



REPUBLIC OF SOUTH AFRICA

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case number 531/03
Reportable

In the matter between:

WDJ LUBBE

APPELLANT

and

BWB LOUW

RESPONDENT

CORAM: FARLAM, CLOETE et HEHER JJA

HEARD: 8 NOVEMBER 2004

DELIVERED: 25 NOVEMBER 2004

SUMMARY: Veld fire – failure by landowner to prevent fire spreading to neighbouring farms – whether omission unlawful – whether presumption of negligence rebutted.

JUDGMENT

FARLAM JA

INTRODUCTION

[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 Oranjevlei, for damages sustained when a fire which started on Oranjevlei 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'.)

[2] At the commencement of the trial the magistrate was requested to adjudicate only on the question as to whether the appellant was liable to compensate the respondent for the damages sustained by him. The question as to the quantum of those damages stood over for later decision if necessary.

[3] After hearing the evidence of the respondent and his witness, the appellant having closed his case without leading any evidence, the magistrate dismissed the respondent's claim on the ground that there had been no negligence by the appellant and that he was not vicariously liable for the conduct of his labourers who were responsible for the fire.

[4] An appeal to the Bloemfontein High Court was successful. Ebrahim J, with whom Beckley J concurred, held that although the

magistrate had correctly held that the appellant was not vicariously liable for the conduct of his labourers, he had been under a legal duty to prevent the fire from spreading onto his neighbour's property and he had not rebutted the presumption of negligence arising from the provisions of section 84 of the Forest Act 122 of 1984 which applied in the circumstances.

EVIDENCE

[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 Oranjevlei and spread to the respondent's farms causing damage.

[6] The following summary of what happened is based on the evidence of one of the appellant's employees, Elias Kotelo, who testified on behalf of the respondent and whose evidence was not challenged in cross-examination. Kotelo had at the appellant's request gone to Oranjevlei from the farm on which the appellant lived, Pypersfontein, to turn off the irrigation system. On the way he gave a lift to two other labourers, Rolls, who was also an employee of the appellant, and Draadmaker, an independent contractor, who said that he wanted to fetch clothing from Oranjevlei. After Kotelo had turned off the irrigation system and while he was driving back to Pypersfontein he stopped the utility

vehicle he was driving, at Draadmaker's request. Draadmaker and Rolls then alighted from the vehicle and proceeded to a poplar tree, from which they tried to smoke out bees to collect honey. Koleto had told them not to do it as the veld could catch alight and he would get into trouble with the appellant, but they paid no heed. Koleto remained in the vehicle while Draadmaker and Rolls went to the tree. They returned without any honey and said that they had put out the fire, which had been made in a grainbag. When they reached the boundary of Pypersfontein, Draadmaker and Rolls said that there was a fire burning behind them. Koleto drove back to the fire and saw that it was burning where Draadmaker and Rolls had lit the fire to smoke out the bees. They tried to extinguish the fire but had nothing with which to beat it out. They tried with bluegum branches but without success. Koleto then turned on the irrigation system but the pipes were too short to reach the fire. He then raced back to the house where he reported the fire to the appellant. He thereafter returned to the scene of the fire in a tractor, accompanied by the appellant who drove the utility vehicle, but when they got there the fire was out of control.

[7] Koleto said that if he had had proper equipment in the beginning the fire would have been extinguished because it was not very big at that stage. In fact according to him it had almost

been extinguished.

[8] In cross-examination Koleto said that he had trusted Draadmaker and Rolls to put out the fire they had lit and that if he had suspected that they had not done so, he would have gone himself to satisfy himself that the fire had been extinguished. Koleto also said in cross-examination that the appellant came on the scene with other people with hoses and other fire-fighting equipment. A number of other people came later with utility vehicles and helped to put out the fire.

APPELLANT'S CONTENTIONS

[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 provided¹ 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.

[10] Mr *Van Rooyen* submitted that the respondent had not succeeded in proving that the appellant's conduct in the present case was wrongful. He referred to the approach to the wrongfulness question adopted in this Court in *Minister van Justisie v Ewels*, 1975 (3) SA 590 (A) at 597 A–C, where Rumpff CJ said:

‘Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die

¹ Section 84, which was repealed by the National Forests Act 84 of 1998, has effectively been replaced by s 34 of the National Veld and Forest Fire Act 101 of 1998.

geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree.'

[11] Relying on the decision of this Court in *Administrateur, Transvaal v Van der Merwe*, 1994 (4) SA 347 (A), Mr Van Rooyen contended that the fact that the appellant was in control of Oranjevlei from which the fire spread to the respondent's farms was not in itself enough to impose a legal duty on him to prevent the spreading of the fire. He referred in particular to the following passage in the judgment of Olivier JA in the *Van der Merwe* case (*supra*, at 361 F-362 B):

'In die afwesigheid van 'n gevaarskeppende positiewe handeling, is blote beheer van eiendom en versuim om dit uit te oefen met gevolglike benadeling van 'n ander, dus nie per se onregmatig nie. Die kernvraag is steeds of die voorsorgmaatreëls wat die beheerder volgens die benadeelde moes geneem het om die nadeel te voorkom, onder die omstandighede redelikerwys en uit 'n praktiese oogpunt, van hom geverg kan word. Die onderliggende filosofie is dat 'n gevolg slegs onregmatig is indien in die lig van al die omstandighede redelikerwys van die verweerder verwag kan word om positief op te tree en die voorgestelde voorsorgmaatreëls, vir die versuim waarvan hy deur die eiser verwytd word, te tref.

Ten einde vas te stel of 'n positiewe handeling of late sodanig is dat dit as onregmatig aangemerkt kan word, moet gevolglik onder andere die onderskeie

belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreeklikheid in die betrokke soort gevalle, versigtig teen mekaar opgeweeg word. Faktore wat 'n belangrike rol speel in die opwegingsproses is, onder andere, die waarskynlike of moontlike omvang van nadeel vir andere; die graad van risiko van intrede van sodanige nadeel; die belange wat die verweerder en die gemeenskap of beide gehad het in die betrokke dadigheid of late; of daar redelik doenlik maatreëls vir die verweerder beskikbaar was om die nadeel te vermy; wat die kanse was dat gemelde maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van sodanige maatreëls redelikerwys proporsioneel sou wees tot die skade wat die eiser kon lei. Sien *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) op 384C ev. Sien ook, vir vergelykende doeleindes, die uitspraak van Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA) ([1972] 3 All ER 557) te 37 ev waarin die soort feitelike oorwegings wat die betrokke juridiese beleidsbeslissing ten grondslag lê, duidelik na vore gebring word.'

[12] He submitted further that the evidence showed that in the area where the appellant and the respondent conducted their farming operations it would be very expensive effectively to control fires that arose because of the size of the farms; that it was not customary for either the appellant or the respondent to make firebreaks to prevent fires spreading; and that the topography of the area where the fires spread was of such a nature that it was

not possible effectively to control fires there. In addition he relied on the fact that the appellant, with the assistance of others, fought for a very long period to extinguish the fire on his own farm. In the alternative, Mr *Van Rooyen* submitted that the respondent did not place facts before the Court which showed that any omission on the part of the appellant was of such a nature that the legal convictions of society demand that any such omission should be regarded as wrongful.

DISCUSSION

(A) WRONGFULNESS

[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):

‘Once such an owner or occupier [ie, an owner or occupier of landed property in a rural area which is under his control, either personally or through his servants] (hereinafter for convenience referred to as a landowner) as is mentioned in the preceding paragraph becomes aware that fire has broken

out on or spread to his property, and he foresees or ought reasonably to have foreseen, the likelihood that, if not controlled or extinguished, it might spread to and cause damage to or on another's property, I am, for the reasons which follow, firmly of the opinion that our law requires him, with such means as are at his disposal, to take reasonable steps to control or extinguish the fire. For, under such circumstances, "the duty to take care" mentioned in *Paine's* case, *supra* [*Cape Town Municipality v Paine* 1923 AD 207 at 216-217], is, in my view, established. Purely as a matter of language, it is no doubt correct to say that where the landowner bears no responsibility for the origin of a fire which is burning on his property, his failure to take steps to endeavour to control or extinguish it is an "omission" which is not "connected with prior conduct". To relieve such a landowner of all legal liability solely upon that ground would, however, in my opinion, be to ignore both practical realities and what I conceive to be our law. For, in the circumstances postulated above, the law, in my opinion, imposes a duty upon the landowner to take, within the range of his capacities, reasonable steps to control or extinguish a fire liable to cause is, in my view damage to another.'

[14] Mr *De Wet* also relied on *HL & H Timber Products, supra*, in which Nienaber JA said (at 823 C):

'Landowners in areas outside fire control areas are saddled with the primary responsibility, falling short of an absolute duty, of ensuring that such fires occurring on their land do not escape their boundaries.'

[15] The fact that the duty cast upon a landowner in these circumstances is not an absolute duty was also referred to by Ogilvie Thompson CJ in the *Quathlamba* case, *supra* (at 83 G-H)

where he said:

‘The scope of the duty, and whether it has been breached, must inevitably depend upon the circumstances of the particular case. *When adjudicating upon an allegation of negligence* against a landowner regarding his failure to control a fire on his property, a variety of considerations must – at any rate in a civil action – necessarily be taken into account in assessing what fire-fighting action could reasonably be expected of him.’ (The italics are mine.)

It is accordingly clear, in my view, that the factors relied on by the appellant in this regard are relevant to the issue of negligence, with which I shall deal presently, and not the issue of wrongfulness.

[16] In my view the *Van der Merwe* decision, *supra*, on which Mr *Van Rooyen* strongly relied will not bear the weight which he sought to place upon it. Mr *De Wet* correctly distinguished that case on the ground that it was concerned with someone, *viz* the Administrator of the Transvaal, who was not the owner of the land from which the fire in question had spread but merely a person under whose control and supervision the land fell. Van der Merwe’s contention that the Administrator was under a legal duty to take precautionary measures against veld fires breaking out on the side of a public road and spreading therefrom to the land of others was based on section 4 of the Roads Ordinance 22 of 1957

(Transvaal) which provided that '[a]ll public roads within the province should be under the control and supervision of the Administrator'. The road in question was an unnumbered and unproclaimed road, seldom used by motor vehicles, about whose condition nobody had complained and in respect of which no requests for the taking of precautionary measures against veld fires had been made to the Administrator. This Court held (at 360 H) that the fact that the Administrator had control and supervision over the road was a necessary factor for the establishment of liability on his part but was not in itself sufficient. It was also pointed out (at 359 H-I) that the control and supervision vested in the Administrator by the Ordinance was merely of a permissive nature and that the ordinance imposed no duty on the Administrator, at least not in relation to the making of firebreaks or the taking of other precautionary measures. In my opinion the case should not be regarded as authority for the proposition that the wide recognition of a duty to take care in relation to veld fires approved in such cases as *Quathlamba, supra*, and *HL & H Timber Products, supra*, is to be qualified in cases where the control of the landowner in question is one of the incidents of ownership of the property concerned.

[17] I am aware of the fact that the decision in the *Van der Merwe*

case has been criticised on the ground that it contains a test of wrongfulness formulated in such broad terms as to blur the distinction between wrongfulness and culpability (see the discussion of this case by Mr Mervyn Dendy in 1994 *Annual Survey of South African Law* 240-241). In view of my conclusion that the case is distinguishable in the present matter it is not necessary to consider whether this criticism is correct.

(B) NEGLIGENCE

[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.

CONCLUSION

[19] I am accordingly satisfied that the decision of the High Court in this matter was correct.

[20] The following order is made:

The appeal is dismissed with costs.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
CLOETE JA
HEHER JA