

SOUTH AFRICA / JUDGMENT

## Mehrez and Another v Ndwandwe (65685/2013) [2017] ZAGPPHC 296 (29 June 2017) [2017] ZAGPPHC 296

COURT

North Gauteng High Court, Pretoria

BEFORE

Louw

CASE / FILE NUMBER

65685/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE

NO: 65685/2013

not

reportable

Not

of interest to other judges

Revised.

29/6/2017

In

the matter between:

M

T H

MEHREZ First

Plaintiff

T

MEHREZ Second

Plaintiff

and

S

NDWANDWE Defendant

## JUDGMENT

LOUW, J

- [1] The plaintiffs are the co-owners of a property situated in President Park, Midrand. The defendant is the owner of an adjoining property. On 2 August 2012, the plaintiffs' house on their property was destroyed by fire. The plaintiffs allege that the fire was started by an employee of the defendant on the defendant's property in order to burn loose leaves and other combustible material and that the fire spread to the plaintiffs' property, destroying the plaintiffs' house. The house had a thatched roof. The plaintiffs' claim is for payment of the damage caused by the fire to their movable assets inside the house.
- [2] The plaintiffs further allege that the employee was acting within the course and scope of his employment with the defendant and that the fire was caused due to the negligence of the defendant and/or the said employee who were negligent in one or more of the following respects: by starting a fire on the defendant's property at a time and under conditions that were not appropriate to do so; by failing to heed indications that climatic conditions were not appropriate for starting a fire; by failing to take appropriate steps to prevent the spread of the fire; by failing to take appropriate steps to prevent the spread of the fire; by allowing a fire to spread to the plaintiffs' property; by failing to ensure that adequate manpower and equipment were at hand so as to ensure that the fire would not get out of control and spread to the plaintiffs' property; by failing to have any, alternatively sufficient regard to the strength of the prevailing wind and/or dryness of the air and/or the condition of the vegetation before starting to burn the leaves and other combustible material; by failing to take any, alternatively sufficient steps to prevent the spread of the fire to the plaintiffs' property; by failing to take any, alternatively sufficient steps to warn the plaintiffs of the fact that a fire was to be made and/or that the fire had gone out of control and was spreading; by failing to make sufficient fire breaks on the defendant's property in order to prevent the spread of the fire; and by failing to make any, alternatively sufficient firefighting equipment and/or trained personnel available in order to fight fires that may begin on the defendant's property and to prevent the spread of such fire to neighboring properties, particularly to the plaintiffs' property.
- [3] The defendant in his amended plea denies that his employee acted in the course and scope of his employment and further denies that he or his employee acted negligently. The defendant pleads in the alternative, in the event of it being found that he or his employee were the effective cause of the fire, that there was contributory negligence on the part of the plaintiffs in that they did not prepare and maintain a fire break around the property when they had ignitable roofing covering their property; that they did not ensure that ignitable grass and vegetation were removed from the vicinity of the property and near their ignitable roofing; that they did not have and maintain in a serviceable condition fire fighting equipment on the property; and that they did not keep and maintain a thatched roof that complied with the relevant building standards and fire-proofing requirements.

- [4] At the request of the parties, the quantum of the plaintiffs' claim was separated from the merits and postponed sine die. The matter therefore proceeded on the merits of the plaintiffs' claim only.
- [5] The plaintiffs' property is 8 565 m<sup>2</sup>. The house was double storeyed. The second plaintiff, who is the wife of the first plaintiff, testified that on the date in question she was in the study which was on the ground floor of the house and was busy talking through Skype to her husband who was in Egypt at the time. She finished talking to him at about 14h10. At about 14h20 she heard screams and smelled fire. She ran out of the house through the kitchen door and saw a man jumping over the fence from the defendant's adjoining property to the plaintiffs' property. She testified, with reference to photograph 28 in exhibit "A", that the fire had already spread from the defendant's property to just behind the banana trees which were close to that part of the plaintiffs' house which faced the defendant's property. In cross-examination, she estimated that the area of the plaintiffs' property on that side of the house over which the fire had spread, was approximately 4000 m<sup>2</sup>. The man who had jumped over the fence, to whom she referred as the defendant's worker, grabbed branches with which he beat the flames. She grabbed the hose pipe to douse the flames. She then ran back to the study and phoned the plaintiffs' own two workers, who had been sent to a nearby other property of the plaintiffs', to come back to help fight the fire. Before they arrived, she saw smoke on top of the roof of the house. The roof then took fire. She was unable to enter the house as it was full of smoke.
- [6] The photographs used in evidence by the parties show that there are two heaps on the defendant's side of the fence which separates the plaintiffs' and the defendant's properties. Facing from the plaintiffs' property towards the defendants property, the heap on the left is a heap of rubble and the one on the right is a heap of dead leaves. The second plaintiff testified that the fire came from the heap of rubble on the left, which is the closest heap to the plaintiffs' house, and spread from there to the plaintiffs' property . She didn't see who started the fire. She said that the lawn on the plaintiffs' property was kept short, but that the fire just ran down the lawn towards the house. The fire which she saw on the defendant's side of the fence was two storeys high. She described it as a massive fire. The wind was blowing from the defendant's property towards the plaintiffs' property. There were a lot of sparks in the air. From where she first saw the fire on top of the roof, it spread through the rest of the house. The fire brigade arrived after being called by one of the neighbours and they struggled for a few hours to bring the fire under control.
- [7] What can be seen from the photographs is that the heaps are fairly close to the fence and appear to be about 4 or 5 m apart. The photographs are recent, but according to the evidence of the witnesses on both sides, the appearance and position of the two heaps on the photographs are similar to what they were at the time of the fire.
- [8] The second plaintiff testified that rubble was frequently burnt on the defendant's property before the day of the fire and also

thereafter. She referred in this regard to photograph 88 in the notices bundle on which can be seen, what appears to be, a burnt out stump. She said that the defendant's worker told her on the day of the fire that he had been told to put fire to the rubble.

[9] In cross-examination, the second plaintiff said that there was a pathway of about 1 m wide all around the property on the inside of the fence which was patrolled by their dogs. On the inside of the pathway there was another fence and the pathway was in between the two fences. She said that the grass on the pathway was kept short because the alarm of the electric outside fence would go off if the grass grew into the fence. The alarm did not go off on the day of the fire. When she went out of the house after smelling fire and hearing shouting, the fire was burning on their side of the fence and on the defendant's side of the fence. She said that the defendant's worker was hysterical. She asked him how he could have started the fire. He said that he was told to put fire to

the rubble and that he had told them, apparently referring to the defendant, that it was dangerous because of the wind that was

blowing.

[10] The second plaintiff said in cross-examination that the plaintiffs had bought the house in 2006 and that there was foil in the thatched roof for protection against fire. They also maintained the thatch by brushing it.

[11] The plaintiffs called Mr. Hadley David Vincent as a witness. He is a real estate agent and lives in a cottage on a property which belongs to his parents, which property borders onto the north-eastern side of the plaintiffs' property. The defendant's property borders onto the north-western side of the plaintiffs' property. Mr. Vincent was able to see the plaintiffs' property and that of the defendant through the kitchen window of the cottage. On 2 August 2012, he was standing in the kitchen having coffee. He looked out of the window and saw a fire on the defendant's property. It was a very big fire. He saw the defendant's worker who was trying to grab the hose pipe, but he dropped it and ran away. He knew the defendant's worker, to whom he referred as his gardener, as he had seen him before. The first time he saw him on the day of the fire was when he was, as Mr. Vincent put it, busy fiddling around with branches at the heap of branches and leaves on the defendant's property. He identified the heap on photograph 80. This is not the heap of rubble referred to by the second plaintiff, it is the one on the right. The next time he saw him, there was already a big fire and the worker was running away.

[12] When Mr. Vincent saw the fire, it had not yet spread from the defendant's property. He shouted to his parents' gardener, who was at the other end of their property, that there was a fire on the defendant's property and instructed him to go and tell the plaintiffs about the fire because he could see that the fire was getting out of control and that it was moving in the direction of the plaintiffs' property. He then telephoned the fire brigade and saw the fire crossing over to the plaintiffs' property whilst he was on the phone. He experienced difficulty in speaking to the right person at the fire station, but the fire brigade eventually

did come out to attend to the fire. He went across to the plaintiffs' property when the house was already on fire.

[13] In answer to a question by the court, Mr. Vincent said that the flames were very high and were "leaning over" to the plaintiffs' property. The flames were just above the grass on the plaintiffs' property, and the grass was about 20 cm high.

[14] In cross-examination, Mr. Vincent said that he saw the defendant's worker fiddling with the branches while he was standing in the kitchen · drinking coffee. He moved around in the kitchen while still drinking coffee and when he looked up again, he saw the fire burning. He said he could see the rubble heap from his kitchen, but that the fire was burning where the dead branches were. It was put to him that the defendant would say that he was not present but that he was told that the fire did not originate from the point where the branches were. He insisted that it did because he saw it.

[15] Mr. Vincent further said in cross-examination that the heap on which the fire started was approximately 5 m from the fence between the plaintiffs and the defendant. He said that the path way between the two fences was not well maintained, there were grass and weeds. The grass he said was also approximately 20 cm high. He said that he assessed the length of the grass from his kitchen window, that he saw it every day, and that he did not agree that the grass was cut short. He further said that when the fire touched the grass, it immediately moved on. The fire engulfed the plaintiffs' whole lawn while he was still on the phone to the fire brigade. The flames were about a half meter high.

[16] In re-examination, Mr. Vincent was referred to photograph 72 which shows a part of the lawn and a part of the pathway which is burnt and a part which is not. Referring to the length of the grass on the photograph, he said that it looked like that on the day of the fire. He was then asked where on the photograph he saw 20 cm long grass. He pointed to some long twigs of grass at the top right of the photograph . He was then referred to the grey area on photograph 80 between the two heaps, but closer to you and behind the rubble heap. He stated that there were regular fires right behind the rubble where the grey area is.

[17] The defendant testified that he was in Mpumalanga on the day of the fire. His wife was also not present. He received a telephone call from his domestic worker late on the afternoon of the fire, who informed him thereof. When he returned home the next day, his gardener told him that he had gone on lunch and when he returned, he saw fire on both sides of the fence. He tried to douse the fire on the defendant's property but realised that the fire on the plaintiffs' side of the fence was getting dangerously close to the house. He jumped over the fence to raise alarm, screaming to get the attention of anyone on the property. Eventually, the second plaintiff came out of the house and they worked together to try and douse the flames.

[18] Referring to photograph 80, he said that he has always had two heaps on his property, namely the heap on the left of the photograph which is for cement and waste intended for the municipal dumping site. The heap on the right is on top of a pit and consists of branches

and leaves which are used to make compost for the defendant's organic vegetable garden. The compost is harvested from the bottom of the pit. He said that that has always been the position. He was referred to the evidence of Mr. Vincent that he saw the defendant's gardener fiddling with branches and when he looked again, he saw fire. He was asked what his instructions were to the gardener. He said that there were a lot of trees on the property and that his instructions to the gardener were to bring the leaves to the compost heap. They did not burn anything. He denied that the grey area on the photograph was ashes, and said that it looked to him like finer granules of cement or bricks. He was referred to what appears to be a burnt log on photograph 88. He said that he wasn't sure, and that it could be a carpet. He disagreed that it was a burnt item because he doesn't burn anything.

[19] It was put to the defendant that his gardener started the fire. He disagreed because of his knowledge of the gardener and his

instructions to him. He was asked what the gardener told him where he was at the time when the fire started. He said that the gardener told him that he was working on the heap of leaves, cleaning branches, that he took a lunch break and that he saw the fire on both

properties on his return. The fire was on top of the heap of leaves and on the plaintiffs' property. He said that the gardener goes to the other side of the house and sits under a tree to have his lunch. The gardener further told him that when he saw the fire, the plaintiffs' house was not yet burning yet burning and that was why he jumped over the fence. He said that there was wind and sparks and that he feared that the sparks would reach the house.

[20] The defendant called his gardener, Mr. Muthavhatsindi Tshifhiwe, to testify. He confirmed that he was employed by the defendant as a gardener at the time. He said that he was having lunch in the changing room when the fire broke out at the back of the house. He was asked where the fire burned. He then drew a red line on photograph 80, commencing at the top and middle of the heap of leaves

and moving from there to the left bottom end of the heap, from there to the right bottom end of the heap and turning down from there onto the pathway between the two fences. From there, he said, the fire spread to the plaintiffs' property. He was asked which area on photographs 80 and 81 the fire had covered when he saw it. He said that the fire moved down from the top of the heap of leaves towards the grass. He didn't know who started the fire. He denied that he did. He then said that the fire may have started at the neighbours. He was then asked how that could have happened, to which he answered that the fire started between the two fences. This evidence contradicted his earlier evidence that the fire started on top of the heap of leaves and moved down from there to the grass and onto the pathway.

[21] He was then asked what the size of the area was that the fire had covered when he saw it. He said that it was spreading towards the fence. That contradicts his evidence that the fire started between the two fences. He confirmed the evidence of the second plaintiff that when he jumped over the fence, the fire was already close to the house of the plaintiffs. He denied that he told the second plaintiff that he had been instructed to burn the leaves on the

defendant's property. He said that she did ask him where the fire started and that he indicated to her where it had started on the defendant's property and had spread to the plaintiffs' property. He said that was the reason he went over to help.

- [22] n cross-examination, he acknowledged that he knew Mr. Vincent and said that they used to greet each other over the fence, but that there was no further interaction. He admitted that Vincent could have seen him working on the heap of garden rubble. It was put to him that Vincent saw him there within a minute before the fire started. He said that he didn't agree because the fire started while he was on lunch.
- [23] He was asked where the fire started. He said that it did not start where he drew the red line on the photograph, but somewhere to the right of the fence and that it spread to the heap. He was asked what the red line or circle showed. His answer was that it showed that the fire did not start there. This evidence contradicts what he said in his evidence in chief. He was later again asked where he saw the fire when he came back from lunch. He then said at the red box which can be seen on photograph 80, and which appears to be wedged between two branches of a tree to the right of the heap of leaves, and that it burned from there to the plaintiffs' property. When he was asked whether he could see fire burning between the two fences, he said that it was burning toward the two fences. All of this contradicts his evidence in chief about where the fire started.
- [24] Mr. Mutavhatsindi agreed with the evidence of Mr. Vincent that he ran to fetch the hose pipe. He said that he was unable to douse the fire with the hose because it was moving downwards towards the plaintiffs' house, the wind blowing it in that direction. He agreed that the fire spread rapidly and that he panicked and jumped over the fence to warn the occupants of the plaintiffs' house.
- [25] He was asked who started the fire. He answered that he did not know, but the neighbours' gardeners were smokers and that they possibly threw a cigarette. According to the evidence of the second plaintiff and Mr. Vincent, their workers were nowhere near the area of the fire.
- [26] He was referred to the black object on photograph 80 and agreed that it looked like a burnt stump, but said that it was not there when he worked there. His evidence was that he left the defendant's employment four to six months after the fire.
- [27] Mr. Mutavhatsindi was an unsatisfactory witness. He repeatedly contradicted himself during his evidence in chief and in cross-examination about where the fire started and how it spread. The probabilities are overwhelming that he was the person who was responsible for starting the fire. He was the only person on the defendant's property who could have started the fire. The second plaintiff and Mr. Vincent were credible witness who did not contradict themselves. I accept their evidence as truthful and, insofar as Mr. Mutavhatsindi's evidence is not in accordance with their evidence, it is rejected. Mr. Vincent's evidence was that he saw Mr. Mutavhatsindi fiddling with the heap of leaves and that within a very short space of time, while still busy having his cup of coffee, and looking out the kitchen window again, he saw the fire on the heap and Mr. Mutavhatsindi grabbing the hosepipe. He could therefore

not have been on the other side of the house having lunch. And, to repeat myself, there was no one else than Mr. Mutavhatsindi who could have started the fire. There can be no doubt that when

starting the fire under the prevailing dry and windy conditions, he acted negligently. He should have foreseen the possibility of the fire getting out of hand and causing damage to the plaintiffs' property and should have taken reasonable steps to avoid such damage, more particularly he should not have lit the fire in the prevailing weather conditions.

[28] The defendant denied that Mr. Mutavhatsindi, when starting the fire as alleged by the plaintiffs, was acting in the course and scope of his employment with the defendant. It was therefore submitted on behalf of the defendant that he should not be held vicariously liable for the negligent act of his employee. An employee acts within the scope of his employment if he acts in the execution or fulfilment of his duties in terms of his employment contract. However, he acts outside such scope if he disengages himself completely from his employment and promotes his own objectives or interests exclusively.[1] An employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment.[2] It is important that a sufficiently close connection did not exist between the employee's conduct and his employment. The commission of a delict during the performance of a forbidden act should also be seen in this light. The defendant relied on the fact that he had instructed his employee not to make fires. Apart from the fact that the first plaintiff and Mr. Vincent testified that fires were regularly made on the defendant's property, which evidence is corroborated by the presence of a burnt out stump and which evidence I accept, the forbidding of the making of fires by the defendant does not, in my view, absolve him from vicarious liability. If the forbidden act is connected to the general character of the employee's work and thus falls within the scope of his employment the employer will still be vicariously liable.[3] Mr. Mutavhatsindi's conduct in starting the fire, even if forbidden by the defendant, falls within the general scope of his employment as a gardener. He was not promoting his own interests and also did not disengage himself from the duties of his contract of employment. I find, therefore, that the defendant is vicariously liable for the negligent conduct of Mr. Mutavhatsindi.

[29] The defendant has pleaded in the alternative that, if it is found that his employee caused the fire, that there was contributory

negligence on the part of the plaintiffs. The ground of negligence relied upon by defendant's counsel during argument was that,

according to the evidence of Mr. Vincent, the grass on the plaintiffs' property was 20 cm long. It was common cause that it was

the sparks from the fire flying through the air which landed on the roof of the plaintiffs' house and which set it alight. The grass on the plaintiffs' property may not have been 20 cm long if regard is had to what can be seen on photograph 72 to which Mr. Vincent referred as showing the length of the grass, but it could not have been very short as the fire would then probably not have ran through it at the rate testified to by the witnesses. Mr. Vincent testified that the height of the flames above the grass on the plaintiffs' property was approximately half a meter. It was submitted on behalf of the defendant that sparks could also have come from the grass on the plaintiffs' property. I agree that that is a possibility and that it should therefore be found that there was contributory negligence on the part of the plaintiffs for not keeping their lawn as short as possible, especially if regard is had to the dry and windy conditions at that time of the year and to the fact that they were aware that fires were regularly made on the defendant's side of the property.

[30] In my view, a fair apportionment of negligence would be 80% in favour of the plaintiffs and 20% in favour of the defendant. I accordingly make the following order:

1. It is declared that the defendant is liable for 80% of the plaintiffs proven or agreed damages.
2. The defendant is ordered to pay the plaintiffs' costs of the action.

Appearances:

For the plaintiffs: Adv. J G van der Merwe.

Instructed by: Markus Moritz Haasbroek Attorneys

For the defendant: Adv. Nyutshama.

Instructed by: S R Mabuza Inc. Attorneys

[1] See: Neethling et al, Law of Delict, 7th ed., p. 393 et seq.

[2] Kasper v Andre Kemp Boerdery CC 2012 (3) SA 20 (WCC) 27

[3] Neethling et al, supra, p. 394 and authorities there referred to.

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