IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

2018/HP/0689

BETWEEN:

SOLOMON SIAME — **PLAINTIFF**

AND

FIRST QUANTUM MINING AND OPERATIONS LIMITED — **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 31st day of August 2020

For the Plaintiff: *Mr. C. Nhari assisted by Ms. S. P. Mbewe, Messrs Nhari Advocates*

For the Defendant: *Mrs. M. B. Mutuna, Madames Mweshi Banda & Associates*

J U D G M E N T

Cases Referred To:

1. *Betty Kalunga (suing as administrator of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines Plc (2004) Z.R 40 (S.C)*
2. *Reid v Tompkins Group Plc (1989) 3 All ER 228*
3. *Poly Technic Limited v Howard Cooke Court of Appeal Judgment No. 38 of 2018*
4. *Kennedy v Cordia (Services) LLP Scotland (2016) UK SC 6*
5. *Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited SCZ Judgment No. 18 of 2001*
6. *Hilton v Thomas Burton (Rhodes) Limited (1961) 1WLR 708 at 707*
7. *Zesco Limited v Elijah Nyondo (suing in his capacity as Administrator of the estate of the late Wilson Sinyinza) Appeal No. 144 of 2017*
8. *Caxwell v Powell Duffryn Collieries Limited (1940) AC 152-178*
9. *Bank of Zambia v Caroline Anderson and Another (1993/94) ZR 47*
10. *Chilufya Kusensela v Astridah Mvula (Married Woman) SCZ Judgment No. 3 of 2014*
11. *Michael Mukula and Highway Transport Limited v Pamela Ngungu Chiwala and James Matungu Chilala (an infant and as an administrator of the estate of Nkisi Chiwala and Lenny Kasongo) SCZ Judgment No. 21 of 2014*
12. *Rodger Scott Miller v The Attorney General (1983) ZR 66*
13. *Reba Industrial Corporation Limited v Nicholas Mubonde Court of Appeal Judgment No. 005 of 2017*

14. *Reuben Nkomanga v Dar Farms International Limited SCZ Judgment No. 25 of 2005*
15. *Clarke v Rotax Aircraft Equipment Limited (1975) 1WLR 1570*

Legislation Referred To:

1. *National Pensions Scheme (Amendment) Act No. 7 of 2015*
2. *Mines and Minerals Act No. 11 of 2015*
3. *Occupational Health and Safety Act No. 36 of 2010*
4. *Workers Compensation Act No. 10 of 1999*

Other Works Referred To:

1. *Winfield and Jolowicz on Tort 13th Edition by W. V. H Rogers Sweet & Maxwell London UK `989*
2. *Halsbury's Laws of England, 4th Edition, Volume 12*

1. Introduction

1.1 At the heart of this suit is Solomon Siame (the plaintiff) who was involved in a serious accident at the defendant's premises. He worked as a tipper truck ADT operator in the defendant's roads division. On the material day of his accident (2nd July 2016), he operated truck fleet no. RT 50, which was assigned to him and when he completed his tasks, he drove the truck to the wash bay. He found bus (no. MV 282) parked in the bay without its driver but its key had been left in the ignition switch.

1.2 Shortly afterwards, Brian Kabeya who operated truck fleet no. RT 77 drove his truck to the wash bay and found it occupied. He moved the bus out of the bay and asked another driver, Musonda Eric Mpundu to park his truck in its lot opposite the plaintiff's cab. At the time, the later

was washing his truck's cab and a little while after Eric left the scene, the accident occurred.

1.3 The plaintiff was seriously injured and was immediately evacuated to various hospitals where he received in and outpatient medical care. He did not fully recover from the injuries and was eventually discharged from employment on medical grounds on 26th July 2016. His contention before Court is that the defendant negligently caused his accident by failing to ensure a safe working environment.

2. **Pleadings**

2.1 The plaintiff instituted this suit on 9th April 2018, by way of writ of summons and statement of claim seeking the following orders against the defendant:

"(i) General damages for negligence.
(ii) Damages under the Mines and Minerals Development Act No. 11 of 2015.
(iii) Interest.
(iv) Costs.
(v) Any other relief."

2.2 The plaintiff's case has been partly underpinned in the introductory part of the judgment. Suffice to state that he also averred that the defendant breached statutory duty and acted negligently as follows:

(i) *Failure by the defendant's mine management to maintain a safe working system at the wash bay. The system of parking vehicles facing each other was a risk to workmen particularly the plaintiff.*

(ii) *Failure by the defendant's driver of tipper truck no. RT77 to apply and properly judge the clearance distance between the plaintiff and tipper truck no. RT50.*

(iii) *Failure by the defendant's driver to apply brakes in time or steer or control his tipper truck to avoid trapping the plaintiff.*

(iv) *Failure by the defendant's mine officials to provide risk assessment for security purposes and ascertain the safety of any employee before allowing such employee to carry out his duties regardless of the fact that mining and construction is dangerous.*

(v) *Failure by the defendant's mine superiors to ensure and enhance concerned appointed personnel to provide and implement standard procedures of parking and washing vehicles at bay area to avoid unnecessary accidents on workers on duty.*

(vi) *Failure by the defendant's superiors to induct or train workers on how to work in a free and conducive environment regardless of the fact that the scene of accident was potentially dangerous.*

(vii) *Failure by the mine officials to carry out safety precautionary measures such as operations and risk assessment before*

permitting any person to commence work during and after the shift regardless of the fact that mining and construction is dangerous.

(viii) *Delegation by the defendant's mine officials of their responsibilities to their subordinates without proper supervision.*

(ix) *Failure by the superiors to close that part of area pending the restoration of safe conditions.*

2.4 The plaintiff further averred that he had been in good health before the accident but sustained an open book pelvic fracture with a vertical shear injury. He also suffered severe muscle wasting in his left leg, developed poor motor control and coordination in his left foot. He stated that his permanent disability was assessed at 65% and was unable to work as a tipper truck driver. As a result, he lost his monthly income of ZMW 4,024.00 and suffered other damage.

2.5 In response, **the defendant** entered appearance and filed a defence into Court on 30th April 2018. It asserted that the plaintiff contributed to his accident by going to the wash bay at 15.30 hours on a Saturday when it was out of service and with no attendant. Further, he did not follow procedure nor the safety instructions at the wash bay. Further, he accessed the area from the exit unlike Brian Kabeya who used the entry point. In addition, he parked his truck on a gentle decline and in the wrong direction contrary to the defendant's parking and shut down procedure. He equally did not apply the hand brake nor choke the

wheels of his truck and it consequently rolled forward and trapped him between the cabs of the two tipper trucks.

2.6 The defendant denied that the plaintiff was healthy and happy at the time of the accident nor that he earned a salary of ZMW 4,024.00. Instead, the plaintiff refused to follow medical treatment paid for by the defendant after the accident. In this regard, he inconsistently attended physiotherapy sessions, lacked motivation for therapy which would have returned him to recover his range of movement in his left leg. The plaintiff was generally uncooperative and therefore contributed to his poor health state.

3. Trial course

3.1 I held trial in this matter on 7th and 13th November 2019 and 27th May 2020. The plaintiff's (**PW1**) evidence by and large, restated the contentions in his pleadings. The departure was that Brian Kabeya entered the wash bay from the exit and did not observe the parking range distance. As a result, his truck rolled forward and trapped PW1 between the trucks and he sustained injuries.

3.2 PW1 stated that he explained the circumstances of the accident to Mr. Chinjamba, the safety officer and was thereafter taken to Mary Berg Community Clinic (MBCC) in Ndola for treatment. He was later evacuated to Victoria Hospital in Lusaka where he was hospitalized for 6

weeks. In that time, he attended 10 out of 15 recommended physiotherapy sessions but his situation did not improve. When he was discharged from hospital, he continued to experience a lot of pain and was unable to stand or walk long distances.

3.3 It was PW1's further evidence that the defendant promised him specialist medical treatment in South Africa which it failed to deliver. PW1 asserted that he received a full salary of ZMW 4,024.00 for three months post-accident and thereafter reduced to a half salary of ZMW 2000. In concluding, he told the Court that his disability was assessed at 65% and never returned to work because the defendant discharged him on medical grounds.

3.4 During **cross-examination**, PW1 testified that he worked in the defendant's roads division at Kalumbila sentinel mine. He averred that bus (MV 282) was wrongly parked in the wash bay, unlike his truck which was on level ground with its hand brake engaged. PW1 admitted that he did not choke the wheels of his truck because there were no blocks at the wash bay, and in this sense, did not comply with the defendant's high pressure wash bay procedure. PW1 denied Ms. Lyonne Kloppers the defendant's occupational clinical occupation health specialist assessment that he lacked motivation for recovery.

3.5 PW1 instead asserted that he failed to consistently attend physiotherapy because the defendant did not provide transport. He nevertheless admitted that the defendant paid the ambulance costs to Beit Cure Hospital in Lusaka on 20th February 2017 and two other subsequent hospital visits. He added that his contribution to the defendant's medical scheme was ZMW 300 and his disability was assessed at 65% but not confirmed by the Workers Compensation Board (WCB).

3.6 When **re-examined**, PW1 replied that bus (MV 282) was parked at the workshop near the wash bay and not opposite his truck. He and Brian Kabeya were the only persons who witnessed the accident.

3.7 **PW2** was **Malfred Moolela** an inspector of machinery at the Mines Safety Department responsible for enforcing occupational health and safety laws, inspecting mineral licensing areas and machinery used in mining explorations. He then went on to testify that he was notified of PW1's accident by the defendant's management. It was a serious accident and happened at the mine's site. The next day, PW2 inspected the accident site on 3rd July 2016 and was accompanied by Mr. Chinjamba. He found that the cabs of two identical trucks were parked opposite each other and the eye witnesses were not available as PW1 was in hospital while Brian Kabeya was off duty.

3.8 PW2 further testified that he ultimately prepared a report without PW1's input and his findings established that the defendant's wash bay had the following inadequacies:

(i) a person was not specifically employed to man the wash bay and to ensure that wheels of trucks were choked after parking.

(ii) information on safety or code of conduct at the wash bay was not displayed.

(iii) drivers were expected to wash their trucks when the acceptable standard in the industry required competent personnel to undertake the task.

(iv) anyone could access the wash bay at any time and the number of vehicles that could be parked in the wash bay was not known.

3.9 PW2 went on to explain that the defendant's employee told him that PW1 failed to fix his truck's gear lever before the accident. He did not accept the assertion because PW1 was not found in a sandwiched position between the truck cabs but not on the ground. As far he was concerned, one of the trucks was moved to release PW1 from the hold. PW2 could not however, say whether PW1 applied the hand brake on his truck after he switched it off or not.

3.10 PW2 told the Court that his findings on the cause of accident were based on a simulation but asserted that the defendant's controls at the

wash bay were inadequate and a source of accidents. In moving forward, PW2 recommended remedial measures to the defendant's management, to improve the wash bay. Among these, were to undertake a comprehensive risk management assessment of the wash bay and thereafter, to develop procedure to prevent accidents.

3.11 When **cross-examined**, PW2 stated that the defendant's management told him that it had a high pressure wash bay procedure manual but did not avail him a copy. PW2 admitted that he did not examine the surface of the wash bay and assumed that PW1's truck was parked on an incline. Further, he did not ask the defendant about the access point to the wash bay but disputed that PW1's truck rolled forward because it was parked on a decline of a slope with wheels that were not choked. He added that since there were no tyre marks on the ground, he could not tell which truck moved first.

3.12 PW2 testified that he was aware that the defendant's drivers received training on the wash bay procedure and its staff knocked off at the appointed time on the material day. He nevertheless insisted that the wash bay had no signage and the accident was quite inevitable.

3.13 In **re-examination**, PW2 replied that he prepared PW1's accident report because he was competent to do so.

3.14 That marked the close of the plaintiff's case.

3.15 In response, the defendant called four witnesses. The first was **Musonda Eric Mpundu (DW1)**, one of its tipper truck driver who worked with PW1 from 2013 to 2016. He testified that he was at the workshop when the accident occurred. He saw PW1's truck at the wash bay and it was parked opposite bus MV 282 which was at the centre. After a short while, Brian Kabeya arrived with his truck at the maintenance section and found the wash bay occupied. He then moved the bus and asked DW1 to park his truck in the lot that had held it.

3.16 DW1 also testified that after parking Brian's truck, he followed the defendant's parking and shut down procedure by engaging the park brake and pressing the neutral button. He then asked Brian to choke the wheels of the truck and averred that all the defendant's trucks were fitted with choking blocks; while those found at the wash bay were supplemental. Afterwards, DW1 alighted from Brian's truck and passed between the cabs on his way to the workshop.

3.17 DW1 explained that he hardly settled at the workshop when Brian yelled at him to switch off PW1's truck. As DW1 responded, he observed that PW1 was trapped in between the truck cabs. On the other hand, Brian Kabeya, Pashani, Patrick and Kona were trying to release him from the hold. After they succeeded, PW1 was rushed to the clinic, while he and Brian were asked to write their reports about the accident by the safety officer.

3.18 DW1 then averred that the defendant had written policy on parking and shut down of machines and all drivers received training on it. He further averred that the parking and shut down policy was additionally delivered at routine safety talks. He also remarked that all drivers were expected to comply with the policy which emphasized the need for drivers to park their trucks on level ground or at angles and to choke the wheels of trucks in order to avoid accidents.

3.19 DW1 went on to testify that PW1 failed to follow the defendant's parking and shut down procedure because he parked his truck on a gentle slope and did not choke the wheels. He also accessed the wash bay from the exit when the entry was clearly marked. Further, PW1 ignored the information on the holding capacity of the wash bay allowing only one vehicle to be parked at a time. He then stated that since Brian had already parked his truck at the wash bay, PW1 should have stayed away.

3.20 DW1 also stated that the defendant's team told PW2 during his investigations that the wash bay had a designated attendant who worked at the wash bay and was employed under the maintenance section. He was responsible for washing trucks but on the day of the accident, knocked off at 15.00 hours when the workshop closed. On the other hand, drivers were expected to work up to 17.00 hours on

Saturdays and to routinely clean their trucks (house-keeping) as opposed to washing them.

3.21 When **cross-examined**, DW1 repeated that he and Brian found PW1 at the wash bay. According to practice, PW1 was entitled to wash his truck first. He reiterated that Brian and PW1 parked their trucks opposite each other and admitted that the accident would have been avoided if Brian did not park his truck at the wash bay. DW1 further testified that he did not witness the accident and that the photographs of the wash bay in the defendant's bundle of documents taken by Mr. Mambwe Mwelwa did not show the entry and exit points. In addition, there were no instructions on choking of wheels.

3.22 The witness was not **re-examined**.

3.23 The next witness was **Phornward Chinjamba (DW2)** the defendant's safety and health supervisor who testified that Mr. Mumba Mambwe informed him of PW1's accident at 15.55 hours. When he reached the accident site, he saw PW1 and Brian Kabeya's truck cabs parked opposite each other. He was told that PW1 was taken to the clinic and he later sealed the accident site. He asked DW1 and Brian Kabeya to write their reports and they were submitted to management. The next day, PW2 and officers from Kalumbila minerals namely, Mr. Kennedy

Sichula, Mr. Stanley Mooya and the defendant's safety officers inspected the accident site.

3.24 PW2 interviewed DW1, Eric Musonda and Brian Kabeya and checked the brakes of PW1's truck. Afterwards, he asked the drivers to move the trucks in reverse and to park them at different points. He also checked on tyre marks and measurements at the places that the trucks stopped. PW2 at his request was given a copy of the defendant's manual on parking and shut down procedure and PW1's training record. PW2 promised to share his finding with the defendant's management but did not deliver.

3.25 DW2 testified that the defendant's safety team also carried out an independent investigation and prepared a report. Their finding was that PW1 contributed to his accident as follows:

(i) he parked his truck on an incline and on little sand.

(ii) he did not apply the parking brake and left the gear in neutral. As a result, his truck unintentionally moved when the ground got wet and it rolled down,

(iii) although PW1 arrived before the others at the wash bay, Brian parked his truck in the right position.

(iv) He risked his life by standing in front of the truck cabs and had no room to escape when his truck rolled. In addition, he did not use the choking

blocks that were at the wash bay and accessed it after the attendant had knocked off.

3.26 When pointed to the remedial measures recommended by PW2, the witness testified that the wash bay had adequate controls and precautionary measures to prevent accidents. He rejected PW2's report on the cause of PW1's accident charging that it was not clear and conclusive.

3.27 When **cross-examined**, DW2 testified that he informed the Mines Safety Department about PW1's accident because it was serious and occurred at the mine area. His investigations revealed that PW1 ignored safety instructions and procedure at the wash bay. He however, stated that if the trucks were both partially parked in the wash bay, then both drivers were at fault. In concluding, DW2 maintained that the defendant was not liable for the accident.

3.28 The witness was not **re-examined**.

3.29 **DW3** was **Leone Kloppers** a clinical occupation health specialist at the defendant company. She stated some of her competencies as specialized therapy that focuses on returning victims of injury or disability to their maximum level of function in consultation with occupational health doctors. Her evidence was that she scheduled a session with PW1 sometime in April 2017 at MBCC in Ndola. The

purpose was to assess whether PW1 was able to return to his job as an ADT operator and also to gauge whether he was suitable for rehabilitation at a specialized centre in South Africa. As part of her assessment, she subjected PW1 to a maximum voluntary test involving grip strength over different diameters so as to determine whether his effort was sincere or not.

3.30 DW3 went on to testify that PW1 did not apply any effort in the test claiming that he was in severe pain and her analysis was based on observation. According to the witness, PW1 was unwilling to sit for more than 2-3 minutes preferring to lie down because he was sleepy. He also showed no signs of increase in pain behaviour (that is the physical manifestation of pain) by shifting his weight or rubbing the uncomfortable area or showing grimacing facial expressions or exhibiting short sitting endurance. In the absence of the hallmarks, DW3 concluded that PW1 limited his effort in the voluntary test and was not recommended for specialist treatment in South Africa because his recovery would not be assured. In addition, DW3 was uncertain that PW1 could endure the two hour flight to that country.

3.31 DW3 further testified that PW1's left leg muscle (injured leg) wasted from lack of use while its decreased strength was due to his failure to comply with the physiotherapy regime. In particular, he abandoned 20 physiotherapy sessions which the defendant paid for because he

refused to leave his house even after transport was provided. In addition, he failed to attend review sessions at the hospitals in Solwezi, Ndola or Kalumbila. As a result, he could not work as an ADT operator because he needed full motion range movement in his leg. Further, if PW1 tried to return to work, he could injure himself or others. All in all, DW3 concluded that PW1 lacked motivation and on account of his poor attitude failed to fully recover.

3.32 The witness was not **cross-examined**.

3.33 The last witness was **Bruce Yowela (DW4)**, a senior human resource officer at the defendant's roads division. He informed the Court that First Quantum Roads Division is a subsidiary of the defendant company and is located at Kalumbila mine. Further, it was responsible for constructing roads at the defendant's premises and operating its fleet.

3.34 DW4 went on to testify that PW1 was employed as an ADT operator by the defendant between 2013 till 1st June 2017. He was discharged on medical grounds after advice given by his doctors at MBCC. However, after his accident, the defendant paid PW1's medical bills at Victoria Hospital in Lusaka and MBCC in Ndola, it also paid for his physiotherapy sessions, ambulance services and taxis; because his medical contribution of ZMW 300 to the defendant's medical scheme, which he

joined in April 2015; was insufficient to cover his medical bills as it covered his spouse, children and dependants.

3.35 In **cross-examination**, DW4 testified that PW1 was paid a severance package calculated at a months' gross pay for each year served. In addition, he received repatriation allowance of ZMW 4000 on his final pay slip and his accident was reported to the Workers Compensation Board (WCB) for the further compensation. DW4 concluded by stating that he not aware if the WBC assessed PW1's disability.

3.36 The witness was not **re-examined**.

3.37 That marked the close of the defendant's case.

4. Submissions

4.1 Learned Counsels for the plaintiff and defendant filed written submissions for which I am indebted. In the case of the plaintiff, the submissions were filed on 8th June 2020 while those of the defendant were settled on 18th June 2020. I shall not reproduce but will consider them in the judgment.

5. Determination

5.1 Having considered the pleadings, evidence adduced, submissions filed and authorities cited therein, it is indisputable that the plaintiff worked as a tipper truck ADT operator in the defendant's roads division. On the

material day of his accident, (2nd July 2016), he operated truck fleet no. RT 50 which was assigned to him and when he completed his tasks, he drove the truck to the wash bay. He found bus MV 282 parked in the bay without its driver but its key had been left in the ignition switch. A little while later, Brian Kabeya who operated truck fleet no. RT 77 drove his truck to the wash bay and found it occupied. He moved the bus out of the bay and asked another driver, Musonda Eric Mpundu to park his truck in its lot.

5.2 In complying, Eric parked Brian's truck opposite the plaintiff's and at that time, the later was washing the cab of his truck. He left the area and went back to the workshop. A short while later, the accident occurred and the plaintiff was seriously injured. He was immediately evacuated to various hospitals where he received in and outpatient medical care. He did not fully recover from the injuries and was eventually discharged from employment on medical grounds on 28th July 2016.

5.3 Arising from the facts, the main issue for determination is whether the plaintiff's accident arose from the defendant's failure to provide a safe working environment at the wash bay? In this regard, the Court will consider the following secondary questions:

(i) Whether the defendant owed the plaintiff a duty of care?

(ii) Whether the defendant breached the duty of care?

(iii) Whether the plaintiff's injuries resulted from the breach of duty owed by the defendant?

(iv) Whether the plaintiff is entitled to damages and interest as a result of the accident?

(i) *Whether the defendant owed the plaintiff a duty of care?*

5.4 Counsel contended that the defendant owed the plaintiff a legal duty of care and it was established by the employer and employee relationship. Thus, the defendant had a duty to ensure that the plaintiff was provided a safe working environment. In buttressing his assertion, counsel cited the case of Betty Kalunga (suing as administrator of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines Plc)[1], where the Supreme Court *held inter alia* that:

> **"The duty of care by employers to their employees has developed to the extent that there is virtually no room for *volenti non fit injuria* to apply in cases of negligence, where there is a common law or statutory duty of care by an employer to his employee except where such doctrine has been pleaded."**

5.5 The Supreme Court further stated that:

> **"Once it is established that an employer is in breach of statutory duty of care or common law duty of care towards his employee that necessarily should mean that the employer is liable for negligence."**

5.6 In response, counsel for the defendant did not raise contestation about the duty of care but argued that the plaintiff contributed to his accident.

5.7 The question that immediately comes to mind is, **what is the tort of negligence?** The learned authors of **Winfield and Jolowicz on Tort, 13th Edition** at page 45 state:

> **"....Negligence as a tort is a breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. The ingredients necessary to prove negligence are stated as: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (b) breach of that duty; (c) consequential damage to B. The three ingredients on the tort of negligence must be established:**
> **(i) There must be a duty of care owed by the defendant to the plaintiff;**
> **(ii) There must be a breach of the duty of care owed to the plaintiff by the defendant; and**
> **(iii) The plaintiff must suffer damages as a result of such breach by the defendant."**

5.8 Put differently, a plaintiff is burdened to prove that a defendant owes him/her a duty of care and that there is breach of that duty. Once proved, the onus lies on a defendant to compensate the plaintiff for the injury. It is worth stating that the duty of care is established in common law and statute and in both instances, an employer is required to provide employees a safe working environment.

5.9 In discussing the duty of care of master to servant, Ralph Gibson LJ in **Reid v Tompkins Group Plc**[2] at page 232 stated that:

> **"The duty has for very many years always been referred to in terms of the physical safety and well-being of the servant."**

5.10 The learned authors of **Winfield and Jolowicz on Tort, 13th Edition** at page 46, reinforce the important principle of duty of care when they say:

"...duties of affirmative action are imposed across a much wider range of relationships, in at least some of them probably because the defendant gains some benefit from his relationship with the claimant. Thus an employer must not only take proper steps to ensure safety in the workplace but must look after a worker who is injured or falls ill at work..."

5.11 From the cited authorities, the legal propositions buttressed on duty of care are: firstly that, there must be a relationship between the plaintiff and defendant of employer and employee. Secondly, where an accident gives rise to an inference of negligence, the defendant should only escape liability if it is shown that there is another probable cause of the accident other than negligence. Thirdly, that an employer is required by law to provide employees safe working conditions at a work place.

5.12 Turning to the facts of this case, I find that the contractual relationship between the parties has already been established. In addition, the defendant demonstrated that it owed the plaintiff and its other employees a duty of care at the wash bay by instituting measures that ensured safe conditions, carrying out a risk assessment and identifying all possible risks. It also developed procedure to avoid accidents and its witnesses DW1 (driver) and DW2 (safety officer) both testified that all the defendant's drivers including the plaintiff were trained on safety, and the wash bay high procedure manual. Furthermore, that the training was reinforced at routine safety talks.

(ii) *Whether the defendant breached the duty of care?*

5.13 Counsel for the plaintiff argued that the defendant breached the duty of care by failing to provide the plaintiff a safe working environment at the wash bay. He went on to illustrate the breach by asserting that a competent person was not available to implement the safety procedure so as to avoid accidents. Further, the safety rule on the holding capacity of the wash bay was ignored. Additionally, there was no notice erected to warn employees of the do's and don'ts at the wash bay.

5.14 To fortify his assertion, counsel cited the case of **Poly Technic Limited v Howard Cooke**[3], where Court of Appeal held that failure to erect warning signs at a working place amounted to a breach of duty of care.

5.15 In response, counsel for the defendant argued that it did not breach the duty of care but rather the plaintiff contributed to his accident by ignoring the safety procedures and rules at the wash bay. She cited the English case of **Kennedy v Cordia (Services)**[4], where it was held that:

> **"90...it is clear from the evidence that Miss Kennedy was exposed to risk to her health and safety whilst she was at work, namely the risk of slipping and falling on snow and ice while travelling between client's houses. That risk was obvious as a matter of common sense, and was in any event within Cordia's knowledge, given their previous experience of incidence of the home carers suffering such accidents each year... 92...No consideration, however, was given to the possibility of individual protective measures, before relying on the measure of last resort, namely giving appropriate instructions to employees. Even then, the instructions given, in form of advice to wear appropriate footwear, provided no specification of what might be appropriate. In these circumstances, the Lord Ordinary was entitled to conclude that there had been a breach of regulation 3(11)."**

5.16 Relating the **Kennedy** case **supra** to the present one, counsel averred that employers owed their employees a duty to assess the risks involved in their work and to implement protective measures. In this regard, the defendant fulfilled its obligations when it developed a wash bay procedure covering the following risks:

(i) in clause 5.3.4 prohibiting the parking of more than one heavy duty equipment in the wash bay area.

(ii) designating responsible staff at the wash bay to enforce the safety precautions;

(iii) clause 5.3.1 – identifying the risk of heavy duty equipment rolling forward whilst being washed on a slight slope and the need for drivers to apply the park brake as well as to choke wheels of trucks.

5.17 Counsel asserted that the defendant expected adult employees such as the plaintiff to use their common sense in following the safe working system at the wash bay so as to avoid injury. On that note, she referred the Court to the case of **Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited**[5], where the Supreme Court remarking on an employee's obligation to avoid injury held that:

> **"The supplier is not an insurer and in our considered view the supplier's duty has in some respects to be co-extensive with the customer's duty. The customers can take their own precautions with sensitive equipment knowing that power does fail sometimes. The loss here of two phases**

out of three which affected the equipment was one in which a prudent customer would have remembered his/her own duty of care. There are a variety of surge protectors which are readily available to electricity consumers and to those who manufacture equipment. It is simply unthinkable that each time a branch or snake or lighting or whatever short circuited the mains and power failure occurred –causing all sorts of damage to all sorts of equipment and electricity using processes – the supplier must be held liable."

5.18 As earlier stated, a plaintiff is burdened to prove a case of negligence. The learned author of **Winfield and Jolowicz on Tort, 13th Edition** states at page 2003, on fines, employer's liability and employee's that:

"...a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said if he alleges failure to provide a reasonable safe system of working, the plaintiff must plead and therefore prove what the proper system was, and in what way it was not observed."

5.19 How that duty is to be discharged and what the key elements are is elucidated in the following authorities: In **Halsbury's Laws of England 4th Edition page 662** the learned authors explain that:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

5.20 In terms of our domestic legislation, the **Occupational Health and Safety Act**, provides in section 16(2)(a) and (c) that:

"Without prejudice to the generality of subsection (1), an employer shall;

Provide plant and systems of work that are, so far as is reasonably practicable, safe and without any risks to human health and maintain them in that condition;

Provide such information, instructions, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety of employees at their workplace."

5.21 Stated differently, what is emphasized in the legal principles is that in the doctrine of duty of care and its breach, there is a level of reasonable care required of an employer. It depends on a question of fact and the circumstances of a particular case but the basic minimum is that an employer must ensure that employees do not suffer from its personal negligence by failing to provide a proper and safe system of working or suitable plant. Where inadequacy is established, an employer must be found liable for the negligence and held accountable for breach of duty of care.

5.22 In as much as the duty of care is imposed on an employer, section 17(1)(a) of the **Occupational Health and Safety Act** places a duty on an employee to act reasonably at a work place as follows:

"**17. (1) An employee shall at a workplace-**

(a) Take reasonable care for the employee's own health and safety and that of other persons who may be affected by the employee's acts or omissions at the workplace."

5.23 The test to be applied when assessing the level of an employee's compliance with safety is articulated in the old case of **Hilton v Thomas**

Burton (Rhodes) Limited[6], where Diplock J, as he then was stated that:

> **"I think that the true test can be expressed in these words: was the (servant) doing something that he was employed to do? If so, however improper the manner in which he was doing it whether negligent...or even fraudulently...or contrary to express orders, the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with master's knowledge, acquiescence or permission."**

5.24 Flowing therefrom, the overriding obligation on an employee in claims of negligence is to ensure that he/she *doing something that he/she was employed to do.* It matters less that an employee executes his/her work in an improper manner, as long as it can be shown that the employer permitted it and thereby becomes liable in a claim of negligence. Notwithstanding, if an employee does work he/she is not employed to do, the employer will not be held liable even if it was aware of the employee's actions.

5.25 The Court of Appeal reaffirmed the position of the law in the case of **Zesco Limited v Elijah Nyondo (suing in his capacity as Administrator of the estate of the late Wilson Sinyinza)**[7], when it stated that:

> **"The two competing interests here are; the supervisor's negligence of leaving the employees unsupervised versus the employee putting himself in harm's way, despite being aware that what he was doing was outside the scope of his work, especially after the directive by management.**

We hold the view that it was in recognition and/or acknowledgment of its duty of care to employees that the appellant's management held the meeting and told all the employees not to perform tasks that they are not trained for, as such, it was no fault of the supervisor that the deceased decided, out of his own volition, to do that which he was neither instructed nor trained to do. On this premise, we find that the appellant successfully established its defence of *volenti non fit injuria*."

5.26 I deliberately set out the law in detail so as to provide a basis for the findings of fact that I will now move to make. As I have indicated, the plaintiff and defendant's relationship of employer and employee is established. The suit premises consist of *inter alia*; the maintenance section and a wash bay. On 2nd July 2016, the plaintiff was on duty at the defendant's premises and performed tasks assigned to him using fleet truck no. RT 50. After completing his tasks, he went to the wash bay to clean his truck and according to the evidence of DW1, all drivers were required to routinely clean their trucks (house-keeping). The cleaning was done at the wash bay and that is the place where the plaintiff met his fate.

5.27 I further find that the evidence on record reveals only one version of how the accident occurred and it was from the plaintiff. The defendant's witnesses were not direct. Both DW1 and DW2 did not witness the accident. Further, DW2's evidence was based on the safety team's report whose investigation was conducted after PW2's. As far as the Court is concerned, the evidence was not authoritative because the

conditions in which the accident was perceived to have occurred had changed.

5.28 In the plaintiff's view, the defendant failed to provide a safe and proper working system at the wash bay on the following accounts: the facility did not have a designated access point neither was there an attendant at hand to supervise the washing of trucks and chocking of blocks. Chocking blocks were not been provided and as a result, the plaintiff failed to choke the wheels of his truck. In addition, there was no sequence for washing the trucks and the plaintiff who arrived before Brian at the wash bay was not given priority. Moreover, Brian failed to observe the parking range distance and his truck rolled down and injured the plaintiff. PW2 further criticized the defendant's safety procedure at the wash bay and in his report highlighted that:

(i) no one was not specifically employed to man the wash bay and to ensure that wheels of trucks were choked after parking.

(ii) information on safety or the code of conduct was not displayed.

(iii) drivers were expected to wash their trucks contrary to the acceptable standard in the industry requiring competent personnel to employed.

(iv) there was unfettered access to the wash bay and no information on its holding capacity.

5.29 On the other hand, the defendant discredited the plaintiff's evidence and asserted that its wash bay procedure was adequate with a good safety record. It argued that the plaintiff contributed to his accident because he accessed the wash bay from the exit and ignored the entry. Further, contrary to the defendant's parking and shut down procedure, the plaintiff parked his truck on an incline and little sand. He did not choke the wheels of the truck with the blocks fitted on it nor apply the parking brake. Additionally, he left the gear in neutral and dangerously washed the front of his truck cab. Thus, when it unintentionally moved, the accident was inevitable and a result of his contribution. The defendant further accused PW2 of bias and averred that his report was speculative and inconclusive.

5.30 After appraising the evidence on record, what I find is that the defendant's wash bay had issues of safety and PW2's evidence which I found to be neutral informed my position. Firstly, he was called to the site by the defendant after the accident and designated by the Mines Safety Department to investigate the accident. Secondly, his findings were a firsthand account of what he observed at the accident site as opposed to the questions put forth in cross-examination, and in some instances inviting him to make assumptions. Thirdly, the defendant's wash bay procedure and its contents were not in issue as counsel

seemed to suggest but rather how it had been implemented by the defendant to ensure its employees safety.

5.31 Fourthly, the images in the defendant's bundle of documents and PW2's evidence showed that access to the wash bay was porous. Further, from the defendant's bundle of pleadings, the images of the wash bay had no signs displayed showing the entry/exit points, its holding capacity and do's and don'ts (rules). Fifthly, I find that PW2's evidence that the practice of drivers washing trucks was contrary to the standard in the industry as opposed to competent personnel was not challenged. The fact that the defendant had a wash bay policy upon which, drivers were trained with reinforcement given at safety talks, did not in my opinion exonerate it from enforcing the safety rules at the wash bay.

5.32 In view of the above, I find no need to make any analysis of the evidence adduced by the defendant during the cross-examination of PW2 on the conditions of the surface of the wash bay on the material day; whether the plaintiff parked his truck on an incline and failed to follow the shutdown procedure; and whether he accessed the wash bay from the exit, because none of its witnesses gave firsthand facts of the accident. Moreover, DW2 and his team only conducted their investigation after PW2 and their findings therefore, were quite unreliable. Accordingly, I hold that the defendant breached its duty of

care to the plaintiff by failing to provide a safe working environment at the wash bay.

5.33 I will now turn to address the issue of strict liability which was raised by the defendant. Counsel contended that since the plaintiff contributed to his accident, absolute responsibility was removed from the defendant and it could not be held liable under section 87 of the Mines and Minerals Act, which says:

> **"87 (1) A holder shall be strictly liable for any harm or damage caused by mining operations or mineral processing operations and shall compensate any person to whom the harm or damage is caused.**
> **(2) Liability shall attach to the person who directly contributed to the act or omission which results in the harm or damage."**

5.34 She also referred the Court to section 2 of the Act on the definitions of holder, mining operations and mining processing operations thus:

> **"Holder" means the person in whose name a mining right or non-mining right is registered under this Act;**
>
> **"mining operations" means an operation carried out under a mining right excluding an operation carried out under an exploration licence or mineral processing licence;**
>
> **"mineral processing operation" means an operation carried out under a mineral processing licence."**

5.35 Counsel then averred that only a "holder" of a mining licence Kalumbila Minerals Limited could be held strictly liable under the Act and not the defendant its subsidiary. Thus, if at all an award was due to the plaintiff, it could only be recovered under section 87 (9) as follows:

> "**Where any harm or damage is caused to human and animal health by mining or mineral processing operations, compensation shall include-**

(a) any costs and medical expenses;
(b) compensation for disability suffered; and
(c) compensation for loss of life."

5.36 In resolving this issue, it is necessary to say a little on the law on contribution to negligence. As I understand it, is a partial defence to an action for statutory breach of duty and in the persuasive case of **Caxwell v Powell Duffryn Collieries Ltd**[8] at pages 152 - 178 Lord Wright laid down authoritative guidance on the principle when he *inter alia* held that:

> **"Due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of detention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is doing at the lost perhaps of some inattention to his own safety."**

5.37 In my view, the law introduced the principle of absolute obligation on the part of employers to protect employees against actions that the latter could rely on as constituting contributory negligence so as to defeat their obligation of providing a safe working environment. This is of course recalling that the burden of proof lies on a plaintiff to show that in causation and blameworthiness, he/she did not contribute to the negligence.

5.38 What emerges from the facts is that the defendant's drivers were expected to clean their trucks (house-keeping). The plaintiff arrived before the others at the wash bay and was entitled to use the facility

first. There were no rules on safety (do's and don'ts) displayed at the wash bay and the absence as I have already determined facilitated the circumstances of an unsafe working environment. Consequently, I find that there was no material either in evidence or from the record, in which a reasonable inference of contributory negligence could be apportioned. Therefore, I hold that the defence of contributory negligence fails.

(iii) *Whether the plaintiff's injuries resulted from the breach of duty owed by the defendant?*

5.39 The plaintiff contended that he suffered serious injury after the accident. It was particularized as open book pelvic fracture with vertical shear as well as significant muscle wasting on the left leg. He averred that it resulted in loss of power, coordination, range of movement and was thereafter, unable to live independently. He also stated that his permanent disability had been assessed at 65 percent by his doctors.

5.40 In response, the defendant argued that it was not liable for the plaintiff's injuries. Through counsel, it attacked PW2's evidence asserting that he was biased. Further, his report was speculative and inconclusive because it failed to objectively consider the questions whether the accident could have been avoided if the plaintiff had not entered the wash bay area and not parked on a slope in front of bus MV282; if his assessment of the defendant's blameworthiness would have been the same had it displayed the dos and don'ts signs at the wash bay rather

than tracking the safety record; and if it was reasonable for the defendant to expect its drivers to choke the wheels of trucks without having an attendant to oversee the process.

5.41 It will be recalled that in the case of **Victor Namakando (supra)**, the Supreme Court held that an employee has a duty to protect himself/herself against injury. In terms of this case, the evidence adduced by the plaintiff and accepted by this Court puts the defendant at fault for the accident. In addition, he had assessed disability of 65 percent. The evidence also shows that the plaintiff received medical treatment at Victoria Hospital, Lusaka and MBCC, Ndola with admissions on adverse dates for a period of six weeks from July 2016 through a multidisciplinary team of medical personnel. On that basis, I have no doubt that there was a clear nexus showing that the plaintiff's injuries resulted from the accident.

(iv) *Whether the plaintiff is entitled to damages and interest as a result of the accident?*

5.42 Counsel for the plaintiff globally submitted that the plaintiff was entitled to damages for the injuries. He then specified the damages as pain and suffering; loss of amenities; permanent disability; incapacitation and loss of prospective future earnings. He estimated the plaintiff's loss at ZMW

850,000.00 and urged the Court to follow precedents that are legion in assessing damages.

5.43 On **damages for pain and suffering, and loss of amenities**, counsel argued that an award of ZMW 150,000.00 was reasonable and fortified his assertion by citing the case of **Bank of Zambia v Caroline Anderson and Another**[9], where the guidance given by the Supreme Court was that courts could make intelligent guesses when assessing such damages as long as awards were not outrageously high. Counsel also referred the court to the case of **Chilufya Kusensela v Astridah Mvula (Married Woman)**[10], to demonstrate that the depreciation of the Kwacha was a factor in assessing damages.

5.44 Counsel further called in aid the case of **Michael Mukula and Highway Transport Limited v Pamela Ngungu Chiwala and Another**[11], where the Supreme Court held that an award of ZMW180,000,000.00 (ZMW180,000.00) rebased was reasonable recompense on damages for pain and suffering.

5.45 Counsel next turned to the issue of **damages for permanent disability/incapacitation**, where he submitted that there was no formula for assessing the damages. However, the Court was urged to follow the principles in the case of **Chilufya Kusensela (supra)**, where damages for the injuries were awarded at ZMW55,000,000 in 2011 for

permanent disability assessed at 30 percent. In this case, counsel argued that damages of ZMW500,000.00 would be adequate compensation because the plaintiff sustained a higher degree of disability and that inflation had risen from the time of the 2011 judgment.

5.46 On damages for **loss of prospective earnings**, counsel averred that the plaintiff would never be gainfully employed as an ADT operator. He further averred that if it had not been for the accident, the plaintiff would have had good prospects of future advancement and increased earnings in gainful employment. However, he was now constrained and unable to support his family and on that basis, counsel urged the Court to apply a multiplicand that accommodated future prospects of earnings vis a vis the degree of the plaintiff's disability.

5.47 Counsel added that since the plaintiff was only 33 years old at the time of the accident, he would be expected to retire at 65 years according to section 18(2)(b) of the National Pensions Scheme (Amendment) Act and thus, an award of ZMW 200,000.00 was appropriate according to the case of **Roger Scott Miller v The Attorney General**[12].

5.48 Counsel next adverted to the Mines and Minerals Development Act where he submitted that the plaintiff was entitled to compensation because his accident was reported to the Mining and Safety Department. He maintained that the defendant was strictly liable for the

plaintiff's accident and was therefore entitled to compensation. Counsel concluded with a prayer for all the heads of damages to be granted with interest and costs.

5.49 In response, counsel for the defendant argued that the plaintiff's global claim of damages at ZMW850,000.00 was heavily inflated and unjustified. She averred that in measuring **damages for pain and suffering and loss of amenities**, a court was required to award reasonable compensation according to the case of **Reba Industrial Corporation Limited v Nicholas Mubonde**[13] at page J15, where the Court of Appeal stated:

> **"We also had recourse to the learned authors of "Guide to Damages" who put it simply that pain and suffering damages are subjective. They are "award for pain which the claimant feels consequent to an injury, both in the past and into the future. The level of damages will depend upon the duration and intensity of the pain and suffering."**

5.50 Counsel also called in aid the case of **Michael Mukula (supra)**, to demonstrate factors in assessing damages. In that case, the Supreme Court at page J19 stated thus:

> **"Any injured person is likely to suffer loss in many ways in which it is not possible to measure in financial terms, such as pain, disability and the reduced ability to derive pleasure from life. In order to attempt to achieve restitution, which is the purpose of damaged for personal injuries, the Court must embark upon the wholly artificial exercise of placing a financial value upon such losses....Clearly in all cases where the body's integrity is violated, resulting in either temporary or permanent impairment, the injury by itself properly attracts an award of damages...**

Damages for pain and suffering are intended to provide reasonable compensation for which the claimants' actual and prospective bodily hurt, including that which results from necessary medical care, surgery and treatment. No perfect compensation can be given. The Court is not estimating the price which the victim would have accepted as consideration for suffering the injuries sustained inevitably, monetary compensation will fall short of the value placed on the victim upon the injury to his mental and physical health..."

5.51 Counsel then argued that the award of K180,000,000 (unrebased) in the **Michael Mukula** case was made on the following considerations:

"In discussing the permanent injuries suffered the respondent, the Judge stated as follows:-
"I have considered the injuries sustained by the 1st plaintiff which include permanent loss of the right arm, which requires replacement with an artificial limb and permanent scaring and facial disfigurement. The injuries called for a number of surgical operations over a period of time. I form the view that the plaintiff suffered a lot of physical pain and will continue to suffer psychologically from the said wounds, scars and disabilities for the 1st plaintiff, I find an award of K180,000,000 to be reasonable in the circumstances for pain and suffering...We can only agree with the learned trial judge that the extent of the injuries and treatment which the 1st respondent had to go through clearly shows that she had suffered agonizing and excruciating pain and suffering.....she had lost her entire right arm which had to be amputated. We also note that in Reuben Nkomanga v Dar Farms International Limited, the permanent disability was 30%. In the current case, the 1st respondent suffered 70% disability for the loss of the right arm..."

5.52 Counsel went on to contend that the **Micheal Mukula** case was distinguishable from the present one for the following reasons:

(i) the medical reports in the plaintiff's bundle of documents at pages 12 and 13 and the defendants bundle of documents at pages 20 to 21 showed that the plaintiff was hospitalized between 2nd July 2016 and 18th August 2016.

(ii) he had a successful operation on 6th July 2016 and was placed on strict bed rest for 6 weeks.

(iii) his medical history at page 12 of the plaintiff's bundle of document showed that the plaintiff had no motivation to recover:

> **"pelvis X ray after 5 weeks of traction showed good callus formation (healing). Traction was stopped on 16 August Solomon mobilising a Zimmer frame....Solomon was managed by a multidisciplinary team (doctor, neurosurgeon, orthopedic surgeon, physiotherapist and psychologist). Although frequently recommended, Solomon did not consistently attend physiotherapy and signs of non-motivation have been noted by several of the team members. (Doctors, neurosurgeon, psychologist and occupational therapist)."**

5.53 As far as the defendant was concerned, it had met all its obligations to the plaintiff and his claim for damages for pain and suffering at ZMW150,000.00 lacked merit.

5.54 Counsel next argued that the plaintiff's claim for **damages for permanent disability/incapacitation** at ZMW500,000.00 was baseless because the plaintiff successfully recovered from surgery. In addition, he did not produce any medical evidence showing after effects of pain or the need for further medical care.

5.55 Counsel stated on **damages for loss of prospective earnings**, that the lawful retirement age in the country was 60 and not 65 years according to section 18(1) and (2) of the National Pensions Scheme (Amendment) Act which she reproduced thus:

> **"18 (1) subject to the provisions of this Act, a member shall retire upon attaining the pensionable age**
> **(2) A member may retire on attaining the age of-**
> **(b) Sixty-five, if twelve months before attaining the pensionable age, the member notifies the contributing employer of the member's intention to retire at the age of 65 years and the employer approves the retirement."**

5.56 Counsel went on to explain that an employee could only opt to retire at 65 years with adequate notice to an employer and its approval. Thus, it was inconceivable that the plaintiff would have worked up to 65 years if the accident had not occurred. She added that since the plaintiff was 35 years at the time of trial, the multiplier should have been placed at 15 years and retirement at 60 years according to the Reba Industrial Corporation (supra) case, where the Court of Appeal opined at page J22 that:

> **"We consider also that the multiplier of 43 years as the number of years he would have worked to be wrong in principle. As noted by Lord Reid in British Transport Commission v Gourley: "there is no certainty as to what would have happened had he not been injured" Furthermore, according to Kemp & Kemp, the age to consider is the plaintiff's age (respondent) at trial. The respondent here was 25 at the time of trial. Thus taking all of the above into account, we would take 30 years as the multiplier. We therefore, reduce the multiplier from 43 years to 30 years."**

5.57 Counsel argued that the multiplier in assessing damages for loss of earnings should have been placed at 25 years with 10 years disallowed. She added that the defendant took all efforts to return the plaintiff to good health by paying all his bills and transport costs. On that basis, counsel urged the Court to deduct the defendant's expenses from any award that would be due to the plaintiff as follows:

(a) US$ 10,220 medical evacuation by Emergency Response Zambia at page 11 of the defendant's bundle of documents.

(b) K43,094 paid to Optimal Medical Wellness Centre at page 12 of the defendant's bundle of documents:

(c) K18,357 paid to Optimal Medical Wellness Centre at page 13 of the defendant's bundle of documents; and

(d) K75,591 paid to Victoria Hospital at page 15 of the defendant's bundle of documents.

5.58 In concluding, counsel prayed to Court to dismiss the plaintiff's case or in the alternative to refer the matter for assessment.

5.59 To recap, the plaintiff claimed damages under four heads. In the first instance, he sought damages for **pain and suffering** whose philosophy is explained by the learned authors of **Halsbury's Laws of England, 4th Edition, Vol.12 (1)** at page 348 paragraph 883 as follows:

> **"pain and suffering"**
> **damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate."**

5.60 In the case of **Reuben Nkomanga v Dar Farms International Limited**[14] the Supreme Court describes the consequences of personnel injury as follows:

"... principle is that in every case of personal injuries, there are two main factors which have to be taken into account in assessing damages. On the one hand, there is the personal injury itself, rising from the loss of limb or other part of the body to slight cuts or bruises and involving not only pain and hardships but also loss of the pleasures of life. On the other hand, there is the financial loss....."

5.61 From the above, the assessment of damages for pain and suffering is based on a two-pronged process, that is to say, firstly a court must consider the plight of an injured person from the time of his injury, during and post treatment; and secondly, the question of any disability, disfigurement or suffering that consequentially arises from the accident. Thus, a plaintiff who suffers injury is entitled to damages to cover the pain, the treatment intended to overcome it and any disability/disfigurement and the financial loss.

5.62 On the facts of this case, I find that whichever way the situation is considered, the plaintiff suffered pain and injury after the accident which was confirmed by his medical report. His lifestyle permanently changed with the disability and during trial, I observed that his left leg is impaired. Although the defendant averred that the plaintiff's disability was not confirmed by the Workers Compensation Board, it did not advance any explanation beyond that and I will not make any analysis of it.

5.63 I further find that DW3's evidence was of little consequence because she only met the plaintiff on one occasion and was therefore not in a position to conclude that the plaintiff lacked motivation for recovery.

Having stated so, I find merit in the plaintiff's claim for damages for pain and injury and award him **ZMW200,000.00**. I additionally award the plaintiff a sum of **ZMW250,000.00** for his permanent disability.

5.64 The plaintiff pleaded **damages for loss of amenities** which in my view, could only be proved with the assistance of a medical practitioner. In the absence of that vital evidence, I was unable to determine what the plaintiff could or not do in the future as a result of his injuries. As a result, the claim fails.

5.65 The plaintiff claimed **damages for loss of prospective earnings** which are defined in the case of **Clarke v Rotax Aircraft Equipment Limited**[15], as follows:

> **"Damages awarded for loss of earning capacity were analogous to damages for loss of future earnings....The loss of future earnings arises from the plaintiff's inability to perform the same job as he had been performing before and this in turn arises from the loss of earning capacity he has suffered."**

5.66 In other words, damages for loss of earnings are awarded to plaintiffs who are unable to return to the job that they were previously employed for before an injury. At the time of trial, the plaintiff was aged 35 and had prospects of gainful years of employment. However, these prospects were curtailed by the accident which left him with permanent disability. It is indisputable that he can never work as an ADT operator and consequently will not be able to effectively provide income for his

family. Therefore, I award the plaintiff damages for loss of prospective earnings at **ZMW340,000.00**.

5.68 The defendant urged the Court to discount the expenses it bore on the plaintiff's medical and transport bills with the intention that it would reduce or net off the awards in the event that the plaintiff succeeded. In justifying the position, counsel for the defendant cited the **Reba Industrial Corporation** case, which the Court was asked to follow. I read the authority and noted that in that case the Court of Appeal was faced with an issue of an award that arose under the Workers Compensation Act. In my view, the circumstances of the **Reba** case are distinguishable from the present one as far as the medical and transport bills are concerned.

5.69 Be that as it may, I find that the medical and transport expenses incurred by the defendant were minimally required to save the plaintiff's life. As far as the Court is concerned, a safe working environment entailed a provision of emergency rescue in an event of an accident. Since the plaintiff's accident happened at the defendant's premises, the event of evacuation and medical care were inevitable to secure the plaintiff's life. Thus, the defendant cannot be exonerated from paying the awards due to the plaintiff.

5.70 As I conclude, I wish to quickly comment on the plaintiff's claim for **damages** under the **Mines and Minerals Act**. In agreeing with the defendant's position, the defendant is not the holder of the mining licence and this evidence was confirmed by DW4. Thus, any claims against it can only arise under section 87(9) of the Act as follows:

(i) Any costs and medical expenses

(ii) Compensation for disability suffered

(iii) Compensation for loss of life.

5.71 I therefore take the view that the awards granted to the plaintiff sufficiently cover the reliefs that would have been available under the Mines and Minerals Act.

6. **Final Orders**

6.1 For the avoidance of doubt, I hold that the plaintiff claims against the defendant succeed except for his claim on loss of amenities.

6.2 I award the plaintiff damages for pain and suffering at **ZMW200,000.00**, damages for permanent incapacity **ZMW250,000.00** and damages for loss of prospective earnings at **ZMW340,000.00**. In total, the plaintiff is awarded **ZMW790,000.00**.

6.3 All awards are to attract interest at the short term bank deposit rate from the date of the writ of summons to the date of judgment, and thereafter at the Bank of Zambia current lending rate till the final date of payment.

6.4 Costs are awarded to the plaintiff to be taxed in default of agreement.

Dated this 31st day of August 2020.

M Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE