

SOUTH AFRICA / JUDGMENT

Ivaura Estates (Pty) Ltd v Member of the Executive Council, Department of Roads and Transport, Mpumalanga Province (28337/08) [2010] ZAGPPHC 8 (15 February 2010)

[2010] ZAGPPHC 8

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

28337/08

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENGHIGH COURT)

PRETORIA

Case no. 28337/08

Date:15/02/2010

in the matter between;

IVAURA ESTATES (PTY) LTD Plaintiff

and

THE MEMBER OF EXECUTIVE COUNCIL, Defendant

DEPARTMENT OF ROADS & TRANSPORT, MPUMALANGA PROVINCE

JUDGMENT

LEGODI J

INTRODUCTION

- [1] The plaintiff, is the owner of a farm known and described as Farm One Tree Hill, no 393, Registration Division JU, Malelane, Mpumalanga Province, (hereinafter referred to as the farm), and is suing the defendant claiming payment of the sum of R287 880 arising from a fire that broke or flared onto the farm and caused damage to the mango trees.

- [2] At the start of the hearing of this matter, quantum was separated from merits and this court was required to deal only with the merits of the case.

PLEADINGS

- [3] In terms of the pleadings, on the 12 October 2005, a fire flared up on at or near the defendant's property referred to as a D533 road and the road reserve near Malelane Mpumalanga Province (hereinafter referred to as D533 road), which fire is alleged to have spread over to the plaintiff's farm.
- [4] The fire is alleged to have been caused by the employees of the defendant, being the Department of Roads and Transport, Mpumalanga.
- [5] The cause of action is pleaded as follows in paragraphs 7 to 9 of the plaintiffs particulars of claim:

"7. At all material times relevant hereto the DRTMP and/or its employees had a duty of care to ensure that-

7.1 Fires were not made on or near the defendant's property;

7.2 Any fire/s which flares up on or about 12 October 2005, or before or after that date, would not spread to adjacent properties;

7.3 Fire/s made by employees of the DRTMP on or near the Defendant's property would not create a fire hazard at any time thereafter;

7.4 After employees of the DRTMP had made fire/s on or near the Defendant's property, no smoldering material, which could cause a fire to flare up or spread, would remain;

7.5 The area where the employees of the DRTMP had been making fire/s was kept under observation to control any fire/s that might flare up, and all fire/s that was/were made was/were properly extinguished;

7.6 The DRTMP had sufficient fire fighting equipment in order to effectively control any fire/s should it/they rekindle.

8. The duty of care arose from the following facts:

8.1 The DRTMP was aware of the fact that its employees were making fire/s on or near the Defendant's property;

8.2 The DRTMP was in control of the area where the fire originated;

8.3 The DRTMP or its employees knew or should have known that fire/s could cause damage to the plantations on adjacent properties;

8.4 The weather conditions in the area during October 2005 caused a fire hazard, especially on or about 12 October 2005.

9. In breach of their duty, the DRTMP and/or its employees acted negligently in that-

9.1 They made fire/s on or about 12 October 2005 and on or near the Defendant's property; and/or

9.2 They failed to ensure that the fire/s that they had made was/were properly extinguished and that any smouldering, flammable material was properly put out; and/or

9.3 They failed to keep under observation the area where the fire/s had been made in order to extinguish any fire/s, which might flare up, timeously, having regard particularly to the prevailing weather conditions at the time; and/or

9.4 They failed to have available sufficient fire fighting equipment in order to ensure that the fire/s remained extinguished;

and/or

9.5 They failed to place a sufficient number of employees with appropriate fire fighting equipment to guard the area of the fire/s in order to ensure that any fire/s did not rekindle and spread onto adjacent properties; and/or

9.6 They failed to prevent the fire/s spreading from the Defendant's property to the plaintiff's property and/or its plantations; and/or

9.7 They failed to react expeditiously and with sufficient fire fighting equipment in order to prevent the fire/s from spreading to the Plaintiff's property and/or its plantations; and/or

9.8 They lit, used and/or maintained a fire when it was inopportune and dangerous to do so; and/or

9.9 They lit, used and/or maintained a fire in close proximity to dry and flammable material; and/or

9.10 They lit, used and/or maintained a fire in a road reserve in a location other than a fireplace designated by a competent authority;

and/or

9.11 They lit, used and/or maintained a fire in contravention of the provisions of the Act; and/or

9.12 They failed to supervise the fire/s which they had lit; and/or

9.13 They failed to take reasonable steps in order to avoid that the fire/s flared up on or near the Defendant's property; and/or

They failed to prevent employees from making fire/s on or near the Defendant's property; and/or

9.15 They failed to ensure that the Defendant's property was maintained in such a manner as to ensure that a fire would not spread onto adjacent properties; and/or

They failed to remove flammable material/s timeously in order to avoid the spreading of a fire which might occur on the Defendant's

property;

9.17 In the alternative to paragraphs 9.1 to 19.16 hereof, by virtue of the fact that the Defendant's property fell outside a fire control area, negligence is presumed in terms of the provisions of Section 34(1)(a) of the Act.

[6] The allegations as pleaded are denied by the defendant. In the alternative, contributory negligence is alleged by the defendant.

FACTS/EVIDENCE

[7]The plaintiff relied on the evidence of three witnesses, that is, Mr Cox, a passer by and a tenant to the plaintiff, Mr Spear, Managing Director of the plaintiff and Dr Fronneman an expert in fire.

[8] I do not intend dealing with the evidence of each witness in detail or separately except insofar as it might be necessary.

[9]In a nutshell, the evidence adduced on behalf of the plaintiff was to the following effect:

9.1 On the morning of the 12 October 2005, round about 9h30 a fire was noticed along side the D533 road. That is, between the road and the fence of the plaintiff's farm.

9.2 About 10 to 15 people were observed along side the road. Some were eating and others were trying to put off the fire.

9.3 The owners of the farm were notified of the existence of the fire. Fire fighter equipments and personnel were dispatched to the scene. By round about 10h00 to 10h15, the fire was completely extinguished.

9.4 At the scene and that morning, cooking pot or pots and stones where fire was made were observed. One of the employees of the defendant admitted that the fire was caused by them and he apologized.

9.5 After the fire was extinguished, everyone left the scene having been satisfied that the danger was averted. At round about 11h00 a further report was made to the effect that there was fire on the plaintiff's farm.

9.6 Upon arrival at the scene, round about 11h15, investigation was quickly launched to determine how the fire could be put down. At round about 11h30 steps were then taken to start fighting the spread of the fire.

9.7 About 200 to 300 people participated in fighting the spread of the fire. About three water tankers were involved, each carrying about 2000 liters of water. These was fitted with pressure hose pipe to release the water. There were also what was referred to as "bakkie sakkies", that is, vans with tankers. Each containing about 50 liters of water with pressure hose pipe or pumps as well.

9.8 The fire was blowing southerly direction. It was decided to perform back burn prevention, that is, fighting fire with fire. This entailed going in the direction of the fire. Started a new fire, so as to avoid the coming fire from spreading further.

9.9 In the process of the back burn step, fire from the back burn spot, flared across the Tonga road onto another camp of the plaintiff's farm. Mango orchards referred to in evidence as point A8(a) were then destroyed by the fire. Point A8 appears on exhibit A being an aerial map handed in during evidence by the plaintiff.

9.10 Another mango orchard was also damaged by the fire, not far from the spot where the fire originated at A2 of exhibit A. This was at point A8.

9.11 The alleged damage suffered by the plaintiff was a destruction or damage to mango orchards at two spots indicated in exhibit A as being A8a and A8.

10. The defendant on the other hand let the evidence of one witness, Mr Nkentshane. His evidence in a nutshell was to the following effect:

He together with about ten employees of the defendant were doing grass cutting along side D533 road. It was almost about four days that they had been working in the area. As usual, on the morning of the 12 October 2005, and round about 8h30 they started to work alongside the D533 road. Their time break was 10h00 to 10h15 and 13h00 to 13h30. That morning and before 13h00 break, they were approached by a motorist who requested them to assist in putting off a fire which broke about 500 meters, from the direction where they had already done grass cutting. They refused to go and assist. Later, Mr Spear, the second witness for the plaintiff approached them and requested them to assist in putting off the fire. They agreed, went to the scene and other employees of the plaintiff were there. Having extinguished the fire, they returned to the spot where they were still doing grass cutting. He observed no other fire or smoke until about 15h30 when they knocked off. Cooking was not allowed and has never been done during the time of their working alongside the road in question. There were no pots at the spot where they were working. He saw no one having a pot.

11. At the end of the defendant's evidence, both parties made closing arguments. In his submission, counsel for the plaintiff sought to suggest that the fire could only have been caused by an act or acts on the part of the defendant's employee or employees. And that, therefore, the fire that flared onto the plaintiff's was as a direct result of or conduct on the part of the defendant's employee or employees. In the alternative as I understood the submission, that as the fire flared from the defendant's property, there is a presumption of negligence against the defendant which presumption the defendant failed to rebut. In the further alternative, that the defendant through its employee or employees contributed mainly to the cause of the damage, that is, the defendant was more negligent than the plaintiff.

12. On the other hand, counsel for the defendant, started by suggesting that the presumption as created in terms of section 34 of the National Veld and Forest Act no. 101 of 1998 was not applicable to the defendant in the circumstances of the case. Secondly, he contended that the plaintiff should be found to be more negligent than the defendant.

ISSUES

RAISED

13. As I see it, the pleadings, evidence and submissions made in this case raised the following issues:

13.1 Whether the fire between the edge of the road and the plaintiff's fence was caused by an act on the part of the defendant's employee or employees? And if not,

13.2 Whether the defendant is entitled to raise the non-applicability of section 34 to it? And if not,

13.3 Whether the fire onto the plaintiff's property was a continuation or re-start of a fire that originated from the defendant's property? And if so,

13.4 Whether the defendant has discharged the onus created by the presumption? And if not,

13.5 Whether the plaintiff was contributory negligent in not preventing the fire from spreading?

APPLICABLE LEGISLATIONS AND CASE LAWS

14. I find the following provisions of the National Veld and Forest Act 101 of 1998 to be relevant,

In terms of section 2 of the Act dealing with interpretation, "fire" includes veld fires. The section defines "veldfire" as veld, forest, or mountain fire. In the Oxford Advanced Learner's Dictionary, "veld" is described as flat treeless open grass land of the South African Plateau. Similarly "veld" in the South African, Concise Oxford Dictionary, is described as

open uncultivated country or grassland in Southern Africa.

16. Section 12 deals with the duty to prepare and maintain firebreaks and provides as follows:

"12. Duty to prepare and maintain firebreaks. -

(1) Every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a fire break on his or her side of the boundary between his or her land

and any adjoining land.

(2) (a) If an owner referred to in subsection (1) intends to prepare and maintain a firebreak by burning, he or she must determine a mutually agreeable date or dates with the owners of adjoining land for doing so, and inform the fire protection association for the area, if any"

17. Section 13 deals with the requirements for firebreaks and it provides as follows:

"13. Requirements for firebreaks.- An owner who is obliged to prepare and maintain a firebreak must ensure that with due regard to the weather, climate, terrain and vegetation of the area-

- (a) it is wide enough and long enough to have a reasonable chance of preventing a veld fire from spreading to or from neighbouring land;
- (b) it does not cause soil erosion; and
- (c) it is reasonably free of inflammable material capable of carrying a veldfire across it".

18. On the other hand section 17 which deals with readiness for the fire fighting and it provides as follows:

"17. Readiness for fire fighting.- (1) Every owner on whose land a veldfire may start or burn or from whose land it may spread must-

- (a) have such equipment, protective clothing and trained personnel for extinguishing fires as are-
 - (i) prescribed; or
 - (ii) in the absence of prescribed requirements, reasonably required in the circumstances;
- (b) ensure that in his or her absence responsible persons are present on or near his or her land who, in the event of fire, will-
 - (i) extinguish the fire or assist in doing so; and
 - (ii) take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any."

19. Similarly, section 18 deals with the actions to fight fires and provides as follows:

"18. Actions to fight fires. -

- (1) Any owner who has reason to believe that a fire on his or her land on the land of an adjoining owner may endanger life, property, or the environment, must immediately-
 - (a) take all reasonable steps to notify-
 - (I) the fire protection officer or, failing him or her, any member of the executive committee of the fire protection association, if one exists for the area;
 - (ii) the owners of adjoining land; and
 - (b) do everything in his or her power to stop the spread of the fire.
- (2) Any person who has reason to believe that a fire on any land may endanger life, property or the environment,

may, together with any other person under his or her control,

enter that land or land to which the fire can spread in order to prevent that fire from spreading or to extinguish it.

(3) In taking control over the fighting of a fire in terms of section 6 (1)(c), any fire protection officer may-

- (a) take control from any person who has, until his or her arrival, controlled the fighting of the fire;
- (b) order any person who is apparently not younger than 16 years and not older than 60 years to assist him or her.

(4) In the absence of a fire protection officer, a forest officer may-

- (a) take over control of the fighting of a fire in or within ten kilometers of any State forest to the exclusion of any other person; and
- (b) order any person who is apparently not younger than 16 years and not older than 60 years to assist him or her.

(5) Any person acting in terms of subsection (1), (2), (3) or (4) may, if he or she considers it necessary for the

protection of life, property or the environment or for preventing a fire from spreading or for extinguishing it-

- (a) enter any land;
- (b) destroy trees, grass, crops or other vegetation;
- (c) enter or break and enter any premises;
- (d) prevent any person from entering any premises;
- (e) forcibly remove from the scene any person who is in danger or who obstructs him or her in the performance of his or her duties; and
- (f) remove or order to be removed any vehicle or other thing.

(6) Whenever a fire spreads or may spread across a boundary of a fire protection association, the fire protection officer must-

- (a) inform the fire protection officer of the area to which the fire spreads or may spread;
- (b) take all steps needed to co-ordinate the fire-fighting operation in accordance with the fire management strategy referred to in section 5(1)(a) and (b)."

1.86cm; margin-top: 0.08cm; margin-bottom: 0cm; line-height: 0.61cm"> "34. Presumption of negligence. -

(1) If a person who brings civil proceedings prove that he or she suffered loss from a veldfire which-

(a) the defendant cause; 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".

21. What is required is that the fire that started on or spreads from the defendant's property at that stage should be a 'veldfire' and not some other kind of fire. In other words, the presumption in section 34 does not operate if the fire that starts on, or spreads from a defendant's property is not a veldfire on the defendant's property,

but becomes one at some later stage. In the case of doubt, the section containing as it does a so-called reverse onus provision

should in principle, be given a restrictive rather than a liberal interpretation. However, any doubt in this regard is said to have been removed by section 12(1) of the Act. (See *Gouda Boerdery BK v Transvaal* 2005 (5) SA 490(at 459G).

22. If section 12(1) and section 34 were to be constructed as applying to some other kind of fire that may start on, burn on or spread from, a defendant's property and later develop into a veldfire, it would mean that an owner of a residential property in a township adjacent to veld would be obliged to prepare and maintain a fire break. This could never have been what was intended by the Legislature. (See *Gouda Boerdery Bk supra* at 496A).

23. In *Gouda Boerdery BK supra*, an issue arose, whether a rail reserve constitute a 'veld' and whether a fire in the reserve was veldfire within the meaning of the Act. It was found that it was not. In coming to this conclusion, it was found that the reserve was a relatively narrow strip, fenced and immediately connected with the railway line and the structures serving it such as poles supporting overhead wires and the like. One of the objects of the enclosed reserve was said to presumably prevent or at least deter unauthorized people for their own good from coming too close to or onto the rails or from interfering with railway structures. It would be to accommodate equipment that may have to be offloaded when necessary to effect repairs, whether to the rails themselves or other structures, including bed on which the rails are land and to afford workers some space within which to operate. It was further held that although the vegetation growing in the reserve may be similar to that found in the veld, the reserve differs from the ordinary meaning of veld both in relation to its shape and use and that It was a trip of land with an industrial use.

24. It was further held that a further indication that the defendant/respondent's property was not a 'veld' within the meaning of the Act, appears from the Act itself. That is, in terms of section 12(1) an owner of land on which a veld fire may start, is obliged to prepare and maintain fire break on his or her side of the boundary between his or her land and any adjoining land. Where the land in question takes the form of a strip of 20 metres wide, it would mean that whatever the use to which the land may be put, the owner would be obliged to turn nearly the entire strip into a fire

break. It was held that such a result could never have been what was intended. It was held that if this was to be allowed, it would mean that virtually every stretch of railway reserve, and for that matter road reserve, in rural areas for example, would have to be turned into a fire break. Based on all of these, it was held that the plaintiff was not assisted by section 34 and that it therefore bare the onus of proving on the balance of probabilities all the elements of its action for damages against the defendant, the owner of the other adjacent land.

25. Wrongfulness is a requirement for liability, under the m... Aquilian action. Negligent conduct giving rise to loss, unless also wrongful is not actionable. The plaintiff's action more often than not would be founded upon conduct which if held to be culpable would prima facie be wrongful. (See *Sea Harvest Corporation (PTY) Ltd and Another v Duncan Dockold Storage (PTY) Ltd and Another* 2000(1) SA 827 (SCA) in para (1) at 837H). This is so, where the negligent conduct takes the form of a positive act which causes physical harm. However, where the element of wrongfulness gains importance in relation to liability for omissions and pure economic loss. (See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A), *Administrateur, Natal v Trust Bank van Afrika BPK* 1979 (3) SA 824 (A), see also *Gouda Boerdery BK's* supra at 498 H). The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence, in other words to avoid negligently causing the plaintiffs harm. (See *Indda Elextronic (PTY) Ltd v Volkskas Bank Ltd* [1991] ZASCA 190; 1992 (1) SA 783 (A) at 797 F, *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA). This will be a matter for judicial judgment involving criteria of reasonableness, policy and where appropriate constitutional norms. If a legal duty is found to have existed, the next enquiry will be whether the defendant was negligent. (See again *Gouda Boerdery* supra at 499 A). The test to be applied will first, be to determine the issue of foreseeability, secondly, to determine a comparison between what

steps a reasonable person would have taken. Lastly, to determine what steps if any, the defendant actually took. (See *Gouda Boerdery* supra, 499 B and other cases referred to therein).

26. The inquiry as to wrongfulness might be anterior to the enquiry as to negligence. It is equally so that without negligence, the issue of wrongfulness does not arise, for conduct will not be wrongful if there is no negligence. Therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, that when the issue of wrongfulness is considered first, to assume for the purpose the existence of negligence. The courts have in the past sometimes determined the

issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceed to determine the second leg of the negligence inquiry, first, being foreseeability having already been decided. If this approach is adopted, it is important not to overlook the disconnection between negligence and wrongfulness. (See Gouda Boerdery supra 499 B-D).

27. In considering whether a defendant was negligent, it should be determined what precautions as were reasonable, was the defendant

obliged to take so, as to guard against the eventuality. This exercise will depend on an examination of all relevant circumstances

and involves a value judgment which is to be made by balancing various competing considerations. These have been said to include:

- (a) the degree or extent of the risk created by the defendant's conduct,
- (b) the gravity of the possible consequences, if the risk of harm materializes,
- (c) the utility of the defendant's conduct and,
- (d) the burden of eliminating the risk of harm

28. If a reasonable person would have done no more than what was actually done, there would be no negligence. (See Ngubane v South African Transport Services [1990] ZASCA 148; 1991 (1) SA 756 (A) at 776 G-J) and also see Gouda Boerdery supra, at 500 D-E in paragraph (14).

DISCUSSIONS, SUBMISSIONS AND FINDINGS

29. I now come to deal with each issue raised in paragraph 13 of this judgment. The issue would be dealt with separately as raised above.

Whether the fire between the edge of the road and plaintiff's fence was caused by an act on the part of the

defendant's employee or employees?

30. The issue concerns the alleged positive act of one or more of the defendant's employees in causing the fire. If this is established, it would prima facie be a wrongful act, assisting the plaintiff in the discharge of the onus on a balance of probability, which will of necessity assist in establishing negligence.
31. This is so, irrespective of whether or not the defendant is hit by the presumption in terms of section 34. The provisions of section 34 was quoted earlier in paragraph 20 of this judgment. I do not find it necessary to repeat the provisions thereof. It suffices to say that, the onus is on the plaintiff to prove wrongfulness of the defendant's action if any.

32. The evidence around this aspect is partly circumstantial and partly based on the alleged admission made by one of the employees of the defendant. Starting with the latter, the plaintiff relied on the evidence of a single witness, the Managing Director of the plaintiff, Mr Spear. When he arrived at the scene round about 10h00, the fire was extinguished. One of the defendant's employees admitted that a pot which Mr Spear allegedly observed belonged to the defendant's employees. Secondly, it was allegedly admitted that the fire was caused by them, the employees of the defendant. This evidence was denied by the only witness for defendant. Firstly, the witness for the defendant denied that Mr Spear found them at the scene of the fire. Mr Spear is said to have found them at a distance of about 500 metres from the scene. They went to the scene with Mr Spear in his bakkie. He heard no one from their group talking to Mr Spear, nor did he see anyone of them talking to him. None of them had a cooking pot, neither were they allowed to cook. All of them had to bring along their lunch boxes.
33. Although the evidence of the defendants' witness may not have been satisfactory in some respects, his evidence in the following respect remained unshaken:
- 33.1 that when they were notified of the fire, they were about 500 metres from the fire scene, they had no pot or pots at the spot where they were working,
- 33.2 that he heard no one amongst his team talking to Mr Spear nor did he see anyone of them talking to him.
34. The submission for the rejection of this witness's evidence revolved around the fact that it was not put to Mr Spear that the latter had fetched them from where they were to the scene of the fire. Secondly, that it was not specifically denied that, no one had confessed to Mr Spear, or that the witness was in no way to deny that an admission was made to Mr Spear.
35. Starting with the latter, the evidence was that no one was seen talking to Mr Spear. Secondly, no one was heard talking to Mr Spear, and apologizing. Lastly, as the witness said, there were no pots and no one cooked. Therefore it is not completely correct that the witness was in no way to deny the alleged admission. Assuming that any such admission was made, and assuming that the fire was completely extinguished by 10h15 and that there was nothing more for Mr Spear to do, when he returned at about 11h00 and the fire was on his farm and ultimately damage was done to his property, one would then have expected him to return to the employees of the defendant. Firstly, to secure the admission and the identity of the person who made such an admission. Secondly, one would have expected him to safe-keep the pot and evidence around the pot. More so that about three or four days after the fire incident, photos of and around the area were taken. Mr Spear in his evidence said nothing about efforts to secure this crucial evidence.
36. Similarly, the defendant did nothing to call more witnesses to corroborate Mr Nkentshane. However, the onus rests with the plaintiff to prove all these allegations on a balance of probability. There were other people around the scene when the alleged admission was made. The alleged confession could have been drawn to the attention of other people from

the plaintiff's side. For example, Mr Spear's brother was there. The issue of the pot as well. The presence of the pot could have been drawn to the attention of other people, especially after the fire that flared onto the plaintiffs property round about 11h00. Instead, the plaintiff decided not to call other witnesses or to explain why such material evidence or information was not secured. This should be seen to weaken the plaintiff's case as a party who bears the onus.

37. I do not think that the fact that it was not put to Mr Spear that he did not find the employees at the scene, but rather that he fetched them about 500 away from the fire is material. The point is, the employees were at the scene of the fire when the alleged confession or admission was made. I have already dealt with the denial in this regard.
38. The issue of the presence of the pot with regard to Mr Cox is not as immaterial as counsel for the plaintiff suggested. This is the witness who had allegedly seen the defendant's employees eating at round about 09h30, whilst the others were seen putting off the fire with tree branches. He said nothing about the pot or pots. His evidence and that of Mr Spear was meant to convey this, that is, the employees must have been eating what they had cooked. Of course, the eating at the time as testified by Mr Cox was denied. Secondly, Mr Cox's evidence in one respect lays credence to the witness for the defendant that there was no pot. The fact that Mr Cox did not see the pot, cannot be attributable as suggested by the plaintiff's counsel only to the fact that he was in a motor vehicle passing by and therefore not paying attention to what was around the people who were eating and others putting fire. It could well be that he saw no pot because there was none as testified on behalf of the defendant.
39. The consequence of all these is that, the plaintiff did not tip the scale sufficiently to discharge the onus. There is in effect, two contradictory versions with regard to the presence of the pot and alleged admission by the employee of the defendant. I am not satisfied that the plaintiff's version in this regard is more probable than that of the defendant.
40. The cause of the fire remains a mystery. A mystery that keeps speculation rife. For example, it was suggested to the defendant's

witness the fire could have been caused by a cigarette bud left on the scene by one of the defendant's employees. On the other hand it was suggested to the plaintiff's witnesses that the fire could have been started by a passer-by, either by dropping cigarette buds or by any other means. It could also be that it was caused by the machinery of the defendant's employees when cutting grass. If there was a pot and cooking, it could be that the fire was started by the cooking fire.

41. Therefore, in the absence of proven positive act on the part of the defendant's employees in starting the fire, the whole case of the plaintiff in this regard, is based on a circumstantial evidence. The evidence as tendered on behalf of the plaintiff instead of excluding any other reasonable inference than that the fire was caused by the defendant's employees through the cooking or other means, created more other reasonable inferences that could be drawn from the evidence. This has a bearing on the plaintiff's inability to have discharged the onus.

I now turn to deal with the issue raised in paragraph 13.2 of this judgment.

Whether the defendant is entitled to raise as a defence on a point of law, the non-applicability of section 34 to it?

42. Remember section 34 creates a presumption of negligence against a defendant once it is proved that a veldfire that spread or flared over another person's property, started on or near the defendant's property.
43. Before I deal with this aspect in more details, it is necessary to first deal with the objective of pleadings. The essence of the particulars of claim is to state every fact which could be necessary for the plaintiff to prove if traversed in order to support his right to judgment. That is, every fact which is necessary to prove must be stated. (See *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 22, *Koth Property*

Consultants CC v Lepelle-Nkupi Local Municipality 2006 (2) SA 25 (T) at 309-H).

44. Proper legal meaning of cause of action is that, the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration of particulars of claim in order to disclose a cause of action. The primary purpose for this is that a cause of action which is stated with the necessary distinctiveness would enable the defendant to know the case that he or she has to meet.
45. Similarly, when a defendant pleads to the particulars of claim, he or she should plead in such a manner that the plaintiff is informed of the case which he or she has to meet and is left in no doubt as to the nature of the defence. (See *Bocliker & Co. SA Ltd v Nengebauer & Co. Ltd* 1926 AD at 21, see also *General Commercial and Industrial Trading Corporation Ltd v Pretoria Portland Cement Co. Ltd* 1944 AD 444 at 413).
46. The plaintiff must be informed as to which facts exactly are being admitted and which denied and what will be asserted by the defendant to counter the admitted allegations so that the plaintiff knows what he or she has to establish what he or she has to meet at the trial. (See *Connock's MotorCo Ltd V Sentraal Westelike Ko-op Mpy Bpk* 1964 (2) SA 47 (T) at 46, see also *Wilson V South African Railways and Harbours* 1981 (3) SA 1016(c).
47. A plea should be clear and unequivocal. It should not leave one guessing as to what it means. (See *Mabaso V Felix* 1981 (3) SA 865 (A) at 875). The plea must be drawn in such a way that the plaintiff at the trial will not be taken by surprise by what the defence raises. Coming back to the issue, the applicability of the presumption of negligence under section 34 was raised as follows in the particulars of claim:

"5. The fire was a veld and or a forest and or a mountain fire as envisaged by the National Veld and Forest Fire Act, no 101 of 1998 ('the Act').

48. This in my view, made it clear that the plaintiff sought to rely on section 34 of the Act. The section was quoted earlier I paragraph 20 of this judgment. The defendant in its plea, pleaded as follows to paragraph 5 of the particulars of claim referred to above:

"9. AD paragraph 5 thereof:

The defendant admits the contents of this paragraph"

49. However, during closing argument, counsel for the defendant started by contending that the presumption as envisaged in section 34 was not applicable to the defendant. In arguing the point, he relied solely on the decision in Gouda Boerdery's case referred to earlier and dealt with extensively in paragraphs 21 to 24 of this judgment.

50. Assuming that the principle enunciated in Gouda Boerdery's case is applicable to the present case, the defendant should be found not to be entitled to argue the defence for the following reasons:

50.1 It admitted the applicability of the section to the present case,

50.2 It elected not to apply for the withdrawal of the admission,

50.3 It elected not to apply for the amendment of paragraph 9 of its plea,

50.4 At the start of the closing argument, I requested the parties to identity the issues. Counsel for the plaintiff having identified what he regarded as the issues and with the court stating what it sees as the issues, counsel for the defendant indicated that he had nothing to add to the issues raised.

50.5 The raising of the defence for the first time at the start of the defendant's closing argument is like an ambush. It was not only a surprise to the plaintiff, but to the court as well.

50.6 The fact that a party is entitled to raise an issue on a question of law without having specifically pleaded it, cannot be done in the face of a clearly stated cause of action and a clear and unequivocal admission to the applicability of the provisions of section 34 of the Act.

50.7 No matter how good the defence might be, parties are bound to their pleadings. The law is not there to create a cause of action or a defence which is not borne by the pleadings. I therefore find that the defendant is not entitled to argue the defence that section 34 is not applicable to it. To allow such a defence would be prejudicial to the plaintiff. For example, if the defence was timeously raised, more evidence could have been obtained regarding the nature of the road reserve in question. On the other hand, the defendant did not seek leave to withdraw the admission and amendment, neither did it ask for a postponement to deal with the withdrawal of the admission and the amendment. I will therefore deal with the matter on the basis that one is dealing with a veld fire. I now turn to deal with other issue.

Whether the fire onto the plaintiffs property was a continuation or a re-start of a fire that emanated from the defendant's property?

51. Should this question be answered in the affirmative it would then bring the presumption of negligence against the defendant squarely within the provisions of section 34(1). Remember, of relevance, subsection (1)(b) provides that if a person who brings civil proceedings proves that he or she suffers loss from a veldfire which 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.
52. For the following reasons, I find that the fire on the plaintiff's property started on or spread from the land being the road reserve owned by the defendant:

52.1 In paragraph 8.1 of the defendant's plea, it is admitted that on the 12 October 2005 a fire flared up on the D533 Road and spread to the plaintiff's property. This admission should bring the issue to an end. That is, it should dispel any doubt regarding the applicability of the presumption of negligence in terms of section 34(1)(b).

52.2 It makes no difference whether the fire was caused by any other source than by an act or conduct on the part of the defendant. It suffices if the fire started on the defendant's land and flared or spread onto the plaintiffs land.

52.3 The fire on the first occasion was observed at point A1 as indicated in Exhibit A. On the second occasion, the fire was

observed at point A2 as reflected in Exhibit A. Point A1 and A2 are, close to each other. Secondly, they are opposite each other. A1 is on the property of the defendant and A2 is on the property of the plaintiff.

52.4 The suggestion that the fire on the plaintiffs property could have originated from that property in my view, is less probable. The area between the edge of the road and the plaintiff's fence was sprayed and swept with water about 50 metres wide. Whilst no one actually saw the fire spreading onto the plaintiff's land, in all probability the sporting or sparking from the defendant's land must have caused the fire on the plaintiff's land. This finding should then bring the operation of the presumption of negligence against the defendant. I now turn to deal with the issue raised in paragraph 13.4 of this

judgment.

53. The presumption created under section 34, as I see it, envisages a situation where a veldfire starts on one person's property and spread onto another person's property without the latter being in a position to know or determine the circumstances under which the fire started and flared onto his property. For these reasons, the legislature has placed certain obligations on the owner of each property, from which a veldfire might start on and spread onto other owner's property. Such obligations are contained in sections 12 and 13 quoted earlier in paragraphs 16 and 17 of this judgment. I do not intend to repeat same.

54. The test for negligence is objective. Therefore, apart from the presumption of negligence, the question is the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence, in other words to avoid negligently causing the plaintiff's harm. As indicated earlier in this judgment, the first issue is whether the restart of the fire on the plaintiffs property was foreseeable? Secondly, what steps the defendant as a reasonable person took in preventing the spread of the fire? Lastly, what steps the defendant actually took when the fire flared onto the plaintiffs property?
55. I now turn to deal with the facts of the case in context. Alongside the road, that is, on the road reserve, the defendant was cutting grass. Fire started on the road reserve. I am prepared to accept that it was around 09h30 when the fire was alerted to the other owner of the land being the plaintiff. This fire was completely extinguished with the help of tractors carrying 2000 litres of water each with pressure hose pipes and bakkie "sakkies" also with tankers and pressure pumps. Both employees of the defendant and plaintiff were involved in bringing down the fire. Everyone was satisfied that the fire would not re-start and they all left the scene.
56. To the plaintiff's surprise, about 45 minutes later, another fire was observed near the scene of the initial fire and this time inside the plaintiffs farm. I have already indicated that the fire in the plaintiffs property must have been caused by the sparks or sporting from the fire which started and extinguished on the defendant's property.
57. The real issue is whether the defendant would have foreseen the re-start of the fire on the plaintiff's property. As I said, the test is objective. That is, placed in the position of the defendant, what a reasonable man would have done. The nearest reasonable man in this case was the plaintiff. It had all the necessary equipments and the personnel to extinguish the fire. In the presence of the defendant's employees who were also assisting, the burnt area was sprayed with water and swept. It would have been to expect too much from the defendant's employees that they would remain in the area to guard against any possible sparking onto the plaintiff's land when everyone was leaving after having been satisfied that the danger of the fire has been averted.
58. Here it is no longer much of the presumption that operates against the defendant. The presumption, should be seen to have been thwarted by the extinction of the initial fire. That is, steps were taken, to ensure that the fire on the road reserve was brought down to avoid the flaring onto the plaintiffs property.
59. Assuming that I was to be wrong in finding that the defendant could not have foreseen the restart of the fire or that I was to be wrong in finding that the presumption of negligence was rebutted with the fire having been extinguished, the next question is, what the defendant could have done in the circumstances of the case to avoid the spread of the fire on the plaintiffs property and the eventual damage to the Mango trees or orchards?

60. As I said previously, certain obligations are placed on the owner of the property in terms of section 12, to prepare and maintain a fire break on his or her side of the boundary between his or her land and any adjoining land. Section 13 sets out the standard by which such firebreaks have to be prepared and maintained. For example, they must be wide enough and long enough to have a reasonable chance of preventing a veldfire from spreading to or from neighbouring land. Secondly, in preparation of the firebreaks, the prevailing

circumstances of the area, for example, weather condition, climate, terrain and vegetation should be considered.

61. The evidence is that the plaintiff had prepared firebreaks on both his side and on the side of the road reserve. These were considered well enough to cater for any eventuality. For example, they were about one to one and half metres wide. The length was enough as to have a reasonable chance of preventing a veldfire from spreading. I do not think that the plaintiff could be blamed for any such effort taken in preparing and maintaining the firebreaks. The issue therefore is what else was expected of the defendant to have done in the preparation and maintenance of the firebreaks? I did not hear counsel for the plaintiff arguing vigorously that the defendant had failed to comply with its obligations in terms of sections 12 and 13 of the Act. In my view, rightly so. The plaintiff elected to do what was supposed to have been done by the defendant. That is, the plaintiff prepared and maintained the firebreaks on the defendant's side of the land. As it was said in Gouda Boerdery's case, turning every corner of the road reserve with firebreaks could never have been intended by the Legislature. Therefore, if the plaintiff had made firebreaks on the side of the defendant's land and these were reasonable enough, there could not have been any legal obligation on the defendant to do anything regarding preparation and maintenance of the firebreaks on its side.

62. The next issue is, whether there was any step that could have been taken by the defendant to avoid further spread of the fire that flared onto the plaintiff's property? The defendant's version that after the fire was put off on the morning of the 12 October 2005, no other fire or smoke was observed is very unconvincing. I am prepared to find that the employees of the defendant who were around the scene on the date in question must have seen the fire or smoke on the plaintiffs property and that they did nothing. The crucial question is, whether there was any reasonable step which the employees of the defendant could have taken that would have brought the fire under control before it reached the plaintiff's mango trees that were eventually damaged by the fire?

63. Firstly, the spot where the employees of the defendant were, was not easily accessible due to the height of the plaintiffs fence. Secondly, the fire on the plaintiffs property, having been noticed round about 11h00, in a short space of time fire fighting machines and personnel were brought onto the property. For example, Mr Spear having been told about the fire at about 11h00 he managed to arrive at the scene by round about 11h15. By this time, his brother and other people were already at the scene. The fire was already uncontrollable and raging through the farm. Thirdly, the best steps available at the disposal of the plaintiff

was to do "a back burn". This is fighting fire with fire. That is, you go in the direction of the fire and start a new fire. This is the procedure by which you create some sort of a firebreak by ensuring that the oncoming fire does not go beyond the start of the back burn spot. This is said to be a very sensitive and difficult procedure that requires careful consideration. According to the plaintiff and also as confirmed by the fire expert, this was the most effective and reasonable step in the circumstances of the case. Other neighbours of plaintiff together with their fire fighting equipments and their labourers assisted in the process. Sizeable tractors with tankers and pressure pumps and bakkie sakkies were used. About 300 people participated in the fire fighting. All of these could not bring down the fire well in time to avoid damage to the mango trees at points A8 and A8(a) of Exhibit A. Remember, exhibit A is an aerial map of the farm in question which was handed in during the evidence of the plaintiff.

64. In the process of the "back burn", the fire arising from the back burn flared across the Tonga road and started salvaging the other camp of the plaintiffs farm. This resulted in the mango trees at point A8(a) being damaged or destroyed by the fire. It was contended on behalf of the plaintiff that this should not be considered against the plaintiff because irrespective of the back burn or not, the fire would in any event have crossed the Tonga road and without the back burn the damage could have been more. I can find nothing wrong with this submission.
65. Whilst the defendant's employees did not participate in the attempts to extinguish the fire on the plaintiff's property, either because they were not aware of the fire or that they just did not deem it necessary to do so, the real issue is whether by their help, damage to the plaintiffs property could have been avoided. Counsel for the plaintiff when quizzed by the court on this difficulty indicated that the employees could have called for more back up to the scene. Therefore suggesting that with more people and more fire fighting equipments, the damage could have been prevented. I think this would require for one to speculate. There was just no evidence that had there been more people and fire fighters the damage to the mango trees could have been prevented. Firstly, it would not have been easy for the employees of the defendant to reach the fire scene on the property of the plaintiff. Secondly, there is no suggestion that the people and the equipments in the fight to extinguish the fire were not sufficient.
66. On the date in question it was very hot. The weather conditions on the date in question as investigated by the plaintiffs expert is described as follows:

"At 8h00 wind direction was 0°. At 14h00 wind direction turned 231°. This is said to mean a change from a wind from blowing from the North to one blowing from South-West. At 8h00 wind speed said to have been 0KM/hr. At 14h00 at the speed of 7.2 KM per hour the maximum recorded temperature around the area was 43,5°C, and the minimum at 20,0° C. At

8h00 is said to have been 30,0 ° and at 14h00 42,5 °C. Although humidity was not given by the Weather Bureau of the condition around the area it is said that humidity should have been low, since it never rained during October of 2005. It is said that using the Lowveld Fire Danger Rating Calculation method, the fire danger index was about B2, which is said to be

Category Red or extremely high fire risk, with recommendations that no outdoor fires should be permitted as per the National Veld and Forest Fire Bill in Chapter 3. It is said the wind direction would have helped spread the fire in a southerly direction.

67. Whilst the fire expert suggested that the fire could have been due to the actions of the defendant's employees through cooking or the discarding of an ignition source for the vegetation, such as a glowing cigarette end, I have already made a finding that evidence to this fact cannot be relied upon to make a final factual finding. The start of the fire on the road reserve, therefore, remains a mystery.
68. Coming back to the issue under discussion, one is not dealing here with a situation where owner of a land, wants to prepare and maintain a firebreak by burning as contemplated in section 12(2) of the Act. A situation which requires a mutually agreeable date or dates with other owner of adjoining land for doing so, and inform the fire protection association for the area. Of necessity in the burning of fire, one would also be guided by the weather condition. The burning of fire may not be done or allowed where the weather conditions are not conducive for the burning of fire. Notification to other adjoining land owners and other authorities is intended to prepare all interested parties to be ready in case the fire getting out of control.
69. The one who wants to make firebreaks by burning owes the adjoining land owners a duty to inform them and agree on the date or dates. The fire on the morning of the 12 October 2005 on the road reserve belonging to the defendant was a surprise. A surprise in the sense that it has not been established who caused it and therefore it could not have been reasonably expected, prepared and maintained. The restart of the fire was also a surprise. It was a surprise in the sense that whilst everything possible and reasonable was done to bring the fire under control, the fire unexpectedly erupted on the property of the plaintiff. The inaction by the defendant's employees and the efforts taken by the plaintiff should therefore be seen in this context.
70. As they say, the degree or extent of the risk created by the actor's conduct must be considered. In the present case the defendant did nothing to create the risk. All that is known, the defendant's employees did, was to cut the grass on the road reserve. This is an issue, which should be considered in favour of the defendant. Cutting of the grass should be seen as another form of creating firebreaks. In the present case, I do not think that a reasonable person would have done no more than what was actually done by the defendant and therefore no negligence can be imputed on the defendant. Similarly, nothing more could have been done by the plaintiff in putting off the fire. This must bring to an end the issue raised under paragraph 13.5 of this judgment as I do not think it is necessary to deal

with it after having found that the defendant is not negligent.

CONCLUSION

71. In conclusion, the plaintiffs action is hereby dismissed with costs.

M F LEGODI

JUDGE OF THE HIGH COURT

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