



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 3517/2015

In the matter between:

SJL MARAIS AND 14 OTHERS

PLAINTIFFS

and

TRANSNET SOC LTD

DEFENDANT

HEARD ON: 07, 08, 10, 14, 15 February 2023, 12, 13, 14 and 15 June 2023 and 10-11 August 2023.

JUDGMENT BY: BOMELA, AJ

DELIVERED ON: 24 NOVEMBER 2023.

INTRODUCTION

- [1] These matters arise from veld fires that took place on 11 August 2012 at approximately 14h00 around the railway reserve and railway tracks in the vicinity of the Karee railway station, Brandford, Free State Province referred to as Transnet's property, between poles numbered 167/13 to 160/05. The "site of ignition.) The defendant is the owner of the site of ignition.

- [2] These fires affected the surrounding farms of the plaintiffs who sued in their different capacities under fifteen (15) different case numbers duly consolidated in terms of Uniform Rule 11.
- [3] It is the plaintiffs' case that the fire was caused as a result of the negligence of the defendant and/or alternatively by employees of the defendant acting in the course and scope of their employment with the defendant, and/or alternatively by persons acting under the control and direction of the defendant, they having been negligent, failed to comply with their duty of care as pleaded in the particulars of claim. It is the plaintiffs' case that as a result of the defendant's negligence, the plaintiffs suffered damages.
- [4] By agreement between the parties, this trial proceeded only to determine the merits of the claim, the quantum was stayed for later determination.
- [5] The defendant denied that its duty of care arose as alleged, it submitted that its train was operated with the necessary degree of care and skill and was properly maintained. It denied that the fire originated as a result of overheated metal fragments and/or other mechanical fragments and/or sparks being deposited from a diesel-powered railway engine no. 8910 operated by the defendant which resulted in the fire starting in the site of ignition.

THE INSPECTION IN LOCO

- [6] On 7 February 2023, an inspection in *loco* was held with regard to the mapping of the fire scar at the point of ignition.
- [7] The minutes of the inspection in *loco* admitted to court as exhibit "A" and the fire scar map by SANSA was by agreement admitted as an exhibit "A" and "B" respectively.

FACTS

- [8] The plaintiffs presented the evidence of Mr Steven Patella, Mr Pieter Swanepoel, Dr Cor Botha, Mr Flip Weyers, Mr Willem Voster, Mr Bogatswi, Mr Van Der Merwe

and Dr Jock Danckwerts. The defendant presented the evidence of Mr Hendrik Slabber, Mr David Hansen, Ms Jantjies and Mr Moerane.

- [9] The parties agreed, for the purposes of conducting the trial, to use the case file of Mr Maas under case number 3519/2015 for all other matters are similar. The defendant conceded *locus standi* of all the plaintiffs, and, that the plaintiffs suffered damages. It was not in dispute that there was a fire in the vicinity of the defendant's property on 11 August 2012.
- [10] The parties were in agreement in terms of the wind direction and there were no objections to the late filing of Mr Foster's additional documents.
- [11] It is common cause that the train journal marked "T1" was illegible and there was no better copy. The locomotive inspection record of the railway stations where the locomotive stopped and the data captured through the condition assessment system (CAS) of the relevant locomotives were not available as the defendant did not have these documents in its possession and the document's whereabouts were unknown to the defendant.
- [12] The diagram from the train control officer at Bloemfontein and Brandford was also not available and the defendant did not have them in its possession, their whereabouts were unknown to the defendant. The defendant filed its Rule 36(10) notice containing photographs to which the plaintiffs had no objection.
- [13] Mr Stefan Moeketsi Patella testified on behalf of the plaintiffs and confirmed that he noted point B on the map and that is on the railway line, on the eastern side of point B is a green gate, and to the east of point B is farm Karee Fontein.
- [14] On 11 August 2012, he was on duty under Mr Joe Maree, he worked as a cattle header looking after the cattle and feeding them.
- [15] It was between 14h00 and 15h00 in the afternoon when he was exiting the green gate to feed the cattle, he was traveling in the northern direction and was from Mr Maree's house, the house is situated in the middle of Karee Fontein. When he reached the gate, he got out of the car to open it, he saw from the Glen side a smoke billowing, he noticed that there was a train coming, he returned to the car, passed

through the gate and stopped again so that he can go and close the gate. It was when he was returning to close the gate when the engine passed him, the train was goods train with goods carriages, he got into his car and he drove alongside the train and there was an uphill somewhere and it was at that point of uphill at the Katop where the last carriage of the train passed him, he saw a flame from the grass after the last carriage of the train had passed and that the grass where the flame erupted from, was next to the rail track.

- [16] The grass was on the embankment next to the railway line where the flames started on the other side of the fence, the fire started from the top downwards, he stopped the car when he saw the flames, alighted and tried to put the fire out with tree branches, the fire came fiercely towards him and he ran as he could not put the fire out, he went back to the farm to take the fire extinguisher and when he got to the farmhouse, he found the owner, Mr Maree, and they observed the smoke, Mr Maree said the fire is strong and they have to go and protect the homesteads, he did not go back to the Katop, the fire had spread at this point to Kareefontein.
- [17] In cross-examination he repeated his story without any contradictions regarding what he witnessed.
- [18] Dr K Botha, a mechanical engineer with expertise in engineering in both the Railway and Building industries testified. He was commissioned by the plaintiff to explain the possible causes of the fire after it was witnessed by Patella. In preparing his report, he consulted Mr Patella, Mr Louw and Mr Swanepoel.
- [19] He confirmed that Mr Louw had since passed away and he concentrated on the facts stated to him by Mr Patella and Mr Swanepoel. He was in court when Mr Patella was testifying, he heard Mr Patella's evidence and he agreed with it. He dealt with the possibility of trains causing wildfires. He testified that there were numerous causes of potentially hazardous hot materials and spark ignitions emanating from the train during operations, the hazards could potentially arise from faults in the powerful internal combustion engines, electrical transmissions of power from engine to wheels, electrical resistance (dynamic) brakes, friction brakes on locomotives and wagons, steel wheels on steel rails, white metal/friction axel bearings and human factor.

- [20] The defendant was alive to these hazards as the defendant protected these railway reserves against fires. The occurrence of hot material and/or spark/metal ignitions from locomotives or wagons causing multiple wildfires over some distance was not uncommon, particularly with the operation of heavy freight trains, and particularly when steam locomotives were used and wagons were equipped with cast iron brake logs and white metal bearings.
- [21] The risks of dangerous levels of these hazardous ignitions from trains is minimized by design and maintenance standard, including modern design standards for rolling stock, including spark arresters, composite brake blocks and roller bearings and regular preventative maintenance on all equipment, including locomotive engines, exhaust system, electrical equipment and brake gear. The risk of spark emissions leading to wayside fires is further minimized by keeping the right of way clear of flammable material including dry grass. These preventative initiatives are the responsibility of the defendant, stipulated by internal organizational rules and instructions.
- [22] He assessed the possibility of trains causing wildfires and looked at one or more combinations when a train causes a wildfire. His opinion was that it was difficult without a detailed inspection of the rolling stock and rails shortly after the incident and with limited documentary evidence available to identify with absolute confidence which of the fire-causing hazards may have occurred. I will deal with this later when I deal in the Judgment with the role documentary evidence plays.
- [23] He expressed the opinion that the most probable generation of heat was by dynamic friction between steel and/or cast-iron surfaces or brake blocks and wheel threads of the train in that this in conjunction with the high winds and dry way-side grass in close proximity to the track could have been sufficient to cause hot metal particles or hot pieces of brake blocks to ignite the dry grass. He conceded that he was not an expert in respect of the temperature at which dry grass would ignite. The generation of heat may have been attributable to cast iron brake shoes applied against the wheels due to possibly missing brake blocks, they could be the result of inadequate inspection and maintenance or faulty installations. Another cause could have been handbrakes not properly disengaged by the yard or train crew, or the

disintegration of a brake block caused by a prolonged and sustained application of brakes and this could be due to incorrect brake settings during installation or maintenance, or the locomotive's independent brakes being engaged. If the handbrakes were engaged on a wagon or if the brakes were engaged erroneously by faulty or misaligned brake gear, the blocks could build up heat over a distance. This could happen even to the point of overheating and disintegration. Him and Hansen, the defendant's expert, did not discount this happening to even empty wagons as in the main this this could happen with loaded wagons.

- [24] Dr Botha was of the view that on a 20-ton tar empty wagon traveling at 50 to 60km/h, the energy generated at the brake block to wheel interface where one brake block is engaged only to one wheel would exceed 70 kilowatts and under sustained conditions given a long enough time span, the temperatures may surpass the blocks, the composition temperature. The hot pieces of brake blocks could then break off and come into contact with flammable trackside vegetation. Dr Botha testified that the composition temperature of composite brake blocks is greater than 350 degrees.
- [25] He was cross-examined on the assumption that all the tests he referred to were properly executed prior to the departure of the train on 11 August 2012 in respect of the possibilities of the cause of the fire, he conceded that defendant would have taken all reasonable steps to prevent the train from causing fires assuming that these tests were done. This was a very important concession as the opposite is true. No documents were provided to confirm whether the tests were indeed done and evidence led in this regard was not backed by any form of documentary evidence.
- [26] He further testified that he mechanical fault would have been detected by the people checking the wagon before it was certified in terms of the yard test. Dr Botha conceded that all those three tests when having been conducted properly would have confirmed that the braking system was in a working condition and that the handbrakes were released. It was further put to Dr Botha that assuming that these tests were properly done before departure, one would not have expected the train

to cause fire and he agreed. No documentary proof of these tests was made available.

- [27] In his report, Dr Botha dealt with the alleged acts of negligence which the plaintiff alleged were committed by defendant and which caused the fires. He also dealt with all the unlikely scenarios which I will not repeat. His report was handed in as an Exhibit.
- [28] Mr Flip Weyers, a Rail Train Specialist was called to give expert evidence on the assembly of a train, the handling of a train, the application of a brake test prior to departure, known as the A-brake test, for the A-brake test as well as the post-departure brake test known as the efficiency brake test or the B-brake test. He explained that as soon as the train is assembled, the handbrakes of some of the rolling stock are engaged to secure the train for movement. Thereafter the A-brake test is undertaken by the train driver and the train assistant. The train assistant is the person who walks the distance of the train to, inter alia, ensure that the brake system operates correctly. Once the A-brake test has been performed the train assistant must once again walk the length of the train and disengage the handbrakes of the train. Once the A-brake test is completed the combined brake test and load certificate (T3216) must be completed and delivered to the train driver. The said document will then form part of the train journal.
- [29] He stated that the incidents during the journey that require maintenance or repairs must be reported to the train control officer and it must be recorded in the locomotive trip report for locomotive repairs (T1510) as well as the (T49) "repair" or the (T50) "not to go-karts". When a train reaches its destination, the driver leaves the locomotive trip report in the locomotive as part of the records of the train. It is known that the risks associated with the running of trains are that they are sources of fire. One of the causes of fires emanating from the operation of trains is when the brake system of a train does not function properly. This happens when the brake blocks of trains do not release completely when the brake system disengages. He testified further that it is the duty of a train driver and his assistant to constantly monitor the train to its destination, this is particularly so if the train is moving around a bend because the driver/assistant has an opportunity to physically inspect the whole

length of the train. If the train for whatever reason causes sparks to be emitted from the wheels or causes a fire in the rail reserve, the driver and/or assistant will be able to observe same and take appropriate action. He himself had experience of a train that caused a fire when the driver forgot to disengage the handbrake system of the trailing locomotives. He further testified that when a train reaches its destination, the train inspector will again inspect the train and any problems, maintenance requirements and/or urgent repair work will be recorded on the applicable recording system of the defendant.

- [30] Pieter Swanepoel testified that he visited the site of ignition three (3) days after the fire. He walked in a southern direction and saw burnt and unburnt patches on the eastern side of the railroad. He picked up objects, approximately 8 to 10 of them at point "D" and "H". These were the objects identified by Dr Cor Botha as disintegrated parts of a composite brake block, two (2) of the objects were handed in as exhibit "C". He took photos of the object he picked up and photo 4 in the photo bundle depicts a piece of disintegrated composite brake block in the burnt railway reserve at point "B" on the map. Photo 5 depicts a piece of disintegrated composite brake block in the railway reserve at point "H" on the map. Photo 6 depicts a piece of disintegrated brake block which Mr Swanepoel picked up in the burnt railway reserve at point "C" and photo 7 depicts a piece of disintegrated composite brake block at point "F" on the map. He further collected a disintegrated composite piece of brake block at point "G" on the map. He was not cross-examined by Mr Knoetze.
- [31] Willem Vorster, a Remote Sensing Specialist in the employ of the South African National Space Agency obtained instructions in October 2012 from a Loss Adjuster of the defendant to prepare an investigation report on the fire which had burned north of Bloemfontein next to the railway line. He used Satellite-based data from two (2) Satellites in order to determine the path and timing of the fire of 11 August 2012. This was two months immediately after the incident had occurred and the defendant must have had all the necessary documents to assist in this investigation.
- [32] He mapped the fire scar as depicted in exhibit "A" and calculated and concluded that the fire started on 11 August 2012 before 14h05. According to him, based on

the Satellite imagery, the fire started at least in three (3) places next to the railway line. He indicated the three (3) places where the fire started. His evidence was not disputed.

- [33] Dr Jock Danckwerts, a Specialist Fire Investigator and Fire Ecologist was called. His testimony was that multiple ignitions which in his opinion were at least five (5) took place at or very close to the railway line, approximately 20 kilometres south/south west of Brandfort, near Glen College.
- [34] All ignitions took place within 9.2-kilometre distance of the railway track and took place on the eastern or South Eastern side of the railroad track. He stated that there were indications of malfunction in the form of pieces of fractured brake blocks (pads) that have been found adjacent to and to the east of the railroad tracks. These are the pieces of brake blocks that were found by Swanepoel near locations "D", "C" and "H" in the map several days after the fire event. At least one of the fire ignitions was witnessed by Patella very shortly after a train had passed point "C" on annexure 3. Satellite imagery had identified three (3) active fires along the railway track, each of these active fires were in the vicinity of the respective heels (basis of the fire scars at 14h05 on 11 August 2012). This indicates all the fires ignited at approximately the same time or shortly after one another.
- [35] In his understanding, the allegation was that the subject fires originated as a result of a malfunction of a passing train, and to his knowledge, no other potential cause of the fire has been suggested. After he examined all information available to him, he could not find any other possible cause of the fire. His conclusion was that the fire was caused by some form of malfunction of a train traveling along the railroad tracks as depicted on the various annexures, malfunction resulted in some form of ignition source being emitted from the train as it passed which ignited the adjacent grass under conditions extremely favourable for spread of fire, in his opinion, any other possible ignition source would call for improbable coincidence. In elaborating, he stated that an alternative cause would require someone or something traveling along or adjacent to the railway line at approximately the same time as the train seen by Patella passed and over a short period of time to have inserted multiple ignitions adjacent to the railroad track. Added to that, there is no road along railway

tracks at least from point "E" to point "H" on the map. After considering some evidence, his conclusion was that the pieces of brake block such as those collected by Swanepoel and seen in the photos, at 350 degrees Celsius, would readily ignite dry grass fuel, under windy conditions.

- [36] After the plaintiffs' case, the defendant presented its evidence by calling Mr Slabber who was the train driver on the 11 August 2012. He did not have any recollection of the events of the 11 August 2012. He could not produce any proof of any report whatsoever which supported the defendant's case. No witnesses were called to give direct evidence in relation to the incident.
- [37] The defendant led the evidence of Ms Jantjies who conceded during cross-examination that her evidence was not based on her own recollection of events but rather on documents that she consulted prior to testifying in Court and that none of those documents were discovered by the defendant.
- [38] Mr Moerane testified on the manufacturing of Jumbo Wagons and the quality control measures followed by the defendant in the manufacturing process, he was only appointed as a quality assurer on 1 September 2016 and could not give any information in respect of the fire that took place on 11 August 2012, he could not give evidence in relation to the quality assurance done on the train in question during the process of manufacturing and the tests done immediately prior to its departure from Bloemfontein.
- [39] At that time relevant to this inquiry, he was an artisan in the Underframe Assembly Department of the defendant and his evidence in that regard was irrelevant to the case in point.
- [40] Mr Hansen was called as an expert dealing with the locomotive's brake system and in particular the electronic controlled pneumatic brake system (ECP).
- [41] He and Dr Botha produced a joint expert report which in general was in agreement on a number of aspects and to their credit, where they disagreed, such disagreements were valid and acceptable. Of importance, is that Mr Hansen prepared a second report after Dr Botha had testified. The opportunity to cross-examine Dr Botha in that regard was missed and he could not be confronted with

any of the aspects raised in Mr Hansen's second report. What was strange was that the first Hansen report was prepared without having consulted with the train driver or any other witness, he conceded this fact. He conceded that the train journal was compiled by the train assistant, the train assistant was not called by the defendant to testify. Hansen also conceded that he had no personal knowledge of the compilation of the train in question and there was no evidence led by the defendant in respect of the compilation of the train. The only document available that was discovered by the defendant with regards to the compilation of the train was the "train journal" which indicated ex facie the document that the train was made up of three (3) locomotives which were one (1) a Class 37 and two (2) Class 34 locomotives.

- [42] According to Hansen's evidence, the ECP system does not operate or function on Class 34 locomotives. He did not have any knowledge of whether any of the wayside equipment was operational on the day in question. He had no knowledge as to whether the wagon brake test was performed when the newly manufactured wagon in question left the Bloemfontein manufacturing depot and conceded that he had no knowledge of the reliability of the wagons coming from the yard and/or whether the brake tests were performed on them. On the assumption that the ECP system did function on the day in question, Hansen conceded that the brake system of a train can still overheat if the clearances of the brakes were not set correctly during manufacturing and the handbrake of a train functions independently of the ECP system and thus any fault or failure to disengage the handbrakes system will not be picked up or prevented by the ECP system.
- [43] Mr Hansen further conceded that his opinion "that it is highly unlikely as a result of the workings of the ECP brake system that the fire started in the railway reserve in the vicinity where the fire occurred was caused by the bonding and consequent overheating of the train's brakes", does not cover the mechanical system of the train, like the handbrakes.
- [44] His opinion is based on the premise that if all things were done correctly as per the layout instructions issued by the defendant, it is highly unlikely that the fire was caused by bonding and consequent overheating by the train's brakes. He conceded

that his opinion on the ECP system did not include mechanical failures and that things could go wrong, for example, handbrakes that are not released, faulty brake settings, sticky beams and when the equipment is not manufactured correctly. This remains a possibility.

ISSUES

- [45] The issues to be decided were the origin and the cause of the fire of 11 August 2012, and whether the fires were the result of negligence on the part of the defendant or of the defendant's employees, and whether, if it is found that the defendant acted negligently, the plaintiff's actions contributed to their own damages and if so, to what extent.

THE LAW

- [46] In *Kruger v Coetzee*¹ Homes JA made the following well-known statement:

"For the purposes of liability culpa arises if:

(a) a diligence pater familias in the position of the defendant:

(i) would foresee 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."

- [47] This has been constantly stated by this Court for some fifty (50) years.

Requirement (a)(ii) is sometimes overlooked. Whether a *diligence pater familias* in the position of the person concerned would take any guarding steps at all and if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.

- [48] Foreseeability of the eventuality of harm is an element of the test for negligence. The test for *culpa* can, in the light of the developments of our law since this judgment is stated as follows:

¹ 1966 (2) SA 42 (A) at 430 E – G.

"For the purpose of liability culpa arises if a reasonable person in the position of the defendant would have foreseen harm of the general kind that actually occurred, would have foreseen the general kind of causal sequence by which that harm occurred, would have taken steps to guard against it and the defendant failed to take those steps."

ANALYSIS

[49] In order to determine the issue of foreseeability, one would have to examine if a reasonable person in the position of the defendant would have foreseen harm of the general kind that actually occurred, would have foreseen the general kind of causal sequence by which that harm occurred, would have taken steps to guard against it and the defendant failed to take those steps. The defendant conceded ownership of the railway reserve, that it was responsible for the operation and maintenance of its property at the site of ignition, and that it was responsible for the operation and maintenance of the railway cars, engines and equipment which travelled through the site of ignition. It further admitted that the farming operations carried on by the plaintiffs in the general area of its property consist of cattle, sheep, and game farming which carries a high risk of damage should a veld fire occur and that during the winter months of May to October, a high risk of veld fires occurring exist by virtue of the expected weather conditions during the winter months and that plaintiffs suffered damages. As a result, it is not difficult to find that the defendant foresaw the harm of a general nature that occurred as well as the general kind of causal sequence by which the harm occurred. What is left to be determined is what steps have been taken to guard against it and whether the defendant failed to take such steps. Documentary evidence becomes critical in this regard.

[50] In *Khoza v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government*,² the defendant, contended that the plaintiff did not produce any evidence to show that the medical staff were negligent, and even if they were negligent, it did not cause or contributed to the HIE. The starting point was the defendant's contention that there were no hospital records to

² 2012/20087) [2015] ZAGPJHC 15; 2015 (3) SA 266 (GJ); [2015] 2 All SA 598 (GJ) (6 February 2015).

demonstrate foetal distress and that evidence of the medical staff, demonstrated that proper procedures were followed including the monitoring of the patient and foetus.

- [51] The Court in that case accepted that it was correct that the plaintiff was unable to rely on the CTG. However, the reason was that the CTG tracings at the critical period were missing.
- [52] Nonetheless, the defendant submitted that the Court was left with the evidence of the plotting done by the medical staff on the Partogram, reinforced by viva voce evidence it presented.
- [53] The Court remarked that it was common cause that this was not the first time in a claim of negligence involving the Chris Hani Baragwaneth maternity ward that CTG recordings have disappeared. It cited *Ntsele v MEC for Health, Gauteng Provincial Government*³ [2013] 2 All SA 356 (GSJ), where Mokgoatlheng J noted at para [116] that all the clinic and hospital notes were missing from the patient's file and that no explanation was proffered.
- [54] In Khoza, the case file was called for, it contained every document one would expect save for the critical CTG tracings. No proper explanation was offered. On the contrary, Dr Mtsi who was called by the Defendant confirmed that CTG records should be kept in the mother's file.
- [55] The CTG records were possibly the single most important monitoring device during labour to detect foetal distress and appear to be essential where labour is being induced by the use of prescribed drugs, such as Prostin and Sintocinon.
- [56] In this regard the court referred to Lamont J in *Makgomarela v Premier of Gauteng and another*. At paragraph [18] of that Judgment, the Court stated the following:

"Had the mother in bed been monitored as required, the monitoring would have yielded data which would have enabled the medical team to intervene at an early stage so as to

³ 2011/35273) [2012] ZAGPJHC 217 (1 November 2012) para [6] to [8].

prevent hypoxia occurring. A CTG could have been used to effect tracings on a continuous basis as such was available at the hospital.”

- [57] In cases where a CTG machine is used, its recordings are regarded as the key evidence. The keeping of the documents may have evidential ramifications in civil suits. The cases referred to indicate that the overwhelming evidence presented was that where it is utilized, the CTG is the single most important and reliable monitoring device during the critical phases of labour.
- [58] On the facts, the CTG traces constitute the original and foundational documentary evidence having been produced directly by the machine. See: *South African Law of Evidence*, 2nd edition by Zeffert & Paizes page 830 to and *Principles of Evidence*, 3rd edition, by Schwikkard & Van der Merwe para 20.3.1 page 405 to 406.
- [59] The subsequent alleged noting of the CTG data and the viva voce evidence of its alleged contents is hearsay evidence. Unless there is a satisfactory explanation as to why the original documents are not available, a Court is entitled to treat such “secondary” evidence with caution or even refuse to allow it into evidence. See *Vulcan Rubber Works (Pty) Ltd v SAR & H*⁴ where Schreiner JA said:

*“The starting point in considering the admissibility of such evidence is the statutory provision which, in each province, refers the Courts in matters of hearsay to the law of evidence in England. Although there is reference in our cases to the statutory requirement that facts must be proved by the best evidence, I do not think that it is really relevant. Weaker evidence is not excluded by the availability of uncalled stronger evidence except in the case of documents, when the original must be produced or its absence properly explained. In that case, the secondary evidence itself proves the existence of the better evidence, namely, the original. No doubt the difference between evidence and hearsay can be said to be an illustration of a broad rule favouring the use of the best evidence, but the better way of stating the position is that hearsay, unless it is brought within one of the recognized exceptions, is not evidence, that is legal evidence, at all. There is no doubt that Brunet’s statements about the reports he had received from other officials were of the nature of hearsay. In several modern cases in South Africa, statements of a generally similar kind have been admitted (see: *Garment Workers Union v De Vries and others*, 1949 (1) SA 1110 (W); *Rex v Ferguson*, 1949 (3) SA 69 (N); *Gibson v Arnold and Co (Pty)**

⁴ 1958 (3) SA 285 (A) at 296 D – H.

Ltd 1951 (2) SA 139 (T). In the last-named case reference was made to Nike v Pillay Trustee, 1923 AD 471, where, at page 477, De Villiers JA, appears to give recognition to a principle of necessity as affording a ground for the admission of evidence that would otherwise be inadmissible. There is no doubt that the exception to the rule against hearsay has come into existence mainly because there was felt to be a strong need for such an exception if justice was to be done. But that is a different thing from recognizing a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity."

[60] In *S v Ndlovu and others*,⁵ the Court was obliged to consider the constitutionality of Section 3 of the Amendment Act. In doing so, the SCA per Cameron JA⁶ approved the passages in *Vulcan* at 296 F that, "hearsay, unless it is brought within one of the recognized exceptions is not evidence that is, legal evidence, at all", but said that what the Amendment Act had brought about was a fundamental change to permit the relaxation of the evidentiary rules by allowing hearsay evidence to be received only if it is in the interest of justice to do so and relied on the statement to that effect by Navsa JA in *Makhathini v Road Accident Fund*.⁷

[61] It was however necessary for the Court in *Ndlovu*, to also deal with the necessary distinction between the admissibility of evidence and its reliability and its application in light of the Amendment Act. This aspect is relevant for present purposes because the SCA explained that the mere relaxation of the hearsay rule does not result in the automatic admissibility of hearsay. The Court stressed, by way of illustration at para [29] to [31], that:

"When hearsay evidence is tendered, the person on whose credibility the probative value of the hearsay evidence may –

- (i) Testify and confirm its correctness;*
- (ii) Not testify;*
- (iii) Testify but deny ever making the hearsay statement;*
- (iv) Testify and admit making the statement but deny its correctness;*

⁵ 2002 (6) SA 305 SCA.

⁶ Para 14.

⁷ 2002 (1) SA 511 (SA) para 21.

- (v) Testify but neither confirm nor deny making the statement.

"If the witness, when called, disavows the statement, or fails to recall making it, or is unable to affirm some detailed aspect of it (situations (iii) to (iv) above), the situation under the Act is not in substance materially different from when the declarant does not testify at all. The principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination. When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required".

"The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement should be admitted notwithstanding its later disavowal or non-affirmation. And though the witness' disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential enquiry, which is whether the interest of justice require its admission."

- [62] The same consideration applies in civil proceedings. See: *Giesecke and Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security*.⁸ There does not appear to be anything in the Constitutional Court decision of *Savoi and Others v National Director of Public Prosecutions and another*⁹ that might qualify the key aspect of the ratio in *Ndlovu* or *Makhathini*, that a Court in the interest of justice may either hold hearsay evidence inadmissible or may admit it as part of the evidential material but ultimately find it unreliable or untruthful.
- [63] If these considerations are applied to the present case, then there is no explanation for the disappearance of the train journal that would have contained the A-Brake test, the assembly of the train report, load certificate, handbrake test of the rolling stock, locomotive trip report, the train inspector's report as well as the originals of the discovered documents, particularly those pertaining to the assembly of the train.
- [64] Mr. Slabber the train driver, had no recollection of what transpired on the day and had testified that when the train reached its destination the only report he had of

⁸ 2012 (2) SA 127 (SCA) para 24 per Brand JA.

⁹ 2014 (5) SA 317 (CC) at para 44, 46 and 49.

the tests conducted was destroyed. The train assistant was not called to give evidence.

- [65] The public policy consideration is that prima facie, it would appear not to be in the interest of justice to condone, without an acceptable explanation, a failure on the part of a State institution to comply with an obligation to ensure the records are preserved, are not tampered with and that proper access controls are put in place.
- [66] There is no suggestion that the internal procedures were inadequate to ensure the safe custody of the documents.
- [67] I align myself with the view expressed in *Khoza* that the defendant has the most to gain by ensuring their safekeeping as the records are the surest way of demonstrating that they had done the tests as alleged and carried out proper procedures. Similarly, the defendant also has the most to gain by the disappearance of these documents if they failed to carry out their duties. They are also the ones who would be giving hearsay evidence because of the disappearance of the original record. The risk of unreliability because of manufactured evidence is high and the ability to cross-examine effectively compromised.
- [68] The origin of the brake block discovered by Swanepoel could not be established due to the missing records. It must be noted that the defendant commissioned an investigation into the incident two months after it occurred. These documents ought to have been available at that time.
- [69] I would therefore have no difficulty in finding that the evidence relied upon by the defendant which purportedly represented the train journal and its contents constitutes inadmissible hearsay. If I am wrong and I have exercised my discretion incorrectly then I would have no hesitation in rejecting the testimony of Slabber, Hansen, Jantjies and Moerane. Slabber remembered nothing, Hansen made no effort to consult any of the defendant's witnesses when preparing his first expert report, prepared a second report after Botha's testimony, Jantjies consulted documents not discovered, could not testify on discovered documents and

Moerane was only appointed as a quality assurer in September 2016. At best, their testimonies were hearsay.

[70] The Court further stated the following in *Khoza*:

"In my view, the inadmissibility of hearsay testimony is not necessarily the only consequence that results from the failure to produce the CTG records without inadequate explanation. That is a negative consequence which provides legal comfort to a plaintiff who still bears the onus of demonstrating negligence." I share these views.

[71] It is the defendant's view that the plaintiffs have failed to furnish proof that the fires were in fact started as suggested by their witnesses. I disagree with this view in the light of the evidence tendered by the plaintiffs and the lack thereof by the defendant. Danckwerts puts the position in its proper perspective. Effectively, the defendant tendered no evidence and the cross-examination offered no version.

[72] It was submitted on behalf of the defendant that the pieces picked up by Swanepoel of composite brake blocks do not constitute evidence that the said pieces of brake blocks started the fire for the reason that there is no direct evidence that the brake blocks started the fires and that there is also no evidence that the said pieces of brake blocks originated from wagons of the kind that formed part of the train in this case. In my view, this does not help the defendant in the light of the concessions by Hansen, the missing documents, the amnesia by Slabber, the failure to call the train assistant and the totality of the evidence led by the plaintiffs.

[73] The limitation in a definite conclusion on the cause of fire is the lost documentation. The plaintiffs do not need to prove a definite cause; they rely on reasonable possibilities. Any criticism of the case made out by the plaintiffs on probabilities is defeated by the weak case the defendant has presented.

[74] The defendant submitted that the plaintiffs have not discharged their onus of establishing a causal link between the conduct of Transnet and the damages that they suffered. I disagree with this submission particularly when one has regard to the missing records, loss of memory from the train driver, the train assistant not having testified and no reason advanced for same, Hansen's first report having been compiled without the input of the defendant's witnesses, Hansen's second

report after Dr Botha had testified and witnesses that are called by the defendant when they knew nothing about the incident and cross-examination based on assumptions. It is my considered view that the test as set out in *Kruger v Coetzee* has been met by the plaintiffs.

- [75] In summary, the failure to produce these records which were under the care of the defendant and where there is no acceptable explanation for their disappearance or alleged destruction, results in the inadmissibility of 'secondary' evidence if the interest of justice so dictates. It is for this reason that I find that the defendant took no steps to guard against harm of a general nature from occurring and it failed to take such steps.
- [76] I am constrained not to find that on probabilities, there was negligence on the part of the defendant in circumstances where Patella saw the fire starting at the site of ignition, Botha scientifically explained the possible cause of the fire as seen by Patella starting and Hansen agreeing with him in that regard, Swanepoel discovering brake blocks on the site of ignition three days after the incident and no records are available to disprove that those were not from the train in question and the uncontested testimonies of Weyers, Voster and Danckwerts.
- [77] The plaintiffs succeed, on a balance of probabilities, in their contention that the fire originated as a result of overheated material fragments and/or other mechanical fragments and/or sparks being deposited from a diesel-powered railway engine or engine number 8910 operated by the defendant which resulted in the fire starting in the vegetation growing in the defendant's property and spreading from the various points of origin in an eastern direction towards various other farms including the plaintiffs' farms is a reasonable possibility, more so where no other possibility is presented by the defendant. The scientific and factual evidence presented established that there were indeed veld fires as pleaded by the plaintiffs.
- [78] I accept the testimony of Patella in respect of the origin of the fire and I find him to be a credible witness. His evidence was corroborated by the SANSA report and the expert evidence of Botha and Hansen in respect of the possible causes.

- [79] Dr Botha was upfront about the fact that it would be difficult without a detailed inspection of the rolling stock and rails shortly after the incident and with limited documentary evidence available to identify with absolute confidence which of the fire-causing hazards may have occurred. Having conceded this, he put quite a number of possible scenarios, where he had to concede he conceded. He agreed with Hansen that things could go wrong. I accept his evidence.
- [80] It becomes difficult to state what further steps defendant could and should reasonably have taken when defendant presents Hearsay evidence or no evidence at all. In my view, the totality of the evidence led by the plaintiff has established a case on a balance of probabilities.
- [81] The train driver or any of the witnesses of the defendant did not present evidence to show that the wagons and locomotives were fitted with carbon resistance that made it unlikely for their engine to start a veld fire, that the driver drove at a speed that avoided wheel spin by the locomotives and accordingly excluded the generation of sparks as a result of wheel spin, that in the direction the train travelled, the stretch of the railway track where the fires originated was slightly uphill, which meant that there was no reason for the train brakes to be applied in the area, and that the driver did not apply the train brakes in the area at all as he could not remember anything.
- [82] No evidence was led that the newly built forty-eight (48) wagons of the train were, before their departure from Bloemfontein, subjected to both the handbrake test and the A- brake test as the train driver could not give any evidence in this regard nor was the train assistant who was supposed to have done these tests called to testify.
- [83] No evidence was led that the brakes of the wagons fitted with ECP could not bind and overheat so as to forcibly disintegrate, no evidence was led that the wheels of the wagon were fitted with roller bearings which eliminated possible

overheating of the bearings and that there were “*hot boxes*” installed along that stretch of the railway line that would have detected an overheated bearing, and would have made the person concerned aware of the problem.

[84] The cross-examination was always on the assumption that all the tests that Mr Knoetze referred to if properly executed prior to the departure of the train on 11 August 2012 the defendant would have acted in line with its duty of care, Dr Botha agreed that Transnet would have taken all reasonable steps to prevent the train from causing fires, no evidence was subsequently led that indeed these tests were done. No documentary proof was provided as to the conduct of these tests.

[85] It was Mr Knoetze’s position that the mechanical fault would have been detected by the people checking the wagon before it was certified in terms of that long test that he had read to Dr Botha and the Court, no proof of such was provided. Further, Mr Knoetze put it to Dr Botha that assuming that these tests were properly done before departure, one would not have expected that the train would cause fire, again, no evidence was led to the effect that these tests were properly done before departure. Dr Botha agreed with Hansen in this regard. I disagree with the submission by Mr Knoetze that Transnet did do these tests as no proof to that effect was ever presented. This therefore defeats the argument that the plaintiffs had not indicated what, in addition to the aforesaid tests, the defendant could reasonably have done to prevent damage to them as a result of brakes-related causes as no such tests were ever done at least according to the evidence presented.

[86] It is for this reason that it is difficult for this Court to accept that the wrongful conduct was not a cause of the Plaintiffs’ loss if it would not so have ensued. I cannot accept that the wrongful act is shown not to be a *causa sine qua non* of the loss suffered and therefore no legal liability arises. It is incorrect to submit that Dr Botha was unable to identify the cause of the fire as he said he could not do so with certainty in the absence of the necessary documents which documents ought to have been in possession of the defendant. Even without those documents he could set out scenarios which I accept that one of them could have been the cause

if one has regard to Patella's evidence. The SANSA report confirms the origin of the fires and that report is not in dispute. A defendant need only to have foreseen harm of a general kind that actually occurred, and the plaintiff needs to prove what steps the defendant failed to take to guard against the damage that actually occurred.

- [87] Dr Botha sets out that the most probable generation of heat that caused the fire was *"by dynamic friction between steel and/or cast iron surfaces, or brake blocks and wheel threads of the train. This, in conjunction with the high winds and dry wayside grass in close proximity to the track could have been sufficient to cause hot metal particles or pieces of hot brake block to ignite the dry grass."*

This in my view, is the logical explanation to what Mr Patella testified to. It is on this basis that I find that the plaintiffs have discharged their onus of establishing a causal link between the conduct of the defendant and the damages that they suffered.

- [88] I can therefore reasonably infer that the fires were caused by friction brake-related causes and as a result of the missing records, the loss of memory by Slabber, the failure to call the train assistant, Hansen's first report compiled without consulting the train driver and the train assistant and the fact that he had drafted a second report after Dr Botha had tendered his evidence resulting in the opportunity which is lost for Botha's cross-examination in that regard as well as the calling of irrelevant witnesses that could not take the matter any further, the defendant failed to complete the factual picture in this case and it has failed to do so by the evidence of Slabber and Moerane.

- [89] I reject the evidence of Slabber that the A-brake test was properly performed before the train left the Bloemfontein station and therefore no reasonable step was taken by Transnet. I also reject the evidence of Moerane as hearsay when he testified that wagons would not be allowed to leave the Transnet engineering workshop in Bloemfontein if the quality of the work and the end result thereof was not controlled as the control sheet that appears on page 2 to 12 of Transnet's trial bundle as that is merely an example not an actual control that was done on this

day on this train. Moerane did not even provide a single cart test that was done as proof that Transnet did something to avoid liability. No certificate for technical completion for this specific train was tendered as evidence. He was only appointed as a quality assurer in September 2016.

[90] It did not help Slabber to insist that or to be adamant that he would under no circumstances have departed from Bloemfontein with the train if that test had not been done without actually providing proof to that effect. I cannot accept that Mr Slabber participated in the A-brake test when he cannot remember anything.

[91] I have no choice but to accept, in the absence of documentary proof that in line with the reasoning in the Khoza judgment. For that reason, I find that there was reasonable foreseeability of the general nature of the harm that might, as a result of this conduct, befall the properties of the plaintiffs exposed to the risk of harm in case the train causes fire. This is in line with the *ratio decidendi* in *Mashongwa v Passenger Rail Agency of South Africa*.¹⁰

[92] Once harm is foreseeable, reasonable measures have to be put in place to prevent the foreseeable harm from occurring. I cannot but restate that this could have been established if documentary evidence was led in this regard as proof, in this regard I cannot find that the defendant put in place reasonable measures to prevent the foreseeable harm from occurring.¹¹ This is in line with the *dictum* of Majiedt AJ, in the *Jacobs*-matter.

[93] From the evidence tendered by the plaintiff and lack thereof by the defendant, I can infer that the defendant was negligent and the plaintiff passes the test as set out in *Kruger v Coetzee*.¹²

[94] In the light of the facts I have found proven and admitted there is a sufficient

¹⁰ 2016 (3) SA 528 (CC) para 53 to 59.

¹¹ *Jacobs and another v Transnet Limited t/a Metrorail and Another* 2015 (1) SA 139 (SCA) para 8].

¹² See also *De Wet and another v President Versekeringsmaatskappy Bpk* 1978 (3) SA 495 (C) at 500 F; *Macleod v Ren's* 1997 (3) SA 1039 (E) at 1046, 1047 D – 1048 B, 1048 D and 1048 J to 1049 B.

balance of probabilities in the plaintiffs' favour.¹³

- [95] I find that on a balance of probabilities the inference may properly be drawn that the train was the source of the ignition of the subject fire. Mr Patella testified as to the cause of the fire and same was corroborated by Botha, Swanepoel, Wyers, Voster and Danckwerts. The possibility is that the train emitted the hot pieces of brake blocks into the vegetation growing next to the railway line causing the fire which fire was seen by Patella when it started.

CONCLUSION

- [96] I find that the plaintiffs have proven on a balance of probabilities that the defendant's negligent failure in either the manufacturing process, and/or in the maintenance and/or in inspecting the train 8910, with the necessary skill and prior to departure of its journey from Bloemfontein on 11 August 2012 has caused the composite brake blocks to overheat to the point where it disintegrated and caused multiple points of ignition in the railway reserve from where the fire spread onto the properties of the various plaintiffs. The costs shall follow the result and due to the complexity of the matter, the costs of senior counsel are warranted.

- [97] In the circumstances, I make the following order:

ORDER

- (1) The defendant is liable to each of the Plaintiffs in the above case numbers for all of each plaintiff's proven or agreed damages flowing from the fire that occurred on 11 August 2012.
- (2) The defendant shall pay the party and party costs of the plaintiffs' including the costs of senior counsel and the reasonable preparation, qualifying,

¹³ *South African Railways & Harbors v Dlamini* 1967 (2) SA 203 D at 207.

traveling, accommodation and reservation fees and expenses, if any, of the following expert witnesses:

- 2.1.1. Dr C. Botha;
- 2.1.2. Mr F Weyers;
- 2.1.3. Mr W Vorster – SANSA;
- 2.1.4. Dr J Danckwerts;
- 2.1.5. Mr F Mosetlho and
- 2.2.6. JA Rossouw – weather services.



L. BOMELA, AJ

On behalf of the Plaintiffs:
Instructed by:
BLOEMFONTEIN

Adv. PJJ Zietsman SC
Honey Attorneys

On behalf of the Defendant:
Instructed by:
BLOEMFONTEIN

Adv. B Knoetze SC
Phatsoane Henny INC