

DP

IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 2473/2016

In the matter between:

AMATHOLE FORESTRY COMPANY (PTY) LTD FIRST PLAINTIFF

C J RANCE (PTY) LTD SECOND PLAINTIFF

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM FIRST DEFENDANT

NGQIKA TRADITIONAL COMMUNITY SECOND DEFENDANT

NGQIKA TRADITIONAL COUNCIL THIRD DEFENDANT

IINKOSANA MATI MORGAN MNCEDISI N.O. FOURTH DEFENDANT

IINKOSANA ZUKISA MGUDLE N.O. FIFTH DEFENDANT

CHIEF GAIKA N.O. SIXTH DEFENDANT

CIVIL 3  
IN THE HIGH COURT OF SOUTH AFRICA  
27 MAY 2022  
EASTERN CAPE DIVISION  
GRAHAMSTOWN

RULE 16A NOTICE

TAKE NOTICE that an important constitutional issue arises in this matter, a trial, which can be stated as follows:

- 1. The Amathole Forestry Company ("AFC") owns amongst others the Evelyn Valley timber plantation in the Eastern Cape, near Stutterheim. CJ Rance (Pty) Ltd ("CJR") owns a sawmill that is supplied with timber exclusively from the

AFC group of plantations, including from the Evelyn Valley plantation. They are plaintiffs in a civil trial in the Grahamstown High Court suing the state for damages suffered in consequence of a veld and forest fire that destroyed part of the Evelyn Valley plantation. The joint claim by AFC and CJR is approximately R21.6 million.

2. The facts of this case are not unfamiliar in as much as we have historically seen many cases along similar lines before: a fire starts on state-owned land and spreads into the adjacent timber plantations causing extensive damage. In the current matter the state-owned land is occupied by a traditional community. The community starts the fire but cannot stop it from spreading. There are no proper fire-breaks, no proper fire-fighting equipment, and the members of the traditional community are hopelessly ill-equipped to do anything about it. The state and/or community also does not belong and contribute to the local fire protection association as they are obliged to do in terms of section 4(8) of the National Veld and Forest Fire Act, Act 101 of 1998. For its part the state, effectively an absent landlord, denies all liability. It's attitude in this case, as it has been in all of the others that have gone before, is that damage caused by a fire started by a traditional community is not its problem.
3. Cases like this one against the state do not succeed. Our common law has, until now, been unwilling to attach liability to the state in circumstances where the state is not the actual occupier. The consequences for both forestry

companies (like AFC) and sawmills (like CJR) of not being able to hold the state liable are devastating. The traditional communities are not in a financial position to compensate forestry companies and sawmills for their losses and the common law, as it currently stands, does not go far enough to allow them to recover their losses from the state. This puts forestry companies and sawmills in a very precarious position.

4. AFC and CJR seek to develop the common law of delict governing state liability with a view to holding the state liable in circumstances where it owns land adjacent to a commercial timber plantation and sawmill but allows somebody else to occupy that land without educating them about the dangers of veld and forest fires and without equipping them to stop fires, once they have started, from spreading into the plantations. The part of the common law that requires development is the element of *wrongfulness* which, to date, shields the state from liability. (I was wondering whether we should in par 4 again refer to belonging to the local FPA, but decided against it, it that what we are asking for broadly speaking includes Government belonging to the local FPA – in general what we are asking Government to do is to do what they are supposed to do in terms of the common law and in statute?)
5. AFC and CJR believe that the time is ripe for our common law to develop to the point where the state can be held liable on the basis of certain omissions, even when it is an absent landlord. The notion of *wrongfulness*, constitutionally informed, requires this.

6. The legal argument that AFC and CJR intend advancing is based on the notion that all law, including the common law of delict, must conform to constitutional values. There are a number of constitutional provisions that feature in this proposition, starting with section 7(2) which requires that the state must “respect, protect, promote and fulfil the rights of the bill of rights”. The bill of rights itself contains (a) the right to the freedom and security of the person in section 12: this obliges the state to keep us all safe from harm including the threat to our lives posed by dangerous veld and forest fires; (b) the right to an environment that is protected for the benefit of present and future generations in section 24: this obliges the state to protect our environment from the destruction caused by dangerous and destructive veld and forest fires; and (c) the right to property in section 25: this obliges the government to protect private property including land, houses and businesses like commercial timber plantations and sawmills.
7. According to AFC and CJR, sections 12, 24 and 25 of the Constitution, when read with section 7(2), create compelling normative considerations that oblige the state to guard against the devastating effects of veld and forest fires, even when they allow others to occupy state land.
8. Potential *amici curiae* are invited to assist the court with deciding whether, and how, the common law should developed by advancing legal argument and by placing crucial evidence before the court to show the extent to which veld and forest fires threaten and/or violate these constitutional rights. Relevant will be,

for example, the actual *harm* to our broader economy on the one hand as well as narrower harm caused specifically to both industries on the other having regard to how many veld and forest fires ravage our country, how many thousands of hectares of commercial timber plantations are destroyed, how many human lives are lost each year to veld and forest fires, how many jobs are lost, the enormous loss to the economy in timber and wood products, etc. This feeds into the need to promote and protect the constitutional rights in sections 12, 24 and 25.

**TAKE NOTICE FURTHER** that any person who believes that they may have an interest in the constitutional issue raised in this application may, with the written consent of all the parties to the proceedings, be admitted as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.



**TAKE NOTICE FURTHER** that the written consent contemplated above shall, within 5 days of it having been obtained, be lodged with the registrar of this court. The *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument. Should the interested party be unable to obtain the written consent then he or she may, apply to this court to be admitted as an *amicus curiae* in the proceedings.

**TAKE NOTICE FURTHER** that where an interested party seeks to apply to this court as *amicus curiae*, such application must take the form contemplated in rule 16A and, in particular, such interested person shall:

- a) briefly describe the interest of the *amicus curiae* in the proceedings; and
- b) clearly and succinctly set out the submissions which would be advanced by the *amicus curiae* and the relevance of those submissions to these proceedings as well as his or her reasons for believing that those submissions will be of assistance to the court and that they are different from those which the existing parties intend making.

**TAKE NOTICE FURTHER** that any party wishing to be admitted as an *amicus curiae*, and making application to the court to be so admitted, shall serve a copy of that application on all parties to these proceedings. Any party to these proceedings shall be entitled to oppose such application by filing an answering affidavit within 5 days of the service of the application upon them.

**SIGNED** at GRAHAMSTOWN on this 26<sup>TH</sup> day of MAY 2022.

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**KLAGSBRUN EDELSTEIN BOSMAN DU  
PLESSIS INC.**

Plaintiffs' Attorney  
220 Lange Street  
Nieuw Muckleneuk  
PRETORIA  
Tel: 012 452 8900  
e-mail: malandi@kebd.co.za  
Ref: MJP/1421/J1000004/mp

c/o Wheeldon Rushmere & Cole Inc.  
Matthew Fosi Chambers  
119 High Street  
Grahamstown  
Ref: MVDV/SA/Farenchia/S19239

TO: THE REGISTRAR OF THE HIGH COURT  
MAKHANDA

AND TO: NN DULLABH & CO  
Attorney for Defendants  
5 Bertram Street  
Grahamstown  
Ref: Mr Wolmarans

