IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
12/10/2011
DATE SIGNATURE

Case No: 9853/08
Date heard: 03/10/2011
Date of judgment: 14/10/2011

In the matter between:

Komatieland Forests (Pty) Ltd	PLAINTIFF
and	
Gabriel Daniel Roux	FIRST DEFENDANT
Johan Roux	SECOND DEFENDANT
Tavlands (Pty) Ltd	THIRD DEFENDANT
Tavistock Colliers (Pty) Ltd	FOURTH DEFENDANT
Tavistock Colliers Ltd	FIFTH DEFENDANT
and	
Santam	FIRST THIRD PARTY
Tavlands (Pty) Ltd	SECOND THIRD PARTY

JUDGMENT

DU PLESSIS J:

The plaintiff conducts eucalyptus and fir plantations on the farm Gemsbokfontein near Belfast in the Mpumalanga Province. The plantations are collectively known as the Pan plantation. The third defendant occupies and farms on a portion of the farm Patatafonteint which is adjacent to Gemsbokfontein. It is convenient to refer to the parties' respective farms as "Pan" and "Tavlands".

On 11 September 2005 a substantial portion of the plaintiff's plantations were destroyed in a fire. The plaintiff contends that by reason of the third defendant's unlawful and negligent conduct, the fire started on and/or spread from the third defendant's Tavlands-farm. In this action, the plaintiff claims damages from the third defendant.

I must point out that the plaintiff initially claimed damages from five defendants. The issues with the other four defendants have been sorted out and the only remaining claim is that against the third defendant. I shall refer to the third defendant as 'the defendant".

Returning to the plaintiff's claim, the defendant admitted in tis plea that the fire was a "veldfire" as envisaged in the **National Veld and Forest Fire Act, 101 of 1998** ("the Act"). Section 34 of the Act provides:

" **Presumption of negligence**.—(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which—

(a) the defendant caused; or

(b) started on or spread from land owned by the defendant,

> the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.
>
> (2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful."

It is common cause on the pleadings that the defendant is not a member of a fire protection association and the proviso to section 34(1) therefore does not apply in this case. At the relevant time, the defendant admittedly was in occupation and control of the Tavlands-farm and it was common cause during the proceedings that it was "an owner"[1] for purposes of the Act.

As to the defendant's liability for the plaintiff's alleged damages, the effect of what I have said in the previous paragraph is that the plaintiff had to prove that the fire started on or spread from Tavlands. While the plaintiff had the onus of proving wrongfulness, the defendant had to prove that it was not negligent in relation to the fire.

By agreement it was ordered that the trial would proceed for the determination only of the question of the defendant's liability. The quantum of damages that the plaintiff suffered was postponed *sine die*. It is to the question of the defendant's liability that I turn.

Common cause and uncontested facts.

[1] See the definition in section 1 of the Act.

Relevant geography

It is common cause on the pleadings that the parties' respective farms are in an area where extensive agriculture and foresting are conducted. Veldfires are known frequently to occur in the dry windy months from July to September.

I annex hereto a map of the area that was handed in as an exhibit.[2] From the map it can be seen that Pan (Gemsbokfontein) lies to the west of Tavlands (Patatafontein) and the farms' common boundary is the eastern boundary of Pan and the western boundary of Tavlands.

Practically the entire Pan is under plantations. From the north, nearly to a point "I "on the map, there was at the time a maize field on Tavlands. It is the uncultivated portion to the south of the maize field on Tavlands that is relevant in this case. What follows now is a description of that southern part of Tavlands as it appears from the evidence. While not formally admitted, the defendant did not put the evidence in dispute.

The uncultivated land on the defendant's property consisted of Highveld grassland with eucalyptus natural regeneration. An organization called Working for Water had cut alien plants there and the slashed vegetation were at the time of the fire still lying where it had been cut.

The plaintiff had established along the entire boundary of Pan a firebreak, 30 meters wide. On its side of the boundary next to the uncultivated land, the defendant did not establish any firebreak at all. In sum, therefore, the common boundary separating the plaintiff's plantation from the uncultivated land on

[2] Volume 3:15A of the agreed bundle of documents.

Tavlands, there was a firebreak 30 meters wide on Pan and no firebreak on Tavlands. On Tavlands, about two meters from its western boundary, at the point "I" on the map, there grew a large blue gum tree.

Referring to the annexed map, it can be seen that blocks P and R of the plantations on Pan are situate on its northern part. Blocks Q and S are on the southern portion. A power line running across Pan separates blocks P and R on the one hand from blocks Q and S on the other. Block S was next to the uncultivated land on Tavlands with the 30 meter firebreak inbetween.

From south to north on Pan there is on the map a green strip. This represents a 300 meter wide strip of land comprising vleiland and, at the time, burnt uncultivated land. On the map it can be seen that this green strip separates some compartments of block S from the rest.

Point A on the map lies just to the north of the green strip. That is where the administration buildings on Pan are.

The land that borders Pan on the south[3] was referred to in evidence as Beestepan. It is not in issue that on the morning in question, 11 September 2005, a fire had started on Beestepan close to its common boundary with Pan.[4]

Fire fighting personnel and equipment

[3] Marked "Hartogshoop" in the map.
[4] The fire was approximately at point D on the map.

It is not in issue that at the relevant time, the defendant had neither personnel available on Tavlands nor, for practical purposes, did it have available fire fighting equipment.

The plaintiff had a fire fighting team stationed on Pan. The team consisted of Mr Mornè Kleynsmith and his father-in- law each of whom had a which is a vehicle carrying 500 litres of water and the means to use the water for fire fighting. These vehicles were in the evidence somewhat inaccurately called "bakkiesakkies" and I shall do the same. Each of the bakkiesakkies had, in addition to the foreman, two crew members. The bakkiesakkies were equipped with tools descriptively called fire beaters. In addition to the bakkiesakkies and its personnel, the team had a fire fighting truck carrying 10 000 litres of water and manned by a crew of six. The truck was equipped with fire beaters, rake hoes and knapsacks which are portable water spraying units. There also was a manned fire tower on Pan. Pan was administered as a satellite of the plaintiff's bigger plantation at Belfast, some 60 kilometres away by road. At Belfast the plaintiff had additional fire fighting equipment and personnel who could be used on Pan.

The evidence

For the plaintiff Mr Mornè Kleynsmith testified that, under the name N & M Bosboudienste, he and his father-in-law held a contract to perform fire protection duties on Pan. They were equipped as described above.

On 11 September 2005 at about 09h00 to 09h30 the fire tower informed the witness of a fire burning on Beestepan. The team went there an put the fire out. While they were still there, Kleynsmith received a second call from the fire tower informing him of another fire burning on Tavlands. Leaving his father-in-law to ensure that the fire on Beestepan was completely dead, Kleynsmith drove along Pan's southern and eastern boundaries to where the new fire was. As he turned to proceed north along Pan's eastern boundary, Kleynsmith saw the fire on Tavlands. It had by then not spread onto Pan. The witness saw the fire going into the large blue gum tree on Tavlands's boundary. From there he saw the fire spotting (jumping) from the tree, across the plaintiff's firebreak and into compartment S5 of the plantation.[5]

When he saw the fire spotting into the Pan plantation, Mr Kleynsmith called his father-in-law for assistance. As he neared the point where the fire had spotted into Pan, the witness saw the fire spotting also on other points. There was a strong wind blowing from the east and this drove the fire on into Pan. The team attacked the fire from its northern flank, but it kept on spreading. Eventually the fire spotted across the strip of vleiland into the compartments of block S to the west of the vleiland and into block Q. In the meantime they called the fire fighting team from Belfast for assistance but the fire spread further into block Q. The combined effort of the two teams managed to stop the fire from spreading across the power line into blocks P and R.s

Mr Kleynsmith was absolutely sure that the fire at Beestepan had been fully extinguished and that it did not spread into Pan. As to the spotting across

[5] This happened at point I on the map.

the 300 meter wide strip of vleiland, the witness said that in his experience he had seen fires spotting over distances of up to two kilometres.

The witness confirmed that he knew about the slashed vegetation on Tavlands and that he had not done anything to remove it. He explained that he could not do so as the slashes were on the defendant's property and he had no right to go there. At some stage before the fire he spoke to Mr Meiring, the person in charge of the defendant's operations on Tavlands. Kleynsmith confronted Meiring with the defendant's failure to take precautionary steps against a veldfire but Meiring was uncooperative.

Mr Michael Walker is, and was at the time of the fire, in the plaintiff's employ as a harvesting forester. He testified that he was not on duty on the day of the fire. He was called at home and told of the fire. He proceeded to Pan, a trip of about 60km by road, with his 4X4 vehicle equipped with a 500 litre bakkiesakkie.

Mr Walker drove past the spot where the fire on Beestepan had been. That fire, the witness said, had then been extinguished and was safe. He was sure that fire did not spread onto Pan.

The witness proceeded towards the administrative block on Pan. It was about 11h00. By then the fire was burning intensely. A strong wind was blowing from east to west.[6] The entire block S to the east of the vleiland was on fire as

[6] With reference to data electronically captured, the witness said that between 2h00 and 15h00, the windspeed increased from 12,9kph to 19,3kph (4:42)

were parts of the plantation to the west of the vleiland. The fire had also spotted at compartment Q2 and was burning in the northern part of block Q.

Walker met Kleynsmith and his father-in-law at the admin block. They decided to attack the fire from the power line in an effort at least to save blocks P and R. Ultimately, they managed to save the entire blocks P and R and also compartments Q6 to 10 in the north western corner of block Q.

An inspection after the fire convinced Mr Walker that it had started on and spread from Tavlands.s

Mr Walker conceded that the plaintiff had known about the slashed vegetation on Tavlands for about a month and had done nothing about it.

The witness was cross-examined about the adequacy of the plaintiff's fire protection plan. There is on the evidence no basis for holding that the plan was inadequate or that it was not adhered to in relation to the fire in question.

At the time of the fire Mr GJ le Roux was the manager of the Belfast plantation. With reference to correspondence, he testified that he had for a long time before the fire been attempting to secure the defendant's cooperation with a view to establishing a joint fire protection plan. He also tried to get the defendant so far as to establish firebreaks on Tavlands. His efforts came to nought. From the correspondence it is evident that Mr Le Roux wanted the defendant to make on Tavlands a 100-meter-wide strip where the vegetation was cut down. This, Mr Le Roux explained, would have reduced the amount of flammable material close to the boundary and it would in addition have served as a strip from where a counter burn could have been started.

Mr Le Roux was the author of the plaintiff's then current fire protection plan. He was cross-examined about the content of the plan but, save for what follows, nothing of note came forth. Mr Le Roux conceded that in terms of the fire plan the fire on Beestepan should not have been left unattended until he had certified it to be safe. He did not so certify it; he was not present on the day of the fire. Mr Le Roux said that in view thereof that Walker had seen the Beestepan fire and was satisfied that it was safe, he would have certified it as safe on the strength of Walker's opinion.

The plaintiff called Mr BJ Bothma as an expert witness in relation to fire fighting and sin relation to establishing the cause and nature of a veldfire after the event. The witness confirmed the contents of his expert report filed under the court rules.

From the report it is evident that the witness regarded the plaintiff's fire plan and the equipment and personnel it had available as adequate. As for the defendant, Mr Bothma is of the view that it should reasonably have established along its boundary a firebreak of between three and five meters wide. Based on his inspection of the properties after the fire and the evidence before the court, Mr Bothma expressed the view that the defendant did not establish reasonable precautionary measures that could have been expected of it in the prevailing circumstances. Apart from its failure to established firebreaks, the defendant's failure to have personnel available to detect and extinguish veldfires was, according to the witness, unreasonable. He pointed out that a veldfire should be

attacked and put out within about 20 minutes after it had started. Failure to do that often leads to the fire becoming uncontrollable.

Based on his investigation and assessment after the fire, the witness expressed the opinion that the fire started on Tavlands. It remained a fire of low intensity while spreading over the uncultivated land on Tavlands. With reference to photographs Mr Bothma explained how one could see form scorch marks on the tree trunks where the flames were still very low. As it spread across Tavlands, the fire was still not intense and could have been put out with relative ease. At that stage it would not have been readily detectable from the plaintiff's fire tower as it would not have been producing sufficient smoke.

Mr Bothma had no doubt that the fire had started on Tavlands and had spread from there onto Pan. It ran through the uncultivated land with its slash up to the blue gum tree where it went into the tree and then spotted over into Pan.

The defendant closed its case without tendering any evidence.

Did the fire spread from Tavlands to Pan?

The evidence as a whole leaves no doubt that the fire started on Tavlands and spread into Pan via the blue gum tree. It was put to several of the plaintiff's witnesses that it was the fire on Beestepan that spread onto Pan. In this regard there is no basis for rejecting Kleynsmith and Walker's evidence that the fire on Beestepan was fully extinguished, safe and that the area had been doused with

water. Moreover, having regard to the wind direction, it is quite improbable that the fire on Beestepan could have spread northwards towards Pan.

Wrongfulness

If regard is had to the admitted conditions in the area during September 2005 the defendant had a legal duty to take reasonable precautions against fires starting on and spreading from its property. It was foreseeable that failure to maintain an adequate firebreak and failure to have personnel with fire fighting equipment available on Tavlands could lead to veldfires spreading onto Pan. In this regard the presence of the blue gum tree close to the boundary with Pan posed a particular and foreseeable threat if no steps were taken to ensure that a fire could not reach it. The defendant took no precautions at all. That was wrongful and it is unnecessary to consider what would have been reasonable. Taking no precautions at all was objectively seen unreasonable.

Negligence

I have found that the fire started on and spread from Tavlands onto Pan and that the defendant's failure to take any precautionary measures was wrongful. In view of these finding and for reasons already stated, the defendant had to prove that it was not negligent in relation to the veldfire.

In my view a reasonable person in the defendant's position would have established firebreaks of at least three to five meters wide. Such person would probably have removed the slash from the uncultivated land or he would at least have had personnel available to detect and extinguish fires in the uncultivated land. The defendant's failure to take any of these steps was negligent. The question is whether that negligence was causally linked to the fire spreading onto Pan.

The evidence shows that a veldfire could spot over distances of up to two kilometres. In the circumstances it could be argued that a firebreak of three to five meters would have made no difference. In this regard it must be borne in mind that the blue gum tree from which the fire spotted was two meters from the boundary. If the defendant had maintained an adequate firebreak there, there would have been no vegetation through which the fire could have crept up to the tree. In any event, a reasonable person in the defendant's position would either have cut the tree down or would have made a somewhat wider firebreak around the tree.

In addition, if the defendant had had a minimum of personnel with even rudimentary fire fighting equipment available, they would probably have detected the fire in time to put it out within the crucial first 20 minutes.

It is concluded that the defendant has failed to prove that it was not negligent in relation to the fire.

The plaintiff's negligence

The defendant contends that the plaintiff was also negligent in relation to the fire. I shall deal with the alleged grounds of the plaintiff's negligence seriatim.

The defendant contends that the plaintiff was negligent in not providing "proper, sufficient firebreaks on its property". It will be recalled that the plaintiff maintained a 30 meter wide firebreak along its entire boundary. Defendant's counsel put it to the plaintiff's witnesses that in the knowledge that the defendant did not have any firebreak, the plaintiff should have maintained a wider firebreak. Mr Walker, Mr Le Roux and Bothma said that would have been unecomical. I agree. For it to have maintained a wider firebreak, the plaintiff would have sacrificed land presently under trees. I do not think that it is reasonable to expect of a forester to sacrifice land only because its neighbour is not acting reasonably. I do not think that the reasonable person in the plaintiff's position would have sacrificed land to maintain a firebreak wider than 30 meters.

The defendant's second contention is that the plaintiff was negligent by failing to "have personnel on the property, when it reasonably should have done so, as it was aware of the possibility of a fire occurring". The evidence shows that the plaintiff had a full fire fighting team with a lookout on duty on the property and it had further personnel and fire fighting equipment available at Belfast to assist. All the witnesses, including the expert Bothma, agreed that this was adequate. There is no evidential basis for upholding the defendant's contention.

It is further contended that the plaintiff unreasonably failed timeously to put out the fire that spread to its property. The evidence shows that the plaintiff had

adequate precautionary measures, fire fighting equipment and personnel available. The fire fighters immediately responded to the detection of the fire There is no evidential basis for holding that the watchman in the fire tower could have detected the fire earlier and that he did not immediately alert Kleynsmith. There is no evidential basis for holding that Kleynsmith could have reached the fire earlier. As for the manner in which the fire was attacked, there is on the evidence no basis for holding that it could have been done otherwise or more effectively.

Having regard to the bulk of the evidence, the defendant's contention that the plaintiff failed to keep proper fire fighting equipment and personnel on the property, must fail.

The last ground of negligence pleaded was, inelegantly phrased, that the plaintiff failed to ensure that fires on its property, once detected, would be controlled and extinguished. For reasons already given, this ground of negligence was not proved.

In argument Mr Riley for the defendant contended that, realising that the defendant had not taken any precautions against veldfires, the plaintiff should itself have taken further precautions. The plaintiff's failure to take such further precautions, counsel contended, was negligent. This ground of negligence was not pleaded and it is unnecessary to deal therewith. A few brief remarks will suffice.

Apart from widening the firebreak on Pan no steps that the plaintiff could have taken on Pan were suggested either in cross-examination or in argument. I

have already pointed out that a wider firebreak on Pan would have been uneconomical. The reasonable person in the plaintiff's position would not have made such an uneconomical sacrifice in order to address the defendant's unlawful failure to make firebreaks.s

There might be circumstances under which the law will allow a landowner to enter upon a neighbouring property in order to make firebreaks or cut trees there. As a general proposition, however, such conduct is unlawful. For the plaintiff in this case to have refrained from unlawful conduct cannot be regarded as negligent.

Mr Riley suggested that the plaintiff could have lain a charge against the defendant for its failure to take reasonable precautions. Mr Mills for the plaintiff correctly pointed out that under Chapter 8 of the Act fire protection officers, and those who may exercise their powers, have powers of search, seizure and arrest. They do not have the power to enter upon property and there to perform acts such as making firebreaks or cutting trees. In the circumstances a charge against the defendant may have led to a conviction and sentence under the Act. That does not mean that a charge would have led to a safer Tavlands or to prevention of the fire in question. Failure to lay a charge cannot be said to have been causally linked to the spread of the veldfire.

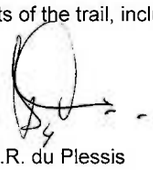
It follows that the plaintiff has proved that the defendant is solely liable for the damages caused by the veldfire. I have pointed out that the plaintiff had initially sued further defendants. The initial first and second defendants were the owners and occupiers of the farm adjoining Tavlands to the east. The plaintiff

has reached a settlement with those defendants. When the order separating the issues in this case was made, I also reserved for determination later the effect that this settlement has on the defendant's liability. On the evidence presented in this trial, the fire started on Tavlands and spread from there onto Pan. Therefore, there is no basis on the evidence before this court to hold that any other person is also liable for the plaintiff's proven damages.

The costs must follow the event. The plaintiff was represented by senior counsel. Having regard to the nature and extent of the damages that the plaintiff suffered, this was a reasonable precaution.

In the result the following order is made:

1. It is declared that the defendant is liable for the damage that the plaintiff suffered as a result of the veldfire that destroyed part of its Pan plantation on 11 September 2005.
2. The defendant is ordered to pay the plaintiff's costs of the trail, including the costs of senior counsel.



B.R. du Plessis

Judge of the High Court

On behalf of the Plaintiff:	MORAJANE DU PLESSIS INC HB Forum Building, 2nd Floor 13 Stamvrug Street Val De Grace Pretoria Adv. D. Mills SC
On behalf of the Third Defendant:	GERHARD BOTHA ATTORNEY C/O Fieldhouse Attorneys 1261 Cobham Road Queenswood Adv. N Riley

(Case didn't proceed against the First, Second, Fourth and Fifth Defendants)


Legend
FireInvPoints
FireInvLines
Adjacent Farms
Building
Fire Lookout
Reservoir
Water Point
Infra Lines
ESKOM Power Line
Telephone Line
Road Classes
Class A Road
Class B Road
Class C Road
National Roads
Fire Footprint
Commercial Compts
PAN 2005 Fire Map
Komatiland
Scale: 1:30 000
DATE: 22 APRIL 2010
RIETVLEI 397 JS
ZONNEBLOEM 396 JS
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