THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 420/2016

In the matter between:

MTO FORESTRY (PTY) LIMITED **APPELLANT**

and

A H SWART NO **RESPONDENT**

Neutral citation: *MTO Forestry v Swart* (420/2016) [2017] ZASCA 57 (22 May 2017)

Coram: Leach, Willis, Mathopo and Mocumie JJA and Coppin AJA

Heard: 27 February 2017

Delivered: 22 May 2017

Summary: Delict: wrongfulness and fault separate elements: regard not to be had to foreseeability of harm in determining wrongfulness: whether reasonably adequate steps taken by landowner to prevent fire spreading to neighbour's property.

Presumption of negligence in s 34 of the National Veld and Forest Fire Act 101 of 1998: effect thereof when facts known.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Joubert AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Willis, Mathopo and Mocumie JJA and Coppin AJA concurring)

[1] The appellant is a private company which conducts a forestry business on what is known as the Witelsbos plantation (Witelsbos) in the district of Humansdorp. The appellant is the beneficial owner of the forest on Witelsbos in the sense that it has the right to harvest the trees and enjoy the income from the forest's production. On 27 October 2005, a fire started on a farm owned by the respondent, situated immediately adjacent to Witelsbos. A strong wind caused the fire to spread onto Witelsbos where it burned for several days. According to the appellant, some 1 300 ha of forest were destroyed as a result. In due course, the appellant instituted action in the Western Cape Division of the High Court, Cape Town, alleging that the fire had either been caused, or allowed to spread onto its plantation, by negligence on the part of the respondent. It claimed damages in excess of R23 million.

[2] This was one of three claims made against the respondent in the summons. The other two related to damage allegedly sustained by the appellant arising from fires that had originated on the respondent's farm on 27 August 2005 and 17 October 2005, respectively. The parties agreed that both those claims, as well as the question of the quantum of the appellant's damages suffered as a result of the fire of 27 October 2005, would stand over for later determination. An order to that effect was made by the court a quo, and as a result the trial proceeded solely in relation to the respondent's liability arising from the 27 October 2005 fire. The hearing culminated with the court a quo holding that the respondent's liability had not been established. It dismissed the appellant's claim but granted leave to appeal to this court.

[3] The respondent is an entity commonly known as the Moravian Church in South Africa and is represented by its Superintendent. It owns the immovable property commonly known as Clarkson Farm, situated to the south of the mountains that lie on the coastal belt between Humansdorp and Plettenberg Bay. Having its roots in a Moravian mission station, a portion of the property was developed into what is known as the Clarkson Township. The property is bisected by the R102 road which runs approximately west to east, and forms the southern boundary of the township. Immovable property owned by the respondent therefore lies immediately adjacent to the western, eastern and southern boundaries of the township. The land upon which the fire broke out is to the east of the township, but north of the R102 road. Approximately 120 ha in extent, it is described in certain of the exhibits in the court a quo as being 'Portion C of the Farm Clarkson No 540/1891' (to avoid confusion with any other portion of the Clarkson Farm, I intend to refer to it simply as Portion C). Witelsbos lies immediately to the north of Portion C.

[4] Situated towards the centre of Portion C is a vlei in the rough shape of a Y. Situated to the east and west of the vlei is arable land planted to grazing for cattle, and totalling some 64 ha in extent. It is common cause that at least those lands had been hired from the respondent to a trust used by a Humansdorp farmer, Mr M Meyer as a vehicle for his farm in operations (the respondent alleges that not just those lands but the entire portion C had been leased– an issue I shall mention in due course).

[5] The vlei between the arable lands was wet, muddy and marsh-like in certain areas. Much of it was covered by its natural vegetation of fynbos and proteas but, particularly towards its northern aspect, it was also heavily infested with invasive alien plants such as black wattle and *acacia longifolia*. This infestation formed a tight thicket, in places up to 10 metres high, that was referred to in evidence as a 'warbos' (and although the direct English translation for that word is 'jungle' it appears to have a unique local connotation and for that reason I intend to use it for purposes of this judgment). As appears from the photographs contained in the record, the warbos was closely packed and caused a build-up of highly flammable dead plant material such as dried leaves and twigs lying on the ground.

[6] It goes without saying that the prospect of a veld or forest fire spreading into its plantations was a nightmare for a company such as the appellant. Not only did it employ highly trained and equipped fire-fighting teams to combat any fire, either on its property or on that of a neighbour, which could spread to its plantations, but as measure of protection the appellant erected watch-towers manned 24 hours a day to ensure that the first signs of a fire are detected. Between midday and 13h00 of the day in question, Mr Con van Niekerk, a

forester employed by the appellant who was at the time at the Witelsbos plantation offices some 30 kilometres away, received a report from the Kromrivier watch-tower near Clarkson of smoke rising from a fire on Portion C.

[7] It was hot and dry at the time, with a light to moderate south-westerly wind. These were dangerous fire conditions and Mr Van Niekerk immediately contacted the appellant's road team and instructed it to proceed to the scene. This team had been specifically trained to fight veld and forest fires, and had considerable resources to do so. It had a number of labourers who were equipped with hand beaters and other implements to fight the fire by hand. They also had a 3 000 litre fire-engine, four fire-trucks equipped with water tanks that varied in size from 3 000 litre to 10 000 litre, and a 'bakkie-sakkie', a light utility vehicle equipped with a water tank and a high pressure water pump.

[8] Mr Van Niekerk also contacted a Mr Fanie Wasserman, a contractor who had a fire-fighting team and who immediately sent 25 fire-fighters to the scene. He also phoned a Mr Burrows, a leading figure in the Clarkson community and a local representative of the appellant who was the recognised contact person the appellant had with the Clarkson community and with whom he had regularly met in regard to fire matters. He knew Mr Burrows had keys to the locked gates leading onto the property and he arranged to meet him so as to gain access to the fire. With that, he set off for the scene with what Holmes JA would have described as 'a celerity worthy of a young Lochinvar'.[1]

[1] See *Sardi & others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 779H.

[9] In the meantime, the report from the lookout tower had also been received by Mr Anton Scholtz, who was at the time the appellant's plantation manager. He, too, contacted Mr Fanie Wasserman to ask for assistance. Mr Scholtz also reported the fire to Mr Meyer, the farmer who was hiring Portion C from the respondent, and asked for his help. He, too, then hurried off to Clarkson.

[10] Mr Van Niekerk arrived at the scene before him where he met Mr Burrows at the south western corner of Portion C. Mr Burrows had died before the trial in the court a quo, and so one does not know where he had been when he first heard of the fire or what resources or manpower were available to him to attempt to douse it himself in the limited time before he met Mr Van Niekerk. We do know that he had, by then, already tried to unlock a gate on the western boundary allowing access to a road leading towards the vlei where the fire was burning, but that his attempts were unsuccessful as he had brought the wrong keys with him (how this had come about was never explained). As a result, he and Mr Van Niekerk tried to see if they could unlock other gates leading onto the property; first on the southern and then on the eastern boundary. When unsuccessful, they eventually ended up at a gate in the northern boundary fence between Portion C and the appellant's plantation. When this, too, could not be unlocked, Mr Burrows produced a hacksaw and proceeded to cut through the wire on which the lock was mounted.

[11] In this way, some 20 minutes after he had arrived at the scene, Mr Van Niekerk gained access to the property. It was at about this time that the appellant's road team, as well as the fire-fighters sent by Mr Wasserman and Mr Meyer's team arrived. Unfortunately, the fire was difficult to reach. Mr Van

Niekerk could not get the bakkie-sakkie he had with him close enough to the fire for its water pump to be effective, and he described how he sank up to his knees in the mud as he attempted to reach the blaze on foot. Despite this, the appellant's fire team did what they could. Using hoses from their fire-engine they sprayed water onto the flames. But the wind had begun to blow much harder from the south–west and the fire, which had started in an area where the vegetation stood waist high, spread into areas where the bushes stood several metres high; and from there into the thick warbos where it was impossible to reach. In addition, flaming plant material was carried forward by the wind and air currents to start fresh fires further into the warbos. In the result, the fire became uncontrollable and it was decided to retire the fire-fighters to the fire-break on the border of the appellant's property in the hope of preventing the fire from spreading into its plantation. The hope was forlorn. The fire became so fierce and powerful that it easily jumped the fire-break and set alight the plantation, where it burned for about a week.

[12] In the light of this background, I turn to the question of the respondent's liability. As the appellant's claim is founded in delict it had to establish, first, the conduct of the respondent of which it complained; second, the wrongfulness of that conduct; third, fault on the part of the respondent (in this case in the form of negligence); fourth, that it had suffered harm; and fifth, a causal connection between such harm and the respondent's conduct that is the subject of its complaint.

[13] In regard to the first element, that of conduct, there was evidence of previous fires regularly occurring on the appellant's property, mostly started by members of the Clarkson community, either accidentally or intentionally,

particularly when burning their rubbish or in order to clear veld or fynbos so as to provide grazing for livestock being run without permission on Portion C. The fire on the day in question was started a short distance from the point where another fire had been started shortly before and, in the light of this history, in all probability both were due to activities of Clarkson residents. In these circumstances, the appellant sought to hold the respondent liable, not for starting the fire on the day in question, but for its alleged negligent omission to take preventative steps which allowed or caused it to spread onto Witelsbos. That such a negligent omission, if established, could found liability cannot be doubted. In *H L & H Timber Products*,[2] a case similar to the present where a veldfire had spread onto the property of the claimant, Nienaber JA said the following in regard to causation:[3]

'Conduct . . . can take the form of a *commissio*, for example where the fire causing the loss was started by the defendant . . . or an *omissio*, for example the failure to exercise proper control over a fire of which he was legally in charge . . . or the failure to contain a fire when, in the absence of countervailing considerations adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping onto a neighbouring property thereby causing loss to others . . . .'[4]

[14] I should mention that the use of phraseology such as 'duty' or 'legal duty' has, with justification, been criticised as not really contributing to the determination of the true issue which is whether, given the particular circumstances of a case, a defendant's conduct should be regarded as wrongful; and as it may lead to confusion with the concept of a 'duty of care' as envisaged in English law, a concept which encompasses both wrongfulness and

[2] *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA).
[3] Paragraph 14.
[4] Authorities cited are omitted.

negligence. Bearing this in mind, I believe that F D J Brand[5] was correct when he commented that reference to concepts such as 'a legal duty' had been 'no more than an attempt at formulating some kind of practical yardstick as to when policy considerations will require the imposition of legal liability'.[6]

[15] Bearing that in mind, I turn now to deal with the importance of distinguishing between the elements of wrongfulness and fault. During a lecture presented in April 2014, later published in the Stellenbosch Law Review, in a passage pertinently relevant to the debate of wrongfulness in the present case, F D J Brand said the following in regard to this issue:[7]

'Wrongfulness – sometimes also referred to as unlawfulness – is one of the elements of delictual liability. The other elements are conduct, fault, causation and harm. Without the convergence of all these elements delictual liability will not ensue . . . In modern South African law, wrongfulness has become the most interesting of these elements. Under this rubric the law determines whether the defendant should be held legally liable for the harm suffered by the plaintiff that resulted from the defendant's blameworthy conduct. If the law determines that there will be no liability, the defendant is afforded immunity from the consequences of the wrongful conduct; the defendant is not liable despite the presence of all the other elements of delictual liability.'

[16] Wrongfulness therefore functions, effectively, as a limitation to ensure liability is not imposed in cases in which it would be undesirable or overly burdensome to do so. Previously, the issue of what the wrongfulness enquiry entailed was somewhat contentious, but this is no longer the case. The Constitutional Court, endorsing developments in the law propounded by this court over the last decade or so, recently confirmed in *Loureiro*[8] and *Country*

[5] A former member of this court, a Professor Extraordinary at the University of the Free State and an Honorary Professor of the University of Stellenbosch.
[6] F D J Brand 'Aspects of wrongfulness: A series of lectures' (2014) 25 *Stellenbosch LR* 451 at 455.
[7] Ibid at 451.
[8] *Loureiro & others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53.

Cloud[9] that the wrongfulness enquiry depends on considerations of legal and public policy, and focuses on 'the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'. It is only if an action is wrongful in that sense that, if it is associated with fault, it becomes actionable. As Nugent JA stated in *Minister of Safety and Security v Van Duivenboden*,[10] in a case which, like this, involved an allegation of a negligent omission:

'A negligent omission is [wrongful][11] only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.'

[17] Despite a number of judgments of this court pointing out that wrongfulness and negligence are indeed separate elements of a delict,[12] there has been a debate in academic circles as to whether it is important in the determination of liability for the two elements to be kept apart. This commenced in 2006 with an article written by Professor Johan Neethling, a respected academic, who expressed the view that certain factors such as foreseeability and preventability of harm are relevant for the determination of both wrongfulness and negligence, so that a degree of conflation of these two elements is inevitable – and that if a degree of overlap can be accepted 'without

[9] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 20-21.
[10] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.
[11] The learned Judge used the word 'unlawful'.
[12] See eg *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 12 and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 and the authorities referred to therein.

negating the distinctive functions of wrongfulness and negligence as separate elements of delict' it would not be a bad thing.[13] A riposte by R W Nugent[14] to the effect that conflation of the two elements is always a bad thing, was swift.[15] F D J Brand, also entered this academic duel,[16] and the debate continued for some years.[17] However, the cases that I have already mentioned, and further decisions both in this court – such as *Steenkamp*,[18] *Fourway*,[19] *Roux v Hattingh*[20]and *Za v Smith*[21] – as well as in the Constitutional Court – such as *Le Roux v Dey*[22] – (this list is not meant to be exhaustive) led me to comment in *Pauw v Du Preez* '(t)hat wrongfulness and negligence are two separate and discreet elements of delictual liability which, importantly, should not be confused, can now be accepted as well established in our law, academic criticism from certain quarters notwithstanding'.[23] Subsequently the Constitutional Court's judgment in *Country Cloud* essentially re-affirmed what I had said and justified the comment of F D J Brand, that the debate on the issue was 'rather sterile'.[24]

[18] One further issue relevant to both wrongfulness and negligence must be mentioned. In *Country Cloud*[25] this court, despite in the past having recognised foreseeability of harm (a clear requirement of negligence) as a factor in

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[13] J Neethling 'The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict' (2006) 123 *SALJ* 204 at 209; 214.
[14] Also a former member of this court and the author of the judgment in *Minister of Safety and Security v Van Duivenboden* quoted above.
[15] R W Nugent 'Yes it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 *SALJ* 557.
[16] F D J Brand 'Reflections on wrongfulness in the law of delict' (2007) 124 *SALJ* 76.
[17] See F D J Brand 'The contribution of Louis Harms in the sphere of Aquilian liability for pure economic loss' (2013) 76 *THRHR* 57; J Neethling and J Potgieter 'Wrongfulness in delict: A response to Brand JA' (2014) 77 *THRHR* 116.
[18] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] 1 ALL SA 478 (SCA); 2006 (3) SA 151 (SCA).
[19] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).
[20] *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) paras 32-38.
[21] *Za v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) paras 17-22.
[22] *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.
[23] *Pauw v Du Preez* [2015] ZASCA 80.
[24] F D J Brand 'Aspects of wrongfulness: A series of lectures' (2014) 125 *Stellenbosch LR* 451 at 458.
[25] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA); [2013] ZASCA 161.

determining wrongfulness, expressed its 'reservation about this approach, mainly because it is bound to add to the confusion between negligence and wrongfulness'.[26] The author of the judgment has since stated extra-curially that it 'went all the way by saying that, because foreseeability is an essential component of negligence, it should find no place in the enquiry into wrongfulness at all'.[27] With great respect, that may be the effect of the judgment but it does not spell it out as being the case in unequivocal terms. But I agree with the motivation for such a conclusion. It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.

[19] Bearing these principles in mind, I turn to the question of the respondent's liability in the present case in which, similar to a number of the previous cases already mentioned, the appellant relies upon an alleged omission to found its case. In this regard, the appellant relied upon, first, an alleged delay on the part of the respondent to take steps to ensure that the fire was promptly extinguished after it was first reported; secondly, an alleged failure by the respondent to have adequate fire-fighting facilities in place; and, thirdly, the respondent's failure to have cleared the warbos from Portion C (contending that if it had it been cleared, the fire would not have become uncontrollable).

[26] Paragraph 27.
[27] F D J Brand *Stellenbosch LR* (2014) at 457.

[20] Although I shall deal with each of these contentions in turn, it is convenient to first deal with a statutory issue relevant to the overall issue of whether the appellant proved its case. Both in the court a quo and in their heads of argument in this court, both parties debated the effect of s 34 of the National Veld and Forest Fire Act 101 0f 1998 (the Act). It reads as follows:

'(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which-

(a) the defendant caused; or

(b) started on or spread from land owned by the defendant,

the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.

(2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful.'

(As an aside it must be stated that this not only recognises the distinction to be drawn between wrongfulness and fault but it provides a clear example of why it would be wrong to conflate the two elements. A landowner might well be deemed to be negligent under s 34(1) but, as is reinforced by s 34(2), may still be able to escape liability in the event of his actions not having been wrongful. This could be the case if, for example, the owner has been essentially divested of the incidence of ownership, including control – as to which see below.)

[21] In any event, relevant to the applicability of the section are the following: the respondent was the owner of the land on which the fire started and from where it spread to the appellant's forest; it is common cause that the fire in question was a 'veldfire' as envisaged by the Act and that the respondent was not a member of a fire protection association in the area where it occurred; the respondent does not dispute that the fire burned a substantial portion of the appellant's forest, so clearly loss was suffered (although it has not yet been

quantified). Despite all of this, the respondent contended that the presumption in s 34(1) does not apply in respect of the appellant's claim against it.

[22] The respondent's argument on this issue was based on an 'owner' being defined in s 1 of the Act as having both 'its common law meaning' and as including, inter alia, 'a lessee or other person who controls the land in question in terms of a contract, testamentary document, law or order of the High Court'. This somewhat awkward definition was the subject of the judgment in *Mondi v Martens*[28] in which the court concluded that unrestricted and exclusive control of possession of an article was central to the common law meaning of ownership and that an owner as envisaged by the section had to have the right of control over a property. Were this is not so, so it was reasoned, the presumption of negligence in s 34(1) would operate unjustly against an owner who had no right of control over the land. In the light of the contractual relationship that existed in that case between the first defendant and another party, in terms of which the first defendant had divested himself of right of control over the property and had retained no more than the registration of ownership in his name, the court concluded that the first defendant had ceased to be an 'owner' within the common law meaning as defined in the Act.

[23] In the present case the respondent alleged it had leased Portion C to the trust used by Mr M Meyer as a vehicle for his farming operations, and that it was consequently not in control of the property at the time the fire broke out. Relying on the judgment in *Mondi v Martens*, the respondent argued that in the circumstances the presumption in s 34(1) was of no application. The appellant's answer to this was two-fold. First, it argued that *Mondi v Martens* had been

[28] *Mondi South Africa Ltd v Martens & another* 2012 (2) SA 469 (KZP).

wrongly decided. Secondly, relying upon the evidence of Mr Meyer himself, whilst admitting the existence of the lease, the appellant argued that it had not related to the whole of Portion C but had been restricted to some 64 ha of arable lands which Mr Meyer had used to graze his cattle, and that the area where the fire had started and spread to Witelsbos had never been let.

[24] In regard to the first of these issues, the appellant argued that the court in *Mondi v Martens* had conflated the liability for certain duties under the Act and the presumption of negligence contained in s 34(1) with delictual liability. This was particularly so in regard to its reasoning that it was necessary to adopt a narrow meaning to the concept of ownership so as to avoid an owner, who had no right to control over land, being held liable. The correct approach, so the argument went, would have been for the court to have held the registered owner to have been an owner in terms of the Act – and therefore liable to perform the prescribed duties imposed by the Act – but not having been liable in delict as, due to him not having been in control of the property in question, he had not acted wrongfully.

[25] This criticism I find to be compelling, and it may well be that the judgment in *Mondi v Martens* was founded on an incorrect premise and approach. But the presumption is really an evidential aid and where, as here, the essential facts are known its role is to a large extent truncated. As appears from what follows, however, the proven facts in the present matter rebut any presumption of negligence, making it unnecessary to reach a decision on whether the reasoning in that case was correct. For present purposes I therefore intend to proceed on the assumption, but without deciding, that the section

placed an onus on the respondents to show that the fire spread to Witelsbos without negligence on its part.

[26] In the light of these comments, I return to the alleged negligent omissions advanced by the appellant. The first of these, as I have mentioned, is an alleged delay on the part of the respondent to take steps to ensure that the fire was promptly extinguished after it was first reported. The appellant argued that the opinion of both Mr Scholtz and Mr Van Niekerk that the fire could have been extinguished had more prompt action been taken within the first 30 minutes, was not speculation as there had been a similar fire in the vlei on 27 August 2005 which had been successfully contained and extinguished. This, so it was argued, had been due to the access gate to the property in the western boundary having been unlocked on that occasion, thereby allowing the fire to be speedily reached. However, this had not been possible on the day in question as Mr Burrows had arrived with the wrong keys and had failed to go and fetch the correct keys when this mistake became apparent. The appellant also argued that Mr Burrows had remained passive and idle until Mr Van Niekerk arrived rather than, either alone or with the assistance of the respondent's fire-fighting personnel, having used the open pedestrian gate onto the property to gain access to the fire and put it out himself.

[27] Certain of the issues arising out of this argument may be disposed of fairly swiftly. First, Mr Burrows was apparently a man of advanced years who, as I have mentioned, had died before the trial and was thus not available to explain his actions or defend himself against the allegations of tardiness levied against him. But, importantly, it was not alleged in the appellant's pleadings that the respondent should be held vicariously liable for any negligent act or

omission on the part of Mr Burrows. His personal negligence was therefore not in truth a live issue. Moreover, even if he was negligent, an issue on which I do not intend to comment, the fact remains that there is nothing to establish that the relationship between he and the respondent was of such a nature as to visit vicarious liability upon the respondent. All one knows is that he was a leading figure in the Clarkson community and that he operated as a channel of communication between the appellant's representatives and the respondent. The fact that he was, seemingly, a member of the respondent's church is no reason, in itself, to render the respondent vicariously liability for any actions or omissions on his part.

[28] Secondly, on this issue the appellant faces a problem in respect of causation. Despite the successful control of the fire of 27 August 2005, it is a matter of speculation whether, if Mr Burrows or anyone else charged with the respondent's affairs, had taken more precipitate action the fire would not have spread and become uncontrollable. The various fire-fighting teams and their equipment only arrived on the scene after Mr Van Niekerk, and there is no suggestion that their attempts to extinguish the fire were delayed by the locked gates. By the time they arrived on the scene the fire was beyond their control. The real culprit for its spreading appears to have been the wind which had, by then, become strong.

[29] The respondent attempted to meet this by pointing to Mr Van Niekerk's evidence that when he arrived on the scene there was no wind at all as the smoke was rising straight up. Whilst he said this when he was recalled to testify, in his initial testimony at the commencement of the trial he had stated that when the fire was first reported the wind was already blowing light to moderately

from the south west. This, too, was the evidence of Mr Scholtz. Although Mr Van Niekerk was not tested on this, his later evidence that there had been no wind when he arrived at Portion C is obviously unreliable given both his and Mr Scholtz's earlier evidence to the contrary, as well as the rapid advance made by the fire immediately upon his arrival.

[30] The wind was obviously an important contributory factor in the spread of the fire. In the light of the climatic conditions and the drought that was being experienced at the time,[29] it is a matter of common sense any veld fires would have been easily spread by wind. The fact that on a previous occasion the appellant had been fortunate enough for a fire in a similar position to have been extinguished before it spread too far does not, in itself, establish that the fire on the day in question could probably also have been extinguished, let alone by Mr Burrows alone or with the assistance of anyone else if available – which was not shown to be the case – had he or they acted sooner. There are just too many variables which come into play: the precise size of the fire; the material that was burning; whether or not the fire spotted[30] either on the day in question or during the previous incident. It needs little imagination to conjure up factors that may have been of significance on one day but not on the other.

[31] One obvious variable is the time it took for the appellants own fire-fighting team to reach the blaze on each occasion. According to Mr Van Niekerk his team had been able to reach the fire of 27 August 2005 within 30 minutes. On the day in question, however, he arrived about 30 minutes after receiving the first report whereas his team arrived later. There is no suggestion

[29] It was alleged in the Particulars of Claim that 2005 was one of the driest in the last 80 years.
[30] Spotting occurs when burning material lifts into the air and then causes a further fire on landing.

that the appellant's team were tardy in their arrival, but the time difference may well have had a significant influence on the outcome of the fire.

[32] I do not intend to dwell on this issue in more detail. Suffice it to say that I do not think that, simply through the fact that the previous fire had been contained, the appellant showed that the fire on the day in question would probably have been similarly extinguished without spreading into the warbos or becoming uncontrollable had more precipitate action been taken. There are just too many uncertainties and variables for that conclusion to be drawn on a balance of probabilities. Moreover the appellant's argument that the respondent failed to take earlier action overlooks the fact that, as set out below, it had appointed an independent contractor, Mr Wasserman, most of whose employees were members of the Clarkson community, to act on its behalf to fight fires. He was immediately called to the scene and it is not suggested he unduly delayed arriving to render assistance.

[33] Accordingly, in regard to the first issue, bearing in mind that the statutory presumptions relates to negligence, not causation, it was not shown that an undue delay on the part of the respondent caused the fire to spread to the appellant's property. That brings me to the more pertinent question raised by the appellant, namely, the alleged inadequacy of the fire-fighting measures the respondent had in place.

[34] In advancing its case in this regard, the appellant placed considerable emphasis on s 17 of the Act which reads:

'Readiness for fire fighting

(1) Every owner on whose land a veldfire may start or burn or from whose land it may spread must-

(a) have such equipment, protective clothing and trained personnel for extinguishing fires as are-

(i) prescribed; or

(ii) in the absence of prescribed requirements, reasonably required in the circumstances;

(b) ensure that in his or her absence responsible persons are present on or near his or her land who, in the event of fire, will-

(i) extinguish the fire or assist in doing so; and

(ii) take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any.

(2) An owner may appoint an agent to do all that he or she is required to do in terms of this section.'

[35] The respondent did not have a dedicated team of trained personnel for extinguishing fires on its property. In addition, its fire-fighting equipment appears to have been fairly rudimentary. It consisted at the time of two 210 litre drums of water and a pump mounted on a trailer towed by a tractor. At first blush this would not amount to compliance with s 17(1) but, notwithstanding the obvious inadequacies in regard to its own equipment and trained personnel, for the reasons that follow I do not view the respondent as having been in breach of its obligations under the section.

[36] The evidence of the appellant was to the effect that although Mr Burrows had from time to time in the past arranged for the odd team of volunteers to fight fires, the respondent had relied more and more upon the appellant to do so on its behalf. This was so particularly from the year 2000 onwards. The appellant had understandably accepted this responsibility as fires on Clarkson were clearly a threat to its Witelsbos plantations; and this arrangement appears

to have been relatively successful. In addition, on various occasions after the appellant had procured the services of independent contractors to assist in fighting fires on the respondent's property, it submitted their charges to the respondent who paid some of them. In this way the respondent became largely reliant upon the appellant and its expertise and assistance to fight fires, as indeed it did on the day in question.

[37] Importantly, the respondent's declining interest in, or commitment to, fighting fires on its property became a sore point for the appellant, whose representatives took the matter up with Mr Burrows on several occasions. As a result of this pressure, and acting on the appellant's recommendation, the respondent contracted with a local independent fire-fighting contractor, Mr Fanie Wasserman, to provide it with fire-fighting services. Mr Wasserman had a team of some 60-80 trained fire-fighters, most of whom were in fact residents of the Clarkson Township, who were well trained in their vocation. Mr Wasserman employed two foremen, each of whom was responsible for a 5 ton fire truck that held the necessary fire-fighting equipment, including hand-beaters and mobile water sprayers, for the men to use. The appellant's own evidence was that Mr Wasserman's team formed an effective and well equipped fire-fighting unit.

[38] As a result, from about 2003 the respondent was able to call upon Mr Wasserman to fight fires on its behalf on its property. Although the relationship between Mr Wasserman and the respondent later became strained due to allegations of non-payment of services rendered, it was only in about 2007 that Mr Wasserman told the appellant that he was no longer prepared to work for it. On testifying, Mr Wasserman himself confirmed that in 2005, the

year that the fire in question occurred, he was under contract to the respondent to perform fire-fighting services on its behalf – as he did on the day of the fire in question.

[39] As already set out above, s 17(2) of the Act allows an owner to discharge its obligations under that section by appointing an agent to do all that is required of it. This the respondent did and it is not suggested that the services and equipment Mr Wasserman was able to supply fell short of what the respondent, as owner of Portion C, was obliged to have available to comply with its obligations under s 17(1). The respondent was thus in no way in breach of its obligations under s 17 and did in fact have in place an effective and well equipped fire-fighting team which, as the events of the day in question proved, was capable of being on its property at short notice in order to combat fires.

[40] Not only had the respondent in this way discharged its obligations under s 17 but, in my view, it cannot be held liable for negligence in failing to have adequate fire-fighting measures in place. Not only was it contractually entitled to call on the considerable expertise and trained manpower of Mr Wasserman and his team, but could also draw comfort from its knowledge that, in the event of a fire on its property, the fully trained might of the appellant's fire-fighting team and its equipment would undoubtedly be immediately summoned to its aid. The mere fact that the fire that day flared up out of control does not mean that reasonable fire-fighting measures or steps had not been taken. They clearly had.

[41] In these circumstances, I am satisfied that the respondent showed that the fire-fighting measures it had in place, including the justified anticipation of assistance from the appellant itself as well as its contracted fire-fighting agent Mr Wasserman, did not fall short of what a reasonable person in its position as owner of Portion C would have provided. On this second issue, too, the appellant must fail.

[42] For the reasons that follow, this also effectively disposes of the appellant's third and final complaint against the respondent, namely its alleged negligent failure to clear the warbos from the vlei on Portion C. The precise sizes of both the vlei and the warbos are not known and were not properly explored in evidence. What does appear from the record is that the arable areas of the property, totalling some 64 ha, extended over more than half of Portion C. A considerable percentage of the remainder appears from the plans to have been vlei land, and as appears from the photographs handed in as exhibits, the warbos, in turn, was of not inconsiderable size. In fact the evidence of Mr Meyer, for some reason not seriously challenged, that the warbos could have been cleared by manual labour in a single day at a cost of R1 000 can, on the photographs alone, be rejected as wholly improbable.

[43] The issue then becomes whether the respondent should be held liable for failing to clear this warbos from its property, bearing in mind that, like the appellant's own plantations, it is far more flammable than the indigenous vegetation of fynbos and protea. Put differently, was it wrongful and negligent for the respondent not to have cleared the warbos knowing that if it caught alight, the fire might spread to Witelsbos?

[44] In the present dispute, the appellant's allegation that the respondent had acted wrongfully was based primarily upon the respondent's knowledge of the fire risk created by the warbos about which it had complained to the respondent on a number of occasions (the respondent had refused to do anything about the situation as the residents of Clarkson were putting the warbos to various uses, including the harvesting of wood). The essence of the allegation of wrongfulness was, thus, the foreseeability of the fire hazard caused by the warbos but, for the reasons already mentioned, that is a factor relevant to the determination of negligence rather than wrongfulness. In these circumstances it seems to me that the dispute ultimately turns on whether the respondent was negligent in not removing the warbos as it was a fire hazard rather than whether its failure to do so was wrongful.

[45] As was mentioned by this court in *Durr*[31] a landowner is under a 'duty' to control or extinguish a fire burning on its land. But as Nienaber JA stressed in *H L & H Timber*, whilst landowners may be settled with the primary responsibility of ensuring that fires on their land do not escape the boundaries, this falls short of being an absolute duty.[32] And in considering what steps were reasonable, it must be remembered that a reasonable person is not a timorous faint-heart always in trepidation[33] 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.

[31] *Minister of Water Affairs and Forestry & others v Durr & others* 2006 (6) SA 587 (SCA) para 19.
[32] Paragraph 21.
[33] *Herschel v Mrupe* 1945 (3) SA 464 (A) at 490E-F.

[46] Although the warbos may have been more flammable than the other vegetation in the vlei, and thus a reasonable person would have appreciated, it was made up of plants, albeit foreign invaders, occurring naturally upon the respondent's property. This distinguishes the present case from the decision of this court in *Durr* in which an alien invader, black wattle, had been cut and then stacked to dry out on the defendant's property thereby creating a 'tinderbox' which ignited and caused a fire to spread. It had been common cause in that case that the defendant, in drying and stacking the wattle, had created 'one of the worst fire hazards imaginable'.[34] The court was therefore concerned with a man-made fire hazard and not, as here, a piece of vegetation which burns readily but which was naturally upon the property. Accordingly, although I accept that it was far more likely for a fire in the warbos to spread than a fire in the fynbos in the vlei, and that this would have been apparent to a reasonable person, the true issue is whether, knowing that to be the case, the respondent took reasonable steps to guard against a fire spreading to the appellant's property – and of course removing the warbos would have been such a step.

[47] A reasonable landowner in the respondent's position was therefore not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it cannot be held liable for negligence just because further steps could have been taken.[35]

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[34] *Durr* para 22.

[35] See *Robertson v Durban Turf Club & others* 1970 (4) SA 649 (N) at 653D cited with approval in *Van Wyk v Thrills Incorporated (Pty) Ltd* 1978 (2) SA 614 (A) at 623C-D; and M Loubser et al *The Law of Delict in South Africa* 2 ed (2012) at 118.

[48] Did the respondent take such reasonable steps? I have already dealt in detail with the fire equipment and manpower it had arranged to have available to fight fires on Portion C. In this regard, not only had the respondent had engaged Mr Wasserman to make his fire-fighting services available if needs be, but it was aware that the appellant would immediately take steps as it had always done in the past to come to its assistance in combatting any fire that should break out. All these fire-fighting forces were considerable and, in my view, more than fulfilled the respondent's obligation to take reasonable steps in the circumstances, including the presence of the warbos, to guard against a fire spreading from its property. Although the warbos may have burned more easily than the surrounding vegetation, it was a natural resource on the property and not a man-made tinderbox such as the case in *Durr*.

[49] The truth of the matter, as I have already said, is that the fire got out of control because of the strong wind that got up. This caused the fire to spot and to spread despite the presence on the scene of a number of fire engines and the substantial number of fire-fighters who ultimately proved to be helpless in stopping the fire from encroaching onto Witelsbos. From the evidence led by the appellant itself, the fire could not be controlled despite the presence of equipment and manpower far beyond that which the respondent alone could reasonably have marshalled, but which it was aware would hasten to its assistance in the event of a fire on its property. It is so that the removal of the warbos would have been a further step to prevent any fire that might start from spreading, but that does not mean that the failure to remove it is to be regarded as unreasonable given the substantial fire-fighting facilities that were available to fight fires on Portion C.

[50] I am therefore of the view that despite the presence of the warbos, the steps taken by the respondent to avoid a fire on its property spreading to its neighbours were reasonable in the circumstances. On this basis the court a quo correctly concluded that the appellant had failed to prove its case and dismissed its claim.

[51] The appeal is dismissed with costs.

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L E Leach

Judge of Appeal

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