REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(JOHANNESBURG)

(1) REPORTABLE: **NO**	
(2) OF INTEREST TO OTHER JUDGES: **NO**	
.....	.....
DATE	SIGNATURE

CASE NO: 26140/2012

In the matter between:

GILPIN, TERENCE MICHAEL **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

KUBUSHI, J

[1] This is a claim for damages for personal injuries sustained in a collision on 7 November 2011. The claim is brought in terms of the Road Accident Fund Act No. 56 of 1996 (the Act). At the time of the collision the plaintiff was driving a motor cycle. Both quantum and merits were at issue. The plaintiff's counsel applied in terms of uniform rule 33 (4) for an order that the merits be heard separately and *quantum* be postponed *sine die*. The defendant's counsel did not oppose the application. I therefore granted an order separating the merits from the *quantum*. The matter proceeded on the merits part only and *quantum* postponed *sine die*.

[2] Two bundles of documents marked 1 and 2 were handed in. Bundle 1 is the pleadings bundle and bundle 2 is the index to the merits and *quantum*. The status of the documents contained therein was agreed by the parties at the pre-trial conference. In terms of that agreement the documents are what they purport to be without the truthfulness of the contents thereof being admitted. Objection to the use of a specific document(s) is to be made prior to the commencement of the trial, under which circumstances the said documents have to be proved. No objection was made by any of the parties to the documents used in court and as such there was no need to prove any document.

[3] The plaintiff's counsel applied for the amendment of the plaintiff's surname in the particulars of claim. The name was written as "GIPLIN" and the correct name is "GILPIN". The defendant's counsel had no objection and I granted the application.

[4] At the end of the trial, closing arguments having also been presented but before I could deliver judgment, the plaintiff applied for the amendment of his particulars of claim in terms of uniform rule 28, which application the defendant is opposing. For a better understanding of this application and for convenience I opt to deal with the amendment after I have dealt with the evidence presented in court.

[5] Each party tendered the evidence of only one witness in regard to their respective cases. The plaintiff testified on his behalf. The defendant called Mr Qhubekani Ndebele (Ndebele), the driver of the motor vehicle who the plaintiff alleges to have caused the collision, to give evidence. The evidence before me is as appears hereunder.

[6] Both parties in their respective evidence referred to the scene of the collision as depicted on the sketch plan on page 14 of Bundle 2 which is common cause between them. The collision occurred along Douglas Drive in Douglasdale. Douglas Drive is described by both parties as going from South to North. At the North end Witkoppen Road intersects with Douglas Drive in the direction of West to East. There is a traffic light at the corner of Witkoppen Road and Douglas Drive. Douglas Drive has two lanes going in both opposite directions. Along Douglas Drive more towards the Witkoppen Road, there is the Douglasdale Police Station and opposite the police station is an area demarcated as a parking lot for the police station. Between the parking lot and the police station is a road, Topaas Road that goes into Douglasdale Drive. There is a stop sign at the corner of Topaas Road and Douglasdale Drive. A person coming from the direction of Witkoppen turning right into Topaas Road has to stop to allow oncoming traffic to pass.

[7] What is also common cause between the parties is that: on the morning in question, the plaintiff and Ndebele were travelling along Douglas Drive. The plaintiff was travelling from South to North towards Witkoppen Road. Ndebele was travelling from the opposite direction – from North to South away from Witkoppen Road. The plaintiff was driving a Harley Davis 1200 CC V ROD motor cycle with registration number L..... GP. It is not in dispute that this is a heavy motor cycle. Ndebele was driving a green Ford sedan motor vehicle with registration number J..... GP. Immediately before the collision, the plaintiff was travelling at a speed of 35 to 40km *per* hour. Ndebele was standing along Douglas Drive opposite the parking lot indicating to turn right into Topaas Road. The plaintiff's testimony is that he does not remember whether Ndebele's motor vehicle was indicating.

[8] The parties are, however, at odds as to how the incident which caused the plaintiff's injuries occurred. The plaintiff's version is that he was travelling in the right lane of the road whereas Ndebele's testimony is that the plaintiff was travelling in the left lane. According to the plaintiff he was travelling behind other motor vehicles which had stopped or were slowing down to stop at the traffic light at the corner of Douglas Drive and Witkoppen. Mr Ndebele denied in his testimony that there were motor vehicles travelling in front of the plaintiff's motor cycle. According to his evidence the motor cycle was travelling in front of the other motor vehicles. There were no motor vehicles on the part of the road next to where he had stopped.

[9] The plaintiff's version as to how the collision occurred is that: a sedan motor vehicle turned too quick in front of him. He did not have time to stop or swerve, in fact, it happen so sudden that he did not even have time to think of what to do. He could not swerve the motor cycle because it was heavy. He does not remember what happened thereafter as he lost consciousness and woke up in hospital. He did not see nor talk to the police at the scene of the incident. His further evidence is that his motor cycle was badly damaged and had to be repaired at the cost of R62 000. He does not know where the motor cycle collided with the sedan. The plaintiff's contention as such is that the driver of the sedan failed to observe the plaintiff's motor cycle and executed a right turn into Topaas Road, at a time when it was unsafe to do so and as a result collided with his motor cycle.

[10] Mr Ndebele on the other hand testified that he was on his way to the police station that morning. He stopped along Douglas Drive with the intention to turn right into Topaas Road. He had stopped there because he wanted to allow the oncoming traffic to pass before he can make the right turn. As he was standing there, a white bakkie came from the direction of Topaas Road and turned right into Douglas Drive. That bakkie hooted once and drove straight into the face of the oncoming traffic. A motor cycle coming from the South along Douglas Drive was at the same time approaching the intersection. The driver tried to avoid colliding with the bakkie but lost control of the motor cycle. The driver of the motor cycle jumped from the motor cycle and landed underneath Ndebele's motor vehicle. The man was embedded deep under Ndebele's

motor vehicle and as a result the radiator pipe to Ndebele's motor vehicle was damaged – there was no contact between his motor vehicle and the motor cycle. According to Ndebele the radiator pipe is the only part in his motor vehicle that was damaged. The driver of the bakkie parked his motor vehicle on the side of the road, along Douglas Drive and together with the police from the police station, came to assist at the scene of the collision. Ndebele did not ask for his name or his contact details nor did he take the details of the bakkie.

[11] At the commencement of the trial the plaintiff's counsel informed me that the plaintiff's claim is based on paragraph 6.10 of his particulars of claim. The said paragraph states that –

> '6. The sole cause of the injuries sustained by the plaintiff was the negligence and/or wrongful act of the driver and/or owner of the insured vehicle, which negligence and/or wrongful act materialised on one or more or all of the following respect:
>
> 6.10 He/she/it failed to observe the plaintiff's motor cycle, executed a right turn at a time when it was unsafe to do so and collided with the plaintiff's motor cycle'

[12] The plaintiff's notice of amendment sought to amend the plaintiff's particulars of claim in the following respects:

> "1. By deleting in paragraph 4 thereof the words "*a motor vehicle"* and by inserting in their place the words "*motor vehicles".*
>
> 2. By inserting in paragraph 5 thereof after the word "*Ndebele"* the following words:

"*and a certain motor vehicle of which the identity of neither the owner nor the driver can be established (hereinafter referred to as "the unidentified motor vehicle") driven by a person whose name or names is to the plaintiff unknown (hereinafter referred to as "the driver of the unidentified motor vehicle")"*

3. By inserting after paragraph 6 thereof the following heading and the following paragraph 6 *bis:*

"In the alternative to paragraph 6 above

6 bis The sole cause of the injuries sustained by the plaintiff was the negligence and/or wrongful act of the driver of the unidentified motor vehicle and/or the owner of the unidentified motor vehicle which negligence and/or wrongful act materialised in one or more or all of the following respects:

6 bis 1 He travelled at an excessive speed in the circumstances.

6 bis 2 He failed to keep any or any proper lookout.

6 bis 3 He failed to exercise any or any proper control over the unidentified motor vehicle.

6 bis 4 He failed to apply the brakes of the unidentified motor vehicle timeously or at all.

6 bis 5 He failed to stop at a stop street at a dangerous time and at a time when he was obliged to do so.

6 bis 6 He proceeded from a minor side road on to a main road at a dangerous and inopportune time and without having satisfied himself that it was safe to do so.

6 bis 7 *He proceeded from a minor road on to a main road without stopping and in circumstances where he was obliged to do so.*

6 bis 8 *He attempted to proceed across the path of travel of the plaintiff's motorcycle bearing registration letters and numbers L..... GP at a dangerous and inopportune time and without having satisfied himself that it was safe to do so.*

6 bis 9 *He failed to avoid the plaintiff sustaining injuries when by the exercise of reasonable care he could and should have done so."*

4. By inserting after the abovementioned paragraph 6 *bis* the following heading and the following paragraph 6 *ter*:

"*In the further alternative to paragraph 6 and 6 bis above*

6 ter *The injuries sustained by the plaintiff were due to the joint and simultaneous negligence of the said Ndebele in one or more or all of the respects set out in paragraph 6 above and of the driver of the unidentified motor vehicle in one or more or all of the aspects set out in paragraph 6 bis above."*

5. By inserting after the abovementioned paragraph 6 *ter* the following paragraph 6 *quat:*

"*6 quat* *the plaintiff is uncertain whether the injuries he suffered were due to the negligence of the said Ndebele or of the driver of the unidentified motor vehicle or of both the said Ndebele*

and the driver of the unidentified motor vehicle in one or more or all of the respects set out above."

[13] The defendant is opposing the application for amendment on the following grounds:

1. The proposed amendment materially and substantially amends the particulars of claim.

2. The proposed amendment introduces a new claim of action not included in the particulars of claim.

3. The proposed amendment, if granted, would adversely affect the defendant's defence in that both the plaintiff's and the defendant's cases had been closed in particular the manner in which the defendant would have prepared and conducted its defence had it been aware of such amended particulars of claim from the outset of the proceedings.

4. The prejudice and injustice suffered by the defendant is irreversible and cannot be cured at this late stage of the proceedings where judgment is allowed.

5. The proposed amendment will not contribute to the determination of the original issue as pleaded by the plaintiff.

6. The proposed amendment will not contribute to the proper ventilation of the issues between the parties as per the pleadings.

7. The proposed amendment is not reconcilable with the testimony of the plaintiff.

[14] In argument in court, the plaintiff's counsel submitted that the application to amend the plaintiff's particulars of claim was brought in consequence of a question I asked during the course of argument at the end of the evidence. The question asked was whether it would make any difference if I find negligence on the part of the defendant as a result of the negligence of the driver of the insured motor vehicle as alleged in paragraphs 5 and 6 of the amended particulars of claim or as a result of the negligence of the driver of the unidentified motor vehicle as testified to by Ndebele. As a result of this question, the plaintiff found it necessary to apply for the amendment.

[15] According to his counsel, the plaintiff's version as *per* the proposed amendment is that the collision was caused by the negligent driving of Ndebele's insured motor vehicle and in the alternative by an unidentified motor vehicle. According to counsel, in terms of uniform rule 28 (10), an amendment can be brought at any time before judgment. He contends further that, in the circumstances of this case, there is no prejudice or injustice to be suffered by the defendant in that: the amendment emanates from the defence of the defendant during trial; and there is no way that the plaintiff would have known about the defence because it does not appear from the papers before court or from the police report pertaining to the collision in question. The defendant knew at all times about this defence but did not disclose it and only canvassed it at the trial. He referred me to the judgments in *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D&CLD) and *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) and to Erasmus: *Superior Court Practice* page B1 -179

[16] The further contention by the plaintiff's counsel is that the plaintiff should not be criticised for bringing the amendment at the end of the case as there is no carelessness, mistake or omission on the part of the plaintiff in bringing the amendment. The plaintiff had no knowledge of the unidentified motor vehicle. The plaintiff relied on the police

sketch plan of the collision. Quiet clearly the application to amend is, according to counsel, *bona fide* in that it was brought as a result of the evidence at the trial which was not pleaded. The amendment is thus reconcilable with the testimony of Ndebele which was tendered by the defendant at the trial. He relied in this regard in the judgment in *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) and Erasmus above pages B1 -181 to B1 - 183.

[17] The plaintiff's counsel also contends that the amendment does not introduce a new cause of action. The amendment introduces fresh and alternative facts supporting the original cause of action. Even if it did, it would, according to counsel, not require the re-opening of the case since the issue was fully canvassed at the trial. The proposed amendment will not cause the defendant any prejudice, as well. In this regard he referred me to the judgments in *Williams NO v Lesotho National Insurance Co (Pty) Ltd and Another* 1997 (4) SA 722 (O), *Mokoena v SA Eagle Insurance* 1982 (1) SA 780 (O) and *Du Bruyn v Joubert* 1982 (4) SA 691 (W).

[18] Another submission is that the plaintiff's claim has also not prescribed yet and a fresh action can be brought all over again. The case would prescribe on 6 November 2016. The Road Accident Fund is liable in respect of unidentified vehicles in terms of s 17 read with regulation 2 of the Act. Such a claim must be lodged within two years of the cause of action or the claim prescribes. The cause of action in this instance occurred on 7 November 2012. The present claim was lodged within two years and the plaintiff has until November 2016 to issue summons. Counsel referred to the date stamp on the summons of 2 March 2012 as indication that the summons was issued well within the two year period. The test in respect of whether the plaintiff has lodged a proper claim against the defendant is whether the RAF was given enough details of the collision. The details must be enough to enable the RAF to conduct its own investigation, so he argued. In this respect counsel referred me to the judgment in *Pillay v RAF* 2014 (4) SA 112 (SCA).

[19] In argument before me, the defendant's counsel concedes that a court may at any stage before judgment, by exercising its judicial discretion, grant an amendment. As the proposed amendment was not raised on the pleadings and only came to the fore at the conclusion of the evidence already heard and presented regarding the issue of merits the

real issue had not been canvassed at the trial. According to counsel, an amendment would be granted unless such amendment would cause an injustice which cannot be compensated by an appropriate order as to costs or postponement. In this regard counsel relied in *Middleton v Carr* 1949 (2) SA 374 (A), *Moolman v Estate Moolman* 1927 CPD 27 and *Trans-Drakensberg Bank Ltd v Combined Engineering (PTY) Ltd* 1967 (3) SA 632 (D).

[20] The defendant's counsel, on the other hand, submitted that the purpose of pleadings is that one should put his or her case forward. The version put to the defendant in the particulars of claim and as persisted with at the pre-trial conference is the one which the defendant replied to. This is also the version which the plaintiff's counsel addressed in his summary opening. By introducing the amendment, it is counsel's contention that the plaintiff wants to change his version by introducing the unidentified motor vehicle. Plaintiff has to prove his case as set out in the particulars of claim. The proposed amendment, according to counsel, does not contribute to the real issues between the parties. In this regard he referred me to the judgments in *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) contra *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) at 44.

[21] According to the defendant's counsel, the defendant reacted to the version as put out by the plaintiff in the particulars of claim and as contained in the RAF 1 form lodged by the plaintiff. The defendant's official plea is the denial that the motor vehicle with registration number JTG 747 GP did not cause the collision or the injuries. From the time, having received the plea, the plaintiff ought to have been aware that the defendant was denying that the collision was caused by the motor vehicle alleged by the plaintiff. The defendant could only act on what was presented to it in the RAF 1 form, the particulars of claim and the evidence tendered orally. The application for amendment should, according to counsel, convince the court to exercise its discretion in favour of the defendant as the plaintiff cannot change its version to suit the testimony of the defendant.

[22] Proper ventilation of issues is paramount, defendant's counsel states. The plaintiff's version is cast in stone and should be replied to. The court having heard that version must also decide on that version. The plaintiff's version is canvassed in such a way that the court

would be able to come to a decision. If the amendment is allowed it would mean that the court must dismiss all what was said by plaintiff in court and take only the version of the defendant. The onus is on the plaintiff and not the defendant, so he argued.

[23] Uniform rule 28 (10) reads as follows:

> "(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

[24] It has been held that the court will normally only allow an amendment at the late stage of the proceedings if the issues raised by the proposed amendment have already been canvassed in the evidence and there is no prejudice or injustice to the other party. See *Pennefather v Gokul* 1960 (4) SA 42 (NPD) at 51B and *Knightsbridge Investments (Pvt) Ltd v Gurland* 1964 (4) SA 273 (SR) at 281 A

[25] It is trite that the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the court. Such discretion must be exercised judicially. An amendment would as such be granted unless such amendment would cause an injustice which cannot be compensated by an appropriate order as to cost or postponement.

[26] Uniform rule 28 (10) authorises a court to grant an amendment at any stage of the proceedings but before judgment. One of the facts which should be presented to a court in its exercise of its discretion is the reason why the application to amend was brought, as in this instance, at a late stage. As it is said, an amendment cannot be granted for the mere asking. The court hearing the application should be satisfied that the party seeking the amendment is not *mala fide*. In the application before me, I find the plaintiff's explanation as to why this amendment is brought at this late stage of the proceedings, acceptable. The information the plaintiff is using to apply for the proposed amendment could not have

come to his knowledge before the trial. The plaintiff's testimony is that he only remembers a sedan motor vehicle turning too quickly in front of him. He did not have time to stop or swerve, in fact, the collision happen so sudden that he did not even have time to think of what to do. He does not remember what happened thereafter as he lost consciousness and woke up in hospital. He did not see nor talk to the police at the scene of the incident. He does not know where the motor cycle collided with the sedan. He could not even remember the model or colour of the sedan. It is thus clear that he could not have known of the presence of the unidentified motor vehicle which according to Ndebele caused the collision. He relied on the information from the police report and sketch plan. On the contrary, from the evidence tendered by Ndebele in court, if it is to be accepted as the truth, one can infer that the defendant was at all material times aware that the collision was not caused by Ndebele but by the driver of the unidentified motor vehicle. The defendant must have at one time or the other consulted with Ndebele, who must have informed it of the presence of the unidentified motor vehicle at the scene of the collision and that that unidentified motor vehicle caused the collision. This information was not disclosed to the plaintiff either in the pleadings or at any stage of the proceedings. It was disclosed only when Ndebele testified in court. In fact, the defendant, in his plea, admits the plaintiff's allegation that the collision was caused by the negligent driving of Ndebele's motor vehicle.

[27] The defendant's contention that the issue which the proposed amendment seeks to introduce was not canvassed at the trial is misconceived. The issue was crisply raised at the trial in the testimony of Ndebele, the defendant's witness. It is, in fact, the evidence of Ndebele that the collision and consequently the injuries sustained by the plaintiff were caused by the unidentified motor vehicle. According to Ndebele, he had stopped along Douglas Drive with the intention of turning right into Topaas Road. He had stopped there because he wanted to allow the oncoming traffic to pass before he can make the right turn. As he was standing there, he saw a white bakkie come from the direction of Topaas Road turning right into Douglas Drive. That bakkie hooted once and drove straight into the face of the oncoming traffic. He also saw a motor cycle coming from the South along Douglas Drive approaching the intersection where the white bakkie was crossing and in trying to avoid colliding with the bakkie, the plaintiff lost control of the motor cycle and fell off. Ndebele was cross-examined by the plaintiff's counsel at length on this version of his evidence. The defendant's counsel also took up the issue again during his re-examination

of Ndebele. The defendant's counsel can, therefore, not be heard to be saying that the issue was not canvassed at trial.

[28] This issue having been so canvassed and it emanating from the testimony of the defendant's witness, it is my view that should the proposed amendment be allowed, it will not cause prejudice or injustice to the defendant. It is my view that, if the plaintiff had relied on this alternative basis before evidence was led Ndebele would still tender the same evidence. He witnessed the collision and his testimony as to how the collision happen will remain the same.

[29] I also do not agree with the contention by the defendant's counsel that the proposed amendment seeks to introduce a new cause of action. It is common cause that the proposed amendment seeks to introduce, in the alternative, the unidentified motor vehicle. This amendment, in my opinion, does not materially and substantially amend the plaintiff's cause of action but introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. It is not in dispute that the cause of action is based on damages suffered by the plaintiff as a result of injuries sustained by the negligent driving of a motor vehicle. The proposed amendment brings alternative facts as to which motor vehicle, other than the plaintiff's motor cycle, caused the plaintiff to lose control of his motor cycle. Initially the plaintiff averred that the motor vehicle involved was that of Ndebele and with the proposed amendment, an alternative motor vehicle, the unidentified motor vehicle, is introduced. This to me is not a new cause of action. The proposed amendment introduces an additional default. See *Williams NO v Lesotho National Insurance Co Ltd* above at 733D – F.

[30] It is thus clear that the amendment should be allowed on the grounds of the evidence already led by Ndebele at the trial. And on that basis, I am of the view that, I should exercise my discretion in favour of the plaintiff and allow the amendment.

[31] In terms of the amended paragraph 6 of the particulars of claim, the plaintiff alleges that the sole cause of the injuries he sustained was as a result of the negligence and/or wrongful act of Ndebele or the driver and/or owner of the unidentified motor vehicle, which negligence and/or wrongful act materialised in that Ndebele or the driver or the owner of the unidentified motor vehicle failed to observe the plaintiff's motor cycle and executed a right turn at a time when it was unsafe to do so and as a result collided with the plaintiff's motor cycle.

[32] The *onus* is on the plaintiff to prove on a preponderance of probabilities that his injuries are due to the negligence or wrongful act of either Ndebele or in the alternative, the driver of the unidentified motor vehicle. The crisp issue, therefore, which this court has to determine, is whether the plaintiff has, on a balance of probabilities, succeeded in establishing negligence or wrongful act on the part of either Ndebele or the driver of the unidentified motor vehicle.

[33] After considering all the evidence presented, I was, at the end of the trial, faced with two versions, which were mutually destructive, of how the collision occurred. I therefore have to evaluate that evidence in order to determine which of the two versions is truthful.

[35] Where there are two mutually destructive stories, the plaintiff, can only succeed if he or she satisfies the court on a preponderance of probabilities that his or her version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is false or mistaken and falls to be rejected. The court's approach in such a situation is to weigh up and test the plaintiff's version against the general probabilities of the case and, if the balance of probabilities favours the plaintiff the court will accept his or her version as probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they favour the defendant's, the plaintiff can only succeed if the court nevertheless believes him or her and is satisfied that his or her evidence is true and that the defendant's version is false. See ***National***

Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440E – 441A quoted with approval in *Baring Eiendomme Bpk v Roux* [2001] All SA 399 (A) para [7] at 402a- f.

[36] The evidence of the plaintiff tendered in court does not, in my view, conclusively establish that the injuries he sustained were caused by the negligence or wrongful conduct of either Ndebele or the driver of the unidentified motor vehicle. The only thing that the plaintiff could remember was that a sedan motor vehicle turned right into his path of travel and caused the collision. He does not know or remember whether his motor cycle collided with the motor vehicle or not as he lost consciousness and only came to in hospital. He could not say which motor vehicle turned into his lane of travel. It can only be inferred that his allegation that his injuries were caused by the negligence of Ndebele, as per his (the plaintiff's) evidence in court, is based on the information he got from the police report.

[37] My view is that either Ndebele or the driver of the white bakkie is responsible for the collision. As per the police report and sketch plan, the motor vehicle that was involved in the incident is that of Ndebele. Yet Ndebele denies his involvement in the incident. According to him, a white bakkie coming from the Toopas Road, which failed to stop at the stop street, caused the plaintiff to lose control of his motor cycle and fall off and as such sustained the injuries. According to Ndebele, he was there and saw everything that happened. There is no other evidence available. The plaintiff's evidence is sketchy. He does not remember everything that happened. He only remembers seeing a sedan motor vehicle moving into his line of travel – basically that is all he remembers. He does not remember what colour that sedan motor vehicle was. He does not remember whether he is the one who collided with the sedan or whether the sedan collided with his motor cycle. Ndebele's testimony is that the motor cycle did not collide with either his motor vehicle or with the white bakkie. According to Ndebele, the plaintiff, in avoiding to collide with the white bakkie, lost control of the motor cycle, fell off and landed underneath his (Ndebele) motor vehicle. This version of Ndebele is uncontested because the plaintiff lost consciousness and does not know what happened thereafter. According to the evidence the only other persons who it can be said witnessed the incident is the driver of the unidentified motor vehicle and Sam, the passenger in Ndebele's motor vehicle. It is common cause that the driver of the unidentified motor vehicle remains unidentified and could not have been expected to give evidence. Sam, on the other hand, though it was said that he was

available was not called to testify. If it is to be accepted that Ndebele's version in he truth, then it would be expected that Sam's evidence would not differ from that of Ndebele. I therefore have to accept Ndebele's version as the truth of what happened there on that day.

[39] Ndebele testified that the plaintiff's motor cycle did not come into contact with his motor vehicle. The plaintiff is the one who came into contact with his motor vehicle when he jumped from his motor cycle and landed beneath his motor vehicle. It is also clear from Ndebele's testimony that the motor cycle did not come into contact with the white bakkie as well. The submission by the plaintiff's counsel, which was not gainsaid by the defendant or its counsel, that in order for the plaintiff to establish negligence on the part of the insured driver, it is not necessary that the plaintiff's motor cycle should have come into contact with the insured motor vehicle, is correct. There is no requirement that there should be contact. The requirements in terms of s 17 (1) of the Act, is that the bodily injury should be caused by or arise from the driving of a motor vehicle by any person and the injuries should be due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle whose identity has been or has not been established. The wrongful conduct of the driver of the unidentified motor vehicle, which caused the plaintiff to take evasive action and resulted in the plaintiff sustaining the injuries is sufficient to establish the required negligence.

[41] In determining the plaintiff's claim, I must consider all the evidence presented in court. The application of the averments contained in the pleadings once the proposed amendment is allowed will be supported by the evidence tendered by the defendant. The amendment having been allowed, and on the totality of the evidence presented, I find that the plaintiff has proved his case on a balance of probabilities and the defendant should therefore be ordered to pay any proven or agreed damages.

[42] The plaintiff's counsel argued that the plaintiff should not be settled with the costs of the application since the application was necessitated by the defendant's failure to disclose his defence in his pleadings. In fact, according to counsel, the defendant should not have opposed the application since it is based on his version of the events. I am in

agreement with this argument. Costs should therefore be granted in favour of the plaintiff as the successful party in the main case and in the application.

[43] In the premises I make the following order:

49.1 The application for amendment is granted.

49.2 The plaintiff succeeds 100% with his claim against the defendant.

49.3 The defendant is ordered to pay to the plaintiff any proven or agreed damages.

49.4 The defendant is ordered to pay the costs of suit on a party and party scale including costs occasioned by the application to amend.

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KUBUSHI J

JUDGE OF THE JOHANNESBURG LOCAL DIVISION GAUTENG HIGH COURT

APPEARANCES

HEARD ON THE	**: 17 SEPTEMBER 2014**
DATE OF JUDGMENT	**: 17 OCTOBER 2014**
PLAINTIFF'S COUNSEL	**: ADV M. CHAITOWITZ, SC**

PLAINTIFF'S ATTORNEY : **DE BROGLIO INC**

DEFENDANT'S COUNSEL : **ADV V STRAUSS**

DEFENDANT'S ATTORNEY : **SISHI INCORPORATED**