



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Western Cape Division of the High Court, Cape Town (Bozalek J, sitting as court of first instance). The appeal was dismissed with costs.

The matter concerned the nature and ambit of the duty of lateral support, an aspect of neighbour law. In about July 2008, a scree slope at one of the highest terraces on Table Mountain, in the Cape Town suburb of Camps Bay, mobilised and subsided. This resulted in extensive damage to a group of adjoining properties which formed a parcel of land bound between Theresa Avenue, on the upper side of the slope, and Barbara Road down below.

One of the properties damaged by the subsidence was that of the respondent, Mr Artur Dias, whose property is situated in Theresa Avenue. The respondent consequently instituted an action for damages in the court below, alleging that the mobilisation and subsidence was caused by excavations undertaken at the properties of the first appellant, Ms Marina Petropulos, in preparation for the construction of a house, and Mr Dawid Venter, in preparation for the construction of a garage, both properties being situated at the lower end of the parcel on Barbara Road, and both excavations being effected near the respective boundaries with the respondent's property. The first appellant and Mr Venter were the first and second defendants in the court a quo.

The respondent alleged that these excavations jointly, or each partially, caused the mobilisation and subsidence of the scree slope, alternatively that it was caused by one of these excavations independently. The respondent alleged further that these excavations deprived his property of the lateral support it had hitherto enjoyed, and to which he is entitled as a neighbouring landowner. Stated otherwise, Mr Dias's case was that the respective excavations undertaken on the properties of the first appellant and Mr Venter were in breach of their duties to provide lateral support to contiguous properties. The second appellant, Nic Moroff & Associates, is a structural engineering firm that was appointed as the project engineer for the works on the first appellant's property. The first appellant alleged that the second appellant, who was one of six third parties joined in the proceedings below, was negligent in carrying out its mandate.

The first appellant and Mr Venter both denied any liability for damages to the respondent. The first appellant particularly denied owing the respondent a duty of lateral support because, firstly, the respondent's property had previously been excavated, developed and built up and was thus no longer in its natural state; and, secondly, because the land on which the respondent's property was situated was compromised by its (own) development or that of neighbouring properties. In the excavation or the development of its property, so the argument went, the first appellant did not deprive the respondent's property of any lateral support to which it was entitled. In any event, the first appellant alternatively denied incurring liability by virtue of the respondent having consented to the first appellant's excavation, thereby accepting the risk of harm resulting from the first appellant's excavation and waiving any right of lateral support he might otherwise have enjoyed. On the other hand, Mr Venter denied liability and pleaded that the slope mobilisation was caused exclusively by the excavation effected by the first appellant on her property.

In terms of rule 33(4) of the Uniform Rules of Court, the high court ordered a separation of issues so that the only issues to be decided in the first instance were, firstly, whether Ms Petropulos and Mr Venter indeed owed Mr Dias a duty of lateral support; secondly, if so, whether the respective excavations effected on the properties of Ms Petropulos and Mr Venter breached this duty; and lastly, whether, in addition to breaching the duty of lateral support, these excavations were also the cause of the scree slope mobilising and subsiding, and accordingly causing extensive damage to Mr Dias's property. The high court answered all three questions in the affirmative.

The high court thus held that the duty of lateral support is owed not only to neighbouring land, but also to buildings constructed thereon, save where such land has been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land.

On appeal to the SCA, the appellants contended that the first appellant did not owe a duty of lateral support to the respondent's property because of that property no longer being in its natural state; that, in any event, the excavation undertaken on the first appellant's property did not breach such duty; that the excavation on the first appellant's property was not linked sufficiently closely to the respondent's

harm for legal liability to ensue; and, lastly, that it would be inconceivable in these circumstances to hold the first appellant strictly liable, that is, without positively establishing fault.

The SCA considered the development of South African neighbour law in relation to the duty of lateral support. It confirmed the trite principles of the right to lateral support being a natural right, incidental to the ownership of property and not servitudinal in nature, and that the right was reciprocal between two neighbours, so that the duty of a landowner to provide lateral support corresponds with the adjacent landowner's entitlement to receive such support. The SCA then considered the divergent views of two schools of thought on whether lateral support is owed only to contiguous land in its natural state, or whether the duty extends also to artificial structures on the land. While English law favours the former approach, the SCA held that, on the basis of fairness and equity being important considerations in South African neighbour law, as well as the constitutional value of Ubuntu, lateral support is owed not only to contiguous land but must necessarily extend to buildings on the land. It therefore agreed with the court a quo on this score.

However, in respect of the exception sought to be introduced by the court a quo, namely that the duty of lateral support extends to buildings constructed on contiguous land except where such land has been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land, the SCA disagreed. It alluded to the practical difficulties that such an exception might introduce, such as a landowner who constructs in compliance with the relevant building and town planning regulations but is nevertheless saddled with the duty to prove that the construction is not unreasonable or disproportionate. The SCA held that there are sufficient safeguards in our law to meet the concerns sought to be addressed by the exception.

After considering the conflicting views of the two expert witnesses, the SCA agreed with the court a quo that the evidence of Dr McStay was to be preferred. The SCA held that Dr McStay's evidence provided the most reasoned and cogent explanation for the geological event and that it closely matched the objective facts. It concluded that the respondent was successful in establishing that the slope mobilisation had resulted from the breach of lateral support due to the excavation effected on the first appellant's property.

The SCA then considered the element of causation. It found that the excavation effected on the first appellant's property was both the factual and the legal cause of the respondent's harm. But for the excavation on the first appellant's property, the slope mobilisation, which caused extensive damage to the first respondent's property, would not have occurred. Furthermore, the respondent's harm was sufficiently closely connected to the first appellant's conduct so that it would be fair, reasonable and just for the first appellant to be held liable.

The SCA concluded that the right to lateral support is a natural right incidental to the ownership of the property and not servitudinal in nature, confirming earlier case law; that it is a principle of neighbour law

that rests on justice and fairness, again confirming earlier case law; that the duty to provide lateral support is owed to contiguous land as well as the buildings constructed thereon, thereby rejecting the English approach on this aspect; and that liability for breach of the duty of lateral support is strict.

Finally, the SCA was critical of the improper consideration of rule 33(4) of the Uniform Rules of Court in ordering a separation of issues. It was of the view that the issues in the separated order were inextricably linked to the remainder of the issues in the pleadings.

In the result, the Court (per Makgoka JA) with Ponnann, Saldulker, Van der Merwe and Mokgohloa JJA concurring), dismissed the appeal with costs, such costs to be paid by the appellants jointly and severally, the one paying the other to be absolved.

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