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

Case no: 10067/2011

In the matter between:

GERT HENDRIK JACOBUS KRUGER Plaintiff

And

THE MEC, TRANSPORT & PUBLIC WORKS FOR THE WESTERN CAPE First Defendant

THE EDEN DISTRICT MUNICIPALITY Second Defendant

JUDGMENT: THURSDAY 29 OCTOBER 2015

Schippers J:

[1] The plaintiff, a practising attorney in Pretoria, sues the defendants for damages in the sum of R906 550.00, sustained when his property, Portion 5 of the farm Honingklip in the Langeberg Municipality, Division Riversdale, Western Cape Province, measuring some 616 hectares ("Honingklip" or "the plaintiff's farm") was extensively damaged in a fire on 26 December 2008.

[2] The plaintiff's claim, as set out in his particulars, may be summarised as follows.

(a) In terms of a written agreement between the first and second defendants (entered into in April 2009), the first defendant appointed the second defendant to maintain proclaimed provincial roads, such as the gravel road between Stilbaai and Gouritzmond, known as the R158 road ("the road"), including the road reserve. The express, alternatively, implied or tacit terms of the agreement, were that the second defendant would maintain, repair, protect and manage provincial roads; the first defendant, through its District Roads Engineer, would provide the necessary funds, plant and professional engineering support; and the first defendant would monitor and evaluate the performance of the second defendant.

(b) At the material times the first and/or second defendant was/were the owners or in control of the road as contemplated in the National Veld and Forest Fire Act 101 of 1998 ("the Act"). The defendants were under a duty of care: to prepare and maintain a firebreak next to the road, and ensure that it was free from inflammable material and sufficient to prevent a veldfire from igniting and spreading from the road; to have equipment, clothing and trained personnel to extinguish a veldfire and alert owners and occupiers thereof; not to create a fire hazard during the summer holiday season; and to effectively and timeously extinguish a veldfire originating on the road.

(c) On 23 December 2008 a veldfire originated in the road reserve in the vicinity of the farm, "Buffelshoek 455". The fire spread to the

> plaintiff's farm and destroyed 9 km of wire fencing, flowers, fynbos and thatching reed. The plaintiff alleges that this fire was caused by the negligence of the first and/or second defendants or their employees who were negligent in the following respects. They failed to: prepare or maintain a firebreak next to the road; extinguish the fire or do so at a time when they were able to, and allowed it to burn out of control; take any steps to prevent the fire from spreading to the plaintiff's farm; ensure that they were properly equipped with fire-fighting and communication equipment; maintain and implement a system of management or control designed to ensure that the fire would be controlled and extinguished and would not spread to the plaintiff's farm; and call for the assistance of the fire brigade and other authorities timeously.

[3] The defendants deny that they or their employees acted wrongfully or negligently. They also deny that the fire of 26 December 2008 was a "veldfire" as contemplated in s 2 of the Act. The defendants plead that in the event of the plaintiff proving that a fire spread to his farm from an adjacent property, the plaintiff or his employees were negligent in failing to prepare and maintain firebreaks and regularly burn the veld on his farm so as to prevent the spread of fires, and in not having trained personnel and equipment to prevent the spread of fires to his farm. They also ask for an apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956. The first defendant alleges that the second defendant was under a legal duty to have equipment, protective clothing and trained personnel to extinguish a veldfire and to take action to contain the spreading of the fire to the plaintiff's farm. The second defendant denies that it was obliged to maintain the road reserve in terms of the written agreement with the first defendant.

[4] The parties agreed to a separation of the issues in terms of rule 33(4) of the Uniform Rules of Court, in terms of which the issues relating to the defendants' liability were to be determined first, and those relating to the quantum of the plaintiff's damages would stand over for later determination.

The fire

[5] The source of ignition of the fire is unknown. The plaintiff testified that on 23 December 2008 at about 17h45 he was on his farm, Driefontein (where he lives for about two months per year), when he saw smoke in an easterly direction. It looked like the smoke was coming from his farm, Honingklip. He immediately went to Honingklip and got there in about 15 minutes. But it was not burning. He travelled east along the road until he reached a point on the road reserve on the northern side of the road where he saw that a fire had burnt in the shape of a rugby ball (as shown at point X on a map, Exhibit A p 3), but it was no longer active at that point. That area can be seen in photo 9 of Exhibit A, taken on 24 December 2008.[1] There was no one else at the scene and no sign that the fire had been put out. A neighbouring farmer, Mr Paul Zietsman, who has since passed away, arrived on the scene about five minutes later.

[6] Subsequently other farmers arrived on the scene and there was a discussion about the fire. However, they could not go into the veld because the fire was too intense. When the plaintiff got to the road reserve he noticed that a strong south-westerly wind was blowing. According to the weather station at Stilbaai, on 23 December 2008 there was a strong south-westerly wind with gusts of up to 60 km/h. The fire had already burnt in a valley up a ridge, as is evidenced by photo 20, and the western and eastern flanks of the fire were active. The plaintiff said that the fire started in the road reserve which appears in photo 9. There is a fence more or less in the middle of the bushes in photo 9,

[1] Point X on photo 3 of Exhibit A - the plaintiff's bundle of maps and photographs.

which appears more fully in photos 18 and 19.[2] The plaintiff remained on the scene for some one and a half hours, after which he returned home.

[7] The plaintiff testified that the road reserve was a risk. It was overgrown on both sides with vegetation, grass and flammable material along the road which is a reasonably busy route during the holiday season and which links two holiday towns, namely Gouritz River Mouth and Stilbaai as appears from photos 9, 10 and 11 of Exhibit A, taken a day after the fire. The vegetation in the reserve was dangerous especially at that time of year when it is hot, dry and windy. The plaintiff conceded that the vegetation in Rein's Coastal Nature Reserve ("the nature reserve" or "Buffelshoek") was also a fire hazard. He said that he bought the farm Driefontein in 1987, Honingklip in 2001 and the farm Honing Can, in 2012, all of which are shown on the map, Exhibit E. Since 1997 the vegetation in the road reserve had never been cleared. Initially he thought that Hessequa Municipality was responsible for this, but later established that it was the second defendant's responsibility.

[8] According to the plaintiff, nothing of note happened on 24 December 2008. That day he noticed that the western flank of the fire (which had been burning in the nature reserve as appears from photo 11 of Exhibit A) was no longer burning, and there was no risk to his farm. According to the Stilbaai weather station, the wind direction was mainly south-westerly, later the evening south and south-easterly, and north and north-westerly during the night.

[9] As this case illustrates, once a fire starts, weather conditions are highly relevant to its progress. Wind, temperature and humidity play a significant role. On the morning of 25 December 2008 the plaintiff noticed that the wind direction had changed to south-easterly. The plaintiff said that the western

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[2] Photos 18 and 19 of Exhibit A.

flank of the fire had flared up and started burning in a westerly and north-westerly direction, towards his farm. The plaintiff was alone and had no employees to help him fight the fire that weekend. They were on leave from the weekend before Christmas until 2 January 2009.

[10] On the morning of 26 December 2008 at about 6h00 the plaintiff returned to the place he had inspected on 23 December (point X on p 3 of Exhibit A), after which he went to Honingklip. The second defendant's disaster team had been positioned on the road near the Honingklip gate. A number of farmers in the area had gathered along the road. The western flank of the fire had flared up and was burning in a western and north-westerly direction, as is evidenced by photo 11. They telephoned the fire brigade at Riversdale, and subsequently Mr Lukas Van Sittert ("Van Sittert") came to the scene. The plaintiff, the Chairman of the "Duineveld Kusvereniging", took a leading role. They went to the farm of Mr Kippie Horn, where from points A-B on Exhibit C in a south-north direction, there was an accessible path of some 2 m wide. Using a bulldozer at the rear of which two railway lines were horizontally attached with chains (Exhibit A photo 7), they flattened the vegetation, thus creating a firebreak of some 14 m – 6 m wide on either side of a 2 m path. The firebreak appears in photo 8.

[11] They returned to the road and suggested to the farmers of the area who had remained on the road, that they should ignite a back fire between points A and B on the map on p 3 of Exhibit A. The plaintiff explained that this is done using a bundle of dry thatching reed of 1 to 1.2 m long as a torch which is lit and then used to ignite flammable material, to cause a fire that burns smoothly into the wind, in the direction of the oncoming fire. The back fire would burn from west to east to meet the oncoming fire, burning from the opposite direction i.e. east to west. At some point the two fires would meet and both would burn

out. However, the farmers told the plaintiff that they were afraid to start the back fire - the wind could change direction and the whole of the Canca valley north of the farms, covered in valuable thatching reed worth millions of Rands, could burn. The farmers had neither the manpower nor equipment, and were unwilling to start the back fire, unless the second defendant's disaster management team assisted them.

[12] At the time, a disaster management team was on the road near the plaintiff's farm, which appears on a map of the area (Exhibit E). The plaintiff said there were approximately 50 workers and fire fighters, three water tankers, and two trucks. Apart from this manpower and equipment, the second defendant fought the fire with a helicopter, performing bucketing on houses and their immediate surrounds to prevent them from burning down. At about 9h00 on 26 December 2008, the plaintiff and Mr Ben Hoogenhout ("Hoogenhout") walked to the person in charge of the fire fighters (whom he could not identify, save to say that it was a strongly built young man with blonde hair) and asked him to assist them with the back fire which they wanted to start, especially with "spotting". Spotting occurs when burning material is lifted by wind, carried through the air, and deposited on unburnt ground. When it is deposited in a place where there is other flammable material, the burning material may start a new fire. The higher the wind speed, the greater the likelihood of spotting. However, the team refused to assist the plaintiff and Hoogenhout. They were told that the team had been given a direct order to leave the road and go into the veld only if there was a threat to human life.

[13] The plaintiff and his fellow farmers then regrouped further west. The fire was fast approaching, as can be seen from the smoke on photos 7 and 8 of Exhibit A. These photos were taken from inside the gate of the plaintiff's farm, next to the road. By lunchtime on 26 December 2008 they got a bulldozer

which they had hired in Stilbaai. Using the bulldozer, they created a firebreak between points E and F on the map, Exhibit A p 3, to the west of the plaintiff's farm.[3] At approximately 18h00 they started a back fire on the edge of the firebreak. The last part of the back fire was lit around 19h00, after dark. Even then, the plaintiff and Hoogenhout were in the minority. He said that it was difficult to convince the other farmers to start the back fire and that there had been a discussion for an hour about it. By the time that the back fire was lit, the flames of the main fire were coming over a ridge as appears from photo 5 of Exhibit A, and virtually the whole of the plaintiff's farm (some 616 hectares) had already burnt. The flames of the back fire are visible on photos 5 and 6 of Exhibit A. Some one and a half hours after they had started the back fire, and shortly after dark, the disaster management team came to help the plaintiff and the farmers. The back fire was effective and the two fires burnt out later on the night of 26 December 2008.

[14] As to contributory negligence, the plaintiff testified that he had made firebreaks of at least 5 m wide on each boundary of Honingklip, south, west, north and east; as well as a firebreak of some 5.5 m in the middle of the farm, running from south to north. There is also a firebreak on the eastern boundary of the plaintiff's farm and the farm of Mr Kippie Horn ("Horn"), as appears more fully in photo 12, taken about two days after the fire.

[15] The plaintiff testified that he got to point X on photograph 3 of Exhibit A at about 18h00 on 23 December 2008. In cross-examination it was put to him that Mr Deon Stoffels ("Stoffels"), an employee of the second defendant, arrived near point X on p 3 of Exhibit A at about 17h30 that day, and that there was no sign of a fire in the road reserve. The plaintiff disagreed. It was also put to the plaintiff that when Stoffels got to point X, the fire was burning in the

[3] The firebreak can be seen in photo 4 of Exhibit A.

valley north of the boundary fence of the nature reserve. The plaintiff replied that it was possible as he had not yet arrived at point X.

[16] Mr JG Horn ("Horn"), on behalf of the plaintiff, testified that he had been farming in the area for 52 years. He said that in 2008 the relevant road reserve was overgrown with vegetation and had never been cleaned since he has been in the area, and there had never been a veld fire in the road reserve. Prior to the fire in 2008, he had put up new fences along the road on his farm, "Groenkamp", and had asked officials of the second defendant to clean the road reserve, but without success. Usually they responded that the second defendant did not have funds. Horn said that there were good firebreaks on the farms on either side of the road, which included the plaintiff's farm. There were however no firebreaks in the nature reserve.

[17] On 23 December 2008 late in the afternoon, Horn was one of the farmers who had met along the road. The head of the fire was about 150 m from where they were standing. Horn left that place, drove along the road in the direction of Mossel Bay, and got out of his vehicle as he followed the progress of the fire. On one of these occasions, Van Sittert, accompanied by his son, had stopped behind Horn and took photos of the fire. He told Van Sittert that he wanted to start a back fire in the road reserve in order to stop the fire. Van Sittert advised him against it. About 4 km from the place where the farmers had met, the fire went behind a hill and came back across the road. He and Van Sittert had to wait as they could not drive through the fire. From there the wind drove the fire to the Gouritz River mouth where it rained and the fire was extinguished.

[18] Horn said that on the morning of 24 December 2008 he saw that the fire had flared up on the farms, Wolwefontein and Melkhoutfontein, and was burning in a different direction. He thought that it would not continue burning

and die out before it got to his farm and the plaintiff's farm. He saw aircraft dousing the fire with water, the second defendant's trucks were carrying water and people were suppressing the fire on the instructions of Van Wyk. Horn and Van Wyk then decided that they were going to extinguish the fire the next day.

[19] The next day i.e. 25 December 2008, Horn said, the fire returned to the same line where it had started. Horn, his son and other farmers of the area went to a house with a thatched roof belonging to another farmer, and made a huge fire around it to burn up combustible material and to protect the house. They returned to the road later that day. They went to the second defendant's employees on the road and asked them to assist in making a back fire between the plaintiff's western boundary and Horn's eastern boundary, so that their new fences would not burn. The employees said no, they were afraid there may be a court case. They wanted to extinguish the fire directly with fire-fighters and helicopters. Horn then left for another flank of the fire to see what was happening there. When he got there damage was everywhere. All the fences and thatching reed had burnt.

[20] Horn returned to his farm before dark. He noticed that a small part of his land had been turned into a firebreak, but there was nobody around. The farmers and the second defendant's employees were at point F on the map at p 3 of Exhibit F, between his and the plaintiff's farm; and a back fire had already been lit. The main fire had just passed through the boundary between their farms and the plaintiff's farm had already burnt. Shortly after arriving there Horn went home. He was angry because when he had asked the second defendant's employees to make a back fire, they were not willing to do so. When Horn returned to his farm on 26 December 2008, he saw that the back fire had stopped the main fire. However, there were still other fires burning in Gouritzmond which were extinguished only around 2 January 2009.

[21] Van Sittert, the former Head of Disaster Management of Hessequa Municipality, testified on behalf of the plaintiff. Van Sittert said that prior to December 2008 the entire fire management function was taken over by the second defendant.

[22] Regarding the fire, Van Sittert testified that he was on duty with a team in Stilbaai on 23 December 2008 at a fire which burned on a farm north of Jongensfontein Road, Stilbaai, which they had put out. They received a call that there was another fire at Gouritzmond. The late Mr Gideon Joubert ("Joubert"), also known as "Terry", a senior fireman, and his team left the scene around 16h47 on 23 December 2008 to attend to the fire at Gouritzmond. Van Sittert remained at the Jongensfontein fire scene for about 15 minutes until he was satisfied that the fire had been extinguished, and thereafter made his way to the Gouritzmond fire. Van Sittert was accompanied by his son, then 16, who took photographs of the fire. They drove along the road and got to a place near the nature reserve after 18h30, where according to Van Sittert the fire in question had started - point X on the map on p 3 of Exhibit A. He remained there for about five minutes. The fire however was not burning there at the time, and he did not observe the fire starting in the road reserve. When Van Sittert made this observation the fire was burning in a northerly direction but changed to an easterly direction.

[23] Van Sittert testified that they stopped at various places, got out of the car and took photographs of the fire. For the first few kilometres, the fire was far from the road, as appears from photos 1 and 2 of Exhibit F, but as they continued the fire came closer to the road because the wind, which was very strong, frequently changed direction. He said that photo 9 of Exhibit F shows the fire crossing the road reserve in a southerly direction, which set the veld

alight in the nature reserve. They had to stop and wait for some 15 minutes because the fire was extremely hot and there was thick smoke in the road. The wind changed direction yet again and they were able to drive through the smoke. Van Sittert, who had worked in the area for 15 years, said it was the biggest fire which had burned in the area.

[24] Van Sittert was a member of the disaster management team. He was concerned about getting to Gouritzmond to open the building which would serve as the Joint Operations Centre from which the fire would be centrally fought, monitored and managed. He referred to a map on p 2 of exhibit A which shows the area of the fire and where it started - at the word "(BEGIN)", which he himself had written for purposes of operational fire-fighting. He said that the spread of the fire was indicated on the map from the first day i.e. 23 December 2008; and that Mr Deon Van Wyk ("Van Wyk"), the Deputy Head of the second defendant's Fire Services, made changes to the map as the fire continued, indicating the points which were dangerous and showing that the fire burned in an easterly direction towards Gouritzmond and Bito, indicated as the encircled "4" on the map. Fortunately it rained late on the night of 23 December 2008. This resulted in the extinguishment of a fire burning towards a caravan park and Bito. Van Wyk then instructed Van Sittert that the people who had been evacuated from those areas, could return to them. The Joint Operations Centre was also responsible for receiving any complaints and providing food and water to the various fire-fighting teams. Van Wyk, a senior fireman, decided where fire-fighting teams had to go, what they were supposed to do and for how long they had to do duty.

[25] Van Sittert said that he was familiar with the concept, "command and control", in the context of disaster management. The response to the fire, and the monitoring and management thereof was directed from the Joint Operations

Centre, under the control of the second defendant. Ms Annelize Lambrecht ("Lambrecht") was the Head of the second defendant's Fire Services. After the fire in 2008 they did not receive complaints about the actions of persons who were involved in the fire.

[26] Stoffels, a fireman employed by the second defendant, testified on behalf of the first defendant. In 2008 he was a trainee fireman. On 23 December 2008 he was on duty at the fire in Jongensfontein, Stilbaai, with his shift leader, Mr Gideon (Terry) Joubert, when they were called to the fire at Gouritzmond. They left Stilbaai at approximately 16h45 in a Nissan 4 x 4 bakkie which Joubert drove. At about 17h30 they got to the road near the crossing depicted on photo 20 of exhibit (in the vicinity of point X on the map at p 3 of Exhibit A), and stopped right opposite the place where the fire could have started.

[27] Stoffels testified that when they got to the scene the head of the fire was approximately 1 km away. Nobody else was present. The fire was burning up a slope in a north-easterly direction but had not yet gone over the crest. It was a hot day and the wind was very strong. Stoffels said that he got out of the vehicle and walked to the road reserve. He looked for a road to gain access to the fire which was on their right hand side. Joubert did not get out of the vehicle, he was on the phone. Stoffels said that he walked on both the right and left sides of the road reserve in order to find an entrance road to the head of the fire - their main focus. He did not see fire or fire scars in the road reserve, but saw smouldering on the other side of the fence, i.e. in the nature reserve. It was not smouldering right up against the fence, but some 3 m from it. He said that he had walked on both sides of the road reserve where a fire had been smouldering inside the fence, and where it may have started. Stoffels told Joubert that he had seen smouldering inside the fence. Joubert responded that

they should look for a road to get to the head of the fire. Thereafter they went to a gate which they thought could provide access to the fire.

[28] At the scene, Stoffels said, the fire turned in an easterly direction as a result of the strong wind. He and Joubert then moved back on the road from which they had come. They wanted to find an entrance road next to the flank of the fire so that they could get to the head of the fire. They got to a gate which they thought was an entrance to an access road. They opened the gate and drove down a road for about 50 m only to discover that it was a dead end. They returned to the road and saw a house to the east of the fire. By that time their crew had arrived with a water truck. Joubert instructed them to secure the house against the fire. Joubert returned to Riversdale to fetch water tankers.

[29] Stoffels said that he and three other firemen took some 3 hours to protect the house against the fire. At that stage the wind was burning in an easterly direction and the fire was coming towards the house. The fire made a loud noise as branches crackled. The wind was extremely strong and blew sand everywhere. They tried to remove combustible material surrounding the house and sprayed water from the truck around the house. During this time the fire came very close to the house. They feared for their lives and saw the house as the only way to protect themselves against the fire. At some point they were lying on their stomachs behind the house because the wind was blowing smoke, branches and burning material all around them. The fire burned along both sides of the house, which was saved. Stoffels and his team then went to the north-eastern flank of the fire where they tried to put out the fire with the remaining water on the truck. In all this time he was in regular telephonic contact with Joubert. Subsequently they were fetched by persons employed by the second defendant.

The issues

[30] The issues which must be decided are these:

(a) Was the fire a "veldfire" as contemplated in the Act, and does the presumption of negligence in s 34 of the Act apply?

(b) Were the defendants under a duty of care to prevent fires from starting in the road reserve or spreading to the plaintiff's property as pleaded in paragraphs 8 and 9 of the particulars of claim?

(c) Was the plaintiff's property damaged as a result of the negligence of the first or second defendants as pleaded in paragraphs 11 and 12 of the particulars of claim?

(d) Did the fire start in the road reserve?

[31] In what follows each of these issues are considered in turn.

Was the fire a "veldfire" as envisaged in the Act?

[32] The plaintiff contends that the fire in question was a "veldfire" as contemplated in the Act, which would trigger the presumption in s 34 that a defendant is presumed to have been negligent in relation to a veldfire which starts on or spreads from land owned by the defendant, unless the contrary is proved.[4] The defendants dispute this.

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[4] Section 34 of the Act reads:

(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."

[33] The Act defines a "**veldfire**" as meaning a veld, forest or mountain fire. In *Gouda Boerdery*[5] the Supreme Court of Appeal (SCA) considered this definition and the historical references to the words "veld" and "veldfire". It affirmed the decision in *West Rand Estates*[6] in which it was held that the word "veld" generally conveys the idea of an area covered with veld grass of considerable extent in its original rough state, but does not include land which is cultivated or immediately connected with buildings;[7] and that it generally denotes an uncultivated and unoccupied portion of land, as distinct from the portion which is cultivated, occupied and built upon.[8]

[34] The SCA in *Gouda Boerdery* referred to the Act itself to determine whether the property in question was a veld. Section 12(1) requires owners of land on which a veldfire may start to prepare and maintain a firebreak on their side of the boundary between their land and any adjoining land.[9] As to the argument raised in that case that a railway reserve constituted "veld", the SCA noted that in terms of the Act, where the land in question takes the form of a strip of land 20 m wide, it would mean that the owner would be obliged to turn nearly the entire strip into a firebreak, regardless of the use of the land. This would mean that virtually every stretch of railway or road reserve in rural areas would have to be turned into a firebreak, which could never have been the lawgiver's intention.[10]

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5 *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA).
6 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 253 and 264.
7 *West Rand Estates* n 6 above at 253 per Solomon JA.
8 *Gouda Boerdery* n 5 above para 9.
9 Section 12(1) of the Act reads:
"Every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land."
10 *Gouda Boerdery* n 5 above para 11.

[35] That is the case here. In fact, the strip of land which would have to be turned into a firebreak is much less than 20 m. Mr Richard Hutton ("Hutton"), a civil engineer in charge of the Regional Roads Management Directorate of the Department of Transport and Public Works of the Province of the Western Cape ("the Department"), testified on behalf of the first defendant. Hutton said that the road in question is a divisional road and that generally, the road reserve for such a road has a 20 m proclaimed width. From the edge of the gravel road to the fence the road reserve is generally 6 m on either side, which would have to be turned into a firebreak. This, in my view, is a clear indication that the road reserve in question cannot be veld, as contemplated in the Act.

[36] The plaintiff's case is that the fire started in the road reserve. This, on the authority of *Gouda Boerdery*, is not veld. The presumption in s 34(1) does not operate if the fire which starts on, or spreads from, a defendant's property is not a veldfire on the defendant's property but becomes one at a later stage.[11]

[37] Inasmuch as the fire did not originate as a veldfire contemplated in the Act, the presumption in s 34(1) does not apply.

Wrongfulness

[38] It is trite that negligent conduct which gives rise to damages is actionable only if the law recognises it as a wrongful.[12]

[39] The test for wrongfulness is settled law. In *Country Cloud*[13] the Constitutional Court stated it as follows:

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11 *Gouda Boerdery* n 5 above para at 495G.

12 *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 54.

13 *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC).

> "Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability." [14]

[40] The wrongfulness enquiry, it was held in *Loureiro*, focuses on,

> "the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm - indeed to respect rights - and questions the reasonableness of imposing liability."[15]

[41] The criterion of wrongfulness ultimately depends on a judicial determination whether it would be reasonable to impose liability on the defendant for the damages flowing from the specific conduct, assuming that all the elements of delictual liability are present. The judicial determination of that reasonableness, in turn, depends on considerations of public and legal policy in accordance with constitutional norms. Reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct. Instead, it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.[16]

[42] The plaintiff contends that the defendants were under a duty not to cause harm (and respect his right to property) by preparing and maintaining firebreaks next to or on the road; ensuring that such firebreak were adequate to prevent a veldfire or fire from igniting or spreading from the road; ensuring that the firebreak was free from flammable material capable of carrying a veldfire or fire

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14 *Country Cloud* n 13 above para 20.
15 *Loureiro* n 12 above para 53.
16 *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* Amici Curiae) 2011 (3) SA 274 (CC) para 122; *ZA v Smith and Another* 2015 (4) SA 574 (SCA) paras 17-19.

across it; ensuring that responsible persons were present at or near the road in the event of a veldfire or fire to extinguish it or to take reasonable steps to alert the owners or occupiers of adjoining properties to the fire; not creating a fire hazard during the summer holiday season; effectively and timeously extinguishing any veldfire or fire that originates on the road during the high fire risk summer and holiday season. Then it is said that the second defendant's disaster management team at or near the fire on 26 December 2008 had a duty to control the spread of the fire to the plaintiff's farm but failed to do so.

[43] When considering the issue of wrongfulness, the question is always whether the defendant ought reasonably and practically to have prevented harm to the plaintiff.[17] In every case a court must consider and balance inter alia the following factors: the foreseeability and possible extent of harm; the degree of risk that the harm will materialise; constitutional obligations; the breach of a statutory duty; the interests of the defendant and the community; who has control over the situation; the availability of practical preventative measures and their prospects of success; whether the cost of preventing the harm is reasonably proportional to the harm; and whether or not there are other practical and effective remedies available.[18]

[44] Applying these principles to the facts of this case, in my view it would be unreasonable to impose liability on the defendants for what is essentially a failure to prepare and maintain adequate firebreaks next to or on the road; to ensure that the firebreaks are free from inflammable material; and to not create a fire hazard during the summer holiday season.

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17 *Administrateur, Transvaal v Van Der Merwe* 1994 (4) SA 347 (A) at 361G-H; *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) para 7.

18 See Van der Walt and Midgley *Principles of Delict* (3rd ed 2005) 85 and the authorities there collected.

[45] As already stated, the duty not to cause harm for which the plaintiff contends is not contemplated in the Act - it would mean that virtually every stretch of road reserve in rural areas would have to be turned into a firebreak.

[46] Apart from this, the Act contemplates a substantial degree of self-help by individual property owners against the risk of fires, more specifically in relation to preventative action, fire-fighting and responsibilities once a fire has started.

(a) Chapter 2 of the Act regulates the establishment, registration, duties and functioning of fire protection associations, to deal with all aspects of veldfire prevention and fire fighting. Thus in terms of s 3 of the Act, owners of land (which include lessees or persons who control the land in question) may form a fire protection association for the purpose of predicting, preventing, managing and extinguishing veldfires,[19] in respect of an area which has regular veldfires, or a relatively uniform risk of veldfires, climatic conditions or types of forest or vegetation.[20] Section 12 enjoins every owner on whose land a veldfire may start or burn or from whose land it may spread, to prepare and maintain a firebreak. The requirements for firebreaks are set out in s 13 of the Act. It provides inter alia that an owner who is obliged to prepare and maintain a firebreak must ensure that it is wide enough and long enough to have a reasonable chance of preventing a veldfire from spreading to or from neighbouring land and that it is reasonably clear of inflammable material capable of carrying a veldfire across it, with due regard to the weather, climate, terrain and vegetation of the area.

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19 Section 3(1) of the Act.
20 Section 3(2) of the Act.

(b) Chapter 5 of the Act places a duty on all owners to acquire equipment and have available personnel to fight fires. Certain persons and officials are given the power to enter land and fight fires in an emergency. Section 17 provides that owners on whose land a veldfire may start or from whose land it may spread must have equipment, protective clothing and trained personnel for extinguishing fires; and ensure that in their absence, there are responsible persons to extinguish a fire, to assist in doing so and to take all reasonable steps to alert the owners of adjoining land.[21] In terms of section 18, any owner who has reason to believe that a fire on his or her land or the land of an adjoining owner may endanger life, property or the environment must immediately take all reasonable steps to notify the fire protection officer and the owners of adjoining land and must do everything in their power to stop the spread of the fire.[22]

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[21] Section 17(1) of the Act 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 insist in doing so; and
  (ii) take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any."

[22] Section 18 of the Act is in these terms:

"**Actions to fight fires** – (1) Any owner who has reason to believe that a fire on his or her land or the land of an adjoining owner may endanger life, property or the environment, must immediately-

(a) take all reasonable steps to notify-
  (i) the fire protection officer or, failing him or her, any member of the executive committee of the fire protection association, if one exists for the area; and
  (ii) the owners of adjoining land; and
(b) do everything in his or her power to stop the spread of the fire.

(2) Any person who has reason to believe that a fire on any land may endanger life, property or the environment, may, together with any other person under his or her control, enter that land or land to which the fire can spread in order to prevent that fire from spreading or to extinguish it.

[47] In my view, these provisions of the Act are inconsistent with the imposition of liability on the defendants for not preparing and maintaining firebreaks next to or on the road; ensuring that such firebreaks are free from combustible material so as to prevent a veldfire or fire from igniting or spreading; ensuring that responsible persons are present at or near the road to extinguish a fire; or taking reasonable steps to alert the owners or occupiers of adjoining properties to the fire.

[48] In other words, the Act envisages that there are many actions that owners and occupiers of land can take to try to protect their property from damage caused by fires starting on their land or spreading from other land. The Act contemplates and in certain circumstances requires individual property owners to take considerable and effective measures to protect their property against fire. These circumstances also militate against the existence of a legal duty of the kind for which the plaintiff contends.

[49] In addition, the evidence of Hutton - which was not contradicted - is that the costs of creating and maintaining firebreaks in road reserves would be prohibitively expensive, and disproportionate to the potential damage to landowners.

[50] Hutton testified that he is responsible for the overall management of District Roads Engineers and the in-house maintenance and construction of roads by District Municipalities and the Regional Offices of the Department. The road in question is classified as a divisional road due to low traffic volumes and the level of service expected from the road, as opposed to major arterial routes or main roads (which are given higher priority). Hutton said that there is a limited budget allocation in respect of the road, and because it is a divisional road, it is graded about four to five times per year.

[51] District Municipalities are responsible for the management of most of the gravel road networks in the Western Cape. This involves routine road maintenance work, and re-gravelling and upgrading of roads, within the budgets determined by the Department. Hutton has a say in the allocation of budgets and gives overall guidance regarding the management of particular units operating in the offices of District Roads Engineers and District Municipalities. He is also responsible for monitoring the expenditure of these offices on a monthly basis, to ensure that no irregular or unauthorised expenditure is incurred in violation of the Public Finance Management Act 1 of 1999.

[52] Hutton, who himself is a former district roads engineer, said that as regards the road reserve, the priority is the driveability, surface and drainage of the road, and the safety of motorists and other road users and pedestrians. Virtually all the complaints which the routine road maintenance teams receive concerning surface and gravel roads relate to driveability and drainage of roads. The focus is on the surface of the road and maintenance teams go out and repair drainage, clean pipes, repair and replace road signs, patch gravel roads with indentations especially after heavy rains, and generally keep roads in the best condition they can manage. Each road maintenance team covers 200 km of road. There is a huge amount of work to be done and they are under resourced.

[53] Another priority of road maintenance teams is to ensure that motorists have sight distance when travelling on the road, and to remove any vegetation encroaching on that sight distance. Hutton said that before the Department can consider a fire risk, it must be informed of that risk either by the public or a District Municipality. On this score Van Sittert, the plaintiff's witness, testified that they never received a complaint about overgrown vegetation in the road reserve of the road in question. Neither did Hessequa Municipality or the

second defendant complain to the Western Cape Province about the condition of the road reserve.

[54] If any fire risk is brought to the attention of a District Municipality, it is considered in the light of resources. There are some 6000 km of surface roads which have both alien and environmentally sensitive vegetation from the side drain to the fence; 10 000 km of gravel roads on which a fair amount of money is spent; and about 15 000 km of minor roads on which very little is spent because of scarce resources. Hutton said that everything is done from a risk and needs perspective, balanced against the affordability - there are many things in relation to roads that the Department simply cannot do because it does not have the money. If the Department or a municipality had to maintain firebreaks in road reserves, it would have to do this on either side of the road. In the case of only gravel roads in the Western Cape, for example, firebreaks would have to be created and maintained for a distance of 10 000 km x 2. This, Hutton said, is a virtually impossible problem.

[55] Aside from this, Hutton said that in terms of the Department's policy in relation to the removal of vegetation, a distinction is drawn between alien and environmentally sensitive vegetation. Environmentalists would first have to survey road reserves before any vegetation can be removed.

[56] In the light of Hutton's evidence, I consider that it would be unreasonable to impose liability on the defendants in the circumstances of this case, particularly having regard to the public interest in the maintenance of public roads; the financial resources of the defendants; the costs of creating and maintaining firebreaks in road reserves which would be prohibitively expensive;

the disproportionality between potential damage to landowners and the potential costs of prevention; and the social consequences of imposing liability.[23]

[57] But the plaintiff also seeks to hold the second defendant liable because its employees failed to assist him in making a back fire between points A and B on the land adjacent to the plaintiff's farm (p 3 of Exhibit A). The particulars of claim state that the second defendant had a disaster management team consisting of fire fighters, fire-fighting equipment and fire-fighting vehicles in the vicinity of the fire able to contain the spread of the fire to the plaintiff's farm, but that they refused to do so.

[58] In this regard Mr Ferreira, for the plaintiff, submitted that the position in English law that a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises so as to come under a duty of care merely by attending at the fire ground and fighting the fire, does not apply in this case because our law "is more scientific than the casuistic English system." Then it was submitted that the second defendant should be held liable because there are numerous cases in South African law in which security and other services were held liable for failing to perform their tasks properly and that the fire brigade, but one arm of a local authority, is liable for omissions.

[59] However, these submissions do not bear scrutiny, both on the level of the facts and the law.

[60] The facts show that the fire was intense and devastating. That appears clearly from the evidence of Van Sittert and the photographs which his son had taken. It shows that the fire had crossed the road and there was always the risk of the fire flaring up and spreading unpredictably, due to changing weather

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[23] *Administrateur, Transvaal v Van Der Merwe* n 17 above at 361I-362B; 364D-F.

conditions, which Van Sittert said happened. Indeed, the evidence established that the fire took off on 23 December 2008 and by 26 December 2008 it was still burning intensely when it destroyed the plaintiff's farm. Van Sittert said that it was the largest fire they had fought in his 15 years of service. Van Wyk testified that the left and right flanks (sides of the fire) were each approximately 17 km long.

[61] The intensity of the fire is underscored in the report by the plaintiff's expert, Mr Willem Vorster ("Vorster"), which is common ground. Vorster used satellite imagery to determine the origin of the fire and to indicate its spread. Vorster states that the fire started on 23 December 2008 on the farm Buffelshoek and burned in a north-easterly direction and an easterly direction. The original fire destroyed an area of some 3171 hectares. The later fire destroyed approximately 3216 hectares. The total area destroyed was about 6387 hectares.

[62] It is also common ground that on 26 December 2008, the fire was beyond direct attack. The plaintiff himself testified that the fire was so intense that one could not go near the fire to extinguish it: that, he said, would have been suicidal. The western front of the fire alone was about 3 km wide, apart from its eastern and north-eastern flanks. The flames were 10 m high at places. The fire was so extreme, that trying to put it out was equivalent to, in the plaintiff's words, "'n miggie teen 'n trein." He said that he had approached the disaster management team for assistance at about 9h00 on 26 December 2008. But by 10h30 that day it was already too dangerous to light a back fire between points A and B on the map at p 3 of Exhibit A, as a result of the intense heat of the fire which the plaintiff said could be felt from a distance.

[63] Yet the duty of care as pleaded, is that the second defendant's disaster management team at or near the fire on 26 December 2008 was in a position to and could have contained the spreading of the fire to the plaintiff's farm, but failed to do so.

[64] The plaintiff however is mistaken. There was nothing the defendants could have done to stop the fire. And there was no evidence that the defendants did anything or omitted to do something which made the danger any worse. Put differently, it cannot be said that the defendants or their employees created, increased or transformed the risk of harm. The second defendant in particular did not, by its employees refusing to assist the plaintiff to start a back fire along points A and B on the map at p 3 of Exhibit A, change the fire from one that covered 616 hectares (the extent of the plaintiff's farm) to one that covered 6387 hectares.

[65] As this case shows, fires, by their nature, may be incapable of control by human action. The fire in this case - a destructive large scale fire - had spread because that is what fires do in hot, dry conditions; or when the direction of the wind changes or wind speeds are high. And a fire can burn uncontrollably until the weather changes for the better, or the fire runs out of fuel or is extinguished. The fire in question spread because of the natural behaviour of fire. It burned over a number of days, flared up at different places, quickly became out of control, consumed everything in its path and ultimately destroyed an area of some 6387 hectares.

[66] As to the spread and intensity of large fires, Luke and McArthur say,[24]

> "The spread, intensity and shape characteristics of large fires defy simple description. Any fire which remains uncontrolled for some days is likely to be subjected to considerable wind and other weather changes, fuel differences and topographic variations. Even minor variations are important as these can determine the direction of head fire travel on any particular day. …
>
> When large fires burn for a lengthy period the main concern is that weather conditions may deteriorate. Should a day of extreme fire danger develop, fires are likely to burn completely out of control and cover a very large area in high-intensity runs."[25]

[67] In addition, the instruction given to the disaster team was to remain in position near the gate of the plaintiff's farm and to be ready to act when there was a threat to life (or a threat of injury). The plaintiff testified that the team was positioned on the road in such a way that they had a very good view of the fire, and could easily react if there was a threat to life. When he approached the disaster management team, the plaintiff said, there was no threat to life as a result of the fire, and the concern was valuable thatching reed and fynbos. He rightly conceded that the protection of life takes priority over the protection of vegetation; that he did not know the position in the area (regarding the raging fire); that the situation was unpredictable and the fire could have endangered the lives of people; and that it was not only the persons on the farms who had to be protected but also those who were using the roads during the fire.

[68] What all of this shows is that positioning the disaster management team at the place they were; deciding upon the composition of the team; equipping them with fire-fighting gear and vehicles; and instructing them to act when lives are endangered and to be ready when the need arises, are all policy decisions and forward planning, taken in the course of fighting a destructive large-scale and unpredictable fire. In my view, in these circumstances, it is not the function of a

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[24] Luke and Mcarthur (eds) *Bushfires in Australia* (1978).
[25] Luke and Mcarthur *op cit* n 24 above 110-111.

court to second-guess policy choices made by functionaries entrusted with fire-fighting, who are also responsible for managing the risks associated with uncontrollable fires. In addition, the second defendant is obliged to fight fires on behalf of the community, and to ensure the safety of the public and its crews, which would conflict with a duty of care of the kind contended for by the plaintiff.

[69] In this regard the argument in *Capital and Counties* against imposing a duty of care on fire brigades is apposite:[26]

> "It seems hardly realistic that a fire officer who has to make a split second decision as to the manner in which fire fighting operations are to be conducted will be looking over his shoulder at the possibility of his employers being made vicariously liable for his negligence. If there can be liability for negligence, it is better to have a high threshold of negligence … and for judges to remind themselves that fire officers who make difficult decisions in difficult circumstances should be given considerable latitude before being held guilty of negligence. It is not readily apparent why the imposition of a duty of care should divert the fire brigade resources from other fire-fighting duties."

[70] For the above reasons I have come to the conclusion that in the circumstances, the second defendant did not owe the plaintiff a duty of care to control the spread of the fire to his farm.

[71] At this point, and assuming that the defendants acted wrongfully, it is appropriate to deal with the question of causation. I am of the opinion that the plaintiff has not proved that the defendants' conduct was the cause of his loss.

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[26] *Capital and Counties plc v Hampshire County Council and Others; Digital Equipment Co Ltd v Hampshire County Council and Others; John Munro (Acrylics) Ltd v London Fire and Civil Defence Authority and Others; Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority* [1997] 2 All ER 865 at 1043.

[72] It is settled that causation involves two distinct enquiries: whether factually, the defendant's wrongful act was a cause of the plaintiff's loss; and whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue.[27]

[73] The cause of the plaintiff's loss, it was established in evidence, was the natural behaviour of the fire - not the conduct of the defendants. By 26 December 2008, under the influence of high winds and other weather changes, and with fuel such as grass, leaves and trees on the ground and in its path, the fire increased in intensity and was burning out of control. It could not be directly suppressed. The plaintiff said that the heat of the fire was so intense and it was approaching rapidly in the direction of his farm, that by 10h30 that morning it was too late to start a back fire. It is thus hardly surprising that the farmers who were with the plaintiff on 26 December 2008 were afraid to start a back fire and that it took him an hour to persuade them to do so - it was extremely dangerous because the wind could change direction at any time.

[74] Further, it is common ground that there was a chain of command from the Joint Operations Centre to the disaster management team. The team was placed along the road and instructed to be ready to act when life was in danger or to prevent injury. That, Van Wyk said, was a lawful instruction and if it was not carried out, the relevant official would be subject to disciplinary action. Moreover, if the official, contrary to his instructions, were to start a back fire which causes damage, the second defendant may be held liable. The plaintiff was informed of the instruction given to the disaster management team. However, he did not contact the Joint Operations Centre at all. Van Wyk said that they had not received a request to ignite a back fire.

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[27] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-I; Joubert *et al* (eds) *The Law of South Africa* (2nd ed 2005) Vol 8 Part 1 p 234 para 129.

[75] Van Wyk testified that there is a protocol in relation to back fires, in terms of which firemen must be trained and work under supervision. Only certain firemen employed by the second defendant are qualified to start back fires; and weather conditions and more specifically, wind speed is taken into account. So too, the condition of the terrain and the type, age and height of vegetation. And a back fire must be preceded by adequate firebreaks, which Van Wyk said, is the anchor from which one works, since a back fire may cause even greater damage than the head fire. Usually back fires would be ignited early in the morning or late afternoon, because the wind is at its strongest between 10h00 and 14h00, as was the case in the Gouritzmond fire. Van Wyk also said that given the size and intensity of the fire in question, and the fact that operationally, they were in charge of the fire, only he and Lambrecht were authorised to make a decision to start a back fire.

[76] On these aspects Van Wyk's evidence stands uncontradicted.

[77] On the plaintiff's own evidence there was a very short window within which a back fire could be started at points A to B on the map at p 3 of Exhibit A – one and a half hours. It is even shorter on Van Wyk's evidence: he said that the wind was at its strongest between 10h00 and 14h00. And the evidence is that the back fire between points E and F at p 3 of exhibit A was started around 19h00 on 26 December 2008. The evidence also shows that the fire that destroyed the plaintiff's farm was intensely hot, burning uncontrollably and spreading rapidly towards the farm; and that there was extremely limited time to put in place the procedures to start a back fire.

[78] In these circumstances, there is no evidence to show that it was probable that igniting a back fire between points A and B at p 3 of exhibit A, would have made any difference to the eventual outcome. Consequently, the failure on the

part of the defendants, if there was one, was not the cause of the plaintiff's loss; and on this basis also, his claim must fail.

Negligence

[79] The test for negligence is trite. Conduct is negligent if a reasonable person in the position of the defendant: would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing patrimonial loss; would have taken reasonable steps to guard against such occurrence; and the defendant failed to take such steps.[28]

[80] A finding that the defendants' omission was not wrongful has the consequence that the issue of negligence does not arise. It is not only impracticable to speculate about the possible negligence on the part of the defendants, but also juridically unsound. The question of negligence can only be answered if a court determines the legal duty owed by the defendant to the plaintiff and that the defendant breached that duty.[29] Stated differently, the issue of negligence only becomes relevant sequentially after the situation has been identified as one in which the law of delict requires action.[30]

The origin of the fire

[81] A central issue in the case is where the fire started. The plaintiff's case is that it started in the road reserve. This is based on the evidence of the plaintiff, Van Sittert, Dr JE Danckwerts, a fire ecologist, and a written statement by Joubert which is hearsay. Initially Horn testified that the fire had started in the road reserve, but later said that he honestly could not remember where the fire had started.

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28 *Kruger v Coetzee* 1966 (2) SA 428 (A) and 430E-G
29 *Van Der Merwe* n 17 above at 364G;
30 *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 9.

[82] The defendants dispute the claim that the fire started in the road reserve. They say that Stoffels' testimony shows that the fire did not start in the road reserve. They also rely on Vorster's report which states that the fire started either in the road reserve, or on the farm Buffelshoek, close to the road crossing. The first defendant adduced evidence by Mr Jens Jakobsen ("Jakobsen"), an expert in fire technology, and a certified fire and explosion investigator. He expressed the opinion that the fire could have started either in the road reserve or on the farm Buffelshoek.

[83] The plaintiff's evidence that the fire occurred in the road reserve cannot be accepted essentially for two reasons. First, the plaintiff did not see any burning or a smouldering fire in the road reserve. He obviously had to concede this. Second, the plaintiff is no expert on the origin of a fire. This too, he conceded. However, when asked how he could express the opinion on the origin of the fire, he replied that it "makes logical sense" that the fire started in the road reserve. For the same reasons, the plaintiff's opinion that Vorster's plotting of the fire scar is wrong; that Vorster's statement that the fire started on the farm Buffelshoek is apparently wrong because no road or road reserve is indicated on the original fire scar mapped (Figure 9 of Vorster's report); and that Vorster's conclusion that the fire started close to the road crossing should be assessed having regard to the accuracy of the satellite imaging, must be rejected.

[84] Likewise, no store can be placed on Van Sittert's statement that the fire started in the road reserve. He too, did not see the fire burning at point X on the map at p 3 of Exhibit A. And he testified that he wrote the word "*(BEGIN)*" on the map at p 2 of exhibit A to indicate the origin of the fire for the purpose of operational fire-fighting - not to identify the point of origin of the fire as a fact, or for forensic purposes. Further, Van Sittert said that he did not receive

forensic training in relation to the origin or cause of fires. Aside from this, Van Sittert himself testified that he had asked Joubert to tell him where the fire had started so that he could furnish a report on the fire to his (Van Sittert's) superiors.

[85] Thus Van Sittert's letter dated 24 May 2010 to the Municipal Manager, Hessequa Municipality, is not only incorrect, but also constitutes hearsay. He had no basis, factual or otherwise to form this opinion:

> "Tydens die ontstaan van die Gouritsmond brand op 24 Desember 2008 was ek in samewerking met Eden Ramp en Brandweer aan diens.
>
> Volgens my waarneming het die brand ontstaan op die afdelingpad 1528 tussen Gouritsmond en Stilbaai naby Reins Natuur Reservaat wat 'n geproklameerde pad is en dus onder die eienaarskap van die Provinsiale Regering is en uitgekontrakteer is na Eden Distriks Munisipaliteit. Die padreserwe waar die brand ontstaan het was nie skoon nie en verseker 'n brandgevaar. Die vuur het gepaard gegaan met sterk stormwind. Alhoewel Eden Brandweer in beheer was van die brand het Hessequa Personeel ook hulp verleen."

[86] The next question is whether the affidavit which Joubert made on 18 June 2010 should be admitted in evidence. It reads:

> "Hiermee verklaar ek, Gideon Joubert, gedurende die brande by Gouritsmond in Desember 2008 ek een van die eerste mense op die toneel was. Volgens my het die brand begin op die pad tussen Gourits en Stilbaai, naby Reins Natuurreservaat. Die brand het volgens my in die Padreserwe begin. Die Padreserwe was nie skoon of in stand gehou nie en was beslis 'n brandgevaar."

[87] In his evidence the plaintiff referred to this affidavit to support his case that the fire started in the road reserve. The probative value of what is stated in the affidavit depends on the credibility of a person other than the deponent – Joubert, who has since passed away. As such, it is hearsay evidence as

contemplated in s 3 of The Law of Evidence Amendment Act 45 of 1988 ("the 1988 Act").[31]

[88] In deciding whether to admit hearsay evidence, the starting point is that hearsay is not evidence, unless it is brought within one of the recognised exceptions. The SCA has said that the 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary. Unless hearsay is admitted in accordance with the provisions of the 1988 Act, it is not evidence at all.[32]

[89] I turn now to consider the requirements of s 3(1)(c) of the 1988 Act. As regards the nature of the proceedings, this is a civil case, a factor which relates not only to the admission of hearsay evidence, but also the weight to be given to such evidence.[33]

[90] As to the nature of the evidence, it is an affidavit in which the deponent expresses an opinion as to the origin and cause of the fire. Regarding this factor, Zeffertt and Paizes[34] observe that the person upon whose credibility the probative value of hearsay evidence depends, is not subject to a curial device

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31 Section 3(1) of the Law of Evidence Amendment Act reads inter-alia as follows:

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies sat such proceedings; or

(c) the court having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

32 *S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) at 316C-D.

33 *Ndhlovu* n 32 above para 16.

34 *The South African Law of Evidence* (formerly Hoffmann and Zeffertt) (2nd ed 2009).

(such as cross-examination) used to identify, assess and eliminate aspects of that evidence which render it potentially unreliable. Therefore, a court should be alert to potential dangers such as insincerity on the part of the absent declarant; erroneous memory; defective perception and inadequate narrative capacity. The court should consider the extent to which such dangers arise in the case before it, and identify factors that tend to reduce or eliminate them. Only then will the court be in a position to determine the extent of the prejudice caused to an adversary who is denied the benefit of cross-examination.[35]

[91] The purpose of the evidence is to establish that the fire started in the road reserve because it was not kept clean and maintained, and was a fire hazard. This purpose is direct and its attainment rests squarely on the reliability of the hearsay.

[92] This brings me to the probative value of the evidence. In *Ndhlovu* Cameron JA said that "probative value" means value for purposes of proof, and relates not only to what the hearsay evidence will prove, but also whether it will do so reliably.[36] In my view, the probative value of the evidence, weighed against the potential prejudice to the defendants if it were to be admitted, militates against its admission. The affidavit contains a bald statement that according to Joubert, the fire started in the road reserve, presumably because it was not clean or maintained. But the affidavit contains no facts or any observation by Joubert at the scene, showing the basis for that opinion, or why he formed it. The court has thus not been placed in a position to make a proper assessment of the value of such opinion, or to decide whether it is founded on fact or logical reasoning. Moreover, there is no indication that Joubert is even qualified to form such an opinion.

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35 Hoffman and Zeffert *op cit* n 34 above 401.
36 Note 32 above para 45.

[93] In addition, there is a lack of corroborating evidence that might otherwise have confirmed the reliability of Joubert's statement. In *Ndhlovu* the SCA referred to "guarantees of reliability" and said that the most compelling justification for admitting the hearsay in that case was "the numerous pointers to its truthfulness."[37] But that is not the case here. Indeed, the evidence points the other way: Stoffels, who was with Joubert when they got to the scene of the fire at Gouritzmond, said that there was no fire or smouldering fire in the road reserve at all.

[94] When regard is had to the factors set out in s 3(1)(c) in the light of the facts of this case, and in particular the probative value of the hearsay evidence and the prejudice which its admission will entail for the defendants, I have come to the conclusion that it is not in the interests of justice that the affidavit by Joubert should be admitted as evidence.

[95] The only direct evidence that the fire did not start in the road reserve is that of Stoffels. When he got to the scene there was no fire or fire scar in the road reserve at all. He saw smouldering behind the fence in the nature reserve. Stoffels was subjected to rigorous cross-examination on this issue. He impressed me as a witness and I accept his evidence. He gave a simple and coherent account of what he had seen and what happened when he and Joubert got to the place where they tried to find an access road to the fire. He came across as honest, made concessions fairly and did not deviate from his version. Contrary to the submissions by Mr Ferreira, and as is shown below, Stoffels' evidence is probable, reliable and credible and there are no contradictions in his testimony. And it is not coincidental that his version is supported by the opinion of Vorster.

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[37] *Ndhlovu* n 32 above para 45.

[96] On 23 December 2008 Stoffels and Joubert were first on the scene where the fire was likely to have started. They arrived on the scene at 17h30. There was no one else there. It will be recalled that they left the fire in Stilbaai when they received the report of a fire at Gouritzmond. When they left, Van Sittert remained at the fire at Stilbaai to ensure that it was extinguished. He therefore arrived later at point X on the map at p 3 of Exhibit A. The plaintiff also arrived later at that point.

[97] Stoffels clearly recollected the events of 23 December 2008. For example, he was able to explain the precise route they had taken to the fire at Gouritzmond. He said that en route to the fire, they got one of the fire trucks on the road. Joubert told that crew to continue with fire-fighting at Jongensfontein; that he and Stoffels would assess the situation; and that they would let the crew know as soon as possible so that the crew could assist at the fire at Gouritzmond. He remembered that Joubert at some point opened the door of the vehicle and sat with one foot outside it whilst he was on the phone. Stoffels was adamant that Joubert did not get out of the vehicle, although he had not looked at Joubert all the time. He had returned to Joubert to tell him that he could not find an access road to the fire. This, of course, would not have been necessary if Joubert had got out of the vehicle and accompanied Stoffels to look for a road. Stoffels said that throughout he was in communication with Joubert.

[98] It was put to Stoffels in cross-examination that the plaintiff had testified that there was no access to the area in the road reserve where the fire had started, because the vegetation was too dense. Stoffels disagreed. He said that there was vegetation in the road reserve but it was not so dense that it was impossible to walk on the road reserve so as to find an entrance road to the fire. And the vegetation was not so dense that one needed a machete (“kapmes”) in order to walk through or around it on the road reserve.

[99] Although Stoffels' focus was on the head of the fire and finding a route to it, this does not detract from his evidence that he had walked along both sides of the road reserve, in a westerly and easterly direction next to the fence (outside it), when he saw smouldering inside the fence. He was sure of that. Stoffels was honest - he said that it looked to him like the fire had started at that place, but he could not be 100% certain. He also said that he did not look for the precise origin of the fire; that he had not been trained in establishing the origin of a fire; but that he was taught to look what was happening around him. Stoffels said that he did not have much experience, but he was certain that there was no burning or a smouldering fire in the road reserve. He was taxed on this in cross-examination and did not once deviate from his version. He consistently said that he had walked on the road reserve while the fire was smouldering inside the fence. And it is highly unlikely that Stoffels would have walked through a smouldering fire in the road reserve.

[100] Stoffels readily conceded that Joubert was an experienced fireman; that he was trustworthy and a person of integrity; and that he had learned much from Joubert. But he did not agree with Joubert's statement that the fire had started in the road reserve. He said that Joubert never got out of the vehicle and did not walk to the road reserve, although Joubert could see it. On this issue also Stoffels was both candid and consistent. He also testified that Joubert did not take issue with him about the fact that he had seen smouldering inside the fence; neither did Joubert show him any signs of fire in the road reserve.

[101] It appears that at the time of the fire in December 2008 or shortly thereafter, nobody had asked Stoffels about his version of events at the Gouritzmond fire. He was asked in cross-examination when he first became aware of the allegation that the fire had started in the road reserve. Stoffels

replied that in 2014 he was told that according to the occurrence book, he and Joubert were the first to respond to the fire and that he had informed the relevant person that the fire had started inside the fence, on a farm.

[102] Stoffels also fairly conceded that Van Sittert may have been at the Jongensfontein fire, although he could not state as a fact that Van Sittert was there. Here again, his honesty and recall of events were evident. He said that he was in the veld at Jongensfontein, fighting the fire with a hose and did not know what was happening on the road. Stoffels could not say whether Van Sittert had arrived at the Gouritzmond fire before or after him; and said that he could not comment on Van Sittert's opinion that there were signs of a fire in the road reserve.

[103] Further, Stoffels' evidence is confirmed by the plaintiff's expert, Vorster. The mapping of the original fire scar indicates that the fire started on the farm Buffelshoek and burned in a north easterly direction and an easterly direction. Vorster concluded that the fire which started on 23 December 2008, started close to the road crossing. He does not state that it started in the road reserve.

[104] As already stated, Stoffels' evidence is consistent with the probabilities. The fire scar in the road reserve is explicable simply on the basis that the fire never burnt on the southern side of the road and the area of origin was on its northern side. Vorster's report states that the resolution of the Landsat 7 satellite is 30 m and he concludes that the fire which started on 23 December 2008 started close to the road crossing. Thus Vorster does not indicate the point of origin with an accuracy of greater than 30 m.

[105] By reason of the conclusion to which I have come, it is unnecessary to analyse the evidence of the experts in any detail. It suffices to say that the opinion by Danckwerts that the fire started in the road reserve is inconsistent with the proved facts and I do not accept it.[38] It was established in evidence that on 23 December 2008, there was no fire scar or burning in the road reserve and that there was smouldering inside the nature reserve. On the facts therefore, the fire did not start in the road reserve.

[106] Danckwerts however said that if indeed there was no fire scar in the road reserve at the relevant time, then some of the information which he had been given and on which he prefaced his thesis would be incorrect, but not his interpretation of the fire behaviour. When pressed as to how the incorrect information would affect his opinion, Danckwerts said that he was confident that the conclusions which he had drawn based on fire behaviour are logical and what one would expect; that either the direction of the wind, the presence of dry fuel on the side of the road or fuel continuity must be wrong; that his interpretation of the fire behaviour based on those facts is nonetheless correct; and that a contrary view would "defy the law of physics".

[107] Danckwerts' answer is illogical, given his own evidence. In his report dated 18 July 2014, confirmed in evidence, he states that the plaintiff was the first to arrive at the site of the fire and it was clear to him (the plaintiff) that the fire had started in the road reserve and spread in a north-easterly direction. Dankwerts goes on to say, "Since I was not present at the time, my opinions rely heavily on the observations of those who were, and I accept this information in good faith."

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[38] *S v Mngomezulu* 1972 (1) SA 797 (A) at 798H-799A.

[108] It is inconceivable that if the stated grounds on which an expert bases his opinion is wrong, the process of reasoning which led to his conclusion is sustainable.

[109] Apart from this, Jakobsen testified that it is impossible to determine precisely where the fire started long after the fact – five years in this case, having regard to the factors which must be taken into account in determining the origin or cause of a fire of the kind in question. These factors, which are really common sense, include the following: preserving evidence at the area of origin; topography, fuels and their classification, content and humidity; factors affecting fire spread; wind influence;

[110] and witness statements. I accept Jakobsen's evidence.

[111] Jakobsen said that a proper investigation involves getting down on one's hands and knees at the base where the fire could have started. The area is mapped out having regard to the witness statements and topography. The area could be narrowed down using a rope to make a grid and then working through grid by grid over a number of days to look for the cause of the fire, such as a bent twig, or the discoloration of rocks or poles, which may indicate the direction of the fire. If it rains or the wind blows, the evidence would be covered up and start fading with time.

[112] Jakobsen explained that there are different densities of vegetation which cannot be determined so long after the fact. The exact kind of vegetation which was there on the day of the fire is unknown. The condition of that vegetation is unknown. The veld has a 10 day cycle of moisture retention and some plants naturally burn faster than others. The wind at the point of origin might be blowing in a different direction with a totally different speed, contrary to the

report of a weather station. Unless one is at the area of origin at the time of ignition or shortly thereafter, one would not know the status of flammable material in the area. Jakobsen said a reasonable time to do a proper investigation to determine the origin and cause of the fire would be a few days. He said that the outer limit in a case like this to produce a report which can be relied upon, is 30 to 60 days.

[113] What this shows, is that the plaintiff has placed no evidence before the court from which it can be concluded, with any degree of reliance, that the fire originated in the road reserve. The evidence shows the contrary.

[114] For the above reasons I find that the plaintiff has not proved that the fire started in the road reserve. On this basis alone also, the claim must fail.

Conclusion

[115] I make the following order:

The plaintiff's claim is dismissed with costs.

SCHIPPERS J

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Applicant's attorneys	:	Gildenhuys Malatji Inc.
First Defendant's counsel	:	Advocate G Oliver
First Defendant's attorney	:	State Attorney
Second Defendant's counsel	:	Advocate D van der Merwe
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