



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

JUDGMENT

Not reportable

Case no: **20182/2021**

In the matter between:

PLATTEKLOOF SAAGMEULE CC

PLAINTIFF

and

SWELLENDAM PLASE (PTY) LTD

FIRST DEFENDANT

LOURENS JOHANNES VAN EEDEN

SECOND DEFENDANT

Coram: JONKER AJ

Heard: 31 July 2025, 25 and 28 August 2025, 19 November 2025

Delivered: Electronically on 9 January 2026

Summary: Delictual claim for veld fire damage dismissed. Plaintiff failed to prove defendants occupied or controlled farm when fire started. Third entity was actual occupier and not party to the proceedings. No legal duty arose.

ORDER

1. The plaintiff's claim is dismissed.
 2. The plaintiff is ordered to pay the defendants' costs on scale C.
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JUDGMENT

JONKER AJ:

INTRODUCTION

[1] The plaintiff claims damages in delict arising from a fire that started on 8 July 2020 on a portion of the farm known as Platte Kloof, in the Riversdale district. The fire subsequently spread to the plaintiff's property on 9 July 2020, causing damage. The plaintiff instituted an action against the first and second defendants, jointly and severally, for damages flowing from this incident.

[2] By agreement between the parties, the Court ordered a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court, with the issue of merits to be determined separately from quantum. The parties further agreed upon, and the Court made an order on 28 August 2025 recording a defined formulation of the specific issues to be determined in this hearing. The terms of that order limit the scope of this Court's enquiry, and this judgment is accordingly confined to determining only those issues expressly identified therein.

[3] Those issues relate principally to occupation and control of the property, the existence of a legal duty, negligence, and causation.

THE FACTUAL BACKGROUND

[4] As mentioned above, on 8 July 2020, a controlled burn was initiated on the farm Platte Kloof. The fire escaped control and spread to neighbouring farms, including the plaintiff's property, on 9 July 2020, causing damage to its plantation.

[5] At all material times, the farm Platte Kloof was registered in the name of Dahlia Investment Holdings (Pty) Ltd (Dahlia). To understand the issues in this case, it is necessary to clarify the corporate structure and relationships. The first defendant is a holding company that concluded a share purchase agreement on 3 June 2020 relating to the acquisition of shares in the entity holding Platte Kloof. The LJ van Eeden Boerdery (Pty) Ltd (Boerdery) is a separate operating entity within the Van Eeden group of companies that conducts farming operations. The second defendant occupied a dual role: he was both the sole director of the first defendant and an employee of Boerdery. As will become apparent, this dual role is central to understanding the issues in dispute.

[6] The controlled burn was conducted by employees of Boerdery, which included Mr Vaaltyn, on instructions of the second defendant acting in his capacity as Boerdery's operations manager.

THE PLAINTIFF'S CASE

[7] The plaintiff pleads, in its particulars of claim, that either the first defendant, or the second defendant, or both defendants jointly, were in occupation of and exercising control over the farm Platte Kloof at the relevant time of the fire. The plaintiff further alleges that the second defendant was acting either: (a) as the sole director of the first defendant, on behalf of the first defendant and within the scope of his employment and in furtherance of the interests of the first defendant; or (b) in his personal capacity.

[8] The plaintiff contends that a legal duty rested on the defendants, jointly and severally, and that their negligence, jointly and severally, caused the fire to start and spread, resulting in damage to the plaintiff's property.

THE DEFENDANTS' CASE

[9] The defendants deny liability on four principal grounds: (a) that neither the first nor second defendant was in occupation of Platte Kloof when the fire started; (b) that no legal duty as pleaded by the plaintiff rested on them; (c) that they were not negligent in respect of the start or spreading of the fire; and (d) that there is no causal link between the plaintiff's damages and their conduct.

THE FUNDAMENTAL ISSUES

[10] The central question is whether the plaintiff has proven that the first or second defendant was in occupation of and exercising control over Platte Kloof on 8 July 2020, when the fire started, and that a legal duty arose and liability can be established.

[11] Related to this is the question of whether the statutory presumption of negligence under section 34(1) of the National Veld and Forest Fires Act 101 of 1998 ("the Act") applies, as specifically argued by the plaintiff.

THE LEGAL PRINCIPLES

[12] It is trite that all five elements of a delict must be present before conduct may be regarded as a delict: an act, wrongfulness, fault, causation and harm. As stated in *Neethling*¹:

"If anyone (or more) of these elements is missing, there is no question of a delict and, consequently, no liability."

[13] The plaintiff ordinarily bears the onus to prove all five elements on a balance of probabilities.

¹ *Neethling, Potgieter & Visser's Law of Delict, 8th Edition, LexisNexis, 2019, page 4.*

[14] However, the plaintiff has specifically relied on section 34(1) of the Act, which creates a presumption of negligence in certain circumstances. Where this statutory presumption applies, the onus shifts to the defendant to prove the absence of negligence.

THE MISJOINDER AND NON-JOINDER ARGUMENTS

[15] During the cross-examination of the plaintiff's witness, Mr Vermaak, counsel for the plaintiff, objected to evidence being led to the effect that an associated entity of the first defendant, Boerdery, was in occupation of Platte Kloof. It was contended that this amounted to an unpleaded defence of misjoinder which ought to have been expressly raised in the pleadings before evidence was adduced. In argument, the plaintiff maintained that the defendants' failure to plead specifically that Boerdery occupied the farm constituted litigation by ambush.

[16] This Court overruled this objection during the trial. The defendants denied occupation. The plaintiff bore the onus to prove its positive allegation. The defendants were entitled to lead evidence in support of their denial.

[17] This principle is established in *Van Wyk en 'n Ander v Boedel Louw en 'n Ander*², where the court held that it was not obligatory to make special mention in the plea of facts relied upon to support a denial.

[18] As stated by *Beck*³:

"A defendant is not bound to put upon the record everything upon which he intends to rely to establish his denial."

[19] The plaintiff's objection to evidence about Boerdery must be understood in context. When the plaintiff requested further particulars, asking the defendants to divulge who they alleged had been in occupation and control of Platte Kloof, the defendants specifically identified Boerdery in their response dated October 2024,

² 1957 (3) SA 481 (C) at 482F to 483F.

³ Beck, *Theory and Principles of Pleading*, 2nd edition, at p56.

well before the trial commenced. The defendants, therefore, disclosed this information in their pleadings and did not withhold it. The plaintiff was free to deal with this information at the time by amending its particulars of claim to join Boerdery or to plead an alternative case against the second defendant in his capacity as an employee of Boerdery. The plaintiff elected not to do so.

[20] Notwithstanding this prior disclosure in the pleadings, when evidence was led during the cross-examination of Mr Vermaak confirming Boerdery's occupation, the plaintiff objected on the basis of litigation by ambush. This objection was misconceived. The information had been provided in the defendants' particulars months before the trial. Moreover, after this Court overruled the objection, the plaintiff (by its own admission in its heads of argument) "*elected to proceed with the case and monitor how this pandoras box would unfold as the trial progressed.*" The plaintiff proceeded with full knowledge of this defence, closed its case, and did not apply for any amendment of its particulars of claim. It did so at its own peril and cannot now complain about the consequences of that strategic choice.

[21] Regarding non-joinder, the plaintiff argues that Boerdery should be joined because it has an interest in the matter. The plaintiff's reliance on *Amalgamated Engineering Union v Minister of Labour*⁴ and *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs*⁵ is misplaced. The principle in those cases is that a court should not decide issues directly affecting third parties' rights without joining them or taking adequate steps to protect their interests. The critical question is whether Boerdery has a direct and substantial interest in the relief sought in these proceedings, such that its rights would be directly affected by any order this Court makes.

[22] Boerdery does not have such a direct and substantial interest. If the plaintiff's claim is dismissed, Boerdery's interests are not affected in any way. No findings are made against Boerdery, and it remains free to defend itself against any future claims on whatever grounds it deems appropriate. Equally, were judgment to be granted

⁴ 1949 (3) SA 637 (A).

⁵ 2005 (4) SA 212 SCA.

against the defendants, no order of this Court would directly bind Boerdery or determine its rights and obligations.

[23] If the defendants are found liable, they might potentially seek contribution or recourse against Boerdery in separate proceedings, based on their internal commercial arrangements. However, this possibility does not require joinder of Boerdery to the present action. The defendants' potential right of recourse is a matter between them and Boerdery, arising from their private arrangements, and does not give Boerdery a direct and substantial interest in the outcome of the dispute between the plaintiff and the defendants. The principle is that joinder is required only where the third party's rights will be directly affected by the order sought, not where the third party might be indirectly affected or where there might be consequential litigation.

[24] Moreover, the plaintiff was aware from October 2024 that the defendants contended Boerdery was the occupier, yet the plaintiff made a deliberate choice not to join Boerdery or to amend its claim. The plaintiff cannot now rely on non-joinder to avoid the consequences of its own litigation strategy. The plaintiff remains free to pursue whatever remedies may be available against Boerdery in separate proceedings if it chooses to do so.

[25] The plaintiff's reliance on misjoinder and non-joinder is therefore rejected. I turn to the evidence regarding Boerdery that was placed before the Court in assessing whether the plaintiff has discharged its onus.

THE FIRST ISSUE: THE OCCUPATION OF PLATTE KLOOF

The plaintiff's documentary evidence

[26] The plaintiff placed substantial reliance on various documents authored by the second defendant, including affidavits deposed to in other legal proceedings involving related entities, as well as correspondence with insurance adjusters and the local municipality. While some of these documents predate and others postdate the fire, none establish that either defendant occupied Platte Kloof on 8 July 2020.

[27] The plaintiff relied on affidavits deposed to by the second defendant on 27 July 2020 and 2 August 2020 in other legal proceedings. These affidavits post-date the fire by approximately three weeks. They concern commercial disputes and transactions concerning certain Van Eeden entities and the company that owns Platte Kloof. In these affidavits, the second defendant made certain statements about the ownership and control of various properties and the relationships between the entities.

[28] These affidavits do, however, not establish occupation on 8 July 2020. They reflect the second defendant's involvement in the affairs of various Van Eeden entities and his role in managing transactions between those entities. They do not address, and were not intended to address, the specific question of which entity conducted farming operations on Platte Kloof on the date of the fire.

[29] The plaintiff relied heavily on a share sale agreement dated 3 June 2020. The agreement provided that the 'purchaser' would take occupation on 26 March 2020. However, this provision is problematic. The agreement was signed on 3 June 2020, some two months after the stated occupation date. This raises immediate questions about the nature and effect of this clause. A provision for backdated occupation in an agreement signed after the stated occupation date cannot, without more, establish that actual occupation occurred on that earlier date. The clause may reflect an intention to allocate rights and obligations as if occupation had commenced earlier, or may relate to accounting or tax considerations, but it does not constitute proof of actual, physical occupation.

[30] More fundamentally, even if some form of occupation for purposes of the share purchase agreement occurred on 26 March 2020, this does not establish physical occupation for purposes of delictual liability. The concept of occupation relevant to the present enquiry is physical possession coupled with effective control and management of farming operations. It requires the practical ability to prevent fires, maintain firebreaks, supervise controlled burns, and direct labour. The share purchase agreement contemplated a future transfer of control, but the evidence

establishes that actual farming operations remained with Boerdery. An agreement to occupy on a future date, or for commercial purposes related to a share transaction, is fundamentally different from conducting actual farming operations and exercising day-to-day control necessary to impose liability for fire damage.

[31] Furthermore, the financial statements of the first defendant for the year ending February 2021 show no income, rental or otherwise, and no farming-related expenses. This corroborates that the first defendant was not conducting farming operations.

[32] The second defendant's various post-fire statements to insurers and letters to the relevant municipality must be evaluated carefully in their context. These statements reflect the commercial relationships between the various Van Eeden entities and the second defendant's role in those entities. They show that the second defendant was involved in managing the affairs of multiple related companies.

[33] However, involvement in corporate affairs and making representations on behalf of related entities does not, in itself, prove which entity was in actual occupation and control of specific property on a specific date. The objective evidence, particularly the financial statements and payslips, provides more reliable proof of which entity was conducting farming operations and employing labourers on 8 July 2020.

The plaintiff's evidence

[34] The plaintiff called three witnesses: Mr Vermaak (Vermaak), his son, Mr Vermaak Junior (Vermaak Jnr) and Mr Vaaltyn. Vermaak and his son did not testify from personal knowledge that either defendant occupied Platte Kloof on 8 July 2020. Vermaak also testified under cross-examination that he could not testify from firsthand knowledge whether the first defendant was conducting farming operations on 8 July 2020.

[35] More significantly, Vermaak admitted that the financial statements placed before the Court demonstrated that, on the day in question, the farming operations were conducted exclusively by Boerdery and not by either defendant.

[36] Tellingly, in the plaintiff's heads of argument, no submission is made that the plaintiff produced evidence proving that either defendant occupied Platte Kloof on 8 July 2020.

[37] Mr Vaaltyn testified that he participated in initiating the controlled burn on 8 July 2020. He testified that he received a payslip each month identifying Boerdery as his employer, and confirmed that he received such a payslip every month, including for the month in which the fire occurred. Moreover, he confirmed that he took instructions from the second defendant.

The defendants' evidence

[38] The defendants called Mr LJ van Eeden, the second defendant, to testify. He led clear and cogent evidence that Boerdery, and not either of the defendants, occupied and farmed Platte Kloof at the relevant time.

[39] The financial statements of Boerdery reflected the following facts: (i) income generated through livestock and seed; (ii) expenses for salaries of approximately R2.5 million in the relevant financial year; and (iii) active farming operations.

[40] The financial statements of the first defendant reflected the following: (i) the main business was acting as a holding company for agricultural land; (ii) it had no employees at the time of the fire; (iii) no farming expenses, specifically no salary expenses; and (iv) operating expenses unrelated to farming activities.

[41] Mr van Eeden testified that he was employed by Boerdery at the time of the fire. It was in that capacity that he applied for a control burn on Platte Kloof and that he supervised the farming operations on the property.

EVALUATION OF WITNESSES

[42] Mr Vaaltyn was a credible and straightforward witness. He testified in a clear and unembellished manner about matters within his personal knowledge. His evidence about receiving a payslip from Boerdery every month, including in July 2020, was unshaken in cross-examination and was corroborated by the actual payslip placed before the Court. Critically, he confirmed that he took instructions from the second defendant but also confirmed that his employer was Boerdery and that the second defendant gave instructions in his capacity as manager of Boerdery's operations. I accept his evidence.

[43] Mr Vermaak senior was also a credible witness, but he readily conceded that he could not testify from personal knowledge about who was conducting farming operations on Platte Kloof on 8 July 2020. His concession regarding what the financial statements demonstrated was significant and properly made. This Court accepts that he genuinely believed, based on the documents he had seen, that the defendants were the occupiers, but the objective evidence did not support that belief.

[44] The second defendant, Mr van Eeden, testified in a detailed and coherent manner about the corporate structure of the various Van Eeden entities and the commercial arrangements between them. His evidence about his employment by Boerdery, and about Boerdery's conduct of farming operations on Platte Kloof, was corroborated by the financial statements and payslips. While he clearly has an interest in the outcome, his evidence was consistent with the documentary evidence, and this Court accepts it.

Was the first defendant, or the second defendant, or both defendants jointly, in occupation of and exercising control?

[45] The evidence established on a balance of probabilities that Boerdery occupied the farm Platte Kloof on 8 July 2020. The plaintiff's own witness concessions and the testimony of Mr Vaaltyn support this finding. The objective

evidence of the financial statements conclusively demonstrates that Boerdery, not the first defendant, was conducting farming operations.

[46] The plaintiff has failed to discharge the onus of proving that either the first defendant, the second defendant, or both jointly, occupied Platte Kloof on 8 July 2020.

Second defendant's capacity

[47] The plaintiff sought to argue in its heads of argument that the second defendant should be held liable as an employee of Boerdery. However, this was not the pleaded case. It is trite that a party will be kept strictly to its pleadings.⁶

[48] The plaintiff's original pleading in paragraph 3 of the particulars of claim alleged, as an alternative, that the second defendant acted in his personal capacity. That allegation was advanced in the context of the second defendant being in occupation and control of Platte Kloof, either on behalf of the first defendant or in his own right. Once the evidence established that neither the first defendant nor the second defendant occupied the property, and that occupation vested in Boerdery, the plaintiff's pleaded case fell away entirely.

[49] The plaintiff cannot, at the stage of argument, recast its case to contend that the second defendant is liable in his capacity as an employee of an unpleaded occupier, namely Boerdery. That contention would constitute a materially different cause of action, necessitating distinct allegations regarding the duty owed, the second defendant's personal conduct as an employee, and whether he personally associated himself with any wrongful conduct. The plaintiff was afforded the opportunity to amend its pleadings once Boerdery's occupation became apparent during the trial, but elected not to do so.

⁶ *Robinson v Randfontein Estate Gold Mining Co Ltd* 1925 AD173 at p198.

[50] The plaintiff's difficulty at this stage of the proceedings stems from the strategic choices it made. Once the defendants disclosed in October 2024 that Boerdery was the alleged occupier, the plaintiff had several options: (a) join Boerdery as an additional defendant; (b) amend its particulars of claim to plead an alternative case of personal liability against the second defendant as an employee of Boerdery; (c) withdraw the action against the defendants and sue Boerdery instead; or (d) proceed to trial on its pleaded case and rely on the evidence to establish that the defendants, not Boerdery, were the occupiers. The plaintiff chose option (d). Even when the evidence at trial confirmed Boerdery's occupation, the plaintiff elected to continue without amendment. The plaintiff cannot now, after an adverse evidential outcome, seek to reformulate its case at the argument stage. Its attempt to do so must be rejected.

SECOND ISSUE: ELEMENTS OF DELICT

[51] Having found that the plaintiff has failed to establish occupation and control, I turn to consider whether, even if occupation had been established, the remaining elements of delict are present.

Wrongfulness

[52] Wrongfulness is a flexible criterion of delictual liability that operates to limit liability on grounds of legal and public policy.

[53] The existence of a legal duty depends on the relationship between the parties and the circumstances giving rise to the alleged harm. The law does not impose liability for every act or omission that causes harm; rather, liability arises only where there is a recognised legal duty.

[54] In the context of veld fires, the legal duty not to cause damage to neighbouring properties arises from occupation and control of land. This is reflected in: (a) the common law principle that an occupier of land has a duty to prevent harmful activities on that land from causing damage to neighbours; (b) section 34(1) of the Act, which imposes a statutory duty on owners (defined to include persons in

control of land) in relation to veld fires; and (c) the practical reality that only a person who occupies and controls land has the ability to prevent fires, maintain firebreaks, supervise burning activities, and respond to fire emergencies.

[55] Public policy considerations support limiting liability to those who occupy and control property. To impose liability on entities with merely commercial or investment interests, who lack operational control and the practical ability to prevent fires, would: (a) create indeterminate and potentially unlimited liability for passive investors and holding companies; and (b) impose liability on parties who have no means of discharging the duty.

[56] The defendants in this case did not occupy or control Platte Kloof. They did not conduct farming operations on the property. They did not employ the workers who initiated the burn. They did not have the practical ability to maintain firebreaks, supervise burning activities, or respond to fire emergencies on a day-to-day basis. In these circumstances, no legal duty arose that would render their conduct (or omissions) wrongful vis-à-vis the plaintiff.

[57] The plaintiff's attempt to impose liability is based on shareholding and directorship in a holding company, coupled with the second defendant's employment by a third entity. These relationships do not, without more, give rise to a legal duty to the plaintiff in relation to fire damage from property the defendants did not occupy or control.

[58] The Supreme Court of Appeal ("SCA"), in *MTO Forestry (Pty) Ltd v Swart NO and Another*⁷, emphasised that wrongfulness functions as a limitation mechanism to ensure liability is not imposed in cases where it would be undesirable or overly burdensome to do so. The wrongfulness enquiry depends on considerations of legal and public policy and focuses on whether, in the circumstances of the particular case, there was a legal duty not to cause harm. The SCA held that wrongfulness

⁷ 2018 (3) SA 555 (SCA).

must be determined with reference to the relationship between the parties and the specific circumstances giving rise to the alleged duty.

[59] In the present case, the plaintiff seeks to impose liability on defendants who were not in occupation or control of the property where the fire started. Public policy considerations support the conclusion that no legal duty arose in these circumstances.

[60] To hold otherwise would mean that any entity with a commercial or investment interest in property, however remote from actual operations, could be held liable for fires. This would impose an unreasonable and indeterminate burden on investors and holding companies. Absent occupation and control of the property, no legal duty arose that would render the defendants' conduct wrongful vis-à-vis the plaintiff.

The statutory presumption of negligence

[61] The plaintiff specifically relied on section 34(1) of the Act, which provides:

"The owner of land on which a veld fire has started or from which it has spread is presumed, until the contrary is proved, to have been negligent in respect of the starting or spread of such fire."

[62] This statutory presumption is a departure from the ordinary rule that a plaintiff bears the onus of proving all elements of delict. Where the presumption applies, it shifts the onus to the defendant to prove the absence of negligence. However, the presumption only arises if the plaintiff first establishes the foundational facts upon which it depends.

[63] The presumption applies only to "*the owner of land*" on which the fire started or from which it spread. The Act defines "*owner*" in section 1 to include:

"...a lessee of land or any other person who, in terms of any agreement, contract or any other title, has been given the right to use or is in control of that land."

[64] This definition focuses on functional control rather than formal legal ownership. It captures the person who has "*the right to use*" or who "*is in control of*" the land. The purpose of this broad definition is to ensure that the person who exercises operational control over land, and who therefore has the practical ability to prevent and control fires, bears responsibility for fire management.

[65] The plaintiff must prove, as a threshold requirement, that the defendant was the "*owner*" as defined in the Act. Only then does the presumption of negligence arise.

[66] In the present case, the plaintiff has failed to establish that either defendant was the owner within the meaning of the Act: (a) The first defendant did not use or control Platte Kloof for farming purposes. Its financial statements show no farming income or expenses. It employed no workers. It conducted no agricultural activities; (b) The second defendant had no personal right to use or control Platte Kloof. He was an employee of Boerdery, which conducted the farming operations. His role as director of the first defendant (a passive holding company) did not give him personal control of the land; (c) The evidence establishes that Boerdery was in control of Platte Kloof on 8 July 2020. Boerdery conducted the farming operations, employed the workers, incurred the farming expenses, and made operational decisions, including the decision to conduct the controlled burn. The statutory definition of "*owner*" is designed to capture the person who actually exercises dominion over the land and therefore has the practical ability to prevent and control fires. The plaintiff has not proved that either defendant exercised such control on 8 July 2020.

[67] The statutory presumption, therefore, does not assist the plaintiff. The foundational requirement for the presumption to arise has not been established.

Negligence

[68] The plaintiff's particulars of claim allege that the defendants were negligent in various respects:

- (a) failing to have a responsible person present to manage and control the burn;
- (b) failing to give all owners reasonable notice of the intended burn;
- (c) failing to take reasonable steps to extinguish the fire and to contain it, and prevent its spread.
- (d) initiating a controlled burn in unsuitable weather conditions;
- (e) failing to maintain adequate firebreaks;
- (f) failing to ensure that firebreaks will be free from flammable material, which could cause the fire to spread;
- (g) failing to have sufficient personnel and equipment to control the fire
- (h) failing to have reasonable fire-fighting equipment and trained personnel available to control and/or contain the fire started on Platte Kloof.

[69] Even assuming these allegations were proved (and the evidence is equivocal on several), negligence must be attributed to the defendants. The evidence establishes that:

- (a) The decision to conduct the burn was made by Boerdery in the course of its farming operations.
- (b) The personnel who conducted the burn were employed by and acting under instructions from Boerdery.
- (c) The equipment and resources deployed were those of Boerdery.
- (d) Any failure in planning, execution, or supervision of the burn would constitute negligence on the part of Boerdery, not the defendants.

[70] The first defendant, as a holding company with no farming operations, no employees, and no operational control over Platte Kloof, could not have been negligent in relation to farming activities conducted by another entity.

[71] The second defendant, insofar as he was involved in organising or supervising the burn, did so in his capacity as an employee of Boerdery, not as director of the first defendant or in any personal capacity. The evidence establishes that he acted within the scope of his employment by Boerdery and in furtherance of Boerdery's farming operations. The plaintiff did not plead a case of personal liability

based on the second defendant personally and intentionally associating himself with negligent conduct, or acting outside the scope of his employment, or acting for personal benefit. Had such a case been properly pleaded, the evidence does not support it. In these circumstances, no personal negligence can be attributed to the second defendant that would render him liable in delict to the plaintiff.

[72] The defendants cannot be found negligent in relation to the fire on property they did not occupy or control.

Causation

[73] Causation in delict requires proof of both factual causation and legal causation. The plaintiff must prove on a balance of probabilities that the defendants' conduct caused the damage complained of.

[74] Even assuming the plaintiff had established wrongfulness and negligence (which it has not), the causation element presents insurmountable difficulties for the plaintiff's case. The evidence establishes that:

- (a) The controlled burn was initiated by employees of Boerdery, acting under the operational control and supervision of Boerdery.
- (b) The application for the controlled burn was made by the second defendant in his capacity as an employee of Boerdery, not in any personal capacity or as director of the first defendant.
- (c) The workers who conducted the burn, including Mr Vaaltyn, were employed and paid by Boerdery, as evidenced by the payslips.
- (d) The farming operations, including decisions about controlled burns, were conducted by Boerdery, which bore the expenses and employed the personnel.

[75] The plaintiff has not established any conduct by either defendant that could be said to have caused the fire or its spread. The first defendant conducted no farming operations, employed no workers, and exercised no operational control over Platte Kloof. The second defendant's actions in organising and supervising the burn were

undertaken in his capacity as an employee of Boerdery, not on behalf of the first defendant or in his personal capacity.

[76] The causal chain extends from the conduct of Boerdery's employees, acting in the course and scope of their employment, to the damage suffered by the plaintiff. The defendants do not form part of that chain. The first defendant, being a passive holding company, conducted no operations and employed no personnel and could not have caused the fire. The second defendant's involvement in organising and supervising the burn does not give rise to liability for two reasons.

[77] First, he acted in his capacity as an employee of Boerdery and not on behalf of the first defendant or in his personal capacity. His conduct was therefore that of Boerdery acting through its employee.

[78] Second, even if one were to seek to attribute personal causal responsibility to him, which was not the pleaded case, the general principle is that an employee acting within the scope of employment does not incur personal delictual liability unless he intentionally associates himself with the wrongful conduct or acts outside the scope of employment. The plaintiff has established neither. The causal link accordingly remains with Boerdery as the entity conducting the farming operations and employing the personnel who initiated the burn.

[79] The plaintiff has accordingly failed to establish causation.

Alternative argument – personal liability of the second defendant

[80] The plaintiff argued, in the alternative, that if Boerdery was the occupier, the second defendant should be held personally liable as an employee of that entity. This argument fails for two reasons.

[81] First, it was not the pleaded case. The plaintiff elected to proceed without amending its particulars of claim after the evidence emerged at trial.

[82] Second, even on the merits, mere employment by an entity conducting operations does not automatically give rise to personal delictual liability. The plaintiff would need to prove the elements of delict against the second defendant personally, including the legal duty resting on him personally (not merely on his employer) and that he personally breached that duty negligently.

[83] Moreover, even if such a claim had been properly pleaded, the general principle is that an employee acting within the scope of employment and in furtherance of the employer's business is not personally liable in delict unless the employee personally and intentionally associated himself or herself with the delictual conduct, or acted outside the scope of employment, or committed the delict for personal benefit.

[84] The plaintiff has not alleged, let alone proved, that the second defendant acted outside the scope of his employment with Boerdery or that he had any personal interest separate from that of his employer in conducting the controlled burn. In the absence of such proof, even a properly pleaded claim of personal liability would have failed.

[85] This Court's finding that Boerdery was the entity in occupation and control does not preclude the plaintiff from pursuing whatever remedies may be available against Boerdery in separate proceedings.

CONCLUSION

[86] The plaintiff has failed to discharge the onus of proving the essential elements of the delictual claim as pleaded.

[87] The plaintiff did not prove that either the first defendant or the second defendant, or both jointly, occupied Platte Kloof on 8 July 2020.

[88] Absent such an occupation, no legal duty arose that would render the defendants' conduct wrongful.

[89] The defendants cannot be held to have acted negligently in relation to property they did not occupy or control.

[90] There is no causal link between any conduct of the defendants and the plaintiff's damages.

[91] The evidence establishes that Boerdery was the entity in occupation and control of Platte Kloof at the relevant time, which entity is not a party to these proceedings.

COSTS

[92] Costs must follow the result. There is no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. The defendants are entitled to their costs on scale C as requested. The complexity of the matter warrants scale C.

ORDER

[93] The following order is made:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendants' costs, on the High Court scale C.

E JONKER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv O'Connor

Instructed by: MJ Vermeulen Inc.

For defendant: Adv D Coetsee

Instructed by: BDP Attorneys