CGU INSURANCE ZIMBABWE LTD
versus
EDWARD WILLIAM KIRBY

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 15 October, 2002 and 22 October, 2003

Civil Trial

Mr *N Machingauta* for the plaintiff
Mr *W Ncube* for the defendant

HUNGWE J: Plaintiff, an insurance company, seeks damages in the sum of $625 506,85 arising out of a motor vehicle collision between its insured and another driven by defendant. The quantum of damages is not in dispute. It is liability which defendant disputes.

At the trial, the driver of the plaintiff's insured one Micah Moyo, gave evidence on plaintiff's behalf. Defendant and his wife gave evidence for the defence.

Micah Moyo was at the time a manager at Beverley Building Society. On the morning of 3 March 1999 he was driving a Mitsubishi double cab light truck from Harare to Masvingo. When he got to the 188/5 kms peg, just outside Mvuma, it was slightly drizzling. He was travelling at a speed between 110 and 120 kms per hour. At that point the road curves to the left. As he emerged from the curve, he suddenly came face to face with a light motor vehicle travelling in his lane. It was in the process of overtaking three fuel tankers pulling trailers. His initial reaction was to go the left of the road. As he attempted to execute this avoiding action, that other driver inside his lane also moved to that side. He then applied brakes and swung back to the centre of the lane. In the process his truck tyres skidded. That caused his truck to hit into the wheels of the lead tanker.

His right front wheel came off and was run over by the right side wheels of the tanker which punctured seven of its wheels. For his part, the truck, due to the velocity and angle of its crash into the tanker, was spun through 90° clockwise. It then bounced off the tanker and landed across the edge of the tarmac with its chassis perpendicular to the edge of the tarmac. The defendant's motor vehicle had meanwhile been safely brought to a halt off the tarmac to the right side of the Masvingo-Harare road, its wrong side. The tanker pulled off the road. The one tanker behind it filed past.

He maintained this evidence under cross-examination.

The defendant's version of the accident was as follows. Together with his wife he was travelling to Harare from Figtree via Mvuma. When he got to the Harare Masvingo road three tankers were headed north on the Harare Masvingo road. He joined after the second tanker had passed but before the third. As these two slowed down opposite the mine dump, to negotiate a bend, he realised there was an unbroken centre line. After a short distance the centre line changes to being broken. At that point, he could see 1200 metres ahead. He decided to overtake the tanker immediately ahead of him.

Midway in his overtaking manouvre, the defendant was confronted by the oncoming red car. He had two options, first to move back into his correct position or go to the right, off the road. Because of the rate at which the gap between his car and the plaintiff's was reducing, he realised he could not make it back in time. The tanker was not doing speed. He decided that the safe manouvre would be to move his motor vehicle completely off the tarmac thereby leaving a gap sufficient for the red car to pass. He then went off the tarmac and drove on the gravel shoulder of the road before bringing his motor vehicle to a rest and switching off his engine. Defendant saw the plaintiff's car

suddenly spin into the tanker hitting it with the front right wheel which cam off in the process. The car bounced off the tanker and came to rest a few metres away from hi. He described the damage suffered by the two trucks. His version was supported by his wife Mrs Kirby. She confirmed that when her husband began to overtake the middle tanker, the road ahead was clear. I found it a bit odd that someone sitting in the front passenger seat could state categorically that she observed the road to be clear at the point when the overtaking procedure was embarked upon. What she could say however is that at the point she first saw the road ahead, it was clear of any obstruction. She must have come to that conclusion only when the motor vehicle was so positioned that she could see the road ahead. That would be after the defendant began overtaking. In deciding whether, the defendant was negligent in the manner of his driving and whether, by virtue of that negligence he is the proximate cause of the accident from which the plaintiff suffered damages, I have to consider the factual contentions of both parties.

In his description of the accident plaintiff in a way admits that he had failed to keep his motor vehicle under control as it was drizzling and the road wet. He says that on realising that another motor vehicle was inside his lane overtaking two or three tankers, his first reaction was to swerve to the extreme left. One may ask whether that would be the reaction of a reasonable motorist who finds himself in the position of the plaintiff. The rule of the road enjoins drivers in this country to keep to the left. There would be circumstances where one may be permitted to keep to her right. Thus when if one meets oncoming motor vehicles, one on their right or left. It is a natural reaction to this rule. That generally speaking when confronted with a situation where another motorist has occupied others lane, the immediate reaction is to go to the left. How far to the left

would then depend on how safe it is judged the vehicles can pass each other in that situation. It seems to me therefore the natural refuge for drivers is almost untenably all cases is the left side of the road.

Plaintiff's evidence was that on taking this avoiding action (i.e. going to the extreme left) he realised that defendant had also landed to go into that direction. It was whilst he was correcting his direction of travel in order to avoid a head on collision with the defendant who was on his wrong side of the road that he lost control of his motor vehicle and hit into the tanker.

It was argued for the defendant that plaintiff was partly to blame for the resultant accident because he was travelling at an excessive speed, or t5hat he failed to keep his motor vehicle under proper control and that he failed to take avoiding action when an accident occurred imminent. Before we consider whether plaintiff was partly to blame for the accident it must be remembered always that the concept of negligence is a relation on depending as it does on the standard of the reasonable rule test.

In my view this case has to be approached from the general principles applying to this type of collision. See *Klinkhas* v *African Guarantees & Industry Co Ltd* 1957(2) SA 619 where it was held that when a driver is in his correct lane realised that another was coming inside his lane he had a duty to take steps to avoid the collision. Those steps, it was held involved that he should go off the tar or to the gravel.

At MYBURGH J observed in *Walpole & Another* v *Santan Insurance Co Ltd* 1973(1) SA 357 at 361 relied on the general principles set out by INNES CJ in *Solomon & Another* v *Musset & Bought Ltd* 1926 AD 427 at p 433 -

> "The general rule is under such circumstances is that persons using the road upon the proper side have the paramount right and are entitled to

> preferences, so that, in case of danger of collisions, it is the duty of those on the wrong side to give way first. (See per SOLOMON J in *Montgomery* v *Hulston* 1917 AD 182). And the driver of a vehicle proceeding at a lawful speed upon its proper side is entitled to expect that another vehicle, approaching upon its wrong side will timeously give way. Fast moving traffic would be impossible if compliance with the ordinary rules of the road on the part of those concerned could not, in the first instance, be taken for granted".

The plaintiff reasonably answered, and quite rightly so, that defendant will quickly return to his correct side. He was entitled to go to the far left in order to accommodate defendants' manouvre in attempting to go back to his correct position. Rather than go back there defendant took the extraordinary step of going to that side which plaintiff was entitled to assume was the safest side to move to. It seems to me that defendant cannot be blamed for failing to keep his motor vehicle under control since it is the defendant's further act that exhorted the situation.

Defendant does not deny that he was wrong to have been found their by the plaintiff. His explanation is that at the time he commenced his overtaking manouvre, it was safe to do so. He therefore is only partly to blame. I do not agree. He is to blame through and through. I say so because a reasonable person in his position could not contemplate the overtaking process when there was a blind bend ahead and a long slow vehicle ahead in his lane. He gave the clear distance as 400 metres, 1200 metres, three-quarters of a mile. The truth of the matter is found in the fact that his vision went up to the blind bend. It was not a long stretch. At least it was not possible for him to complete the process should a fast moving car approach as did the plaintiff's. There are dips in this section of the road. Added to that a blind bend then a reasonably careful driver applying his mind to the act of overtaking would not have proceeded with the decision to overtake. In failing to act as a reasonsable man, the defendant was negligent. In deciding to go to

the extreme right of the road, he acted negligent toward plaintiff. I am not saying he should have somehow remained there and wait for plaintiff to hit into him, but as a man creates a sudden emergency he cannot exempt the finding that it was negligent for him to have failed to realise the danger he creates to other road users.

In the circumstances I am satisfied that defendant is liable to the plaintiff in the amount claimed in the summons as damages together with interest as well as costs.

Honey & Blanckenberg, legal practitioners for plaintiff
Sansole and Senda, legal practitioners for defendant