

# IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

**Case Nr: 396/2001**

**Case Heard: 20/02/2006**  
**Date delivered: 17/03/2006**  
In the matter:

**MELNICHENKO C**

**APPELLANT**

versus

**ROAD ACCIDENT FUND**  
**MELNICHENKO N**

**1<sup>ST</sup> RESPONDENT**  
**THIRD PARTY**

**Coram:** Kgomo JP et Majiedt J et P L Tlaetsi

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## JUDGMENT ON FULL BENCH APPEAL

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**KGOMO JP:**

1. The appellant is Mrs Cleone Melnichenko, the plaintiff in the *court a quo*. She sues the respondent, the Road Accident Fund (RAF), a statutory body constituted in terms of Section 2 of the Road Accident Fund Act, No 56 of 1996, for an amount of R3.725 million for injuries she sustained in a vehicle accident on the 10<sup>th</sup> March 1997.
2. The vehicle, a Toyota Conquest, in which the plaintiff was a front-seat passenger was driven by her husband, Mr Nataniel Melnichenko. The RAF has joined Mr Melnichenko as a Third Party in the proceedings in terms of Section 2 (2) (b) of The Apportionment of Damages Act, No 34 of 1956, seeking to recover from him, as a joint wrongdoer, a contribution in respect of his degree of responsibility for any damages which may have been suffered by the plaintiff.

3. The said collision, just outside Kimberley, on the N12, normally referred to as the Kimberley-Cape Town Road, occurred between Mr Melnichenko's car and a motor vehicle, a Jetta, driven by Mrs Jane Elizabeth du Plessis. The latter's is the insured vehicle.
  
4. By agreement the merits were separated from the determination of the quantum in terms of Rule 33 (4) of the Superior Courts Rules. On the 21<sup>st</sup> November 2003 the trial court, **Olivier J**, dismissed the plaintiff's claim with costs. The appellant applied unsuccessfully for leave to appeal to the *court a quo* but petitioned the President of the Supreme Court of Appeal successfully therefor.
  
5. There was much confusion relating to the cardinal points and the directions which the respective drivers were taking between the submitted police sketch and what the court *a quo* deemed to have been the correct directions. I will simplify the scene of the accident in this manner:
  - 5.1.The accident took place at an intersection of the N12 National Road: The Kimberley – Cape Town Road;
  - 5.2.The N12 at this intersection is a through road which accords the drivers thereon a right of way;
  - 5.3.Plaintiff and her husband approached the intersection from the side of the Kalahari Lodge, where they both worked. The traffic approaching this intersection (as the Melnichenkos did) was controlled by a stop sign;
  - 5.4.The Melnichenkos had to drive (having obeyed the stop sign) right across the N12 to their home in the direction of Barkley-West. This road is called the Landbou Road. The traffic approaching the intersection from the Barkley-West side was also controlled by a stop sign.
  - 5.5.Mrs du Plessis, the insured motorist involved in the collision, was driving on the N12 from the Cape Town direction towards Kimberley.
  
6. Only three witnesses testified. The Melnichenkos for the plaintiff and Mrs du Plessis for the defendant – RAF. The N12 is a tarred road. These witnesses are agreed that the collision occurred on Mrs du Plessis' correct side of the road. In other words Mr Melnichenko had already driven over the central line that divides the N12 into two halves. The central line was measured at 8 meters from the point where Mr Melnichenko had stopped on the Kalahari

Lodge side of the N12. This means that Mr Melnichenko had driven just a little over 8 meters from the stop line to the point of impact.

7. The gravamen of Mr Nel's, appellants' counsel's, argument was that it had been raining that late afternoon; that visibility was poor as a result and that the cause of the accident is entirely attributable to Mrs du Plessis' failure to switch on her lights under those so-called wretched weather conditions. Allied to this Mr Nel argued that Mrs du Plessis also failed to keep a proper look out, failed to apply her brakes, failed to alert Mr Melnichenko of the impending danger by not pressing her hooter and failed to take evasive action by swerving left or right.
8. First the weather conditions at about 17h15 on 10 March 1997. It was common cause that the sun was some way from setting in Kimberley at that time of the year. Both Melnichenkos testified that there was a light drizzle at the time of the accident. Mrs du Plessis said she had no clear recollection on whether it was drizzling but recalled that visibility was good and that she had not switched on her head lights (or any lights for that matter) because there was no necessity for her to do so.
9. I will therefore accept that there was a light drizzle at the time of the collision. There was also some indication that when the police attended the scene the surface of the tarred road was still wet, although it is not stated what time this was. The establishment that it drizzled lightly at 17h15 on the particular day does not, however, answer adequately the visibility question.
10. I will attempt to answer this issue with the aid of the *ipsissisima verba* of the witnesses:
  - 10.1. Mr Melnichenko said this in his evidence-in-chief:  
*"Mr Nel: How was the visibility? Was it good or bad? -- Well, I wouldn't say that it was like a hundred percent perfect, because of the rain conditions obviously. But it wasn't like at night ... Yes.*
  - Mr Nel: Now the other cars that you saw, not the car that collided with you, the other cars, were their headlights also on or were they off? -- As far as I remember, cars that passed, (their) lights were on.*
  - Why did you switch on your headlights that day? -- That's what you will do when it's raining. Even in the morning I will always do that. And if it's raining, you put your lights on.*

*If you think back now on that particular day, with regard to the weather, the time of the day and so forth, do you think that the reasonable driver, the average driver should have switched on his headlights or not? -- Yes.*

*And the car that collided with your car, was that car's headlights on? -- Not that I remember.*

*If that other car's headlights were on, do you think you would have seen that other car? -- Definitely ... yes."*

**10.2.***In cross-examination by Mr Pohl Mr Melnichenko stated:*

*"Mr Pohl: And those trees were at, I think that this was about 800 m, was the distance that was measured. Could you see that distance on that day when you stopped there at the stop street? -- Well, I remember looking out on both sides.*

*Yes. -- I well, I could see (indistinct).*

*Could you see that far? That is what I am asking. -- Well, it wasn't dark, yes."*

**10.3.***The plaintiff testified in this fashion on this point:*

*"Mr Nel: Describe the weather to us. How was that particular day? -- It was, it had been raining, it was raining at the time. I remember when we left the lodge, it was (raining). We ran to the car and ja, it was overcast, it was very cloudy, the sun was setting as well at the time. So it was quite covered."*

**10.4.***Plaintiff went on to say:*

*"Mnr Nel: How was the visibility at the time of accident? -- The sun was setting and it was overcast. It was raining. So it was quite dusky I would say."*

**10.5.***Then under cross-examination:*

*"Mr Pohl: You see, why I am asking is, Mrs du Plessis will testify that she was clearly able to see, as she was approaching the intersection, she was clearly able to see the kombi and your vehicle behind this stop (sign) -- Okay.*

*So what I am asking is, if she could see you, is there any reason why you could not have seen her? Given the visibility at that time in March at quarter past five. -- Well, she definitely did not have her headlights on.*

*But your headlights were facing the other way. They weren't facing her. So if she could see you, is there any other reason why you could not have seen her? -- I don't know."*

**10.6.***As pointed out earlier Mrs du Plessis says visibility was good. Under cross-examination she responded:*

*"Mr Nel: En u hoofligte was natuurlik ook nie aan nie, want u sê dit was mooiweer... -- Nee, my hoofligte was nie aan gewees nie.*

*Indien dit die betrokke dag gereën het in daardie tyd, dit is nou*

*so kwart oor vyf toe die botsing plaasgevind het, as dit gereën het, sou u die hoofligte aangesit het van u motor? -- Ja, as dit gereën het en die sig was swak, definitief.*

*Sou u dit gedoen het. - Ja.*

*Mnr Melnichenko het ook getuig dat die ander motors se ligte aan was omdat die sigbaarheid beperk was. Kan u dit onthou? -- As u praat van 'n ander motor, praat u van die kombi?*

*Nee, aankomende verkeer, ander aankomende verkeer. Die ander motors in die omgewing. -- Ek dra geen kennis van enige ander motors nie."*

**10.7.Mr Nel further put this statement to Mrs du Plessis:**

*"My kliënt maak die bewering dat daardie betrokke dag het dit gereën en die sig was baie swak gewees. Die son was alreeds besig om so half onder te gaan. En derhalwe moes motoriste se hoofligte aan gewees het en omdat u ligte nie aan was nie, dit is een van die redes hoekom hy u nie raakgesien het nie. Wat sê u daarvan? -- Nee Meneer. Ek is 'n baie versigtige bestuurder en 'n baie veilige bestuurder. Op 10 Maart is ons nog in somer. Die son sak nog nie vyfuur op 10 Maart nie.*

*Tensy dit baie donker daar kan reën. -- Tensy dit daardie tyd bewolk, daar gereën het ...."*

11. Based on the foregoing extracts and other aspects adverted to and taken in conjunction with some aspects about to be dealt with, I am satisfied that, notwithstanding the light drizzle, visibility was fairly good at the time of the accident. This was also the conclusion the Learned Trial Judge came to. It need to be made plain that Mr Melnichenko did not say that 800 m was the furthest he could see through the drizzle. The inspection in loco, as to which see later, revealed that beyond 800 m there is a sudden dip or descent on the road enabling only car roof tops to be seen. The Court *a quo* has therefore not misdirected itself in this regard.
12. I now proceed to examine briefly how the accident took place. The Melnichenkos testified that whilst they had stopped for traffic traveling towards Kimberley and in the opposite direction towards Cape Town on the N12 a minibus taxi approached them from behind and passed their car on the left hand side without stopping. There was only a stop sign and no yield sign. The minibus should therefore have stopped as well. The minibus turned left in the direction of Cape Town. It drove for a short while on the yellow barrier lane and encroached gradually onto the driving surface of the road on the left and drove off, never to be seen again.

13. The Melnichenkos initially were adamant that the minibus at no stage, even fleetingly, obscured their view of the traffic traveling in particular to their left on the N12, ie vehicles driving from the Cape Town direction towards Kimberley which is the path followed by Mrs du Plessis. However, under cross-examination both were constrained to concede that at a particular juncture the much higher and longer minibus must have temporarily obscured their view.

14. These are some of the exchanges which explain the chain of events leading to the accident:

14.1. *Mr Nel (to Mr Melnichenko): Did that minibus taxi obscure your view at any time from your left? -- I considered that. Well, he was slight, moving slow and obviously I have been standing and waiting from both sides, you know and everything go past. So because he was in a slow motion, but still moving, I could see the road, what's happening in the road.*

*Court: So he did not obscure your view. -- He was moving, but no, I won't say that he was obscuring me.*

*You could see. -- Ja, I could see, because he was in a movement.*

*Mr Nel: In other words, could you see the road to your left the whole time? -- Yes, yes.*

*The whole road? -- Yes.*

*Court: And it's also your lefthand side where the vehicle came from that collided with you? -- Ja."*

14.2. It must be noted that Mr Melnichenko only made the concession that his view was impeded after he was confronted by Mr Pohl with the following statement in his deposition (Exhibit "B") that he made to the police: *"It (the minibus) stopped at a slight angle to the left as it intended turning left. It thereby obscured my outlook to the left."*

14.3. *Mr Pohl: Now you also mentioned in this affidavit that is before you there, that "The taxi pulled away and we then pulled away", in paragraph 3, is that correct? -- Well, he was driving and we drove also the same time as he was driving. We also were proceeding across the road."*

14.4. *Mr Pohl: The question is really did he at the time when he pulled away, you said that you looked to your left. Did he at that time, this taxi, this minibus, did it obscure your view with reference to oncoming traffic from the south? -- I saw the road is clear from both sides.*

*Court: Just a moment. -- At the time that I pulled ... Yes?*

*Mr Pohl: And can we accept therefore that you had a clear unimpeded view to the left and there was no traffic there? -- You can say that I had a clear look, Ja. Now, and then you pulled straight over, you crossed 8 metres onto the next lane, is that correct? -- You mean, I don't know how many metres it were."*

*14.5. "Mr Pohl: Let us analyse what you have now said. You said that your wife Cleone, saw her (Ms du Plessis) as she hit the left, is that right? -- Cleone shouted at me.*

*Yes. -- My name.*

*By then you had already pulled off and you had almost reached the centre of the road, not so? -- By then I accelerated when she saw the car."*

*14.6. "Mr Pohl: You mean, except, because of the fact that your wife saw this car approaching, that there was nothing that impeded your view. You could have seen it as well. -- I could have seen it as well."*

15. The plaintiff's account relative to the movements of the minibus and her husband's car were the following:

*15.1. "Mr Nel: Did you see the car that collided with you at any stage, apart from just before the accident? -- Not at all. No.*

*Not at all. Did you look before the accident to your left? -- Yes.*

*And you didn't see the car? -- Not at all.*

*What did you do when you saw the car just before the accident? -- I shouted to Nathan.*

*That's your ex-husband. -- Ex-husband, yes.*

*And what did you then, and what did he do then? -- He accelerated and pulled forward. He accelerated to get out of the way."*

*15.2. "Mr Pohl: Can you advance perhaps any reason why it is that you didn't see this car approaching prior to the last minute that you saw it and the last second that you saw it? -- Look, it was overcast, as I say. It was cloudy, it was raining.*

*But let me just ask you this way. Your husband testified that those trees that were in the dip there where we were this morning, they are some 800 m off and one could see that distance clearly. I mean, this was quarter past five, even though it was raining, in March. Would you agree with that? -- That we could see the cars?*

*Yes, that you would be able to see a car approaching from that distance." (No answer was forthcoming – question avoided).*

*15.3. "Mr Pohl: Did the taxi, did it physically stop and then pulled off slowly as it was waiting for the car to pass from the right? -- No, it was just moving*

*all the time from when it came from behind. It did continue to move very slowly, it edged forward and it didn't come to a standstill completely. And did your husband pull off almost immediately as this kombi passed him? -- Ja."*

15.4. "Mr Pohl: Because you see he accelerated, that was his evidence as well and it seems to us, if one has regard to the photo's, they are there in front of you, if you want to have a look at them. That the impact was almost slap-bang in the middle of your vehicle where you were sitting. So it would appear that he accelerated almost into the point of impact. Would you agree with that? -- Ja, I suppose."

## THE LAW

16. The principle concerning the traffic flow at an intersection is captured succinctly in the following cases:

16.1. **National Employers' General Insurance CO Ltd v Sullivan 1988 (1) SA 27 (A)** at 36D-F whereat **Hefer JA** held:

"The driver in a through street, while being required to keep a general look-out, is entitled to assume, in the absence of indications to the contrary, that a driver approaching from a stop street will heed the stop sign operating against him and bring his vehicle to a stop. It is only when it would become apparent to a reasonable man in the position of the driver in the through street that the driver in the stop street does not intend to stop, or will be unable to stop in time, that the duty rests on the through street driver to take appropriate avoiding action. Until that stage is reached it is not incumbent upon him, under normal conditions, to regulate his driving on the assumption that the driver in the stop street may not stop."

16.2. In **Diale v Commercial Union Assurance Co of SA Ltd 1975 (4) SA 572 (A)** at 576H-577A:

"Secondly, the arguments of counsel, for both parties, on the question as to whether Harmsen could and should have observed the cycle before he did and, if so, whether he could have avoided the collision were founded to a large extent upon mathematical calculations similar to those already made in seeking to determine the relative positions of the station wagon and the cycle when Harmsen saw the 'flash'. In this connection it is prudent to recall the following remarks of **Ogilvie Thompson AJ** as he then was, in **Van der Westhuizen and Another v S A Liberal Insurance Co Ltd 1949 (3) SA 160 (C)** at p168:

*'In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases,*



*since any mathematical calculation so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.'*

*As will have already been apparent these cautionary observations are particularly opposite in this case."*

17. The approach that we should adopt has been set out in **R v Dhlumayo 1948 (2) SA 677 (A)** at 705 to the effect that where there has been no misdirection on fact by the Trial Judge, the presumption is that the Judge's conclusion is correct and that the Court of Appeal will only reverse it where it is convinced that it is wrong. However, if the court hearing the appeal is merely left in doubt as to the correctness of the conclusion that court came to, then the Court of Appeal must uphold it.
  
18. The Learned Trial Judge, apart from enjoying the advantages of being steeped in the trial, also conducted an *inspection in loco* on the scene of the accident. Before us Mr Nel sought to argue that this on-the-scene investigation was conducted in the morning under bright sunny skies in contrast with a 17h15 drizzling late afternoon. An inspection loco was never meant to be a replica re-enactment of the scene. It is merely a reconstruction of the scene with the aid of the witnesses to assist the Court to understand and apply the evidence better. The court *a quo* duly recorded its observations and the parties declared themselves to be satisfied therewith after Mr Nel, no less, has made his inputs. This makes it even more difficult for us to interfere in the trial Court's finding. See **R v Sewpaul 1949 (4) SA 798 (A)**.
  
19. **Olivier J** gave a detailed and well reasoned judgment. In the course of the judgment and in applying the facts of the case to the law he expressed himself inter alia as follows:
 

"16. *To my mind the most important, and indeed crucial, issues in this matter are whether the minibus at any relevant stage posed an obstruction which prevented the third party and Mrs du Plessis from observing one another's vehicles and actions and, if so, whether the third party negligently entered the intersection and whether Mrs du Plessis kept a proper lookout and could reasonably have been expected to take steps to*

avoid the collision. ...

25. There is absolutely no evidence to the effect that Mrs du Plessis had failed to keep a proper lookout. The fact that she did not specifically watch the third party's vehicle and the minibus (after she had initially noticed them) as she neared the intersection does not detract from the fact that she saw, albeit peripherally, how the minibus passed the third party's vehicle and turned into the national road towards her. There was nothing wrong for her to have regarded the view ahead as a priority at that stage and her evidence certainly did not justify an inference that she no longer kept any lookout at all on the vehicle of the third party and the minibus. ...

26. According to the third party the minibus had already entered the national road, and more specifically its yellow lane (the area to the left of the yellow line), and was already about 10 metres away from the intersection before he pulled away and proceeded to cross the intersection. On this basis he contended that he had had a clear view to the left before proceeding to cross the intersection. The plaintiff's evidence in this regard was materially different. According to her initial evidence (in chief) the third party "edged forward" when the minibus passed on their left. This was never mentioned by the Third Party (Mr Melnichenko). According to him he kept his vehicle stationary until it was safe to cross and then simply proceeded to cross the intersection. In cross-examination the plaintiff testified that the third party simply pulled away, to cross the road, immediately as the minibus passed them. The plaintiff's evidence in this regard created a strong suspicion in my mind, and indeed justifies as a strong possibility the inference that the third party had pulled away and proceeded across the intersection at a stage when his vehicle was still obscured from Mrs du Plessis's view by the minibus and while the minibus was still moving forward and to its left into the national road.

27. This would explain why Mrs du Plessis only saw the Third Party's vehicle again when it was already crossing into her lane and at a stage when it was far too late to avoid a collision. If it had moved forward simultaneously with the minibus the Third Party's vehicle would have remained obscured from Mrs du Plessis's view for longer than would have been the position had it remained stationary. ...

29. To (have expected) Mrs du Plessis to have taken precautionary measures like hooting or swerving under these circumstances would amount to adopting an "armchair approach", which would be wrong (see **Lombo v African National Congress** 2002(5)SA 668(SCA) at 685I-J). Even if it is to be assumed that Mrs du Plessis ought reasonably to have noticed the Third Party's vehicle at the moment when he crossed the stop-line and entered the intersection there is no evidence to justify the inference, on a balance of probabilities, that there would then have been sufficient time for Mrs du Plessis to have taken steps to avoid the collision. As appears from Exhibit C the Third Party's vehicle had to move only about 8 metres before entering into Mrs du Plessis's lane. It is not known at what speed the Third Party drove across the intersection. In view of the uncertainties in the plaintiff's case regarding how long the obstruction by the minibus lasted, the plaintiff never made out a case as (regards) at what point Mrs du Plessis would have been able to see the Third Party pull away."

20. I cannot fault the Trial Judge's reasoning. It is evident that:

20.1.Although it had been drizzling visibility was relatively good at the time of the accident;

20.2.Mr Melnichenko could see objects (trees) about 800 meters from the scene of the accident at the time of the accident;

20.3.Mr Melnichenko's view was momentarily obscured by the minibus taxi at the time that he drove from the stop street that

operated against him;

20.4.Mr Melnichenko did not keep a proper look-out before he endeavoured to cross the N12. It was not only inopportune for him to have left the stop but extreme risky and dangerous;

20.5.On the account of both Melnichenkos Mr Melnichenko did not even see Mrs du Plessis' car approaching and would not have done so until after the collision if his wife, the plaintiff, had not alerted him thereto a split second before the collision;

20.6.Surprised by the sudden turn of events Mr Melnichenko took the wrong option by literally accelerating into the accident whereas slamming on his brakes would undeniably have yielded a better result;

20.7.Mrs du Plessis, who had the right of way and driving at 80-90 km/h and her own view having been fleetingly obstructed by the same minibus taxi, could do nothing to avoid the accident. The Court *a quo* correctly accepted her evidence as reliable and preferred it to that of the Melnichenkos where same were in conflict and Mrs du Plessis did not commit a patent error;

20.8.The fact that Mrs du Plessis' lights were not switched on could not and did not contribute causally or cannot be linked causally to the occurrence of the accident.

21. Mr Nel's argument that the Melchenkos' evidence to the effect that the lights of other vehicles were switched on at the time of the accident was not challenged under cross-examination or later controverted by Mrs du Plessis is correct. He also has a valid point that therefore such evidence ought to be accepted as correct. See: **President of the RSA & Others v South African Rugby Football Union & Others** 2000 (1) SA 1 (CC) at 36J-37E and **S v Boesak** 2000 (3) SA 381 (SCA) at 397D-F. However, as already pointed out, this point does not advance the appellant's' case in the slightest.
  
22. I also find it unnecessary to deal in any length with Mr Nel's fervent reliance on the case of **Rondalia Assurance Corporation of SA Ltd v Page & Others** 1975 (1) SA 708 (A) because the facts of that case are clearly distinguishable from the present. In the **Rondalia** case the court found that the driver of the insured vehicle (the Mercedes Benz) in taking his eyes off the other vehicle (the Cortina) after he (van der Merwe) saw it nosing forward at the edge of the intersection and not noticing it again, until it was three-quarters of the way across the first-half of the road, had failed to keep

a proper lookout because he could not have predicted what the Cortina's next move was going to be. This cannot be said of Mrs du Plessis *in casu* on the facts hereof which need not be recounted. The trial Judge correctly, as it has now turned out, also found the **Rondalia** case distinguishable.

23. The Court *a quo* was therefore justified in its finding that Mr Melnichenko, the Third Party, was negligent and was the sole cause of the accident. To find otherwise would be to impute *culpa* on Mrs du Plessis in an unjustified manner. See **South African Railways v Symington** 1935 AD 37 at p44-45; or to make driving impossible – see **Izaaks v Schneider** 1991 (3) SA 675 (Nm) at 678J-679A.
24. It is a great pity that Mr Melnichenko (who described himself as of Russian origin) came close to playing Russian Roulette with the life of his now ex-wife, despite his vehement but shallow protestations. However this may be, maudlin sympathy has no place in our decision making.

**Order:**

**In the result: The appeal is dismissed with costs.**

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**F D KGOMO**  
**JUDGE PRESIDENT**  
**NORTHERN CAPE DIVISION**

**I concur:**

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**S A MAJIEDT**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

**I concur:**

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**P L TLALETSI**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

**For Appellant:      Adv C Nel**  
**Instructed by:      Venter van Eeden Inc**

**For Respondent:    Adv L Le R Pohl**  
**Instructed by:      Haarhoffs Inc**