IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.:3861/2016
Matter heard: 30/09/2021
Judgment delivered: 16/11/2021

In the matter between:

LOUIS GERHADUS NEL — Applicant

and

GOVERNMENT OF SOUTH AFRICA — First Respondent

JOSEPH JUBENI — Second Respondent

JUDGMENT

SMITH J:

Introduction

[1] The plaintiff's claim is for damages he suffered as a result of two veldfires, which originated on the first defendant's farm and spread onto his farm. The fires occurred on 28 September 2013 (the first fire) and 3 August 2014 (the second fire), respectively. Issues of liability and quantum have been separated, and at this stage only the former issue falls for decision.

[2] The plaintiff was at all material times the owner of the farm known as Paradys Hoogte, in the district of Komga, and the first defendant was at all material times the registered owner of a neighbouring farm, namely Eversly Farm. The second defendant was the lessee and the person in control of the latter farm. It is common cause that both defendants fell within the definition of an owner in terms of the National Veld and Forest Fire Act, 101 of 1998 (the Act).

[3] It was common cause that on 28 September 2013, a fire originated on Eversly Farm and spread onto the plaintiff's farm. It was also common cause that the fire was a veldfire as defined in terms of the Act.

[4] The defendant was not a member of a local fire protection association mentioned in Chapter 2 of the Act, and the presumption of negligence provided for in section 34 of the Act accordingly applies to it.

[5] That section provides as follows;

> "Presumption of negligence
>
> (1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which —
>
> (a) the defendant caused; or
>
> (b) started on or spread from land owned by the defendant,
>
> The defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area that the fire occurred.
>
> (2) The presumption in sub-section 1 does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful"

[6] It was not disputed that the obligations provided for in sections 12 (the duty to prepare and maintain firebreaks); 13 (requirements for firebreaks); 17 (readiness for firefighting); and 18 (actions to fight fires), applied to the defendants at all material times.

[7] The second fire originated on Eversly farm on 3 August 2014 and spread onto the plaintiff's farm. Although the first defendant did not admit in the pleadings that the fire originated on its farm, the evidence on a balance of probabilities established that fact. During the course of the trial, the first defendant also accepted that the

second ffire was a veldfire as defined in terms of the Act. The aforementioned statutory obligations are accordingly also of application in respect of the second fire.

[8] The first defendant also admitted that it was aware that: (a) during the winter season there is generally a danger of veldfires; (b) veldfires posed a threat to the neighbouring farms; and (c) at all material times the build-up of high fire fuel loads is extremely dangerous and could potentially cause a fire to originate on its farm or cause the uncontrollable spread of fires.

[9] In reply to a question in the plaintiff's request for further particulars whether it contended that there were no high fire fuel loads present at the material times, the first defendant replied as follows: "The defendant bears no knowledge of the alleged fire loads". And in response to a question whether its case was that high fire fuel loads could not potentially cause a fire to originate on its farm or spread to neighbouring farms, it replied as follows: "No, this is not the defendant's case".

[10] At the commencement of the trial Mr Coetzee, who represented the plaintiff, put on record that the second defendant had died and that the plaintiff did not intend pursuing his claim against the appointed executor.

[11] The first defendant was initially represented by Mr Sandi, who unfortunately tragically passed away, and on the adjourned date Mr Cole SC took over as counsel.

[12] The plaintiff testified and was cross-examined by Mr Sandi when the matter was first heard during February 2021. The matter was postponed sine die at the conclusion of his testimony, and when it resumed on 28 September 2021 , the plaintiff closed its case without calling any further witnesses. The defendant then called two witnesses namely, Professor Meiklejohn, a meteorologist, and Mr Pawuli, who resided on Eversly Farm at time of the first fire.

[13] Mr Coetzee correctly submitted that it is rather remarkable that there was very little factual disputes between the parties. As will become evident from my summary of the evidence, the plaintiff's version of events was confirmed by the first defendant's witnesses in all material respects.

The evidence

[14] The plaintiff testified that there had been three or four fires on Eversly Farm before 2013, and he was accordingly not surprised when he received a call on 28 September 2013 informing him that a fire was raging on the farm.

[15] The defendant's farm was overgrown with grass, shrubs and black wattle trees. He said that in the absence of firebreaks, the black wattle trees had fallen to his side of the fence, and he had to complain to the second defendant on several occasions. As a result, the firebreaks on the plaintiff's side of the fence were not effective in preventing the spread of the fires from Eversly Farm onto his farm. The firebreaks on the plaintiff's farm were, on the other hand, effective in preventing the fires from spreading onto neighbouring farms.

[16] The plaintiff said that he had firefighting equipment available on his farm. He also maintained good co-operation with his neighbours and they shared firefighting equipment whenever necessary.

[17] Prof Keith Meiklejohn is the Head of Geography at Rhodes University. He testified that from meteorological data provided to him, he was able to determine the following in respect of the first fire:

(a) the day started with moderate high wind velocities that reached gale force conditions by 08h00. The fire danger index thus became high from that point;

(b) the wind blew consistently from west to east and then from south-west at approximately 14h00;

(c) from 20h00 the wind started shifting back to being westerly; and

(d) having regard to the wind direction and fire scars evident on the maps, he was able to conclude that the fire started on Eversly Farm and then moved onto the plaintiff's farm.

[18] And in regard to the second fire he said that:

(a) berg winds blew during the entire day and the wind speed was consistently high from the north-west;

(b) the fire started on Eversly Farm, and then spread to the east onto the plaintiff's farm;

(c) thus, both fires occurred on dry days when the wind speeds were high. He could not discern any firebreaks from the satellite images.

[19] During cross-examination, he confirmed that despite the wind speeds and prevailing conditions, neither of the fires had spread from the plaintiff's farm onto neighbouring farms. He conceded that it is common sense that the build-up of high fire fuel loads is extremely dangerous and could potentially have caused fires to originate on the farm or spread to neighbouring properties.

[20] Mr Pawuli testified that Eversly Farm was overgrown with grass and black wattle trees. He described the grass as being taller than he is. He also said that there was no firefighting equipment on the farm, and it was left to him and three women to fight fires with water and tree branches.

[21] He also confirmed that there were no persons on Eversly Farm with any experience or training in firefighting. The defendants also did not provide any assistance in this regard.

Submissions by counsel

[22] Mr Cole submitted that the plaintiff has failed to establish causal negligence on the part of either defendant.

[23] He argued that Prof Miecklejohn's testimony established that the prevailing weather conditions on the day, namely dry weather and gale force winds, were conducive to the easy spread of veld fires.

[24] He submitted that Mr Pawuli has also confirmed, in respect of the first fire, that it was impossible to stop the advance of the fire, and that firebreaks would not have

made any difference. Thus, there was nothing that the reasonable person could have done to prevent either the start or spread of the fire.

[25] Mr Cole also submitted that the defendant had leased the property to the second defendant, and the latter had assumed full control of the property and thus undertook certain specific statutory obligations.

[26] He argued that after the second defendant had taken control of the property, the first defendant could not reasonably have foreseen that the former would fail to carry out those obligations, which he had assumed in terms of a valid and binding contract. There was also no evidence to suggest that the first defendant was aware of any propensity on the part of the second defendant not to meet those contractual obligations.

[27] The first respondent has accordingly not acted wrongfully, could not have foreseen that the second defendant would fail to carry out these obligations, and there was thus no causal connection between any act or omission on the part of the first defendant and the damages suffered by the plaintiff. Instead, the finger points only to the second defendant.

[28] Mr Coetzee argued that the defendant has not presented any evidence to rebut the presumption of negligence. He submitted that no evidence was proffered as to the steps the first defendant had taken to prevent the start of the fires on its fire prone property, or to prevent it from spreading onto neighbouring properties.

[29] He submitted furthermore that Mr Pawuli's evidence confirmed the plaintiff's assertion that instead of complying with its statutory obligations as owner to minimize the risk of fires on its property, the defendant has allowed conditions conducive to the start of veldfires to develop on its property. On its own evidence, its property was overgrown with high grass and black wattle trees, and there was no firefighting equipment available. Neither were there any persons experienced or trained in firefighting. The first defendant accordingly did not take any steps to prevent the start of fires on its farm.

[30] He submitted furthermore that while it may be possible that once the fires had started, firebreaks would not have made any difference, the efficacy of firebreaks

would only have been negated by the overgrown vegetation and size of the wattle trees on the first defendant's farm. The properly maintained firebreaks on the plaintiff's farm, on the other hand, were effective in preventing the spread of the fires onto neighbouring farms.

Discussion:

[31] The test for negligence is whether a diligens pateffami/ias in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another in his person or property, or causing him patrimonial loss; would have taken reasonable steps to guard against such occurrence; and that the defendant has failed to take such steps. (Kruger v Coetzee 1966 (2) SA 428 (A) at 430).

[32] To my mind the first defendant's assertion that it is not liable because it had transferred possession of the farm to a responsible person, namely the second defendant, is untenable.

[33] As Mr Coetzee has correctly pointed out, that contention was neither pleaded nor ventilated during evidence. The point is accordingly simply not available to the first defendant. Furthermore, this contention directly contradicts the admissions made in the pleadings, which I have alluded to above. The first defendant's reliance on Nieuco Propeñies 1005 (Pty) Limited and another v Trustees for the Inkululeko Community Trust & others (872/017 [2018] ZASCA 123, (21 September 2018), is accordingly misplaced.

[34] The plaintiff bears the onus of proving that the conduct of the first defendant's duly authorised agents or employees, which caused the fires, resulted in the damage to the plaintiffs farm. He is assisted in this regard by the presumption of negligence provided for in section 34 of the Act. Thus, the first defendant was required to rebut the presumption of negligence in respect of both fires.

[35] As mentioned, it is common cause that the fires started on Eversly Farm and spread from there onto the plaintiff's farm. It is also common cause that the first defendant was at all material times not a member of a fire protection association in the area where the fires occurred.

[36] The factual matrix relied upon by plaintiff for the assertion that the first respondent's negligence caused its loss is rather curiously common cause.

[37] Mr Pawuli has confirmed the plaintiff's testimony regarding the absence of firebreaks, firefighting equipment or persons of suitable qualification or experience in firefighting on Eversly Farm.

[38] It is also common cause that the area was prone to veldfires and that, given the high fire fuel level, it was reasonably foreseeable that fires could start on Eversly Farm and spread onto the plaintiff's farm. It was also common cause that the first defendant did not take any steps to prevent or even ameliorate the possibility of such an occurrence.

[39] Mr Pawuli's testimony painted a picture of a neglected, overgrown farm, prone to fires and with absolutely no consideration on the part of either defendants for the foreseeable probability of fires starting and spreading onto neighbouring properties. He was left to fight fires together with three women with only water and tree branches at his disposal.

[40] It is also common cause that the first defendant was in breach of its statutory obligations to: (a) prepare and maintain firebreaks; (b) ensure that such firebreaks are wide and long enough to have a reasonable chance of preventing a fire from spreading onto neighbouring properties; (c) to have equipment, protective clothing and trained . personnel for extinguishing fires; and (d) to do everything in its power to stop the spread of the fires.

[41] Although being in breach of these statutory obligations does not necessarily equate to causal negligence, I am satisfied, for the reasons mentioned above, that the first defendant's negligence was the cause of the damages suffered by the plaintiff as a result of the fires.

[42] I am also of the view that Mr Cole's argument that the plaintiffs negligence contributed to his loss, cannot be upheld.

[43] The plaintiff has prepared and maintained firebreaks on his farm; he had firefighting equipment; and had cleared vegetation with a bush cutter throughout the

year, having initially cleared it with a bulldozer. As far as firefighting equipment is concerned, he had a tractor fitted with a 700 litre spray contraption and firefighting belts. He also co-operated with and shared firefighting equipment with owners of neighbouring farms, whenever needed. It was not disputed that it was through the efficacy of these measures that the fires did not spread from his farm onto other neighbouring lands. I am accordingly of the view that the evidence did not establish any contributory negligence on the part of the plaintiff.

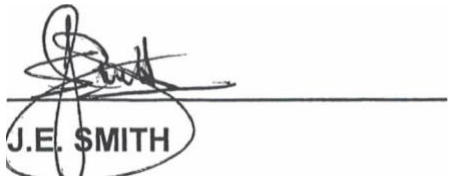
Order

[44] In the result the following order issues:

(a) The defendant is liable for the plaintiff's proven or agreed damages resulting from the fires, which occurred on 28 September 2013 and 3 August 2014, respectively.

(b) The defendant is liable for the plaintiff's costs of action to date, including the costs of an in loco inspection by plaintiffs attorney.

(c) The issue of the costs regarding the quantum of the claim stands over for determination when quantum is decided.



JUDGE OF THE HIGH COURT

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