INTERPLAN INVESTMENTS (PVT) LIMITED
versus
RECLENIX INVESTMENTS (PVT) LIMITED t/a MANDEEP TOURS
and
HAPPINESS GOGWE
and
CLARION INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 6 September, 4 October, 8,15 & 23 November 2022,
10 & 26 January, 22 & 23 February, 28 March, 17 & 31 May, 8 June 2023
& 31 January 2024

Civil Trial

E Mubayiwa, for the plaintiff
M Chivasa, for the 1st and 2nd defendant
M K Chugudu, for the 3nd defendant

CHITAPI J: In the early hours of Sunday 6 October, 2019, at approximately the hour of 0545 two buses of the Yutong make collided head on along the A5 Highway at the 234 Kilometer peg. The A5 Highway is the road from Harare to Bulawayo or the vice versa direction. The 234 kilometre peg is located between Kwekwe and Gweru. The accident can only be described as tragic and horrific. It marked a sad day for the country which lost thirteen of its citizens from injuries sustained due to the accident. Scores of surviving passengers were injured to various degrees. The two buses involved in the fatal accident were owned one by the plaintiff and the other by second defendant.

Both the plaintiff and the first defendant are duly incorporated and registered companies carrying on the business of transport services. The plaintiff Interplan Investments (Pvt) Ltd operates under its trade name called Govasberg Services. The plaintiff's owned bus registered No ADC 2592, hereafter called "Govasberg bus" for brevity was travelling in the southerly direction towards Bulawayo. The bus was being driven by Richard Muchenje. Richard Muchenje was a casualty in the accident. He died on the spot. The bus which he drove was carrying forty (40)

passengers. No evidence was led on the total number or passengers of casualties from that bus, save that the total number of casualties from both buses combined was thirteen.

The first defendant Reclenix Investments (Pvt) Ltd carries on its transport business under the name Mandeep Tours. On the fateful morning the first defendants' owned bus registered No ADZ 1425 (hereafter called "Mandeep bus") was travelling in the northerly direction towards Harare on the same highway as the Govasberg bus. As alluded to in the introduction, the Govarsburg and Mandeep buses collided head on. The Mandeep bus was being driven by Tafadzwa Shambare. Tafadzwa Shambare succumbed to the injuries sustained in the accident. It was therefore common cause that both drivers of the two buses died. They are not here to explain how the accident occurred. That is the peculiar feature of the accident. It follows that any investigation on the cause of the accident will not be aided by explanations of the drivers who were in charge of the locomotion of the two buses.

In the aftermath of the accident, the plaintiff considered that the first defendant's bus driver drove the Mandeep bus negligently and caused the head on collusion in the process. The plaintiff believed that it must get recompense for its damaged bus and consequential damages. The plaintiff commenced this action by summons filed on 25 November 2019. In the summons the plaintiff included additional defendants to the first defendant. The plaintiff cited as the second defendant Happiness Gogwe and as the third defendant, Clarion Insurance Company.

In citing the second defendant in person, the plaintiff alleged that the second director was "-the director and shareholder of the first defendant." This was pleaded in para '3' of the declaration. The plaintiff further pleaded as follows in para 5 of the declaration.

> "5. The first defendant is being sued in its capacity as the owner of the bus, being a Yutong registration No ADZ 1425, which was involved in accident (sic) with that of the plaintiff and also her (sic) capacity as the employer of the late Tafadzwa Shambare who was driving the bus in question whilst acting int(sic) the cause and within the scope of his employment with the 1st defendant.
> 5.1 The 2nd defendant is being sued in his capacity as the director and majority shareholder of the 1st defendant. 1st defendant is an alter ego of the second defendant."

The way the plaintiff pleads in the two paragraphs quoted is atrocious or of very poor quality. There is for example no nexus pleaded between the causation or liability for the delict sued on and the citation of the second defendant personally and/or as an alleged *alter ego* of the first defendant. The reference to citing the second defendant as a shareholder or *alter ego* of the

first defendant without alleging a connection between the cause of action and relief sought flies blindly into the realm of this company law. It shows a basic ignorance or misunderstanding of principles of litigation involving companies and the law of separate existence of a company and its shareholders in litigation. It is an elementary principle of company law that companies are separate juristic entities to be sued in their stead as such unless there are circumstances which the applicant must establish which justify *contra* the upliftment of the corporate veil of a company. The circumstance(s) must be specifically pleaded. See *Robert Tindwa v Sheriff for Zimbabwe & Anor* SC 94/22 where HLATSHWAYO JA (as them he was) stated in paras 10 and 11.

> "[10] The concept of separate legal personality of a company is the cornerstone of company law. The cardinal principle of company law as enunuated in *Salomon* v *Salomon & Co Ltd* [189] AC 22 (HL) and Dado Ltd Ors v Krugersdorp Municipal Council 1920 AD 530 at 550 is that a company is a separate entity that is distinct from its members. The concept of corporate personality is that a company once it is registered acquires a personality of its own quite distinct from its members or shareholders. See *Welli -well (Pvt) Ltd v Malvern Imbayago & Anor* SC 8/21 at p 6.
> [11] Because a company is separate from its members the courts will not readily disregard such corporate legal personality and lift the corporate veil so as to attach liability to individuals who are related to the company ……."

In fact, the confusion of the plaintiff of the plaintiff is also apparent when one considers that in the same declaration in para 2, the plaintiff pleaded that the first defendant was a corporate entity duly registered. The same criticism applies in relation to the citation of the third defendant. The plaintiff pleaded as follows in relation to the third defendant.

> "5.2 At the material times and in particular on the 6th October 2019, the third defendant was the approved insurer for purposes of Part IV of the Road Traffic Act [Chapter 13:11] of the Yutong bus registration No. ADZ 1425 belonging to the first defendant under policy number IccIa 1951-74536."

Nothing was pleaded to connect the allegation of the third defendant being an insurer of the first defendant and the of cause of action and/or the liability of the third defendant on the relief claimed by the plaintiff.

Despite the disconnects in the declaration as I have pointed them out above, the plaintiff then pleaded relief as follows;

> "WHEREFORE Plaintiffs'(sic) claims against all the three defendants jointly and severally; one paying the other to be absolved;
>
> a) Payment of damages in the sum of US $148 967.00 (one hundred and forty eight thousand nine hundred and sixty seven United States Dollars) or equivalent in Zimbabwe dollars at the prevailing interbank rate being the replacement of the plaintiff's bus which was damaged in an accident caused by the negligence of the first defendant's driver while acting on (sic) the course

and within the scope of his employment with the first defendant, the owner of a Yutong bus registration ADZ 1425 which was insured by the third defendant.

b) Payment of US$1 120.00 (one thousand one hundred and twenty United States Dollars) or equivalent in Zimbabwe dollars at the prevailing interbank rate being costs of towing the (sic) accident damaged bus from place of accident to plaintiffs' garage.
c) Payment of US$500.00 (five hundred united states dollars) or equivalent in Zimbabwe dollars per day being less of income from date of accident to date of full payment.
d) Interest on the total sum of amount stated in (a) to (c) calculated from date of demand to date of full payment."

No costs claim was pleaded nor sought in the relief by the plaintiff. No basis for the joint and several liability of the parties was pleaded in the declaration but for inexplicable reasons such relief was sought in the prayer.

The plaintiff was somewhat lucky in that the defendants by design or oversight did not except to the summons and declaration as not disclosing causes of action against the second and third defendant. The pleadings were not amended at any stage. The third defendant despite the fact that no grounds for its liability were pleaded nonetheless held itself in its plea, as being liable for damages to the extent of the statutory limit and proof of liability of the first defendant for damages and their quantum. The third defendant was generous in linking itself to a cause to which the basis of its liability was not pleaded save that it was the insurer of the defendant's bus.

Whilst it is correct that the parties did not raise exceptions to the pleadings, that failure does not sanitize the defective pleadings. The pleadings raise the issues for the court to determine. The issues arising from the pleadings are the ones on which evidence is allowed to be led. The adversarial system used in this jurisdiction in civil litigation and as mandated by the rules of court on settling pleadings requires that parties to litigation should place their cards on the table and not surprise each other at trial by withholding or hiding material facts needed to be pleaded for the furtherance and/or success of their claims or defences as the case may be.

It has however, been held that where an issue has not been canvassed in the pleadings but has been identified for determination at a pre-trial conference and fully canvassed at trial even if the pleadings are not amended, the court will determine the issue. In this way, a defective pleading will be cured by evidence see *Mtuda* v *Ndudzo* 2000(1) ZLR 70H at 719B – F. This case is quoted with approval in the Supreme Court in the case *Silonda* v *Nkomo* SC 6/22. In *casu*, I have already noted that the first and second defendants did not take exception to the plaintiffs summons and declaration. It follows that the plaintiff escapes sanction for the defective pleadings. The case will therefore be determined on the basis of the issues settled at pre-trial conference and endorsed by

the learned judge who presided the pre-trial conference. The court's criticism of the pleadings as stated in this matter remains and counsel is advised to pay due attention to settling pleadings properly to achieve what they are intended to achieve which is to clearly inform the court and the other party of the nature of the plaintiff's claim or the defendants defence as the case may be.

At the pre-trial conference, the parties agreed on the issues for determination as follows as set out in their joint pre-trial conference minute.

> "1. Whether or not the accident was caused by the negligence of the (sic) first defendants' employee.
> 2. Whether or not the first and second defendants were vicariously liable for the damages arising from the accident.
> 3. Whether or not the third defendant is indebted to the plaintiff, if so, the quantum thereof.
> 4. (**blank**)
> 5. Who should pay the costs and at what scale."

Issue number three was common cause because the liability of the insurer of the vehicle is governed by statute. This issue was settled by agreement of the parties. Counsel for the third defendant nonetheless continued in attendance in a watching brief, no doubt a rare but welcome instance when a legal practitioner is lawfully entitled to charge his fee sitting as a spectator in court proceedings.

In relation to pleading the grounds of negligence on which the plaintiff relies to prove blame for the accident on the Mandeep bus driver, the plaintiff pleaded as follows in para 7 of the declaration.

> "7. The said accident was solely caused by the negligence of the first defendants' driver who was negligent in one or more of the following.
> 7.1 He encroached into incoming lane despite the road markings prohibiting such conduct.
> 7.2 He failed to keep a proper look out of the road ahead.
> 7.3 He failed to keep the bus under control.
> 7.4 He drove at an excessive speed.
> 7.5 He failed to stop when accident seemed imminent."

So much for the poor grammar. It all boils down to a failure to put the mind to detail when drafting the pleading.

The first and second defendants in their plea denied that the Mandeep bus driver was negligent. They denied the allegations of negligence as follows in para 5 of the plea.

> "5 Ad para 7
> This is not admitted, is denied and plaintiff is put to the strict proof thereof. As both drivers died at the scene of the accident, there can be no basis for the plaintiff to exclude its own driver from having caused the accident."

The response is vague, embarrassing and not informative. If the first and second defendants intended to impute negligence for the cause of the accident on the Govasberg driver they ought to have pleaded so specifically. To plead that there is no basis not to impute negligence and causation for the accident on the other driver does not mean anything and is argumentative. Such kind of pleading is appalling and speaks to the need for counsel to continue to be guided by the rules of pleading. These are contained in r 36 (11 – 18) and r 37 of the High Court Rules 2021. They guide both the plaintiff and defendant on how to properly settle the plaintiffs and the defendants' pleadings respectively. Counsel are advised to refresh on these rules which are incorporated by reference. The criticism of the plea aside, taking a magnanimous approach, the plea can holistically be described as one of denial by the first and second defendant of liability of the Mandeep driver for the accident and the consequent denial of liability for the damages claimed by the plaintiff.

Reverting to the substance of the case, certain evidence was common cause. However, before detailing it, there is need to comment on the summaries of witness evidence filed by the plaintiff and first and second defendants in turn. Paragraph one (1) of he plaintiffs "summary of evidence" reads as follows:

> "1. The plaintiff will lead evidence from four witnesses namely, Lazarus Chigava its operations manager Lovemore Tibugare a member of the Zimbabwe Republic Police stationed at Kwekwe Traffic Traffic as a Road Traffic Evaluator. Ishmail Muchatura a survivor of the accident and Edwin Mutuze an employee of National Loss Adjustors (Private) Limited.
> 2. The evidence of the witnesses will be to the following effect……."

Thereafter there follows ten (10) paragraphs of summarised evidence which is prefaced as "The witnesses will say…." However, when one reads the summary it is clear that not every witness will testify to what is prefaced as "The witness will say…." Whilst there does appear to be a specific rule which requires that parties should prepare and file summaries of evidence unlike with criminal procedure, the filing of the summarizes have become accepted as necessary to inform the other litigant of the evidence to be led by or on behalf of the plaintiff and vice versa by the defendant. The point I observe and make is that when settling summaries of evidence, it is important that the witnesses are individualized with summaries prepared for each witness to be led in evidence. It is embarrassing to state that "witnesses will state" yet the individual witness will speak to different facts.

If the summary of evidence of the plaintiff stood to be criticized, that of the first and second defendants stood to be condemned. In fairness to the first and second defendants and to justify my view that their summary of evidence is not helpful at all, I quote what is presented as the summary. It reads:

> "First and second defendants summary of evidence.
> TAKE NOTICE THAT during trial, the first and second defendants through a single witness Shephere Gogwe with say:
> 1. That the first defendant is a family company in which the second defendant is a shareholder and one of the directors. No family member owns more that 20% of the shares in the first defendant.
> 2. The plaintiffs bus and the first defendants bus were involved in an accident on 6 October 2019.
> 3. Both drivers died at the spot. Accordingly, no driver lived to tell his or her story.
> 4. Whatever the cause of the accident it was not caused by the first defendant's driver".

If what is stated above amounts to a summary of evidence then it may pass as a summary of the witness stating that far as the cause of the accident is concerned he has no comment on allegations of negligence made against the Mandeep bus driver because only the deceased driver could tell what happened and that because the driver was dead, thus the accident should be passed off as one where the cause could not be ascertained since the Govasberg driver also died. In the same breath the witness would say that whatever caused the accident it was not through the fault of the Mandeep driver. The listed witness bears a different name from that of the second defendant and it was indicated that the witness would also speak for the second defendant. From the summary as quoted, what it really says is that as far as the cause of the accident was concerned the first and second defendant would offer a bare denial on the claim. There was no comment in the summary on the damages claimed. The so called summary of evidence did not summarize any evidence or facts at all hence its condemnation.

All the imperfections aside, the trial commenced. Counsel for the plaintiff summarized the plaintiffs' case as that the plaintiff claimed relief in three parts. Firstly, would be the claim for the replacement cost of the Govasberg bus, secondly costs of towing the wreck of the bus from the accident scene and thirdly, loss of business. Counsel submitted that the plaintiff held the Mandeep driver to have driven the bus negligently by encroaching on his wrong lane of travel thereby causing a head on collision with the Govasberg bus. Counsel submitted that the place where the accident had continuous road markings which prohibited overtaking.

In response to the plaintiff's summary, the first and the second defendant's counsel simply stated that as the drivers of both buses died on the spot, the plaintiff bore the onus to prove that the Mandeep bus driver caused the accident. Counsel also submitted that the first and the second defendants would say that the plaintiff was adequately compensated by the insurer of the Mandeep bus. As for damages counsel submitted that the issue would only arise after, proof of liability.

In response to the plaintiff's summary, the third defendant's counsel submitted that the defendant was the third party policy insurer of the Mandeep bus. He submitted that the third defendant honored its statutory obligations by paying the plaintiff $2000.00 being the statutory limit. Counsel further submitted that the third defendant wanted the court to declare that the third defendant had discharged its liability on the accident claim. There was no need in my view to seek such declaration to be made because the third defendant's contention was not contested. That was how and when third defendant's counsel indicated that he would remain as part of the hearing in a watching brief.

The parties had prepared a consolidated bundle of pleadings and another consolidated bundle of discovered documents. The bundle of documents was produced and marked exhibit A by consent. The bundle comprised of 216 pages. However, only a few documents were produced. Even then few were challenged. Counsel have a duty to avoid just pecking and putting together documents for court proceedings when they are not going to be used to advance the case or defence as the case may be. Counsel should try and curtail proceedings by seeking admissions of evidence and of documents prior to trial. They should use the opportunities provided in r 49 (1) and (2) of the High Court Rules 2021 which mandates the parties to hold their own pretrial conference to agree on the expedition and curtailment of the trial. They must relate to all matters set out in paragraph (a)-(b) of sub rule (2) of r 49. A further opportunity is provided for in r 49 (5) when parties then hold a further pretrial conference before a judge of this court. These processes are meant for and should be fully utilized by the parties to try and settle their dispute or if not settled, to streamline trial issues and to generally agree on how the trial can be curtailed

In relation to evidence advanced by witnesses, the plaintiff led evidence from the plaintiff's operations director Lazarus Chigova, from Loyd Rangarirai Mako, a mechanic employed by plaintiff, Inspector Lovemore Tibugwe and Constable Lizette Dani Dhenya who are police officers. The brief summaries of the evidence of these witnesses was to the following effect.

Starting with Mako the mechanic, his evidence related to the occurrence of the accident. He was a passenger on a different bus belonging to the plaintiff. The bus on which he travelled was on the same road enroute to Gweru. The bus on which he travelled arrived at the scene just after the Govasberg and Mandeep buses had collided. When the bus on which he travelled stopped at the scene, the witnesses) dis embarked and rushed to the crash site. The witness noted that the Govasberg driver had died and his body hung from the driver's window. The witness checked the Mandeep bus and noted that the driver whom he knew before as much as he knew the Govasberg bus driver was still alive. His legs were trapped in the driver's cabin. The witnesses conversed with the driver and asked him what had happened. The driver simply stated in shona "ndabhaiza" which was interpreted to the court to mean "I erred." The driver requested the witness to call the fire brigade and to also advise the driver's wife of the accident. The driver also asked for water but other persons present advised against giving the driver water as that could worsen his condition. The witness then saw the fire brigade arrive and remove the driver who appeared to have passed on. The witness who knew both drivers refused to commit to expressing an opinion on who caused the accident between the two drivers. In cross examination the witness stated that his understanding of the word "ndabhaiza" was that it means "to err". Other than further stating that there were many people at the scene, there was nothing of substance which was relevant to the issues for determination which the witness testified to. There was similarly nothing to doubt about the witness testimony. He gave his evidence well and honestly.

I next deal with the evidence of a police officer, constable Dhenya. She was a passenger in the Mandeep bus on the morning 6 October 2019. She had boarded the bus at Beitbridge terminus where the bus took off from. She is based at Zhombe police Station. She was returning home from a shopping trip. She boarded the bus on 5 October 2019 in the afternoon. The witness was seated on the driver's side on the third seat from that of the driver when counting seats from the driver cabin going to the back of the bus. In that seat the witness testified that she could see the driver and the road ahead clearly. She stated that on departure the bus was full but seemed to have a mechanical issue which was resolved when the conductor went under the bus and asked the driver to rev the engine. She was not sure about what was being repaired save that she saw that the conductor had removed his shirt and remained shirtless as the bus progressed on its journey. The

conductor would attend on police at road blocks still shirtless. The bus travelled overnight and was in Gweru in the morning and continued on its journey past Gweru.

The witness testified that she was tense on that day and did not sleep. She noted that the conductor fell asleep after covering himself with a blanket. Around dawn, she was witnessing cars from the Harare direction passing by. She then saw a bus coming from the opposite direction. At the same time she saw the driver of the Mandeep bus turn the steering wheel and the bus swerving into the lane of the oncoming bus. She saw the driver of the oncoming throw his hands into the air as if saying what you are doing to the Mandeep driver. The witness sensed imminent danger and a head on collision. She moved her legs to the isle and put them together to avoid the legs from being crushed on the seat in front of her. The witness stated that she waited for the eventuality and that was the last time that she witnessed the events until she came to and was still on the seat but with legs trapped in the baggage that had moved. The witness was assisted out of the bus by a man who saw her after she peeped through the window and he got into the bus and carried the witness on his back to outside the bus where the good samaritan sat her on the ground.

The witness testified that the two buses had their headlights lights on and that the collision occurred on the Govasberg bus lane of travel towards the edge of that lane as the Govasberg bus appeared to have moved to the extreme end of its lane of travel to avoid the collision.

The cross examination of the witness was not eventful. She denied that she was asleep nor that her testimony was not accurate. It is noted that even on this score the first and second defendants counsel did not suggest a *contra* account of how the accident occurred for the witness to comment upon. The only somewhat relevant question which she was asked was to explain the sign language of throwing both hands up by the Govasberg bus driver. The witness did not commit to a definite answer but volunteered an opinion that the driver by throwing both his hands up did not do so as a sign of despair but as a sign of astonishment or surprise at the driving conduct of the Mandeep driver. I would however, say it could be either or both for all it matters. The witness gave evidence with confidence in a clear manner which was easy to follow. The testimony remained unshaken in cross examination. The cross examination itself was hasty or cursory, not surprisingly so given the first and second defendants plea of a bare denial.

Dealing with the evidence of Sergeant Lovemore Tibugwe, he is an accident evaluator with the Zimbabwe Republic police. He had eighteen years' experience as an accident evaluator. He

attended the accident on 6 October 2019. He compiled an affidavit which counsel for the plaintiff took the witness through whilst highlighting points which the plaintiff considered key. At the scene, witness noted that the two buses were still locked together towards the edge of the road on the lane of Govasberg direction of travel or towards Bulawayo. In relation to warnings on the road, the witness testified that there was a continuous white line on the Mandeep lane of travel which forbade overtaking. On the Mandeep lane of travel there was also an arrow marking on the road pointing leftwards which was a warning to motorists to keep to the extreme left. The stretch of the road is straight and the road is tarred with a width of 9-3 meters and had a good tyre adhesion. The witness noted that the point of impact was on the edge of the Bulawayo bound lane which was the Govasberg lane of travel.

The witness noted that the Mandeep bus was laden with groceries which comprised gum poles, cartons of rice, bath soap, washing powder, drinks, net wire fencing rolls and other grocery items. There was luggage inside the bus too. The luggage which was loaded on top of the bus was secured by a tarpaulin. The luggage loaded inside the bus in the back area was thrown forward on impact causing injury to passengers whilst some of the luggage on the bus carrier of the Mandeep bus was on impact pushed to the top of the Govasberg bus which did not have a carrier.

In his reconstruction of the accident, the witness opined from facts on the ground that the Mandeep bus encroached onto the lane of the Govasberg bus and continued to cross the white line which forbid overtaking before hitting into the Govasberg bus whose driver had swerved the bus to the left edge of its lane of travel in an attempt to avoid the collision. The witness noted that the speedometer of the Mandeep bus was stuck at 110km per hour which meant that the driver was driving at 30 km per hour above the 80km per hour authorized maximum speed limit for buses. In his conclusion the witness attributed blame and fault for the accident on the Mandeep bus driver.

Under brief cross examination by counsel for the first and the second respondents about his experience the witness stated that he had lost count of the number of accidents which he had evaluated as they were many. He had also evaluated similar accidents involving head on collisions involving buses. When asked which of the two buses suffered worse damage, the witness answered that it was the Mandeep bus. When asked whether the point of impact and resting place of the buses was the same, the witness confirmed so. When asked why he opined that the Mandeep bus was over speeding, the witness indicated the speedometer was struck at 110km per hour often

impact. When asked about the speed of the Goversberg bus, the witness stated that he could not tell because there was extreme damage to the front of that bus and the speedometer was damaged. When asked whether he worked on probabilities the witness stated that he used evidence on the ground. When told that a witness Dhenya had stated that the bus was not over speeding the witness responded that the witness had expressed her opinion. The witness stated that the best evidence was the speedometer stuck at 110km per hour because it stops once power is cut as happened on impact. It was not suggested to the witness that the speedometer may not have been working prior to the impact. The witness also stated that the movement of luggage on the Mandeep bus roof carrier onto the top of the Govasberg bus and goods from inside the back of the Mandeep bus to the front as well as the extent of damage to both buses was indicative of a high speed impact.

In the assessment of the witness, the court noted that he gave flawless evidence in a manner easy to follow and was confident of himself as he gave evidence. He took photographs of the scene and was attentive to detail. His opinions were factually supported by evidence on the ground. His cross examination was not eventful and his testimony remained intact. It was easy and comfortable to accept the evidence of the witness as credible.

The last witness whose evidence is dealt with was Lazarus Chigova who was however called as the first witness for the plaintiff. I decided to deal with her evidence last for chronology in determining issues. His evidence was relevant to the claim for damages whilst the rest of the witness whose evidence has been dealt with related to liability for the accident.

The witness Chigova stated that he is the operations director of the plaintiff and sees to the day to day operations of the company's bus fleet. He testified that the Govasberg bus left Kwekwe headed to Gweru with forty passengers on board. He then received a report of the bus having been involved in a fatal accident. The witness produced the road worthiness certificate for the bus and the RT 16 notice given by vehicle inspection department (VID) to prohibit the use of the bus. As regards the removal of the bus from the accident scene, the vehicle inspection department directed that the bus should be craned to a place of repair. The vehicle inspection department vehicle exemption report no 213 showed extensive frontal damages to the bus. The bus towering charge was $3 220.00 from the accident scene to Kwekwe which was 22km away. An invoice with endorsement of payment being invoice number 0985 was produced. The witness produced a "write off" report of the bus which was assessed to be beyond repair by a company called Dulys Harare.

The witness produced another assessment for repair report prepared by National Loss Adjusters (Pvt) Ltd dated on 8 November 2019. The report showed the market value of the bus as US$145 000.80 and concluded that the bus was a write off. The report shows that the opinions of Swiss Motors, Willowvale Panel Beaters and Hammer and Tongues were sought and they all concluded that the bus was a write off. The witness produced a report for towing the bus from Kwekwe to Harare and the charge was $RTGS 15 020.

In relation to lost income which would have been realised from the written off bus had it been operational, the witness testified that the bus route served by the bus was Kwekwe to Gweru to Chivhu to Murambinda and Mutare as the final destination. The witness testified that he reassigned a bus which was plying the Kadoma to Chipinge route to replace the damaged bus. The Kadoma to Chipinge route had two buses doing opposite trips. The reassignment of one bus meant that there was loss suffered on the Kwekwe Chipinge route by reason of the deployment of one bus in place of two.

The witness by consent produced waybills for the period 1 August 2019 to 5 October 2019 for the days that the Govasberg bus registration number ADC 4592 travelled to Mutare and returned to Kwekwe on following day. A waybill was said to be a document or form filled in by the conductor of the bus and it shows *inter-alia* the mileage travelled, tickets sold, amount realized, fuel used, rank marshall payments, bus wash, airtime, staff allowances, police fines, gross and net income. Counsel for the parties agreed to the schedule of summary of the total of waybills for the Govasberg bus ADC 2592 for the period 1 August 2019 to 5 October 2019. The net total amount for the period 1 August 2019 to 30 August 2019 was $95 707. For the period 1 September 2019 to 5 October the amount was given by consent as $238 438.

The witness produced another schedule of waybills for the period 3 October 2019 to 29 November 2019. The waybills which are summarized on the schedule relate to bus number registration AEG 6417 plying the same route as bus registration ADC 2592. The next income for the period 3 October 2019 to 30 October 2019 was given as $71 789 and for the period 31 October 2019 to 29 November 2019. The net income was $56 952. The plaintiff also prepared a summary of all waybills for the period 1 August 2019 to 29 November 2019 showing gross income realized per trip in local currency. For the period 25 September 2020 to 8 October 2020 the income was reflected in United States dollars. The witness testified that bus registration number AEG 6419

would cross with bus AEG going in the different direction from bus registration ADC 2542. The witness stated that the plaintiff buses' most lucrative route was Chipinge, Mutare and Kwekwe. No evidence was led on the incomes realizable from that route nor was the significance of this route to the claim extrapolated upon. The witness testified that the salvage of the bus was in Harare. Earlier in his testimony the witness stated that the value of the salvage was between forty and sixty thousand dollars.

The witness was cross examined on the cause of the accident and had no comment. He agreed that his evidence related to the claim for damages. In relation to the claim for the damaged bus being ferried to Harare, the witness justified the expense on the basis that the plaintiff wanted to have the bus rebuilt. However upon assessment it was written off. Significantly the witness was asked to confirm that he deployed another bus to cover the gap left by the damaged Govasberg bus. The witness responded that no bus was deployed on that route but that after the accident some passengers who could continue with the journey after the accident were reloaded on another of the plaintiff's buses which was following behind the one which was involved in the accident and plies the same route but continues beyond Mutare to Chipinge. Some of the passengers were also loaded on a ZUPCO bus going to Chipinge. The witness could not say how much money was refunded to passengers for those who were refunded.

In relation to waybills, the witness was asked to confirm whether or not they were not prepared for purposes of the court case. The witness averred that the waybills were authentic and that no bus travels without them. The witness admitted that the plaintiff's income was not constant. He stated that the plaintiff considers monthly waybills, adds them together and then calculate average profit per month. The third defendant's counsel put questions which are inconsequential to the issues for determination like asking the witness whether he knew the statutory limit which the insurer pays on a third party policy.

The witness gave evidence well. However, his explanations on the damages claim based on waybills was not clear in that the waybills were not related to the loss of income claim. He did not quite explain how if the damaged bus was replaced and it continued to ply the same route the waybills on the trips by that bus could be used to justify a damages claim. The issue remained crying for clarity. The plaintiff closed its case after the evidence of the witness I have dealt with had testified.

Counsel for the first and second defendant advised the court that he was instructed to apply for absolution from the instance. Despite it being clear that evidence of witnesses on the cause of the accident implicated the Mandeep bus driver and needed to be explained, the court could not refuse counsel the right to make the application. Time lines were granted for filing of written submissions by counsel and the matter was postponed. On the resumption date first and second defendant's counsel capitulated to reason, common sense and logic and abandoned the application for absolution from the instance. The first and second defendants opened the defence case.

The first and second defendants led evidence from two witnesses Timothy Kufamunhu and Charles Gurure. Counsel for the first and second defendants produced the affidavit of the witness Timothy Kufamunhu by consent and advised the court that he did not have further questions hence opening the witness to cross examination. In the witness affidavit sworn to on 13 April 2023, the witness deposed that he was employed by the first defendant as the operations manager since 2013. He deposed that the first defendant's buses are subjected to fitness tests every five months. The company has six mechanics who carry out regular checks on the buses. He further deposed that the first defendant buses had never been involved in any serious accidents. He also deposed that the buses had two drivers on long distances routs and that if passengers have a lot of luggage the three back rows of the seats would be utilized for luggage. That was all that the witness deposed to in the affidavit.

Counsel for the plaintiff surprisingly saw the need to cross examine the witness. The cross examination was not unexpectedly inconsequential and irrelevant to the issues for determination being liability for the accident and damages if any are due. The witness answered the questions in cross-examination irrelevant as they were well. The witness appeared lost and must have wondered why he was called to court.

The second witness for the defence was Charles Gurure. The witness deposed to an affidavit which counsel produced by consent. The witness in the affidavit deposed that he was a passenger in the Mandeep bus which was travelling from Beitbridge to Kwekwe. The witness had travelled on the same bus going to Beitbridge. He deposed that the bus was involved in an accident around 4.00 a.m. He deposed further that just before the collision he saw lights flashing in front before impact when there was a collision. The witnesses also deposed that the Mandeep bus was not speeding and that the driver maintained the same speed during the journey to Beitbridge and

back. The witness said that he sat on the first seat on entering the bus. He was able to escape through the window before he opened the door for passengers to disembark. The witness stated that the Mandeep bus driver was trapped and crying for help but no one went near the driver until the fire brigade came. The witness related to a stoppage of the bus around Bubi Bridge area when the driver checked the bus accelerator cable but did not disclose what was wrong with it before continuing with the journey.

The witness was cross examined somewhat intensely although his evidence was not very key. He only saw lights flashing and the next, a collision. He was asked why he stated that the Mandeep bus was not speeding and he responded strangely that had the driver been speeding the bus would not have had an accident as it would then have passed the place of accident. When referred to evidence of the stuck speedometer of the bus locked at 110km/h the witness stated that there was a slope at the place of impact suggesting that the bus speed then increased. The witness also stated that just before impact he had just given his power bank to a woman who wanted to charge her phone and was therefore awake and conscious of the happenings..

The witness did not fare very well in cross examination. It was clear that he saw very little and did not witness much about the accident and how it occurred. He was lucky to have survived in any event given the position of the seat which he occupied. The witness's evidence on the cause of the accident was not helpful. In fact he only saw flashed lights from the opposite direction and thereafter there was the impact. The court noted that the witness evidence was not helpful. The first and second defendants closed their cases at this juncture.

The third defendant who had not been expected to table a case indicated that the third defendant would lead evidence. Counsel for the third defendant called Pamela Masikati, a claims supervisor with the third defendant. She testified that the statutory limit and liability of the third defendant on the third party policy that covered the insured in the accident was $2 000 and that the third defendant discharged its liability by paying the said amount. Having testified to the obvious there was no cross examination of the witness. The third defendant closed its case. It had no case to close because its liability was never contested.

Counsel filed written closing submissions. Plaintiff's counsel submitted that the first and second defendants must be held to have made admissions of the facts which were contained in the notice to them filed on 17 November 2022 and served on 18 November 2022 asked by the plaintiff

asked the defendants to make the listed admissions. The notice it was common cause was not responded to. No explanation was given by the first and second respondent for failure to respond to the notice. All that they submitted was that since the matter went to trial, the court should determine the case only on the evidence led and disregard the notice. The notice to admit facts was couched as follows:

> "**TAKE NOTICE THAT** plaintiff in this cause required first and second defendants to admit, for the purposes of this cause only, the several facts respectively hereunder specified.
>
> **TAKE FURTHER NOTICE THAT** the facts, the admission of which is required are:
>
> [1] That Tafadzwa Shambare was employed by first defendant and was acting in the course and scope of his employment when the accident occurred.
> [2] That defendant's bus was loaded with groceries of varieties and fencing rolls and net wire, some of which were loaded in luggage compartments and others on top of the bus in a tarpaulin. The bus had no roof track and on impact, most of the groceries were thrown forward in defendant's bus whilst others were thrown on top of plaintiff's bus.
> [3] That the accident occurred on plaintiff's side of the road and in its lane.
> [4] That the road markings at the 264km peg where the accident occurred include carriage way markings and a white continuous line that warn Harare bound traffic to keep left and prohibit traffic from overtaking, crossing, or changing lanes.
> [5] That the accident occurred on the lane of traffic travelling towards Bulawayo.
> [6] That when the accident occurred, the front of plaintiff's bus was outside the road on the left side of its lane.
> [7] That the speedometer of defendant's bus was stuck or jammed at a reading of 110km/hour.
> [8] That the damage of plaintiff's bus was such that it was written off.
> [9] That the replacement value of the bus is USD148 967.00.
> [10] That the bus was towed away from the accident scene at a cost of USD1 120.00.
> [11] That plaintiff's bus had a valid road permit for the Mutare–Kwekwe route.
> [12] That from this bus and route, plaintiff was realizing at least USD500.00 per day.
> [13] That this income was lost because of the accident and continues to be lost.
>
> **TAKE FURTHER NOTICE** that first and second defendants are required, within ten (1) days excluding Saturdays, Sundays and public holidays from the service of this notice, to admit the above facts, saving all just exceptions to the admissibility of such facts as evidence in this cause."

The notice is provided for in the procedure for admissions as provided for in r 50 of the High Court Rules 2021. In the previous rules 1971 the procedure was provided for in Order 27. There has been a cosmetic change in r 50 dealing with costs implications in that the party not admitting facts will not pay costs if the court is satisfied that the refusal to admit "was reasonable and was not frivolous." At the risk of impregnating the judgment with quotes, it is I believe necessary to quote the provisions of r 50. They say:

> **"50. Admissions**

(1) A party to a cause or matter may give notice, by his or her pleading, or otherwise in writing, that he or she admits the truth of the whole or any part of the case of any other party.
(2) A party may by notice in writing at any time not later than ten days before the day for which notice of trial has been given –
(a) call on any other party to admit for the cause, matter or issue only, the facts mentioned in such notice;
(b) call on any other party to admit, saving all just exceptions, that any document was properly executed or is what it purports to be.
(3) The notice to admit facts shall be in Form No. 18 and admissions of facts shall be in Form No 19 and the notice admit documents shall be in Form No 20 and these documents shall be filed before trial.
(4) In the case of failure to reply to the notice to admit any facts within ten days of delivery the party called upon therein shall be taken as having admitted all such facts for the purposes of the cause, matter or issue only.
(5) in the case of refusal to admit any facts, the costs of proving them shall be paid by the party so refusing whatever the result of the cause may be, unless the court considers that the refusal to admit was reasonable.
(6) In the cases of failure by the party to reply within ten days when called upon to admit that any document was properly executed or is what it purports to be, then as against such party the party giving notice shall be entitled to produce the documents specified at the trial without proof other than proof that the documents are the documents referred to in the notice and that notice was duly given if those facts are disputed.
(7) If the party receiving the notice states that the documents are not admitted as aforesaid, such documents shall be proved by the party giving the notice before he or she is entitled to use them at the trial but the party not admitting them may be ordered to pay the costs of their proof unless the court is satisfied that the refusal was reasonable and was not frivolous.
(8) The court may at any time allow any party to ament or withdraw any admission so made on such terms as may be just.
(9) If a notice to admit includes unnecessary facts or documents, the extra costs occasioned thereby shall be borne by the party giving such notice."

A consideration of r 50 as quoted brings out the following highlights. The notice to admit has a time line of not later than (10) days to the date of trial for giving it. In *casu* the notice was given many days before trial. In fact a trial date had not been set when the notice was filed. The notice may relate to facts or documents. The notice must give (10) ten days from delivery to the party required to admit to respond to it. If the party to whom notice is given fails to reply to the notice within (10) ten days of delivery of the notice, subrule (4) above obliges the court to deem the defaulting party to have admitted the facts or documents in the notice whose admission is sought. The deemed admission will only apply to the matter before the court and may not be used for other matters or causes.

Subrule (5) above would on the face of it appear to be draconian as it penalizes a "refusal to admit any facts" with an order of costs of proving the facts whether or not the party who refused

to admit the facts was successful or lost the case. The court will however excuse the errant party from liability for costs if the court considers that the refusal was reasonable. The subrule when considered carefully says no more than that a party who is asked to admit facts is expected to admit them if they are not contentious or are common cause and may only refuse to admit the facts for reasonable cause. The circumstances of each case will determine whether or not there is reasonable cause to refuse to admit the facts and whether if the party who has requested the admission is then forced to prove those facts, the party that refused to admit the facts should be ordered to pay the costs of proving the facts.

More or less the same considerations apply to the notice to admit the authenticity of documents as provided in Subrule (6). A party can on (10) days' notice require the other to admit that any document was properly executed or that it is authentic or that it is what it purports to be. If the party requested to admit does not reply to the notice, then and as against the party that has not replied to the notice, the requesting party shall be entitled to produce the documents listed in the notice without proof except to prove that the documents are the ones listed in the notice to admit and to also prove that the defaulting party was served with the notice. Subrule (7) provides for a costs sanction against the party who has refused to admit the documents and the party seeking the admission has proved them. The court will saddle the party who refused to admit the documents with costs if the court is satisfied that the refusal was unreasonable and frivolous.

Subrule (8) provides that at any stage of the proceeding a party may be allowed by the court to amend or withdraw any admission on such terms as the court may find to be just. Lastly a party requesting the other to admit unnecessary facts or documents may be ordered to pay extra costs occasioned by the unnecessary request. It must however be noted that the onus is on the other party to show that unnecessary facts or documents were listed for admission.

There is no gainsaying that admissions are central and integral to the speedy dispensation of justice in trial causes. They ensure a curtailed trial because once facts and documents which are common cause are admitted, the court treats them as such. A court should not be made to hear a narration of common cause facts from which no determination is required of it to make. The court should be left to deal with disputed facts and documents. The purpose of r 50 and its sanctions is to chivvy litigants to try and admit facts and documents and obviate a prolonged trial. The court's time is saved and parties are similarly saved legal costs associated with a prolonged

hearing. Courts must generally give effect to r 50 to achieve its noble objectives in the speedy resolution of trial causes. It can be seen that processes such as admissions seek to achieve more or less the same aims as pre-trial conferences and the processes complement each other, the ultimate aim being to expeditiously dispose of trial causes.

The dicta in the case of *Chikwavira* v *Mutonhora & Anor* HH 224/16 to the effect that the purpose of seeking admissions before a trial helps to stream line issues between the parties and save time and costs is correct . In the case of *Delta Corporation Limited* v *Forward Wholesalers (Private) Limited and Joseph Munyondo* HH 53/17 CHIGUMBA J in dealing with the subject of admissions and their effect quoted the case of *Mining Industry Pension Fund* v *Dab Marketing (Private) Limited* SC 10/2011. In that case the Supreme Court per MAKARAU JA (as then she was) had to deal with the issue of whether or not in circumstances where a defendant has admitted the plaintiff's claim in a plea and the plea is not amended or withdrawn the defendant can be absolved from the instance on the basis of insufficient evidence led by the plaintiff. In finding that the admissions held as proven evidence of the admissions, the learned judge commented generally on the subject of admission and *inter-alia* stated:

> "A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issues or facts admitted. Thus where liability in full, as *in casu*, is admitted, no evidence is permissible to prove or dispose the defendants admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted (See *Rance* v *Union Marcantile Co. Ltd* 1922 A1) 312; *Gordon* v *Tarmon* 1947 (3) SA 2525 AD; *Moresby-White* v *Moresby-White* 1972 (1) RLR 199 (A1) at 203 E – H 1972 (3) SA 222 (RAD) at 224; DD *Transport (Private) Limited* v *Abbot* 1988 (2) ZLR 98 and *Liquidation of M & C Holdings (Pty) Ltd* v *Guard Alert (Pty)* Ltd 1993 (2) ZLR 299 (HC)."

Section 36 of the Civil Evidence Act [*Chapter 8:01*] provides for admissions in civil litigation as follows:

> "(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those, shall be admissible in evidence as proof of that fact whether the admission was made orally or in writing or otherwise.
>
> (2) Subject to subsection 3 in determining. Whether or not any fact in issue has been proved, the court shall give such weight to any admission to have been made in respect of that fact as the court considers appropriate; bearing in mind the circumstances and manner in which the admission was made.

(3) It shall not be necessary for any party to Civil proceedings to prove any fact admitted on the record of the proceedings.

(4) It shall not be competent for any party to civil proceedings to disprove any fact admitted by them on the record of the proceedings.

Provided that this subjection shall not prevent any such admission being withdrawn with leave of the court, in which event the fact that the admission was made may be proved in evidence and the court may give such weight to the admission as the court considers appropriate, bearing in mind the circumstances in which it was withdrawn."

There can be no doubt about the commanding position which admissions play in action proceedings. The first and second defendants down played the enormity of their failure to respond to the notice to admit. They did not show just cause why the notice with facts whose admission was sought was ignored. They cannot escape the deeming of the facts which they were requested to admit but ignored the notice as proved.

All the facts which the first and second defendants were requested to admit were material to the resolution of the claim made against them in this action. The court will deem the facts as set out in the notice to admit facts as proved. The effect of accepting the admissions is to find as agreed facts the following ones of significance to the issue of lability

(a) That the accident occurred on the plaintiff's lane of travel meaning that the Mandeep bus driver encroached on the lane of the incoming Govasberg bus driver encroached on the lane of the incoming Govasberg bus.
(b) That the road markings at the scene of the collision were carriage way markings and a continuous white line that prohibited Harare bound traffic and therefore the Mandeep Bus driver from changing or, crossing lanes.
(c) That on impact, the Govasberg bus driven had moved to the extreme side of his lane of travel to avoid the head on Collion.
(d) That the Mandeep bus driver was speeding at 110km/h on impact as evidence by the speedometer of his bus which was stuck at 110km/hr after the accident.

On these facts, the conclusion that one makes is that the Mandeep bus driver was negligent in one or more or all of the following particulars of negligence;

(i) He drove at an excessive speed of 110km/hr when the legal speed limit was 80 km/hr when the legal speed limit was 80 km/h.

(ii) he encroached on the lane of oncoming traffic and hit his bus into the Govasberg bus.

(iii) He – failed to act reasonably or take any avoiding action to avert the collision.

The first and second defendants have themselves to blame for gifting the plaintiff with the arsenal of admissions to aid the plaintiff from proving its claim against at least the first defendant.

Despite digging their grave so to speak in having admissions which they did not make being held against them, they gained a small window of opportunity to challenge some of the damming evidence in the form of admissions. The plaintiff decided not to rely on admissions only but to collaborate its evidence already admitted by default through calling witnesses to give oral testimony. Such approach has its risks. It may result in the witness called to give oral testimony contradicting the admissions and this is what happened in respect of quantification of damages as it will be shown later.

Upon the plaintiff deciding to call further evidence on admitted facts and in this process defeating the whole purpose of admissions which is that an admitted fact is proved *finis* by leading evidence on facts admitted, this opened the window for the first and second defendants counsel to exploit the chance to destroy the admissions or their effect by at least putting the admissions to the plaintiff witnesses and seeking contrary evidence. This the first and second defendants failed to do. It turned out that the plaintiff witnesses being Constable Dhenya and inspection Tibegane cemented the admissions. The witness called by the first and second defendants, Charles Gurure did not give any evidence assistive to the court and did not testify to exactly how the accident occurred. In any event the evidence on the ground as testified to by the accident evaluator clearly showed that the Mandeep bus was travelling above the legal limit and that the driver encroached on the incorrect side of the road and hit into the Govasberg bus whose driver tried to avoid the crash. There was feeble or no challenge to these significant pieces of evidence.

The totality of the evidence led clearly lead to the conclusion that the plaintiff proved on a balance of probabilities that the Mandeep bus driver drove the Mandeep bus negligently and solely caused the catastrophic accident. There is no need to get entangled in the issue of res qestae which the plaintiff's counsel raised in relation to what the driver of the Mandeep bus reported to the plaintiffs witness Shambare. Enough evidence was led to prove the negligence of that driver.

The next and last issue pertains to the damages claimed against the first and second defendants. The plaintiff sought the admission that the bus was written off. There really was no

controversy on that. However, the bus or wreck had a Salvage value and in addition the third defendant assurance company also paid its $ 2000.00. Counsel for the plaintiff quoted several South Africa court cases to move the submission that the plaintiff is entitled to recover from the defendant the amount that represents the diminution in the plaintiff's patrimony by reason of the defendants wrongful actions. Counsel quoted *inter-alia* the following decisions *Trotman v Edwick 1951 (i) SA 443 & Ranger* v *Wykera* 245 1977 (2) SA 976 (A).

The further principle cited by the plaintiff counsel was that the onus was on the plaintiff to prove the market value of its property. Counsel quoted the following *dicta* from the decision in *Philip Robimison Motors (Pty) Ltd* v *NM Dada (Pty) Ltd*. 1975 (2) SA 420(A) at 428 F-G where it is stated that:

> "The time at which to measure the delictual damages is ordinarily the date of the delict because that is when the owner's patrimony is reduced. In the present case the date is 17 June,1971 who the respondent unlawfully disposal of the applicants on to Verster.
>
> The measure of damages is the value of the article to the owner. See the judgement of TROLLIP J as he them was in *Mlambo* v *Fouice* 1964(3) SA 350 (T) at p 358 and authorities therein cited"

The law is therefore clear in that regard. The first and second defendants did not argue otherwise.

Plaintiffs' counsel referred the court to documents which were part of the consolidated bundle. Willowvale vehicle Body Engineering company (Pvt) Ltd assessed the wreckage of bus and commented:

> "The bus has suffered catastrophe and excessive structural damage that have rendered it uneconomical and unsafe to repair – a write off – salvage value and cost of repairs is far much grater than its current value. The body have (see) been compressed and reduced into a shell.
>
> Therefore, the bus is a total write off with a salvage value of ZWL $40 000.00 to 60 000.00 (Exchange rate USD = 15.8 ZWL $....."

As already noted, the company National Loss Adjusters (Pvt) Ltd after writing off the bus indicated that the Market value of a similar bus cost USD 145 000.00. The bus was of the Yutong type being a 2014 model that has a passenger capacity of 65. The plaintiff did not lead evidence on the replacement value of the bus which it pleaded to cost US 148 967.00. The plaintiff did not take into account the value of the salvage. The plaintiff was entitled to rely on the deemed admission by the first and second defendants that the replacement cost of the bus was USD 148 967.00. That figure must be accepted by the court. If the value of the salvage was a maximum of

60 000 ZWL $ at an exchange value of USD $15.8 the salvage value was therefore USD$3 797.47 when converted. If the value of the salvage is deducted from the replacement cost, the reduced cost would be USD 145 169- 52. In addition, the sum of ZWL $ 2000.00 paid by the third defendant must be accounted for in the replacement cost. Using the same exchange rate of 15.8 ZWL to 1 USD. The amount equates to USD $ 126.58. If the amount of USD$126.58 is further deducted from the USD $ 145 169.52. The reminder is USD 145 042.94. The plaintiff is entitled to this amount and not USD148 967.00. The court is entitled to determine the matter based on all available evidence including the admission and the factoring in of the salvage value and the insurance money.

The claim for towing the bus in the sum of US $ 1120.00 was not contested and was deemed admitted. This amount will be awarded to the plaintiff as claimed.

The claim for loss of income was supported firstly by the deemed admission that the plaintiff realized an average income of USD $ 500.00 per day. The figure was supposedly backed by way bills showing the gross and net income realized per trip on the route in question. The first and second defendants counsel queried the authenticity of the way bills. Indeed, those produced for the period post the accident recorded the plaintiff's replacement bus doing the trips as registration ADC 2592 yet this bus was already a wreck and not on the road. The court was not convinced that it could rely on the evidence of waybills. However, the first and second defendants even without the evidence of way bills admitted by operation of law, that the average figure of net income was US $ 500 per day. The first and second defendants counsel in his not so helpful closing submission did not deal with the loss of income claim save to state that it was not proper to include the period of litigation in the assessment thereof.

In Cooper Motor Law Vol 2 on p 392 para–C as quoted by CLAYDEN J in *Shroq* v *Valentine* 1949 (3) SA 1228 (t) on 1237-8 it is stated

> "A plaintiff is entitled to claim for loss of income or loss of profits which results from his being deprived of the use of the vehicle while it is being repaired……. Since a party is bound to mitigate his loss, a businessman should normally hire another vehicle in place of the damaged one. In that event however he does not have to prove that the expense was reasonable, the reasoning being.
>
> "…….. the lost profits owing to the deprivation of the use of a vehicle are not required to be reasonable. They are the actual profits. Where that loss was avoided by the taking of steps by the plaintiff to hire a lorry to replace the damaged vehicle, the expense is an expense for which the

> defendant is responsible unless he can show that the action of the plaintiff in hiring a lorry at all, or in hiring a lorry at that cost was unreasonable."

The plaintiff must therefore mitigate the loss. This aspect of the claim was not adequately dealt with by the plaintiff. The evidence of the plaintiff was that another bus was deployed on that route. If another bus continued to ply that route, then there could not have been a loss of income resulting from that route since the route continued to generate more or less the same amount after deployment of a replacement bus. It seems to the court therefore that the loss of income in the circumstances was not proved. The income continued to be generated as before on that route. In such circumstances, the plaintiff was required to claim the cost of deploying a replacement bus to ply the same route. In other words, the plaintiff would have maintained the same position it was in at extra cost. The extra cost is then the loss to the plaintiff. That evidence was not led. The admission that the written off bus realized income of US $ 500.00 per day on its own is just an admission of a fact but the issue remains, so what, about the US$ 500.00 vis -a- vis loss of income since the same income continued to be realized. The court is not satisfied that the claim for loss of income was properly pleaded or settled in evidence.

The next issue pertains to costs which the plaintiff claims on the scale of legal practitioner and client. Costs were not sought in the summons and declaration. They were however made an issue at pre – trial conference and therefore may be claimed. Costs are in the discretion of the court. Legal practitioner and client costs are punitive in nature. They must be specifically pleaded and proved. The courts attention was drawn to the case of *Chisese* v *Garamukanwa 2002(2) ZLR 392* SC 68/ 2002 per GWAUNZA AJA (as she then was) at 405A-B.

> " It is correct that costs on a higher scale can only be awarded in exceptional cases. Lack of *bona fides* on the part of the party against whom such costs are sought may justify an award of costs on the higher Seale. *See Damudson* v *Stanndard Finance Ltd* (supra) where the following passage is cited with approval.
>
> "Absence of *bona fides* in conducting litigation may constitute a ground for awarding costs on an attorney and client scale."

The court is not satisfied that the defence of the matter was not *bona fide*. It is a difficult claim for damages and could not be said to have been clearly cut out as evidenced by the interrogation by the court of damages claimed. What may have given a false impression that the first and second defendants did not defend the matter with *bona fides* was the poor standard of

settling their papers and presentation of their case by their legal practitioner. They were really not assisted and neither was the court. Any wins which the first and second defendants may have made are not attributable to their counsel's prowess but to the law and the evidence which led to such wins such as reduction in the replacement costs of the plaintiff bus and inadequacy of the plaintiffs claim for lost income. Ordinary costs will be granted. The plaintiff did not in any event succeed in all its claims thus showing that the matter was not an easy one.

The last issue is that there was no basis presented on the evidence to attach personal liability for the claim on the second defendant. The second defendant did not give evidence. the plaintiff did not apply for a default judgment against the second defendant. In claims for damages default judgment would still have to be supported by evidence. There is no legal basis to attach liability on the second defendant personally.

The matter is therefore disposed of as follow:

IT IS ORDERED THAT

1. The first defendant shall pay the plaintiff the sum of USD $145 042.94 or the equivalent in ZIG currency at the official bank exchange rate prevailing on the date of payment as replacement cost for the plaintiff's written off bus together with interest of 5% per annum from the date of judgment to date of payment.
2. The first defendant shall pay to the plaintiff $ USD1120.00 or its equivalent in ZIG currency with interest of 5% from the date of judgment to date of payment being bus towing charges.
3. The claim for loss of income fails and is dismissed.
4. The claim again the second defendant is dismissed.
5. The claim against the third defendant is disposed of as withdrawn.
6. The first defendant pays costs of suit on the court tariff.

Bherebhende Law Chambers, plaintiff legal practitioner
Lovemore Madhuku, first & second defendant legal practitioner
Zinyengere Rupapa, third defendant legal practitioner