IN THE HIGH COURT OF SWAZILAND

CASE NO. 1535/2007

In the matter between:

MPENDULO SHONGWE **PLAINTIFF**
AND
CMC RAVENA (PTY) LTD **DEFENDANT**

CORAM: MAMBA J
FOR PLAINTIFF: MR Z. MAGAGULA
FOR DEFENDANT: ADV. M. VAN DER WALT (Instructed by Currie & Sibandze)

JUDGEMENT
28th November, 2008

[1] The plaintiff, a twenty four (24) year old male, was born on the 26 August 1983 and was employed by the Defendant company as a soil materials tester on or about the 3rd January, 2007. He holds a Diploma in Civil Construction which was awarded to him by Gwamile Voctim. Prior to his employment by the defendant he had been employed in similar work with two other companies in Swaziland at two separate occasions.

[2] He explained to court that his work as a soil materials tester involves the sampling and testing of soil materials or aggregates used in the construction industry to determine its quality, fitness and suitability or otherwise thereof for purposes of use in the industry. He is a quality control

technician. These materials include cement and crush stones.

[3] It is common cause that on the 8th February 2007 whilst taking cement samples from a mixer at the defendant's depot in the Siphofaneni area, the machine of which the mixer is a part, went on and cut off the plaintiff's right arm just below the elbow. This occurred whilst the plaintiff was acting in the course and within the scope of his employment as a materials tester by the Defendant.

[4] The plaintiff has alleged in his particulars of claim that the machine was switched on by one Mpendulo Ndlovu, another employee of the defendant who was also acting in the course and within the scope of his employment. The plaintiff alleges that the said Mpendulo Ndlovu acted negligently in starting the machine inasmuch as he knew or ought to have known that the plaintiff had his hand or arm in the machine or mixer at the time he started the machine and by implication knew or ought to have known that the mixer or machine would physically injure the plaintiff's arm or that part of it that was in the mixer.

[5] As a result of the injury suffered by the plaintiff as stated above, he claims damages in the sum of E1, 000, 000-00, broken down as follows:
(a) E100, 000-00 for pain and suffering
(b) E200, 000-00 for permanent disability
(c) E500, 000-00 in respect of diminished career prospects or advancement and

(d) E200, 000-00 for loss of amenities of life

[6] Save to deny that its servant Mpendulo Ndlovu was negligent as alleged or at all and that the plaintiff has suffered the damages claimed by him, the defendant has admitted the allegations made by the plaintiff. In particular the defendant denies that Mpendulo Ndlovu knew or ought to have known, at the time he switched on the machine, that the plaintiff had his arm or hand in the machine or that the plaintiff was working on that part of the machine at the time. In the alternative the defendant has pleaded that plaintiff was also negligent or contributed in causing the injury to his arm in that he put his arm into the machine when it was not necessary for him to do so and he failed to notify Mpendulo Ndlovu, as he was obliged to do that he was going to take the cement samples and further by actually putting his hand into the mixer. (The suggestion in this is obvious that, under normal circumstances one would not have to put his hand in the mixer in order to obtain the necessary cement sample.)

[7] It is common cause that in order to obtain cement samples from the machine, the laboratory personnel would first report to or notify the Batch Plant Controller about his intentions and the latter would facilitate this by granting the go ahead. Mpendulo was the Batch Plant Controller at the relevant time. The Controller's office is situated away from the laboratory, where the plaintiff worked. The mixer and in particular the location where the cement samples were normally accessed and obtained, was situated outside the said Controller's office. It is common cause further that in

opening the hatch where the cement could be accessed, a spanner had to be used to unscrew the unit or nut that secured the hatch closed. It is further common cause that it was normal for the laboratory personnel or whoever went to collect the cement sample, to draw the cement by inserting his hand through that opening into the mixer, if necessary, as in the case where the required quantity of cement would not automatically spill out of the hatch on being opened.

[8] On the fateful day, according to the plaintiff, he approached the Batch Plant Controller and informed him of his intention to extract cement samples from the mixer through the usual or normal opening. The operator granted him the permission to do so and also informed him to get help and assistance from some of the employees who were outside the Controller's office, including one Sipho Mngomezulu who directed him where to get the relevant spanner to open the mixer.

[9] For some reason, the right size spanner could not be obtained and the plaintiff settled for a shifting spanner which he received from the storeman - Moses Nsimbini. It was Sipho Mngomezulu who opened the mixer to access the cement. The Plaintiff held a plastic bag in which the cement sample was being put by Sipho Mngomezulu. Sipho Mngomezulu had to insert his hand into the mixer in order to draw the cement and after a while he got tired doing this and it was time for the plaintiff to insert his hand into the mixer to draw the cement. Sipho held the plastic bag. All this time the machine was off. Immediately the plaintiff put his hand inside the mixer, the machine went on without any warning whatsoever. Before even

experiencing any pain in his arm he realized that his right arm had been cut off just below the elbow. Sipho Mngomezulu, probably in shock, immediately ran away and so did most of the people who were in that area. The machine was switched off about two minutes later. Mxolisi Ginindza, a fitter who had been attending to a fault on a silo about four metres away, came to him, administered what first aid he could and transported the plaintiff to the site clinic and eventually to the RFM hospital in Manzini.

[10] I should note here that the machine control room - where the machine was switched on and off - was the room that doubles up as the Batch Controller's Office and Mr Mpendulo Ndlovu was in that room at the relevant time.

[11] The circumstances under which the plaintiff was injured are substantially common cause. The nature and extent of the injury suffered by the plaintiff is also common cause. The only point of disagreement between the parties, bar the extent of the damages claimed by the plaintiff, is whether or not the plaintiff did report and obtain permission from the Batch Plant Controller to extract the cement samples from the machine. Flowing from this is the further issue of, even if his permission had not been sought and obtained. The Batch Plant Controller knew or ought to have known that the plaintiff was accessing the cement at the relevant place and time and in the manner described by the plaintiff.

[12] Mr Ndlovu has not denied that he is the one who caused the machine

to be switched on and off at the material time. He maintained, however, that the plaintiff did not notify or come to him to alert him that he was about to extract the cement samples from the mixer or any part of the machine. He testified that he was not aware of the plaintiff's presence in that area until after the accident. He testified further that the place was at the time relatively busy as there were about 6 people there including Mxolisi Ginindza who was fixing a broken bearing on a silo about 12 metres away from him and Sipho Mngomezulu who was working on the manual controls in the control room.

[13] Sipho Mngomezulu was not called by either side to testify in these proceedings. At the time when evidence was being led, he was no longer employed by the defendant.

[14] The evidence of the plaintiff is supported in material respects by the evidence of Mxolisi Ginindza. The plaintiff testified that he approached Ndlovu and made the request to take the cement sample and the Production Manager, a certain Mocambican by the name of BLOZA was in the vicinity too. He said he found Mr Ndlovu just outside the control room. Mr Ndlovu granted him the necessary consent and directed him to Sipho Mngomezulu who would assist him in this regard. He was told to report to him once he had obtained what he wanted.

[15] It is not insignificant that whilst the plaintiff knew the location of the Batching plant, he had never been therefore to collect the cement sample before. He had never done it before. All the witnesses confirmed this. He

did not know the exact spot where the cement was to be drawn or extracted and how this was to be done, save for the fact that permission had first to be sought from the Batch Plant Controller. This procedure is similar to that followed at sampling at the crush plant, where the plaintiff had been before. (He also knew, from his colleagues in the laboratory, that a hand was often used to access the cement from the machine as his colleagues often came back with their arms covered in cement). Mxolisi Ginindza told the court that he saw the plaintiff and Mpendulo Ndlovu talking outside the control room, but did not hear what their conversation was all about. This was before the plaintiff was injured. The suggestion by the defendant that Mr Ginindza was telling an untruth in this regard is baseless. If, for example, Mr Ginindza had decided to tell a lie, in order to bolster or advance the plaintiff's cause, he could have told the court that he heard the Plaintiff being granted permission by Mr Ndlovu to go and do the sampling. He could have also testified that he actually saw Sipho Mngomezulu open the hatch in the mixer and extracting the cement. It is, on the whole, totally unfathomable that the plaintiff would have invaded the Batch Plant, obtained a spanner from Mr Nsimbini and gone to a specific location or spot - previously unknown to him - on the batching machine and drawn cement from there.

[16] His evidence is that he was led to that spot by Sipho Mngomezulu after being instructed by the Batch Plant Controller. He was also directed how to extract the cement by the said Sipho Mngomezulu and when this was going on, the machine had been switched off. The plaintiff has in my judgement proven, on a preponderance of probabilities, that he was given

the permission or go ahead to extract the cement sample from the mixer by the Batch Plant controller, Mr Mpendulo Ndlovu.

[17] Whilst the plaintiff and Sipho Mngomezulu were in the process of extracting the cement from the pipe or hatch and in particular whilst the plaintiff had his right arm inside, Mpendulo Ndlovu switched on the machine and the rotating screw inside cut off the plaintiff's right forearm just below the elbow. The screw was set in motion by the machine being switched on. The agreement and the prevailing procedure at the Defendant's plant was that after completing taking the sample, the plaintiff (and Mngomezulu) would then report to the Batch Plant Controller, that he had completed the sampling. This was, obviously meant or intended to ensure that that part of the machine was cleared or rid of any persons that might be put in danger by the machine being activated or switched on. In the present case the Batch Plant Controller switched on the machine without ensuring that no person came to harm as a result of such. In particular he failed in his duty of care towards the plaintiff who had specifically been granted permission by him to do what he was doing at the relevant point and time.

[18] Whether or not the plaintiff went to obtain the cement sample because he had contaminated the samples that were already in the laboratory that day, is in my respectful view irrelevant. I would hold that even if he had negligently spilt or contaminated the cement sample that was in the laboratory by sweeping the floor and thereby exposing it to dust and

therefore had to replace it, that negligence did not, even in the remotest sense contribute to the injury he sustained and the damages consequent thereupon. The contamination of the sample was not the proximate cause of his injury. Neither can it be said that in trying to correct or rectify what he had done, he was not on the business of his employer but on a frolic of his own. The reason and or motive for him obtaining the sample was innocent and can not excuse the Defendant from the negligence of its employee in switching on the machine while the plaintiff had his arm inside it. It was not unusual for the employees to extract cement in this way and Ndlovu knew or ought to have known about it.

[19] I turn now to examine the issue of the quantum of damages suffered by the plaintiff.

[20] It is common cause that after the accident the plaintiff was taken to the RFM hospital in Manzini for medical attention. He also had to receive psychological and physiotherapy treatment at the Salvation Army and Cheshire home clinic respectively. The costs for these services were all borne by the Defendant. Later, and after some negotiations between the parties herein, the plaintiff was taken to Med-clinic in Nelspruit in South Africa and an artificial arm (Prosthesis) valued at over E40,000.00 procured for him by the defendant. He has further received or is due to receive a sum of just over E72, 000-00 from the Workmen's Compensation fund. It is because of these facts relating to his medical and hospital expenses that he has claimed for General damages only. Again, it is worth noting that the plaintiff did not suffer any losses in his earnings during this

period. In fact he was later promoted and had his salary increased. His promotion was not within the field of his speciality though.

[21] The plaintiff has stated in his evidence that although he has been provided with an artificial forearm, as a right-handed bricklayer he is unable to use this artificial limb to do things like lifting bricks or cement blocks, roofing tiles or mortar or handle the heavy tools of his trade. His disability in this respect is permanent. He says also that he is now incapable of doing the ordinary personal chores such as washing and ironing his cloths. He now has to hire a helper to do these. He also testified about the severe pain he suffered after the incident. Whilst this pain has substantially gone away, he usually has flashes of such pain on his right arm, especially during cold periods. He fears that because of his present physical condition, he may not be in a position to carry out his profession as a bricklayer or soil materials tester.

[22] The Plaintiff has not furnished any medical report, data or material or actuarial evidence upon which this court may work on in the assessment of his damages. He contends himself by stating that his ability to carry on his trade or his prospects of advancement in his career have been diminished. This may well be the case but there is no expert evidence to indicate the extent or level of the said diminution. This court cannot guess this.

[23] Recently in the case of **DELISA KENNETH MASINA vs UMBUTFO**

SWAZILAND DEFENCE FORCE AND ANOTHER (Case Number 274/05), this court referred to PJ Visser JM Potgieter in their work, LAW OF DAMAGES (1993 ed) at Page 11 where the learned authors state as follows:

> "(a) interesse is defined in terms of the actual loss suffered.
>
> 1. Liability for damages includes liability for loss of profits. The expectation of profits must, however, be certain in order to render the defendant liable.

In the assessment of damages no account is taken of affective or sentimental loss. The assessment is based on a general objective standard of value.

> (d) Adequate proof of loss should be adduced. Although Voet accepts the award of a small sum of damages, this should not be confused with nominal damages from English law. The *actio legis Aquiliae* is only available when there is proof of actual damage.
>
> 2. Since proof of damage may be difficult, the court should in doubtful cases where the plaintiff does not prove his damage with a high degree of certainty, favour the defendant by awarding law damages.
> 3. The principle of Codex 7.47 in terms of which damages may not exceed double the value of the object in dispute, was accepted.

Damages in terms of the actio legis Aquiliae have no (primary) penal function. This means that a defendant who has in a culpable manner cause damages is liable for more than the actual damage sustained. ...

> (i) Damages may be awarded for the causing of pain and suffering as a result of bodily injuries." (footnotes have been omitted by me).

And at page 435-437 the learned authors state that

> "A plaintiff has to prove on a balance of probabilities that he has suffered damage, the extent of such damage and what amount of compensation he should be awarded in respect thereof. Damage and damages are determined through the appropriate measure of loss as well as the particular circumstances of each case. ...If a plaintiff has not proved his damage, he is not entitled to allege that, since the defendant is in possession of the necessary documentation an 'enquiry as to damages' should be held so that the damages which are to be found to be due to him may be paid. ...In cases [wherein

damage and damages are capable of precise calculation or assessment], it is incumbent upon a plaintiff to produce sufficient evidence substantiating the exact amount of damage. Where a plaintiff has proved some patrimonial loss but there is insufficient evidence to enable (precise) assessment, the court may in some instances estimate damages on the best available evidence. However, where evidence was in a general sense available to the plaintiff but he has failed to produce it, the court will not attempt to assess his loss and will order absolution from the instance. It is not the task of the court to award an arbitrary amount of damages where a plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made."

The court also referred to the case of **NTOMBIFUTHI MAGAGULA v THE ATTORNEY GENERAL (Civil Appeal 11/2006** - unreported) at paragraph 20 thereof.

And again at paragraph 15 with reference to the measure of General damages the court stated:

"[15] In **Magagula's case (supra)** @ paragraph 14 RAMODIBEDI JA had this to say:

"I turn now to that most difficult part of the case, namely the measure or general damages. Difficult in the sense that there are no scales by which pain and suffering can be measured in monetary terms. I commence this exercise by pointing out that the principles which would guide a court in the assessment of general damages are well established. Essentially the question of the assessment of such damages is a matter pre-eminently within the discretion of a trial court. ...a finding on general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life, as here, is essentially a matter of speculation and estimate."

[24] In the circumstances, the plaintiff has failed to prove that he has suffered any diminution in his ability to earn a living or in his ability to be in gainful employment.

[25] The assessment of the quantum of damages for pain and suffering, permanent disfigurement or scaring and loss of amenities of life stand on a different footing. There is generally, an overlap in these as well. For instance, in casu, the issue of the permanent disability or disfigurement is linked to and with, the loss of amenities of life. These two issues are also related to the medical and hospital expenses that were incurred in procuring and providing the artificial limb to the plaintiff. The court has to guard against duplication in assessing such damages. In **Administrator General, South West Africa, and other V Kriel, 1988 (3) SA 275** (A) Hoexter JA quoted with approval what was stated by Kriegler J in the case of **Johannes Dhlamini v Government of Republic of South Africa** reported in Corbett and Buchanan - The Quantum of Damages at 587 where the learned judge stated that:

> "If I were to have assessed the damages for the non-patrimonial elements in isolation, I would have arrived at an award considerably in excess of the figure at which I have arrived. I have grappled with the question what, in law, logic or equity, underlies my conviction that there must be some interaction between the awards for patrimonial loss on the one hand and the award for non-patrimonial loss, on the other. Whatever may be the rationale in principle or in other cases, it appears to me, in this case, and on its particular facts, that I cannot ignore the very substantial awards made under paras 2, 3,5 and 6 above when I come to assess general damages for pain and suffering, loss of amenities of life, disability and disfigurement. Those awards were considered reasonable for the very reason that they served to ease the plaintiff's painful shuffle across this mortal coil. They were intended to reduce the suffering, the loss of amenities of life and general disablement that the plaintiff will have to live with. I cannot ignore them when assessing those very elements under what is a different head of damage, but forms part of one and the same award."

And referring to the notion of the loss of amenities of life the court referred

to Lord Devlin's definition in **H. West and Son Ltd V Shephard [1963] 2 All ER 625 (HL) at 636G-H** where the learned Law Lord defined it as

> ''a diminution in the full pleasure of living.' The

Learned judge of Appeal then stated that

> "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 walk 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.
>
> That none of the paramedical aids with which the case is concerned will be able - to use the words of the learned trial Judge - 'to restore to Marie the amenities of life' which she has lost must be accepted of course as a sombre truth. It is no less important to bear in mind that no amount of paramedical aids can even be a substitute to limbs which have ceased to function. But the matter does not end there. As Hendler AJ himself pointed out, the paramedical aids would make life 'less intolerable' for Marie. It seems to me that whatever renders the uncomfortable and deprived existence of an accident victim less intolerable or more endurable must inevitably have the tendency to restore to the victim of an accident at least some of the pleasure in living once enjoyed by such victim; and likewise to serve as some measure of compensation for the loss of amenities of life."

[26] Taking into account all the above facts and the law, the plaintiff has established on a balance of probabilities that he has suffered damages for pain and suffering, permanent disability or disfigurement and loss of amenities of life. The extent of his disability and loss of amenities of life has been diminished or mitigated by the provision of the artificial forearm. As for the pain and suffering, these are both physical and mental. The mental or emotional pain was no doubt mitigated or ameliorated by the

psychological sessions the plaintiff had following his injury and no doubt also by the provision of the prosthesis.

[27] In **Delisa Masina's case (supra),** the plaintiff had suffered a single gunshot wound to the back of his head, and a fractured skull. In consequence he suffered an 80% loss of hearing on his left ear which was permanent. He had been rendered blind for about three weeks. He was awarded damages of E100,000-00 for pain and suffering. I consider the plaintiff's situation less severe than in that case and I am of the considered view that a sum of E75 000-00 should be the award under this heading.

[28] In respect of permanent disability or disfigurement an award of E75,000-00 is also made. E80,000 is awarded to him in respect of loss of amenities of life, bringing the final or total award to a sum of E230,000-00.

[29] In the result judgement is granted in favour of the plaintiff as follows:

1. The defendant is to pay to the plaintiff a sum of E230,000-00 in respect of General damages plus interest thereof at the rate of 9% per annum with effect from the 8th December 2008.

2. The defendant is ordered to pay the costs of suit.

MAMBA J