**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**Case number: A287/2014**

**Date:** 27/1/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

27/1/2016 Retief
DATE SIGNATURE

In the matter between:

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**FIRST APPELLANT**

**THE MINISTER OF SAFETY AND SECURITY**

**SECOND APPELLANT**

**And**

**DAVID ROUX GESINSTRUST**

**FIRST RESPONDENT**

**DJH ROUX**

**SECOND RESPONDENT**

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**JUDGMENT**

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*PRETORIUS J,*

(1) This is an appeal against the findings and judgment of Louw JW J who sat as court of first instance. Leave to appeal was granted to the Full Bench of this division on 2 April 2014 by the Supreme Court of Appeal.

(2) The respondents' claims are for damages suffered to farms, cattle and equipment, except for Mr Röntgen, who is claiming for personal injuries suffered during a veldfire. Fifteen respondents had claimed against the appellants for damages suffered during the veldfire. The fifteen claims were consolidated, by agreement between the parties. It was further agreed that the fifteen matters would be dealt with simultaneously for purposes of merits.

(3) The appellants were found to be jointly and severally liable for damages suffered by the respondents as a result of a veldfire which started on 28 August 2008 at the Thabazimbi Training Institute ("Verdrag"), the property of the first appellant. This property was under the control and supervision of the South African Police Services ("SAPS"). The fire had spread from Verdrag to the respondents' properties. The appellants were also held liable for the personal injuries Mr Röntgen had suffered during the fire.

(4) The appellants initially relied on contributory negligence of the respondents and requested the court to apply the provisions of the

**Apportionment of Damages Act No 34 of 1956**.

(5) The appellants amended their plea on 1 December 2011 and pleaded that on Sunday, 31 August 2008, a second fire had started on Mr Coetzer's farm, which fire spread through the institute in a north to north-easterly direction through Bravo Camp, on Verdrag, through Verdrag and onto adjoining property to the north-east of the institute.

(6) On 1 December 2011 third party notices were served on *"Dabchick Wildlife Reserve (Pty) Limited, Casspir Johannes Coetzer, Petrus Johannes Le Roux N.O. as Trustee of the Kliprivier Trust, and in personal capacity..."*

(7) The third party notices alleged that should the appellants be held liable to compensate the respondents, the third parties were jointly and severally negligent with the appellants in the causation of the spread of the first, alternatively the second fire to the properties of the other respondents, alternatively an order declaring the appellants and the third parties joint wrongdoers against the other respondents with a determination of the respective degrees of blame. The third parties pleaded, denying all liability to compensate the appellants and denied that there was a second fire which had caused damage to the respondents.

(8) At the two pre-trials held respectively on 28 September 2010 and 26 January 2011 the parties agreed to a separation of issues and formulated it as follows:

*"The question of negligence of Defendants as alleged in the respective Particulars of Claim, together with the question of contributory negligence as pleaded in the respective Pleas, together with the question of causation of damages as a result of any negligence of Defendants in respect of each particular Plaintiff."*

And further:

*"The Court will then be asked to make a determination in respect of each of the separate matters whether Defendants are liable to compensate the relevant Plaintiff(s) for damages suffered, and if so, what percentage of damages should be covered by compensation so paid."*

(9) At the conclusion of the trial certain facts were common cause. A veldfire had started on Verdrag, comprising of the farms, Buffelspoort and Buffelskloof, as well as Groenfontein, which was owned by the first Appellant and known as the Thabazimbi Training Institute. Due notice had been given to the appellants in terms of the **Legal Proceedings Against Certain Organs of State Act No 40 of 2002**. The *locus standi* of the respondents were initially in issue, but it is common cause at present that all the respondents have *locus standi*. It was further common cause at the end of the trial that the appellants were not

members of a Fire Protection Association ("FPA").

(10) The fire which had started at Verdrag was a veldfire as defined in section 1 of the **National Veld and Forest Fire Act No 101 of 1998** ("the Act"). Therefor the appellants had to prove on a balance of probabilities that the members of the appellants were not negligent in any respect alleged by the respondents. Furthermore the appellants had to prove that the conduct of the officials of the SAPS, if it fell short of the standards required of them, that those failings would have had no effect as section 34 of the Act provides:

> *"Presumption of negligence*
>
> *(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**.* (Court's emphasis)
>
> *(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."*

(11) Although the appellants had initially relied on a second fire which,

purportedly, had started on Mr Coetzer's farm, counsel for the appellants informed this court that it was no longer an issue. Therefor this court has to deal with the one fire and its' consequences.

(12) Both counsel for the appellants and the respondents, referred the court to the decision of **HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd 2001(4) SA 814 SCA** where Nienaber JA set out the principle objectives of the Act at paragraph 21 as:

> *"One of the principal objectives of the Act is the prevention and control of veld, forest and mountain fires (cf Prinsloo v Van der Linde and Another (supra at 1016E - H)).* ***Landowners in areas outside fire control areas are saddled with the primary responsibility, falling short of an absolute duty, of ensuring that such fires occurring on their land do not escape their boundaries...Similar considerations in my opinion apply when there is uncertainty as to whether the actions or inaction of a defendant had or would have had a bearing on the state and course of the fire****. These are issues arising within the context of the 'question of negligence'."* (Court's emphasis)

(13) This court is aware that the grounds of appeal pertain to factual issues and not on the interpretation and application of the law. An appeal court will only interfere in the instance where the appeal court can establish that the judgment was wrong. Should this court find that the

court *a quo* misdirected itself, this court will come to its own conclusion on the evidence.

**THE FACTS:**

(14) On 27 August 2008 there was a weather forecast warning for Limpopo due to the prevailing heat and wind at the time. On 28 August 2008 at approximately 12h30 a veldfire started on Verdrag at the Skirmish Range where recruits were being trained. At that stage the fire danger rating was average. The fire was reported to the Rankin's Pass Police Station at 14h57 as being out of hand due to the dry conditions in the veld. At 15h00 Warrant Officer Kruger informed Mr Haupt at Dabchick, the adjoining property to Verdrag, that the fire was under control and according to the witnesses, backburns were being made from the Urban Centre on the farm to the T-junction east of Verdrag. At that stage the fire had spread into the mountain, but the fire had been extinguished on the flat surfaces at 18h00.

(15) Sergeant Reichel testified that there was no citizen's band radio on Verdrag at the time and cellphone reception was almost non-existent. Captain Macheke, who was acting as commanding officer at the time, left for Pretoria on 29 August 2008, the Friday morning at 6h30. At 7h00 the Blesbok vehicle, containing 7000 litres of water, was sent to Bravo and Charlie camps to extinguish the fire around both camps. On the same date at 11h00 Mr Weilbach, who was the chairperson of the Modimolle Fire Protection Agency ("FPA") was requested to help

with the fire on Verdrag by Warrant Officer Kruger. Subsequently he spoke to Captain Mienie, who was acting commanding officer in the absence of Captain Macheke, who informed him that Verdrag did not require any help. At 14h00 Warrant Officer Kruger once more asked for assistance from Mr Weilbach. They fought the fire at Verdrag south of block Z. At 16h00 Captain Mothoni, Captain Mienie and all the permanent staff, apart from four members, left Verdrag for the weekend as it was the end of the month. Two helicopters took off to Verdrag at 16h20 after Sergeant Reichel and Captain Mienie requested their assistance. Between 17h00 and 21h00 backburns were made east of where the backburns had been made the previous day. At 20h00 on 29 August 2008 the fire in the mountain at Dabchick had been contained.

(16) Captain Macheke's evidence was that the SAPS had withdrawn whilst the fire was still burning in the mountain on Verdrag. Both Messrs Dippenaar and Henning's evidence were that they had noticed fire on the mountain during the night of 29 August 2008. According to Warrant Officer Kruger there was no effort on the ground on 30 August 2008 to extinguish the fire until 12h00, as they had relied on the helicopters to extinguish the fire. This evidence has to be questioned as to Warrant Officer Kruger's knowledge to fight fires as it was common cause that the helicopters assisted ground crews in cooling the fire down, to enable the fire fighters to combat the fire on the ground. On 30 August at 12h00 both the Yorks and Mr van der Merwe

drove on the main road and could smell and see smoke, but did not see any fires. At 12h00 Captain Keshebang was requested to assist with the fire at Meletsi Lodge.

(17) Mr van der Merwe testified that at 13h00 he was at Weltevrede crossing where there was chaos as farmers were collecting their cattle and there was heavy smoke. The fire was on its way to Innie-Sak Beleggings' property and Mr Gildenhuys was warned that the fire was on its way to Goedehoop. Mr Gildenhuys arrived at Goedehoop and found that it had already burned and that the fire was on Mr York's farm at 15h00, while the fire had also burned to Coetzer's farm over the top of the Hoekberg. At 16h00 the fire had been contained at Dabchick, where according to Mr Weilbach a backburn had been made to the southern part. At 17h00 Captain Keshebang, who was the course leader on the farm and was assisting beating the fire at Meletsi Lodge, left and took the trainees for supper. Mr Henning's evidence was that the fire had spread to Marones and was burning. At 18h00 the fire on Mr Coetzer's farm had been contained by backburns.

(18) Between 18h00 and 21h00 Captains Keshebang, Macheke and Warrant Officer Kruger combatted the fire in block Z with backburns. Mr Pretorius noticed fire burning on Hoekberg at 18h00, whilst Mr Henning and others contained the fire at Marones between 18h00 to 23h00 and at 19h00 the fire was contained on the northern part of Inni-

Sak Beleggings. Between 19h00 to 20h00 Mr Roux saw the fire at Kralingen and smouldering at Rankin's Pass opposite Weilbach's property.

(19) On 31 August 2008 Mr Visser at 4h00 arrived at his farm to find that it had already burnt. Mr van der Merwe confirmed that the fire was still burning in the mountains at 4h00. At 5h00 Captain Macheke left to monitor the fire at Meletsi Lodge. At 6h00 Mr Dippenaar warned Mr Mokaba of the fire on the south western side of the Main Road property. Just after that Captains Keshebang and Macheke noticed fire at the back of Bravo camp, whilst Warrant Officer Kruger told Mr Weilbach the fire was under control. At 8h45 the wind changed. At 9h00 Mr Weilbach and other farmers made a backburn at the Rankin's Pass – Bela Bela road. At 11h00 the fire was burning from Groenfontein on both sides of the Alma/Thabazimbi road and the Coetzers testified that the fire was on the way to the lodge. At that time Inni-Sak Beleggings burned down.

(20) The Thabazimbi Fire Brigade assisted in fighting the fire, but could not prevent the fire burning through Mr Roux's farm and from jumping the Alma road into the Main Road property. The De Coning house burnt down as well as the Botha property. Coetzer's lodge was saved with the assistance of the helicopters, but his farm could not be saved from the ferocious fire. Thereafter Mr Dippenaar's farm burnt. On 1 September 2008 at 13h00 the fire flared up once more on Botes'

property, and it was only extinguished in the early hours of 2 September 2008.

(21) The appellants' own expert, Mr Strydom, confirmed that the reaction time to get to a veldfire is crucial. The sooner you get to the fire the better your chance of extinguishing it immediately. His further evidence was that he had not inspected the firebreaks at Verdrag. He was of the opinion that there was enough fire fighting equipment on Verdrag, until he was told that three of the water tanks were not in use in August 2008 due to their disrepair. His evidence was that initially he had found that the personnel at Verdrag were adequately trained in fighting veldfires, until he received the certificates which indicated that the personnel had been trained to fight in-house fires. He further conceded that he was not an expert in the field of veldfires.

(22) The court *a quo* found that the appellants were negligent by not having sufficient suitably trained personnel for extinguishing veldfires; that the fire had crossed the most southern firebreak road as a result of the appellants' failure to properly maintain the firebreak; that the appellants' had failed to notify the neighbours and the FDA in terms of section 18(1)(b) of the Act; that the negligence of the appellants was relevant to the spread of the fire to the properties of the respondents and to the harm and damage the respondents had suffered to their properties and the personal injuries suffered by Mr Röntgen.

**THE LEGAL PRINCIPLES:**

(23) The appellants relied on non-causative negligence and disagreed with the court *a quo* where it was found:

> *"The defendants accepted that if I found that they were negligent in the said respects, the uncontrollability of the fire on the Sunday would not assist them."*

(24) Counsel for the appellants contended that if such a concession was made it was wrongly made and should be disregarded.

(25) In **Neethling, Potgieter & Visser Law of Delict, 6th Edition**, the learned authors sets out at para 2.4 page 185:

> *"The existence of a factual causal chain must therefore be demonstrated in view of the proved relevant facts.* ***A test for factual causation therefore depends on the facts of each case and is not something of a general nature that can be applicable to all factual complexes****. In other words, there are probably as many "tests" for causation as there are causal links."* (Court's emphasis)

(26) In **Minister of Safety and Security v Van Duivenboden 2002(6) SA 431 (SCA)** the court held at 449:

> *"The first enquiry is whether the wrongful conduct was a factual cause of the loss. The second is whether in law it ought to be*

*regarded as a cause. Regarding the first enquiry he said the following:*

*'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question.* ***In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant****. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; aliter, if it would not have ensued.'...****A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics****."* (Court's emphasis)

(27) To determine factual causation the court has to decide what would probably have happened if the SAPS had acted positively by

extinguishing the fire earlier and if the SAPS had acted differently in maintaining the firebreaks and notifying the FPA and neighbours timeously of the fire and had trained personnel to fight the fire with adequate equipment.

(28) In issue is whether the reasonable person would have foreseen and prevented the spreading of the fire in the circumstances that prevailed in this instance from 27 August 2008 to 2 September 2008.

(29) Unlawfulness or wrongfulness is a requirement for delictual liability. In **Gouda Boerdery BK v Transnet 2005(5) SA 490 (SCA)** at paragraph 12, Scott JA held:

> *"Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm.* ***This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms****. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in Kruger v Coetzee, involving as it does,* ***first, a determination of the issue of foreseeability and, second, a comparison between***

***what steps a reasonable person would have taken and what steps, if any, the defendant actually took.***" (Court's emphasis)

(30) The facts in the present matter are similar to **Gouda's case** (*supra*) and in paragraph 13 Scott JA agreed with the court *a quo* in that matter as follows:

*"As to the former, he expressed himself as follows:*

*'I am of the view that the legal convictions of the community would, in a case such as the present,* ***expect that if the defendant's negligent conduct leads to harm by fire to a neighbour's property, such harm should be regarded as having been wrongfully inflicted, or, put another way, that the defendant should be regarded as having been subject to a duty not to cause such harm****. In arriving at this conclusion I particularly bear in mind the fact that the defendant is a commercial entity, all of whose shares are held by the State, and that its purpose is to conduct a commercial rail operation. That being the case, and if it can be shown to have acted negligently and in a manner to have caused harm, there can be no reason to excuse it from liability. In arriving at this conclusion, I take into account the fact that the net of liability will not be cast too wide as a plaintiff still needs to establish both negligence and causation before it is entitled to succeed.'"* (Court's emphasis)

(31) In this instance the court had to decide whether the appellants had succeeded in disproving negligence on their part of containing and extinguishing the fire. In **Van der Eecken v Salvation Army Property Co 2008(4) SA 28 (T)** paragraph 36 it was stated:

> *"That neighbouring landowners can be expected by the legal convictions of rural communities to owe a duty of care not to cause harm to each other by negligently spreading fires from their land seems so obvious as to be undeserving of comment. Lest there be any doubt, such convictions are conveniently captured in the provisions of the National Veld and Forest Fire Act 101 of 1998..."*

(32) In **Kruger v Coetzee 1966(2) SA 428 (A) at 432 E – G** Holmes JA set out the position of a *diligens paterfamilias*:

> *"(a) a diligens paterfamilias in the position of the defendant -*
>
> *(i)* ***would foresee the reasonable possibility*** *of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii)* ***would take reasonable steps*** *to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps...Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular*

*circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."* (Court's emphasis)

(33) In **Lee v Minister for Correctional Services 2013(2) SA 144 (CC)** Nkabinde J dealt with causation at paragraph 38 as follows:

*"The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries.* ***The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim****. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises.* ***The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation****."* (Court's emphasis)

And at paragraph 58:

*"Substitution and elimination in applying the but-for test are no more than a mental evaluative tool to assess the evidence on record. In my view, this hypothetical exercise shows that probable causation has been proved."*

(34) In paragraph 68 the Judge held that if the court found that a causal link exists, the next enquiry regarding legal liability must follow.

(35) It is clear from all the evidence that veldfires on Verdrag were not a novel concept as veldfires had previously been a common feature on Verdrag and had previously even lead to loss of life. The risk of veldfires at Verdrag in 2008 was reasonably foreseeable. The appellants were obliged to take precautionary steps to prevent veldfires and should such a fire occur, to prevent it from spreading to neighbouring farms.

(36) The respondents relied in their particulars of claim that the appellants were under a legal duty:

> *"(a) to prepare and maintain firebreaks on the inside of the boundary of Verdrag between Verdrag and adjoining properties, which firebreaks should have been wide enough and long enough to have a reasonable chance of preventing a veldfire from spreading to neighbouring land;*
>
> *(b) to have equipment, protective clothing and trained personnel for extinguishing fires which may spread to adjoining land, and to ensure that responsible persons were present who, in the event of fire, would extinguish the fire or assist in doing so;*
>
> *(c) to take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association of any veldfire;*

*(d) to inform owners of adjoining land of a veldfire on Verdrag and to do everything in their power to stop the spread of the fire."*

(37) A breach of one or more of the legal duties provided for in the Act will constitute unlawful conduct. The particulars of claim makes the allegation that the appellants were negligent in one or more of the following respects:

*"(a) No firebreaks, alternatively insufficient firebreaks were made around Verdrag, in particular around the skirmish shooting range;*

*(b) They proceeded with firearm training with live ammunition, including mortars, tracers and flares notwithstanding a fire hazard warning and in circumstances in which it was dangerous and unreasonable to do so;*

*(c) No arrangements were made to detect fires which might have started on Verdrag, and no steps, alternatively inadequate steps, were taken to prevent fires from spreading to neighbouring properties;*

*(d) No provision, alternatively inadequate provision, was made for personnel to fight fires, and adequate equipment for fire fighting was not available;*

*(e) They omitted to notify, alternatively to give timeous notice, to neighbouring property owners that a veldfire*

*had started on Verdrag, and neighbouring owners and the relevant fire protection association were not alerted, alternatively not timeously alerted;*

*(f) They omitted to put out the fire which started on Verdrag under circumstances where they could and should have done so.*

*(g) They omitted to prevent the fire from spreading to neighbouring farms, when they could and should have done so."*

(38) The court *a quo* found that the cause of the respondents' damage was the fire which started on Verdrag. The question the court had to deal with was whether the appellants had been negligent in any of the respects alleged by the respondents and/or if their conduct, at the time of the fire fell short of the standards required of them and that their failure to adhere to such standards would have had no effect on the spread of the fire and the resultant damage the respondents suffered.

(39) It was clear that the possibility of veldfires was taken into account by the appellants when they went for training to the Skirmish Range on 28 August 2008 as they took the precaution to take fire extinguishers with them. There was evidence by Warrant Officer Reichel that he had previous to August 2008 experienced veldfires being started by the shooting of regular bullets. He was the person responsible for the in-house training of Captains Macheke, Warrant Officer Kruger and

Sergeant Ramoshabana relating to veldfires.

(40) It is common cause that neither the trainers nor the trainees had any training or experience in fighting veldfires, although they were aware of the danger of starting a veldfire because they took fire extinguishers to the Skirmish Range as a precaution.

(41) The personnel who had training in combatting veldfires on Verdrag were Warrant Officer Reichel and Warrant Officer Kruger. On 28 August 2008, Sergeant Reichel was absent from Verdrag and only Warrant Officer Kruger was present, although he at no stage during the following days took the lead to combat the fire.

(42) This court has scrutinized the record and came to the same conclusion as the court *a quo* that there was no individual who took control of the process of fighting the fire. The evidence was that when the fire was detected it was still a small fire, which the trainees, regrettably, tried to extinguish with fire extinguishers. The evidence by the expert was that the use of fire extinguishers exacerbated the situation as it fanned the fire. Warrant Officer Reichel's evidence was important in that his evidence was that water had to be used to combat a veldfire and not fire extinguishers. This court cannot fault the findings by the court *a quo* that the probabilities were that the fire extinguishers had caused the fire to grow and spread rapidly and if a suitably trained person with proper equipment had been present at the start of the fire the small fire

would probably have been extinguished immediately.

(43) Captain Macheke, the acting officer in command, arrived on the scene, but had no knowledge of fighting veldfires, he only knew how to make backburns. Section 17(1) provides:

*"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."*

(44) The only person trained to combat veldfires on Verdrag at that time was Warrant Officer Kruger, who did not take control at any stage to extinguish the fire. The court *a quo* correctly found that a single

trained person on a huge farm like Verdrag, where there was a history of veldfires and the nature of the vegetation at the time was not sufficient.

(45) The court *a quo* correctly found that the fire was fought in a "haphazard" manner. It was further exacerbated by the permanent members on Verdrag leaving the property on 29 August 2008, leaving only four members behind, whilst the fire was still burning in the mountain. There was no evidence that the appellants tried to prevent the fire spreading to the neighbouring farms. The court *a quo* was correct to find that the appellants were negligent by not having sufficient trained personnel for extinguishing veldfires on the farm – Warrant Officer Kruger was the only trained fire fighter regarding veldfires.

(46) The second ground of appeal by the appellants was the finding by the court *a quo* that the appellants had failed to notify the neighbours and the FPA timeously of the imminent threat of the veldfire.

(47) Debchick is the neighbouring property directly adjacent to the east of Verdrag and there was no evidence that anybody from Dabchick was informed of the outbreak of the veldfire on 28 August 2008. The extent of the fire was downplayed as can be gathered from the evidence that when Mr Weilbach phoned Captain Mienie on 29 August 2008 at 11h00 she informed him that no assistance was required and then at

14h00 Warrant Officer Kruger requested assistance from Mr Weilbach. Captain Mienie, who was the officer in command at the time, left Verdrag on 29 August 2008 at 16h00, although the fire had not been extinguished. She had also promised to let Mr Weilbach know the extent of the fire, which she never did. She never inspected the fire to ascertain what the position was before she left Verdrag.

(48) Colonel Seroma arrived on 30 August at 15h00 and although none of the other witnesses mentioned it, he had according to him, a meeting with Sergeant Reichel, Warrant Officer Kruger and Captain Macheke. The misleading message from Captain Mienie on 29 August 2008 caused the farmers not to assist fighting the fire at Verdrag. Both the fire brigade and Working-On-Fire were only called out on Saturday evening, 30 August 2008, after Colonel Seroma's arrival. On 28 August 2008 Verdrag was not a member of the FPA. The only evidence was that Rankin's Pass Police Station was informed of the fire at 13h32 and there was no evidence that the owners of the adjacent properties had been informed of the veldfire at Verdrag. A further call was made to Meletsi Lodge at 14h37, but there is no evidence that anybody on Dabchick was informed of the fire on 28 August 2008. Sergeant Reichel assumed that the police at the Rankin's Pass Police Station would alert the adjoining properties. There was no evidence that it was actually done.

(49) This court has to agree with the finding of the court *a quo* that the

appellants were negligent in not complying with their statutory obligation of immediately notifying the FPA and owners of adjacent farms. The court *a quo* found that the issue whether if the appellants had informed the FPA and the owners of the adjacent farms of the fire when it started, would or would not have prevented the fire spreading to the adjacent properties could not be determined on the evidence or on probabilities and therefor the issue was decided against the appellants. Having regard to all the evidence, facts and applying the principles as set out in **HL & H Timber** (*supra*) and the other authorities mentioned above this court finds that the court *a quo* was correct in its finding.

**PREVENTING THE SPREAD OF THE FIRE:**

(50) Section 18(1)(b) of the Act provides:

> *"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) ...*
>
> *(b) do everything in his or her power to stop the spread of the fire."*

(51) The respondents argued that the appellants could have extinguished the fire on 28 August 2008 where the fire started. Unfortunately this did not happen due to various factors, of which the lack of leadership

in combatting the fire, was one of the more serious reasons. At the onset of the fire trainers and trainees tried to extinguish the fire with fire extinguishers and branches taken from the trees. Colonel Seroma's evidence was that on 28 August 2008 there was no radio communication on the ground. His further evidence was that the course leaders were warned that the risk of veldfires was high and that the trainers and trainees had to take firebeaters with them to the Skirmish Range, which they failed to do.

(52) The only person trained to combat veldfires was Warrant Officer Kruger, who was only informed of the fire more than an hour after it had started. The evidence by the appellant's witnesses were that Captain Macheke, Warrant Officer Kruger and Captain Keshebang were in control fighting the fire. The evidence was that Warrant Officer Kruger thought Captain Macheke was in control and Captain Keshebang did not know who was in control. It is thus clear that nobody took responsibility for preventing the fire to spread to the adjacent farms. Captain Mienie who was in charge on 29 August 2008 did not even go to the trouble to go out and see for herself what the situation was and left at 16h00 for the weekend.

(53) In this instance, where a state organ like the appellants, own a huge farm on which a training facility is being conducted, it is expected that there would be at least somebody to have taken control and to have co-ordinated the combatting of the fire and preventing it to spread to

neighbouring farms. It is important to note that the fire in the mountain was left to burn on the southern slope of Hoekberg, despite Colonel Seroma's evidence that there was a part of the mountain that could easily have been ascended as the vegetation was not as high and dense as in the flat parts. Even if it was not possible to ascend the mountain at night, it could have been done during the day, when there was a lull in the wind and if there were fire fighters equipped with backpacks.

(54) It is clear from the evidence that the main aim of the appellants was to preserve Verdrag and therefor backburns were made on 28 and 29 August 2008 on the north-western side of the fire at Verdrag. The only exception was the effort to assist Meletsi Lodge. There was not any attempt to make a backburn on the eastern side adjacent to Dabchick or on the southern side of the fire. As the wind was predominantly north-west, the expert's opinion was that it could be expected that a backburn would be made from the south-east. This was confirmed by Captain Keshebang when he testified:

> *""No, I know you did it, because you did not have any experience whatsoever? --- Of course M'Lord.*
>
> *In fighting field fires and you did not have equipment, because all the equipment of Verdrag was centred at the Urban Centre and you never thought of making a back burn at the southern fire break, is that not true? --- Yes, that is true."*
>
> (Vol 39 page 3524, lines 12 – 18)

(55) The finding by the court *a quo* that it was not unreasonable not to attempt to extinguish the fire on the mountain at night, but that there had been nothing which prevented the SAPS during the day, Friday and Saturday mornings, when the wind had died down to extinguish the fire on the mountain, must be confirmed. This court must agree with the court *a quo* that the actions by the appellants during the fire on Verdrag were to protect the property of Verdrag and not to prevent the fire from spreading to the adjacent farms. The fire was under control on 31 August 2008 to such an extent that Warrant Officer Kruger was planning to go to church on the Sunday morning, although none of the appellants' personnel knew how far the fire had spread over the mountain and what the conditions were on the other side of the mountain. The uncontrollable fire would not have burnt, on Saturday and Sunday had the SAPS made use of the periods of calm on Friday, Saturday and Sunday to bring the fire under control.

(56) In any event, the members of Verdrag must have foreseen that the wind may change direction as it did on 31 August 2008 when the fire burnt down the slope of the Hoekberg mountain and was blowing strongly in a north-easterly direction. The court *a quo* was correct in finding that the fire which burnt down the northern slope of the mountain above Bravo camp on Sunday, was the same fire, which as a result of a change in the wind direction, was blown back to Verdrag from the southern side of the mountain.

(57) This court must agree with the conclusion by the court *a quo* that the appellants failed to do everything in their power, whether immediately or during the course of the fire to stop the spread of the fire.

(58) It is important to note that the appellants averred in the further particulars that the assistance of the South African Air Force ("SAAF") was requested on Thursday, 28 August 2008, to assist by deploying helicopters. This is patently inconsistent with all the evidence, but it is even more important that it is inconsistent with the evidence of the appellants' own witnesses. On 28 August 2008 at 14h57 Captain Mienie was already of the view that the fire was out of hand due to heavy winds and dry veld conditions. Nevertheless the assistance of the SAAF was only requested later on 29 August 2008 which resulted in the helicopters only reaching Verdrag late in the afternoon on 29 August 2008.

(59) The excuse by Sergeant Reichel for not calling for assistance from the helicopters on 28 August 2008 cannot be entertained as the same conditions existed on the Friday, 29 August 2008, when the call went out and two helicopters assisted. Had the helicopters assisted immediately on 28 August 2008 the fire in all probability would have been extinguished on the Thursday. This inaction on the part of the appellants on the Thursday is further evidence of the appellants not acting immediately and doing everything in their power to stop the fire,

by not extinguishing the small fire at the Skirmish Range due to a lack of experience, a lack of proper equipment, using unsuitable equipment and not eliciting the help of the SAAF when the fire got out of hand at 14h57. This resulted in the fire spreading as the appellants did not make a backburn along the southern road from the T-junction to the Urban Centre.

(60) The fact that the SAPS failed to extinguish the fire on the mountain, while it was able to do so, lead to the fire spreading further. The appellants conceded that there were no firebreaks in the mountain. The further evidence by *inter alia*, Captain Keshebang, was that nobody took control of the situation. He further testified there had been too little transport on Verdrag to contain the fire and in his experience the roads had not been properly maintained. This evidence was confirmed by Colonel Seroma who testified that he had no knowledge of backburns and no training or experience in the combat of veldfires and that there was not enough fire fighting equipment on Verdrag at the time. This is supported if the further particulars are taken into account, where it was set out that there were:

> *"(a) A self-propelled watertanker vehicle ("Blesbok") with a water tank capacity of 7 000 litres equipped with its own engine and a 100 meter hose which exerts water under pressure;*
>
> *(b) Two trailer watertankers with a tank capacity of 6 000 litres each capable of being drawn by a tractor or similar*

*vehicle, each equipped with its own engine and a hose which exerts water under pressure;*

*(c) Three transportable watertanks with a capacity of 750 litres each, each equipped with an engine and hose which exerts water under pressure."*

(Vol 4 p 359).

In actual fact there were only two bakkie-sakkies and the Blesbok. There were no backpacks to enable fire fighters to ascend the mountain and to fight the fire.

(61) The appellants rely on the strong wind of Saturday afternoon and Sunday to submit that the fire was uncontrollable at that stage and therefor they were not liable for the damage caused by the fire on the Sunday.

(62) This court cannot agree with this submission, the damage was caused by the fire that had started on 28 August 2008. The fact that the appellants failed to contain or extinguish it timeously, which they would have been able to do had they been trained to fight veldfires, had been equipped with sufficient fire fighting equipment, employed the use of the helicopters already on 28 August 2008 and if somebody had taken the lead and co-ordinated the operation to fight the fire. The same fire raged throughout until 2 September 2008 when it was finally extinguished at Mr Botes' farm.

**CONTRIBUTORY NEGLIGENCE – DABCHICK:**

(63) The appellants submitted in argument that the finding by the court *a quo* that the fire was uncontrollable on the Saturday afternoon and Sunday later in the morning and Dabchick was therefore not negligent and responsible for the fire spreading to neighbouring farms, to be incorrect.

(64) The allegation was that Dabchick did not have adequate firebreaks, which resulted in the fire spreading to the properties of the other respondents. The complaint was that the firebreaks on Dabchick had been slashed and not graded. This submission must be considered against the fact that on the Saturday afternoon the fire had become uncontrollable due to the strong wind to such an extent that the fire jumped over Dabchick's main access road, which was graded. It is also important that the court *a quo* found that the fire had spread to Dabchick and that the fire burning from Verdrag had crossed the Dabchick firebreak where Verdrag had not made any firebreak. Messrs Weilbach and Haupt's evidence was that the grass was tall on Verdrag's side and overgrown with sickle bush, which was later confirmed by Captain Keshebang. Their further evidence was that they could not make a backburn there, due to the density of the bush on Verdrag's side. No evidence was presented by the appellants that they had not contemplated that a fire burning from Verdrag would cross Dabchick's firebreak, where they themselves had not made a

firebreak.

(65) This court agrees that the facts of this case is distinguishable from the case of **Porritt v Molefe 1982(3) SA 76 AD** where Mr Porritt had testified that he did not think a fire would cross his own firebreak, which was evidently not the case in the present matter.

(66) The conclusion by the court *a quo* that no negligence can be contributed to Dabchick is thus confirmed.

**NON-CAUSATIVE NEGLIGENCE:**

(67) Mr Ferreira, on behalf of the appellants, argued that the negligence by the SAPS did not cause the damage on the Saturday and the Sunday. The appellants rely on paragraph 21 of the **HL & H Timber** matter (*supra*).

(68) The argument is that it was irrelevant what had happened before the Saturday and the Sunday as the negligence was non-causative. The submission was that it could not have been expected of the appellants to know what was happening behind the mountain. This court cannot agree, the SAPS saw the fire burning right up to the crest of the mountain, which was the border of Verdrag, and was negligent in not ensuring that the fire in the mountain was extinguished.

(69) There was no attempt to demonstrate that the unreasonableness of

the SAPS actions were irrelevant. In these circumstances the operation of the presumption must therefore be held against the appellants.

(70) This court finds that had the appellants not been negligent in the manner described, the fire would have been extinguished much earlier and would not have caused the extensive damage on the Saturday and the Sunday. Therefor the findings in this respect by the court *a quo* must be confirmed.

**INJURIES TO MR A RöNTGEN:**

(71) The appellants contend that Mr Röntgen was the author of his own misfortune. Mr Röntgen's evidence was that he was a passenger in Dr Henning's bakkie on Saturday, 30 August 2008. He, his wife and son were standing on the back of the bakkie when Dr Henning drove to investigate where the fire had spread to. On the way from the farm, Marones, the fire cut them off and Dr Henning had to drive through the flames to escape the fire. There was no time for Dr Henning to stop and Mr Röntgen to get into the passenger seat as the fire was ferocious and burning fast.

(72) He could not lie down as his wife and son did, due to the recent back operation he had undergone and therefor he sustained burns to his face, hands and arms. He was taken to hospital due to the seriousness of the injuries.

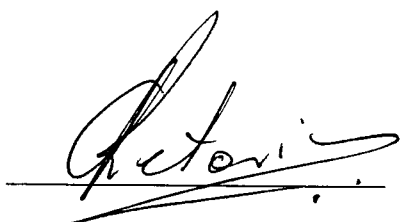
(73) This court finds that the court *a quo* was correct when it found the appellants liable for the injuries suffered by Mr Röntgen.

**CONCLUSION:**

(74) This court has considered all the arguments, evidence and the judgment of the court *a quo*. The court has applied the principles as set out in the **HL & H Timbers** case (*supra*) and the **Lee** case (*supra*) and other authorities and can come to no other conclusion, but that the court *a quo* was correct in its findings.

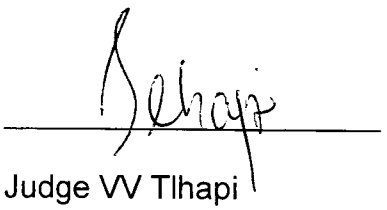
(75) It follows that in the court's view the appellants failed to convince the court on a balance of probabilities that they were not negligent and not liable for the damages of all the respondents, including the farms that were damaged on the Saturday, Sunday and Monday as well as the personal injuries sustained by Mr Röntgen. In such an instance the appeal must accordingly fail.

(76) The appeal is dismissed with costs.

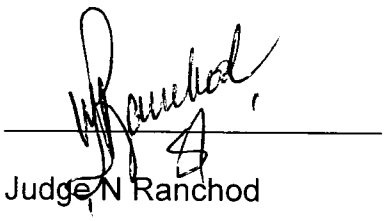


Judge C Pretorius

We agree.



Judge VV Tlhapi



Judge N Ranchod

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| Case number | : A287/2014 |
| Matter heard on | : 11 November 2015 |
| For the Applicant | : Adv AC Ferreira SC/Adv HOR Modisa/ Adv NAR Ngoepe |
| Instructed by | : State Attorney |
| For the Respondent | : Adv JG Bergenthuin SC |
| Instructed by | : Van Zyl Le Roux Inc |
| Date of Judgment | : |