4]**REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO A1236/02

In the matter between:

PAUL LEATHAM HUMPHRYS N.O. **Appellant**

and

HENRY JOHN BARNES **Respondent**

JUDGMENT: DELIVERED 3 DECEMBER 2003

GRIESEL J:

1]On 22 May 1997 the appellant (plaintiff *a quo*), in his capacity as trustee of the P & L Trust, bought an immovable property, erf 2297 Plattekloof, situated at 3 Fuschia Close, Plattekloof (*the property*), from the respondent (defendant *a quo*). I will refer to the parties as they were in the court *a quo*. Almost exactly a year later, a wall between the property and the lower neighbouring property collapsed, giving rise to fairly extensive damages. The plaintiff unsuccessfully sought to recover

those damages from the defendant in the magistrate's court, thus giving rise to the present appeal.

2]By agreement between the parties the trial in the lower court was confined to the question of liability, with the question of *quantum* standing over for later determination.

Factual Background

3]During 1996 the defendant bought the property, which was vacant at the time. The property is situated on a steep slope on the Tygerberg, overlooking the Cape Peninsula. The defendant designed and built a dwelling thereon. On the southern boundary between the property and the lower adjoining property was a pre-existing retaining wall, approximately two meters high and erected some five years earlier by the owner of the adjoining property, one Newman (*Newman*). The defendant obtained permission from Newman to increase the height of the existing retaining wall by building on top of it. Shortly after completion of the dwelling, the defendant sold the property to the plaintiff, as mentioned earlier.

4]The deed of sale contained *inter alia* the following provisions:

'3. On transfer, possession of the property and all the risks and benefits of ownership shall pass to the purchaser.

…

9. WARRANTIES AND UNDERTAKINGS

9.1 The property is hereby sold ***voetstoots****and subject to all existing servitudes and title deed conditions.*

9.2 The parties hereto agree that this agreement constitutes the entire agreement between them and that no warranties or representations other than those contained herein have been made by any of the parties, or their agents. No variation of this agreement shall affect the terms hereof, unless such variation has been reduced to writing and signed by both parties.'

5]On 7 May 1998, after heavy rain, the wall in question collapsed, resulting in fairly extensive damage to both properties. The plaintiff alleged that this was due to a latent defect *'in that the side of the property bordering on the adjacent property was not adequately and/or properly retained and/or supported'.* Faced with the *voetstoots* clause quoted above, the plaintiff pleaded that the defendant was aware of the defect and had a duty to disclose it to the plaintiff, but intentionally concealed the existence of such defect. The plaintiff did not, however, persist in this claim – either at the trial before the magistrate or on

appeal – and nothing further needs to be said in this regard.

6]The plaintiff's alternative cause of action was based squarely on the *actio legis Aquiliae:* the plaintiff pleaded that the damage was caused by the defendant's alleged negligent conduct in various respects, most importantly, in that the defendant constructed the retaining wall without the necessary structural integrity; he failed to construct the wall in accordance with the National Building Regulations; and he failed to obtain the services of a structural engineer or other form of suitably qualified assistance to attend to the structural design of the wall.

7]At the trial in the court *a quo*, the plaintiff adduced the evidence, *inter alia*, of a structural engineer, Mr Lee. It appeared from his evidence that the defendant extended the retaining wall and built a free-standing wall of at least 1,2m on top of it. The end result was a wall without the necessary structural integrity. As Mr Lee explained, the retaining portion, as extended, was too high and of inadequate width and should not have carried any '*surcharge*'. The free-standing wall increased the wall's '*bending moment*' by adding wind as an additional aggravating factor.

8]The defendant also filled the area immediately behind the extended retaining portion, which fill amounted to approximately one third of the total soil level supported. As Mr Lee explained, the extension of the retaining portion and the additional fill dramatically increased the bending moment of the wall. In addition, the defendant paved the filled area immediately behind the extended retaining portion and utilised it as a driveway for motor vehicles. According to Mr Lee, this too acted as a force increasing the bending moment of the wall.

9]The defendant also failed to provide adequate drainage for the filled and paved area. Mr Lee testified that at least a soil drain and weep holes were required for adequate drainage. The lack of drainage caused the soil to become saturated, which exerted a pressure almost double that of dry sand.

10]In summary (according to Mr Lee), the defendant – without professional assistance or design – extended the wall and altered its immediate vicinity in such a manner as to introduce or increase all the aggravating factors which would add to the bending moment of – and thus tend to topple – the wall.

11]The exact nature and dimensions of the wall – both the portion constructed by the defendant and the original wall built by Newman – were heavily disputed at the trial, as was the exact cause of its eventual collapse. In the view I take of the matter, it is not necessary to resolve these disputes. The fact of the matter is that the magistrate found – and this finding was accepted by both sides on appeal before us – that *'neither the original retaining wall nor the extension to it was constructed with the necessary integrity and in accordance with National Building Regulations'*. The magistrate's judgment proceeds as follows:

> *'Both owners, Mr Newman and Mr Barnes, had a duty of care to ensure the integrity of the structure. Neither of them complied with this duty of care. Both building operations showed that there were contributary [sic] factors relating to both building projects and with the evidence presently before this Court, it is not possible to quantify the extent of the cause of collapse and consequently attribute liability to a particular party.'*

12]The magistrate accordingly granted absolution from the instance with costs against the plaintiff on the narrow basis that he had failed to prove that it was the negligence of the defendant – rather than the

negligence of Newman – which had caused the wall to collapse.

Discussion

13]As I read the judgment of the court *a quo*, the magistrate was satisfied –

a) that the defendant had been negligent in respect of his construction of the wall, *and*

b) that such negligence was a contributory cause of the collapse of the wall.

c) However, the fact that Newman's negligent construction was *also* a contributory cause of the collapse, and the fact that the extent of each contribution could not be determined, meant that legal liability could not be attributed to the defendant.

14]On appeal before us, neither party attacked the magistrate's findings numbered (a) and (b) above. Instead, the argument was focused purely on the third finding, namely the question of causation.

15]In my respectful view, the magistrate's approach on the question of causation runs counter to established authority. The correct approach to a situation such as the present is to be found in the judgment of SCHREINER JA in *Kakamas Bestuursraad v Louw,*[1] where the learned Judge expressed approval of the Anglo-American principle –

> *'that a plaintiff can hold a defendant liable whose negligence has materially contributed to a totality of loss resulting partly also from the acts of other persons or from the forces of nature, even though no precise allocation of portions of the loss to the contributing factors can be made.'*

16]Boberg[2] explains the significance of the whole passage from which the above extract is taken as follows:

> *'This passage is important because it places the onus of proof in its proper perspective. As Schreiner JA said, it is not for the* ***plaintiff*** *to prove* ***which part*** *of the loss the defendant caused. But the learned judge might have added (though in the circumstances before him it was unnecessary to do so) that the* ***defendant*** *can escape liability for the whole loss by proving* ***which part*** *he caused. In short, the harm is presumed to be indivisible, and the plaintiff need prove only that the defendant*

1 1960 (2) SA 202 (A) at 222A – C. See also *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 264A – B; *Norris v R A F* [2001] 4 All SA 321 (SCA) para [16] at *325h – i*.

2 *The Law of Delict* (1984) 404 – 405.

> *contributed materially to the totality of it. The onus is then on the defendant to rebut the presumption by proving that the harm is in fact divisible and that he did not cause all of it – which he does by proving which part he* ***did*** *cause.' [Author's emphasis.]*

The learned author continues:3

> *'Turning next to the situation where the plaintiff's damage was caused partly by the negligent conduct of A and partly by the negligent conduct of B, we apply the same presumption of indivisibility of the damage to hold both A and B liable for the loss. They are in fact "joint wrongdoers" in terms of s 2 of the Apportionment of Damages Act, which makes them jointly and severally liable for the whole damage with a right of recourse* ***inter se****. But the application of the Act presupposes that A and B caused "the same damage" (as s 2(1) expressly states) – i.e. that the plaintiff's damage is one and indivisible. It is presumed that the damage is indivisible, but a defendant who can discharge the onus of proving that he caused only a distinct part of the plaintiff's harm is liable only for that part which he caused."*

17]In the present instance it was therefore incumbent upon the plaintiff to prove only a material factual link between the defendant's negligent conduct and the collapse of the wall. He was not required to quantify

3 *Op cit* 405.

the extent of its causal contribution. On the evidence as a whole, I am satisfied that the plaintiff had discharged that onus. It was then for the defendant to discharge the onus of proving that he caused only a distinct part of the plaintiff's harm, which he failed to do. It follows, therefore, that the magistrate's order cannot stand.

Concurrence of actions

18]Before concluding this judgment, it is necessary to refer briefly to a separate and more fundamental issue that was not raised directly in the judgment of the court *a quo* or counsel's arguments. It concerns the concurrence of contractual and delictual claims in the present factual matrix. Given the fact that there was a direct contractual relationship between the present parties, which contract included *inter alia* the *voetstoots* clause that I have quoted above, counsel were requested to submit further argument on the question whether the plaintiff in these circumstances has in principle a delictual claim against the defendant.

19]Counsel on both sides responded to this request with commendable diligence, both coming to the conclusion that the plaintiff does indeed, in principle, enjoy a delictual claim in circumstances such as the present. In view of this mutual concession, and because it played no

role in the *ratio* of the judgment of the court *a quo*, I shall only very briefly state my reasons for coming to the same conclusion.

20]It is well established that contractual and delictual liability can exist side by side in the same factual scenario, depending on the facts of each case. In the present case, the plaintiff's claim arises from physical damage to property (the collapsed wall, subsided soil and paving). Even in the absence of the agreement of sale, the defendant's conduct and resultant damage could still have constituted a delict committed against the plaintiff. If, for example, the plaintiff had not been the immediate, but a subsequent purchaser of the property, the defendant would have remained delictually liable towards him, as he would be within a foreseeable class of victims.4

21]Parties to a contract are free to either limit or exclude liability in respect of certain types of actions. Some of these provisions may indeed be applicable to the delictual liability of a party. In each case it will merely be a question of which type of liability has been excluded and, in a situation of concurrence, the exclusion of a specific action may still allow the retention of an alternative one. It is thus important to give

4 Compare *Tsimatakopoulus v Hemmingway Isaacs & Coetzee CC and Another* 1993 (4) SA 428 (C) at 435C – H.

effect to the intention of the parties to the contract so as to determine the precise field of application of these stipulations.

22]It is clear that a *voetstoots* clause only limits the *contractual* liability of a seller for latent defects in the article sold. It does not exclude liability for anything else, such as for negligence or misrepresentation. Thus in *Cockroft v Baxter,*5 the court (per OGILVIE THOMPSON J) held that there appears to be –

> *'… no sufficient warrant for expanding the ambit of a mere agreement to buy* ***voetstoots*** *(without more) beyond its recognised sphere of relieving the vendor from liability for latent defects to the extent of precluding the buyer from relying upon any misrepresentation whatever as to the condition of the article sold. If a vendor wishes to guard himself against all liability for all representations as well as for all defects he should, in my opinion, incorporate into the sale an appropriate condition in that behalf.'6*

23]In order to exclude liability for non-fraudulent representations, a contractual clause such as Clause 9.2 *supra*7 is frequently employed. Similarly, exclusionary or indemnity clauses excluding delictual liability

5 1955 (4) SA 93 (C) at 98B – C.

6 See also *Fitt v Louw* 1970 (3) SA 73 (T) at 77E – F: *'The term "voetstoots" means no more than that the non-fraudulent seller is relieved from liability for latent defects…'*

7 Para *supra*.

are, of course, an everyday occurrence.8 No such clause appears in the deed of sale between the present parties, with the result that the plaintiff is not precluded from claiming damages in delict from the defendant in the present circumstances.

Conclusion

24]For the reasons set out above, I would accordingly issue the following order:

1. The appeal is upheld with costs.

2. The order of the magistrate is set aside and replaced with the following:

'(a) It is declared that the plaintiff is entitled to recover damages from the defendant as a result of the collapse of the wall in question in an amount to be determined by the court or agreed between the parties.

(b) The defendant is ordered to pay the costs of suit.'

8 See e.g. *Durban Water Wonderland (Pty) Limited v Botha and Another* 1999 (1) SA 982 (SCA) 991C – D.

3. **The matter is remitted to the magistrate for determination of the question of *quantum*.**

25]

26]_____

27]B M GRIESEL

MLONZI AJ: I agree.

28]_____

29]R N Mlonzi