

VELDBRANDE WET 101 VAN 1998

Ongeveer 90% van veldbrande is as gevolg van nalatigheid en/of brandstigting. Weerlig veroorsaak brande ongeveer 'n maand voor die reënseisoen begin. Die veld is dan baie droog. Eskom is ook 'n bron van brande.

Hierdie wet is van toepassing op verskeie grondgebruikers en eienaars

Vakansieoorde

Universiteite

Skole

Landbouers/boere

Munisipaliteite

Staatsinstellings

WAT IS BELANGRIK

Waterbeskikbaarheid ('n vuurvegter op 'n bakkie gebruik 500 liter water binne 20 – 30 minute)

Brandstof

Drinkwater

Noodhulptoerusting

Toerusting moet werkend wees

Maak voorsiening vir 8 uur op die brandlyn (kos water ens.)

Beskermende klere en radios

BRANDSTROKE

As 'n brand op u grond kan ontstaan of versprei moet u as eienaar van die grond 'n brandstrook maak en onderhou. Alle gras of brandbare materiaal moet verwyder word. "Eienaar" beteken ook huurder of 'n persoon wat beheer oor die grond uitoefen, moet die brandstrook maak en behoorlik onderhou.

Die brandstrook moet skoon gemaak word of gebrand word geskoffel of geploeg word. Die gras kan met 'n chemiese middel gespuit word ("Roundup").

Die Wet bepaal dat die brandstrook lank en breed genoeg moet wees om redelikerwys te voorkom dat 'n brand oor die strook kan versprei.

Altwee bure langs hulle gemeenskaplike grens moet brandstroke maak. Die brandstrook hoef nie presies op die grens te wees nie. Die aangrensende eienaars kan ooreenkom om 'n gemeenskaplike brandstrook weg van die grens van hulle eiendom te maak.

DIE BRAND VAN BRANDSTROKE

Die bure moet oor 'n dag wat dit gedoen word afsprek of 14 dae kennis gee.

Die toestande moet reg wees vir sodanige optrede.

Indien een eienaar brand en die ander een nie moet die ander een teenwoordig wees of 'n agent. Daar moet genoeg mense wees om te keer dat die brand versprei.

Die Wet vereis dat 'n brandstrook "redelik vry" van brandbare material moet wees.

Die Wet bepaal dat alle eienaars en huurders op wie se grond 'n veldbrand mag plaasvind en/of versprei brandstroke moet maak.

As daar goeie rede is kan die Minister 'n eienaar of 'n groep eienaars vrystel van bogemelde verpligting.

BRANDBESKERMINGVERENIGINGS

Dit is 'n vereniging wat deur grondeienaars gestig kan word om veldbrande te voorspel, voorkom te bestuur en te blus.

Lidmaatskap is vrywillig behalwe Munisipaliteite en die Staat. (Belangrik word nie gedoen nie!) Staat en Munisipaliteite moet toesien dat sodanige verenigings volgens Wet gestig en onderhou word.

Die pligte van so 'n vereniging is die volgende:

- a. Dit moet 'n veldbrand bestuurstrategie ontwikkel reëls maak vir lede opleiding van lede mbt bestryding van brande en brande bestry en voorkom en met aangrensende verenigings koördineer.
- b. 'n Brand-beskermingsbeampte moet aangestel word.
 - (i) Take uitvoer wat an hom opgelê word
 - (ii) Beheer neem oor brandbestryding
 - (iii) Die reëls van die vereniging afdwing
 - (iv) Nakomming van die Wet monitor en verslag doen ook aan die Minister
 - (v) Lede oplei ingevolge die Wet
 - (vi) Lede se grond inspekteer ten einde te verseker dat hulle hulle pligte kragtens die Wet en die reëls van die BBV nakom. (Dit word nie gedoen nie!)

DIE VOORDELE VAN LIDMAATSKAP VAN BBV IS

Daar sal geen vermoede van nalatigheid geld in geval van 'n siviele eis nie, veral waar die brand van 'n lid se grond versprei en skade aan 'n ander se eiendom aangerig het nie.

TOERUSTING VEREIS:

Die Wet vereis dat elke eienaar toerusting moet hê wat voorgeskryf of by gebrek wat redelikerwys nodig is in die omstandighede.

Redelik is: brandslaansakke

Sleepwa met watertenk

'n klein kragbron wat water spuit

Beskermende klere word nie uitgespel nie – “wat redelikerwys nodig is in die omstandighede”

Miskien skoene handskoene oorbaadjies plastiekhelms, nywerheids neusfilters

Opgeleide personeel – wat redelikerwys in die omstandighede nodig is

Die soort opleiding word nie uiteengesit nie.

Alles in 'n persoon se vermoë moet gedoen word om 'n brand te blus. Indien nie kan jy aan 'n misdryf skuldig bevind word. Dus redelike stappe moet geneem word.

Aangrensende eienaars moet ook in kennis gestel word van 'n brand.

As 'n eienaar afwesig is moet daar 'n verantwoordelike persoon wees in geval van 'n brand om die eienaar se verantwoordelikhede oor te neem.

In geval van brand mag jy private grond betree, asook jou werkers om die brand te blus ook by 'n perseel inbreek voertuie implemente verwyder

AANSTEEK VAN VURE

Die Wet verwys na enige persoon wat 'n vuur aanstreek gebruik of aan die gang hou.

DIE VOLGENDE IS MISDADE:

- a. 'n Vuur in die ope lug alleen laat voordat dit geblus is.
- b. Gemoeid is met 'n vuur wat versprei en skade aanrig.
- c. Vuur aansteek in 'n padreserwe.
- d. 'n Persoon wat in die ope lug rook waar rook verbode is.

NALATIGHEID (AANSPEEKLIKHEID VIR BRANDE)

(Sien aangehegte artikel wat ek reeds in 2011 versprei het)

Volgens ons gemene reg is jy aanspreeklik weens nalatigheid:

- a. Indien 'n redelike man die moontlikheid sou voorsien dat sy optrede of versuim (om op te tree) skade aan 'n ander kan veroorsaak
- b. Redelike stappe moes geneem om die skade te verhoed
- c. Die boer/werknemer (midddelike/aanspreeklikheid) om sulke redelike stappe te neem.

BELANGRIK

Daar is 'n vermoede van nalatigheid as jy nie lid is van 'n Brandbeskermingsvereniging nie (Artikel 34 van die Wet)

Jy sal jou onskuld moet bewys as verweerder mbt verspreiding en ontstaan van die brand.

As jy lid is van 'n BBV het die Eiser die bewyslas.

DA Maree

Marie

anyone in article or
veldbrand en die gevolge
se aansprakelijkheid 223 Geete

NOTES

*Safety and Security (Centre for Applied Legal Studies Intervening) (supra) paras 50-60; Fourie & another v Minister of Home Affairs & another 2003 (5) SA 301 (CC) para 12; Phumelela Gaming and Leisure Ltd v Gründlingh & others (supra) para 25). However, the interests of justice are the determining issue in the Constitutional Court's decision whether or not to grant an application for leave to appeal. Whether the issue has been decided by the Supreme Court of Appeal is only one of the factors to be considered in this regard. (Factors which are relevant with regard to the interests of justice include the circumstances of the parties, the nature of the rights involved, whether the issue has been decided by the Supreme Court of Appeal, whether or not anyone else might be harmed by the relief sought and the prospects of success: see eg *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & others* 1998 (4) SA 1157 (CC); para 32; *Brunner v Gofil Brothers Investments (Pty) Ltd & others* 2000 (2) SA 837 (CC) para 3; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2004 (1) SA 406 (CC) para 3; *Phumelela Gaming and Leisure Ltd v Gründlingh & others* (supra) para 24.) Ms Goss's chances of obtaining leave to appeal if she sought it are therefore uncertain.*

Thus it seems that for the foreseeable time to come *Kruger* will reflect the state of the law. Hopefully, another plaintiff will challenge the legal position on constitutional grounds in the future.

Daniel Marce

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LIABILITY FOR DAMAGE CAUSED BY VELD, FOREST AND MOUNTAIN FIRES

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INTRODUCTION

In South Africa there are constant threats of harm to persons or their property by veld, forest and mountain fires as a result of others' delictual conduct. Over the years, important decisions have been delivered on the issue and the legislature has also made provision for measures to prevent and combat veld fires throughout our land (see s 1(1) of the National Veld and Forest Fire Act 101 of 1998; in terms of s 2 of the Act a 'veldfire' means a veld, forest or mountain fire). It is trite that a delictual claim for damage caused by fires can succeed only if the five elements of a delict are present, namely an act, wrongfulness, fault, causation and damage (see *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) at 820; *Minister of Water Affairs & others v Durr & others* [2007] 1 All SA 337 (SCA) para 20; *Wingaart v Grobler* 2010 (6) SA 148 (ECG) at 156; J Neethling & J M Potgieter *Neethling-Potgieter-Visser Law of Delict* 6 ed (2010) 4). The discussion that follows will focus on the application of these elements in the present context. The issues relating to the vicarious liability of employers for veld fire

damage caused by their employees, will not be dealt with (see *Minister of Water Affairs v Durr* (supra) paras 7 and 23; *Louw v Long* 1990 (3) SA 45 (E); cf *Viljoen v Smith* 1997 (1) SA 309 (A)).

ACT OR CONDUCT

Conduct, also in the case of liability for veld fires, may be in the form of a commission or an omission (see *HL & H Timber Products v Sappi Manufacturing* (supra) at 820; *Minister of Water Affairs v Durr* (supra) para 20). The main reason for the distinction is that liability for an omission is more restricted than that for a positive act (see Neethling & Potgieter op cit at 55; see also the discussion under 'wrongfulness' below). But the distinction is often difficult to draw. A clear example of a commission is where a fire causing the loss is started by the perpetrator (see *HL & H Timber Products v Sappi Manufacturing* (supra) at 820; cf *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A)). However, where a person, for example, makes a fire in the veld for a picnic braai, or burns the veld of a camp on his farm for purposes of stimulating new growth after winter, or makes a fire-break between his and neighbouring property (cf *Van der Eecken v Salvation Army Property Co & another* 2008 (4) SA 28 (T); *Simon's Town Municipality v Dews & another* 1993 1 SA 191 (A)), or sets a heap of garbage on his farmstand alight, and fails to take reasonable steps to prevent the fire from spreading and it causes damage to another person, the question arises whether failure to take certain measures in the course of such positive activities, should be classified as conduct in the form of an omission. J C van der Walt & J R Midgley *Principles of Delict* 2 ed (2005) at 65-6 argue that this is not necessarily the case since such failure may well indicate that the positive activity was negligently performed. According to them 'negligence is by definition a failure to take reasonable precautions', and many 'omissions' are therefore 'merely indications of legally deficient positive conduct'.

However, where failure to take preventive steps is not in the course of a positive activity, it indeed constitutes conduct in the form of an omission to prevent damage to other people. This may be so even though a person has by prior positive conduct created a new source of danger and subsequently fails to eliminate that danger with resultant harm (omissio per commissionem) (cf *Minister of Water Affairs v Durr* (supra)). As long as the failure is not merely indicative of legally deficient prior positive conduct, a true omission is at hand. Of course, this will also be the case where positive conduct is completely absent, for example, where the owner of a land fails to take measures to contain a fire which starts on his land without his responsibility (cf *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A)). Where conduct is in the form of an omission, the next crucial question is whether the omission is wrongful, and this depends on whether there was a legal duty to act positively to prevent damage to another.

WRONGFULNESS

A distinction should be made between commissions and omissions with regard to the element of wrongfulness. The crux of this distinction, as

explained in, inter alia, *Gouda Boerdery Bpk v Transnet* 2005 (5) SA 490 (SCA) at 498–9 (see also *Van der Eecken v Salvation Army Property* (supra) at 37–8), a case about damage caused by fire, is that a positive act which causes physical harm to the property or person of another, is prima facie wrongful, which wrongfulness may be rebutted by the presence of a ground of justification. Omissions causing loss, on the other hand, are not prima facie wrongful but prima facie lawful. To be wrongful, there must have been a legal duty to avoid causing harm to another, which duty is ascertained by the criterion of reasonableness or boni mores. Here the court has to exercise a value judgment embracing all the relevant circumstances and considering the interplay of various factors as well as legal policy and constitutional values (see *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 156; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* [2007] 2 All SA 489 (SCA) at 494; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at 956–7, 970; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) at 395–6; Neethling & Potgieter op cit at 45, 54–5, 82–3; F D J Brand 'Reflections on wrongfulness in the law of delict' (2007) 124 SALJ 76 at 78–9).

In *Van der Eecken v Salvation Army Property* (supra) the plaintiff instituted an action for damages for loss sustained when his house burnt down as a result of a fire that had originated and spread from the defendants' neighbouring (but not adjacent) property. The defendants had lit the fire as an exercise in controlled burning (thus a commission). Fanned by winds, the fire eventually reached the plaintiff's farm. The defendants admitted that they had caused the fire (causation), so that the court was required to determine only the issues of wrongfulness and negligence. As far as wrongfulness is concerned, Murphy J (at 38) stated that the legal convictions of the community (boni mores) dictated that neighbouring landowners in rural communities had a duty of care (rather, a legal duty: see *McIntosh v Premier, KwaZulu-Natal* 2008 (6) SA 1 (SCA) at 8–9; J Neethling & J M Potgieter 'The law of delict' 2008 *Annual Survey of South African Law* (2009) at 825) not to cause harm to each other by negligently spreading fires from their land to their neighbours' land. The court then set out a number of specific legal obligations on landowners who start controlled fires on their land (at 38–9), the non-compliance with which would be prima facie wrongful, constituting a breach of the landowners' legal duty, and therefore delictual wrongfulness (at 39), unless justification for non-compliance can be demonstrated. The court found that absent any legitimate explanation for non-compliance with some of these obligations, the defendant's conduct was wrongful (ibid). Although this conclusion may be accepted, Murphy J's line of thought should not. As mentioned earlier, a commission which causes physical harm, as in casu, is for this reason prima facie wrongful (see *Gouda Boerdery v Transnet* (supra) at 498–9, cited with approval by Murphy J at 37–8). It was thus completely unnecessary to invoke the concept 'legal duty' in the present context. Moreover, it seems that non-compliance with the legal obligations or duties imposed on landowners

regarding controlled veld fires on their land, does not raise the issue of omission on their part as a form of conduct for which the concept of legal duty would be appropriate. It rather refers to their negligence, i.e. their failure to take reasonable precautions imposed by the legislature, and may therefore justly be considered as indications of legally deficient positive conduct (this will be discussed in detail below under 'negligence').

As far as liability for an omission in instances of damage caused by veld fires is concerned, the following factors, which according to the legal convictions of the community may be indicative of a legal duty to act positively, have been considered by the courts: a person is in control of a dangerous (or potentially dangerous) fire, or of long grass alongside a road or wattle stacked on property exposing the bordering property to a fire hazard; legislation obliges the person to take certain steps to prevent damage by veld fires; a person is aware or had knowledge of a dangerous veld fire; a person foresaw or should have foreseen that his failure to take preventive steps against the spreading of a veld fire would cause harm to others; and practical steps that could have been taken by a person to prevent the loss (see Neethling & Potgieter op cit at 62-5 for a general discussion; cf 293-4 as to the determination of a legal duty in cases of liability for pure economic loss). In passing it should be noted that the last two factors may also be relevant with regard to the determination of negligence, which concerns the reasonable foreseeability and preventability of harm (see *Gouda Boerdery BK v Transnet* (supra) at 499; Neethling & Potgieter op cit at 157 and 203-4). There is a measure of overlap between wrongfulness and negligence, which is acceptable in suitable instances as long as the essential functions of the two elements — in the case of wrongfulness to indicate that a legally protected interest has been infringed in an unreasonable manner, and in the case of negligence to indicate the blameworthiness of the alleged wrongdoer for such infringement — are not violated (see J Neethling 'The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* at 204ff; contra R W Nugent 'Yes, it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 *SALJ* 557ff).

The application of the above factors may be illustrated with reference to certain cases. Since the decision in *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A) it is trite law that the owner or occupier of land in a rural area which is either personally or through his servants under his control, and on whose property a veld fire is burning, whether it originated on his property or not, in principle has a legal duty to prevent the fire from spreading and causing harm to his neighbours (see *Gouda Boerdery BK v Transnet* (supra) at 499-500; *HL & H Timber Products v Sappi Manufacturing* (supra) at 820; *Van der Eecken v Salvation Army Property* (supra) at 38; *Minister of Water Affairs v Durr* (supra) para 19).

In *Quathlamba* a fire broke out on the defendant's property and despite his attempts to extinguish it, it spread to the plaintiff's land and caused damage. The fire was not started by a servant of the defendant or indeed by any human agency. The court held that although he bore no responsibility for the

origin of the fire, there was a duty on the defendant to contain the fire on land under his control (and he therefore acted wrongfully by failing to do so), but he was not liable for lack of negligence. However, the fact that a landowner had control of the property on which a fire was burning, is in itself not sufficient to establish a legal duty to take precautionary measures. Other factors which according to Ogilvie Thompson CJ in *Quathlamba* (at 81, 83) co-determine the existence of the legal duty, are that the owner was aware that fire had started or spread to his property, that he foresaw or ought reasonably to have foreseen the likelihood that, if not controlled or extinguished, it might spread to and cause damage to or on another's property; and the resources that were available to him to combat the fire.

The fact that mere control of property is not sufficient to establish a legal duty, was also emphasised in *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A). The plaintiff sued for damage caused to his farm by a veld fire which had started on the side of a public road, over which the defendant exercised legislative control, and had spread over a neighbouring farm to the plaintiff's farm. It was alleged that the defendant had a legal duty to make fire-breaks on the sides of the road to prevent the spreading of fire onto neighbouring farm land. Olivier AJA (at 359-60) held that although the element of control is an important factor in the adjudication of the question of wrongfulness, in itself it is not sufficient to establish wrongfulness. The crucial issue is whether the precautionary measures (fire-breaks) which the controller should, according to the plaintiff, have taken in order to prevent the prejudice can in the circumstances be reasonably and practicably required of him (at 361). Factors which play an important role in this regard are, inter alia, the probable or possible extent of the prejudice to others; the degree of risk of such prejudice eventuating; the interests which the defendant and the community or both have in the act or omission in issue; whether there were reasonably practicable measures available to the defendant to avoid the prejudice; what the chances were of the measures being successful; and whether the cost involved in taking such measures was reasonably proportional to the damage which the plaintiff could suffer (at 361-2). The court held that, considering all the facts, the objective criterion of reasonableness did not require the making of fire-breaks by the defendant and its omission was accordingly not unlawful (at 364).

In *Minister of Water Affairs v Durr* (supra) (see J Neethling & J M Potgieter 'The law of delict' 2007 *Annual Survey of South African Law* (2008) at 770-1 for a critical discussion) fire originated from the property belonging to A, over which B allegedly had control and possession, and on which employees of C had stacked up a large number of wattle trees they had felled. The fire spread onto the property of B and from there in turn to the properties of the plaintiffs (respondents). The latter instituted an action for damages against A, B and C. The crux of the matter was whether there was a legal duty on the defendants to prevent the fire from causing damage to the plaintiffs' properties. (Although Ponnar JA (in para 10) argued that the appeal raised questions of liability for so-called pure economic loss, it is difficult to imagine

how damage caused by the fire to the plaintiff's properties could be described as purely economic (see Neethling & Potgieter op cit at 290-1). Ponnann JA (in paras 18 and 19) held that since it is trite that a landowner is under a duty to control or extinguish a fire burning on its land (coupled with the fact that A was acutely aware of the extreme fire hazard created by stacking the felled wattle heaps (para 8)), according to the legal convictions of the community, A had such a legal duty, but not B who, in the court's opinion, did not hold the property in any capacity whatsoever. The latter conclusion is questionable and the opposite minority opinion of Conradie AJA should rather be supported. Having found that B factually exercised possession and control of the property where, to its knowledge, the wattle was stacked and created a fire hazard, Conradie AJA concluded that there was a legal duty on B to prevent the fire from starting and spreading (para 45). As far as C was concerned, Ponnann JA found that it had a legal duty to avoid causing harm to surrounding landowners during the activities of their workers on the property (inter alia by the said stacking), and concluded that the conduct of the workers was clearly wrongful (para 23). In this regard the omissio per commissionem rule was also indicative of C's legal duty (cf Neethling & Potgieter op cit at 58). The stacking of the felled wattles clearly constituted prior positive conduct, creating a new source of danger which C subsequently failed to eliminate with resultant harm.

Apart from the foregoing common law factors that may be indicative of a legal duty to prevent damage by veld fires, legislation may also place an obligation on a person to take preventive steps. A clear example can be found in s 12(1) of the National Veld and Forest Fire Act 101 of 1998, in terms of which landowners have a legal duty to prepare and maintain fire-breaks: 'Every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land' (see Gouda Boerdery BK v Transnet (supra) at 495-6; Van der Eecken v Salvation Army Property (supra) at 38). Although the Act places this obligation on every owner, provision is made for neighbouring owners to co-operate in the sense that they are obliged to burn their fire-breaks on the boundary at the same time (s 12(3)). By doing so, they may agree to make one fire-break between their properties which is wide and long enough to have a reasonable chance of preventing a veld fire from spreading to or from their land, instead of two separate adjoining fire-breaks, each complying with this requirement (see s 13(a)). Owners of adjoining land may even agree to position a common firebreak away from the boundary (s 12(7)). According to Gouda Boerdery BK v Transnet (supra) at 495-6, s 12(1) clearly contemplates the making of fire-breaks on land (veld) on which a veld fire may start, burn or spread. The section is for example thus not applicable to an owner of residential property in a township. If a landowner fails to comply with this section and a veld fire consequently causes damage to neighbouring property, his omission will be prima facie wrongful.

In addition to an owner's duty to make fire-breaks, the Act (ss 17-19) also places a duty on all owners on whose land a veld fire may start or burn or

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from whose land it may spread, to have the equipment, protective clothing and trained personnel for extinguishing fires as are reasonably required in the circumstances. If an owner has reason to believe that a fire on his land or the land of an adjoining owner may endanger life, property or the environment, he must immediately take all reasonable steps to notify the fire protection association (if any) and the owners of adjoining land, and he must do everything in his power to stop the spread of the fire. An owner must ensure that in his absence responsible persons are present on or near his land who, in the event of fire, will extinguish the fire or assist in doing so, and take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any. Causing veld-fire damage by failure to comply with any of these duties will be indicative of a wrongful omission on the part of the owner.

NEGLIGENCE

Where a court finds a perpetrator's commission or omission wrongful, the next question is whether his conduct is also negligent; on the other hand, where his conduct is not judged to be wrongful, the question as to negligence on his part becomes irrelevant (see *Administrateur, Transvaal v Van der Merwe* (supra) at 364). The test to be applied for negligence will be that formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 (see also *Neethling & Potgieter op cit* at 131-2; *Minister of Water Affairs v Durr* (supra) para 10), involving, first, whether a reasonable person would have foreseen damage by fire to another, and second, whether he would have taken steps to guard against such occurrence. If damage was reasonably foreseeable and preventable, the next question is what steps, if any, the defendant actually took (see *Gouda Boerdery BK v Transnet* (supra) at 499). If a reasonable person would have done no more than was actually done, there is no negligence (*Gouda Boerdery BK v Transnet* (supra) at 500). This was indeed the case in *Minister of Forestry v Quathlamba* (supra), where fire started on the defendant's land and despite his attempts to extinguish the fire, it spread to the plaintiff's property and caused damage. The court (at 88-9) held that although the defendant breached his legal duty as a landowner to contain a fire on land under his control, it also found that he acted in accordance with the standard of the reasonable person in attempting to extinguish the fire and that he was thus not liable. Despite the wrongfulness of his conduct in not complying fully with his legal duty, he escaped liability because of the absence of negligence (see *Neethling & Potgieter op cit* at 160-1).

Relevant statutory provisions may be indicative, or provide evidentiary material, of how a reasonable person would have acted in the circumstances (see *Van der Walt & Midgley op cit* at 187). With regard to veld fires, certain provisions of the National Veld and Forest Fire Act 101 of 1998 are apposite. Section 12 of the Act imposes a number of specific duties upon owners of land (or a lessee or other person who legally controls the land: see s 2 of the Act) regarding the preparation and maintenance of fire-breaks, and accord-

ing to Murphy J in *Van der Eecken v Salvation Army Property* (supra) at 38, they should apply equally to any controlled burning exercise undertaken by a landowner. These duties are that if a landowner intends to prepare and maintain a fire-break by burning, he must determine a mutually agreeable date or dates with the owners of adjoining land in doing so, and inform the fire protection association for the area, if any. (Owners may form an association for the purpose of predicting, preventing, managing and extinguishing veld fires and apply for its registration as a fire protection association: see ss 3-8 of the Act.) If agreement cannot be reached, such owner must give to the owners of adjoining land and the fire protection association, if any, at least fourteen days' written notice of the day or days during which he or she intends burning fire-breaks, fire danger permitting. If burning cannot be done on the agreed day or days, the owner must inform the owners of adjoining land and the fire protection association, if any, of the additional days on which he intends to burn. Should an owner intend to be absent for a period longer than fourteen days during the period or part of any period in which burning normally takes place, he must give all owners of adjoining land an address and telephone number, if any, at which he may be contacted. If an owner of adjoining land is not present on the agreed or notified day or days, or has not given an address and telephone number, if any, the owner may proceed with the burning in his or her absence. An owner of adjoining land must burn his fire-break on the boundary on the same day (or days), must be present at controlled burnings and ensure that a sufficient number of persons are present on his side of the boundary to prevent any spread of fire when the fire-break is burned.

Controlled burning is not permitted if the fire protection association objects to the proposed burning, or a warning has been published that the fire danger is high in the region, or the conditions are not conducive to the burning of fire-breaks. (A 'fire danger' is defined in s 2 of the Act as 'the chance of a veldfire occurring or of an existing veldfire getting out of control and, if so, the anticipated rate at which, and intensity with which, it will burn'. Sections 9-11 of the Act establish a comprehensive fire danger rating system involving the Minister, the South African Weather Bureau, fire protection associations and effective communication through the media. A prohibition on the lighting, use or maintenance of fires in the open air comes into force when the Minister warns in the media that the fire danger is high or extreme.) The Act (s 13) also set certain requirements for fire-breaks. The owner must ensure that, with due regard to the weather, climate, terrain and vegetation of the area, a firebreak is wide and long enough to have a reasonable chance of preventing a veld fire from spreading to or from neighbouring land, that it does not cause soil erosion, and that it is reasonably free of inflammable material capable of carrying a veld fire across it.

Finally, s 25(5) makes it a criminal offence for any owner, occupier or person in control of land on which a fire (veld fire or otherwise) occurs to fail to take reasonable steps to extinguish the fire or to confine it to that land or to prevent it from causing damage to property on adjoining land (see *Van der Eecken v Salvation Army Property* (supra) at 38).

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There can be no doubt that if a landowner fails to comply with the above precautionary measures, he deviates from what a reasonable person would have done in the circumstances and his conduct is therefore negligent. In *Van der Eecken v Salvation Army* ((supra) at 39-40) Murphy J explained it thus with regard to the facts in that case. In the first place, a reasonable person in the defendants' position, when embarking upon a controlled burning exercise, would have foreseen the possibility of harm of some kind being inflicted upon landowners (including the plaintiff) in the vicinity of the fire if reasonable precautionary measures were not taken. By failing to comply with well-established methods for controlling burning, the defendants had failed to take adequate precautions to guard against the reasonably foreseeable harm. The plaintiff had accordingly discharged his evidentiary burden that the defendants were negligent.

Normally the onus is on the plaintiff to prove on a preponderance of probabilities that the defendant was negligent (see Neethling & Potgieter op cit at 154). However, where there is a statutory presumption of negligence, the onus rests on the defendant to rebut the presumption in order to escape liability. Section 34(1) of the National Veld and Forest Fire Act 101 of 1998 creates such a presumption in cases of veld fires (see *Gouda Boerdery v Transnet* (supra) at 494-5; *Van der Eecken v Salvation Army* (supra) at 36). The presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire the origin of which he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated (see *HL & H Timber Products v SAPPI Manufacturing* (supra) at 823.) The section provides that where a person proves that he suffered loss from a veld fire which the defendant caused or which started or spread from land owned by the defendant, the latter 'is presumed to have been negligent in relation to the veldfire until the contrary is proved', unless he is a member of a fire protection association in the area where the fire occurred (cf on the predecessors of s 34(1), s 26 of the Forest and Veld Conservation Act 13 of 1941 (see *Van Wyk v Hermanus Municipality* 1963 (4) SA 285 (C) at 293-5); s 23 of the Forestry Act 72 of 1968 (see *Minister of Forestry v Quathlamba* (supra) at 84ff; *Clan Syndicate (Pty) Ltd v Peattie* 1986 (2) SA 791 (A) 796ff; *Titlestad v Minister of Water Affairs* 1974 (3) SA 810 (E) at 814); s 84 of the Forest Act 122 of 1984 (see *Louw v Long* 1990 (3) SA 45 (E) at 54-6; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at 1033-6; *HL & H Timber Products v SAPPI Manufacturing* (supra) at 820ff; *Steenberg v De Kaap Timber* (supra) at 174; *Minister of Water Affairs v Durr* (supra) paras 11 and 20-1; in *Prinsloo* the court held that the reversal of the onus of proof in this section was not unconstitutional).)

According to Scott JA in *Gouda Boerdery v Transnet* (supra) at 495 the predecessors of s 34(1) were cast in such wide terms as to give rise to a need to cut them down in some way. The courts accordingly held that for the presumption of negligence to operate, the plaintiff had to establish a nexus between the fire and the defendant. Fortunately, s 34(1) abandoned the wide

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terms and now prescribes clearly what has to be established for the presumption to arise: the defendant must have caused a veldfire, or a veldfire (and not another kind of fire) must have started on or spread from his land. In other words, the presumption does not operate if the fire that starts on, or spreads from, a defendant's property is not a veldfire on the defendant's property (see *Gouda Boerdery v Transnet* (supra) at 495). There seems to be consensus that '[by] veld is generally understood the [relatively open] uncultivated and unoccupied portion of land, as distinct from the portion which is cultivated, occupied and built upon' (*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 253; *Gouda Boerdery v Transnet* (supra) at 495-6; *Van der Eecken v Salvation Army* (supra) at 40-2; *Van Wyk v Hermanus Municipality* (supra) at 293-4). A fire on a farmhouse 'werf' (*West Rand Estate* (supra) at 253) or a golf course (cf *Van Wyk* (supra) at 294) will thus not qualify as a veld fire, nor will a fire on the land reserve along railway lines which is in reality a strip of land with industrial use (*Gouda* (supra) at 497-8). Of course, if a fire on, for example, a defendant's golf course spreads to his veld and from there to the neighbouring property, the fire causing damage will then qualify as a veld fire (see *Van Wyk* (supra) at 294; cf *Van der Eecken v Salvation Army* (supra) at 41-2). Apart from cases involving loss caused by fires other than veld fires, negligence on the part of the defendant will also not be presumed if, as indicated, the defendant was a member of a fire protection association. In these two instances the onus will therefore remain on the plaintiff to prove negligence on the part of the defendant.

Moreover, the presumption of negligence will in terms of s 34(2) of the Act also not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful. This provision is therefore in conformity with the decision of Nienaber JA in *HL & H Timber Products v SAPPI Manufacturing* (supra) at 820 as regards the immediate predecessor of s 34(1) (s 84 of the Forest Act 122 of 1984), where he held that the presumption of negligence does not relieve the plaintiff of the onus of proving the other delictual requirements, namely wrongful conduct, causation and damage (see also *Minister of Water Affairs v Durr* (supra) para 20).

CAUSATION

Apart from a wrongful act and negligence, a plaintiff will also have to establish causation before he is entitled to succeed (see *HL & H Timber Products v SAPPI Manufacturing* (supra) at 820; *Gouda Boerdery v Transnet* (supra) at 500; *Minister of Water Affairs v Durr* (supra) para 10; see also s 34(1) of the National Veld and Forest Fire Act 101 of 1998, which requires a plaintiff to prove that he suffered loss from a veld fire which the defendant caused). Factual as well as legal causation must be established (see generally Neethling & Potgieter op cit at 177ff, 187ff; Van der Walt & Midgley op cit at 198-211). This entails first that the plaintiff must factually have suffered loss from a veld fire as a result of the defendant's conduct (positive act or omission), and here the 'but for' or conditio sine qua non test is decisive;

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CONCLUSION

A delictual claim requires the plaintiff to prove that the defendant's conduct was wrongful, that the plaintiff suffered loss, and that the loss was caused by the defendant's conduct. Factors which may be taken into account in determining whether an omission constitutes negligence include: the defendant's knowledge of the danger, the foreseeability of the damage, and the defendant's failure to take reasonable steps to prevent the damage. The following factors are relevant in determining whether the defendant has acted negligently: the defendant's knowledge of the danger, the foreseeability of the damage, and the defendant's failure to take reasonable steps to prevent the damage. The following factors are relevant in determining whether the defendant has acted negligently: the defendant's knowledge of the danger, the foreseeability of the damage, and the defendant's failure to take reasonable steps to prevent the damage.

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INTRODUCTION

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secondly, damage must not be too remote (cf *Clan Syndicate v Peattie* (supra) at 802), and here the basic question is whether there was a close enough relationship between the defendant's conduct and the damage caused by the fire for such damage to be imputed to him in view of policy considerations based on reasonableness, fairness and justice.

CONCLUSION

A delictual claim for damage caused by veld fires can succeed only if all the requirements of a delict are present. Harm to persons or their property by veld fires may be caused by commissions as well as omissions. The latter form of conduct should be distinguished from an 'omission' which is merely indicative of legally deficient prior positive conduct and therefore negligence. Whereas a commission is prima facie wrongful, the wrongfulness of an omission depends on the existence of a legal duty to prevent the harm. Factors which are indicative of such a duty in instances of veld fires are, inter alia, the following: control of a dangerous (or potentially dangerous) fire; the obligation to obey certain statutory precepts; the awareness or knowledge of a dangerous veld fire; the foreseeability or reasonable foreseeability that failure to take preventive steps against a veld fire could cause harm to others; and practical steps that could have been taken to prevent the loss. Negligence is ascertained by the reasonable foreseeability and preventability of fire damage. Statutory provisions may be indicative of how a reasonable person would have acted in the circumstances. In cases of veld fires a statutory presumption of negligence places the onus of rebuttal on the defendant. Finally, factual as well as legal causation must be established.

THAT 'DEVILISH LITTLE POINT' — THE IMPACT OF SECTION 6(1) OF THE TRUST PROPERTY CONTROL ACT 57 OF 1988 ON THE CAPACITY OF TRUSTEES TO CONTRACT, SUE, AND BE SUED: *LUPACCHINI NO & ANOTHER v MINISTER OF SAFETY AND SECURITY*

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INTRODUCTION

The trust is an institution that has developed in the South African common law (see Edwin Cameron, Marius de Waal, Basil Wunsh, Peter Solomon & Ellison Kahn *Honore's South African Law of Trusts* 5 ed (2002) at 21–4), unlike a company which owes its existence to statute. The appointment and powers of a trustee are determined by the will or contract in terms of which the trust is founded (ibid at 179; *Deedat v The Master* 1998 (1) SA 544 (N) 548G–H; see also *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 10 and *Erwee NO v Erwee NO* [2006] 1 All SA 626 (O) at 629).