



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

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

Case number: 962/2014

In the matter between:

W G P WESSELS N.O 1st Plaintiff

JUDITH ADRIANA WESSELS N.O 2nd Plaintiff

A H RAUBENHEIMER N.O 3rd Plaintiff

PETRONELL SMIT 4th Plaintiff

and

PHUMELELA MUNICIPALITY Defendant

CORAM: **MHLAMBI J,**

HEARD ON: 15-18 August 2017; 30-31 Jan 2018; 02 February
2018 19 April 2018; 07 June 2018

DELIVERED ON: 16 August 2018

MHLAMBI, J

INTRODUCTION

[1] The plaintiff issued summons against the defendant for the recovery of losses they suffered as a result of the fire which allegedly broke out on the defendant's garbage dumping site on 20 September 2013 and spread onto the plaintiffs' neighbouring farms, causing extensive damage to property and livestock.

[2] At the commencement of the trial, a draft order was granted in terms of which the issues were narrowed down and it reads as follows:

- "1. The issue in respect of merits and quantum are separated in terms of Rule 33(4)*
- 2.*
- 3. The merits-trial entails the adjudication of paragraphs 4, 5.2, 5.3, 6 and 7 of the Particulars of Claim read with the corresponding paragraph of the Defendant's plea and also read with the Plaintiff's Request for Further Particulars, the Defendant's further particulars, the Plaintiff's Rule 37(4) Questionnaire and the Defendant's answer in terms of Rule 37(4)."*

[3] It was agreed between the parties that the only issue for determination in respect of paragraph 4 of the particulars of claim was whether the fire that arose on the defendants' properties, more especially the dumping site or "asgate", spread to the plaintiffs' farming properties. The plaintiffs' case was pleaded in

paragraph 4. The issues of the date of the fire, whether it was a veld fire and the damage to the various properties were not in dispute. The issue of negligence and the non-compliance with a legal duty were contained in paragraphs 5 and 6.

- [4] The evidence of Mr Steenkamp, the fire association officer, would indicate that the defendant was not a member of the Phumemela Fire Association in 2013; the plaintiffs therefore relied on the presumption of negligence as contained in Section 34 of the National Veld and Forest Fire Act 101 of 1998 which provides as follows:

“(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.”

- [5] In support of their cases, the plaintiffs called seven witnesses, including two experts: Mr Vorster, a satellite image processing specialist and Mr de Beer, a forensic fire investigator. The defendant called two witnesses instead of the four it had indicated earlier in the trial. By agreement the evidence of Mr Smit, on behalf of the fourth plaintiff, was not led as the parties accepted that it would be a repetition of what was contained in paragraphs 5 and 6 of the particulars of claim in regard to the allegations of a breach of duty of care and negligence and would have been in accordance with the evidence of the other plaintiffs. The witness

was at the time unavailable and it would have taken great difficulty for him to attend the court.

Summary of the evidence

- [6] Mr W.G.P Wessels testified that he was the trustee of the Koefontein Trust which consisted of three properties: Koefontein, Glen Harry and Vaalpunt farm. He was a member of the Phumelela Fire Protection Association which was active at Vrede. He was a farmer in the district for the past 28 years. On 20 September 2013 there were no “*fire breaks*” at the dump. There were no gates and access thereto was gained unhindered. The period August- September was a dangerous period as it was a windy season due to the strong Westerly winds. The Fire Protection Association issued warnings by “*smes*” and 20 September 2013 was a so-called code red day. The fire index had moved to red, indicative of the dangerous conditions which were conducive to the outbreak of fire.
- [7] Having received a telephone call at around 13h15, he walked to a point where he could see the dump from Koefontein. The wind was blowing very strongly and he detected smoke and realised that it was veld burning. He summoned his workers, drove towards the fire which had already moved over the Volkstrust road. He then drove to Glen Harry which was approximately 5 km away where he met the fourth plaintiff’s husband. He started extinguishing the fire. The fire spread in the direction of Memel away from Vrede. It spread past Koefontein. The farm was burnt but the livestock was saved.

- [8] He denied that neither he nor his employees were negligent or contributorily negligent as he had complied with the fire association prescriptions before the incident. Neither did he see any Municipal employee assist in extinguishing the fire nor phone from the Municipal Office. Frequent fires broke out at the dump.
- [9] In cross-examination, he said that a fire could cross over a tarred road that was plus-minus 20 m wide if there was tamboekie grass on the road edges, but not short grass. A strong wind was blowing and it was impossible to stop the fire. The fire moved towards and passed Glen Harry and Koefontein. It then moved and passed the side of Vaalpunt towards Memel. At 16h00 they waited for the smoke to subside while the fire was smouldering at the dump. He never made fire breaks between his farm and the dump which was plus-minus 5 km away because it was not expected of him to do so by the Fire protection Association.
- [10] Mr Raubenheimer testified that he drove along the Memel Road when he saw smoke emanating from the dumping site on 20 September 2013. He was about three hundred metres from the dumping site when he noticed the smouldering thereon. As he left Gibson Street and the town, he saw the flames leave the dumping site and move in a southerly direction towards the Volksrust Road. Tall grass grew on its sides. The fire proceeded up to the farm, Brakfontein. According to him the defendant failed to have proper equipment to control the fire and lacked manpower to look after and manage the dump. As fires frequently started on the dumping site, the defendant failed to make fire breaks before the

time or to scrape and keep the place surrounding the dump clean as to prevent fires from starting or spreading. On being confronted with the defendant's defence that the fire that started around the dump was fully extinguished, his response was that, had the fire been properly extinguished, managed and there were fire breaks, it would not have started at the same place as the grass there was short.

- [11] Mr Andries Greyling testified that on 20 September 2013 he was on his farm, which was eight kilometres (8 Km) from the dumps, when he saw smoke between 13h00 and 14h00. He moved in its direction. He drove on the Memel Road and noticed that the smoke came from the dumping site. It was a sunny day and the wind blew in a north-westerly direction. He was about five hundred metres from the dumping site when saw the fire and the flames move in the direction of the Volksrust Road. No persons extinguished the fire as it moved towards the tarred road. Grass or vegetation around the dumping site was short but grew taller as it reached the service area next to the road which belonged to the municipality. This is the area where tall tamboekie grass grew and the moment the fire reached it on the road edges, it became uncontrollable, larger and eventually jumped the road. The wind was strong and stoked the fire and eighty percent of the wind blew in a westerly direction. They fought the fire until dusk. He was a Fire Protection Officer with the Phumelela Fire Protection Association. All the plaintiffs were paid up members of the association as at 20 September 2013. The defendant was as at that date not a member of the association. He was informed of the smoke and the smouldering on the dump on 20 September

2013 whereafter he communicated with Mr Hope Mthembu, an employee of the defendant and advised him of the fire on the dump. Mr Mthembu informed him that he had no knowledge of the fire that had started at the dump and had no personnel available to confirm that there was indeed a fire on the dump. During cross-examination he confirmed that on Friday 20 September 2013 at approximately 11h30, he received a call from a motorist who informed him of an uncontrollable fire burning at the refuse site. He maintained that the fire was uncontrollable as no person supervised the smouldering on the dump and, as it was a red day, no open fires were to be made on the dump. The cross-examination was based on the affidavit he had made to the police in connection with the incident.

- [13] Mr Philip de Beer testified that he was the owner of the Hexagon Fire Investigation CC and performed duties as the fire origin and cause experts. He had compiled two reports dated 19 January 2014 and 13 October 2014 and reported that a fire had probably originated within the boundary of the Vrede Municipality dump site on the 20 September 2013. The initial suppression of this fire was *inter alia* conducted by Mr Joshua Tshabango. He encountered the right flank of the fire on the dumpsite at the south- western fence. It was reported to him by Mr Fanie Tshabango that the latter commenced the fire suppression at the fence whereon burnt vegetation was still evident underneath the fence. Physical evidence in the form of a line of unburnt vegetation verified the version and the location of the reported fire suppression actions. Fire indicators were identified and traced from the western side of the R543 road in an approximate north- western direction up to

the general area of the fire origin located between the Southern boundary fence of the dumping site and the Southern edge of the site itself. Fire indicators identified in this area indicated the specific origin area to be located in close proximity to the most North Western point of the fire damage within that area. The specific origin area was subjected to a systematic grid search and the point of the fire origin could not be identified. The cause of the fire was therefore classified as undetermined. The following hypotheses regarding the cause of the fire were considered as possible but not verifiable:

1. Deliberate open flame ignition of the vegetation, and
2. Ignition of the vegetation by burning object (carried by the wind) from fire burning within the dumping site.

[14] He had not seen any fire breaks around the dumping site and if the fire had not spread before it got into the tamboekie grass, it would mean that no embers were produced while the fire was burning before it got to the tamboekie grass and there was no fire on the other side of the road before it got to tamboekie grass, then logically one would infer that if there was no tamboekie grass the fire would not have spread. It is easier to extinguish a fire that has just started than one that had developed into a head fire.

[15] Mr Vorster testified that he was an RS production and VAP technologist, with specific field of expertise in satellite image processing. He compiled a report dated May 2017 which related to a fire which occurred on 20 September 2013 in the Vrede area of the Free State by means of using available satellite imagery

and satellite data. His conclusion is contained in paragraph 4 of the report and reads as follows:

It is the expert's opinion, based on his knowledge and experience as experienced satellite image processing specialist, and based on his research and interpretation of the available satellite images that the following can be stated with reasonable degree of confidence:

4.1 The relevant fire which is the subject-matter of this case probably started on 20 September 2013 on the Farm Krynaauws Lust (The town Vrede falls on this farm) at an unknown time prior the orbit of the relevant MSG satellite (indicated by fire scar of 20 September 2013) before 13:42 (figure 4). It probably started at the dumping site."

- [16] Mr Joshua Tshabango testified that his brother, Fanie Tshabango, died on 22 September 2017 and the appropriate death certificate forms part of the court record marked as exhibit "I". He confirmed that he and his brother witnessed the same event of the veld fire which occurred on 20 September 2013. He and his brother were working on a fence when at about 13h00 they saw smoke at the dumping site. When they eventually saw the fire, they took a tractor and a water tank and drove towards it. On entering the dumping site, he saw a small fire about half a metre from the fence. When their water supply was depleted, they left the site to refill the water tank. On returning to the dump site to continue the fire suppression, the fire had spread across the road between the dumpsite and the golf course. Many farmers assisted to extinguish the fire. The golf course was on the other side of the dumping site and there were no fire breaks as well as

on the Vrede/Memel road. The fence also did not have any fire breaks.

[16] Mr Jan Motaung testified on behalf of the defendant and stated that he worked for the defendant as the manager of the Community Services. At around 16h15 on the day in question he became aware of the fire and called the Warden Fire station in connection with the dumping site which was burning. He was informed that the fire would be controlled. He confirmed that Mr Hope Mthembu was in the employ of the Phumelelela Municipality in the capacity of Acting Director of Technical Services. According to him, the area that was burnt out was the length between two soccer posts. He did not know where the fire started. He could not contest the evidence of the plaintiffs' two expert witnesses as well as Tshabango's, during whose testimony in court he was present. He conceded all the points and the plaintiffs' version of the events that were put to him by the plaintiffs' counsel and more especially that the fire emanated from the dumping site. The municipality was responsible for the dumping site and its surrounding area. There was a gate leading to the dump but the entry was uncontrolled. He could not dispute that the fires occurred regularly on the dump during September 2013 and that mechanisms were only put in place to stop the spreading of the fires after the incident of 20 September 2013.

[17] The evidence of Mr Siyabonga Radebe, the defendant's second witness, centred around the occurrence book, which formed part of the court record, and marked exhibit "J" and related to the entries made on 20 September 2013. The essence of his

evidence was that informal people cooked, recycled and burned plastics on the dump and sometimes these burning plastics could be brought up by the wind and spread. Fires appeared occasionally on the dump and they used to complain to Mr Motaung about informal people starting fires there and nothing happened. He confirmed that prior to 2013 no fire breaks were made. He saw smoke from the inside of the dumping site. He did not know how the fire started and could not deny that it spread all the way to Brakfontein along the Volksrust road which had no fire breaks. Had Mr Hope Mthembu responded to Mr Steenkamp's call at 11h30 on that day and sent one water truck or fire fighter, the fire could have been stopped from spreading. Despite a postponement of the case to enable Mr Mthembu to testify, he failed to do so.

The pleadings

- [18] The following are specifically alleged in the particulars of claim:

“4

Op of ongeveer 20 September 2013 het 'n veldbrand ontstaan by die Verweerder se stortingsterrein (asgate), Vrede en vandaar versprei na die voormelde plase van die Eisers waar dit skade veroorsaak het.

5.1 Daar was te alle tye relevant tot hiedie aksie 'n regsplig op die Verweerder om te voorkom dat brande by die stortingsterrein ontstaan, alternatiewelik vandaar verspei na aangrensende eiendom, meer in besonder diè van die Eisers as gevolg van die feit dat vuur inherent gevaarlik is en verder in terme van die bepalings van die Nasionale Wet op Veld-en Bosbrande Nr 101 van 1998.

5.2 *Ter verbreking van voormelde regsplig het 'n veldbrand ontstaan op die datum voormeld en versprei vanaf die Verweerder se stortingsterrein na die eiendom van die Eisers.*

5.3 *Die voormelde veldbrand het ontstaan en versprei as gevolg van die uitsluitlike nalatigheid van die Verweerder, alternatiewelik Verweerder se werknemers wat te alle tye relevant hiertoe opgetree het en gehandel het binne hulle diensverhouding met die Verweerder en binne die omvang en bestek van hulle diensverhouding. Die name en besonderhede van Verweerder se weknemers is onbekend aan die Eiser.*

6

Verweerder, alternatiewelik Verweerder se voormelde werknemers, was nalatig in een of meer van die volgende opsigte:

6.1

6.2

6.3 *Deurdat Verweerder toelaat dat vullis wat op die stortingsterrein gestort word verband word sonder voorsorgmaatreëls, alternatiewelik behoorlike voorsorgmaatreëls;*

6.4 *Deurdat Verweerder versuim om 'n behoorlike brandbaan om die stortingsterrein te maak wat 'n redelike kans het om die verspreiding van bran vanaf die stortingsterrein na aangerensende eiendom te voorkom en meer in besonder na die eiendomme van die Eisers;*

6.5

6.6

6.7

6.8 *Deurdat Verweerder versuim het om alles in sy vermoë te doen om te verhoed dat die brand versprei nadat die brand ontstaan het [Artikel 18(1)(b) van die Wet].*

7.1 *As gevolg van die Verweerder se voormelde nalatige en onregmatige optrede het die brand wat versprei het na die onderskeie Eisers se voormelde grond skade aangerig en het die Eerste en Tweede Eisers skade gely in die bedrag van R 620, 106.55, het die Derde Eiser skade gely in di bedrag van R 563, 725.00 en het die Vierde Eiseres skade gely in die bedrag van R 109, 830.00.*

7.2 *Verweerder was te alle relevante tye, en spesifiek op of ongeveer 20 September 2013, nie 'n lid van 'n Brand-beskermingsvereniging nie"*

[19] The defendants' plea reads as follows in relation to the above:

"4

AD PARAGRAAF 4 DAARVAN:

4.1 *Verweeder erken dat op 20 September 2013 het daar twee relatief klein brande gebrand in die omgewing van die Verweerder se stortinsterrin (asgate) te Vrede.*

4.2 *Verweerder pleit egter spesifiek dat werknemers van die Verweeder het hierdie twee brande volledig geblus op September 2013, voordat dit na naburige eiendomme versprei het en stel Eiser tot die bewys van die teendeel.*

4.3 *In die vooropstelling, en in die lig van die feit dat die voormelde brande volledig geblus was, ontken Verweerder dat die brande versprei het na*

die Eisers se plase, waar dit na bewering skade veroorsaak het en stel Eisers tot die bewys van ieder en elke sodanige bewering.

5

AD PARAGRAAF 5.1 DAARVAN:

Verweerder erken dat daar in die algemeen 'n regsplig op die Verweerder rus om te voorkom enige brande wat by die stortingsterrein mag ontstaan, vandaar versprei na aangrensende eiendomme"

The Parties contentions

- [20] It was contended on behalf of the plaintiff that overwhelming evidence, uncontested by the defendant, was produced that the veld fire started and spread from the defendant's property to the plaintiffs' farms. According to the evidence, the defendant was not a member of the Fire Protection Association on 20 September 2013 and the presumption of negligence operated as against the defendant. The evidence of the plaintiffs' experts and factual witnesses showed clearly that the veld fire started on the defendant's property on 20 September 2013 whence it spread across Volksrust road and spread all the way to the adjoining farm properties of the plaintiffs. Consequently, the plaintiffs succeeded in alleging and proving a wrongful act or omission by the defendant in causing a veld fire; negligence on its part or someone else for whom he or she was vicariously liable; a causal connection between the loss suffered and the defendant; that the defendant started the fire or that the fire emanated from

the defendant's property¹ and that the defendant was not a member of a Fire Protection Association in the area in which the fire occurred.²

[21] It was contended furthermore that the onus was on the defendant to prove on a balance of probabilities that it was not negligent in any of the respects alleged by the plaintiff or if its conduct did fall short of the standards required of it, such failings would have had no effect on and would not have been relevant to the harm caused³. It was contended that the only statement of the defendant which was put to Mr Raubenheimer was that the defendant had allegedly extinguished the fire, which version was not supported by the defendant's witnesses. The two witnesses called by the defendant were non-contributory save to confirm that the defendant failed to take preventative steps to curb the fires up until 20 September 2013. Their evidence did not dispute that the veld fire had spread from the defendant's property on 20 September 2013 to the plaintiffs' various farms. The court was requested to make a negative inference against the defendant for failing to call Mr Johannes Mahlangu who allegedly extinguished the veld fire before it could spread to the plaintiffs' properties as indicated in the further particulars furnished by the defendant. Although the matter stood down on 31 January 2018 and resumed on 2 February 2018 to enable the defendant to call Mr Hope Mthembu as a witness; he was eventually not called as a witness.

¹ Rosenthal v Mastroguiseppe 2004 (2000) 4 All SA 295 (A)

² Minister of Forestry v Quathlamba (Pty) Ltd 1973 (3) SA 69 (A) on page 84

³ Minister of Water Affairs and Forestry v Durr 2006 (6) SA 587 (SCA)

- [22] Even though the argument on behalf of the defendant did briefly refer to aspects of negligence and contributory negligence, the main thrust of the argument, both orally and in writing, was based on the absence of wrongfulness on the part of the defendant. It was argued that, if the defendant was held to have been negligent, the plaintiffs failed to prove that it acted wrongfully and as such no liability could ensue. Consequently, the plaintiffs' claim should be dismissed with costs.
- [23] Counsel, relying on The Municipality of Cape Town v Bakkerud and Administrateur van Transvaal v Van der Merwe argued that in order to determine unlawfulness, the court must carefully balance and evaluate the interest of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation⁴ and submitted that, based on the undisputed evidence of financial constraints and limited means in the small town of Vrede (Phumelela Municipality), it would be unreasonable to hold that it wrongfully breached its legal duty to prevent or put out veld fires that arose in circumstances such as those present on the day in question. Any such failure could not be regarded as unlawful in these particular circumstances⁵. This submission is faulty and without base as no evidence was led to this effect. In order to bolster its argument in respect of the absence of unlawfulness, counsel for the defendant relied on the following cases; Minister of Safety and Security vs. Van Duivenboden 2002 (6) SA 431 (SCA) 441-2; McIntosh vs.

⁴ Municipality of Cape Town v Bakkerud [2000] ZASCA 174 and Adminstrateur van Transvaal v Van Der Merwe [1994] ZASCA 174

⁵ Paragraphs 22 and 23 of defendant's heads of argument

Premier, Kwazulu Natal and Another 2008 (6) SA 1 A; **MTO Forestry v Swart** [2017] ZASCA 55; **Gouda Boerdery BK v Transnet** 2005 (5) SA 490 (SCA); **Hammerstrand vs. Pretoria Municipality** 1913 TPD 374; **Oosthuizen Petrus Marais vs. Swissport South Africa and Another** [2005] ZAGPHC 36; **Pretoria City Council vs. De Jager** 1997 (2) SA 46 (A). On the contrary, in my view, these cases do not assist the defendant's argument on the issue of wrongfulness in the present case, but are relevant to the issue of negligence as stated in **Kruger vs Coetzee**⁶.

[24] In the **MTO Forestry v Swart**⁷ (which was extensively quoted by Mr De La Rey, on behalf of the defendant) the following was said:

".... In all probability both were due to activities of Clarkson residents. In these circumstances, the appellant sought to hold the respondent liable, not for starting the fire on the day in question, but for its alleged negligent omission to take preventative steps which allowed or caused it to spread onto Witelsbos. That such a negligent omission, if established, could found liability cannot be doubted."

In **Gouda Boerdery Bk v Transnet**⁸ it was said:

It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable. But the issue of wrongfulness is more often than not uncontentious as the plaintiff's action will be founded upon conduct which, if held to be culpable, would be prima facie wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of

⁶ 1966(2) SA 428 (A)

⁷ 2017 ZASCA 55

⁸ 2005 (5) SA 490 (SCA)

wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial. A judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in Kruger v Coetzee, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.

- [25] Mr Cilliers submitted in reply that the defendant admitted the existence of a legal duty to prevent the spreading of a fire from its property to the neighbouring properties. The evidence adduced established negligent conduct on behalf of the defendant, which was *prima facie* wrongful. No evidence was

adduced by the defendant to the extent that its conduct was not wrongful. It was *prima facie* clearly assumed that once it was established that the fire had spread from the defendant's property to the plaintiffs' neighbouring farms, such conduct would be wrongful and negligent.

- [26] In order to prove contributory negligence on the part of the plaintiffs, the defendants relied on the provisions of section 12 (1) of Act 101 of 1998 in that a duty was imposed on every land owner on whose land a veld fire may burn to prepare and maintain a fire break. It was contended that as the plaintiffs were members of the Fire protection Association and their experience taken into account, their failure to prepare and maintain fire breaks could not be justified, as it could reasonably be assumed that such fire breaks could have prevented the fire from spreading to their farms.

Evaluation

- [27] In its plea and paragraph 6.2 (C) of the Rule 37 Minute, the defendant admitted that a fire arose on the dumping site (stortingsterrein) and that such fire was extinguished by its employees on 20 September 2013 before it could spread to the plaintiffs' properties. As a result, there was no need to notify other people as the fire never extended beyond the municipal boundaries. The further particulars supplied by the defendant to the plaintiffs on 11 February 2016 stated that one Johannes Mahlangu was one of the employees who assisted to extinguish the fire on the dumping site. The defendant did not exercise any

control on the dumping site due to financial constraints. Even though a grader was used to remove grass from the surrounding dumping site, there were no fire breaks in existence around the dumping site. Despite the answers so furnished, the defendant failed to call any employee in substantiation of its defence. The *onus* rested on the defendant to rebut the presumption of negligence created by section 34 of Act 101 of 1998 and that any failure on its part would have made no difference to the eventual spread of the fire.⁹ The defendant failed to adduce evidence to prove contributory negligence that the alleged failure by the plaintiffs to erect fire breaks would have contained a large fire that had developed and stoked by the strong winds.

Conclusion

- [28] I am therefore satisfied that the plaintiffs have acquitted themselves of the *onus* to prove that the defendant acted wrongfully and negligently in the causation of the veld fire which arose on the defendant's dumping site on 20 September 2013 and spread to the plaintiffs' properties causing damage thereto. The defendant failed to discharge its *onus* on a balance of probability that it was not negligent or that the plaintiffs were contributorily negligent.

Costs

- [29] In the circumstances the successful party is entitled to the costs.

⁹ HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd 2001 (4) SA 814 (SCA)

[30] I therefore make the following order:

Order

1. The defendant is liable for payment of 100% of the first to fourth plaintiffs' damages to be proved or agreed in respect of the veld fire which occurred on 20 September 2013.
2. The defendant is liable for payment of the plaintiffs' costs on a party and party scale in respect of 15 August 2017, 16 August 2017, 18 August 2017, 31 January 2018 and 2 February 2018, which will include the following:
 - 2.1 The first to fourth plaintiffs' reasonable travelling and accommodation expenses, if any;
 - 2.2 The reasonable preparation, qualifying, reservation, accommodation, travelling fees and expenses as well as the income forfeiture fee for court attendance (if any, as per invoice), including travelling expenses of obtaining the experts' reports (if any) of:
 - 2.2.3 Mr AP de Beer;
 - 2.2.4 Mr WA Vorster.
 - 2.3 The costs attendant upon obtaining the payment of the amount referred to in this order.

MHLAMBI, J

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