

SUBSIDENCE: STRICT LIABILITY TO SUPPORT A NEIGHBOUR'S LAND

Petropulos and Another v Dias (1055/2018) [2020] ZASCA 53 (21 May 2020)

Your neighbour's building activities, conducted in terms of approved plans, causes subsidence on your property and damage to your home. Is there a legal duty on landowners to provide lateral support, i.e. to have your land physically supported by adjoining land in built-up urban areas? Must negligence be proved? This judgment settles the law in this regard, holding that the duty of lateral support exists in an urban environment. It is a strict liability which extends to buildings on contiguous pieces of land provided that, in the specific circumstances, there is a link between the conduct complained of and the damage that resulted.

The Judgment can be viewed [here](#).

FACTS

Petropulos and Dias owned adjoining properties in Camps Bay, Cape Town, on a steeply sloping mountainside. Petropulos's property was situated below that of Dias. At the time relevant to this matter, all of the properties had houses built on them, except for Petropulos's erf which was still undeveloped.

In March 2008 Petropulos commenced building work on her property. This included extensive excavations near the boundary of Dias's property, involving the construction of three tiers and a lift shaft. To provide lateral support, the three levels were each secured by a retaining wall.

From May 2008 onwards, problems on Dias's property became evident: a dip in the garden; a terra-force wall collapsing and insert semi-colon; ultimately, the entire slope on which Dias's property was situated subsiding. The home moved laterally and downwards towards the excavation on Petropulos's property, resulting in extensive structural damage to Dias's property.

Dias instituted a claim for damages against Petropulos, based on strict liability for breach of the duty to provide lateral support.

The Western Cape High Court declared that: Petropulos owed Dias a duty to provide lateral support to his property; the excavations undertaken on Petropulos's property breached that duty; and that as a result, the slope on which Dias's property was situated, mobilised and subsided. It held in addition that **a duty of lateral support extends not only to land but also to buildings, save where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land'**.

Petropulos appealed to the Supreme Court of appeal, arguing that she did not owe a duty to provide lateral support to Dias's property, inasmuch as the latter's property was no longer in its natural state; that the excavations on Petropulos's property did not breach the duty to provide lateral support; that the excavation on Petropulos's property was not linked sufficiently closely to the harm suffered by Dias for legal liability to ensue (causation); and that on the facts of the matter, it was inconceivable that Petropulos should be held liable to Dias in the absence of a finding of fault on the side of Petropulos.

HELD

Is the duty of support owed only in respect of land in its natural state?

- A crucial question for the Court to determine here was whether the duty of lateral support - owed to an

adjacent landowner - exists only where the land is unimproved (as in the English law) or whether it applies also where the land is improved.

- After a thorough examination of differing existing case law and legal principles, the Court answered that it applies also to land that has been improved and that the duty of lateral support corresponds with a neighbour's entitlement to such support. The right to lateral support is thus reciprocal between neighbouring landowners (and not based on servitude).
- The principle of lateral support is further: (i) linked to our neighbour law, which in turn has fairness and equity as important considerations; (ii) relevant in our constitutional context, so that it finds expression in the constitutional value of Ubuntu, which '*carries in it the ideas of humaneness, social justice and fairness*'. The English law principle of lateral support in all its rigidity may well be inimical to all these.
- The Court *a quo* was accordingly correct in holding that the duty of lateral support was not limited to land in its natural state, but extends to buildings on the land. However, its articulation of an exception to the general principle, namely that a duty of lateral support extends not only to land but also to buildings, save where such land has been '*unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land*', has no grounding in our law and has to be rejected. Our law has sufficient existing safeguards to meet the concerns sought to be addressed by this exception.

Did the excavations on Petropulos' property breach the duty of lateral support owed to Dias?

- It was common cause between Dias and Petropulos's specialist witnesses that there was a slope failure which caused ground movement on the affected properties. However, they differed on the cause and mechanism of the slope failure. On examination of the experts' opinions, the Court noted that it was not contested that Dias's property was damaged when it moved laterally and downwards towards the excavation on Petropulos's property. This happened because lateral support, previously provided by her property to Dias's property, had been removed. Given these considerations, the exact mechanism which caused the removal of lateral support as debated between the expert witnesses, was not relevant. Dias thus succeeded in establishing that the slope mobilisation had resulted from a breach of the duty to provide lateral support due to the excavation on Petropulos's property.

Causation

- There are two distinct questions in the causation enquiry: (i) A factual question, namely did the relevant conduct cause or materially contribute to the harm giving rise to the claim? (ii) If the answer is yes to the first question then the second question becomes relevant, namely whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or stated differently, whether the harm is too remote from the conduct.
- The *causa sine qua non* (the 'but for' test) is ordinarily applied to determine factual causation. Applied to the facts of this case, the question was whether, but for the excavation, the slope would have mobilised. Under cross-examination, the SCA quoted the following question that was put to Petropulos's expert:

'MR BEY: So Dr, it is not clear that but for the Naumann [first appellant] excavation the land on the Dias [respondent] property behind the [Mr] Venter property would not have failed? ---M'Lord, if the excavations had not been formed we wouldn't be here today'.

I take that as a yes--- Yes'

- Thus, whilst Petropulos emphasised the role of the other factors (such as the innate instability of the slope, the excavation on other neighbouring owners' properties, winter rainfalls), which are not to be discounted, it was clear that given the nature and extent thereof, the excavation was central to the slope mobilisation.
- The excavation was thus a 'substantial factor' or a proximate cause of the slope mobilisation. In the circumstances, it is safe to conclude that but for the excavation on the Petropulos property, the slip circle failure would most probably not have occurred. The Court thus found a direct and probable chain of causation between the excavation and the slope mobilisation which caused damage to Dias's property. Factual causation was accordingly established.
- With regard to legal causation, it has to be determined whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote. (The test provided by the law for this part of the enquiry is a flexible one, in which reasonable foreseeability is but only one factor, among several. Other factors include directness, the absence or presence of a *novus actus interveniens* (an intervening occurrence), legal policy, reasonableness, fairness and justice.
- In the present matter, this question clearly had to be answered against Petropulos.

No fault liability

- As stated already, none of the affected properties were in their natural state. They had all been developed for the building of houses. Petropulos submitted that it was unlawful and unacceptable in a constitutional state to impose strict liability on others for breach of the duty of lateral support.
- The following must however trump other considerations: Broadly speaking, "every landowner has a right to the lateral support and where subsidence or other destabilisation occurs, as a result of excavations on an adjacent property, the owner of the adjacent property will be liable in an action for damages irrespective of whether she was negligent or not. That is not to suggest that an adjacent property owner is not entitled to excavate. His or her entitlement to do so, is limited by the duty not to withdraw the lateral support which is afforded to the adjacent property. The right is reciprocal. Neither *culpa* [negligence] nor *dolus* [fraud] is a requirement for liability for damage caused by the withdrawal of lateral support. Of course, if an aggrieved property owner can prove that he or she suffered pecuniary loss through *dolus* or *culpa*, she can likewise sue in delict ...".
- Also, a cause of action based on strict liability in cases such as this, serves to ensure that those who suffer damage are not non-suited because of the absence of fault or because of their inability to prove the presence of fault.
- In summary: Firstly, *culpa* or *dolus* is not required for liability because the right of support is a natural right of ownership. Second, there are sufficient safeguards and flexibility in our law so as to ensure that one is not unjustifiably punished at the expense of others. Third, liability without fault here is usually restricted to damage to life, limb and property.

CONCLUSION

The appeal was dismissed.