

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 03/02/2009
CASE NO: 24084/05

UNREPORTABLE

In the matter between:

GERT DIEDERICKS JACOBUS PRETORIUS

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOLOPA J

In this matter the Plaintiff has instituted an action against the Defendant for damages arising from a motor vehicle collision which occurred on 14 March 2004 along Vaalfontein Road in the vicinity of Groblersdal, between a motor vehicle with registration letters and number CRJ 478 MP (“the insured vehicle”), driven by one Pieter Spaumer (“Spaumer”) and a motorbike (“the bike”) with registration letters and number BPS 108 MP driven by the Plaintiff.

When the trial commenced, the parties by agreement made application for separation of liability and damages, i.e. separation of merits and quantum in terms of Rule 33 (4) of the uniform Rules of the Superior Court, which order I granted. The matter thus proceeded on the merits and the quantum was postponed *sine die*.

As already stated above the two vehicles aforesaid were involved in the collision in question. The Plaintiff seeks full liability from the Defendant. If the driver of the insured vehicle is found to be negligent, full damages against the Defendant are recoverable by the Plaintiff. If the

Plaintiff is found to be contributory negligent then, an apportionment to his damages will be applied.

It is common cause that a collision occurred on 14 March 2004 along the Vaalfontein Road in the vicinity of Groblersdal between the insured vehicle, driven by Spaumer and a motorbike driven by the Plaintiff. The allegations in this regard are set out in paragraph 4 of the Plaintiff's particulars of claim read with paragraph 4 of the Defendant's plea (pages 3 and 27 of the pleadings' paginated papers).

The issue for determination in this matter is whether the driver of the insured vehicle was negligent as alleged in paragraph 5 (5.1- 5.5 of the particulars of claim) page 4 of the paginated papers, and what degree of fault if any can be attributed to the Plaintiff in relation to the collision that occurred on 14 March 2004.

The evidence of the Plaintiff was that he is a production superintendent in the service of McCain Foods residing at 658 Pieke Street, Marblehall. That he was born on 11 December 1960. He is married for twenty years to Maria Jacoba Pretorius. They have two daughters aged 19 and 13 years old.

He is being staying in Marblehall for forty years and he has had his driver's license for twenty years and he has been driving big motor bikes for approximately twenty years.

He testified that on the day of the collision he was driving a Kawasaki ZX9 900cc motorbike depicted on the photo on page 42 of bundle B. Further photographs depicting his motorbike after the collision are on pages 34,35,36,37 and 38 of bundle B (photos 49-58). Photographs 59 and 60 on page 39 depict the helmet which he wore on the day of the collision.

The Plaintiff testified that on the day in question a collision occurred on the Vaalfontein road between Groblersdal and Marblehall. That he was coming from Groblersdal going to Marblehall along the Vaalfontein road. That when he came to a bend (draai) he saw a motor vehicle which was approximately 2 to 3 meters in front of him. The bend was to the left as depicted on photos 25, 26, 27 and 28 on pages 22 and 23 of bundle B. He testified that the collision occurred at a crossing depicted on photo 27, page 23 of bundle B after he had gone through the bend aforesaid.

He testified that he drives through the accident scene at least three times in a week and, that he knows that area very well since he has been staying there for almost forty years. He stated that he does not remember how the accident occurred, that he saw a motor vehicle a few meters in front of him, and that is all he can remember. That due to this collision he lost consciousness and only regained same after three to four weeks. He stated that he sustained head injuries.

He stated that prior to the collision in question he and his wife went to church, after church two of his friends suggested that they drive through to Loskop dam for a trip in a group. They decided not to go. They went to an old age home to see his grandmother. Thereafter they drove to Spar where they bought groceries. They then drove home. He and his wife decided to take a ride to Loskop dam. They used the Vaalfontein road from Marblehall to the dam and back. His wife was his passenger on the motor bike. They both had their helmets on.

He testified that the accident occurred approximately twelve kilometers from Marblehall as they were returning from the dam. He stated that he cannot remember the speed which he was driving, but he was on a pleasure ride and in no hurry to get home, thus he believes that he drove a normal speed. He stated that he is very careful when he is riding with his wife on his bike since they are both from one household and should an accident befall them or they get injured, then their children will grow up alone.

He stated that the collision occurred at approximately 15h00 on a clear sunny Sunday afternoon. That the bend is neither sharp nor a gentle bend but a manageable one. He testified that he drove, came to a curve and he just saw a car in front of him. He could not tell where the car came from. That he just saw a green double cab and he drove into it. He indicated that the gravel crossing crosses the tar road next to the canal. The crossing is depicted on photo 5 (page 12) of bundle B, and on the photos on page 8 of bundle C. He testified that as he was driving from the dam to Marblehall the junction aforesaid was on his right hand side. That when he returned the gravel road depicted on photo 4, page 8 of bundle C was on his left hand side.

Under cross examination after identifying his signature on a statement in which he had stated that he does not remember anything that occurred on the day that the collision took place, he stated that as he came around the bend he saw a green thing in front of him, that he is not sure of whether it was two or three meters and he is not even sure whether he

drove into it or not. That he made the affidavit in question whilst he was still in hospital, that he does not say he hit it precisely at two to three meters, that that was his estimation.

He stated that he does not have personal knowledge of how the accident occurred, that he later on saw in the newspapers that it was a green Mazda double cab, because he saw that on newspaper clipping, that it is just an indication to the Court of what he had seen. That he did not specifically see what had happened, that he personally cannot remember the accident.

He stated that the Kawasaki Z9 900cc is a fast motor bike. That the bend was a gentle one and that he has been driving along that road for forty years. He stated that as he was negotiating the bend he does not know what speed he was driving nor does he have any idea thereof that he drove at a normal speed. He stated further that there was neither racing nor slow driving, as he was just on his way home. That on his observation he was not driving at a high speed.

When it was put to him that the insured driver and his witnesses will come and testify that he was driving at a very high speed, he stated that he does not believe that there will be anyone who can say that he was driving fast. He stated that most likely he when he first saw the insured vehicle he was already past the bend, that it was a matter of seconds and it was over. That he does not even know that he hit the insured vehicle. He just saw the “thing” (referring to the insured vehicle) in front of him, and it was over.

When it was put to him that the evidence on behalf of the Defendant would be that when the collision occurred, he was driving on his incorrect side of the road, i.e. on the lane for traffic flowing from Marblehall to Groblersdal, he stated that he does not agree because he believes that he would have traveled in his lane, because for what reason would he had traveled on the right lane.

He stated that the collision occurred on the right lane, i.e. in his incorrect lane of travel. When put to him that he was all along from the curve/bend driving on his incorrect lane of travel, he said that he agrees that it is possible, that there could be factors in the collision that he does not know about. That he could in a short distance have swerved to his right and back, that he does not know what happened there.

He stated that he does not know from which side the insured vehicle came from. He stated that he does not dispute that visibility from the curve to the gravel road from where the insured vehicle emerged is 170 meters as agreed by the two experts on behalf of both parties. That he presumed that the insured vehicle came out, and he at that stage went to the right to avoid the collision, that he is not 100% sure, that could have been his action.

When challenged on where he would have been looking if he did not see the insured vehicle within the distance of 170 meters and or 110 meters, he stated that the Court should forget about the 3 to 4 meters, it was just a proposition, that the 3 to 4 meters should be ignored. That it could have been further, he just made a proposition to the Court because that was what he noticed.

When put to him that even if he were driving on his left (correct) lane at 100 to 120 kilometers per hour for 170 meters around the curve he would have been able to stop, he said that he agrees, but that it depends on when the person crossed the road. That possibly he was too close to him and he (the insured driver) crossed the road, he does not know. He stated that he saw the insured vehicle in front of him at a very close position. That had he seen the insured vehicle earlier he would probably have stopped earlier, that he did not because he had not seen anything in front of him and the next moment the insured vehicle was in front of him, that possibly he went to the right on that short notice, that there was a vehicle in front of him, that is likely possible.

He stated that he does not know what type of tyres his motor bike had. That he doubted that the brake marks depicted on photo no 4, page 5 of bundle B marked G to H were those of his bike. He did not dispute that the brake marks and/or skid marks depicted on photo 4, G to H (page 5) of bundle B, photo 5, I to J and K to L (page 6) of bundle B were on the Marblehall to Groblersdal lane of travel.

Next witness was Mrs. Maria Jacoba Pretorius. She testified that she is the wife to the Plaintiff. That she usually rode with the Plaintiff on his motor bike as a passenger.

She testified that she and the Plaintiff rode to Loskop dam using the Vaalfontein road, which is the tarred road. She usually held onto the body of her husband with both hands, and that as they drove around the bend/curve, she looked over his left shoulder. She just saw a motor vehicle, a double cab, in front across the road, that the side of the driver

faced them, and the next moment she pulled her head back. That the vehicle was busy making a U-turn.

That after she pulled her head back from the Plaintiff's shoulder she just heard a thud/bang. That she cannot remember anything, she does not know after how long she passed out when she came to she was on the ground and someone was calling her. She had fallen next to the board written Vaalfontein depicted on photo 10, page 14 of bundle B and photo 5 on page 8 of bundle C, where she marked with **an X**. She cannot say how far from the collision did she fall. That thereafter an ambulance came, it took her and her husband (Plaintiff) to Groblersdal hospital where they were stabilised, and they were then transferred to Middleburg hospital. That her husband (Plaintiff) came to about a month after the accident. That he was in a coma for about a month.

She testified that as she saw the situation as they came around the curve/bend there is nothing that the Plaintiff could have done to avoid the collision. She disputed the insured driver's version put to the Plaintiff that the Plaintiff was driving at an excessive speed, saying that her husband is careful driver, that they were not in a hurry, they were on a pleasure ride and his speed was normal.

Under cross examination she stated that she was not looking at the speedometer, that prior to the collision he was driving about 120 kilometers per hour. That she cannot say how far the insured vehicle was when she first saw it. She confirmed that the collision occurred on their incorrect lane of travel, i.e. on the lane of travel from Marblehall to Groblersdal. She disputed neither that they were driving on their incorrect lane of travel nor that they were traveling at an excessive speed.

The next witness for the Plaintiff was Mr. David Muller Visser. He testified that he is 34 years old, that he stays in Goblersdal in the Vaalfontein area on the D15 property. That he has been staying there for eight years and he works at Loskop Irrigation Board. He testified that the house depicted on photo 6, page 12 of Bundle B is his, that it is 100 meters away from the gravel crossing depicted on photo 5, page 12 of bundle B. That the speed limit in that area is 120 kilometers per hour.

He testified that when the collision in question herein occurred at approximately 15H00 he was inside his house watching a film on television. His little son stood up and said that he heard a motor bike, which he also heard, the son then ran to the window to see the motor

bike. He saw the motor bike pass through and he then heard a thud/bang. His son said that he thought that the motor bike crashed.

He then realised that something was wrong because he no longer heard the motor bike. That he jumped and ran to the scene. On whether he might have heard the motor bike apply brakes for about 94.2 meters he stated that the place is very quite and since he could hear the motor bike from far, he believes that he would have heard if it had applied brakes. That there was no sudden change on the sound of the motor bike from the time he heard it.

He stated that on arrival at the scene he first saw the insured vehicle which stood slanting across the road. He went around the insured vehicle he then saw the motor bike and a person lying there. He did not know who the person was. The person lay behind the right rear wheel half slanting across under the insured vehicle and he took out his cell phone and started phoning.

He testified that he found the insured vehicle as depicted on the sketch plan on page 9 of bundle B, drawn by one sergeant Mienie. He indicated with an **X** on the sketch plan the point of impact on the Marblehall - Groblersdal lane of travel. He also indicated on the sketch plan with a **Y** the place where he allegedly found Mrs. Pretorius.

Under cross examination he stated that the Vaalfontein road is not a busy road. He stated that his son drew his attention to the oncoming motorbike, further that the Vaalfontein road is not a very busy road. That that road is used mostly by farmers traveling between Groblersdal and Marblehall because there are two roads that go from Groblersdal to Marblehall.

He stated that he has a quad bike (four wheel motorbike). That he does not normally participate in competitions to Loskop dam. That his motorbike is not that big. Also that he has never partaken in fun rides to Loskop dam because his motorbike is not roadworthy.

He further stated that there are motorbikes which often drive past on the road between Groblersdal and Marblehall.

When it was put to him that the Defendant's case is that he heard the sound of a motorbike because it came at a high speed, he stated that he cannot say what the speed of the motorbike was.

He reiterated that at the scene he saw the motorbike, after he went around the insured vehicle, he then saw the Plaintiff and 3 or 4 minutes later he saw Mrs. Pretorius (plaintiff's wife). He stated that he saw debris, oil spill, and water spill on the surface. He also stated that there were brake marks on the road. That he cannot really say if they were fresh.

He stated that he did not observe the mark G-H depicted on photo 4 page 5 of Exhibit B. That at that stage (when he attended the scene of the accident) he did not look for marks or other things. His main concern was to try to help the people (in the collision). He stated that the mark in question, G-H, was 100 meters from the scene of the collision. That the marks he initially spoke of were marks that were at the scene.

He further stated that he could have seen the marks depicted on the photos, page 6 of bundle B but that he cannot remember. That he observed skid marks and/or brake marks on that day, that there are many marks on the road.

He stated that he knew about the Plaintiff, that his (Plaintiff's) brother informed him that they go on such 'runs', for example from Marblehall to Loskop dam, or elsewhere.

He reiterated that the speed limit in that area is 120 km per hour. When it was put to him that the evidence for the Defendant will be that the brake marks on the lane traveling from Marble hall to Groblesdall were marks left by the motorbike of Mr. Pretorius, he stated that indeed there were brake marks on the road but he does not know who and/or what made those marks.

Under re-examination he stated that he knew the insured driver, Mr. Spaumer, that they were together at school.

The next witness for the Plaintiff was Professor Gerald Lemmer, Plaintiff's expert witness. He testified that he is a retired professor of mathematics, applied mathematics and astronomy at the University of South Africa. His credentials and curriculum vitae were not in dispute.

He testified that he prepared a report of an investigation regarding the collision in question herein which took place on 14 March 2004 on the Vaalfontein road, bundle C herein.

He testified that in preparing the report in question he had access to the following,

- i. the police plan and photo plan with key(B1-9)
- ii. color photos of the scene (B10-39)
- iii. color photo of the plaintiff's motorbike (B42)
- iv. warning statement by the insured driver, Mr. Spaumer (A18-19)
- v. statement by Mr. Visser (A27-29)
- vi. statement by Ms. Bester (A20-21)
- vii. expert report by Mr. Grobbelaar (C10-27)

He testified that as stated in paragraph 2 of his report, that on 15 February 2007 he, together with the Plaintiff's legal representatives and the Plaintiff and his wife as well as Mr. Visser, inspected the scene of the collision, that he took certain photographs, which are depicted on exhibit C, photos 1, 2, 3, 4, 5, 6 and 7 forming part of his report. That photo 1 on page 6 of exhibit C shows the road in the vicinity of the collusion, showing the direction from which the motorbike came from, from Groblersdal towards Marblehall. The left side on the photo depicts Mr. Visser's house, the right side depicts the canal where a white wall is, where the insured vehicle allegedly immersed. That photo number 2 on page 7 on bundle C depicts the curve/bend from which the Plaintiff's motorbike would have approached, photo 3 also depicts the bend/curve in the lane of travel of the Plaintiff along which the motorbike allegedly emmerged, i.e. from Groblersdal towards Marblehall. He testified that the purpose of the photograph in question was to show the grass, that long grass does grow at certain times of the year.

He testified that photo 4, page 8 of bundle C depicted the gravel road off the tarred road towards the western side, from where the insured vehicle would have turned from into the tarred road. That photo 5, page 8 depicts the other side of the road opposite the gravel road from which the insured vehicle turned from. That photo 6 and 7 (page 9 C) depicts the same direction as photo number 1 taken to the south.

He testified that he just sensed that the insured driver turned around, that it came from a farm house and then crossed the road, turned around and then went back again. He confirmed what he stated in paragraph 3 of his report, summarizing the collision to the effect that the Plaintiff's motorbike was traveling from Groblersdal to Marblehall, i.e. from south to north. That the insured driver, in a bakkie entered the main road from west to east and the collision took place south of the intersection, close to the centre of the road.

It is common cause, as recorded in exhibit D, the joint minute between the Plaintiff's expert (Professor Lemmer) at Defendant's (Mr. Grobelaar), that the insured driver must have turned right (southwards) towards Groblersdal when he entered the road. That the insured driver did not go straight across the road.

He further testified that both Mr. Grobelaar and the police have got the directions on the sketch plan wrong.

He testified that as recorded in the joint minute, exhibit D, the insured driver would have been able to see 170 meters from a position at the western edge of the road.

Although there seemed to have been confusion about the point of collision, the two experts had agreed that point E on the police plan is probably the most probable point of collision. This is recorded in the joint minutes of the two experts, i.e. exhibit D. He further testified that the brownish patch depicted on photo number 8 is very close to the agreed point of impact, i.e. E on the police plan, that the Plaintiff had informed him that his motorbike was water cooled circle so that very close to the point of collision he would have a deposit of water from the radiator. He testified that this is fairly common in collisions, that when a radiator is punched one gets brownish water from the radiator which makes a brownish patch on the surface as depicted on the photos.

He testified that the distance from where the insured vehicle would have made a turn to the right, to the point of vicinity of E on the police plan, i.e. the agreed point of impact, is 14 meters as measured by Mr. Grobelaar the Defendant expert. He stated that this would mean that the insured driver would have taken approximately 3 seconds to travel from the urge of the road to the point of the collision, that that implied that if the motorbike was not visible to the insured driver at the time, i.e. more than 170 meters away when the insured driver took off, on his calculations as set out in paragraphs 9 and 10 of his report the Plaintiff would have been traveling in excess of 200 km/hr to make the collusion possible at the point.

He further testified that it was highly improbable that the brake marks, G-L, indicated as 94 meters on pages 5 and 6 of bundle B were due to the Plaintiff's motorbike, if the speed of the motorbike was in excess of 200 km/hr and it skidded for 94 meters and its collision speed would have been at least 160 km/hr. That if it had been the right angle collision

(which it was not) the motorbike would have gone straight through the bakkie, that it acts like a knife. That there would have been very little left of the insured vehicle and of the motorbike and of the Plaintiff and of his wife Mrs. Pretorius if the collision had taken place at 160 km/hr, as set out in paragraph 12 of his report. He testified that the distance between where Mrs. Pretorius was found after the collision to the point of the collision was 12 meters. That people fly through the air the same as stones fly through the air and that this is not indicative of high speed collision. That therefore Mrs. Pretorius' final position is not indicative of particularly high speed collision. Also the final position of the motorbike which is on the road very close to the insured vehicle as depicted on the photographs in bundle B, is not indicative of a particularly high speed, that otherwise the Plaintiff would have probably been killed or would have had worse injuries if the collision speed was in the region of 160 km/hr.

He stated that wheels of the motorbike act as gyroscopes, that for this reason a motorbike is a stable object. That the motorbike having two wheels that are turning pretty fast, it makes a motorbike essentially a rigid body so that if one wants to turn a motorbike going at a speed of for example 150 km/hr or even less one cannot move the handle bars. That if one has got to turn one would have to lean the bike one or the other to turn it. That the two wheels of the motorbike rotating at a high speed act as a gyroscope. That if the bike skids the back wheel locks so that the gyroscope pick effect is gone, i.e. that the motorbike would only skid if the wheels locked/stopped its rotation because of the breaking. The back wheel locks and the front wheel slow down. That it is highly unlikely that the motorbike would have stayed upright with two people on it in a skid without falling over for 94 meters.

He further testified that if the rear wheel of the motorcycle was skidding then the gyroscope effect of the rear wheel would have disappeared pillion passenger it is highly improbable that the Plaintiff would have been able to keep the motorbike upright for 94 meters.

On the skid/brake marks depicted as GH, IJ and KL he testified that GH shows a tire mark due to a tire whose thread had grooves running around the circumference of the tire as the mark consist of the dark and light lines running parallel to each other. That there are four brands divided by three grooves. That the tyre mark (G-H) was cost by a tyre with threads and grooves running around the circumference, i.e. the ribs running around the circumference of the wheel in a circular motion. He testified that looking at the photograph of the rear wheel of the motorbike depicted on page 42 of bundle B, the thread thereof is not of the nature of

tyre mark depicted as G-H in photo 4 page 5 of bundle B. that the grooves of the wheel of the wheel of Plaintiff's motorbike run around the tire from edge to edge not around the circumference, i.e. arrow like grooves across the wheel of the tire rather than along the tire. His conclusion was that the Plaintiff's tyre did not make the mark G-H as he states in paragraph 14 of his report.

He testified that the mark I-J is a thick dark line, that he does not know what made that mark and that if it were made by a tyre it seemed to him as if it was most likely a bicycle tyre, that one was not going to get bicycles skidding that long, that looking at the photo of the Plaintiff's motorbike tyre it cannot be said that the mark I-J was made by the motorbike in question herein. He further testified that the marks G-H and I-J were completely different that he cannot see any connection between them. He stated that he cannot say whether the mark I-J is a tyre mark or a brake mark or a scrape mark or what kind of a mark, that it is black as it appears on the photo that he is unable to say what it is. That it looks as though it could have been made by rubber but one does not know if it is a groove, an old groove which would have turned black but that he cannot see if there is any connection between the first mark G-H and the mark I-J.

In so far as the mark K-L is concerned depicted on photo 5 bundle B he testified that there are two black marks roughly the same width as the single mark, that the width of a single mark is not known but this looks like tire marks. That they are close together, i.e. the mark K-L is a pair of short thin dark marks very close to each other. That he is unable to give a rational explanation for these marks. That this seems to be directed and/or angled towards the centre of the road to the right as one is looking at the picture. That the fact Mrs. Pretorius ended up off the road on the eastern side that the motorcycle was in fact in the process of moving towards the eastern side of the road when the collision took place, i.e. that the Plaintiff not have been able to execute a bit of a swerve to his right towards the east just prior to the collision. That his deduction from Ms. Pretorius final position after the collision is that when the collision took place the motorbike was in fact moving slightly to the right of the Plaintiff, i.e. a little bit towards the east. That if the marks K-L were made by the motorbike then they are actually moving in the wrong direction in that they are moving towards the centre of the road, i.e. towards the western side not towards the eastern side.

He testified that the marks K-L were in the end directed incorrectly in so far as the final position of Mrs. Pretorius is concerned. That in his opinion the marks were not made by the Plaintiff's motorbike.

He stated that if the insured driver did look before he crossed the road, he did not see the motorbike that the motorbike was there. That if the motorbike was traveling at 120 km/hr then it must have been 100 meters away when the insured driver took off.

Professor Lemmer further testified that if danger comes from one's left, the natural reaction is to swerve to the right. That his feeling is that the Plaintiff saw the thing coming at the last minute, tried to swerve to his right, succeeded to an extent, which is why his wife ends up on the eastern side of the road. That it seems that he did in fact manage a minor swerve.

He further testified that from his many years of inspecting collision scenes, there are marks everywhere on the roads and that very often it is confusing to the reconstruction experts that when they get to a scene there is a whole lot of marks and it takes a while to realize very often that some of the marks or all of the marks are unrelated to the collision, i.e. that one is not always able to ascertain precisely what, from where the marks originate. That this could be the situation here (in this collision).

Under cross examination he confirmed that in exhibit D (the expert's joint minutes) the point from where the insured driver would have taken off and where the plaintiff/motorbike emerged, visibility thereof is approximately 170 meters. That if one is driving at 100 kilometers per hour at distance of visibility of 100 meters the distance to stop would be approximately 60/64 meters, that reaction time should be added thereto. That if one is driving at 120 km/p.h the stopping distance would be about 90 meters that if reaction time is added thereto stopping distance would be about 140 meters. He stated that if the Plaintiff was driving at normal speed of 120km/p.h (as testified by Plaintiff and his wife) and he saw the insured driver at a distance of 170 meters his reaction time to stop would have been 140 meters provided the insured vehicle was representing a threat. He stated that it does not make sense that the Plaintiff's wife could have seen the insured vehicle for the first time just after the curve/bend because they would then have been involved in a head on collision with the insured vehicle. That there was an error of judgment/observation that she was probably a long way past the bend when she saw the insured vehicle moving across. That the Plaintiff saying he saw the insured vehicle at 2/3 meters away then the accident is happening i.e. basically he is in the accident.

He reiterated that the brake marks G-H are not the brake marks of the Plaintiff's motorbike. On whether the Plaintiff braked or not, he stated that if he quite close to the car and starts moving in front of him the natural reaction would to swerve to his right, probably also to stand on the brake and there is going to be smoke and a collision and the Plaintiff's wife would be projected in the direction that the motorbike is going and that is right at the collision (implying there would be no brake marks). He stated that he could not explain the marks K-L because they seem to be going in the wrong direction given the position of Mrs. Pretorius. He confirmed after it was put to him by Defendant's Counsel that the brake mark K-L is immediately before the agreed point of impact, having stated earlier that the fact that they (both experts) agreed on the most probable point of impact/collision does not necessarily mean that they are right.

When it was put to him that K-L (which was immediately before the chip) might be the marks made by the motor bike before the collision, he stated that these (K-L) were black marks on that point, that he does not know what made them. That they are too close together so they cannot be made by two different wheels. That the insured vehicle with impact would have been pushed backwards a bit and he thinks that there is a possibility the insured vehicle was at an angle, i.e. might have been pushed back on its wheels a bit, but it is just one tyre which would have made that mark and they are too close together to be due to different tyres. That the truth is he does not know what made those marks i.e. K-L. When put to him that K-L are tyre marks of the Plaintiff's motor bike just immediately before the impact, he stated that he had a difficulty with that, in that they are moving in the wrong direction as far as he is concerned given the fact that Mrs. Pretorius ended up on the eastern side of the road.

He stated that considering the damage to the insured vehicle, the impact did not occur at 90 degrees but that the motor bike was at an angle to the insured vehicle at impact. That what he visualises is that if the insured vehicle has turned and is partially facing a south easterly direction at some angle i.e. 45 degrees, it is the point of turning in the eastern lane and the motor bike at the same time is swerving to its right, then one is going to get this sort of impact between the two vehicles. That he cannot see the motor bike can do K-L brake marks that if it is a tyre mark and it is associated with the collision in question herein, it is more likely to be one of the right wheels of the insured vehicle which has been pushed back by the impact. That in that process one of the tyres makes this mark K-L. That he still have a difficulty in explaining why there are

two marks but he would think that it is more likely that those marks were made by one of the wheels of the insured vehicle being pushed backwards rather than the motor bike.

He further stated that it takes three seconds to travel twelve meters. That the average speeds over those twelve meters is obviously four meters a second, which means that when one gets to the twelve meters, since one started at zero, one's speed is going to be eight meters per second. That if it is fourteen meters it is going to be a quarter of a second more than three second. That the calculation aforesaid are an assumption based on a measurement which have been done. That if the assumptions are incorrect then the conclusion thereof will also be incorrect.

He stated that the motor bike probably managed to execute a small swerve to its right in order to avoid the collision and that is the direction which the Plaintiff's wife was projected. He stated that under normal circumstances if one is faced with danger the normal/natural thing is to get off the road as fast as possible, i.e. to turn away from where the danger is coming from, e.g. if something comes from the right the natural reaction would be to swerve to the left, if something is coming to you directly from the front the natural thing is to get off the road as fast as possible. He stated that it is far more probable that Mrs. Pretorius was projected in the direction of travel of the motorbike. That concluded evidence for the Plaintiff.

For the Defendant the following witness testified:

Pieter Johannes Spaumer (the insured driver). He confirmed that a collision occurred on 14 March 2004 along Vaalfontein road between his motor vehicle and the Plaintiff's motorbike. He testified that on photos 1 and 2 on page 4 of bundle B and photos 4 and 5 on page 8 of bundle C depict the place where the collision took place.

He further testified that he came out of the gravel road depicted on photo 5 on page 8 of bundle C moving towards the tar road depicted therein. That he made a U-turn on the gravel road next to the poles depicted on photo 4 on page 8 of bundle C, which he indicated with an arrow, that he then stopped next to tar road, which he indicated with an o (both indicated on photo 4 on page 8 of bundle C). That they then waited for his grandparents to arrive from Pretoria. The grandparents went past them and pulled off the road approximately twenty to thirty meters away from them. That he then checked if the road was clear and

crossed the road back to the gravel road from where he initially came (depicted on photo 4 of page 8 of bundle C).

He testified that whilst in the process of crossing aforesaid, he saw a motorbike from his right hand side traveling from the Groblersdal to Marblehall direction at high speed. That the motorbike was in the lane of travel of Marblehall-Groblersdal i.e. In his incorrect side/lane of travel. That he was shocked and he just accelerated to try and get his bakkie off the road.

That the motorbike hit his bakkie on the right hand side as depicted on photos 7 and 8 on page 7 and 8 of bundle B. That the collision occurred on the lane of travel from Marblehall to Groblersdal. That after the collision he could not open his door, he then got off the bakkie through the door on the left hand side. He first walked around then saw the motorbike and Mr. Pretorius (The Plaintiff). That there was oil, brake marks and glasses on the road. That the brake marks were on the Marblehall-Groblersdal lane, and that the brake marks aforesaid were of the motorbike. He further testified that photos 4 and 5 of bundle B depict the brake marks of the motorbike on its incorrect lane of travel.

Under cross examination he stated that he is a laboratory technician aged 36 years old and staying in Groblersdal. That the collision occurred on a Sunday and he was visiting his parents in law, Mr. and Mrs. Isak and Sarie Bester who live along the gravel from which he emerged depicted on photo 5 on page 8 of bundle C, approximately 5 kilometers from the tarred road in the vicinity of the accident scene. That on the Sunday in question they had not yet had their lunch nor had they had anything to drink since they were waiting for his grandparents, their son and grandson who would be visiting his parents in law to have lunch with them.

That the driver of the grandparent's vehicle was one Werner de Jager (the grandson). He had to meet them because it was the first that de Jager came to the farm, thus he had to show him the way. That de Jager was his wife's nephew. De Jager was driving either a Mazda or a Ford Tracer. That the grandparents phoned from the Dennilton T-junction to arrange for their meeting. From the T-junction from T-Junction (where they phoned) was approximately ten minutes drive to where they were to meet. That he took his two sisters in law, Johanna and Cecilia Bester and his son along. That his Mazda double cab is just big but it is not a **4X4**.

He marked on the police sketch plan at page 9 of bundle B, on the right hand side the area where his motor vehicle had stopped while

waiting for de Jager's car. That he did not wait very long, it was quick and that he was not sure whether switched off his vehicle. That when Werner came, there was no communication between them, as they had already communicated over the phone that they (Spaumer) would wait for them on the road and they (de Jager) must just drive behind them. That he then drove across the tarred road back to his parents in law's farm and accepted that de Jager would follow him. That when he crossed the road he did not check if they followed him, he would have just crossed the road and he would wait for them to follow. He moved at a slow speed.

He further testified that when he crossed the road he saw the motorbike on his right hand side on its incorrect lane of travel that he was seeing it for the first time on the Marblehall to Groblersdal, more to his left hand side. That when he saw the motorbike for the first time his motor vehicle was right across the middle line, i.e. the two front wheels across the middle line and the two rear wheels behind the middle line. That at that time the motorbike was approximately 100 meters away, but that he was not so sure of the distance aforesaid. That one of his passengers, he does not know which one shouted "pasop"/beware.

He further testified that before he crossed over the road the vicinity to his right hand was about 170 meters. That it was a beautiful sunny Sunday afternoon and that beside the oncoming motorbike, there was no other oncoming traffic. That the motorbike was on its incorrect side of the road at that time probably because he came around the bend at high speed.

He disputed that the collision occurred because he had failed to keep a proper look out. He further disputed that when he crossed the road the motorbike was already visible. He testified that after he had seen the motorbike at approximately 100 meters aforesaid he did not continue watching it, he concentrated on trying to get his vehicle out of the road by accelerating.

He further stated that after the collision his vehicle ended up along the Groblersdal road from the crossing as depicted on the sketch plan on page 9 of bundle B. That he panicked because the motorbike came at a high speed.

He further testified that everyday after the collision when driving to the Bester farm he saw the brake marks. That while he was still on the scene of the collision on the same day before he was taken to the doctor by his wife he noticed the brake marks. The whole time as they were at

the accident scene they spoke of the brake marks in question. He stood by his evidence that the brake marks depicted on the photos on and page 5 and 6 of bundle B were those of the motorbike. That the Plaintiff was indeed driving at high speed to the extent that he (Plaintiff) wrote off his bakkie and that this could not have been at a normal speed.

Under re-examination he testified that the motorbike was on the left hand side of its incorrect lane close to the demarcating white line. Further that whilst entered he saw a motorbike coming at a high speed on its incorrect lane of travel at approximately 100 meters when he first saw it. He also stated that the first time he saw the brake marks was immediately after the accident while they waited for ambulance and the police to arrive. He further insisted that the brake marks depicted on photo 4 on page 5 of bundle B were those of the Plaintiff's motorbike because those marks lay on the road immediately after the collision.

The next witness for the Defendant was Johanna Petronella Bester. She confirmed that on 14 March 2004 a collision occurred along Vaalfontein road. That they were four in the vehicle i.e. the insured driver (Spamer), her sister, Spamer's child and herself. She testified that they emerged from the area depicted on photo 5 on page 8 of bundle C.

She testified that they drove, they then saw the grandparents on the other side, they then drove across the road to the other side and turned the bakkie on the gravel road. That they made a U-turn on the gravel road depicted on photo 4 on page 8 of bundle C, they then started to cross over the tarred surface, she then saw a motorbike coming on its incorrect lane of travel driving at a high speed. She then told Pieter (Spamer) to watch out. That the insured, then driver accelerated to cross over the road. She testified that the collision occurred on the incorrect lane of travel of the motorbike.

She further testified that after the collision she saw brake marks which were previously not there in the Marblehall to Grobblersdal lane. She testified that after executed a U-turn after the area depicted on photo 4 of page 8 of bundle C, the insure driver stopped and looked to both sides to see if there was any incoming traffic.

Under cross examination she stated that when they came to the tarred road towards the area where they made a U-turn, the motor vehicle which was driven by Werner de Jager was already standing there. The

purpose of meeting them there was to take them back to the farm for lunch. When they got there and found the grandparents they had just to turn around to go to the farm. There were no other communication between their vehicle and the grandparents. She made a mark/arrow on photo 39 on page 29 of bundle B to show the area where the insured driver made a U-turn. She occupied the front passenger seat. She testified that the insured driver completed the U-turn on the gravel road and that he stopped before he crossed the tarred road.

She testified that when they crossed the tarred road and saw the motorbike on its incorrect lane of travel she did not scream watch out, she spoke normally. That when she called watch out to the insured driver, the front wheel of their vehicle were already over the white lane, and that was the first time she was seeing the motorbike. She does not know when the insured driver saw the motorbike for the first time. She testified that the motorbike had just come out of the bend when she saw it for the first time. She further stated that the insured driver had tried to move the bakkie out of the way, that he executed a right turn. That when she saw the motorbike for the first time she realised that now here come an accident and that it was too late to do anything about it.

She was confronted with the statement she made, contained on pages 20 and 21 of exhibit A, paragraph 2 thereof and that she did not state therein that after they had turned across the road, the insured driver first stopped. She reiterated that their guests/grandparents were already waiting when they came. She testified further that she kept the motorbike in question on sight all the time. That it was a matter second from the time he saw the motorbike to the time it hit them. Further that the motorbike remained upright until the moment of collision.

Under re-examination she stated that the arrow she made on photo 39 on page 29 of bundle B is how she remembers the U-turn.

The next witness was Werner de Jager. He testified that on 14 March 2004 they were traveling from Pretoria to visit the insured driver's parents in law that somewhere along the way there was a telephone conversation for Spaumer to meet them on the Vaalfontein road. That when they got there, they stopped on the Groblersdal to Marblehall road. That he pulled two to three meter from the gravel road depicted on photo 2, page 4 of bundle B. That they waited for Pieter Spaumer to come and fetch them. He (de Jager while so waiting) got out of the car to stretch his legs, he then saw Pieter Spaumer approaching from the direction depicted on photo 5, and page 8 of bundle C and he got back into the motor

vehicle. That Spaumer drove across the road and made a U-turn on the gravel road on the other side of the road depicted on photo 4, page 8 of bundle C.

He further testified that he saw Spaumer crossing the road again back to the other side i.e. from where he came. That he (de Jager) then heard a sound of a motorbike. He heard the sound of an exhaust pipe of the motorbike. That he looked over his right shoulder and saw the motorbike, it was traveling on the left hand of the Marblehall to Groblersdal lane, and its incorrect lane of travel. That he then saw the motorbike applying its brakes that smoke came out of the tarred road. That the motorbike then collided with Spaumer's bakkie. He further testified that on impact the motorbike's passenger (Plaintiff's wife) was flung over the bakkie and fell on the right hand side of the road. That the motorbike with impact was thrown back onto the left lane.

He further testified that as a result of the braking and the smoke (that came out of the tarred road) he observed a long black brake mark. That these brake marks are the ones depicted on photo 4(G-H), page 5 of bundle B. That he also observed the brake marks on photo 5 (K-L), page 6 of bundle B. That these marks were also on the scene of collision on that day. That he saw these brake marks after the collision.

Under cross examination he stated that he is twenty three years old. That on the day of the collision he was driving his grandfather's vehicle a Ford Tracer which is the same size as a Mazda 323 hatchbacks. He made a mark on photo 16, page 17 of bundle to indicate a position where his motor vehicle had stopped on the left hand side of the gravel road. He reiterated that after he had stopped he got out of the motor vehicle and stretched his legs, that he then saw Spaumer emerging from the direction depicted on photo 5, page 8 of bundle C. He then got to his motor vehicle when he saw Spaumer's vehicle while it was still on the gravel road (on photo5, page8 of bundle C) on the other side, before the vehicle crossed the tarred road. When it crossed the tarred road he was already sitting in the driver's seat, and that the area where Spaumer made a U-turn (photo 4, page 8 of bundle C) was behind him, therefore he could not say whether Spaumer's U-turn was clockwise or anti-clockwise.

He further stated that the next time he saw Spaumer's bakkie again was when he heard the motorbike approaching, when he looked over his right hand shoulder. That the bakkie was already in the middle of the tarred road the two front wheels across the barrier line in the left hand lane and the rear wheels still in the right hand lane. That the first time he

saw the motorbike was when it was applying brakes and it collided with the bakkie. That is when he saw the smoke coming out of the tarred road. That when he saw the motorbike for the first times it was in the left hand lane on its incorrect lane of travel. That he did not see the motorbike when it came around the bend, when he saw the motorbike for the first time it was on the left hand side busy braking. When it was put to him that he could not have seen the motorbike because the double cab was higher than his vehicle and thus it would block his vision, he stated that the bakkie was just not standing but it was moving forward. He reiterated that he saw everything from the time motorbike was busy braking until it hit the bakkie. He further stated that he did not see whether or not Spaumer stopped before entering the tarred road after he had made a U-turn on the gravel road (photo 4, page 5 of bundle C) since he was facing to his front.

He was confronted with the statement he allegedly made, contained on pages 23 and 24 of bundle A. That in paragraph 2 thereof he states that he (Spaumer) made a U-turn on the gravel road, that he (Spaumer) stopped and again entered the tarred road to cross, whereas he testified that he had not seen that. He reiterated that although he had not seen him (Spaumer) making a U-turn and or stopping before entering the tarred road, he (de Jager) however did see the whole accident from the time the motorbike was braking until it hit the bakkie.

He stated that it is difficult to say which of the brake marks on the tarred road, i.e. I-J and or K-L was made by the motorbike, nor which of those brake marks was on the tarred road prior to the accident in question.

Under re-examination he stated that the brake marks on photo 4, page 5 of bundle B were not made by the motorbike.

The next witness is Nicolaas Christiaan Pieter Minnie: He testified that around March 2004 he was stationed at the local criminal record centre ("LCRC") at Groblersdal. That he is the one who prepared the key and sketch plan on bundle B; he also took the photos on bundle B.

He testified that on 17 March 2004 at about 8h50 he visited the scene of the collision herein on the Vaalfontein road. That Mrs. Spaumer made some points to him of the collision in question herein and that from his own observation he proceeded to take some photographs, i.e. photos 1 to 8, pages 4 to 8 of bundle B and also proceeded to draw a sketch plan which is on page 9 of bundle B. That he then compiled a key to the sketch plan and photos, which key is on pages 2 and 3 of bundle B. That he then

also went to Harrington panel beaters on the same day at about 10h and took some photos of a green Mazda double cab with registration letters CRJ 478 MP i.e. photos 7 and 8, pages 7 and 8 of bundle B.

That according to his observation on the scene of the collision he saw tyre marks marked G-H, I-J and K-L depicted respectively on photos 4 and 5, page 5 and 6 of bundle B. That he also observed a fresh white paint mark, E on photo 5, page 6 of bundle B. That the marks aforesaid were all on the lane of travel of Marblehall to Groblersdal road.

He testified that on his observation, looking at the marks G-H, I-J and K-L, that these brake marks came from the same vehicle and are in line with the point of impact in the vicinity of point E on his sketch plan. That he then concluded that the brake marks aforesaid were part of the accident and were probable left by the motorbike.

Under cross examination he stated that on 17 March 2004 he was accompanied by Mrs. Spaumer, who is employed in the financial department at Groblersdal SAPS, the insured driver's wife, when he visited the scene of the collision. That in March when he attended the scene of the collision with Mrs. Spaumer, he was working from the SAPS Head Office in Groblersdal. He further testified that when he went to draw the sketch plan there was no conclusion about who the suspect was and who the innocent party was (between the insured driver and the Plaintiff). That he was just asked to go and draw a plan and take some photos by inspector Mashiloane, the investigating officer in the matter.

He testified that he identified point E on photo 5, page 6 of bundle B as a point of impact. He further stated that the brake marks G-H, I-J and K-L were not pointed to him by anyone else. They were made by his own observations. That point C, the position where the Mazda bakkie stood after the collision, as well as B, A, M, N and O on his sketch plan on page 9 of bundle B were pointed to him by Mrs. Spaumer. He stated that he was aware that Mrs. Spaumer was not present when the collision occurred, but that she had arrived on the scene while all the occupants and all the vehicles were still on the scene. That he himself he did not attend to the scene on the day of the collision. That Mrs. Spaumer had told him that according to one inspector Mako, a member of CSC, who had visited the scene of the collision point O, was the point of impact. That however after his own observations he did not agree with that and deduced that point E on his sketch plan was the point of impact.

He stated that the marks G-H, I-J and K-L were not pointed out to him by anybody who was present when the collision occurred. That he found the three stretches of marks to be more or less in line with the point of impact, and that the conclusion he reached was that the motorbike started braking at point G, came to dead stop and then impact at point E with the bakkie. Also that the motorbike was traveling in the lane Marblehall to Grolbersdal which would be the wrong side if he (the motorbike) was coming from Groblersdal to Marblehall.

He stated further that he came to the conclusion that the marks G-H, I-J and K-L were made by the same vehicle since they appear in a line, it is not something that comes from a different side, they came in a straight line; also, that while a vehicle is out of control it is not going to make one simple straight mark, the marks will differ, therefore his conclusion that these marks came from one vehicle. That in the 16 years that he has been in the SAPS he has never found that a vehicle makes an accident and make the same tyre marks. He concluded that these could not be a car's thread marks because there was one line i.e. G-H, I-J and K-L were in one straight line, coming from the same vehicle, and that was the motorbike.

The next witness for the Defendant was Mr. Barry Grobelaar who testified as the expert for the Defendant. Both counsel confirmed that it is not in dispute that he is an expert; hence it was not necessary to read his credentials into the record. He confirmed the facts jointly agreed to between him and Professor Lemmer set out in the minutes of the meeting held between the two on 31 May 2007, exhibit D.

He testified that he differed with the opinion of Professor Lemmer regarding the skid/brake marks depicted on photo 4, page 5 of bundle B. He testified that looking at the marks on photo 4 aforesaid, one sees a single brake mark but if one looks within that brake mark it has parallel dark lines with a light separation, the same colour as the road in between. That the wheel that left the mark (G-H) was locked and that mark was deposited, i.e. the wheel was stationery and it was being dragged across road surface. That the brakes were applied to the extent that the wheel had locked. That looking at the mark and the lighter lines in between the darker ones all that it tells one is that at the point where the lighter lines left, there was no rubber in contact with the road, and the dark area is where there was rubber in contact with the road and the tyre was dragged across the road surface.

He further testified that looking at the motorbike rear tyre of the motorbike on page 42 of bundle B, the grooves in the tyre are not longitudinal and also they are not directly across the tyre, they are at an angle. That with a motorbike like this, when the area of the tyre in contact with the road and the normal traveling is very small, due to the curvature of the tyre at some point one may have one or more of the grooves aforesaid creating an air gap between the tarred surface and the rubber of the tyre, and that that air gap is what leaves the gap ones sees on the photographs. That the wheel seen on the photographs on page 42 could also have left those marks (G-H).

He further testified that the mark I-J which is a much thinner line indicates that either the same tyre (page 42) at a different angle or a different portion of the tyre or another rubber component made that mark, such as a foot rest of the motorbike. That in so far as the marks K-L are concerned, the one conclusion that one can make from these marks are more or less in line with the area of impact which is in the lane of travel of Marblehall to Groblersdal as the experts had agreed.

That K-L is a tyre mark which is darker on the outside and it is angled at an angle towards the centre line, more or less the area of impact. Looking at pages 36 and 37 of bundle B on the photos of the front wheel of the motorbike, the ream of the motorbike shows two prominent dents which must have been caused by impact with the Mazda, when the motorbike drove into the right side of the Mazda that probably where the collision occurred, where the forces were great enough to damage the ream of the motorbike to bend to that extend, it was forced towards the road surface to leave those marks (K-L) at the point of impact. That looking at photo 7, page 7 of bundle B, as agreed by the two experts, there was an angle between the vehicles at impact, the motorcyclist would have approached the Mazda at an angle in front of him and he would have collided against the right side and at that position the marks would have been left on the road. That his conclusion on the marks K-L is that they are at an area of the collision, that is where the front wheel of the motorbike left those marks (K-L) at the point of impact (E).

He further testified that the mark I-J is more or less parallel to the road, that it may be a slight angle to the left or to the right but it is not a drastic angle. That looking at the photographs it appears to come directly from the centre line but the angle at which it is at is very small relative to the actual direction of the road. Further that mark G-H aforesaid is a relatively short mark if one looks at the width of the road. He commented that a sketch plan is not a scale plan so it cannot give one the exact

inferences, it is not a plan to scale so he would not put too much emphasis on the exact directions in which the lines (I-J) were drawn and the length of the lines. On the position where Mrs. Pretorius fell after the collision, indicated with a Y by Mrs. Pretorius on the sketch plan on page 9 of bundle B, he testified that looking at where Mrs. Pretorius ended up, she could have ended up there from being deflected past her husband who was in front of her seated on the motorbike in front of her at impact, i.e. he cushioned the blow for her and she was deflected the way to the right. Also that from what Mrs. Pretorius testified that at the curve she looked on the left hand side of the Plaintiff's shoulder and immediately went back that this can have an effect on where she fell as indicated with Y, depending on when she moved back. That on her evidence when she moved back in behind her husband and the impact took place; she was moving left to right at impact which would give her momentum towards the right to be flung away at an angle.

Further he testified that the insured vehicle being a double cab with a number of people inside may have taken 4 to 4.5 seconds and not 3 seconds as testified by Professor Lemmer to cover a distance of 14 or 15 meters. That if the insured vehicle took 4 seconds to cover the distance of 14 meters and not 3 seconds, and then the motorbike had to have been traveling at 153km/h if it was not visible the moment the Mazda pulled away. That if the Mazda took 4.5 seconds to cover that distance (14 meters), which is half a second longer than 4, and then if the motorbike was traveling at 136km/h it would not have been visible yet or it would have become visible just after the Mazda had pulled away. That they as experts when doing reconstructions they make assumptions, that in the assumptions they make they should allow a tolerance to that. That one cannot be dogmatic and say everybody pulls away over 10 meters in 3 second tolerance to that. That one cannot be dogmatic and say everybody pulls away over 10 meters in 3 seconds.

He further testified that if the motorbike was traveling a 120km/h would not be able to stop in time over a distance of 110 meters, it would take him about 144 meters to stop if one include a reaction time of 1 or 1.5 seconds. He further testified that if the motorbike was in its correct lane of travel and the Mazda was already in the middle of the road with the front wheels of the Mazda over the barrier/centre line, the motorbike in its correct lane would have passed the Mazda in its (the motorbike) correct lane. The probably would not have been a collision.

Under cross examination he stated that in doing reconstructions they, as experts, in calculating traveling and distances should allow a

margin between drivers and vehicles. That one cannot be dogmatic about a figure and say it was 3 where it could have been 4. One must allow a leeway for the fact that they do not know exactly.

He further stated that if the occupants of the Mazda first saw the motorbike when the Mazda was straddling the centre line that would mean the driver of the Mazda was not looking properly towards his right hand side. That if he was on the centre line he was accelerating at the point and half a second later a collision occurred, the motorbike must have been visible earlier to him if he looked to his right.

He further stated that the mark G-H and I-J aforesaid are, as a rough estimation are roughly the same length. That the difference between the marks could be that the motorcyclist hit his brakes at G-H, then released them and tried some different action to avoid the collision. That the initial brake marks was initiated, then the motorcyclist stopped braking that wheel to the extent that the wheels locked, so he could still have been braking but he allowed the wheel to start rotating again leaving the brake marks on the road. Also, that the marks I-J may have been caused by the edge of the rear wheel of the motor bike braking or partially braking. That it was possible that G-H and I-J were made by the same motorbike, that there is a distance of approximately 60 metres (estimation) between G-H and the initiation of I- J.

He stated that he doubted that the marks could have been left by a motorbike in an upright position; it could be caused by a motorbike at an angle. That the motorcyclist might have attempted to put the motorbike down to try to minimise the damage. That putting the motorbike down at an angle, the tyre as it was in contact with the road is not in contact in the same way as if it was the tyre that left that mark.

He further stated that once one leans over the motorbike, it would start to change direction and driver corrects with the handlebars. That the rear wheel leaves the mark, even though the front of the motorbike is at an angle away as depicted on photo 5 of bundle B, assuming that I-J would be the rear wheel of the motorbike under partial or full braking, the motorbike is leaning at an angle when the front of the motorbike is in the position of E, i.e. when the of front of the motorbike is now at an angle when it reaches the point of impact and the rear wheel at the area of J.

He further stated that the motorbike had not leaned over completely; it was in a process, at an angle. That at impact the rear tyre stopped making its mark, impact had lifted it up and the front tyre was

pushed into the road surface to leave the mark at the front, i.e. point E and the tyre marks K-L left by the front wheel. That the motorbike was leaning over the front wheel whilst being turned into the slide and the front wheel was at K-L and the rear wheel in the vicinity of J when impact occurred. That the marks from point J to K-L were left by different portions of the motorbike. Also that the marks I-J could have been made by the foot rest if the motorbike a considerable distance, i.e. beyond the point of no return further than 45 degrees angle to the road.

He stated that if the motorbike was upright at all point in time to the point of collision then I-J cannot be possible. That if one read some of the witnesses statements and the marks were all in line (G-H, I-J and K-L), he would also have come to the conclusion that all three were caused by the same vehicle, i.e. the motorbike. That the mark K-L, looking at the photo of the motorbike on page 36, the front dent at the bottom of the motorbike front wheel would have been caused by the edge of the sill (below the door of the Mazda) and lower dent as it is forced onto the road surface, i.e. that the marks K-L were made by the front wheel of the motorbike.

He stated that when the tyre gets forced onto the road surface as a result of the impact, the edges of the rim get buckled; the two edges of the rim above the tyre push the two portions of tyre against the road surface to leave the mark left by the left and right sided of the tyre. That most heavy mark would be left underneath the edges of the rim because that is now pushing the tyre into the road surface.

He stated that I-J cannot be explained if the motorbike was totally upright, but K-L could still be explained if the motorbike was upright, He further stated that the Mazda was roughly at the angle facing towards the left of the road when impact took place, so, when the tyre (of the motorbike) hit the side of the Mazda at an angle it took, it took the angle of the Mazda as it left the marks on the road and it then deflected away to the left.

He disputed that it was not possible for the mark G-H to have been caused by a motorbike tyre but by an ordinary car tyre mark, stating that it was quite possible that the mark is left by the tyre on page 42 of bundle B as he has already explained in his evidence in chief.

That concluded the evidence of the whole case.

It is common cause, as agreed by the experts for both parties, that the distance at which the motorbike would first have become visible to the insured driver is 170 meters. That point E as indicated on the police photographs and sketch plan indicate the probable point of impact between the insured vehicle and the Plaintiff's motorbike.

Counsel for the Plaintiff argued that the collision was probably caused by Spaumer, by not keeping a proper look out, entering the road at an inopportune time, having not seen the motorbike. On the other hand counsel for the Defendant, having conceded that Spaumer (the insured driver) may have been, to some degree, negligent, argued that the Plaintiff was to a larger degree also negligent that he drove at an excessive speed in the circumstances, that he failed to keep a proper look out.

The evidence of the witnesses is fully set out in this judgment. The most important issues for determination are whether the Plaintiff was driving at an excessive speed, whether both the Plaintiff and the insured driver kept a proper look out and whether they ultimately took evasive action to try to avoid the collision.

The Plaintiff testified that he does not know what speed he was driving, nor does he have any idea thereof, but that he drove at a normal speed. The Plaintiff's wife could not say what speed the Plaintiff was driving. Visser testified that his attention to the Plaintiff's motorbike was brought by the sound of the oncoming/approaching motor bike. For the Defendant Ms Bester and Spaumer testified that they saw the Plaintiff's motorbike for the first time at approximately 100 meters, coming at a high speed on its incorrect lane of travel. There were various brake marks at the scene of the accident, **G-H, I-J, K-L**, which were said to have been caused by the Plaintiff's motorbike.

In so far as the speed he was driving is concerned, the Plaintiff seems to be ducking and diving on this issue. He does not seem to want to commit himself to the exact speed that he was driving. This aspect is very important since there is evidence that he was driving at a very high speed. He seems to have a clear recollection of everything that occurred on that day from the time they were at church discussing with friends the pleasure ride to Loskop dam until the time of the collision as he alleges. His wife is of no assistance in so far as the speed that the Plaintiff was driving, save to suggest that since they had left their two daughters at home they were driving responsibly so as not to endanger their lives as suggested by the Plaintiff as well in his evidence.

Looking at the evidence of the Defendant's witnesses it is clear that the Plaintiff came at an extremely high speed around the bend towards the Defendant's vehicle. Mr. de Jager, who I found to be an honest witness, is certain that he saw the Plaintiff apply the brakes of the motorbike and smoke came out of the tarred road. This would on a balance of probabilities have caused one or other of the brake marks depicted on the photos referred to in evidence.

There is a discrepancy between the evidence of the Defendant's witnesses in so far as which of the brake marks depicted on photos 4 and 5, pages 5 and 6 of bundle B were made by the screech of the Plaintiff's motorbike. However, all the witnesses, especially Spaumer, Bester and De Jager were adamant that the Plaintiff's motorbike came at a very high speed and that he braked leaving brake marks on the tarred road. De Jager even saw smoke from the tarred road made by the braking of the motorbike. On the evidence before this court I find that on a balance of probabilities, the brake marks depicted as K-L on photo 5, page 6 of bundle B were made by the Plaintiff's motorbike.

These brake marks (K-L) are right at the point of impact, i.e. at point E. In all probabilities this cannot be a mere coincidence. Further, these brake marks are consistent with the explanation of Mr. Grobbelaar on how these came about. I accept Mr. Grobbelaar's explanation in this regard as more probable. In so far as the brake marks G-H and I-J are concerned, it is likely that they may have been caused by the motorbike; however, I am not prepared to make a finding on these since there is a discrepancy in so far as they are concerned.

It was contended on behalf of the Plaintiff that the evidence of Bester and de Jager should be rejected since their testimony in court differed from their statements (made to the police). The statements referred to herein contained in bundle A (pages 20-21 and 23-24) are not even deposed to before a commissioner. In any event it has been held in our courts that statements made to the police are not intended to be a precursor to a witness' court testimony. That such discrepancy does not necessarily warrant that the evidence of a witness should be disregarded. See *S v Govender* 2006 (1) SACR 322 ECD. I found the two witnesses to be truthful and honest.

It is obvious that Mrs. Pretorius cannot be objective in so far as her evidence is concerned. She is the wife to the Plaintiff, she definitely

stands to gain on the positive outcome of her husband's case, also although no mention was made of her having lodged a claim, she is a possible claimant and surely she would not want to prejudice her claim, thus she would not likely concede that her husband (Plaintiff) was driving at an excessive speed nor that he could have been driving on his incorrect lane of travel. For that reason her evidence is approached with circumspect.

In all probabilities the reason why Visser and/or his son's attention was attracted by the sound of the motorbike was because it approached at a very high speed, considering that from Visser's evidence the road in question was frequently used by motorbikers; there would be no reason in my view why Visser and/or his son would be attracted to the sound of a bike if there was nothing unusual. From the facts and on a balance of probabilities the Plaintiff was driving at high speed in circumstances. It was contended by on behalf of the Plaintiff that the position where Mrs. Pretorius ended up after the collision was indicative that the motorbike was not driving at an excessive speed. Both experts agreed that it was possible that the Plaintiff cushioned her thus minimizing the impact on her. This (being cushioned by husband) in my view is probably what minimized her fall.

On his own version, the Plaintiff did not apply his brakes in any way to try to avoid the collision. The Plaintiff was on his incorrect lane of travel when the collision occurred. It was suggested by Prof Lemmer that the motorbike could have been on its incorrect lane of travel because the Plaintiff may have swerved to his right when he saw the insured vehicle to try to avoid the collision. There is no evidence whatsoever by the Plaintiff or Mrs. Pretorius that prior to the collision the Plaintiff swerved to the right; this is merely a speculation by Professor Lemmer.

It is clear from the Plaintiff's evidence that he saw the insured vehicle at a very short distance, initially he testified that it was at about 3-4 meters when he saw it, and under cross examination he sought to change his version saying that he was further than 3-4 meters, that he was just estimating and this court should ignore the 3-4 meters which he had stated earlier. But one thing is clear even though the Plaintiff alleges that he has no recollection of the accident it is clear that his recollection is very good and intact on what happened prior to the collision, including up to the time he saw the insured vehicle. On his own and version he saw the

insured vehicle and immediately hit it. Nowhere does he mention any swerving reaction on his part. In all probabilities he just saw the insured vehicle and he got straight into it. The damage to the insured vehicle, which is more in the middle/centre, indicates this. Point E on the photographs and the Police sketch plan, which is the agreed point of impact, is more to the centre of the road than to the western side of the road as it is sought to be made out. In all probabilities in my view, the Plaintiff did not in anyway swerve to his right. Further, if the Plaintiff was indeed in his correct lane of travel prior to the collision, and he swerved to avoid the collision, the question is why did he not swerve to his left and not to his right hand towards where the insured vehicle was moving to. On the evidence of Mr. Grobbelaar, if the Plaintiff was in his correct lane of travel and he just proceeded straight there would not have been a collision.

On the evidence before this court and on a balance of probabilities the Plaintiff drove on his incorrect lane of travel because he came around the bend at a very high speed, and not because he had swerved to his right hand to try to avoid the collision.

The other issue to be determined is whether the Plaintiff kept a proper look out. As already mentioned above it is common cause that the distance at which the motorbike would have first become visible to the insured driver is approximately 170 meters. As much as it is expected that the insured driver should have seen the Plaintiff at 170 meters, the same holds for the Plaintiff. There is no reason why the Plaintiff should not have seen the insured vehicle at the same distance. Some evidence was led relating to the tendency of long grass growing around the bend from where the Plaintiff would have emerged. However, there is no evidence whatsoever from the Plaintiff, his wife or Mr. Visser who testified on behalf of the Plaintiff that there was any long grass which impeded visibility from the curve from where the motorbike emerged to the crossing where the insured vehicle emerged.

It is clear from the facts that the Plaintiff was driving at an excessive speed i.e. above 120km/p.h and he was definitely not keeping a proper lookout. The distance from the curve/bend to where the insured vehicle emerged clearly bears testimony to this. There is no evidence why he could not have seen the insured vehicle at that distance to enable him to apply his brakes and stop at last about 140 kilometers away and/or to take evasive action to avoid the collision.

On the evidence of the Plaintiff's own expert, Professor Lemmer, if the Plaintiff was traveling at 120 km/hr as it is alleged, then he would have been at least 100 meters away when the insured driver took off. In my view even if it were to be accepted that he might have been driving at 120 km/hr if he had been keeping a proper lookout he would have seen the insured driver and, at 120 km/hr, he probably would have been able to slow down and apply his brakes and/or in a way swerve in a way such as to avoid the collision. It is clear in my view that both the Plaintiff and the insured driver did not keep a proper lookout, they did not see each other and they could not take proper evasive action prior to the collision.

The insured driver as well as Ms. Bester testified that the first time they saw the motorbike was when the insured vehicle had already entered the tarred road while the two front wheels had already crossed over the barrier line to the western side and the two rear wheels were still on the eastern side. That when he saw the motorbike he accelerated and tried to turn to his right to avoid the collision.

On his own version, when he saw the motorbike for the first time, instead of driving right across the tarred road onto the gravel road towards the Bester farm, he turned to his right towards the direction from which the motorbike was coming. This in my view contributed to the collision. Probably, as he also conceded, had he accelerated straight across the road onto the gravel road to the Bester farm, the collision might not have happened.

Further, as with the Plaintiff, there is no explanation why the insured driver did not see the Plaintiff's motorbike at 170 meters away, being the distance at which it would have first become visible to him, as already stated above. It is clear on the facts before this court that the insured driver did not keep a proper lookout. Also he entered the tarred road at an in opportune time and when it was not safe to do so, especially since he was coming from a side road/junction, entering the main road. He should have made sure that it was safe to enter the road before entering, but because he did not keep a proper lookout he did not see the Plaintiff's motorbike well in advance.

On all the facts before court, in my view, both the Plaintiff and the insured driver were negligent. The question is to what degree is each other to blame. I am of a considered view that the Plaintiff was 40% to blame whereas the insured driver was 60% to blame for the collision.

The Defendant is thus ordered to pay 60% of Plaintiff's proven damages, as well as costs. Such cost to include the costs of two counsel and the qualifying fees of Prof Lemmer.

L M MOLOPA
JUDGE OF THE HIGH COURT