

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 488/2006

In the matter between:

TAURIQ HASSAN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON 23 APRIL 2008

CROWE A.J.:

{1} Plaintiff was involved in a motor vehicle accident and claims compensation from the Defendant in terms of the provisions of the Road Accident Fund Act, No 56 of 1996. The issues have been separated in terms of Rule 33(4) and I am required to determine the merits only at this stage.

[2] It is common cause that the accident in question occurred at approximately 19h00 on 24 December 2004 at Searle Street, Woodstock between an Opel Corsa motor vehicle driven by one Geordie Patrick Mackenzie

and a 400cc Honda motorcycle on which the Plaintiff was being conveyed as a passenger.

[3] Three witnesses testified for the Plaintiff, namely Constable R Moos (the municipal police officer who attended the scene of the accident and who completed the accident report form at pages 1 to 4 of Exhibit "A"), Mr Abdullah Jappie (who testified that he was the driver of the motorcycle) and the Plaintiff (who testified that he was a passenger on the motorcycle). Two witnesses testified for the Defendant, namely Mr Mackenzie (the driver of the Opel Corsa) and his wife Mrs Suzette Mackenzie (a front seat passenger in the Opel Corsa).

[4] It is common cause between the two drivers that the Opel Corsa was stationary on its correct side of the road shortly before the accident. Mr Jappie testified that as he and the Plaintiff came up Searle Street he noticed a car coming down and as they got close, the car was stationary in the middle of the road. Just before they passed this car, it turned right and hit them. He flew through the air and landed up on the tarmac on the west. Mr Mackenzie testified that he was stationary in his lane, preparatory to turning right into a parking lot, with his indicator on waiting for the motorcycle to pass and that as it approached, it sped up and swerved and hit the right side of the Corsa. He stated that his vehicle was at a slight angle and was in his lane, towards the right hand side of his lane, waiting to turn. An "*Audatex Repair Calculation*" handed in as Exhibit "A" (pages 12 to 15) described the "*impact area*" as "*Front, Right Front*".

[5] Constable Moos testified that he is a Metro Police Officer stationed at Gallows Hill. He attended the scene of the accident on 24 December 2004. There were two vehicles at the scene. A red Opel Corsa was on the corner of Searle Street and the entrance to the swimming baths. A yellow and black Honda motorcycle was on the pavement next to the road. He had an accident report form (pages 1 to 4 of Exhibit "A") in his car and completed this at the scene. He obtained the information recorded therein from people at the scene. He drew the rough sketch of the accident scene at page 3 thereof on which the (northerly) direction of travel of the Corsa and the position of the Corsa post-accident are both marked "A" and the (southerly) direction of travel of the motorcycle and the position of the motorcycle post-accident are both marked "B". The drivers of the Corsa and the motorcycle were identified to him as Mr Mackenzie and Mr Jappie respectively. There were no eye witnesses. The ambulance had not yet arrived and he requested the control room to call it. He recorded the following "brief description of the accident" at page 3 thereof:

"As alleged by driver A [Mr Mackenzie]. He was travelling in a northern direction. He was apparently lost and did not see the cyclist when he turned right. He allegedly did not see anyone. As alleged by driver B [Mr Jappie], driver A was on a cellphone that is the reason why he did not see the motorcycle".

He usually shows the description of the accident recorded by him to the people who make the statements to him to ensure that there are no discrepancies and that he has correctly recorded what they told him. Notably, he was not asked whether, in this instance, he confirmed the contents of the said "brief description of accident" with Mr Mackenzie in accordance with his usual practice. The

ambulance came and removed the motorcycle driver and passenger. Regarding the allegation in the plea that Plaintiff failed to make use of a helmet, he pointed out that, in relation to the Plaintiff, he had circled the answers "*helmet present*" and "*helmet definitely used*" at page 2 of the accident report. His accident report also reflects that he recorded the following: time of accident was 19h10, weather conditions and visibility were clear, light condition was daylight, road surface was dry, road surface type was tarmac, quality of road surface was good, road marking was a barrier line, direction of road was straight, the motorcycle was travelling uphill and the Corsa downhill, both vehicles were in their correct road lanes, the Corsa was turning right and the motorcycle was travelling straight, and the accident constituted a sideswipe between vehicles travelling in opposite directions.

[6] Under cross-examination Moos stated that he had attended many accident scenes and this one was more than three years ago. This accident was memorable because it was Christmas Eve. Although he remembers it clearly, he must rely on what he wrote down. He has no other notes, besides the accident report. Although he completed the accident report at the scene, he signed it at his office shortly after midnight that same evening. When asked if he independently recalls filling in the accident report at the scene he said that is his practice as he does not make notes and makes it his duty to fill in the report at the scene. He could not say for sure, but this was his usual practice. His reason for not signing it at the scene was that the form needs to be signed off by someone at the office. There were helmets on the scene and he asked the driver

of the motorcycle if they wore helmets and he answered yes. It was put to him that Mr and Mrs Mackenzie would say that neither cyclist wore helmets and someone else brought the helmets to the scene. He could not dispute this and confirmed that there were other people on the scene. He could not dispute that Mr and Mrs Mackenzie would testify that their vehicle was in the middle of the road and had to be moved as it was obstructing traffic. He confirmed having indicated on the accident report form that the Opel was damaged on the "*front centre*", the "*right front*" corner and the right side. It was put to him that the insured driver would testify that he was not lost, but had missed his turn-off to the right. It was put to him that when he arrived at the scene he went over to the insured driver (who was attending to the Plaintiff, who was lying in the gutter some distance from the motorcycle driver) who said to him "*I did not see this guy*" and that the insured driver meant by this that he had not seen the pillion passenger until he found him in the gutter. He responded that he gathered from the insured driver that he had not seen the motorcycle, but conceded that he could have misunderstood him. In re-examination he was asked why he had recorded that the insured driver "*was apparently lost*" and responded that the insured driver told him that he was busy phoning friends to get directions and that he gathered from this that he was lost and that these were his own words. He confirmed that it was still light at the scene.

[7] Mr Jappie testified that he was the driver of the motorcycle and the Plaintiff was his pillion passenger. He and the Plaintiff both work in Claremont and had travelled together on the motorcycle from Claremont along the Eastern

Boulevard and had turned off to a friend's house. The friend was not there. In this regard, in his affidavit dated 8 January 2007 (at pages 9 to 11 of Exhibit "A") he stated that they established by phone that the friend was in Sea Point and then proceeded along Searle Street towards the Eastern Boulevard. In evidence, he said that they then travelled along Main Road and turned into Searle Street to visit another friend whose home is just off Searle Street. They both wore helmets. As they came up Searle Street he noticed a car coming down and as they got close it was stationary in the middle of the road. Just before they passed this car, it turned right and struck them. He landed up on the tarmac on the west side of the road (note that the accident report indicates that he was on the east side of the road), having flown through the air. He had injuries to his genitals but no head injury and was not unconscious. He was in pain and was sitting. He took off his helmet and went to sit on a grass patch. The Plaintiff landed on the side of the road next to or on the pavement, or in between. He glanced at the Plaintiff and thought he was unconscious, there were people around him. People he knew arrived and he was taken away in an ambulance. He could not avoid the collision.

[8] Under cross-examination Jappie was referred to an affidavit deposed to by the Plaintiff on 11 May 2005 as the complainant in a reckless and negligent driving case against the insured driver. In this affidavit, the Plaintiff stated that on the day in question he left work at approximately 18h15 and while on his way to take a taxi home had met an acquaintance "*known to me as Shahiem*" who offered him "*a lift home on his Honda motorbike yellow and black in colour*" and

that this person was the driver of the motor vehicle at the time of the accident. He stated that Shahiem was not his nickname. He confirmed that the affidavit described the same motorcycle, place and time of accident and the same accident as his accident. He stated that Shahiem was the owner of the motorcycle. He could not explain why Plaintiff had stated in his affidavit that Shahiem was the driver of the motorcycle at the time of the accident. He was referred to another affidavit made by the Plaintiff the day after the accident in which the Plaintiff had similarly stated that Shahiem was the driver of the motorcycle. He confirmed that the Plaintiff knew his name and would not have called him Shahiem.

He was asked where the turning vehicle was damaged and responded that, as far as he could recall, it was damaged on the left side. Note that at paragraph 5 of his aforesaid affidavit he stated that he "*collided with the left front fender at the left front wheel*" of the Corsa. It was put to him that if the damage was on the right side this would mean that he was responsible for the accident and he responded that this was not necessarily so and that it depends how the vehicle was situated. He conceded that if the damage was on the right side he would not be able to explain the accident.

Regarding ownership of the motorcycle, he stated that he had purchased it from Shahiem Soeker, but that the papers had not yet been registered in his name and that he was, therefore, not the "*legal*" owner. He later stated that he had paid for it and had possession of it.

The insured driver's version was put to him, namely that the insured driver was stationary with his indicator on waiting to turn right into the parking area, then saw the approaching motorcycle, which started to speed up and then developed a wobble or the driver lost control and that a collision then took place with the right side of that vehicle while it was stationary. He disputed this.

It was put to him that neither of them wore crash helmets and he denied this. It was put to him that a lady bystander said these young guys don't like to wear helmets as it messes their hairstyle. It was put to him that the Plaintiff had a spiky gelled hairstyle at the time which was inconsistent with his having worn a helmet and he declined to comment. It was put to him that someone else in the crowd had brought the two helmets to the scene and he denied this. He denied that he and the Plaintiff were going up Searle Street on a joyride without helmets and had lost control. He strongly disputed that the insured vehicle was stationary and on its side of the road. He stated that he did not have a license to drive the motorcycle at the time, but had previously had a motorcycle and that he now has such a licence.

[9] The Plaintiff testified that he got a lift from work with Jappie and that he knew him and that they both wore helmets. They went to the home of a friend, Kashif, in Woodstock, but he was not home. They made a phone call and then went up to Hide Street, which is off Searle Street, to another friend. In this regard, in his affidavit dated 11 May 2005 he stated that the driver "was going to

drop me at friend's place at Hide Street, Cape Town". When asked if he remembered the collision he said that he could only recall the car swerving in front of them, he could not recall its colour, and that he next recalled waking up in the gutter with many people around and an ambulance in attendance. He had no head injury. He was referred to the statement in his affidavit the day after the accident that the motorcycle was driven by Shahiem and to the previous evidence that Shahiem had verbally sold the motorcycle to Jappie. He said that he knew who Shahiem was. He was asked why he gave Shahiem's name in the affidavit and answered that he was asked by either Soeker or Jappie to make the statement "for insurance purposes". He did this again in his subsequent affidavit dated 11 May 2005, also "for insurance purposes". He said that Shahiem was at the scene of the accident, as well as other people who he knew.

[10] Under cross-examination the Plaintiff confirmed that he laid a charge of reckless and negligent driving against the insured driver, that this was a serious matter, and that he knew when laying a criminal charge that he must give a truthful statement. He conceded having given two untruthful statements under oath and that he knew he had lied under oath but didn't know that it was a serious offence. He confirmed that the purpose of doing so was to defraud an insurance company. It was put to him that the three of them were prepared to lie under oath because they knew the insurance company would not pay. He denied that the three of them had done so. It was put to him that he does not regard the oath as important and he said that he did. It was put to him that he only did so when it suited him, which he denied. When asked how he could

make a false statement under oath, he responded that he was confronted by one of the other two to make the statement. It was put to him that he could not remember anything of the accident and he stated that he just remembers coming up Searle Street. This contradicted his evidence in chief that he could recall the car swerving in front of them. When asked why Shahiem Soeker was at the scene, he stated that they were going to visit Abubaker in Hide Street, as it was his birthday, and that Kashif and Shahiem Soeker were good friends of Abubaker. He confirmed that both he and Soeker lived in Goodwood. He stated that he normally has a gelled hairstyle, when his hair is long, to look neat at work. He said that he lost consciousness, it could be for some time, but he could not say for how long. It was put to him that he had presumably hit his head and that the Mackenzies would say that his eyes were glazed and that he was unresponsive. He could not recall them and could not say why. He denied that they went for a joyride without helmets on.

[11] In answer to questions from the Court, Plaintiff stated that he was born on 23 December 1980 and was 27 years old. He matriculated at Heathfield School and has a national diploma in environmental health, which took 3 years to complete at Peninsula Technikon. He did 1 year's community service in the SANDF in Kwa-Zulu Natal and is registered with the Health Professions Council as an independent health practitioner. He had these qualifications at the time of the accident and was then the manager of a store in Cavendish Square, where he was responsible for overseeing staff, making sure the banking was done properly and for stock taking. Regarding courses in law, during his studies they

did touch on acts and regulations, such as the Health Act. He currently also works as a health practitioner. When asked how he felt when making the false statements under oath he said that he had done so to assist his friend and that it was not a good feeling.

[12] Mr Mackenzie testified that he is a navigation officer at sea working on various ships for Smit Marine. He was driving the Opel Corsa with his wife as front seat passenger. They were going to visit friends for a Christmas Eve get-together in Nerina Street, Woodstock. He knew the way, but they were approaching from a different direction and he missed the turn-off after exiting from the highway. He saw a parking lot on the right hand side and decided to turn right into the parking lot in order to turn his vehicle around. He saw a motorcycle coming up towards him, he stopped, his indicator was on and he waited for it to pass. As the motorcycle came closer it sped up and started swerving and hit the right side of his car which was in its lane, towards the right side of the lane, waiting to turn. It was at a slightly curved angle. After the accident his vehicle was in the same place and bystanders helped him move it. Immediately after the accident he checked his wife who was "okay". He then climbed out and went to the driver on the side of the road on the grass who was complaining of a sore groin. The driver showed him his passenger, approximately 20 metres up the road, lying in the gutter. He went to the passenger, who was unconscious, and checked his pulse and breathing. He is a "first aider". The passenger's eyes were glazed over with a yellowy / glossy look and he was not wearing a helmet. The driver was also not wearing a helmet. When asked if there were helmets on

the scene he said that after a while, he could not be exact, he noticed someone bring two helmets and throw them on the lawn. It looked like they knew the people on the bike. In the crowd an elderly lady standing next to the passenger said they don't like to wear helmets as it affects their hairstyle when they wear gel. Mr McDougall, for the Plaintiff, objected to this hearsay evidence and I admitted it provisionally. He was referred to the accident report form and confirmed the post-accident position of the two vehicles on the sketch after they had been moved. Regarding the aforesaid "*brief description of accident*" he denied that he was "*apparently lost*", he denied that he "*did not see the cyclist when he turned right*" and he denied that he "*did not see anyone*". He stated that when Constable Moos arrived, if he remembered, he was standing near the passenger and the Constable asked him what happened. He said he never saw him at first, referring to the passenger lying in the road. He denied that Constable Moos' description of the accident was read over to him. His vehicle was repaired and he submitted a claim to his insurers, Budget Insurance Brokers. He subsequently received several telephone calls from the passenger's wife or girlfriend wanting to know why he had not been to the police and had responded that he had spoken to the police at the scene and that it was not necessary. Subsequently a Constable from the Woodstock Police called him and he went in and made a statement on the 26th or 27th of that month. A week or so later he had a phone call from Shahiem asking him if they could settle privately - to sort his motorbike out. He furnished Shahiem with his claim number and insurance broker's details. He did not see the passenger before the accident, because he was sitting behind the rider.

[13] Mr Mackenzie was extensively cross-examined. He stated that while he was parked stationary at a slight angle waiting to turn, the motorcycle accelerated and lost control. At impact the driver came off the bike, he saw him in the air a metre or so off the ground, but cannot say how far he flew. The motorcycle came to rest in the middle of the road near to the point of collision. He only saw one person come off the bike. He first became aware of a passenger after the accident when the driver showed him the passenger, by pointing up the road. The passenger was lying on his back at the point where he must have landed and had no helmet on. He felt his head, but could not find any injury. He stood with him and phoned the emergency services. The driver was sitting on a grass embankment. He may have walked to the side of the road after he landed.

The police arrived shortly afterwards. He moved the car before Constable Moos arrived and a crowd of persons who knew the passenger gathered around him. One of these persons said he should move the car and they pushed it to the point indicated on the sketch. After moving the car he went back to the passenger and this is where Constable Moos found him. That is when he said to Moos that he never saw the passenger immediately and that he only saw him after the accident. He did not know why he said that, that is the way it came out. Moos walked with him to his car and asked him very basically about the accident and how it happened. He told him he was waiting to turn and the motorcycle came up swerving and collided with him. He could not explain why Defendant's

counsel had not put this to Moos in cross-examination. When asked if he had told Defendant's counsel this, he responded that he had never been asked that question until now. He was asked if Moos wrote it down and he responded that he did not see him write anything.

He said that the ambulance then arrived and he went back to the passenger. The ambulance took them away, the tow truck took his car away and he and his wife left the scene with friends. He is 34 years old, has a matric plus a Navigation T3 qualification which took two years of study. He denied that the version in Moos' brief description of the accident was his. It was put to him that his evidence that he told Moos that he never saw the passenger was nonsense. He said Moos had asked what happened, not about the passenger, and that he was in shock at the time and that his answer was just the way it came out.

He was questioned about a lengthy 26 paragraph affidavit he made a day or two after the accident, Exhibit "B". He did not write it himself. Regarding his statement therein that the motorbike tumbled over "*and the driver together with his passenger were off*", it was put to him that he saw the passenger when the collision took place. He denied this and said the statement was made after the event at a time when he was aware there was a passenger. Regarding his statement therein that he went "*to check on the driver and passenger of the motorbike*", he was asked if he intended to check on the driver and passenger and denied this. Regarding his statement therein that the driver "*was sitting on the pavement*", it was pointed out that his evidence in chief was that the driver

was on the grass. He was later referred to his further statement therein that while he was speaking to the emergency services on the phone he noticed the driver "had moved off the sidewalk and onto the grass embankment". He apologised and said he had not remembered this before.

He confirmed that the policeman who took the statement read it back to him at the time and said that it "seemed fine at the time". He was asked if the passenger was unconscious and answered that he seemed to be unconscious. He was asked if the statement was read back to him before he gave evidence and he responded not the entire statement, but bits and pieces thereof.

Regarding the helmets, he conceded that it was possible that the helmets were lying around and that someone had just gathered them up.

Regarding his statement in his affidavit that "the whole time while we were waiting for the ambulance to arrive the officer from the City Police ... Recording Officer R Moos was busy taking notes, asking questions of what happened and asking names", he said that he could not remember Moos taking notes. When asked why his statement said that he was taking notes, he answered not necessarily written notes but maybe mental notes. It was put to him that nowhere in the statement did he say that he had told Moos he did not see the passenger. He responded that he was also in shock at the scene and that he was "horribly shocked". He said that he may not remember 100%.

It was put to him that his statement that he first saw the passenger afterwards was a feeble excuse to explain away what Moos had recorded. He responded that when the police at Woodstock read to him what Moos had written in the accident form he told them it was wrong.

It was put to him that his evidence that he told Moos at the scene that the motorcycle came up the road and swerved and hit him was false and that he never gave Moos that information. He insisted that he had. It was put to him that he was not telling the truth and that he never saw the motorcycle.

He stated that his vehicle could not move after the accident as the front wheel on the driver's side was squashed up against the fender. He did not institute any claim against the RAF, but did institute an insurance claim for the damage to his vehicle. He did not lay criminal charges.

[14] Mrs Mackenzie's evidence was largely consistent with that of her husband. She confirmed that they missed their turn-off and that her husband saw an open parking space on the right hand side, that he stopped and waited for a motorcycle to pass so that he could turn, the indicator was definitely on. It seemed the motorcycle was going very slowly and then suddenly sped up and the driver lost control and collided with them. The front right section of their vehicle was damaged. At impact their vehicle was stationary in its lane with the car slightly "*curved to the right*". After the accident her husband went to the driver and then went to assist the passenger lying further up the road. She was

in shock, waiting for her husband to come back. She then went to the driver of the motorcycle and then went to try and assist the passenger. She did not notice if they were wearing helmets. She sat beside the passenger who was lying on the kerb and noticed that he had spiky gelled hair. He was "*not with it*", his eyes were glazed and the white of his eyeball was yellow. There was no blood. He did not move. While she was sitting next to the passenger she noticed someone throwing two helmets down nearby. The crowd came and she was pushed away, they seemed to know them.

[15] Mrs Mackenzie was also extensively cross-examined. She confirmed that while they were stationary in the road she saw the motorbike approaching and said that she only saw the driver at that stage. It was later put to her that it was strange that the passenger did not have head injuries if he was not wearing a helmet. She conceded this and said that he was definitely concussed. It was put to her that there were no scratches on his head and face and she said that he lay on his back and there were no scratches on his face. She said she did not see both of them wearing helmets and it was put to her that she might not have seen the helmets being removed. She responded, but "*when driving towards us*" they were not wearing helmets. She was asked if she saw that both of them were not wearing helmets before the accident and she said yes. The question was asked again and she answered "*yes I did*". This evidence contradicted her earlier evidence that she had only seen the driver before the accident. An affidavit she made to the police on 26 December 2004 was handed in as Exhibit "B". She was asked why she had not positively stated in her police statement that they were

not wearing helmets and did not answer. It was put to her that she was making this up and she responded that her police statement said there were *"two people on it"*. She was clearly flustered in the witness box at this stage.

She was asked if she saw what happened to the driver after the accident and responded *"not at all"* and that the last she recalls is the driver coming towards them and that she could not remember what happened after that, but that they were definitely stationary. She was asked how she could remember the vehicle was not moving if she could not remember what happened after the impact and answered that she was in shock and this was her first accident. Her statement in her police affidavit that she *"felt we were standing still"* was put to her and she said that she was sure they were stationary and that she did not feel a movement with the impact.

She repeated that her husband got out and went to the driver and then to the passenger and then came back to the vehicle and that she then got out of the vehicle. She went to the driver first, she could not remember if she spoke to him. It was put to her that in her affidavit she said she first went to the passenger, but in evidence had said she first went to the driver and then to the passenger. It was put to her that she had a bad memory and she responded that the accident took place 4 years previously. These questions and answer should be seen in context. In her affidavit she stated that after the accident she saw her husband get out of the motor vehicle to attend to people who were on the motorbike. She saw one sitting on the pavement and the other one was lying on his back. The

"first person", who was sitting on the pavement, was holding his legs inside "complaining about severe injuries". She climbed out of the motor vehicle and went to the person on the road lying next to the kerb (i.e. the passenger). It is apparent from this that she must have had some sort of communication with the driver before she went to the passenger as she heard him complain of his injuries. In her evidence in chief she stated that she went to the driver and then to try and assist the passenger. Under cross-examination she said she went to the driver first, but could not remember if she spoke to the driver, and she then went to the passenger. It appears, therefore, that these versions in her statement and in her evidence are reconcilable.

She was asked whether, when Constable Moos arrived, she heard him talk with her husband. She answered that she was then sitting on a hill nearby, that she was shocked and that a bystander had bought her sugar water.

Prior to giving evidence she did not discuss Moos' brief description of the accident in the report form with her husband.

She was asked whether she had discussed the accident with her husband and said that she might have. She could not recall discussing it the previous evening. She stated that she had consulted Defendant's lawyers approximately a week before and that both her and her husband were in the office at the same time when they discussed the accident. She denied that her memory was not good and that she was protecting her husband.

[16] My evaluation of the evidence is as follows. Constable Moos was an independent witness who did not appear to take sides. Although he had some independent recall of the accident, his evidence was somewhat vague and sketchy and he clearly had to rely on the accident report form for the details. He did not witness the accident and his evidence is confined to what transpired thereafter. The most important part of his evidence relates to what transpired between him and Mr Mackenzie at the scene of the accident and the reliability of what he recorded in his brief description of the accident in the accident report. In this regard, although he testified that his practice is to complete the accident report at the scene of an accident, in this instance he could not say for sure that he did so. He also testified that he signed off the form at his office shortly after midnight that evening, which indicates that he was working on it at that time. Furthermore, although he said that he usually shows descriptions of accidents recorded by him to the persons who make the statements to him, in this instance he was not asked if he did so. The insured driver, on the other hand, gave direct evidence pertinently denying that Moos did so. Importantly, he did not dispute the insured driver's version that when they first spoke at the scene, while the insured driver was attending to the Plaintiff who was lying in the gutter, the insured driver said to him "*I did not see this guy*" and that the insured driver meant by this that he had not seen the passenger until he found him in the gutter. When this was put to him he responded that he gathered from the insured driver that he had not seen the motorcycle, but conceded that he could have misunderstood him. Based on this evidence, and given this concession, it

appears that Moos' recordal in the accident report that the insured driver "*did not see the cyclist when he turned right*" and "*allegedly did not see anyone*" may be unreliable and the result of a misunderstanding between him and the insured driver. In this regard, I point out that the words "*turned right*" and "*apparently lost*" are all reasonably consistent with the insured driver's version and therefore take the matter no further. Furthermore, Moos testified that the latter words were his own, and not those of the insured driver.

[17] The Plaintiff was a singularly unimpressive witness. He adopted a flippanant and cocky attitude in the witness box. He casually testified before me that he had falsely stated under oath on two previous occasions that the driver of the motorcycle was Shahiem, when in fact it was Jappie, and that he did so "*for insurance purposes*". He also conceded that he did so in order "*to defraud an insurance company*". This makes me a witness to him committing perjury for the purpose of perpetrating a fraud upon an insurance company. What is more, the fraud intended to be perpetrated upon the insurance company arises from the same set of facts before me. It is apparent that he is an educated person who works in a responsible position as the manager of a business and is qualified as a health professional. He must surely have appreciated the seriousness of what he had done, but glibly sought to downplay it.

[18] Jappie was also an unimpressive witness. For much of his evidence he adopted a sheepish attitude, hanging his head and gazing steadfastly at the ground to avoid making eye contact with anyone. This was particularly so when

he was cross-examined regarding his knowledge of Plaintiff's perjured affidavits to the effect that Shahiem, and not he, was the driver of the motorcycle. His alleged inability to explain why the Plaintiff had done so must be viewed together with Plaintiff's evidence that he was asked by either Shahiem Soeker or Jappie to make the perjured affidavits for insurance purposes. Furthermore, his questioning elicited that he had already paid Shahiem for the motorcycle and had taken possession of it and that all that was outstanding was for the motorcycle to be registered in his name. He was driving it at the time but did not have a licence to do so. In these circumstances, it is clear that he was the person who stood to gain by the fraud to be perpetrated upon the insurance company by way of the perjured affidavits. He must have known why Plaintiff falsely alleged that Shahiem was the driver of the motorcycle and I do not accept his evidence that he could not explain this. It is apparent that he knew far more about this aspect than he was letting on. I also do not accept Plaintiff's evidence that either Shahiem Soeker or Jappie asked him to make the perjured affidavits as he clearly must know exactly how it came about that he made the perjured affidavits for insurance purposes. It appears that Jappie and the Plaintiff conspired together before they testified to try and avoid directly implicating Jappie in the fraud. In this regard, it is notable that Jappie was the person who stood to gain benefit from the Plaintiff's perjured affidavits and that the Plaintiff stands to gain from Jappie's evidence before me. I also note that Jappie was also particularly sheepish when it was put to him that they were on a joyride without helmets at the time.

[19] Although the issue of the helmets is not pertinent to the question of the alleged negligence of the insured driver, it has relevance in assessing the credibility of the various witnesses. In this regard, and having regard to the concession by the insured driver that it is possible that the helmets were lying around and that someone had just gathered them up, I do not consider that there is sufficient evidence to find that Jappie and the Plaintiff were not wearing helmets. It is quite possible that they were wearing helmets and that these were removed shortly after the accident and that someone did gather them up. The hearsay statement of a bystander regarding the gelled hair of the Plaintiff takes the matter no further and I have no regard thereto.

[20] Apart from the perjury and the fraud, there are other unsatisfactory aspects of the evidence of Jappie and the Plaintiff.

Jappie testified that the motorcycle collided with the left side of the Opel Corsa, which is clearly incorrect as the Corsa was damaged on the right front corner. This appears from the accident report form, the insurance document and the evidence of the insured driver that his vehicle could not move after the accident as the front wheel on the driver's side was squashed up against the fender. Moos also recorded in his brief description of the accident that the driver of the motorbike alleged that the driver of the Corsa was "*on a cellphone that is the reason why he did not see the m/cycle*". Jappie did not repeat this allegation in evidence, which is rather strange as such evidence would tend to support the

Plaintiff's case and is something one would expect him to repeat in evidence, if it was true. It was also not put to the insured driver.

Plaintiff testified in chief that he could only recall the car swerving in front of him and that he could not recall its colour. The use of the word "swerving" is inconsistent with the evidence of both drivers that the insured vehicle was stationary in the middle of the road until shortly before the accident. Furthermore, in cross-examination he stated that he could not remember anything and just remembered coming up Searle Street. It follows that no weight can be attached to the Plaintiff's evidence that the insured vehicle swerved in front of the motorcycle.

[21] Although Mr Mackenzie made a generally good impression upon me in terms of his demeanour, there are some troubling aspects of his evidence. Principally, there is the fact that he stated, for the first time in cross-examination, that he had informed Moos at the scene of his version that the motorcycle sped up and appeared to lose control just before the accident and that he had not crossed its path. This was not put to Moos in cross-examination, nor was it led in chief. In this regard, I was referred to the following dictum in President of the RSA v SA Rugby Football Union 2000 (1) SA 1 (CC) at 36 J – 37 E:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to

*afford the witness an opportunity while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in **Browne v Dunn** and has been adopted and consistently followed by our courts.*

*The rule in **Browne v Dunn** is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed".

The failure to put this allegation of the insured driver to Moos in cross-examination is clearly an unsatisfactory aspect of the Defendant's case as the Court now does not have the benefit of Moos' response to it and the Plaintiff has been denied the opportunity of having Moos refute it. It casts doubt on the credibility of the insured driver as it is the kind of evidence one would expect him to disclose to Defendant's counsel and which Defendant's counsel would have led in evidence, if he was aware of it. On the other hand, there may be an innocent explanation for this as Moos did not testify as an eye witness to the accident and it was therefore not necessary for Defendant's counsel to put the insured driver's version of the merits to Moos. It appears that Defendant's counsel may not have canvassed this aspect with him in consultation, as appears

from his response that he had never been asked that question (whether he had told Moos his version of the merits at the scene) until now. It appears that Defendant's counsel consulted concerning the initial discussion between the two of them and was informed that Moos appears to have misunderstood what was said at the time and assumed that they had no further discussion on the merits. It appears that he did not consult about any subsequent discussion between them on the merits. In this regard, the insured driver added in cross-examination that, after their initial discussion, Moos walked with him to his car and asked him very basically about the accident and how it had happened and that it was then that he informed Moos of his version on the merits. This sequence of events is to some extent confirmed by the statement in his police affidavit that the whole time while they were waiting for the ambulance to arrive Moos "*was busy taking notes, asking questions of what happened and asking names*".

There are also other questionable aspects of his evidence, for example his evidence that he could not remember Moos taking notes at the scene and his suggestion that his statement in his affidavit that Moos took notes may refer to mental notes. There is a further aspect of his evidence, not dealt with in evidence or argument, which bears consideration. At paragraph 9 of his police affidavit he states that other people started to arrive at the scene and he "*saw a guy running down towards the scene of the accident holding helmets*" and "*when he got to the scene he dropped the helmets near the bike*". He did not repeat this version before me and in fact conceded the helmet issue under cross-examination when he agreed that it was possible that the helmets were lying

around and that someone had just gathered them up. This indicates that the insured driver's recall of events was not that good and, also, that he was prepared to make concessions where he was uncertain or did not recall. There were also some other inconsistencies between his affidavit and his evidence, as set forth above, which I regard as minor.

[22] Mrs Mackenzie was in court while her husband was cross-examined and appeared upset by the vigorous nature of that cross-examination. On entering the witness box, it appeared as if she was relishing her contest with the cross-examiner in order to rally to the support of her husband in a wifely fashion. This is obviously the incorrect manner of approaching testimony and, unfortunately for her, she was not equal to the task and cross-examination exposed that she was a partial witness and, in one particular respect, that her evidence was unreliable. In chief she testified that she only saw the driver of the motorcycle before the accident, yet in cross-examination she was bold to declare that before the accident she saw that both the driver and passenger were not wearing helmets. This is not only a material contradiction in her evidence, but suggests that she adapted her evidence to bolster her version that Plaintiff and Jappie were not wearing helmets at the time of the accident and suggests that she was not impartial. I therefore attach no weight to her evidence.

[23] To summarise, the issue I have to decide on the totality of the evidence is whether, in the last few moments before the accident, the insured driver pulled off from a stationary position across the path of travel of the oncoming

motorcycle or whether the driver of the motorcycle sped up, lost control and collided with the insured vehicle while it was still stationary, preparatory to crossing the road. I must also have regard to the probabilities which arise from the evidence. The evidence of the Plaintiff and of Mrs Mackenzie regarding what happened in the few moments before the accident is inherently contradictory and cannot be relied upon to advance either parties' case. In any event, they were both unsatisfactory witnesses.

[24] I am left with the conflicting versions of Jappie, who I have already found to be an unsatisfactory witness, and Mackenzie, whose evidence is also not without blemish, and the evidence of Moos. During argument I put to Plaintiffs counsel, Mr McDougall, some of the aforesaid problems I have with the evidence led on behalf of the Plaintiff and he conceded, quite correctly, that without the evidence of Constable Moos, the Plaintiff has not discharged his onus of proof. He submitted that Moos' evidence was the key to the matter and that I should find for the Plaintiff. The problem I have with this submission is that Moos is not an eye witness and his evidence is confined to what happened after the accident. As such, his evidence really goes to the credibility of the insured driver. In this regard, Mr McDougall submitted that I should reject the insured driver's version and find that he was lying. I disagree. As set forth above, Moos made important concessions and accepted that he may have misunderstood what the insured driver told him at the scene. While there are certain unsatisfactory aspects of the insured driver's evidence, alluded to above, I am not satisfied that these are sufficient for me to reject his version *in toto*. It is clear that his memory of the

events is certainly not clear. For example, in chief he stated that Jappie was sitting on the grass, whereas his affidavit reflected that Jappie initially sat on the sidewalk and then moved onto the grass embankment. Jappie confirmed this in evidence. When it was put to the insured driver that his statement said this, he apologised and said that he had not remembered this before. There were also other aspects, set forth above, where it was apparent that his memory was not clear and at one point he said that he may not remember 100%. It is also so, despite the aspects of criticism that may be levelled against his evidence, that he consistently stuck to his version on the merits throughout his evidence and in his police affidavit made shortly after the accident. He testified in a calm and dignified manner and my impression is that he attempted to recall as best he could and was prepared to make concessions that were favourable to the Plaintiff's case. I do not find him mendacious.

[25] In all the circumstances, I am not satisfied that the Plaintiff has discharged the onus of proving on a balance of probabilities that the insured driver pulled off from the stationary position and drove in front of the motorcycle shortly before the accident. The evidence tendered on behalf of the Plaintiff was highly unsatisfactory and it is clear that both Jappie and the Plaintiff have a propensity to misrepresent the truth for the purposes of material gain in relation to the very facts before me. While there are several unsatisfactory aspects of the insured driver's evidence, I do not regard these as sufficient to reject his evidence *in toto* and to find that he lied and perjured himself before me, as was submitted by Mr McDougall. I do not attach any weight to Mrs Mackenzie's evidence and I do not

consider that Moos' evidence is decisive. In my view, it is equally probable, on the evidence, that the insured driver's vehicle remained stationary on its correct side of the road and that Jappie, an unlicensed driver of a newly purchased motorcycle, lost control and collided with the front right corner of the insured vehicle. In these circumstances, and applying the *dicta* in Machewane v RAF 2005 (6) SA 72 (T) at 76 D – F and 77 F – H, I find that there are two mutually destructive versions before me, neither version demonstrates a higher probability value than that of the other and that no credibility finding can be made in favour of either party which disturbs the even balance. In the circumstances, the appropriate order is one of absolution from the instance.

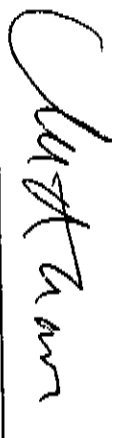
[26] I consider that it is my duty, as the judge presiding in this matter, to bring the evidence of perjury, fraud and unlicensed driving before me to the attention of the Director of Public Prosecutions for his consideration and possible investigation and the order I make will provide for this.

[27] In the result, I make the following order:

27.1 Absolution from the instance is granted and the Plaintiff is ordered to pay Defendant's costs of suit.

27.2 The Registrar is directed to forward copies of this judgment, Exhibits "A", "B" and "C" in this matter, and transcripts of the evidence of Abdullah Jappie and the Plaintiff before me in this

matter, to the Director of Public Prosecutions for his consideration and possible investigation and to inform him that the presiding judge in this matter considers that same contain evidence of the possible commission of the following or similar crimes: perjury on the part of the Plaintiff, fraud and/or attempted fraud on the part of the Plaintiff and/or Abdullah Jappie and/or Shahiem Soeker; and, driving a motorcycle without a licence on the part of Abdullah Jappie.

A handwritten signature in black ink, appearing to read 'A.J. Crowe', written over a horizontal line.

CROWE, A.J.