IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Appeal case no. A25/2011
Case no: 10879/2006

In the matter between:

BERND RAINER KASPER **Appellant**

and

ANDRÉ KEMP BOERDERY **Respondent**

JUDGE	:	**P.A.L. GAMBLE**
FOR THE APPELLANT	:	**Adv. D.J. Coetsee**
INSTRUCTED BY	:	**Cilliers Odendaal Attorneys**
FOR THE RESPONDENT	:	**Adv. J.Y Claasen SC**
INSTRUCTED BY	:	**A.J. Wagener Attorneys**
DATES OF HEARINGS	:	**19 August 2011**
DATE OF JUDGMENT	:	**22 November 2011**

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(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

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In the matter between:

BERND RAINER KASPER **APPELLANT**

and

ANDRÉ KEMP BOERDERY CC **RESPONDENT**

JUDGMENT DATED 22 NOVEMBER 2011

GAMBLE J

INTRODUCTION

1. On Wednesday, 14 September 2005, a huge fire swept through the mountains surrounding a valley located between Uniondale and Avontuur in the South Western Cape. The fire destroyed extensive areas of mountain fynbos and agricultural land, and caused damage to, *inter alia*, various farm fences and irrigation pipes in the process.

2. It is common cause that the fire started at around midday on the day in question, when a labourer employed by the appellant lit a heap of dried weeds and other plant material lying in a heap in a field on the appellant's farm close to the boundary with the respondent's farm. The fire spread quickly over the respondent's land and eventually encroached on land farmed by various of the parties' neighbours.

3. The local fire brigade was called out to assist but there was little that they could do to stop the runaway fire other than to take preventative measures to protect certain buildings. The fire brigade withdrew from the area on 15 September 2005, evidently satisfied that the fire had burned itself out.

4. The various neighbours involved lost little time in getting together to discuss the disaster and on Saturday 17 September 2005 they met on the appellant's farm. Later that day there was further burning in a kloof deep in the mountains with consequent further destruction of veld and fynbos.

5. The respondent (as plaintiff in the court *a quo*) initiated proceedings in this court to recover damages from the appellant (defendant *a quo*) allegedly arising from the fire. The claim was a comprehensive one brought on behalf of the various farmers who were affected by the fire, with the plaintiff claiming both in its personal capacity and on behalf of its neighbours under alleged cessions of action.

6. The matter went to trial before Justice Saldanha who heard evidence in the Circuit Court sitting at George. For the sake of convenience, I shall refer to the parties further as in the trial court.

7. The parties had agreed that the merits and the quantum should be separated and the trial on the latter was deferred. On 3 August 2010, Saldanha J delivered a thorough and reasoned judgment in which he found that the defendant was liable to the plaintiff for the damages sustained by it and the neighbours (Ms Schutte and Messers Bateman and Strydom) as a result of the fire. The defendant appeals against that finding with the leave of the court *a quo*.

8. The material facts are set out in great detail in the judgment of the court *a quo* and it is therefore not necessary to go into the same measure of detail herein.

ISSUES ON APPEAL

9. On appeal before us, counsel for the defendant relied on a lengthy notice of appeal raising some 27 grounds. Many of those grounds overlap and at the end of the hearing the following issues fell for determination:

   9.1. Was the fire started negligently?

   9.2. If so, was the worker who started the fire acting within the course and scope of his employment with the defendant?

9.3. Did the defendant acknowledge the delictual liability for the fire at the meeting on Saturday 17 September 2005 referred to above?

9.4. Were the claims of Schutte, Bateman and Strydom properly ceded to the plaintiff?

9.5. Did the fire which burned on the Saturday start spontaneously, or was it a flare-up of the original fire?

9.6. If the fire which burned on the Saturday was not a flare-up of the original fire, what was the extent of the damage caused by the original fire?

9.7. Were the damages claimed by the plaintiff causally linked to the fire which started on the defendant farm on the Wednesday?

9.8. Was the plaintiff entitled to rely on the presumptions of negligence contained in section 34 of the National Veld and Forest Fire Act, 101 of 1998?

I do not propose dealing with the issues in the order set out above. In addition, on appeal, the defendant attacked the court *a quo's* decision to grant the plaintiff a late amendment.

NEGLIGENT LIGHTING OF THE FIRE

10. It was common cause that a farm worker employed by the defendant, Mr Steven Huma ("*Huma*"), was instructed by his employer to clear a piece of land which the defendant wished to utilize for the planting of crops.

The land in question had lain fallow for many years and was overgrown with weeds and other unwanted plants. The ground had been ploughed with an implement known colloquially as a "*ripper*", which loosened the plant matter.

11. Huma was instructed to rake together the loose plant material after it had dried out for the purposes of disposing of it. The idea was that the dried plant material would be transported a short distance by agricultural trailer to a donga where it would be dumped in an effort to stem further soil erosion.

12. On Wednesday, 14 September 2005, the defendant was not on his farm, having driven through to nearby Jeffreys Bay for the day. He gave Huma instructions to carry on with disposal of the weeds in his absence. Huma evidently took it upon himself to adopt what can only be described as a short-cut: instead of transporting the weeds to the donga he decided to burn the neatly gathered heaps on the land.

13. By all accounts Huma could not have chosen a more inopportune time to strike a match. It had been a very dry year in the Langkloof and an equally dry month. The humidity on the day in question was very low, a strong warm berg wind of about 30 kph was blowing and the temperature at midday was around 35°C. The South African Weather Service had issued several "*Code Red*" fire-hazard warnings for the area.[1]

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[1] This, the court *a quo* was told, is the most serious level of warning and indicates that fire activity is extremely dangerous. Fire teams and equipment should be placed of full standby and at the first sign of smoke every possible measure should be taken to bring a fire under control.

14. As Huma set fire to the first heap, it flared up and an almighty conflagration ensued. Workers on a nearby farm heard the blaze before they saw it; describing what they thought was the sound of an approaching long-distance haulage vehicle. The blaze spread rapidly across the defendant's land and jumped the boundary with the plaintiff's land (a stream) just a short distance away. Before long, large parts of the valley were ablaze and the entire area engulfed in smoke.

15. The court *a quo* found that Huma acted negligently in the prevailing circumstances. Before us on appeal, counsel for the defendant all but conceded that this finding was unassailable. With respect, I agree with the court *a quo's* findings in this regard. To start a fire in such circumstances was inadvisable to say the least. To do so without any fire-fighting equipment or personnel at hand was grossly negligent, if not reckless. There is therefore no basis to disagree with the court *a quo* on this point.

VICARIOUS LIABILITY

16. The defendant was not present on the farm when the fire started. He testified that he had not instructed Huma to do any burning on the day in question. Although this evidence was disputed, I am of the view that there is no basis to doubt the defendant's word. The plaintiff's allegations (both in the pleadings and in the evidence of its principal member, Dr Kemp) regarding the personal negligence of the defendant were speculative, contrived and ultimately baseless.

17. But that is not the end of the case for the plaintiff. If it be found that Huma was acting in the course and scope of his employment with the defendant, the defendant may be held liable vicariously. The approach was dealt with extensively by the Appellate Division almost a century ago in one of the earlier decisions involving liability of an employee for fire damage caused while on duty. In **Mkize v Martens**[2] the defendant was travelling through rural Natal (as it then was) with a wagon and mules. At an outspan, the defendant left the wagon in the care of two youngsters who decided to start a fire to cook their midday meal. The fire soon spread out of control and caused damage to the plaintiff's property. The trial court found that the fire had been started negligently, a finding which was endorsed on appeal. The enquiry turned to the question of vicarious liability.

18. After a detailed consideration of the common law, Innes JA (as he then was) said the following (at p 390):

> "*but perhaps the most satisfactory statement . . . is that given by Pollock, Torts, (8th ed. p 78), founded upon a pronouncement of Chief Justice Shaw of Massachusetts: 'I am answerable for the wrongs of my servant or agent not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' However that may be, we may, for practical purposes, adopt the principle that a master is*

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[2] **1914 AD 382**.

answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. Such an act cannot be said to have taken place in the exercise of the functions to which he (the servant) is appointed."

19. The court found that in cooking their meal in the prevailing circumstances, the employees were "*engaged about their master's affairs and were acting in the course of their employment*".[3]

20. In the subsequent decision of **Estate van der Byl v Swanepoel**[4] Wessels JA noted with reference to **Mkize's case** (***supra***), that:

"*This Court in applying the general principle that a master is liable for the torts of his servants acting with the scope of their employment has taken an extended view of the master's liability to third parties rather than the narrow one which would confine his liability strictly to acts done within the instructions or necessarily incidental thereto.*"

21. The "*extended view*" was revisited by the Appellate Division in **Feldman (Pty) Ltd v Mall**[5] in which a thorough review of the principles and approach to vicarious liability was undertaken. The decision gave rise to

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[3] **p 393**.
[4] **1927 AD 141 at p 147**.
[5] **1945 AD 733**.

the so-called "*deviation principle*" in which the employee who disobeyed an employer's instructions could still attract vicarious liability for the employer. Watermeyer CJ outlined the approach in such circumstances as follows (**at p 736**):

> "*Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the 'means' – by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts.*"

22. The rather paternalistic language used by the courts in the earlier cases is no doubt somewhat jarring to the ears of contemporary employment law practitioners, but the principles expounded therein are as applicable today as they were all those decades ago.

23. Over the years, deviation cases have resulted in much deliberation by our courts, the problem being how to assess, firstly, whether a particular

factual matrix constitutes a deviation at all and then, if so, whether the deviation is of such a nature as to include or exclude vicarious liability. The nub of the problem was explained by Watermeyer CJ in **SAR & H v Marais**.[6] In that case, one Marais (the late husband of the respondent on appeal) had been travelling lawfully on a train. He was invited by the engine-driver to join him on the footplate of the engine where the two men drank brandy supplied by Marais. Marais' presence on the footplate was expressly prohibited by the railways authorities. While Marais was travelling on the footplate, the engine left the rails due to the negligence of the driver and Marais was killed. Mrs Marais sued the railways for damages for loss of support due to the death of her husband, alleging that the invitation by the engine-driver to Marais to join him on the footplate was within the course and scope of his employment.

24. The Chief Justice conducted a detailed study of various foreign jurisdictions and then commented as follows (at p 620G):

> "*These decisions seem to me to be in agreement with the result at which I have arrived and it is satisfactory to find that so many other courts, when dealing with the difficult subject of a master's liability for the acts of his servant, should have come to the conclusion that, when a driver of a vehicle gives a lift to a friend, such act being outside the scope of his employment, the master is not responsible if the friend is thereafter injured through the negligent driving of the vehicle while being carried on the vehicle.*"

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[6] **1950 (4) SA 610 (A)**.

25. Turning to the argument that the engine driver had not entirely abandoned his employer's work to attend to his own affairs when he invited Marais to join him on the footplate, Watermeyer CJ made the following trenchant observation (**at p 619**):

> "*I cannot agree with that reasoning. The work entrusted to the driver was to drive the engine and he had to do it in such a manner as not to injure anyone by negligence in driving it. It was not the work of the [railways] administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment. It cannot be said that transporting a passenger on the engine was a negligent manner of driving the engine: it had nothing to do with engine driving. . . The transportation of Marais upon the engine was in my opinion entirely the driver's own act. It was not done for the purpose of furthering his master's interests and was wholly outside the scope of his employment.*"

26. In a later judgment involving the death of a hitch-hiker given a lift by an Eskom employee who crashed an Eskom vehicle while on duty,[7] Heher AJA (as he then was) commented as follows on Watermeyer CJ 's aforesaid *dictum*:

> "*[12] It is clear from this passage that the Chief Justice was conscious of the fact that the act which gave rise to the delict,* viz *the driving of the engine, was the essence of the work entrusted*

[7] **Bezuidenhout NO v Eskom 2003 (3) SA 83 (SCA)**.

to the driver but considered that a determination of whether he actually acted within the scope of his employment insofar as Marais was concerned at the time of committing the delict required a broader perspective which took account of other facts that cast light on the relationship between the employee and employer at the time of the delict."[8]

27. Significant problems arise in circumstances where the employer has expressly proscribed the offending conduct of the employee and yet our courts have not found this *per se* to be a basis to deny a plaintiff delictual relief. I cite but one recent example.

28. In **Mogamat v Centre Guards CC**[9], Griesel J was called upon to decide whether an on-duty security guard was acting within the course and scope of his employment with the defendant when he shot a customer at the shopping centre he was guarding in circumstances where his contract of employment expressly forbade him to be armed (whether with a company or personal firearm) while on duty. The employer relied on this provision to assert that the guard was not acting within the scope of his employment when he injured the plaintiff who was busy assisting in a burglary at a shop in the centre.

29. Griesel J referred to, *inter alia*, **Feldman (Pty) Ltd v Mall** (***supra***) and went on to cite the following passage from **Minister of Police v Rabie**:[10]

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[8] **p 90B**.
[9] **[2004] 1 All SA 221 (C)**.
[10] **1986 (1) SA 117 (A) at p 134D-E**.

"*It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. . . The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the* ***Salmond*** *test (cited by Greenberg JA in* ***Feldman (Pty) v Mall*** *[supra at 774]:*

> *'a master . . . is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them. . .'.*"

30. As Griesel J correctly observed:[11]

"*[22] there are many instances in our law reports where employers were held liable, even though the employee in question disobeyed instructions and performed forbidden acts. It is no answer, therefore, simply to say – as the defendant seeks to do – that . . . [the security guard] was forbidden to use a firearm on duty and therefore the defendant is not liable. The standard question*

[11] **At p 227, footnotes omitted**.

remains: was the employee engaged in the affairs of the employer at the time the delict was committed?

[23] In answering this question in the context of forbidden acts, an important distinction is drawn between a prohibition which limits the sphere of employment, on the one hand, and one which only deals with conduct within the sphere of employment, on the other. The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment.

[24] To conclude as far as this aspect is concerned, the position is neatly summarised by Neethling et al [Law of Delict (4th ed)] as follows:

> *'The employer may only escape vicarious liability if the employee, viewed subjectively, has not only promoted his own interests, but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment.'"*

31. The court was satisfied, on the facts before it, that the security guard was indeed acting in the scope of his employment when he injured the plaintiff.

32. In supplementary heads of argument filed subsequent to the hearing at the request of the Court, counsel dealt with the import of the decision of the Constitutional Court in **K v Minister of Safety and Security**[12] in the context of the present case. We are indebted to counsel for their assistance in this regard.

33. The facts in **K's case, *supra***, are wholly different to the instant case and, importantly, incorporate public policy considerations given that the errant employees in that case were police officers in the employ of the State.

34. Nevertheless, in a wide-ranging judgment which considered the common law both locally and abroad O'Regan J confirmed that the common law approach in South Africa passed constitutional muster. After considering, *inter alia,* Feldman v Mall, *supra* and Minister of Police v Rabie, *supra* the learned judge said the following:

> *"[32] The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own*

[12] 2005(6) SA 419 (C C)

interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights…

[44]…The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order."

35. I turn then to the relevant facts before the court *a quo* on this point. In evidence, Huma claimed that he had acted contrary to the instructions of the defendant when he set fire to the first heap and said that he did so to lessen his own burden on a hot day. As I have said, this issue was disputed by the plaintiff, which attempted to demonstrate, through the evidence of bystanders who claimed to have been in conversation with Huma, that the defendant had indeed so instructed Huma.

36. The court *a quo* did not entirely resolve this factual issue although it did seem to prefer the plaintiff's version which was based on the evidence of a certain Isaac Thyssen, who impressed the court as an honest witness. Thyssen was a farm-hand, who had grown up on a neighbouring farm, and in a conversation with Huma a day or two after the event, it was alleged that Huma had told him that he was acting on instructions. If that allegation was true, then, of course, the liability of the defendant was established without more.

37. The court *a quo* approached the evidence more cautiously and found that it mattered not (for purposes of vicarious liability) whether Huma was acting on direction instructions or not. Relying on cases such as **Bezuidenhout NO v Eskom** (***supra***), and **Mogamat v Centre Guards** (***supra***), the trial judge found that:

> "*The burning of plant material on a farm in such circumstances when viewed objectively cannot be regarded as a deviation of his employment to such an extent and degree (albeit to ease his own burden) that his employer is not to be held responsible for such actions. I am of the view that Huma's actions in setting the plant material alight was clearly carried out within the cause (sic) and scope of his employment with the defendant.*"

38. In my view, this finding by the court *a quo,* considered in the light of the approach in **K's case**, *supra*, cannot be faulted. Assuming of course that Huma acted contrary to instructions, it cannot be said that, in burning the weeds rather than removing them to the donga, the

employee had "*completely disengaged himself from the duties of his contract of employment*". His conduct fell within the "*important distinction*" which Griesel J speaks of in **Mogamat's case**, *supra*, between "*a prohibition which limits the sphere of employment*" and "*one which only deals with conduct within the sphere of employment*". The facts of this case clearly fall within the latter category. Or, to use the words of Greenberg JA in **Feldman's case (*supra*)**, one is dealing here with an "*improper mode*" of the discharge of one's contract of employment.

39. In conclusion on this point, one may, in the current circumstances, rightfully pose the rhetorical question – if Huma was not acting within the course and scope of his employment with the defendant, in whose business was he engaged?

ACKNOWLEDGEMENT OF LIABILITY

40. The plaintiff claimed that at the meeting of affected parties on Saturday, 17 September 2005 on the defendant's farm (at which two of the neighbours, Bateman and Strydom were present) the parties discussed what was to be done to address the calamity. At that stage, the fire which was spotted the following day burning deep in the mountains, had not been seen by anyone.

41. The defendant informed those present that he had insurance cover with Santam and that he would submit a claim in respect of the fire damage. The parties discussed, too, the manner in which a claim would be

brought against the defendant and the plaintiff indicated that it would act on behalf of the affected neighbours in bringing such a claim.

42. The plaintiff pleaded in its particulars of claim, in the alternative to its delictual action, that the parties to this gathering had concluded an implied, alternatively tacit, agreement that in the event of Santam repudiating the defendant's claim, the defendant would personally make good any of the parties' damages.

43. The court *a quo* found, correctly in my view, that it was not necessary to deal with this issue in light of its finding on the main claim in delict. In the circumstances of the finding above on the delictual claim, it is similarly not necessary to deal with the alternative claim on appeal.

APPLICABILITY OF THE NATIONAL VELD AND FOREST FIRE ACT, 101 OF 1998

44. Section 34 of this Act contains a presumption of negligence against the owner of the land on which a veldfire starts and then spreads to adjacent properties. It is a piece of legislation (like its predecessor) which has enjoyed much attention in the courts.

45. The court *a quo* held that it was not necessary to determine the applicability of the presumption in the present matter given its finding in respect of the delictual claim. Nevertheless, the court *a quo* dealt with the meaning of the word "*veld*" quite extensively in an *obiter dictum* and found that the ground upon which the fire had started was indeed veld.

46. Given the finding above on the delictual claim, I do not consider it necessary to go into this aspect on appeal either.

THE ORIGIN AND EXTENT OF THE FIRE WHICH BURNED ON SUNDAY 18 SEPTEMBER 2005

47. In his amended plea, the defendant admitted the plaintiff's allegation that a fire started on the defendant's farm on 14 September 2005 and that it spread to a farm known as "*Elandsdrift*". This name, said the plaintiff, was the name which collectively referred to all of the agricultural land which it farmed as a unit in the area. The defendant also admitted that the fire spread to neighbouring farms but said that he had no knowledge of the names, owners or boundaries of such farms.

48. The defendant went on to allege that not all of the damage caused to "*Elandsdrift*" and the neighbouring farms was occasioned by the fire which broke out on his land on 14 September 2005. In amplification of this allegation, the defendant asserted that a second fire broke out on "*Elandsdrift*" (or in its vicinity) about 3 days after the fire had started on his farm and at a time when that fire was under control.[13] The defendant said, further, that he had no knowledge of the extent of the damage on "*Elandsdrift*" (or on any other farm) caused by the fire which started on his farm on the 14th and the fire which started on or in the vicinity of "*Elandsdrift*" and put the plaintiff to the proof thereof. This issue was not clarified in the request for trial particulars nor at the Rule 37 conference.

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[13] "*reeds onder beheer was*".

49. At the trial, considerable evidence was led on the issue of the so-called "*second fire*". This included both lay and expert witnesses. In addition, the court *a quo* enjoyed the benefit of an inspection *in loco* in evaluating this fiercely contested aspect of the case.

50. The court *a quo* carefully analysed the evidence relating to this point. In so doing, the learned judge had regard to questions of demeanour and credibility as well as the expertise of the witnesses and the general probabilities. The court *a quo* came to the conclusion "*that on a balance of probability the fire of the Sunday was a re-ignition of the fire that had been started by Huma on the 14th September 2005*".

51. If this finding is correct, it is not necessary to determine what areas were burnt initially and what areas were burnt later: all the damage ultimately flowed from the conflagration started by Huma's negligence on the 14th.

52. Having considered the evidence carefully, the court *a quo* was satisfied with the plaintiff's version of events. In argument before this court, counsel for the defendant argued that the trial court should have found the other way. This argument was not based on any suggestions of misdirection by the court *a quo*. Rather, it was contended that the court *a quo* should have accepted the evidence of the defendant's expert witness and rejected that of the plaintiff's expert.

53. In **Michael and another v Linksfield Park Clinic (Pty) Ltd and another**[14], the court was called upon to determine the delictual liability of

[14] **2001 (3) SA 1188 (SCA)**.

a medical practitioner and a private hospital for damages arising from the treatment of a patient during a surgical procedure. All the parties to the litigation relied on the opinions of experts to sustain their cases. In considering the matter on appeal, the court made certain observations regarding the role of expert witnesses in general and medical malpractice suits in particular. I shall refer only to the former.

54. Firstly, the Court said:

> "*[36] . . . [W]hat is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL(E)). With the relevant* dicta *in the speech of Lord Browne-Wilkinson we respectfully agree.*"[15]

55. After summarizing that *dictum* on the issue of medical negligence, the Court concluded thus:

> "*[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for*

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[15] **p 1200I-J**.

example, as a greater or lesser than fifty percent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police 200 SC (HL) 77 and the warning given at 89D-E that

> *'(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence'."*[16]

56. In the instant case, the court *a quo* preferred the plaintiff's fire expert, Mr Botha, over that of Mr van Wyk, the local fire chief who testified on behalf of the defendant. That preference took cognizance of Botha's level of expertise and Van Wyk's near absence thereof. The court *a quo* also had regard to the fact that Van Wyk testified both as an expert and as a lay witness who had been involved in fighting the fire and who seemed to have assumed a measure of personal responsibility in ensuring that the

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[16] **p 1201E-H**.

fire was properly extinguished. The trial court was not convinced of Van Wyk's reliability or impartiality either.

57. But, most importantly, the court *a quo* applied common sense and logic to the contested evidence before it. In the absence of any other explanation[17] as to the origin of the fire high in the mountains at a spot inaccessible to humans, the court found Botha's theory that there was a slow and protracted smouldering of combustible material like thick, dry vegetation in inaccessible ravines in the intervening period between the Wednesday and the Sunday, as the more probable source of the fire which broke out on that Sunday.

58. I can find nothing wrong or objectionable in the reasoning of the court *a quo* on this aspect of the case and I am satisfied that the trial court got it right: there was one fire started by Huma on Wednesday the 14th which to the naked eye appeared to have burnt itself out but which flared up again on the Sunday when combustible plant material high in the mountains ignited. The consequence of that finding is that all of the fire damage on the plaintiff's farm and that of the neighbours was correctly found to have been causally linked to Huma's negligence.

THE CESSION OF THE NEIGHBOURS' CLAIMS

59. Following on from the meeting of the affected parties at the defendant's farm on the Saturday, the plaintiff formally took cession of the claims of Ms Schutte and Messrs Strydom and Bateman in written documents

[17] There was no suggestion of a lightning strike or spontaneous combustion.

signed in January and February 2008. The cession signed by Schutte reflects that she had already initiated proceedings against the defendant for damages arising out of a fire which started on his farm on 14 September 2005, while the documents signed by Messrs Strydom and Bateman reflect that they each had a claim for similar damages.

60. In its amended particulars of claim, the plaintiff made the following allegation in paragraph 10.5 in relation to these cessions:

> "*10.5 Plaintiff refers to the dates and places mentioned in the written cessions of claims, attached hereto, namely a cession by Schutte of the farm Narouga, Strydom of the farm Frisgewag and Bateman of the farm Bergpost. These three cessions are attached hereto marked annexure "C", "D" and "E" respectively, at which time and place the neighbours in writing, ceded their right to their claim against the Defendant to the Plaintiff.*"

61. To this allegation the defendant pleaded as follows:

> "*10.13 Wat die inhoud van paragraaf 10.5 betref, pleit die verweerder soos volg:*
>
> *10.13.1 dit word erken dat aanhangsels gemerk "C", "D" en "E" by die Besonderhede van Vordering aangeheg is maar dit word ontken dat die*

dokumente geldige en afdwingbare sessies daarstel;

10.13.2 dit word spesifiek ontken dat die eiser oor die nodige locus standi beskik om enige van die eise waarna verwys word in aanhangsels "C", "D" en "E" tot die Besonderhede van Vordering, af te dwing; en

10.13.3 die verweerder herhaal sy pleit uiteengesit in paragraaf 8.15.4 hierbo."

62. The allegations made by the defendant in paragraph 8.15.4 of the plea included a denial that Schutte, Strydom and Bateman were the owners of their respective farms.

63. At the conclusion of the trial, the defendant argued that the plaintiff had failed to establish that the neighbours were owners of the farms referred to in the cessions, said that there was no proof of ownership by reference to any title deeds, and claimed that he was entitled to absolution in respect of those parts of the plaintiff's claims.

64. The court *a quo* made short shrift of these submissions – in my view correctly so. During his evidence-in-chief, the plaintiff's principal witness, Dr Kemp, referred to the ownership of the farms of Schutte, Strydom and Bateman. No objection was made to the evidence when given in chief

nor was there any cross examination on the point. That, with respect, is the end of the matter in my view.

65. The plaintiff has adduced evidence on which it bears the onus and in the absence of any challenge thereto, the evidence becomes conclusive. Further, there was no attack upon the actual wording of the cession documents themselves – the only point raised by the defendant was in relation to the ownership issue set out above.

LATE AMENDEMENT OF PARTICULARS OF CLAIM

66. The plaintiff's original particulars of claim did not contain allegations in each relevant paragraph that the defendant was liable on the basis of vicarious liability for Huma's negligence. There was, however, an introductory paragraph early in the pleading which made it clear that this was the plaintiff's case:

> "*4. On or about 14 September 2005 an employee of Defendant, known as Steven, whose further particulars are unknown to Plaintiff, while acting at all relevant times hereto within the course and scope of his employment by [sic] Defendant and in furthering Defendant's business, started a fire on Elandsfontein ....*"

67. However, later in the pleading the plaintiff alone was mentioned. For example:

"*8. The fire was caused ... due to the sole negligence of Defendant who was negligent in one or more of the following respects:*"

68. The trial was quite obviously conducted on the basis of the defendant's vicarious liability for Huma's negligence and there was no doubt in the defendant's mind that this was the case. However, when the plaintiff received the defendant's heads of argument it noticed that the defendant, quite pedantically it may be said, took the point that only the defendant's negligence had been pleaded. A formal amendment was sought (duly supported by an affidavit) while no opposing affidavit was filed by the defendant.

69. Saldanha J found that there was no prejudice to the defendant and granted the amendment which added the phrase "*and/or Steven*" whenever it was necessary to qualify the allegations against the defendant. Quite surprisingly, the defendant argued (albeit feintly) on appeal that the court *a quo* erred in granting the amendment.

70. In my view Saldanha J was quite right in granting the amendment which was brought *ex abundante cautela* by the plaintiff. It is trite that an amendment will be granted (even at a late stage) if it leads to a proper ventilation of the dispute and if it does not occasion an injustice to the opposing party which cannot be remedied by an appropriate costs order.[18] It was never seriously suggested that the defendant had

[18] **Commercial Union Assurance Co. Ltd v Waymark N.O. 1995 (2) SA 73 (TkGD) at 76-77.**

suffered any grave injustice by the granting of the amendment and the issue had been fully traversed in the evidence before the trial court.

71. I am accordingly of the view that there is no merit in this ground of appeal.

CONCLUSION

72. In my judgment there is no basis to interfere with the order of the court *a quo*. I would accordingly dismiss the appeal with costs.

P. A. L. GAMBLE

ERASMUS, J: I agree. It is so ordered.

pp Erasmus J

NDITA, J: I agree.