

**Cape Shires Properties (Pty) Ltd and Another v National Employers General Insurance Co Ltd
1976 (4) SA 747 (C)**

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Citation	1976 (4) SA 747 (C)
Court	Cape Provincial Division
Judge	Watermeyer J
Heard	August 27, 1976; August 31, 1976; September 1, 1976
Judgment	September 9, 1976

Flynote : Sleutelwoorde [G](#)

Insurance — Multi-peril insurance policy — Policy covering damage caused by a 'storm' — Damage caused by a 'landslip' excluded — Retaining wall on a mountain slope collapsing after a heavy rainfall and damaging property on lower premises — Such damage caused by a 'landslip' and not [H](#) a 'storm'.

Headnote : Kopnota

A multi-peril insurance policy undertook to indemnify the insured in respect of destruction of or damage to a building caused by 'storm, tempest, flood, excluding destruction or damage by subsidence or landslip'. So far as contents and loss of profits were concerned, the policy covered destruction or damage caused by 'storm, wind, water, hail or snow', but not if caused by 'subsidence or landslip'. The insured claimed in respect of damage to the building and contents caused by the collapse of two retaining walls on the boundary between such building and the property immediately above it on a mountain slope. One

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wall was poorly designed, had an inadequate footing and insufficient weepholes' to drain off water with the result that after a strong wind accompanied by a heavy rainfall the walls had collapsed and caused the damage,

Held, that the damage had been caused by a landslip despite the retaining wall which had been put there in an attempt to [A](#) prevent it. Judgment accordingly for defendant with costs.

Case Information

Action for damages. The facts appear from the reasons for judgment.

R. G. Comrie, for the plaintiffs.

W. G. Burger, for the defendant.

Cur. adv. vult. [B](#)

Postea (September 9).

Judgment

Watermeyer, J.:

In view of the fact that I think this matter can be decided on a narrow issue there is no need for me to [C](#) refer to the pleadings in any detail.

First plaintiff is the owner of Nos. 35 and 37 Gatesville Road, Kalk Bay, and second plaintiff is the proprietor of a nursing home business carried on there. Second plaintiff is also the owner of the contents of the buildings. The question in issue is whether the plaintiffs are entitled to be compensated for certain damage and losses suffered by them in terms of a [D](#) multi-peril insurance policy issued by the defendant.

The policy was made out in the name of Susan Chandler Sanatorium (Pty.) Ltd. and one of the issues is whether the plaintiffs are entitled to have that policy rectified so as to show the plaintiffs as the insured, and not Susan Chandler [E](#) Sanatorium (Pty.) Ltd. In as much as I am of the view that the damage and losses sustained did not fall under the risks insured against, it is not necessary for me to express any opinion as to whether or not the plaintiffs would have been entitled to rectification of the policy.

On 11 June 1974 the building situated on No. 37 Gatesville Road and its contents were damaged in circumstances which I shall [F](#) detail later and, in consequence thereof, second plaintiff suffered loss of profit from the nursing home business. First plaintiff was also compelled to incur certain costs in the removal of debris from the site.

As I have already said, the policy is a multi-peril policy and in so far as the damage to the building is concerned the material portion of the relevant clause reads as follows:

[G](#) 'The insurers will indemnify the insured by payment... following destruction of or damage to the property... caused by... storm, tempest, flood, excluding destruction or damage by subsidence or landslip'.

So far as the contents and loss of profits are concerned the relevant clause reads:

'The insurers will indemnify the insured... in the event of [H](#) destruction of or damage to the property... caused by storm, wind, water, hail or snow. This extension does not cover destruction or damage caused... by subsidence or landslip.'

Plaintiffs contend that the damage to the building and contents was caused by storm, flood or water, and not by landslip. Defendant's contention is that the damage was not caused by storm, flood or water, and in any event, even if it was, it was caused by landslip.

The facts giving rise to the damage are virtually common cause. No. 37 Gatesville Road consists of a double-storeyed building and it is situated on

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the mountain slope at Kalk Bay. Immediately above it is a house belonging to one Allen. When the building on No. 37 was erected the site must have been levelled and the earth face at the back, which is more or less on the boundary line between No. 37 and the Allen property, was supported by a vertical masoned **A** sandstone wall some 3,35 metres high. In front of the sandstone wall a flower box was built with a retaining wall 1,4 metres high. At a later date a concrete wall some 1,3 metres high was built above the sandstone wall with a concrete footing let in behind the top of the sandstone wall. The space behind the concrete wall was then filled with earth, presumably with the object of making more level the lawn and/or garden in front of the Allen house. Exactly when these walls were built is not **B** clear but they were certainly there in 1964. On the four days ending at 8 a.m. on 9, 10, 11 and 12 June rain totalling 101 millimetres was measured in the adjoining Fish Hoek valley which, according to the evidence, is a heavy rainfall. How much rain fell at Kalk Bay was not established but the probabilities are that there was a substantial rainfall there too extending **C** over this period. At about midday on 11 June the concrete and **D** sandstone walls collapsed, the concrete wall, which was about 13 metres long, breaking into three sections. There was a difference of opinion between the engineers as to whether the sandstone wall or the concrete wall broke first, but the whole cliffside collapsed bringing down earth and boulders which came to rest against the back wall of first plaintiff's building. The centre section of the concrete wall tipped forward and tumbled down the slope striking the back wall and causing most of the damage to the building.

I think there can be little doubt that what happened was that the persistent rain over four consecutive days percolated into the soil behind the walls thereby increasing its weight and **E** reducing its cohesion and that the walls were of insufficient strength to retain it.

Both engineers were agreed that the concrete wall was poorly designed, had an inadequate footing and insufficient weepholes to drain off the water.

Two questions arise for decision, firstly was the damage caused by storm, flood or water, and secondly, if so, was it caused by **F** landslip. Mr. *Comrie*, who appeared for the plaintiffs, referred the Court to the definition of the word 'storm' in the *Shorter Oxford Dictionary*, namely:

'A violent disturbance of the atmosphere, manifested by high winds, often accompanied by heavy falls of rain, hail, or snow, by thunder and lightning... Hence, sometimes applied to a heavy fall of rain, hail or snow, or to a violent outbreak of thunder and lightning, unaccompanied by strong wind.'

There was some evidence that there had been a strong wind on 10 **G** June and, although he did not contend that the wind as such had played any part in causing the damage, Mr. *Comrie* submitted that this accompanied by heavy rain constituted a storm and that this storm, or alternatively the rain by itself, which he contended constituted a flood, or water was the effective cause of the damage. Whilst it is true that without the rainwater **H** there would probably have been no collapse I have some doubt as to whether it would be correct to say that this damage was caused by storm, flood or water within the meaning of the policy. However, it is not necessary to decide this point because in my view plaintiffs must fail on the alternative issue of whether or not the damage was caused by landslip. 'Landslip' is defined in the *Oxford Dictionary*, as

'the sliding down of a mass of land on a mountain or cliff side; land which has so fallen'.

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The present case bears a strong resemblance to the case of *Oddy v Phoenix Assurance Co. Ltd.*, (1966) 1 Lloyd's L.L.R. 134. In that case the plaintiff's bungalow was damaged by the collapse of a retaining wall about 12 feet high after heavy rain. The **A** policy covered damage caused by storm or tempest or flood but excluding damage caused by subsidence or landslip. As in the present case the retaining wall was insufficient in design and had no weepholes. After heavy rain on the preceding two days it collapsed because of pressure from water building up behind it over a long period. VEALE, J., decided that the damage was not caused by storm, tempest or flood, but he then went on to say:

B 'Had it been necessary to make any finding on the point I would have held that this fall was a landslip. I do not think it would be right to describe it as a subsidence. Landslip again is something which I think should be approached in a broad common-sense way much as a jury would approach it. Landslip is a small land-slide. One can perhaps define a landslip in different ways but the accepted definition was 'A rapid downward movement under the influence of gravity of a **C** mass of rock or earth on a slope'. This was put to Mr. Brew and I think he agreed that that is exactly what happened here, because the land was held temporarily in position by the retaining wall, and it was stopping it from slipping; when the pressure built up it pushed over the wall and there was nothing to stop the land slipping and it slipped and it was, in my view, a landslip.'

Although these remarks were *obiter* this reasoning appears to me **D** to be applicable to the present case.

Mr. *Comrie* argued that the word 'landslip' as used in the policy referred only to a sliding, or slipping, of land in its natural state. He submitted that if the natural contours of the land had been interfered with by man either by removing land at the bottom of the slope or by adding soil at the top any movement of this land would no longer constitute a landslip. I **E** can see no good ground for drawing any such distinction. If a cliff face on the upper side of a road created in the building of the road were to slump after heavy rain I think that would be a landslip, and this would be so even if the roadbuilding authorities had attempted to support it by means of an inadequate retaining wall. Nor do I think that the position **F** would be different if additional soil were piled on the natural soil behind the retaining wall.

Mr. *Comrie* also sought to ascribe the cause of the damage in the present case to the failure of the retaining wall, but in my view this is saying no more than that the damage was caused by a landslip despite the retaining wall that was put there in an attempt to prevent it.

In my opinion the damage in the present case was caused by a **G** landslip and this precludes the plaintiffs from recovering under any of their heads of claim.

There will accordingly be judgment for the defendant with costs, such costs to include the qualifying expenses of Mr. Van der Meulen.

Plaintiffs' Attorneys: *Fuller, Moore & Son*.

Defendant's **H** Attorneys: *Gelb, Gelb, Simon & Shapiro*.

