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Vedanta Resources PLC and Konkola Copper Mines PLC v Lungowe and Others 2019 UKSC

20

Pamela Towela Sambo

Facts

This case was initiated in the court of first instance, the England and Wales Technology and Construction Court (hereinafter referred to as the UK High Court Division) on 31 July 2015, by 1, 826 Zambian citizens who are resident in Chingola, Zambia. The claimants sought damages for personal injury, wide ranging environmental harm, damage to property, loss of income and amenity and enjoyment of land arising out of alleged pollution and environmental damage caused by the second appellant, Konkola Copper Mines (hereinafter referred to as 'KCM') at its Nchanga copper mine from about 2005 to date.

The first appellant, Vedanta Resources Plc (hereinafter referred to as 'Vedanta') is the holding company for a large multinational group of base metal and mining companies, including KCM, the second appellant, which is a public limited company incorporated in Zambia. KCM owns and operates Nchanga mine in Chingola, Zambia. In effect, these proceedings were brought against Vedanta, a UK incorporated parent company, and KCM, its Zambian subsidiary. The claims against both appellants were founded in negligence and breaches of applicable Zambian environmental laws.

In 2016, the UK High Court Division held that the claimants could pursue their case before the English courts, despite the fact that the alleged tort and harm occurred in Zambia, where both the claimants and the second appellant, KCM were domiciled. This decision was later upheld by the UK Court of Appeal in October 2017, after the appellants' appeal. Being dissatisfied with the decision of the UK Court of Appeal, the two appellants launched their final appeal to the UK Supreme Court.

The Issues

The main issue for determination before the UK Supreme Court was solely the preliminary question regarding the jurisdiction of the courts of England and Wales to determine the claims brought against both appellants. As against Vedanta, the claimants relied on the provisions of article 4 of the Recast Brussels Regulation (Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).¹ As against KCM, the claimants relied on what was loosely referred to as 'necessary or proper party' gateway of the English procedural code for permitting service of proceedings out of the jurisdiction.

In resolving the main issue of jurisdiction, however, the UK Supreme Court had to address several related issues, which involved traversing volumes of significant evidence. These issues are now summarised as follows:

- (i) Whether or not the claimants had abused EU law by relying on Article 4 of the Brussels Regulation Recast to establish jurisdiction over Vedanta as 'anchor' defendants for the purpose of attracting the English courts' jurisdiction over the claims against KCM, who, according to the appellants were 'the real target of all the claims';
- (ii) Whether or not the claimants' case with its supporting evidence disclosed any real triable issue against Vedanta;
- (iii) Was England the 'proper place' in which to bring the claims against KCM and Vedanta?
- (iv) In the event that Zambia was the 'proper place' to litigate this matter, would there be a 'real risk' that the claimants would not obtain access to 'substantial justice' in Zambia?
- (v)

In order to understand these issues better, it is important to provide the procedural history of the case in both the UK Court of Appeal and the UK High Court Division:

Procedural History

¹For further reading refer to https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

A. UK Court of Appeal (2017): Vedanta Resources Plc and Konkola Copper Mines Plc v. Dominic Liswaniso Lungowe and others [2018] 1 WLR 3575

The appellants brought these proceedings in the UK Court of Appeal against an order dated 16 June 2016, following judgment of the UK High Court Division dated 27 May, 2016, which dismissed the jurisdictional challenges brought by Vedanta and KCM. Procedurally, the claimants had earlier in 2015 been granted permission by the UK High Court Division to serve process on the second appellant out of jurisdiction.

Both appellants sought almost identical remedies, namely:

1. A declaration that the court did not have jurisdiction to try the claimants' case, or alternatively, that the court ought not exercise any jurisdiction which it may have to try these claims and/or;
2. A stay of proceedings pursuant to CPR Part 11(6)(d) and/or CPR 3.1(2)(f) and/or pursuant to the court's inherent jurisdiction until further notice;
3. Such further or consequential relief as the court deems fit; and
4. Costs.

Both Vedanta and KCM were agreeable that their almost identical issues be tried together in the Court of Appeal, with consideration of the circumstances under which a parent company, Vedanta would be said to owe a duty of care to those affected by the acts and omissions of its subsidiary, KCM. The other substantive issue for consideration, in relation to the question of jurisdiction was the issue of the claimants accessing substantive justice in the Zambian courts. This was generally couched as the 'dearth of private lawyers in Zambia to conduct such a complex web of technical litigation and who was to blame for the failure of other environmental litigation' in Zambia.

The rest of the deliberations in the UK Court of Appeal are summarised in sequence as follows:

1. The UK Court of Appeal agreed with the UK High Court Division on the approach of narrowing the relevant issues to three initial conclusions: first, it was plainly obvious from the evidence on record that England was not the appropriate forum for these claims, while Zambia was the more appropriate. Secondly, the option of considering the claim against Vedanta led to the conclusion that England was the more appropriate place to try the claims against KCM. Thirdly, if the UK High Court Division were to be wrong about this, in any event, it was open to conclude that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia.
2. Based on the evidence adduced in the UK High Court Division, it was open to that Court to find it inappropriate for the claimants' case to be conducted in parallel proceedings involving identical or virtually identical facts, witnesses and documents, in circumstances where the claim against Vedanta would in any event continue in England; and that this made England the most appropriate place to try the claims against KCM. The UK Court of Appeal declined to analyse this aspect differently.
3. In relation to the contention on access to justice, the UK High Court Division had to trawl through a voluminous body of evidence from which seven key factors were condensed. The UK Court of Appeal agreed with the approach advanced by the court of first instance that evaluated the key evidence and accordingly saw no merit in disturbing the finding that if the claimants were to pursue KCM in Zambia, it was likely that they would not obtain substantial justice. According to the judgment, the seven key factors that led to this finding are as follows²:

² Lungowe and others v. Vedanta Plc and KCM Plc [2016] EWHC 975 (TCC), Paragraphs 178- 198 on pages 39 - 44

- (i) The claimants earned considerably below the national average in Zambia, one of the world's poorest countries. It was plausible to conclude that the vast majority of the claimants would not be able to afford the cost of any legal representation.
- (ii) In consequence of their poverty, the only way in which the claimants could ordinarily bring the present claims in Zambia would be by a Conditional Fee Agreement (CFA). It was common ground, however that CFAs were not available in Zambia and were unlawful.
- (iii) There was no prospect of the claimants obtaining legal aid from the Zambian state. The evidence of the Director of the Legal Aid Board was 'emphatic' to the effect that the Legal Aid Board would not provide funding for a large environmental claim in respect of the 1,800 claimants.
- (iv) The prospect of ad hoc litigation funding was entirely unrealistic. Considering the evidence as a whole the judge in the UK High Court Division concluded that it was 'fanciful' to suggest that the claims could be funded by Zambian lawyers on such a basis:

This is complex and expensive litigation involving over 1,800 claims. Detailed evidence is going to be necessary in respect of personal injuries, land ownership and damage to land; and expert evidence as to pollution, causation and medical consequences. On the evidence before the court, it is quite unrealistic to suppose that the lawyers would fund such large and potentially complex claims, essentially out of their own pockets, for the many years that litigation might take to resolve.³

- (v) No private lawyers with relevant experience were willing and capable of taking on such claims in Zambia. Elaborate evidence was adduced that the Bureau for Institutional Reform and Democracy had reported in 2012 on the lack of lawyers and the consequences for its citizens. Further, KCM was only able to identify a lawyer who would be willing to represent the claimants, much later in the course of the proceedings. It was pointed out though, that this lawyer was a sole practitioner without apparent expertise in the field. Furthermore, although this practitioner was 'extremely keen' to take on the claimants' case, it was unclear how he was to do; having only committed himself to funding the initial gathering of instructions from a sample of plaintiffs and preliminary enquiries as to merits. A second lawyer was identified, and he was willing to act but only when he had made an assessment of the merits which he had not done. As the UK High Court Division noted, there was no commitment on the part of this second lawyer to act at all; and there was no evidence adduced that a number of lawyers could possibly combine efforts for the purposes of representing the claimants.
- (vi) Previous environmental litigation in Zambia had failed in respect of some or all of the claimants for various reasons. The UK High Court Division referred specifically to two cases: *Benson Shamilimo and 41 others v. Nitrogen Chemicals of Zambia Ltd*⁴ and *Nyasulu and 2,000 others v. KCM*.⁵ On the one hand, the *Benson Shamilimo* case failed because the claimants had been unable to obtain expert evidence to prove a connection between proven illnesses and the proven exposure to radiation. The *Nyasulu* case, on the other hand ended disastrously, according to the UK High Court Division, with the claimants succeeding on liability but 1,989 of them failing in the Supreme Court

³ *Lungowe and others v. Vedanta Plc and KCM Plc* [2016] EWHC 975 (TCC), Paragraph 185, Page 41

⁴ 2007/HP/0725 (unreported)

⁵ 2007/HP/1286 (unreported)

because they had not submitted medical reports with the consequence that they were held not to be entitled to any damages at all.

- (vii) It was noted that the UK High Court Division had reviewed the claimants' evidence of the peculiar nature of the second appellant's attitude and conduct in litigation generally in previous cases in the Zambian courts. The UK High Court Division had rightly described KCM's conduct as likely 'obdurate' in approach to litigation in Zambia, and further that KCM had in the past pursued 'an avowed policy of delaying [cases] so as to avoid making due payments'.

In conclusion, the UK Court of Appeal found that the UK High Court Division was on firm ground in finding that, although the claimants only needed to establish a 'real risk' that they would not obtain substantial justice, the evidence was so overwhelming that the most plausible conclusion to reach was that the claimants would 'almost certainly' not obtain justice in Zambia.

In its unanimous decision, the UK Court of Appeal found that there were no proper grounds for reopening the decision of the lower court. Both appellants had failed, on a balance of probabilities to prove that the UK High Court Division was misdirected on the law, nor that court had failed to take into consideration key evidential matters. Further, the UK Court of Appeal was unanimous that the court below had not arrived at a plainly wrong decision and accordingly dismissed the appellants' appeals.

**UK Technology and Construction Court, High Court Division (2015): Dominic Liswaniso
Lungowe & Others V. and Vedanta Resources Plc and Konkola Copper Mines [2016] EWHC
975 (TCC)**

This was the court of original jurisdiction in this matter. At the outset, the UK High Court Division observed that serious findings of dishonesty had previously been made against KCM by eminent judges in the English courts, the consequence of which was that the credibility of evidence adduced by KCM was compromised.⁶ In addition, KCM's financial position which was supposed to be publicly available in line with the Zambian Companies legislation was inaccessible. This in sum pointed to the fact that KCM had wilfully neglected to discharge its business in line with the provisions of Zambian law. This presented a real risk that without the parent company Vedanta in the proceedings, KCM had insufficient resources to meet the claimants' demands.

The claimants' principle claim against Vedanta was in negligence; that Vedanta had a duty of care towards the claimants, which arose as a result of their assumption of responsibility for ensuring that [KCM]'s mining operations did not cause harm to the environment or local communities, as evidenced by the very high level of control and direction that Vedanta exercised at all material times over the mining operations of KCM and its compliance with applicable health, safety and environmental standards.

The claimants argued that overall, the polluted waterways were critical to their 'livelihoods, physical, economic and social wellbeing' and as such, they had suffered loss and damage. An express plea of a relationship of proximity between Vedanta and the claimants was made out by the claimants on the strength of established tortious principles. In the alternative, the claimants raised four breach of statutory duty arguments based on Zambian legal provisions.

As against KCM, the claimants raised causes of action in negligence, nuisance, the rule in *Rylands v Fletcher*, trespass, and liability under Zambian statute law. These claims rested on the fact that KCM

⁶ According to the evidence before the Technology and Construction Court, three Commercial Court judges in an unrelated case, *U & M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 2146 (Comm); [2014] EWHC 2374 (Comm); and [2014] EWHC 3250 (Comm) had all previously found that KCM had repeatedly acted in a dishonest and unjustified manner.

were for all intent and purposes, the primary operators of the mine, the source of pollution in this case. Further, the claimants argued that as the owners and operators of the mine, KCM are said to be 'strictly liable' to the claimants under a number of Zambian statutory provisions.

In an elaborate and thorough judgment, the UK High Court Division found that:

1. Vedanta's application for a stay on the grounds of *forum non conveniens* must fail.
2. There is a real triable issue between the claimants and Vedanta and that, whilst establishing their claims may not be straightforward, the claimants were entitled to try and bring themselves within the class of liability previously recognised by English jurisprudence.
3. There was reliable evidence that the claimants sought to pursue Vedanta because they were the 'real architects of the environmental pollution in Chingola, Zambia' and ultimate recipients of the millions of pounds from the pollution-generating mine.
4. Furthermore, there was a risk that KCM may not be able to honour their debts as they fall due, owing to the existence of evidence strongly suggesting that KCM was having liquidity challenges. This justified the founding of a claim against the more financially stable parent company.
5. Accordingly, it could not be said that the sole purpose of the claim against Vedanta was to act as a hook for the claim against KCM; there was a real issue between the claimants and Vedanta and there were legitimate concerns about Vedanta's conduct and KCM's financial position. Further, the claim was not a fraudulent use of Vedanta's domicile, therefore, there was no basis upon which to stay the proceedings as an abuse of EU law.
6. Finally, the court expressed 'consciousness' that excerpts of the judgment could be seen as a criticism of the Zambian legal system and perhaps 'colonial condescension'. Proceeding on the basis that the judgment was not a review of the Zambian legal system, the court emphasised that it was intended to reach a conclusion on a specific issue, based on the evidence before it. Consequently, and on the basis of the available evidence, the claimants would almost certainly not get access to justice if their claims were pursued in Zambia.

In effect, the UK High Court Division dismissed the appellants' jurisdictional challenge that the claimants were using the 'necessary or proper party argument' solely as a way of imposing English jurisdiction against their real target, KCM and that this was in effect an abuse of EU law.

Against the background of the procedural history of this case, we now turn to the final decision of the UK Supreme Court.

The Holding

The UK Supreme Court unanimously dismissed the appellants' case, effectively upholding the UK High Court Division and the UK Court of Appeal's finding in all but one respect. The decision is summarised as follows:

1. The majority of the Court of Appeal had followed existing authority that the court of an EU member state cannot decline jurisdiction where the defendant is a company domiciled in that member state (in this case, the UK), and recognised that it would be an abuse of this rule to allow claimants to sue an English domiciled 'anchor' defendant (in this case, Vedanta) solely to pursue a foreign co-defendant (a 'real' target, in this case KCM) in the English courts but that this exception was to be applied strictly. The Supreme Court noted that *both the High Court and the Court of Appeal had found on the facts that the claimants had a bona fide claim and a genuine intention to seek a remedy in damages against Vedanta, even though establishing the*

*English courts' jurisdiction over KCM was also a key factor in their decision to litigate in England.*⁷ According to the Supreme Court, this was sufficient basis for the finding that there was no abuse of EU law, and accordingly, there was no need to refer the matter to the Court of Justice for the European Union.

2. In relation to whether there was a real triable issue against Vedanta, the UK Supreme Court approached this issue with the key question - had Vedanta 'sufficiently intervened in the management of the mine owned by KCM such that it assumed a duty of care to the claimants and/or to establish statutory liability under applicable Zambian environmental, mining and health laws?' The Supreme Court found that 'there was nothing special or conclusive about the bare parent/subsidiary relationship [...] the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all.' Accordingly, Vedanta had, in the circumstances, assumed a duty of care in respect of the claimants in this case.
3. England was the proper place - whilst the lower courts concluded that parallel proceedings against a UK company in the English courts and a Zambian company in the Zambian courts would be unthinkable, making England the proper place for the claims against both defendants (given the similarity of facts and legal principles at issue), the Supreme Court took a different view. It would have been open to the claimants to either sue both companies in Zambia (as Vedanta had agreed to submit to the jurisdiction of the Zambian courts) or to sue Vedanta in England and KCM in Zambia, recognising that the risk of irreconcilable judgments 'mainly concerns the claimants.' In reaching this view, the Court referenced Article 8 of the Brussels Recast Regulation, which gives claimants in intra-EU disputes the choice (but not the obligation) to consolidate proceedings in order to avoid the risk of irreconcilable judgments, and concluded that the same principle should apply where the claimants are domiciled outside the EU (as in this case).
4. In relation to the question of access to substantial justice in Zambia, the UK Supreme Court acknowledged that most reasonable observers would conclude that Zambia would, in the ordinary course, be the proper place for the proceedings, given the location of the claimants, the alleged damage, the evidence and KCM's personnel. Further, it was noted that the Zambian courts were also best equipped to interpret the Zambian laws which would be applied in the case. However, following the decisions of the lower courts, the UK Supreme Court was persuaded by two primary factors in concluding that claimants would be denied access to justice if they were not permitted to serve English proceedings on KCM out of jurisdiction:
 - (i) First, the claimants were living in abject poverty and could not obtain local legal aid and would be prohibited from entering into conditional fee agreements under Zambian law;
 - (ii) Secondly, the claimants would be unable to procure the services of a legal team in Zambia with sufficient experience and expertise to effectively manage litigation of this scale and complexity.⁸ This was, in fact, the deciding factor for the Supreme Court in dismissing the defendants' appeal. The Court emphasised that, were it not for the claimants' inability to access substantial justice in Zambia, it would have allowed the appeal.

⁷ Emphasis supplied by author

⁸ N. A. Kahn- Fogel, *The troubling Shortage of African Lawyers: Examination of a Continental Crisis Using Zambia as a Case Study* 2012. 33:3 U.Pa.J. Int'l. See also S Karangizi, *Future Proofing the Legal Profession in East Africa* available at <https://www.aflsf.org/director-article/future-proofing-legal-profession-east-africa>

5. The UK Supreme Court took the opportunity to restate the law that appeals on matters of jurisdiction ought to be kept at a minimum. Parties in such cases were implored not to lose sight of the requirement for proportionality⁹ when presenting their cases.

Significance

The UK Supreme Court decision in the *Lungowe* case has significance beyond the UK and the EU:

1. It highlights the need for multinational companies to be aware of the possibility that any third-party claimants may be able to bring claims, particularly for human rights abuses and environmental damage against them in the English court. Further, there is now a real possibility that the scope of potential claimants has been widened to include communities affected by the operations of a local subsidiary. This is particularly important in the operations of multinational corporations that are involved in the extractive industries which by their very nature are responsible for immense environmental degradation across the globe through subsidiaries.¹⁰ This decision paves the way for the first trial in the UK involving environmental damage committed in a foreign jurisdiction by an overseas subsidiary of a UK- domiciled company.

The UK Supreme Court found that the parent company, Vedanta, had exercised significant influence of the day-to-day operations of the subsidiary, KCM. Further, the UK Supreme Court agreed with the lower courts that the extent of Vedanta's involvement in the operation of KCM's mine was a factual issue, relevant to both the negligence and statutory liability claims. In this regard, the lower courts held that it was arguable that Vedanta owed a duty of care to the claimants given that it had done the following:

- (i) Published a sustainability report which emphasised how the Board of the parent company had oversight over its subsidiaries;
- (ii) Entered into a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training;
- (iii) Provided health, safety and environmental training across its group companies;
- (iv) Provided financial support to KCM;
- (v) Released various public statements emphasising its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure;
- (vi) Exercised control over KCM, as evidenced by a former employee.

In *AAA v Unilever Plc*¹¹, another case which considered the jurisdictional question, it was found that:

A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claim are satisfied in the particular case.

In agreeing with the court's reasoning in the *Unilever* case, it is worth mentioning that liquidation proceedings have been commenced in the Zambian courts against KCM.¹² The basis of these proceedings, apart from alleged financial impropriety and insolvency, also hinges on failure by KCM to employ environmentally friendly or sustainable mining techniques.¹³ These allegations have been made and proved in courts of law since 2006.

⁹ The court cited Lord Templeman's judgment in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 465, in which it was stated that '[a]n appeal should be rare and the appellate court should be slow to interfere.'

¹⁰ P D Cameroun and M C Stanley 2017 Oil, Gas and Mining: A Source Book for Understanding the Extractive Industries, Washington, DC: World Bank. doi:10.1596/978-0-8213-9658-2.

¹¹ [2018] EWCA Civ 1532, para 36

¹² At the time of writing, legal proceedings had commenced in earnest to place KCM under liquidation. See *ZCCM Investment Holdings Plc v. Konkola Copper Mines Plc* 2019/HP/761.

¹³ Paragraph 10, Winding Up Petition (Pursuant to the Corporate Solvency Act) filed in the case *ZCCM Investment Holdings Plc v. Konkola Copper Mines Plc* 2019/HP/761

2. The trial of the substantive issues in the *Lungowe* case is yet to be listed. This Supreme Court judgment on the interlocutory matter of jurisdiction highlights the need for multinational companies to be aware of the possibility that any third-party claimants may bring claims against them in the English courts where they have an English parent company. In the same vein, this decision re-echoes the norm that jurisdictional limits are procedural and should not, ordinarily curtail *bona fide* claims.
3. Given the human rights dimension of *Vedanta*, both in relation to the nature of the damage and the access to justice arguments, multinational companies ought to implement measures to ensure that human rights are respected and protected throughout their operations. This decision should also be seen in the light of recent global trends to de-mystify the application of the *forum non conveniens* doctrine,¹⁴ as well as global efforts towards an international human rights and business convention, mooted to focus on access to justice and effective remedies for those who suffer harm as a result of the operations of a business enterprise.
4. The UK Supreme Court decision further brings access to justice in Zambia under the global spotlight. By repeatedly echoing the findings in the lower courts that the claimants would have faced real and insurmountable hurdles in their pursuit for justice in the Zambian courts, the UK Supreme Court effectively added an international voice on the need to check some of the shortcomings in the pursuit for justice in the Zambian courts. The elaborate and unchallenged evidence presented in relation to the operations of KCM and Vedanta are not only incriminating but also indicting on all regulators; incorporation of companies, environmental compliance as well as mining. Some of the lingering questions include, why it took so long for KCM operations to be brought under scrutiny, as well as why the High Court findings in *Nyasulu and 2000 others v. KCM* were not followed through.

Related to the well-articulated aspect of access to justice, this case, from its inception in the UK High Court Division progressed with minimum delay. At the slightest hint of any delay, the Court was quick to explain itself, following firmly in the dictates of ‘justice delayed is justice denied.’ Specifically, Coulson, J. had this to say:

The applications were heard over three days in mid-April 2016. The first full draft of this Judgment was prepared in the four days immediately thereafter, after which I went on circuit until the end of May. As I explained to the parties at the outset of the hearing, the logistical difficulty that I faced was that I could not take the 24 lever arch files on circuit, which meant in consequence that the final ‘polishing’ stage in the production of this Judgment was delayed for longer than I would have wished.¹⁵

This explanation shows that the delay in issue was only for a few weeks. Such a courteous explanation from the court is welcome as it goes a long way towards easing litigants’ anxieties on the outcome of their claims before the courts.

¹⁴ For further reading, see among others; Christopher A. Whytock, Cassandra Burke Robertson, ‘Forum Non Conveniens and the Enforcement of Foreign Judgements’ (2011) Columbia Law Review; Christopher A. Whytock, ‘The Evolving forum Shopping System’ (2011) Cornell Law Review; Surya Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?’ (2004) ILSA of International and Comparative Law; Joost Pauwelyn, Luiz Eduardo Salles, ‘Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions’ (2009) Cornell international Law Journal; Edwin Peel, ‘Forum Shopping in the European Judicial Area – Introductory Report’ (2006) Oxford legal studies Research Paper No. 39/2006; Donald Earl, ‘Forum Conveniens: The Search for a Convenient Forum in Transnational Cases’ (2012) Virginia Journal of International Law.

¹⁵ *Dominic Liswaniso Lungowe and others v. Konkola Copper Mines Plc and Vedanta Resources Plc* [2016] EWHC 975 (TCC), 4

On the contrary, similar cases in Zambia have been known to take several years without any explanation for the delay whatsoever. Take for instance the case of *Nyasulu and 2000 others v. KCM* which was commenced in the Lusaka High Court in 2007 and was only decided in 2011. Further, an appeal was lodged in the Supreme Court in 2012 and decided upon in 2015. None of these two judgments makes any comment on the glaring delay between 2007- 2015. While it is acknowledged that several operational challenges exist in the pursuit of justice in Zambia, the courtesy of an explanation would go a long way towards dispelling entrenched views that such delays are fueled by powerful and corrupt litigants conniving with judicial officers.¹⁶

5. Operation of the duty of care principle in the tort of negligence

The UK Supreme Court agreed with the claimants' argument that the possible duty of care that the appellants owed them was not novel, but rather that it is the application of well-established principles to a fresh type of situation. The Court re-emphasised the test for the duty of care principle in determining negligence, based on the *Dickman v. Caparo*¹⁷ case as being whether:

- (i) there is sufficient proximity between the parties to impose a duty;
- (ii) the harm is reasonably foreseeable as a result of the defendant's conduct; and
- (iii) it is fair, just and reasonable to impose liability.¹⁸

While the application of this test to the circumstances of the *Lungowe* case remains the preserve of the substantive hearing on its merits, it must be pointed out that a clear duty not to pollute or harm the environment exists in respect of all mining facilities, local or multinational. It follows therefore that any arising breach and consequential damage, provided the causal link is established, must be atoned for.

Although this judgment was essentially centred on the procedural and peripheral issue of jurisdiction, it is important for the emphasis and clarity provided in respect of a good number of substantive legal issues that have been outlined in this review and which are critical in a globalised economic space. The interplay of business and human rights, particularly environmental human rights is also an important issue to look out for as the matter proceeds to the substantive hearing.

¹⁶ See generally, the case *Nyasulu and 2000 others v. KCM* 2007/HP/1286 (unreported)

¹⁷ [1990] 2 AC 605

¹⁸ See also the case of *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4