THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 872/2017

In the matter between:

NIEUCO PROPERTIES 1005 (PTY) LTD **FIRST APPELLANT**

JACOBUS JOHANNES BOSHOFF **SECOND APPELLANT**

and

TRUSTEES FOR THE TIME BEING OF THE INKULULEKO COMMUNITY TRUST **FIRST RESPONDENT**

MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

SIPHO LEVY MASEKO **THIRD PARTY**

Neutral citation: *Nieuco Properties 1005 & another v Trustees for the Inkululeko Community Trust & others* (872/2017) [2018] ZASCA 123 (21 September 2018)

Coram: Cachalia, Saldulker, Dambuza, Van der Merwe and Schippers JJA

Heard: 31 August 2018

Delivered: 21 September 2018

Summary: Fire – National Veld and Forest Fire Act 101 of 1998 – interpretation of definition of ‘owner’.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Peterson AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘a The question of law is answered in the affirmative.

b The second defendant is directed to pay the costs of the hearing of the separated issue, including the costs of two counsel.’

JUDGMENT

Van der Merwe JA (Cachalia, Saldulker, Dambuza and Schippers JJA concurring)

[1] This appeal concerns the meaning of the definition of ‘owner’ in s 2(1) of the National Veld and Forest Fire Act 101 of 1998 (the Act). The need to determine this issue arose from the facts and circumstances set out below.

[2] The first appellant, Nieuco Properties 1005 (Pty) Ltd, is the owner of the remaining extent of portion 1 as well as the adjoining portion 10 of the farm Glengarry 652 situated in the province of Mpumalanga. I refer to these two portions of land collectively as Glengarry. The first appellant and the second appellant, Mr Jacobus Johannes Boshoff, jointly farm on Glengarry and, *inter alia*, produce macadamia nuts.

[3] The first respondent, the trustees for the time being of the Inkululeko Community Trust IT490/63, is the owner of the farm Rietvley 651 (Rietvley). The Government of the Republic of South Africa is the registered owner of portion 1 and of the remaining extent of the farm Hanging Stone 636 (collectively referred to as

Hanging Stone). Hanging Stone is thus ‘State land’ as defined in the Act. The second respondent, the Minister of Rural Development and Land Reform, is responsible for its administration. The parties therefore agreed that the second respondent should be regarded as the registered owner of Hanging Stone. Rietvley adjoins Hanging Stone and both adjoin Glengarry.

[4] On 20 April 2011 the second respondent (duly represented) entered into a written agreement of lease with a third party, Mr Sipho Levy Maseko, in terms of which Hanging Stone was let to him for a period of five years commencing on 1 April 2011. In terms of the lease agreement the second respondent relinquished possession, use and enjoyment of Hanging Stone to Mr Maseko for the duration thereof. The agreement obliged him to make firebreaks on the boundaries of Hanging Stone as well as within its boundaries where necessary, to protect the farm against internal fires and to comply with any statutory fire protection requirements or conditions imposed by any competent fire protection authority (clause 11.16). In terms of clause 11.6, Mr Maseko was obliged to keep all the firebreaks open and free from any combustible material.

[5] On 7 June 2012 a veldfire started on Rietvley. From there it spread to Hanging Stone and then to Glengarry. The veldfire was extinguished, but flared up again on 8 June 2012 and spread to the appellants’ macadamia orchards on Glengarry.

[6] The appellants instituted action against the first and second respondents in the North Gauteng Division of the High Court, Pretoria. They alleged that the wrongful and negligent conduct of both respondents had caused the destruction of thousands of macadamia trees on Glengarry. In the result they claimed damages from the respondents, jointly and severally, in the amount of R16 775 257.95, consisting of the costs of replacement of the macadamia trees and loss of income for the period until the replacement trees come into full production.

[7] In their particulars of claim the appellants relied principally on the alleged failure by the respondents to comply with the obligations placed on an ‘owner’ of land in terms of the Act. There was some debate before us on the question whether the particulars of claim also placed reliance on the common law duties of landowners to prevent

veldfires and the spreading thereof. In view of the conclusion I have reached, it is unnecessary to determine this issue.

[8] Chapters 4 and 5 of the Act provide for various duties of owners in respect of the prevention of veldfires and fire fighting. Non-compliance with these duties is a criminal offence under s 25 of the Act. Chapter 4 places a duty on owners to prepare and maintain firebreaks. Section 12(1) provides that every owner on whose land a veldfire may start or burn from, must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land. Section 13 deals with the requirements for firebreaks. In essence, it provides that an owner is obliged to prepare and maintain firebreaks that are wide and long enough to have a reasonable chance of preventing a veldfire from spreading to or from neighbouring land.

[9] Chapter 5 places a duty on all owners to acquire the necessary equipment and to have personnel available to fight fires. Section 17(1)*(a)* provides that every owner on whose land a veldfire may start or burn or from whose land it may spread, must have the fire fighting equipment, protected clothing and trained personnel prescribed by regulation or reasonably required in the circumstances. Section 17(1)*(b)* obliges an owner to ensure that in his or her absence responsible persons are available to act in the event of fire. In terms of s 17(2) an owner may appoint an agent to do all that he or she is required to do in terms of s 17. Section 18 provides that any owner who has reason to believe that a fire on his or her land or the land of an adjoining owner may endanger life, property or the environment, must immediately take all reasonable steps to notify the relevant fire protection officer or authority and all owners of adjoining land and must also do everything in his or her power to stop the spread of the fire.

[10] The particulars of claim also foreshadowed that the appellants would rely on s 34 of the Act. It provides:

‘(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which –

(a) the defendant caused; 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.'

It is common cause that the second respondent was not a member of a fire protection association in the area where the fire in question occurred.

[11] The plea of the second respondent focused on the control of Hanging Stone. The second respondent pleaded that in terms of the lease agreement, Hanging Stone was at the relevant time under the control of the third party. The plea postulated that only persons in control of land are owners thereof in terms of the Act and, therefore, that the second respondent was relieved from performing any of the obligations in respect of Hanging Stone in terms of the Act.

[12] In response to the second respondent's plea, the appellants added the third party as a party to the action. They claimed that he was liable for their damages, jointly and severally, with the first and second respondents.

[13] As between the appellants and the second respondent, however, the central issue was whether, as a matter of law, the lease agreement absolved the second respondent from compliance with the obligations in terms of the Act. They agreed to place this issue before the court for determination as a separated question of law on agreed facts. The first respondent and the third party played no part in these proceedings. The question of law was formulated in these terms:

'Do the provisions of the Act and more particularly the duties imposed on an owner referred to in the various sections apply in relation to State land where the Minister of the Government Department (the Second Defendant) concluded a lease agreement with a third party whereby possession and control of such land are given and made over to the lessee in terms of the provisions of the lease agreement including clauses 11.6 and 11.16 of the lease agreement, **Annexure "B"**?'

[14] The answer to this question depends on the proper interpretation of the definition of 'owner' in the Act, namely:

'**"owner"** has its common law meaning and includes –

(a) a lessee or other person who controls the land in question in terms of a contract, testamentary document, law or order of a High Court;

(b) in relation to land controlled by a community, the executive body of the community in terms of its constitution or any law or custom;

(c) in relation to State land not controlled by a person contemplated in paragraph *(a)* or a community –

(i) the Minister of the Government department or the member of the executive council of the provincial administration exercising control over the State land; or

(ii) a person authorised by him or her; and

(d) in relation to a local authority, the chief executive officer of the local authority or a person authorised by him or her.'

[15] In the court a quo the appellants contended, in essence, that the definition determined that more than one person may be the 'owner' of a particular piece of land at the same time. Therefore, so it was argued, both the second respondent and the third party were saddled with the obligations in terms of the Act at the relevant time. The second respondent, on the other hand, contended that on a proper construction of the definition only a person who has the right of control over the land in question, is regarded as the owner and because possession and control of Hanging Stone was handed to the third party in terms of the lease, only the latter was obliged to comply with the Act. Thus, the appellants contended, the question of law should be answered in the affirmative, whereas the second respondent contended that the answer should be 'no'.

[16] The court a quo (Petersen AJ) answered the question of law in favour of the second respondent. It held that 'the word "*control*" traverses the definition of "*owner*" like a golden thread'. As the second respondent had relinquished control over Hanging Stone to the third party, so it reasoned, the obligations in terms of the Act and the presumption of negligence in terms of s 34 thereof did not apply to it.

[17] The court a quo dismissed the appellants' claim. Presumably this only entailed dismissal of the claim against the second respondent. In any event the court a quo erred in this regard. It was not called upon to determine liability. It had to decide only

the question of law. The court a quo, however, granted leave to the appellants to appeal to this court.

[18] In reaching its conclusion, the court a quo relied heavily on the judgment in *Mondi South Africa Ltd v Martens & another* 2012 (2) SA 469 (KZP). There the first defendant was the owner of two farms. In terms of a written agreement and power of attorney, the first defendant handed complete control of the farms, including the right to alienate the farms, to his father, the second defendant. The court concluded that as the right of control over the farms was divested in favour of the second defendant, the first defendant ceased to be an 'owner' of the farms.

[19] The court in *Mondi* regarded the common law right of control over the property as the decisive incident of ownership for the purposes of determining whether the first defendant fell within the common law meaning of owner (para 20). Although recognising that this did not apply to para *(d)* of the definition, the court pointed out that the control of the land was required by paras *(a)* to *(c)* thereof (para 22). The court proceeded to say that it would be anomalous to require control over the land in question to qualify the other named entities as an 'owner', but not in the case of the 'common law meaning' of owner (para 23). The court also referred to decisions of this court that dealt with the delictual liability of a landowner for damages resulting from a fire that spread from the property controlled by the landowner, including *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A) (*Quathlamba*) (paras 29-32). It held that 'the historical judicial requirement of control over the property as a determinant of liability' indicated that the common law meaning of owner in terms of the Act must include the element of control over the property in question. The court also found it unpalatable that the presumption of negligence in s 34 would operate against an 'owner' who had no right of control over the land in question (para 34).

[20] It is trite that the interpretation of the definition entails giving meaning to the words used within the context in which they were used, including the purpose of the Act. As always, one has to start with the language.

[21] In this regard, the definition commences with a primary meaning of 'owner', namely its 'common law meaning'. In terms of the common law ownership is the most

extensive right that a person may have with regard to a corporeal thing. The content of ownership is not capable of exhaustive tabulation. Nevertheless, ownership is not absolute. Its full extent may be limited by public law or by the owner having granted private law rights over the property to a third party. By doing so the owner only suspends his or her powers over the property to the extent of the rights granted. When such rights of a third party come to an end, the full content of ownership is automatically restored. This is referred to as the elasticity of ownership. Thus, at common law, it is quite clear that an owner who temporarily transfers the right of control over the property to a third party, remains the owner of the property. See CG van der Merwe *Sakereg* 2 ed at 171-175.

[22] It follows that the definition of 'owner' in the Act includes an owner, who temporarily relinquishes possession and control of the property in terms of a lease agreement. Taking into account that para *(d)* of the definition also does not require control of the land, it is clear that the definition of 'owner' is not limited to persons in control of land.

[23] As a general rule, the word 'includes' is used as a term of extension. Depending on the context, it generally serves to extend a primary meaning by adding matters not ordinarily included in the primary meaning. See *R v Debele* 1956 (4) SA 570 (A) at 575-576 and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2004 (1) SA 406 (CC) para 17-18. The court a quo correctly recognised that this is the meaning of the word 'includes' in the definition. The common law meaning of owner is well known and the persons mentioned in paras *(a)* to *(d)* of the definition do not ordinarily fall within that meaning.

[24] When regard is had to the word 'and' (not 'or') between paras *(c)* and *(d)*, it becomes apparent that the meaning of the language of the definition is that all the persons referred to therein are conjunctively regarded as owners. This is put beyond doubt by the Afrikaans text of the Act. It provides that 'owner' means '. . . dieselfde as in die gemenereg *en ook*' (my emphasis) the persons tabulated in paras *(a)*, *(b)*, *(c)* and *(d)*. (In respect of the permissibility of having regard to the unsigned text in these circumstances, see *Bonitas Medical Fund v The Council for Medical Schemes & another* [2016] ZASCA 154; [2016] 4 All SA 864 (SCA) para 16).

[25] It follows that more than one person may simultaneously be the 'owner' of a particular piece of land for purposes of the Act. The obvious example is that of landowner and lessee. The same applies, for instance, to land owned by a local authority that is under the control of a person referred to in paras *(a)* or *(b)* of the definition. Therefore, all persons falling within the wide definition of 'owner' in respect of a piece of land, are liable to comply with the obligations in terms of the Act, subject to the provisions of s 2(5).

[26] Section 2(5) of the Act provides strong contextual support for this conclusion. It provides:

'(5) Where there is more than one owner in respect of the same land, the proper performance by one owner of a duty imposed in terms of this Act exempts the other owners from performing that duty.'

As counsel for the second respondent fairly conceded, this section would be wholly superfluous if only persons in control of land were regarded as the 'owners' of that land.

[27] Thus, the definition of 'owner' does two things. First, it extends the categories of persons liable for the obligations in terms of the Act. Second, it enhances effectiveness by nominating the responsible body or persons in paras *(b)*, *(c)* and *(d)*.

[28] This accords with my understanding of the purpose of the Act. The judgment of the Constitutional Court in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) (which declared the predecessor of s 34 of the Act not to be unconstitutional) commences with the following:

'Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna.'

The purpose of the Act is set out in s 1 thereof. It provides:

'(1) The purpose of this Act is to prevent and combat veld, forest and mountain fires throughout the Republic.

(2) The Act provides for a variety of institutions, methods and practices for achieving the purpose.'

In my judgment, the Act seeks to fulfil its purpose of preventing enormous environmental and economical damage by veldfires by assigning the obligations in terms of Chapters 4 and 5 of the Act as widely and effectively as possible.

[29] In *MTO Forestry (Pty) Ltd v Swart NO* [2017] ZASCA 57; 2017 (5) SA 76 (SCA), Leach JA found the following argument to be compelling but unnecessary to decide:

'[24] In regard to the first of these issues, the appellant argued that the court in *Mondi v Martens* had conflated the liability for certain duties under the Act and the presumption of negligence contained in s 34(1) with delictual liability. This was particularly so in regard to its reasoning that it was necessary to adopt a narrow meaning to the concept of ownership so as to avoid an owner, who had no right to control over land, being held liable. The correct approach, so the argument went, would have been for the court to have held the registered owner to have been an owner in terms of the Act – and therefore liable to perform the prescribed duties imposed by the Act – but not having been liable in delict as, due to him not having been in control of the property in question, he had not acted wrongfully.'

[30] Subject to one qualification this argument is sound. The provisions of the Act are of course not entirely insulated from the law of delict. Non-compliance with a statutory duty in terms of the Act may underpin a finding that a person negligently and wrongfully caused damages resulting from a veldfire and a plaintiff may rely on the presumption of negligence contained in s 34 in a delictual action. But the Act does not determine delictual liabilitiy. That is done only by the law of delict. It follows that whether or not delictual liability would lie, is not relevant to the interpretation of the definition of 'owner' in the Act.

[31] The qualification is this. It is well established that wrongfulness is determined by a judicial evaluation of whether considerations of public and legal policy require that a particular act or omission be visited with delictual liability. As Nugent JA said in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 423 (SCA) para 12, this exercise is often assisted by postulating negligence. Thus, in matters such as the present, the question would be whether public and legal policy considerations indicate that a landowner be held liable for damages caused by his or her negligent omission to prevent a fire spreading to neighbouring land, irrespective of whether that landowner has the right of control of the land or not. The answer must no doubt generally be in

the affirmative. It follows that in most cases a landowner without control of the land would, in these circumstances, escape delictual liability because of the absence of causal negligence on his or her part. That is the import of what Ogilve Thompson CJ said in *Quathlamba* at 82D-83H.

[32] Seen thus, the application of s 34 to a landowner who temporarily transfers possession and control of his or her land, presents no real difficulty. First, s 34 does not apply if the landowner is a member of a fire protection association for the area in question. Second, the facts in respect of when, how, to whom and for what period such transfer of rights took place, would generally not be public knowledge but would lie within the peculiar knowledge of the landowner. Third, a landowner who transfers possession and control of the land to a responsible person who could reasonably be expected to take reasonable steps to prevent and control veldfires on the land would seldom be sued and if so, would have no difficulty rebutting the presumption of negligence. If not, a finding of negligence against him or her would not be unfair.

[33] For these reasons the decision in *Mondi v Martens* should no longer be followed. The court a quo should have answered the question of law in the affirmative and the appeal must be upheld.

[34] The following order is issued:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘a The question of law is answered in the affirmative.

b The second defendant is directed to pay the costs of the hearing of the separated issue, including the costs of two counsel.’

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellant:	F J Becker SC (with him T van der Walt SC) Instructed by: Tim du Toit Attorneys, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For Second Respondent:	A C Ferreira SC (with him H O R Modisa) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein