plaintiff's ownership of the subject vehicle was not in dispute. She also found that it was not in dispute that the said motor vehicle was damaged in 2015 and was repaired at CFAO. She considered that the question for determination was whether the damage occasioned to the plaintiff's motor vehicle could be attributed to the defendant.

3.2 The learned judge first considered whether the fuel complained of was bought from the defendant. She found that the undated tax invoice issued days after the purported purchase of fuel from the defendant

and the subsequent write up by DW 1 did not prove that the plaintiff actually bought the purported contaminated fuel from the defendant.

3.3 The court also found that the plaintiff did not adduce sufficient evidence to prove that the subject fuel was contaminated to the standard enunciated in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited'.***

3.4 The learned trial judge considered the principles for establishment of negligence as espoused in the case of ***Donoghue v Stevenson***[2], and held that the plaintiff had to prove that the fuel sold by the defendant to itself was not sold exactly in the same form and condition in which it left the manufacturer.

3.5 Ultimately, she considered the provisions of the ***Energy Regulation*** Act' and held that it did not create a statutory duty on the part of fuel merchants or filling stations.

3.6 In light of these considerations the judge concluded that the plaintiff had failed to prove negligence against the defendant on a balance of probabilities.

4.0 The appeal

4.1 The lower court granted leave to appeal to this court on the basis that the case raised a novel question. The plaintiff being dissatisfied with the Judgment of the lower court, has fronted four grounds of appeal:

1. *The Court below erred in law and in fact when it found that the tax invoice issued by the defendant was not proof that the fuel which damaged the motor vehicle was purchased from the defendant's filling station.*
2. *The Court below erred in law and In fact when It found that the plaintiff had not met the standard of proof in establishing that the fuel that damaged the motor vehicle was bought from the defendant's filing station as the receipt issued by the defendant was later than the date of purchase.*
3. *The Court below erred in law and in fact when it found that the plaintiff failed to adduce sufficient evidence that the fuel bought from the defendant's filling station was contaminated.*
4. *The Court below erred in law and In fact when it found that the liability for negligence established in the case of Donoghue v Stevenson applies only to manufacturers of goods.*

5.0 Appellant's submissions

5.1 On 27th May, 2019, the appellant filed its heads of argument which it relied upon entirely. Under the first ground of appeal, the essence of the appellant's submissions was that the issuance of a receipt by the respondent to the appellant was proved and it was evidence that the appellant purchased fuel from the respondent. That soon after refueling and upon realizing that the engine had seized, the appellant's managing director called the respondent's manager, one

Patel, and informed him of the incident. Patel's response was that he should address his complaint to the manufacturer.

5.2 It was submitted that issuance of the tax invoice by the respondent to the appellant was proved and confirmed by the respondent's witness, DW1 at the instruction of its manager, Patel, being the one to whom the complaint was made the moment the engine ceased upon refueling the motor vehicle. That the issuance of the tax invoice was not disputed. As such, the receipt was credible evidence that the appellant purchased fuel from the respondent and soon thereafter, the appellant's motor vehicle ceased.

5.3 The Court was invited to take judicial notice of the fact that issuance of a receipt is considered to be evidence of proof of purchase of whatever items appear on it, and that it is an issue of law rather than custom. In the same vein, the appellant argued that the respondent is bound by the issuance of the tax invoice and this was confirmation that the appellant purchased fuel from it. In support of this argument, the case ***of Kalusha Bwalya v Chadore Properties and Ian Chamunora*** Nyalungwe *Haruperi*[3] was cited with particular reference to the ***passage Misrepresentation, Mistake and Non-Disclosure*** per Cartright J where he states:

> ***.If a Defendant seeks to argue that a document issued or to which he gave assent was not reflective of his true Intentions, when an objectively clear meaning is conveyed by the document, he has in practice, a***

significant burden to explain not only that he had a contrary understanding, but also why the claimant should not hold him to the document."

5.4 It was further argued that the respondent did not discharge the burden resting on it with respect to issuance of the receipt. Taking issue with the dates on the receipt was an unconventional way of dealing with the matter when the defendant had confirmed issuing the same.

5.5 As proof that it was the fuel bought from the respondent that damaged the appellant's motor vehicle, the appellant procured a report from Vehicle Center Zambia Limited, where it purchased the vehicle from. The analysis report stated that the injector pump was damaged due to contaminated fuel.

5.6 With respect to the second ground of appeal, the appellant mainly repeats its arguments under the first ground relating to the alleged failure by the trial court to find that the appellant proved its case to the required standard. It was submitted that the appellant discharged its burden of proof with both oral and documentary evidence.

5.7 It was submitted that the case of ***Duly Motors (Z) Limited v Patrick Katongo and Livingstone Motor Assemblie&*** could be distinguished from the instant case in that in that case, the blame was placed on the manufacturer of the vehicle as it was found there was no evidence of intermittent examination when handing over the vehicle to the dealer, which was the first defendant. As such, the dealer could not immediately pick the defect on the motor vehicle.

5.8 Further, that in referring to the facts of the ***Duly Motors*** case, the learned judge misquoted the facts by stating that:

> *"**the plaintiff purchased** fuel **from the 1st defendant a motor vehicle which** was **assembled by the second defendant. 10 days after purchase, the vehicle developed a fault and** was **taken to the 1 st defendant's garage for repairs..."***

That the above facts were not true as the 1st defendant in that case was the dealer of vehicles assembled by the 2' defendant and had nothing to do with fuel at all. That the problem with the vehicle was attributed to a manufacturing defect which is not the case *in casu.*

5.9 It was submitted that the learned trial judge misapplied the case cited .That the lower court was in manifest error when it found that the appellant failed to meet the standard of proof imposed on it. Counsel argued that the standard was met within the dictates of the authority the court relied upon. It was submitted that the requirement for intermittent examination was met and within the warranty conditions, Vehicle Center Zambia Limited examined the vehicle and the fuel and repaired the vehicle. It was submitted that the issue in the lower court had nothing to do with the motor vehicle manufacturer's liability and the court simply fell in error when it directed its mind to an issue not before it. The Court is urged to reverse the finding of the learned judge and to allow this ground of appeal.

5. 10 Under the 3rd ground of appeal, the appellant seeks to assail the lower court's finding to the effect that the appellant did not adduce sufficient evidence to prove that the subject fuel was contaminated. Ms. Kaunda repeated the appellant's arguments in support of grounds one and two. In addition, it was submitted that the respondent's witness, DWI, admitted to dealing with three similar complaints in which the respondent took corrective action. The appellant contended that this was not an isolated case of fuel contamination. It was submitted that the court below fell in error when it failed to effectively evaluate all the evidence before it in arriving at the finding it made that the appellant did not adduce sufficient evidence to prove that the subject fuel was contaminated. We are urged to allow this ground of appeal.

5.11 Under the fourth ground of appeal, the appellant seeks to assail the following finding of the trial court, appearing at page J13 of the judgment appealed against. It states:

> ***"All the more so, it is clear from the evidence that the liability for negligence as established in Donoghue v Stevenson applies to manufacturers of goods and hence is not applicable to this case without more."***

5.12 It was submitted on this premise that the *neighborhood principle* espoused in the ***Donoghue case*** was never expressed to be limited to the manufacturer and consumer relationship but expressed as a

general duty of care in all cases. Ms. Kaunda argued that *in casu,* the appellant met all three requirements for the tort of negligence, as it is not in dispute that the motor vehicle stopped soon after refueling it with fuel purchased from the respondent and that the said vehicle had to be repaired at a cost.

5.13 Counsel submitted that the *neighbourhood principle* espoused in the ***Donoghue case*** was never expressed to be limited to the manufacturer and consumer relationship but expressed as a general duty of care in all cases. The cases of ***Beauty Kayoba Kabinga v Euro Africa Bus Services***[5] and ***Faindani Daka v Attorney*** General[6] were referred to.

5.14 It was submitted that even if the court below found that the ***Donoghue*** *case* did not apply *in casu,* the lower court was still duty bound to determine the respondent's liability to the appellant referring to the pleaded general tort of negligence. That it was an error for the lower court to come to a finding of the sort made which could be interpreted to mean that a seller of fuel has no liability for contaminated fuel sold to its customers that results in damage to their vehicles.

5.15 Counsel argued that the presumed manufacturer of fuel may well equally deny being responsible for any contamination of the same after loading it into the respondent's pipes and tanks. She ***submitted that section 53*** of the ***Sale of Goods Act*** [1893][2] imposes on the respondent the duty to sell fuel which is fit for the purpose

for which it is required. That the provision entitles the buyer to damages where there is a breach by the seller. That it was the duty of the court below to assess the responsibility of the respondent as a seller of fuel and not to leave the issue undetermined. The cases of ***Zambia Consolidated Copper Mines Limited v Goodward Entreprises Limited***[7] and ***City Council of Ndola v Colcom Cooperative (Zambia) Limited***[8] were referred to.

5.16 It was submitted that it was erroneous for the court below to stop at determining that the case of ***Donoghue v Stevenson*** supra did not apply. That the court below was under a duty to determine the responsibility of the respondent as retailer of the fuel which the appellant put to normal and ordinary use resulting into damage to its motor vehicle. It is submitted that the decision arrived at by the court below was absurd and unfair on retail fuel consumers.

5.17 Further, that if the court below had considered the above position under the claim for other relief, it would have deemed it fit to consider the respondent's responsibility as a retailer and this would have produced a different result. The case of ***Edith Tshabalala v Attorney*** General[9] was referred to.

5.18 It was the appellant's prayer that this ground of appeal succeeds and that the entire appeal be upheld with costs.

6.0 Respondent's submissions

6.1 The respondent did not file into court any heads of argument. However, Mr. Chalenga made oral submissions in response to the appellant's submissions. Counsel submitted that the court below was on firm ground to hold there was neither proof nor evidence to show that the appellant purchased the contaminated fuel from the respondent's station. In respect of ground one, he placed reliance on the learned judge's finding of fact at page J12 where she stated:

> ***"In the matter in casu, I find that the undated*** *tax* ***invoice which*** *was* ***issued days after the purported purchase of fuel from the defendant and the subsequent write up by PW2*** **[must be DW1],** ***do not at all prove that the plaintiff actually bought the purported contaminated fuel from the defendant."***

6.2 Counsel further relied on the lower court's finding of fact at page J 11 to the effect that whilst it was a fact that the tax invoice was generated by Pearson Tembo, DW1, it was not evidence that the fuel that purportedly caused damage to the appellant's motor vehicle was bought from the respondent in light of the fact that the purported purchase was on 10th July, 2015 and the invoice was issued on 13th October, 2015. Counsel's submission was that the court below was on firm ground.

6.3 Under ground two, Mr. Chalenga supported the learned trial judge's analysis on the standard of proof being on the balance of probabilities which is flexible in its application, dependent on the seriousness of the allegations. The learned judge, he submitted, went on to state that the flexibility of the standard does not adjust the degree of the probability required for an allegation. That however, the strength or quality of the evidence would in practice be required for an allegation to be proved. Counsel submitted that the learned judge clearly had time to analyse the appellant's evidence and she found that the appellant had not met the standard of proof. He urged us to dismiss ground two of the appeal.

6.4 With respect to the third ground of appeal, Mr. Chalenga relied on the previous arguments, which we need not repeat.

6.5 Turning to the fourth ground of appeal, it was Mr. Chalenga's submission that the lower court was on firm ground. That the ratio decidendi in the case ***Donoghue v Stevenson*** supra is that a manufacturer of products which it sells has a legal duty of care to the ultimate consumer of its product. He argued the learned judge applied her mind to the ***Donoghue*** *case* and made her finding ant page J 14 to the effect that a retailer cannot be held liable in negligence unless he interfered with the goods before selling them off to third parties. Counsel supported the court's reasoning and urged us to dismiss ground four of the appeal.

6.6 In sum, Mr. Chalenga submitted that grounds one to three were grounds meant to seek the indulgence of the Court to interfere with findings of fact. He relied on the case of ***Attorney General v*** Administrator General[1°] and submitted that the appellant had not established any ground upon which this Court could interfere with findings of fact. It was counsel's prayer that the appeal lacked merit and he urged us to dismiss it with costs.

7.0 The court's decision on appeal

7.1 We have considered all the evidence on record, the judgment appealed against, as well as the written and oral submissions advanced by both parties herein. We will now proceed to determine the first three grounds of appeal in seriatim as they are interrelated.

7.2 Under grounds one to three of appeal, our question for determination is whether, based on the evidence on record, it can be said that the appellant proved its case on a balance of probabilities that the respondent sold it contaminated fuel which caused damage to its vehicle? If we answer this question in the positive, it then follows that we can exercise our power to reverse the findings of fact made by the trial judge.

7.3 Under the first ground of appeal, it is not in dispute that the respondent did not issue a tax invoice to the appellant at the time of occurrence of the subject incidence. The learned trial judge found that the undated tax invoice was issued days after the purported purchase

of the fuel from the respondent and the subsequent write up by the respondent's witness, Pearson Tembo (DWI). The learned judge found that this did not prove that the appellant bought the contaminated fuel from the respondent.

7.4 As we determine whether or not this finding was justified, we bear in mind the question which the learned trial judge sought to determine, which was whether the damage occasioned to the appellant's motor vehicle could be attributed to the respondent. With regard to the appellant's argument that the respondent did not challenge the issuance of the tax invoice, we find that the issuance of the tax invoice is of course not in issue. In any event, going by the portion of the ***Kalusha Bwalya case*** cited by the appellant in relation to a defendant's obligation to explain a contrary understanding of a document to which he gave assent if it was not reflective of his true intentions, the respondent's witness (DW1) gave unrebutted evidence to the effect that he issued the said receipt when PW 1 told him he had bought fuel from the respondent's filling station sometime back and he needed a receipt for purposes of obtaining a refund at work, as he had used his own money. On this issue, the appellant's submission was that the receipt is the only credible evidence that the appellant purchased fuel from the respondent and that soon after the appellant's motor vehicle seized. The implication of this argument is that the receipt was evidence of two things; firstly, that the appellant purchased fuel from the respondent and secondly, that soon after the

said purchase, the appellant's motor vehicle seized. To say that a mere undated receipt issued months after the purported purchase of fuel, and allegedly obtained for purposes of cash refund, proves these two crucial elements would be a serious misdirection. We bear in mind that the finding of the learned trial judge in this regard was with specific reference not only to PW1's purchase of fuel but also the time lapse between the date of the purchase and the date of issuance of the receipt.

7.5 The appellant also submitted with regard to the learned trial judge's statement in relation to the time lapse between the date of alleged purchase of fuel and the date of issuance of the receipt, stating that picking an issue with the dates was an unconventional way of dealing with the matter when the defendant had confirmed issuing the same. The relevant portion of the judgment appealed against in relation to this issue are at pages J 1 to J12. It states:

> ***"While I accept the said*** *tax* ***invoice as evidence that it*** *was* ***generated by Pearson Tembo, the*** *tax* ***invoice is not evidence that the fuel that purportedly caused damage to the Plaint****iff's* ***motor vehicle*** *was* ***bought from the Defendant especially in light of the delay to obtain the same. The evidence shows that the purported purchase of the fuel*** *was* ***on the*** ^{10th} *July* ***2015 and the invoice*** *was* ***issued on*** ^{13th} ***October 2015. This delay raises a lot***

of doubts on the plausibility of the evidence that the fuel *was* ***bought from the defendant."***

7.6 Our understanding of the trial judge's analysis of the tax invoice in so far as it relates to the date of issuance is that she married it to the likelihood or probability of PW1's purchase of contaminated fuel from the respondent, and not necessarily the issuance of the receipt. As we have stated earlier, there is no dispute as to the issuance of the said receipt. On this premise, we hold that the finding of the trial judge that is subject of this ground of appeal was properly arrived at after a fair evaluation of evidence, and there is nothing on the record that would prompt us to upset the same.

7.7 In relation to the appellant's request that we take judicial notice of the effect of a receipt, we are of the view that this should be analyzed in relation to the issue that the trial court sought to determine by referring to the receipt, and that was whether or not the receipt proved that the contaminated fuel was bought from the respondent's filling station. The issuance of the receipt by the respondent was not disputed. What was in dispute was what the tax invoice represented, and that was by no means the purchase of contaminated fuel that caused damage to the subject vehicle. For this reason and those stated earlier, we find no merit in the first ground of appeal and we accordingly dismiss it.

7.8 With respect to the second and third grounds of appeal, it was argued that the fuel bought from the respondent's filling station was contaminated. Reliance was placed on the report from Vehicle Center Limited, whose finding was that the fuel was contaminated, resulting in damage to all five injectors and high pressure fuel pump.

7.9 At the hearing of the appeal, we asked Ms. Kaunda if the report by Vehicle Center Limited showed that the contaminated fuel was bought from the respondent's filling station and her answer was in the negative. She added that the vehicle stopped almost immediately after refueling and the manager was notified as soon as the incident occurred. Her written arguments stated further that a sample was then given to Patel, the respondent's manager and this evidence was not challenged throughout the proceedings. That it was therefore for the respondent to show that it had this fuel tested and established that it was not contaminated or not purchased from its filling station. Further, the said Patel's response that the respondent was not the manufacturer of the fuel goes against the respondent's responsibility to ensure that it sold goods fit for the purpose for which they were required and thus owed a duty of care to his customers.

7.10 We wish to address this submission by the appellant's counsel on the burden of proof in a civil matter such as this one. It is trite law that he who alleges must prove. The appellant was alleging that the respondent's fuel was contaminated and caused damage to its vehicle. How was it up to the respondent to test the fuel sample and prove that

it was not contaminated? This submission is contrary to the law of evidence as we know it, as enunciated in a plethora of cases such as ***Khalid Mohammed v Attorney-General."*** We note that the trial judge in fact acknowledged the need for the appellant to prove its case ***when she cited the case Wilson Masauso Zulu v Avondale Housing*** Project Limited *supra* at page J12 when she quoted these words; *"A Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponents' case."* We cannot emphasise this point any further. Entertaining this submission by the appellant's counsel, would be a departure from a trite principle of law which binds this court.

7.11 In support of ground three, Ms. Kaunda drew our attention to the evidence of DW 1 in cross examination to the effect that when he was in the employment of the respondent, there had been three incidents involving vehicles developing faults after refueling at the respondent's filling station. Suffice to say that the purchase of the fuel from the respondent's filling station was not proved to the satisfaction of the trial judge. As an appellate court, we perceive no basis on which we can overturn her finding in this respect.

7.12 In view of the fore stated we find no merit in grounds one to three and we dismiss them for lack of merit.

7.13 Under the fourth ground of appeal, our attention is drawn to the case of ***Donoghue v Stevenson*** *supra* and the argument that the neighbour principle was never expressed to be limited to the

manufacturer and consumer relationship but expressed as a general duty of care in all cases. Counsel argued further that *in casu,* the appellant met all three requirements for the tort of negligence, as it is not in dispute that the motor vehicle stopped soon after refueling it with fuel purchased from the respondent and that the said vehicle had to be repaired at a cost.

7.14 As we make an analysis of the trial court's finding and evaluation of the evidence on record, we find it prudent to reproduce a portion of the judgment at page J13 where the learned judge stated:

> ***"Donoghue v Stevenson clearly established the tort of negligence in relation to manufacturers as it sets out the principle that manufacturers do owe a duty to the consumer. Going by the principle in that case, the Plaintiff*** *has* ***to prove that the fuel sold by the Defendant to the Plaintiff*** *was* ***not sold exactly in the same form and condition in which it left the manufacturer and further that there was a possibility of inter mediate examination or Interference when the fuel left the manufacturer. There was no such evidence in this matter and it is inescapable to find for the Defendant as I hereby do."***

7.15 Our reading of the judgment of the ***Donoghue case*** is that the House of Lords established the civil law tort of negligence and obliged

manufacturers to observe a duty of care towards their customers and consumers. The main principles established were threefold, as follows:

1. **Negligence as a tort: That a plaintiff can take a civil action against a defendant if the defendant's negligence causes the plaintiff injury or loss of property.**
2. **Duty of care: That manufacturers have a duty of care to the end users or consumers of their products. According to Lord *Atkin's reasoning, "the manufacturer of products owes a duty to the consumer to take reasonable care."* This has developed over time to be the basis of laws that protect consumers from contaminated or faulty goods.**
3. **Neighbour principle: Established the *'neighbour principle'* which extended the tort of negligence beyond a tortfeasor and the immediate party, raising the question of who might be affected by negligent actions.**

7.16 The appellant is opposed to the learned trial judge's application of the **Donoghue Case** to the extent that the appellant should have proved that the fuel was not in the same state as it left the manufacturer, yet the *Sale of Goods Act* imposes an implied warranty as to fitness for purpose, which is not restricted to manufacturers only.

7.17 Another legal framework that protects consumers of goods from unfair trade practices is competition law, which in our jurisdiction is ***governed by the Competition and Consumer Protection Act***[3]. The said Act states under ***section 49(1)*** that:

> [11]**49. (1) A person or an enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise."**

7.19 On the trial court's application of the *Donoghue Case,* we are inclined to agree with the submission advanced on behalf of the respondent that the principles espoused therein are not limited in application to only manufacturers of goods. Such a narrow application is in our view contradictory to the provisions of the *Sale of Goods Act* and the *Competition and Consumer Protection Act.*

7.20 However, as this was an action for negligence, the elements of the tort of negligence had to be met for the appellant to have succeeded in the court below. The respondent's requirement to ensure that the fuel sold is fit for its intended purpose emanates from a duty of care owed to consumers. If the respondent sold defective or contaminated fuel to the appellant, that would entail a breach of such duty of care and implied warranty. However, in an action for negligence, there is need to establish a causal link between the allegedly contaminated fuel bought from the respondent and the resultant damage caused to the vehicle.

7.21 *In casu,* causation was hardly established based on the evidence on record, as the appellant only obtained a receipt about three months after the alleged purchase of fuel and did not submit a sample for

inspection by the relevant authorities. There is only an undated report by a mechanic, stating that the contaminated fuel was found in the vehicle, thereby causing damage to the fuel pump and other parts of the vehicle. This does not establish that it was in fact the fuel purchased from the respondent that caused such damage.

7.21 With regard to the argument of the respondent's responsibility as seller of fuel, Ms. Kaunda referred us to **Section 53 of the Sale of** Goods Act of 1893 which provides for the remedy of damages where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty. We note from the record that the argument of liability under the **Sale of Goods Act of 1893** was never canvassed in the lower court. It is none the less a point of law which we must address.

7.22 The consideration of **Section 53** of the **Sale of Goods Act of 1893** cannot be in a vacuum. It must be read in concert with **Section 14** the relevant portion of which provides that:-

> [11]***14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:***
>
> ***(1) Where the buyer, expressly or by implication, makes fitness known to the seller the particular***

purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the cause of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regard defects which such examination ought to have revealed."

7.23 The Oxford Dictionary of Law' defines an implied term as:

"A provision of a contract not agreed to by the parties in words but either regarded by the courts as necessary to give effect to their presumed intentions or introduced into the contract by statute (as in the case of contracts for the

sale of goods; An implied term may constitute either a condition of the contract or a warranty; if it is introduced by statute it often cannot be expressly excluded."

7.24 **Black's Law Dictionery**[2] defines an implied warranty of merchantability as:

"A merchant seller's warranty-implied by law-that the thing sold is fit for its ordinary purposes."

7.25 The question which is the subject of this appeal therefore, is, in the circumstances of this case, did the appellant adduce sufficient evidence, in the court below, to prove that there was a breach of an implied warranty that the fuel the respondent supplied to the appellant was not fit for the intended purpose, or was contaminated?

7.26 Mr. Chalenga supported the learned trial judge's finding to the effect that the appellant failed to meet the standard of proof that the contaminated fuel was purchased from the respondent. The evidence relied upon by the appellant to prove contamination is a report from Vehicle Centre Zambia, the vehicle dealership which reads as follows:

"VEHICLE CENTRE ZAMBIA

REPORT ON ALR **7851**

On the 20 July 2015 the above vehicle came into Vehicle Centre Zambia Malambo road as a non-runner.

Electronic diagnosis equipment was connected to the vehicle it showed faults with the fuel system. Further visual and other inspections showed the fuel/fluid to be contaminated. This contamination normally has no lubrication content resulting in component failure.

This fuel/fluid resulted in damage to all 5 injectores and high pressure fuel pump.

As a result of this contamination the fuel tank was removed and cleaned out, along with the fuel lines.

The following parts were replaced.

1. Fuel injector's quantity 5
2. High pressure fuel pump quantity 1
3. Fuel filter quantity 1
4. Diesel fuel 10 litres to allow for starting of the engine and road.

On completion of this work the vehicle was able to start and it was road tested satisfactorily. The customer was informed and a fuel/fluid sample provided to him. See photo.

Signed: BG BredenKamp
Service Operations Manager"

7.27 In light of the above evidence, our firm view is that we cannot fault the learned trial judge's finding to the effect that the only proof the appellant had was an undated report from Vehicle Centre Zambia which was a mechanic's opinion and not proof that the respondent's

fuel was contaminated. We find that upon her analysis of the evidence before her, she was entitled to come to the conclusion that there was insufficient evidence to prove that the subject fuel was contaminated. We are fortified in our position by the case of **BJ Poultry Farms Limited v. Nultri Feeds (Z) Limited**[12] where the Supreme Court had this to say in affirming their position in **Khalid Mohamed v. Attorney-General** *supra:*

> ·· ***We made it clear that the plaintiff cannot rely on the alleged "failed defence" of the defendant to sustain his claim against the defendant and that a plaintiff should not automatically succeed whenever a defence fails as the plaintiff must prove his case and that*** *if* ***he falls to do so, the mere failure of the opponent's defence does not entitle him to judgment."***

7.28 Therefore, we are not satisfied that the respondent breached an implied warranty that the fuel it supplied to the appellant was of merchantable quality, which would have been the basis upon which we could have found the respondent liable for loss occasioned to the appellant. *In casu,* there was simply no link between the alleged contaminated fuel purportedly purchased from the respondent and the resultant loss suffered by the appellant. The report relied on does not show the contaminated fuel to be that of the respondent. This ground of appeal equally fails, and it is effectively dismissed.

7.29 The appeal is therefore dismissed in its entirety with costs to the respondent to be taxed in default of agreement.

F. M. **Chisanga**
JUDGE PRESIDENT

D.L.Y. -ichinga
COURT 0 APPEAL' **'GE**

P.C.M. Ngulube
COURT OF APPEAL **JUDGE**