

SOUTH AFRICA / JUDGMENT

Oosthuizen and Others v Vorster (1491/2016) [2019] ZAECHGHC 35 (26 March 2019) [2019] ZAECHGHC 35

COURT

Eastern Cape High Court, Grahamstown

BEFORE

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CASE / FILE NUMBER

1491/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION - GRAHAMSTOWN)
Case
No: 1491/2016
In

the matter between:

PIETER
NICOLAAS OOSTHUIZEN
First
Plaintiff
ABRAHAM
VLOK OOSTHUIZEN
Second Plaintiff
JOHANNES
PETRUS LOURENS HATTINGH
Third Plaintiff
and
SCHALK
WILLEM VORSTER
Defendant

JUDGMENT

MALUSI J:

- [1] This is an action for damages arising out of a veldfire which started on a farm owned by the defendant and later spread to farms owned by the plaintiffs.
- [2] At the trial the parties applied for a separation of the merits and the quantum as provided in Rule 33(4). I granted the application and the matter proceeded on the merits.
- [3] The plaintiffs led the evidence of Pieter Nicolaas Oosthuizen (Oosthuizen), the first plaintiff's son. Oosthuizen testified that on the morning of 9 September 2014 at about 10h00 he was in the homestead at the farm Alomfraai, Aliwal North. He noticed smoke coming from the adjacent farm, Avontuur. He drove along the public road towards the smoke and arrived there in a few minutes. Upon arrival he noticed that the fire was already burning on Alomfraai though it had not yet crossed the public road which dissects the farm.
- [4] Oosthuizen gave evidence that he immediately turned back to the homestead to get cellphone reception and fetch his fire fighter. The fire fighter is a high pressure spray connected to a small tank mounted on a trailer. He managed to contact a number of farmers requesting assistance with human and mechanical resources to fight the fire. It took him 10-15 minutes to fill up his fire fighter with water.
- [5] Oosthuizen testified that upon his return to the scene he noticed that the fire had already crossed the public road and he could not control it alone. He decided to get his livestock out of the path of the fire. He noticed that the defendant was standing in the veld in Avontuur. He drove to various grazing camps in Alomfraai, mobilized his workers and they managed to gather the livestock away from the path of the fire.
- [6] According to Oosthuizen on that day 'the wind was quiet' earlier in the morning and only picked up at about 10h00. By noon it was worse. The fire traversed the Kraai River which is about 100-150 metres wide.
- [7] Under cross-examination Oosthuizen stated that even if he brought the fire fighter on the first occasion he visited the scene, on his own he would not have controlled the fire. On the second occasion he visited the scene the fire was out of control even if the defendant had assisted him.
- [8] Oosthuizen conceded that there were no firebreaks on Alomfraai similar to most farms in the area. This was on the advice of the local fire association, Brandt Vereniging, which deemed them as unnecessary. He was adamant that during the year 2014 the Brandt Vereniging was functioning.

- [9] Oosthuizen testified that the fire went through the middle of Alomfraai. It was only later that it opened up and spread sideways. He stated that by this time reinforcements had arrived and it was later brought under control.
- [10] Aubrey Mzimkhulu Mjobo (Mjobo) is a Warrant Officer in the South African Police Services based in Lady Grey. He was an investigating officer of the criminal complaint of malicious injury to property relating to the fire damage. He testified that he obtained a warning statement from the defendant. Mjobo testified that the defendant told him that he was working at his 'garage' cutting an iron bolt with a grinder. The grinder sparks were flying to the floor on the dung of the sheep. When he finished working he left the 'garage' and drove away. Whilst driving approximately 1 kilometre away the defendant saw smoke from the mirror of the 'motor vehicle' he was driving. He went back to the farm and noticed that the veld was burning. He could not control the fire as the wind was very strong. He contacted neighbours to assist in controlling the fire.
- [11] Under cross-examination Mjobo stated that he spoke with the defendant in Afrikaans and then recorded the statement in English. It was pointed out to him that he referred to a 'garage' when the defendant worked in a shed. He was also referred to the term 'motor vehicle' when the defendant actually drove a tractor. He insisted that he wrote what the defendant told him.
- [12] Doctor Jacques Eric Danckwerts (Danckwerts) is a fire ecologist who visited Avontuur farm to investigate the fire. He was engaged as an expert to investigate the origin, the point and cause of the fire, the spread of the fire and the role that firebreaks would have played in the fire. Dr Danckwerts

prepared two different reports. The first report dated 28 July 2017 was based on the version provided to Dr Danckwerts by the defendant personally. The second report dated 26 September 2017 was based on the version the defendant provided to Mjobo recorded in the police statement.

- [13] Dr Danckwerts gave evidence that he visited the scene approximately two and a half years after the fire had occurred. The defendant gave him the following version: On the day of the fire at approximately 7h30, the defendant was working in the corrugated iron shed which had an earthen floor and at least one side wall open. There was combustible fuel in the form of animal droppings on the floor. At approximately 9h00 the defendant left the shed and returned to his homestead. At approximately 10h00 the defendant saw smoke and returned to the scene at about 10h30. He then proceeded to the area where he noticed the fire and started with attempts to suppress the fire. There was a strong wind blowing during the morning on the day of the fire. The defendant had initially suspected that the fire had started in the shed where he had been using an angle grinder. However five days after the fire he had noticed a conductor had become detached from a pole on the power line in the area and was lying on the ground. The defendant suspected that the power line might have been the cause of the fire.

- [14] Dr Danckwerts testified that weather conditions play a very important role in the behaviour of a fire. He highlighted that wind speed, temperature and relative humidity all have a very strong influence on the behaviour of a fire. In his opinion the weather stations with reliable data were too far from the scene and the topography of the area was too varied for the data from the weather stations to be relied upon. He cautioned against extrapolating weather data over a distance and in an area with rugged terrain.
- [15] Dr Danckwerts testified about the mechanics of a fire starting with a pre-heating phase. He stated that an endothermic reaction is involved wherein an energy / heat source is required to denature the hydrocarbons that sit in the fine fuel. Once the fuels are denatured they release flammable gases which burn and create heat in the process. This is called an exothermic reaction as it releases heat. When the endothermic reaction and the exothermic reaction are in equilibrium in the early phases of combustion then there is going to be difficulty for the fire to start.
- [16] Dr Danckwerts explained the difference between glowing combustion and smouldering combustion. Glowing combustion is when all the hydrocarbons have been released and one sees light glowing but there are no flames. On the other hand smouldering combustion occurs when all the phases of combustion are happening at a very slow rate. That rate may be increased by the addition of fine fuel or oxygen which will then turn it to a flaming combustion.
- [17] Dr Danckwerts testified that animal droppings are compacted fine fuels which can combust quite easily. Due to a restriction of oxygen availability such fine fuels are particularly susceptible to smouldering combustion which is easily undetected as you do not see the smoke.
- [18] Dr Danckwerts stated that an angle grinder abrades steel which is mostly iron and produces sparks. These are incandescent particles of iron releasing light and heat. He testified that the heat is not created by the angle grinder abrading the steel but by the spontaneous combustion of small particles of steel. He stated that only a shower of sparks which continuously replaces the cooling particles will combust fine fuel within 3-4 metres. In his opinion an angle grinder showering sparks onto animal droppings is a fire hazard. He stated that what would have occurred in this case is that the sparks penetrated below the animal dung surface and ignited therein.
- [19] Dr Danckwerts opined what would have occurred in this case is that the sparks penetrated below the animal dung surface and ignited therein. He stated that smouldering combustion would possibly not be detectable as the sparks hold their heat for nanoseconds. In his view this would have been an unusual but possible scenario that the sparks do not ignite fuel on the surface but penetrate below to set fire on the subsurface fuel. This is a low probability though not impossible scenario. He emphasised that he proffered this scenario only because of the version the defendant gave him that he did not see smoke shortly after completing the grinding task but only saw smoke after approximately an hour. Dr Danckwerts

emphatically stated that in his opinion the probability is that if a person uses an angle grinder on fine fuels then it ignites the surface fuels. This probability was only discounted because of the version the defendant had given him.

- [20] When Dr Danckwerts was presented with the version given to Mjobo he opined that this version would fit with a more probable behaviour of the fire. He stated that such a fire would produce billowing smoke visible from 1 kilometre away in approximately 15 minutes. He further stated that in 20-30 minutes the fire would reach its terminal velocity. This scenario indicates a surface fire was probable and not a subsurface combustion.
- [21] Dr Danckwerts expressed the view that the defendant ought to have taken precautions for a possible fire even if the defendant was unaware of the smouldering subsurface combustion at the time. He further agreed that preventative precautions ought to have been taken or an inspection conducted after completing working with the grinder.
- [22] Under cross-examination it was put to Dr Danckwerts that the defendant's version was that in the shed it was not a solid floor of droppings but interspersed dung across the sand floor. In his opinion a scattering of dung as contended by the defendant makes a subsurface smouldering fire 'extremely improbable / highly unlikely / a remote probability'. The reason is that a subsurface fire requires a hip of dung with cavities for the sparks to go under. If the sparks scattered and fell on the ground they lose heat too quickly to ignite the scattered dung.
- [23] Dr Danckwerts stated that the process whereby combustion proceeds directly from preheating to smouldering without first exhibiting the flaming phenomena is relevant as the possible cause of the ignition of the fire. However, in his view this type of smouldering combustion normally occurs where there has been a fire and it appears the fire has been extinguished but in fact it is still alive. This is a common phenomena known even to lay people that a fire would stand up after smouldering and this takes place after a previous fire which appears to be extinguished but is not. Dr Danckwerts

stated emphatically that in this present case it would be an exceptional circumstance that there would be smouldering combustion

before there has first been flaming combustion. He testified that to the best of his knowledge it would have been the first time such a scenario had happened.

- [24] Dr Danckwerts stated that the wind came from the western side of the shed, blew through the shed carrying some dung approximately 4 metres to the grass adjacent to the shed. He stated that combusting dung loses weight and becomes easily picked up by a gust of wind. In his opinion the veld fire was started with a combusting dung being carried by the wind and igniting the grass outside the shed.

- [25] Dr Danckwerts stated that what he could not determine was whether this fire was as a result of smouldering combustion or surface combustion. The answer to that issue dependent on the timelines. He stated repeatedly that a surface fire was more probable if the timelines had been different from what he had been told by the defendant.
- [26] Dr Danckwerts expressed the opinion that the fire must have started between 9h45 and 10h00, probably closer to the latter. The reason for this opinion was the fact that by 10h15 there was a big fire. He stated that it takes more than 15 minutes for a fire to evolve from ignition phase to a big fire.
- [27] Willem Adriaan Forster is a remote sensing specialist based at the South African National Space Agency. He was engaged by the plaintiffs to utilize satellite imagery to determine the path and timing of the fire. He used two satellites called the Modis and Landsat to map the fire. According to the Modis imagery of 9 September 2014 at 9h50 there was no fire visible. He testified that at 10h12 there was no sign of a fire on the satellite imagery. Forster stated that a fire must at least be 50 square metres for the Modis satellite to pick it up. He also stated the non-appearance of a fire on the imagery does not mean that there was no fire as it may not have been large enough at the time to be picked up by the satellite imagery.
- [28] Forster also utilised the NSG satellite which is a weather satellite that captures images every 15 minutes. The thermal imagery from this satellite indicated that there was heat in the area at 10h27. The probability is that this was the fire on the farms owned by the parties. At that stage the fire covered an area of approximately 500 square metres. At 10h42 the imagery was the same as the earlier one.
- [29] Forster gave evidence that at 10h57 and 11h12 the fire was bigger and more intense. At 11h27 the fire appeared to be dissipating in certain areas. Forster stated that in his opinion the fire started at about 10h00.
- [30] The defendant gave evidence that on 9 September 2014 he left Mooifontein, the farm where he resides, on a tractor. He crossed the Kraai River which at that time was impassable with a motor vehicle. On arrival at Avontuur he plugged the three electrical leads he had with him on the power point in the shed. He then plugged the angle grinder on the electrical leads. He proceeded to cut a bolt on a back wheel of a plough using the angle grinder. This process caused the steel bolt to emit a shower of sparks.
- [31] The defendant testified that after the bolt was cut off he removed the wheel from the disc plough and placed it on a tractor. He then went to the plug point where he removed the electrical leads and rolled them up. He hanged the electrical leads on the tractor. He returned to the cannibalised plough and inspected an area approximately 6 metres around it. He saw no signs of a fire.
- [32] The defendant stated that he started cutting the bolt at about 8h00. He had completed the work and collected the equipment he had used at approximately 8h30. He then drove back to Mooifontein arriving at approximately 9h00.

- [33] According to the defendant he proceeded to fit the wheel on another Massey Ferguson plough in a shed at Mooifontein. When he came out of the shed he saw smoke at Avontuur where he had been working earlier. He testified that he took a saw and cut a few branches of a bush known as 'Besem bos'. He travelled with a tractor to Avontuur as fast as possible in the circumstances.
- [34] On arrival he noticed that the grass was burning in the area between the shed and the poplar bush. He got off the tractor and climbed a hill to get cell phone reception. He called Oosthuizen twice but did not manage to make contact. He called his own son and requested him to alert the neighbouring farmers about the fire and seek their assistance in controlling it.
- [35] Thereafter he drove back his cattle which were in the path of the fire. He went to the shed and using the 'Besem bos' managed to extinguish the fire for quite a distance in that area. Other farmers arrived with fire fighters and assisted him in controlling the fire at his kraals. They fought the fire on his farm up to the road.
- [36] Under cross-examination he confirmed his statement to the police except for some aspects which will be dealt with later in this judgment. The defendant confirmed that whilst driving away from Avontuur about 1 kilometre he saw smoke and returned to the farm. He conceded that the timeline in his police statement was provided to Mjobo by him. He conceded that Mjobo 'did not suck these facts from his thumb' but obtained them from him.
- [37] The plaintiffs' claim is founded in delict. In order to prove the defendant's liability the plaintiffs had to establish:
- (a) The conduct of the defendant of which they complained;
 - (b) The wrongfulness of that conduct;
 - (c) Fault, in this instance negligence, by the defendant;
 - (d) Harm suffered by the plaintiffs;
 - (e) The causal connection between such harm and the defendant's conduct that is the subject of their complaint.[1]
- [38] The Constitutional Court has acknowledged that there is growing coherence in this area of our law. It has been stated that 'conduct . . . can take the form of a comisio, for example where the fire causing the loss was started by the defendant . . . or an omisio, for example the failure to exercise the proper control over the fire of which he was legally in charge . . . or the failure to contain the fire when, in the absence of countervailing consideration adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping into a neighbouring property thereby causing loss to others . . . [2] The concept of 'a legal duty' must be understood in this context as 'no more than an attempt at formulating some kind of practical yardstick as to when policy considerations will require the imposition of legal liability.' [3]

- [39] The wrongfulness enquiry depends on considerations of legal and public policy. It focuses on ‘the duty not to cause harm - indeed to respect rights - and questions the reasonableness of imposing liability.’[4] ‘The reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant’s conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.’[5] It is only if the harm causing conduct is wrongful in this sense that, if associated with fault, it becomes actionable.
- [40] It has been held that wrongfulness and negligence are two separate and discreet elements of delictual liability which should not be confused.[6] It has been held that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that ‘its role may be safely confined to the rubrics of negligence and causation’.[7]
- [41] The test for negligence as propounded by Holmes JA was stated as:
- “(a) *A diligens pater familias in the position of the defendant-*
- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) The defendant failed to take such steps.”[8]
- [42] It is clear that foreseeability of the eventuality of harm is an element in the test for negligence. It has been held that the exact manner in which the harm occurred need not be foreseeable but the general manner of its occurrence must indeed be reasonably foreseeable.[9]
- [43] It has been stated that in terms of section 34(1) of the National Veld and Forest Fire Act 101 of 1998 where the damages or loss result from a veldfire and the plaintiff proves that the defendant caused the veldfire or that the veldfire started on or spread from land owned by the defendant, then in those circumstances, the defendant is rebuttably presumed to have been negligent in relation to the veldfire, unless he is a member of a Fire Protection Association in the area where the fire occurred. This reverse onus will only be avoided by a land owner who participates in a Fire Protection Association under the legislation.[10] The reverse onus places a burden on the defendant to disprove not just any possibility of negligence but the negligence alleged

against the defendant by the plaintiff in the latter’s particulars of claim.

- [44] The plaintiffs’ particulars of claim stated that the basis of negligence were the following grounds:

“7.1 By welding and/or grinding in or near dry grass on the Defendant’s farm without taking any or any reasonable precautions against the possible and foreseeable ignition of the dry grass in the immediate vicinity, as a result of the said activity.

7.2 By welding and/or grinding in circumstances when it was unsafe to do so due to the fact that the wind was blowing and due to the fact that the grass in the immediate vicinity of the said activity was extremely dry.

7.3 By welding and/or grinding without taking any, alternatively, reasonable precautions against the ignition and spread of a fire.

7.4 By welding and/or grinding in circumstances and at a place where it was dangerous and unreasonable to do so in the prevailing circumstances and without taking any and/or reasonable steps to prevent the spread of any veld fire that might and did originate and spread from such activity.”

[45] In response to the stated grounds the defendant pleaded that:

“AD PARAGRAPH 7 THEREOF:

6.1 The Defendant admits that on 9 September 2014 he, using an angle grinder, cut a bolt from an old plough and pleads further that he did so in a shed and not in or near grass;

6.2 The Defendant denies the further averments and conclusions set out in this paragraph.”

[46] The following facts were common cause at the conclusion of the trial:

- (a) The fire which occurred on 9 September 2014 was a veldfire as envisaged in the National Veld and Forest Fire Act 101 of 1998;
- (b) The veldfire originated on the defendant’s farm and spread to the farms owned by the plaintiffs.
- (c) The fire was started by a shower of sparks from the grinding conducted by the defendant falling on animal dung. The dung was later blown away by wind and landed on dry grass which ignited.
- (d) The fire started at approximately 10h00.

[47] The main point of dispute in the matter was whether the fire was a result of smouldering combustion or surface combustion. The answer to that depended on a number of issues including the time lines, the version accepted by the court etc.

[48] It is convenient to first deal with the cause of the fire. Dr Danckwerts indicated clearly in his evidence that a fire ignited by a shower of sparks would probably be a surface fire. The reason he had discounted the surface fire was due to the defendant providing him a version that he first saw smoke after approximately an hour from the time he had left the shed. Dr Danckwerts sought scientific reasons to explain the delay of about an hour before smoke was visible.

[49] In my view Dr Danckwerts provided sufficient reasons for the probable scenario that this was a surface fire. The defendant's version was that there was a scattering of dung in the shed and not hips of dung. Dr Danckwerts expressed the opinion that a scattering of dung makes a subsurface fire 'extremely improbable / highly unlikely / a remote probability'. This is principally due to the scattered sparks falling on the ground and losing heat too quickly to ignite the scattering of dung.

The other aspect relates to the fact that smouldering combustion normally occurs where there has been a fire which was later extinguished. There is no evidence that there had been a prior fire before the fire that started in the shed and burnt the veld.

[50] In my view the crucial aspect is that the defendant had told Mjobo that he saw the smoke whilst approximately a kilometre away from the shed as he was on his way to Mooifontein farm. This version given to Mjobo by the defendant ties in with the probable cause of the fire according to Dr Danckwerts.

[51] A further crucial aspect is that the defendant did not tell Mjobo that he had inspected the area in which he had worked with the grinder. Neither did he tell Dr Danckwerts about an inspection of the area. The evidence indicates that he was frank with both these witnesses during the respective interviews. The only reason proffered for this lack of report by Mr de la Harpe, who appeared on behalf of the defendant, is that there was a communication breakdown with Mjobo.

[52] I find no merit in the submission. Although the defendant is clearly Afrikaans speaking he appears to me as someone who had a good understanding of English. At times during the trial he gave his evidence in English and read documents that were in English. He gave no indication during his evidence that he had difficulty in understanding English.

[53] Mjobo was assailed as not being proficient in Afrikaans. I gained the distinct impression that he had a reasonable working knowledge of Afrikaans. He was given a passage to translate into Afrikaans. Mr de la Harpe did not complain about Mjobo's translation of the passage. I am satisfied that if the defendant had inspected the area he had worked in the shed he would have told both Mjobo and Dr Danckwerts. It can safely be concluded that his failure to inform these two independent witnesses indicates that he did not conduct any such inspection.

[54] The next aspect relates to the timelines. At the conclusion of the trial both parties agreed that the fire started at 10h00. The defendant had told Mjobo that he had been working in the shed at about 9h30. Dr Danckwerts testified that the fire usually incubates for a period of 3 to 7 minutes after which it either self-extincts or spreads more rapidly. He opined that if the defendant left immediately after completing his task, it is more conceivable that a fire ignited shortly before he left, could have evolved through the incubation phase and become obviously visible after he had driven a distance of approximately a kilometre. It is clear on the reasoning of Dr Danckwerts that the version given to Mjobo by the defendant is more probable. It further accords with the time Dr Danckwerts had opined is the time when the

fire started. The stages the fire underwent in its development and spread as indicated by Dr Danckwerts in his evidence accords with the satellite images Forster had introduced in the trial. Dr Danckwerts had made the point that it takes more than 15 minutes for a fire to evolve from ignition phase to a big fire. It stands to reason that by the time the fire was visible on the satellite images as it was more than 50 square metres it must have been burning for more than 15 minutes.

- [55] The next element requires that a determination be made regarding the foreseeability of harm to the plaintiffs. The defendant readily admitted that he foresaw that using a grinder to cut the bolt was likely to cause a fire. He stated that this is the reason he allegedly conducted an inspection after completing his task.

I am satisfied that the admission regarding foreseeability by the defendant and the concession by Mr de la Harpe on this aspect were well made.

- [56] I am required to consider whether the defendant took reasonable steps to guard against a fire. It appears from the evidence of Dr Danckwerts that the reasonable steps to guard against the fire would have been to conduct an inspection of the immediate vicinity, to disturb the dung with a boot or to pick it up. These are fairly basic steps and I am satisfied that it is reasonable to have expected a person in the position of the defendant to complete these steps.
- [57] In my view the defendant failed to take these reasonable steps. I reject his evidence that he had conducted an inspection. If he had inspected the immediate area he had been working on he would have noticed the fire on the surface of the dung. The defendant admitted that he did not disturb the dung either with his boot or pick it up. I am satisfied that the general manner of the occurrence of the fire was reasonably foreseeable. It is not necessary that the exact manner must be foreseen.
- [58] In my view the defendant failed to rebut the presumption of negligence contained in section 34 of the National Veld and Forest Fire Act 101 of 1998. I am alive to the fact that the presumption is only an evidential aid and where the essential facts are known its role is to a large extent limited.[11] Be that as it may, it only adds weight to the fact that the plaintiffs have established the liability of the defendant.
- [59] Oosthuizen gave his evidence in a clear and forthright manner. He tendered his evidence without any obvious hesitation. In my view he was an honest and a credible witness. I found his evidence to be very reliable. Where his evidence contradicts that of the defendant, I have no hesitation in accepting his version rather than that of the defendant.
- [60] Mjobo was a good witness. It is clear from his evidence that English is his second language and Afrikaans a third language. I found him to be an honest and credible witness. In my view his evidence is more reliable than that of the defendant. I accept his evidence.

- [61] Dr Danckwerts was an impressive witness. I considered his reasons for his opinion and found them to be cogent and persuasive. I have no hesitation in accepting his opinion.
- [62] The defendant failed to call an expert witness which is not without consequence. Dr Danckwerts' evidence was not challenged. The same holds true for Mr Forster. Their evidence stands uncontradicted and is accepted.
- [63] The defendant was a poor witness and wholly unsatisfactory. He gave incoherent and at times contradictory evidence. It appeared to me, and his demeanour in court only served to fortify this view, that he was in a state of confusion. He was an evasive witness at times. He vacillated from one version to the other without apparent compunction. It appeared he had a poor memory perhaps due to his advanced age. Important and numerous aspects of his evidence were not put to plaintiffs' witnesses. It appears the blame for this must be placed at his door as he was ably represented by competent counsel. I am satisfied this was not due to misunderstanding the questions or the language. His evidence was riddled with contradictions. I reject his evidence where it is contradicted by the plaintiffs' witnesses and the experts.

[64] In the result the following order will issue:

64.1 The defendant is held liable for all the proven or agreed damages which the plaintiffs suffered as a result of the veldfire on 9 September 2014.

64.2 The defendant is liable for payment of the plaintiffs' taxed or agreed party and party costs relating to the merits, which costs shall include but not be limited to:

64.2.1 the costs of obtaining by the plaintiffs of the experts reports and the qualifying, preparation, reservation, accommodation and travelling and expenses of:

64.2.1.1 Mr W A Forster;

64.2.2 Dr J E Danckwerts;

64.2.3 The South African Weather Service;

64.2.4 Dr Barker.

64.2 The costs of counsel.

64.3 Mr Pieter Nicholas Oosthuizen and Aubrey Mzimkhulu Mjobo are declared necessary witnesses relating to the merits trial.

T MALUSI

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiffs: Adv

Zietsman instructed by

Whitesides Attorneys

53 African Street

GRAHAMSTOWN

For the Defendant:

Adv de la Harpe instructed by

Netteltons

118A High Street

Heard on: 14-15

November 2017 & 22 March 2018

Judgment

delivered: 26

March 2019

- [1] HL & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd 2001 (4) SA 814 (SCA) at 820, MTO Forestry (Pty) Ltd v Swart NO 2017 (5) SA 76 (SCA) at para 12.
- [2] HL & H Timber Products ibid at para 14.
- [3] MTO Forestry ibid at para 14.
- [4] Loureiro & Others v Imvula Quality Protection (Pty) Ltd 2014
- (3) SA 394 (CC) para 53, Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015
- (1) SA 1 (CC) paras 20-21.
- [5] Le Roux & Others v Dey (Freedom of Expression Institute & Restorative Justice Centre as amici curiae) 2011
- (3) SA 274 (CC) at para 122.
- [6] MTO Forestry ibid at para 17 and the authorities cited therein.
- [7] MTO Forestry ibid at para 18.
- [8] Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-G.
- [9] Sea Harvest Co-operation (Pty) Ltd & Another v Duncan Dock Cold Storage (Pty) Ltd & Another 2000

(1) SA H 27 (SCA) at para 22, *Jacobs & Another v Transnet Ltd T/A Metrorail & Another* 2015 (1) SA 139 (SCA), *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 258 (CC) at para 59.

[10] *Van der Eecken v Salvation Army Property Co & Another* 2008 (4) SA 28 (T) at 36H-I.

[11] *MTO Forestry* *ibid* at para 21.

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