

167/92

Case No 677/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE SIMON'S TOWN MUNICIPALITY

Appellant

versus

CYRIL DEWS

First Respondent

and

ALAN MCKAY GARLICK

Second Respondent

CORAM: CORBETT CJ, VIVIER, NIENABER, VAN DEN HEEVER,
JJA, et VAN COLLER AJA.

DATE OF HEARING: 4 September 1992

DATE OF JUDGMENT: 23 September 1992

J U D G M E N T

CORBETT CJ...../

CORBETT CJ:

The prevention and combating of veld, forest and mountain fires are objects of major concern in South Africa; and part VI of the Forest Act 122 of 1984 ("the Act") is devoted to enacting a general scheme designed to achieve these objects. This scheme provides, *inter alia*, for the declaration of fire control areas and regions (sec 18 of the Act); for the establishment of a fire control committee for each fire control area and a regional fire control committee for each fire control region (sec 19); for the preparation by fire control committees and by regional fire control committees of fire protection schemes for their respective areas of jurisdiction and, subject to ministerial approval, for the public notification of the schemes (sec 20); and for the clearing and maintenance of fire belts in fire control areas (sec 22). A "fire belt" is defined in the Act as meaning -

"a strip of land, whether under trees or not, prepared and maintained for the purpose of preventing the spread of veld, forest or mountain fires".

On 2 May 1988 certain employees of the appellant, the Simonstown Municipality ("the Municipality"), acting within the course and scope of their employment, undertook the clearing of a fire belt on vacant land (situated on the mountain-side) in an area known as Murdoch Valley. The land lies within the Municipality and is owned by it. The method of clearing employed by the municipal workers consisted of progressively setting fire to the vegetation within the boundaries of the fire belt by means of what are called drip torches. The operation was carried out by six labourers under the supervision of a Mr C J Payne. The so-called "controlled" burning commenced at about 08h00 on the day in question and continued without any untoward event until about 14h30. Then suddenly the fire spread to the

open veld on the mountain-side above the fire belt, got out of control and, driven by a northerly wind, fanned out up the mountain and also in a southerly direction along the coast in the direction of Cape Point. It reached areas known as Miller's Point and Castle Rock. There a number of houses and other buildings were damaged or destroyed, including those belonging to the two respondents.

These events resulted in the respondents instituting jointly an action in the Cape of Good Hope Provincial Division in which each claimed damages for the loss suffered by him by reason of the fire. In their particulars of claim the respondents alleged, inter alia, that the spread of the fire to their properties was caused by the negligence of the Municipality's employees engaged in the clearing of the fire belt. Various grounds of negligence were alleged. The Municipality defended the action and in its plea, inter alia, denied

negligence on the part of its employees; in the alternative pleaded that, if its employees were negligent, such negligence was not the cause of any damage suffered by the respondents; denied vicarious liability; and, in addition, raised the defence that it was absolved from liability by sec 87 of the Act. By arrangement between the parties the matter went to trial on these four issues only, other issues, including the quantum of damages suffered, being left over for determination at a later stage.

The trial Judge (Foxcroft J), having heard evidence and argument, held against the Municipality on all four issues. That is, he held that respondents had established negligence on the part of defendant's servants acting within the course and scope of their employment; that this negligence caused damage to the respondents' properties; and that the Municipality did not enjoy any immunity from liability by reason of sec 87

of the Act. Thereafter, the parties having settled the outstanding issues between them, the trial Judge gave judgment in favour of the respondents. The judgment has been reported: see Dews and Another v Simon's Town Municipality 1991 (4) SA 479 (C). The trial Judge further gave leave to the Municipality to appeal to this Court on the issue as to whether sec 87 afforded the Municipality a defence to the respondents' claims. Accordingly that is the only issue before us on appeal.

Clearly anyone who lights a fire in the open veld is under a duty at common law to take all reasonable precautions to keep it under control and to ensure that it does not spread beyond the area of the intended burn. Because of the inherently dangerous character of fire the standard of care and diligence is a high one and the person concerned must have, or have at his disposal, the skill and equipment needed to keep the fire under control. This is a case where imperitia culpa adnumeratur.

(See Fourie v Sang 1924 OPD 153, 155-6; Van Wyk v Hermanus Municipality 1963 (4) SA 285 (C), 300 D-E.)

One of the hazards of veld-burning is wind. For wind can readily and rapidly cause the fire to spread and get out of control. This should be obvious to any reasonable person; and in particular to officials charged with the duty of preventing the spread of veld fires by, inter alia, the clearing of a fire belt by burning.

In this case the evidence indicates that when, on 2 May 1988, the clearing of the fire belt by burning commenced there was virtually no wind blowing. Initially, it was, therefore, a suitable day on which to carry out this operation. Later, however, the wind came up and this was almost certainly the prime cause of the fire spreading to the mountain-side adjacent to the fire belt.

The evidence also shows that shortly after 14h00 a Mr W A Barten, the deputy fire-chief of the Simonstown Municipal Fire Brigade, visited the scene of operations. The fire chief, Mr Gildenhuys had previous-

ly been alerted to the fact that at Murdoch Valley, a wind had arisen and he had asked Barton to go there and to investigate the position. Barton did so; and on his arrival he found that a wind had indeed come up, although it was not blowing consistently. He was of the opinion that conditions were no longer suitable for burning. He accordingly instructed Payne to cease operations and to ensure that the fires that were still burning were extinguished. He then left. Payne, however, decided to continue the last part of the burning operation. While this was in progress he suddenly noticed that a fire had broken out in the veld and bushes on the mountain-side above the fire belt. He ordered his labourers to put out this fire, but they were unable to do so and it spread rapidly, with the results already described.

At the time when this happened Payne had with him, at the site of the burning operations, only three of the six labourers constituting his work force. The

other three were at the vehicle, referred to in evidence as "the Unimog". It was the vehicle which had conveyed Payne and his team and their equipment from the premises of the municipal fire department to the area where the burn was to take place. The Unimog was, as it were, their operational base. It was equipped with a fire-fighting hose over 200 metres long. At the time of crisis the Unimog was parked below the fire belt in Rocklands Road with its hose still rolled up. The distance from the vehicle to the place where the fire broke out above the fire belt was 149 metres. There was a water hydrant in the vicinity of where the Unimog was parked.

The trial Judge's finding that Payne had failed to take adequate precautions to ensure that the fire did not spread is contained in the following paragraph of his judgment (see reported judgment at 485 D-F):

"To my mind, the crucial issue is whether Payne, having decided to continue

with the last part of the burning operation after Barten's instruction to stop burning, took adequate precautions to ensure that a fire did not break out. At the very least he should have ensured that all his men were on site and not down at the Unimog mixing more fuel, making tea or anything else. He should also have seen to it that the hose from the Unimog was rolled out and on hand in case there should be any difficulty with the last part of the burn. Most important of all, he should have ensured that sufficient of his men were watching carefully the area around the fire-belt so that if a fire had broken out it could have been seen very quickly. His own evidence which I have referred to that he heard rather than saw the fire breaking out is an indication of the failure to keep a proper look-out. He could not have been keeping an all-round watch nor could any of his men, for a proper watch would have ensured a much more rapid observation of a fire breaking out. If the hose had been readily available it would in all probability have been possible to stop the fire in its early stage before it was racing away."

This finding is fully justified by the evidence and, as I have indicated, is not open to attack on appeal.

Sec 87 of the Act provides as follows:

"No person, including the State, is liable

in respect of anything done in good faith in the exercise of a power or the carrying out of a duty conferred or imposed by or under this Act."

It was appellant's general contention in the Court below (and the same contention is advanced on appeal) that this section creates a legal immunity in favour of a person who in good faith exercises a power conferred by or under the Act even in cases where the person concerned is "negligent", in the sense that in exercising the power he fails to take reasonable precautions to eliminate or minimize the risk of injury which his action may cause to others. This is a far-reaching proposition. It would provide a licence to persons exercising, for example, the fairly drastic powers under part VI of the Act to do so carelessly and without proper regard for the interests of others, provided only that they did so in good faith. The potentially devastating consequences of such conduct are manifest. In the circumstances, it would, in my opinion, require clear language to establish such a

legislative intent.

As I see it, sec 87 is reasonably clear, but it does not mean what appellant contends that it does. It must be interpreted against the general background of the law relating to statutory authority as a defence to a delictual claim. Conduct which would otherwise give rise to delictual liability may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power. Whether a particular statutory enactment in fact authorizes interference with or the infringement of the rights or interests of another depends upon the intention of the legislature, which is determined in accordance with the usual canons of statutory interpretation. Of especial significance in this connection is whether the statutory provision is directory or permissive in character. Most of the decisions from which these general principles are derived were referred to by Hoexter JA in the recent case of

East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others 1989 (2) SA 63 (A).

A further important principle is that, even where the statute does authorize interference with the rights of others, the person or authority vested with the power is under a duty, when exercising the power, to use due care and to take all reasonable precautions to avoid or minimize injury to others. Failure to carry out this duty has been described as "negligence", but, as pointed out by Prof J C van der Walt in 8 LAWSA par 30, in this context the word is used in a special sense; and -

"The presence of 'negligence' in this special sense in the exercise of a statutory power is, however, a conclusive indication that the defendant has exceeded the bounds of his authority and has therefore acted wrongfully." (8 LAWSA par 30.)

See also Neethling, Potgieter and Visser, *The Law of Delict*, pp 91-2; Van der Merwe en Olivier, *Die Onreg-*

matige Daad in die Suid-Afrikaanse Reg, 6 ed, p 105-6; Boberg, The Law of Delict, Vol 1, pp 771-3. In my view, these writers all correctly state that jurisprudentially the consequences of the repository of the statutory power having exercised it without due care and without having taken reasonable precautions to avoid or minimize injury to others, are that the repository must be taken to have exceeded the limits of his authority and accordingly to have acted unlawfully. Save for a fleeting remark in Kenly Farms (Pty) Ltd v Minister of Agriculture 1984 (1) SA 406 (C), at 410 G, so far as I am aware, there has hitherto been no judicial pronouncement specifically to this effect. I am nevertheless satisfied that the analysis is sound and that it accords with modern distinctions in our law of delict between fault and unlawfulness. The principle of statutory authority renders lawful what would otherwise have been unlawful; and if the implied limits of the statutory authority are

not observed the repository of the power acts without authority, or in excess of his authority, and consequently unlawfully.

I return to sec 87. In my opinion, the section postulates two requirements for legal immunity: (a) the act in question must have been done in good faith, and (b) the act in question must have been done in the exercise of a power or duty under the Act. It is common cause that the person seeking to rely on sec 87 bears the onus of establishing that his conduct falls within the ambit of the section.

"Good faith" here relates to the subjective state of mind of the repository of the power and, broadly-speaking, requires that in exercising the power he should have acted bona fide, honestly and without ulterior motive. (Cf. Oude Meester Groep Bpk and Another v SA Breweries Ltd; SA Breweries Ltd and Another v Distillers Corporation (SA) Ltd and Another 1973 (4) SA

145 (T), at 150 G-151 D; Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk 1976 (4) SA 677 (A), at 689 A-E.)

As to (b), it seems to me that the section is clear. The person sought to be held liable must show that he acted within the authority conferred by the power in question. It necessarily follows that if, owing to a failure to exercise due care or to take reasonable precautions, he exceeded the power and acted without authority, he will be unable to establish requirement (b) and his reliance on sec 87 must fail.

It was submitted by appellant's counsel that if sec 87 be interpreted in this way, it in effect adds nothing to the common law and is redundant. This would suggest that this was not the legislative intent. I do not think that this argument is sound. As I have indicated, a party relying on statutory authority as a defence must first establish that the statutory enactment under which he acted authorizes interference with or the

infringement of the rights or interests of others. This is a matter of interpretation. The effect of sec 87 is to dispense with any such enquiry as far as powers or duties conferred or imposed by or under the Act are concerned. At the same time sec 87 introduces as a positive element the requirement of good faith, the onus of establishing which would be on the party claiming immunity. It is thus not correct to say that the interpretation which has been placed on sec 87 renders it redundant. But even if it does, this would not be the first time that a legislative provision was declaratory of the common law or was inserted ex abundanti cautela. Moreover, as I have emphasized, the alternative interpretation which would create a general licence for carelessness and indifference to the interests of others would conflict with the very purpose of the statute.

Respondents' counsel advanced a number of grounds for holding that "negligence" apart, Payne and

his fellow employees exceeded their powers under the Act and the relevant fire protection scheme, but I do not find it necessary to deal with these; nor with an argument that Payne acted without good faith. For in my view, for the reasons stated the finding that Payne failed in the respects listed by the trial Judge, to take adequate precautions to ensure that the fire did not break out and spread, means that the Municipality cannot satisfy requirement (b) of sec 87. Accordingly I hold that the trial Judge reached a correct conclusion as to the applicability of sec 87.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

VIVIER	JA)	
NIENABER	JA)	CONCUR
VAN DEN HEEVER	JA)	
VAN COLLER	AJA)	