IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE DATE: 17/3/2005

Case No: 3037/2005

I n the matter between

BRETT VAN BERGEN Applicant

and

P C VAN NIEKERK First Respondent

PETER DOS SANTOS Second Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an urgent application in which the applicant seeks the following final relief-

(1) That first and second respondents be ordered to immediately take preventative steps to prevent the subsidence and/or apprehended invasion of soil and rubble onto applicant's land and/or the further disintegration of the boundary wall between first and second respondents' property at 11/13 Marais Street, Baileys Muckleneuk.

(2) That first and second respondents immediately take all necessary preventative measures in order to prevent .the boundary wall from collapsing by excavating the landfill on the northern side of the boundary and/or by immediately repairing and or lending support to the wall erected between the applicant and the first respondent's property, in order to release the pressure and avert collapsing of the wall and to immediately commence with the construction of a replacement wall which will be built according to the correct specifications to serve as a 'retaining' wall.

(3) That first and second respondents be ordered to remove the soil, rubble, bricks and plant material, accumulated on applicant's property caused by the subsidence and collapsing of the wall which occurred on 21 January 2005 as more fully depicted on the photographs which are annexed as Annexure 'B1' to 'B20' to the founding affidavit.

(5) That first and second respondents be ordered to pay the costs of the application jointly and severally.

[2] The applicant seeks final relief on notice of motion. Where there are factual disputes the principles set out in ***Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E-635C must be applied. The applicant has not argued that any

allegation or denial of the respondents is so far-fetched or clearly untenable that it should be rejected on the papers. Accordingly, final relief may be granted only if the applicant's allegations of fact which are admitted by the respondents together with the respondents' allegations of fact support the grant of final relief. These facts may be summarised as follows -

[3] The applicant and the first respondent are neighbours. The applicant owns and resides with his family at 11 Marais Street, Baileys Muckleneuk, Pretoria which is also known as erf 477/1, Baileys Muckleneuk, Pretoria ('erf 477/1'). The first respondent owns and resides with his family at 13 Marais Street, Baileys Muckleneuk, Pretoria which is also known as erf 477/2, Baileys Muckleneuk, Pretoria ('erf 477/2'). The second respondent is the previous owner of erf 477/1. In June 2002 the applicant and the second respondent entered into a written agreement in terms of which the second respondent sold erf 477/1 to the applicant for R1 130 000.

[4] Erf 477/1 and erf 477/2 are situated on two levels. Erf 477/2 lies immediately to the north of erf 477/1 and the natural ground/level of erf 477/2 is approximately three metres higher than that of erf 477/1. Between the two properties stands the remnants of the retaining wall which was built on the sloping bank between the two properties. This wall is the subject of this litigation. A large part of the wall has

collapsed and the rest of the wall is about to collapse. When the wall collapsed the bricks and backfill which was behind the wall fell onto erf 477/1 blocking the entrance to the house and one garage door. The rest of the wall is leaning over towards erf 477/1. When it collapses it will fall onto erf 477/1. If the wall lands on anyone it could cause serious injury or loss of life. The applicant and the first respondent cannot agree who is responsible for maintaining and repairing the wall or taking steps to ensure that it does not collapse further. Each considers this to be the responsibility of the other party.

[5] Until 1991 erf 477, Baileys Muckleneuk belonged to Willem Nicolaas Schutte. In 1991 Schutte subdivided the property into erf 477/1 and erf 477/2. He then sold erf 477/1 to the second respondent who took transfer on 5 July 1991. Schutte retained erf 477/2. Before he subdivided erf 477 Schutte and the second respondent agreed that the second respondent would erect a suitable retaining wall between the subdivided portions. The purpose of the wall was twofold. First, it would ensure the privacy of the two properties. Second, it would permit Schutte to extend his garden to the retaining wall. The second respondent built the retaining wall on the sloping bank between the two subdivisions. When the wall was completed there was a space between the bank and the wall. Schutte filled this space with rubble and soil. According to Schutte the space was small - it was wedgeshaped and half a metre wide at the top, narrowing down to the bottom.

He says the fill was minimal. This backfilling enabled Schutte to extend his garden up to the retaining wall.

[6] Schutte sold erf 477/2 to Anton Visagie who sold it to the Thompson Family Trust which sold it to the first respondent. According to Schutte the garden and the backfill looks the same today as it did in 1991. Schutte says he did not interfere with the design or building of the wall. He was under the impression that the wall was fit for the purpose for which it was built taking into account the backfilling to be done there.

[7] The second respondent had the wall built by the builder who built the house on erf 477/1. After the wall was completed planter boxes filled with soil were placed against the wall on erf 477/1 to support it. When the wall was built no proper provision was made for drainage. There are no pipes at the foot of the wall to allow for water to drain. There are only small plastic pipes below the level of the backfill which do not allow for all the water trapped behind the wall to drain away. According to the second respondent when the wall was built proper provision was to be made for drainage.

[8] During about 2000 the wall started to lean over. The second respondent installed steel supports to prevent the wall from falling over. During 2002 the second respondent decided to sell the property. His asking price was R1,4 million. Eventually the applicant offered to purchase the property for R1 million. After some negotiation the

parties agreed on R1 250 000. However just before they finalised the written agreement the applicant inspected the property. He saw that the wall was leaning over and that it was supported by metal sheets and steel rods. On two occasions during June 2002 (probably before the applicant purchased the property) the applicant called on the first respondent. On both occasions the applicant voiced his concern about the boundary wall which was leaning over and cracking. On the second occasion the applicant asked the first respondent if the second respondent was prepared to repair the wall. The first respondent refused to do this and said that it was the second respondent's wall. The applicant insisted on the purchase price being reduced as it was possible that the wall would have to be rebuilt. The applicant and the second respondent eventually agreed on a purchase price of R1 130 000. The reduction in the price included R100 000 for the wall to repaired or rebuilt. Clause 9 of the agreement reads as follows:

'VOETSTOOTS AND WARRANTIES

9.1 The sale is 'voetstoots'.

9.2 The sale is subject to all the conditions and servitudes contained in the original and subsequent deeds to which the PROPERTY is legally subject. The PURCHASER acknowledges that the SELLER is not liable for any defects in the PROPERTY or for any damages which may be suffered by the PURCHASER as a result of the defects.

9.3 The PURCHASER acknowledges that he has inspected the PROPERTY and that he is completely satisfied and that he

> has decided to purchase the PROPERTY as a result of his own investigations and not as a result of representations made to him by or on behalf of the SELLER, except as set out in "this agreement.'

[9] During heavy rain in January 2005 a large part of the wall collapsed. Bricks and backfill fell or was washed onto erf 477/1. A large amount of rubble had to be removed by the applicant to gain access to the front door of his house. Where the wall collapsed, the backfill, which rises to about three metres above the surface of erf 477/1, is exposed and no longer supported and is threatening to collapse onto the applicant's property. The backfill consists of rubble and soil up to the height of the wall. The rest of the wall is also leaning over towards the applicant's property. If the wall falls onto anyone this could cause serious injury or loss of life. The applicant has been obliged to keep his children away from the wall. The situation clearly interferes with his use and enjoyment of the property. When the wall collapses bricks and backfill will fall onto erf 477/1. This may cause damage to the applicant's property and will have to be removed at substantial expense. If this occurs during heavy rain the backfill may be washed into the applicant's swimming pool. The wall is not fit for the purpose for which it was built. The cost of rebuilding the wall has been estimated by the first respondent's attorney at R150 000.

[10] The applicant demanded that the first respondent repair or rebuild the wall and remove the backfill. The first respondent denied that this is

his responsibility. He contended that this is the applicant's responsibility.

[11] The relief sought by the applicant is inelegantly formulated. It seems to be in three parts. First, the applicant seeks an order that the respondents take steps to prevent the backfill from going onto the applicant's property. Second, the applicant seeks an order that the respondents prevent the wall from collapsing by (a) excavating the backfill on erf 477/2; (b) repairing or lending support to the wall and (c) constructing a replacement wall in accordance with proper specifications so that it can serve as a retaining wall. Third, the applicant seeks an order that the respondents remove the soil, rubble, bricks and plant material which came onto the applicant's property when the wall collapsed on 21 January 2005.

[12] In seeking relief against the first respondent the applicant relies on the common law duty of a neighbour to provide lateral support to an adjoining property and in seeking relief against the second respondent the applicant relies on the second respondent's undertaking to Schutte to build a wall to retain the soil behind it and create stability.

[13] <u>First respondent</u>

Insofar as the applicant's claim against the first respondent is based on a duty not to withdraw the lateral support which his land affords to

adjacent land, it is misplaced. This duty comes into play when an owner alters the condition of his land, for example by excavating soil on his land for building purposes. In such a case it is the owner's duty not to withdraw the lateral support which his land affords adjacent property - see *Dimont v Akal's Investments (pty) Ltd* 1955 (2) SA 312 (D) 316B-G: Silberberg and Schoeman *The Law* of *Property* 2 ed 182 para 2.2.2 and Van der Merwe *Sakereg* 2 ed 197-201. In this case the first respondent has not altered the condition of his land by excavation or in any other way and has not withdrawn the lateral support which his property gives to the applicant's property.

[14] It is clear that the wall collapsed because it was not properly designed and built. It is no longer fit for the purpose for which it was built: ie retain the backfill. The wall was effective for about eight years and then started to tilt towards the applicant's property. This may have been caused by lateral forces exerted by the backfill but a properly designed and constructed wall would have resisted these forces. The wall should have incorporated a proper means of draining water trapped behind the wall as well as other features.

[15] In accordance with general principle, 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 - see *Regal v African Superslate (Pty)*

***Ltd* 1963 1 SA 102 (A)** at 106H-107D (per Steyn CJ). In the present case it has not been shown that the wall is situated on either erf 477/1 or erf 477/2 and the parties accepted that the wall is situated on the boundary between the two properties. According to Voet 8.2.15 (Gane's translation), in case of doubt, a wall intermediate between two adjoining pieces of land is presumed to have been built on the common boundary. Such a party wall belongs to the owners of the adjoining properties separated by the wall, irrespective of who built it - see Silberberg and Schoeman 194-195 para 2.2.5. 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.

[16] The question is whether the applicant is entitled to any of the other relief against the first respondent in terms of neighbour law. The general principle is that ownership is the most comprehensive right which a person can have in respect of a thing. The starting point with regard to immovable property is that the owner may do as he pleases on his property. However that is subject to qualification. No owner may use his property without regard to the rights of others. And in the case of adjoining owners of immovable property the law regulates the relationship by limiting the owners' rights and placing reciprocal duties on the owners. See *Regal v African Superslate (pty) Ltd supra* at *106-107; Gien v Gien* 1979 2 SA 1113 (T) at 1120C-1121A. For the applicant to be entitled to any relief against the first respondent the applicant would have to establish that the first respondent was acting unlawfully: in the present case by failing to carry out a duty imposed on him by law. And the question of whether a failure to act is unlawful or not will depend upon considerations of fairness and reasonableness - see *Gien v Gien supra* 1121D-F and the cases there cited; *East London Western Districts Farmers Association and others v*

***Minister* of *Education and Development Aid and others* 1989 2 SA 53 (A)** at 66F-67B.

[17] The applicant seeks to compel the first respondent to take steps to prevent the backfill from coming onto erf 477/1 by excavating the backfill which was placed behind the wall. In view of the agreement between Schutte and the second respondent that backfilling was proper and reasonable use of Schutte's property - to maximise the area available for the garden. The present situation has arisen because of the collapse of the wall - not because the backfill created an inherently dangerous situation. (The case is therefore distinguishable from ***Flax v Murphy* 1991 4 SA 58** (W)). It is clearly the normal consequence of the collapse of the wall. It cannot be rectified until the wall has been rebuilt. (The applicant's counsel conceded that the rest of the wall will collapse). In the present case the applicant knew that the wall was defective when he purchased the property. He negotiated a reduction in the price to cover repairing or rebuilding the wall. He should have taken steps to rectify the defective wall before it collapsed as the consequences of the wall collapsing were obvious. In these circumstances it cannot be said that the first respondent's failure to act is unlawful - even if he had a duty to act. The applicant therefore cannot compel the first respondent to excavate the backfill. Instead the applicant must take steps to prevent the backfill from coming onto erf 477/1.

[18] The applicant seeks an order that the first respondent remove the soil, rubble, bricks and plant material which came onto erf 477/1 when .the wall collapsed. As already mentioned this was the normal consequence of the retaining wall collapsing. The applicant has known since he purchased the property that the wall probably would collapse.

[19] The relief sought against the first respondent IS inappropriate and cannot be granted.

[20] Second respondent

Insofar as the applicant seeks to enforce an agreement between Schutte and the second respondent it is clear that he cannot do so for the simple reason that he is not party to that agreement.

Insofar as the applicant seeks to rely on the agreement between the applicant and the second respondent there are two reasons why the applicant cannot succeed. The first is that clause 9 of the agreement precludes any claim against the second respondent based on the wall being defective, whether the claim is based on contract or delict. The second is that the applicant was aware that the wall was defective when he purchased the property in June 2002 and it was for that reason that it was agreed to reduce the price by a substantial amount to enable the applicant to repair or rebuilt the wall. On these facts it must be accepted for purposes of this judgment the applicant is not

entitled to any relief against the second respondent based on the agreement.

[21] In argument the applicant's counsel attempted to rely on a misrepresentation made by the second respondent when the agreement was entered into. Neither in the papers nor in argument does this cause of action appear with any clarity or certainty. Accordingly it must be found that the applicant has not made out a cause of action against the second respondent for any relief.

[22] Costs

The applicant enrolled this matter as an urgent application on 11 February 2005 when the court refused to hear the matter as a matter of urgency. The court postponed the matter to the 25th of February 2005 and reserved the question of costs. In my view this was a risk which the applicant undertook when he launched the application as an urgent application. If he could not satisfy the court that the matter must be heard he would needlessly have brought the respondents to court. See ***Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*** **1972 1 SA 773 (A)** at 782A-D. The applicant must therefore bear these costs.

[23] The following order is made:

(1) The application is refused;

(2) The applicant is ordered to pay the costs of the first and second respondents which shall include the costs of the 11th of February 2005.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 3037/2005

HEARD ON: 25 February 2005

FOR THE APPLICANT: ADV G. LUBBE

INSTRUCTED BY: Mr M. Stuart of MARAIS STUART INC

FOR THE FIRST RESPONDENT: ADV A.F. ARNOLDI SC

INSTRUCTED BY: Mr Oosthuizen of COUZYN HERTZOG & HORAK ATTORNEYS

FOR THE SECOND RESPONDENT: ADV A. SOUTH

INSTRUCTED BY: Mr Mac Donald of GIESSING-MAC DONALD ATTORNEYS

DATE OF JUDGMENT: 17 March 2005