

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

**Case No.: 4138/2009**

In the matter between:

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| <b><u>BON ACCOR SAFARIS (EDMS) BPK</u></b> | First Plaintiff  |
| <b><u>DAL TEMPE BOERDERY BK</u></b>        | Second Plaintiff |
| <b><u>BAREND JACOBUS WESSELS</u></b>       | Third Plaintiff  |
| <b><u>WILLEM JOHANNES PIENAAR N.O.</u></b> | Fourth Plaintiff |
| <b><u>DORATHEA PIENAAR N.O.</u></b>        | Fifth Plaintiff  |

and

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| <b><u>MASILONYANA MUNICIPALITY</u></b> | Defendant |
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| <b><u>HEARD ON:</u></b> | 11 FEBRUARY 2014 |
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| <b><u>JUDGMENT BY:</u></b> | C.J. MUSI, J |
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| <b><u>DELIVERED ON:</u></b> | 27 MARCH 2014 |
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[1] On 23 September 2007 a fire raged in the Winburg district leaving the following farms damaged in its wake:

- (i) Little Saxony (various parts)
- (ii) Bon Accor
- (iii) Dal Tempe

- (iv) Hattingskraal
- (v) Chateau Therry
- (vi) Hartebeesfontein

[2] The respective owners and/or lessees of the aforementioned farms issued summons against the Masilonyana Municipality alleging that the fire originated on and spread from its farm. They alleged that the municipality was negligent in one, more or all the following respects:

- 2.1 By allowing its farm to be utilised as an initiation school where open air fires are made;
- 2.2 By neglecting to keep flammable material or grass in the vicinity of the initiation school short or by not removing it;
- 2.3 By neglecting to have adequate fire extinguishers or fire fighting equipment available alternatively failing to provide its employees with such equipment;
- 2.4 By failing to give proper or adequate training to its employees with regard to the danger and handling or control of fires;
- 2.5 By failing to give proper or adequate training to its employees with regard to fire fighting and extinguishing of fires that may originate on municipal property.

[3] They further alleged that the defendant was aware that veldfires occur in the Winburg district and specifically at the initiation school, and in light of the prevailing weather conditions and long dry grass, the defendant was negligent in one or more or all the following respects in failing to prevent the fire:

- 3.1 By failing to properly or adequately train its employees in fighting and extinguishing fires that may occur on municipal property;
- 3.2 By failing to make the necessary firebreaks on municipal property, as prescribed by law;
- 3.3 By failing to alert those that may be affected by the fire immediately after it started;
- 3.4 By failing to fight and/or prevent the fire; and
- 3.5 By failing to take reasonable steps to prevent the fire from spreading from its property to the property of the plaintiffs.

[4] The plaintiffs also alleged that the defendant is not a member of a fire protection association and is therefore presumed to have been negligent in relation to the veldfire until it proves the contrary.<sup>1</sup>

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<sup>1</sup> Section 34 of Act 101 of 1998 reads as follows:

- [5] The defendant denied that the fire was a veldfire. It also denied that it was negligent.
- [6] We held an inspection *in loco* and I put my observations on record. Both the plaintiff and the defendant confirmed the correctness of what was put on record. In accordance with the agreement between the parties and because I deemed it convenient to do so, I ordered that the merits should be separated from the quantum in terms of Rule 33(4) of the Uniform Rules.
- [7] The plaintiff called a single witness, while the defendant called six witnesses.
- [8] Mr Jacobus Lourens Griessel testified that he is an ex-policeman. He is currently a professional hunter. He was raised in Winburg and stayed and worked there for approximately thirty-two years. He knows the area very well, *inter alia*, because as a police officer he used to patrol the entire district.

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“(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.”

- [9] He used to hunt lions on Bon Accor farm and had a key to the farm's gate. Bon Accor shared a perimeter fence with municipal grounds 681, the property of the defendant. He testified that part of the defendant's property is used as an initiation school. According to him, the defendant's property has always been used as an initiation school, because as a boy he used to see and tease the initiates there.
- [10] On 23 March 2007 between 13h00 and 14h00, he was driving a police vehicle from Bloemfontein to Winburg on the N1 national road. He noticed smoke. He drove in its direction, passed the Wolwasdam, which is also situated on the defendant's property, to the place where the initiates meet and eat. He noticed between ten and fifteen initiates who stood there watching the fire. They were aggressive and did not want him to get close to them. In the circle, which is used as a meeting place, he saw that a hut or similar structure was destroyed by the fire. He also saw pots and pans and he could clearly see that a fire was made in the circle. The fire burned in a V form with the epicentre of the fire being in the circle. The fire burned in the direction of a hillock. There was a strong wind which fanned the fire. When he saw that it is a runaway fire, he called the police and Mr Frikkie de Wet, the farm manager of Little Saxony. He and the latter arranged to meet at the gate of Little Saxony, where De Wet handed over a Land Cruiser pick-up with fire fighting equipment to him. Other farmers also came to assist. They tried to extinguish the fire to no avail. The

fire spread to Little Saxony, Rheezicht, Bon Accor, Dal Tempe, Chateau Therry, Hartebeesfontein, Eirene and Hattingskraal where it was finally extinguished.

[11] He further testified that there was no firebreak on the defendant's property.

[12] Mr Malefetsane Eric Mogethi, the acting unit manager at the defendant, was the customer care officer during September 2007.

[13] He testified that persons applied at the defendant's offices to hold initiation schools. He referred them to Ms Maphobole, who is attached to the social and community services at Theunissen, because the Winburg office does not have authority to grant such applications.

[14] He knows Mr Majoro Ntema, who is a teacher at the initiation school. Mr Ntema never approached their offices in order to seek permission to hold an initiation school. He does not know where initiations are held, but he knew that Mr Ntema coached or counselled initiates.

- [15] During cross-examination he testified that Ms Maphobole and Mr Monaheng worked together and that they approved applications to hold initiation schools on the defendant's property.
- [16] Mr Molefe Phanis Magosi testified that he worked for the defendant at the Theunissen offices. His duties included the installation of stop streets signs, painting roads and fire fighting. Fire fighting is done by means of a vehicle that has a water tank installed on it. Although they had two such vehicles, only one worked during September 2007.
- [17] On 23 September 2007 he and his colleague, Mr Hitchcock, were called upon to extinguish a fire in Winburg. They drove to Winburg where they met Mr Grobbelaar, a traffic officer at Winburg. He could see that the fire is burning from the hillock downwards towards the road. He also noticed lions were trapped in the fire. They extinguished the fire at the wind pumps. According to him, the fire only burned on one side of the road. They left the scene at approximately 17h00.
- [18] During cross-examination it was put to him that the fire raged on both sides of the road and that it begun at the foot of the hillock and not on top as he testified. It was also put to him that Grobbelaar was not there on the day of the incident, because he was on leave.

- [19] Mr Mohau Petrus Makwaela testified that he and his friend took five initiates to the initiation school on the defendant's property. Messrs Dladla and Dithabe were in charge of the initiation school. He and his friend stood approximately 150 metres from the initiation school where they lit a cigarette and threw the match in the veld. A fire started. They tried to extinguish the fire, without success. The fire started at the hillock and spread.
- [20] Mr Isaac Samadula Mofokeng testified that on 23 September 2007 he was with Mr Makwaela at the initiation school. He confirmed that he lit a cigarette with a match and that he threw the match away thinking that it was safe to do so. A fire started. They tried, unsuccessfully, to extinguish it.
- [21] Mr Majoro Ntema, an 87 year old man, testified that he cannot remember the date of the fire. He remembered that the fire started on the defendant's property and burned in the direction of the hillock. He had the defendant's permission to hold initiations on its property. He denied that Mr Griessel was there on the date of the fire.
- [22] Mr Anthony John Emiry, a director of Emross Consulting, is an expert in geographic information systems. He testified about the mapping and spread of the fire based on data that he extrapolated and analysed from satellite images. His



conclusion, in a nutshell, is that there were two distinct fires and not a single fire. The aforesaid conclusion was based largely on visual images that the witness observed. His evidence and observations were strenuously challenged and disputed.

[23] After the defendant closed its case, Mr Van Rooyen, on behalf of the plaintiff, requested me to give judgment in the plaintiff's favour, because the defendant did not rebut the presumption in section 34 of the Act. Mr Ploos van Amstel, on behalf of the defendant, made no submissions.

[24] Mr Mogethi's evidence does not take the matter much further.

[25] I accept Mr Ntema's evidence that he had permission to conduct initiation schools on the defendant's property.

[26] Mr Magosi's evidence is totally at variance with the totality of the facts before me and the defendant's case. If the fire was started by Mofokeng and Makwaela, then it could not have spread as he testified. It could therefore only have spread towards the hillock and not from the hillock. He testified that Grobbelaar was there when the fire raged. This was pertinently denied by the defendant, but Grobbelaar was not called although he could have been of great assistance to bolster Magosi's evidence and the defendant's case.

[27] I find the evidence of Mofokeng and Makwaela very strange indeed. According to them they informed Mr Ntema that they started the fire at the time that the fire was started, but this was not the defendant's case. I also find their evidence that Griessel was not there improbable. It is clear that Griessel attended at the place when the fire started and spread. If everyone knew then that they started the fire, why did the defendant deny that the fire started on its property.

[28] I do not intend to say much about Mr Emiry's evidence. His evidence was based on reports by other persons who were not called as witnesses in respect of the start and spread of the fire. Although I accept his expertise in the interpretation and analysis of satellite data, it was clear that in this matter it was not an easy task. He relied on Dr De Ronde's observations and Dr Vorster's reports. Lastly, the difference in colour combinations may easily lead to misinterpretation of satellite data. It was pointed out to him that different colour combinations might have led to a different interpretation. It was also put to him that the quality of the printer may also influence his interpretation. He conceded it. He also conceded that he will not be able to contradict the evidence of eye witnesses as to where the fire started and that it was only one fire. Faced with the overwhelming evidence pointing to a single fire spreading from the defendant's property, coupled with the concessions made by Mr Emiry I cannot accept his evidence that there were two different and distinct fires.

[29] In my view Griessel's evidence is clear, concise and to the point. It is also corroborated by some of the defendant's witnesses. I say this because some of the defendant's witnesses testified that the fire moved in the direction of the hillock. His evidence in relation to the extent of the spread of the fire to different farms is also corroborated to some extent, by Mr Emiry. His evidence that the fire spread from the place where the initiation school was, was also corroborated, in broad strokes, by the defendant's witnesses.

[30] There are essentially two issues to decide in this matter. Firstly, whether the fire was a veldfire and secondly, whether it was caused by the negligence of the defendant. If I find that it was a veldfire that started or was spread from the property of the defendant, then the defendant is presumed to have been negligent in relation thereto, unless it proves the contrary. The plaintiffs will however have to prove that the veldfire was caused by a wrongful act or omission by the defendant. If I find that it was not a veldfire, then the plaintiffs will not be assisted by the presumption in the Act.

[31] In section 2 of the Act a veldfire is defined as a veld, forest or mountain fire. This fire was not a forest or mountain fire. In **West Rand Estates Ltd v New Zealand Insurance Co Ltd** 1925 AD 245 at 253 Solomon JA said:

“It is easier indeed to determine in a particular case whether a fire is a veld fire than to give a satisfactory definition of the term. But generally it may be said that the expression grasveld conveys the idea of an area covered with veld grass of considerable extent and in its original rough state. Any land, therefore, which had been cultivated or which was immediately connected with buildings, either residential or industrial, would not, in my opinion, be included under the word veld.”

See also Van Wyk v Hermanus Municipality 1963 (4) SA 285 (CPD) at 294A – C; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) at paragraphs [8] – [10].

[32] I harbour no doubt that the area where the fire started, even on the defendant’s version, is indeed a veld. We have, as I said above, visited the scene and it is clearly a veld. There are no houses in the vicinity. Likewise there are no residential or industrial buildings in the area. It is just open veld of uncultivated land. The defendant’s witnesses testified that the fire started and spread from the defendant’s property. I am convinced that the fire started or spread from a veld and that it was a veldfire.

[33] I now consider the issue of wrongfulness. According to Mofokeng and Makwaela they or rather Mofokeng started the fire. They informed the teachers at the initiation school how the fire was started. They were called by the defendant.

The defendants initially denied that the fire started on its property.

[34] It is clear from the evidence of Ntema, Mofokeng and Makwaela that initiates are trained on the property of the defendant. Despite Mogethi's denial, I am satisfied that it was indeed generally known that initiates were trained on the defendant's property.

[35] It is also clear from the totality of the evidence that the defendant allowed persons access to its property, either to visit the dam or as grazing for their livestock or as an initiation school. People had unfettered entrance to the property without any control being exercised.

[36] The defendant must have known or it should reasonably have known that initiates, who are trained on its property, will make fire to cook or for general heat purposes. It should also have known that people will visit the initiates on the property. The chance of a veldfire starting or spreading on its property is therefore increased. It had a legal duty to ensure that initiates, their teachers or their visitors do not start fires on its property or where fires are started on its property, that it should not spread to the adjacent properties.

[37] The defendant is a municipality with a fire fighting section and personnel. It did not have any fire fighting equipment or trained personnel on its property where the danger of fires starting was clear and present. It was unreasonable for the defendant to allow initiates and others to visit and be trained on its property, to make fire there without putting in place any measure to prevent the fire from spreading to other properties.

[38] I am of the view that the plaintiff established on a balance of probabilities that the veldfire was caused by the wrongful act, by allowing the public and initiates unhindered access to its property, or omission, by failing to take any precautionary measures, of the defendant. Public policy would, under these circumstances, demand that the defendant take steps to prevent and or control fires on its property. It did nothing. I have already found that it was a veldfire. The defendant is therefore presumed to have been negligent in relation to the veldfire until the contrary is proved. In my view the defendant did not rebut the presumption of negligence.

[39] I, therefore, find that the fire that damaged the farms mentioned in paragraph [1] of this judgment was caused by the wrongful and negligent act and or omission of the defendant.

[40] There is no reason why costs cannot be granted in favour of the successful party at this stage of the proceedings.

[41] I, therefore, make the following order:

Judgment granted in favour of all the plaintiffs with costs.

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**C.J. MUSI, J**

On behalf of plaintiff:

Adv P.C.F. van Rooyen SC  
Instructed by:  
Symington & De Kok  
BLOEMFONTEIN

On behalf of defendant:

Adv C. Ploos van Amstel SC  
Assisted by:  
Adv N. Snellenburg  
Instructed by:  
Peyper Sesele Inc  
BLOEMFONTEIN