IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 7331/1993

In the matter between

RONNIE PILLAY **Plaintiff**

and

NUGALEN GOPAL PILLAY **Defendant**

JUDGMENT

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1. The Plaintiff is 44 years old.

2. Half a lifetime ago (at least for the Plaintiff), when he was a 22 year old young man, tragedy struck when, in the early hours of the morning he was severely injured in a motorbike accident. This much is common cause. The circumstances of the incident are, however, in dispute. According to the Plaintiff he was struck from behind by another motor vehicle whilst, according to the Defendant, no other vehicle was involved in the incident.

3. Against this background the Plaintiff approached

an Attorney (the Defendant) to investigate his claim in terms of prevailing legislation and to take such steps as were necessary to obtain payment from the then **Multilateral Motor Vehicle Accidents Fund**.

4. It is common cause that the Defendant failed timeously to take the necessary steps and institute action and that, as a result thereof, the Plaintiff's claim (if established) prescribed.

5. Against this background I was informed, at the commencement of the trial, that:

(a) the negligence of the Defendant was not in issue;

(b) the only issues between the parties, were:

(i) whether the incident was caused by an unidentified vehicle;

(ii) if so:

(aa) whether the driver of the vehicle was causally negligent;

(bb) whether the Plaintiff was also causally negligent;

(cc) the respective degrees of negligence (if established);

(c) the parties have agreed jointly to apply for a separation of the Plaintiff's quantum.

6. In the circumstances I granted an order (by consent) separating determination of the

Plaintiff's injuries and their sequelae, including the Plaintiff's quantum, for determination later, if necessary.

7. It is not in dispute that the incident occurred near the Jacobs bridge on the southern freeway, Durban bound, at about 02h00 in the morning.

8. The Plaintiff gave evidence that he had been to Da Cota Beach, to meet friends and that he and his friend (Clive Pillay) thereafter proceeded to the Blue Lagoon to meet members of their motorcycle club. He testified that he was travelling in the fast lane, with Clive Pillay following in the middle lane approximately 30 metres behind him and that they were travelling around 100 kilometres per hour. It was a clear night, the road surface was dry and there was little other traffic. Whilst he was travelling along, he noticed, in his rearview mirror, the headlights of a vehicle following some distance behind him. When, again, he looked in his rearview mirror, he noticed that the vehicle was about 30 metres behind him and he, accordingly, activated his flicker to change lanes to the middle lane. Just before crossing the line separating the two lanes, he was struck from behind. He remembered coming off his motorbike and sliding (on his back) along the road. Thereafter he was in pain and not entirely alert to what was happening around him.

9. In the course of his evidence the Plaintiff explained that he was not someone who exceeded the speed limit, that he never raced against others in the motorcycle club, that he always stuck to the speed limit and that the fastest he had driven his motorbike was about 100 kilometres per hour. He denied having taken any alcohol on the night in question or driving at an excessive speed. He also denied that there was any reason for him to apply brakes and leave brake marks.

10. Clive Pillay was then called as the Plaintiff's next witness.

11. When Pillay rose to give evidence it was clear that he had been sitting in Court listening to the Plaintiff's evidence. When I raised that with him, he confirmed that he had been told not to be in Court to listen to the Plaintiff's evidence but explained that he had forgotten about the instruction because he, as it were, got carried away with the Plaintiff testifying.

12. Clive Pillay proceeded to explain how, on the night in question, the two of them had, indeed, been to Da Cota Beach to meet friends there and how, at about 01h00 fate found him travelling about 30 metres behind the Plaintiff in the manner described by the Plaintiff, when he observed a motor vehicle approaching fast, saw the Plaintiff indicate to go left and being struck moments later. He said that his first dilemma was to decide whether to chase after the vehicle or to help the Plaintiff. He settled for the obvious choice of rendering assistance. He found the Plaintiff lying on the road in terrible pain. He immediately tried to comfort him and to prevent further injury. He described the Plaintiff's left leg as seriously injured and hanging on a piece of skin. Some 15 to 20 minutes later a motor vehicle stopped, parked behind the Plaintiff and activated its emergency lights to prevent further injury. A police officer then approached him to confirm that he had called for an ambulance and, thereafter, assisted with the direction of the traffic. He claims that he had no further interaction with the police officer and that the police officer did not, at any stage, ask him what had happened. He was certain that the police officer was a city policeman and that he had arrived in a white City Police vehicle. He was not sure whether other police also arrived (it being such a long time ago) but remained adamant that no police officer had spoken to him about the incident. He confirmed that, when he subsequently saw the motorbike, it appeared to have skidded on its left side. After the incident the motorbike was loaded onto a tow truck and Clive Pillay then proceeded to inform the Plaintiff's mother of the incident

(inviting the assistance of a lady next door). He, also, did not explain to the Plaintiff's mother how the incident had occurred and mentioned that she, likewise, did not ask him how it had happened. He was asked about the police vehicle and badge, found himself unable to describe it exactly but confirmed that he was certain that it was a white van with the markings then used by the City Police. He denied that they had been racing.

13. The Plaintiff then closed his case.

14. The Defendant then called an inspector in the South African Police (Muller). Muller testified that, at the time, he was a Constable employed at the Brighton Beach Police Station and that he received a call to go to the scene of an accident. He was in a yellow police vehicle.

15. Whilst he had no clear recollection of the assistance rendered, he confirmed that he would, firstly, have secured the Plaintiff's safety by parking his vehicle in the manner described by Clive Pillay and that he would have called for medical assistance. He confirmed that, on his arrival, he found the Plaintiff lying in the road, the motorbike some distance further and that there was no sign of another vehicle. He stayed on the scene until the Plaintiff was removed. He remembered, independently, that the Plaintiff had serious injuries and that his left leg appeared to be **mangled**. His impression, at the time, was that the leg was going to be amputated (this expectation, unfortunately, turned out to be accurate and the Plaintiff's left leg was, indeed, subsequently amputated).

16. Muller testified that he vaguely remembered speaking to another person, who he thought was the Plaintiff's brother. (In fact, he was fairly certain that he had been told by this other person that he was the Plaintiff's brother). According to him, this person told him that **they were having a bit of a race** and that the Plaintiff had lost control of his motorcycle. He found no debris

indicating impact with another vehicle and remembered, independently, that the motorcycle was badly scraped on the one side and that the mirrors or mirror on that side appeared to be damaged.

17. Muller was responsible for completing the plan and the key thereto and, significantly, the **road traffic collision report**.

18. In the road traffic collision report, Muller reflected the following description of the incident:

> **"M/c A was travelling north on southern freeway. Lost control of m/c. No other vehicle involved. Motorcyclist seriously injured. M/cycle extensively damaged. No other property damaged.**
>
> **No collision.**
>
> **Vehicles involved : 1".**

19. Muller claimed that he saw fresh skid marks or brake marks which, in his view, could be the brake marks left by the motorbike. He believed this because of the freshness of the marks and because they were closely associated with the incident and the location of the Plaintiff and the motorbike some distance away on the road.

20. The Defendant then called Professor Bedford to give evidence as an expert. He is a retired physics professor who, at the Defendant's request, had inspected the scene, considered the plan and key prepared by Muller and who, on the strength thereof, drew certain inferences.

21. Against this background Bedford expressed the following opinions:

(a) at the start of the skid marks the motorbike must have been doing between 150 and 200 kilometres per hour;

(b) the skid marks were probably caused by

severe braking of the rear tyre;

(c) it is unlikely that the Plaintiff had been knocked off the motorbike (as claimed by the Pillays).

22. Whilst there is some merit in the reasons advanced by Bedford, in support of his opinions, he was sufficiently fair and honest to concede that:

(a) the skid marks could also have been caused by a damaged or locked rear tyre;

(b) it was possible that the motorbike could have continued (after the Plaintiff had been dislodged) on its wheels and in an upright condition, before it fell over and slid;

(c) his opinions about speed and braking may be affected by the aforegoing.

23. It has often been said that expert evidence (especially in collision cases relying, as it inevitably does) on a magnitude of uncertainties and assumptions, is a poor substitute for direct evidence. Bedford claimed no expertise on the handling of motorbikes and he could, therefore, not really discount the possibility of the motorbike continuing upright (at least for a distance) in circumstances which, if that happened, destroyed the foundation of his opinion on speed. Since there was no clear evidence of the state of the rear tyre or any other indication of it locking, it can also not be said that the skid marks must have been caused by the application of brakes. Whilst, therefore, there might be some logic reasoning (as argued by the Defendant), I prefer to approach the main issues on the basis that Bedford's evidence is neutral and not of sufficient value to tip the scale in either direction.

24. That leaves me with the evidence of the Pillays and Muller.

25. In assessing their evidence I must allow for the fact that the incident occurred 22 years ago and that it would be surprising if any witness could offer a clear recollection (without the benefit of a full statement) of all the events.

26. In addition I must recognise that Clive Pillay is a close friend of the Plaintiff, that he sat in Court to listen to his evidence (in spite of having been told not to do so) and that he was, therefore, not an entirely independent witness free of the desire to assist.

27. The Plaintiff gave his evidence in a straightforward manner and did not exhibit signs of dishonesty. Whilst Clive Pillay also did not show signs of dishonesty, in his evidence, he did not always leave me with the impression of complete cander. I nevertheless refrain from making any credibility findings against Clive Pillay.

28. Muller came across as entirely independent, objective and helpful. He struck me as a careful and conscientious policeman who would follow the basic rules. He was quick to make concessions without bothering about the implications and gave every indication of doing his best to assist with his incomplete recollection of the incident, supported by his plan, the key thereto and the road traffic accident report.

29. In argument Mr Jacobus (correctly, in my view) conceded that there was absolutely no reason to suggest that Muller was not honest.

30. In the circumstances it is necessary to consider whether Muller could have been mistaken and to compare his evidence on the disputes, with that of the Pillays.

31. There can be no doubt that Muller was, indeed, on the scene and that he was, in all probability, the only policeman directly involved in the securing

of the scene and the inspections undertaken thereat. His recollection of the Plaintiff's injuries, the condition of the motorcycle, the manner in which he parked his vehicle and the presence of another person who claimed to have been with the Plaintiff, is not only corroborated by Clive Pillay but also indicates that he had independent recollection of the incident. (After all, there was no reference to the aforegoing in the road traffic accident report or his plan and key).

32. Muller said that it was important to him to establish how the incident occurred. He said that if another vehicle had been involved in the incident, he would have made reference to that in the road traffic collision report (by referring, in the **B Section**, to **an unidentified vehicle**) and that he would have made it clear to the investigating officer that it was a **hit and run**. Whilst some of the material recorded on the road traffic collision report and his plan came from his own observations, he confirmed that his record of **lost control** came from the witness on the scene (as he put it).

33. Whilst Muller could, of course, give no direct evidence of the circumstances of the incident (unlike the Pillays), the statement made to him, if made by Clive Pillay, raises a direct and significant factual dispute since, if it was indeed made by Clive Pillay, it serves directly to contradict the entire version relied upon by the Plaintiff and his witness.

34. This means that I must return to Clive Pillay's evidence to consider it in the context of the contradicting evidence by Muller. Clive Pillay was clearly distressed by the behaviour of the alleged driver of the motor vehicle, sufficiently so to consider, for a moment, to chase after him. On his version the motorist callously struck the Plaintiff down and immediately departed from the scene. In spite of this, he claims that he did not inform the policeman of the circumstances of

the collision because everything happened too fast, he was traumatised and he did not realise that the police would want to know what had happened. I find that strange in the light of his own concern with the behaviour of the motorist. If another vehicle was involved, I believe that he would have had no doubt that the police would have been interested in that and that he would have had enough time to inform the policeman thereof. In spite of offering a clear recollection of distances, the circumstances of the incident, the speed at which they had been travelling and the employment of the policeman, he could not remember whether police officers had arrived at the scene. Strangely, however, he remembered clearly that no police officer had come to speak to him about the incident.

35. Strangely Clive Pillay also did not inform the Plaintiff's mother, when he reported the incident to her, later that morning, how it had happened. He also claimed that she had not asked him how the incident had happened. I would have thought that such disclosure would have been uppermost in Clive Pillay's mind and that he would have used the opportunity to explain to the Plaintiff's mother that it was not the Plaintiff's fault but that of a callous motorist.

36. Possibly because the motorbike subsequently showed no obvious rear impact damage, Clive Pillay explained that the motor vehicle appeared to strike the motorbike on its right side with the motor vehicle's left front, whilst it was in the process of accelerating past in the fast lane. Elaborating on this observation, Pillay denied that the motorbike had not, at any stage, struck the barrier on the right of the fast lane.

37. I cannot escape the feeling that Clive Pillay knew that, whilst possible, it is unlikely that the motorbike would have moved to the right to cross the fast lane into the barrier if, as he claimed, the motor vehicle had, in effect, **side swiped** the motorbike as it was in the process of crossing

into the middle lane. Clive Pillay's failure to allow for this possibility (probably for the reason mentioned) is significant in the light of Muller's observations on the scene. With reference to point E on his plan, Muller mentioned that this point on the barrier must have been used by him to measure the distances from there to the positions of the Plaintiff and the motorbike, probably because some mark must have been left there to indicate where the motorcycle or the Plaintiff had struck. This seems to make sense to me since there can be no other reason for the specific point to have been marked and used by Muller. (In coming to this conclusion I am mindful of the fact that Muller's measurements - one more than the others - do not entirely make sense).

38. It is, of course, so that Muller stated that the person who had told him that they had been racing, was the Plaintiff's brother. It is common cause that the Plaintiff's brother was not on the scene and that the only witness who could have told Muller how the incident had happened, was Clive Pillay. (In the circumstances it is possible that Muller might have made a connection between the surnames, that Clive Pillay had told him that the Plaintiff was his brother or that Muller might have misunderstood him). In my view nothing turns on this.

39. In the circumstances the Plaintiff's version stands directly contradicted by that of Muller, in circumstances which go to the heart of the Plaintiff's case. Whilst the brake marks and the absence of debris indicating the involvement of another vehicle might not, in itself, render the Plaintiff's version improbable, the other features mentioned herein do, to some extent, tend to give support for the Defendant's version.

40. In the final analysis the onus is on the Plaintiff to persuade me that his version is more likely or probable than that relied upon by the Defendant, on the strength of Muller's evidence.

41. For the reasons given I am not so satisfied and the Defendant is, accordingly, absolved of the instance, with costs.

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ACTING JUSTICE MARAIS
5 NOVEMBER 2009