IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

M.S.C.A. CIVIL APPEAL NO. 12 OF 1993

BETWEEN:

H. O. CHIDULE ..... APPELLANT

AND

MALAWI ENTREPRENEUR DEVELOPMENT INSTITUTE ..... RESPONDENTS
(MEDI)

Coram: BANDA, CHIEF JUSTICE
Mkandawire, J.A
Chatsika, J.A.
Nakanga, of Counsel for the Appellant
Mvalo, of Counsel for the Respondents
Kalimbuka Gama, Court Clerk
Jere, Machine Recorder

JUDGMENT

This is an appeal against the decision of the High Court sitting in the first instance when the appellant's action was dismissed.

The appellant is a young married man of 33 years with two children. He was working, at the material time, at the workshop of the Malawi Entrepreneuer Development Institute hereinafter called "MEDI" in Dowa. He is a trained general fitter Grade One and in October 1990 was invited to attend a course in Metal Fabrication and Business Management. He completed the course on 28th of February 1991. The appellant was among the four MEDI graduates who had been asked to remain behind after graduation. The idea was to give to the appellant and his colleagues an opportunity to work at MEDI so that they could raise money to help them when they went back to their villages to start up their own businesses. It was during this period that the appellant was injured while working in a metal workshop at MEDI.

As a general fitter, the appellant had been using milling machines, lathe machines, angle grinder, pipe benders, guillotine, arc-welding machines and gas-welding machines. The work on which the appellant and his colleagues were working was for staff houses for MEDI which were being built under UNDP and they also worked on other work for MEDI. On the particular day in question, the appellant was working on burglar bars for the staff houses. He was using an angle grinder to smooth the edges of the burglar bars which he had made when the disc of the machine broke apart and the sprinter pieces injured his arm.

The main issue in the case was whether the appellant was working at MEDI as an employee or whether he was an independent contractor. As we have already indicated, the appellant is a trained general fitter having obtained a Grade One qualification. He is specialised in metal fabrication. When he came to MEDI he was supposed to receive training in Business Management relating to metal work. Although originally that training was to last three months, it eventually lasted five months. There can be no doubt that the appellant did well during that course otherwise he would not have been asked to remain behind and work at MEDI. The other friends who remained with him were Mr. Francis Nkandira, Grey Lipato and H. Ghambi.

The injuries which the appellant suffered can only be described as very serious and debilitating. He had a very big laceration on the left forearm and had severed tendons and nerves on the forearm. Part of the medium nerve was missing and as a result, the arm is now completely weak and cannot move its fingers. The appellant was sent to South Africa for further treatment. The doctor in South Africa when attempting an operation found that the injury had developed "a massive area of fibrosis". The doctor could not, therefore, perform the operation as he also found that the appellant's skin on the injured arm was not in a very healthy state. He, consequently, decided to close him up but he envisaged operating upon the appellant after four months had elapsed in order to give the fibrosis a chance to settle down and soften up. The appellant was never sent back to South Africa for the operation. The injury was so serious that it was not possible to close it back to anatomical position. As a technician, he cannot now use his left arm and will have a permanent bend because of the injury to the nerves. He has suffered permanent disability which was assessed at 50%. The evidence was that the appellant's arm had gone worse by the time the case came up for trial.

It is the contention of Mr. Nakanga for the appellant that the learned trial Judge erred in law and fact when he held that the appellant was an independent contractor. That, in our judgment, is the main ground of appeal and the other grounds are subsidiary to this particular one. It is important, therefore, that we should review the facts in this case in some detail.

The evidence of the appellant and his witness was that they were working on burglar bars for staff houses at MEDI funded by UNDP. In that work, they used materials and equipment supplied by MEDI. They stated that they could not start any work for MEDI unless it was first approved by a MEDI supervisor who was Mr. Mbejere. They stated that the rates of pay were fixed by MEDI and that the appellant had nothing to say on how much should a customer be charged. They stated that their salary depended on how much work they had done and that although initially they were paid fortnightly, later on they were paid monthly as any other junior staff of MEDI. The appellant also stated that the profit margin was kept by MEDI.

Mr. Mvalo for the respondents has contended that the appellant was an independent contractor. He submitted that the respondents had no control over the manner in which the appellant

did his work and that his salary fluctuated depending on how much work he had done. He submitted that on all the tests which are employed in order to determine whether the relationship between two parties is one of master and servant or independent contractor show that the appellant was in fact an independent contractor. He argued that the respondent did not exert any degree of control over the appellant. He further contended that on the question of integration test it cannot be argued that the appellant's work was integrated in the work of MEDI. It was also Mr. Mvalo's contention that on the economic reality test it was clear that the appellant was not on a salary from the respondents as his fluctuating monthly income depended on the work done in a month and was not, therefore, consistent with employment. It was also Mr. Mvalo's contention that on a multiple test it is to the whole facts that one must look before one can determine whether the relationship between parties is one of a master and servant. In other words, one has to look at the degree of control, the integration test and the economic reality test to see whether together they show that one party was an employee of the other.

There is now no single test capable of general or universal application in all cases. The matter is one of interpretation of the contract between the parties and to discover their intention. It will turn upon the view the court takes after consideration of the relationship between the parties as a whole. There can be no single element in the relationship which can be regarded as conclusive. The relationship must be looked at as a whole. As Denning, L.J. said in the case of **Stevenson Jordan and Harrison Ltd. vs. McDonald** (1952) 1 ELR page 101 at 11:

> "It is often easy to recognise a contract of service when you see it".

It is recognised that there are four indicia of the contract of service, namely: employer's power of selection, payment of wages or other remuneration, master's right to control the method of doing the work and the master's right of suspension or dismissal. The right to control has been regarded in the past as a decisive element in the relationship and it continues to be resorted to as a useful one on determining the issue. However, the control test has been found wanting as a decisive test in cases dealing with professional people or people with some particular skill or experience. In the case of **Stevenson Jordan and Harrison Ltd. vs McDonald** (supra) Denning, L.J. stated this:

> "One view which seems to run through the instances of the contract of service is that under the contract of service the man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract of services, his work, although done for the business, is not integrated into it, but he is only accessory to it".

The position now is that a court must take into account and give appropriate weight to each of the separate factors in the case, always remembering that the question is one of mixed law and fact. The factors to be taken into account include, in addition to control, whether the person provides his own

equipment, whether he hires his own labourers, what functional risk he takes, what degree of responsibility for investment and management he has. As was said in the case of **Cassidy vs. Ministry of Health**, (1951) 1ALL E.R. 574, the court must consider objectively all the factors present in the case. As Somervell, L.J. said:

> "One cannot get beyond this; "was his contract a contract of service within the meaning which an ordinary person would give to the words".

Would an ordinary Malawian, looking at what the appellant was doing at MEDI workshop, come to the conclusion that he was an employee or an independent contractor? Where a person doing the work is a person not exercising an independent discretion but is directly under the professional control or supervision of his employer, the inference is that he is employed as a servant and not as a contractor although he may be specially retained as a person skilled in the particular duty or office for which he is engaged. It has also been said that 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, who undertakes to produce a given result but so that in the actual execution of the work, he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified before hand. Can it be said then, having looked at the relationship which existed between the appellant and MEDI, that the appellant was his own master, that he could use his discretion in things which had not been specified by MEDI before hand?

It is significant, however, to observe that both the Principal, Mr. Nyoni and Mr. Whittby, the Chief Technical Adviser, agreed that MEDI had control over what the appellant produced at MEDI's workshop and they further agreed that whatever came out of MEDI's workshop went into MEDI's accounts. Indeed Mr. Nyoni himself specifically agreed that the appellant's work was an integral part of MEDI's business. Mr. Nyoni and Mr. Whittby also agreed that it was MEDI who provided the machinery, premises, equipment and materials and all the documentation which was necessary in the appellant's work. They also agreed that the appellant could not begin any work before it was approved by a member of MEDI's staff. Looking at all these factors, the fact that the appellant was supervised, that the machinery, equipment, materials and all documentation belonged to MEDI, that the profit margin went to MEDI, that it was MEDI who negotiated the prices with the customers, could it be reasonably said on these factors that the appellant was an independent contractor?

The learned trial Judge considered and found these facts but came to the conclusion that these facts were only consistent with a contract of service. In other words, he found on these facts that the appellant was an independent contractor. The trial Judge came to that conclusion after finding that the respondents had no control over the manner in which the appellant did his work and that he had a wide discretion over the mode and time of doing his work. With respect to the learned trial Judge that finding cannot be supported by the facts which were before

him. Both Mr. Nyoni and Mr. Whittby agreed that the appellant's work was supervised by MEDI staff and that the appellant could not begin any work before it was approved by them. We find it difficult to see how anybody in those circumstances could have a wide discretion on the mode and time of doing his work. It seems to us that the evidence was overwhelming to show conclusively that the appellant was an employee of MEDI and could not be described as "his own master". We are satisfied therefore and find that the appellant was an employee of MEDI. It is clear, therefore, that there was an error in law in that the trial Judge made a wrong inference of law from those facts.

That brings us now to the issue of how the accident actually happened. This, too, is a highly contested issue. The respondents argued that the accident happened as a result of a deliberate assumption of risk of danger by the appellant and that he proceeded to use a machinery which had no guard. Secondly, it was further contended that the accident occurred because the appellant failed to take the necessary safety measures which would have prevented the accident from occurring. The main point at issue was whether the angle grinder which the appellant was using had a stone guard on it or, alternatively, if it had a stone guard on it, why it was not fitted on it or why was it removed from the grinder.

The evidence of the appellant and his colleague was that there was only one grinder which was working in the workshop. It was an old one and was constantly wobbling when it was in operation. They stated that they had drawn the attention of MEDI, but were told that this grinder had been used by all their predecessors and that they should continue using it. The respondents on the other hand contended that the grinder had a stone guard and that it was the appellant who either removed it or failed to get it from the stores. It is significant to note, however, from the evidence of the storekeeper who seemed to remember very little from his work, that he could not remember if his store had any stone guard. Clearly, therefore, if there was any stone guard either on the grinder or in the store, the storekeeper should have remembered this fact. The suggestion by the respondents as testified by Mr. Whittby was that the grinder had a stone guard which the appellant must have removed when he was trying to fit a 9-inch disc to it. But if that suggestion were true, then one would have expected to find a stone guard lying about in the workshop or in the store; and neither was the case in this particular instance. Indeed, it is also important to note from Mr. Nyoni's own evidence when he stated that immediately after the accident the report he received was that the grinder had no guard. Equally curious to note is the fact that two days after the accident had happened six angle grinders were paraded before Mr. Whittby and all of them had apparently stone guards on them. Mr. Whittby could not say, by just looking at the six grinders that were paraded before him, which ones were working and which ones were not working. Later in his evidence Mr. Whittby conceded that he could not dispute the statement by the appellant that the grinder which he was using in the workshop had no guard.

It was interesting to note from the evidence of the appellant's witness that soon after the accident the trainees at MEDI were asked to make recommendations on what should be done in order to improve the safety measures in the workshop. If the safety measures were in place and the grinder had a stone guard, why was it necessary for MEDI to ask for recommendations to improve safety measures and indeed, if the grinders that they had in the workshop all had stone guards and were in working order, why was it necessary soon after the accident to buy new grinders from Brown and Clapperton in Blantyre.

Mr. Whittby demonstrated to the court how the grinders work together with the stone guard, but it should be remembered that the grinder on which Mr. Whittby demonstrated was not the grinder on which the appellant was working at the material day. The evidence of Mr. Whittby on how the accident could possibly have occurred depended on this grinder which was exhibited in court and it was upon it that his speculation about the accident was based. The learned trial Judge found that the grinder on which the appellant was working had a stone guard and that the appellant had deliberately removed the safety guard to enable him to fit a large disc. That finding with respect was based on the evidence of Mr. Whittby relating to the grinder which was exhibited in Court. But it had been agreed by both parties including the Judge that the exhibited grinder was not the one on which the appellant was working. Therefore, Mr. Whittby's evidence on how the accident happened was based on conjecture and had no relevance to the factual situation as it was in the workshop on that fateful day. There was no evidence to contradict what the appellant and his witness said on how the accident happened. In fact later in his evidence Mr. Whittby did concede that he was told that the grinder on which the appellant was working did not have a stone guard. This apparently is the same report which Mr. Nyoni received immediately after the accident. In our view, there can be no doubt, especially in the absence of any evidence contradicting what the appellant said, that the cause of the accident was due to the absence of a stone guard on the grinder.

It is also clear, in our view, that the disc which broke was faulty. The evidence was that the disc had no fibres in it which strengthen and prevent it from splintering badly. It is interesting to observe from Mr. Whittby's evidence that although initially he seemed to know something about discs, and suggested that the particular disc which broke had fibres in it he later on professed ignorance on the issue of discs. When he was asked for his opinion on the discs he stated that he could not comment as he was only an engineer and not a manufacturer of discs. He was evasive on simple and straight forward questions. We do not think Mr. Whittby was an impressive witness.

We are satisfied, therefore, and find, that the accident occurred because the grinder did not have a stone guard. It was the duty of MEDI, as the employer of the appellant, to provide sufficient safe working conditions, sound and safe equipment and materials. In terms of the Employment Act, the respondents were in breach of their statutory duty to the appellant. We would also find that the respondents were in breach of their duty of

care which they owed to their neighbour, the appellant.

The injuries which the appellant has suffered as a result of this accident are, as we have already said, very serious indeed. He is permanently disabled and he will continue to suffer pain in his left arm for some years to come because of the injury to the nerves. He has stated that this pain sometimes rises to the ear. There can be no doubt that his earning capacity has been adversely affected by the injuries and there is very little he can now do with his left arm. His enjoyment of the amenities of life will be severely limited. He stated that he can now no longer do gardening; he cannot have a bath on his own. He can only sleep on one side. He stated that he could not apply for clerical jobs and that he now looks like an old person. He cannot straighten his left arm.

The general principle in awarding damages is for the Court, after considering all the relevant factors, to arrive at such a sum of money which will put the injured party in the same position as he would have been if he had not suffered the injury for which he is claiming reparation. When the Court comes to assess damages for injury it will look at the position as it was at the date of trial. And in assessing damages for pain and suffering the Court must consider the pain which the particular plaintiff has suffered and is likely to suffer in future. This is because the circumstances of the particular plaintiff are bound to have a decisive effect on the assessment of damages. The effect of the injuries on the appellant has been the loss of use of his left arm. He was earning at the time of the accident K500 per month. There were possibilities that he was going into business and that his earning power might considerably be increased. We have carefully considered all the relevant factors including the nature of the injury and we are satisfied that the proper award for pain and suffering should be K15,000.00 and for loss of amenities we think a proper award should be K5,000.00 The appellant is a young man aged 33 years and is a trained general fitter. The injuries have greatly disabled him from earning a living from his trade as a general fitter. We think that K60,000.00 is a proper award for his loss of earning capacity. There will therefore be a total award of K80,000.00 as general damages.

We would like to make general observations on some aspects of the manner in which the case proceeded at the trial. Our system of justice is an adversary one with the parties fighting it out to prove their respective claim or defence. The role of a Judge is one of an impartial umpire only entering the arena to ensure that the fight is being fought in accordance with the rules. The Judge does not enter into the fray and start exchanging cudgels with any of the parties. It is of course open to the Judge to ask questions to clarify any point of conflict or uncertainty in the evidence. Unfortunately, there was an occasion when the learned trial Judge entered the fray and took up cudgels against one party. This occurs on page 27 of the record when from the tone of the questions by the Judge it gave the unfortunate impression that the trial Judge had already made up his mind on one of the crucial issues which he was to determine in the case.

There is also the unfortunate comment by the trial Judge when he states that the appellant was ungrateful for apparently bringing the action in view of what MEDI and Mr. Whittby in particular did for him during the appellant's period of hospitalisation. While what MEDI and Mr. Whittby did for the appellant must be commended, it should not be regarded as **quid pro quo** for the appellant's legal rights to claim reparation for an injury which was clearly caused through a failure of duty.

We would therefore allow this appeal and the appellant will have costs here and below.

DELIVERED in open Court this 15th day of April, 1994 at Blantyre.

Signed:.....
R. A. BANDA, C.J.

Signed:.....
MKANDAWIRE, J.A.

Signed:.....
CHATSIKA, J.A.