DOUGLAS MASHIRI
versus
MING CHANG SINO-AFRICA MINING INVESTMENTS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 &16 June, 12 September and 21 December 2016

**Civil Trial**

*W Madzimbamuto,* for the plaintiff
*Ms M Kenede,* for the defendant

TSANGA J: The plaintiff is 22 year old Douglas Mashiri whose claim is one for additional compensation from his former employer in the total sum of US$32 000-00 for bodily injuries suffered at work on 5 September 2012.

His declaration disclosed that he was employed by the defendant, *Ming Chang Sino Africa Mining Investments*, in February 2012 as a general plant attendant. On the day in question he had commenced work at about 11pm when he was instructed to abandon his duties and take up responsibility at the ball mill, a machine he had never worked at before. The person in charge of same had not turned for duty. He was wearing a hoodie, basically a sweat shirt or jacket that has a hood to cover the head. As he bent down the ball mill to remove some dirt captured by a sieve in the ball mill, his hoodie was caught by the machine dragging his whole body which became entangled in the rotating machine. He grounds his claim on the basis that he had been instructed to operate the machine notwithstanding that he had not received any training to operate such as delicate and dangerous machine. His employer had equally failed to provide him with protective clothing. Additionally, there were no emergency devices at all that could have stopped the machine.

In terms of the injuries sustained, the plaintiff declared that his hands were broken, with the left hand now very weak such that it can now only perform light duties. His right hand was left 100 % paralysed and cannot do anything. His legs were both broken, resulting

in metal rods being inserted in both legs. His left leg is also now shorter than the right leg. He declared that he can longer squat or go to the toilet unaided. To the litany of severe injuries was also the fact that his right ear was completely severed, such that it is difficult, if not impossible to hear from that ear. He also suffered broken ribs and other deep cuts all over his body. He required skin grafting. He was hospitalised for six months. A medical report by one Dr Mangwiro from National Social Security Authority (NSSA) put his disability at 75%. He was only 18 years old at the time that he sustained these injuries. He declared that he was left with no prospects of ever being employed again. He had made a written demand to the defendant who had denied negligence and had refused to pay, hence the claim in this court of law.

The sum claimed was broken down as $7 500-00 being damages for pain and suffering, whilst USD9 500-00 was for permanent disfigurement and loss of amenities in life. The remaining USD15 000-00 was for loss of future of earnings. He also claimed interest on the sum claimed at the rate of 5% per annum calculated from the date of the summons to date of payment in full.

The essence of defendant's plea was that the plaintiff had not established a cause of action in light of s 8 of the National Social Security Authority (NSSA) [Accident Prevention and Workers Compensation Scheme] Notice SI 68 of 1990[1], which provides that no action shall lie against the employer at common law. The rationale is that National Social Security Act [*Chapter 17:04*] provides for compensation in the event of injury to an employee and an employer is enjoined to contribute to the Worker's Compensation Fund. Thus an employee will benefit in the event of an injury to the employee. It was thus the defendant's standpoint that the claim must be dismissed with costs.

On the merits, the defendant also said that the plaintiff was fully trained to operate the machine in question and that he had been operating it as per his job description on the day in question. Defendant's plea was also that the accident was wholly caused by the plaintiff's

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[1] It is couched as follows:

8. 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 an 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; and

(c) any worker who is entitled to periodical payments under this Scheme shall not be entitled to receive wages in terms of section 14 of the Labour Act [*Chapter 28:01*].

own negligence in that contrary to standing guidelines, he was putting on loose clothes. Furthermore, against all safety operating guidelines, he had put his hand into a running machine without first switching it off. He was therefore said to have acted without due care and attention at all times. The defendant also pleaded that the plaintiff had been provided with a work suit, helmet and gumboots and all protective clothing needed to for him to operate the machine. Injuries suffered were said to have been due to his own negligence.

The plaintiff's replication to the point *in limine* was that his claim is for additional compensation in terms of s 9 of the National Social Security Authority (NSSA) [Accident Prevention and Workers Compensation Scheme] Notice SI 68 of 1990. This provision allows an employee to institute an action for additional compensation if the accident was due to the negligence on the part of the employer. The plaintiff emphasised that it had sought for authority from the general manager of NSSA and had been granted such authority.

The issues referred to trial in the joint PTC minute centred on the preliminary issue of whether or not the plaintiff has established a cause of action entitling him to pursue the claim. The substantive issue for decision was whether or not the plaintiff suffered severe injuries as a result of defendant's negligence and if so the quantum of damages for additional compensation.

On the point *in limine* Ms *Kenede* argued on behalf of the defendant at the start of the trial that there was no negligence on the part of the employer to justify additional compensation in terms of s 9 of the relevant statutory instrument, namely SI 68 of 1990. It states more fully as follows:

> "9 (1) Notwithstanding anything to the contrary contained in this Scheme if a worker meets with an accident which is due—
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> (a) to the negligence—
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> (i) of his employer; or
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> (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
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> (iii) of a person having the right to engage or discharge workers on behalf of his employer;
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> or
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> (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 paragraph (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 3 years of such accident**, proceed by action in a court of law against his employer, where the employer concerned 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.
>
> (2) 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.
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> (3) 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 the other provisions of this Scheme."

Mr *Madzimbamuto* who appeared on behalf of the plaintiff, argued that whether or not there was negligence was in fact a triable issue and that the defendant could not seek to base its point *in limine* on a triable issue. He was insistent that the court had to hear the evidence and relied on the case of *Christopher Gwiriri* v *Starafrica Corporation (Private) Limited T/A Highfield Bag (Private) Limited* HH 20 / 2010 for the assertion that where negligence has been shown on the part of the employer, the employee is entitled to additional compensation. I was in agreement with Mr *Madzimbamuto* that it would be impossible for me to hold that there was no negligence on the part of the employer to justify additional compensation without hearing the evidence. Accordingly, the trial proceeded on the basis that it would only be on hearing evidence that negligence or the lack thereof on the part of the employer, would be established.

**The evidence**

The plaintiff Douglas Kashiri expounded on the details contained in the declaration. He stated in his evidence that he had commenced working for the defendant in February 2012 and had been injured in September of the same year. He said that on night of 5 September 2012 he had been summoned by Mr Leo, one of the Chinese bosses at the work place, who spoke little English. Mr Leo had indicated to him by sign to remove some dirt from the running ball mill and had demonstrated practically himself what he wanted done. He said he had commenced to remove the dirt in question very quickly as Mr Leo had done. It was whilst bending over that he had been catapulted into the machine as a result of his hoodie being caught in the machine. He described the graphic injuries sustained as outlined in his declaration.

He emphasised that he had only started working on the machine on the day in question when the accident happened. He denied being provided with a work suit, gumboots or helmet. He

equally denied ever attending any safety workshops. He said he had only been told how to handle the soft pump where he worked – a job which simply entailed opening and closing taps as part of monitoring the thickness and consistency of the sludge that went through the machine where he was stationed. He also told the court that after the accident he had been dismissed and told that he was no longer able to work.

As regards the monetary claim for USD 7 500-00 for pain and suffering, he said that the pain he had suffered had been excruciating as his head had been cut, his ear lost and his bones broken. He said that up to now his buttocks continue to itch uncomfortably from the cuts he received. He said he was also claiming USD 9 500-00 for permanent disfigurement and $15 000-00 for loss of future earnings for 15 years. He added that he was however cognisant of the fact that someone can work for longer periods.

Regarding the fact that the medical report revealed that his disability of 75% was supposed to have been reviewed after four months, he explained in cross examination and also further to the court, that he had been advised by the doctor at NSSA that it was final. He denied in cross examination that he had been given money to set up as shop as a way of assisting him since he could no longer work. He also disputed the suggestion that he had been negligent.

Mr Lazarus Maringira who worked with the plaintiff also gave evidence on behalf of plaintiff. His evidence was that only three people in the company generally worked at the ball mill and that the plaintiff at all times was employed to work at the soft pump. His job was basically to open and close valves at the soft pump. He further explained that when they initially joined the company, their work generally consisted of clearing the premises as general hands before being assigned to different departments. He said that in reality they had no job titles. He stated that it was only after the accident that sensitisation workshops had been undertaken on how the machines work and that it was also then that they had then been given safety clothes because the company was aware that it was now facing these allegations. His own work involved controlling chemicals used in the mill as a plant controller. He had left employment in December 2012. He said the reason was that the dumpsite they were grinding gold ore was finished and the company was on a shutdown process.

Mr Action Kasuso gave evidence on behalf of the defendant. He said he was then employed as the plant manager at the time of the plaintiff's accident. He told the court the company hierarchy consisted of a general manager, a plant manager, a supervisor who was

Mr Leo and a junior supervisor. He explained that the defendant is involved in the business of grinding gold ore. His evidence was that the plaintiff was employed as a general hand and whenever there was work to do, he would be assigned to do that work. In this regard he corroborated the evidence by Lazarus Mazingira. He also stated that the plaintiff did not know how to operate the ball mill and that those who operated it had received training in Shamva for three months. He explained to the court how the machine works and said that the operator of the ball mill would not in fact be involved in the dislodging of residue that was caught in the machine as that could be done by anyone. His point was that where the plaintiff was working on that day was not the actual ball mill but simply where the ball mill discharges residue. He explained that the actual ball mill had its own operator. Having narrated how the machine operated he said he had difficulty understanding how the plaintiff had ended up in the mill.

Materially, he told the court that he had worked the afternoon shift that day and therefore did not know what instructions Mr Leo had given the plaintiff. He could therefore not speak about the actual accident itself. As regards safety clothes, he told the court that it was the company policy to give people who had been there for at least three months. He stated, nonetheless, that some employees had safety clothes whilst others did not. In plaintiff's case, he said he had work suits but not gloves. However, he did not provide the court with anything to support the basis of his assertion. He also told the court that the company used to have safety talks given by supervisors. When later asked by the court to expand on the nature of the talks he said these were as generally contained in applicable mining regulations on how to prevent accidents at the work place.

He stressed that his own view was that the plaintiff should be given some compensation although he had no figure in mind. He said he had merely heard that the plaintiff had been assisted to start a shop but said he could not confirm the authenticity of the claim.

**The legal arguments**

Mr *Madzimbamuto* asserted that two issues must be proven in order for the plaintiff's claim to succeed under section 9 of SI 68 of 1990 which provides an exception to s 8 which ordinarily ousts an employee's right to claim compensation where this has already been paid by the worker's compensation scheme. Firstly, there must be negligence on the part of the

defendant and secondly the person who gave instructions must have a position of authority entitling him to act as such. The second issue he said was straight forward in that Mr Leo was clearly within the hierarchy of the company's management and gave his instructions that capacity. In other words, he was a person entrusted by his employer with the management of the work floor.

On negligence, Mr *Madzimbamuto* argued that the standard test is the same in criminal and civil matters, which is that if a person fails to observe the standard of care and skill which would be observed by a reasonable person, then he is guilty of negligence. He drew on cases such as *S* v *Mauwa 1990 (1) ZLR 235; S* v *Burger 1975 (4) SA 877 at 879 D-E* for the discussion of the 'reasonable man' or more aptly the reasonable 'person' test.
As observed in *S* v *Burger* above:

> *Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* in the position of the person whose conduct is in question. A *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.

Since the plaintiff was not trained as a ball mill operator and since he was asked to operate a dangerous machine without training, Mr *Madzimbamuto's* contention was that the defendant's floor supervisor, Mr Leo, had in fact been recklessly negligent. In addition, he argued that negligence was exhibited in the failure to provide protective clothing. He further raised the question why defendant would have been allowed to work without the requisite clothes if this was against standing instructions. On whether the plaintiff had made out a case for damages for pain and suffering, loss of amenities in life and loss of earnings, he drew the court's attention to cases such as *Minister of Defence and Anor* v *Jackson* 1990 (2) ZLR (1); *Chinembiri* v *ZETDC* HH-55-14*; Sandler* v *Wholesale Coal Suppliers Ltd* 1941 AD 194 *at* 199; *Sigournay* v *Gillbanks* 1960 (2) SA 552 A; *Southern Insurance Association* v *Bailey NO* 1984 (1) SA 98 at 116 B-D*; Ngwenya* v *Mafuka S 18-89; Radebe* v *Hough* 1949 (1) SA 380 at 386; *Sadomba* v *Unity Insurance Co Ltd and Anor* 1978 RLR 262 (G at 270 K) which outline the various principles to be taken into account. These include among others taking into account facts such as inflation, the value of money and interest, and the fact that pain and suffering should not vary according to the standing of the person injured.

Ms *Kenede's* legal argument was that there was no negligence on the defendant's part and that negligence in the air will not suffice. She drew on the case of *LAPF* v *Nyakatawa* HH-6-15 where it was stated thus:

> "Negligence is the failure, judged objectively, to exercise that degree of care expected in any given circumstances. It involves a duty of care owed to the plaintiff that the defendant ought reasonably to have guarded against. Negligence in the air will not suffice".

She questioned whether the defendant lacked such care when it was Mr Kasuso's evidence that safety talks were held at the work place and that the plaintiff was part of those talks. She further drew on Mr Kasuso's evidence that work suits were provided after a given time to further bolster her legal argument that no duty of care had been breached. She placed the negligence squarely on the plaintiff's shoulder in operating a machine whilst wearing loose clothes instead of the requisite work suit. Furthermore, she was emphatic that he had been negligent in putting his hand into a running machine.

On the quantum of damages she argued that the damages were excessive having regard to the principles to be applied as clearly laid out in *Minister of Defence and Anor* v *Jackson* 1990 (2) ZLR 1 (SC). See also *Bay Passenger Transport Ltd* v *Franzen* 1975 (1) SA 269 (A) at 274 H.) These principles take into account factors such as that damages are not a penalty but a compensation; that the aim is to place the injured party in the position he would have occupied had the injury not occurred; that the court has to heed the effect of its decision on future cases. She also pointed to the fact that case law is clear that awards must reflect the state of economic development and economic conditions in the country and that as such reference to awards granted in South African and English decisions may be misleading in this regard. (See *Sadomba* v *Unity Insurance supra*).

She additionally relied on the case of *Judith Nyoka* v *Nyamweda Bus Service & Zimnat Lion Insurance* HH 148-15 where the court awarded USD 2 500-00 for pain and suffering because the report relied on was compiled in 2006 and the report showed that a further assessment was to have been done. *In casu,* she argued that a further assessment was to have been done four months from the issuance of the report and that this had not been done. She also argued that the plaintiff can walk with the aid of a crutch and was therefore not entitled to the USD 9 500-00 which he claimed for loss of amenities in life. She equally drew on the *Gwiriri* case above mentioned where USD 6 000-00 had been awarded. On loss of future earnings she argued that the basis for a claim of USD 15 000-00 had not been laid out. Overall, she contended that the plaintiff's claim should be dismissed.

In response to the argument on negligence Mr *Madzimbamuto* emphasised the duty of an employer to maintain records in terms of s125 of the Labour Act [ *Chapter 28:01*] and that

no records on the provision of safety clothes or the nature of training provided had been placed before the court. On the damages, his position was that these should be determined by the level of recklessness demonstrated by the defendant and the fact that a career young in its infancy had been ruined, the plaintiff having been only 18 years old at the time of the accident.

**Factual and legal analysis**

In his book *Principles of Delict*[2], Burchell sets out the test for determining negligence as follows:

> "a) Would a reasonable person in the same circumstances as the defendant have foreseen the possibility of harm to the plaintiff;
> (b) Would a reasonable person have taken steps to guard against the possibility
> (c) Did the defendant fail to take steps which he or she should have reasonably taken to guard against it?"

This action has been brought for additional compensation because the plaintiff believes that the employer negligently caused his accident. The plaintiff's claim is essentially that he was injured as a result of the employer's egregious negligent conduct as exemplified by poor safety control in asking him to work at an inherently dangerous machine which he had never worked at and for which he had received no prior training. Furthermore, the employer is said to have been negligent in that the plaintiff had been dispatched to work at that machine when he did not have the right clothes on. The plaintiff's evidence was in my view credible that he had been instructed to carry out a task at the particular machine and had been shown exactly what to do by Mr Leo. Ms *Kenede's* view that he could not seriously have followed an instruction that was patently illogical in that he was asked to put his hand into a moving machine, in fact goes to show the magnitude of recklessness in that very instruction. The plaintiff at 18 had little work experience and was more likely than not to follow instructions without thinking too deeply about the reasonableness or otherwise of the instruction given.

However, since the accident occurred as a result of the plaintiff's clothing being caught in the machine, a key question must be the state of knowledge of the defendant's supervisor of the dangerous condition which caused the accident. In other words, would a reasonable person in the same circumstances as the defendant's supervisor have foreseen the possibility

[2] Jonathan Burchell *Principles of Delict (Cape Town: Juta) 2016 at p 86*

of harm to the plaintiff? The degree of risk of the harm occurring in my view was very high. A reasonable person, in this case a supervisor at a plant using heavy machinery, would have foreseen harm arising from asking an employee to work on a moving machine whilst inappropriately dressed for the task. Coupled with this was a lack of knowledge of the dangerous parts of that machine. Thus lack of familiarity on the plaintiff's part with that particular machine; asking him to operate the machine whilst inappropriately outfitted for the task; and asking him to place his hand in a moving machine in order to reach a part of that machine for the performance of a manual task, cumulatively constituted an obvious risk which a reasonable person in the same circumstances as the defendant's supervisor ought to have foreseen.

Given that the accident occurred as a result the hoodie being caught in the machine, the provision of safe clothing was a necessary precaution to prevent the harm that occurred. Whilst it can be said that the plaintiff did have the ability to dress appropriately to prevent machine related injuries, what is material is that this was not his usual duty station and the evidence was that at his normal station his responsibility was simply to turn a tap on and off. Generally it is also the employer's duty to provide safe working conditions at work. Safe working practices entail ensuring that employees are appropriately dressed for the tasks that they are about to perform. There was no definitive evidence that the plaintiff had in fact been given such clothes after the three month period. Mr Kasuso simply stated that it was a company policy that work suits would be provided after three months. Since Mr Kasuso himself stated that there were employees without such clothes I am more inclined to believe the evidence of the plaintiff and his witness Lazarus Maringira that they had no clothes and that these were later provided after the accident. If indeed he had been given then it would have struck Mr Leo who instructed him to work at the machine that the plaintiff was not wearing his work clothes and that the clothes he wore in fact presented a hazard. Failure to observe the unsuitability of the clothes for the task to be performed was negligent to say the least. Clothes have to be appropriate to the task to be performed. The possibility of loose clothing becoming caught in the machine should have been foreseen. Failure to provide adequate and safe conditions inclusive of clothing does in this instance constitute negligence on the employer's part.

It is also the totality of the causal factors that this court must have regard to. It was negligent in the extreme for Mr Leo to have asked the plaintiff to place his hand in a moving machine in order to attain the objective of unblocking the machine. It was equally negligent to fail to observe the inappropriateness of the clothes he was wearing for the task he was assigned. At the very least he ought to have asked the defendant to remove the jacket with the hoodie he was wearing given that loose clothing around machines pose extreme risk. The nature of the harm that would occur from failure to do so, would indeed be the serious likelihood of clothing or bodily parts being caught in a moving machine as it turned out.

Defining jobs clearly and undertaking a risk assessment is part of that duty of care that an employer owes an employee. Providing adequate training is equally part of that duty of care given that at the heart of prevention of workplace accidents is proper training in operating equipment and knowledge of safety rules. I agree with the plaintiff's counsel that there were material contradiction between what the defendant pleaded and the evidence ultimately given by the defendant's witness Mr Kasuso at the trial. Whilst the defendant had pleaded categorically that the plaintiff knew how to operate a ball mill and that he had been employed as a ball mill operator, Mr Kasuso's evidence was that he was not trained for this. He also described him as a general hand who could be assigned various tasks. His evidence was that the actual ball mill for which training was required was a separate component of the mill to where the plaintiff said he had been assigned to remove the dirt and the residue. However, this does not detract from the reality that it was the sum total of that machine that the plaintiff had never worked. It matters not that there were parts of it that were operated by skilled personnel and parts that did not require skilled input. The fact is that he had never worked at that machine which fact the defendant's witness did not dispute. The plaintiff's familiarity with the machinery and its "pull" areas would in this instance have likely prevented the accident *in casu* since the plaintiff would have known that he needed to exercise extra caution around that machine.

Also, safety talks for all workers appear to have been undertaken in earnest after the accident as the plaintiff's witness Mr Muringira indicated. In light of Mr Kasuso's failure to put actual evidence before the court to show that safety talks had been an integrated for all from the onset, there is again no reason to disbelieve both the plaintiff and Mr Lazarus Muringira that the initiative commenced after the accident. I therefore find that on a balance of probabilities it is more likely than not that the accident is wholly attributable to the

negligence of the employer and that the employer was in breach of a common law duty of care which resulted in the injury.

**Assessment of damages**

I turn now to the issue of damages. To reiterate, the claim is USD7 500-00 as damages for pain and suffering. The sum of USD9 500-00 is for permanent disfigurement and also loss of amenities in life. A sum of USD15 000-00 is for loss of future earnings.

In dealing with each of these I find the approach as outlined in *Dururu Tpt (Pvt) Ltd* v *Mutamuko NO & Anor* HH-95-11 by PATEL J particularly apt in that he highlights the need for each case to be dealt with on its own merits. He emphasises that courts are not obliged to adopt any specific method of calculation but should endeavour to assess an amount that is **fair** towards all of the parties concerned. In so doing courts of course cannot totally overlook the awards that may have been granted by the court in similar situations. As stated in *Sadomba* v *Unity Insurance Co Ltd and Anor* 1978 RLR 262 G, awards must reflect the state of economic development and current economic conditions of the country.

The defendant's primary objection to the amounts claimed under each of these heads arises from the fact that the 75% disability that the plaintiff relies on was not reassessed after four months as had been indicated on the card. The plaintiff's ultimate explanation was that he had gone to a doctor who had told him that money would be needed for a re- assessment. He had then gone to the NSSA doctor who had told him the assessment was final. It is unlikely though from the nature of the injuries that there would have been a material difference to the final percentage given the nature of the injuries even if he had succeeded in seeing another doctor. His ear for instance which was severed off will not grow back. He continues to walk with a limp. The paralysed arm remains paralysed. His leg remains shortened. Any shifts in his condition if any would most likely have been marginal rather than seismic

The plaintiff's claim is for USD7 500-00 as damages for pain and suffering. This encapsulates physical pain as well as shock, discomfort and mental suffering. *In casu* the plaintiff was hospitalised for six months. His hands were broken and one arm was eventually left paralysed, his legs were broken and one was left shortened, his head was cut, his buttocks were cut and his ear was completely severed. Virtually every major part of his anatomy was under the siege of pain as a result of the accident. These injuries must surely have resulted in

unimaginable pain. Plaintiff's claim for pain and suffering is in my view reasonable and not extortionist. In *Gwiriri* v *Highfield Bag (Pvt) Ltd* 2010 (1) ZLR 160 (H) the plaintiff therein, who had effectively lost the use of his right hand which was assessed at 65% disability during an accident at work was awarded the sum of USD3 000-00 for pain and suffering for his hand. In *Mugadzaweta* v *The Co-Ministers Of Home Affairs & Ors* 2012 (2) ZLR 423 (H) received USD5000-00 for wounds sustained and arising from having been tortured by the defendants. He also received a separate amount of USD4000-00 to compensate him for shock. A sum of USD7500-00 for pain and suffering against the totality of the plaintiff's injuries in this case is in my view justified.

The plaintiff *in casu* has claimed USD9 500-00 for permanent disfigurement and also loss of amenities in life. As discussed fully in the *Gwiriri* and in the *Mugadzaweta* case, the loss of amenities in life denotes a diminution in the full pleasure of living. It also encompasses as stated therein satisfaction in one's existence from having a healthy body and an unclouded mind. It is also about the ability to do vital function such as the ability to walk and he ability to stand unaided. The age and sex of an injured person are also said to be vital in assessing what ought to be awarded. One has to also look at what a claimant has been incapacitated from doing and what is he is still able to do. Disfigurement was explained in the *Mugadzaweta* case at p 427 G to 428 A as follows:

> "Disfigurement, which is also referred to as deformity, refers to any defacing or mutilation of the plaintiff's body or any part thereof. It includes scars, loss of limb, a limp caused by an injury to the leg(s), and distortions of the body. The loss involves the aesthetic value of the body or a part thereof and not its functional performance. *Visser & Potgieter* (*supra*) at 101 state that the extent of the loss under this head depends upon a number of factors, which include the plaintiff's sex, age, the visibility of the disfigurement, its influence on the plaintiff's life, and the plaintiff's appearance before the injuries. Whether the disfigurement is temporary or permanent is also a factor to be considered"

The plaintiff says that he can no longer go to the toilet unaided. He is also no longer able to use his right hand which is totally paralysed. His left leg is shorter although he is able to walk with the aid of a crutch. He has no ear and his disfigurement is in general very apparent for all to see.

In the *Mugadzaweta* case, the plaintiff was awarded USD3 000-00 for disfigurement mainly to his buttock and permanent scars resulting from his assault. In the *Gwiriri* case the plaintiff therein was granted USD6000-00 for permanent disfigurement and loss of amenities in life. He had claimed USD100 000-00. The disability in his hand for which he was awarded this sum was 65% for the hand only. The court found that:

> "… 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."

This is not the case here. The plaintiff's injury which was assessed at 75% at the time relates to a much wider range of injuries. What has been affected here is the ability to use his hand and also his ability to walk unaided. Again, I am struck by the reasonableness of his claim and it is quite clear that he has not sought to unduly benefit from the defendant as a result of his injuries. If age is a fact to be taken into account I cannot help but observe the very young age at which the plaintiff met with his misfortune yet he has kept his claim realistic and within range of what the courts have been prepared to award. I find that the claim of USD9500-00 is also realistic under the full circumstances of the injuries he sustained and the resultant disfigurement.

His claim for loss of future earnings is USD15 000-00 bearing in mind that he currently receives USD83-00 per month from workmen's compensation. In the *Gwiriri* case the court observed that it is a fact that it is not every case that one reaches retirement age. It emphasised that the probabilities or possibilities of early retirement due to ill health or from natural causes, retrenchment and discharge by an employer all have to be considered. The plaintiff has not sought damages until retirement. He has based the sum claimed on the salary that he was earning at the time and looked at a period of 15 years. He has also taken into account the fact that he is currently receiving USD83-00 a month. In *Gwiriri's* case a sum of USD11 407.00 was awarded for loss of earning to the plaintiff who was 37 years old at the time. The plaintiff is currently 22. It will take time for him to adjust to his condition in order to fully learn how to make use of his much altered limbs. There will clearly be limitations to what activities he will be able to engaged in. Thus even if one takes the defendant's argument

in casu that the plaintiff is still able to walk using a crutch and most probably that he can still use his other arm, the limitations are manifestly evident . If it is the deficiency or limitations to what he can do that must be compensated then I have no doubt that plaintiff's claim cannot be dismissed. The defendant has simply sought dismissal of the plaintiff claim for all damages and has made no serious effort to engage on alternative sums. Again, in my view the sum claimed by the plaintiff of USD15 000-00 for loss of earnings is reasonable, bearing in mind that it takes into account what he will continue receiving from NSSA.

Accordingly, judgement is hereby entered in favour of the plaintiff and against the defendant as follows:

a) USD 7 500-00 as damages for pain and suffering.
b) USD 9 500-00 for permanent disfigurement and loss of amenities in life.
c) USD 15 000-00 as damages for loss of future earnings.
d) Interest at the rate of 5% per annum on the sum of USD 32 000-00 being the total sum of all the above, from the date of summons to date of payment in full.

*W Madzimbamuto & Simango,* plaintiff's legal practitioners
*Tavenhave & Machingauta,* defendant's legal practitioners