

HH 139-03
HC 3353/02
KENNEDY SIBANDA
versus
INDEPENDENCE GOLD MINING ZIMBABWE (PRIVATE) LIMITED
t/a ARCTURUS MINE
and
JOHN MATEO

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 28 May and 27 August, 2003

Mr *Hogwe* for the plaintiff
Mr *Gijima* for 1st defendant

SMITH J: The plaintiff (hereinafter referred to as "Sibanda") issued summons claiming from the defendants \$704 658 for loss of future earnings and \$500 000 for pain and suffering. The facts on which his claims are based are as follows. On 16 July, 1999 Sibanda, who was employed by the first defendant (hereinafter referred to as "Arcturus Mine"), was on duty as a machine operator. He was being assisted by the second defendant (hereinafter referred to as "Mateo") and Henry Gwandira, both of whom were also employed by Arcturus Mine. Sibanda alleges that while he was reversing the drilling machine Mateo negligently switched on the machine, thereby causing it to turn, which knocked Sibanda down. As a result of Mateo's negligence, Sibanda suffered very serious injuries, namely, a fracture of his right femur and osteomyelitis. He was rendered incapable of continuing with his normal work. At the time of the accident he was earning a net monthly salary of \$3 725.86. Because he can never work again, he estimates that he has lost future earnings of about \$1 117 758, which he would have earned had he continued working and retired at the age of 65 years. He has been awarded a disability pension by the National Social Security Authority (NSSA) which will amount to \$413 100 over the period from the date of the accident to the date he would attain the age of 65 years. The difference between what he would have earned and the pension he will receive is

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\$704 658. He has also experienced pain and suffering for which damages in the sum of \$500 000 is claimed.

The defendants denied that Mateo had been negligent. They allege that the accident occurred as a result of a mechanical fault when Sibanda lost his grip on the spanner he was using to unscrew rods, resulting in the spanner injuring his thigh. They deny liability and claim that the payment by NSSA to Sibanda of a disability pension has discharged any liability they may have had. The legal practitioners subsequently renounced agency on behalf of Mateo as they lost contact with him.

Sibanda testified as follows. He was employed by Arcturus Mine as a machine operator. He was on duty on 16 July 1999, being assisted by Mateo and Gwandira. He was using the machine to drill holes in the rock underground. He wanted to reverse the machine so he got a spanner and started to unscrew some bolts. He had loosened two and was about to start unscrewing the third when he was suddenly flung against the side of the tunnel. His helmet was knocked off. He looked down and saw that his leg had been injured. The femur had been fractured. He saw Mateo standing at the control switch. Mateo should have been removing litter from the floor of the tunnel and generally cleaning up the place. Mateo had obviously switched on the machine. At the time the machine was switched on he was using a metal spanner to loosen a bolt. When it was switched on the drill started to revolve at high speed and that jerked the iron spanner out of his hand and it hit him on the leg. He was taken to the clinic at the mine and then transferred to Parirenyatwa Hospital. His leg was put in plaster. On 23 July the plaster was removed and a pin was inserted in his leg. He was discharged from hospital on 26 July. Even now his leg is not completely healed. Some liquid is still oozing from the wound. He felt severe pain when the bone was broken. For 3 or 4 months afterwards he could not sleep on his side or his stomach. He had to lie on his back. After his recovery he returned to the mine for light duties but was eventually discharged on medical grounds in April 2000.

At the time of the accident Sibanda was 38 years old and his net salary was \$3 725.86 a month. Initially his disability was 60% but as he improved it was reduced to 30% and finally 23%. He receives a pension from NSSA. Originally it was \$1 300 a month but it has been reduced to \$738 a month. He has no job and cannot work. He is unable to carry a 5-litre bucket filled with water. He is often in pain. He takes 3 pain-killer pills a day, morning, noon and night. He cannot bend his leg. NSSA paid him \$10 000. He is claiming \$704 658, being the difference

between what he would have earned had he carried on working with Arcturus Mine until he reached retirement age and what he will have received from NSSA over the same period. He is also claiming \$500 000 as damages for the pain and suffering he experienced. When the accident occurred Mateo could see that he was working on the drilling machine. Mateo deliberately switched it on.

In the course of cross-examination Sibanda made the following responses. He started working for Arcturus Mine in 1991 as a general hand. Then he was promoted to the position of drilling assistant and, in 1996, he was appointed as a diamond driller. As the machine operator he handled the drilling machine, which has a power pack. The drill is connected to the control room where there is a switch. When the accident occurred he was at the rock face, which was about 3 metres from the control unit. Mateo was in the control room which housed the control unit. Being the machine operator, he was the one who switched on the machine. The drilling rod is fitted to the machine through a chuck-head. When the rod has penetrated to the fullest extent, the machine is stopped and the chuck-head is loosened and the machine is reversed so that another section of the rod is exposed. Then the chuck-head is tightened and the drill can penetrate further. He loosened two bolts on the chuck-head and was loosening the third when Mateo switched on the machine. When the machine was switched on the chuck-head started to spin and that was what caused the chuck spanner to fly off and hit his leg. He had not told Mateo to switch on the machine.

Sibanda agreed that he had signed the Claim Form sent to NSSA which was the employer's report of the accident (Exhibit 5). In giving a brief description of how the accident happened it is stated "The worker was unscrewing rods which had got stuck in the hole using a wrench spanner when it lost grip, hitting the worker on the thigh". He said that he did not remember seeing the form and that the description of the accident is not correct. He is uneducated and did not appreciate fully the contents of the document. He did not describe how the accident had occurred to anyone. Officials from NSSA had gone to investigate the matter.

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Arcturus Mine called two witnesses. The first was Sylvester Kadewere, the Human Resources Manager at the mine. He testified as follows. Whenever there is an occupational accident which results in a worker being incapacitated for more than 8 hours an Accident Report Form is completed and submitted to NSSA. The form relating to Sibanda's accident had been completed by a junior in his office. NSSA had accepted the claim in respect of Sibanda's accident and has been paying him a disability pension. After the accident Sibanda had been detained at Parirenyatwa Hospital for a short period. After his release from hospital he had performed sedentary duties at the mine. Then he had had a relapse and went to see a doctor who had referred him to NSSA for a reassessment. Originally the assessment of his disability had been 60% and, as his condition had improved, it had been reduced to 50% and then 23%. Eventually, on the recommendation of NSSA, Sibanda had been retired on medical grounds on 2 April, 2001. He had been paid the normal terminal benefits.

In cross-examination Kadewere gave the following responses. The description of the accident given on the Accident Report Form was based on the investigations of the safety officer. It was not Sibanda who had completed the form.

The last witness was Daniel Chatera, the resident geologist at the mine, who testified as follows. He had been resident geologist at the mine for 11 years. He knew how the machine that Sibanda had been using at the time of the accident functioned. The machine is a tool to take samples from the rock. It has a diamond crown which is attached to rods, and bores into the rock. It has three components; a power pack, a control panel and a motor assembly which causes the rods to turn so that the crown bores into the rock. When the chuck-head which holds the rod firm gets close to the rock-face, it must be reversed so it grips the rod further down and

then the rod can go deeper into the rock. The switch on the control panel can stop the machine. The machine operator has to unscrew the chuck-head to move it further down the rod.

Chatera said that it was most unlikely that the accident could have happened in the manner described in the Accident Report Form. The chuck spanner that Sibanda was using is much smaller than a wrench spanner. If the chuck spanner had fallen on his leg it would not have caused the femur to fracture.

From the evidence it seems clear that the accident occurred in the manner described by Sibanda. He was using the drilling machine at the rock face. The machine had been switched off and he was loosening the chuck-head, using a chuck spanner. Before he finished doing so Mateo switched on the machine, causing the chuck-head to start spinning. That had the affect of wrenching the chuck spanner out of Sibanda's hand and sending it flying. It struck Sibanda's leg and fractured the femur.

Ordinarily, in a case such as this the employer is liable for damages suffered by an employee due to an accident which occurs in the course of his duty. That is the position under the common law. However the Legislature has introduced legislation dealing with compensation for workmen being injured on duty. Section 3 of the National Social Security Authority Act [*Chapter 17:04*] (hereinafter referred to as "Chapter 17:04") empowers the Minister to whom the administration of the Act has been assigned to establish social security schemes by way of a statutory instrument. Acting in terms of that section, the Minister has made the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68 of 1990) (hereinafter referred to as "the Scheme"). The Scheme prescribes what compensation shall be payable to a worker if he has an accident which results in his death or disablement. The compensation so payable is in substitution of any other legal remedy. Section 8 of the Scheme provides 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

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- 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 Relations Act, 1985."

Section 9 of the Scheme, which provides for additional compensation if the accident was caused by negligence, reads as follows -

"9. (1) Notwithstanding anything to the contrary contained in this Scheme, if a worker meets with an accident which is due -

(a) to the negligence -

- (i) 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
- (ii) 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 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 the 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."

In the light of s 8 of the Scheme, the liability of the defendants must be determined in terms of the Scheme. Sibanda has been paid, and is still being paid, compensation in terms of the Scheme in respect of the accident which happened at the mine on 16 July 1999. It is to be hoped that the compensation he is receiving will be increased substantially to enable him to survive in the present hyper-inflationary

environment in which we are living. A pension of \$738 a month is hardly sufficient to buy food for one person for one day, let alone a month. In terms of s 9 of the Scheme, Sibanda is entitled to institute an action for additional compensation if the accident was due to negligence on the part of his employer or a person entrusted with the management or in charge of the business or of a person having the right or engage or discharge workers on behalf of the employer or to a patent defect in the condition of the premises, works, plant or machinery. There is no question of any negligence on the part of any person other than Mateo, a fellow worker, who switched on the machine when Sibanda was in the process of trying to loosen the chuck-head that was holding the rod. There has been no question of any patent defect in the drilling machine.

Can the negligence of Mateo be attributed to Arcturus Mine, which was the employer? Arcturus Mine is an artificial *persona* and therefore cannot, itself, be capable of doing something negligently. Negligence can only be attributed to an employee of the corporate body. Under the common law, Arcturus Mine could be liable for the negligence of Mateo, even though he is a very junior employee. However, the Scheme does change the common law. Section 9(1)(a) of the Scheme spells out the categories of employees whose negligence can be laid at the door of the employer. It must be a person who is entrusted by his employer with the management of the trade or business or any branch or department thereof, or who is appointed to be in charge thereof, or a person having the right to engage or discharge workers on behalf of the employer. Mateo does not fall into any of these categories. Therefore the Arcturus Mine cannot be held liable for any damages suffered by Sibanda.

Section 10 of the Scheme provides that where an accident in respect of which

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compensation is payable under the Scheme was caused in circumstances creating a legal liability in some person other than the employer to pay damages to the worker, then the worker may both claim compensation under the Scheme and institute an action against the third party. In this case, the accident was caused by Mateo and therefore Sibanda would be entitled to claim damages from him. However, subsection (2) of s 9 of the Scheme provides that before instituting proceedings against the third party, the worker must notify the General Manager of the Scheme, in writing, of his intention to do so. The subsection specifically provides that no proceedings in a court of law to recover damages from a third party may be taken by the worker until the General Manager of the Scheme has been so notified. There is nothing in the papers to show that the General Manager of the Scheme was notified of these proceedings and so the claim against Mateo cannot be recognized.

Under the common law, if a worker is injured whilst at work and, because of negligence on the part of the employer or a fellow worker, the employer is liable for the damages suffered by the worker, the worker can claim damages for pain and suffering. The Scheme does not provide for payment for pain and suffering and precludes the worker from pursuing any such claim, against his employer save in very limited circumstances. I would recommend that this aspect be reconsidered by NSSA. I also strongly recommend that pensions be reviewed as a matter of urgency and increased substantially in order to enable pensioners to survive.

As regards costs, Mr *Hogwe* submitted that, if the Court determines that Sibanda is debarred by the Scheme from claiming damages from the Arcturus Mine, then the latter should have raised that defence in its plea. It did not do so and therefore each party should pay its own costs. The issue of non-liability in terms of the Scheme was raised only after Sibanda had closed his case. It seems to me that there is merit in that submission. If the defendants had pleaded that the Scheme precluded Sibanda from claiming against his employer, it is probable that the action would have been aborted. Accordingly I think it will be appropriate to order that each party pays its own costs.

It is ordered that the plaintiff's claim is dismissed and that each party pays its own costs.

Hogwe, Dzimirai and Partners, plaintiff's legal practitioners
Gill Godlonton & Gerrans, legal practitioners for respondent