



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 22323/2016

In the matter between:

D[...] D[...]

PLAINTIFF

and

SAFAMCO ENTERPRISES (PTY) LTD

DEFENDANT

Coram: BARENDSE AJ

Heard: 14 to 16 October 2025 and 5 November 2025

Delivered: 19 November 2025

ORDER

1 The action is dismissed.

- 2 Plaintiff shall pay Defendant's costs on the party/party scale as taxed or agreed, with the costs of counsel taxable on scale B;
- 3 The Defendant is liable for the wasted costs occasioned by the postponement on 29 October 2024, and counsel's fees shall be taxed on scale B.

JUDGMENT

Barendse AJ

- [1] This is an action for payment of damages instituted by the Plaintiff as a result of an incident that, according to him, occurred on 17 December 2003 at Klapmuts, Western Cape. Plaintiff was born on 12 December 1995, he was eight years old at the time of the incident, and the action was instituted during December 2016.
- [2] The issues of merits/liability and quantum were separated by agreement between the parties and the trial proceeded on the merits only. An inspection *in loco* was conducted on day one of the trial, before any evidence was led. The minute thereof was admitted into the record as Exhibit C.
- [3] In the Particulars of Claim ("POC"), the Plaintiff pleaded that:
 - (a) The Defendant was the owner of certain immovable property situated at Merchant Street, Klapmuts, Western Cape, more fully described as farm 744, portion 2, Paarl Road ("the farm").

(b) Defendant was the owner and/or lawful possessor in control of a caterpillar machine which was being operated by one of its employees at the farm to clear a portion of land on the farm.

Alternatively;

(c) Defendant engaged the services of a contractor, whose further particulars are unknown to Plaintiff to operate the caterpillar to clear a portion of, and on the farm with the caterpillar.

[4] Plaintiff further averred that on the date and in the circumstances reflected in paragraph [1] above, he was injured when the caterpillar collided with him and that his injuries were negligently and wrongfully caused by the Defendant's employees, acting in the course and scope of their employment with the Defendant.

[5] It was further pleaded that the clearing of a portion of land on the farm by Defendant constituted construction work within the meaning of Section 1 of the Construction Regulations promulgated in terms of the Occupational Health and Safety Act, 85 of 1993 ("the Act").

[6] The Plaintiff alleged and relied upon the following grounds of negligence on the part of the Defendant and/or its employees:

(a) they knew or ought to have known that children, in particular the Plaintiff, had access to the portion of the farm where the construction work was being carried out by the caterpillar;

(b) the operator of the caterpillar failed to ensure that children, in particular the Plaintiff, did not have access to the construction site where the caterpillar was working when he could and should have done so;

- (c) they failed to take any or adequate steps to avoid the collision when they could and should have done so;
- (d) the operator of the caterpillar failed to keep a proper lookout;
- (e) they breached the provisions of Section 9 of the Act by failing to ensure that the plaintiff was not exposed to hazards when they knew or ought to have known that it was dangerous to allow the construction work to take place in circumstances where they knew or ought to have known that children, in particular, the plaintiff, may be directly affected by the construction work conducted by the caterpillar and thereby exposed the plaintiff to hazards to his health and safety;
- (f) they failed to prepare a health and safety specifications plan for the work to be performed by the contractor or to require the contractor to prepare a health and safety specifications plan for the construction work to be carried out by the caterpillar as required by Regulation 5 and 7 of the Construction Regulations promulgated under the Act;
- (g) they failed to discuss and negotiate with the contractor the contents of the contractor's health and safety plan as contemplated in Regulation 7(1) of the Construction Regulations and thereafter, to finally approve the health and safety plan for implementation as required by Regulation 5(1)(L) of the Construction Regulations;
- (h) they failed to stop the contractor from executing the work when they knew or ought to have known that the work was not being carried out in accordance with a suitable health and safety plan and that the failure to do so posed a threat to the health and safety of the plaintiff as required by Regulation 5(1)(q) of the Construction Regulations;

- (i) they failed to ensure that the contractor managed and supervised the construction work adequately or at all as required by the provisions of Regulation 8 of the Construction Regulations;
- (j) they failed to ensure that the contractor had organized the construction site in such a way that pedestrians, in particular, the Plaintiff, could move safely and without a risk to health as required by Regulation 23(2)(b) of the Construction Regulations;
- (k) they breached the provisions of Regulation 2C of the General Safety Regulations promulgated in terms of the Act by allowing children, in particular, the plaintiff, to enter the construction site where the health and safety of the children, in particular the plaintiff, was at risk;
- (l) they failed to ensure that notices were posted at the entrances to the construction site prohibiting the entry of unauthorized persons, more particularly the plaintiff, to such construction site.

[7] Four witnesses were called to testify on behalf of the Plaintiff. The salient features of the evidence of these witnesses will be summarised in the following paragraphs.

[8] Ms Seugnet Nelson testified that during 2004, she was employed as a candidate attorney by Plaintiff's attorneys of record. Her principal at the time was Ms Van Heerden who was and remained the Plaintiff's attorney of record. On 23 March 2004, some three months after the incident, Ms Van Heerden handed her a Memorandum containing certain instructions.¹ The instructions included requests to visit the scene with the client, establish from the police station at Klapmuts whether a docket had been opened, obtain the registration

¹ The Memorandum is found at p78 of Exhibit A.

of the caterpillar, establish who the owner thereof was and to photograph the scene at which the incident occurred and if possible, photograph the caterpillar.

[9] The witness reported on her attendances in a handwritten file note.² In the note, she recorded that she visited the scene with Plaintiff's grandfather and took photographs of the open field where the incident occurred. Plaintiff's grandfather pointed the location of the scene out to her. Ms Nelson took seven colour photos which are contained at p8A of Exhibit A. She took the photos while standing in Merchant Street.

[10] The witness mentioned that a cable stay that supports an upright electric pole is faintly visible on the right side of photo 3. Photos one and two were taken more towards, what was at the inspection and during the trial referred to as the mountain side. Photos three and four were taken more towards what was at the inspection and during the trial referred to as the N1 side. She also pointed at a wired fence that is visible on photos one and two. This fence was on the Merchant Street side of the open field. Her evidence in chief was that this fence was broken at places and "flat"/collapsed at some places. The witness stated that there was no fence on the N1 side of the open field.

[11] Ms Nelson expressed the opinion that to her as a lay person, it appeared that the open field was disturbed as it looked sandy and not natural. She indicated that this was also visible on the photos.

[12] During cross-examination, the witness stated that she was unable to say how the Plaintiff's grandfather knew the location of the incident. She also admitted that the broken and collapsed sections of the fence were not visible

² The note is at p80 of Exhibit A.

in the photos. It was put to her that the state of the vegetation could have been caused by the summer season, which typically is a hot, dry season in the Western Cape. The photos were taken during March, after the summer season. The witness acknowledged that and admitted that she was not an expert on this topic.

[13] Ms Nelson further testified with reference to a typed Memorandum produced by her for Ms Van Heerden.³ In this Memorandum, she recorded that the Klapmuts police did not open a docket for the incident because it did not occur on a public road. They also had no information on the caterpillar. She established that the manager of the land on which the incident occurred was a Mr John Lawson.

[14] Her Memorandum reflects that she visited Mr Lawson who told her that he owned the land on which the incident occurred. He also told her that the "implements" were not his property. This was a reference to the caterpillar. Mr Lawson mentioned to her that a friend, one JJ Mouton from time to time tested his machinery on his land/field and this was what happened on the day of the incident. Mr Lawson provided a mobile telephone number for this Mr JJ Mouton but she was unable to reach him on this number. She assumed that Mr Lawson provided her with a wrong telephone number.

[15] The second witness for the Plaintiff was his attorney, Ms Cornelia Van Heerden. She read a typed file note made by her into the record.⁴ This note was dated 23 October 2024 and related to a telephone call between her and Mr Conrad Coetzee, the Defendant's attorney. The telephone call mainly related to a supplementary discovery affidavit by the Defendant dated 21 October 2024. At that stage, the action was set down for trial on 29 October

³ The Memorandum is at p81 of Exhibit A.

⁴ The note is at p46 of Exhibit A.

2024. The supplementary discovery introduced documents relating to a subdivision of a portion Farm 744 into two sections measuring 7.47ha and 13.88ha respectively, and the sale of the 7.47ha part thereof, by Defendant to one Mr Francois Mouton.⁵ It is not necessary to repeat the entire contents of the note. Ms Van Heerden wanted to establish whether there was a dispute as to who owned the land on which the incident occurred. The deed of sale, clause 61 provided for possession and risk to pass to the purchaser upon payment of a deposit of R50,000. Mr Coetzee intimated to Ms Van Heerden that the two persons who concluded the deed of sale, Mr Neethling on behalf of Defendant and Mr Mouton, the purchaser, passed away in 2005 and 2004 respectively. Mr Coetzee further indicated that the purchaser apparently paid the deposit but passed away before the full purchase price was paid. Ms Van Heerden stated that in view of the supplementary discovery and the dispute around who owned the land on which the incident occurred, she would appoint a land surveyor to determine whether the location pointed out by her client formed part of the larger portion (13.88ha) or the smaller portion (7.47ha) of the farmland. This telephone call was followed up by a letter from her to Defendant's attorney, confirming what was discussed on the call.⁶

[16] The witness further testified about a telephone call between her and Mr Coetzee on 28 October 2024 during which he informed her that the incident occurred on the smaller (7.47ha) portion. She referred to her file note for what was discussed on the call.⁷

[17] The witness testified about her letter dated 24 April 2025 to Defendant's attorney in which reference was made to a joint inspection held between the

⁵ The deed of sale is at p19 of Exhibit A and the diagram at p 32 thereof.

⁶ The letter is at p48 of Exhibit A.

⁷ At page 50 of Exhibit A.

parties on 23 April 2025.⁸ At this inspection, the Defendants pointed out that the incident indeed occurred on the larger portion and not the smaller portion of the land. Further, in an email of 25 April 2025 at 08:07, the Defendant's attorney informed Ms Van Heerden that it was admitted that the incident occurred on Portion two of the land (the larger section).

[18] Ms Van Heerden also testified about a file note relating to her visit to the premises of the Defendant on 1 October 2015.⁹ According to this note, she spoke to unknown persons at Defendant's factory. They confirmed to her that the land on which the incident occurred belonged to Mr John Lawson but they did not know who owned the caterpillar. While on the premises, a person called Mr Lawson and she spoke to him. He mentioned on this call that the caterpillar belonged to one Wouter and his business was called "J&J". The said Wouter was testing the caterpillar /had it tested on the day and this was how the incident occurred. He also mentioned that a "No Entry" sign was on display and that the children were not allowed access to the area where the incident occurred.

[19] During cross-examination, the witness was referred to two pages of a RAF1 Claim Form at page 63 of Exhibit B. These pages were completed in handwritten fashion and the witness stated that she was not aware who completed this but that it was not her. These documents, completed during March 2024 reflected the owner of the motor vehicle, the driving of which the claim arose from, as "Mnr Lawson". It reflected the driver as Albert Kappa. The motor vehicle was described as a "caterpillar" (sic) and no registration for it was reflected. The witness indicated to the court that a claim against the Road Accident Fund was not pursued.

⁸ Exhibit A, p75.

⁹ The note is at p83 of Exhibit A.

[20] Defendant's counsel referred the witness to the two pages of the Occurrence Book of the South African Police Services at Klapmuts.¹⁰ It contained an entry about a report of the incident to a Sergeant Abrahams and reflected that a yellow bulldozer collided with one D[...] D[...] on an open field next to the SAFAMCO farm. The driver of the bulldozer was named as one Albert Kappa. The witness was asked whether any steps were taken to trace the said Albert Kappa. She indicated that some of her staff unsuccessfully tried to trace the witness on Face Book but no other steps were taken.

[21] The witness was, during cross examination, also referred to trace information reports discovered by the Plaintiff in respect of one Elmaree Lawson and John Lawson.¹¹ She conceded that no similar traces were done for JJ Mouton or Albert Kappa and when JJ Mouton could not be reached on the number supplied by Mr Lawson, no further efforts were made to trace him.

[22] Plaintiff gave evidence too. He testified that he was born on 12 December 1995 and is currently 29 years old. At the time of the incident, he was eight years old and in Grade 3. Him, his friends and other children in the community regularly played on the open field in question. He lived nearby, at 2[...] M[...] Street. On Wednesday 17 December 2003, it was school holidays already and him and 10-12 friends aged between 8 and 10 years old went to play on the field and when they got there, there was a caterpillar cleaning/ scraping the land. He identified the location where the caterpillar was working with reference to photos one and two.¹² According to him, the caterpillar created heaps of sand which was then loaded onto a truck. These activities

¹⁰ P 65-67 of Exhibit B.

¹¹ P 67-73 of Exhibit B.

¹² Exhibit A p 8A.

carried on from the Monday 15 December through to Wednesday, including Tuesday 16th December even though this was a public holiday.

[23] At first, they played soccer and later, they played on the sand heaps that the caterpillar operator created. They covered themselves under the sand so that the caterpillar driver would not see them and when the caterpillar approached the sand heap, they would uncover themselves and run away. On one occasion, when his body was halfway covered in sand, he was unable to free himself up and get out of the way and in the process, the caterpillar struck him.

[24] He also testified that at the time, there was a wired fence on the Merchant Street side of the open field. This fence was broken at places and flat at other places. They were able to walk over the flat parts without having to climb over the fence. He pointed at photo one and indicated that the incident happened to the left of the triangular pole that is visible in the photo.

[25] It was put to him that, according to the Defendant, there was a fence on the N1 side of the open field at the time of the incident. He denied this. His next memory after being struck by the caterpillar was being covered with a blanket. He recalled that the caterpillar was running on chains, not wheels.

[26] He did not know the driver of the caterpillar. When the contents of p65 of Exhibit B was put to him, with specific reference to the entry that the children were previously warned not to play on the field, he denied that they were ever so warned. During re-examination, he admitted that Mr Lawson would chase them off the field when seeing them there. He also denied that there was any warning signs posted in the area. He knew Mr Lawson and regarded him as the owner of the land. He knew that it was wrong to climb over a fence and enter the property of another without consent.

[27] Ms A[...] D[...], the Plaintiff's mother, also gave evidence. She pointed at the aerial photo on page nine of Exhibit A and indicated that the building marked with orange lines is a church and the buildings to the right of the church are the building of Mr Lawson, the owner of the land. Mr Lawson lived opposite the church at the time. She also testified that the children in the area always used to play on the field.

[28] On Monday, 15 December 2003, while on her way to work, she observed a yellow caterpillar in the area. It had blade wheels. When she returned from work the evening, she saw that the part of the field was scraped. The caterpillar continued working on Tuesday, 16 December. On Wednesday, 17 December and while she was at work, her father called her to say that she had to come home immediately as D[...] got hurt badly.

[29] She was working in Durbanville at the time, and her employer took her to Klapmuts. Upon her arrival, she found D[...] covered under a blanket. The police were there, and the caterpillar was still on the scene. Mr Lawson was also at the scene and was strongly reprimanding the driver of the caterpillar. She testified that there was never a fence on the N1 side of the field between Merchant Street and the pole visible on the photos at pages 223 and 228 of Exhibit B.

[30] Importantly, she testified that never before Monday 15 December 2003 was there any activity on this open field. It was never cultivated, it was never used for farming, and it was never cleared. Since the incident, the land has similarly never been used for any farming activities and remained unused as before. After Ms D[...] evidence, the Plaintiff's case was closed.

[31] Mr Adolf Neethling was the first witness for the Defendant. He testified that his father, Francois Neethling was the sole shareholder and director of SAFAMCO. His father acquired the piece of land in question during the eighties. It was purchased as an investment, and the land was initially vacant and unused. His father was a building contractor, and they resided in Kraaifontein at the time. At a stage during the nineties, his father asked his sister, Elmaree and her husband, John Lawson to live on the property so that there was someone to look after it. There was a building, later used as a factory/workshop, and some labourer cottages on the property. During the mid-nineties, his father had wooden pallets made on the premises and this was sold to fruit exporters.

[32] Later, while Ms Elmaree Lawson and Mr John Lawson were living on the property, a business manufacturing steel window frames was started by them. The witness moved to Bloemfontein during 1997. His father passed away during 2005, and the witness returned to Cape Town during 2006. After his father's death, Mr Neethling, his sister Ms Elmaree Lawson and mother, Ms Elizabeth Neethling became the shareholders of SAFAMCO. He attended to some of the administration of the business.

[33] Much of this witness' evidence and the cross examination by Plaintiff's counsel centred around when and how the documents relating to the subdivision and sale of a portion of the land to Mr Francois Mouton were discovered and the lateness at which it was discovered during these proceedings. Not much turns on this as the Defendant has conceded that the incident occurred on the large (13.88ha) portion of the land, of which it was the owner.

[34] The witness testified that while he was resident in Bloemfontein, he would occasionally visit Cape Town and would then visit his sister and her husband. He used to drive along the Old Paarl Road and mentioned that the tractors and machinery of Mr Mouton were always visible from this road. His father never owned tractors or caterpillars. He was not present when the incident occurred as he was living in Bloemfontein at the time, but his impression has always been that the incident occurred on the large portion of the land.

[35] Mr John Lawson was then called as a witness for the Defendant. He was the last witness in these proceedings. He testified that he married Ms Elmaree Neethling, the daughter of the late Mr Francis Neethling during April 1999. Him and his wife then lived in Durbanville and moved to the smallholding owned by SAFAMCO on 1 September 1999 at the request of his late father-in-law. He pointed at the aerial photo on p9 of Exhibit A and indicated that he and his wife occupied a house opposite the church to which was referred in paragraph 27 above. His late father-in-law requested him and his wife to move to the smallholding so that it wouldn't stand vacant and they were free to conduct any business of their choosing on the premises. When referred to the Memorandum by Ms Nelson,¹³ he stated that by "...op sy grond..." (his land) he meant not on his land but the land that Mr Mouton purchased from his father-in-law. The witness indicated that he did not own the land in question.

[36] According to him, the Mr JJ Mouton whom he mentioned to Ms Nelson never asked for permission to test his machinery on the land/open field. The witness said that he had no independent recollection of the conversation with Ms Nelson but did not deny talking to her.

¹³ Exhibit A p 81.

[37] When the witness was referred to the file note by Ms Van Heerden on page 83 of Exhibit A, he indicated that the workers would not have been on the premises on the day of the incident, as the business closed on 10 December every year and reopened on 10 January. He mentioned that it was possible that he had the telephone conversation to which the file note refers with Ms Van Heerden. He stated that the "Wouter" whom he may have mentioned to her was a business associate of the Moutons. He further stated that the late Francois Mouton to whom reference was made in paragraph 33 above was the father of JJ Mouton and this explains the reference to "J&J" in the note. He testified that the Municipality erected a fence that ran parallel to Merchant Street right up to where their factory was located. This was the fence visible on photos one and two,¹⁴ and according to him, the Municipality affixed "No Entry" signs right along this fence. He also stated that children would often climb over the fence and play on the open field. Whenever he saw children doing this, he would chase them off the field, mainly to avoid them making it a playground permanently.

[38] According to the witness, he was at home on the day of the incident. Children came to call him, and he went to the scene. Upon his arrival, he saw a boy lying there and he admitted that he reprimanded the driver of the caterpillar for not paying attention to what he was doing. He did not know the driver. The only person known to him who operated the machinery of the Mouton's was one Nico.

[39] Under cross-examination, and when referred to the memorandum on p81 of Exhibit A, the witness testified that people in the vicinity regarded him as the owner of the land. He said it was possible that he had told Ms Nelson

¹⁴ P 8 A of Exhibit A.

that he was the owner of the land. He admitted that he would have told her that JJ Mouton used to test his machinery on this land. This explained the reference to JJ Mouton in the Memorandum.

[40] He was cross-examined extensively on whether the incident occurred on the small section or the large section of the land. The witness explained that his late father-in law often mentioned that he sold "that" portion of the land to Francois Mouton and would point in the direction of the smaller section. He never saw maps of the land and never knew exactly where the boundaries were. The witness did not agree that the incident occurred at the location pointed out by the Plaintiff. He was asked by Plaintiff's counsel to mark on the aerial map on page 9 of Exhibit A where, according to him, the incident occurred. He at first drew a red line and when prompted again, made a mark. The mark made by him indicated that the incident occurred on the large portion. The red line appeared to depict the boundary between the small and large portion of the land.

[41] Under cross examination, the witness stated that he did not believe that Mouton would have crossed the area where he drew the red line and enter the large section of the land without permission. He said that Mouton did not have his permission and he did not know whether he had the late Mr Neethling's permission.

[42] It was put to the witness that he must have known that the caterpillar worked on the open field because it was there for three days. The witness denied that he was aware thereof. It was also put to him that the Defendant appointed the person/s to clean the field. The witness denied this too. It was further put to the witness that the appearance of the soil on photos one to three and five to seven constituted uncontroverted evidence that the field was

cleaned. The witness did not admit this either. This concluded the evidence for the Defendant and it closed its case.

Application in terms of Rule 28(10)

[43] The evidence was concluded on 16 October 2025, and the matter was postponed to 5 November 2025 for argument. Upon resumption of the matter, the Plaintiff applied for leave to amend the POC in terms of Rule 28(10) as follows:

(a) by adding at the end of paragraph 3.3 thereof *'alternatively authorised and/or permitted the operation of the caterpillar to clear a portion of land on the farm.'*

(b) by deleting paragraph 5 thereof and substituting it with the following:

"5. The clearing of a portion of the land on the farm as aforesaid constituted construction work within the meaning of Section 1 of the Construction Regulations promulgated in terms of the Occupational Health and Safety Act No. 85 of 1993.

(c) by deleting paragraph 6.2 and the substitution thereof with the following:

"6.2 They failed to ensure children, in particular the Plaintiff. Did not have access to the construction site where the caterpillar was working when they could and should have done so."

[44] Plaintiff submitted that the amendment was aimed at aligning the pleadings with the evidence, specifically the evidence referred to in paragraph 41 above. Defendant objected to the amendment on several grounds. One of

the disputes was whether the Court should allow an application of this nature and at this stage of the proceedings to be made orally from the bar without a Rule 28(4) application that complied with Rule 6. The Court considered the judgments in *De Kock v Middelhoven*¹⁵; *Booyesen v Followers of Christ Church*¹⁶ and *Swartz v Van DerWalt t/a Sentraten 1998 (1) SA 53(W)*.¹⁷ It is clear from these authorities that not every application for amendment has to be brought formally in terms of Rule 6 but that the Court has a discretion that should be exercised on a case by case basis, taking into the account the nature of the amendment and the subject matter of the particular case.

[45] The Court held that in the circumstances of this case, it was incumbent upon it to receive and consider the Plaintiff's application from the bar without the need for a formal application. The application for amendment was then considered but dismissed with costs, on the bases that the amendment, if allowed at this late stage, would grant to the Plaintiff an unfair tactical advantage and would materially prejudice the Defendant. In particular, the amendments would materially alter the case that the Defendant had to meet at a stage when both parties had already closed their cases. The amendments, if allowed would have imposed additional duties to rebut on the Defendant.

The Parties' cases

[46] During argument, counsel for Plaintiff conceded that the evidence did not sustain the allegations contained in paragraphs 3.2 and 3.3 of the POC. These allegations pertained to Defendant having been the owner or lawful possessor of the caterpillar which was being operated by one of its employees, alternatively, that Defendant engaged a contractor whose particulars were

¹⁵ 2018 (3) SA 180 (GP).

¹⁶ (6195/2019, 22079/2016 [2021] ZAWCHC 161.

¹⁷ 1998 (1) SA 53 (W).

unknown, to operate the caterpillar. The effect of this is that the Plaintiff was no longer contending for vicarious liability on the part of the Defendant on the aforesaid grounds.

[47] Argument on behalf of the Plaintiff was that the Defendant admitted to ownership of the land on which the incident occurred, that the evidence by Plaintiff's witnesses was that the caterpillar was being operated on Defendant's property over a period of two and a half days, and that the activities in which the caterpillar was engaged constituted "construction work" as defined in regulation 1 of the construction regulations of 2003, promulgated in terms of the Occupational Health and Safety Act of 1993. Plaintiff testified that these activities entailed creating heaps of sand/soil which were loaded onto a truck and transported away. The aforesaid regulations define "construction work" as *'the moving of earth, clearing of land, the making of excavation, piling or any other similar type of work.'*

[48] The land/open field in question was flanked by a residential area on two sides and the evidence was that children regularly played on this land/field. The POC contained allegations to the effect that the Defendant and its employees were negligent in that they knew or ought to have known that children, in particular the Plaintiff, had access to the portion of the farm where the construction work was being carried out by the caterpillar, that they failed to take any or adequate steps to avoid the collision when they could and should have done so, and that they failed to stop the construction work when they became aware of the presence of children, particularly the Plaintiff, in close proximity to the caterpillar.

[49] The Plaintiff submitted that Mr Lawson would have been aware of the caterpillar's presence on the farm and that it was inconceivable that he would not have been aware of these activities being carried out over two and a half

days. It was further submitted that the site at which the caterpillar was working was near Mr Lawson's house and because it was mid-December, it was inconceivable that he would have remained indoors during that period. The Court may add that Mr Lawson's house, as observed during the inspection in loco was some distance away from the site of the incident, albeit that this distance was not measured. There was no request by either party for this distance to be determined.

[50] Plaintiff further submitted that Mr Lawson, as the person in control of Defendant's property was, or ought to have been aware of the work being carried out by the caterpillar, that he was aware that children frequented and often played on the open field and that he was or ought to have been aware of the dangers that the activities of the caterpillar posed to children. Consequently, so the argument went, he was under a duty to prevent children from entering the property or he had to stop the caterpillar from working. This he failed to do, and these omissions were wrongful and negligent.

[51] Plaintiff referred the court to the judgment in *Cape Town Municipality v Paine*,¹⁸ where it was said that: ' *The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discharged.*'

¹⁸ 1923 AD 207 at 216.

[52] Plaintiff's counsel further referred to *Farmer v Robinson Gold Mining Co. Ltd*¹⁹ where, dealing with trespassers it was held that: ' *It is not that the fact of trespass deprives the wrongdoer of all right to protection. That cannot be so, because if an owner is in fact aware of the presence of a trespasser, he is bound to observe a certain degree of care. The reason why an owner as a general rule is not obliged to be careful in the case of a trespasser is that he cannot be reasonably expected to anticipate his presence. The ordinary reasonable man would under such circumstances, take no precautions and the failure to take any could not constitute culpa*'. It was then submitted that the presence of the young boys as trespassers was reasonably foreseeable to Mr Lawson, and he would have been under a legal duty to take steps to prevent them from entering upon the place where the caterpillar was working.

[53] There was no evidence before the court that Defendant was the owner or possessor of the caterpillar, that the Defendant employed the driver thereof or that it appointed a contactor to carry out the work performed by the caterpillar.

[54] Defendant argued that the Plaintiff had the onus to prove all the elements of the delict on which it relied as a cause of action. It referred the Court to the well-known case of *Kruger v Coetzee* in support of the submission that even where a plaintiff succeeds in showing that the reasonable person in the position of the defendant would have foreseen as a reasonable possibility his conduct injuring the plaintiff and would have taken steps to guard against such occurrence, the onus remains on plaintiff to show that there were further steps that he could and should reasonably have taken. Defendant submitted that in the present case, Mr Lawson testified that the municipality fixed the fence between Merchant Street and the open land. This

¹⁹ 1917 AD 501 at 522.

fence was still visible on the photos taken Ms Nelson. Although Mr Lawson testified about warning/no entry signs posted along the fence, it is apposite to mention that these were not visible on the photos and was disputed by Plaintiff's witnesses. Plaintiff, under cross examination admitted that when Mr Lawson occasionally drove past the area and saw them playing on the field, he would chase them off. For Defendant, it was argued that Plaintiff failed to prove that there were further steps that Defendant should reasonably have taken and that Plaintiff failed to discharge this onus.

[55] Both parties referred the Court to the case of *Herschel v Mrupe*²⁰. It is apposite to quote the following passage appearing at page 490 thereof: '*After all, law in a community is a means of effecting a compromise between conflicting interests and it seems to me that according to the principles of Roman Dutch law the Aquilian action in respect of damnum injuria datum can be instituted by a plaintiff against a defendant only if the latter has made an invasion of rights recognized by the law as pertaining to the plaintiff; Apart from that, loss lies where it falls. I do not invade the recognized rights of the burglar or the marauding boys; On the contrary they invade my rights. I cannot understand how by their unlawful conduct they can virtually impose a servitude upon my property. Whether the injury to them is foreseeable therefore or not, they cannot- apart from dolus- sue me. The unwitting trespasser who falls into a pit dug near the road is obviously in a different position; the distinction is not relevant to the present inquiry and to pursue it will take me too far afield. It is sufficient to say that the pit is a trap and a man is not outlawed because he unwittingly and excusably deviates from a path in the dark. By driving a motor car in the street, I exercise equal rights with all other users of the road; but if I do so negligently and dangerously, I invade the rights of other users by curtailing their equal rights. If I sell a*

²⁰ 1954 (3) SA 464 (A).

powerful motorcycle to an impulsive young man, experience and the actuarial tables tell me that there is not only a possibility but a distinct probability that sooner or later he will be involved in a crash. As a reasonable man I can foresee harm to him and to others. Responsibility for his accidents will be his own, however not mine.'

Reasoning and Findings

[56] The Plaintiff's mother testified that for as long as she has lived in the area where the incident occurred, she has never observed any activity of farming, construction, or the like, on the open field in question. It is common cause that the piece of land, although privately owned, is vacant and has never been cultivated, developed or used by the owner. It is further common cause that the children in the community have always used the field as a playground, even at a time when it was fenced off. At the inspection in loco, it was observed that the field is presently not fenced off and that portion thereof is being used as an informal cricket pitch, presumably by the young people in the community. This comes as little surprise, given the lack of recreational facilities in this area.

[57] The Plaintiff's attorneys made various efforts to identify the driver of the caterpillar but were unable to do so. Efforts were made to establish details of the caterpillar and the owner thereof, but the South African Police Services did not obtain or record such details. Other than a reference to the driver as a Mr Kappa, the occurrence book at the police station contained no details of the driver or owner. As appears from paragraph [19], Plaintiff's attorneys even contemplated a claim against the Road Accident Fund at a stage on the basis that Lawson was the owner and Kappa the driver of the caterpillar. This claim

was presumably not lodged because the caterpillar did not fall within the definition of a motor in the Road Accident Fund Act, 56 of 1996. A claim against the owner and driver of the caterpillar would have taken on an entirely different complexity, compared to the present action.

[58] The Defendant owns the land in question but its activities always have been confined to a very small portion thereof.²¹ Initially, there was a dispute over whether the incident occurred on the larger portion owned by Defendant or whether it occurred on the smaller portion that the late Mr Neethling had sold off to Mr Mouton. Mr Adolf Neethling indicated that he was always under the impression that it occurred on the larger portion. Mr Lawson at first contended that it occurred on the smaller portion but later conceded that it occurred on the Defendant's portion.

[59] Mr Lawson testified that he was and is still not sure where exactly the boundaries between the large portion and the small portion were. He conceded that the community always regarded him as the owner of both portions. Plaintiff argued that the Court should reject Mr Lawson's evidence in its entirety, save for concessions made by him. The grounds of wrongfulness, negligence and causation on which Plaintiff relies require a finding that Mr Lawson was aware of the caterpillar's activities or that he commissioned these activities. There was no evidence to sustain such a finding.

[60] The Court cannot on a balance of probabilities find that Mr Lawson was aware of the work being carried out by the caterpillar or that he commissioned this work. There was unchallenged evidence by Mr Neethling that the machinery owned by Mouton were visible from Old Paarl Road, a road that

²¹ See paragraphs 31 and 32 *supra*.

he regularly used when visiting the Lawsons. Mr Lawson consistently, since Ms Nelson and Ms Van Heerden spoke to him over 21 years ago, referred to the caterpillar having been owned by Mouton. There was no evidence that Defendant ever owned or used caterpillars. In the absence of evidence that Mr Lawson commissioned the work or was aware thereof, the obligations under the Occupational Health and Safety Act and Construction Regulations of 2003, applicable to a contractor, employer or agent as defined, were also not triggered. Can it be held that Mr Lawson ought to have been aware of these activities? His evidence was that he was not aware and there is no reason to reject this. The mere fact that the activities were carried out over a few days does not justify such a finding. His home was not in such proximity to the scene that he ought to have become aware of the caterpillar's activities. One must be careful not to impute the conduct of the driver or owner of the caterpillar to Mr Lawson.

[61] While Mr Lawson was not the best of witnesses, his evidence cannot be rejected in its entirety. The Court did not accept his version of where the incident occurred. His evidence that a fence and a gate on the N1 side of the open land existed at the time of the incident was also not accepted. Plaintiff suggested that Lawson's version about this fence and gate that existed and his confusing evidence about the site of the incident justify the rejection of all his evidence. His explanation for his uncertainty over the exact boundaries between the properties was plausible one. His evidence about the fence mentioned above was not supported by any of the other witnesses but given that there was ultimately no dispute over where the incident occurred not much turned on this and this is not a basis on which to reject all his evidence. His demeanour was also not that of a lying and evasive witness.

[62] Mere ownership of a piece of land located near a community and accessible to children cannot, in the context of this case, clothe Mr Lawson or the Defendant with the duties contended for by the Plaintiff. The Court cannot find that this communal coexistence imposed such duties on the Defendant. The position would have been different if the property posed potential hazards such as animals or dangerous equipment. Further, the *boni mores* of society permeated by our Constitutional values did not on the facts of this matter impose the stringent duties contended for by Plaintiff, on the Defendant, merely based on ownership of land. In the absence of such legal duties, omissions on the part of the Defendant to take steps to prevent the incident was not wrongful. The convictions of the community would not have expected that the Defendant be visited with liability to the Plaintiff. For the above reasons, the Court finds that the element of wrongfulness was not established.

[63] Wrongfulness and negligence must be considered and determined separately. In *Minister of Safety and Security v Van Duivenboden*,²² it was held that negligence on its own is not inherently unlawful. In *Gouda Boerderye BK v Transnet*,²³ it was held that: '*While conceptually the enquiry 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'. Joubert, in *The Law of South Africa*²⁴ cautioned that the above approach is only tenable if it means that

²² 2002 (6) SA 431 (SCA) at para 12.

²³ 2005 (5) SA 490 (SCA).

²⁴ Second Edition, Part 8 paragraph 59, p81-82.

negligence does not presuppose the material existence of wrongfulness. It is also only tenable if it postulates a position that a person's conduct could only be negligent, if it was wrongful too.

[64] The Court was mindful that while factors relevant to wrongfulness may also be relevant to negligence that these enquiries are viewed from different perspectives and for different purposes.²⁵ It is indeed so in this matter that the factors relevant to these two elements of delict intersect.

[65] In *MTO Forestry (Pty) Ltd v Swart NO*,²⁶ we were reminded that '*...the reasonable man is not a timorous faintheart 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.*' On the facts of this matter, the Court finds that the reasonable person in the position of the Defendant and/or Mr Lawson would not have foreseen this incident and the harm caused thereby as a reasonable possibility and would accordingly not have taken steps to guard against such occurrence. It follows that wrongfulness and negligence were not established and the action is dismissed.

[66] Both counsel made submissions around costs. The matter was on 29 October 2024 postponed because of the late discovery by Defendant of the documents relating to the sub-division and sale of the small portion of the land. By agreement, the costs of that postponement stood over for later determination. On 5 May 2025, the matter was again on the roll for trial and was "crowded out". Those costs were costs in the cause. The costs should follow the result and the action is dismissed with costs, save for the wasted

²⁵ Joubert *supra* at paragraph 59, p81.

²⁶ 2017 (5) SA 76 (SCA) at paragraph 45.

costs occasioned by the October 2024 postponement, which costs shall be borne by the Defendant.

Order

- (a) The action is dismissed;
- (b) Plaintiff shall pay the Defendant's party/party costs as taxed or agreed, with counsel's fees taxable at Scale B;
- (c) The Defendant is liable for the wasted costs occasioned by the postponement of 29 October 2024, and counsel's fees shall be taxed on Scale B.

RD BARENDSE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: RD Mc Clarty SC
Instructed by: Heyns & Partners
CS van Heerden

For defendant: M van der Berg
Instructed by: SDP Attorneys
C Coetzee

