REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 92734/16

22/12/17

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

22/12/2017 — DATE

SIGNATURE

In the matter between:

IWAN VOSLOO — **APPLICANT**

and

LOUIS MARTIN CLOETE — **RESPONDENT**

Heard: **6 December 2017**
Delivered **22 December 2017**

JUDGMENT

VAN DER SCHYFF AJ

Introduction

[1] The Applicant is seeking interdictory relief whereby the Respondent is ordered to take all reasonable steps to prevent damage and / or harm to the Applicant, his family and property that may be caused by the collapse of the retaining wall between the parties' respective properties.

[2] It is stated in Applicant's affidavit that the respective properties are situated next to each other in Muckleneuk. The properties are separated by a retaining wall. Respondent's property is elevated above Applicant's property, and, according to the Applicant, the retaining wall provides support for the Respondent's property. The Applicant avers that the retaining wall is also used by the Respondent as the foundation of the driveway which provides access to the Respondent's property. In recent years this wall has started to collapse in certain areas and cracked in others. Applicant instructed structural and civil engineers to assess the retaining wall. They concluded that the retaining wall does not comply with the SANS structural requirements for a safe structure. It was further concluded that the wall is beyond repair and in its present state dangerous to the extent that it should be kept clear of any access. In reply to the Respondent's answering affidavit, a confirmatory affidavit of the engineers are attached.

[3] Applicant appointed a land surveyor to determine the position of the retaining wall between the respective properties. A confirmatory affidavit of the land surveyor is attached to Applicant's replying affidavit. The land surveyor's report indicates that the 'toe' position of a portion of the outside face of the retaining wall is located almost exactly on the boundary line of the two properties. The 'toe' position of the outside face of another portion of the wall was found to be located inside Portion1 of Erf 330 (the Respondent's property). The top position of the first portion of the retaining wall is located in the Respondent's property and the top position of the second portion of the wall is located inside both the Respondent's and Applicant's properties.

[4] Applicant then gives an account of the communication that has ensued since 2012 between himself and the Respondent pertaining to the wall, and the dispute between the parties.

[5] Applicant is of the view that it is solely the Respondent's responsibility to repair the retaining wall at his own costs. He bases this view on two arguments – (i) the fact that the foundation of the wall is on the Respondent's property, and (ii) the wall is used by the Respondent as his driveway. He states in paragraph 8,1 of his affidavit *'[t]he retaining wall is thus not a normal boundary wall between two properties, the boundary wall provides support for the Respondent's driveway and it serves to level the otherwise naturally sloping property of the Respondent'*.

[6] Applicant claims that he has a clear right in that Respondent has a duty to prevent damage and / or harm to the Applicant and / or his property that may result from the Respondent's omission to exercise control over the retaining wall. Applicant further contends that the fact that the retaining wall was found to be beyond repair and dangerous, and has in fact partially collapsed, not only poses a threat but has already resulted in an injury to the Applicant. Applicant contends that there is no alternative legal remedy available to him to ensure that no injury is caused to him or his property.

[7] Respondent filed and answering affidavit. Respondent admits that the properties are separated by a retaining wall. He avers that the retaining wall is the actual border between the properties. Respondent admits that the structural engineers' report is attached to Applicant's application but they deny the allegations contained in it and *'put Applicant to the proof thereof'*. Respondent also denies that the wall is dangerous – he states that *'I have lived on the property for close to fifty years now and can attest to the strength and durability of both the foundation and the structural elements of the wall.'*

[8] Respondent admits the extent of communication averred by Applicant and the extent of the dispute that exists between the parties.

[9] Respondent admits the location/position of the wall as set out in the Applicant's affidavit. Respondent denies, however, that it is necessary to completely rebuild the biggest portion of the wall. He attaches a quotation to support this statement, but the quotation is not substantiated by a confirmatory affidavit.

[10] Respondent denies that the Applicant has made out a that he has a clear right to approach the Court for interdictory relief. He denies that there is a difference between a retainer wall and a boundary wall and states that it is impossible to *'use the retaining wall as a driveway.'* Respondent also denies that the wall is posing any danger to the Applicant or his family. According to his observation *'the retaining wall is in at* (sic) *the back of Applicant's property where there are servant's quarters, some old outbuildings, and a lot of trash piled up'*. Respondent denies that the wall is continually collapsing and that it is only a matter of time *'until the retaining wall collapses completely and causes major damage.'*

[11] Respondent specifically denies that he is using the retainer wall at all. He states that *'the wall is a structural necessity required to hold the soil from my property to slide down and tumble down to Applicant's property. Applicant acquired this property with the wall intact and found me using my property in the same manner I continue doing. He did not raise an objection then.'*

[12] Respondent ascribes the damage to the wall, and the subsequent excavation of soil from the side of the wall to Applicant's own actions in that Applicant removed a tree whose root's damaged the wall.

[13] Respondent denies that an interdict is the appropriate remedy and aver that there are other *'avenues opened* (sic) *to the parties to resolve the matter without unnecessary litigation'*. Respondent attaches a letter dated 15 February 2017 wherein he proposes to have the wall repaired on the basis that the parties each contribute 50% to the construction of the wall.

[14] In reply to the Respondent answering affidavit, Applicant states that he moved into the property in November 2011, and removed a tree that was situated near the portion of the wall that is still *'sound and intact'*. He denies that his removal of the tree caused any damage to the wall. He attaches a photo of the tree stump. He claims that the Respondent's answering affidavit amounts to nothing more than a bare denial of the facts stated in the founding affidavit.

[15] During argument counsel for the Applicant reiterated the argument made out in the founding and replying affidavit. He states that the Respondent's allegations that he can attest to the strength and durability of the wall should be discounted in light of the structural engineers' report, and in light of the fact that it is not supported by any facts. In addition it is averred that the Respondent acknowledged that the wall is collapsing and posing a danger by indicating in a letter dated 22 February 2015 (which letter forms part of the extent of communication between the parties referred to in paragraph 8 above). Applicant's counsel asks the Court to discount Respondent's claim that damage was caused to the wall through Applicant's conduct in light of the fact that Respondent raises this allegation for the first time in the answering affidavit. It was never previously contended that the removal of the tree was the reason for the damage to the wall. In addition, the portion of the wall where the tree stump remained is intact. The Court is also

requested to discount Respondent's claim that he does not use the wall on the basis that the foundation of the wall is built exclusively on the Respondent's property. Counsel argued that the mere fact that the wall supports the soil on Respondent's property is a use of the wall. He reiterated that Applicant has established a clear right, that Applicant only needs to *'show that it is reasonable to apprehend the* (sic) *injury will result'*, and that there is no alternative legal remedy available to Applicant.

[16] During argument counsel for the Respondent argued that the Respondent was not shying away from his responsibility and that he is willing to make a 50% contribution to having the wall repaired, since the wall is a boundary between the two properties. She stated that the report from the structural engineers merely stated the nature and extent of the damage to the wall and not the cause thereof. She argued that the fact that the Respondent consulted experts pertaining to the repair of the wall, as is evident from the correspondence of February 2015, is in no means an admission of liability but merely a statement of fact – namely that the Respondent has consulted experts. The issue of costs is left open in this correspondence. Counsel for the Respondent then refers to the *Australian Handbook on Retaining Walls* to provide guidance in determining both parties' liability in this regard. She argued that there is *'no rational basis'* to allocate all the costs to the Respondent. Counsel finally denied that the Applicant has made out a case for interdictory relief in that he has not established a clear right in that he has failed to prove what rights in his property have been infringed, no actual injury has been committed, and that the Applicant has not exhausted other available remedies in that he has not responded to the Respondent's tendered proposal to repair the wall with both parties contributing 50% to the repair costs.

[17] During oral argument I posed the question to the parties whether the principles of lateral support should not find application in this situation. They undertook to prepare and submit supplementary heads of argument. The last of these heads of argument was apparently filed on 13 December 2017, although it only reached me on 19 December 2017.
Both counsel submit that the principles pertaining to lateral support do not find application in this matter.

[18] Counsel for the Applicant contended that the right to lateral support relates only to land in its natural state, *'and it exists only to the extent to which it is necessary to support*

the soil itself without any extra burdens (such as buildings) "artificially" erected or placed on it". I am urged to take cognisance of the fact that this application does not deal with land in its natural state – since *'it is evident that the natural slope of the land was altered before either of the parties took ownership of their respective properties'.* It is also argued in the supplementary heads of argument that in the current case the parties both have reciprocal duties of lateral support to one another.

[19] Counsel for the Applicant argues that both parties bought their respective properties with the retaining wall already in existence and that neither of the current parties *'have excavated any soil next to or adjacent to the retaining wall that would have caused an infringement of a right to lateral support.'* He points out that there is no claim by either party based on the right to lateral support. He makes various submissions, amongst others, (i) *'On the facts it is impossible to establish whether the Applicant's property was lowered or the Respondent's property raised by the retaining wall',* (ii) *'Even if it had been shown that the Applicant's property was lowered by the previous owner of the Applicant's property, it would still not entitle the Respondent to rely on a breach of the right to lateral support, because the Applicant himself has not infringed on the Respondent's right to lateral support.',* (iii) *'It is submitted that the construction of the retaining wall prior to the parties taking ownership of their properties cannot alter the mutual right to lateral support that currently exists between the properties'* (iv) *;a breach of lateral support would result in a claim for damages and there is presently no damages in this matter'.*

[20] Respondent's counsel also argued that the principles of lateral support are not applicable in this case. From a reading of her heads of argument it is evident that she comes to this conclusion on the basis that *'there has been no excavation or filling by the Respondent that caused damage to the Applicant's property.'*

[21] In order for the Court to determine whether the Applicant has made out a proper case to claim interdictory relief in terms whereof the Respondent is ordered to take all reasonable steps to ensure that the retaining wall between the Applicant's and Respondent's respective properties is safe and free of any danger, the Court first needs to determine whether there is any legal basis for the contention that the Respondent is solely responsible for the costs pertaining to the upkeep, repair or replacement of the wall. It is only once this has been found that the Court can find that the Applicant has a clear right

that would entitle him to interdictory relief if the remainder of the requirements for interdictory relief are met.

[22] It is the Applicant's case that the Respondent is indeed solely responsible for the maintenance and repair of the retaining wall because the foundation of the wall is exclusively on the Respondent's property and the Respondent uses the wall, if not as a driveway (or as the foundation of the Respondent's driveway) then *'to hold the soil of the Respondent's property and to keep it from sliding and tumbling down into the Applicant's property'*. It is Respondent's contention that *'where one shares a common boundary wall or fence with a neighbour, it is usually the case that each party will maintain their respective side of the fence.'- De La Harpe v Body Corporate of Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 (28 October 2014).

[23] If "use" is to be the criteria against which liability for the maintenance and reparation of the wall is to be determined, it can likewise be argued that the Applicant is "using" the wall to prevent soil from the Respondent's higher-lying property tumbling into his property. If the Respondent is using the wall to keep his soil **on** his property and the Applicant is using the wall to keep soil **from** his property, both parties are utilising the wall and it would only be fair to expect both to contribute equally to its maintenance and repair. However, other principles of law find application.

[24] In accordance with the general principle of law as stated in *Regal v African Superslate (Pty)* Ltd 1963 (1) SA 102 (A) 106H-107D the owner of the property on which a wall is situated would be responsible for maintaining, repairing and rebuilding the wall and would not have a duty to maintain, repair or rebuild the wall unless it had become so dilapidated that it was a danger to adjoining properties. The parties agree to the location of the wall as indicated by the land surveyor and the Respondent stated in his answering affidavit (paragraph 4.3) that the wall *'is actually a border between our respective properties'*. He again refers to the wall as *'the boundary wall'* in paragraph 8.1 of his affidavit. Applicant also indicated in paragraph 8.1 of the founding affidavit that the retaining wall is a boundary wall, *albeit 'not a normal boundary wall'*. It is thus clear that both parties concede that the wall under discussion is a retaining wall and a boundary wall.

[25] Southwood J had to adjudicate a similar dispute in *Van Bergen v Van Niekerk and Another* (3037/2005) ZAGPHC 2005 180. On the facts of that case he found *'that the wall*

in question, is not only a retainer wall, but also a boundary wall and that both parties should contribute equally to its maintenance and repair.' He continued – *'Although this is not co-ownership in the accepted sense of the term the owners of the neighbouring properties do have rights against each other. In* Wiener v Van der Byl *(1904) 21 (SC) 92 at 96 the Court held that they have the rights of co-owners in that 'each is entitled to the maintenance of the wall encroaching on his neighbour's property, as well as the part standing on his own property'. In* De Meillon v Montclair Society of the Methodist Church *1979 (3) SA 1365 (0) at 1371F it was held that while each owner has no right of ownership in the portion of the wall standing on his neighbour's ground, each owner is entitled to demand that the other co-owner should keep his half of the wall in a proper state of repair. The learned authors of Silberberg and Schoeman consider that the view that each owner owns the half of the wall on his side of the median line with reciprocal servitudes of lateral support is a correct reflection of the present state of our law. Accordingly both neighbours are liable for the cost of the maintenance of the wall and both must refrain from doing anything which may detrimentally affect the stability of the wall - see Silberberg and Schoeman 196-197. It seems to follow therefore that if a party wall collapses and must be rebuilt the adjoining owners of the properties are jointly liable for the cost of rebuilding the wall. However neither is entitled to demand that the other owner rebuild the wall at his sole expense. A mandatory interdict to that effect is not appropriate.'* (my emphasis).

[26] Due to the fact that both parties state in their respective affidavits that the wall in question is a retaining wall as well as a boundary wall, I find that the Applicant has not made out a proper case for the relief sought.

[27] In light of Southwood J's decision in *Van Bergen v Van Niekerk and Another* (3037/2005) ZAGPHC 2005 180, referred to above, the question of whether the principles of lateral support find application in this case becomes moot. (I must mention that I only came about this decision in researching the applicable legal principles after I have asked counsel to submit supplementary affidavits.)

[28] The Applicant did not make any other claims in his affidavit that indicate that the Respondent uses his property in an unlawful manner that may give rise to any harm suffered by or prejudice suffered by the Applicant.

[29] I accordingly find that the Applicant did not make out a proper case for the relief sought.

[30] It should however be mentioned, that were disputes between neighbours are to be adjudicated, mediation should be considered as the preferred method of dispute resolution to assist the parties to resolve the issues between them, and to facilitate a harmonious relationship that is indispensable if neighbours are to co-exist in peace. Mediation is not only considerably cheaper than litigation, but it promotes reconciliation and often offers a speedy resolution of disputes.

ORDER:

IT IS THUS ORDERED THAT:

1. The application for interdictory relief is dismissed.
2. The Applicant to pay the costs of the application.

E VAN DER SCHYFF
Acting Judge of the High Court