THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20811/2014

In the matter between:

THE MEC FOR THE DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT **APPELLANT**

and

LORETTA BOTHA **RESPONDENT**

Neutral citation: *MEC for the Department of Public Work, Roads and Transport v Botha* (20811/2014) [2016] ZASCA 20 (17 March 2016)

Coram: Leach and Swain JJA and Fourie AJA

Heard: 11 March 2016

Delivered: 17 March 2016

Summary: Delict – tree falling across public road – public authority responsible for safety of road users – liability of public authority for loss and damage caused by a tree falling onto a public road – court a quo erring in imposing a wide general duty upon public authority in the absence of relevant evidence – imposition of duty not necessary for just determination of case.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Tshiki J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Leach JA and Fourie AJA concurring):

[1] On 2 August 2006 the late Louis Bartholomeus Botha (the deceased) was driving at night along the R62 road between Joubertina and Kareedouw in the Eastern Cape during a very severe storm accompanied by heavy rain and strong winds. Trees were uprooted and fell across the road. Tragically the deceased's vehicle collided with a fallen tree, the trunk penetrating the cabin of his vehicle and causing his death.

[2] The widow of the deceased, Ms Loretta Botha (the respondent), instituted action in the Eastern Cape Local Division, Port Elizabeth against the MEC for the Department of Public Works, Roads and Transport in the Eastern Cape (the appellant). She did so in her personal capacity and in her capacity as the mother and natural guardian of a minor child, Bart Petrus Botha, born of her marriage to the deceased. She claimed damages from the appellant suffered as a result of the loss of support provided by the deceased to them both. The respondent alleged that the death of the deceased had been caused entirely by the negligence of employees of the appellant, acting within the course and scope of their employment in a number of respects.

[3] The trial court (Tshiki J) by consent directed that the issue of liability be determined initially with the quantum of the respondent's damages to be determined, if necessary, at a later stage. The trial court found that the appellant's employees had failed to prevent harm to the deceased when they should have done so. It held that their omission was negligent, wrongful and the factual cause of the death of the deceased.

[4] The factual findings of the trial court upon which this conclusion was based were twofold. Firstly, the appellant's employees had failed to maintain the road by removing trees 'that constantly grow and cause a potential danger to road users'. Secondly, they failed to close the road in time before the collision occurred. The present appeal is with the leave of the trial court.

[5] The first finding of the trial court was based upon an allegation by the respondent that employees of the appellant negligently allowed or did not prevent trees from growing in such proximity to the road surface, as to create a risk of obstruction if they fell onto the road. The second finding of the trial court was based upon an allegation by the respondent that the employees of the appellant failed to close the road, when it was apparent that use of the road posed a risk to life.

[6] On the evidence, however, a determination of the appeal falls within a far narrower compass, based upon the allegation made by the respondent in the Particulars of Claim that the employees of the appellant failed within a reasonable time, or in such a manner, so as not to endanger the life of road users, to remove the tree in question. This allegation was based upon the evidence of Mr Daniel de Vos, called by the respondent, to establish that employees of the appellant were aware of the presence of the tree in the road. He testified that they were engaged in what turned out to be an unsuccessful attempt to remove the tree from the road surface which they abandoned some time before the collision.

[7] The trial court accepted the evidence of Mr De Vos and found it was supported by the probabilities. It accepted his evidence that well before the accident the appellant's employees were at the scene of the accident, knew about the tree and were in the process of removing it from the road. It also accepted his evidence

that the trunk of the tree had been cut before the collision after the tree had fallen onto the road.[1] On a conspectus of all of the evidence the finding of the trial court was undoubtedly correct, as fairly conceded by counsel for the appellant. This renders it unnecessary for present purposes to analyse in any further detail the evidence led at the trial in respect of the appellant's denial of having knowledge of the tree. The appeal must accordingly fail.

[8] Although not necessary for the determination of the appeal it is, however, necessary to say something about the finding of the trial court that a general duty rested upon the appellant 'to maintain the road by removing the trees that constantly grow and cause a potential danger to the road users. . .'

[9] A great deal of evidence was led by the respondent regarding the alleged duty of care on the part of the appellant to identify and remove trees growing alongside a public road, which may pose a risk of falling onto the road surface and causing danger to passing motorists.

[10] Mr Roodt, an engineer specialising in road safety stated that the Roads Department were obliged to identify and remove any tree, even outside the road reserve, of a sufficient height that if it fell it would obstruct the road surface. In addition, representatives of the Roads Department should be able to recognise a hazardous tree based on its type, its distance from the road as well as its height and shape. They should also examine the conditions of the ground and the roots at the base of the tree and if uncertain as to the stability of the tree, refer it for further investigation.

[11] Mr Bergh, an engineer also specialising in the maintenance and safety of roads, stated that representatives of the Roads Department should have removed the tree that caused the accident before it fell across the road. They should have had

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[1] It did not, however, find that this conduct of the appellant's servants constituted a ground of negligence in itself, but rather relied upon it in support of the conclusion that the road in the area where the accident occurred should have been closed without delay.

a systematic programme of eliminating trees which could potentially be blown over in a storm, resulting in the obstruction of the road.

[12] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 23, Nugent JA stated the following:

'The classic test for negligence as set out in *Kruger v Coetzee* has since been quoted with approval in countless decisions of this Court: whether a person is required to act at all so as to avoid reasonably foreseeable harm and, if so, what that person is required to do, will depend upon what can reasonably be expected in the circumstances of the particular case. That enquiry offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably.'. . . (Footnote omitted.)

[13] No evidence of the cost to and the difficulty of taking precautionary measures by the appellant, to avoid or reduce the risk of trees falling across public roads and thereby causing danger to passing motorists was led by the appellant. In the absence of this evidence the imposition of such a duty upon the appellant, which was not necessary for the just decision of the case, was accordingly unjustified.

[14] It is ordered that:

The appeal is dismissed with costs.

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	A Beyleveld SC (with M Simoyi)
	Instructed by:
	The State Attorney, Port Elizabeth
	The State Attorney, Bloemfontein
For the First Respondent:	G J Scheepers (with W R Du Preez)
	Instructed by:
	Van Zyl Le Roux Attorneys, Pretoria
	Honey Attorneys, Bloemfontein