

SOUTH AFRICA / JUDGMENT

Carstens v Squires and Another (4405/2019) [2020] ZAWCHC 91 (24 August 2020)

[2020] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers

CASE / FILE NUMBER

4405/2019

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 4405/2019 In the matter between PAUL CHRISTOPHER CARSTENS APPLICANT And
BEVERLEY ANNE SQUIRES FIRST RESPONDENT JOHN SQUIRES SECOND RESPONDENT

Coram: Rogers J

Heard: 10 June and 11-12 August 2020

Delivered: 24 August 2020

Rogers J

- [1] The applicant is the owner of a residential property situated at [...] Road, Lakeside. The first respondent is the owner of an adjacent residential property situated at [...]. I shall refer to these properties as the Carstens and Squires properties respectively. The second respondent, now deceased, was the first respondent's husband. Since he was not the owner or co-owner of the Squires property, he did not have a legal interest in the proceedings. I shall thus refer to the first respondent simply as the respondent.
- [2] The applicant launched these proceedings in March 2019 for orders compelling the respondent to repair and maintain a retaining wall situated just on her side of the common boundary; to cut and remove overhanging branches; and to cut and remove all trees and tree roots encroaching onto the Carstens property or having the potential to cause damage to the Carstens property or the retaining wall. The application was opposed.

- [3] The matter first served before me on 10 June 2020. A few days earlier, the respondent delivered an application seeking leave to file an affidavit by a civil engineer, Mr Andrew Cowie, as well as a supplementary affidavit by the respondent. The application to file these further affidavits was opposed.
- [4] Leaving aside these supplementary affidavits, the position as at 10 June 2020 was that although both sides had attached expert reports to their respective affidavits, including reports from civil engineers (Mr Cowie's report was attached to the respondent's affidavit of 22 May 2019), there were no affidavits from the experts themselves. I raised this point with counsel. I also told them that there appeared to be material disputes between the engineers which would be difficult if not impossible to resolve without oral evidence, and that it might also be desirable to conduct an inspection in loco.
- [5] I thus suggested that counsel consider the possibility of a short postponement so that affidavits by the engineers could be filed, whereafter there would be oral evidence, limited to cross-examination (on the basis that the affidavits and any attached reports would serve as the experts' evidence in chief). Counsel agree. The matter stood down so that they could prepare a draft order, which was finalised a few days later. The engineer whom the applicant intended to call seems not to have cooperated, as a result of which there was a further delay. Eventually the applicant filed an affidavit and report by a new engineer, Mr Pierre de Villiers. Mr Cowie likewise filed an affidavit, which seems to be identical to the one which the respondent previously applied to have admitted.
- [6] In terms of the agreed order, the case was to be heard on 11-12 August 2020. Proceedings started at 09:00 on 11 August with an inspection at the properties. Apart from the legal representatives, the applicant and respondent and their respective engineers were present. At the conclusion of the inspection, I asked counsel to explore whether the engineers might find common ground acceptable to the parties.
- [7] Although the oral evidence was scheduled to start at 11:00, I was notified by counsel that they wished to stand the matter down so that a resolution of the merits could be further discussed. As the day progressed, I was told that the parties were hopeful of a settlement. In the early evening I was sent an agreed draft order which resolved the merits. However, the parties could not come to terms on costs. Accordingly, on 12 August I heard oral argument on costs.
- [8] Quite correctly, counsel did not suggest that I should hear oral evidence on the merits for purposes of deciding the question of costs (*Gamlan Investments (Pty) Ltd & another v Trillion Cape (Pty) Ltd & another* 1996
- (3) SA 692 (C) at 700F-710C). I must, on the material at my disposal, make a proper allocation as to costs.
- [9] The draft order reads as follows ('Property One' and 'Property Two' in the order are references to the Carstens and Squires property respectively):

1. The applicant's expert, Mr Pierre Francois de Villiers ('De Villiers') and the first respondent's expert, Mr Andrew Cowie ('Cowie'), shall prepare a joint method statement, by no later than 24 August 2020, setting out the necessary and required repairs to be made to the retaining wall ('the wall') including repairs to the exposed foundation and/or bedding between the properties situated at [...] Lakeside ... ('Property One') and [...] Lakeside ... ('Property Two').
 2. De Villiers and Cowie shall agree on and appoint an independent structural engineer by no later than 11 September 2020, to supervise and/or oversee that the repairs are made in accordance with the joint method statement.
 3. The parties shall agree on and appoint a suitably qualified and independent stone mason and/or builder to conduct the necessary and required repairs in accordance with the method statement, by no later than 8 October 2020.
 4. Insofar as the method statement provides for necessary and required repairs to be made to the wall on Property One such repairs shall be for the first respondent's account.
 5. Insofar as the method statement provides for repairs to be made to the exposed foundation and/or bedding on Property One, and insofar as those repairs have been occasioned by the applicant's conduct according to the method statement, such repairs shall be for the applicant's account;
 6. Upon completion of the repairs, the first respondent shall produce the appointed structural engineer's written confirmation of the wall's structural integrity and that same does not pose a threat to Property One.
 7. Upon completion of the repairs, the applicant shall produce the appointed structural engineer's written confirmation that the exposed foundation and/or bedding no longer poses a threat to the structural integrity of the wall.'
- [10] The draft order provides a sensible *modus operandi* for resolving the dispute about the retaining wall. It does not, however, indicate to what extent repairs will in fact be needed. That lies in the future. The draft order may be thought to reflect a recognition by the respondent that the retaining wall is at least in need of some repair. On the other hand, the order reflects a compromise. Just as the applicant may feel that the agreed order gives him less than he might have got had the court decided the merits after hearing evidence, so the respondent may feel that she has given more than that which would have been ordered (if anything) following a trial of the merits. If one or other of the parties had been told that a settlement on the merits would be used against them when it came to decide the question of costs, one or both of them might have declined to compromise the merits.
- [11] In the circumstances, I do not think that decisive weight should be accorded to the draft order in deciding costs.

- [12] In regard to overhanging branches, these were removed long before the inspection was held. Three trees, whose roots were alleged by the applicant and his experts to be growing through or under the wall and impairing its stability, have now been completely removed. The respondents said in her affidavit that the trimming of branches was something she did on an ongoing basis. There is evidence that the applicant began complaining about overhanging branches in October 2017. Although this elicited some response, photographs attached to the founding affidavit[1] suggest that there were still some overhanging branches, though it is not altogether easy to judge the precise extent.
- [13] Two of the trees removed after institution of the proceedings were ficus trees, and it is not in dispute that they have aggressive root systems known to cause damage to building structures. Mr Cowie opined that the trees were not yet of sufficient size to compromise the retaining wall, but it appears likely that sooner or later they would have had to be removed. Whether, however, there was a case for their immediate removal is doubtful.
- [14] Messrs de Villiers and Cowie were in agreement that the retaining wall was a 'gravity retaining wall', ie one in which the gravity exerted on lower stones by higher stones, coupled with a measure of interlocking, provides stability. They differed, however, on the significance mortar. Mr de Villiers considered that the wall could not rely purely on gravity and interlocking, and that mortar was thus required to bind the stones together. Mr Cowie, by contrast, considered the mortar to be primarily aesthetic, though at the wall's base the bottom stones were embedded in concrete.
- [15] Mr de Villiers regarded the mortar as weak and inadequate. Recent superficial repairs had not remedied the deficiency, with cracking already visible. In some places the mortar had broken away, leaving voids susceptible to intrusion by roots, plants and water. In some areas the boulders or stones were fairly loose, with the possibility of falling out during heavy rainfalls.
- [16] His overall conclusions were the following. The wall design as such is adequate. Mortar, if properly applied, would have a shear strength much larger than the forces it needed to withhold. For the reasons summarised above, the wall is currently in a poor condition. It is not in danger of collapsing in its entirety. However, in those parts of the wall where the rocks are already loose, there could be localised failures. The continued ingress of tree roots and water would lead to further deterioration. The remedial action taken by Mr Cowie 'was somewhat sufficient to restrain any current threat' but 'inadequate as a once-off, long-term solution'. The wall would still have to be maintained and repaired regularly, and the 'effort and cost' in so doing 'could be spared by the simple once-off solutions I recommend'.
- [17] The remedial work he recommended was the following. First, the three trees with aggressive root system should be removed. (This was done after the institution of proceedings.) Second, the wall should be taken down segmentally and reconstructed with the same stones but using a class (iii) mortar. Third, a soil drainage system should be installed. And fourth, the retained side of the wall (ie the side facing the Squires property)

should be painted with a bituminous paint. (On the evidence, his fifth recommendation, relating to the water tank's foundation, was implemented prior to institution of proceedings.)

- [18] Mr Cowie happens to have lived in [...] Road for many years. He says that the retaining wall was built in about 1985. He conducted an inspection in June 2018, and certain remedial work was done on his recommendation and under his supervision, such work having been completed by April 2019.
- [19] As part of his investigation, he dug inspection pits along the length of the wall on the Squires side in order to expose the face of the wall against which retained ground was piled. (The corresponding part of the wall on the Carstens side is above ground level, because of the different levels of the properties.) He found the wall to be 'well founded along its length'. It was founded on 'good natural ground', with the larger boulders forming the base. The wall uses its own weight to resist horizontal forces induced by the retained ground. The wall does not have any concrete foundation save for a shallow bedding layer.
- [20] He caused the inspection pits to be backfilled with a cement-stabilised sand mix, which would further help to strengthen the wall. Mr Cowie criticised the reports of Mr de Villiers and of the applicant's previous experts, because conclusions had been drawn without the benefit of inspection pits. These, he said, were critically important in the conclusions he reached.
- [21] As I have said, he disagrees with Mr De Villiers' view that the mortar is of structural significance. On the contrary, he says that the inside face of the wall (ie on the Squires side) is completely porous, with little or no mortar rendering. This is advantageous because the wall does not come under any water-table-induced pressure. Because both properties slope down the mountain side to [...] Road, natural drainage occurs; water does not dam up against the base. No weep holes or drainage system are needed.
- [22] Most of the cracks and gaps in the mortar were, he says, repaired before the application was launched, though the work could not be completed without access to the Carstens property. In that regard, the applicant's attorneys on 20 November 2018 wrote to the respondent's attorneys regarding remedial work already undertaken, stating that the respondent had seen 'fit to trespass' onto the Carstens property, and that permission had to be sought from the applicant. In fairness, the letter did not suggest that permission would not be forthcoming, and the applicant's telephone number was furnished that purpose.
- [23] My own assessment, judging the matter simply on the papers as supplemented by my observations during the inspection in loco, is the following. This wall has stood for 35 years. Mr de Villiers does not say that it is in immediate danger of collapse. He seems to regard Mr Cowie's remedial work as sufficient in the short term, but prefers his own solutions as more cost-effective in the long term.

- [24] Here and there a tree root in the wall could be seen. These did not appear to be alive, and may even over time have come to provide some stability where otherwise there would have been a void. The mortar is indeed cracked, and it is probably so that in places it would not take much to pull it away. I accept that as a result of this, a stone might here or there become detached on the Carstens side of the property.
- [25] I was shown a smallish rock which had allegedly fallen off the wall and was lying at the base on the Carstens side. During the inspection, Mr de Villiers handled a largish boulder in the wall on the Carstens side. The boulder came away. My impression was that he had applied gentle but not substantial outward force. This indicates that the mortar in that part of the wall was in poor condition. On the other hand, this boulder has apparently been in place for 35 years without falling. Unless the wall comes under horizontal pressure on the Carstens side (as opposed to downward pressure), one would not expect boulders to fall out of their own accord. The fact that this large boulder became detached did not have any discernible effect on the surrounding part of the wall.
- [26] The ground that is retained by the wall is packed against the wall on the Squires side of the wall. That is where one would expect the wall to experience its greatest horizontal pressure. Mr Cowie had the benefit of inspecting the retaining face of the wall when he exposed the ground by way of inspection pits. I have no reason to reject his conclusion that the wall is well founded along its length.
- [27] The applicant sought relief in respect of the retaining wall on the basis that he reasonably apprehended, due to deficiencies in the wall, that there might be a significant collapse which would cause a large mass of retained ground to move from the Squires property onto his own property, with resultant damage to his house. The relief he claimed was the implementation of option 1, alternatively option 2, contained in a civil engineering report of 30 August 2018.
- [28] Option 1 entailed the following: the employment of a stone mason to remove the cracked mortar and roots, and to undertake repairs, this to be done annually or as necessary; the installation of weep holes, with bundles of stone and bidum behind the wall; removing the water tank which was located close to the wall; removing all trees and shrubs with aggressive root systems; repairing and providing adequate stormwater management behind the wall; installing a surface channel for water; and checking the Squires swimming pool for leaks that could cause an ingress of water. (Option 2 was more drastic.)
- [29] I cannot find on the papers that the applicant would probably have obtained substantially this relief if oral evidence had been heard. The same is true if the applicant were to have applied to amend his notice of motion in line with Mr de Villiers' recommendations. I cannot find that the wall was, when the proceedings were launched, in danger of imminent collapse to an extent that would have caused any appreciable harm on the Carstens property.

- [30] On the other hand, the applicant was entitled to insist that the part of the wall facing onto his property should be kept in sufficient repair that stones do not fall out. I cannot find that the applicant refused permission for the respondent to carry out remedial work on the Carstens side of the property. The applicant was entitled to insist that consent be obtained before people came onto his property. The evidence does not suggest that consent was requested but refused.
- [31] I also think it likely that if the respondent had not removed the three trees previously mentioned, the wall might in due course have become more precarious. The respondent was tardy in responding to the applicant's insistence that she remove overhanging branches, and this was not completely remedied by the time the application was launched.
- [32] The respondent can also be criticised for not having responded to requests from the applicant's attorneys to give details of her structural engineer and his recommendations. Mr Cowie only produced a written report May 2019, and this was only made available to the applicant in early June 2019.
- [33] At least one plausible outcome of the case is thus that while the applicant may, following oral evidence from the engineers, have established that when he launched the application he was entitled to some modest relief, he may substantially have failed in requiring extensive and expensive work to be done on the retaining wall.
- [34] In the circumstances, and having regard to the compromise which the parties have reached on the merits and to the fact that they will still need to tolerate each other as neighbours, I think the fairest outcome is that the parties should bear their own costs.
- [35] As to the wasted costs of 10 June 2020, those costs would have been incurred whether or not the respondent had brought an application to adduce further affidavits. It became unnecessary to adjudicate that application, because the main case could in any event not proceed in the absence of affidavits from experts on both sides and after at least some oral evidence.
- [36] I thus make the following order:
- (a) By agreement the draft order attached as 'X' is made an order of court.
 - (b) There is no order as to costs.

O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicant R van Wyk Instructed by Keith Jenkins Attorneys 7 Sunninghill Road Wynberg For Respondent G Goosen Instructed by Haydn Elmes & Elmes 'The Corner House', 26 Hope Street Gardens

[1] See the photographs taken in early march 2019 at record 50 and 52.

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