IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 8190/2011

AR457/16

In the matter between:

Tartan Timbers (Pty) Limited	First Appellant
Vriendschap Boerdery CC	Second Appellant
Yourtrade 240 CC	Third Appellant

and

Mondi Limited	Respondent

Judgment

Lopes J

[1] This is an appeal against a judgment of Balton J, delivered on the 10th May 2016. The appellants instituted an action against the respondent for damages caused to their property during a fire which occurred on the 30th and 31st days of August 2008. The fire started on the respondent's Langfontein farm in Melmoth, Kwazulu-Natal on the 30th August 2008. On the next day the fire spread to the farms owned by the appellants.

[2] The grounds of negligence relied upon by the appellants in the particulars of claim are divided into two categories:

(a) That the respondent and/or its employees made a fire or caused a fire to be made when it was dangerous and inopportune to do so;

(b) Once the fire had taken hold the respondent failed to combat the fire, as a result of which it spread to the appellant's farms causing damage to timber plantations and sugar cane.

[3] After hearing six witnesses for the appellant, Balton J dismissed the appellants' claims with no order as to costs. On the 21st June 2016 Balton J granted the appellants leave to appeal against her decision. She also granted the respondent leave to cross-appeal (which relates only to the question of costs) and reserved the question of the costs of the application for leave to appeal for decision by this court.

[4] No acceptable evidence was placed before the court *a quo* to demonstrate how the fire started. Indeed the exact position where the fire started could not be determined; only the general area. Nevertheless, the general area where the fire started was in reasonably close proximity to the homesteads on the respondent's farm. Mr Henderson, who appeared as one of the experts for the appellants opined that the fire had started within approximately 15 metres of one of the homesteads. Mr *Troskie SC*, who appeared for the appellants, accepted in argument that a case had not been made out by the appellants on the first category of negligence.

[5] Mr *Troskie* submitted in his heads of argument that the second category of negligence relates to the respondent's awareness of the risk of a fire starting in the open grasslands where the homesteads are situated on the farm. The evidence of the witnesses was that homesteads constitute a risk of fire where they are built in the vicinity of grasslands.

[6] In this regard the appellants rely on the following:

(a) No firebreaks were created around the homesteads such as would have prevented the spread of the fire.

(b) The opinion of Mr Henderson that the entire grassland should have previously been burnt out as a precaution against the start and spread of the fires.

[7] Mr *Troskie* submitted in argument that the appellants restricted the area of negligence to the respondent's failure to clear the grasslands around the homesteads. This was dealt with in the evidence of Mr Henderson.

[8] Prior to dealing with these aspects of negligence it is necessary to set out the relevant legislation as well as the role played by the appellants' experts during the trial. The National Veld and Forest Fire Act, 1998 became operative on the 1st April 1999 with the object of reforming the law on veld and forest fires. The Act provides in s 4 for the establishment of a fire protection association to be registered in an area for the purpose of predicting, preventing, managing and extinguishing veld fires. The comprehensive duties of a fire protection association are set out in s 5 of the Act, including, inter alia, the development and application of a veld fire management strategy for the area, making rules which bind its members and set out the minimum standards to be maintained by members, and controlled burning to conserve ecosystems and reduce the fire danger.

[9] Section 6 of the Act provides for the appointment of fire protection officers who are required to perform the function of the chief executive officer of a fire protection association. The tasks of the fire protection officer includes inter alia, taking control of any fire-fighting in the area for which the fire protection association has been formed if the veld fire is a threat to life or property, and the fire protection officer is reasonably able to take control of the fire. The fire protection officer is also required to enforce the rules of the association and inspect the members' land to ensure compliance with the rules.

[10] In the area with which we are concerned in this appeal, a fire protection association named the Zululand Inland Fire Protection Association was registered by the Minister of Water Affairs and Forestry on the 1st November 2006. A comprehensive business plan for the Fire Protection Association for the period from 2006 to 2011 was drafted setting up steps to be taken to prevent fires as well as a management strategy for dealing with fires. Rules regarding fire breaks, etc were also laid down by the association.

[11] As is clearly evident from the provisions of the Act, the position which applied prior to its coming into operation has changed. At that time the relevant legislation was the Forest Act, 1984. Section 84 of that Act made provision for a presumption of negligence in respect of a veld, forest or mountain fire occurring on land outside a fire control area. Negligence would then arise where it was alleged against a party to proceedings, and the party making the allegation established a nexus or connection between the fire and the party against whom the allegation was made, which was consistent with such negligence.

See *H L & H Timber Products (Pty) Limited v Sappi Manufacturing (Pty) Limited,* 2001 (4) SA 814 (SCA), paragraphs 12 to 17.

[12] The present Act contains no such presumption and it is accordingly incumbent upon a plaintiff in an action to prove the common requisites for negligence:

(a) Conduct initiating wrongfulness, by the defendant.

(b) Fault, in this instance, negligence by the defendant.

(c) Harm suffered by the plaintiff.

(d) A causal connection between (a) and (c).

See *H L & H Timber Products (Pty) Limited* at paragraph 13.

In this regard Mr *Troskie* conceded that the appellants bore the onus of establishing negligence on the part of the respondent.

[13] The appellants led the evidence of Trevor Mark Wilson, the fire protection officer for the Zululand Fire Protection Association at the time of the fire. Mr Wilson's evidence may be briefly summarised as follows:

(a) He operated as a spotter pilot out of KwaMbonambi on the Kwazulu-Natal coast, and his function in fire-fighting was to assess the nature and extent of the fire and direct the bomber pilots as to where to discharge their loads of fire retardant treated water.

(b) He was also responsible for weather warnings. In the present case he was aware of a very strong cold front coming up to Kwazulu-Natal from the Cape. Such a weather pattern sets off what is commonly referred to as "berg winds" – an offshore flow of very dry air of low humidity and high wind accompanied by high temperatures which create a significantly high fire danger rating. So concerned was Mr Wilson about the potential for a fire at the time that he arranged for an additional bomber to be present in the area, and which was in fact stationed on one of the appellant's farms.

(c) Mr Wilson regarded the weather indicators on the 30th August 2008 as constituting "very extreme fire indicators". The temperature at 3pm was high, 26.3 degrees celsius, the humidity 14% and the average wind speed 33.8m/h. The highest wind gusts at that time were 67.6 km/h. He referred to it as a "very bad day."

(d) Mr Wilson was notified of the fire on the Saturday afternoon, and to complicate matters the conditions for flying were turbulent and difficult. The conditions were in fact so bad that a less qualified pilot had declined to fly, indicating that he was insufficiently inexperienced to fly in those conditions.

(e) Having flown over the area within half-an-hour of the start of the fire, Mr Wilson was of the view that the area of origin of the fire was in the vicinity of the homesteads on Langfontein farm. He ceased observing the fire because one of the bomber pilots had gone missing. It later emerged that the bomber plane had crashed in the forest. Mr Wilson's view was that on Saturday afternoon the fire was contained, meaning that there was a dry break all around the fire. He was unable to see any open flames, but testified that there were still smoke patches the next morning.

(f) The weather conditions overnight had improved considerably, but later, again deteriorated. By 8am on the 31st August the wind was gusting up to 95km/h, and Mr Wilson's view was that any ignition on a wind of that speed would not be able to be stopped. It was extreme fire weather and they should not even have been flying in that wind. The high wind speed remained for most of that day.

(g) On the Sunday morning Mr Wilson was flying a little way south of the fire when he suddenly saw the smoke explode. The exploding smoke was due to a phenomenon called 'inversion' where layers of warm and cold air reverse, resulting in the violent re-ignition of a fire. He flew closer in order to observe what was happening: the fire had re-erupted, and as he put it '*running very quickly and spotting on the left and the right flank'.* Spotting is when it throws embers ahead.

(h) Mr Wilson testified that the spotting could be from between 2 to 3 kilometres. He described the fire at that stage as being '*absolutely uncontrollable – man and beast have got no place to be there*'.

(i) Mr Wilson made no criticism whatsoever of the conduct of the respondent in failing to prevent the fire or failing to stop it spreading.

[14] The other main witness for the appellants was Clive Scott Henderson, who has studied and worked in the farming and forestry industries since before 1970. From that time he was involved in a cross-section of agricultural and forestry

activities dealing in the assessment of where fires start, how they progress, and assessing the quantum of damages.

[15] Mr Henderson's principal submission in the trial was that the respondent could have easily prevented the fire by carrying out what he referred to as a 'burn-out' of the whole valley in which the homesteads, near to which the fire started, were situated. His reason for advocating the 'burn-out' of the entire grassland was because it is situated at the teeth of the north-west wind, and has many dwellings on it which are a known source of danger. The grassland consisted of tall flammable grass which abutted onto the plantations. His view was that once you took into account the likelihood of strong hot winds blowing up a dry western slope, the grassland area was particularly dangerous to the plantations situated downwind of it.

[16] Mr *Troskie* submitted that the concept of a 'burn-out' advocated by Mr Henderson could have been achieved by cutting or hoeing the grassland or burning it. Mr *Troskie* submitted that no evidence was led by the respondent to suggest that a 'burn-out' (or, indeed, hoeing or cutting) could not have been done. He submitted that no attention was paid to this aspect in the judgment of the court *a quo*

[17] Mr *Broster SC,* who appeared for the respondent, criticised Mr Henderson's evidence for the following reasons:

(a) His idea of a 'burn-out' of the entire valley was an afterthought, and referred in essence to what is termed a 'block-burn' which is essentially a burning of grasslands for bio diversity reasons, and not as a fire precaution.

(b) Unlike the evidence which he gave in court, Mr Henderson's expert summary referred to a network of fire breaks, both external and internal. No reference to a 'block-burn' was made in his expert summary, and no supplementary expert summary was delivered.

(c) Mr Henderson did not disagree with the suggestion that a ‘burn-out’ of the entire valley of grassland would involve approximately 300 hectares.

(d) Mr Henderson did not regard it as important to look at the history of fires in the area, and had not, prior to the trial, examined the map depicting the areas where the respondent had burned firebreaks and the dates upon which those firebreaks were burned.

(e) Mr Henderson had made no enquiries as to the actual cause of the fire, contenting himself with hearsay evidence from one of the occupiers of a residence adjacent to the grassland.

(f) If a ‘block-burn’ was necessary or required, it would have been stipulated by the fire protection association. It was not.

[18] In assessing the evidence of both Mr Wilson and Mr Henderson:

(a) Mr Wilson was the fire protection officer for the area.

(b) Mr Wilson set out, on behalf of the Fire Protection Association for the region, the steps which had to be taken by farms in the area in order to prevent fires.

(c) Mr Wilson had no criticism whatsoever of the firebreaks and precautions taken by the respondent in order to prevent fires.

(d) Mr Wilson’s evidence was that firebreaks were intended only to enable firefighters to obtain proximity to any fire in order to enable them to combat it. The firebreaks themselves are not intended to prevent fires.

(e) Mr Henderson, on the other hand, appeared not to appreciate the distinction between the old Act and the new Act and the role of the Fire Protection Association in taking steps to predict fires and warn landowners in the area under its control of the likelihood of such fires. Mr Henderson also failed to appreciate the function of the Fire

Protection Association in controlling and fighting fires once they had started.

(f) The blame apportioned to the respondent by Mr Henderson may have been applicable under the old Act, and established a *prima facie* case of negligence against the respondent. The terms of the new Act do not do so.

[19] Mr *Troskie* submitted that the fire protection association provided only a 'macro-management' of the problems leading to fires and the control and handling of them. In my view this approach does not accord with the numerous functions and duties of the fire protection officer and the association, including advising farmers on the correct fire prevention methods and ensuring that these methods are implemented by the farmers.

[20] It was the evidence of Mr Wilson that on the evening of the 30th August the fire was contained on the premises of the respondent. His evidence of what occurred the next morning when the inversion of air occurred, and the explosion which caused the fire to restart made it clear that this was not something which could have been prevented. His description of the conditions on the day, together with his evidence of what are ideal conditions for fires to start and continue, make it clear that nothing could have been done by anyone to have stopped the fire on the 31st August.

[21] The evidence of Mr Wilson is confirmed by Mr Smith, a member of the second appellant. His evidence was that he had gone out to investigate the fire on the evening of Saturday the 30th August, and his view was that the fire had stopped. He was satisfied that all naked flames and any immediate threat were under control.

[22] Mr *Troskie* also criticised the fact that Mr *Broster*, did not put to Mr Wilson that the fire protection association had failed properly to carry out its duties to ensure that

the fire did not take place. He submitted that the respondent cannot hide behind the fact that the association did not carry out its functions. I am not persuaded that it was the task of the respondent or Mr *Broster* to do so. It was incumbent upon the appellants to establish wrongfulness and negligence on the part of the respondent. They failed to do so.

[23] In my view no criticism of the judgment of the learned Judge in the court *a quo* would be sufficient to disturb the overall impact of the judgment and the ultimate decision of the learned Judge that there was no negligence on the part of the respondent in either allowing the fire to start, or failing to contain it and control it after it started.

[24] The only aspect of the judgment in the court *a quo* which could be the subject of any appeal is the matter of costs. The learned Judge found that there was no reason to mulct the appellants in costs on the basis that the weather conditions of the 30th and 31st August 2008 caused the fire to spread from the respondent's farm to the appellants' farms. The learned Judge expressed the view that to burden the appellants with the costs of the action would be unfair, and not in the interests of justice.

[25] In my view this approach does not pay due regard to the fact that the appellants instituted an action against the respondent, and continued to do so when they had been provided with the evidence which would be given by Messrs Wilson, Henderson and Smith. Faced with that evidence and the applicability of the new Act and the marked disparity between that Act and the old Act with regard to the responsibility resting on land owners to ensure that fires did not spread from their property to the properties of others, should all have been taken into account by the appellants in the preparation of their trial. That should have alerted them to the fact that it was unlikely that the appellants would be able to establish negligence on the part of the respondent. That is how it turned out to be at the trial, and the respondent should not have been put to the costs of litigating in this matter.

[26] The normal rule that costs should follow the result was applicable in this case, and with respect to the learned Judge in the court *a quo*, should have been applied. The appellants were not successful with any part of their case, and there are accordingly no 'special circumstances' which would warrant a deviation from the normal rule.

[27] In all the circumstances I make the following order:

(a) The appeal is dismissed.

(b) The counter-appeal by the respondent is upheld and paragraph 2 of the order of the court a quo is amended to read:

'2. The plaintiffs jointly and severally, the one paying the other to be absolved, are to pay the defendant's costs of suit.'

(c) The appellants are directed to pay the costs of the application for leave to appeal and the costs of the appeal.

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Lopes J

I agree.

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Seegobin J

I agree

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Poyo-Dlwati J

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Date of hearing:	8 February 2017
Date of Judgment:	23 March 2017