THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 488/05
NOT REPORTABLE

In the matter between:

MEC FOR PUBLIC WORKS, ROADS AND TRANSPORT, FREE STATE — **APPELLANT**

v

THEOPHILUS ESTERHUIZEN	**FIRST RESPONDENT**
MARYKE VAN ROOYEN NO	**SECOND RESPONDENT**
REINER ZIETSMAN	**THIRD RESPONDENT**
AREND HENDRIK ADRIAANSE	**FOURTH RESPONDENT**

Coram: Nugent, Cloete JJA and Cachalia AJA

Heard: 28 August 2006

Delivered: 7 September 2006

Summary: Serious allegations of impropriety made against the trial judge. The allegations were abandoned on appeal without apology or explanation. Punitive costs order as between attorney and client imposed as a mark of court's opprobrium.

Neutral citation: This case may be cited as *MEC for Public Works, Roads and Transport v Esterhuizen* [2006] SCA 96 (RSA).

JUDGMENT

CACHALIA AJA

[1] This is an appeal against a finding by the Free State Provincial Division (Van Coppenhagen J) that the appellant's negligence caused a motor vehicle accident on the R64 road between Dealesville and Bloemfontein on the evening of 22 June 2001.

[2] The court found that the accident occurred in the following circumstances: Driving from west to east the driver ('Joubert') had, after observing a small buck in front of him, taken evasive action by veering to the left thereby bringing the two wheels on the left side of the vehicle off the tar onto the gravel verge on the northern side of the road while the two wheels on the vehicle's right side, i.e., the southern side remained on the tar. As Joubert attempted to regain the tar he felt a jerking action on his steering wheel and then lost control of the vehicle. The vehicle swerved to the right across the road, struck an embankment on the southern side of the road, rolled over and came to rest on its wheels in a field. The court found as a fact that the point at which Joubert had attempted to bring the two left wheels back on to the tar had a dangerous difference in height between the gravel and the tar. This, it concluded, was the cause of the jerking action of the steering wheel which resulted in Joubert's loss of control of the vehicle. The appellant was held liable because it had failed properly to maintain the road.

[3] In the course of argument in the court below the appellant's counsel submitted that it was improbable that the accident had occurred in that way. He submitted that it was probable that Joubert had never veered to the left of the road but had swerved to the right to avoid the animal and lost control of the vehicle at a point further west from where the court found the incident had occurred. Support for this submission was sought on three grounds. The first was that a police plan of the incident apparently compiled on the night of the incident, but never proved in evidence, made no reference to the vehicle having veered to the left before leaving the road on the right side. Secondly, a statement that had been compiled by the attorney of one of the vehicle's occupants for submission to the Road Accident Fund also bore no such reference. Finally, reliance was sought to be placed on the discovery by the appellant's expert witness several years after the incident, of parts of vehicle

wreckage in the ploughed fields next to the road at a different point to where the court found that the incident had happened. There was no direct evidence that the wreckage emanated from the vehicle involved in this accident, and that fact the appellant's counsel sought to establish by inference.

[4] The court below rejected this submission on the basis that it had never in any shape or form been put to any of the respondent's witnesses. On the contrary, it observed that the cross-examination of all the witnesses by the appellant's counsel was based on the premise that the accident occurred at the place and in the circumstances referred to in para [2] above. At a stage during the respondents' (the plaintiffs in the court below) case in the court below counsel for the appellant (the defendant in the court below) applied for the witnesses who had already testified on the respondents' behalf to be recalled to put its version to them. This was declined at that stage, the trial judge indicating that another such application could be entertained at the end of the appellant's case. No such application was made by the appellant's counsel, nor was the version put to experts called to testify on behalf of the respondents.

[5] In this court the appellants persisted in the argument that the vehicle did not leave the road to the left at all, but that Joubert swerved to the right to avoid the animal and lost control of the vehicle. As pointed out by the learned judge in the court below, that hypothesis of how the accident occurred is in direct conflict with the evidence of Joubert, and it was never put to him that that is how the accident occurred. That apart, a Mr Payne visited the site of the accident a few days after it had occurred, in the company of Joubert and his father. He said that he observed a fresh track leaving the left edge of the road, proceeding some way along the gravel verge, and then again regaining the tar road. Moreover, he said that on the right hand side of the road the grass had been ploughed up, consistently with a vehicle having left the road at that point, and that the point at which this occurred was consistent with the vehicle having veered across the road after mounting the left edge. His observations, which were altogether consistent with Joubert's evidence as to how the accident occurred, were not placed in issue at all. (Mr Payne was not

even cross-examined.) Indeed, the whole case was conducted in the trial court on the basis that Joubert's evidence as to what had occurred was not in dispute. To suggest in those circumstances, and then on tenuous grounds, that the accident did not occur in that manner at all, is quite without merit. In my view the argument put forward on behalf of the appellants, and repeated in this court, was rightly rejected by the court below. As to the remaining findings of the court below, they are dealt with in its thorough and well-considered judgment, and were not placed in issue before us.

[6] In my view this appeal has no merit. Indeed, the reason that it has reached this court is only that, in support of their application for leave to appeal, the appellant's legal representatives impugned the conduct of the trial judge in conducting the trial. The trial judge made it clear in his judgment granting leave to appeal that it was for that reason alone that he considered himself bound to grant leave to appeal. But for the allegations that were made in relation to the conduct of the trial judge I am satisfied that leave to appeal would also have been refused by this court, and that the appeal would not have come before this court at all.

[7] The grounds upon which the conduct of the trial judge was attacked are set out in the notice of appeal in the following terms:

'Die verhoorhof het onreëlmatig gehandel:

1.1 deur nie geregtigheid te laat geskied nie en dit ook nie duidelik te laat voorkom dat geregtigheid wel geskied nie;

1.2 deur onredelike tydsdruk op Applikant te plaas in die aanbieding van Applikant se saak en in besonder tydens die stellings wat namens Applikant aan Respondente se deskundige getuies gemaak is;

1.3 deur onredelik in te meng met die aanbieding van Applikant se saak;

1.4 deurdat sy optrede tydens die verhoor gedui het op die afwesigheid van objektiwiteit, onbevangendheid en relatiewe onbetrokkenheid.'

[8] There is not the slightest support in the record of the trial for any of these allegations, and, indeed, they were not pursued before us, nor in the heads of argument. We were told in the course of argument that they were founded upon allegations that were made in an affidavit that the appellant sought to introduce in the course of applying for leave to appeal, but which the court below refused to receive. What we were also told, however, and this was not placed in dispute by the appellants' counsel, was that that affidavit dealt exclusively with matters that had occurred in the courtroom during the course of the trial, all of which appear from the record, and that the affidavit that was tendered to the trial court added nothing to what was already before us.

[9] I have already pointed out that the allegations that were made against the trial judge were altogether groundless, so much so that they were not persisted in at all, and were expressly retracted in the course argument during the appeal. It is unacceptable that allegations of impropriety can be made against a judge in so cavalier a fashion. The effect of this has been that the respondents have been put through considerable and unnecessary expense, inconvenience and delay and this court has had to expend scarce judicial resources on an appeal utterly devoid of any merit. As a mark of opprobrium, I think a punitive costs order should be imposed on the scale as between attorney and client.

[10] Counsel for the respondents submitted that the appropriate costs order should be on the scale as between attorney and own client. However I do no think that the circumstances described above can be considered so extraordinary that they warrant such an order.[1]

[1] See in this regard *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) 22B-D.

[11] I make the following order:

The appeal is dismissed with costs on the scale as between attorney and client, such costs to include the costs of two counsel.

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A CACHALIA
ACTING JUDGE OF APPEAL

CONCUR:

NUGENT JA
CLOETE JA