M/S: Dr. Nkaungula

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 450 OF 1992

BETWEEN:

H Q J CHIDULE (MALE).....PLAINTIFF

- and -

MALAWI ENTREPRENEURS DEVELOPMENT INSTITUTE.....DEFENDANTS

CORAM: **TAMBALA, J.**
Nakanga, of counsel, for the Plaintiff
Mvalo, of Counsel, for the Defendants
Kaundama, Official Interpreter
Longwe, Court Reporter

J U D G M E N T

The plaintiff, a young man of 33 years, was working in a metal workshop at the Malawian Entrepreneurs Development Institute (MEDI) in Dowa when he got injured. He was using an angle grinder to smooth the edges of burglar bars which he had made when the disc of the machinery broke apart and some of the broken pieces larcerated his left arm, seriously injuring and disabling him. He brings this action to claim damages for the injury which he suffered. The action is based on breach of statutory duty; it is also based on breach of the common law duty to take care, i.e. negligence. The defendants strongly resist the action. They plead innocence.

The plaintiff is a trained general fitter. He obtained Grade I in that field. It would seem that he specialised in metal fabrication. On 1st October 1990 he joined MEDI to receive some training in entrepreneurship. He was supposed to receive training in setting up and managing a business relating to metal work. The training lasted five months. He graduated from the Institution on 28th February 1992. It would seem that the plaintiff performed exceedingly well during his training; for at the end of the training, he was selected together with three other graduates who included Francis Mkandira, PW2, Grey Lipato and H Ghambi, to remain at MEDI to do certain jobs for which they could receive some remuneration.

The work which the plaintiff and the other graduates were required to do was connected with a project undertaken by UNDP and the construction of some staff houses at the Institute. There was also work of different types which was

brought to the Institute by members of the public and the plaintiff and his colleagues were required to attend to it especially if it related to metal fabrication. The remuneration of the plaintiff was based on the work done. Initially he and his colleagues were paid fortnightly. They were later paid at the end of the month. The amount they used to receive fluctuated each month, as it depended on the amount and value of the work done during each month. Nevertheless, their average monthly earning was K500.00 for each person.

The defendants provided the materials, equipment and tools for carrying out the work. The plaintiff and the other three graduates were expected to employ their own skilled labour. Upon completion, each job had to be costed. In costing the job the cost of the materials used had to be included; again, overheads costs which would include the value for the use of equipment and tools would be added to the cost of the job; then a charge for labour would be added; in the end there would be a mark-up of 25% which went to MEDI as profit. It was the labour charge which was eventually paid to the plaintiff.

Before he undertook work for a customer, the plaintiff was required to prepare an invoice/work order. This document described the work required to be done and quoted the price to be paid by the customer. A supervisor of MEDI approved the work by signing on the document. The customer also signed it. Then he would prepare a job card. This document too, would describe the work required to be done. It would show the name of the customer. It would also show a breakdown of the cost of materials, labour and overheads. The profit would also be shown on this document. Then an invoice would be prepared. Before the plaintiff commenced the work he would ask the customer to pay 25% of the total price. This money would be paid to a cashier of MEDI. A general receipt would be issued to the customer. When the customer came to collect the product he would pay the balance of the price. Again, the money would be paid to a cashier employed by MEDI, who would also issue a general receipt to the customer. All these documents - work order, job card, invoice and general receipt - belonged to MEDI. After doing the work for several weeks the money would be added up and they were paid out of this money at the end of the month.

I must now come to the evidence showing how the accident happened. On 20th March 1992 the plaintiff and Francis Mkandira, PW2, were working in a metal workshop. They were making burglar bars. After he had welded together some pieces of metal he decided to grind away a piece of metal. He used an angle grinder for that purpose. But as soon as he switched on the equipment, its disc broke apart and the pieces which flew from the broken disc struck his left arm causing larcerations which cut some tendons and

nerves. The "medium nerve" was completely severed and a section of it was missing. The injury was very serious. He immediately became unconscious. He lost a lot of blood.

He was rushed to Mponela dispensary in a MEDI vehicle. The medical personnel at the dispensary simply gave him some first aid and referred him to Kamuzu Central Hospital for the actual treatment. He was, on the same day, brought to Kamuzu Central Hospital where Dr Van Hoyweghen carried out a surgical operation on the arm. He was admitted in the paying ward at MEDI's expense. After eight days he was discharged from the hospital. Upon discharge the fingers were folded. They could not stretch. He was told to be stretching them. He was required to report to the hospital every Monday to see Dr Van Hoyweghen.

He was later told by the doctor that the hand could not function because of the tendons and nerves which were cut. It was recommended that he should go to South Africa for specialised surgery. MEDI solicited funds from UNDP and in May 1991 he was sent to South Africa. He was admitted in hospital in South Africa on 29th May and discharged on 7th June 1991. While in South Africa an exploratory operation was carried out on the arm. MEDI paid a total of 7006.87 South African Rands for the plaintiff's stay and treatment in South Africa.

Upon his return to Malawi he went to see Dr Van Hoyweghen at Kamuzu Central Hospital. The doctor recommended that he should be having physiotherapy. He was later advised by the doctor that there was some improvement in the hand. The doctor then said that it would not be worthwhile to spend money to go back to South Africa to receive some treatment.

He cannot use the left arm for any work. He told the Court that he cannot now do the work for which he was trained. He cannot wash himself. He sleeps on one side. He experiences sudden pain and dizziness. He sometimes feels pain in the affected arm and at times it gets swollen. There is no sensation on the thumb, index finger and the middle finger because of the tendons and veins which were severed.

The case presented two principal issues for determination in the light of the available evidence. The first issue which was hotly contested was whether the plaintiff was an employee of MEDI or an independent contractor. It would seem that this issue is relevant for the purpose of establishing liability based on breach of statutory duty. The plaintiff says that he was an employee of MEDI because he only received payment for labour. The defendants were entitled to the profit for each work done, and they provided materials, equipment and tools. He says that he should be regarded as an employee because a supervisor of the defendants had to approve each job which

he had to do and all the necessary documentation was provided by MEDI. The suggestion here is that the defendants controlled the work of the plaintiff to such degree that he should be regarded as their employee.

The defendants deny to have employed the plaintiff. It was the evidence of Mr Garry Whitby, the Chief Technical Advisor to MEDI, that the plaintiff was one of four entrepreneurs who had graduated at MEDI and were given an opportunity to start their business at MEDI to raise money to help them when they went back to their village to start their own business. It must be appreciated that at MEDI the plaintiff and his colleagues were trained in the skills of setting up and managing business. They were trained to become small businessmen on their own. It seems that it was consistent with that training policy that the plaintiff was given practical training in running a small business soon after graduation. Both Mr Nyoni, the Principal of the Institute, and Mr Whitby said that vacancies at the Institute are advertised and prospective employees undergo an interview. The successful person is issued with a letter of appointment which is signed personally by the Principal. The employee is also subjet to written terms and conditions of service. Mr Nyoni and Mr Whitby said that this procedure did not apply to the plaintiff because he was not an employee of MEDI. The plaintiff, however, claims that he was verbally employed.

Mr Whitby testified that the payment which the plaintiff received carried with it an element of profit. He explained that the plaintiff was free to engage other workers to do a particular job and pay them a sum which would be less than the price agreed with MEDI; in that event the plaintiff would be entitled to the difference as profit. He also explained that a supervisor of MEDI had to approve the work and its value to ensure that MEDI remained competitive in the business. Mr Whitby said that the plaintiff was free to start work at any time and to knock off at a time which suited him. He could choose not to work on any particular day. He said that MEDI did not control the manner in which the plaintiff performed his work. The defendants, therefore, claim that the plaintiff was an independent contractor.

The learned author of **SALMOND on TORT, 13th Edn, at p.113** gives a distinction between servant and independent contractor as follows:

> "What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is

> a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it - he is bound by his contract, but not by his employer's orders. Thus my chauffeur is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place: if an accident happens by his negligence, he is responsible and not I."

This passage was quoted with approval in the case of **Performing Right Society, Limited -v- Mitchell and Booker Ltd (1924)** 1 KB 762 at p.763.

The plaintiff was engaged to do particular jobs and his remuneration depended on the jobs done and completed. He had no fixed salary. His remuneration fluctuated each month depending upon the tasks completed during that month. The defendants had no control over the manner in which he carried out his work. He had wide discretion over the mode and time of doing his work. I easily came to the conclusion, on both authority and facts before me, that the plaintiff was not an employee of NEDI. He was an independent contractor.

The second issue which was contested by the parties was the cause of the accident. The plaintiff contended that the defendants supplied him with an angle grinder which had no safety guard and was old; it would shake when switched on. He also said that the disc had no fibres to strengthen it. He said that these factors combined to cause the accident.

Mr Garry Whitby showed the Court an angle grinder and demonstrated how it functions. He said that every such equipment has a safety guard which is part and parcel of it. The guard can be detached, but it is supposed to remain connected to the grinder at all times, especially when the equipment is in operation. He said that the guard is part of the safety measure and when grinding or cutting the guard is supposed to protect the person operating it.

He said every angle grinder has a set of instructions stamped upon it by manufacturers as part of safety measure. The information is engraved on the body of the equipment so that it cannot be erased. He said that the instructions indicate the disc size which can be fitted on the grinder and the revolution per minute of the disc. He said that a disc is usually removed from the grinder and fixed to it by means of a nut. He said that in the case of the grinder which the plaintiff used on the day of the accident, it

carried instructions that it could use a 7-inch disc whose revolution per minute was 8500. He said that other grinders require 9-inch discs which revolve 6500 times per minute.

There is uncontroverted evidence that the plaintiff was fully trained and experienced in metal fabrication before he came to MEDI and he was conversant with all safety requirements connected with his occupation. He fully appreciated the hazard of operating an angle grinder without a safety guard. He, however, told the Court that during the training at MEDI they were taught that as small businessmen they should not expect to have all the tools and equipment and that what was important was to have the work done. He said it was emphasised at MEDI that they should be prepared to take risks. He said that he had seen trainees using the angle grinder without a guard and that was the reason why on the fateful day he willingly used the equipment without a guard fitted to it. The plaintiff was supported in this evidence by Francis Mkandira, PW2.

Regarding the training at MEDI, Mr Whitby said that they teach their trainees that they must know where to seek useful information. They emphasise on quality of work, efficiency and self-confidence. They also teach entrepreneurs to take calculated and reasonable risks in business decisions in order to get an advantage over competitors. He denied that they teach trainees to take the risk of personal injury. He said that they do not allow trainees to use an angle grinder without a safety guard. He said that at MEDI he never saw an angle grinder without a guard attached to it.

I was unable to believe the evidence of the plaintiff and Francis Mkandira that at MEDI they were taught to disregard personal safety. No responsible institution would do that. I agree with Mr Whitby that the trainees were taught, **inter alia**, to take calculated and reasonable risk in their business decisions. I also believe Mr Whitby that trainees were not permitted to use an angle grinder without a safety guard. I find as a fact that the practice at MEDI was that an angle grinder had a safety guard attached to it at all times.

Mr Whitby told the Court that the plaintiff used a 9-inch disc instead of the required 7-inch disc during the time of the accident. He said that to fit the 9-inch disc he had to remove the safety guard. He said that the larger disc was designed by the manufacturers to revolve at a lesser speed than the 7-inch disc. When fitted to the grinder the larger disc was forced to revolve at a greater speed and that contributed to its breaking apart. He explained that the broken pieces injured the plaintiff because there was no safety guard to protect him.

I believed Mr Whitby. I was convinced that he told the truth. I was satisfied that a safety guard is part and parcel of an angle grinder. I was also satisfied that the plaintiff deliberately removed the safety guard in order to fit a larger disc. I find that the accident occurred because the plaintiff fitted a wrong disc to the angle grinder and at the same time removed the safety guard which could have protected him. I am satisfied that the plaintiff lied when he said that the disc which broke apart had no fibres. When he fitted a wrong disc to the angle grinder and deliberately removed the safety guard before operating the equipment the plaintiff was, in my view, reckless and showed total disregard for his own safety. He deliberately assumed risk of personal injury. I am satisfied that the defence of **volenti non fit injuria** is available to the defendants.

The evidence showed that there was a metal substore within the metal workshop in which were kept some gloves, boots, goggles and overalls. The plaintiff was free to obtain these articles to use when working in the metal workshop. From the available evidence I am unable to find that the defendants contravened sections 23 and 49 of the Factories Act.

Before I rest, let me say a word asbout the conduct of Mr Whitby, DW3. When this witness heard about the injury sustained by the plaintiff he followed him to Kamuzu Central Hospital. He found the plaintiff had been operated on, but he was lying on a bed where there was only some mattress and a single bedsheet covered his body. He was in a crowded ward. Mr Whitby negotiated with hospital authorities to transfer the plaintiff to the paying ward. He was successful and the plaintiff was on the same day transferred to the paying ward. The witness used his personal money to pay the required deposit. While at the hospital the plaintiff was frequently visited by officials from MEDI who usually brought him food. Transport was also readily made available to him. It was also Mr Whitby who solicited funds required to send the plaintiff to South Africa for treatment. I am satisfied that Mr Whitby is a person who has love and kindness for humankind regardless of race, creed or social status. The conduct of this witness deserves commendation.

The plaintiff gave me the distinct impression that he was ungrateful for what MEDI did to him. He still blames MEDI for not sending him to South Africa a second time for treatment even after Dr Van Hoyweghen had recommended against a second visit to South Africa. The plaintiff should realise that most of the things which MEDI did for him after the accident were done purely on humanitarian grounds.

Having resolved the two issues in favour of the defendants, the inevitable conclusion which I reach is that the plaintiff has failed to establish his claim against the defendants. The plaintiff's action is dismissed with costs.

PRONOUNCED in open Court this 25th day of November 1992, at Blantyre.

D G Tambala
JUDGE