Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16936/2010

In the matter between:

IZAK POTGIETER Plaintiff

v

UNIVERSITY OF STELLENBOSCH Defendant

Court: Justice J Cloete

Heard: 31 August 2015, 1-2 September 2015, 25-26 and 28 April 2016, 3-5, 9 and 11 May 2016, 1-2, 4, 8, 10-11, 16, 18 and 22 August 2016, 12 and 13 September 2016

Delivered: 4 November 2016

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff's claim against the defendant is for damages arising out of serious and permanent injuries he sustained on 9 August 2007 when, as a 21 year old third year

student at the Eendrag men's hostel of the defendant, he had to escape a fire through the window of his top floor room. The merits and quantum having been separated, the trial proceeded on the merits only.

[2] The plaintiff testified and adduced the evidence of 11 witnesses of which 7 were called as experts. The defendant called 6 witnesses of which 2 testified as experts. For reasons that will appear later it is not necessary to deal with all of this evidence.

[3] The plaintiff's case ultimately boiled down to the following. The defendant was obliged to ensure that proper and reasonable measures and procedures were in place, and were implemented, for the safety of students in its hostels, including in the case of fire. The absence of fire stops in the common roof void of Eendrag posed a real and imminent fire risk to the residents of the top floor (referred to as the third floor) immediately below the roof void, given that once a fire reaches a roof void it will spread rapidly unless proper preventative measures are in place.

[4] The plaintiff contends that the defendant was aware of the risk which a fire in non-compartmentalised roof voids posed to the residents in such hostels, and actually took steps between 1984 and 1987 to mitigate the risk, after a similar fire at a women's residence, Huis Ten Bosch, in 1983.

[5] It is common cause that other fires also occurred at the defendant's various buildings in 1981, 2005, 2006 and 2007 in the Polymer Science Building, Sonop women's residence, Neelsie student centre and Huis Visser men's residence respectively, although Huis Ten Bosch was one of the most devastating (it had a

similar roof structure to Eendrag, which is a pitched roof with clay/cement roof tiles). Two others occurred after the Eendrag fire, in the Wilcocks Building in 2010 and the Helderberg men's residence in October 2015.

[6] The plaintiff alleges that the steps taken by the defendant, namely to install smoke detectors in the roof void of Eendrag, linked to an alarm, were completely inadequate. He maintains that the defendant failed and/or neglected to take reasonable and proper cognisance of the development of best building practices in the years following Eendrag's construction in 1966 (and other hostels with similar roof structures, including Huis Ten Bosch) with regard to fire safety measures. As a result it failed to implement reasonable measures which were well-known years before the Eendrag fire to make such hostels safer for occupants in the case of a fire.

[7] He also alleges that it was only in 2011 that the defendant implemented a Roof Risk Mitigation Project at those hostels where there was a real risk to life and safety of residents, which included the installation of fire stops in pitched roof voids. He submits that, at the latest, after the Huis Ten Bosch fire 24 years earlier, such steps should have been taken. Had the defendant done so he would not have been forced to escape the fire through the window of his top floor room.

[8] The defendant appointed the resident warden and house committee members of Eendrag (and other hostels) to carry out and enforce its risk management policy. This policy stipulated that there had to be reasonable and effective training of all occupants for the emergency evacuation plan, and all house committee members

were required to undergo training in the various disciplines for which they were appointed such as fire fighting and evacuation.

[9] The plaintiff alleges that the defendant failed in numerous respects to implement its own rules in respect of risk management at Eendrag during 2007. In particular, it failed to ensure that house committee members received proper training. Had it done so the plaintiff would not have been placed in the situation that he was.

[10] The defendant made various admissions in its plea, principally that it was under a legal duty to take and implement adequate and reasonable safety measures to protect occupants of its hostels from the risk of fire and its consequences. However it alleged that it took such steps by installing smoke detectors coupled to an alarm in the roof void of Eendrag, and by adopting a risk management policy for its hostels to comply with its obligations under the Occupational Health and Safety Act 85 of 1993 (the OHS Act) and the regulations issued thereunder, and/or in fulfilment of its legal duty. In the alternative, the defendant relied on an indemnity clause contained in the plaintiff's enrolment application to exempt it from any liability.

The statutory framework in respect of building regulations

[11] At the time Eendrag was built in 1966 its construction was regulated by the local authority by-laws in existence at the time, i.e. municipal by-laws pertaining to building regulations for the Stellenbosch area. Neither party was able to procure these.

[12] On 23 October 1970 the Standard Building Regulations were issued in terms of s 14 bis (1) of the Standards Act 33 of 1962 (the Standard Building Regulations). Local authorities were permitted to adopt these regulations or any part thereof but they were not compelled to do so. Again, neither party was able to procure evidence as to whether the Standard Building Regulations, or any part thereof, were at any stage adopted by the Stellenbosch Municipality. The Standard Building Regulations were not retroactively enforceable. The plaintiff did however present evidence that after the promulgation of the Standard Building Regulations they were generally seen as best practice in the building/safety industry.

[13] On 22 June 1977 the National Building Regulations and Building Standards Act 103 of 1977 was assented to (the NBR Act), but it only came into effect on 1 September 1985. Section 17 of the NBR Act made provision for National Building Regulations to be issued, after consultation with the council of the SABS.

[14] The first publication of the National Building Regulations occurred in 1987 (SABS 0400:1987). The first revision of these regulations occurred in August 1990 when the SABS 0400:1990 was published and put into effect. SABS 0400:1990 remained in place until it was superseded by the SABS 10400:2011 during 2011.

[15] The National Building Regulations were also not retroactively enforceable at any stage. Local authorities were not required to adopt or enforce them. Nothing however prevented an owner of a building to upgrade his building to comply, or partially comply with the 1970 Standard Building Regulations or, after 1990, with the National Building Regulations, thus SABS 0400:1990. At the time of the fire at

Eendrag the National Building Regulations (SABS 0400:1990) had already been in existence for 17 years. Again, evidence was led by the plaintiff that after its acceptance the National Building Regulations (the SABS 0400:1990) constituted best building practice.

[16] It is common cause that both sets of regulations dealt also with fire safety and fire protection in buildings and contained measures as to how these could be adequately achieved (the 1970 regulations were more stringent in relation to fire stops than the later 1990 regulations). The regulations were well known in the industry for 13 years before the Huis Ten Bosch fire and (in their 1990 form) for 17 years before the Eendrag fire. Cumulatively they were well known in the industry for some 30 years before the fire at Eendrag.

Applicable legal principles

[17] In order to succeed with his claim the plaintiff must show that the defendant was guilty of conduct (in the form of an omission) which was negligent, wrongful and the cause of the plaintiff's injuries. It is convenient to first outline the applicable legal principles against which the relevant evidence must be assessed.

[18] The starting point is the dictum of Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para [12]:

> *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in*

order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful.'

[19] The test for negligence is to be found in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G:

'For the purposes of liability culpa arises if –

(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.

… Requirement (a)(ii) is sometimes overlooked. 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…'

[20] In *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) 776G-I Kumleben JA said that, once it is established that a reasonable person would have foreseen the possibility of harm, the answer to whether he or she would have taken measures to prevent its occurrence, although always dependent upon the circumstances of each case, entails four basic considerations, namely: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.

[21] In *Za v Smith and Another* 2015 (4) SA 574 (SCA) para [30] Brand JA, referring to the test for factual causation said:

> *'What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the "but-for test" is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.'*

[22] Fault would be established if a reasonable person in the defendant's position would have realised that harm to the plaintiff might be caused, even though the exact nature of the ensuing harm fell outside that realisation: *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) 1112I-J.

[23] As to wrongfulness, in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) para [19] Scott JA said:

> *'If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of dolus or culpa, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful…To find the answer the Court is obliged to make what in effect is a value judgment based, inter alia, on its perceptions of the legal convictions of the community and on considerations of policy.'*

[24] This was dealt with as follows in *Za v Smith* at paras [20] and [21]:

> *'Reverting to the enquiry into wrongfulness – properly understood – in this case, it will be remembered that prior to the watershed decision of this court in* Minister van Polisie v Ewels *1975 (3) SA 590 (A), liability for omissions was confined to certain stereotypes. One of these was referred to as relating to those in control of dangerous property, who were said to be under a duty to render the property reasonably safe for those who could be expected to visit that property. After* Ewels*, those stereotypes did not become entirely irrelevant. They still afford guidance in answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in a particular case, although these stereotypes no longer constitute the straitjackets that they were before* Ewels*…Having regard to this stereotype of those in control of dangerous property, as well as other considerations of policy finding application in this case, I am satisfied that the element of wrongfulness had been established by the appellant.*
>
> *Broadly speaking my reasons for this finding are as follows. In determining wrongfulness, the other elements of delictual liability are usually assumed. Hence the enquiry is whether – on the assumption (a) that the respondents in this case could have prevented the deceased from slipping and falling to his death; and (b) that he died because of their negligent failure to do so – it would be reasonable to impose delictual liability upon them for the loss that his dependants had suffered through their negligence…'*

[25] In *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) it was said at paras [51] and [67] that:

> *'[51] Our pre-constitutional law of delict is not couched in terms of a duty to protect fundamental rights. It is clear, however, that many interests and rights protected under the common law quite easily translate into what we now recognise as fundamental rights under the Constitution…*

> *[67] In addition to the general normative framework of constitutional values and fundamental rights, our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability, even on an assumption that all the other elements of delictual liability – harm, causative negligence and damages – have been met, on grounds rooted in the Constitution, policy and legal convictions of the community…'*

[26] In *South African Hang and Paragliding Association and Another v Bewick* 2015 (3) SA 449 (SCA) para [23] Brand JA said:

> *'Even on the assumption that the appellants had failed to perform a duty imposed on them by statute, the question remains whether their omissions were wrongful in the delictual sense…'*

[27] The reverse is also true. Albeit dealing with the element of negligence, Neethling et al: Law of Delict (7th ed 2014) para 4.8, p158, fn 188 state that:

> *'It must also be pointed out that the mere adherence to a statutory rule does not necessarily prevent a person from acting negligently. Where there is eg. a speed restriction of 100 km/h and X drives at 95 km/h under circumstances where he should have driven at 60 km/h (because of a slippery road surface, etc) X cannot be heard to say that he did not act negligently because he stayed within the speed limit. To hold otherwise would be to adopt too mechanical an approach to negligence and for this reason the test of the reasonable person still applies as described above. The existence of a statutory provision is thus only one factor to be taken into account in the determination of the possible negligence of a wrongdoer.'*

[28] See also Van der Walt and Midgley: Principles of Delict (4th ed 2016) para 164 p263:

> *'…thus a breach of a statutory duty does not necessarily constitute negligence and, vice versa, compliance with a statutory regulation does not* ipso iure *exclude negligence.'*

[29] Referring to *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [21], Brand JA in *Bewick* went on to say at para [25]:

> *'Accountability is therefore just one of the considerations which should, amongst other things, be taken into account…'*

[30] In *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) para [122] the Constitutional Court also pointed out:

> *'Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'*

The issues on the merits

[31] During closing argument the defendant made certain important concessions. These were that: (1) it would be vicariously liable for negligent acts and/or omissions of those responsible for the implementation of its risk management system at Eendrag; (2) after the fire in the roof void and uppermost floor at Huis Ten Bosch in 1983 it reasonably foresaw that such roof fires were a hazard that could lead to loss of life, limb and property; and (3) at all relevant times it had the financial resources, or access to such resources, to install fire stops, hose reels and smoke detectors in

communal areas below ceiling at Eendrag. The defendant also abandoned any reliance (as pleaded) on contributory negligence on the part of the plaintiff.

[32] It was also ultimately not in dispute that, post the Huis Ten Bosch fire and given its realisation of the risk, the defendant took steps towards making Eendrag (and other buildings) safe, to prevent roof fires and to manage risk, by installing smoke detectors in the roof void coupled to an alarm.

[33] In addition, it was undisputed by the end of the trial that the fire was the direct cause of the plaintiff's injuries. The central issue for determination thus crystalised into whether or not the steps taken by the defendant in relation to Eendrag were reasonable. If they were, then no negligence can be attributed to the defendant and the question of wrongfulness does not arise. However, if they were not, then negligence is necessarily established in the particular circumstances of this matter (given the *'but-for test'*) and it is then required to determine whether or not the defendant's conduct was also wrongful.

[34] With this in mind, I turn to deal first with the events of 9 August 2007, and second, the evidence on the disputed issues.

The Eendrag fire – 9 August 2007

[35] In 2007 there were 276 students in Eendrag, housed on three floors, with first year students on the ground floor (referred to as the first floor), second year students on the second floor and third year and other more senior students on the third floor. The head student (the primarius or *'prim'*) and vice-head student (the onder-

primarius or *'onder-prim'*) could select rooms of their choice. At the time of the fire the prim was De Wet Spies and the onder-prim was Andre Coetzee.

[36] Each floor is divided into three wings. These wings were referred to in the trial as the eastern, northern and western wings. The plan depicts the northern wing in the middle with the eastern wing (or arm) at an angle of about 45° to the left and the western wing at about 45° to the right. House committee members were each designated a section under their supervision on each floor (4 house committee members per floor).

[37] On each floor there are relatively large, roofed but otherwise open, balconies at the furthest tip of each of the eastern and western wings, as well as at the intersections of the eastern and northern wings, and northern and western wings, respectively. The fire started in the early morning of 9 August 2007 on the third floor balcony at the intersection of the northern and western wings (referred to as the north western balcony). Adjacent to each balcony is a flight of stairs leading to exits from the building. Other such stairwells are located in the middle of the eastern and western wings.

[38] The plaintiff and his roommate, Servaas Fick, shared room 117 in the middle of the northern wing on the third floor, 5 rooms away from the north western balcony. Their immediate neighbours, P J Engelbrecht and Bernard Bravenboer, occupied room 115, which was the next room further away from the north western balcony. The house committee member in charge of the plaintiff's section was Linsen Loots who occupied room 100, which is roughly in the middle of the eastern wing adjacent

to another flight of stairs leading to an exit. Loots was in charge of rooms 100 to 117, known as Swingel section.

[39] In addition to the plaintiff, Engelbrecht, Loots and Coetzee gave evidence about the events of that morning. Engelbrecht and Loots were called by the plaintiff and Coetzee by the defendant. These four witnesses were patently honest and gave consistent accounts which were not dented in cross-examination, including the testimony which they give on the disputed issues which I will deal with later. Their testimony was credible and reliable and there is no basis to reject it.

[40] It is convenient to start with Coetzee's evidence because, by having noted times on his cell phone, he was able to place a reliable time frame on what happened. Coetzee occupied room 41 close to the furthermost tip of the eastern wing on the second floor. He was woken by the alarm at 06h47. He went down to the control panel on the ground (first) floor and silenced it.

[41] The control panel indicated that the alarm had been activated by a smoke detector in the western section of the roof void (*'dakruimte wes'*). He went upstairs to this section (it took him less than a minute) and found a smallish group of students attempting to extinguish a fire on the north western balcony by using hand held fire extinguishers. By then the alarm had reactivated.

[42] The fire had not yet breached the ceiling of the balcony although flames were starting to lick the ceiling boards. They were visible on the balcony side of the window between the balcony and the third floor passage. Coetzee could see that it

was a very serious fire. He grabbed a few fire extinguishers but they had already been emptied. Another he grabbed had been jammed. Coetzee recalled how loud the noise was (the alarm was sounding, the fire was roaring and students were shouting and running around).

[43] Coetzee ran downstairs in search of more fire extinguishers and, after finding none, then outside to gauge the extent of the fire. In the process he called campus security (USBD) to inform them that this was not a false alarm but in fact a fire. That happened at 06h52. Outside Coetzee realised that, given that the fire was now raging out of control, only the fire brigade would be able to extinguish it. He was outside for no more than 10 seconds.

[44] He ran back into the building in search of the prim, Spies, who occupied the room directly opposite or immediately adjacent to his (he could not recall exactly which) to report the severity of the situation. He found Spies awake in the corridor and together they ran down to the first floor to evacuate the first year students. En route (i.e. whilst on the second floor) they banged on doors and shouted for students to evacuate. He and Spies then *'started pulling people out of bed'* on the first floor. Their concern was with the first floor students and not with those on the third floor, as each section had a house committee member responsible for that section. Coetzee and Spies were not assigned sections although the first year students were their responsibility. He said *'So my concern was not with the third floor, but just to make sure that the rest of the building also evacuated'.*

[45] Once all the first year students were evacuated, Coetzee returned briefly to *'his'* wing on the second floor (i.e. the eastern wing, and thus furthest away from the north western balcony). He found it empty and again returned outside. By now it was just before 07h00.

[46] He said *'…by that stage the fire had spread already quite extensively across the roof on the third floor, and had already reached the side opposite from where it had started. So it would have already been closer to the east side of the building'.*

[47] After quickly retrieving his computer containing his thesis from his room, Coetzee again returned outside. He estimated that by then 90 to 95% of all students had evacuated. No formal roll call was held, but an attempt was made to ascertain whether there were students left in the building, and some students were sent back inside to look for those still missing. One was woken by a brick hurled through his window. The fire brigade arrived shortly before 07h00 but according to Coetzee *'it was quite some time before they started spraying water or anything'* (there was apparently a difficulty with access to fire hydrants).

[48] Coetzee was uncertain whether at a stage he also returned to the third floor. At a point he testified that *'I don't think I went back after that. The smoke by that stage was, anyway, you couldn't breathe on the third floor'.* At another stage he recalled having also briefly returned at some point to the third floor of the northern wing where he noticed students leaving. However nothing turns on this given his evidence that the third floor was not his primary concern.

[49] Engelbrecht testified that he was studying on the evening of 8 August 2007 and thus consumed no alcohol. A number of other students were socialising and drinking, given that 9 August 2007 was a public holiday. He and his roommate, Bravenboer, went to sleep at around 23h00.

[50] Engelbrecht was woken by screams from the adjoining room. Opening his window he saw the plaintiff and his roommate Fick on the windowsill of the room next door, screaming for help. He could see the red glow of flames in the room behind them. He turned back and saw his own room filling with smoke and hot *'kooltjies'* of burning debris swirling around. Realising that the building was on fire he woke the still sleeping Bravenboer. Engelbrecht's immediate instinct was to open the door to their room and to run next door to assist.

[51] However the brass knob of the door was too hot. Grabbing a hand towel for protection, Engelbrecht managed to get his door open only to be confronted by what he described as a *'inferno brand vlamme wat in die gang af is…'* outside the plaintiff's room. Engelbrecht realised that he would not be able to reach them and had to focus on getting himself and Bravenboer to safety.

[52] He picked up Bravenboer (who was barefoot) because the floor of the corridor was littered with burning debris. The smoke was so dense that he could barely see his hand in front of his face and as a result first missed the stairwell exit. Turning around and feeling his way along the wall, he found the stairwell and he and Bravenboer ran outside. According to Engelbrecht it would have been impossible for the plaintiff and Fick to exit their room through the door and thus the building

down the stairwell. Although Engelbrecht did not wish to commit to a specific timeframe, his evidence was that it had felt as if less than 40 seconds elapsed between opening his window and reaching the outside of the building.

[53] Engelbrecht then saw that the plaintiff and Fick were still trapped on their windowsill with flames rapidly spreading around them. He shouted to the fire brigade for help. However the flames were by now threatening to engulf the pair and they jumped. Underneath their windowsill (adjacent to the first floor) was a small roof tiled canopy visible on the photographs introduced in evidence, of not more than about 1 metre wide. Engelbrecht saw Fick's foot breaking through the canopy and *'catching'* him: *'Hy het op die dakkie bly lê, ek het gedog hy is dood'*. (Fick ultimately managed to fall or jump to safety). The plaintiff jumped but hit the canopy and tumbled off.

[54] Asked to describe what he saw upon arrival outside the building Engelbrecht replied:

> *'Die hele boonste vloer het, dit het gelyk of iemand petrol uitgegooi het en aan die brand geslaan het. Die vlamme was onmenslik hoog, ons het op die gras gesit of gestaan en soos wat ons daar gestaan het die yskaste se gasbottels begin ontplof. Ja, ek self was in 'n moeilike posisie want ek het gaan slaap in die aand met 'n onderbroek Edelagbare en dit is al wat ek aangehad het met 'n handdoek. So ek het nie eers tyd gehad om enigiets te vat nie, ek was net met 'n onderbroek en 'n handdoek op die gras gewees sonder 'n foon of sleutels, ek kon niemand kontak nie, ek het letterlik niks gehad nie.'*

[55] Engelbrecht had not heard the alarm sounding or anyone knocking on his door to alert him to the fire, nor had he heard any shouting or other warning. After his arrival

outside there was no orderly procedure to identify students who might still be trapped in the building. There was no roll call or head count.

[56] The plaintiff testified that he went out on the evening of 8 August 2007 and had a glass of punch and a few beers. There is no suggestion that he was intoxicated. He thereafter walked back to Eendrag just after 01h00. Fick had not yet returned and so he left the door to the room closed but unlocked.

[57] He does not know what exactly woke him that morning. However he immediately heard *"n hengse lawaai'* (the roar of fire and people shouting and running further down the corridor). He does not recall hearing the alarm siren. He saw *'kooltjies'* burning the ceiling of his room and falling into the top shelf of his cupboard (its door was standing open, setting his clothing alight). Realising immediate danger, he shook Fick awake. They tried to open the door but the doorknob was too hot. One of them grabbed a hand towel and (like Engelbrecht) used it to turn the doorknob. Upon opening the door they were confronted by a wall of flames and overpowering heat, rendering it impossible for them to exit.

[58] The only other way out was through the window. Fick, being smaller in build than the plaintiff, was able to crouch on the windowsill facing forward. The plaintiff had to position himself facing into the room (i.e. with his back to the outside). Looking over his shoulder the plaintiff saw the fire brigade arriving. As he looked back the ceiling in his room collapsed and the entire room became engulfed in flames. He still held on for as long as he could until the heat from the flames began to burn his hands and arms. He decided to try to jump backwards onto the canopy and from there

onto the ground. That is the last he can remember until regaining consciousness in hospital two weeks later, rendered a paraplegic, with burn wounds to his hands, arms, back, legs and feet.

[59] Loots testified that on 8 August 2007 he went to sleep at about midnight. He awoke to the sound of the fire alarm siren. He is a light sleeper and was accustomed to reacting to the siren because he knew that house committee members were required to do so. He pulled on some clothing and ran from his room with the intention of going to the alarm control panel.

[60] On his way, and when he reached the stairwell at the intersection of the northern and eastern sections on the third floor, he noticed the fire on the north western balcony. He could see the glow of flames through its window into the corridor. He grabbed a fire extinguisher and ran along the northern wing corridor (past the room of the plaintiff) to the balcony. However in his attempt to douse the flames, he mistakenly jammed the fire extinguisher by pressing the handle without releasing the pin. He had not been shown or trained how to use a fire extinguisher.

[61] There were others at the balcony, including Coetzee, trying to extinguish the fire. Loots ran down to the second floor and, having found another fire extinguisher, returned. Although he was able to activate it, he almost immediately realised that the fire was too large to be brought under control by the students, and that he would have to start waking the occupants to get them out. His reaction was to run back to his own room (thus again past the room of the plaintiff) to put a piece of white clothing on the doorknob of his room to indicate he had vacated it (I will refer again

to this later). He then began to alert those in his section, banging on their doors and shouting for them to leave. This he started doing in his section from the furthest point away from the fire. Some of the occupants were still asleep and he had to wake them up.

[62] About 2 to 3 rooms before the plaintiff's, i.e. just after the north eastern stairwell, the smoke in the third floor corridor became overwhelming and Loots struggled to breathe. The fire (and smoke) was proceeding towards him from the opposite direction, and the rooms of both the plaintiff and Engelbrecht were located in between. Loots was not able to reach their rooms. He realised his own life was in danger and thus fled the building.

[63] When Loots reached outside, he saw that the fire had proceeded rapidly from the roof above the north western balcony, and within a minute or two after his exit from the building, the roof collapsed over the eastern section (i.e. that furthest away from the fire). He described the situation outside as follows:

> *'Daar was toe nog redelik chaos. Mense – daar was heelwat HK lede en mense het soort van stadig begin almal in seksies laat aantree, maar dit was nog nie enigsins georganiseerd nie…*
>
> *En kort nadat ek uitgekom het by die gebou, seker 'n minuut of twee, onthou ek, ek het op die Bun gestaan en gesien hoe die vuur deur die kamers op hierdie voorste – waar my kamer was – op daai gang, hoe die vuur deur die gang beweeg en die kamers se plafonne een vir een inval soos wat die vlamme dit – die kamers sou oorneem…*

> *Omdat dit 'n vakansiedag was, was daar 'n klomp mense wat nie in die koshuis was nie, so dit – en niemand weet presies wie daar behoort te wees nie, so dit was moeilik om te weet wie is moontlik nog in die gebou. Maar ek weet daar was mense wat, veral in die onderste twee vloere, nog in die gebou was, wat ons toe mense ingestuur het om hulle to gaan wakker maak en uitkry…*
>
> *En ek onthou Ian Burger, wat in een van die kamers in Katstraat was op die derde vloer, het by die middelste trap, so die een langs my kamer, het hy afgehardloop tot die – tussen die onderste vloer en die tweede vloer, en van – daar is 'n venster, en hy het by daai venster uitgespring op die Bun.'* (Katstraat was the section in the eastern wing furthest from where the fire started).

[64] Loots estimated that no more than 7 minutes elapsed between him realising that the students would not be able to extinguish the fire and his exit from the building.

[65] He was asked *'What sort of time did you have on your hands to make these kinds of decisions about whose door you were going to knock on?'* and he responded *'Probably seconds, because the whole fire felt like it happened in minutes…'*

[66] Ms Anina Burger, a forensic fire investigator appointed to investigate the fire by the defendant's insurer, testified on the plaintiff's behalf. Although the cause of the fire could not be established with certainty, her opinion as to its probable cause and spread was accepted as correct by all of the fire experts who gave evidence.

[67] It was Ms Burger's opinion that a discarded cigarette in an empty bottle had probably been left to smoulder in a municipal rubbish bin in the northern corner of the north western balcony. The bin itself had been destroyed (only the handles were

still intact), but a cigarette butt was discovered amongst its remains, leading her to believe that it was probably *'protected'* by having been placed in a bottle in the bin.

[68] Students had smoked on the balcony before the fire and no ashtrays were used. Cigarettes were reportedly stubbed out or discarded *'in any possible manner'*. Several sofas on the balcony comprised polyurethane foam, covered with cotton type material, and would have been susceptible to smouldering ignition by a burning cigarette.

[69] It was not possible to determine how long the cigarette butt had been smouldering before spontaneous ignition occurred, but when it did, the fire would have spread rapidly. All indications were that the fire had been burning undetected for an extended period and had progressed to a well-developed stage upon its discovery, although at that point it was still restricted to the north western balcony. The combustion of the extremely high fuel load on the balcony (i.e. sofas and the like), as well as the balcony's soft board ceilings, contributed immensely to the rapid spread of the fire into the roof void. In addition, a strong northerly wind was blowing at the time of the fire's discovery.

[70] Although reinforced concrete slabs separated the first, second and third floors, this was not the case above the third floor, apart from reinforced concrete slabs over the stairwells (which would have prevented the drop down of burning roof and ceiling material in these limited areas only). The building had a pitched timber roof clad with cement tiles. The third floor had a double volume ceiling which was constructed of two layers, with flammable soft board panels above and combination gypsum

plaster and asbestos/cement below. These were fitted to inverted metal T's. Ms Burger explained that in older buildings soft board was traditionally used as ceiling material because of its insulative and noise reduction properties. It is not fire resistant. Gypsum on other hand has moderate fire resistant properties, and will contain fire spread for a limited period until it collapses. (Dr De Vos later explained: *'The only thing that a non-combustible ceiling is, it doesn't contribute to the fire load, that's almost all it does. It has very low fire resistance integrity value').*

[71] The combustion of the timber roof construction and soft board panels resulted in rapid fire spread through the roof void. The fire burnt with great intensity and its spread was enhanced by the prevailing northerly wind. Visible fire damage in the rooms on the third floor was extensive, widespread and largely homogenous, and the fire consumed virtually all of the combustible content in these rooms. The entire roof collapsed (in flames) within 20 minutes of the fire reaching the roof void.

[72] The damage resulted from the drop-down of burning roof and ceiling material and the subsequent ignition of the incidental fuel loads. In addition there was evidence to indicate that the fire had ventilated through the door and windows linking the balcony and third floor, and then spread under the ceiling along that corridor, although its main thrust would have been upwards into the roof void.

[73] Ms Burger explained that a fire's direction is always "up and out" and it will move to the highest point that it can. Once the ceiling is breached it will spread vertically to the highest point, filling the roof void with hot flammable gas, and then laterally, while also radiating downwards onto the ceiling below. In Eendrag, the uppermost

point of the roof (the apex truss positioned directly above the third floor corridor) would have been compromised. Then as the purlins fell the heavy concrete roof tiles would have done so as well. All of this burning material would have fallen down onto the ceiling above the corridor and rooms, and once the ceiling collapsed, into the corridor and rooms below along with the burning ceiling embers.

[74] She was also of the opinion that, while gypsum was installed as a bottom ceiling layer on the third floor, it had not also been installed under ceiling in the cupboard in the plaintiff's room, which meant that all that separated the cupboard and the roof void was a combustible soft board ceiling.

[75] With reference to photographs taken while Eendrag was in flames, Ms Burger demonstrated how the absence of fire stops in the roof void was evident: *'…die vlammevuur is omtrent die hele lengte van elke vleuel, dit is een vlammevuur, een kontinue vlammevuur. Waar as jy brandmure gehad het op sekere punte, sal jy verwag dat jy 'n konsentrasie van brand het, en dat die brand sal lyk of hy beperk is tot 'n sekere area, en dan skielik sal hy oorgaan, en jou volgende area sal brand, en met die dieselfde intensiteit, en tot die brandmuur tot niet is of geval het, en dan sal dit aanskuif. Jy sal nie verwag dat jy een, kontinue vlammevuur het as jy brandmure gehad het wat effektief was nie…Enige tiepe brandmuur, of dit nou…baksteen, sement is, en of dit giepsbord is, of – dit maak nie saak nie. Iets wat daar is om die brand te – tydelik te vertraag.'*

[76] Once the fire breached the ceiling it thus spread unhindered and very rapidly in both directions. The roof began collapsing within a minute or two after the ceiling was

breached. A further exacerbating factor would have been the accumulation of dust in the roof void, which accelerates combustion.

[77] The following passage of her evidence places the significance of fire stops in a roof void in perspective:

> ‘ *As daar byvoorbeeld* fire walls – *ek gebruik die Engelse uitdrukking – of* fire stops *in die dak was, sou dit daarteen vasgebrand het aanvanklik? --- Hy sal. Hy sal in 'n kompartement gebrand het, van muur tot muur, en afhangend van die brandbestrydingseienskappe van jou mure, of hy 20 minute brandbestand is of 30 minute, sal hy in daai kompartement brand, as dit effektiewe mure is.*
>
> *Ja. --- En dan behoort jy te kry – die rede vir die brandmure is om die brand te vertraag. So hy perk hom in vir 'n tyd; hy hoop in daai tyd gaan jou dak val, en al daai hitte wat andersins horisontaal sou versprei het in jou dakruim, kan uitgaan, gaan deur jou dak. Jou dakteëls het geval. Sou hy die muur op een of ander manier vernietig of hy sou geval het, het jy weer jou volgende kompartement, wat dan nou weer moet begin brand. Hy begin dan nou stelselmatig brand, en dan het jy dieselfde brandgroei in hom, tot jy dak-val het. Maar in daai tyd gee jy die brandweer kans om dalk die brand te blus tot op 'n stadium, en/of mense om uit te kom. Dis die doel van die brandmuur, is nie om jou brand te blus nie, is om jou tyd te gee om die brand te bestry en om te kan uitkom, en jou skade te – jou verlies to verminder.’*

[78] Ms Burger also explained that what predominates in a fire is the accumulation of smoke which is why smoke detectors play a crucial role in fire detection. Accordingly, the higher the positioning of the smoke detectors, the longer it will take for them to activate. It is common cause that in Eendrag the smoke detectors had only been installed at the highest point of the roof void (which is where they are usually installed in a pitched roof).

[79] It was also Ms Burger's evidence that, once the fire breached the ceiling, any attempts by the students to extinguish it with the use of fire extinguishers, hose reels and the like, would have been futile. Only the fire brigade would have been able to bring it under control. The other fire experts who testified agreed.

The evidence on the disputed issues

[80] Ms Marieta Nel was called by the plaintiff to testify about her experience of the Huis Ten Bosch fire on 9 September 1983 when she was a student in that hostel.

[81] Ms Nel occupied a corner room on the top floor, furthest away from where the fire started in another student's room on the same floor (bedding in that student's room caught fire from a heater). A few feet away from Ms Nel's room was a stairwell leading to an exit from the building. In the early hours of that morning she awoke to voices outside in the corridor but paid them no heed because *'dit is tipiese naggeluide in 'n koshuis'.* Her sister, also an occupant of the hostel, then came to tell her that it had caught fire.

[82] She pulled on clothing and together with her sister and roommate ran towards the stairwell. As they emerged from their door she saw thick black smoke at the end of the corridor. Immediately after exiting the building she and her roommate decided to return to their room to save their year's work, cash and important documents. They ran back upstairs but as they reached the top of the stairwell they were confronted by intense heat (her roommate's hair was singed) and smoke so dense that it was impossible for them to proceed further, and they were forced to run back downstairs.

[83] Once outside again, Ms Nel saw the roof of the building engulfed in flames: *'jy kon sien hoe hardloop die vuur'.* It is not disputed that the fire destroyed the entire roof as well as the contents of the rooms on the third floor, and that about 50 students occupying these rooms lost all their possessions.

[84] Ms Nel was referred to a front page article that appeared in the Eikestadnuus, the Stellenbosch local publication, on 16 September 1983 in which details of the Huis Ten Bosch fire were reported. The relevant portion reads as follows:

> *'Dit was die derde oudste koshuis vir meisies en die daksolder* [i.e. roof void] *was nog op die ou manier sonder afskortings* [i.e. fire stops] *gebou sodat dit baie gou heeltemal aan die brand was en ingestort het…'*

[85] This article was introduced in evidence not for the purpose of proving the truth of its contents, but to show that already on 16 September 1983, a week after that fire, it was front page news in the local newspaper that the cause of the rapid fire spread was that the roof void was without compartmentalisation.

[86] The expert evidence adduced by the plaintiff on the disputed issues (apart from Burger's), was that of Mr Anthony Young (fire investigator), Dr Phillip de Vos (fire, forensic and structural engineer) and Mr Rod de Witt (occupational health and safety consultant). Mr Cornelius Moir (development and fire consultant) testified on behalf of the defendant. The plaintiff, Engelbrecht, Loots and Coetzee also gave evidence on these issues, as did Mr Christiaan Munnik (who was called by the defendant). He was previously the defendant's Chief Director: Facilities Management, having been appointed to this position in April 2009, some 20 months

after the Eendrag fire and before the Wilcocks Building fire in 2010. He retired during 2014.

[87] As previously stated, it is common cause that at the time of the Huis Ten Bosch fire the Standard Building Regulations 1970 (which *inter alia* prescribed the installation of fire stops in roof voids for buildings such as Eendrag), although not retrospectively enforceable, had already been in place for 13 years.

[88] From 1990 the National Building Regulations became effective, albeit again not retrospectively. The latter regulations (SABS 0400:1990, Part T) prescribed *inter alia* the following in respect of a building such as Eendrag (with a classification of occupancy class H2). First, rule TT 12.5(a) stipulated that a roof space be divided into areas of a maximum of 300m^2 by non-combustible fire stops (the only exception being where a sprinkler system was installed above and below ceiling, which all the experts agreed was hugely expensive, and did not feature in Eendrag). Second, rule TT 34 prescribed that hose reels of 30m in length be installed at a rate of one per 500m^2 of floor area, such that the end of the hose would reach any point in the area to be protected. Third, rule TT 31.1(c) prescribed the installation of a fire detection system with an emergency evacuation system of type L1, L2 or L3 (as appropriate). The evidence of De Vos was that, because people sleep in such a building, the most appropriate system is deemed to be a type L1 – i.e. smoke detectors linked to an alarm in each room throughout the building. However, as a minimum, and taking into account considerations of expense and practicality, a type L2 system, with smoke detectors installed at ceiling soffit level in all communal areas (such as lounges, balconies and the like) as well as the common escape

corridors should be combined with smoke detectors in each compartmentalised section of the roof void. (In a roof of the size of Eendrag, there would be 6 such compartments). As previously stated, at the time of the fire, Eendrag had no fire stops, or hose reels, and smoke detectors were only installed in the roof void.

[89] It is also common cause that in 1981 (i.e. two years before the Huis Ten Bosch fire) the defendant appointed a risk manager to develop systems and procedures to ensure, *inter alia*, the safety of students in its hostels.

[90] A memorandum dated 20 March 1998 issued by the defendant's vice-rector at the time, Prof Christo Viljoen, and headed *'Risikobestuursbeleid'*, contains: (a) the defendant's acknowledgement of its responsibility to protect students from any form of physical risk as far as practically possible, and the consequent imperative to develop and implement an effective risk management policy; and (b) its undertaking to bind itself to fulfil all statutory and other legal obligations in this regard (including the OHS Act), and ensuring that all persons appointed for this purpose did so as well. A memorandum in almost identical terms was issued by Prof J. F. Smith, the vice-rector (management), on 20 October 2003.

[91] During his testimony De Witt referred to the defendant's rule booklet titled *'Koshuisreëls'* which accompanied the memorandum issued on 20 March 1998 (*'the 1998 booklet'*), as well as the defendant's manual titled *'Risikobestuur in Koshuise'* addressed to all heads of hostels, *primarii*, *primaria* and house committee members on 20 October 2003 (*'the 2003 rule booklet'*) i.e. on the same day as the memorandum issued by Prof Smith.

[92] Clauses 4.1 to 4.4 of the 1998 rule booklet deal with the various duties and functions of hostel personnel. The resident warden is obliged, in conjunction with the prim and house committee, to ensure adherence to hostel safety rules. Clause 4.2 deals with the responsibilities of the prim and that he:

> *'4.2.13 Is oorhoofs persoonlik aanspreeklik om te verseker dat die Universiteit se Risikobestuursbeleid streng toegepas word en veiligheidsmaatreëls afgedwing word.'*

[93] Clause 4.3 deals with the duties and responsibilities of the onder-prim, including (at clause 4.3.4) co-ordination of the hostel's risk management system in his capacities as chief co-ordinator and manager of the hostel's emergency plan. Clause 4.4 prescribes the duties and responsibilities of house committee members, in particular (at clause 4.4.18) that he or she:

> *'Is 'n persoonlike hoedanigheid aanspreeklik om toe te sien dat die Universiteit se Risikobestuursbeleid toegepas word en veiligheidsmaatreëls afgedwing word in daardie gedeelte van die koshuis wat as sy/haar verantwoordelikheidsgebied geïdentifiseer is.'*

[94] Clause 1.4.2 of the 2003 rule booklet records that the risk management system includes the emergency plan and training for its implementation. Clause 1.8 deals with the various role players in the hostel responsible for implementation of the risk management program. The persons to be appointed by the university to carry out the risk management system were the resident warden, the prim, onder-prim and house committee members.

[95] Clause 2.4 of the 2003 rule booklet makes it incumbent on the prim and house committee members to ensure that each student in the hostel is properly trained in all safety and risk management rules and procedures. Clause 2.10 stipulates that:

> *'Brand is 'n belangrike risiko en maatreëls in hierdie verband is van die grootste belang:*
>
> - *Brand gevare en optrede tydens 'n brand moet deel vorm van die opleiding van inwoners van die koshuis…*
> - *Die Primarius/Primaria en alle H.K.-lede moet opgelei en vaardig wees om brandblusapparaat te gebruik. 'n Voldoende aantal inwoners in elke seksie moet ook in die gebruik van brandblusapparaat opgelei word.'*

[96] Clause 2.11 deals with the early detection/alarm system. It prescribes that: (a) the *primarii* and each house committee member must receive training and are required to know *'presies …hoe om 'n alarmtoestand te hanteer'*; (b) when a false alarm occurs campus security must immediately be informed; and (c) false alarms are a criminal offence and when they occur the *primarii* must immediately launch an investigation and ensure disciplinary action is taken against perpetrators.

[97] Clause 8.3.2 sets out the procedure to be followed in case of fire, as follows: (a) raise the alarm; (b) use fire extinguishers, unless the fire is already too large or becomes too large, in which event evacuate and contact campus security to notify the fire brigade (i.e. so as not to place one's life in danger); (c) restrict access to the area; and (d):

> *'8.3.2.5 Ontruim stelselmatig-*
>
> *(i) eerste mense in direkte gevaar;*
>
> *(ii) dan mense bo-, onder-en langs gebied*

(iii) slegs indien werklik nodig moet hele gebou ontruim word.'

[98] Finally, clause 8.5 sets out the rationale for the need to practise implementation:

> *"n Noodplan sonder inoefening is sinneloos en gevaarlik. Verwagtinge word geskep en sukses word aanvaar wat nie sonder gereelde inoefening haalbaar is nie.'*

[99] I will first deal with the evidence of most of the lay witnesses because it helps to contextualise some of the expert evidence.

[100] The testimony of the plaintiff, Engelbrecht, Loots and Coetzee established the following. Evacuation drills at Eendrag traditionally took place once each term (i.e. 4 times per annum). Students were notified in advance when the drills were to take place as they always coincided with a house meeting which all students were required to attend immediately thereafter. Only the first year students were expected to respond and to evacuate the building (i.e. those occupying the first/ground floor). The other students did not have to respond or follow any procedure. Provided they arrived in time for the house meeting they were at liberty to wander down to the common room where these meetings were held at a leisurely pace.

[101] The alarm would be activated about 15 minutes before a house meeting. When the alarm sounded the first year students followed the procedure of vacating their rooms and leaving a white sock on the outside doorknob to indicate that the room was empty. They then exited the building and assembled on the *'Bun'* (a lawn next to Eendrag) in their *'sections'*. The relevant house committee member in charge of

each section would then tick their names off a list. The only individuals involved in the co-ordination of the first year students' evacuation drill were the prim, onder-prim and the 3 responsible house committee members on the ground floor.

[102] Other than being given a brief overview of what was required for an evacuation drill during orientation week for first year students, this was the sum total of what occurred in respect of student training and practicing in fire fighting and evacuation. No unscheduled evacuation drills ever took place in the years that these four students resided in Eendrag before the 2007 fire, nor were any of them properly trained in how to evacuate or to use fire extinguishers (which was the only fire fighting equipment available in the hostel). Loots, a house committee member, had never used a fire extinguisher. Coetzee only knew how to use one because he had fortuitously gained this knowledge elsewhere.

[103] False alarms caused by student pranks were a regular occurrence to the point where students did not take the alarm siren seriously. The night before the Eendrag fire there were two such false alarms. The established modus operandi was for the alarm to first be silenced by the relevant individual (i.e. the prim, onder-prim or house committee member) before investigating the cause, and for the students to continue whatever they were doing until notified over the public address system what was happening (invariably, that it was a false alarm).

[104] Loots testified as follows:

> *'Oor die algemeen het studente nie gereageer daarop nie. Dit het, soos ek sê, gereeld genoeg gebeur, en was amper altyd iemand wat dit – wat 'n brandglasie*

gebreek het sonder 'n rede. So dit word nou maar ignoreer, en die – ek dink die aanname was, as dit 'n ernstige probleem is, sal iemand soos 'n HK lid dit besef en dan later vir jou sê jy moet nou reageer.'

[105] During the almost 3 year period that the plaintiff resided in Eendrag before the fire there had not been a single incident of a real emergency. Furthermore, neither Loots nor Coetzee (nor Spies or any other house committee member) received specific training in evacuation or fire fighting in the year that they were responsible for these duties (from the commencement of the 4th term 2006 until the end of the 3rd term in 2007).

[106] Apart from the little they gleaned from their respective predecessors during portfolio handovers, according to Coetzee the training was generally conducted by the prim and onder-prim at the first meeting of the new house committee members. He explained that *'…and that training would have included a broad discussion of our responsibilities and then instructions specifically on how the fire alarm worked.'* Neither Coetzee nor Loots had ever read clause 8.2.3 of the 2003 rule booklet which dealt with the manner of evacuation required in an emergency, nor was this procedure ever conveyed to them. Neither received any formal training by the defendant.

[107] Although the defendant maintained that a general evacuation plan was affixed to the communal notice board, it clearly did not receive any particular attention from these students. Although in cross-examination the plaintiff accepted that after the briefing (such as it was) during orientation week he knew what was expected of him in case of a fire, it was clear from his testimony, as well as that of Engelbrecht,

Loots and Coetzee, that his knowledge (and that of other students) did not come close to what was required by the defendant's 1998 and 2003 booklets.

[108] The defendant did not produce the specific evacuation plan which it contended was affixed to the notice board at Eendrag in 2007. However what was referred to by the defendant was a *'similar plan'*. This makes no reference whatsoever to the order of evacuation of students in the case of an emergency such as a fire. Instead it instructs students to: (a) react to the alarm; (b) close doors and windows; (c) switch off lights and electrical points; (d) collect important personal effects; (e) wait for instructions to evacuate; and (f) when they are given, place a cloth over the doorknob outside one's room and proceed outside.

[109] This was also Coetzee's understanding of what was required. It also supports the evidence of Loots that all he had was a general idea on how to evacuate those in his section: *'Net baie breedweg…Ek sou geweet het, kry mense uit die gebou so gou as moontlik en gaan na die Bun toe'.* Loots was never informed that those closest to the danger must be evacuated first. As he explained, his instinctive reaction in the emergency of the fire was to follow what he had been told, which was to first run to his room, place a white sock on the doorknob, and then start evacuating students. In the process he ran past the plaintiff's room twice without alerting him to the danger. He said:

> *'…in hindsight, it's easy for me to say that going to rooms from the fire, moving outwards, would have been the better angle of approach. I don't think, given the time, I was really able to make very well thought through or considered decisions,*

so I relied on instinct and whatever I remembered from fire drills and sort of the system that I should be following.'

[110] Despite the fact that false alarms were a regular occurrence in the years that these four students resided in Eendrag none, apart from Coetzee, recalled a single perpetrator being apprehended or disciplined. Coetzee remembered *'at least 2 or 3 people'* being caught during the 6 years he resided in Eendrag, although he accepted that the disciplinary records of Eendrag did not reflect these incidents. He was also unable to comment on what punishment they received, but mentioned that a fine of R200 could be imposed for breaking an alarm glass. According to both Loots and Coetzee it was almost impossible to apprehend a culprit because he was long gone by the time the alarm was silenced at the control panel on the ground floor and no-one readily came forward.

[111] The evidence also showed that apart from the general established apathy in responding to alarm sirens most students, who became accustomed to the noise in a hostel such as Eendrag, often slept through an alarm. Indeed, on the morning of the fire Engelbrecht, Bravenboer, the plaintiff, Fick and a number of other students did so. When Coetzee made his written report to the defendant after the fire, he urged it to consider the installation of a second, louder alarm that could only be activated by the house committee in the case of a *'real emergency'* because *'living in residence you become accustomed to sleeping through noise, and ….because of the situation with false alarms in the past…'* this would help people to wake up and alert them to an actual evacuation.

[112] De Witt (the occupational health and safety expert called by the plaintiff) testified that, while the defendant's written risk management policy was a good one, there were some serious shortcomings in its implementation in the period leading up to the Eendrag fire. These were chiefly as follows.

[113] First, it was the responsibility of the defendant (and not its students) to provide proper training for those charged with its implementation which, at least in 2007, the defendant clearly had not done, particularly in respect of fire fighting and evacuation procedure. Second, the defendant should have ensured that its system was rigorously enforced because the safety of its students depended on this. It was unacceptable for the defendant to have allowed the regular occurrence of false alarms to continue without putting in place measures (such as CCTV cameras) to identify culprits and to discipline them severely, so that other students would not only realise the serious consequences, but also the danger of being apathetic. Third, the established apathy of students in reaction to an alarm signal, coupled with the modus operandi of first silencing the alarm and then having students wait for further instructions before evacuating (reinforced by the defendant's own emergency plan displayed on Eendrag's communal notice board) created a serious risk to life, limb and property. In response to the defendant's contention that it had acted reasonably in its handling of student behaviour De Witt said:

> *'No, I don't think so. I think they know very well the animal that's called the student…I think they know what students do, and I think they didn't handle an emergency procedure well enough, although they knew what a student is.'*

[114] It was De Witt's opinion that, had the risk management system been properly implemented: (a) the alarm would have been taken seriously by those who awoke; (b) those responsible for fire fighting would have had at least a chance of extinguishing the fire or bringing it under control before it breached the ceiling; and (c) evacuation would have commenced earlier and would have occurred systematically, starting with those in direct danger (such as the plaintiff) and progressing to those in least danger (such as those on the ground floor). While accepting in cross-examination that proper implementation of the system would not have ensured a positive result, he responded that it would have increased its likelihood.

[115] It was also his opinion that based on the defendant's experience of the Huis Ten Bosch fire as well as its own rules and memoranda issued in 1998 and 2003 the defendant was fully aware of the risk that a fire in a hostel (where a large number of occupants may be asleep when a fire breaks out) represented. It was also clearly aware of the relevant statutory provisions applicable to occupational safety (which he explained apply not only to employees of the defendant but also its students), but to a large extent merely paid lip service and failed to ensure proper practical implementation and enforcement of its own risk management system and rules. This failure impeded the effective management of the risk caused by the fire to students.

[116] De Witt was a good witness, who gave reliable, credible and objective testimony, at times to the point of being diffident. His opinions and the reasons therefor were not

materially challenged. Moreover, there was no like expert called by the defendant to gainsay his testimony. I accept it.

[117] Young (the other fire investigator called by the plaintiff) testified at an early stage of the trial. He too was a good witness even if a little rigid at times. As it turned out, much of his evidence overlapped with, and supported, that of Burger and De Vos, and it is therefore not necessary to deal with it in any detail.

[118] De Vos accepted at the outset that Part T of the 1990 regulations did not apply retrospectively to Eendrag. However he was consistent in his opinion that a reasonable university in the position of the defendant would have taken certain minimum steps, envisaged by the regulations, to ensure the safety of students in its hostels. His reasons were as follows.

[119] First, the defendant's prior knowledge of, at the least, the devastating effect of the 1983 Huis Ten Bosch fire. Second, its prior knowledge of the reason for the rapid spread of that fire once it reached the roof void. Third, the defendant's appointment of a suitably qualified professional in the form of the risk manager to assess and address risk of this nature. Fourth, the overwhelming probability that the risk manager (and his successors) would have been well acquainted with best practice in relation to measures to prevent rapid spread of fires in buildings, and the shortcomings in respect of buildings such as Eendrag. Fifth, the defendant, being one of the foremost institutions of higher learning in the country, had ready access to expertise of this nature. Sixth, the defendant's own express recognition of its

obligations in respect of the safety of its hostel residents, as encapsulated in the memoranda and rules issued by it in 1998 and 2003.

[120] He explained this as follows:

> *'I mean my opinion is based, M'Lady, on the fact that we have, at the university, some unfortunate incidences of fire and the destructive nature of fires. We have a risk manager that one would assume is quite aware of the current best practice standards, an assessment of that building against those standards would show that the building is alien from that standards* [sic]*, and my opinion is that if that were to be known, the minimum – in an ideal world you would rip everything out and try to conform the building to current standards, but that's not economically feasible, and it's not practical* [but] *to create some kind of retrofit systems, that would at least seriously mitigate the fire risk in the building.'*

[121] The minimum measures which in the opinion of De Vos were necessary to at least partially achieve this goal were installation of the following: (a) fire stops in the roof void; (b) smoke detectors under ceiling as well in common areas, including balconies; and (c) hose reels (as prescribed by rule TT34).

[122] De Vos explained that with the third floor area of Eendrag being about 1640m^2, the roof void should have been divided into 6 zones by retrofitting non-combustible fire stops (12.5mm thick gypsum board). The most practical locations of these fire stops would have been at each stairwell/ablution facility with one additional fire stop in the centre of the northern wing of the hostel. These boards could simply be screwed to the existing timber trusses. Installation of these fire stops would have implicated temporary removal of certain suspended ceiling panels to provide access to the roof void, and making good on completion. He pointed out that the 1990 regulations only

required non-combustible material (unlike the later 2011 regulations which prescribe material with a 20 minute fire rating). De Vos was not prepared to commit to precisely how long fire stops of the kind he proposed would have delayed the spread of the fire because of the range of possible variables involved in the rate of fire spread. However the following passage of his evidence is relevant:

> *'But as you explained earlier, if the fire is contained between two firewalls and the roof fails, what is the probability of the fire spreading laterally? --- Well significantly lower. Significantly lower.'*

[123] At the time of providing his initial report (in January 2014) De Vos was not aware of the defendant's Roof Risk Mitigation Project which was later driven by Munnik and to which I refer below. Once he had sight of the documentation relating to this project, and conducted an inspection of Eendrag shortly before he testified, he established that all of the measures that he had earlier proposed had in fact been implemented (although obviously not on his recommendation) by the defendant. The only differences were that the fire stops installed at Eendrag were made of brick (an even better option, and feasible, given that Eendrag's roof had been destroyed in the 2007 fire), and one of the fire stops had been erected in a different, but equally acceptable, position (i.e. in the middle of the northern wing but on the western instead of the eastern side of the plaintiff's former room). This had the result that two fire stops had been erected between the north western balcony and the plaintiff's room.

[124] It was the opinion of De Vos that the measures taken by the defendant prior to the Eendrag fire were irrational in the management of the known fire risk and the risk to life and safety of occupants.

[125] He employed the following metaphor:

> *'If you drive around in a 1954 Anglia, because you're a vintage car owner, lover, which does not have a safety belt or ABS brakes or airbags or crumple zones, you're an enthusiastic vintage car owner and you care for the car well, but you do realise that you do live in an environment of modern cars that have these safety features to protect your life. In other words if you drive that car, you know that you are exposed to a higher risk if you get involved in an accident. What I tried to do in my presentation, in my reports, is show that these are the rules that apply now, or 1990, from 1990 to 2006/2007, these were the safety belts and the airbags, these were the rules, and if you know what the real rules are, because you have a risk manager and you are in a university that teaches your science and…engineering students to the latest world developed technology, you know how alien you are from those risk mitigation features. That's what I tried to implicate, that you, as an Anglia driver, do not comply. And there's nothing also that can force you as a driver, to comply, nobody can force you to put in airbags as far as I know, but you are aware of the risk that you're exposed to…'*

[126] During his testimony Young referred to the fire that occurred at the Helderberg men's residence in October 2015. The fire started on a balcony where students had been lying on a bed with a foam mattress with a table alongside them. They had been smoking. They left the balcony for the canteen. The bed and/or papers adjacent to it caught alight. The fire developed on the balcony and spread both into the adjacent room (through windows facing onto the balcony) as well as into the roof. There was early detection and an early response and the fire was suppressed

before it could cause any significant damage. A total of about 3 rooms were affected. However in the roof void it was fully contained between the fire walls.

[127] Munnik (the defendant's former chief director of facilities management, who testified on its behalf) spent his entire career in property and related facility management. After his appointment in April 2009 his primary task was to assess the condition of the defendant's buildings (thus also its hostels), including backlog maintenance and risk mitigation. He both conceptualised and was the driving force behind the defendant's roof risk mitigation project which commenced in 2011.

[128] He explained that what kick-started this was his witnessing the fire in the Wilcocks Building at the end of 2010:

> *'I was called out to Stellenbosch and everybody rushed out there to find the building in flames and what made the biggest impression on me, was that one of the staff members was a lady on the third floor of the building, was being hauled out of a window, the office window, by – and somebody on the second floor stood on his windowsill, so that she could lower her feet on his shoulders, and that way they actually saved her from death, because the fire reached the outside of her office, she couldn't open the door, the door was stuck already, twisted and distorted, the only way was through the window, and fortunately somebody was there to get hold of her and take her down. It made a huge impression on me, and I actually started to investigate now what is the real situation, and what I discovered, I learnt all about the roof spaces and I heard there were no fire walls, I actually knew it, because of the old buildings. I was told about Eendrag, I learnt about Eendrag. I knew about Eendrag because my son-in-law was in that building when it burnt. I wasn't at the university then, but I knew about it. And thirdly, the insurance company actually informed us that, or asked us what are our plans to mitigate the risk, because this is becoming a real financial risk now to the insurance company, seeing that the Wilcocks is only a few years after Eendrag…'*

[129] After making his investigation Munnik identified non-compartmentalised roof voids as being a particular risk in rapid fire spread, with the consequent risk to occupants being unable to escape safely. This he conveyed to the defendant as deserving the utmost priority to prevent the loss of life. Munnik also testified about how he had to persuade the defendant to make available the necessary funds to finance the project (as previously stated it was only during closing argument that the defendant eventually conceded that at all material times it had been able to finance at least the minimum measures which were included in the project and which De Vos had coincidently independently recommended).

[130] His evidence was further that the defendant's insurers were becoming concerned about what it was going to do to mitigate this risk *'because one fire after the other, it's a huge claim to the fund'.* He explained that Huis Ten Bosch was one of the residences included in the roof mitigation project, as it still had no fire stops or the other minimum measures recommended by De Vos.

[131] The following passage of his evidence in cross-examination is also relevant:

> *'* *Ja. Were you – before the Wilcocks fire, and seeing your years of experience in managing buildings, I presume you were aware of firewalls in roof voids and what their purpose is. --- Yes.*
>
> *And I presume that you were also aware of that in terms of the building regulations, such as they were, the old building regulations, they prescribe firewalls in buildings. --- Hmm.*
>
> *And also the SABS, the 0400 of 1990. --- That's right.*
>
> *… they described, or rather prescribed firewalls in buildings, but old buildings, they're not applicable to them. --- Correct.*

But that did not deter you, you wanted to - you realised the risk and you wanted something done about it, would that be right? --- That would be right, but qualified.

Qualify it. --- I qualify by saying that, I think the impact of the fire of Wilcocks on me was quite difficult, because I actually witnessed what happened there. And bearing in mind that it happened so soon after Eendrag, and my son-in-law was in Eendrag when the fire actually happened, it made me go into this problem, and think about it, and see is there anything we can do. Now on the other hand, I was actually forced to that by the system, because I was put on a block now to say identify the major risk in your environment and come and report it to the committee.'

[132] Munnik added that, in fairness to the defendant, the necessity for these measures to be taken was not resisted but the difficulty lay in having the defendant make the funds available. What requires mention however is that, unlike the defendant, Munnik himself was not aware of the devastating consequences of the Huis Ten Bosch fire until a few days before he testified. Munnik was also not aware at the time that the defendant had previously addressed this risk by installing only smoke detectors coupled to an alarm in the roof voids of certain buildings (including Eendrag). Having investigated, Munnik realised these measures were inadequate. It was also his evidence that during the rollout of the roof risk mitigation project hostels were identified as a first priority because students slept there.

[133] Moir (the development and fire consultant called by the defendant) tried to be a lone voice against the weight of the other evidence, but was ultimately forced to make a number of important concessions. Unlike De Vos (an impressive witness who understood the role of an expert and who was completely objective throughout his testimony), Moir mostly tended to be evasive and expedient, and was reluctant to make obvious concessions, for example seeking to draw a semantic distinction

between *'good'* and *'best'* building practice in relation to fire safety measures at the time of the Eendrag fire.

[134] I will highlight a few of the most notable instances. Moir initially maintained that gypsum fire stops with a thickness of 6.5mm installed on one side of a roof truss every 30 metres would have been compliant had the defendant been obliged to comply with the 1990 regulations, while at the same time claiming that these would have had virtually no effect (a matter of only one to two minutes) in delaying the spread of fire in the roof void.

[135] He maintained that the 12.5mm gypsum fire stops recommended by De Vos would have been prohibitively expensive for the defendant to install. When asked what purpose the installation of the 6.5mm gypsum boards would on his version have served, he changed his evidence and said that he would have installed two of these boards for each fire stop, one on either side of each truss (thus effectively proposing a marginally thicker fire stop than De Vos, with the attendant additional cost). This, Moir said, would have delayed the spread of fire by 3 to 4 minutes per side (thus 8 to 10 minutes per fire stop), although he then sought to minimise this with the qualification that it would depend on the point that the fire had reached in the roof. This again changed and he said (but with a different qualification) that an installation of this nature would delay the spread of fire by about 10 minutes per fire stop. This qualification was that once the ceiling started collapsing, the fire would also start spreading beneath.

[136] Moir then had to concede that the 1990 regulations did not stipulate any particular width for a fire stop, and that the only requirement was that it be non-combustible. Furthermore, in one of the rough diagrams he prepared and referred to in his evidence on alternative fire stop installation scenarios at Eendrag, he positioned two of these between the north western balcony and the plaintiff's room. It is therefore fair to accept on his own version that, had these been installed at the time of the Eendrag fire, this would have delayed the spread of the fire to the plaintiff's room for somewhere around 10 to 15 minutes, even taking into account collapsing ceilings (as opposed to what actually happened, namely the collapse of the entire roof in flames within 20 minutes from it first breaching the roof void on the north western balcony).

[137] Moir gave an explanation about industry norms for evacuation distances and evacuation times but, it turned out, within the context of rational building design (it is common cause that Eendrag was built according to generic design principles and Moir's area of expertise is rational design).

[138] One of his grounds for contending that the plaintiff should have been able to safely evacuate within 10 minutes of the alarm first sounding (i.e. before the fire even breached the ceiling) was that the distance between the plaintiff's room and the nearest exit point was 45 metres. When it was pointed out that the distance was in fact about 65 metres (De Vos had measured this distance from the drawings discovered by the defendant and his evidence in this regard had not been challenged) Moir had to concede that he had not physically measured the distance himself but had also only had regard to the plans.

[139] As regards a reasonable evacuation time, Moir's evidence was that this was calculated as follows. 30 Seconds is allowed for an initial reaction period from the time the alarm first goes off. A *'buffer'* of only 15% to 20% (i.e. 4.5 to 6 seconds) is allowed for the initial reaction period for those individuals who are *'slow'* to react. 20 Seconds are then allowed for the individual to grab a few valuable possessions and leave his room. A maximum of 10 minutes (at a stage Moir mentioned 7 minutes) is allowed between the time the alarm first goes off and the individual exits the building, because that is usually how long it takes for fire smoke to become dangerously toxic. Moir made it clear that no allowance is made for apathy in responding to an alarm, although at the same time he found it acceptable practice for an alarm to first be silenced and then allowed to reactivate only in the case of a real emergency.

[140] This testimony does not assist the defendant for the following reasons. First, the evidence showed that student apathy was the norm as a response to the alarm, and that this was reinforced by the *modus operandi* of those responsible for implementing the emergency plan at the time. Second, it was Loots' unchallenged estimate that not more than 7 minutes elapsed between him first spotting the fire (on his way to silence the alarm after it initially sounded), when it was still contained under ceiling on the north western balcony, and having to leave the building because he was no longer able to breathe. Third, as a matter of fact, the plaintiff (along with a number of other students) in any event slept through both alarms, and the defendant no longer contends that he was in any way negligent in this regard.

[141] When asked what he suggested the plaintiff should have done when confronted with a wall of flames and smoke upon opening his door, Moir's startling response was that *'he has to go through that door'.* Apparently the window was not an option because '*Ja, well the window is not a good choice'.*

[142] Moir also initially testified that the Huis Ten Bosch building *'was entirely different'* in structure to Eendrag, only to concede in cross-examination that it's style of construction was similar and that: *'Fire in a roof – all fires in roofs tend to behave – in wooden roofs like that, tend to behave similarly'.*

[143] Moir finally conceded that a roof fire, especially where there are students sleeping if it happens at night, is a serious risk to their safety. He conceded that without the fire stops that even he proposed: *'if you look at the scenario room 117* [i.e. the plaintiff's room] *is the furthest room away from the stairs and you needed about approximately four minutes – if you responded to the alarm approximately 4 minutes to get out…Yes, and it could have posed a risk if they didn't…move immediately, yes.'*

[144] The following passage of his cross-examination is also relevant:

> *'Eendrag, it's a risk for those sleeping in the building. You have to do something. If there's a fire in that roof void, it's a risk to the people sleeping in that building. Do you think the University could then just say oh well, we don't need to comply, why should we? --- No, they would consider any report you gave them, yes…*
>
> *That is just one – what one would expect if they are aware of the problem that they will do something about it. --- That's correct.*

They won't say legislation doesn't apply, why do we need to spend money on fire walls, you will expect them to do something. --- If it's brought to their attention you'd expect them to do something.

Yes. And especially the spreading of the fire in a roof void because that is dangerous, would you agree with that? --- Ja, the spreading of the fire is dangerous but also a greater loss of property too.'

[145] Moir was not a credible witness. To the extent that his evidence differed from that of De Vos, Young, Burger and De Witt, I reject it and accept theirs.

Evaluation

[146] Having regard to the evidence as a whole there is little doubt in my mind that the plaintiff has discharged the onus resting upon him to show that, on a balance of probabilities, the defendant was negligent. A *diligens paterfamilias* in the position of the defendant would have foreseen, after the Huis Ten Bosch fire, that its failure to take reasonable steps to guard against a similar occurrence would cause injury to students in its hostels. A *diligens paterfamilias* in the position of the defendant would also have taken reasonable steps to guard against such an occurrence. The steps taken by the defendant were not reasonable and fell far short of the reasonableness standard, both in relation to the installation of fire safety measures at Eendrag and in the implementation of its own risk management policy, to which it merely paid lip service.

[147] The evidence established that, as a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday life experiences (see *Za v Smith* (*supra*)), the defendant's failure to take

reasonable steps caused the plaintiff injuries. The risk of fire spreading unhindered through a roof void was a severe one. The gravity of the possible harm to students if the risk materialised was serious. The defendant was financially able to take reasonable steps to adequately address that risk. The defendant had a risk manager and access to the necessary expertise to adequately address that risk. The burden of adequately addressing the risk was not unduly onerous (see *Ngubane* (*supra*)). In these circumstances, there is no reasonable basis to arrive at any conclusion other than that the defendant was negligent.

[148] The defendant's conduct was also wrongful. The authorities to which I earlier referred make it clear that compliance with a statutory obligation is not itself determinative of this issue, and that other considerations of policy such as accountability, industry norms and constitutional imperatives are equally important. Stereotypes such as those relating to persons in control of dangerous property are not entirely irrelevant, and they still provide guidance to answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on a defendant in a particular case (*Za v Smith*). Foreseeability may also be a factor (*Telematrix* (*supra*)).

[149] As pointed out in *H v Fetal Assessment Centre* (*supra*) our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict, on grounds rooted in the Constitution, policy and legal convictions of the community. As pointed out in *Le Roux and Others v Dey* (*supra*) reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the

defendant's conduct, but rather concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.

[150] During closing argument the defendant's counsel urged me to exercise caution in making the required value judgment because of the potential consequences to other owners of buildings such as Eendrag in its pre-August 2007 condition. I have given this careful consideration, but believe that the answer lies in what the Constitutional Court said in *H v Fetal Assessment Centre* at para [70]:

> *'A further general objection is that of the possibility of indeterminate liability. That is a bogey often raised when the law needs to cater for new circumstances and one that almost always fails to materialise in the wake of innovation…'*

[151] In referring to this passage I do not suggest that what I am dealing with in this matter are *'new circumstances'*. The point is rather that, by finding that it is reasonable to impose liability on the defendant, the finding is based on the particular circumstances of this individual case. All cases such as these are fundamentally fact bound and a finding of wrongfulness will depend on each particular set of proven facts. To my mind therefore a finding of wrongfulness in this matter will not have the automatic consequence of opening the floodgates of potential liability for others.

[152] In finding wrongfulness I have taken into account the following. What constituted reasonable and adequate safety measures had been well known in the industry for 30 years before the Eendrag fire. Not only the defendant but many affected students had the experience of the Huis Ten Bosch fire in 1983. The primary cause

of its spread was publicised in the community. The plaintiff and other students who reside in hostels such as Eendrag have a constitutional right to bodily integrity. Institutions such as the defendant should be accountable for the safety of those who live and sleep in the premises which they own and manage. Students are, after all, students and for most of them residence in a hostel is just one step further away from parental care and supervision. They are generally not mature adults in the true sense. Their parents should be able to place their faith in these institutions to have adequate measures to address the safety of their children. These parents and students represent a not insignificant sector of society. These considerations have led me to conclude that it would be reasonable to impose liability on the defendant in the particular circumstances of this case.

The indemnity clause

[153] The defendant's alternative defence is that it is relieved of any reliability by virtue of an indemnity clause, being clause G(1)(f) of the plaintiff's written application for enrolment. It is common cause that he signed this application at the age of 17 and was therefore assisted by his mother who was his guardian reads that:

> *'(f) dat ek onderneem om geen eis van enige aard teen die Universiteit of enige werknemer van die Universiteit in te stel nie en om op geen wyse hoegenaamd die Universiteit aanspreeklik te hou vir enige skade of verlies wat ek persoonlik of aan eiendom van my mag ly en wat regstreeks of onregstreeks spruit uit my deelname gedurende my studietydperk aan die Universiteit aan enige aktiwiteit van watter aard ook al, wat te doen het met my studie of opleiding of met sport of ontspanning van enige aard, hoe sodanige skade of verlies ook al mag ontstaan en dat ek aan enige van die*

gemelde bedrywighede op my eie verantwoordelikheid sal deelneem en die risiko daaraan verbonde vrywillig aanvaar…'

[154] In essence the defendant contends that *'enige aktiwiteit'* includes sleeping in its hostels, because *'ontspanning'* includes rest and relaxation.

[155] To my mind the interpretation which the defendant seeks to place on this clause is both strained and artificial. Having regard to the principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the plain language of the clause (which is the starting point) reflects that in order for the indemnity to have any effect the plaintiff must first have voluntarily participated in an activity relating to the period of his study. Sleep is an essential, involuntary, biological function. It is also not an activity which flows from the plaintiff's *'studietydperk'*.

[156] Moreover, the clause cannot merely be considered in isolation. The context in which it was produced, and the material known to those responsible for its production (i.e. the defendant) must also be taken into account. At the time the plaintiff signed the enrolment application (on 21 June 2004) the defendant had already identified fire as a real risk to students sleeping in its hostels and had issued both its 1998 and 2003 rule booklets. If it was ever the defendant's intention that a student, while asleep, would be regarded by it – contrary to the very tenor of its own risk management policy – as voluntarily participating in an activity linked to his period of study then, peculiar though it would be, the defendant would surely have specifically included *'sleep'* in its indemnity clause. There is no merit in this defence, and it must fail.

Conclusion

[157] **In the result I make the following order:**

1. **The plaintiff's claim succeeds.**
2. **The defendant is declared liable to the plaintiff for such damages as might be agreed upon or proven in consequence of the injuries he sustained in the fire at the defendant's Eendrag mens residence on 9 August 2007.**
3. **The defendant shall pay the plaintiff's costs, including the costs of two counsel and the qualifying fees and expenses of the following expert witnesses:**
   - **3.1 Ms Anina Burger;**
   - **3.2 Dr Phillip De Vos;**
   - **3.3 Mr Anthony Young;**
   - **3.4 Mr Rod De Witt;**
   - **3.5 Mr Mark Carstens;**
   - **3.6 Mr Richard Ward; and**
   - **3.7 Mr Peter Holman.**

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J I CLOETE