

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 76/2012

In the matter between:-

VAN DER MERWE B J

Applicant

and

PADONGELUKKEFONDS

Respondent

JUDGMENT BY: RAMPAL, AJP

HEARD ON: 13 SEPTEMBER 2013

DELIVERED ON: 6 FEBRUARY 2014

- [1] The matter came to court by way of action proceedings. The plaintiff sues the defendant for compensation in the amount of R4 760 767,60 plus ancillary relief. The hearing endured for three days. It ended on Friday 13 September 2013. The action is defended. The plaintiff's supplementary heads were filed on 7 October 2013.
- [2] At the beginning of the trial I was asked to make an order for the separation of issues in terms of rule 33(4). I granted the order. I ordered that the issues relating to *quantum* should be shelved for later adjudication. The issues relating to the substantive merits as set out in paragraph 6 of the particulars of claim were accordingly adjudicated first.
- [3] The plaintiff was involved in a road accident which took place near Rustfonteindam on the 27th January 2007. On that day a collision took place between a motorcycle with registration number D[...] which has there and then driven by the plaintiff, Mr B J van der Merwe and another motorcycle which was there and then driven by Mr Herman Beukes, hereinafter called the insured rider. Its registration number appeared nowhere. The plaintiff was

riding a two-wheeled motorcycle whereas the insured driver was riding a four-wheeled motor cycle. The latter is also known as a quad bike.

- [4] The two gentlemen were a part of a group of motorcyclists who had gathered at a place called Two-Zero-Bravo earlier that morning. From there the group used a few rural roads on their way to their intended destination. The purpose of the outing was to have a “fun-ride”. The entire network of rural roads they used was dirt road. From Sannaspost they rode parallel to the N8 national road until they joined the secondary road, S417, to the Rustfonteindam. The particular dirt road runs perpendicular to the aforesaid national road.

- [5] The group followed that gravel road and rode in the direction of Rustfonteindam. Along the way they overtook a red BMW sedan. When they reached the gate of the Rustfonteindam they stopped. The group actually wanted to gain entry into the premises of the Rustfonteindam. However the gatekeeper denied them access. The plaintiff, who was the organiser of the fun-ride, negotiated unsuccessfully with the gatekeeper. During those negotiations the driver of the red sedan arrived on the scene. He apparently sided with the gatekeeper. A quarrel then ensued between him and the plaintiff.

- [6] Seemingly the rest of the group did not want to be involved. In order to avoid any further confrontation, they turned away from the gate and continued further down the road. The plaintiff remained behind at the gate. Two riders led the pack away from the gate. They were Mr Hein Fourie and Mr Westley Buhrmeister. The rest of the riders followed them. Both Mr Fourie and Mr Buhrmeister were riding two- wheel motorcycles. Right at the back of the riders was a light delivery van, an Opel Corsa. It was used as a back-up bakkie. The two front bike riders negotiated a curve to the left. They then moved downhill to a point where they stopped and waited for the organiser, in other words, the plaintiff.

- [7] The particular point was approximately 1km from the gate where they had left the plaintiff behind. They came to a standstill on the left-hand-side of the

gravel road, or shall I say, the left hand side of the imaginary centre-line. The rest of the group followed and travelled down towards the two front stationary bikes. The insured driver, who was driving a quad, then surged forward, overtook the van and a few riders to join the two stationary bikes in the middle of the road.

- [8] By then the plaintiff was right at the back of the insured rider. He passed the bakkie, and a few of the slow riders but he did not overtake the insured rider. He approached the stationary motorcycles at a constant speed. He approached them from behind. The plaintiff had no intention of stopping but rather attempted to pass the stationary motorcycles. His attempt to pass them was unsuccessful. There and then his bike collided with the quad ridden by the insured rider who had suddenly decided to stop in the middle of the road. The point of impact was more or less in the middle of the road.

- [9] The portion of the road on the right-hand-side of the imaginary centre line was open. There was no motor vehicle or any other road user travelling in the opposite direction at the time of the collision. The road at the point of impact was about 9 metres broad. This means that each traffic lane on the side of the imaginary centre-line was approximately 4,5 metres wide.

- [10] The plaintiff sustained bodily injuries in the accident. The plaintiff had no recollection of how the accident occurred. Therefore, he was not called as a witness. This was placed on record by agreement between the parties. That, in brief, is the synopsis of the undisputed facts coupled with facts which, though denied, could not be seriously disputed.

- [11] The version of the plaintiff was narrated by three witnesses, namely Mr Hein Fourie, Mr Wesley Buhrmeister and Mr Henti Kriel. As I have indicated the plaintiff himself did not testify. Mr Fourie testified that he was one of the two riders who were leading the pack. He stopped on the road, approximately a metre or so from the edge of the road. He was on the correct side of the road. He was riding a two-wheeled-motorbike. Mr Buhrmeister brought his

motorcycle to a standstill on his right-hand-side. Both motorcycles were stationary on the road and on the left-hand-side of the imaginary centre line.

- [12] There they waited for the plaintiff, the organiser of the fun ride, to come and show them the way. While they were waiting, he heard the sound of an approaching motorbike. He looked over his shoulder and saw that the plaintiff was the rider of the motorbike that was approaching their stationary motorbikes from behind. He turned his head over his right shoulder. At that very moment Mr Herman Beukes, who had been stationery behind them, diagonally moved to the right. By so doing, he encroached on the plaintiff's line of travel. As a result of such inopportune and unexpected move, his quad clipped the plaintiff's bike. At that moment the plaintiff was about to pass the three stationary motorbikes. The area of impact was slightly over the imaginary centre line. The point of impact was approximately in the middle of the road.
- [13] Mr Fourie testified further that his bike and that of Mr Buhrmeister took up approximately two thirds of the traffic lane. In other words about 3 metres from the left edge of the road towards the imaginary centre line. The gap between the imaginary centre line and Mr Buhrmeister was about 1.5 metre or so. That space was wide enough for the plaintiff to pass the stationary bikes with ease. The plaintiff was travelling on that space.
- [14] His impression was that the plaintiff was travelling at a speed of approximately 120km/h shortly before the collision. Such a speed was not too high, according to him, because the road in question was in good conditions. There were no potholes, loose stones or loose sand on the scene. They were riding the so-called enduro motorbikes which were specially engineered for racing at a very high speed even in the veld. The good suspension of such a motorbike enables its rider to travel in the open veld at a speed as high as 160km/h. The group consisted of experienced bike riders.
- [15] There was nothing the plaintiff could have done to avoid the accident, the witness stated. Everything happened in a split second. The plaintiff was not

expecting that any of the three front riders would suddenly turn into his line of travel. The witness added that the plaintiff was an experienced bike rider who had previously participated in many races and that he had won various racing awards, accolades and prizes. The accident would not have happened had Mr Beukes not attempted to pull-up alongside Mr Buhrmeister.

- [16] Mr Buhrmeister also testified on behalf of the plaintiff. He testified and confirmed that he and Fourie came to a dead stop in the middle of the road where they waited for the plaintiff to come and to lead the way forward. He was on the inner side whereas Mr Fourie was on the outer side. Therefore he was nearer to the centre line than his companion. The group consisted of 8 to 10 riders. The two of them were right in front and immediately behind him was Mr Beukes on his quad bike.
- [17] He then heard the sound of a bike that was approaching them from behind. He looked over his right shoulder. As he did so he noticed that Mr Beukes was busy turning his quad bike out of its original position behind him and turning towards the centre line of the road. He had no idea why Mr Beukes wanted to do that. The next moment the plaintiff's bike clipped the front wheel of Mr Beukes's quad bike. According to him Mr Beukes was to blame for the accident because he turned into the plaintiff's path of travel. There was nothing the plaintiff could do to avoid the accident. The plaintiff's line of travel was at least 2 metres away from his motorbike. But for Mr Beukes' unexpected manoeuvre the plaintiff would have safely passed the three stationary motorbikes.
- [18] Mr Buhrmeister estimated that the plaintiff was travelling at a speed of about 100km/h at the time of the collision. That was the average speed at which they were all riding before they came to a standstill. He first met the plaintiff once in November 2006.
- [19] Mr Henti Kriel also testified on behalf of the plaintiff. He met the plaintiff and the insured driver for the first time on the day of the accident. He was invited by Mr Hein Fourie for the fun ride. He was not one of the motorbike riders.

He was rather driving the back-up vehicle, an Opel Corsa light delivery van. He was travelling at a speed of approximately 60 – 70km/h right at the back of the riders. He estimated that Mr Beukes was traveling at a speed of about 90 – 100km/h. He, the insured rider, did not pass the two stationary motorbikes. Instead he stopped behind them. He described that movement by saying that the quad slid sideways and came to a stop with its front facing to the right. The quad stopped for a fraction of a second and then moved forward towards the centre line. By doing so it encroached onto the plaintiff's path of travel.

[20] The plaintiff also overtook him at a speed of approximately 90 – 100km/h. However, the plaintiff was not able to safely pass the three stationary motorbikes because the quad had unexpectedly shifted its original position and moved towards the centre line where it clipped the plaintiff's motorbike. He witnessed the whole accident from a distance of approximately 80 metres from the point of impact. He testified that Mr Beukes was arrogant and showing off at the time the accident happened. He testified that the collision was unexpected. Everything happened in a fraction of a second. The plaintiff had chosen a safe line, but the rider of the quad suddenly and unexpectedly moved over the plaintiff's line of travel. The accident could have been avoided if the driver of the quad had looked behind him before he moved towards the centre line or if the quad had come to standstill in a straight line. He identified exhibits "A" and exhibit "B" as the photos which he took on the scene.

[21] The version of the defendant was narrated by two witnesses, namely Mr Herman Beukes and Mr Michael White. Mr Beukes testified that he was part of the group that had gone out to have a fun ride. He was riding in the middle of the road. There were two motorcycles that were stationary on the road. The riders of those two bikes were Mr Fourie and Mr Buhrmeister. He approached them from behind. He was part of the group that had gone out to have a fun ride. He was riding a quad in the middle of the road. He attempted to bring his bike to a standstill next to the bike of Mr Buhrmeister. He slammed the brakes of the quad very hard in order to stop. Since he was on a gravel road the bike wiggled from side to side. He was very close to the

stationary bikes when his bike came to a standstill. He turned the handle bars to the right, in other words, to the centre-line.

[22] While his bike was still in the process of stopping he tried to dismount. He did not manage to completely get off the bike. At that very moment the plaintiff's bike crashed into his bike. He was on the right-hand-side of Mr Buhrmeister at that critical moment. The left shock-absorber of the plaintiff's motor vehicle and the right rim of his quad were involved in the physical impact. He asserted that the plaintiff approached the three front motorbikes at a very high speed. He reckoned that the plaintiff was very upset following the argument he had had with the driver of the BMW and the gate-keeper at the gate of Rustfonteindam. He denied any suggestion that he did not keep a proper look-out. He denied that as a result he moved towards the centre line and encroached onto the plaintiff's path of travel at the time when it was unsafe to do so. He explained that after turning the handle bars of his quad to the right, its right front wheel rolled for about 30cm towards the imaginary centre line.

[22] The second witness who testified on behalf of the defendant was Mr Michael White. He was one of the riders in the group. He and Mr Freddie Stresso were riding side-by-side from the gate of Rustfonteindam. While they were riding he noticed two motorcycles on the road ahead of them. They were stationery. They were two-wheeled motorcycles. They were shortly joined by a four-wheel motorcycle. The third rider was Mr Beukes, who then stopped his quad on the right-hand-side of Mr Buhrmeister. His quad occupied the space between the imaginary centre line and Mr Buhrmeister. Mr Buhrmeister was sandwiched by Mr Fourie on the left and Mr Beukes on the right.

[23] When he saw that the three fellow riders in front of the group had stopped he reduced speed. The plaintiff overtook him. He was traveling at a speed of approximately 100km/h to 140km/h. He was travelling on the right-hand-side of the imaginary centre line. Shortly thereafter, the plaintiff's motorbike crashed into the motorbike of Mr Beukes. The point of impact was more or less in the middle of the road. At the time of the collision the opposite traffic lane was not occupied. There were no oncoming motor vehicles. The plaintiff

could have avoided the accident by passing the three stationary motorbikes on the opposite traffic lane, seeing that there was sufficient space for him to do so.

[24] The plaintiff did not make any attempt either to slow down or to apply the brakes of his motorbike immediately before collision. At the time of the collision he was busy getting off his motorcycle. The evidence that Mr Beukes's motorbike cut across the plaintiff's correct line of travel was incorrect. The plaintiff was to blame for the accident. This completes the evidence tendered on behalf of the defendant.

[25] On the strength of the foregoing evidence, counsel for the plaintiff, Mr Steenkamp, urged me to reject the defendant's version and to accept the plaintiff's version. He argued that if the insured rider had looked behind before moving across the plaintiff's line of travel, the accident would not have occurred. Counsel then submitted that the insured driver's failure to do so, constituted negligence. The thrust of the plaintiff's contention was that the insured rider's negligence stemmed from his failure to keep a proper lookout. He then submitted that the insured rider's negligence was the sole cause of the accident. Accordingly he urged me to find the defendant liable.

[26] On the other hand Mr Thompson, counsel for the defendant, argued that, on the strength of the foregoing evidence, the plaintiff's negligence caused the accident. He, therefore, urged me to reject the plaintiff's version and to accept the defendant's version. He contended that the evidence showed that the plaintiff rode his bike in a negligent manner and that his negligent conduct was the sole cause of the collision. Counsel submitted that the evidence showed that the plaintiff rode at an excessive speed in the circumstances; that he failed to keep a proper lookout and that he failed to avoid the accident when, by the exercise of reasonable care and diligence, he could and should have avoided the accident. Accordingly he urged me to dismiss the plaintiff's claim.

- [27] The issue in the case revolved around the question of negligence. To put it in lay man's terms the question was who was to blame for the collision between the two motorbikes?
- [28] The onus of proof rests on the plaintiff to show, on a balance of probabilities, that the insured rider was negligent on one or more or all of the grounds as averred in the particulars of claim. The question is whether the evidence tendered on behalf of the plaintiff was, on the probabilities, correct. See: **Body Corporate of Dumbarton Oaks v Faiga** 1999 (1) SA 975 (SCA) at 979 I – 980 A.
- [29] There is a significant legal connection between the credibility of the witness and the probabilities of the case. It has been held that whether the plaintiff has discharged the onus of proof, the estimate of the credibility of the witness will be inextricably bound up with the consideration of the probabilities of the case and that if the balance of probabilities favours the plaintiff, then the court would be inclined to accept his version as been probably true – **National Employers' General Insurance Co Ltd v Jagers** 1984 (4) SA 437 at 438 (A) per Eksteen AJP. His view was paraphrased in the headnote and quoted with approval by Maluleke J in **Machewane v Road Accident Fund** 2005 (6) SA 72 (TPD) on 77 at par [14].
- [30] In **Selamolele v Makhado** 1988 (2) SA 372 (V) the court reconfirmed the principle that where there are two mutually destructive versions in a civil trial, the correct approach to be adopted in deciding the issue, is to determine which of the two versions is more probable than the other.
- [31] I now proceed to examine the evidence. I deal with the version of the plaintiff first. The essence of the plaintiff's case was based on the foundation that the insured driver Mr Herman Beukes encroached on the plaintiff's path of travel and that such contact verifies to the collision between the two bikes and the plaintiff's injuries.

- [32] The *crux* of Mr Hein Fourie was that the insured rider approached the two stationary front bikes from behind and that he stopped directly behind Mr Buhrmeister while he, Mr Fourie, Mr Buhrmeister and Mr Beukes were stationary, he heard the plaintiff approaching them from behind. He then noticed Mr Beukes moving diagonally towards the centre line to a position on the right-hand-side of Mr Buhrmeister. Mr Beukes was slightly behind Mr Buhrmeister but a little closer to the centre line than Mr Buhrmeister when the plaintiff crashed into him. According to him Mr Beukes, by so moving, narrowed the space between the centre line and Mr Buhrmeister on which the plaintiff was travelling.
- [33] The first difficulty I had with Mr Fourie's testimony was that he could give no estimation as to how long Mr Beukes had been stationary behind them before he shifted towards the centre line. The second difficulty I had was that his evidence was inconsistent with that of Mr Hendrik Kriel. According to Mr Kriel's evidence Mr Beukes passed him on the way towards the front. When he reached the two stationary motorbikes he squared his motorbike on the right-hand-side of Mr Buhrmeister. His evidence suggested that Mr Beukes was continuously in motion until the plaintiff's bike crashed into his.
- [34] That evidence could not be reconciled with Mr Fourie's evidence that the insured rider arrived on the scene all alone; that he stopped alone behind Mr Buhrmeister for some unknown length of time; that the plaintiff arrived on the scene a little while later and that the insured rider then crossed the plaintiff's line of travel. Mr Fourie could hardly give any indication of the time lapse between the alleged stopping or arrival of the insured rider and the subsequent arrival of the plaintiff. That in itself made his testimony suspect.
- [35] The version of Mr Buhrmeister did not assist the plaintiff very much. He too was unaware as to how long before the collision the insured driver had stopped behind him. I found the witness' evidence strange bearing in mind that the insured driver had alleged stopped a mere two metres behind him and that he slammed the brakes of his roaring quad hard to show off, as alleged. He did not arrive there quietly and stopped. Although the two riders of the stationary

bikes did not hear the loud sound of the quad they heard that of the bike ridden by the plaintiff.

- [36] His motorbike like those of the two stationary motorbikes was making a lot of noise. Had he stopped within such a close proximity behind Mr Buhrmeister he would probably have heard the sound of the quad on his arrival and would have seen him. The fact that Mr Buhrmeister was unaware of Mr Beukes until the plaintiff's arrival, seemed to have supported Mr Beukes evidence that he was never in a stationary position behind him. He first became aware of Mr Beukes's presence in his close proximity at the time of the collision between the two bikes. He did not see any of the two gentlemen involved in the collision immediately before the collision.
- [37] His evidence was that he heard the sound of the plaintiff's motorbike and turned right over his shoulder. At that very moment the collision took place. I find it strange, as to why, he could not have had heard the sound of the stationary bike right behind him. If Mr Beukes had indeed brought his bike to a standstill so close behind him as Mr Fourie alleged. His evidence that Mr Beukes suddenly emerged from behind them at the time the plaintiff was about to pass them, left much to be desired. His evidence about the movement of Mr Beukes shortly before the collision was unconvincing. Therefore, there was no satisfactory corroboration of Mr Fourie's evidence concerning the alleged diagonal movement of Mr Beukes slightly behind Mr Buhrmeister.
- [38] I found it strange that both Mr Fourie and Mr Buhrmeister who co-incidentally heard the plaintiff's motorbike, also could not hear the insured rider's motorbike approaching them from behind. It was also a surprising coincidence that both of them glanced over their right shoulders for the first time when the plaintiff's motorbike was right upon them. All three of them did not hesitate to say that Mr Beukes was to blame for the collision. They all completely exonerated the plaintiff. The three wanted me to believe that the plaintiff was riding his motorbike safely and that, but for the negligent conduct of the insured rider, he would have safely passed Mr Buhrmeister because his line of travel was two metres away from him.

- [39] According to Mr Kriel the plaintiff was riding behind the insured rider. The insured rider, without any warning, deviated from his path of travel, moved to the right, crossed the line of the plaintiff and caused the collision. The three witnesses for the plaintiff made common cause with each other that the insured rider should first have ascertained that it was safe for him to cut across the plaintiff's path of travel before he actually did so. They were all adamant that the plaintiff could not have avoided the accident. They maintained that the plaintiff had chosen his line of travel and that the insured rider blindly landed in front of his bike. The accident, they all said, was occasioned by such careless movement on the part of the insured rider. According to them there was nothing the plaintiff could do to avoid the collision.
- [40] It was common cause that the plaintiff did not blow the horn of his bike; did not apply the brakes to reduce speed and did not swerve to the right. However, they maintained that he did not travel at an excessive speed in the circumstances. They all stated that the plaintiff did not have the opportunity of reducing speed, because everything happened very fast. Now if the plaintiff was not in a position to take any evasive action to avoid the collision, it can only be that he did not maintain a safe following distance behind the insured driver. If the evidence of Mr Kriel is to be accepted, then in my view, the correctness of the evidence of Mr Fourie and Buhrmeister becomes questionable. The versions of those witnesses were in my view improbable.
- [41] The evidence of Mr Michael White, on behalf of the defendant, was that two motorbikes ridden by Mr Fourie and Mr Buhrmeister were stationary of the downward lane. From the position behind them, he saw how Mr Beukes rode his bike to a standstill alongside Mr Buhrmeister in the middle in the middle of the road. According to him, therefore, there were therefore three stationary bikes in the middle of the downward lane. Mr Buhrmeister was sandwiched by Mr Fourie on the left and Mr Beukes on the right. When he saw those three stationary bikes, he reduced speed.

- [42] Immediately there came the plaintiff travelling at a speed of no less than 100 km/h and no more than 140 km/h. Initially the plaintiff was travelling on the upward lane. He did not reduce speed and he could not pass the three stationary bikes. Instead he crashed into the insured rider's motorbike more or less in the middle of the road. According to him the plaintiff was to blame for the accident. His evidence was that the plaintiff could have avoided the accident by passing the three stationary motorbikes seeing that there was sufficient space for him to safely pass them on the upward traffic lane.
- [43] Mr White dismissed, as incorrect, the contention that Mr Beukes had caused the accident by cutting across the plaintiff's path of travel seeing that Mr Beukes' bike was stationary at the time of the collision. He added that Mr Beukes was in the process of getting off his motorbike at the time of the collision. Contrary to the evidence tendered on behalf of the plaintiff, it was his evidence that Mr Beukes, at all material times, rode his motorbike straight until he came to a standstill alongside Mr Buhrmeister.
- [44] The evidence tendered on behalf of the defendant was clearly not consistent. The one inconsistency was that according to Mr Beukes his bike had not yet come to a complete standstill at the time of the collision. On that point Mr White and Mr Beukes differed. It must be accepted, in my view, that the former did not notice the wiggling of the quad and its slight lateral movement after the squaring of its handle bars.
- [45] However, in certain respect the version of Mr Kriel, the plaintiff's witness, supported the version of Mr White, the defendant's witness. The two witnesses were some distance behind the two motorbikes involved in the collision, as well as the two front stationary motorbikes, but Mr White was nearer.
- [46] Mr Beukes was adamant that he stopped on the side and not behind Mr Buhrmeister. Immediately before he stopped he had been riding on a straight

line. Like Mr Buhrmeister and Mr Fourie, he stopped in order to wait for the plaintiff. He was unaware that the plaintiff was following hot on his heels. He turned the bar handles of his motorbike sideways as he was trying to get off. His motorbike then moved for about 30cm towards the centre line. He was in the process of alighting from the bike at the time the plaintiff's bike crashed into his. To a great extent Mr White supported Mr Beukes's version. The essence of his evidence was that the insured rider was, all along, riding on a straight line until he stopped on the right of Mr Buhrmeister. It seemed improbable that he would have chosen a line behind Mr Buhrmeister regard being had to the high speed at which he was riding as well as the ample safe space available to his right.

- [47] The evidence of Mr Kriel tended to materially support the defendant's version. His evidence was that Mr Beukes first overtook him closely followed by Mr Van der Merwe, the plaintiff. He corroborated the defendant's version that Mr Beukes stopped in the middle of the road. It is my view that the version of the defendant was more probable than that of the plaintiff.
- [48] I am persuaded that the evidence of Mr Fourie had to be rejected to the extent that it referred to Mr Beukes alleged stationary position behind him and Mr Buhrmeister. His evidence that Mr Beukes had initially stopped behind them before he made a diagonal movement across the plaintiff's path was in my view not probable. I have already indicated that Mr Buhrmeister's evidence was also unreliable. To the extent that it was inconsistent with the defendant's version it appeared less probable. In my view Mr Kriel's evidence, though not flawless, was a reasonably probable credible and reliable account of what happened. His evidence, like that of Mr White materially corroborated the version of the insured driver.
- [49] The plaintiff carried the *onus* of showing that the accident was occasioned by the negligence of the insured driver. Because the credibility of the witness and the balance of probabilities are inextricably linked up they are both important elements of the equation in determining whether the plaintiff has discharged the *onus* of proof. Where the credibility of a witness is untarnished and where

the balance of probabilities favours the plaintiff the court will accept the version of the plaintiff has been probably true. **Machewane v Road Accident Fund** *supra*. The converse is also true. Where the balance of probability does not favour the plaintiff the court will not accept the version of the plaintiff as been probably true. In that event the credibility of the plaintiff or his witness will be tarnished.

- [50] I am persuaded that the defendant's witnesses gave a more reliable and credible account of the accident notwithstanding its unfavourable features. Mr Beukes and Mr White were comparatively impressive witnesses. The same cannot be said about the plaintiff's witnesses, save for Mr Kriel whose version was substantially consistent with that of the defendant's witnesses in important respects.
- [51] The question which I am now called upon to decide is whether the insured driver was negligent as alleged or at all and if so whether his negligence caused the collision between his bike and that of the plaintiff.
- [52] Mr Beukes left Mr Van der Merwe at the gate of Rustfonteindam. On his way down he overtook first Mr Kriel, then Mr White and other riders before he stopped right in front next to Mr Buhrmeister. The evidence showed that he was closely followed by the plaintiff all the way down until their two bikes collided. Yet Mr Beukes was unaware that the plaintiff was following him all the way. Shortly before the accident occurred he stopped in the middle of the road. He thereby created a hazardous situation, just as Mr Fourie and Mr Buhrmeister had done.
- [53] A prudent road user is always aware of the traffic situation in front, behind and on his sides. Since he decided to stop in the middle of the road, it was incumbent upon him to ascertain before he slammed the brakes of his bike in order to stop in the middle of the road, that it was safe to do so. That Mr Beukes failed to do. In my view, his failure constituted negligence. He clearly failed to keep a proper look-out and carelessly stopped his bike in the middle of the road at the time when it was unsafe to do so. I am persuaded

that if he was alert and careful about the traffic situation around him, he would probably not have stopped as he did and the collision would probably not have occurred.

[54] I now turn to the plaintiff. The yardstick used to assess the conduct of a road user is that of a reasonable person. A road user, in this case a rider, is negligent if he is in a position to reasonably foresee that his driving or riding might cause harm to other road users but fails to take reasonable steps to guard against such possible harm. A reasonable and prudent driver or rider appreciates the prevalent circumstances on the road he uses. Such a rider foresees that he might encounter stationary, or very fast, or very slow moving vehicles, or pedestrians, or animals, or any other obstruction that may impede his normal use of the road. He or she appreciates that at times road users disobey traffic rules and conventions. All such acts whether deliberate, reckless or playful are manifestations of delictual negligence.

[55] A prudent rider takes all reasonable steps to prevent harm to other road users. He realises that a motorbike, just like a motor vehicle, is a dangerous mobile machine. He regulates his speed according to the prevailing circumstances, including but not limited, to visibility and the density of the traffic at any given moment. A very important traffic rule is that a driver or a rider must at all times maintain a proper look-out in order to navigate safely through a traffic situation. A prudent driver regulates his speed in such a way that at all times he remains in a position to stop or take evasive course of action if prevailing circumstances dictate that he should. See **Cooper, Delictual Liability in Motor Law**, p 147 – p 160.

[56] Our case law has distilled some traffic obligations for motorists. Such obligations apply to motorcyclists equally well. Failure to comply with such obligations constitutes negligence. A rider has a legal duty to keep a proper lookout, to drive at a reasonable speed, to maintain a safe following distance from the vehicle immediately in front, to make provision for lateral movements by other road users and to have a motor vehicle (s)he is driving under proper control at all times – **Cooper** *supra*, p 192. See also **Klopper Isaac and**

Livinsens, Law of Collision (2003) Lexis Nexis, RAF Practioners Guide, Lexis Nexis p A-57, Zaymes v Farous and Company 1940 CPD 474 at 477.

- [57] The evidence revealed that the plaintiff remained behind the gate when his fellow riders proceeded further. Seemingly the insured rider was right at the back when the rest proceeded further from the gate leaving the plaintiff behind. Then the insured rider emerged on the scene at a high speed. He was closely followed by the plaintiff. He too did likewise. They overtook Mr Kriel, Mr White and a few other riders before they reached the two stationary motorbikes right in front. The insured rider slammed the brakes of his motor vehicle very hard to bring it to a standstill. The evidence revealed that the plaintiff was caught off guard. He was not able to reactively do anything in order to avoid the collision. He did not apply the brakes; he did not reduce speed; he did not blow the horn of his bike; he did not swerve out of the way. He did nothing at all.
- [58] It must be remembered that the upward or opposite lane of traffic was 4,5 metres broad. That traffic lane was not occupied by any road user. Therefore it was freely available to the plaintiff. Notwithstanding such safe option, the plaintiff did not wisely exercise his options. Consequently a collision took place. It took place because the insured driver suddenly stopped but the plaintiff could not suddenly stop or do anything else to avoid the collision. The two bikes collided simply because the plaintiff rode unreasonably. He did not keep a proper lookout, did not maintain a safe following distance, and did not take any evasive step to avoid the collision. He was the architect of that situation. That been the case he cannot be heard to say that he was an innocent victim of a sudden emergency.
- [59] In my view a reasonable and prudent rider would not have conducted himself the way the plaintiff did prior to the collision. To ride at the speed of 120km/h or even 100km/h when there were so many motorbikes, mobile and stationary, in the middle of the road constituted plain negligence. In such a situation any side-wards or literal movement could reasonably be foreseen or expected.

- [60] It must also be born in mind that the plaintiff, the insured rider and their fellow riders were not conventional road users on that particular occasion. They were a group of excited riders. They were out there to have fun on the road. Therefore, the argument that the plaintiff did not expect any literal movement from any of his experienced fellow riders was flawed. The riders were out there to display their stunts and what they were able to do with their speedy motorbikes. The fact that some of them came to a standstill in the middle of the road and there waited for the plaintiff, was indicative of their excited mind-set. They waited there for their leader. That also explained why the insured rider also stopped. It seemed to me everyone had expected the leader to stop to give them further directions.
- [61] When he emerged on the hill he came down very fast. The speed at which he was travelling at indicated that he did not have any intention to stop as his fellow riders had expected. His unexpected conduct was probably a further indication of the mood of excitement that had already gripped the group. Seemingly the conduct of the insured rider was also indicative of that excitement. None of the plaintiff's witnesses could say why the plaintiff did not stop as they had expected. It appeared to me that as far as the plaintiff and the insured rider were concerned the fun had already started.
- [62] The plaintiff had ample space to his right where he could have easily ridden and where he could safely have overtaken everybody, mobile or stationary. Yet he chose a line dangerously close to the centre line where the downward traffic lane was densely populated by his fellow riders. By doing so the plaintiff failed to allow sufficient berth between him and his fellow riders, particularly the insured rider and the stationary bikes.
- [63] Consequently I have come to the conclusion that the plaintiff was also negligent and that his negligence caused the collision between his motorbike and that of the insured rider.
- [64] In **Smith v Eagle Insurance Company** 1986 (2) All SA 314 (SA) 317E the duty of a motorist to keep a proper lookout was considered. The court held

that such a duty requires a continuous scanning of the road ahead and from side to side to ensure that there are no hazardous objects, impediments, or situations or potential obstructions. From the top of the hill and after negotiating the curve, a prudent rider would have scanned the horizon ahead. He would have easily noticed two stationary bikes right in front and a number of bikes in motion all the way down. He would have realised that the motorbike he was following could make a lateral movement towards the centre line to overtake those stationary bikes or even stop next to them. He was not entitled to assume that it would pass them. Needless to say that the plaintiff failed to act in accordance with the requisite duty of a prudent rider to keep a proper lookout.

- [65] The duty of a motorist to travel at a reasonable speed and the duty of a motorist to keep a proper lookout are logically intertwined. In the light of that connection the workable definition of a reasonable speed has been described as a speed at which the driver is able to stop his vehicle within his range of vision – **Cooper** *supra*, p139. Again the plaintiff's conduct was found wanting in this regard.
- [66] Another important traffic rule is that a motorist who follows another is obliged to regulate his speed as well as the following distance between him and the vehicle he is following. The purpose of the rule is to place a motorist in a position to avoid a collision should a vehicle in front, for one or other reason, suddenly stop. That rule is normally known as "the safe distance rule". The essence of that rule is that it requires a motorist to ride at a reasonable speed in order to remain in complete control of his vehicle at all times. **Uniso v Bezuidenhout** 1982 (3) SA 957A at 965B-C.
- [67] Mr Thompson, counsel for the defendant, submitted that the plaintiff was traveling at an excessive speed in the prevailing circumstances. In my view there was substance in that submission, bearing in mind the number of the riders, the congestion on the downward traffic lane, the mobile as well as the stationary bikes in the middle of that lane. In those prevailing circumstances,

a prudent and reasonable driver would not have ridden or travelled at the speed at which the plaintiff was travelling seconds before the disaster.

[68] Mr Steenkamp, counsel for the plaintiff, differed. He submitted that the plaintiff was not travelling at an excessive speed in the circumstances regard been had to the good conditions of the road.

[69] To the question of the speed I now turn. On Saturday the 27th January 2007 the plaintiff and the insured rider were among a group of 10 or so riders of motorcycles. They set out to have fun. The plaintiff was on a motorcycle with two wheels. The insured rider was on a motorcycle with four wheels. There was no evidence of rain, wind, dust storm, mist or wildfire smoke in the vicinity of Rustfonteindam. The weather was fine. The visibility was very good.

[70] The scene of the accident was on a dirt road, a secondary road that intersects N8 national road between Botshabelo and Bloemfontein. From the gate of Rustfonteindam it curves first to the right and then to the left. The distance between the two curves is about 500 metres. From the second curve the road straightens up and it then slopes down for about 250 metres. From the end of the downhill it flattens for some considerable distance. The scene of the accident is approximately 500 metres from the point up there where the downhill begins. The two bikes collided about one kilometre beyond the gate to the aforesaid dam. These details were gathered during the inspection *in loco*. See also exhibit “a”, exhibit “b” and exhibit “c”.

[71] The road was properly fenced. It was about nine metres broad. Although it was not macadamized, it was in fairly good conditions. There were no loose stones. There were no potholes, there was no loose sand. It was dry. Since it was a gravel road, there were obviously no road markings. The imaginary centre line demarcated the road into two traffic lanes. It consisted of one lane for each opposite stream of traffic. The parties were in agreement that the two bikes collided more or less in the middle of the road.

- [72] The final rest position of the plaintiff after the collision was about 23 metres beyond the area of the impact. That point was on the grassy shoulder of the opposite traffic lane, in other words, the upward lane. Perhaps I should rather say that it was on the incorrect side of the road in relation to the direction in which he and his fellow riders were moving. That point was also diagonally opposite to the point where Mr Buhrmeister's bike had come to a standstill. The evidence was that by sheer force impact, the plaintiff was physically dislodged from his bike, flung high into the air and propelled forward. He finally landed some considerable distance away from the point of impact. The angle of his deviation from the centre line was about 15 degree in my opinion.
- [73] The final rest position of the bike ridden by the plaintiff was also not without significance. After the physical contact with the bike ridden by the insured, the plaintiff's bike did not slide straight on the surface of the road. By the sheer force of the impact, it was tossed off the ground, flung very high into the air over the fence but below the telephone lines and finally dropped in the veld on the adjacent farm, diagonally apposite to the probable area of impact. The angle was about 45°.
- [74] One of the important factors relative to the issue of negligence was speed. According to Mr Fourie the estimated speed at which the plaintiff was travelling was approximately 120km/h, according to Mr Buhrmeister 100km/h. It must be borne in mind that Mr Fourie and Mr Buhrmeister did not really have adequate opportunity of making proper observation of the plaintiff as he was descending the road. They were sitting on their bikes and facing forward most of the time. They glanced over their right shoulders shortly before the collision. When they looked back the plaintiff was virtually right there on the scene with them. Therefore, their evidence was not very reliable. However I do not mean that it was entirely useless.
- [75] Mr Kriel estimated that the highest speed at which the plaintiff overtook him was about 100km/h. He observed the plaintiff and witnessed the incident from a vantage point. The accident happened in front of him. His testimony was comparatively more reliable. His estimation was somewhat corroborated by that of Mr Buhrmeister. It will be recalled that the plaintiff did not personally

testify. The evidence tendered on his behalf by two of the three of his witnesses suggested that he was travelling at the speed of no more than 100 km/h.

[76] The evidence adduced on behalf of the defendant painted a different picture. According to Mr Beukes the plaintiff was travelling at a speed of 140km/h. The critique that I levelled against Mr Fourie and Mr Buhrmeister applies to him as well. In his case the critique carried even greater force. On his own version, he did not see the plaintiff immediately before the collision.

[77] According to Mr White the plaintiff's highest speed was about 140km/h. He had time to observe the plaintiff. The plaintiff overtook him just seconds before the disaster. He was nearer to the scene of the accident than Mr Kriel at the moment of the impact. He had comparatively a closer and a more advantageous point to observe the plaintiff than any other witness. The mere fact that his bike did not have a speedometer, did not in itself diminish the value of the estimation he made. He was, like all his fellow companions, an experienced biker. His estimation was consistent with that of Mr Beukes. To an extent the evidence adduced on behalf of the defendant also strengthened his evidence. According to the testimony of one of the plaintiff's witnesses, Mr Fourie, the plaintiff was travelling at the speed of about 120 km/h. These then were the perceptions of the witnesses.

[78] The conduct of the plaintiff is a crucial factor in determining the issue of negligence. He was the leader of the pack. He remained behind at the gate. It appeared that he wanted that the riders use a certain route to get to their destination but whatever that was. There was no evidence as to precisely where the bikers were going to have the fun drive. Whether the plaintiff wished that they camp inside the reserve and have their fun right in there or whether he merely wanted the riders simply to pass through the reserve is only known to the plaintiff but unknown to me.

[79] What I do know is that the plaintiff was behind everyone when he left the gate. He first overtook the back-up vehicle driven by Mr Kriel. There were nine or

so bikes ahead of him as he descended down from the top of the hill. Those bikers were in motion with the exception of two or three stationary bikes which were right in front. They were stationary in the middle of the left or downward traffic lane. The engines of many of the bikes were running because they were in motion. The stationary bikes in the middle of the downward traffic lane certainly created a potential hazardous situation. Anyone who knew anything about driving would have appreciated such danger. It was quite reasonably foreseeable that those riders approaching them from behind might want to overtake them. In those circumstances a careful rider in the position of the plaintiff would have acted differently than the plaintiff did.

[80] Firstly, he would have drastically reduced his speed to be able to take an evasive and safe action in case any of those riders in front of him was unaware of him. It was important to any biker to remind himself that although the conditions of the road were good, it remained a gravel road nonetheless. A gravel road is never as safe as a tarred road. However I hasten to say that in this instance there was no evidence to suggest that the conditions of the road had anything to do with the accident. Secondly, a prudent and reasonable driver would, without necessarily slowing down, have allowed wider and safer berth, than the plaintiff did, between his line of travel and the line of the inner bike he was about to pass, in particular, the insured rider's line behind whom he was travelling.

[81] It must be kept in mind that the uphill traffic lane was completely free, it was not occupied by any road user. Therefore there was ample and safe space to the right of the imaginary middle line for the plaintiff to use without endangering anyone. Yet he kept his line of travel to the left of the imaginary middle line. By so doing he unreasonably allowed a dangerously narrow berth between himself and those he tried to pass.

[82] Another objective fact was the position of the insured bike after the collision. The undisputed evidence of the insured rider was that he and his bike together

weighed 250kg. That heavy mass was turned 180° by the sheer force of the impact. This objective fact was also telling against the plaintiff's contention.

[83] In my view the final rest position of the plaintiff, the final rest position of his bike as well as the final rest position of the insured rider and his bike were all objective facts. Those undisputed and objective facts strongly militated against the plaintiff's version as regard the speed at which he was travelling seconds before the disaster. On the contrary, those three objective facts materially fortified the version of the defendant that the plaintiff was riding at an excessively high speed regard been had to the peculiar circumstances of this particular accident.

[84] In the light of all the foregoing I am persuaded that the plaintiff overtook his fellow riders probably at a speed of 140km/h. He was riding dangerously close behind the insured rider. He failed to maintain a safe following distance between the insured rider's motorbike and his. He failed to reduce speed when he approached the stationary motorbike. He failed to reduce speed when the insured rider reduced speed in order to stop. He failed to swerve or to take any other invasive action in order to avoid the collision. He failed to make provision for a possible lateral movement by any of his fellow riders. In short he failed to keep a proper lookout, in the prevailing circumstances.

[85] There is no doubt that the insured rider was also negligent and that his negligence contributed to the occurrence of the collision between the two motorbikes. There is no doubt in my mind that the plaintiff was also negligent and that the collision between the two motorbikes was brought about by his contributory negligence. Accordingly I am not persuaded that the insured rider was the sole cause of the accident as Mr Steenkamp submitted. Likewise I am not persuaded that the plaintiff was the sole cause of the accident as Mr Thompson submitted. On the facts, both riders were to blame for the accident. However, the plaintiff's negligence was the primary cause of the accident in my view. His careless conduct substantially caused the accident. On the facts I am of the view that an apportionment of 60/40 in favour of the defendant is justified.

[86] Accordingly I make the following order:

- 86.1 The plaintiff's action succeeds.
- 86.2 The defendant is liable for 40% of the plaintiff's proven or agreed damages.
- 86.3 The defendant is directed to pay the plaintiff's costs relating to the substantive merits of the matter.
- 86.4 The adjudication of issues relating to quantum is postponed *sine die*.

M. H. RAMPAL, AJP

On behalf of the plaintiff: Adv. MDJ Steenkamp
Instructed by:
Ben van der Merwe Attorneys
BLOEMFONTEIN

On behalf of the defendant: Adv. DR Thompson
Instructed by:
Nozuko Nxunani Inc.
JOHANNESBURG
Honey & Partners
BLOEMFONTEIN