CHRISTOPHER GWIRIRI
versus
STARAFRICA CORPORATION (PRIVATE)
LIMITED t/a HIGHFIELD BAG (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 18, 21 & 22 May 2009 and 3 March 2010

Civil Trial

G. Mhlanga, for plaintiff
N. Moyo, for the defendant

CHITAKUNYE J: The plaintiff is a former employee of the defendant. The defendant is a duly incorporated company in terms of the laws of Zimbabwe.

The plaintiff was employed by defendant from 1990 to 2006. He was employed as a Cibra Machine Operator. Later he was assigned to work as an Assistant Tapeline 11 Machine Operator.

On the 19 to 20 April 2006 the plaintiff was involved in a workplace accident. His right hand was trapped between machine rollers of the tapeline 11 machine as he tried to insert some broken plastic strands. He sustained a crushed right hand assessed at 65% disability. After the accident he was taken to hospital. He remained hospitalised from the 20th April 2006 to 4 September 2006. Upon discharge from hospital he was later discharged from employment on medical grounds with effect from 1 June 2007.

As defendant was a contributor to the National Social Security Authority Scheme, here in after referred to as NSSA, relevant documents were completed and plaintiff was awarded compensation in terms of the NSSA scheme.

Upon receipt of the compensation the plaintiff approached his employer for more compensation as he stated that the compensation from NSSA was too little. The defendant declined to compensate the plaintiff contending that he had been adequately compensated in terms of the NSSA scheme.

The plaintiff being dissatisfied sued defendant in this court for more compensation in the form of damages. The plaintiff alleged that the accident was caused by the negligence of the defendant. The particulars of negligence he alluded to were that :-

1. the defendant compelled the plaintiff to operate the Tapeline 11 Machine to which he had no requisite know how of its operation since he was a novice at that time
2. Defendant failed to provide a safe working condition for the plaintiff
3. Defendant did not take the necessary steps to avoid such a happening as the machine had no emergency devices at all regardless of being informed on innumerable times that the machine was faulty.

The plaintiff's employment was terminated as the defendant contended he could not continue working with one arm.

The plaintiff's claim, as amended on the date of trial was for:

(a) Payment of USD30 000 (thirty thousand United States dollars) being damages for loss of future earnings

(b) Payment of USD10 000 (ten thousand United States dollars) being damages for pain and suffering; and

(c) Payment of USD60 000 (sixty thousand United States dollars) being damages for permanent disfigurement and loss of amenities of life

(d) Costs of suit

The defendant denied liability and contended that it was plaintiff's negligence that led to the accident in question.

In its plea, the defendant contended that the plaintiff had been operating similar machines throughout his 10 years or so of his employment with the defendant. Defendant went on to say the plaintiff had been operating this particular Tapeline II Machine for more than a year.

In para 3 of its plea the defendant stated that:

> "..At the time of the accident the plaintiff was employed as an operator on the Tapeline II Machine and had been employed in that capacity for more than a year".

Defendant further stated that the working conditions were totally safe and the plaintiff had been trained in work and safety procedures. Shortly before the accident he had infact attended and participated in a safety training workshop at the workplace which was conducted by NSSA. Further, the defendant stated in its plea that the Tapeline II Machine in question had and still has cut off switches at very accessible level, which the plaintiff should have used to stop the machine when the plastic strand broke instead of inserting his hand into moving

machinery. When his hand got trapped the plaintiff should have used this cut off switch to stop the machine.

The machine had never been faulty and neither the plaintiff nor his assistant had ever notified anybody that the machine was faulty. As far as the defendant is concerned therefore it was the plaintiff's own negligence which led to him being injured. The plaintiff also contravened laid down work procedure and safety rules by inserting his hand into the moving rollers to try and reconnect the plastic strand leading to his hand being trapped in the rollers.

It was the defendant's further contention that the plaintiff had no claim at common law as the plaintiff was compensated fully in terms of Zimbabwean law and there was no further claim for damages. Defendant also disputed the quantum of damages as claimed by the plaintiff.

The issues for determination were identified as:

1. Whether the plaintiff was a Tapeline II Machine Operator or was asked to do a job he was not familiar with
2. Whether or not the injury suffered by the plaintiff was a result of the defendant's negligence.
3. Whether there is any basis at common law, on which the defendant could be liable to the plaintiff for damages.
4. What is the quantum of damages, if any?

The plaintiff gave evidence and called two witnesses namely Mr Themba Mazvipunza and Mr Tawanda Murindi. Two defence witnesses namely Mr Reginald Takura Kawonza and Mr Chrispen Singe, thereafter gave evidence.

A number of documentary exhibits were tendered into evidence. In an effort to acquaint the court with the machine in question an inspection in loco was conducted during which the operations of the machine were explained segment by segment. The position where the plaintiff was operating from was shown together with the rollers that trapped his hand.

ISSUES

1. Whether the plaintiff was a Tapeline II Machine Operator or was asked to do a job he was not familiar with.

The plaintiff's evidence was to the effect that he was not a Tapeline II Machine Operator. He was a Cibra Machine Operator. He was assigned to go and work at the Tapeline

II Machine as an assistant to Themba Mazvipunza in March 2006 when there was a shortage of raw materials for his Cibra Machine.

He categorically denied the defendant's contention that he started working as Assistant Tapeline II Machine Operator in August 2005. He maintained that he was only assigned to assist Themba Mazvipunza in March 2006.

As Assistant Tapeline II Machine Operator, his duties comprised taking job cards to the workshop, mixing the material used to make plastics and pouring the mixture into the hooper. He would also be sent by the operator on errands. He was very clear that his duties did not include operating the machine as the operator.

Mr Themba Mazvipunza gave evidence next. He was the Tapeline II Machine Operator. His evidence was to the effect that the plaintiff was not a Tapeline II Machine Operator, but a Cibra Machine Operator. He confirmed the plaintiff's evidence on the circumstances that led to the plaintiff joining him on the Tapeline II Machine.

He also confirmed that the plaintiff was assigned to assist him in March 2006 and not in August 2005. Plaintiff was thus his assistant from March 2006 to 19 April 2006. During that period the plaintiff had not worked as an operator of the Tapeline II Machine but only as his assistant.

Mr Themba Mazvipunza further confirmed that there was no formal training given to the plaintiff. Whatever the plaintiff learnt was by observing what Themba Mazvipunza was doing.

It is clear from the plaintiff's evidence and that of Mr Mazvipunza that, at the time the plaintiff was asked to operate the Tapeline II Machine, he had not received any training as a Tapeline II Machine Operator. He had merely been an assistant to Themba Mazvipunza for a few weeks.

The defendant's contention on this aspect was without support. Mr Reginald Takura Kawonza, the defendant's Human Resources Officer gave evidence. Unfortunately as he confirmed himself, at the time of the accident he was not yet employed by the defendant. He thus had no first hand evidence on the events in question. He could not confirm that the plaintiff was a Tapeline II Operator. He did not produce any documentary proof of the plaintiff's status at the time of the accident.

The defendant's second witness was Chrispen Singe, also known as Nyikadzino. He was the plaintiff's supervisor. As a supervisor he exercised some authority over the plaintiff.

Mr Singe's evidence was to the effect that the plaintiff was assigned to work as Themba Mazvipunza's assistant on the Tapeline II Machine in August 2005.

He confirmed that there was no formal training for the job but one had to train on the job by observing what the Tapeline II Machine Operator was doing. Though Mr Singe insisted that the plaintiff was assigned as assistant to Themba Mazvipunza in August 2005, he could not produce any evidence to confirm the date of the assignment. It thus remained a question of his word against that of the plaintiff and Mr Mazvipunza. On the status of the plaintiff at the time of the accident, Mr Singe confirmed what both the plaintiff and Mr Mazvipunza said that he was an assistant Tapeline II Machine Operator. The night of the incident was his first time to act as the operator of the tapeline II machine.

Mr Singe's evidence contradicted the defendant's defence as depicted in the plea and summary of evidence in some material way. Firstly, on the status of the plaintiff whilst in the plea and summary of evidence defendant contended that the plaintiff was employed as a Tapeline II Operator, Mr Singe confirmed the plaintiff's assertion that he was an assistant Tapeline II operator.

Secondly whilst in its plea the defendant contended that the plaintiff had been operating similar machines throughout the 10 years of his employment with defendant, Mr Singe did not support this contention. Mr Singe said the plaintiff only started working at the Tapeline II Machine in August 2005 as an assistant to Mr Themba Mazvipunza. The machine that the plaintiff had been operating prior to that was Cibra machine. That machine was in no way similar to the Tapeline II machine.

The inspection in loco revealed that the Cibra machine was a much simpler machine comprising one station where as the Tapeline II machine is a heavy duty machine with several segments operating at the same time. It is no doubt a much more complicated machine than the Cibra machine.

According to the defendant's summary of evidence, Mr Singe was to come and say that the plaintiff was in fact the substantive operator of the Tapeline II machine and he had no assistant. The person who had gone for a funeral was working on a different machine altogether.

Unfortunately Mr Singe's evidence was not to that effect. He in fact confirmed that the substantive operator of this machine was Mr Themba Mazvipunza with the plaintiff as his

assistant. It is Mr Themba Mazvipunza who had gone for a funeral thus leaving the plaintiff alone at the machine.

In the summary of evidence it was contended that there existed laid down procedures and safety regulations that the plaintiff contravened. Mr Singe did not confirm this. He could not tender any such laid down procedures and safety regulations that the plaintiff had been trained in when operating the Tapeline II machine.

The inconsistencies and contradictions between Mr Singe's evidence and the defendant's plea and summary of evidence creates doubt on the veracity of defendant's version of events. Mr Singe was defendant's key witness, yet his testimony was materially different from the defendant's plea and summary of evidence. It is thus difficult to rely on Mr Singe's evidence or defendant's evidence especially were it conflicts with the plaintiff's evidence.

On issue number one, it appears common cause from all who testified on it that the plaintiff was not a Tapeline II Machine operator.

2. Whether he was asked to do a job he was not familiar with.

That should follow from the above finding.

Plaintiff had never operated the machine in question. He had not received any formal training. The person who was expected to have trained him on the job Themba Mazvipunza confirmed that no formal training had occurred. The few weeks the plaintiff worked with Mr Mazvipunza were spent as an assistant Tapeline II Operator performing duties expected of an assistant.

Mr Singe did not say there was anytime the plaintiff was trained to be a tapeline II machine operator neither did he ever witness the plaintiff operating the machine as the operator. Thus even from the defendant's evidence there was no concrete evidence to rebut the assertion that the plaintiff was not familiar with the job of a Tapeline II Machine operator. From the evidence adduced I am inclined to believe the plaintiff when he said that he did not volunteer to operate the machine. The probabilities are that he could not have volunteered to operate a machine he had never operated before. Mr Singe as the supervisor had authority over him and so when his initial refusal was turned down the plaintiff proceeded to do the job as instructed by the supervisor. He had to comply with the order of the supervisor more so as he knew that the supervisor had consulted another senior person. It was thus not proper for Mr Singe to order the plaintiff to operate the machine in the circumstances.

3. The next issue is whether or not the injury suffered by the plaintiff was a result of the defendant's negligence.

The defendant contended that it was not negligent at all. It is the plaintiff who was negligent in attempting to insert the broken plastic strands in between the rollers when the machine was in motion.

The plaintiff on the other hand said that he was not negligent at all.

It should be apparent from my findings on the first issue that the plaintiff was a novice in the operations of the machine in question. Plaintiff had only been assistant to Themba Mazvipunza for about 5 weeks. He had not received any training on how to operate the machine. All he had learnt was from observing Mr Mazvipunza operating the machine whilst he performed his duties as an assistant.

During these operations he had observed Mr Mazvipunza connect and insert broken plastic strands into the rollers without first stopping the machine.

That novice operator was assigned a novice assistant operator Mr T. Murindi. Mr Murindi confirmed that he had not worked on the machine before and so he did not know much about this particular machine. There was no denying that Mr Murindi had not been trained or even been introduced to the safety procedures and emergency devices on this machine. It was thus a tale of two novices being ordered to operate the Tapeline II Machine which they were clearly not familiar with.

Since the plaintiff had seen Mr Mazvipunza reconnect or insert the broken plastic strands into the rollers without first stopping the machine, he proceeded to do the same.

Mr Mazvipunza in his evidence confirmed that he would connect the broken plastic strands whilst the machine was in motion just as the plaintiff had tried to do. He would only stop the machine when a lot of the strands broke. In cases of only 1 or 2 strands breaking he did not stop the machine to connect the strands.

It was in a bid to do what he had seen Mr Mazvipunza doing, inserting the broken strands in the rollers whilst the machine was in motion, that the plaintiff's overall was trapped on the arm. When this happened a fellow novice who had no clue about the safety or emergency device of the machine, was expected to switch off the machine.

Plaintiff indicated that at the time of the accident no emergence switch was in place and within reach. Though Mr Singe indicated that there was such an emergence device within

reach, the inspection in loco confirmed that the one he referred to could not effectively and swiftly turn off the machine.

It needed to be wound for sometime before it could stop the machine. It also needed to be wound by someone who had knowledge about its operations.

In casu, both the plaintiff and Mr Murindi were not shown to have been trained in its effective use. A more effective emergence device was only put in place after the accident.

A number of scenarios maybe observed.

Had Mr Singe not ordered the plaintiff to operate a machine he was not familiar with probably the accident would not have occurred. Equally had the defendant put protective bars, as it has now done on the rollers, the plaintiff would not have had his hand trapped by the rollers. It may also be said that had the plaintiff been trained on the operation of the machine and on the dangers associated with the machine he would probably not have been tempted to do as he had seen Mr Mazvipunza doing.

It is also apparent that had the defendant installed a more effective emergency stop device and ensured that only trained personnel worked on that machine either the plaintiff or Mr Murindi could possibly have stopped the machine as soon as the plaintiff's hand was trapped.

I thus conclude that the defendant was negligent. It is that negligence that caused the plaintiff to be injured.

4. The next issue is whether there is any basis at common law on which the defendant could be liable to the plaintiff for damages.

The defendant contended that the plaintiff had no claim against the defendant at common law as the injury occurred in the course of the plaintiff's employment with the defendant and the plaintiff was fully compensated in terms of the Zimbabwean law.

In their addresses counsel for both parties referred to compensation schemes in terms of the National Social Security Authority [*Cap 17:04*]. The National Social Security Authority (Accident, Prevention and Workers Compensation Scheme) Notice 1990 (S.I 287/90) hereinafter referred to as the Notice sets out the compensation payable in the event of the death or injury of an employee.

The defendant's contention was based on s 8 of the Notice. That section states that:

"From and after the 1st January, 1960

(a) no action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in

respect of any injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and

(b) no liability for compensation shall arise save under and in accordance with this scheme in respect of such disablement or death; ….. "

The plaintiff on the other hand argued that his case was for additional compensation as provided for under s 9 of the Notice as the employer was negligent.

Section 9(1) of the Notice states that:

"Not with standing anything to the contrary contained in this scheme if a worker meets with an accident which is due:-

(a) to the negligence
  (i) of his employer; or
  (ii) of a person entrusted by his employer with the management or in charge of such employer's trade or business or any branch or department thereof; or
  (iii) of a person having the right to engage or discharge workers on behalf of his employer; or

(b) to a patent defect in the condition of the premises, works, plant or machinery used in such trade or business, which defect his employer or any person referred to in para (a) has knowingly or negligently failed to remedy or caused
……..
……

the worker or, in the case of his death as a result of such accident, his representative, may, within three years of such accident, proceed by action in a court of law against his employer, where the employer is an employer individually liable, or otherwise against his employer and the general manager, jointly, for further compensation in addition to the compensation ordinarily payable under this scheme.

Provided that in the case of an action in which the employer and the general manager are joined, nothing in this section shall be construed to mean that any compensation awarded under this section is payable by the employer".

In *casu*, it is common cause that the plaintiff was paid the compensation ordinarily payable under the scheme.

It was after that, that he approached his employer for more compensation as he deemed the compensation paid inadequate and also alleged negligence on the part of his employer.

In his correspondence to his employer dated 31 July 2007 and 25 September 2007 (exhibits 9 and 12 respectively) he made it clear the employer was at fault in forcing him to

operate a machine he was not familiar with with another person who was also new to the machine. In his level of English he wrote thus:

> "It was caused by some illegitimate inference of management which forced me to operate a machine which I was not great at".

(See para 1 of exb 12)

It is clear from the correspondence that what the plaintiff was seeking was additional compensation due to the employer's negligence.

In order for the plaintiff to be entitled to such additional or further compensation he must show that his case falls within the provision of s 9 of the Notice, that is that the employer was negligent in one or more of the ways stated therein.

The plaintiff based his claim on the negligence of the employer as provided for in s 9(1)(c)(i) and also on the fact that the machine was not safe because it did not have emergency stop devices.

When ruling on the 2nd issue, I found the defendant to have been negligent. The question of the lack of emergency stop devices on the machine was quite evident.

Whilst the defendant contended that there was an emergency switch, even as on the date of the accident, that switch as observed during the inspection in loco was not that effective.

The report by the Inspector of factories Mr Marufu, dated 12 March 2008 confirmed as much. That report shows that the safety provisions on the machine were highly inadequate. Mr Marufu made a number of findings which included that:

> "1. The machine had no emergency switch off button.
>
> 2. Nip points of the machine were not guarded
>
> 3. The operator was not trained on the safe procedure of the machine".

Those findings were consistent with the plaintiff's evidence on the lack of an emergency switch off device and lack of training. The lack of an emergency switch off device was something that the employer was well aware of as confirmed by Themba Mazvipunza. The employer had nevertheless not seen it fit to attend to the issue. The appropriate emergency stop devices were only put in place after the accident.

Section 9(2) of the Notice provides that:

> "If the court is satisfied that the accident was due to any such negligence or defect as is referred to in subsection (1), it shall award the applicant such additional compensation as it would deem equitable to award as damages in an action at common law".

It is my view that in this case I am satisfied that the plaintiff is entitled to be awarded damages.

5. The next issue is the quantum of such damages

Quantum of Damages

The plaintiff's claim for damages is under three headings namely:

(a) Loss of future earnings USD30 000
(Thirty thousand United States dollars)

(b) For pain and suffering USD10 000
(Ten thousand United States dollars)

(c) Permanent disability and loss of amenities of life USD60 000
(Sixty thousand United States dollars)

As the damages are being considered in terms of s 9 of the Notice the provisions of s 9(3) of the Notice are pertinent. That subsection states that:

> "In making any award under this section the court shall have regard to the amount of compensation which has been paid or in the court's opinion will be paid under other provisions of this scheme"

I will thus consider the fact that the plaintiff was paid compensation and is expected to be receiving monthly compensation. It is not clear how much he will be paid as he said only last week he received USD$20 after several months of waiting. He was not advised for what period that USD$20 covered.

In considering the three heads I will consider the loss of future earnings last.

(b) PAIN AND SUFFERING

In his book, 'The Law of Delict' by PQR BOBERG Volume 1 1984 at p 516, the learned author had this to say about the remedy for pain and suffering.

> "Compensation may be awarded not only for actual physical pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability; and loss of expectation of life. For convenience we speak simply of 'pain and suffering', but the concept embraces all these non-pecuniary misfortunes – past and future – of an injured persons. Nor is the list a closed one".
>
> By virtue of its description, it is not an easy task to provide for pain and suffering in monetary terms in an exact manner. There is no hard and fast rule the various aspects constituting pain and suffering can be measured to come up with an exact figure.

The 'pain and suffering' experienced by each individual varies. No two people can experience the same level of such pain and suffering. This makes it hard to rely on past cases with any certainty except as general guidelines.

Indeed in *Minister of Defence and Another v Jackson* 1990(2) ZLR 1 (SC) GUBBAY JA (as he then was) had this to say at p 7.

> "It must be recognised that translating personal injuries into money is equating the incommensurable, money cannot replace a physical frame that has been permanently injured. The task of assessing damages for personal injury is one of the most perplexing a court has to discharge".

The learned judge went on to highlight 8 broad principles that should guide a court in assessing such damages.

These include that:-

"1. General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrong-doer.

2. Compensation must be so assessed as to place the injured party, as far as possible in the position he would have occupied if the wrongful act causing him the injury had not been committed.
See *Union Gvt v Warnecke 1911 AD 651 at 665.*

3. Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded, can only be determined by the broadest general considerations (See *Sandler v Wholesale Coal Suppliers Ltd*1941 AD 194 at 199).

4. The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in future. (see *Sigournay v Gill Bank* 1960(2) SA 552(A) at 555H

5. The fall in the value of money is a factor which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics as may lead to an unreasonable result, per SCHREINER JA in Sigournay's case, *supra,* at 556C See also *Southern Insurance Association Ltd v Bailey N.O* 1984(1) SA 98(A) at 116 B-D, *Ngwenya v Mafuka* S18/89 not reported at page 8 of the cyclostyled copy.

6. No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon or vary according to whether he be a millionaire or a pauper (See *Radebe v Hough* 1949(1) SA 380(A) at 386.

7. Awards must reflect the state of economic development and current economic conditions of the country. See Mairs case *supra* at 29H; *Sadomba v Unity*

Insurance Co. Ltd & Another 1978 RLR 262(G) at 270F; 1978(3) SA 1094® at 1097C *Minister of Home Affairs v Allan* S 76/86… at p 12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant See *Bay Passenger Transport Ltd v Franzem* 1975(1) SA 269(A) at 274H.

8. For that reason, reference to awards made by the English and South African courts may be an inappropriate guide since conditions in those jurisdictions, both political and economic are so different".

See also *Marufu v Mawona and Others* 1996(1) ZLR 593. *Deklerk & Others v Makwiro* HH 31/92.

In *casu*, the plaintiff went through shock and excruciating pain as his hand was being crushed by the rollers. He cried in much pain but his assistant could not switch off the machine. The machine had to be stopped by workers summoned from another section who had to break a chain as the machine would not respond to any of the switches. That must have been an agonizing experience. It is one that adversely affects one's mental faculties, to watch one's hand being crushed. Thereafter the plaintiff was hospitalised from the 20th April 2006 to the 4th September 2006. Whilst in hospital he was in pain as well. For all this pain and suffering the plaintiff claimed a sum of USD10 000 (Ten thousand United States dollars).

Previous awards in this jurisdiction were in Zimbabwean dollars. With the advent of the use of multi currencies the previous awards in Zimbabwean currency may not be very useful. They are nevertheless a guide.

In the *Minister of Defence & Another v Jackson* (*supra*) the plaintiff was a 26 year old medical doctor. He suffered a shortened leg, loss of smell, double vision, memory loss, laboured speech, and emotional instability. He was awarded $35 000 for pain and suffering, loss of amenities and disfigurement.

In *Chamunorwa v Soweto and Another* HH 212/93, a 50 year old woman was injured. She had metal plates, put in her arm, and she was left with facial scars. She suffered a 40% disability. She was awarded $15 000 for shock, pain and suffering, and loss of amenities of life.

In *Marufu v Mawona* & Others (*supra*) the plaintiff suffered injuries to his limbs. Both his lower legs and the right femur were broken. The bones protruded. Pins were inserted in both legs. His right leg was now shorter than the other and he had to wear special shoes.

He suffered 40% disability. He was awarded $50 000 (Zimbabwean dollars) for pain suffering and loss of amenities of life.

In *Mabvoro & Another v Muza* HH 199/85 the two plaintiffs were injured in a road traffic accident. They were husband and wife. The husband was aged 30 years and the wife 24 years. The husband suffered a fracture of the left leg below the knee and at the right wrist. He sustained serious cuts and bruises and was unconscious for some hours. He was hospitalised for 2 weeks. He was awarded $15 000 (Zimbabwean dollars) for pain and sufferings, loss of amenities and disfigurement.

The wife had fractures in both legs above the knees. A mal union of the other bone in the right leg which was ¾ of an inch shorter than the left. She also had recurrent pain in her legs for the rest of her life. She was awarded $20 000 (Zimbabwean dollars) for pain and suffering, loss of amenities and disfigurement.

The awards were all in Zimbabwean dollars. It is not easy to translate that into United States dollars more so currently when the real value of the United States dollar does not seem to be well appreciated. What is clear is that in the periods above the United States dollars was generally stronger than the Zimbabwean dollar.

Going by the above awards, which were not just for pain and suffering, it should be apparent that $10000 US dollars for pain and suffering only is rather high. The award should not be punitive but compensatory for pain and suffering.

It is not in dispute that the plaintiff suffered pain as the rollers crushed his hand. It is also not disputed he was hospitalised. Even after discharge from hospital it was not disputed the hand had not completely healed. The pain and discomfort continued. I am of the view that a sum of US$3 000 would be adequate compensation for pain and suffering.

(c) Permanent disability and loss of amenities.

Under this heading the plaintiff claimed US$60 000 (Sixty thousand United States dollars).

The disability that the plaintiff suffered is the loss of part of his right hand, as this was crushed. He has thus lost the use of his right hand. This is a disability he will have to live with for the rest of his life.

The concept of loss of amenities is not an exact concept. In *Administrator-General, South West Africa and Others v Kriel* 1988(3) SA 275 at p. 288 D-G. HOEXTER JA had this to say about this concept:-

> "The Concept of the loss of amenities of life has been tersely but aptly defined by Lord Devlin in *H.West and Son Ltd v Shephard* [1963] 2 ALL ER 625 (HL) at 636G-H as:-
>
> > 'a diminution in the full pleasure of living'
> >
> > The amenities of life may further be described, I consider, as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to work and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self sufficiency, happiness and dignity are undoubtedly highly dependent".

Factors that may influence the amount to be awarded include the age and sex, of the injured person. Also the disfigurement and its influence on the plaintiff's personal and professional life. For instance how many of the activities he was able to do or participate in is he still able to or has he been incapacitated and what did those activities mean in his life.

The plaintiff indicated that he is right handed and so the loss of the use of his right hand was devastating He now has to learn to use the left hand. He is no longer able to participate in any activities that require the use of both hands. The disfigurement is visible and he will have to live with that discomfort. As far as employment is concerned he can no longer be employed were the use of both hands or the right hand is needed.

The disfigurement whilst prominent does not appear to be as serious as that in *Ministry of Defence and Another v Jackson* (supra). As already alluded to in that case a 26 year old medical doctor suffered injuries that affected many aspects of his life such as shortened leg, loss of smell, double vision, memory loss, laboured speech and emotional instability. In that case an award of $35 000 Zimbabwean dollars was made.

I am of the view that an appropriate award would be in the sum of $6 000-00.

(a) Loss of future earnings

It is common cause that as a result of the disability, the plaintiff was discharged from the defendant's employment on medical grounds. That discharge was accompanied by a loss of salary and other benefits that employees in his grade were entitled to. Unfortunately no evidence was adduced as to the salary such a grade was entitled to from the time of his discharge.

The plaintiff claimed a sum of USD$ 30 000 for loss of earnings. He based his claim on what he said employees in his grade are currently earning. In his computation of damages

in this regard the plaintiff multiplied the current monthly wages and benefits for employees in his grade by the number of years left to retirement from time of the accident. At the time of the accident he was 37 years old and he said the retirement age was 60 years. He was therefore left with 23 years of working life. The current earnings of employee in his grade were stated as follows:-

Basic monthly wage	USD 88-00
Accommodation allowance	USD 15-00
7% Basic wage being shift allowance	USD 6-16
Total monthly	USD109-16

Multiplying that by 12 months a year and then by 23 years gives a total of USD30 128-16 of which he claimed USD 30 000.

The assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures. There are several contingencies that must be taken into account.

In *Rusike v Tenda Transport (Pvt) Ltd and Another* 1997(1) ZLR 495(H) BARTLET J had this to say on the assessment of loss of earnings at p 497-498C:-

> "As a starting point it is important, wherever possible, to deal with the matter on an arithmetical, actuarial basis as opposed to a 'gut feeling' basis – to use a word often referred to in the authorities . The basic approach is as referred to in Corbett Buchanan and Gauntlett, 3ed p. 60-61, where the learned authors quote at length the observations made by NICHOLAS JA in *Southern Ins. Assn v Bailey N.O*. 1984(1) SA 98(A) at 113F to 114E. I must also: I feel take account of the observations made in *Carsten N.O v Southern Ins Assn Ltd* 1985(3) SA 1010(C) where, referring to the headnote it is stated:
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> "While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case".

Where there is insufficient evidence on the exact figures to use the court is still enjoined to make an award. In *Santam Ins. Co Ltd v Paget* (1) 1981 ZLR 73(A) court held that:-

> "A court should make some award in cases where damages are claimed for loss of future earning capacity if it is satisfied that the plaintiff has suffered such a loss, even where there is insufficient information to assess the loss accurately and the court has to pluck a figure out of the air".

I raise the above point because there appears to be a gap in the plaintiff's evidence. The evidence adduced did not state the wages that were being paid to workers in the grade as from the time he was discharged to when dollarisation of our economy took place in 2009.

In the assessment of such loss of future earnings there are contingencies to be taken into account.

It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill health from natural causes, retrenchment and discharge by employer on other grounds have to be considered.

In *casu* the plaintiff was not rendered useless by the disability. What has been rendered of not much use is the right hand. His other limbs were unaffected by the injury. His mental faculties and other abilities were not affected. He should be in a position to learn how to effectively use the one remaining hand and embark on another career. It is unfortunate that from the evidence adduced, he did not seem to have embarked on any other career other than to mourn his lost arm. He should be reminded that damages of the nature sought cannot sustain him. He is not useless or hopeless. He has to mitigate his loss by engaging in meaningful activities.

Due to the fact that he will be using one arm, there will, of cause, be limits to the nature and extent of the employment or activities he can engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.

The plaintiff's case is such that he needs time within which to learn how to use his left hand. As this may take time I am of the view that the compensation of the award be done in a progressive manner.

Thus for the first few years he must be awarded as per the earnings of employees in his grade as he clearly will be adjusting to the use of the left hand. A period of about 3 years should be adequate for this adjustment. After that period he would need to gain experience in the use of the left hand as part of the adjustment. His level of efficiency will be expected to progressively improve. The next stage will thus be for about 5 years. These years will be assessed at a 50% of the earnings. The balance of the years to be assessed at a rate of 1/3 of the wages for the grade. The calculations will thus be as follows:-

USD 109-16 x 12 months x 3 years = USD 3 929-76

USD 109-16/2 x 12 months x 5 years = USD 3 274-80

USD 109-16/3 x 3 x 12 months x 11 years = USD 4 803-04

Total = USD12 007-60

Taking into account the contingences already alluded to and the fact that he has been compensated in some way and he will continue receiving some money from NSSA, albeit the amount was not clear, a provision of 5% for contigencies should meet the justice of the case.

An award of USD11 407-00 will thus be just and fair in the circumstances for loss of future earnings.

Accordingly judgment is hereby entered for the plaintiff and against the defendant as follows:-

1. USD 3000-00
   being damages for pain and suffering.

2. USD 6 000-00
   being damages for permanent disfigurement and loss of amenities of life.

3. USD 11 407-00
   being damages for loss of future earnings

4. Costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners