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

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

Case No.: 2347/2016

In the matter between

DIRK SAMUEL BOTHA First Plaintiff

HENDRIK PIETER VAN DER POST Second Plaintiff

and

RHYNO DU TOIT First Defendant

JACO FOURIE Second Defendant

HEARD ON: 27, 28 FEBRUARY and 2 MARCH 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 8 MARCH 2018

I INTRODUCTION

[1] A South African landowner, resident and employed in the United Kingdom, is confronted with the Afrikaans proverb "ver van jou goed, naby aan jou skade." In English: a man far from his good is near his harm, or put otherwise, the master's eye makes the cattle thrive. A veld fire was ignited on his farm, situated in the Brandfort district, close to Bloemfontein, which fire spread to some of his neighbours.

II THE PARTIES

[2] First plaintiff is Mr Dirk Samuel Botha N.O, a major businessman in his capacity as a duly authorised trustee of the Prof Trust (IT 2055/01) (hereinafter referred to as "the Trust"). Second plaintiff is Mr Hendrik Pieter van der Post N.O, a major businessman in his capacity as a duly authorised trustee of the Trust.

[3] The *locus standi* of the trustees was in dispute, but eventually admitted at the hearing. I shall herein after refer to the trustees as the plaintiff in the singular.

[4] Adv SJ Reinders appeared for the plaintiff, duly instructed by Phatshoane Henney Attorneys.

[5] Two defendants were cited in the action, to wit Mr Rhyno du Toit, a major male person as first defendant and Mr Jaco Fourie, ("Fourie") a major male person as second defendant.

[6] Second defendant did not defend the action, but judgment has not been granted against him yet. The action is only defended by first defendant, and therefor, I shall later interchangeably refer to Mr Du Toit as the defendant or Du Toit.

III THE PLEADINGS

[7] The plaintiff alleged that:

7.1 on 3 October 2015 and at 9h45 a fire orignated on the farm Weltevreden 243, Brandfort district, which spread to the farm Glen Doring and other neighbouring farms;

7.2 plaintiff is the owner of the farm Glen Doring and defendant is the owner of the farm, Weltevreden 243;

7.3 at the time of the fire the defendant was leasing the farm Weltevreden 243 to his lessee, Mr Jaco Fourie, cited as second defendant;

7.4 both defendants, including their employees owed a duty of care to the plaintiff for which allegation plaintiff relied on nine reasons which I do not intend to repeat;

7.5 the fire on Weltevreden 243 ignited by the first and/or second defendant and/or their employees and/or persons acting under the control of first and/or second defendant, spread to neighbouring farms and especially the farm Glen Doring of the plaintiff. The spreading of the fire was the result of the negligence by any of the persons mentioned, they having been negligent in all or a number of or one of nine respects listed in paragraph 8 of the particulars of claim. I shall deal with some of the grounds of negligence raised on behalf of the plaintiff *infra* insofar as I was addressed by counsel.

7.6 The fire caused extensive damages to animals, implements, natural veld, fences and electrical cables on the plaintiff's farm. The *quantum* of the damages is alleged to be R797 013.02 for which plaintiff holds defendant liable.

IV SEPARATION OF MERITS AND *QUANTUM*

[8] I separated merits and *quantum* by agreement and made an appropriate order in terms of rule 33(4). In terms thereof I ordered that the disputes relating to paragraphs 9 and 10 of the Particulars of Claim, read with paragraphs 11 and 12 of the plea, shall stand over for later adjudication, if required, and all other disputes to be adjudicated at the hearing.

V COMMON CAUSE FACTS

[9] The following facts turned out to be common course, either from the pleadings, or as agreed prior to the leading of evidence, or during the hearing of the matter:

9.1 the *locus standi* of the trustees of the Trust;

9.2 plaintiff and defendant are the registered owners of the farms Cyferbank, district Brandfort, commonly known as Glen Doring, and Weltevreden 243, district Brandfort respectively;

9.3 on 3 October 2015 a veld fire originated on Weltevreden 243 which fire spread to plaintiff's farm Glen Doring;

9.4 Fourie, the second defendant and lessee of Weltevreden 243 at the time, started a fire on Weltevreden 243 in order to kill lechwe cacti on a portion of 14 ha of the said farm;

9.4 at 08h18 on 3 October 2015 and prior to the fire, Fourie established a so-called WhatsApp group on his cellphone. The members of the group included neighbours, *inter alia* Mr Freek Strauss, ("Strauss") the farm manager of plaintiff, as well as the defendant;

9.5 there was some communication by group members via WhatsApp messages *ex facie* Exhibit "B", an extract of Fourie's WhatsApp records which was handed in by agreement; it may be accepted, as Strauss confirmed in his evidence that group members were informed at 08h20 that Fourie intended to ignite a fire in order to burn the 14 ha on "his farm" to the right of the gravel road as his message indicated;

9.6 not long after the fire was started, it went out of control, prompting Fourie to call Strauss who was at that stage in Bloemfontein. Strauss rushed to the scene, but to no avail: the fire could not be extinguished and it spread to neighbouring farms, including plaintiff's farm;

9.7 Fourie had fire fighting equipment in the form of a bakkie (LDV) with a 1000 liter water tank and a tractor with wagon carrying a 2500 liter water tank and pump. He was assisted by 4 employees. When he needed to utilise his fire fighting equipment, he experienced technical difficilties, leaving the bakkie and tractor useless, due *inter alia* to a beakdown caused by the uneven terrain. Although it was calm the morning, the wind started to pick up after he had ignited the fire and this together with the defective vehicles caused the fire to become out of control;

9.8 other farmers came to assist later, but to no avail;

9.9 *ex facie* Exhibit "B" defendant left the WhatsApp group at 16h10 on 3 October 2015;

9.10 plaintiff's trial bundle, containing a Google map of the relevant farms, a history of Fourie's WhatsApp communication sent by him to defendant at defendant's request, as well as a letter of demand from defendant to Fourie sent by e-mail on 11 October 2015 was accepted by agreement as Exhibit "A";

9.11 defendant's rule 35(3) affidavit containing Vodafone statements of his cellphone account, including an itemisation of all calls sent and received, was handed in by agreement as Exhibit "C";

9.12 the written lease agreement between Fourie and defendant placed strict obligations on the lessee and one of those is found in clause 7.7. The lessee was expressly forbidden to intentionally start veld fires on the farm.

VI <u>LEGISLATION AND AUTHORITIES</u>

[10] The National Veld and Forest Fire Act, 101 of 1998 is applicable. The purpose thereof is described as follows in s 1:

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

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

[11] "Owner" is defined in s 2. In terms thereof "owner has its common law meaning and includes – (a) a lessee or other person who controls the land in question in terms of a contract, testamentary disposition, law or order of a High Court; ...." The further sub-paragraphs of the definition are not relevant *in casu*.

[12] Section 17 stipulates as follows:

> "Readiness for fire fighting.—(1) Every owner on whose land a veldfire may start or burn or from whose land it may spread must—
> (a) have such equipment, protective clothing and trained personnel for extinguishing fires as are—
> (i) prescribed; or
> (ii) in the absence of prescribed requirements, reasonably required in the circumstances;
> (b) ensure that in his or her absence responsible persons are present on or near his or her land who, in the event of fire, will—
> (i) extinguish the fire or assist in doing so; and
> (ii) take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any.
> (2) An owner may appoint an agent to do all that he or she is required to do in terms of this section."

[13] A plaintiff may rely on the presumption of negligence created in s 34 as an evidential tool to prove his case. The section reads as follows:

> "34. Presumption of negligence.—(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which—
> (a) the defendant caused; or
> (b) started on or spread from land owned by the defendant,

the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.

(2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful."

[14] The five requisites for delictual liability are well-known. These are (a) conduct of the defendant which can be in the form of a *commissio, e.g.* the start of a fire, or an *omissio*, *e.g.* the failure to exercise proper control over a fire of which the defendant was in charge; (b) wrongfulness of that conduct; (c) fault in the form of negligence (or intent); (d) harm suffered by the plaintiff and (e) a causal connection between the harm and the defendant's conduct.

[15] A negligent failure to exercise proper control over a fire or to take preventive steps to prevent a fire from spreading to neighbouring property may cause the owner or person in control of the property to be held liable. See: *H L & H Timber Products v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) at para [14].

[16] Much time was spent on the concept of ownership or "owner" in argument during an application for absolution from the instance which I refused, as well as during the parties' closing arguments. Therefor it is apposite to quote extensively from the judgment of Swain, J (as he then was) in *Mondi South Africa Ltd v Martens and another* 2012 (2) SA 469 (KZP). I refer to the following passages:

[16]From the aforegoing, it is evident that central to the common law meaning of ownership, is that of unrestricted and exclusive control and possession of the res, together with the power of alienation.

[18]In my view, regard being had to the incidents of ownership which the first defendant disposed of, namely the exclusive control of the properties, together with the right to possession and alienation of the properties, as well as the nature of the arrangements under which they were disposed of, the interest retained by the first defendant was solely that of the properties being registered in his name in the deeds registry.

[20] In my view, registration of ownership in the deeds registry is not an incident of ownership within the common-law meaning of that term, flowing as it does from statute, in the form of the Deeds Registries Act 47 of 1937. For the reasons that follow I regard the common-law right of control over the property, as the decisive incident of ownership to determine whether the first defendant falls within the 'common-law meaning' of 'owner' in terms of the Act.

[21] What the legislature intended by referring to the 'common-law meaning' of 'owner', must be determined not only in the context of the language of the rest of the Act, but also its apparent purpose and scope, as well as the historical background to the Act. (Jaga v Dönges NO and another; Bhana v Dönges NO and another 1950 (4) SA 653 (A) at 662G–664H.

[22] As regards the language of the rest of the Act, the other meanings accorded to the definition of 'owner', in s 2 of the Act, are instructive. Paragraph (a) refers to a lessee 'or other person who controls the land in question' in terms of a contract, testamentary document, law or order of a High Court. The issue of control of the land is repeated as the criterion in respect of a community, as well as State land, respectively,

in paragraphs (b) and (c). However, with regard to a local authority, no reference is made to the criterion of control, in paragraph (d).

[23] When the emphasis placed upon control of the land in question is considered with regard to the other entities which fall within the definition of 'owner' in the Act, the significance of the attribute of control, in the common-law meaning of 'owner', becomes apparent. If control is the determining criterion in the other categories of 'owner', for the purposes of the Act, why should it not be the determining criterion in the 'common-law meaning' of 'owner'? It would be anomalous to require control over the land in question to qualify the other named entities as an 'owner', but not in the case of the 'common-law meaning' of 'owner'.

[33] It is therefore clear that control of the landowner, over the property in question, as one of the incidents of ownership, is a decisive factor in the determination of liability.

[34] Regard being had to the provisions of the predecessors of s 34 of the Act, and the historical judicial requirement of control over the property as a determinant of liability, 'the common-law meaning' of 'owner' in terms of the Act must include the element of the right of control over the property in question. If this were not so, the presumption of negligence contained in s 34 of the Act would operate against an 'owner' who had no right of control over the land in question.

[35] I am accordingly satisfied, as a consequence of the divesting by first defendant of the right of control over the properties in question, in favour of the second defendant, that the first defendant ceased to be an 'owner' of the properties in question within the 'common-law meaning' of the definition of 'owner' contained in the Act.

[17] In *Lubbe v Louw* [2006] 4 All SA 341 (SCA) at para [16] the court, dealing with wrongfulness, referred to the "wide recognition of a duty to take care in relation to veld fires approved in cases such as *Quathlamba and H L & H Timber Products*" and stated that the judgment in *Administrateur, Transvaal v Van der Merwe* should not be regarded as authority for the proposition that such wide recognition should be qualified "where the control of the landowner in question is one of the incidents of ownership of the property concerned." In *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (AD) at 359 H – 360 H the Appeal Court, as it was known, found that the fact that the Administrator had control and supervision over a road was a necessary factor to find liability on his part, but this was in itself not sufficient.

[18] In *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at paragraph [53] the Constitutional Court also warned that the concepts of wrongfulness and negligence should not be conflated. The court continued as follows: "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability." The defendant's "subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault."

[19] In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) the wrongfulness enquiry was dealt with as follows:

> "[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue.' Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.
>
> [21] .....The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault."

[20] *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) is the latest reported judgment on the delictual requirements of wrongfulness and negligence. In paragraphs [16] to [18] the SCA referred to the *dicta* of the Constitutional Court in *Loureiro* and *Country Cloud supra* pertaining to the wrongfulness enquiry, but warned that "(I)t is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence." It concluded in paragraph [18], after criticising some academics, that it should now be recognised "that foreseeability of harm should not be taken into account in respect of the

determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation." Leach JA, the scribe of the judgment, drove the point home in *Pauw v Du Preez* [2015] ZASCA 80 that "wrongfulness and negligence are two separate and discrete elements of delictual liability which .. should not be confused."

[21] In *MTO Forestry* the SCA criticised the *Mondi* judgment *supra* by stating in paragraph [25] ".... it may well be that the judgment in Mondi v Martens was founded on an incorrect premise and approach." However, it found that insofar as the proven facts rebutted any presumption of negligence, it was not necessary to decide whether the reasoning in *Mondi* was correct. The SCA approached the arguments pertaining to the effect of the *Mondi* judgment as follows:

> "[22] The respondent's argument on this issue was based on an 'owner' being defined in s 1 of the Act as having both 'its common law meaning' and as including, inter alia, 'a lessee or other person who controls the land in question in terms of a contract, testamentary document, law or order of the High Court'. This somewhat awkward definition was the subject of the judgment in Mondi v Martens28 in which the court concluded that unrestricted and exclusive control of possession of an article was central to the common law meaning of ownership and that an owner as envisaged by the section had to have the right of control over a property. Were this is not so, so it was reasoned, the presumption of negligence in s 34(1) would operate unjustly against an owner who had no right of control over the land. In the light of the contractual relationship that existed in that case between the first defendant and another party, in terms of which the first defendant had divested himself of right of control over the property and had retained no more than the registration of ownership in his

name, the court concluded that the first defendant had ceased to be an 'owner' within the common law meaning as defined in the Act.

[23] In the present case the respondent alleged it had leased Portion C to the trust used by Mr M Meyer as a vehicle for his farming operations, and that it was consequently not in control of the property at the time the fire broke out. Relying on the judgment in Mondi v Martens, the respondent argued that in the circumstances the presumption in s 34(1) was of no application. The appellant's answer to this was two-fold. First, it argued that Mondi v Martens had been wrongly decided. Secondly, relying upon the evidence of Mr Meyer himself, whilst admitting the existence of the lease, the appellant argued that it had not related to the whole of Portion C but had been restricted to some 64 ha of arable lands which Mr Meyer had used to graze his cattle, and that the area where the fire had started and spread to Witelsbos had never been let.

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

[25] This criticism I find to be compelling, and it may well be that the judgment in Mondi v Martens was founded on an incorrect premise and approach. But the presumption is really an evidential aid and where, as here, the essential facts are known its role is to a large extent

truncated. As appears from what follows, however, the proven facts in the present matter rebut any presumption of negligence, making it unnecessary to reach a decision on whether the reasoning in that case was correct. For present purposes I therefore intend to proceed on the assumption, but without deciding, that the section16 placed an onus on the respondents to show that the fire spread to Witelsbos without negligence on its part."

[22] The SCA considered the issue of negligence as follows in *MTO Forestry*:

"[45] As was mentioned by this court in Durr a landowner is under a 'duty' to control or extinguish a fire burning on its land. But as Nienaber JA stressed in H L & H Timber, whilst landowners may be settled with the primary responsibility of ensuring that fires on their land do not escape the boundaries, this falls short of being an absolute duty. And in considering what steps were reasonable, it must be remembered that a reasonable person is not a timorous faint-heart always in trepidation of harm occurring but 'ventures out into the world, engages in affairs and takes reasonable chances'. Thus in considering what steps a reasonable person would have taken and the standard of care expected, the bar, whilst high, must not be set so high as to be out of reasonable reach.

[46] ....

[47] A reasonable landowner in the respondent's position was therefore not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it cannot be held liable for negligence just because further steps could have been taken."

VII EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW TO THE FACTS

[23] I have mentioned the facts which are common cause between the parties. I did not summarise the evidence earlier as I am of the view that it is not required as a result of the minor factual disputes. In my evaluation I shall address the factual disputes and make findings in that regard.

[24] Three matters need to be considered. Mr Zietsman indicated from the onset that wrongfulness and negligence remained in dispute as is the issue of whether defendant falls within the definition of "owner" as defined in s 2 of the Act.

[25] Two witnesses testified for the plaintiff and defendant testified in his defence. Strauss, the farm manager of plaintiff, was the first witness. According to him, Fourie never before 3 October 2015 indicated that he wanted to burn the veld on defendant's farm. He obtained knowledge of Fourie's intention to start a veld fire after he was added to Fourie's WhatsApp group referred to *supra.* At that stage he was in Bloemfontein. Fourie's version is that he not only informed defendant some time before 3 October 2015 of his intention to burn the cacti on the 14 ha, but also all his neighbours. This is in direct contradiction of Strauss' version. In fact he went further towards the end of his evidence in stating the following: "Ek het lank voor dit (die brand) sy (verweerder) en ander bure se toestemming verkry." When he was asked immediately after this

response about consent, he said: "Enigeen op die groep (the WhatsApp group) kon sê nie vandag of ander voorwaardes stipuleer." This is a ludicrous response from somebody that was already on the verge of setting the veld alight.

[26] Fourie went further and mentioned that he discussed the issue again with defendant during their telephonic conversation of Friday, 2 October 2015. According to him, defendant consented to igniting a fire on condition that all neighbours were informed and it was safe to do so. The telephone records of defendant show that there was indeed telephonic contact on the particular Friday afternoon. Defendant's version of the conversation is as follows. His debit orders went through his bank account on the first of every month and therefore it was crucial that he received the rental in order to provide sufficient money to meet his obligations. When he was made aware of Fourie's failure to pay the rental, he phoned him to demand payment. There was no discussion of Fourie's intention to burn cacti on his farm. The WhatsApp message of 3 October 2015 at 18h50:57 *ex facie* Exhibit "A" by defendant to Fourie corroborates defendant's version. Refer also to Fourie's immediate explanation why he did not deposit the money that day.

[27] In light of Strauss' uncontested evidence – he was called by plaintiff and could not be cross-examined by plaintiff's counsel – defendant's version of the conversation with Fourie is far more probable than Fourie's version. In this regard Fourie conceded in cross-examination that his affidavit filed in previous proceedings between the parties was incorrect in several aspects. One important incorrect allegation contained in that affidavit is that

defendant and all the neighbours had agreed that he may burn the veld and that the neighbours were present when the fire was started and helped to extinguish it. He blamed his attorney for advising him that it was not necessary to amend the statement prepared on his behalf before he signed and verified the contents thereof under oath.

[28] Although I am prepared to accept defendant's version in respect of his lack of prior knowledge of the fire, *i.e.* prior to Saturday, 3 October 2015, his version in respect of his knowledge of the existence of the WhatsApp group is contradictory and doubtful. It should be regarded as improbable and/or mistaken, if not false. Initially his counsel put it in no uncertain terms to Strauss that defendant knew nothing of this WhatsApp group and consequently he required Fourie, once he had received information of the existence of the group after the fire, to provide him with a history of the conversations, which Fourie did. It is apparent from Exhibit "B" that defendant left the group at 16h10 on Saturday afternoon, 3 October 2015. This confirms Strauss' version as well as Fourie's version that he (Fourie) earlier that morning added defendant as a member of the group. Eventually defendant had to concede that he was a member and that he had left the group as reflected in Exhibit "B".

[29] I have to accept defendant's uncontested evidence that he visited a nature reserve in Wales that particular weekend and that cellphone signals were limited to certain areas only. This is corroborated by the WhatsApp messages on Exhibit "A". At 19h18 on Friday evening defendant sent a message to Fourie, mentioning

that he did not have any cellphone signal and that he had to get onto a bakkie (LDV) for signal. Furthermore, Exhibit "A" reflects defendant's query about payment of the money due to him. His message at 18h50 on Saturday night confirms this. At 18h54, in response to defendant's query, Fourie promised to deposit money the next day, mentioning that he could not pay that day as he was busy extinguishing a fire. No details of the fire were reported then.

[30] I have reason to believe that defendant received the group's WhatsApp communication which was limited in nature. There is no indication as to when the fire would be started and when it became out of control. In my view, defendant, finding himself in Wales at the time, or even if he was close-by in Bloemfontein, could not have done anything to prevent Fourie from starting the fire and/or to take any steps to prevent the fire from getting out of control and spreading to neighbours. According to the common cause facts this occurred at approximately 09h45 and thus very soon after the WhatsApp group had been established and the fire started. Defendant, who initially denied that he was aware of the existence of the WhatsApp group, eventually conceded that he was added as a member, but left the group later. It must be mentioned that nothing was mentioned on this message system by anyone that day that a fire had gone out of control. Fourie's message of that Saturday night to defendant merely stated that he could not make payment as he was busy extinguishing a fire without providing any detail. Although defendant had his dates wrong in his evidence initially, he rectified that later, probably after refreshing his memory by consulting Exhibits "A" and "C". No doubt, there was no telephonic conversation between him and Fourie on 3 October

2015. He only learnt about the fire and extent thereof on 4 October 2015. Although defendant may be blamed for the manner in which he responded to various questions and the fact that he tried to distance himself from the WhatsApp group and knowledge of the intention to start a fire, his version is more probable than that of Fourie. I am also satisfied of the inherent truth of his version insofar as it is corroborated by Strauss and the communication set out in the Exhibits referred to. Fourie, in my view, subtly evaded questions by providing answers on several occasions in order to support his contention that Strauss, defendant and all neighbours knew about his intentions and consented to the fire before 3 October 2105. When it was put to him that he only informed defendant of the fire on 4 October 2015, he responded that defendant was on the WhatsApp group. Fact of the matter is that it was never mentioned on this group's message system that a fire had spread to several neighbouring farms, causing extensive damage. I have no reason to doubt Strauss' evidence that he did not know prior to 3 October 2015 that Fourie intended to burn veld.

[31] I find that Mr George Myers, a neighbour, informed defendant of the fire on 4 October and this led to the two long telephone conversations between defendant and Fourie on that day. Therefore, Fourie kept his lessor in the dark and he had to be informed by a neighbour. The mere fact that Myers at that stage mentioned that defendant should keep his lessee under control is no proof that defendant knew or ought to have known that his lessee was a troublemaker. The contrary is rather true, bearing in mind the relationship between defendant and Fourie and the fact that Fourie was regarded as an experienced farmer.

[32] I respectfully agree with the SCA's criticism of the *Mondi* judgment. However, the SCA did not decide the issue and the criticism does not form part of the court's *ratio decidendi*. Mr Zietsman tried to convince me that defendant could not be regarded as "owner" for purposes of the Act insofar as he had parted with his control over his farm. Obviously, the relinquishing of control was not as complete as in *Mondi,* but defendant did not have the right to peep over the lessee's shoulder daily and regularly to ensure that he does not breach any of the terms of the contract. He merely had the right to do inspections from time to time. Mr Zietsman used the analogy of an old widow who had inherited her husband's farm, but being too old and ill to farm – staying in an old-age home – decided to rent out the farm. She, not being in control of farming activities, should not be regarded as owner, although she is still the registered and common-law owner. One should be careful to make use of extreme examples. It may well be that the same old widow decided to rent out her farm to a known unsavoury character and also that she had been warned in the past by neighbours of the lessee's illegal operations, including ignition of veld fires in unsafe circumstances, but refrained from acting in terms of the contract and cancelling same. Could it then still be said that she as the absent owner is not hit by the presumption in s 34? In my view it is unnecessary to decide the issue. The presumption, an evidentiary aid, does not come into play *in casu.* The evidence is clear. It is apposite and more appropriate to deal with the matter by asking the question whether any proven *commissio* or *omissio* of defendant should be found to be wrongful

and negligent, bearing in mind the separate enquiries needed to come to a final conclusion.

Wrongfulness

[33] Could it be found that an owner of immovable property such as defendant *in casu,* considering all relevant circumstances, acted wrongfully by either committing a certain conduct or refraining from doing something where he was expected to act? Mr Zietsman submitted that control of the landowner is a decisive factor in the determination of liability. This cannot be accepted as a general proposition. As mentioned in *Loureiro supra* the test is whether the policy and legal convictions of the community, constitutionally understood, regard the conduct as acceptable. There is a duty not to cause harm to others and to respect their constitutional rights. It is common cause that allowing the ignition of a fire on one's property is inherently dangerous and the Act was promulgated with the purpose to prevent and combat *inter alia* veld fires. But, the concept of wrongfulness acts as a brake in the words of Khampepe J in *Country Bird supra* where it is undesirable or overly burdensome to impose liability. In my view public and legal policy considerations do not determine that a lessor that leases his farm to an experienced farmer as *in casu,* and without being presented by any warning signs of unsavoury conduct by that person, shall be held to have acted wrongful in allowing the lessee to conduct farming activities on the farm. That being my conclusion on the requisite of wrongfulness, it is unnecessary to consider possible negligence, but I shall make some remarks in that regard.

Negligence

[34] The test for negligence is an objective test, *i.e.* what would the reasonable person have done if put in the defendant's shoes. The test pronounced in *Kruger v Coetzee* 1966 (2) SA 428 (AD) at 430 E – F is still authoritative. The questions to be posed are whether the reasonable person would have foreseen the reasonable possibility that his conduct may cause harm and if so, would he be taking reasonable steps to guard against such harm; finally, whether the defendant failed to take such steps.

[35] Mr Reinders referred me in argument to s 17 of the Act which I quoted *supra*. In my view there was nothing which the reasonable man would and could have done, based on the version that defendant received notice of the intended fire on Saturday morning only. There were just no steps, never mind reasonable steps, that the reasonable man would or could have taken to guard against harm. Defendant's inaction by not responding to the WhatsApp message cannot be described as unreasonable in the circumstances. Even if I was prepared to accept Fourie's version that defendant was informed of his intention the previous day, (which I am not prepared to do) I am satisfied that the reasonable person in defendant's shoes would not have acted differently. According to Fourie, consent was given on condition that all the neighbours consent to the ignition of a fire on the farm and that it was safe to do so. Fourie was well-known to defendant and it is common cause that he is an experienced farmer. Clearly, he had an interest to ensure that at least the farm that he was renting, be

safe-guarded as he was dependant on the farm to produce income. The reasonable person is not "*'a timorous faint heart always in trepidation' of harm occurring.*" I refer to the *dicta* in paragraphs 45 and 47 of *MTO Forestry supra*. Therefore, on both scenarios, no negligence was proven.

VIII **COSTS**

[36] There is no reason why defendant as the successful party shall not be entitled to his party and party costs in defending the action. The purpose of an award of costs is to indemnify the successful party for the expense he had been put through, having been unjustly compelled to initiate or defend litigation as the case may be. The only contentious issue is the request by defendant that his travelling costs between the United Kingdom and South Africa should form part of his costs. I am satisfied that plaintiff knew at all time that defendant was employed and resident in the United Kingdom. This appeared particularly from the facts deposed to by plaintiff in the application for an order that defendant's assets in South Africa be frozen pending finalisation of the action. Defendant was accused of acting unlawfully and negligently and notwithstanding his plea, relying on the lease and the fact that Fourie was in complete control of the farm, plaintiff insisted with the action against defendant. Instead of taking judgment against Fourie who did not even defend the action, Fourie was called as a surprise witness by the plaintiff. Mr Zietsman did not refer me to any authority for his submission. The fundamental rule relating to

awards of costs is that it is wholly in the discretion of the court, although such discretion must be exercised judicially. Based on what I have mentioned *supra*, I am satisfied that the travelling costs should be allowed.

IX ORDER

[37] Consequently the plaintiffs' claim is dismissed with costs, such costs to include the travelling costs of the first defendant based on the costs of return air tickets on economic class between the United Kingdom and Bloemfontein, South Africa.

J.P. DAFFUE, J

On behalf of the plaintiff:	Adv S J Reinders
Instructed by:	Phatshoane Henney Attorneys Bloemfontein

On behalf of the respondent:	Adv P J J Zietsman
Instructed by:	Honey Attorneys Bloemfontein