

Case No 157/99

REPORTABLE

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

In the matter between:

THE CAPE METROPOLITAN COUNCIL

APPELLANT

and

NOEL RAYMOND GRAHAM

RESPONDENT

CORAM: **HOWIE, OLIVIER, SCOTT, ZULMAN JJA et FARLAM
AJA**

HEARD: **14 NOVEMBER 2000**

DELIVERED: **27 NOVEMBER 2000**

*Landslide on Chapman's Peak Drive on the Cape Peninsula - wet period -
motorist seriously injured - local government body entrusted with
management of road held to be liable in delict.*

J U D G M E N T

SCOTT JA/...

SCOTT JA:

[1] Chapmans Peak Drive is a road linking Hout Bay and Noordhoek on the west coast of the Cape Peninsula. On 26 June 1994 the respondent was severely injured while driving on the road when his vehicle was struck by a landslide descending from above a rock cut. The accident occurred during a particularly wet period in the Cape winter. The appellant is a local government body and the legal successor to the obligations of the Western Cape Regional Services Council which had previously been entrusted with the management and maintenance of the road on behalf of the Cape Provincial Administration. The respondent sued the appellant for delictual damages in the Cape of Good Hope Provincial Division. In terms of Rule 33(4) the Court *a quo* was called upon to decide only the issue of liability. At the conclusion of the trial it ruled that the appellant was liable for the damage suffered by the respondent in consequence of the accident. The judgment of the Court *a quo* is reported *sub nom Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C). The appeal is with the leave of the Court *a quo*.

[2] Since its completion in 1922 Chapman's Peak Drive has been a major tourist attraction. With the development of the area to the south it is now also used as a commuter route. Starting from virtually sea level at Hout Bay it

traverses what is relatively speaking a gentle slope for a distance of approximately 5 km rising several hundred feet to a look-out point which overlooks the Hout Bay Sentinel and the bay itself. At this point the slope of the mountainside increases dramatically and for the next 4 km the road winds its way around Chapman's Peak as it gradually descends to Noordhoek with an almost sheer drop down to the sea on the western side and towering rock cuts and steep mountainside on the eastern side. The rock cuts in many instances are perpendicular or at angles only slightly less than perpendicular. To the north of the look-out point (i.e. on the Hout Bay side) there are two identical warning signs about three km apart directed at traffic travelling south towards Noordhoek. This sign, which is internationally recognised and is described in the relevant regulations as the "falling rocks" sign, takes the form of a triangle enclosing a sketch in diagrammatic form of rocks falling down a steep incline. Beneath one is a board bearing the words, painted in white against a green background, "For 5 km". There is a similar sign near the commencement of the drive on the Noordhoek side directed at traffic travelling north towards Hout Bay.

[3] Records kept at the Hout Bay weather station reveal that it had rained every day for nine consecutive days prior to the accident. A total of 156

mm of rain was recorded for the week ending Friday 24 June at 8 am. By Monday, 27 June, at 8 am a further 87,4 mm of rain had fallen. The rainfall recorded at Cape Town International Airport for the month of June 1994 was more than double the average for the period 1961 to 1990.

[4] On Sunday afternoon, 26 June 1994, the respondent, who lived in a flat in Cape Town, decided to go for a drive. He drove to Hout Bay via Marine Drive on the west coast of the peninsula and then took the fateful decision to proceed over Chapman's Peak Drive to Noordhoek. He recalled in evidence that there had been much rain for some days prior to the accident. He recalled also observing the "falling rocks" sign as he proceeded up the first section of the drive to the look-out point. At the time there was what he described as a "mild drizzle". After proceeding past the look-out point he could remember nothing further until waking up in hospital. What happened in the intervening period appears from the evidence of Mr Cagnazzo. At the time he was the driver of one of several motor cars proceeding some way ahead of the respondent towards Noordhoek. At a point some 200 metres beyond where the accident occurred he found the way blocked by mud and a tree which had washed onto the road. He executed, he said, a "three-point" turn in order return to Hout Bay. By this time water and small stones were raining down onto his vehicle from above and he

began to fear for his safety. After proceeding a short distance back towards the look-out point the vehicle ahead of him stopped. He saw that there had been another landslide which barred their way. He and the other drivers alighted from their vehicles and sought refuge from the falling stones by standing up against the rock face. At this stage he observed the respondent's vehicle, a Volkswagen minibus, a short distance away. The roof had been dented in the shape of a "V" by mud and rocks, and the windscreen was broken. On investigation he found the respondent still in the vehicle. The front was filled with mud which he had to dig away in order to free the respondent. With the help of others the respondent was taken to an area where there was some protection from falling stones. Mr Cagnazzo returned to make sure that no one else was in the vehicle. No sooner had he done so than it was struck by more mud and debris falling from above. Thereafter he and some of the others set off on foot for Noordhoek to summon help. In the meantime, the initial landslide, i.e. the one which had prevented Mr Cagnazzo from continuing to Noordhoek, had been brought to the attention of the appellant's assistant maintenance superintendent, Mr Lamb, who had immediately taken steps to close the road.

[5] The distance between the look-out point and where the accident occurred is 1.5 km. A photograph taken some hours after the event shows the

respondent's vehicle surrounded by mud, rocks and water as deep as the front bumper. The vehicle itself appears to be extensively damaged with the front section of the roof flattened almost to the level of the headlights. Much of the roof is covered by mud, smallish rocks and what appear to be plant roots. The photograph also shows water cascading down the rock cut at various points.

[6] The appellant admitted in its plea that it was under a legal duty to take such reasonable precautions as circumstances permitted in order to avoid or minimise injury to users of the road. In other words, it effectively acknowledged that if it were found to have negligently failed to take such precautions its conduct would have been not only negligent but also wrongful. (Cf *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 837 G - 838 C.) In my view the admission was properly made. Given the circumstances, the existence of such a duty accords with what I would perceive to be "the legal convictions of the community" (see *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056 F - G). In view of the admission, however, it is unnecessary to consider this aspect further.

[7] Turning to the question of negligence, it is now well established

that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be “(a) the degree or extent of the risk created by the actor’s conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor’s conduct; and (d) the burden of eliminating the risk of harm”. (See *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776 H - J where J C Van der Walt in *The Law of South Africa* vol 8 para 43 is quoted with approval; *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) 55H - 56C.) If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.

[8] It was clear from the evidence of the experts who testified at the trial that the unstable nature of much of the rock, the height and slope of the cuts and the steepness of the mountainside above (and its inaccessibility) rendered it virtually impossible to prevent rockfalls and so ensure the safety of users of the road. The problem of falling rocks was nothing new. Although the appellant and its predecessors kept no proper records of slope failures, inquiries

from various sources revealed that over the years there had been a number of major rockfalls or landslides resulting in the road being closed for varying periods. Such slope failures are known to have occurred in August 1977, July 1987, March 1989, July 1993 and August 1993. The failure in July 1993 occurred during or after a rainstorm. The weather conditions prevailing when the other failures occurred are unknown. It is also unknown whether there were other similar failures; there may have been, but one does not know. There were, however, a number of minor or less severe slope failures which were known to have caused injury to users of the road and in one case the death of a motorist. Several reports dealing with the stability of the slope were obtained from time to time by the appellant and its predecessors from consulting engineers. On advice given, steps were taken some years prior to the accident to stabilize certain of the rock cuts close to the base but these did little to eliminate the risk of rockfalls and landslides emanating from the upper reaches of the rock cuts or from the mountainside above the rock cuts. A possible solution, perhaps the only one to avoid the danger altogether, would have been to construct something in the nature of a concrete roof over the road but, quite apart from the technical problems involved, the cost of such a structure would be so prohibitive as to render it not a feasible option. Nor, I should add, did the

respondent contend that the appellant was negligent for not having adopted such a course.

[9] By the time the trial commenced the grounds of negligence relied upon by the respondent had been confined to: (a) the appellant's failure to warn users of the road of the risk of harm from falling earth and rock (it being alleged that the "falling rocks" sign previously referred to was inadequate), and (b) the appellant's failure to close the road temporarily prior to the accident. The appellant conceded that it was obliged to warn the public of the danger but contended that the existing warning signs were adequate for this purpose. Similarly, the appellant accepted that it was obliged to close the road temporarily when the circumstances were such to warrant such a step but denied that its failure to close the road prior to the accident amounted to negligence. The Court *a quo* found for the respondent on both grounds.

[10] The warning sign described above serves to warn users of the road not only of the danger arising from rocks lying on the roadway but also from rocks falling from a rock cut or the mountainside above. The Court *a quo* appears to have held that the sign does no more than warn motorists of the former. I cannot agree. The rocks are not placed on the road; they fall there. Anyone who is not prepared to run the risk must choose some other route. The

risk of falling rocks is, however, one which is inherent in any mountain pass or for that matter any unstabilized rock cut or cutting. Indeed, the sign in question is frequently encountered on mountain passes in the Western Cape - even the relatively new ones. Most motorists would ordinarily accept the risk without demur. They would generally also be aware that the risk is not necessarily uniform. In the case of some passes, typically the older ones built in a different technological age, the risk would be somewhat greater. Although rockfalls on Chapman's Peak Drive are unpredictable and can occur both in wet and dry periods it is clear that the risk of rockfalls associated with the characteristics of the slope, and particularly major slope failures whether in the form of rockfalls or landslides, are greatly increased by rainfall and particularly the saturation of the mountainside. Indeed, all the experts who testified were agreed that the greater the rainfall, the greater the risk of rockfalls and particularly landslides. As far as the latter are concerned, Mr Stapelberg, an engineering geologist who gave evidence for the respondent, explained that with the increase in the moisture content of soil on a mountain slope there is a decrease in the shear strength of the soil and that once the critical shear strength is reached a slope failure will result. In view of the steepness of the slope of the soil on the ledges above the rock cuts on Chapman's Peak Drive, the risk of a landslide in

sustained wet weather is accordingly much greater than would normally be expected on a mountain pass. It is no doubt true that most experienced motorists would be aware that the risk is generally intensified in wet weather. But the appellant is in a far better position to assess that risk. Not only does it have knowledge of the particular problems associated with the road, it also has or ought to have knowledge of previous landslides and major rockfalls in wet weather as well as incidents in which people have suffered injuries as a result of all forms of slope failures. In addition, the rainfall figures recorded at Hout Bay are readily available to it. There comes a time, I think, when it must or ought to be known to the appellant that by reason of the weather conditions, or otherwise, the risk of harm resulting from rockfalls or landslides has increased to such an extent that the “falling rocks” sign no longer adequately conveys to users of the road the true extent of the risk. This is to some extent implicit in the appellant’s acceptance of an obligation to close the road when weather conditions or other circumstances rendered it unsafe. The concession was contained in a reply to a request for further particulars in which the appellant indicated that it did not dispute that it would be obliged to close the road to the public “in circumstances and/or weather conditions which rendered the road unsafe for public use”. In addition, the appellant’s chief engineer (roads,

transportation and planning division) testified that the appellant had in the past closed the road following heavy rains even in the absence of some obstruction occurring if the maintenance staff had observed that rocks were beginning to fall on the road.

[11] The problem that would face the appellant, of course, would be to decide whether in the particular circumstances the stage had been reached that the road should be closed. The decision would not be an easy one and when subsequently considering whether the appellant was negligent or not it is important to bear in mind that it is not required to exercise prophetic foresight; it is obliged to do no more than act reasonably.

[12] The engineers in the employ of the appellant emphasized the dilemma which faced them when the question of closing the road arose. Closure of the road is inevitably greeted by a public outcry. As previously mentioned, the road is now a commuter route and no longer merely a scenic drive. There is, however, another road linking Noordhoek and Hout Bay. Admittedly, it involves a detour of something like an additional 14 km but this is no more than an inconvenience. A further problem, they said, was that once the road had been closed an equally difficult question arose as to when to reopen it as slope failures occurred at all times of the year and not only in wet weather. It may

well be difficult to decide when to reopen the road; but that is no justification for keeping it open in circumstances which require it to be closed.

[13] It is clear from the evidence that the decision whether to close or leave Chapman's Peak Drive open was not a decision taken by a member of the appellant's engineering staff who would have had expert knowledge of the particular problems associated with the road. Instead, the decision was left in the hands of the assistant maintenance superintendent, Mr Lamb, who was in charge of the maintenance of roads in the Hout Bay area, including Chapman's Peak. Mr Lamb is not an engineer. His principal task was to check for damage to the road surface and to ensure that roads under his supervision were kept clean and stormwater culverts and drains unblocked. There was no policy as to when he was to close Chapman's Peak Drive, nor were there guidelines laid down so as to assist him in making a decision. No proper records were kept of past major slope failures which might have provided some indication of when they were likely to occur in the future. No regard was had to rainfall figures which were available at the Hout Bay weather station and no regard was had to weather forecasts. Indeed, it appears that in June 1994 no one on the staff of the appellant applied his or her mind to what might happen in the future. Mr Lamb would merely take steps to close the road once a rockfall or landslide had

rendered it unusable. Having regard to the problems associated with Chapman's Peak Drive and its history of major slope failures, the appellant, in my view, was negligent in failing to appoint an appropriately qualified person to consider the information available and to consider the question whether the risk of a major slope failure had increased to such an extent as to justify the closure of the road. Indeed, I did not understand counsel for the appellant to contend the contrary. But this does not mean that the appellant is necessarily liable. What must be decided is whether in all the circumstances the failure of the appellant to close the road prior to the accident was unreasonable and accordingly amounted to negligence on its part.

[14] As I have said, the month of June 1994 was particularly wet. Records kept at the Hout Bay weather station show that by 8 am on Friday 24 June 1994 no less than 221 mm of rain had fallen since the beginning of the month. Of that, 156 mm had fallen in the course of the immediately preceding week. If regard is had to these figures, which were available, it must have been obvious to anyone in the employ of the appellant, who was familiar with the problems associated with Chapman's Peak Drive, that by then the risk of rockfalls, and in particular a major rockfall or landslide, had greatly increased. Furthermore, there was nothing to suggest that the wet spell was over. On the

contrary, heavy rainfalls were forecast for the weekend. In the event, by Monday 27 June a further 87.4 mm of rain had fallen. The accident occurred on a stretch of the road which was known to have a high risk of slope failure. On 9 July the previous year, viz 1993, a major rock fall had occurred at virtually the same point during or after a rainstorm resulting in a lengthy closure of the road. During the week the road was patrolled by a worker with a wheelbarrow who removed any stones or rocks which might have fallen onto the road. On Saturday morning 25 June, Mr Lamb was called out to clear away rocks which had subsequently landed on the road. Although he could no longer remember the full extent of the falls he was able to recall that they were scattered along the length of the road. He said that while he was able to remove the rocks without assistance they must have been sufficiently substantial to warrant a traffic officer calling him out over the weekend. On the morning of Sunday 26 June, he was again called out but this time the problem was on the Hout Bay side of the look-out point.

[15] Having regard to the cumulative effect of the foregoing, there can, I think, be no doubt that at least by the morning of Sunday 26 June 1994 the risk of slope failures on Chapman's Peak Drive had greatly increased and that this would have been known or ought to have been known to the appellant through

its officials having knowledge of the particular problems associated with the road. Counsel for the appellant contended, however, that while this was undoubtedly the case, the possibility of a slope failure actually causing harm, or serious harm, to users of the road remained too remote to justify the extreme measure of closing the road. That may or may not be so in relation to the risk of harm resulting from minor slope failures involving, for example, stones or individual rocks falling onto the road. It is unnecessary to resolve this issue. What is clear is that the risk of slope failures which had increased with the rain was not confined to the risk of such minor failures; it included the risk of major rockfalls or landslides and this ought to have been clear to the appellant. In the event of such a slope failure occurring, a relatively large area of the road would be affected and the possibility of serious harm being suffered can by no means be regarded as remote. In all the circumstances it seems to me that the risk of a major slope failure and harm to users of the road had increased to such an extent that by the morning of Sunday 26 June at the latest, the “falling rocks” warning sign no longer conveyed to the public the true extent of the risk involved in using the road and that by then it had become unreasonable for the appellant not to have closed the road. In my judgment, therefore, the appellant was negligent in failing to close the road prior to the accident.

[16] It was not contended in this Court that there was contributory negligence on the part of the respondent. The appeal is accordingly dismissed with costs.

D G SCOTT

CONCUR:

HOWIE	JA
OLIVIER	JA
ZULMAN	JA
FARLAM	AJA