

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 8960/2016P

In the matter between:

NORMANDIEN FARMS (PTY) LTD

PLAINTIFF

and

SAFIRE CROP PROTECTION CO-OPERATIVE LIMITED

DEFENDANT

JUDGMENT

BEZUIDENHOUT J:

[1] Plaintiff instituted an action against Defendant resulting from a fire in a plantation on a farm known as Albany Farm, Newcastle during May 2015 which it alleged resulted in damage in the sum of R 14 385 720.85. The action is defendant by Defendant. It is common cause that Plaintiff was insured with Defendant at the time and had such insurance with Defendant for some prior years. It is also common cause that the necessary instalments in respect of the said policy had been paid.

[2] Plaintiff's claim was repudiated on 22 June 2016. Defendant pleaded that in the event of it being found that a fire occurred in the plantation on Albany Farm on 7 November 2015 that Plaintiff had misrepresented to Defendant that the fire giving rise to the claim originated in compartment A13a when in fact it originated in a sawdust and timber waste area situated on the north western boundary of compartment A13a. It is contended that this misrepresentation was material and entitled Defendant to repudiate the claim. Plaintiff allowed sawdust and timber waste to be dumped on the property

adjoining the insured plantations, increasing the combustible material in the vicinity of the insured plantation increasing the fire risk. Plaintiff had not made any mention of the existence of the sawdust and timber waste area in completing the renewed form. Plaintiff was also involved in litigation in respect of certain local inhabitants relating to grazing rights which was not declared and affected the risk. The sawdust and timber waste area required a firebreak of at least 30 metres wide around the whole immediate exterior perimeter thereof and in breach thereof Plaintiff failed to maintain such a firebreak which entitled Defendant to repudiate the claim.

[3] In a replication by Plaintiff it was contended that Mrs R Bezuidenhout (Bezuidenhout) representing Defendant admitted that the insurance premium was paid and the cover was applicable from 1 May 2015 to 31 April 2016 and that the claim was duly instituted during that period. The claim was considered by Bezuidenhout and in a letter dated 22 June 2016 she repudiated the claim. Plaintiff did not accept the repudiation and instituted action on 17 August 2016. It refers to the plea where the defences referred to above are raised and contends that Defendant, by the conduct of Bezuidenhout, failed to void the insurance and thereby waived reliance on these defences, alternatively elected not to rely thereon and is estopped from now relying thereon.

[4] Bezuidenhout on 9 November and 11 November 2015 visited Albany Farm concluded that a firebreak of 30 metres had not been made around the perimeter of the waste dump. On 9 February 2016 a letter had been addressed to her about the grazing rights. Letters were received from her by Plaintiff on 10 February, 24 February, 26 February and 16 March 2016 which did not indicate any repudiation of the claim. In the letter of 16 March 2016 she merely recorded that she was unaware of the sawmill dump until 7 November 2015, that it must cease, that Defendant was unaware of the substantial risk factor and that further cover would not be extended to Plaintiff and that Defendant will continue to hold Plaintiff covered under the existing certificate subject to certain conditions.

[5] On 20 January 2016 to February 2016 various letters were addressed by Bezuidenhout to representatives of Plaintiff in respect of the salvage of trees, the price of burnt trees etc. She did not void the policy nor repudiate the policy. She waited until after the expiry of the insurance period on 30 April 2016 and only on 22 June 2016 addressed a letter to Plaintiff repudiating the claim which was submitted on 13 November 2015. If the claim was repudiated shortly after it was submitted then Defendant would have had to repay to Plaintiff the sum of R 1 254 461.80 for the remaining five month period. It is therefore contended that Defendant waived the right to rely on the alleged breaches of the policy. Further in the alternative that Defendant is estopped from relying on the defences set out in the plea. There was no indication from Defendant from 13 November 2015 to 20 June 2016 that the claim would be rejected.

[6] Defendant filed a rejoinder that the relationship between the parties were contractual in terms of the contract and section 18(b) of the policy provides no indulgence by Defendant to Plaintiff that failure to reinforce the terms of the agreement shall be construed as a waiver or capable of founding estoppel. Accordingly Plaintiff is precluded from relying on a waiver by Defendant to rely on the defences and raising estoppel.

[7] During the evidence of Defendant's case when Bezuidenhout testified Plaintiff's sought an adjournment and tendered the wasted costs to bring an application to file a replication. Such application was brought and Plaintiff was granted leave to file a replication.

[8] The evidence in this matter is voluminous and a typed record has been provided. I accordingly deem it unnecessary to deal with the evidence of each witness in detail but will refer to the evidence of the witness which is relevant to the issues in these proceedings.

Plaintiff's witnesses

[9] Miss Nthombifuthi Khubeka (Khubeka) was employed by Plaintiff since 2011 and at times did duty in the fire tower. This entails the reporting of any fire which is visible from the tower. She is provided with a cellular phone and a radio. If she sees a fire she reports to the person in charge. On 7 November 2015 she was on duty in the tower from 6 a.m. She took over from one Thandi Nbugase who reported no incident to her. While she was seated she saw smoke in the sawdust area. She could not see the sawdust area from the tower because of the trees. She reported it to Mr Dennis Pretorius (Pretorius) at 8:45 a.m. It was white smoke that became black. She did not see any smoke at the sawdust area when she was walking to work that morning. There was wind at the time that she reported the smoke. The smoke was white for approximately 10 minutes. She did not contact Mr Simon (Simon) as he was not on duty.

[10] Pretorius testified in Afrikaans as will appear from the record. (I have translated his evidence into English). He was employed by Plaintiff from 2003 until 2016. He was in control of forestry, the workshops and cutting of trees. He was on duty on Saturday 7 November 2015 as they were on duty during certain weekends. They were busy chopping wood to load and take to the saw mill. He commenced working at 7 a.m. and had radio contact with the tower. Simon was not on duty that day. He received the radio contact at 8:40 a.m. from Khubeka. It is a call channel open to all vehicles on the Normandien Farms. When he received the radio call he had not seen any smoke. She referred to the sawdust area. He immediately went to the area where she said the fire was. He drove into the saw mill area from where he could see smoke. He used the road which went past the sawdust area. Simon also arranged with workers to go to where the smoke was coming from.

[11] He went past the area marked waste 1 and waste 2 and did not see any smouldering. The material that was in the waste areas come from the saw mill. It was sawdust, bark, soil and stone. This was then transported to the said places and flattened with a grader. They wanted to rehabilitate the donga area to plant trees. Soil was usually brought and thrown over the sawdust etc. which was then flattened. When he arrived at A13a compartment he saw that the fire was about 10 to 15 metres from

the road. He went into the compartment to contain the fire. He then marked with an X on the map where the fire was. The wind was blowing in a westerly direction and he was not able to contain the fire. He estimates that the wind was blowing between 15 and 25 km per hour. It is incorrect that the fire started at the sawdust site. He has never seen any smouldering at the sawdust site. The fire burnt from west to east. There were many spot fires which made it difficult to determine the line of fire. At times there were 3 or 4 different fires ahead of him. The fire jumped the tar road which is the Newcastle Normandien Road. When they started fighting the fire the wind came from a westerly direction in an easterly direction but as the fire became larger whirlwinds started and it was not possible to determine how big the fire became. During the afternoon they went to the waste sites and at waste site number 1 he saw an area of approximately $\frac{1}{2}$ metre by 1 metre that was smouldering. There were no flames.

[12] Compartment A13a burnt in a westerly direction towards the road. The area on the road where waste sites 1 and 2 were had been burnt and he suspected that it was back burning. He has been involved in fighting approximately 100 fires. When back burning is done you attempt to cause a buffer zone between the fire coming in your direction and it then burns back towards the fire approaching. In the afternoon when the smouldering was seen they attempted to douse it with a water cart and the water bag at the back of his bakkie. After the incident Mr Hay (Hay), the attorney for Defendant had discussion with him and took various statements from him in English. He attended a meeting where a senior advocate and Plaintiff's attorney was present while he was being questioned by the attorney for Defendant. After this a statement was drafted which was read to him by Mr Vinnicombe, Plaintiff's attorney and he signed it as correct. The statement is contained in bundle B page 67 and he confirmed that he signed each page and it was his signature that appeared thereon.

[13] Approximately 3 months later an interview was conducted with him by the insurance company's employees. He was aware that the insurance company was of the view that the fire had started at the waste site. The waste site does not pose a fire danger. He did not explain to the representatives of Defendant how the waste site was

filled and that the sawdust, bark, soil and gravel was flattened and filled with soil and compacted. He did not think that it was necessary or important as he had seen where the fire had started. The dump site was not a priority. He had later showed Simon where the fire had started. Simon was also aware of the procedure followed at the dump site. Mr Rob Houtson (Houtson) the general manager on the farm was aware of the procedure at the dumping site. Only dump site 2 was not in use. On 9 November 2015 machinery was working at dump site 1. He was shown a photograph from which it did not appear to be material from the saw mill which was compacted. He agreed. He was not at the dump site the week after the fire. When he saw the start of the fire there was no burning on or towards the dump site. The fire had burnt out in approximately 45 minutes. The plantation burnt for much longer than an hour. It was approximately 4 or 5 hours before it was brought under control. The wind became stronger during the day and the fire generated its own energy. The trees that had burnt were cut down after the fire. The trees to the left of the west side of the origin of the fire had burnt and was therefore cut down. The roads were clear and with no combustible material. The smouldering was on dump site 1. There was no burning on the west side of the road marked in blue. The fact that it was smouldering made it a possible fire hazard if the wind blew and it could have gone to the plantation on the western side. The photograph on page 20 taken on 11 November 2015 indicated how the dump site normally looked. On the Saturday the fire at the dump site was extinguished at 5:15 p.m. There were no further fires. He was never asked by Hay about the dump site nor was he asked what the dump site consisted of.

[14] Mr Voster (Voster) testified he had been employed by the South African National Space Agency since 2010. He has a master's degree from UNISA about analysing veldt fires and he is an Image Processing Specialist. The South African National Space Agency has a branch where they receive satellite imagery at Hartebeespoort. All the data is accessible via the internet from catalogues which the ground stations space agency holds. He uses landscaped data from a satellite owned by America. The landscaped data is used for identification of the outline of the fire perimeter. The method

he uses is that he first draws a perimeter of the fire from landscaped data because on a low resolution data it is difficult to orientate yourself.

[15] From the imagery that he has he saw that there was a large fire at Albany Farm on 7 November 2015 at 10:45. From the analysis of documents the fire could have started between 8:57 a.m. and 9:12 a.m. The data indicates the forest and the light that is red indicates grassland that is burning. He cannot establish the exact starting point of the fire. All fires burn back a little bit as well. If a fire starts in vegetation where there is no wind it would have burnt in a circle outwards. If there is wind it burns ones and also burns back into the wind against the wind. He expressed the view that the expert of Defendant one Mr Frost with the satellite data he had could not determine the origin of the fire. The data used by Frost can only determine that there was a fire on the farm but not the area of the fire. The distance between the saw mill waste site 1 and 2 is about 250 metres.

[16] Simon was employed by Plaintiff as a farm manager. He was responsible for the planting of trees until the trees were ready to be harvested. He was employed at Normadien Farm during February 2013 together with Pretorius. On 7 November 2015 at about 7 a.m. he was on the farm Buffelshook which also belongs to Normandien Farms looking at the grazing. He drove in the direction of the fire tower. He went past the western side of compartment A13a and past compartment A10 in the direction of Buffelshook. He passed the sawmill dump between 6 and 6:45 a.m. and there was no smouldering at the said dumps. He heard via the radio that the fire tower was calling Pretorius stating that there is a fire in the region where the rubble of the sawmill was dumped. It was in Zulu and referred to the saw mill waste dump. He drove thereafter, picked up some people workers. He saw the smoke and drove to compartment A13a and saw the fire. He did not see Pretorius at the time. He did not establish where the fire commenced. It was between the markings X and Y on the map. The fire was then in plantation A13 and he attempted to extinguish the fire but was unable to do so.

[17] The fire spread in an easterly direction and they tried to prevent it from crossing the road. They were unsuccessful and then attempted to prevent the fire at the next road but were again unsuccessful. The fire burnt up until the tar road. At the tar road it jumped the road but was then extinguished on the other side of the tar road. There were, besides him and Pretorius, other employees and neighbours assisting. Later that afternoon he returned to the waste site and found that it was smouldering but there were no flames. It was an area of approximately 1 metre. It was extinguished. The smouldering was at waste dump 1. It was being used as a dumping site to rehabilitate the area so that further trees could be planted. Their dumping material consisted of bark, soil and mud. Once it was dumped it was levelled with a TLB and once a year soil was thrown over it and it was levelled. This was done by Pretorius. He does not know precisely how it was done but only saw when travelling past that they were busy at the site. After the fire on the Monday there were earth moving equipment and he was instructed by Mr Lawrence Hoatson to push all the material into the area and to cover it with soil. He used a bulldozer to do so. Whilst they were busy a representative of Safire, Bezuidenhout arrived.

[18] The fire moved speedily driven by wind. He agrees with Pretorius that there was spotting. Later on 7 November 2015 he had a discussion with Pretorius who showed with his hand where he saw the fire starting. It was not specific. It was the first time to see the dumping site smouldering when he went there in the afternoon. The smouldering was about 1 metre by 1 metre and he did not see any other portion of it burning. A large portion of the plantation to the east of the dumping site had burnt. He did not recall any burning to the western side of the road. The smouldering at the dumping site was completely extinguished.

[19] On the Monday when he worked at the dumping site he did not notice any fire damage. He cannot recall that he together with Bezuidenhout went in his bakkie on the farm. He cannot recall being together with Bezuidenhout in his vehicle. It was put to him that she would say that he told her that there was a fire in 13A and smouldering in the dumping site. He could not remember that. He informed her that he did not know where

the fire started. He was shown various photographs relating to the earthworks which were conducted at dumping site 1. There was fire damage to the west of saw mill waste site 1. The dump site was rehabilitated. Earlier that year fire breaks were made in the area of the dump site. It was put to him that Bezuidenhout would state that on the Monday there were signs of fire at the dump site larger than the metre by metre smouldering that he was referring to. His reaction was that was her view. He does not agree.

[20] Mr. Dumisani Mfusi (Mfusi), employed by Plaintiff, as culture supervisor and in charge of the mill stated that he had been involved in the fighting of fires on many occasions. On 7 November 2015 he heard Khubeka call Pretorius on the radio. She said there is fire at the area of the sawdust. He was called to fetch labourers. He knew the sawdust area. When he went past the sawdust he did not see any fire or smouldering. The fire that he saw was inside the plantation. He was on the road and it was about 20 metres inside the plantation. The fire was burning backwards towards the road. The front of the fire was gone by then. The fire was burning back to where he was. He did not stay there and they were moving towards the sides. The wind was pushing it hard towards the road. It was burning against the wind. There was no smouldering at the saw mill. The wind was strong and they were able to distinguish the fire in the end. They kept on patrolling after the fire was extinguished. He then drove past the sawdust heap in the afternoon and saw Pretorius who was extinguishing something with water. It was at saw mill waste site 1. He had already extinguished whatever there was. The head of the fire was the eastern boundary of A13a. The wind was strong in a westerly direction. He indicated that the area which Pretorius was dousing at the waste site was approximately 50 cm by 50 cm.

[21] Pretorius was recalled and was shown various photographs which had been taken. He was shown certain burnt areas and stated that they were not burnt on the 7 November 2015 the day of the fire. On the morning 8 November 2015 he made a fire and burnt an area around sawdust site 1. This was to prevent any possibility of a fire starting at the sawdust site. There was no smoke or smouldering on 8 November 2015.

He stated that prior to him being recalled he had consulted with his legal team and was shown the photographs in bundle E. The photographs indicated signs of burning around the dump site. It was put to him that when he was cross-examined on the previous day he was aware that he had burnt that area at a later stage. He was referred to a transcription of a conversation with Mr Hay wherein he was asked that the property at the west road burnt on the Saturday and his answer was there was a little bit of grass between the waist pit and the road. He was asked in respect of the consultation where he had stated that there were no flare ups after the fire had been extinguished at about 5:15 p.m. on the Saturday. He confirmed that he did not state that they had made fire breaks on the Sunday.

[22] Mr Vinniconde testified that he was an attorney practicing at Thornville and the attorney of Plaintiff in certain of the land issues. He testified that an application was brought in the Land Claims Court dealing with a compliance notice against Plaintiff by the Department of Agriculture due to overgrazing of an area of the Farm Albany occupied by labour tenants. In terms of the order cattle were removed from the said area. The issue of a labour tenants had also previously been settled. The cattle amounting to approximately 260 was ordered to be removed from Albany Farm two days prior to the fire. There were five homesteads occupied by the families involved which were approximately 14 Respondents. There was only one case of litigation between Plaintiff and the labourers on the farm.

[23] Mr Lawrence Johan Houtson (L Houtson) testified he was the Chief Executive Officer of Plaintiff which was formed in 2000 and purchased certain plantations from Mondi in the Normandien area. After purchasing the said land insurance cover was taken out with Safire. That was in 2001. A saw mill was constructed on the farm Albany in about 2003/ 2004 and was insured separately but also through Safire. Initially when the insurance was taken in respect of the timber plantations Defendant was represented by Bezuidenhout. At all times she was involved in the issues and discussions in respect of the insurance. Before the insurance was put in place he drove to the farm with Bezuidenhout who did an assessment of the farm. They drove most of the farm. On the

day she handed him a list of requirements, an application form and it was thereafter renewed annually. The insurance is extended from 1 May of the year until the end of April of the following year. A form was completed annually. He was shown a form indicating that on 15 February 2001 insurance was sought through Defendant. He was shown proposal forms of various years thereafter which he confirmed he signed. He was shown a review of proposal for 1 May 2013 and indicated that it was signed by his son Matthew. The proposal form dated 21 April 2015 was signed by his son Matthew as he delegated some of it as Matthew took over all the insurance work. All premiums were paid as required. The premiums were paid annually in advance. The annual premiums were approximately R 2.5 million. On 7 November 2015 there was a fire on the farm Albany and the claim was repudiated by Defendant.

[24] He was informed of the fire by his son Robin while he was at a meeting and could not do anything immediately. He received a missed call from Bezuidenhout at about 3 p.m. and returned her call and she informed him that smoke was seen from a fire at Normandien. She asked him what the cause of the fire was and he replied that his son Robin had informed him that it came out of the sawdust and that he responded that he could not see that happening. Bezuidenhout visited the farm on Monday 9 November 2015. He informed her that she had to go up there as quickly as possible after she had informed him that she and Mr Mullins were due to go there on the Thursday because he had given instructions that earth moving equipment was to go to the sawdust heap and bury it.

[25] The fire was reported to the Normandien Police Station and a reference number was given. A claim calculation was done of the burnt areas and in terms of the policy Defendant had to be notified within 30 days. It was however done verbally on the Saturday that the fire occurred. The claim form was submitted to Defendant. This was done in terms of sub clause 71. Hay the attorney for Defendant had various meetings with him and members of the staff and they cooperated at all times. He visited the farm on more than one occasion. Only the initial meeting was in his presence. Many emails were sent by his son Matthew setting out the calculation and the value of the damages

suffered. There was also communications in writing between Bezuidenhout and himself. She was the senior person of Defendant that dealt with forestry. They had had previous fires and they always dealt with Bezuidenhout and she assessed the claims unless it went over a certain size an adjuster would be appointed. The smaller claims she finalised. No previous claims had been repudiated. The previous claims were smaller than this one. Plaintiff also has farms in Mphumalanga which are insured by Defendant. He is no longer insured by Defendant. In 2014 there was a spate of fires in a period of two weeks. There were attacks of fire. They instructed their security company to investigate it. It was established that employees that had been retrenched were responsible for the fires. This was then conveyed to Bezuidenhout as a matter of courtesy. Within a day of communicating this to her he received a withdrawal of insurance based on labour action.

[26] He then had discussions with Bezuidenhout and Bekker. The withdrawal was then cancelled. On 20 October 2015 he had informed Bezuidenhout that there was litigation between Plaintiff and the occupiers on Albany Farm being the Mathibani's. There was a fire in the gum tree area and Mullins and Bezuidenhout were on the farm doing an assessment. He informed her that they were going to court that Thursday against the tenants and she did not comment at all. No changes were received in respect of the policies. Bezuidenhout has been on the major farm road going past compartment A13a. There was a fire on that road some years before which she assessed. The area that was assessed by her was block AO13b.

[27] The sawdust, woodchips and bark from the mill is incinerated. But all the sawdust is diverted into a fuel which feeds the boilers. The residue is piled up with the mill residue and the mill residue consists of sawdust, woodchip, log yard scrapings which would include bark and so on. In the summer months also mud. The log yard scrapings were dumped into valleys to aid environmentally friendly to prevent soil erosion and to repair damage. This has been done since 2003. Bezuidenhout was well aware of the saw mill. Bezuidenhout was not instrumental in the insurance of the saw mill but another

member namely Belinda Henry. For 14 years the dump sites would after the dumping of material be flattened. The banks would be broken down and covered with soil.

[28] It was put to him that Bezuidenhout in a letter stated that she was unaware that log yard scrapings had been dumped on the farm. He stated that she had been on the farm for 14 years and he does not know how she missed it. He had not seen the risk surveys before until it was in the bundle of documents for trial. He was shown a document on page 454 paragraph 2.4 which deals with land claims/disputes and that it was scored a minus 2 and a qualification at the bottom that a general land claim for area classified as minor. The areas adjoining the plantation would be grass land, roads and waterways and the dump sites would be in a waterway in the ravine. Woodchips are sold from the saw mill and the sawdust is burnt. The scrapings are dumped. There has been a tenant claim lodged against the property by the Mathabani family. That is an issue which has been finalised in March 2014. Nothing was done to increase the fire risk prior to the renewal of the policy. The dump site has been there since approximately 2003 when the saw mill commenced. The dump sites were never considered to be a fire risk. He has been involved in the timber industry since 1993. At Mount Alif he had a massive sawdust dump just outside the mill. In Piet Retief they dumped on a farm next door. In Thornville they had a big dump on the property. There was never any risk of fire. Trees were planted in areas which were recovered and rehabilitated. The dumping areas will be covered when the machinery was on the farm.

[29] L Houtson disputed that the fire started in the sawdust heap and stated that he had never had a situation where a fire started in a sawdust heap as a result of combustion. According to his knowledge the fire started in compartment A13a. Bezuidenhout did not visit the farm after the repudiation. When she did visit the farm on 9 November 2015 she did not tell him to stop dumping waste at that spot. The letter dated 22 June 2016 was a notification of a rejection of the claim. He responded to that notification. There was no evidence that the Mathebane's caused the fire. They stay about 3 or 4 km from the point of fire. They have never issued any threats to him. Nor since their cattle were removed in March 2017. The repudiation came after he had

already moved to another insurance company as he did not renew the insurance on 1 May 2016.

[30] During that period of November 2015 every single day was orange which indicated a fire hazard and therefore he instructed, as the machinery was on the farm, that the sawdust pit be spread over with soil. As a practise sawdust was not dumped at the dump site but only in exceptional circumstances. At the time the plantation had been thinned and pruned about 4 months prior so there would have been a lot of brush wood on the ground. His unhappiness with Safire commenced during 2014 prior he had been satisfied with them. He agreed that a number of claims arose on his farms and these claims were paid except for one. He agreed that he was paid an amount of R8 million in 2012 in respect of a claim. There was a reserve placed on it by Defendant. He agreed that the instalment was R1 254 000 that stated that it did not include the farms Piet Retief and Nottingham Road. The Normandien Farms were covered until March 2016. He agreed that he received value for the premium. It was put to him that on 26 February 2016 he received a letter from Defendant that they were concerned. He told her that he was informed that it was possibly spontaneous combustion. He does not know how it can be and it would be investigated.

[31] He denied that he had said to her that they can come and look in a few days' time. He told her that he was cleaning up and she phoned him to inform him that she was only going up on the Wednesday and he told her that the cleaning up was taking place and she then phoned back to say that she is coming to the farm. It was put that is was the first time she became aware of the dump sites and he stated that he was not aware that she did not know that they existed. He was surprised that she was not aware of the dump sites. He cannot dispute that she first got to know of the dump sites on 9 November 2015. There was compaction. He did not want the dump site to pose any danger. He informed her during October 2015 about a court case starting in the Lands Claims Court in respect of the labour tenants. He did not notify Defendant of this litigation. On 9 February 2016 he sent a letter to Bezuidenhout saying that the contents is self-explanatory and advising of adverse circumstances.

[32] Mr. Butt (Butt) was employed by Plaintiff as planning manager and knows the farms at Normandien very well. He knows dump site 1 and dump 2 very well. He was previously employed by Mondi for most of his career. He commenced working for Houtson in 2016. He took specimens of sawdust heaps. He took one from Franklin saw mill on the KwaZulu-Natal South Coast and marked the sample. It was mixed material composed of soil, bark and pretty similar to the material dumped at Normandien farms. Three sample were taken. Sample number 4 was taken from Normandien farms saw mill on Albany farm. It consisted of soil, bark, gravel and small amounts of sawdust. The 5th sample was taken from dump site 1. He also took sample 6 and 7. They were taken from Kernville Farm which adjoins Albany. It was old dump sites that had been used some time back. The samples were sealed and taken to Johannesburg CSIR Complex. He was present when the tests on the samples were conducted. Some pine needles were also taken. The samples were taken approximately six weeks before the date of his testimony. The material was decomposed except for that from Franklin which was pretty recent.

[33] Mr Jacobus Strydom (Strydom) is self-employed, under the name Fire Lab and is involved in the testing of materials. He does such tests on the CSIR Campus in Pretoria. It commenced in 2001 after the CSIR discontinued doing such testing. He was previously employed by the CSIR for 26 years. Testing is done to different materials of which timber is one. Timber for mining is tested on a quarterly basis in a furnace that is heated up to 400 degrees centigrade and the log is then inserted. In this case it was also tested at 400 degrees Celsius because the ultimate goal was to look at the heat that would be obtained during the test. He was instructed to determine the heat or the risk associated with the various samples that he received. They were scrapings from various origins. It included sawdust that was taken from the mill and sawdust heaps and grass samples as well. He was requested to compile a report which he did and completed two reports. Combustion can best be explained in terms of the fire triangle where you have combustible material, ignition source and oxygen.

[34] Without one of these there cannot be any combustion. Spontaneous combustion is something which is very often misleading because spontaneous combustion means that the entire surface or area is combusting when exposed to certain temperatures. The critical temperature for timber is 220 degrees centigrade exposed for 10 minutes. The samples he received were subjected to heat. The amount of the material was placed on a tray and then subjected in a furnace as would be done with line log or timber. 500 grams of each sample was used. It was subjected to 400 degrees centigrade for a 10 minute period. He referred to a graph and indicated that there was no rise above the 400 degrees recorded from the sample as shown on the graph. There was no ignition because otherwise it would have spiked or increased the temperature. Sample 2 which was from the Franklin Log Yard was done on the same basis, the sample was wet and as it was heated for about 8 minutes and then commenced increasing in temperature. Only glowing was present. From the graph of sample 4 (Albany Farm) it can be seen that the temperature went negative, it never went up. It went up to about 300 degrees and the decrease in the furnace temperature to below 30 degrees centigrade. Sample 5 was from saw mill waste there was no ignition. There was smouldering and glowing but no flame. The 6th sample was from Kernville Farm, in a decomposed state and there was no flame ignition. Sample 8 was pine needles and there was a spike right in the beginning which constituted the ignition of the material that was posed there and then decayed and just glowed.

[35] Sample 9 which was fresh saw dust was moist and when it was inserted into the furnace glowing of the coarse particles was visible for approximately 30 second. There was no flaming during the test. There was no glowing when the tray was removed from the furnace and also an increase in temperature which decreased at the end. The first two sample which came from the Franklin Log Yard was a mix of soil and decomposed whatever whereas the third one was less decomposed and contained no soil. Sample 1 and sample 3 were very close whereas the Franklin Log Yard was moist and therefore a negative reading. Sample 4 from a log yard at Normandien contained a lot of sand. It was moist and had a negative reaction. There was ignition but no flaming ignition. Ignition can represent slight glowing or whatever smoke coming from decomposing or

flaming combustion constitute flames. Samples 1 to 6 the outer service of the samples were charred with a little bit of glowing during the test being subjected to a heat of 400 degrees centigrade. All glowing disappeared when the test samples were removed from the furnace. The sawdust specimen did not ignite during the exposure period when subjected to 400 degrees centigrade. Sawdust only charred during the test period with glowing visible at times. He concluded that from a test conducted on the scrapings of the mill and specimen samples taken from the plantation the log scrapings cannot be regarded as constituting any special fire risk to the timber industry. It cannot burn because oxygen cannot reach the inner portion of whatever is lying in the dump or heap or a hole or whatever the case is. It excludes oxygen. It only smoulders. The log yard scrapings did increase the fire load. During cross examination he stated that if there is a very strong wind and it is exposed you may have a short flame. It will only be small flames. During cross examination he stated that all of the material combusted sufficient to contribute an increase in the temperature in the furnace.

[36] Mr Lucas Mthanti (Mthanti) testified that he was employed as a Supervisor in the culture section at Normandien Farms since 2001. He knows the layout of the farm and the different compartments and where the fire tower is situated. He also knows the sawdust area. At about 9 a.m. he was alerted about a fire by one Dumisani and was told to get ready. When they arrived at the farm the fire truck was there. He could not see the fire he only saw the smoke. He was together with Dumisani. The fire was brought under control in the afternoon before sunset. They then went towards the dump site where they met Pretorius. Pretorius had been extinguishing a spot that he had already extinguished. It was near the area that was levelled at the dumping site. There was smoke and the smoke was extinguished. They then left.

[37] On the Sunday they went back to check. He was with the driver of the fire truck. They went to the dump site but there was no fire or smouldering at the dump site. Pretorius was there. They then burnt a piece of grass that was there because the wind changes direction. If the charcoal that was burning there could be pushed by the wind it could go into compartment A11 which was across the road. By charcoal he means the

logs that had burnt. On photograph 6 of bundle B he was shown a piece of land that had been burnt and indicated that he had burnt it. He was also shown a black patch near where there was an excavator and indicated that that was the area they were protecting and had burnt. A black area in front on page 14 was shown and he indicated that he had burnt that. The trees in compartment A11 were seen in the background. He was also shown a black patch to the top left hand corner of the photograph and once again confirmed that that was veldt that he had burnt to protect the area. All the areas that he was shown he indicated that he had burnt them. In photograph 19 an excavator was shown as well as burnt grass and he indicated that also was what he had burnt. The same in photograph 22. During cross examination he indicated that it was his proposition that on the Sunday the area around the waste site be burnt. That was because the wind always changes direction. There was grass that remained there and he thought that it was going to be problematic. He therefore thought that it should be burnt in case that the wind changes direction. There was nothing burning at the waste site on the Sunday. According to him there was no fire risk at the dump site on the Sunday. It was around about 7H00 on the Sunday that the burning took place. The burning around the sawdust heap was to protect the plantation. That was Plaintiffs case.

[38] Bezuidenhout testified she was the general manager of the crop division of Defendant and had been employed with them for 27 years. She was involved in the yearly renewal process of insurance for Normandien Farms. Renewal invitations were sent out in February each year inviting the client to renew the policy. She dealt with the renewal for 2015.

[39] She had, prior to 9 November 2015, no knowledge of the dump sites and had been visiting Albany Farm on numerous occasions for the past 14 years. She was not aware of the litigation with regards to grazing. She had conducted 3 formal surveys on the farm and also certain informal surveys. The survey is a document that assists Defendant as to whether a risk is acceptable. Whether there should be any special terms or conditions applied and the premium which is payable. She was referred to page 30 of bundle G which is a computer generated risk survey report and stated that

she did the physical survey and her assistant captured it. The rating was 58 out of 100 which is acceptable although it is not the best risk. There is a heading Negative Land Use Factors and one for example was a purely managed forest where it would receive a minus 2 score. It would mean that on the adjoining property there was plantation which would negatively affect the fire risk. Although she had done surveys of the farm she was not aware of the dump site because she cannot see the entire farm. The day that she went around the farm she was with Rob Hoatson. They travelled out of the saw mill in a westerly direction and went to the point where compartments 13A and 13B meet. They had a look at the condition of the trees and the general area that had burned. They did a full circle around the area that did burn being A13b and she advised him that she needed to walk around and he then left her there, returned to the office and came and collected her some time later.

[40] They went back to the saw mill after that. In the past 14 years the Normandien group has had 37 claims and 7 relating to Albany Farm of which one is the present claim. The claims that have been paid out is approximately 11.5 million rand. On 7 November 2015 the Saturday she phoned L Houtson who was not available but phoned her back and confirmed that there had been a fire on Normandien Albany Farm. He informed her that it was early in the morning and that they were busy with the mopping up process. His response was that it was possibly spontaneous combustion. She understood him to say on the side of the hill. She informed him that she would arrange a survey to come and assess what had transpired. On the Monday morning at 7:39 she received a call from him to say that they had started extensive mopping up operations which included bulldozers, excavators etc. This was because he was worried about the balance of the plantations that were not burnt as a result of a change in the weather conditions and specifically the wind direction. He asked her to delay for a couple of days because they are involved in extensive mopping up. She was however advised by Bekker to go immediately to the farm. She then informed L Houtson that she was to do so and he told her to contact Rob when coming to the farm. She arrived at the farm at approximately 1 p.m. on 9 November 2015.

[41] On arrival driving from the eastern side towards Albany Farm she had a clear view of the layout of the farm from north to south and could see where the fire had taken place. Instead of going to the saw mill she took a ride along the right flank of the fire. She traversed around the edge of the fire, making her way towards where the fire would have started because on approaching the farm you could see the very distinct pattern that had presented. She did go near the dump site because on coming up the right flank of the fire she then travelled down the road with A13a on the right hand side. She noticed for the first time extensive dumping of saw mill waste in what has been labelled waste sites 1 and 2. There were vehicles, fire tankers and a lot of people busy in the area and she realised that this area was where the possible spontaneous combustion had taken place. At the dump site they were attempting to get an excavator out which had got stuck. The excavator had been used together with the bulldozer to rework the surface area and the stream line area of the saw mill waste dump. She observed smoke coming out of the saw mill waste in an area that had been bulldozed into almost a pyramid shape. The smoke was limited to that area. She noticed a lot of black marks within the saw dust area that had already been reworked. She was concerned about the process of extracting the excavator. She saw a lot of burn marks in the stream line area looking into the dump site. She also observed that point where the grass was burnt on the eastern northern side of the waste dump. It was also burnt along the back side.

[42] She took some photographs of the area. Photograph 3 reflects the area that was being worked in the waste site between it and the adjoining plantation A13a which had been subjected to fire. Photographs were contained in exhibit E. The road was in a good condition, had been graded and had no vegetation. She did not physically go and touch or pick up the blackened area because she was concerned about the extraction of the excavator. The firebreak had been burned at the beginning of the season and this was visible as it was already green. There was an area which was black which was shown that it was burnt now. There was an area of unburnt grass.

[43] One of the most important aspects of risks of any plantation are waste dumps. There was smoke evident where it appears to be grey in the area of the saw dust and

reflected over the grass backward over the blackened grass in the back ground. The smoke was coming out of the pyramid area. There was under the arm of the excavator a darkened area which was burnt material deep within the saw mill waste site. In the stream line area there was also burnt material. She went back 2 days later on 11 November 2015 with Mullins. He prepared a report. It looked different to what she had seen on 9 November 2015. It was very difficult to see the saw mill waste on 11 November 2015 as it had been reworked very well with sand and other material. The photographs at page 37 of bundle E indicated the markings left on the trees by the fire. She observed that on the western facing side of the trees there were little to no burn marks. On the eastern side of the trees there were charred marks or burnt marks which progressively got higher as you walked into the burnt plantation. She walked through the entire compartment A13a to where it joined A13b. The observations which she referred to were consistent throughout the entire area.

[44] She returned on 16 November 2015 and has since then been back on two occasions. She has also been back to the dump site. She confirmed a letter that was written to Hoatson in connection with the farm Stafford and which was withdrawn 3 days later. It was withdrawn because Hoatson had informed them that the issue had been resolved. She received an email from Hoatson relating to grazing issues that Hoatson had on the farm Albany which she was not aware of. She received this on 9 February 2016 after the event. She further wrote an email as she was concerned about the dumping on the farm and that there may be areas where this was taking place and potentially posed a risk. Hoatson responded to the letter and it was confirmed to Hoatson that they were not aware of the saw mill waste dumping that was going on at the farm and the dumping was seen as a huge increase in risk. The policy was thereafter endorsed to limit cover as a result of any fire that could take place in the area or in the dump. She has no recollection of the conversation that allegedly took place at a meeting on 20 October where she was informed that a case of Normandien Farms was due to start. A video was shown which was taken by her. She indicated where the heaps in the triangle the smoke was emanating from. It also shows what the excavator was doing, namely opening up the stream line area which had burnt material in it.

[45] The cross examination of Bezuidenhout was lengthy and I will only summarise the portions which in my view are applicable. The risk assessment in almost all cases rests with her but if she has concerns she elevates it. As far as Normandien is concerned up to 2015 the decision rested with her. A proposal if revealing risk factors it would depend on the severity of the risk whether such person would be insured or not. A risk survey is done on the farm after a proposal confirms certain information as being received. There are cases where they will not insure. She had undertaken surveys on the farm Albany. There is an onus or responsibility on the insured to make sure that they keep their side of the policy. The risk survey is her guideline in terms of whether the risk is acceptable or not. As the properties are generally large not all aspects can be seen in a single visit. She had travelled over the years on some of the roads on the farm Albany and normally Rob Hoatson was with her in his vehicle. She has never carried out a survey independently. When doing the risk survey she completes a form as guideline and will print out the previous survey and then compare the two. The surveys are based on her observation. The decision to repudiate the claim was not entirely her own. It was a collective process including assistance from their legal representatives.

[46] There were surveys in 2011 and 2014 but in 2015 there was no survey conducted. She was questioned about a discovery affidavit where she stated "A copy of the fire risk survey 2003, 2005, 2011 and 2014 are attached. The fire surveys for years not mentioned above were destroyed in a fire at Metro File, where the plaintiff's closed files are held." She then conceded that an error occurred in that the 2015 survey would appear from the affidavit to have been done but it was not done and that the fire at Metro File was during 2013. It was pointed out to her that the 2015 survey could not have been destroyed in the fire as it was in 18 October 2013 and she said it was a mistake and she apologised therefore. No risk survey was also done in 2013. In 2014 one was done. A risk survey is also not done for every single farm every year but it is done on a rotational basis and there is no fixed rotation. The risk surveys for 2011, 2010 and 2005 were done by Norris who was previously employed by Defendant on a contractual basis. She had done a general inspection with Hoatson in 2001 and in 2003

the risk survey was done by Norris who was instrumental in upgrading what they used to do in such a fire risk survey.

[47] When a score of minus 1 is recorded on the risk assessment it is a negative but it is a minor negative. If it was a minus 2 then it would be a serious risk. The risk assessment would give her an opportunity to look whether there is something that she could come up with positively. There have been no negative issues. This was up to 2015 although there was no adjustment in the premium. The proposal form was devised predominantly by Norris and Bekker. The question in paragraph 12 of the proposal form at page 25 of bundle G was prepared by her.

[48] Dealing with the fuel load she stated that it can extend from a compartment at the roadside to an adjoining area and to an adjoining plantation. These are aspects that they look at. A fuel load is one of the most critical factors when it comes to fires because fuel loads create a different behaviour in a fire. A low fuel load makes a fire more controllable. A high fuel load not only makes it uncontrollable but also increases the intensity of the fire. They prefer to do risk surveys between June and September of the year that they do it. During summer months a false impression of a fuel load is presented. They do not have the manpower or the time to do an inspection of every compartment on a farm. She was cross examined extensively about the scoring that had been made on several of the forms which are in the bundles.

[49] She stated that she is confident that when Norris did the scoring if there was a saw waste dump he would have raised it as a problem and mentioned it. Exhibit "G" page 454 is a handwritten document by her done on 15 April 2014. That is when she conducted a survey. Referring to page 465 she indicated that there was a discrepancy between the typed form and the handwritten document and that the person who captured the information did so incorrectly. The correct document is the handwritten survey. It was put to her that her handwritten document, if it was correct where she ticked "Yes", could be reference to land disputes and related to the cattle issue. She responded that Hoatson could have conveyed the message in the manner that did not make it feel an extra risk or concern. She cannot recall what was said to her.

[50] She agreed that on 9 February 2016 she received a letter together with a court order. She was unaware that there had been any dispute in the land claims court. On 10 February 2016 the day after receiving the order she wrote to Hoatson but did not raise the issue of the court order. On 24 February 2016 she again addressed a letter to Hoatson but did not raise the issue. On 26 February 2016 another letter was written to Hoatson and once again the issue was not raised. On 16 March 2016 she addressed a further letter and that dealt with the issue of the waste site. Once again there was no mention of the livestock issue. She could not explain why no letter about the livestock was written once the order had been received. Mr Hay, Defendant's attorney investigated the claim on behalf of Defendant. She was familiar with the farm Albany and also with the Hoatson's attempts to improve the farm and to reduce fuel loads. The plantation areas are approximately 2 048 hectares and the total size of the farms Albany and Buffelshook approximately 3 359 hectares. In 2012 there had been a fire and she together with Hoatson drove through the area to inspect where the fire had occurred.

[51] Dealing with the fuel load in 2012 there was heavy felling due to the last fire that she kept it at a zero. She did not score them negatively. The fire had taken away the fuel load which changed the dynamics. She was confident that it was smoke that she saw at the saw dust pits which were being reworked. She confirmed that the video which was taken did not show any smoke. There was still smoke in the area that was being worked as appears from the photographs that she had taken. She conceded that there was smoke from the diesel.

[52] She did not comment about smoke on the video as she did not see any smoke on the video. She was further shown a photograph in bundle E on page 5 which was similar to that of the photograph on exhibit "1" which she agreed to and agreed that there was no smoke visible there. The reason she took photograph 5 was to show all the burns and the different sections and that the area had been worked. The saw mill was known to her and was insured by Defendant up to 2014 but not for the 2014 to 2015 years. Although she had walked along what was termed the blue road she did not

walk past the waste dumps. At the saw mill she has seen debris and that it contained bark, pieces of wood as well as soil from the floor of the log yard. The residue was lying in heaps and she foresaw this as a problem. She was however assured that the waste material was either burnt in the boilers or was sold to other farmers.

[53] On 11 November 2015 she once again inspected the burnt area but did not inspect the unburnt area. There was evidence as testified to by Hoatson that shortly before the forest was pruned and thinned. The fuel load is then increased. But it was not regarded as exceptionally high in these circumstances. The fuel load on the unburnt area of all the veld grass was slightly higher because of the left over material from the thinning operation. The grass area adjacent to compartment A13a had been burnt on a regular basis. That year it had been burnt so the fuel load in the valley or the grass area adjacent to A13a was low at the time of the fire.

[54] On 9 November 2015 she was angry and disappointed when she saw the dump sites and questioned Hoatson about it and why she had not been shown it before and he responded that it was not a danger or a threat. She however considered it a serious non-disclosure and a basis for rejecting the claim. She agreed that on 9 November 2015 she knew that potentially this could be an issue to repudiate or not. She also visited the scene again on 11 November 2015 with Mullins and Simon. Simon stated in his statement that the fire started in A13a. Mullins was concerned that the fire started in the saw dust heap. It could have been as a result of a fire break burn that went into the sawdust heap. She received the report from Mullins on 15 December 2015. There was not a 30 metre fire burn around the saw dust heap. She had formed the opinion that the fire started at the saw dust heap and not in compartment A13a.

[55] She requested Plaintiff to provide her with the salvage value of the burnt wood and what was left after the fire. She agreed that she intended to obtain information to enable her to consider what amount should be kept in reserve in the event that the claim was to be paid. In the letter of 16 March 2016 addressed to Plaintiff she set out that she was unaware of the saw mill waste dump until 9 November 2015 and was

unaware that it was a continuous practice to dump saw mill waste and saw dust scrapings on Albany Farm. They were requested to immediately seize that and should any fires spread from the saw mill waste dump then they would not cover the damage. They will continue to hold them covered subject to the said condition referred to. On 22 June 2016 the letter of repudiation was sent.

[56] The non-disclosure of the saw dust heap would have given them a reason in November 2015 to cancel the policy. In February 2016 Hay investigated the issue, visited the farm and had various consultations. When asked why she did not include the issue of livestock knowing that it was an issue she stated that she could not give a reason. The fire belt around the saw dust heap was also not mentioned in the letters and she agreed therewith.

[57] At this stage Plaintiff indicated it wished to file a replication and that the matter be adjourned with Plaintiff to pay the wasted costs so that it could bring a substantive application to file the replication. This was done and after the replication was filed the matter then continued some three years later with the cross-examination of Bezuidenhout.

[58] She agreed that Plaintiff had complied with the provisions of the policy in respect of the claim procedure. The documents containing the claim form had been submitted to her and this was done within the time limits prescribed. It was also reported to the police at Normandien under case number CAS 6/11/2015. She confirmed that in a letter from her to a Mr Jamalabin, a landowner, she informed him that there was no negligence attributable to Normandien Farms for damage caused by the fire to his property. The letter was written on 6 January 2016 before the investigation had been fully completed. The saw dust heap is on the edge of the road going past plantation A13a and anybody driving past there would be able to see this heap. She denied that when she visited the farm as a result of a fire on 22 September 2015 she had driven past the dump site on Albany Farm. She disputed that where the dump site was, was in a roadbed area but in her view it was a stream line area.

[59] She was referred to the letter of repudiation wherein it stated that Plaintiff had caused saw dust and timber waste from the industrial saw mill plant to be dumped on the farm in an area adjoining the insured plantations and thereby increasing the load of combustible material in the vicinity of the insured area and that she had used the word “dramatically” increased. She was then referred to some article written by one Dave Hopson who stated that saw dust cannot combust. She disagreed therewith. She was not aware of everything that was happening on the farm and Plaintiff had a duty to make her aware of anything that was not ordinary or that has changed.

[60] In re-examination she stated that there were no factors that increased the risk on the farm according to the proposal form. The form has a declaration which is signed by applicant that he was satisfied that everything he had completed was correct. The 2014 one was definitely that of L Houtson but the 2015 one may have been signed by Matthew Hoatson. She referred to clause 12 with the heading “Duty of Disclosure” that they were to disclose or advise of any changes that may have taken place during the prior period. Normandien Farms consists of about 7 or 8 farms and between 1500 and 2000 hectares of planted trees. It was a large operation. She once again confirmed that it was smoke that came out of the saw dust heap. There were definitely no machines to the left or anywhere near where the smoke was coming out of the saw dust area. She stated that it was conveyed to her by Lawrence Hoatson that “I recorded at the inception of my insurance review the question of the dump site was never raised. Compounds where saw mills were and further that our warranties make no mention of the dump site.” She was adamant that during May 2015 the investigation was still proceeding and therefore the letter of repudiation was only sent on 22 June 2016. If there was any repayment of the insurance premium due to the fact of earlier cancellation it would only have been about 20 per cent of the premium that was repayable. That concluded her evidence.

[61] Mr Piere Bayley Bekker (Bekker) testified that he was the CEO of Defendant. That their business was forestry insurance and that he had joined the company in 1997.

He has a BSC Honours degree from Stellenbosch University in forestry followed by a B com in business. He did not attend to the farm after the fire at all. He was informed by his brother who farms in the same area that there had been a fire on the Hoatson farm and he then contacted Bezuidenhout who then thereafter went to investigate. The account of Plaintiff was an important one for them especially in respect of the forestry side. The cancellation or repudiation of a policy or claim was a major decision. Only he makes that decision. He did repudiate and conceded that it was only in June of the year after the fire. They believed in an upfront underwriting policy and that entails that the farmer must beforehand advise them of all possible risks on the farm so that it does not become a later issue. The survey which was used was put together over some time and it is taken into account as a management tool. In 2007 and 2008 there were a lot of fires in the timber market and a lot of companies pulled out of underwriting forestry and a lot of farmers approached them at that stage.

[62] Saw dust was a pertinent factor and irrespective of the result of the survey he would have expected it to be brought to his attention. Saw dust stores fire and when the fire gets into the saw dust it can hide there and come to the surface when there is combustion. It is a risk factor that increases the fuel load. It needs to be specifically mentioned. They would exclude any fire that emanates from a saw dust pit. They may still continue to ensure the balance of the farm. Accordingly if there was a saw dust heap it did not exclude the possibility of insuring the farm but it may have been on different terms.

[63] During cross examination he stated that being upfront was to ensure that there is no issues at the claim stage. The survey was a management tool to assess the risk. The risk surveys are conducted with the farmer and an objective view of the farm is obtained. The farmer is encouraged to take them to the areas of concern. He indicated that a scoring of 2 on the survey means that there is a high fuel load. 1 indicates a low fuel load. He has no record of any saw dust heap being reported to them. It is expected of a client to bring such information to their attention. One of the reasons it took so long to decide on whether to repudiate was to make certain that the fire started in the saw

dust heap. From day one there was a suspicion that there was a problem but they gave them the benefit of the doubt until all the investigations had been conducted and completed. Such decisions are not made easily and quickly. The Hoatson's had at great surprise to them the very day after the fire started a massive process of remedial action using excavators and all sorts of things and it made no sense for them to do so if there was only a tiny little fire on top of the saw dust heap. It indicated that there may be tampering with evidence.

[64] It was therefore agreed by Defendant that they will continue to insure but will not cover any fire that emanates from the saw dust heap. There were different places provided to them where the fire had started. He had seen the report of Mullins on 15 December 2015. The report indicated that there had been a non-disclosure. From everything provided to him he was satisfied that the fire started in the saw dust heap. He was further cross examined on an article written by one Mr Dobson about saw dust and the combustion thereof and whether there was spontaneous combustion and how that occurs which in my view it is not necessary to deal with here in detail as it appears from the typed record.

[65] He regarded an industrial waste site or dump site as part of a manufacturing process. When he was phoned by Bezuidenhout after she attended the scene he was informed by her that there was a saw dust waste dump. This was a big issue as it had not been reported to them. On 13 May 2016 there was still discussions going on. There was a transcript of an interview with Pretorius and it was only finalised on 7 June 2016.

[66] Mr Michael Charles Mullins (Mullins) testified that he was a professional loss adjustor and had been doing so for 40 years specialising in timber adjustments. Attempts to ensure that there is a fair settlement at the end of the day. He does not make any decisions nor recommendations but just says what the issues are. He likes to be there before anything is disturbed so as to obtain the necessary information. He received a call from Bezuidenhout either on Monday or Tuesday but then met her on the

farm on Wednesday 11 November 2015. He is aware that there is a saw mill, an air strip, a fire tower and a weather station on the farm.

[67] The weather conditions are presented by different colours and an orange colour indicates that it is dangerous and that your firefighting equipment should be ready. On Saturday 7 November 2015 the temperature was 29 to 31 degrees and the wind speed at 11h00 was 18 km per hour. It abated a bit and then got stronger again. It was a westerly and south westerly wind. He was questioned as to when it says westerly wind is it blowing from west or towards west and responded that it is blowing from the west. He was shown a diagram and indicated that the wind was blowing from the left to the right on the diagram. For the Saturday it was marked as orange which meant that there was danger. It was pointed out to him that in his report he stated that the fire appears to have started in or adjacent to compartment A13b spreading rapidly in a south easterly direction due to the strong westerly wind.

[68] He stated that he used the word waste bits because there was no more saw dust or anything when he arrived there. There was some grass that had been burnt along the top. He had been told by Rob Hoatson that they had been dumping saw dust there for the past 7 years. He expressed the view that there is a possibility due to the weather conditions that the saw dust waste dump spontaneously ignited caused by the low humidity, high temperatures and strong winds. When he spoke to the lady that was in the watch tower she indicated that the smoke at first was white smoke and then later turned to black. No clearing of the surrounding grass of the waste dump had been carried out and he commented that there had been a non-disclosure and that reasonable steps may be taken.

[69] During cross examination he stated that he has experience in many fires but he would not express himself as an expert in the field of fires but that he is an expert in terms of fires relating to insurance claims. He went to the saw dust heap on the day in question together with Rob Hoatson and Bezuidenhout went with Simon in his bakkie. He was aware of expert reports and theories that the fire did not start within a

compartment. Although the statement of Hoatson was that it did not start in the saw dust heap Rob Hoatson immediately took him to the waste dump when he was there. He was referred to his report where he said that an alternative was that it started from the dump site itself and spotted into compartment 13A. He stated that grass burning normally makes white smoke. In 13A and 13b all the material on the floor had burnt out. If the grass between the trees burnt it was possible that it would have created white smoke. He agreed that it was possible that the white smoke which was seen by Khubeka could have emanated from within a compartment amongst the trees. He agreed that the wind directions change during the day on the farm.

[70] The purpose of his report was to set out what he had seen at the scene. It was a preliminary report and he was not asked to do anything further. The saw dust heap when he arrived there, had large trucks and bulldozers in the pit and it had been worked.

[71] The manuscript changes to his report relating to 13b was done by him as it is his initial that is next to it. He was asked by someone from Defendant to change the reference on page 21 from compartment 13b to 13a and towards the middle also to compartment 13a and 13b instead of just 13b. He says it was possibly Bezuidenhout. It was not changed on page 19 and he indicated that it must have been an oversight. It was put to him that the point indicated marked with an X was dump site 2 and not dump site 1.

[72] Mr Abraham Petrus Du Preez (Du Preez) testified that he has a Bachelor of Science in forestry, civy culture and nature conservation, an Honours Degree in business administration and is a part time lecturer at Nelson Mandela University and lectures fire management and fire ecology and forestry engineering practises. He is an independent forestry and wild fire consultant. He started his career in forestry inline management and after a period of 21 years was moved to another position in a company MTO Forestry as manager doing fire investigations or being a member doing

fire investigations. He left MTO in 2017 then lectured for 3 years and then became an expert in fire investigation.

[73] He visited the site on 5 October 2018. With the knowledge at his disposal and what was possible to see on site as to the origin of the fire and the direction and the intensity of the fire are issues which he attempted to determine. There was a small area of trees that were left after the fire. The area next to compartment A13a had already been harvested and replanted. It was a gentle slope upwards from the road into compartment A13a in an easterly direction. There were black burn marks or scars on the fronts of the trees which was visible. The burn scars on the bark will remain visible for many years. It was evident that the fire burnt from a westerly direction in an easterly direction up the slope away from the road into A13a. It was a west to northwest wind according to the records.

[74] The angle of char would normally if there was wind involved be a distinction between the side where the wind comes from and the opposite side where it is referred to as the lee side of the tree. The bark on the tree points to the direction of the spread of the fire. The angle would be lower in the direction from where the wind is coming and higher in a direction in which the wind is blowing. What he could establish was that the fire burnt from one direction to another, the angle of char indicates the direction and thirdly the presence of wind. It is evident to him from the photographs and observation on the day of the visit that the fire initially moved reasonably slowly into the compartment as it entered. It thereafter definitely increased in intensity. If one considers the photographs it can be seen that compartment A13a the trees in the foreground facing the observer there is very little evidence of a burn scar on this side whereas one can see black at the back of the tree, where there is clear signs of scorching. The photograph is clear that the fire was moving in the opposite direction from which the photograph was taken at page 39 of bundle E. The fire intensity increased as the fire progressed. There are no signs of a so called back fire burning towards the origin of the fire. Where a fire burns there are two clear flanks. The left flank and the right flank

burning outwards from a source of the origin of the fire. One can clearly see the direction of the fire burning away from a westerly to an easterly direction.

[75] It is so that external sources, such as fire embers burning material might be blown into the sawdust heap. If it is blown into the saw dust heap or dump site it may be dormant for weeks and even months. The dumping of saw dust was a potential hazard in a plantation area. He stated that from his observations that it is highly improbable that the fire would develop into such a big fire inside the plantation. The remaining trees did not show signs of back fire at the rear. Although it is not uncommon that fires do burn slowly back from the origin, the signs left in compartment A13a would not be in keeping with that due to the angle of the char and it showed that the fire had momentum moving from west to east and not in the opposite direction. He stated that it was virtually impossible for a fire to jump back across the road against the prevailing wind. The wind was around 19 to 20 km per hour which is a reasonably strong wind. Where there is smoke there is 99 per cent of the time a fire. He said that on the photographs the fire at the saw dust heap was indeed larger than the area of approximately a metre by metre, a surface fire which was stated by Simon. He was asked whether where there is a slope one can expect a sudden increase in speed of fire which he stated was correct but stated that the wind would be the most important factor. If the fire has gone up higher it is indicative of a fair amount of undergrowth.

[76] In this case the wind was consistent from the west. It changes gradually. In the southern hemisphere the wind direction changes anticlockwise from northwest to west to a southwest and that would be the explanation why on the Saturday it was predominantly west northwest and on the Sunday southwest. A back burn is a counter fire in the terminology to explain the fire burning slowly back from its point of origin away from it against a predominantly wind direction. But a back burn would be putting in an additional fire to stop the progress usually against a safe place like the road or a structure. Winds can change direction but in his opinion that was not so in this case. If the fire originated from the saw dust heap it would have spotted across the road into A13a. It is about 4 to 6 metres. The angle of char indicated the direction of the

movement and that it burnt from west to east but not from east to west. It is most likely that it spotted from the saw dust heap and that is the most likely point of origin. As far as burning embers inside the dump he testified that it was either due to spontaneous combustion or burning embers from previous burning operations such as fire breaks adjacent to the saw dust heap. Smouldering will not necessarily emanate smoke. It can burnt inside without generating smoke.

[77] He considered all the factors such as lightening, the teams working in the area arson, but the only logical cause for the fire was that it originated from the saw dust heap. He stated that it definitely crossed the road so it spotted. Either directly from the saw dust heap or from burning vegetation on the verge of the saw dust heap. The angle of char would be deeper on the lee side. He denied that he had been influenced in anyway by what was told to him by Defendant's representatives. He then referred to what was called a V pattern as a very reliable indicator. This indicated that the fire crossed the road into A13a and then moving from a westerly to an easterly direction fuelled by the westerly wind. He once again expressed the view that it was a wind driven fire and not a slope driven fire. The wind pushed it in an easterly direction.

[78] He was questioned at length about the V pattern but was adamant that the V pattern indeed confirmed what he had established as the origin and burning of the fire. He stated that it was not based on speculation but on evidence provided to him. It spread into A13a and the followed the typical V pattern. He could find no evidence of anyone having lit a fire. There were clear indications of a fire in the saw dust heap. The fire definitely burnt from the road into A13a and not back to it. He was adamant that there was still a V pattern and his conclusions were reached on the evidence found on the trees in A13a. He was instructed by attorney Hay and also consulted with Bezuidenhout, shown photographs and also a video but made his own observations. He was questioned why he did not in his report refer to the fact that he had consulted with Bezuidenhout and responded that he was not asked whether he had done so. He was taken to the scene so somebody had to take him there.

[79] He conceded that the direction of fire can vary in general terms but not radically or instantly. It normally happens over a period of time. He once again confirmed that what remained in A13a clearly indicated a fire burning from west to east not the opposite direction.

[80] During re-examination he referred to his report where he stated that it was improbable that the fire first entered the saw dust waste area only on 7 November 2015. The visible traces of saw dust and blackened char remains are more consistent with an indication that the fire had been resident in the saw dust waste for a period preceding 7 November 2015. He once again confirmed that there was a constant reasonably strong westerly wind blowing at the time at roughly below 35 km per hour. It is a reasonably strong wind. It was a westerly wind and he once again referred to the charring on the remaining trees. He explained that it is a physical reality the way that the flame moves and it is to do with the air vacuum and the shape of the flame going up similar to when a fire moves uphill and it will always be higher on the other side of the tree but the height will be determined by the fuel load. So the burning or the char on the leeward side is always more severe. It was put to him that the evidence presented was that the wind at all times was in a westerly direction. He was asked if he could postulate how a fire that started in the compartment can end up in the saw dust heap which was against the wind. His answer was that it was virtually impossible. That concluded his evidence. That was the case for Defendant.

[81] Heads of argument were filed and the matter also argued. At the argument stage Defendant indicated that it no longer pursued the issue that the claims procedure had not been complied with, the issue of the grazing rights and the fire belt of 30 metres that was not burnt around the sawdust waste area. These issues have therefore not been dealt with in detail in the summary of evidence. The issues which have to be determined are thus the origin of the fire and whether there was any misrepresentation, whether there had to be a disclosure of the sawdust heap which affected the risk and the issue of waiver and estoppel.

[82] Both parties referred me to the decision of *Regent Insurance Company Ltd v Kings Property Development (Pty) Ltd t/a Kings Plot 2015 (3) SA 85 (SCA)*. I was also referred to various other decisions relating to the onus and the test of materiality. However, in my view, these issues are dealt with in the *Regent Insurance* decision.

[83] Section 53(1) of the Short Terms Insurance Act 53 of 1998 provides as follows:

“Misrepresentation and failure to disclose material information

(1)

(a) Notwithstanding anything to the contrary in a short term policy, whether entered into before or after the commencement of this Act, but subject to subsection 2.

(i) the policy shall not be invalidated.

(ii) the obligation of the short term insurer thereunder will not be excluded or limited and

(iii) the obligation of the policy holder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short term insurer so that the

insurer could form its own view as to the effect of such information on the assessment of the relevant risk.”

[84] What is clear from the decision of Regent Insurance is that the onus of proving materiality is on the insurer to prove that the non-disclosure or representation induced it to conclude the insurance contract. Further that it is an objective test to determine the materiality of a non-disclosure as set out in section 53(b) whether a reasonable person would have considered that the risk should have been disclosed to the insurer. The test for inducement remained subjective, whether the particular insurer was induced by the failure to disclose a material fact to issue the policy. These legal issues are accordingly not in dispute.

[85] Plaintiff submitted that Defendant had to prove the materiality of misrepresentation, and also had to prove where the fire started. It was submitted that it was speculation by Defendant where the fire started in that:

1. It was speculated that it crept into the sawdust heap earlier on.
 2. It was not said when.
 3. The issue of spontaneous combustion was speculation.
 4. Bezuidenhout did not say where in the sawdust heap it first started it was a reconstruction of how the fire started with no factual evidence to base this on.
 5. The photograph of smoke at the sawdust heap shown at the trial.
- It was the conclusion of Du Preez that the fire spotted from the sawdust heap.

[86] The expert witness of Defendant Mullins, concluded that the possibility was that the fire emanated from the sawdust heap, which is adjacent to compartment 13b. He was told that he had to make alteration to his report by Bezuidenhout and it was submitted that his evidence was conjecture.

[87] It was further submitted that the evidence of Bekker was of no assistance he was a biased witness and his evidence should be treated as inadmissible. It was submitted

that the alleged non-disclosure of where the fire started was akin to fraud and had to be distinctly proved. The evidence of Plaintiff was that the fire started in A13(a). It was submitted that the following factors proved that the fire did not start in the sawdust heap. Bezuidenhout knew of the sawdust heap, the repudiation of the claim long after the fire. On 9 and 11 November 2015 Bezuidenhout formed the opinion that the fire started in the sawdust heap. She took a video version thereof. A photograph taken on 9 November 2015 showed smoke. No letter after 9 November 2015 to Plaintiff that the fire started in the sawdust heap until the letter of 16 March 2016 stating to Plaintiff there was a misrepresentation as to where the fire started. The misrepresentation only arose after the claim had lapsed and there was correspondence between the parties about the salvage of the timber. The silence of Bezuidenhout from November 2015 to March 2016 without repudiating or communicating creates an irresistible inference that she knew of it. An adverse inference also had to be drawn from the fact that the expert Thomson in respect of whom an expert notice had been given was not called to testify.

[88] It was submitted that having regard to the decision of *Representative of Lloyds v Classic Sailing Adventures 2010 (5) SA 50 (SCA)* at paragraph 60 that where there were eyewitness evidence or direct evidence of an occurrence this may render the construction of experts less relevant or even irrelevant.

[89] It was submitted that it must be accepted that when the witness Khubeka walked past the sawdust heap at 5:35 she saw no smoke. Pretorius at 8:30 was informed by Khubeka that there was a fire in the sawdust area. There was no fire but only smouldering and he saw a fire in A13(a) 10 to 15 metres from the road. Later a small area smouldering was in the sawdust heap. The witness Mfusi saw a fire in A13(a) and no smouldering at the sawdust heap. The witness Mfanathi burnt the area around the sawdust heap the day after the fire so there was no fire at the sawdust heap.

[90] It was submitted that Defendant failed to prove non-disclosure of the sawdust heap. There were no factors which increased the fire risk since the last proposal including changes to management. The sawdust heap had been there since 2003 and

the farm was visited by Bezuidenhout over a period of 14 years and she could not explain how she missed it. The risk remained the same and Defendant itself assessed the risk. She knew thereof but falsely denied it. Fire surveys were conducted on 28 July 2011 and 15 April 2014 and Bezuidenhout admitted that the handwritten survey of 2014 conflicted with the typed version. Bezuidenhout had travelled on the roads but made all attempts to avoid admitting that she travelled on the road passing the sawdust heap. The forms used by Defendant contained scores and the fuel load was important and in 2011 as well as 2014 she scored the surrounding areas as zero.

[91] Bezuidenhout must have been aware of the sawdust heap and only enquired about such on 25 February 2016. She was unable to comment why only then. She was of the opinion on 9 and 11 of November 2015 that due to the non-disclosure the claim could be repudiated. She also addressed letters to Plaintiff about salvage and made no mention of the sawdust heap. By not immediately referring to the sawdust heap is indicative that she knew about it. Further there was false evidence of the 2015 survey.

[92] It is further submitted that the sawdust heap did not increase the insured risk and that it was not necessary to disclose. It had been no risk for more than 10 years. Bezuidenhout was a poor witness which was argumentative and her demeanour was bad, and she was untruthful.

[93] In respect of the replication it was submitted that it took from 7 November 2015 until 22 June 2016 to repudiate the claim. The sawdust heap was also only first mentioned on 16 March 2016. Defendant thus waived its rights.

[94] It was submitted on behalf of Defendant that as it was a contract of insurance Plaintiff had to notify Defendant of any increase in the risk, had to maintain firebreaks and make a full disclosure. In terms of clause 12 of the contract of insurance a full disclosure had to be made and the non-disclosure of the waste dump site was therefore irregular. There was no evidence prior to 9 November 2015 that Bezuidenhout knew of the waste site. There is no evidence to back up the accusation that she must have been

aware. On 24 February 2016 she stated that she only became aware of it on 9 November 2015. Mr Houtson responded that the warranties never made mention of a dump site. The evidence of Houtson as to her knowledge was speculation.

[95] Defendant referred to the Regent Insurance decision and stated that a person seeking cover is obliged to disclose all matters material to the assessment of risk to allow the insurer to make a proper assessment. It was submitted that in terms of section 53 of the Short Term Insurance Act Defendant alleging the non-disclosure had to prove the materiality thereof and that it was an objective test. Du Preez testified as to the threat of the timber waste site and this was not challenged. The work on the dump site the following day as testified by Plaintiff's witness indicated that it was a danger. Anything that increases the risk in the vicinity of a plantation is critical. Further it was submitted that the timber waste site did burn and this should have been disclosed. The repudiation was therefore justified.

[96] As far as the origin of the fire it was submitted there was fire in the dump site on 7 November 2015. The cluster of trees on the western end of compartment A13(a) survived but all the timber to its east was destroyed. The wind blew from west to east and the road between the dumpsite and the compartment had no fuel load. The char pattern on the surviving trees indicate that a westerly wind blew and varying degrees of char was visible on the eastern side. Du Preez was not challenged that he was wrong. The marks on the tree indicate that the fire burnt from west to east. There was nothing to indicate that the fire had moved from east to west.

[97] It was further submitted that the evidence of Pretorius that the fire originated 15 metres into the plantation compartment was contrary to the char marks on the surviving trees and the fire would have had to back burn against the wind. There was no explanation for this. The probabilities did not support the evidence of Pretorius. Pretorius testified that the dumpsite was safe but if it was so then why all the workings that occurred there the following day. In his statement Pretorius stated that the tower informed him that the fire was in compartment A13(a). On 16 February 2016 he stated

that he could see the fire in A13(a) and that is where it started. However he had not shared this information with anyone up until then. It is improbable that he would not have reported where he thought the fire started. His evidence is accordingly improbable and cannot be accepted. It was proven that in all likelihood the fire started in the dumpsite.

[98] As far as the waiver and estoppel was concerned the fire was on 7 November 2015. It was attended by Bezuidenhout and Mullins on 9 November 2015 and 11 November 2015 and on 10 February 2016 it was stated to Plaintiff that the reinsurers had certain queries. On 19 February 2016 Defendant's attorney and Bezuidenhout attended the farm and interviewed various witnesses and this was the first time that Pretorius stated that the fire started in A13(a). It was a protracted investigation that was only completed on 7 June 2016 and Plaintiff was aware of the investigation. On 22 June 2016 the claim was repudiated. It was accordingly submitted that Defendant did not waive its right to rely on the said defences and that clause 18 of the insurance contract excludes waiver.

Origin of the fire.

[99] The witness Khubeka, who was in the tower at Normandien Farm on the morning in question, stated that she reported at 8:45 that there was smoke in the sawdust area. This evidence of her was not disputed and was also confirmed by various other witnesses such as Pretorius and Mfusi. It is therefore uncontested that the report made by her indicated smoke from the sawdust area. Pretorius went to the scene and stated that he saw a fire at compartment A13(a). There was no smouldering at the sawdust heap and the wind was blowing in a westerly direction and there were spot fires. In the afternoon there was smouldering at the sawdust heap in the section of approximately a metre by a half a metre. He suspected that there was back burning. The waste site was no fire danger.

[100] The witness Simon indicated that there was no smouldering at the dump site at approximately 06h00. He however confirms that Khubeka stated that she saw smoke at

the dump site. He saw the fire at A13(a) but could not established where it had come from. It spread in an easterly direction. In the afternoon the dump site was smouldering. He confirmed that there was extensive workings at the dump site on the Monday and that there were bull dozers etc. operating there. Pretorius showed with a hand where the fire started but was not specific. Mfusi stated that he saw fire in the plantation. There was no smouldering at the sawmill dump site and the wind was in a westerly direction. The burning was against the wind.

[101] Houtson stated that he informed Bezuidenhout on 7 November 2015 that he was moving equipment into the sawdust heap. She had been on road A13(a). The sawdust heap had been there since 2003 and what it consists of is log yard scrapings which is dumped so as to fill up the area that trees can later be planted. He stated that it was a surprise to him that after having travelled on the farm for 14 years Bezuidenhout missed seeing the sawdust heap. The dump site was never considered to be a fire risk and he denied that it started there. Bezuidenhout also on 9 November 2015 when she visited the farm not tell him to stop dumping. Four months prior to the fire the plantation had been thinned out and pruned and there was a lot of brush wood lying in the forest. Various samples were taken to Mr. Strydom, previously employed by the CSIR, to do various tests as to the scrapings of the samples taken from the mill sites and also the dump and he was of the view that log yard scrapings would not make large flames.

[102] Bezuidenhout was adamant she only became aware of the dump site on 9 November 2015. She however conceded that she had on numerous occasions in the previous 14 years been to the said farm and had also conducted a survey of the farm. Houtson had on 7 November 2015, when she spoke to him telephonically, informed her that he suspected it was spontaneous combustion and on the Monday informed her that he was commencing remedial operations because of changes in the wind direction. She then went to the farm on 9 November 2015 and saw various vehicles operating in the dump site area. There were burn marks at the dump site and such a dump site was high risk. On 11 November 2015 she attended at the farm with Mullins. On the western side of the trees that were still left there were very little burn marks. She also went to the

farm on 16 April 2015 and on 2 occasions thereafter. She later informed Houtson about the dumping and the policy was endorsed accordingly. There was no survey during 2015.

[103] On 16 March 2016 she addressed a letter to Houtson dealing with the waste site. The fuel load is increased when forests are pruned and thinned and this is accepted. On 9 November 2015 she considered the waste dump as a non-disclosure and as a basis for rejecting the claim. The report from Mullins was received on 15 December 2015. She agreed that she enquired from Houtson what the salvage value of the wood was and that on 22 June 2016 the claim was repudiated.

[104] She was cross examined at length about various issues which are not of assistance in deciding where the origin of the fire was. It is however apparent from her evidence that she attempted at all times to avoid admitting that she, although having been to the farm on numerous occasions over a period of 14 years, had ever passed the waste site. When she was referred to her attendance at the farm on the previous occasion when there was a fire she once again attempted to avoid admitting passing the waste site by stating that she approached on the farm from the other side.

[105] Bekker, who was the CEO, never attended the scene and stated that a saw dust heap is a risk and needs to be mentioned by the insured. He concluded that the fire started in the sawdust heap.

[106] Mullins testified that the wind was in a westerly direction and that the saw dust waste heap spontaneously ignited and that this was due to the humidity, the temperature and the wind. He agreed that white smoke was from grass and could be from among trees.

[107] Du Preez concluded the fire burnt from west to east up the slope of compartment A13(a). The angle of char showed the side of the wind. The char on the remaining trees was indicative that the wind blew from a westerly to an easterly direction. It first moved

slow into the compartment and then increased in intensity. He could find no signs of back burning and the fire was from a westerly to an easterly direction.

[108] The dump site was seen by him as a potential hazard. Due to the angle of char there was no back burning. The wind was about 20 km per hour and the fire did not jump back against the prevailing wind. He therefore concluded that the fire started at the sawdust heap and spotted therefrom. The V pattern was what one would have found as the fire crossed the road into compartment A13(a). The fire in the sawdust heap was from spontaneous combustion or burnt ambers. He was cross examined at length on various issues as well as to his qualifications to testify as an expert. It was his first time to present evidence as an expert in the High Court. This however is not an issue that would affect the calibre of his evidence. It is apparent that he has extensive knowledge of forestry and of the controlling of fires and also lectures in that regard. Although there was lengthy cross examination it could not be disputed that the angle of char indicated the direction of the fire. Unfortunately due to the fact that all the other trees had been cut down at the time that he visited the property he could only refer to the small portion of trees that were still in the compartment opposite the sawdust heap and which contained the char from which it could be established due to the angle thereof that the wind blew in a westerly direction and the fire burnt in the same direction.

[109] Khubeka's evidence can be accepted and was also not challenged. Pretorius, although agreeing that Khubeka reported smoke coming from the sawdust heap, only at a later stage during February 2016 stated that he saw the origin of the fire about 10 to 15 metres inside the plantation. Although his evidence in this regard was what he actually observed, his evidence must be considered together with all the other evidence and the probabilities. He conceded that the wind was blowing in a westerly direction. He stated that there was later some whirlwinds but did not indicate that that would have caused the burning of the plantation in compartment A13(a). He suspected it was back burning but it must then have been spontaneous back burning because there was no evidence by any of the witnesses that a fire was ignited to cause the actual back

burning against the prevailing wind. Although he answered all questions the veracity thereof must be established.

[110] The witness Simon's evidence that he saw the fire at A13(a) is not of much assistance as he could not indicate where the fire had started. It is not in dispute that the fire spread through compartment A13(a) and therefore it is of no assistance in determining the origin of the fire. Mfusi indicated that he saw the fire in the plantation burning against the wind. He admitted that the wind was in a westerly direction. Once again his evidence as to where the fire was seen by him has to be considered against the probabilities and the other factors such as the wind direction. He could not provide any explanation as to how this fire would have burnt against the prevailing wind which it was common cause was at least 20 km per hour at the time. Therefore just as in the case of Pretorius and Simon the other factors such as the wind direction and the other evidence which I will deal with later makes one to conclude that no reliance can be placed on their evidence. Houtson could not provide any assistance as to the origin of the fire except that he stated that the sawdust heap had been there since 2003 and that he did not regard the sawdust heap as a risk factor. He was surprised that Bezuidenhout, having been to the farm on so many occasions, had not observed the sawdust heap. Also four months prior the plantation had been trimmed and pruned with a lot of brush wood which was lying under the trees. When the policy was renewed there was no increased fire risk. When Bezuidenhout visited the fire on 9 November 2015 she did not tell him to stop dumping. He agreed that on the next day and especially the Monday various machinery was brought in to work on the dump site. Extra soil poured onto it and in his view this was done due to the change in the wind direction and to ensure that no further fires could be started.

[111] Bezuidenhout attempted to ensure when answering questions that she had not gone past the dump site. She had only gone up the road to a certain extent or came down the road to a certain extent but never past the area where the dump site was. She did not conduct a survey in 2015. The fuel load was increased when the forest was

pruned and thinned. On 9 November 2015 she already considered it as a non-disclosure and a basis for rejecting the claim.

[112] It is difficult to understand why, if on 9 November 2015 she already was satisfied that it was a non-disclosure and a reason for repudiating the claim, which was confirmed by Mullins on 15 November 2015, that the repudiation was only done on 22 June 2016. It is contended that this was due to further investigations which took place. In my view there is nothing from the evidence which indicated that such a lengthy further investigation was necessary and further that one would have expected, at least if the parties were satisfied during November 2015 that there was a non-disclosure and where the origin of the fire was, that this would be communicated to Plaintiff and would not wait until March 2016 to communicate it and then only cancel it during June 2016 after the policy was not renewed. This was after the salvage value of the timber was requested from Plaintiff even though she had already decided that it was a non-disclosure which warranted a repudiation. She was not the best of witnesses. At times she could not answer the questions posed to her or explain her conduct. Her conduct does not seem to accord with what she found and in my view no reliance can be placed on her evidence as to the origin of the fire.

[113] The evidence of Mullins that it was spontaneous combustions at the sawdust heap is supported by the wind direction

[114] Although Du Preez's evidence may have had certain deficiencies, it was in my view reliable. He was honest in respect of the findings that he made and his evidence was supported by the other factual evidence and probabilities. The char marks and the angle thereof is indicative that the fire burnt in a westerly direction from west to east and therefore it would appear on the probabilities that it commenced at the sawdust heap. There was no dispute about the direction of the wind and no credible evidence that contradicted the conclusions drawn from the char marks. It entered the compartment A13(a) and from there due to the wind of at least 20 km per hour in a westerly direction kept on burning up the compartment away from the sawdust heap. I accept for the said

reasons that there was no back burning as this does not appear from the angle of char. If the fire had started in compartment A13(a) as testified to by Pretorius the fire must have burnt against the wind. There was no evidence to support this possibility as the wind speed was about 20 km per hour or more at times. There was no evidence direct or indirect that the fire burnt from inside compartment A13(a) towards the dump site. Although Pretorius stated that the fire started in A13(a) he did not testify that he saw it burning against the wind. The V shape also did not show burning towards the west.

[115] Considering all these factors and especially the direction of the wind the charring on the remaining trees and the fact that immediately after the fire Plaintiff commenced extensive work on the sawdust heap, it has been proved on a balance of probabilities that the sawdust heap must have been the origin of the fire.

Non-disclosure of the sawdust heap and risk effect.

[116] It is common cause that Plaintiff at no stage informed Defendant of the sawdust heap. The evidence of Houtson was that it had been dumping at the said heap since 2003 so as to fill up the area to enable it to plant more trees in that area. In its letter of repudiation dated 22 June 2016 Defendant contends that the fire spread from the sawdust waste area. In the said letter it sets out that section (A) of the certificate was breached because the member did not take reasonable steps and precautions to prevent accidents or losses and in terms of section B clause 7(c) the member shall in addition to the express warranties contained therein take all reasonable steps and precautions to prevent loss or attempt to minimise such losses that may occur. It is contended that by allowing sawdust and timber waste from the saw mill to be dumped on the farm in an area adjoining insured plantations increased the combustible load and increased the fire risk.

[117] It is also contended that in terms of section A clause 8 if any claim under the certificate is in any respect fraudulent or if any event is occasioned by the wilful act with the connivance of the member the benefit afforded under this certificate shall be forfeited. It is further contended that during the investigation management employees

made materially inconsistent and contradictory statements regarding the incident and that they caused part of the area where it was dumped to be interfered with on about 9 November 2015 in a deliberate effort to destroy. However the issues relating to the cattle and the court cases relating thereto and the 30 metre firebreak were not pursued by Defendant.

[118] It referred to section B clause 12 of the certificate which has the heading “Duty of Disclosure” and states that the member shall be obliged to make a full disclosure of any factors which may impact on the assessment of the risks underwritten in terms of the certificate. Such obligation extends to informing the cooperative of any material change and circumstances that may have an impact on the risks underwritten during the currency of the certificate including change of ownership, i.e. cross-partnerships, cease lease agreements etc. It is then once again alleged that by dumping the sawmill waste it substantially increased the load of combustible material in the vicinity of the plantations.

[119] The policy was taken out the first time in 2001. On 21 April 2015 a renewal proposal form was signed as appears at page 54 of exhibit “B”. In paragraph 13 thereof it enquires whether there were any factors which have increased the fire risk of the farm since the last proposal was completed including change to management and the answer was no. The evidence of Houtson that the dumping had taken place since 2003 was not disputed. Accordingly the answer which was provided in the renewal proposal form that there was no factor which increased the fire risk since the last proposal does not appear to me to have been a misrepresentation neither to have been fraudulent.

[120] Also from the evidence it did not appear that there was any intentional fraudulent means or conduct by Plaintiff or its employees in respect of the origin of the fire. It was never disputed that the dumping had taken place and Plaintiff also from the commencement provided the evidence of the witness Khubeka that the first report stated that smoke was seen from the sawdust dump area.

[121] In terms of clause 12 of section B a member shall be obliged to make a full disclosure of any factors which may impact on the assessment of the risks underwritten in terms of the certificate. Such obligation extends to informing of any material change in the circumstances that may have an impact on the risks underwritten during the currency of the certificate. It is then contended that by dumping the sawdust waste from the mill in the area in which Plaintiff did it increased the combustible load in the vicinity of the plantations and increased the fire risk in the plantations.

[122] The question that therefore arises is whether there was a duty to make a disclosure thereof to Defendant. There is no specific mention in the certificate or in any of the documentation that was referred to that the dumping of the sawdust waste is not allowed. Houtson and Pretorius were of the view that it is not a fire hazard. The tests done by Strydom did not find that the saw dust waste from the dump was highly flammable. Bezuidenhout, Du Preez and Bekker were of the view that it was indeed a fire risk and a factor which had to be disclosed.

[123] What is concerning is that if Defendant was convinced on 9 November 2015 at the latest by 15 December 2015 that the fire originated from the sawdust pit this was not mentioned to Plaintiff until 16 March 2016. There was only an enquiry in this regard on 16 February 2016 but still no indication that Defendant was of the view that there was a possible breach of the conditions of the policy which would have entitled Defendant to cancel the agreement. To the contrary Defendant enquired from Plaintiff what the salvage value would be of the timber that remained. As the claim was not paid out by the end of April 2016 Plaintiff did not renew its policy with Defendant but did so through another insurer. It is only thereafter on 22 June 2016 that Defendant repudiated the claim. The question arises why, if during November 2015 it was known or Defendant was of the view that a breach had occurred which allowed for termination of the policy and repudiation of the claim, that it did not do so until 22 June 2016. As already stated there could not have been a necessity for such a lengthy investigation to come to that decision. It would appear that Defendant was itself not convinced about the origin of the fire and/or to repudiate.

[124] What is set out in clause 12 is very similar to what the common law is and as set out in section 53 of the Insurance Act that a full disclosure must be made. The onus of proving the materiality is on Defendant and it is an objective test viewed through the lens of the reasonable person.

[125] The question therefore is whether a reasonable person in the position of Plaintiff would have considered it necessary to inform Defendant of the waste site. At that stage the dumping had been taking place for a period of approximately 12 years. It would therefore appear that a reasonable person in that position when such dumping had been taking place for such a time period and had never caused any fire risk would regard it as necessary to specifically inform the insurer thereof. Even if it is accepted that it did increase the fire risk it was also accepted by Defendant's witnesses that the pruning and trimming of the trees which was done and waste left on the ground increased the fire risk but it was not considered necessary that it be reported.

[126] Defendant did not from November 2015 to 16 March 2016 specifically mention the dumping site as being irregular and causing an increased fire risk. If it was such a serious concern which needed to be reported by the reasonable person in the position of Plaintiff as alleged by Defendant, one would have expected that Defendant would immediately have raised this with Plaintiff. The time lapse to which I have referred in my view is indicative that Defendant itself was not at that stage convinced that it was such a serious breach to take it up with Plaintiff immediately. Further if it is considered to be such a serious fire risk one would expect it to be specifically contained in the policy document.

[127] In the circumstances due to the factors mentioned it does not appear that there was a misrepresentation by Plaintiff nor that there was a duty to disclose the waste dump site to Defendant as an issue which would affect the insurance policy or Defendants decision to insure the said property. Defendant has failed to prove that the

non-disclosure or representation induced it to conclude the contract. The evidence of its witnesses that it increased the fire risk in itself is not sufficient to prove such materiality.

Waiver and estoppel

[128] Plaintiff contends that Bezuidenhout, on her version, knew on 9 November 2015 that the sawdust heap existed but did not repudiate the claim but stated that they were still considering whether to repudiate it or not. The decision to waive may be express or implied. Implied waiver is proved by the conduct which is inconsistent with an intention to repudiate the insurance claim. It took from November 2015 until June 2016 before the claim was repudiated. It was submitted on behalf of Defendant that the investigation was still taking place and that there were certain concerns and that Plaintiff was well aware thereof. It was further submitted that clause 18 of the certificate states that no indulgence by the cooperative to the member or failure strictly to enforce the terms of shall be construed as a waiver or be capable of founding an estoppel.

[129] A failure to strictly enforce the terms thereof shall, according to clause 18, therefore not be construed as a waiver. It is indeed so that the right to repudiate according to Defendant was already known during November 2015 but only communicated to Plaintiff during June 2016. There is however no specific time period within which the repudiation had to take place except that after a period of 24 months no claim shall be payable. It would accordingly appear that in terms of clause 18 the length of time which Defendant took to repudiate the claim can be frowned upon but it does not constitute a waiver of its rights.

Accordingly the following order is made.

1. Defendant is ordered to pay to Plaintiff
 - (i) The sum of R 14 385 720.84 (14 million, three hundred and eighty-five thousand, seven hundred and twenty rand and eighty-four cents)
 - (ii) Interest on the said sum at the rate of 9 per cent per annum from date of service of summons to date of payment.

(iii) Costs of suit such costs to include the costs of senior counsel where appropriate.

BEZUIDENHOUT J.

Date reserved: 28 July 2022

Date delivered: 26 January 2023

For Plaintiff: Adv Roberts SC

Instructed by: VINNICOMBE & ASSOCIATES
C/O STOWELL & CO
REF: ANTHONY IRONS/VIN180011/JB
Tel: 033 845 0500
Email: laraw@stowell.co.za

For Defendant: Adv Troskie SC

Instructed by: HAY AND SCOTT ATTORNEYS
REF: PS HAY/tc/08S223020
Tel: 033 342 4800
Email: paul@hayandscott.co.za