LUKE CHIGWIDA
and
MAVIS CHIPFUPA
versus
WITBEST ENTERPRISES (PRIVATE) LIMITED
and
SYDNEY CHADA
and
MAINLINE TANKERS
and
STANLEY CHIHURI

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 28, 29 and 30 January, 16 February and 6 May 2009, 20 January 2010 and 27 October 2010.

Civil Trial

P. Takawadiyi, for the plaintiffs
E. Mugwadi, for the first and second defendants
S. Chatsanga, for the third and fourth defendants

MAVANGIRA J: The first plaintiff's claim as amended is for the replacement cost of his motor vehicle, being a 1996 model Mitsubishi Canter truck imported from Japan in the amount of USD 7000 and ZAR 58 043,99 for freight and duty charges.

The second plaintiff's claim as amended is for loss of support for herself and on behalf of her minor children in the sum of USD 15 840 and funeral expenses in the sum of Z$34 336 000.

Both plaintiffs also claim interest on the stated capital sums at 30% per annum calculated from 20 June 2007, the date of the accident, to date of payment in full.

All four defendants deny liability.

Both the plaintiffs claim against all the defendants jointly and severally, the one paying the others to be absolved. The plaintiffs' claims arise from a road traffic accident which occurred on 20 June 2007 at the 65km peg along the Beitbridge/Masvingo road involving on the one hand, the first plaintiff's vehicle, a Mitsubishi Canter truck which was being driven by the second plaintiff's husband, the late Emmanuel Chigwida and on the other, two trucks; one belonging to the first defendant and driven by the second defendant and the other belonging to the third defendant and being driven by the fourth defendant.

The late Emmanuel Chigwida who drove the first plaintiff's vehicle was also a brother to the first plaintiff. On the date in question he was driving the first plaintiff's Mitsubishi Canter truck from Beitbridge in the direction of Masvingo. He was following behind the first defendant's truck which was also going in the same direction. Sometime between 6.30 pm and 7.00 pm, a sack of cotton lint dropped from the third defendant's truck which was going in the opposite direction. The sack fell onto the driver's side of the first plaintiff's motor vehicle. This happened soon after the third defendant's truck had by-passed the first defendant's truck. The first plaintiff's vehicle veered from its lane of travel but the driver, the late Emmanuel Chigwida, applied brakes and it came to a halt. By the time well wishers who arrived at the scene forced open the driver's door, the driver Emmanuel was already dead.

It is common cause that the accident was a result of the side-swiping between the first defendant's and the third defendant's vehicles' loads as the vehicles by-passed each other going in opposite directions. The first defendant's vehicle was carrying a load of cotton cake bags or sacks which were about $1/^{1/2}$ metres high from the floor of the trailer. (The question whether it was cotton lint or cotton cake {both of which are products of cotton} that was in the bags or sacks remained unresolved throughout the trial.) The third defendant's vehicle on the other hand was carrying an excavator whose width at some levels overlapped the sides of trailer on which it was loaded.

It is common cause that the protruding part of the excavator came into contact with the load of bags of cotton cake resulting in the ripping open of the tarpaulin that covered the bags or sacks and cutting through and the straps and belts that held the bags together.

The plaintiffs contend that the accident was caused by the negligence of all the defendants. They contend that second defendant was driving during the course and within the scope of his employment with the first defendant and that they were both negligent in that they failed to ensure that the load on their vehicle was safely secured before embarking on the trip as well as during the course of the trip. The plaintiffs also contend that the third and fourth defendants were negligent in that their vehicle which was carrying an excavator encroached into the lane of travel of vehicles travelling in the opposite direction resulting in the side swipe with the first and second defendants' vehicle thereby off-balancing the load of cotton cake bags one of which then fell on to the first plaintiff's vehicle. They contend that the third defendant's driver was negligent in encroaching into the other vehicles' lane and that as the vehicle was carrying an abnormal load it should not have been travelling at that time of the day

particularly as it had no escort, beacon lights or flags. They further contend that the fourth defendant was driving during the course and within the scope of his employment with the third defendant and that he was also driving while under the influence of alcohol.

Both sets of the defendants have denied liability with each blaming the other for the accident. The first and second defendants further contend that the late Emmanuel Chigwida who was driving the first plaintiff's vehicle was negligent and that he also contributed to the accident in that his vehicle was travelling at a speed which was excessive in the circumstances and that when the collision was imminent he failed to stop or take evasive action in order to avoid the cotton cake bags falling onto the first plaintiff's vehicle.

The following issues were referred to trial:

"1. Whether the accident was caused by the negligence of the first and second defendants or by the negligence of the third and fourth defendants or by the negligence of all or any of the parties. If all or any of the parties contributed to the accident, in what proportions did each contribute and would be liable? (*sic*).

2. What is the quantum of damages suffered by each of the plaintiffs?"

The plaintiffs' first witness was Lovemore Mukura. He was seated on the front passenger seat of the first plaintiff's Canter truck which was being driven by Emmanuel Chigwida, now deceased. The vehicle was travelling along the Beitbridge/Masvingo road towards Masvingo, the final destination being Harare. In front of them and travelling in the same direction was a truck carrying what he thought was a caterpillar. (It is now common cause that it was an excavator and that it was loaded on the third defendant's truck.) He said that the driver of the Canter truck, the late Chigwida, tried at various stages to overtake the third defendant's truck but failed. One of the reasons why he failed to overtake the third defendant's truck was that the third defendant's truck was long and the driver seemed not to anticipate that he was going to be overtaken. At another stage he said the failure to overtake was because the driver in front would not allow the driver of the Canter truck to overtake him as he would increase his speed making it impossible for the late Chigwida to overtake and thus forcing him to remain behind hoping for another opportunity when he might successfully overtake.

The witness said that he did not check to see if the excavator was fully accommodated inside the trailer of the truck in front of them. He however described the excavator as a big load and also said that it was of considerable height. He said that the Canter truck had been travelling at between 80 and 90 km per hour before they caught up with the third defendant's

truck. They drove behind it for about fifteen (15) to twenty (20) minutes during which period the driver of the Canter truck had reduced his speed to between 75 and 80 kilometres per hour, the same speed that the third defendant's truck appeared to have been travelling at. All of a sudden, he saw a sack landing on the windscreen of the Canter truck on the driver's side resulting in the driver being slung onto the steering wheel. The witness was struck on the right lower chest and was also injured on the right cheek and on the back of his head by the shattering windscreen.

When asked where the sack came from the witness said that it fell off a truck that was travelling from the opposite direction. When asked why or how it fell he said that he did not know what actually happened between the two trucks. He said that after the sack fell on their truck, the Canter truck left its lane and went of the road. It came to a halt after the driver applied the brakes. The truck with the excavator did not stop. After the accident he observed cotton cake sacks strewn on the road.

Whilst being cross-examined by the third and fourth defendants' legal practitioner the witness said that as they travelled behind the third and fourth defendants' truck he observed that the trailer in which the excavator was was not stable as it was swerving and thus making it difficult for the driver of the Canter truck to overtake it. He also said that when the accident occurred the Canter truck was some forty metres behind the truck with the excavator. He did not see how or why the sacks fell onto the road; he only saw them on the ground. However, the Canter truck was in motion at the same time that the sack that eventually fell on it was also in motion.

The plaintiffs' next witness was Shepherd Bhebhe, an Assistant Inspector in the Zimbabwe Republic and stationed at Masvingo National Traffic Section. The morning after the accident, he arrived at work and saw the third and fourth defendants' truck parked at the police station. The driver of the truck, the fourth defendant was in the office. He was then assigned to visit the scene of the accident. In the company of Constable Mudzimirwa he took the fourth defendant to the vehicle parked at the station. He examined the vehicle and saw that it had a sticker in front on which was written the word "abnormal". The vehicle had a load which the third defendant told him was an excavator. He examined the excavator and observed that its height was abnormal as it was about 4,5 to 5 metres high. The top width of he excavator was protruding beyond the sides of the trailer by about 15cm while the bottom park was wholly accommodated within the sides of the width of the trailer. He observed cotton lint

on the top part of the excavator. The third defendant expressed ignorance as to where the cotton lint had come from. He also observed that the truck had no red flags on its sides to show that it was carrying an abnormal load. They then went to the scene of the accident with the driver.

At the scene of the accident he observed the first defendants' truck which was parked off the road on the left side. He went to examine the truck and saw that it had not sustained any damages. He however observed the tent which was torn on the top right side. He also observed some bales of cotton (cake) which were scattered beside the road. The load of cotton cake bales remaining on the truck had moved or was leaning to the right. He interviewed the second defendant and asked him how he had secured the load. The second defendant said that he had had a problem with his load which he had then off loaded in Masvingo in order to rectify it. He did so with the help of some young men from the locality who he was directing on how to reload and secure the load.

The witness said that the second defendant said that the excavator on the third defendant's truck had caused his load to shift to the right. He said that he heard two bangs which caused him to stop. The second defendant's version which he recorded in the Police Traffic Accident Book states:-

> "I was travelling towards Beitbridge border post along Masvingo Beitbridge road. I was hit by an abnormal truck on the left side of my trailer. The abnormal load did not stop. Tent damaged and bags of cotton cake. I was travelling at 70km/hr. Time 19:15pm" (*sic*)

The witness also interviewed the fourth defendant who said that he did not hear anything. He proceeded with his journey as he drove towards Harare until he met police officers at Midzi business centre along the Masvingo-Harare road, some 105km away from the scene of the accident. The third defendant's version as recorded in the Police Traffic Accident Book was also to the effect that when the accident happened he did not hear anything and was only informed about it later.

The witness said that he then also observed an unregistered truck which was off the road. The windscreen had been smashed by a cotton cake bale which was still on the vehicle. The front fender, lights and the cabin were extensively damaged. There were blood stains on the driver's seat and the steering wheel. He said that he has been in the traffic department for seven years. Both the second and the fourth defendants are being charged with culpable

homicide and the case is still pending at the Masvingo Magistrates Court. He produced a report to that effect which was produced as an exhibit.

The witness said that the third defendant's truck was carrying an abnormal load and that it did have an abnormal lead permit. One of the conditions of the abnormal load permit was that the truck carrying an abnormal load should not move after 6.00pm until 6.00am. He said that that was the only condition on that permit that could be of relevance to this case. He also said that he did not observe any marks on the road that could have suggested that the Canter truck was over speeding. He said that the Canter truck's final resting place was some 70 metres from the point of impact. The driver of the Canter truck died whilst two passengers from the Canter truck were referred to hospital as they had sustained serious injuries.

When he was being cross-examined by the first and second defendants' legal practitioner, the witness said *inter alia*, that in view of the cotton cake that was left on the excavator, it appeared to him that the side swiping between the first defendant's truck and the third defendant's truck could have been the cause of the accident. He also said that he blamed both drivers for the accident. He said that the fact that the load on the first defendant's truck was tilting to the right when he saw the truck at the scene after the accident suggested that when the second defendant tried to secure the load at Masvingo, it had not been done properly.

The witness also said that he did not believe the fourth defendant's claim that he heard nothing when the accident occurred and that as a result there is a docket for the fourth defendant's failure to stop after an accident. This is in addition to the charge of culpable homicide that he faces jointly with the second defendant although both drivers have not yet been brought before the criminal courts. He said that the two year delay in finalising the matter is because it has been difficult for the police to locate the fourth defendant who is based in South Africa.

Whilst under cross-examination by the third and fourth defendants' legal practitioner the witness said, *inter alia*, that the excavator on the third defendant's vehicle was properly secured with chains although it had protruding ends. He said that he was unaware that the fourth defendant had been cleared of the charge of failing to stop after an accident by one Inspector Mubvuta as alleged by the third and fourth defendants' legal practitioner. He said that the said Inspector Mubvuta was the Officer In-Charge of Masvingo National Traffic Section. He also said that after his investigations he allowed both the second and the fourth defendants to proceed with their journeys. He also said that what the fourth defendant had was

a large red cloth on which was written the words "abnormal load" and that the cloth covered the length of the front of the vehicle from one end to the other. The cloth was not reflective. He said that he was hearing for the first time while before the court, the allegation that the third defendant's vehicle was travelling in a zig-zag manner.

The witness also explained that the note which it was being claimed was evidence of the fourth defendant having been cleared of charges by Inspector Mubvuta was in fact a note that the fourth defendant requested for purposes of explaining to his employers the delay he had experienced in Masvingo as he had a time frame within which to complete his journey.

Luke Chigwida the first plaintiff gave evidence next. He runs a company called Swedde (Pvt) Ltd. He bought and imported the Mitsubishi Canter truck from Japan. His claim against the defendants is for the replacement cost of the vehicle which was damaged in the accident on 20 June 2007. He also wants to be compensated for the freight and duty charges. He produced documents which confirmed the importation as well as the cost price of the vehicle as USD5100. He also paid ZAR 36000 to the South African Revenue Service for the vehicle to be shipped from Japan to Durban and this included freight and insurance. He also paid ZAR 21744 to a company called Exploranka Freight (Pvt) Ltd for handling charges. He paid to Freight Solutions (Pvt) Ltd, a Zimbabwean Company, the sum of Z$3 876 830,74 for the vehicle to be imported into Zimbabwe. He also paid duty at the Zimbabwean border in the amount of Z$2 830 000 to ZIMRA. He produced all the relevant supporting documents.

After clearing the vehicle at the border and paying all dues as described above, he took possession of the vehicle. He then asked his brother, the now deceased Farai Emmanuel Chigwida to drive it while he led the way driving another vehicle, on their way from Beitbridge border post. As they progressed on their journey he drove past a Mainline, tanker, presumably the third defendant's vehicle. Then after some time he realised that he could no longer see his brother following behind him. He stopped in Masvingo waiting for his brother to arrive. As there was a long delay he flagged down a bus and asked if they had seen a Mitsubishi Canter truck. On receiving a report from the bus driver, he made a u-turn and drove to the mortuary. He then went to the scene of the accident in the company of some police details. He incurred towing costs in the sum of Z$ 34 million. The Canter truck had to be towed as it could no longer be driven due to the extensive damage that it had sustained. The vehicle was assessed as being beyond economic repair by the assayer. He said that he has since ascertained that it would cost him USD 7000 to replace the truck and he produced a quotation

to that effect. He said the wreck was valued at USD 800 as that was the last offer he got from a potential purchaser.

Under cross-examination he confirmed that he was claiming the replacement value of the vehicle and all the other stated charges less the amount that he is able to realise from the sale of the body being USD800.00.

The first plaintiff's case was then closed.

The second plaintiff then gave evidence. She said that she was customarily married to the deceased Emmanuel Chigwida who died as a result of the accident described above. She has four children from her marriage to the deceased, one of whom being Arthur, is now above the age of 18 and is a major, Lorraine Kudakwashe was born on 4 August 1991. Tanyaradzwa was born on 1 December 1994 and Kudzai on 30 June 2000.

The deceased then aged 59, was employed by Medicines Sans Frontiers as a driver. He earned USD 308 per month. She is not employed. For herself and the three minor children she is claiming USD 15 840. She met the funeral expenses relating to her husband's death with the assistance of her late husband's brother. She paid Z$159 735-00 to Homage Funeral Services and Z$18 342-00 to Moonlight Funeral Services.

Under cross-examination she said that the deceased had worked for Medicines Sans Frontiers for 6 months at the time of his death. Before then he had been employed by the Swedish Embassy for five years.

The second plaintiff's case was then closed.

The second defendant gave evidence on behalf of the first and second defendants. He is employed by the first defendant and was driving its truck on 20 June 2007. He has 12 years experience as a long distance truck driver. He was carrying cotton cake bags from Harare to Johannesburg. From the trailer his load was $1^{1/2}$ (one and half) metres high. It was high enough to have had contact with load of the third defendant's vehicle which was going in the opposite direction.

The witness said that as he was entering Masvingo he realised that his load had shifted to the left. He then drove to a place where lorries are usually parked. He looked for young men who usually roam the place looking for odd jobs. When asked as to how he had picked those who then assisted him he said that he had known them for some time and knew them to be experienced in that work. They assisted him to re-secure the load. Before leaving his port in Harare the vehicle had been loaded by young men engaged as casual workers. According to

company policy he must check his load after every 300 kilometres and that is what prompted him to check his load as he was entering Masvingo which is some 291 kilometres from Harare.

The witness said that he was carrying 600 bags. They were covered by tarpaulin and secured by 21 belts which tightened them. After re-securing the load he left Masvingo at 5.45pm and the accident occurred about 7.20pm. As he approached the third defendant's vehicle which was travelling in the opposite direction, he dipped his lights and switched on his right indicator to show the on-coming driver what space was occupied by his vehicle. He did not realise that the third defendant's vehicle was carrying an abnormal load. He did not see the cloth said to have been at the front of the vehicle on which the words "abnormal load" were written. As the vehicles passed each other going in different directions, he heard two separate and distinct noises. His vehicle swerved off the road and he then stopped it. The first noise was from the impact of the loads of the two vehicles. The second noise was from the impact of the cotton bags on the deceased's vehicle. He thought that the now deceased's vehicle must have been travelling too close to the third defendant's vehicle and was travelling at an excessive speed otherwise he would have found the cotton bags already on the ground.

The witness said that he was then approached by a witness from the deceased's vehicle who made a report to him and indicated the deceased's vehicle to him. The witness got to the deceased's vehicle and removed the driver from the vehicle. He was already dead. The witness also removed two passengers who were seated in front, a man and a woman. The witness went back to check on his truck and realised that the tarpaulin and the ropes had been cut though on the right side. He thought that it was possible that the fourth defendant may not have heard the sound of the impact of the two loads as the fourth defendant's load was very large. He believed that immediately before the accident his load was in a safe position as it had just been re-secured in Masvingo. The load was properly accommodated inside the trailer and was not overlapping the sides of the trailer. Furthermore as a professional driver, he was checking his view mirrors every forty-five seconds. He was also switching the worklight on at intervals in order to check on the security of his load.

On being cross-examined by the plaintiffs' legal practitioner the witness said *inter alia* that the load he was carrying was from Cottco and the young men who loaded the truck were employed by Cottco to do the job. The young men who re-secured the load in Masvingo were not employed by Cottco. The witness used to know them when they used to work for an organisation called CARE where they used to perform the same duties on a daily basis;

however on this occasion they had since left employment with CARE. The witness was questioned also about his statement whilst he was giving evidence in chief that loads normally slant to the left and not to the right. He said that this is what he had grown to know from his observations during the years of experience that he had. He further stated that it is unusual for a load that would have shifted to the left, to thereafter shift to the right.

The witness said that if he had noticed as he approached the third defendant's truck that it was carrying an abnormal load he would have pulled off the road. He did not expect to meet an abnormal load vehicle at that time. He denied that he was not exercising due care and attention or that he failed to keep a proper look out. He said that if he had been driving without due care and attention there would probably have been a head-on collision or the horses of the two trucks would have collided. He said that the bags fell off because the tent or tarpaulin and the ropes had been ripped and cut through when the two loads came into contact.

The witness said that he did not see the deceased's vehicle before the accident and conceded that his conclusions regarding how closely it was following the third defendant's vehicle were based on assumptions. He said that his conclusions were based on the fact that the bags fell and landed onto his vehicle and that one would have expected him to have run over the bags if he was not too close to the third defendant's vehicle and was not travelling too fast.

The witness said that he had travelled some 65 kilometres from Masvingo when the accident happened. He denied that his constant checking of the view mirrors disturbed his concentration on keeping a proper look-out.

On being cross-examined by the third and fourth defendants' legal practitioner the witness said that he did not believe that his load had already shifted to the right before the impact. He said that the impact caused his vehicle to go off the road. He said that the tarpaulin was torn at the height of some 40 cm from the trailer and that it was torn right across its whole length on the right side. He said that as the tent and ropes were ripped open and cut through, some bags of cotton cake were carried away by the abnormal load and some landed on the third defendant's vehicle. He said that as the third defendant's vehicle carried an abnormal load it did not leave sufficient room for the two trucks to pass each other safely. He also said that he did not see if the third defendant's truck encroached onto his lane of travel or it was in its own lane. All he heard was the impact on collision. He said that the third defendant's load overlapped the sides of the trailer but would not agree nor could he deny that it overlapped by

15 centimetres. He also said that he could neither agree nor deny that such an overlap would be the same as that of a view mirror and would therefore not be a danger to other road users.

No other witness testified on behalf of the first and second defendants and their case was then closed.

The fourth defendant gave evidence on behalf of the third and the fourth defendants. He is employed by the third defendant as a driver and has been so employed since November 1989. He has been driving heavy vehicles since 1976. On 20 June 2007 he was driving the third defendant's truck and on it was loaded an excavator which he was transporting from a harbour in Durban to a destination in Ndola in Zambia. On the way from Beitbridge to Masvingo he was involved in the accident that has given rise to this suit. When asked if he had seen the first defendant's truck coming from the opposite direction whilst it was still some distance away he said that he had. He was asked if he had noticed anything that was out of order on or about the first defendant's vehicle. His answer was:

> "I did not see the slanting or position of the load because the road was straight. I did not see that the load was protruding. I did not see anything abnormal or if the load was in any way not properly positioned"

The witness said that he travelled for some distance with the deceased's vehicle trailing behind his. He noticed the deceased's vehicle at Ngundu Halt and also at another place called Maringire. He said that he did not at any stage notice any indication of the deceased's intention to overtake him.

The witness said that his load was not an abnormal load. An abnormal load protrudes out of the trailer significantly. The height of the load and the tonnage also determine whether a load is abnormal or not. He said that an excavator is constructed in such a way that the bottom part is wider than the top part and it is the bottom part which was on the trailer. Three quarters of the chain wheels were contained in the trailer with a protrusion of about ten to fifteen centimetres. It is thus the bottom part which was overlapping and not the top part. A load would be abnormal if the overlap would be such as to interfere with the other lane of travel for vehicles from the opposite direction.

The witness said that his load was 3,8 to 4 metres high and to his knowledge a load of 5 metres and above would be abnormal. A weight of 35 tonnes and above on a 3 wheeled axle would also qualify to be labelled as an abnormal load. The witness also said that an abnormal load must be carried on a low bed trailer. When intending to carry an abnormal load, one must obtain a permit from the Ministry of Transport first. One is also allocated a route to use or

follow. One must also have two vehicles to escort the abnormal load with one vehicle in front to alert on-coming traffic. Abnormally loaded vehicles are not allowed to travel between 6pm and 6am. When entering a town one is supposed to telephone the police who would then escort the abnormally loaded vehicle through the town in order to avoid accidents. In this instance no application was made for a permit to carry an abnormal load from Durban to Ndola as he was carrying a normal load. He said that all he had was what he called a "cross-border permit". The police would not have allowed him to pass or proceed without that permit if he had been carrying an abnormal load. If carrying an abnormal load, one does not go to the weigh-bridge at the border. A different gate is used and the vehicle is parked in the clearance yard. On the day in question he went through the weigh bridge as he was not carrying an abnormal load. He produced the weigh-bridge ticket.

The witness said that he stopped some 40 kilometres after Masvingo on his own accord as he needed food and refreshments. He was only alerted to the fact that he had been involved in an accident by the owner of the shop where he had parked. They then examined his vehicle using torches as it was dark and they observed some pieces of cotton cake on his trailer by the chain wheels. By the view mirror close to the driver's cabin were pieces of bags. The owner of the shop then called Masvingo Traffic Police and asked the witness to wait for them there. The police finally arrived at 3.30am and they drove back to Masvingo Central Police Station where he disengaged the horse from the trailer and drove back to Ngundu with three police details.

The witness said that at the scene he saw bags of cotton cake on the right side of the road. A truck had hit against a rock. The first defendant's truck was parked off the road. On the first defendant's truck he noticed that just after the centre of the trailer the tent was ripped open. It looked like the vehicles had side swiped causing the bags to fall off. He said that the glass or windscreen of the driver's cabin on the excavator was not damaged. He believed that the bags must have been raked by the view mirror of the excavator as there is no other part of the vehicle or its load which could have come into contact with the bags. He said that they realised that the protruding bottom part of the excavator had not come into contact with the cotton cake bags. He also said that the horse of the first defendant's truck was not dented. He said that he also observed that the tearing of the tarpaulin was concentrated more on the area where the load was slanting. He did not see a tear running the whole length as stated by the second defendant. The load was slanting to the right. He denied being partly or wholly responsible for the accident.

Under cross-examination by the plaintiffs' legal practitioner the witness said that as he observed the second defendant's truck approaching he saw that its load was the same height as his. He said he travelled at a maximum speed of 80km per hour reducing to lower speeds when the terrain or circumstances required that. He said the document that he had produced, the weigh-bridge ticket showed three weights taken from the front axle, the diff and the tri-axle trailer. He said that the total weight would then be the total of the three stated weights. He said that he does not know the width of his trailer but it was like any other tri-axle trailer.

The witness was asked why the plaintiffs' witness, the police officer, was not challenged when he said that the top part of the excavator was protruding from the trailer. He said that he had not been given an opportunity to personally cross-examine the witness. He said that it was not true that there was a piece of red cloth stuck at the front of the horse of his truck. He said that there was a permanently stuck abnormal load sticker on the horse of the trailer. On the day in question he was using a truck with a low bed. The witness denied that he was negligent by failing to warn other road users of the load that he was carrying. He denied that he is being charged with culpable homicide and failing to stop after an accident as he has not been formally charged nor has he received documentation to that effect. Furthermore, the police had cleared him after the accident and had also given him a document to show to his employers indicating that he had been delayed at Masvingo Police.

The witness was then cross-examined by the first and second defendants' legal practitioner. He said that he although he had not seen that the first defendant's truck's load was slanting before the accident, he did not agree that the contact between the two loads or trailers caused the load to be in the slanting position that he saw it in after the accident. He said that if his trailer had side swiped the first defendant's truck's trailer there would have been more extensive damage than what transpired. Tyres would have burst and the chains securing the excavator would probably have been severed with a possibility of the excavator being thrown out of the trailer. He said that the first defendant's truck would then have probably veered off the road and the driver would have lost control. He maintained that the cause of the accident were the cotton cake bags which were slanting to the right and that the protrusion of his own load had no effect on other road users. He had travelled a long distance all the way from Durban for about one and half days and he had left in the evening. The protrusion of his load had not caused any problem then.

The witness further said that he did not think it was the second defendant's fault that the load was slanting. As roads are bumpy and there are holes, that can result in loads shifting without there being any negligence on the part of the driver. He said that his own load did not shift as it was secured by chains. If it had slanted it would have fallen. He denied that he obstructed the second defendant preventing him from overtaking and maintained that his vehicle occupied its correct lane only and did not protrude into the other lane for traffic from the opposite direction.

The third and fourth defendants' cases were then closed.

The plaintiffs' claims are for delictual damages arising from alleged negligence on the part of all defendants. In *Cape Town Municipality v Paine* 1923 AD 207 at 216 – 217 Innes CJ stated:

> "It has repeatedly been laid down in this court that accountability for unintentioned injury depends upon *culpa,* - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law, - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, - and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias, the* duty to take care is established, and it only remains to ascertain whether it has been discharged."

It is common cause that first and second defendants' load of cotton cake or lint came into contact with the third and fourth defendants' vehicle or load (excavator). It is also common cause that although the loads of the two vehicles made contact, the horses of the two vehicles did not make contact when they passed each other as they proceeded in opposite directions. The police investigating officer said that the top part of the excavator was protruding outside the trailer and that he observed traces of cotton lint on the excavator. The third defendant however said that it was the excavator's view mirror which raked the cotton lint or cake bags and that there were traces of cotton lint or cake on it. Although this may appear to be a difference in their versions, the fact remains that a part of the excavator was protruding and that that part raked the cotton bags.

The second defendant said that as he drove he would constantly check on his load to make sure that it had not shifted as it is known that a load may shift whilst in transit due to the movement of the vehicle as well as the terrain on which the road passes. He also said that he

noticed that his load had shifted before he got to Masvingo and that this necessitated him having the load re-secured in Masvingo before he proceeded further with his journey. The accident occurred after the stop-over in Masvingo and after he had travelled some 65 km. he suspected that by the time of the accident his load may possibly have shifted again.

That the fourth defendant's load may have shifted again by the time of the accident appears to be strongly supported by the fact that the re-securing of the load at Masvingo was done by people who were not professionals at the job. Furthermore, that the accident occurred only some 65 km after he had left Masvingo. This ought to be viewed in light of the second defendant's evidence that his employer requires him to check on his load every 300 km. That the load had shifted at the time of the impact also seems to be supported by the fact of the impact itself as it is highly unlikely that there would otherwise have been contact between the two vehicles. The first and second defendants were thus negligent in not ensuring that the load was properly secured and would not cause danger to other road users. They were therefore negligent and thus cannot escape liability for the plaintiffs' claims.

It however appears to me that it could not only have been the shifting of the second defendant's load that led to the impact of the two loads. The protrusion of part of the fourth defendant's load, the excavator, appears to me to have also played a part in the occurrence of the impact between the loads. The fact that the two horses did not collide with or side-swipe each other suggests that the two drivers must have each been driving well within the confines of their respective lanes. I thus find the first and second defendants' contention that the third and fourth defendants' vehicle encroached into their vehicle's lane to be highly improbable. There would otherwise have been a collision or side-swiping of the horses and the fourth defendant would have become aware of the accident as it happened or at the very least very soon thereafter.

It appears from the evidence adduced by the parties that neither driver was able to see the state of the other's oncoming vehicle. Each could only see the approaching headlights of the other's vehicle. This is not unusual when one considers that the accident occurred at about 7.20pm when it was already dark. The second defendant stopped soon after the impact. The fourth defendant did not stop as he was not even aware of the accident until he was advised about it when he was already some (one hundred kilometres – or is it forty?) away. This could well be explained by the fact that the fourth defendant's load being a solid and presumably metal piece of equipment was not affected or moved by the impact. On the other had the

second defendant's load being non metal was torn, ripped and strewn off the vehicle by the excavator or more specifically the part of the excavator that it came into contact with. During daylight the second defendant would have seen the slanted load of the oncoming vehicle and would have taken the necessary avoiding action. The fourth defendant would also have seen the protrusive part of the oncoming vehicle's load and would also have taken the necessary action to avoid the impact of the loads. As neither saw the state of the other's vehicle or load, neither took evasive action and this resulted in the accident.

It was common cause that the third and fourth defendant's vehicle had no flashing beacon and no escort. The plaintiffs contend that as the third and fourth defendants' load was abnormal they needed to have taken the stated precautions. The third and fourth defendants disputed this contention. However, the police witness said that the horse had a sticker at the front on which were inscribed the words "Abnormal Load". He also said that the excavator was about four to five metres in height. The fourth defendant however put it at four metres high. The police witness also said that the fourth defendant had an abnormal load permit. I have no reason to doubt the truth of his evidence. The evidence placed before the court tends to support the plaintiffs' contention that the third and fourth defendants load was an abnormal load which required compliance with the permit's restrictions on the times when movement on public roads is allowed as well as the other precautions that are meant to avoid danger to other road users. I am also persuaded by the plaintiffs' contention that even if the third and fourth defendants' load was not abnormal, the type of the item carried as well as the size of it were such that they should have foreseen that it might cause danger to other road users and should have taken the necessary precautions which would include not travelling after 6.00pm, or at least after dark, and would also include flashing a beacon. The type of load that the fourth defendant was carrying was in my view such that it not to have been transported on a public road after dark.

The evidence of the passenger who sat in the front passenger seat of the deceased's vehicle was to the effect that for some distance the deceased failed to overtake the fourth defendant as his trailer was zig-zagging along the road. I have no reason to disbelieve this witness' testimony. In any event, the fourth defendant himself confirmed that the deceased travelled for a long distance behind him without overtaking him, although he said that he assumed that the driver (the deceased) was happy to follow behind him. As regards the third and fourth defendants it would appear to me that the evidence adduced before this court

supports the plaintiffs' claim or contention that they were also negligent and that such negligence also contributed to the accident.

The third and fourth defendants averred in their pleas that plaintiff's (presumably the first plaintiff's) motor vehicle "was either travelling at too fast a speed, and/or too close to the defendant's motor vehicle and trailer" and that they therefore deny any liability to the subsequent damages suffered by the plaintiffs as a result of the accident. It is however common cause that immediately before the impact the deceased had been travelling behind the fourth defendant for a long distance. The fourth defendant himself said that he was travelling at 80 km per hour. It follows that the deceased must have thus been travelling either at the same or a lower speed as he drove behind him. Lovemore Mukura, the passenger in the deceased's vehicle also confirmed that the deceased was travelling at a speed of between 75 and 80 km per hour. The deceased can thus not be said to have been travelling at an excessive speed. Regarding whether the deceased's vehicle was travelling too close to the fourth defendant's vehicle I propose to do no more than quote a portion of the plaintiffs' closing submissions.

> "The issue of the Canter driving too close to the 4th defendant was raised in the defendants' pleadings. However, this allegation is based on an assumption which has been challenged. Nobody could tell at what point in relation to the accident the side swiping took place. It could have occurred a distance away from the scene of the accident. The bags may have started falling a little while after the side swipe, nobody knows. It is therefore submitted that the allegation was not proven. … ."

I therefore find that no contributory negligence on the part of the plaintiffs has been proven. On the other hand, by travelling at night with the type of load on their vehicle, the third and fourth defendants were negligent as they ought to have foreseen that their vehicle could pose a danger to other road users.…….

It is the plaintiffs' contention that whilst all the defendants are jointly and severally liable for the damages that they have sustained, the third and fourth defendants' blameworthiness is higher than that of the third and fourth defendants. The plaintiffs urged the court to find that an apportionment of 70% of the blame (for the accident) to the first and second defendants with the other 30% being apportioned to the third and fourth defendants would be reflective of the respective defendants' levels of blameworthiness.

In *Portwood v Samvur* 1970 (1) RLR 225 @ 231H to 233C; 1970 (4) SA 8 (RAD) Beadle CJ stated:

"It is trite that as a very general principle before any act of negligence can be regarded as being responsible, even in part, for an injury, it must be shewn that that act was a *sine qua non* of the accident causing the injury, and, unless it can be shewn that the accident would not have happened but for that act, such act of negligence is not regarded as a *sine qua non. (*See McKerron's *Law of Delict,* 6th Edn., pp. 117 and 272, and cases there cited.) …….. . McKerron goes so far as to say that there is only 'one exception' to this 'rule'. This exception is where the damage is brought about by two concurrent causes, each of which, operating alone, would have been sufficient to cause the damage (McKerron, *loc cit*., p. 117). Instances of this exception are not difficult to imagine. Take, for example, this situation. A and B are the drivers of two motor-cars approaching each other from opposite directions on a straight and open road. They collide 'head-on', and C, an innocent bystander on the side of the road, is injured in the collision. Both A and B are driving at a furious speed and neither is keeping a proper look-out. Suppose that the facts are that neither A nor B, had he not been negligent, could have avoided the consequences of the other's negligence. If the *sine qua non* principle was applied to test the liability of A and B, both could escape, because each could plead that his own negligence was not a *sine qua non* of the accident because, even had he been diligent, the accident would still have happened as a result of the other's negligence. It would appear that it is in order to avoid this absurd result that the exception mentioned by McKerron is introduced. This exception, however, is of little assistance in the instant case, as the facts do not fall within it, …. This is not a case where the accident would still have happened if one of the concurrent factors causing it was removed. With respect, however, to such an eminent writer on the law of delict as Professor McKerron, I do not think that tests of causation in delict can be circumscribed by rules and exceptions to quite the extent which he appears to suggest. I would quote here what was said by CLERK and LINDSELL on *Torts*, 12th Edn., para. 297:

> '*Test of causation*. The courts have repeatedly disavowed scientific and philosophical tests by which to determine this most troublesome question. They prefer instead to approach the matter broadly on a common-sense basis, and it is, therefore, difficult to reduce the innumerable decisions to hard and fast principles. There is a frequent allusion in the judgments to the *causa causans,* the effective factor, as distinct from the *causa sine qua non,* the factor without which the damage could not have occurred, but these phrases give no indication as to how the distinction between them is to be drawn. It is profitless to seek a precise test; nothing could be more explicit than the judicial disavowal of any such thing. The most that can be said, perhaps, is that in any given case the judge, adopting a common-sense approach, will try to pick out the factor which, in his opinion, overshadows all others in importance. 'The decision of the case,' said Lord Wright, 'must turn not simply on causation, but on responsibility.' The very vagueness of such an idea as this imparts considerable flexibility to the whole concept of legal causation. Frequently it is just as plausible to select one out of a mass of contributory factors as another. When a court does pick out one as being the 'responsible cause' this is the result in some cases of a common-sense balancing of the various factors involved, such as their relative blameworthiness, or in other cases of a policy decision.''.

I would also refer to the case of *Yorkshire Dale Steamship Company v. Minister of War Transport* (1942) A.C. 691. In that case, Lord Wright (at p. 706) is reported as saying:

> 'This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view.''.

It seems to me that this is the proper approach.

> *In the example I have given of the suicidal motor-drivers colliding head on with each other, I think it would be quite profitless to expect C, the injured bystander, to have to try to prove what might or might not have happened if one or other of A or B had not been negligent. The proper approach, surely, is the direct common-sense approach of the man in the street; and, in the example given, he would, without doubt, simply say: 'Of course, they are both to blame.' This is how I propose to approach the facts of this case."* (The emphasis is mine)

For the reasons discussed above I am in agreement with the plaintiffs' legal practitioner's submission that a higher level of blameworthiness ought to be apportioned to the third and fourth defendants. I agree that on an overall assessment of the evidence adduced and the findings already made by the court, the third and fourth defendants' blameworthiness ought to be placed at 70% and that of the first and second defendants at 30%.

The defendants did not challenge or dispute the quantum of any of the two plaintiffs' claims. It is thus not necessary for me to delve into the merits of this aspect of the matter save to state firstly, that the extent of their respective liabilities shall be in accordance with the above stated levels of blameworthiness apportioned to the respective sets of defendants jointly and severally, the one paying the other to be absolved. Secondly, with the dollarisation of the economy, the second plaintiff's claim for funeral expenses, which claim is denominated in Zimbabwe dollars, would even if it were to be granted by this court, be of no real meaning or benefit to her. It will thus not be granted. In addition, the rate of interest can only be granted as the law stipulates, at 5% per annum. The plaintiffs' claims as stated above must otherwise succeed. Costs will follow the cause.

It is therefore ordered as follows:

1. Judgment is granted in favour of the **first** plaintiff against the **first and second** defendants jointly and severally, the one paying the other to be absolved, in the sums of:

(a) USD 2 100 (Two thousand one hundred United States dollars)

(b) ZAR 17 413.20 (Seventeen thousand four hundred and thirteen Rand and twenty cents)

(c) Interest on each of the said amounts at the rate of 5% *per annum* as calculated from 20 June 2007 to the date of full payment.

(d) Costs of suit.

2. Judgment is granted in favour of the **first** plaintiff against the **third and fourth** defendants jointly and severally, the one paying the other to be absolved, in the sums of:

(a) USD 4 900 (Four thousand nine hundred United States dollars)

(b) ZAR 40 630.80 (Forty nine thousand six hundred and thirty Rand and eighty cents)

(a) Interest on each of the said amounts at the rate of 5% *per annum* as calculated from 20 June 2007 to the date of full payment.

(d) Costs of suit.

3. Judgment is granted in favour of the **second** plaintiff against the **first and second** defendants jointly and severally, the one paying the other to be absolved, in the sums of:

(a) USD 4 752 (Four thousand seven hundred and fifty two United States Dollars).

(b) Interest on the said amount at the rate of 5% *per annum* as calculated from 20 June 2007 to the date of full payment.

(c) Costs of suit.

4. Judgment is granted in favour of the **second** plaintiff against the **third and fourth** defendants jointly and severally, the one paying the other to be absolved, in the sums of:

(a) USD 11 088 (Eleven thousand and eighty eight United States Dollars).

(b) Interest on the said amount at the rate of 5% *per annum* as calculated from 20 June 2007 to the date of full payment.

(c) Costs of suit.

P. Takawadiyi & Associates, plaintiffs' legal practitioners
Byron Venturas & Partners, 1st & 2nd defendants' legal practitioners
Robinson & Makonyere, 3rd & 4th defendants' legal practitioners