DAVID ALAN CLARKSON TREDGOLD N.O.
(In his capacity as Curator Bonis of Amanda Visser)
versus
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUNGWIRA J
HARARE, 2-6 July 2001, 5 November 2001,
9 September 2003 and 28 July 2004

Advocate *E Mushore*, for the plaintiff
Advocate *E. Matinenga,* for the defendant

MUNGWIRA J: The Plaintiff is the curator *bonis* of the estate of Amanda Visser who, on July 15, 1998, sustained severe injuries when a motor vehicle which she was driving across a rail crossing on Mardon Road, Msasa, Harare, was struck by a train. The plaintiff claimed damages against the defendant, National Railways of Zimbabwe on the grounds that the defendant is vicariously liable for the negligent acts and/or omissions of its driver who is alleged to have caused the collision, more particularly in that: -

a) he drove too fast under the circumstances prevailing: and/or
b) he breached a special duty of care which he owed Amanda Visser in the circumstances prevailing as he had a very clear view of the traffic jam in front of him and a clear view that a collision was imminent, but failed to prevent the same; and/or
c) he failed to keep a proper lookout; and/or
d) He failed to sound his whistle sufficiently to warn persons at the vehicular crossing that he was approaching; and/or
e) He failed to brake sufficiently to prevent a collision occurring when it was imminent; and/or
f) He failed to avoid a collision when, by the exercise of reasonable care, he could and should have done so.

The plaintiff, additionally or in the alternative, pleaded that in any event, the collision was caused by the negligence of the

defendant in one or more of the following respects, namely its failure :-

a) to erect a preventive boom at a rail crossing at a busy industrial crossing;
b) to erect flashing lights to warn the public when there is a likelihood of a train passing through the rail crossing;
c) to provide sufficient whistle boards at sufficient intervals to warn vehicles using the crossing that a train passing is imminent;
d) to mark the vehicular crossing adequately to warn the public that it is a rail crossing;
e) to regulate for these safety measures at a crossing which clearly requires that adequate preventative measures be taken.

At the close of the plaintiff's case, the defendant sought an order of absolution from the instance on the ground that the plaintiff had failed to establish a case on the issue of liability such as would require an answer from the defendant.

The plaintiff's case on the issue of liability is founded upon the testimony of four witnesses, namely, Messrs Pindayi, Kwambana, Van Rooyen and Schoeman.

The first two witnesses were employees of a company, Earth and Fire, situate on the northern side of the rail crossing. They both claim to have been, on the date in question, assigned the task of loading a lorry which was outside the premises of their employer.

The evidence of Mr. Pindayi was that he was on the back of the lorry at about 3:30 p.m.

His observations were that the road which traverses the rail crossing was at that time very busy. There were, according to him, vehicles on the southern side of the crossing proceeding in the northerly direction and traffic on the on the northern side of

the crossing was at the time stationary as it was giving way to other traffic which was proceeding into another road which is adjacent to the crossing. He described what appears to have been a bottleneck of traffic at the rail crossing. From his evidence, it is as this traffic came to a halt that the train came into view. He himself had seen the train as it was a distance of about 10 metres from Ms Visser's vehicle which was then in the path of the oncoming train.

The witness had difficulty in describing the exact sequence of events which led to the collision in that he was unable to give details as to how the accident occurred, how or at what point in time Ms Visser's vehicle came to be on the railway track.

He however seemed to suggest that there were other vehicles in front of and behind Ms Visser's vehicle and that these vehicles attempted to make room for her vehicle to manoeuvre when the driver's of the vehicles observed the train bearing down on the crossing. The picture which emerged was that at the time of the collision there were vehicles backed up along the crossing and onto the tracks as the foremost southbound vehicle was giving way to a vehicle or vehicles which were turning into a subsidiary road.

The witness stated that the first time he heard the train whistle was at almost the exact time of impact.

The witness commented that as the road was busy it had become a practice for vehicles to enter into the crossing without taking any precautions.

The witness was unable to comment on the presence of another witness, Mr Van Rooyen, at the scene. He was unable to comment on the position of Mr Van Rooyen's vehicle before or after the collision. The reason he gave for this is that he was only concerned about the accident. From this and given that it is common cause that Mr Van Rooyen was at the scene and

rendered assistance the witness powers of observation become questionable as Van Rooyen states that the accident occurred shortly after he had negotiated the same crossing.

In his view Van Rooyen was probably mistaken when he testified to having heard the train whistle when the train was about 80 to 90 metres from the crossing. He, in matter of fact, went so far as to state that Van Rooyen was probably been lying in that respect, as if he had heard the whistle at that distance he would not have made the decision to cross the railway line at that stage.

The witness was asked by the defence to comment on another aspect of Van Rooyen's evidence to the effect that when Van Rooyen crossed the railway line to the southern side of the track there was a queue of several stationary northbound vehicles at a distance of about 17 metres from the outer subsidiary track on the southern side of the railway line. Again his response was that Van Rooyen could have been mistaken and alternatively that he was lying as the track was blocked by a line of vehicles. He had not observed the distance from the level crossing at which Van Rooyen had stopped his vehicle.

The witness, who had in his evidence in chief stated that the train was moving fast under cross-examination experienced difficulty in giving an estimate of the speed of the train and failed to explain the basis for his conclusion that the train was travelling at a fast speed. He was further unable to comment on the speed of the vehicle or vehicles which he had stated were in the process of negotiating the crossing at the time of the impact.

Bernard Kwambana, a workmate of Pindayi, stated that shortly before the collision he was sitting in a truck on the northern side of the crossing and outside the premises of Earth and Fire Tile factory when Pindayi had asked him if he could see the train bearing down on the crossing whilst there was vehicular traffic in

the crossing. The collision had occurred as the two were talking with the train whistle having gone off as the train struck Ms Visser's vehicle. From his observation the train did not slow down at any stage.

There was at the time what he described as a traffic jam in the crossing, his exact words being that there were 'trucks jammed from Casalee on the southern side of the crossing to Earth and Fire on the other side'. There were he said vehicles backed up across the railway line to a beerhall on the southern side He had no recollection of the state of northbound traffic.

He recalled Van Rooyen as the person who had approached Ms Visser's vehicle to render assistance and who had instructed that she not be moved lest she sustained further injuries.

When asked to describe the area he stated that at the time there was grass on the verges, about half-a–metre in height and that the road was full of holes.

Under cross-examination he was asked who would have been better positioned to make a more accurate observation given the conflicting evidence given by Van Rooyen who had crossed the railway line shortly before the collision. The witness was of the view that he was at a vantage point as he was perched on the back of a lorry and thus had a better view than Van Rooyen who was at a lower level and was surrounded by grass which was of window height. .He further disputed that Van Rooyen could have heard the train whistle as the train was some 80-90 metres from the crossing. When Van Rooyen's version was put to him he remarked that VanRooyen must have been lying as he could not have crossed the railway track in the circumstances he described. He went so far as to say it would have been folly for Van Rooyen to have done so. He referred, without furnishing details to an accident which had occurred some years before at the same spot.

In the final analysis the witness confessed to his not having seen Ms Visser's vehicle before the accident.

The testimony of Peter Van Rooyen was to the effect that on July 15, 1998, he was driving in a southerly direction towards Casalee which is on the southern side of the rail crossing at which the collision occurred. He had opted for that particular route in a bid to avoid congestion on the Mutare road caused by construction work on that stretch of road. As he approached the level crossing he observed many cars on either side of the crossing.

Initially he stated that as he approached the track he heard a train whistle. He looked to his right and observed the train as it was a distance of about 80-90 metres from the crossing. He had made a decision to accelerate in order to cross the track safely. As he was a distance of some 22 to 28 metres from the outer subsidiary track on the southern side he heard a loud bang to which he reacted by stopping and alighting from his vehicle. It was then that he made the observation that a collision had occurred. He had proceeded to render assistance. He was unable to comment on the positions of any other vehicles when he alighted from his vehicle after he had heard the sound of the collision.

He later stated that he had stopped before the railway line to let vehicles go past from the southern side of the crossing and that he had started to move towards the crossing when he heard the whistle. He indicated that he did not hear the train whistle earlier.

It was the witness' evidence that when he was still on the northern side of the crossing he had seen several northbound vehicle on the southern side of the crossing. He had himself stopped short of the crossing, that is, approximately 8-9 metres from the crossing, to allow other vehicles ahead of him to cross the railway line. He could not recall the number of vehicles ahead of him although he recalled that there was more than one vehicle. To the best of his recollection there were a couple of oncoming

vehicles on the southern side of the crossing. Asked to comment on the speed of the vehicles on his side of the track, he said that these vehicles were 'crawling, probably in first gear.

He had little or no recollection of the state of the road or the surroundings on the southern side of the crossing. All that he was able to say was that at the time he crossed the railway line, his vehicle was the only one on his side of the crossing and that is what had urged him to cross the line after he had seen the train.

The witness tended to be vague on the issue of whether he could have stopped before the railway crossing after the whistle gave him warning of the approach of the train. Although he denied that he took a risk certain question marks were raised as to the reasonableness or otherwise of his decision to accelerate and clear the crossing in the face of the approaching train.

The witness accepted that he was familiar with the crossing and conceded that even for a first time user there are ample road signs at the particular crossing to warn motorists of the existence of the crossing.

The evidence of this witness was far from clear. He intimated that he was not paying any real or close attention to the events which were occurring particularly on Ms Visser's side of the level crossing He himself confessed to a poor recollection of the incident and the accuracy of his evidence is questionable.

The difficulty which presented itself is in the patent conflict between his testimony and that of Pindayi and Kwambana. The versions of these three, whom one would describe as eye witnesses is, even allowing for a margin of discrepancy such as might arise from individual observation or perception of events at such variance as to create an irreconcilable conflict.

The 4th witness Simon Rickard Schoeman professed to be an expert witness. He is a former railway engine driver. He outlined his experience with the railways departments, and it emerged that he

had last worked for the railways in the sixties and that he left that occupation more than thirty years ago He is currently running a business in an unrelated field and stated that he had come to be a witness in response to a request by Ms Visser's parents with whom he is acquainted.

He testified to the rules and regulations which a train driver is expected to observe by reference to the relevant manuals, Exhibits 2 and 3. He proved to be helpful at the inspection *in loco* by pointing out the various warning boards, signs and signals and what they represent.

In his opinion a driver was expected to whistle upon passing or reaching a board a little over 700 metres from a level crossing and again at various other points before the crossing and was in addition expected to have his train in check with brakes applied to enable him to stop the train short of the crossing should the need arise. He however indicated that in the circumstances of this case he did not believe that a driver would have succeeded in stopping short of the crossing even if he had applied brakes. He mentioned that there were other relevant factors to consider such as the weight of and speed of the train and any load carried.

He further went on to state that it was the duty of a driver to report to the authorities that the level crossing was busy in order that consideration could be given to extending the level of protection at the level crossing. He himself did not "feel" that the particular crossing was adequately protected as there were no flicking lights and no booms.

He made mention of his being aware of an accident that had occurred earlier at the same crossing without giving any details as to the cause of or nature of that accident.

He acknowledged the existence of the St. Andrew's cross on the southern side of the crossing but said that this was a basic warning which the public tended to ignore.

He did however concede that as an ordinary driver one would be obliged to bring one's vehicle to a halt and to check both sides of the crossing before proceeding across a railway line.

Upon being referred to the section of the Highway Code, Exhibit 4 at p 14, which deals with instructions to a driver at a railway crossing in light of Van Rooyen's evidence his comment was that the conduct of Van Rooyen in crossing in the circumstances that he did was negligent, and in fact "very careless".

Following upon this the witness was asked if in the circumstances it was not folly for any other driver to cross the railway line after Van Rooyen. His remark was the grass and a big tree might have caused an obstruction and that there was perhaps other traffic in front of the particular car. His attention was drawn to the detail of Van Rooyen's evidence. This time his response was that a person who behaved in that manner would be taking a calculated risk with his life.

The witness was asked whether in mentioning the need for flashing lights he was aware of the existence of a signal department within the railway administration whose job it was to trigger the installation of preventive mechanisms by the relevant urban or rural authorities in the case of national roads. His response was that he had been led to believe that that was within the province of the national railways. He however conceded that to be the correct position when the question was repeated. He further went on to agree that that aspect of national railways operations was not within his area of expertise.

He indicated that he only became aware at a late stage that in this particular case traffic had been re-routed solely because of the ongoing road construction work on the Harare-Mutare road as he himself did not use the road much. This would seem to imply that his assessment as to the preventive requirements for this

crossing was based upon it being a permanent rather than a temporary route.

The witness referred to an earlier accident that had occurred at the same spot and that that on its own would have warranted the installation of a CDC facility as a preventive measure. He was asked if this would have had to be done as an immediate reaction to the fact that an accident had occurred. His answer was that these signals were there to control the movement of trains but that the facility would not stop accidents. It was then put to him that in fact such a facility was in place at the scene. The witness simply accepted that this was the case and that on the particular day the light was green in favour of the train.

The next question to the witness related to the need to conduct a traffic count before a decision could be made to install booms. The response was that he would not know as he had never worked in the railway traffic department. He did however finally accept that a traffic count was necessary but that he was personally ignorant of the level of traffic that would justify the installation of booms and flashing lights.

A further concession was made to the effect that the conduct of a motorist at a railway crossing is regulated as are traffic signs, which signs fall into different categories in terms of the relevant statutory instruments e.g. danger, informative, regulatory.

He admitted knowledge of the fact that the St Andrew’s cross sign was originally designated as a danger sign but has since been reclassified as a regulatory sign, the reclassification having the effect of placing added responsibilities upon motorists at level crossings with the result that any person who crosses a railway track in the face of a rail borne vehicle commits a criminal offence, RGN 666/73 –Exhibit 5).

The witness agreed that in the circumstances and confronted with Van Rooyen's evidence that Van Rooyen committed an offence, as would anyone else who crossed after him.

He was further asked if he was aware of the existence of the Estate department of the railways, that is the department responsible for level crossings and that in terms of the departmental manual which is consistent with the regulations the railways has the right of way at every level crossing.

Mr Schoeman was asked if he was familiar with the method for calculating braking distances for trains. He said that a train driver was obliged to take into account the load of the train and the speed at which he was travelling together with the condition of the brakes. When the question was repeated his sole comment was that that was a question for the driver's judgment. It was suggested to the witness that there were other additional factors to consider such as the gradient. He was also asked if he had ever heard of an engineer by the name of D Chapman. After the witness had said that he could have heard of the name in passing it was put to him that D Chapman is the engineer who derived the formula to be used in calculating braking distances for trains. The witness pleaded ignorance of that fact.

The defence went further and told the witness that calculations in this case had been done by Engineer Kaseke of the National Railways and that the result had been that the train driver in this case could not have stopped in time to avoid the accident whilst travelling at 60 kph.

It was put to the witness that at the inspection in loco the driver had indicated that he started to brake at a distance of approximately 127 metres from the crossing but had only come to rest some 237 to 247 metres beyond the crossing which would reflect that he was travelling at approximately 50 – 55 kph The

response was that the driver would have stopped 150 -175 metres short of the level crossing regardless of the shoes on the brakes.

Photographs of the scene were produced in evidence. These photographs were taken by Ms Visser's father at different times of the year but not about or near the time of the accident. The photographs were taken in January 1999 and shortly before the inspection *in loco* in respect of those photographs which were taken whilst there was uncut grass growing on the verges Mr Visser stated that he had to put the wheels of his vehicle on the subsidiary tracks to enable him to see down the railway track.

He was not aware if his daughter was familiar with the area or the particular crossing such that one might infer that she could not have been expected to find a train where she did.

An inspection *in loco* attended by all the above named witnesses was conducted at the onset of the trial. It is not necessary for me to again set out the detailed observations as these were recorded and confirmed by both parties. They thus form part of the record of the proceedings.

The general principles governing the rights and duties of road users and of rail traffic using level crossings are to be found in the following passage from *Worthington & others v. C.S.A.R.* 1905 T.S. 149 at 150-1 per SOLOMON J (see Cooper's Motor Law @ p 173):

> "……. Where the public road crosses the railway, the rights and the obligations of the officials of the train and of people who are travelling on the public road are mutual. The level crossing itself is common both to the railway and to the public. Each has the right to pass over it, and to expect that due care will be exercised by the other to avoid mishaps; but it is quite clear from the nature of the case that a train cannot in the ordinary course be expected to pull up at a crossing to allow passengers by the public road to get over the crossing. The train must necessarily have the preference over passengers by road.
>
> It is the duty of the traveller to look out for and wait for the train. At the same time a condition is attached to the

> preference which the railway has, and that is that the train ought to give due warning of its approach when it is nearing a level crossing of this nature, so that persons might stop and allow the train to pass. The train is bound, in my opinion, to give due and timely warning of its approach, and also not to be travelling at such an excessive rate of speed that the warning it might give should be of no avail. What is an excessive speed and what is due warning must entirely depend on the special circumstances of each case. Where there are obstructions to prevent persons travelling along the road from seeing an approaching train, or where there are any other circumstances which would make it difficult to ascertain that a train is approaching, then, of course, better warning would have to be given, and the train would have to travel at a slower speed. But even if a train, in approaching a level crossing, does not give due and timely warning of its approach, that in itself does not relieve a person who is travelling along the road from the necessity of taking every care in crossing the line. A level crossing must always have a certain element of danger, and any person, before crossing the railway, should exercise due and proper care in order to see that a train is not approaching; and neglect on the part of railway officials in not giving warning of its approach is in my opinion no excuse whatever for neglect on the part of anyone travelling along the road. Anyone so travelling is bound to use his eyes and ears, and if he does not use his senses, and so fails to observe that a train is approaching, then he himself is primarily responsible for any injury he may sustain, and which would have been avoided if he had exercised reasonable care."

The defendant in submissions made in support of its application for absolution highlights Mr Van Rooyen's account of his 'scramble' through the crossing. Emphasis is placed on the fact that Mr Van Rooyen stated that at the time he went through the crossing there was no other vehicle on the track and that the vehicle at the head of the queue of stationary oncoming vehicles was about 17 metres from the outer track of the southern subsidiary track. The defendant submits that assuming that that vehicle was Ms Visser's vehicle, she could only have entered the crossing after Mr Van Rooyen and at a time when the train was sounding its whistle. The defendant drew the court's attention to the fact that even

according to the judgment of the other three witnesses the conduct of Mr Van Rooyen was dangerous and constituted a calculated risk, amounting to what could be deemed recklessness.

The court was further asked to have regard to the legal position as put to Mr. Schoeman, the plaintiff's expert witness, more specifically the existence of the regulatory sign in the form of a St Andrew's cross, which would have certain implications and legal ramifications for a driver failing to take heed of the sign. In other words what is raised is the question of whether Ms Visser herself confronted by the warning sign was on her guard and approached the crossing with due care such that she entered the danger area with her vehicle fully in control, in other words did she act as a reasonably careful driver would have done.

Bearing in mind that the accident occurred in broad daylight and on a day on which visibility was good and having been afforded the opportunity to make observations at an inspection in loco there were numerous questions which went unanswered and which the plaintiff omitted to address.

We have the version of Mr Van Rooyen, which I have commented on above. No attempt was made to deal with an issue, which in the peculiar circumstances of this case is vital and, which addresses specifically the question of how Ms Visser's vehicle came to be on the crossing in the face of the warning sign, guard rails and the gradient which allows for a clear view of the crossing when one is a substantial distance from the gossip. In matter of fact the crossing is visible before one even proceeds beyond the wall surrounding the Casalee premises on the southern side of the crossing that is, from a distance of in excess of 60 metres. A further feature was that this crossing is made up of a two subsidiary tracks and a main line which runs between the subsidiary tracks, which subsidiary tracks measure 6 metres in width. The issue of the height of any grass that might have obscured her line of vision was

skimmed over. The photographs produced did not provide substantial proof of the facts which they sought to support. It would amount to speculation were one to accept that they reflect the position as at the time of the accident given that they were taken some time after and given that there are certain variables which determine the growth and length of the grass. The only reference of sorts to the grass was from the Earth and Fire employees whose evidence was lacking in detail. At most on the evidence before the court one can conclude only that there was grass growing alongside the verges but without there being any means of ascertaining whether it was of such height as might have hindered Ms Visser or any other driver using that portion of road from having clear view of the railway line or any trains travelling thereon. This I say bearing in mind that at the inspection in loco it was established that a driver emerging from the Casalee premises would have a 180 degree line of vision.

Schoeman's evidence was to some extent subjective and largely based on assumptions and speculation. He as I have mentioned previously at one point went so far as to say that he did not 'feel' that the level of protection at the crossing was adequate. He was at sea when it came to real evidence on technical issues such as the speed of the train, method of calculating that speed, provision of justification for additional safety measures over and above those in place and the duties of the various authorities responsible for such matters. He initially appeared to be an authority with considerable knowledge about the matters on which he spoke but in cross-examination it soon became abundantly clear that this was not the case. Some of his observations were such as might have been made by the ordinary man in the street without the backing of any empirical data. His testimony, one might say, was coloured more by his own brief experience as a train driver and did not contribute much to shedding light to the question of liability.

His evidence crumbled as he made a number of concessions which did little to enhance the plaintiff's case and tended to support the defendant's case. An example of this arises in his acceptance that going by Van Rooyen's testimony and the distance at which he said he saw the train before he made the decision to cross the track the driver of the train would not have succeeded in those circumstances in stopping his train short of the crossing whereas in his evidence-in-chief the witness had indicated that the train driver ought to have been able to stop some 100-150 metres short of the crossing. The effect of this evidence was that there was no evidence before the court to show that once the danger became apparent the train driver could have avoided a collision such that his failure to do so might be considered negligent.

The reference to a previous accident without delving into the cause or circumstances of that accident did not take the plaintiff's case further.

I have little hesitation in agreeing with the defendant that the sum total of the evidence of Pindayi and Kwambana was that they reacted to the sound of the collision. If Van Rooyen heard the train whistle before he crossed the line how does one then account for the fact that Kwambana and Pindayi only heard the whistle go off at the point of impact? The question is posed with a full appreciation of the principle that an engine-driver is not necessarily absolved from negligence merely because he has sounded his whistle in terms of the regulations and that conversely, he is not necessarily guilty of negligence because he has not strictly observed the regulations.

Relying upon *R v Herbst* 1948 (2) S A 20 (N) at 202 Cooper at page 578 submits that an engine-driver is entitled to assume that a motor vehicle approaching a crossing will respect his right of precedence, albeit he must keep an approaching motor vehicle under careful observation and should he reasonably anticipate that

the motor vehicle does not intend to stop at the crossing, he should, at the same time as continually sounding his whistle, immediately slow down and, if possible stop his train. The inquiry as to whether a train driver has failed to keep a proper lookout is a question of fact. In the instant case the evidence before the court is that Ms Visser's vehicle must have been stationary on the southern side of the crossing, at a minimum distance of 17 metres from the outer subsidiary track. This at a time when the train was barely 80 metres from the crossing with its whistle in operation.

In *Fortman v SAR. & H* 1948 (3) SA 595 (N) at 598 cited by COOPER at page 579 the court dealt with the question of speed as follows:

> '…… having regard to practical considerations, more especially the consideration that normally a train travelling at any reasonable speed cannot pull up with anything like the facility with which a road vehicle can pull up when travelling at any reasonable speed, a train possesses a prior right as it were and is not expected to approach a level crossing at a speed which enables it to pull up short of the crossing; but this right is conditional upon its giving fair and reasonable warning of its approach ..'.

COOPER goes on to state that this view finds support in *Dyer v SAR* 1933 AD 10 where it was held that a train has a right of way and its speed cannot be decreased at every crossing so as to make sure no collision will occur. He goes further to say the matter was put beyond doubt in *Pretoria City Council v SAR & H* 1957 (4) SA 338 where, after a consideration of a number of authorities, the Court came to the conclusion that an engine-driver is under no duty to travel at such speed that, in the event of the crossing being obstructed, he can stop the train between the point where the crossing comes into view and the obstruction, and it accordingly held that the mere fact that the train could not be stopped in such a distance was in itself not negligence.

In response to the application for absolution the plaintiff argued that the inquiry is not limited to the obligations of the injured driver but extends to the obligations of the train driver and the railway authority. I did not hear plaintiff's counsel to make any meaningful or persuasive submissions to the effect that the evidence adduced by the plaintiff is that the court might at this stage determine that there is evidence upon which it might find in favour of the plaintiff. The plaintiff's argument is, in my view, untenable in that the plaintiff seeks to place the defendant in the witness stand for the purpose of eliciting from the defendant evidence of negligence on its part when at the conclusion of its case the cause of the accident has not been established. At the end of the day and after taking into account that the essential question, which is that of whether one might say that the evidence adduced provides sufficient basis upon which one might at this stage rule that the acts and omissions on the part of the administration and its employees which might have put Ms Visser off her guard or that there were insufficient precautions to render the level crossing reasonably safe, has not been adequately addressed.

I do not believe it necessary for me to consider the question of contributory negligence which would have perhaps warranted consideration if there had been evidence of negligence on the part of the defendant.

I am in the result satisfied that it would be proper to grant the order sought by the defendant.

In the result an order of absolution from the instance is granted with costs to be borne by the plaintiff.

Coghlan, Welsh and Guest, plaintiff's legal practitioners.
Chihambakwe Mutizwa and Partners, defendant's legal practitioners.