REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 7764/05

In the matter between:

MONDI SOUTH AFRICA LIMITED **PLAINTIFF**

and

ANDRE MARTENS **1ST DEFENDANT**
PAUL OSCAR MARTENS **2ND DEFENDANT**

JUDGMENT Delivered on 09 November 2011

SWAIN J

[1] Before me for decision is a stated case, which by agreement between the plaintiff and the first defendant is to be dealt with separately in terms of Rule 33 (4). The second defendant, did not formally consent to this procedure, but did not oppose it and abided the Court's decision on this issue. At the hearing of the matter I therefore granted the requisite order in terms of Rule 33 (4).

[2] The agreed facts placed before me, for the purpose of adjudicating the stated case are as follows:

[2.1] The first and second defendants are a father and son.

[2.2] During or about 1989 the first defendant joined the second defendant to farm with him at the farm Wuthering Heights on the Loteni Underberg Road, upon which the second defendant had farmed since the early 1960's.

[2.3] The first and second defendants during or about 1990 purchased three abutting properties, fenced in as a single farm named Neteni to extend their farming enterprise. The properties were:

[2.3.1] Sub 4 of the Farm Balmoral No. 13347, situated in the administrative district of Natal, in extent 94,0735 hectares; and

[2.3.2] Remainder of the Farm Rialto No. 13788 situated in the administrative district of Natal, in extent 353,7785 hectares, registered in the name of the first defendant.

[2.3.3] Remainder of Portion 15 of the Farm Balmoral 1375, situated in the administrative district of Natal in extent 203,3690 hectares registered in the name of the second defendant.

[2.4] The second defendant provided collateral security in order to secure a hundred per cent loan from the Landbank for the purchase of the three farms comprising Neteni.

[2.5] Two of the properties were registered in the name of the first defendant and one in the name of the second defendant.

[2.6] During 1991 the first and second defendants realised that the joint farming enterprise did not work out for them.

[2.7] During or about mid 1991, the first defendant returned to Gauteng to take up employment and residence there.

[2.8] The arrangement between the first and second defendants was that the second defendant would take occupation/possession and control of the farm Neteni, which included the two portions registered in the name of the first defendant.

[2.9] The first defendant on or about 29 April 1993 signed an "Agreement and Power of Attorney", and handed same to the second defendant's attorney, one Tony Hofmeyer of the firm Bale Buchanan in Pietermaritzburg.

[2.10] The second defendant signed the document on or about 04 May 1995.

[2.11] The agreement was implemented by the parties, in that the second defendant took possession/occupation of Neteni to the exclusion of the first defendant and exercised exclusive control thereover.

[2.12] Neteni (comprising all three constituent properties referred to hereinbefore) was sold by the second defendant, relying on the authority contained in the said power of attorney during or about 2005.

[2.13] The first defendant was not party to the sale, did not at the time know thereof, did not sign the Deed of Sale or any transfer

documents and did not receive any proceeds of the sale.

[2.14] The first defendant only learned of the sale of Neteni after the event.

[2.15] The two properties forming part of Neteni which was registered in the name of the first defendant, was still so registered in his name on 17 July 2003, the date of the fire which forms the subject of this action.

[2.16] No neighbourly matters, such as making of firebreaks and/or fire fighting strategies were raised and/or discussed by employees and/or representatives of the plaintiff (Mondi) with the first defendant.

[2.17] The first defendant did not inform the plaintiff of the said agreement.

[2.18] The summons commencing acting in this matter was issued against the first defendant only and was served at Wuthering Heights on or about 06 January 2006, by handing the same to the second defendant, at his permanent place of residence and domicile.

[2.19] The second defendant handed the summons to his insurance broker who forwarded same to Mutual and Federal Insurance Company, who finally instructed Messrs Mason Incorporated to defend the action.

[2.20] The first defendant at the time of service of the summons was permanently resident and domiciled at 453 Snowey Walker Street, Garsfontein, Pretoria, Gauteng.

[2.21] The first defendant was oblivious of the existence of the present action, until such time as he was, on or about 28 November 2006, telephonically informed thereof by the attorney acting for the second defendant.

[2.22] The agreement was only, during consultation in preparation for the trial set down for a date during or about the end of 2008, revealed by the second defendant and thereafter furnished to all concerned.

[2.23] The production of the agreement prompted the joinder of the second defendant.

[2.24] The first defendant in due course by amendment, introduced his own plea, during or about September 2011.

[3] The stated case was formulated as follows:

"Whether the facts listed hereinbefore, against the backdrop of the terms and conditions of the National Veld and Forest Fire Act of 1998 absolves the first defendant from liability for damages allegedly suffered by the plaintiff as a consequence of an omission on the part of the first defendant, as pleaded, allegedly allowing the fire to spread from the farm Neteni onto the farm Gilboa upon which the plaintiff conducted timber farming".

[4] The following terms contained in the "Agreement and Power of Attorney" are relevant to the adjudication of the stated case:

"7. In view of this, to secure my father's position, and to ensure that the properties are looked after:

7.1 I agree to hand over the complete control of the above properties to my father on the following terms:

7.1.1 This control will continue for as long as my father wishes;

7.1.2 My father will have the right to use the property himself or to lease the properties to anyone he chooses free of rental or at a rental he in his sole discretion considers acceptable;

7.1.3 My father undertakes to make all payments to the Land Bank on my behalf in terms of my obligation to the Land Bank.

7.2 In addition I give my father a power of attorney, with the power of substitution, to:

7.2.1 take transfer of the properties into his own name at a value he in his sole discretion considers reasonable, or

7.2.2 to sell the above properties on my behalf, at a reasonable price to be determined by him entirely at his sole discretion,

7.2.3 to do all things and sign all papers required to take transfer of the properties or to sell and to transfer the properties to the purchaser,

7.2.4 to keep for himself all proceeds from any farming activity, or from the leasing of the properties or from the sale of the properties".

[5] In order to place in context, the issue to be decided by way of the stated case, it is necessary to briefly set out the plaintiff's cause of action against the defendants. The plaintiff claims payment of the sum of

R1,209,389.00 from the first defendant, alternatively the second defendant, alternatively as against both defendants jointly and severally, on the grounds that:

[5.1] On 17 July 2003 a fire started on the first defendant's property which was a "veld fire", as defined in Section (2) (1) of the National Veld and Forest Fire Act No. 101 of 1998 (the Act).

[5.2] The fire spread into timber plantations situated on properties owned by the plaintiff, burning and causing damage to the timber.

[5.3] The first defendant and/or the second defendant, acted negligently and unlawfully in a number of respects and thereby breached the duties imposed upon them in terms of Sections 12 (1), 13 (a), 17 (1) and 18 (1) (a) and (b) of the Act.

[6] The central issue which falls to be decided in the stated case, is whether the fact that the first defendant entirely divested himself of legal control over the property in terms of the "Agreement and Power of Attorney", which then vested exclusively in the second defendant, has as a legal consequence, that the first defendant no longer falls within the definition of "owner" contained in Section 2 of the Act.

[7] The definition of "owner" in the Act reads as follows:

"**"owner"** has its common law meaning and includes –

a) a lessee or other person who controls the land in question in terms of

a contract, testamentary document, law or order of a High Court;

b) in relation to land controlled by a community, the executive body of the community in terms of its constitution or any law or custom;

c) in relation to State land not controlled by a person contemplated in paragraph (a) or a community –

i) the Minister of the Government department or the member of the executive council of the provincial administration exercising control over that State land; or

ii) a person authorised by him or her; and

d) in relation to a local authority, the chief executive officer of the local authority or a person authorised by him or her".

[8] It is therefore necessary to determine, for the purposes of the Act, what the common law meaning of "owner" is. In the case of

MEC for Local Government & Finance, KwaZulu-Natal

v

North Central &South Central Local Councils, Durban & Others

[1999] 3 All S A 5 (N) at 14 – 25

Thirion J conducted an exhaustive and detailed investigation of the concept of ownership at common law, but prefaced his remarks with the following comment at pg 14 e

"The concept of ownership has thus far defied exhaustive definition. I do not propose to attempt to define it".

[9] For present purposes, it is only necessary to highlight aspects of the learned Judge's research.

[10] In the case of

Johannesburg Municipal Council

v

Rand Townships Registrar & Others

1910 TPD 1314 at 1319

Wessels J stated the following:

"What, however, is the exact scope of *dominium* has been a matter of controversy for centuries (see Glück, *Pandecten* vol 8, p 26; Dernburg, vol 1, p 444). Savigny's definition may be accepted as of high authority. '*Dominium* is the unrestricted and exclusive control which a person has over a thing' (Savigny, *System,* vol 1, sec 59, p 367). Inasmuch as the owner has the full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all rights of ownership over the thing".

[11] Thirion J regarded the last sentence of the quotation as being of doubtful validity, expressing his misgivings in the following terms at pg 14h:

"I would think that whether in any given case the owner who retains an interest in property after having disposed of certain of the incidents or entitlements of ownership still remains the owner would depend on the particular incidents or entitlements disposed of; as well as the nature of the arrangement under which they have been

disposed of".

[12] By reference to Voet 6.1.2, Thirion J referred to the fact that from ownership springs the right of vindication, which is relevant in ascertaining where ownership lies (*supra* at 15 (c)).

[13] By reference to the decision of Jansen J A in

Chetty v Naidoo
1974 (3) SA 13 (A) at 20

where the learned Judge of Appeal expressed himself in the following terms:

"…. but there can be little doubt …. that one of its incidents (i.e. of ownership) is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of the ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner in instituting a *rei vindicatio* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* …."

Thirion J referred to the important position which the right to possession holds as an incident of ownership, with the correlative right of vindication (at pg 15 d).

[14] In a reference to

Huber-Heedensdaegse Rechts Geleertheyt 2.2.5

and a description of ownership of corporeal property, Thirion J pointed out that to Huber, the "complete power" of ownership signified two things, firstly, "the free control of his property" and secondly "the power of alienation" provided that by law or agreement, this power is in certain instances curtailed (at pg 16 b – c).

[15] A reference to

Sohms Institutes of Roman Law (Ledlie's translation)
3rd Ed pg 309

describes ownership as follows:

"Ownership is a right, unlimited in respect of its contents, to exercise control over a thing. The difference, in point of conception between ownership and *jura in re aliena* is this, that ownership, however susceptible of legal limitations (e.g. through rights of others in the same thing) is nevertheless absolutely unlimited as far as its own contents are concerned. As soon therefore as the legal limitations imposed upon ownership – whether by the rights of others or by the rules of public law – disappear, ownership at once, and of its own accord, re-establishes itself as a plenary control. This is what is sometimes described as the 'elasticity' of ownership".

(*supra* at pg 17 b – d)

[16] From the aforegoing it is evident that central to the common law meaning of ownership, is that of unrestricted and exclusive control and possession of the *res,* together with the power of alienation.

[17] On the agreed facts placed before me, together with the contents of the "Agreement and Power of Attorney" it is clear that:

[17.1] The first defendant handed over "complete control" of the properties to the second defendant, which included the power to use the properties, or to lease the properties to a third party, free of rental or at a rental which the second defendant in his sole discretion considered acceptable.

[17.2] This control was to continue for as long as the second defendant wished.

[17.3] The first defendant gave to the second defendant, a power of attorney to take transfer of the properties at a value which the second defendant in his sole discretion considered reasonable.

[17.4] The first defendant gave to the second defendant, a power of attorney to sell the properties on behalf of the first defendant, at a reasonable price to be determined by him entirely at his sole discretion.

[17.5] The second defendant was entitled to keep the proceeds from any farming activity, or from leasing the properties, or from the sale of the properties.

[17.6] The agreement between the first and second defendants was implemented, the second defendant took possession/occupation of the properties to the exclusion of the first defendant and exercised exclusive control over them.

[17.7] The second defendant sold the properties without reference to the first defendant, albeit after the occurrence of the fire. The first defendant only learnt of the sale after the event, and did not receive any of the proceeds of the sale.

[18] In my view, regard being had to the incidents of ownership which the first defendant disposed of, namely the exclusive control of the properties, together with the right to possession and alienation of the properties, as well as the nature of the arrangements under which they were disposed of, the interest retained by the first defendant was solely that of the properties being registered in his name in the Deeds Registry.

[19] As pointed out by Thirion J in MEC KZN *supra* at 25 h, "owner" in the case of land is ordinarily understood to be the registered owner of the land, but this is not necessarily so. The learned Judge in support of this view, referred to the following statement in

Union Government (Minister of Justice) v Bolam
1927 AD 467 at 472

where Solomon C J had the following to say:

"Nor does the fact that the land in question is registered in the name of the board,

militate against this conclusion (i.e. that the Government was the owner) for registration is not necessarily conclusive on the question of ownership of land. It is not so for example in the case of marriage in community of property, or partnership or of bequest by will. And where a statute regulates the ownership of land, registration must necessarily give way to the provision of the statute".

[20] In my view, registration of ownership in the Deeds Registry, is not an incident of ownership, within the common law meaning of that term, flowing as it does from statute, in the form of the Deeds Registry Act 47 of 1937. For the reasons that follow, I regard the common law right of control over the property, as the decisive incident of ownership to determine whether the first defendant falls within the "common law meaning" of "owner" in terms of the Act.

[21] What the Legislature intended by referring to the "common law meaning" of "owner", must be determined not only in the context of the language of the rest of the Act, but also its apparent purpose and scope, as well as the historical background to the Act.

Jaga v Dönges N.O. & another
Bhana v Dönges N.O. & another
1950 (4) SA 653 (A) at 662 G – 664 H

[22] As regards the language of the rest of the Act, the other meanings accorded to the definition of "owner", in Section 2 of the Act, are instructive. Paragraph (a) refers to a lessee "or other person who controls the land in question" in terms of a contract, testamentary document, law or

order of a High Court. The issue of control of the land is repeated as the criterion in respect of a community, as well as State land, respectively, in paragraphs (b) and (c). However, with regard to a local authority, no reference is made to the criterion of control, in paragraph (d).

[23] When the emphasis placed upon control of the land in question, is considered with regard to the other entities which fall within the definition of "owner" in the Act, the significance of the attribute of control, in the common law meaning of "owner", becomes apparent. If control is the determining criterion, in the other categories of "owner", for the purposes of the Act, why should it not be the determining criterion in the "common law meaning" of "owner"? It would be anomalous to require control over the land in question, to qualify the other named entities as an "owner", but not in the case of the "common law meaning" of "owner".

[24] That the intention of the Legislature was to accord decisive significance to the issue of control of the land, in determining whether an entity fell within the "common law meaning" of "owner", is fortified by an examination of the definition of "owner", in the context of the provisions of Section 34 of the Act, together with the purpose and scope of this Section, as well as its historical background.

[25] Section 34 of the Act provides as follows:

"**34. 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.

(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".

[26] The predecessor of Section 34 of the Act, was Section 84 of the Forest Act 122 of 1984, which provided as follows:

"When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved".

[27] As pointed out by Scott J A in

Gouda Boerdery, BK v Transnet
2005 (5) SA 490 (SCA) at 495 D – E

by reference to Section 84 of Act 122 of 1984;

"This section and its predecessors (ie s 23 of Act 72 of 1968 and s 26 of Act 13 of 1941) were cast in such wide terms as to give rise to a need to cut them down in some way. It was accordingly held that for the presumption to operate the plaintiff had to establish 'a *nexus* or connection between the fire and the party against whom the allegation is made'. In enacting the present s 34 the Legislature abandoned the

wide terms employed in the earlier enactments and sought to avoid the difficulties of the past by prescribing more closely what had to be established for the presumption to come into operation".

[28] The reference by the learned Judge of Appeal to a "nexus or connection" was a reference to the decision of Fannin J in

Quathlamba (Pty) Ltd. v Minister of Forestry
1972 (2) SA 783 (M) at 788 H

in which by reference to Section 23 of Act 72 of 1968, Fannin J held that a "question of negligence" can only "arise" for the purposes of this section, when negligence is alleged against the defendant and the plaintiff establishes a nexus or connection, between the fire and the party against whom the allegation is made, which is consistent with such negligence.

[29] On appeal in

Minister of Forestry v Quathlamba (Pty) Ltd.
1973 (3) SA 69 (A)

Ogilvie -Thompson J A, held that the additional element could be satisfied by proof that the fire originated upon land owned and controlled by the defendant. Olgivie -Thompson J A expressed himself in the following terms at pg 82 D – F:

"Despite his innocence regarding the origin of the fire on his property, the landowner's failure, in the circumstances presently under discussion, to take any steps to attempt to regulate or extinguish the fire falls, in my opinion, outside the

category of 'mere omission' because the landowner is in control of the property which – albeit without fault on his part – has, by reason of the fire burning upon it, become a potential hazard to others. In such a situation there exists, in my opinion, a duty upon the landowner to act reasonably in an endeavour to avoid foreseeable harm to others".

[30] It is clear that the issue of the control exercised over the property by the landowner, was the decisive consideration in elevating the conduct of the landowner, beyond that of a "mere omission".

[31] The case of

Administrateur Transvaal v van der Merwe
1994 (4) SA 347 (A)

concerned the provisions of Section 4 of the Roads Ordinance 22 of 1957, which provided that "all public roads within the Province shall be under the control and supervision of the Administrator". The Administrator was sought to be held liable, for a fire which had broken out on the edge of a public road and had spread to the plaintiff's farm. It was held that the element of control is an important factor in the adjudication of the question of unlawfulness (at pg 359 I/J). The fact that the Administrator had control and supervision over the road in question, was a necessary factor for the establishment of the Administrator's liability, but in itself it was not sufficient (at pg 360 G – H). In the absence of a positive danger-creating act, the mere control of property and the failure to exercise such control with resultant prejudice to another was not *per se* unlawful (at pg 361 F – G).

[32] In the case of

Lubbe v Lowe (2006) (4) All S A 341 (SCA) at 346 J

by reference to the decision in Administrateur Transvaal, it was held that:

"In my opinion the case should not be regarded as authority for the proposition that the wide recognition of a duty to take care in relation to veld fires approved in such cases as *Quathlamba (supra)* and *HL & H Timber Products (supra)* is to be qualified in cases where the control of the landowner in question is one of the incidents of ownership of the property concerned".

[33] It is therefore clear that control of the landowner, over the property in question, as one of the incidents of ownership, is a decisive factor in the determination of liability.

[34] Regard being had to the provisions of the predecessors of Section 34 of the Act, and the historical judicial requirement of control over the property, as a determinant of liability, "the common law meaning" of "owner" in terms of the Act, must include the element of the right of control over the property in question. If this were not so, the presumption of negligence contained in Section 34 of the Act, would operate against an "owner" who had no right of control over the land in question.

[35] I am accordingly satisfied, as a consequence of the divesting by first defendant of the right of control over the properties in question, in favour of the second defendant, that the first defendant ceased to be an

"owner" of the properties in question, within the "common law meaning" of the definition of "owner", contained in the Act.

[36] Very little argument was addressed to me at the hearing of the stated case, on the issue of costs. On the face of it the first defendant is the successful party and consequently should be entitled to his costs. My reservation in this regard is that from the facts of the stated case, it is clear that the first defendant never informed the plaintiff of the agreement he had concluded with the second defendant. The summons was issued against the first defendant and served on the second defendant on 06 January 2006. The first defendant was however unaware of the present action, until he was informed by the second defendant's attorney on 28 November 2006. The agreement was only revealed by the second defendant towards the end of 2008. As a consequence, the second defendant was joined and the first defendant filed a plea dated 01 September 2011, in which the issue of the agreement was raised, including the issue of the divesting of control of the properties by the first defendant. It was not however alleged by the first defendant, that as a consequence he did not fall within the definition of "owner" in the Act.

[37] There may be some argument on behalf of the plaintiff, that because the agreement was only disclosed a considerable period after summons was issued against the first defendant, the plaintiff should only be liable for the first defendant's costs incurred after the filing of the first defendant's amended plea on 01 September 2011. The fact remains however that the plaintiff has never conceded the point in issue and as a consequence withdrawn its claim against the first defendant. It seems to

me therefore that the first defendant's entitlement to his costs, as the successful party, should not be disturbed. As regards the second defendant, which abided the decision of this Court on the stated case, it should pay its own costs, which it may have incurred. However, in case the matter requires further argument, the costs order which I intend to make will be provisional at this stage.

I therefore answer the stated case in favour of the first defendant and make the following order:

a) The first defendant is absolved from liability to the plaintiff, for damages allegedly suffered by the plaintiff, as a consequence of an alleged omission on the part of the first defendant, in allowing a fire to spread from the farm Neteni onto the farm Gilboa, upon which the plaintiff conducted timber farming.

b) The plaintiff is ordered to pay the first defendant's costs.

c) The second defendant is ordered to pay his own costs incurred in connection with the stated case.

d) The order for costs in paragraph (b) and (c) above will be provisional for the period until 21 November 2011 and, up to that date, the parties have leave to file and serve a notice recording their intention to submit further argument on the question of costs. Thereafter and by arrangement with the Registrar the matter may

be set down for further argument on the issue of costs. Failing such notification the order for costs will become final on 22 November 2011.

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SWAIN J

Appearances /…

Appearances:

For the Plaintiff	**:**	Mr. A. J. Daniels
Instructed by	**:**	Eversheds C/o Stowell & Co. Pietermaritzburg
For the 1st Defendant	**:**	Mr. L. du Koning S C
Instructed by	**:**	Werner Prinsloo Prokureurs Pretoria
For the 2nd Defendant	**:**	Mr. M. G. Roberts S C
Instructed by	**:**	Mason Incorporated Pietermaritzburg
Date of Hearing	**:**	01 November 2011
Date of Filing of Judgment	**:**	09 November 2011