THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1055/2018

In the matter between:

MARINA PETROPULOS **FIRST APPELLANT**

NIK MOROFF & ASSOCIATES CC **SECOND APPELLANT**

and

ARTUR FERNANDO PERREIRA DIAS **RESPONDENT**

Neutral citation: *Petropulos & Another v Dias* (Case no 1055/2018) [2020] ZASCA 53 (21 May 2020)

Coram: PONNAN, SALDULKER, VAN DER MERWE, MAKGOKA AND MOKGOHLOA JJA

Heard: 3 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 21st day of May 2020.

Summary: Neighbour law – duty of lateral support – owed to land and buildings on it – English principle of lateral support, although influential, not part of our law – strict liability – available in principle for breach of lateral support.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek J sitting as court of first instance): judgment reported *sub nom Dias v Petropulos and Another* [2018] ZAWCHC 93; 2018 (6) SA 149 (WCC); [2018] 4 All SA 153 (WCC).

The appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the other to be absolved.

JUDGMENT

Makgoka JA (Ponnan, Saldulker, Van Der Merwe, and Mokgohloa JJA concurring)

[1] This appeal concerns the nature, scope and ambit of the duty of lateral support owed in respect of contiguous properties. The court a quo, the Western Cape Division of the High Court, Cape Town (Bozalek J), concluded that the duty of lateral support is owed not only in respect of land but also buildings constructed on the land, save where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land.' The appeal is with leave of the court a quo.

[2] The facts are comprehensively set out in the judgment of the court a quo, which has been reported *sub nom Dias v Petropulos and Another* [2018] ZAWCHC 93; 2018 (6) SA 149 WCC; [2018] 4 All SA 153 (WCC). Briefly stated, the facts are: The first appellant, Ms Petropulos, the respondent, Mr Dias, and Mr Dawid Venter (Mr Venter), Mr Kenneth Wentzel (Mr Wentzel) and Mr Peter Babrow (Mr Babrow), owned adjoining properties in Camps Bay, Cape Town, on a steeply sloping mountainside. The land on which the properties are situated, is bound by Theresa Avenue, on the upper end of the mountain, and Barbara Road, on the lower end. The respondent's property is situated in Theresa Avenue. It shares a boundary with the properties of the

first appellant and Mr Venter, both of which are situated downhill in Barbara Road. At the relevant time, being March to August 2008, all of the properties, except for the first appellant's, which was still an undeveloped erf, had houses built on them. The respondent's house had been completed in 1994.

[3] During March 2008 the first appellant and Mr Venter each undertook excavations on their respective properties, near the respective boundaries with the respondent's property. The excavation on the first appellant's property was in preparation for the building of a house, while Mr Venter was preparing to build an additional garage. The building works on Mr Venter's property were uneventful, and were completed in April 2008. The excavation on the first appellant's property, on the other hand, involved fairly substantial excavations to produce three tiers, and for a lift shaft. To provide lateral support, the three levels were each secured by a retaining wall. Mr Naumann, the first appellant's husband, an experienced builder, undertook the building works on the property.

[4] From May 2008, problems became evident on the respondent's property. A dip appeared in the garden; furrows appeared in the garden between the respondent's property and the first appellant's; the respondent's terra-force wall, and the ground under it, collapsed during the course of the construction of the top retaining wall. Between 23 July and 1 August 2008, there was a major movement in the underlying ground. The entire slope on which respondent's property is situated, subsided. The respondent's property moved laterally and downwards towards the excavation on the first appellant's property, resulting in extensive structural damage to the property. Cracks appeared in the walls, tiles, floor slabs, the boundary wall as well as the driveway adjacent to Theresa Road. The pool rail detached from the house and a hairline crack appeared in it. There were problems on Mr Venter's property, too. The property subsided and cracks appeared thereon. On 23 July 2008 Mr Venter, because of safety concerns, was forced to abandon the property.

[5] The respondent attributed the damage to his property to the excavations undertaken by the first appellant and Mr Venter on their respective properties. He instituted a claim for damages against both, based on strict liability, for breach of the

duty to provide lateral support. It was alleged, among others, that the slope mobilised through the mechanism of 'a shallow slip circle with uplift at the toe, resulting in vertical upward bulging of the ground surface between Barbara Road and the structures facing onto it; and lateral movement towards Barbara Road.' This allegation became the focal point of the first appellant's case during the trial, as will be clear later. The first appellant and Mr Venter each defended the action and denied liability. The first appellant also joined the second appellant, Nik Moroff & Associates, the project engineer for the works on her property, as a third party to the proceedings.

[6] Before the trial commenced, an order was made, by a different judge, to adjudicate the following issues separately in terms of Rule 33(4) of the Uniform Rules of Court:

(a) Whether a common law duty to provide lateral support to the respondent's property was owed by each of the first appellant and Mr Venter properties;
(b) Whether the excavations carried out on each of the above properties in May or June 2008 breached this duty to provide lateral support;
(c) If so, whether as a result of the respondent's property being so deprived of such lateral support by such excavations the scree slope on which respondent's property was situated mobilised and subsided in June 2008.

[7] The trial commenced before the court a quo on 21 November 2016. During the course of the trial, Mr Venter reached an agreement with the respondent and ceased participation in the action, hence he takes no part in this appeal. On 30 July 2018 the court a quo delivered its judgment. It declared that: the first appellant and Mr Venter owed the respondent a duty to provide lateral support to his property; the excavations undertaken on their respective properties breached that duty, as a result of which the slope on which the respondent's property is situated, mobilised and subsided. No substantive order was made against the second appellant, except that it was ordered to pay the respondent's costs, jointly and severally with the first appellant.

[8] In this court, it was contended on behalf of the appellants that: First, the first appellant did not owe a duty to provide lateral support to the respondent's property, inasmuch as the latter's property was no longer in its natural state. Second, that the

excavations on the first appellant's property did not breach the duty to provide lateral support. Third, that the excavation on the first appellant's property was not linked sufficiently closely to the harm suffered by the respondent for legal liability to ensue (causation). And, fourth, that on the facts of this case, it is inconceivable that the first appellant should be held liable to the respond in the absence of a finding of fault. Each of these contentions will be considered in turn.

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

[9] In answering this question, the learned judge undertook an extensive analysis of the various authorities. This included *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E). There, it was held that our law of lateral support was the same as English law, in terms of which the right is confined to land in its natural state and does not extend to constructions such as buildings on it.

[10] The court a quo also considered the decision of this court in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* [2006] ZASCA 118; 2007 (2) SA 363 (SCA); [2007] 2 All SA 567 (SCA). The court a quo declined to follow *East London Municipality*, and concluded (at para 59)[1] that in our law, the duty of lateral support is owed to neighbouring or contiguous pieces of land as well as the buildings on it. However, at para 60,[2] the court expressed the following caveat to that general principle:

'However, too broad a formulation of the right or duty of lateral support could lead to conceptual and equitable difficulties, particularly where the contiguous parcels of land are situated on a slope. Where a property has been unduly or unreasonably loaded through the erection of disproportionately large or heavy structures, it would seem unfair in my view that a neighbouring piece of land should attract an equivalently onerous duty of lateral support'.

Later, at (para 63)[3] the learned judge summarised the position as follows:

'In the result, I consider that the appropriate approach is to hold 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'.

[1] Para 152 in the original text.
[2] Para 153 in the original text.
[3] Para 156 in the original text.

[11] The appellants submitted that the court a quo was wrong by not concluding that the duty of lateral support in our law is similar to English law, in terms of which the duty is owed to land only in its natural state, and does not extend to artificial structures such as the buildings on it. Further, in English law, support for buildings can only be obtained by means of a servitude, which is obtainable by a user of a building after at least 20 years or by agreement. This principle of English law was enunciated more than a century ago in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 and is best expressed in the oft-quoted passage of Lord Penzance's speech at 804:

'[I]t is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground.'

[12] It is necessary to examine the development of our own law in this regard. The duty of lateral support owed to an adjacent landowner corresponds with the neighbour's entitlement to such support. This means that the right to lateral support is reciprocal between neighbouring landowners. That principle was first accepted into South African law as a principle of neighbour law in *London and SA Exploration Co v Rouliot* (1890-1891) 8 SC 74. There it was held (at 93) that the right of lateral support is a 'well established natural right', incidental to the ownership of the property and not servitudal in nature. *Rouliot* was followed, albeit on different grounds, in *Johannesburg Board of Executors and Trust Company Limited v Victoria Building Company Limited* (1894) 1 OR 43.

[13] However, the application of the principle to situations where land has been improved with buildings or structures on it, and where excavation causes subsidence and damage to buildings, has given rise to two contrasting views. Van der Walt[4] explains the divergent underlying philosophies thus:

'Milton argues that the right of lateral support is explained in terms of two theories. According to the one theory, the right of lateral support is a servitude arising from the natural situation of land (as opposed to servitudes created by grant or prescription). According to this theory, the right would be restricted to the land in its natural state and would not apply to buildings on the land. Furthermore, any infringement of the right would arise from the mere withdrawal of lateral

[4] AJ van der Walt *The Law of Neighbours* (2010) at 96 para 3 2 1.

support and not only from damage caused by such withdrawal, with the implication that prospective damages could be awarded. The second theory explains the right of lateral support as a natural right of property that is based on the principle *sic utere tuo alienum non laedas* and protected by nuisance law. Seen in this way, the right pertains to mutual respect for normal use of land and there is no reason why it should not apply to buildings as well. Furthermore, liability for infringements of the right would arise from actual damage and not simply from withdrawal of the support, and consequently prospective damages could not be claimed. Liability would be strict.'

As I have shown, *Rouliot* grounded the introduction of these principles in our law on the second basis.

[14] In *Victoria* and in *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61 it was held that Roman and Roman-Dutch law recognised a right of lateral support for land and buildings. Consequently the defendants were held liable for the collapsing of buildings caused by the excavation of land on the boundary between two tenements. See also *Demont v Akals' Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N), where Selke J (at 316B-E) said:

'An owner of land is normally entitled to expect and to require from land contiguous to his own such lateral support as would suffice to maintain his land in a condition of stability if it were in its natural state. A landowner can, of course, alter the condition of his land, for example by excavating or building on it, but he cannot normally, by the mere fact of doing that, acquire greater or different rights to lateral support. His basic rights … remain the same whatever he may choose to do with his land. They are rights ancillary to his ownership, and they are enjoyed reciprocally by him and by all owners of contiguous land; and, while they exist unimpaired, any infringement of them by the withdrawal or disturbance of lateral support furnishes him with a cause of action'.

[15] However, a different path was followed in *Douglas Colliery Ltd v Bothma and Another* 1947 (3) SA 602 (T) and in *East London Municipality.*[5] Those cases relied heavily on English law and consequently concluded that lateral support is owed only

[5] *East London Municipality* was uncritically followed in *Gordon v Durban City Council* 1955 (1) SA 634 (N) and in *John Newmark & Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (N).

to land in its natural state, and not to artificial structures on it. *Douglas* concerned mining law. Neser J held (at 612) that there is no natural right of support for that which is artificially constructed on land. The learned judge relied on a passage in Halsbury *Laws of England* (Hailsham ed, vol 22 under the title *Mines*) in which the following is stated at para 1341:

'There is no natural right of support for that which is artificially constructed on land: such a right cannot exist *ex jure naturae* for the thing itself did not so exist. Therefore any right to the support of such an artificial burden must in each case be acquired by grant, or by some means equivalent in law to a grant. Thus it may be acquired by express grant, or implied grant, or by prescription, or it may be created by statute.'

[16] In *East London Municipality*, a landowner had granted to the municipality and the public in general a public road over his property. The municipality laid high tension electric cables along the road. The defendant, in carrying out his quarrying operations, removed the lateral support and caused a subsidence. Reynolds J held that in regard to artificial constructions on land our law was the same as English law. Accordingly he concluded, in line with English authorities, that the right of lateral support extends only to land in its natural state and not to constructions such as buildings on it.

[17] Reynolds J (at 482H-484E) expressly declined to follow *Victoria* on the basis that the Roman law authorities relied on by Morice J in *Victoria* were no authority for the conclusion that lateral support was owed not only to neighbouring land but also to buildings on it. The learned judge then referred to Halsbury Laws of England (Hailsham ed (vol 11, para 640) in which the following is said:

'The mere fact, however, that there are buildings on his land does not preclude an owner from his right against a neighbour or subjacent owner who acts in such a manner as to deprive the land of support, so long as the presence of the buildings does not materially affect the question, or their additional weight did not cause the subsidence which followed the withdrawal of the support.'

[18] Over 50 years after the decision in *East London Municipality*, this court in *Anglo Operations* had to consider whether the principle of neighbour law should be extended to govern the relationship between mineral rights holders and owners of the same land. It was held that the principle should be restricted to the right of lateral support as

between neighbouring landowners, and that the relationship between the landowner and the holder of mineral rights in the same land is regulated by the principle of servitude. In the course of its judgment, the court considered the effect of *Rouliot,* in respect of which it was pointed out (in para 8) that the gravamen of the decision was that 'a rule, similar in content to the English rule of lateral support, which provides landowners, as an intrinsic element of their ownership, with the right of adjacent support of their land, should be incorporated into our law'. The court took the view that the origin of the principle was unimportant.

[19] After dealing with the conceptual differences between English law and our law, Brand JA cautioned (at para 17) with reference to *Rouliot*:

'Equally erroneous, in my view, is the statement that De Villiers CJ decided to incorporate the English doctrine of lateral and subjacent support, with all its ramifications, into our law. On the contrary, I agree with the statement by the Court a quo (at 366B) that what had happened in *Rouliot* was that:

"De Villiers CJ and Smith J simply introduced, as Judge-made law, a rule which they regarded as common to all civilised systems of law because, as they perceived it, a lacuna existed. The Judges did not concern themselves with the exact pedigree of the rule. . . . The rule was introduced because it was regarded as just and equitable."'

[20] It would thus seem that one of the 'ramifications' of the English doctrine of lateral support, which Brand JA cautioned against, is the slavish adoption of the restriction of lateral support being owed to neighbouring land only, and not extending the duty to buildings constructed thereon. This is surely understandable. English law on this aspect is rigid, and results in anomalies, as demonstrated in the passage from *Dalton*. Therefore, the significance of *Anglo Operations* is two-fold. First, it affirmed *Rouliot* as the correct statement of our law on lateral support. Second, it qualified *Rouliot*, and brought the principle of lateral support within the sphere of our neighbour law.

[21] In our neighbour law, fairness and equity are important considerations. As Hoexter JA explained in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 114G those considerations are the basis of the law between neighbours. Furthermore, in our constitutional context, the principle of lateral support must find expression in the

constitutional value of Ubuntu, which 'carries in it the ideas of humaneness, social justice and fairness'.[6] The English law principle of lateral support in all its rigidity may well be inimical to all these.

[22] It is significant that in at least one common law jurisdiction, Singapore, this principle has been jettisoned. In *Xpress Print Pte Ltd v Monocrafts Pte Ltd and Another* [2000] SGCA 37; [2000] 3 SLR 545, the appellant and the first respondent were neighbouring landowners. As a result of excavation work done by the first respondent on his land for the purposes of construction, the building on the appellant's land suffered massive damage. The appellant sued for, among others, wrongful interference of support, which was dismissed by the trial judge on the basis of English law as set out in para 11 above.

[23] On appeal to it, the Court of Appeal of Singapore held that the right of support enjoyed by a neighbouring landowner extended beyond the land in its natural state to the buildings erected thereon. In arriving at this conclusion, the court took the view that the right of support must have its roots in 'the principles of reciprocity and mutual respect for each other's property (at para 43). With regard to English law, the court observed (at paras 33 and 37):

'English law on the subject of the right of support … contains a number of curious propositions. If my neighbour's land is in its natural state, I may not remove the soil on my land without providing alternative support for his land; but if my neighbour expends money and effort in building a bungalow on his land, then I may excavate with impunity, even though his bungalow may crumble to the ground. Yet, my liberty to ignore the support required by his house is not perpetual, but lasts only for 20 years, at which time any indolence in pursuing my right to remove my soil is transformed into a positive right of support in respect of his dwelling. . . .

Perhaps only lawyers can understand and appreciate how a simple issue such as this, through the process of law, comes to be governed by a mass of convoluted and irreconcilable rules; surely only the bravest among them would attempt to explain it to the average citizen. For our part, we fail to see any legal principle capable of supporting the distinctions drawn by the cases. Further, we are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour`s building and everything in it crashing to the ground, is

[6] Per Madala J in *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC) para 236.

a proposition inimical to a society which respects each citizen`s property rights, and we cannot assent to it'.

[24] These remarks are apposite, and accord with the principles of our own neighbour law. So viewed, and in the light of this court's exposition in *Anglo Operations*, it is clear that the courts in *Douglas* and *East London Municipality* erred. It follows that those decisions are not to be taken as correctly reflecting the position of our law. 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.

[25] However, as stated earlier, the court a quo articulated an exception to that general principle. The court said 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'. What exactly the court a quo intended to convey by the quoted expression is unclear. The exception is not without practical difficulties. A typical example is that of a landowner who builds his or her home in full compliance with town planning and building regulations and in accordance with architectural plans. In terms of the exception, such an owner bears the onus to prove that the building had not 'unduly or unreasonably loaded' the land, or that it is not 'disproportionately large' or 'a heavy structure'. That is untenable.

[26] Furthermore, the philosophical foundation of the exception seems, with respect, doubtful. The learned judge relied heavily on the views of Professor Milton for the conclusion that the English principle of lateral support is not part of our law. The learned judge, said:

'Professor Milton argues that the exception whereby the English law does not apply to all artificial erections on land "so long as the presence of the buildings does not materially affect the question, or the additional weight did not cause the subsidence which followed the withdrawal of support" was doubtfully of any real value.'

However, in the same article, the learned author stated:

'It is an inevitable tendency of modern life for more and more people to gravitate to cities. As a result larger buildings must be erected to accommodate them and provide employment. The larger the buildings, the greater the pressure on the soil and the less the duty of lateral support

owed by neighbouring land. This, it is submitted, is an illogical and unrealistic approach and, on principle, it should not be preserved'.[7]

[27] The approach of the court a quo therefore appears incongruous. Furthermore, it unwittingly introduces a feature of the English principle of lateral support, referred to in *East London Municipality*, as set out in para 17 above. This is the very principle which the court a quo had correctly declined to follow. It follows that the exception the court a quo sought to introduce cannot be supported. As I demonstrate later in the judgment, there are sufficient safeguards in our law to meet the concerns sought to be addressed by this exception.

Did the excavations on the first appellant's property breach the duty of lateral support owed to the respondent?

[28] Seven witnesses testified on behalf of the respondent, two for the first appellant. The second appellant did not call any witnesses. For purposes of this appeal, only the evidence of the two geo-technical experts, Dr McStay and Dr Day is relevant. The reason for this is that it is no longer in dispute that the respondent's property was damaged by the slope failure in July and August 2008. Both appellants have, in their respective heads of argument in this court, conceded that aspect. Implicit in this, is the acceptance that there was no prior damage or structural defects on the respondent's property before the slope failure. That issue is one in respect of which the respondent, his wife, Mr Wentzel, Mr Babrow and Mr Naumann all testified. The other witness was Ms Valentia Papanicolaou, whose evidence related to the measurements of the ground movement from the end of July. Nothing turns on her evidence in the appeal.

[29] About the geo-technical experts, Dr McStay, for the respondent, is an engineering and environmental geologist, and a director in charge of a geo-sciences unit of an international engineering consultancy firm. Dr Day is a practising specialist geo-technical engineering consultant and an adjunct professor of geo-technical engineering at the University of Stellenbosch.

[7] Quoted in para 144 of the judgment of the court a quo (Footnote omitted.)

[30] The court a quo gave a commendably detailed exposition of their evidence. I would therefore focus on what I consider the salient features of their respective opinions. It was common cause between them 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. I find it convenient to commence with Dr Day's evidence.

[31] The defining theme of Dr Day's evidence was his distinction between mechanisms of slope failure – one as a result of the removal of lateral support, and the other, slope instability. He went on to explain how each of them manifested. In respect of lateral support failure, the primary cause of both ground movement and failure is a reduction in the lateral (horizontal) pressure exerted on the face of the excavation. Here, the ground movement is confined to the area of excavation. Regarding the failure due to slope instability, Dr Day explained that it is normally characterised by a rotational or translational movement on the ground above the failure surface. In the event of a rotational failure, a scarp may develop at the top of the failing mass and bulging may occur at the toe. Unlike in the failure caused by lateral support, here the area of slope instability is generally not confined to a particular property, but may pervade a general area.

[32] Applying these suppositions to this case, Dr Day testified that the failure was caused by the removal of the weight of material from the toe of an already compromised slope, the mechanism of which is a deep seated circular slip failure. On this mechanism, according to Dr Day, the failure would not be through the removal of lateral support, but attributable to the general instability of the hillslope, which, in turn, was caused by a multiplicity of historical factors, including the earlier excavations and loading of the affected properties when houses were built thereon, starting from the early 1980s.

[33] According to Dr Day, the movement of the slope was triggered by a combination of the excavation at the toe of the slope on the properties of the first appellant and Mr Venter, and the added weight at the top of the slope on the properties of the respondent and Mr Babrow**.** He explained further that the excavation at the toe of the

slope had two effects. Firstly, it reduced the weight of the soil at the toe. Secondly, it reduced the shearing resistance of the soil over the part of the failure plane, below the excavated area. When that happened, given the already compromised slope, according to him, the excavation resulted in slope failure.

[34] In line with his mechanism distinction theory, Dr Day went on to explain that if the ground movement was only as a result of the removal of lateral support, it would have been confined to the area immediately above the retaining wall, ie it would have a localised effect. As there was no sign of ground failure in the area immediately above the retaining walls, Dr Day postulated that the ground movement was caused by general instability of the slope rather than the removal of lateral support. This, as stated earlier, was one of the ways in which failure due to slope instability manifested itself, ie it generally pervades a general area, rather than confinement to a particular property. Dr Day also thought it significant that when the slope mobilised, neither the excavation itself nor the retaining walls built by Mr Naumann failed, but continued to support the face of the excavation. This included the portion of the respondent's land that fell inside the failure zone. According to Dr Day, this further supported his view that the lateral support afforded to the respondent's property had not been compromised.

[35] I turn now to the evidence of Dr McStay. The essence of his evidence was that the deep-seated movement, which occurred under the properties of the first appellant and the respondent, was a slope failure triggered by the removal of lateral support due to the excavation on the first appellant's property. According to him, the mechanism of the failure was a progressive one, ie a series of smaller slip planes immediately above the face of the excavation. In Dr McStay's opinion, both his 'progressive' failure and Dr Day's deep- seated circular slip failure theories resulted from the removal of lateral support because the mechanism in each case was the same, namely the excavation on the first appellant's property, which was the main triggering mechanism for the slope instability. Thus, explained Dr McStay, it was largely irrelevant whether there was a series of small progressive failures or the existence of a deep slip circle.

[36] Dr McStay further testified that the respondent's house itself did not appear to have undergone extreme lateral movement but rather relatively small scale vertical settlement. This suggested that the original foundation of the house was largely below the active slip circle causing the lateral movement. According to him, there was a vertical down movement rather than just uplift, as suggested by Dr Day. To support this view, he had regard to the crack in the paving between the respondent's garage and Theresa Avenue, which movement straddled two properties. Dr McStay also explained why the excavations on the first appellant's property stood for some time before they affected the respondent's property. According to him, this was not unusual, as a slope failure normally occurred over a period of time, and not immediately, especially on a deep-seated circle such as the one in the present case.

[37] That summarises the evidence of the two experts. To consider their competing contentions, one has to bear in mind, the objective facts. Key among those is that the respondent's property was damaged when it moved laterally and downwards towards the excavation on the first appellant's property. This happened because lateral support, previously provided by the first appellant's property to the respondent's property, had been removed. Given these considerations, the exact mechanism which caused the removal of lateral support is unimportant. The distinction by Dr Day in this regard is artificial, has neither a factual nor legal basis, and is not borne out by the objective facts. It was rightly rejected by the court a quo.

[38] A further string to the first appellant's bow was this: as the respondent's property was contiguously situated on a slope with other properties, the weight of the first appellant and Mr Venter's properties was meant to support the entire slope, and not only the respondent's property. Accordingly, so went the argument, following the slope mobilisation and damage to his property, the respondent does not, as a matter of law, have a cause of action for breach of lateral support. The court a quo rejected this submission as follows (at para 111):[8]

'[O]ne reason is the inherent illogicality of the proposition that if an excavation is of such large proportions that it causes not simply a localised subsidence or failure but also one which undermines an entire slope comprising multiple properties, then the owner of a contiguous

[8] Para 207 in the original text.

property cannot sustain an action based on a breach of the duty of lateral support. To accept this reasoning would mean that a landowner whose excavation or breach causes far-reaching damage affecting a number of properties escapes liability whilst land owners, the consequences of whose breach are much more modest, are saddled with strict liability'.
I cannot fault this reasoning.

[39] What is more, it became necessary for Mr Naumann to implement remedial measures to arrest further slope failure, including having experts install anchors and to reinstate the lateral support previously provided by the ground excavated from the first appellant's property. It is common cause that the bulk of these measures were implemented on the first appellant's property, where the major excavation took place. The significance of this, as correctly pointed out by counsel for the respondent, is that if the lateral movement of the respondent's property was caused by the excavations on the first appellant's property, it is on that property that the remedial measures had to be implemented. And it was common cause that these remedial measures in fact arrested the movement of the slope.

[40] Counsel for the appellants made much of the averment in the respondent's particulars of claim that the slope mobilised through the mechanism of 'a shallow slip circle with uplift at the toe' which had resulted in vertical upward bulging of the ground surface at the bottom of the first appellant and Mr Venter's properties. It was suggested that there was evidence of such uplift and bulging. This, according to the first appellant, was fatal to the respondent's case because the pleaded mechanism fitted in with the opinion of Dr Day that the slope mobilisation occurred when an uplift took place at the toe of the excavation and the slip circle, thus excluding the removal of lateral support.

[41] There is no merit in this contention. In *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 810D-F, it was pointed out that, in most instances, the complaint of a plaintiff suing for deprivation of lateral support arises from a subsidence that was caused by the removal of such support. Nevertheless, such a subsidence (ie one *caused* by the removal of lateral support) is not required for a successful plaintiff action. By way of analogy, I conclude that is not required for a plaintiff in an action based on the removal

of lateral support to plead a particular mechanism through which such removal of lateral support manifests.

[42] The respondent's averment as to the mechanism of the slope failure was thus totally superfluous. Even in its absence, the thrust of his claim was clear: as a result of the excavation on the first appellant's property, lateral support owed to his property was removed; the slope mobilised in the process of which extensive damage was caused to his property. It is therefore patently opportunistic for the appellants to seek to tie the respondent to a superfluous averment in his particulars of claim.

[43] In any event, the two mechanisms were fully explored during the trial and it became clear that they overlapped; and that, in essence, as the court a quo correctly observed, they were variations of the same mechanism. The position is analogous to the converse situation, where an issue not pleaded is fully traversed during the trial. As explained in *Van Mentz v Provident Assurance Corporation of Africa Ltd* 1961 (1) SA 115 (A) at 122:

'In a case where it is clear that the appellate tribunal has all the material before it on which to form an opinion upon the real issue emerging during the course of the trial it will be proper to treat the issues as enlarged (*Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (AD) at 433), where this can be done without prejudice to the party against whom the enlargement is to be used (*Robinson v Randfontein Estates, GM Co Ltd*, 1925 AD 173 at 198).'

See also *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 44H-45C).

[44] In the final analysis, the court a quo was faced with conflicting evidence of a very technical nature. Where this is the case, the resolution of the dispute 'must depend on an analysis of the cogency of the underlying reasoning which led the experts to their conflicting opinions' (*Buthelezi v Ndaba* [2013] ZASCA 72; 2013 (5) SA 437 (SCA) para 14). The court a quo preferred Dr McStay's evidence to that of Dr Day, and observed as follows (paras 127-128):[9]

[9] Paras 222-223 in the original text.

'The opinions which he [Dr McStay] expressed were rational and backed by consistent reasons. What came through in his reports and evidence was a practical and common sense approach which demonstrated his wide experience in the field…
As far as Dr Day is concerned there is no doubting his expertise as a geo-technical civil engineer and his evidence was very helpful in understanding the geological aspects of what took place on the site from March 2008 until the remedial measures were completed. Although I do not doubt Dr Day's sincerity or his professional integrity, I gained the distinct impression that he became overly wedded to his client's case, including the notion that the geological event was not a failure of lateral support. Dr Day's unwillingness to accept that the Dias dwelling was in excellent condition prior to 2008, based on speculative or weak evidence indicating the contrary, suggested that he fell into the trap of approaching some of the issues in the matter in a less than balanced manner'.

[45] Having carefully considered the totality of the evidence of the two experts, the court a quo cannot be faulted for preferring that of Dr McStay. Of the two experts, it is Dr McStay's evidence which provided the most reasoned and cogent explanation for what had happened. His evidence closely matches the objective facts. It follows that the respondent succeeded in establishing that the slope mobilisation had resulted from a breach of the duty to provide lateral support due to the excavation on the first appellant's property. Given the objective facts in this case, it would indeed defy all logic for a court to hold that the excavations by the first appellant did not destabilise the respondent's property and thus breached the duty to provide lateral support to it.

Causation

[46] I turn now to causation. As explained in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-35D, there are two distinct questions in the causation enquiry. The first is a factual one and relates to the question whether the relevant conduct caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise. If it did, 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.

[47] The *causa sine qua non* (the 'but for' test) is ordinarily applied to determine factual causation. The central theme of the first appellant's case was that the slope

mobilisation was a result of a multiplicity of factors, of which the excavation on her property was but one. In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431; [2002] 3 All SA 741 (SCA) (para 25) it was explained:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.'

And in *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA):

'The legal mind enquires: What is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification … Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences.[10]

The test set out in *Van Duivenboden* and *Gore* received the imprimatur of the Constitutional Court in *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) para 47.

[48] Applying the above test to the facts of this case, it must be asked whether, but for the excavation, the slope would have mobilised. In this regard, the excavation was extensive, involving the removal of 5413m³ of earth, 57 blasting shots as well as the removal of many large boulders. The lift shaft excavation was 13m in length, 5.5m in width and 9.5m deep. It was excavated up to about 6m from the respondent's property and done without any bracing or support. It involved blasting at least one large boulder and many others which needed to be broken and removed. In these circumstances, it is hard not to accept Dr McStay's opinion that there was a clear nexus between the excavation and the slope failure.

[49] There must be a logical explanation as to why, after standing unaffected for 16 years, the respondent's property mobilised shortly after the major excavation on the first appellant's property in 2008 and why the movement ceased when the remedial measures were effected. During his testimony, Dr Day utilised a model to demonstrate

[10] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA) para 33 (Citations omitted.)

the slip circle failure. After a demonstration with reference to four blocks, the court a quo pointed out that in terms of the model he used, a necessary condition of the slip circle was the removal of an excavation block, to which proposition Dr Day agreed. He explained the role of excavation as follows:

'It was a contributing element. There is no doubt about it. It's no coincidence that this failure occurred when excavation was formed. So the formation of the excavation contributed to the instability of the slope, that is correct. But it contributed to the instability of the slope as opposed to a lateral support failure'.

[50] It is also common cause that the excavation on Mr Venter's property stopped in April 2008. In answer to a direct question during cross-examination as to what event, thereafter, could have caused the distress on the entire hill slope, Dr Day was constrained to concede that 'the major event was the removal of ground which then set the process of slope instability in motion ….' After suggesting that the rainfall was a contributing factor, he conceded that the excavation was 'a necessary condition' for the failure. The following excerpt from the evidence of Dr Day's cross-examination is illustrative of the centrality of the excavation to the slope failure and eventually the damage to the respondent's property:

'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'

[51] The appellants emphasised that the role of the other factors such as the innate instability of the slope, the excavation on Mr Venter's property, and the winter rainfalls, should not be discounted. Of course they should not. But, as shown above, given the nature and extent thereof, the excavation was central to the slope mobilisation. As pointed out in *Van Duivenboden* para 25 the respondent was not required to establish the causal link between the excavation and the damage to his property with certainty. All that was expected from him was to establish that the excavation was probably the cause of the damage to his property.

[52] In *Regal*, Ogilvie Thompson JA (at 116A-C) referred with approval to the *American Restatement of the Law of Torts*, vol IV at 277, where, dealing with factual causation, the learned authors say:

'In some cases the physical condition is not, of itself, harmful, but becomes so upon the intervention of some other force – the act of another person, or force of nature. In such cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause.'

[53] Applying these tests to the facts of the present case, the excavation on the first appellant's property must be regarded as 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 first appellant's property, the slip circle failure would most probably not have occurred. I thus find a direct and probable chain of causation between the excavation and the slope mobilisation which caused damage to the respondent's property. Factual causation was accordingly established.

[54] With regard to legal causation, the court a quo expressed doubt whether it was necessary to enquire into legal causation, since liability was strict in the present case and 'the question of reasonable foreseeability does not arise'. With respect, the court a quo overlooked the fact that there has to be a measure by which it is determined whether the conduct that factually caused the harm suffered, is too remote from the harm. 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*, legal policy, reasonableness, fairness and justice, as explained in *S v Mokgethi and Others* 1990 (1) SA 32 (A); [1990] 1 All SA 320 (A) at 40I-41D . It could well be that in a particular case, such as the present, one or more or all of reasonable foreseeability, directness, or the absence or presence of a *novus actus interveniens*, play a subsidiary role, or no role at all. But it is difficult to imagine a case where legal policy, reasonableness, fairness and justice would play no role at all.

[55] Viewed in this light, legal causation is necessary, irrespective of whether liability is strict or not. As explained by the Constitutional Court in *Mashongwa*:[11]

'No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.'

[56] In *International Shipping Co (Pty) v Bentley (Pty) Ltd* 1990 (1) SA 680 (A) at 700H-J Corbett CJ neatly summed up the position with regard to legal causation as follows:

'[D]emonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[57] In determining the presence of legal causation, the question is whether, having regard to the considerations alluded to, the harm is too remote from the conduct or whether, it is fair, reasonable and just that the first appellant be burdened with liability. In my view, the question should be answered against the first appellant.

No fault liability

[58] As stated already, none of the affected properties were in their natural state. They had all been developed for the building of houses. It was submitted on behalf of the appellants that for that reason, our law does not permit a claim under strict liability for breach of the duty of lateral support. The respondent's claim, it was submitted, should have been brought as an Aquilian action, so that negligence and wrongfulness

[11] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) para 68. (Citations omitted.)

on the part of the first appellant could be established. In their heads of argument, counsel submitted:

'The imposition of strict liability can only be justified in principle where prospect of direct harm is so obvious that there can be no question of a lack of foreseeability and where there is clear and obvious single cause. By contrast, where potential for harm, as in this instance where mechanism of failure is more complicated, or obscure, and hence not readily foreseeable, or involves more than one cause, including a contribution by the claimant, and the conduct may be neither negligent nor unlawful, the entire blame for the earth movement should not be visited on one neighbour by virtue of a rule of strict liability.'

[59] Broadly stated, 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 nor dolus 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 by virtue of the lex Aquilia.

[60] It is now settled that liability in subsidence cases is strict. *In D&D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) it was explained (at 253H-I) that:

'In subsidence cases it is unnecessary to prove an unlawful act or negligence; the cause of action is simply damage following upon deprivation of lateral support. The action lies only against the owner of the adjoining property, and each successive subsidence gives rise to a fresh cause of action'.

See also *Gijzen* at 811E.

[61] Prof JC van Der Walt[12] offers the following justification for strict liability:

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[12] JC van Der Walt 'Strict liability in the South African law of delict' (1968) 1 *CILSA* at 63.

'Liability based on risk is usually created - either by legislation or by the courts - in cases where a particular activity normally entails an extra· ordinary increase in the risk of harm to the community. Fleming states it thus: "Certain types of activity which involve extraordinary risks to others, either in the seriousness of the harm threatened or, more often, in its high degree of probability, are charged with responsibility for ensuing harm, even if the most diligent care has been exercised to obviate its occurrence. In these situations, it is widely felt that he for whose benefit the risk is created should bear the loss unavoidably entailed rather than the random victim."
…The most common defences at the disposal of a defendant in cases of strict liability are "act of God" (vis maior) and fault on the part of the injured party.'

[62] There is sufficient safeguard in our law to meet the appellants' concerns, in the form of legal causation, which, inter alia, rests on policy considerations. The elastic approach to legal causation adopted by this court in *Mokgethi* is 'sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice'. (See *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC) para 19, referring to *Mokgethi* at 40I-41D).

[63] 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. As is evident in this case, the respondent simply did not know exactly what was happening on the first appellant's property, other than that his property was damaged. Importantly, there is no attack on the strict liability action as being contra bonos mores, or unconstitutional. There are therefore no policy considerations for our law to, *a priori*, set itself against an action based on strict liability for breach of lateral support, as cases always turn on their own facts.

[64] In sum, the answer to counsel's submission is, first, that 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. On the facts the court a quo correctly held that the first appellant is liable to the respondent. Although there is

no unanimity among scholars on a theoretical justification for strict liability, the authors of *Neethling-Potgieter-Visser Law of Delict*[13] observe:

'[w]here a person's activities create a considerable increase in the risk or danger of causing damage, that is, an increased potential for harm, there is sufficient justification for holding him liable for damage even in the absence of fault . . . Van der Walt, however, points out that the question whether or not the potential of risk has been increased enough, will depend largely on the legal convictions of the community, as reflected in legislation or case law. This theory [the risk or danger theory] provides a satisfactory explanation for most of the instances of strict liability which are recognised in our law.

Nonetheless, a satisfactory and universally accepted scientific basis for every instance of liability without fault has not yet been found, and will probably never be found. A flexible approach is therefore necessary so that each specific case may be valued on its own merits and judged accordingly.'

[65] It remains to sum up the position of our law on the right of lateral support owed between contiguous properties. First, it is a natural right incidental to the ownership of the property and not servitudal in nature, as enunciated in *Rouliot*. Second, it is a principle of neighbour law as explained in *Anglo Operations*, which rests on justice and fairness, as articulated in *Regal.* Lastly, it is owed to land not only in its natural state, but extends to buildings upon it. Although influential in the acceptance of the right of lateral support into our law, English law was not slavishly implanted into our law.

[66] Before I conclude, something needs to be said about the manner in which this litigation has been conducted. The order of separation followed on an application by the appellants, which was opposed by the respondent. The costs of that application were reserved. The trial of the separated issues was lengthy, taking place over a total of 27 days. In this court, the record spans 4248 pages, which includes the court a quo's judgment 129 pages. It is thus disquieting that despite this circuitous journey, in terms of the separation order, the judgment of this court would not result in a final determination of the dispute between the parties. It was with this in mind that it was enquired of counsel during the hearing of the appeal whether the parties would be prepared to accept the order of this court as a final word on the liability dispute between

[13] J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7ed (2014) 379-80.

the parties. Counsel for the parties accepted that this judgment will finally dispose of all the disputes between the parties, as far as liability is concerned.

[67] It is regrettable that this court has, once again, to express disquiet on how rule 33(4) is often not properly considered.[14] As it was stated in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3:

'Rule 33(4) of the Uniform Rules ─ which entitles a Court to try issues separately in appropriate circumstances ─ is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order ─ and, in all cases, it must be so satisfied before it does so ─ it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

See also *ABSA Bank Ltd v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21.

[68] In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA), this court cautioned against piece-meal litigation:

'Piece-meal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first.

This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one

[14] See, for example, *Firstrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6; 2018 (5) SA 300 (SCA) paras 9-10; *Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and Another* [2016] ZASCA 32 para 15; *Cilliers NO and Others v Ellis and Another* [2017] ZASCA 13 paras 12-14; and *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* [2017] ZASCA 95 para 6.

hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.'[15]

[69] It is by no means clear that these principles informed the decision to separate issues in this matter. In my view, the issues raised in the separated order are inextricably linked to the rest of the issues in the pleadings. They could conveniently have been ventilated in one hearing. This should have been clear to the parties and the judge who granted the separation order.

[70] In all the circumstances the appeal has to fail. The following order is made:
The appeal is dismissed 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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T M Makgoka

Judge of Appeal

[15] *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) paras 89-90. (Citations omitted.)

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