SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 184/17

In the matter between:

PIETERMARITZBURG AND DISTRICT COUNCIL FOR THE CARE OF THE AGED (PADCA) **APPELLANT**

and

REDLANDS DEVELOPMENT PROJECTS (PTY) LTD **FIRST RESPONDENT AND 32 OTHERS**

Neutral citation: *Pietermaritzburg and District Council for the Care of the Aged (PADCA) v Redlands Development Projects (Pty) Ltd* (184/17) [2018] ZASCA 51 (29 March 2018)

Coram: Navsa JA, Wallis JA, Willis JA, Mathopo JA, Pillay AJA

Heard: 27 February 2018

Delivered: 29 March 2018

Summary: *Actio aquae pluviae arcendae* – interdict – stormwater from higher property discharging into municipal stormwater drainage system – combined with water from road and other properties – increasing flow in watercourse on lower property – discharging in accordance with approved plans – discharge lawful – alternative claim based on neighbour law unjustified.

[1]

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Kruger J sitting as the court of first instance):
The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Pillay AJA (Navsa JA, Willis JA, Mathopo JA concurring)

[1] The appellant, the Pietermaritzburg and District Council for the Care of the Aged (PADCA), a voluntary association, appeals against the judgment of the KwaZulu-Natal Division of the High Court, Pietermaritzburg. The trial court dismissed with costs PADCA's action for an interdict to 'stop the run-off of water from the properties that form part of the Redlands Estate . . . in excess of the natural flow when . . . Redlands Estate was in a pristine condition.' The trial judge (Kruger J) gave leave to appeal to this court.

[2] Redlands Development Projects (Pty) Ltd (Redlands) is the first of 32 respondents opposing the appeal. Redlands and the second respondent, Mr Hesse, developed the property that is known as the Redlands Estate. Apart from the fifth respondent, Redlands Estate Homeowners Association, the remaining respondents are either owners of property on Redlands Estate or bodies corporate representing the owners.

All the property owners are members of the association, which owns and maintains the common services including roads and stormwater systems.

[3] The appellant based its action on the *actio aquae pluviae arcendae* (*actio*).[1] To determine whether PADCA meets the requirements of the *actio*, I begin by outlining the topography of the area and the relative location of the properties.

[4] After November 1993 PADCA began to develop 'Woodgrove' on its property, being Lot 3344 Pietermaritzburg, to provide residential accommodation for the elderly. Shortly thereafter, development started on Lot 321 Pietermaritzburg, being Redlands Estate, a secure enclosed estate that is situated on ground that slopes down to Woodgrove. Old Howick Road, a steep incline from the centre of Pietermaritzburg, runs on the south western side of both properties, bounding Redlands Estate directly but, separated from Woodgove by a single row of freehold houses. Redlands Estate is higher up Old Howick Road than Woodgrove.

[5] Redlands Estate and the freehold and sectional title properties forming part of it are not contiguous to Woodgrove. George McFarlane Lane, a short road, lies between the lower (eastern) boundary of Redlands Estate and the upper (western) boundary of Woodgrove. In November 1994 contractors for the developer of Redlands converted George McFarlane Lane from a dirt track into a tarred road, on two erven registered in favour of the municipality. Another two privately owned properties lie between George McFarlane Lane and Woodgrove namely, Portion 1 of Erf 674 and Portion 20 of Erf 837. Additionally, several other

[1] J Voet *The Selective Voet being the Commentary on the Pandects* (translated by Percival Gane *Dig.* XXXIX) vol 6 *Water and the Action on the Diversion of Rain Water* at 34; T Mommsen, P Krueger and A Watson (eds) *The Digest of Justinian* vol III D. 39.3.1 translation: *Water and the action to ward off rainwater.*

freehold properties separate the properties of some of the respondents from Woodgrove.

[6] The municipal stormwater system consists of an open channel or gutter on Old Howick Road adjacent to the boundary of Redlands Estate and running up to the entrance to the estate. This collects water from further up the hill and from municipal stormwater pipes before diverting the water into drainage catchment pits and thence into two pipes near the corner of Old Howick Road and George MacFarlane Lane, to discharge into a canal. From at least the 1930s the municipality had discharged its stormwater from Old Howick Road and higher properties into and across the natural watercourse on the property where Woodgrove now stands. PADCA built its canal on this watercourse during the construction of Woodgrove for the purpose of receiving water from higher properties and drainage within Woodgrove itself. This pipe and another municipal pipe are laid over a stormwater drain servitude on Portion 20 of Erf 837.

[7] Additionally, three roadside catchment pits – two situated on either side of the entrance to Redlands Estate, the third further along George MacFarlane Lane – collect stormwater from George MacFarlane Lane, including water run-off from Old Howick Road. Redlands Estate discharges stormwater into one of these catchment pits.

[8] After its development, Redlands Estate had a combined stormwater reticulation and disposal system for all the properties within the estate. Together they contributed to the volume of water flowing into the Redlands Estate disposal system. This combined run-off of water from Redlands Estate consolidated further in the catchment pits, from where it passed through a 600 mm pipe under George McFarlane Lane, up to the

headwall of PADCA's canal. Some surface water from Redlands Estate and Briar Ghyll runs off onto George McFarlane Lane on to Woodgrove, via an access road and through a stand of bamboo on the western boundary.

[9] Before the development of Redlands Estate the property on which it stands was not pristine. Instead it had a large residence, related buildings, terraces and driveways. When this litigation started Redlands Estate had developed into a residential estate and business park with a boutique hotel, tarred roads, pavements and parking areas, all of which resulted in the impervious coverage of the land increasing from 11.85 per cent pre-development to 42.2 per cent post development.

[10] Stormwater within Redlands Estate is not attenuated; it is collected and its discharge into the municipal system is controlled. The sources of water allegedly causing damage to Woodgrove are via the 600 mm pipe, and over George MacFarlane Lane at both an emergency exit driveway and through bamboo at the top end of Woodgrove. This 600 mm pipe replaced a 450mm municipal pipe that had been installed before Woodgrove was developed. The new pipe was built at the instance of the municipality during the construction of George McFarlane Lane. Although the old pipe terminated on Portion 1 of 647, just short of PADCA's boundary, the outflow from that pipe entered the watercourse on Woodgrove. Water from the new pipe is also designed to enter the watercourse. Predictably, however, the new pipe carries more water than the old pipe; it receives municipal stormwater including water from the catchment pits on George MacFarlane Lane.

[11] The 600 mm pipe, the catchment pits and George MacFarlane

Lane belong to the municipality. The pipe transmits all the water it collects not only from Redlands Estate but also a considerable volume of water flowing down from Old Howick Road. So it is practically impossible to distinguish water from Redlands Estate from other water flowing into Woodgrove's canal. PADCA accepts that the respondents are not responsible for water run-off from Old Howick Road, or for all the water from George MacFarlane Lane. As mentioned above, when developing Woodgrove PADCA knew of the pipe carrying water from Redlands Estate as well as the other sources of water into the natural watercourse. Hence, when it built its canal it knew that it would receive the stormwater from Redlands Estate.

[12] The municipality has several servitudes registered in its favour. As described above, a stormwater servitude exists under George MacFarlane Lane and to the headwall at the top of PADCA's canal into which two drains deposit municipal stormwater. A condition of title in Deed of Grant 1877 preserved the right of the municipality to discharge water into the natural watercourse on Woodgrove. Preservation of this right is reinforced in the Deed of Grant of 1878 of Woodgrove and as a specific condition of title in the Certificate of Consolidated Title of Woodgrove. The private properties between Woodgrove and George Macfarlane Lane namely, Portion 1 of Erf 837 and Portion 1 of Erf 647 are subject to a registered servitude in favour of the municipality and the province to drain existing and future storm and surface water onto Woodgrove for the effective drainage of Old Howick Road. Manifestly, the purpose of the servitude over both private properties, which ceases at their boundaries, is to carry stormwater over those properties. The watercourse over Woodgrove would then bear the burden of that water downhill and discharge it into a pipe leading eventually into the

Dorpspruit.

[13] When Redlands Estate was developed, one of the conditions in the municipality's Guidelines for Private Developers (Roads and Stormwater Drainage) read:

> 'All outfalls shall be arranged to discharge either into the City's stormwater system or a natural recognized watercourse … Alternatively the design shall ensure that the post-development run-off does not exceed the pre-development run-off.'

[14] Although a final signed plan could not be found, either in the records of the municipality or the company that completed the works, PADCA accepted that on the probabilities the plan would have been approved. PADCA's witness, who was also responsible for the works on Redlands Estate, confirmed that the company 'built . . . exactly as the plan is. We built the stormwater reticulation as per the design plan.' The City Engineer's 'approved' stamp appears on the layout plans for all the subdivisions. If the developers had not complied with the guidelines and the design plan, it is safe to say that the municipality would not have approved the plan for Redlands Estate.

[15] In summary, the respondents are disposing of their stormwater into a reticulation system designed and installed according to approved plans. The stormwater then enters the municipality's stormwater disposal system, which rests on several servitudes in the latter's favour.

[16] PADCA relied primarily on the *actio* and alternatively on neighbour law. It pleaded that the respondents had increased the run-off onto Woodgrove by proliferating artificial works without attenuating or

controlling the stormwater thus causing damage to Woodgrove. Both the volume and the velocity of the water flowing from Redlands Estate into the municipal stormwater system and on to George McFarlane Lane exceeded the natural flow. Although s 23 of the National Building Regulations and Building Standards Act 103 of 1997 (Act) exempted the municipality from any liability arising from its having approved Redlands' plans, PADCA contended that it did not exempt the respondents from their common law obligations, especially the alleged duty to attenuate the run-off from their properties. Whilst acknowledging the servitudes registered in favour of the municipality, PADCA submitted that the respondents nevertheless had no right to use municipal servitudes that were not registered in their favour. As the owners of the higher properties discharging more water than the natural flow onto the lower property, they had no servitudinal or other right to do so. Consequently, even though the respondents complied with the municipality's requirements, PADCA contended that they did not comply with their common law obligations.

[17] The trial court dismissed the action after finding first, that PADCA was non-suited because its property was not contiguous to those of the respondents; consequently the *actio* did not apply. Second, the action based on neighbour law also had to fail because the appellant had failed to prove animus or intention on the part of the respondents. The court opined that it was not necessary to consider the exemptions under s 23 of the Act because that would become necessary only if the question of damages arose.

[18] Three legal principles arising from the *actio* are relevant:

a) First, a higher property has a natural servitude over a lower

property, which, as the servient property, is obliged to receive the natural water flow from the higher property. [2]

b) Second, a higher property has no right to concentrate or divert the flow of water onto a lower property unless it is allowed to do so by a servitude granted by regulation, the nature of the site or established custom.[3]

c) Third, a person who undertakes construction work that causes water to flow elsewhere than its normal, natural course or to flow greater, faster or stronger than usual,[4] will be liable if it causes damage unless (a) it acts under a statutory or a common law right and (b) takes reasonable care to ensure that no injury is caused to others.[5]

[19] Applying these principles to the facts, it is common cause that Redlands Estate has a natural servitude over Woodgrove. As the servient property, Woodgrove, has to carry the natural water flow from Redlands Estate. It is also obliged by servitude to receive water from the municipal stormwater system and allow it to discharge into the canal. Woodgrove is subject to the terms and conditions in the original Deed of Grant dated 27 July 1855, in force when PADCA took transfer under Certificate of Consolidated Title T20859/94. One such condition is that '[a]ll … watercourses, authorised by the Corporation running over the land, shall remain free and uninterrupted . . .'.

[20] It is common cause that the developers of Redlands Estate altered the natural flow of water onto Woodgrove. However, the design

---

[2] *Digest* above fn 1 at 39.3.1.; *Williams v Harris* 1998 (3) SA 970 (SCA) at 981E-F; *Bishop v Humphries* 1919 WLD 13 at 17-18.
[3] *Digest* 39.3.2.; Voet 39.3.2.; *Pappalardo v Hau* 2010 (2) SA 451 (SCA) paras 11-12.
[4] *New Heriot Gold Mining Company Ltd v Union Government (Minister of Railways and Harbours)* 1916 AD 414 at 421.
[5] *Barklie v Bridle* 1956 (2) SA 103 (SR) at 109-110.

of the stormwater disposal system on Redlands Estate is such that its water is collected within the estate before being diverted into the municipal system; some surplus run-off from the Redlands Estate, the precise amount of which is uncertain, combines with other water run-off from Old Howick Road, to be diverted into the municipal system. It then passes into the 600 mm municipal pipe over the two private properties before discharging into the canal on Woodgrove.

[21] Manifestly, from the design of the system, the respondents do not discharge any water directly onto Woodgrove. They are also not the sole source of water discharging directly off George McFarlane Lane and down PADCA's concrete driveway. Furthermore, the municipality approved the stormwater system within Redlands Estate during construction; the design plan met guidelines in place at the time for stormwater disposal. Consequently, the respondents were lawfully authorised to dispose of their stormwater into the municipal system. Lastly, in regard to the *actio,* the developers of Woodgrove knew the design plan; not only did the developers of both properties use the same firm of engineers, but also the same guidelines were then in force and applied to both properties. In anticipation of receiving increased volumes of water from its own and higher properties PADCA built its canal during the construction of Woodgrove.

[22] Contrary to the advice it received, PADCA did not line its canal with concrete. It built the canal in place of the natural watercourse when construction of Woodgrove was underway, in order to carry the water discharged by the municipal stormwater system as well as stormwater from within Woodgrove itself. So, even if water from Redlands Estate did not discharge into this canal, scour damage to the canal by other water

is inevitable. However, whether damages arise in these circumstances is not a question we have to answer. For now, PADCA fails to establish a clear right entitling it to an interdict on the basis of the *actio.*

[23] As to whether contiguity was a prerequisite for invoking the *actio*, in the cases to which the trial court was referred – *Bishop v Humphries*, *Barklie v Bridle*, *Pappalardo v Hau* – the properties shared common boundaries. However, in *De Villiers v Galloway* 1943 AD 439 at 444 this court held that alien water may be discharged onto neighbouring property if legislation or agreement allows. By 'alien' the court was referring to water not from an adjoining land. Roman Law and Roman Dutch Law cite examples in which contiguity is not a requirement but that some degree of proximity should exist.[6] Whether contiguity is a requirement is not relevant in the circumstances of this case in which the municipality has directed how the respondents should dispose of their water.

[24] As for PADCA's alternative claim based on the law of neighbours, this Court held in *Regal v African Superslate (Pty) Ltd* 1963 (1) 103 (A) (per Steyn CJ) that our common law must be investigated fully before considering the English law of nuisance, which has not replaced our common law. And, importantly, that liability flowed from our conventional principles of delict. In that case the appellant sought to prevent slate waste being carried down the river from the respondent's farm and being deposited across his land. Even if the *actio* did not apply, the developers of Redlands Estate had a duty to comply with the municipality's conditions. In fulfilling this duty they acted reasonably. If the municipality required the respondents to do more, either during or

[6] Voet 39.3.2.; *Digest* 39.3.6.

after construction, it would have directed them accordingly. After all, the municipality is the authority responsible and accountable publicly for assessing and managing the water disposal needs of the area. In these circumstances, PADCA cannot justifiably rely on neighbour law to hold the respondents liable.

[25] Regarding the exemptions under the Act, the drainage system that Redlands installed falls within the broad definition of 'building' under the Act in that it is a system 'for the provision of a water supply, drainage, sewerage, stormwater disposal . . . in respect of the building.'[7] As such, the municipality had to and did approve plans for it. PADCA does not suggest that the municipality's conditions are unreasonable or even negligent. If they were, then PADCA might have proceeded against the municipality, which is not cited in this case.[8]

[26] However, the owner of a building is not exempted

'from the duty to take care and to ensure that such building be designed, erected, completed . . . in accordance with the provisions of this Act and any other applicable law.'[9]

On 1 October 2008 amended National Building Regulations came into operation.[10] Regulation R 1(3) enabled the municipality to call on an owner to submit for approval plans and particulars of a complete stormwater control and disposal installation for a site in certain circumstances. These requirements are stricter in that plans have to be approved first and the evidence was that in the present day the municipality would require a greater degree of on-site attenuation of

[7] *Halliwell v Johannesburg Municipality* 1912 AD 659 at 669; *New Heriot Gold Mining Company Ltd v Union Government (Minister of Railways and Harbours)* 1916 AD 420 at 421.
[8] *New Heriot Gold Mining Co Ltd v Union Government (Minister of Railways and Harbours)* 1916 AD 414.
[9] Section 23(b) of the Act.
[10] National Building Regulations GN R574, *GG* 8895, 30 May 2008.

stormwater from a development such as Redlands Estate. Previously, and when Redlands Estate was being developed the municipality accepted as-built plans. Seemingly the need for municipalities to be more interventionist before rather than after building starts is being recognised.

[27] PADCA has not pointed to any provisions of the Act that the respondents have violated. It relies on the common law but has established no duty arising under the common law. Nor has it proven that any rule of the common law has been breached. The appeal is dismissed with costs, including the costs of two counsel.

D Pillay
ACTING JUDGE OF APPEAL

Wallis JA (concurring)

[28] I have read the judgment of Pillay AJA and agree with her that this appeal should be dismissed for the simple reason that, whether PADCA's case is expressed as lying under the Roman Law *actio aquae pluviae arcendae*, or under the more modern aspect of our law of delict characterised as neighbour law, it must fail for the same reason. The reason is that the collection and discharge of water from the Redlands estate into the municipal storm water system, from whence it discharges into the stormwater canal across PADCA's property, Woodgrove, was required by the terms upon which the construction of the Redlands development was approved by the Umsunduzi Municipality. In those circumstances it is not open to PADCA to select one of the many sources from which that stormwater derives and demand that it attenuate the water emanating from its property, in order to relieve PADCA of the consequences of the municipality being entitled to discharge stormwater

across Woodgrove.

[29] In view of that simple approach it is unnecessary to formulate and express final views on several issues that arise from the manner in which PADCA has formulated its case. However, I think it desirable, lest there be any misunderstanding, to highlight certain matters not dealt with in my colleague's judgment.

[30] Two of those issues arise in relation to the availability of the *actio aquae pluviae arcendae* in our modern law. Firstly, like Hurt AJA in *Pappalardo v Hau*,[11] I have considerable doubts as to its availability in relation to damage to urban, as opposed to rural, properties. In addition to the Roman Dutch authorities to which he referred, my reading of the relevant passages in the *Digest* suggests that it is a remedy that is available to the owners of rural properties. Thus for example in D 39.3.17 it is said that:

'Again it must be understood that this action is not available except when it is a field that is damaged by rainwater. When it is a building or a town that is damaged, this action is not valid, but an action can be brought to deny the right of eavesdrip or the flow of water onto one's property.'

Further in D 39.3.19 it is said:

'Cassius also writes that if water deriving from a town building damages either a field or a rural building, it is an action on a flow of water and eavesdrip that should be brought.'[12]

[31] That passage is explicit in saying that the remedy available in

[11] *Pappalardo v Hau* [2009] ZASCA 160; 2010 (2) SA 451 (SCA) para 6.
[12] Mommsen, Krueger and Watson (eds) *The Digest of Justinian* Vol 3 p 396. Voet 39.3.2 (Gane's translation, Vol 6 p 37) is to like effect in saying that: 'The action is available to the owner of a tenement when rain water … does harm on the farm of a neighbor as the result of an artificial work.'

relation to urban properties is not the *actio aquae pluviae arcendae*. There is academic writing that supports this conclusion,[13] as well as Roman Dutch authority. Voet 39.3.4 says:

'*Action does not cover urban tenement.* – The action falls away furthermore if water is hurtful not to a rural but to an urban tenement, whether it flows down from an urban or a rural tenement, inasmuch as in that case suit would rather have to be brought by the action for denying a liability to receive drippings or a stream of rain water.'

[32] If the distinction between urban and rural tenements is still part of our law it raises the question of what is an urban and what is a rural property.[14] That cannot be answered solely by reference to municipal demarcation in an environment very different from that in which the *actio* evolved. Beyond saying that rural properties would not be confined to those in a local authority area, and that the type of urban environment where Redlands and Woodgrove are situated would probably not be regarded as rural for the purposes of the *actio*, it is undesirable to essay any definition. All of these questions remain open and nothing in my colleague's judgment lends support to the notion that the *actio* is available in an urban environment or that, if under Roman and Roman Dutch law it was not, we should develop the common law to make it available.

[33] The second issue is the one on which PADCA's case was dismissed in the high court, namely, the perceived need for contiguity

---

[13] Paul du Plessis 'Die gelding van die *actio aquae pluviae arcendae* in die Suid-Afrikaanse Reg' 2000 *Fundamina* 77 at 79-80. The view of William Smith, William Wayte and G E Marindin *A Dictionary of Greek and Roman Antiquities* (1890) sv *aquae pluviae arcendae actio* was that the action only lay for damage to land and not for damage to a town or building. The authors also say that it was a defence to the *actio* if the act was done with the permission of a public authority. *Redeleinghuis v Bazzoni* 1976 (1) SA 110 (T) held that the distinction between urban and rural tenements remained part of our law.

[14] *Pappalardo v Hau* para 6, fn 7. *Benoni Town Council v Meyer* 1961 (3) SA 316 (W) at 318D-H.

between the higher and lower properties. This was not fully argued but counsel's attention was drawn to the decision of this Court in *Cape Town Council v Benning*,[15] where Solomon JA gave a full exposition of the actio, without suggesting that contiguity was a necessary element thereof. There are two passages in the Digest that suggest that contiguity may not be essential in all instances,[16] although the majority of texts are formulated in terms that deal with contiguous properties. If contiguity is not essential, there is the difficult question of deciding when two properties are too remote from one another for any obligation to rest on the upper property to safeguard against increasing the discharge of water onto the lower property, especially if that discharge occurs through the municipal storm water system. Counsel was unable to suggest a solution when this problem was posed and we need not determine it. The problem disappears if contiguity is required. As matters stand it cannot be said with confidence that contiguity is not a requirement or, if it is not, what the relevant requirement of proximity would be.[17] That must await determination on another occasion.

[34] Turning to the claim based on neighbour law this was not fully developed during the trial, perhaps because in opening the case counsel for PADCA nailed his colours firmly to the mast of the *actio*. According

[15] *Cape Town Council v Benning* 1917 AD 315 at 319-321.
[16] D 39.3.6 (Mommsen *et al* op cit p 399) records Ulpian as writing that:
'Sabinus says that if my neighbour next-but-one carries out some work and water from it flows down through my immediate neighbour's property and causes me damage, I can bring an action against the immediate neighbour or, leaving him out of it, against the neighbour next-but-one. This view is correct.'
D 39.3.18 attributes to Javolenus the following:
'If a piece of work which causes rainwater damage is carried out on public land, no action can be brought. But if the public land intervenes between the site of the work and that of the damage, an action will be possible.'
[17] A J van der Walt *The Law of Neighbours* (Juta, 2010) 240-241 suggests that for claims based on nuisance the properties must be situated close together, but not necessarily adjacent to one another.

to the leading judgment of *Regal v African Superslate*[18] the criteria of reasonableness in the use of one's property determines what usage a neighbour must endure and what need not be tolerated.[19] The evidence showed that the storm water system on Redlands was designed in accordance with the then existing requirements of the local authority in order to collect storm water from Redlands and discharge it into the municipal storm water system. No reason was advanced for saying that this was unreasonable.

[35] That conclusion obviates any need to consider whether the criterion of negligence alone suffices for conduct by a neighbour to be unlawful, or whether a legal duty not to cause harm by negligence is required and, if so, when that duty arises and the extent thereof.[20] Any person discharging storm water into a municipal storm water drainage system must be aware of the possibility that the storm water from their property will be concentrated with other water and may be discharged by the municipality in a way that causes harm to others. But there is something illogical in permitting the lower owner who suffers loss as a result to recover from the upper owner, when they could only recover against the municipality if the latter was negligent in constructing the municipal storm water drainage system.[21] A different view would mean that the residents of the municipality could be held liable for discharging storm water into the municipal storm water system, even though the municipality could not. In those circumstances, there is much to be said

[18] *Regal v African Superslate (Pty) Ltd* 1965 (1) SA 102 (A). At 109F-H Steyn CJ specifically refers to the need for unlawfulness.
[19] See also *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* [2007] ZASCA 167; 2008 (3) SA 134 (SCA) paras 15 to 17 and 21.
[20] See J R L Milton 'The law of neighbours in South Africa' 1969 *Acta Juridica* 123 to 269 and the discussion of this topic and the authorities referred to by Van der Walt, *op cit*, Chapter 1.
[21] *Halliwell v Johannesburg Municipality* 1912 AD 659 at 669; *New Heriot Gold Mining Company Ltd v Union Government (Minister of Railways and Harbours)* 1916 AD 420 at 421.

for the principle that negligence alone is insufficient to support an action based on neighbour law and an element of unlawfulness is required.

[36] The duty element plays a central role in identifying the circumstances in which a party will be liable for negligently causing harm to another.[22] The reasonableness of imposing liability in a particular set of circumstances – something different from the reasonableness of conduct when determining negligence – is central to this enquiry.[23] Sometimes, as with the conduct of a chicken hatchery adjacent to a residential property,[24] or the activities of a golf club in relation to its neighbours,[25] both the existence of the duty and its extent will be reasonably obvious and the focus will fall on questions of negligence. In others it will be more complex, especially where the activity in question is one regulated by law. That is the present situation. There was no endeavour to explore the duty element in the present case and it cannot be assumed that Redlands Estate owed any duty to Woodgrove to avoid causing it damage by the negligent discharge of stormwater from its property.

[37] The last point that needs to be made is that the trial judge relied upon various judgments, starting with that of Gregorowski J in *Bishop v Humphries*,[26] and the passage in which the following was said about the implications of claims such as these in a developed urban environment:

'The fact is that when land is sold in small building plots, a state of things is created and contemplated which puts an end to a large extent to the natural servitude which

---

[22] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A; *Telematrix (Pty) Ltdt/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) par 14.

[23] *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd* 2004 (3) SA 138 (SCA) para 11. See generally F D J Brand 'Aspects of Wrongfulness: A Series of Lectures' (2014) 25 *Stellenbosch Law Review* 451.

[24] *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D).

[25] *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* [2007] ZASCA 167; 2008 (3) SA 134 (SCA).

[26] *Bishop v Humphries* 1919 WLD 13 at 17 to 18. The others were *Barklie v Bridle* 1956 (2) SA 103 (SR) at 108 to109 and *Pappalardo v Hau, supra.* To these can be added *Green v Borstel* 1940 (2) P.H. M89 (W)

previously existed as regards the water which falls on the plots. Each owner puts up a building which covers a substantial part of the plot. He places an impervious surface over the naturally porous surface of the soil. He accumulates the water thereon. He alters the natural surface of the rest of the area of his plot by paving it or allocating temporary structures thereon or digging it up, and thereby annihilates the natural arrangement of the soil. The rainwater can no longer flow as it used to flow.'

[38] The claim by the upper owner to discharge water concentrated on that property by the building activities on it was dismissed because:

'The Applicant has altered all the old conditions existing on the stand while it was virgin soil and in a state of nature and it is quite impossible for him to throw a burden on the adjoining stand which is based on the assumption that his stand has preserved rights which he himself has put an end to by his own constructions on the property.'

[39] While the point pertinently made in these passages that urban development must be a significant factor in dealing with claims such as those arising in the cases to which the judge referred is clearly correct, it must be borne in mind that all those cases[27] involved the owner of the upper property seeking to compel the owner of the lower property to accept a discharge of water that had been concentrated by the development of the upper property. The present case is the converse of that, in that it is the owner of the lower property objecting to the owner of the upper property concentrating stormwater on its property so that there is an increased discharge of water across the lower property. This difference was not recognised. If anything, the statement by Gregorowski J supported rather than undermined PADCA's case.

M J D WALLIS

[27] *Williams v Harris* 1998 (3) SA 907 (SCA) which the judge distinguished involved an objection by the lower owner to the discharge of stormwater from the upper property.

JUDGE OF APPEAL

APPEARANCES

For Appellant:	A J Dickson SC
Instructed by:	J Leslie Smith & Company Inc, Pietermaritzburg
	McIntyre Van Der Post Attorneys, Bloemfontein
For Respondent:	A J Troskie SC and P J Wallis
Instructed by:	Venns Attorneys, Pietermaritzburg
	Webbers Attorneys, Bloemfontein