

**IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH EASTERN CAPE LOCAL DIVISION)**

**REPORTABLE**

**CASE NO: 3465/04**

**DATE DELIVERED:**

**IN THE MATTER BETWEEN:**

**BERNICE VAN DER LINDE**

**1<sup>ST</sup> PLAINTIFF**

**BERNICE VAN DER LINDE**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**THE ROAD ACCIDENT FUND**

**RESPONDENT**

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**JUDGMENT**

**LIEBENBERG, J:**

[1] The plaintiff instituted action in her personal capacity and in her representative capacity as mother and natural guardian of her minor daughter, Luschka. The action is one for damages arising from a collision between an Audi sedan motor vehicle driven by the plaintiff and a passenger bus driven by one Mr. Tembani. The collision occurred at some time between 22h00 and 22h30 on the 24<sup>th</sup> June 2000 at an intersection where the road from Coega and the M17 Roadway (the “M17”) enter the Addo road (the intersection)

[2] The following facts are common cause or not in dispute. On the evening in question Mr. Tembani was en route from Motherwell to the bus terminus after he dropped off some bus drivers at their homes in Motherwell. He was travelling in a southerly direction on the Addo road approaching the intersection. The plaintiff and her

husband, who sat in the front passenger seat, were travelling on the Coega road in a westerly direction. It was dark and it was misty in the area where the collision occurred. Where the Coega road enters the Addo road on its eastern side, there is a stop sign requiring traffic in the Coega road to stop before entering the Addo road. The M17 enters the Addo road from the West diagonally across from the entrance to the Coega road in such a manner that the traffic lanes of these roads that are running towards the intersection are opposite each other.

[3] It is further common cause that the Addo road in this area is a dangerous road. It is normally a very busy road. Many unroadworthy vehicles and many pedestrians, some of whom are often drunk, are encountered on this road. As it approaches the intersection from Motherwell there were no lights on the side of the road. There are roadside lamps lighting the road commencing on the opposite side of the intersection, but at a distance where they had no effect on the area at the intersection. At the time there were no lights on the M17 having any effect on the intersection. The Coega road was unlit. The surface of the Addo road was not in good condition at the time. On the north eastern corner of the intersection and further to the north thereof on the Addo road there are large sign boards which obstruct the view which a driver, approaching the intersection from the Coega road, will have to the North into the Addo road, almost until the driver has to come to a stop at the stop line. It is common cause that, at the time of the collision, the area on the north eastern side of the intersection was overgrown with high bushes and other vegetation which had the same effect. Once a vehicle has come to a stop at the stop line the driver has an unobstructed view along the Addo road.

[4] Mr. de Lange, a private investigator appointed by the plaintiff, testified that he visited the scene, which is a well known area to him. He took some photographs which were handed in as evidence. He testified that there is a short rise in the Addo road approximately 75 meters from the intersection. The effect of this rise in the road is that a person sitting in a car at the intersection will see the roof of an oncoming vehicle before it comes over the rise. Tembani testified that approximately the upper half of his bus would have been visible to such a person.

[5] As to how the accident occurred, the plaintiff called one witness, Inspector September of the South African Police Services. His evidence was that, for purposes of police work he was performing on that night, he was parked in his vehicle on the northern side of the M17 facing the intersection. Whilst waiting he saw the lights of a vehicle in the Coega road approaching the intersection. The vehicle's lights were on bright. He flicked his own lights and the approaching vehicle's lights were then changed to dim. He thought that it might be the person whom he was waiting for and he moved his vehicle forward. The approaching vehicle came to a stop at the intersection. He saw that the left indicator light of the vehicle was on. It thereafter moved into the Addo road turning to its left. He also heard the noise of an approaching vehicle and by its sound came to the conclusion that it was travelling at high speed. As the first vehicle was negotiating its turn into the Addo road, September saw a bus entering the intersection. It was his undisputed

evidence that his vision of the Addo road to the north of the intersection was obstructed by bushes and that he could not, from where he was, see a vehicle approaching from that side until it entered the intersection. According to September the bus was travelling at a fast speed which he, rather cautiously, estimated as between 90 and 100 kph. According to him the main lights of the bus were off and only its park lights were on. The bus then collided with the motor vehicle as the latter was beginning to straighten into the Addo road, but had not yet completed the manoeuvre.

[6] It is common cause that the vehicle with which the bus collided, was the Audi driven by the plaintiff and that the bus was the one driven by Tembani. It is further undisputed that Tembani lost control of the bus after the collision, which left the road on its right hand side of the road, ploughed through the bushes and came to a stop some 150 meters from the intersection. The Audi came to a stop on the same side of the road, but mostly on the tar surface, some 30 meters from the intersection.

[7] It was the further evidence of September that, due to the mist, visibility was approximately 50 meters. The lights of a vehicle could, however, be seen as the lights created a beam through the mist in front of the vehicle.

[8] The defendant called Tembani as its only witness. He testified that he approached the intersection at a speed of 80 kph, which is as fast as the bus could go. Although he could not testify about the technical aspects thereof, it can be inferred from his evidence that the speed of the bus was governed at 80 kph. He conceded in his evidence that, under the conditions on the Addo road on that night as described above, he was travelling at an excessive speed. Although there was a dispute as to whether the speed limit was 80 or 60 kph, his concession was that even if the speed limit was 80 kph, it was too fast in the prevailing conditions. He also testified that he never saw the Audi before the moment of impact. In answer to a question in this regard he stated that he cannot dispute September's estimation that visibility was 50 meters at the time. It is clear from his evidence that he never applied brakes nor did he make any endeavour to swerve out in order to avoid any collision. This is in line with his evidence that he did not see the Audi until the moment of impact. He confirmed the evidence of September that there were no vehicles on the Addo road travelling in the opposite direction, namely from South to North, at the time.

[9] The main dispute between the parties concerns the question whether the headlights of the bus were on. In my view September's evidence in this regard is not convincing. By this I do not wish to suggest that September was not a good witness. He was an independent witness and I never gained the impression that he was not truthful. He made four statements about the incident. Two of the statements were made to the police and two to de Lange. It was pointed out to him that some facts that he testified about were not included in all the statements. In my view, whatever complaints have been directed at these perceived shortcomings, they do not detract from the veracity of his evidence before me. With regard to the question whether the lights of the bus were on,

the position is that from the time when the bus came into his line of vision until the moment of impact, it could not have been within his view for much more than a second, if that long. As a result the perception of September as to lights of the bus cannot be held to be reliable. As against this evidence, Tembani testified that the headlights of the bus were on, but they were on dim. He said that it would have been impossible for him to drive under the prevailing conditions, especially at the speed of 80 kph, without the lights being on. He also stated that, apart from the headlights, the park lights were also on. Above the windshield of the bus there is also a destination sign which automatically lights up as soon as the head lights are switched on. The lights in the passenger area of the bus were also on. It is common cause that after the collision, save for the right park light, all the other lights were not on. I have found Tembani to be a truthful and reliable witness. Although September was also a truthful witness, I am of the view that the probabilities are overwhelmingly in favour of Tembani's version which I accept as correctly describing the position with the lights of the bus.

[10] It is in my view clear that, on his own evidence, Tembani was negligent in that he travelled at a speed which was excessive in the circumstances, that he did not keep a proper lookout and that he failed to avoid a collision when by the exercise of reasonable care he could and should have done so. Mr. Schubart, for the defendant, correctly conceded that Tembani was negligent, but argued that such negligence did not contribute to the collision. In the circumstances of this case that argument cannot be sustained. The probabilities favour the conclusion that the collision could have been avoided if Tembani kept a proper lookout and drove at a speed which was more appropriate in the circumstances. Had he done so he would have seen the plaintiff's vehicle moving into his line of travel in time to take avoiding action which could have included moving onto the right hand side of the road and passing the plaintiff's vehicle on her right thereby avoiding the collision. Cf *Wulf v City Tramway Co Ltd & Black* 1945 CPD 3 at 15. Counsel did not refer me to any decisions dealing with facts and circumstances similar to the present matter. It is trite that each matter should be decided on its own facts.

[11] The plaintiff testified that she suffers from retrospect amnesia as a result of the accident and that she cannot recall anything about it. This was not disputed. When the circumstances of the collision as they appear from the evidence are, however, considered, it is clear that the plaintiff herself was negligent. If she stopped her vehicle in such a position as to have a proper view to the north along the Addo road and kept a proper lookout, she should have either seen the approaching bus or, if it was still behind the rise in the road, the reflection of its lights, despite the mist which, according to September, was not very thick. It is further clear that vehicles approaching from her right into whose line of travel she was moving, posed the biggest danger to the plaintiff. Of this she should have been aware and, in the prevailing circumstances, she should have been especially alert to that situation even after she commenced moving away from the stop line. In my view, had she done so and looked properly she should have seen that there was an approaching vehicle and, being in a stop street, she should have waited for it to pass before moving into the Addo road. Her failure to do so contributed to the collision.

[12] In view of the fact that there has been contributory negligence on the part of the insured driver, Tembani, and the plaintiff it affects the plaintiff's claim in her personal capacity. It is, therefore, necessary to decide on the apportionment of blame. In the circumstances of this case I am of the view that 60% of the blame must be attributed to the plaintiff and 40% to Tembani. In view of the finding that there was contributory negligence on the part of Tembani, the plaintiff in her representative capacity is entitled to the full amount of any damages she may be able to prove.

**THE ORDER:**

**(A) THE PLAINTIFF IN HER PERSONAL CAPACITY.**

1. The plaintiff is declared to be entitled to payment by the defendant of 40% of any damages she may be able to prove.
2. Costs of the trial on the merits.

**(B) THE PLAINTIFF IN HER REPRESENTATIVE CAPACITY**

1. The plaintiff in her representative capacity is declared to be entitled to payment by the defendant of such amount of damages as she may be able to prove.
2. Costs of the trial on the merits.

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**H.J. LIEBENBERG**  
**JUDGE OF THE HIGH COURT**