

SOUTH AFRICA / JUDGMENT

Lubbe v Louw (531/03) [2004] ZASCA 130; [2006] 4 All SA 341 (SCA) (25 November 2004) [2004] ZASCA 130

COURT

Supreme Court of Appeal

BEFORE

FARLAM JA, CLOETE JA

CASE / FILE NUMBER

531/03

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Case number 531/03

FARLAM JA

- [1] The respondent in this matter, who was the lessee of three farms in the southern Free State, namely Boven-Dwarsrivier, Smartryk and Oaklands, instituted action in the magistrate's court for the district of Philippolis against the appellant, the owner of an adjoining farm Oranjevelei, for damages sustained when a fire which started on Oranjevelei spread over the boundary on to the three farms of which the respondent was the lessee. (In what follows I shall refer to these farms as 'the respondent's farms'.)
- [5] It was common cause at the trial that in the course of the afternoon of Saturday 8 November 1997 a fire started on the appellant's farm Oranjevelei and spread to the respondent's farms causing damage.
- [9] Mr Van Rooyen, who appeared on behalf of the appellant, pointed out that the negligence of the appellant relied on by the respondent consisted of omissions. The allegations made by the respondent in this regard were that the appellant failed to prevent the spread of the fire to the respondent's farms when he reasonably could have done so, that he failed to give his employees sufficient training in the prevention and fighting of fires as a result of which the fire spread to the respondent's farms and that he failed to have sufficient proper and adequate equipment available so as to be able to extinguish a fire that had arisen on his property or to prevent it spreading. Mr Van Rooyen contended that it was accordingly incumbent on the respondent not merely to allege but also to prove that the conduct relied on was wrongful. He pointed out that conduct taking the form of an omissio is prima facie lawful (*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46 G – H) and that the onus to prove wrongfulness rests on the respondent, despite the provisions of section 84 of the Forest Act

122 of 1984, which was in force at the time and provided that in the case of a fire such as the one presently under consideration negligence was presumed until the contrary was proved. The section however said nothing about wrongfulness, with the result, submitted counsel relying on the decision of this Court in *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) at 820 E–G, that the onus to prove wrongfulness remained on the plaintiff in a claim based on a veld fire.

- [13] In my opinion the submissions by Mr Van Rooyen cannot be accepted. As Mr De Wet, who appeared for the respondent, correctly submitted, it has repeatedly been decided by our courts that a landowner in our law is under a duty to control or extinguish a fire burning on his land. Among the cases cited by Mr De Wet in support of this proposition was *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A), where Ogilvie Thompson CJ said (at 81 G–82 A):
- [18] I turn to the question of negligence. Mr Van Rooyen submitted that the evidence led at the trial by the respondent showed that the appellant had not been negligent and that it was unnecessary for him to lead any further evidence himself. In this regard he argued that it was probable that the appellant when the fire raged constantly foresaw that the fire would spread to the respondent's properties but he was clearly not in a position effectively to prevent or limit the damage which the respondent suffered. The difficulty with this submission is that we do not know precisely what the appellant could have done to fight the fire or what he in fact did. What we do know, as Mr De Wet pointed out, was that there had been at least five fires in the area shortly before the fire in question and that the grass where the fire raged was long, dry and highly inflammable. No precautionary measures had been taken to prevent any fire that arose on the appellant's land from spreading to that of his neighbours and his workers were not equipped with the most elementary firefighting equipment. In all the circumstances I cannot find that the appellant rebutted the presumption of negligence created by s 84 of Act 122 of 1984.
- [19] I am accordingly satisfied that the decision of the High Court in this matter was correct.

The appeal is dismissed with costs.

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JUDGE OF APPEAL

CLOETE JA

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