IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA) 25/01/2017.

Case No: 66861/2014

In the matter between:

BEDROCK MINING SUPPORT (PTY) LTD Plaintiff

and

GREATER TZANEEN LOCAL MUNICIPALITY First Defendant

MOPANI DISTRICT MUNICIPALITY Second Defendant

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

25/1/17
DATE SIGNATURE

JUDGMENT

D S FOURIE, J:

(1) The plaintiff is a timber company and the owner of the Leobi Plantation near Tzaneen. The first defendant is the Tzaneen Local Municipality and the owner of certain land known as the Hamabuya Farm. The second defendant is a district municipality with a fire brigade service as defined in section 1 of the Fire Brigade Services Act, No 99 of 1987.

(2) The plaintiff claims payment of R1 817 355.10 against the first and second defendants jointly and severally pursuant to a fire which destroyed part of the plaintiff's Leobi Plantation. The case against the first defendant was settled on the first day of the trial on the basis that the first defendant would pay the plaintiff an amount of R1 million plus 50% of the plaintiff's costs. The trial then proceeded against the second defendant only after the issue of liability had been separated from the issue of quantum by an order of Court.

(3) In essence, the plaintiff's case is that on Sunday 5 August 2012 part of the first defendant's farm land was on fire. After the second defendant had been alerted, this fire was apparently distinguished. On Monday 6 August 2012 this fire reignited and the second defendant was again alerted. Sometime later the fire became uncontrollable and spread to other properties, including that of the plaintiff. The second defendant denies any liability.

THE PLEADINGS

(4) It is alleged by the plaintiff in its particulars of claim that the second defendant had a legal duty (or a duty of care) in terms of the common law to, *inter alia*, extinguish and/or contain a fire whilst it was still small and to prevent such fire from reigniting and/or spreading to neighbouring properties including that of the plaintiff. It is also alleged that in terms of section 18(1)(b) of the National Veld and Forest Fire Act No 101 of 1998 the second defendant had a statutory duty to do everything in its power to stop the

spreading of fire. It is also pleaded that in terms of the provisions of section 84(1)(j) of the Local Government: Municipal Structures Act 117 of 1998 the second defendant, as a district municipality, has the function and powers of fire-fighting services serving the area of the district municipality as a whole and that it acted wrongfully by failing to call timeously for aerial assistance to extinguish the fire.

(5) According to the plaintiff the start of the fire, the uncontrolled burning of it and the spreading thereof from the first defendant's property to the plaintiff's property was caused by the wrongful breach of the second defendant and/or its agents or employees of the legal and statutory duties referred to above. It is also alleged that the second defendant was negligent by, *inter alia*, failing to extinguish a veld fire on the first defendant's property at a time or times when they were able to do so, when the fire was still small and containable, and by allowing it to become out of control and to spread to neighbouring properties.

(6) The second defendant has raised three special pleas, all being to the effect that it had been misjoined in these proceedings. The first special plea is that the municipal employees/members of the fire brigade service were exercising and/or performing a delegated statutory authority in terms of section 19 of the Fire Brigade Services Act No 99 of 1987 "for which the second defendant had no control". In its second special plea the second defendant relies on the provisions of section 20 of the Fire Brigade Services Act. It provides for an indemnity in favour of a controlling authority, Chief Fire

Officer or member of a service with regard to, *inter alia,* damage to property which is caused by or arises out of or in connection with anything done or performed *bona fide* in the exercise or performance of a power, function or duty. The third special plea was raised in answer to the plaintiff's allegation that the second defendant was at the relevant time a person in control, in occupation or the owner of the property identified as the Farm Hamabuya. It is now common cause that the second defendant was not in control, in occupation or the owner of the said property. It also transpired that the plaintiff's case is no longer based on this allegation. Therefore, the third special plea is no longer an issue before me.

(7) As far as the merits are concerned, liability has been denied. The second defendant has pleaded that a legal duty imposed on it to provide fire-fighting services, "if proved by the plaintiff", is limited to the availability of resources to provide such service. It has also pleaded that the plaintiff had the obligation to take reasonable steps to ensure that the fire does not spread to its own property. It is further alleged, in the alternative, that if it is found that the second defendant, through its employees and/or agents, acted wrongfully and negligently, that the plaintiff was contributory negligent in that it, *inter alia,* failed to take any, alternatively adequate steps to control and/or prevent the continuous burning of a veld fire on the Hamabuya Farm and/or at the plaintiff's own farm and also to prevent a veld fire from spreading from the Hamabuya Farm onto neighbouring properties.

(8) The parties have also agreed in writing on certain common cause facts and what the main issues in dispute are (exhibit "X"). It is not necessary to refer to this document now, but I will do so later when it becomes necessary. I shall now proceed to summarise the evidence.

EVIDENCE FOR THE PLAINTIFF

Butch Baker

(9) Mr Baker was called to explain some of the entries which had been made in the logbook of the Letaba Fire Protection Association ("LFPA") on Sunday afternoon, 5 August 2012. He was the base manager and despatcher at the offices of the LFPA where there was also an airfield. According to him a spotter plane and a helicopter were on standby to combat veld fires. Also stationed at the offices of the LFPA was a Working on Fire team consisting of 22 fire fighters who were also on standby and ready to be deployed.

(10) As a member of the LFPA the first defendant was entitled to call out the spotter plane, the helicopter and the Working on Fire team. The second defendant, not being a member, could have done the same through the first defendant. The second defendant could also obtain these services if it was authorised by the Disaster Management or the Municipal Manager of the second defendant.

(11) The fire was reported to the LFPA at 15:51 on Sunday afternoon 5 August 2012. Attempts to contact Mr Visser who was the Chief Fire Officer of the second defendant or the Municipal Manager of the first defendant were unsuccessful. At that stage the fire was burning on the municipal land of the first defendant. At 16:43 the fire brigade services reported that the fire was still in a river bed but once allowed to get out of it, there would be big trouble.

(12) At 16:49 the witness informed the Disaster Management Centre of the second defendant that there was still 40 minutes flying time left for aerial assistance. According to him water could have been dropped by the helicopter on the fire to extinguish it. The Working on Fire team could also have been activated to do fire-fighting or mop-up. However, there was no callout for either the Working on Fire team or the aerial assistance which was available.

Fanie Venter

(13) Mr Venter is the airbase manager and dispatcher at the LFPA. During August 2012 his occupation was that of a dispatcher. His work was to receive a call for assistance and then to dispatch the resources as requested. He testified about logbook entries which had been made on Monday 6 August 2012.

(14) On 6 August 2012 at 11:12 he tried to contact the Disaster Management Centre of the second defendant, but could not get an answer.

At 11:48 when Hannes Enslin of another farm requested aerial support, he spoke to Ms Altenroxel from the Disaster Management Centre of the second defendant and also gave her the information. He confirmed that at 13:34 it was reported by Bravo 2 (who was Ludwig Stemmet, an employee of the second defendant) that the fire was out of control and that they could not do anything at that stage.

(15) Aerial support was activated for the first time at 13:40 by Hannes Enslin of the Farm Merensky to protect their own plantations. At 13:53 Hannes Steyn who was the head of the Disaster Management Centre of the second defendant, stated over the radio that they had authority but it was too late as the aircraft was already being employed by Merensky at their plantation. He also reported that at 13:53 the plaintiff asked that the helicopter should go to Bedrock's new Reeds Plantation after completion of the Blacknoll fire at Merensky. At 14:11 Ludwig Stemmet reported that the fire was making spots (jumps) of ± 3km. At 15:42 it was reported that Koos and Etienne of the plaintiff were on their way to Leobi and that the fire which was out of control at 16:04, jumped to the Leobi plantation at 16:29.

(16) In cross-examination it was put to the witness that if the plaintiff had requested aerial support before or immediately after Blacknoll, it would have been possible to provide that support. His reply was that the plaintiff's property is not in the same area where the fire was at that stage. According to him "they only got into part of this fire late that afternoon". It was also suggested to him that the responsible person to mobilise aerial support at

that point was the first defendant and not the second defendant. He replied as follows:

> *"... I would say that that would be wrong as they have access to the aerial support. But in that week they pulled aerial support to another fire ... later that day they pulled it away from the Blacknoll Plantation. So they could have called it to their site earlier to try to kill that fire, to try and stop it or to slow it down".*

(17) It was also put to him that it would not have been unreasonable of the plaintiff to mobilise aerial support before or immediately after Blacknoll. His reply was that the plaintiff would not have called for any resources when a fire is 5 to 6 kilometres away from them. He emphasised that the fire was on another property, not threatening the plaintiff directly and therefore it would not have been necessary for the plaintiff to request aerial support to protect its property at that stage.

Andries Khoza

(18) Mr Khoza is employed by Hans Merensky Timbers as a supervisor. They are the owners of the Blacknoll Plantation. He has 26 years of experience in fire-fighting. He testified that during this period he was combating between 10 and 20 fires per annum. On many occasions he also witnessed how helicopters were assisting in the extinguishing of fires.

(19) On Sunday 5 August 2012 he was on standby. According to him there was a fire and smoke on the first defendant's property, Hamabuya Farm. He and his people then started to combat the fire. He noticed a big truck stationary at the main road as well as small trucks which were stationary at the power line. At about 17:17 the fire was in the ravine area, but they were able to contain it. There was no strong wind but there were still stumps smouldering in the ravine area. They had to mop-up, i.e. make sure the smouldering stumps are properly extinguished by using water to avoid a flare up at a later stage. They did not perform the mop-up operation as employees of the municipality were there and they thought that these employees would do the mop-up. He later indicated that the trucks which he had noticed belonged to the fire brigade.

(20) He was also questioned about aerial assistance. According to him three or four drops of water by the helicopter would have extinguished this fire. He confirmed that there are dams in the vicinity from where the helicopter could have obtained the water.

(21) In cross-examination it was suggested to him that with the assistance of more people the fire could still have been extinguished. His reply was that if there had been enough manpower they would have been able to extinguish the fire. It was also put to him that Mr Stemmet, together with some of his colleagues, were combating the same fire until 21:00 that night. He was unable to dispute that.

Johannes Enslin

(22) During 2012 Mr Enslin was a planning manager employed by Merensky Timbers, a forestry company with offices at Blacknoll which is situated just south of the first defendant's farm, Hamabuya. He started in 1978 as a forester. For about eight months every year he performed fire duty and according to him, he is "quite involved in it". He has also witnessed the effectiveness of helicopters and spotters in the extinguishing of fires.

(23) He testified that the first defendant had prior to 5 August 2012 failed to maintain the roads on its property and had allowed existing roads to become overgrown with vegetation. This prevented fire-fighters on Sunday 5 August and Monday 6 August 2012 to reach all the burning areas on the first defendant's property with their fire-fighting vehicles to extinguish or to suppress the fire. According to him the fire could have already been suppressed or even extinguished on the Sunday afternoon, or the Monday morning, if the fire-fighters had been able to reach all the affected areas on accessible roads.

(24) According to his evidence as summarised in the Rule 36(9)(b) notice, he also pointed out that, despite their appreciation of the danger of the fire on the Sunday afternoon, the second defendant failed to utilise the services of a Working on Fire team and it also failed to utilise aerial support which was available on both the Sunday afternoon and the Monday morning. Water was available from three nearby dams to combat the fire with a

helicopter. The turnaround time of a helicopter is between three to five minutes and at that time and with a few loads of water the fire could have been extinguished.

(25) He also testified that Sunday was a pleasant afternoon. The prediction for the next week according to the Fire Danger Index, i.e. from the Monday onwards, was not so good. The prediction for the Monday was a "high fire rating" which means that "we are going into a very difficult fire prevention period". According to the witness this information is usually sent through to the LMPA twice on a daily basis from where it is distributed to inform everybody concerned. He was of the view that the second defendant should also have received this information as it is "going through to the ops room in the fire brigade".

(26) According to his evidence as summarised in the Rule 36(9)(b) notice it was reported on Monday at about 11:05 that the fire had stood up again. At 11:08 Disaster Management was phoned but there was no answer. The witness then went to the area on the first defendant's property to assist. At about 11:48 he pleaded with the first and second defendant to get aerial support to combat the fire on the first defendant's property and also requested a grader to grade the roads to enable fire-fighters to gain access to the first defendant's property. The grader never arrived.

(27) According to the witness a few drops of water by the helicopter and one extra Working on Fire team would be able to extinguish the fire

completely between 09:00 and 13:00 on Monday. He also pointed out that the dispute between the first and second defendant on Monday about the deployment of Working on Fire teams and aerial support continued until late that afternoon when the fire was already out of control. The cost to deploy the chopper would have been R20 376.00 plus VAT and another R60.00 per hour for foam. For a Working on Fire team only transport was payable at the rate of R13.00 per km and daily rations of R50.00 per person.

(28) In cross-examination the witness explained that early on the Monday morning until about 11:00/12:00 it was still a calm day. The actual problem started after 12:00 when the weather conditions changed for the worse. However, according to the witness the fire could still be contained before 13:00. After that, when the fire became uncontrollable, it was moving in the direction of Leobi and the shooting range. It then also started spotting in that direction "by the wind". He also explained that another fire was burning on the plaintiff's other property at New Reeds Plantation where the plaintiff's employees were fighting that fire. He estimated the distance between the two properties between 35 and 40 kilometres.

Simon Venter

(29) Mr Venter is a spotter pilot and he was employed in that capacity by Working on Fire during August 2012. He has 12 years experience as a spotter pilot. He explained that the spotter plane serves as the "eye in the

sky" and will direct a helicopter where to throw water on a fire and it will also direct ground teams where to move in by way of radio communication.

(30) He was on standby duty as the spotter pilot with Mr Paul Bester, the helicopter pilot on Sunday and Monday at the airfield base. There were also Working on Fire teams available at the base as well as two dispatchers, Mr Baker and Mr Venter. According to him water was close by and they would be able to do ten drops within one hour, which is 90 000 litres of water on that fire. According to him they could already have extinguished the fire on the Sunday afternoon. He was surprised that they were not called out on the Sunday, as the weather prediction for the Monday was that the wind would start at approximately 10:30. He explained that "when the western wind comes tomorrow there is nothing".

(31) On Monday morning he and the helicopter pilot were again on standby duty. They could see that the smoke column was getting bigger and bigger and they said to themselves "you had better call us". That was approximately 10:00 Monday morning. It was only at 13:40 that they were called out to go and assist people from Blacknoll. He explained that the fire which spotted onto the Leobi Plantation was the same fire which started on the first defendant's farm. He also confirmed the logbook entries indicating that at 16:29 "brand het gespring na Leobi-plantasie". According to him the fire was then running out of control everywhere.

Ian Sales

(32) During August 2012 Mr Sales was the forestry manager of the plaintiff for the Tzaneen area. He was living on the Leobi Farm. He testified with reference to a document titled "Fire Preparedness Audit" dated 1 August 2012 that at the time of the fire the plaintiff complied with the norms and requirements of the industry as far as safety, health, environment and quality (SHEQ) were concerned. On the Sunday afternoon employees of Blacknoll and a representative of the plaintiff went out to the fire to assess it and to decide whether it was necessary for the plaintiff to assist. At that stage the fire did not pose a threat to the plaintiff's property as the wind was blowing away from them and the fire was far away from their plantation. A fire-fighting team of Merensky Timbers as well as the fire brigade were at the scene where the fire was.

(33) On the Monday morning they were called out to their new Reeds Plantation which is 30 km away from the Leobi Plantation. There was a fire in the vicinity of the new Reeds Plantation and as the wind was blowing towards their plantation, they went out in full force to prevent the fire getting to the new Reeds Plantation. Later that day at approximately 15:15 the Fire Protection Association informed them that there is a serious threat to the Leobi Plantation. He and a colleague then left to ascertain the situation at the Leobi Plantation.

(34) According to the witness there was a firebreak at the boundary of their property facing the Hamabuya Farm. The width of this firebreak varied between 150 and 200 metres which, according to the witness, are much wider than what is required. When asked how could the fire get across this wide firebreak he explained that the weather that afternoon at 16:00 was so bad that this fire had jumped 350 to 500 metres. This happens when the wind carries burning material in the air and then deposits it in front of the fire from where a new fire is then created. He also said that under those circumstances it would not be safe to do a back burn as "the wind was just too strong".

(35) In cross-examination he explained that they had mobilised all their fire-fighting equipment and personnel to fight the fire at the new Reeds Plantation and in the process the Leobi Plantation was left unattended. He also said it is accepted practice in forestry that when you have a fire threat you hit it "with everything you have". It was then put to him that it was in contravention of the law to leave the Leobi Plantation unattended. His answer was that when the fire had jumped into the Leobi Plantation, they were present. He was then again confronted with their decision to mobilise all their forces to the new Reeds Plantation well aware of the fact that there was a fire at the Hamabuya Farm and also having regard to the weather forecast for that particular day. He replied as follows:

> *"... Our protocols works as such, when we get a fire callout, when there is fire in our plantation we meet it with everything we have.*

We cannot then take our forces and split them for where something could happen ... so we take everything we have and we go and hit the threat that (is) imminent. If a second threat will then appear we will then make an adjustment in the plan we have, how are we going to react, do we have a neighbour that can cover for us, do we have a fire brigade that can cover for us or how would we then treat the second imminent threat. But we cannot, when the first threat happens, keep people back if a second threat might happen. We do not have that many resources ...".

(36) It was also put in cross-examination that on the Monday morning the second defendant pulled human resources and equipment from as far as Phalaborwa, Giyani and Sekororo to come and assist in minimising the potential damage which could be caused by this fire. The reply was that the fire was already out of control when these steps were taken. The witness also explained that "if it had happened early in the morning it would have made a big difference".

Trevor Phillips

(37) Mr Phillips, the chairperson of the Letaba Fire Protection Association since 2007, was called as an expert witness. He has 23 years experience with Stevens Lumber Mills and was involved in combating more than 460 fires.

(38) According to this witness the second defendant as a district municipality was obliged in terms of the National Veld and Forest Fire Act to

become a member of the Fire Protection Association. He testified that the second defendant was requested many times to become a member which never materialised. He also had a meeting with the former municipal manager in this regard, but notwithstanding this meeting and for some unknown reason the second defendant never became a member. He also explained that when the Fire Protection Association was registered he had to obtain a signature from the municipal manager for registration at the Department of Agriculture, Forestry and Fisheries. It took them two and a half years to get a signature from the municipal manager. That was only done after one of the larger timber companies had sent them a lawyer's letter of demand that the municipal manager should sign the document concerned.

(39) He further testified that a normal landowner who is not a member of the Fire Protection Association will not be entitled to call for aerial assistance, but with regard to a district municipality the position is different. According to him a district municipality has an obligation to render a service and therefore it may request aerial assistance when necessary, but it will still be liable for payment of the account. Therefore, according to him, the second defendant was entitled to request aerial support as well as the services of Working on Fire on the Sunday and Monday if they wished to do so. This indeed happened during the same week when the second defendant commanded aerial support to combat a fire elsewhere close to the bird sanctuary.

(40) According to the witness the defendants failed to make use of aerial support and Working on Fire teams which were both available on 5 and 6 August 2012 to extinguish the fire at a time when it was still containable and possible to do so. As a result of this failure the fire had become uncontrollable whereafter it was spotting from the first defendant's property to other properties. As far as the plaintiff's conduct is concerned, he was of the view that it could not prevent the uncontrollable fire from spreading to the plaintiff's property and to that of his neighbours.

(41) In cross-examination it was suggested that on the Monday morning before 12:00, when it was still a normal day, the second defendant could not have foreseen that the fire would all of a sudden at a later stage get out of control. The witness disagreed. He explained that the second defendant who has a fire service and "who should know the nature of fire, and to know that under the conditions of the future forecast, the chances that it will become uncontrollable is very high with the resources they had at the time".

Richard Wolff

(42) Mr Wolff is employed as a technical officer at the Institution of Fire Engineers, Southern Africa. He was also called as an expert witness who testified with reference to a summary of his expert opinion contained in a Rule 36(9)(b) notice. According to him the second defendant is in terms of section 84(1)(j) of the Local Government: Municipal Structures Act No 117 of 1998 responsible for fire-fighting services in the Tzaneen area. This

responsibility includes training of fire officers, the establishment of specialised fire-fighting services, coordination and the regulation of fire services.

(43) According to his opinion the second defendant neglected its duties as a fire-fighting service by not preventing the spreading of the fire and by not extinguishing the fire when it was opportune to do so. Both defendants failed to make use of aerial support and Working on Fire teams which were both available on 5 and 6 August 2012 to extinguish the fire at the time when it was still possible to do so.

EVIDENCE FOR THE SECOND DEFENDANT

Bernadine Altenroxel

(44) Ms Altenroxel is an employee of the second defendant and she was called to explain certain entries in the logbook of the Disaster Management Centre. She testified that Hannes Steyn is the head of the Mopani Disaster Management Centre. Mike Rabothatha was employed by the first defendant as the disaster manager for the Greater Tzaneen Municipality. The "TZB" is a reference to the Tzaneen Fire Brigade. Kobus Visser is employed by the second defendant and he is the Chief Fire Officer for the district. She confirmed that Vincent van der Westhuizen, the assistant fire chief officer, was on leave on 5 and 6 August 2012.

(45) On 6 August 2012 at 11:59 she called Mike Rabothatha to request aerial assistance. He said he was going to the scene and will talk to Olga regarding the use of a grader. She confirmed that she had informed him of the possibility that the fire danger index would reach "orange this afternoon". The grader never arrived because it was not in a working condition.

(46) In cross-examination she confirmed that according to the entries in the logbook the fire was out of control at 13:32 on Monday 6 August 2012. At 14:12 it was reported that the fire had jumped about 3 km. She also conceded that at 15:23, long after the fire had become uncontrollable, she was authorised to activate one team from Giyani and another one from Phalaborwa to assist.

Ludwig Stemmet

(47) Mr Stemmet is an employee of the second defendant and on 5 August 2012 he was the Station Officer, Fire Prevention. He explained some of the entries which had been made in the Incident Book of the Disaster Management Centre on 5 August 2012. He also went out to the scene where the fire was and assisted other personnel to do some back-burning at one section. He left the scene at 20:47 and according to him by that time the fire had already been extinguished.

(48) The following day at approximately 12:00 they were again alerted about another fire. According to him this fire did not start at the same place

as the fire of the previous day, but it was still in the same area. He then requested backup assistance and also tried to contact Mike Rabothatha from Disaster Management. Later on the fire jumped a section of the road whereafter it "was just jumping the whole time". He was unable to attend to all the fires as he had to move from the one place to the other. According to him there were houses close to the dumping site as well as people at the offices of the SPCA. About eight farms were affected by this fire.

(49) He confirmed that it was necessary to call for aerial support before the fire had become uncontrollable on 6 August 2012. In support of this answer he also said the following:

> *"The only way that we were going to be able to control that fire with the prediction that we received the day beforehand already was with aerial support. We work on the principle that if you have aerial support you have got two systems working ... you take them with water, you draw water lines, you stop the fire there and then you bring in ground crews to mop up and kill that fire. The ferocity of the fire and the wind was very high that day."*

(50) The witness was then asked to indicate at what time aerial support had been requested. According to him it was approximately 12:58. When asked why he did not call for aerial support when he could not get hold of Mike Rabothatha, he said that it was the responsibility of the landowner, i.e. the first defendant to do so. In that event it would also be the first defendant

to take responsibility for payment of the account. He did not indicate that it was impossible for him to also have called for aerial support.

(51) In cross-examination he conceded that on the Sunday night he only had made observations from his vehicle. He did not do an inspection to check all the stumps. He also conceded that during August 2012 he, Kobus Visser and Vincent van der Westhuizen were all acting in the course and scope of their employment with the second defendant. According to him policy and decision-making were the responsibility of the officials of the second defendant, such as the various municipal managers and the Director of Community and Safety and not that of lower level officials.

Vincent van der Westhuizen

(52) Mr Van der Westhuizen was the Assistant Chief Fire Officer employed by the second defendant during August 2012. He testified that all the people employed by the Tzaneen Fire Station are professionally trained fire-fighters. They make use of state of the art equipment and vehicles that comply with national standards. According to him the second defendant as a district municipality was and still is in a position to pull resources from different stations, i.e. Giyani, Modjadjiskloof, Phalaborwa and Tzaneen Fire Station. On 5 and 6 August 2012 he was on leave.

DISCUSSION

(53) It was contended on behalf of the plaintiff that the second defendant had failed to fulfil its statutory duties in a number of respects as prescribed by various statutes, i.e. the Veld and Forest Fire Act 101 of 1998, the Fire Brigade Services Act 99 of 1987, the Local Government: Municipal Structures Act 117 of 1998 and the Disaster Management Act 57 of 2002. It was also submitted that the second defendant had failed to make use of aerial and Working on Fire teams support when they could and should have done so to prevent the fire spreading to other properties, including that of the plaintiff. This failure, so it was argued, amounts to negligent conduct which was the sole cause of the damages suffered by the plaintiff.

(54) The second defendant was relying on the special pleas referred to above. It was contended, having regard to the merits of these special pleas, that the plaintiff's claim should be dismissed. It was also argued, having regard to the onus of proof, that the plaintiff was unable to prove on a balance of probabilities that the fire of the 6th of August 2012 reignited from or was caused by the fire of the 5th of August 2012. It was contended in the alternative that if it is found that the second fire was indeed caused by the first fire, and that it could have been extinguished had aerial support been mobilised timeously, "that the omission to provide aerial support and/or call for aerial support was a *novus actus interveniens*". It was suggested, as I understand the argument, that it was the first defendant's responsibility to do so and not that of the second defendant. Finally it was submitted, if it is

found that the second defendant was negligent, that the plaintiff was contributory negligent. I shall first consider the special pleas raised by the second defendant.

FIRST SPECIAL PLEA

(55) The first special plea is that the municipal employees/members of the Fire Brigade Service were exercising and/or performing a delegated statutory authority in terms of section 19 of the Fire Brigade Services Act No 99 of 1987 "for which the second defendant had no control" and can therefore not be held liable for their negligent conduct.

(56) Section 19(1) provides as follows:

> *"A Chief Fire Officer may –*
>
> *(a) delegate any power granted to him by or under this Act, the regulations contemplated in section 15 of the by-laws or regulations contemplated in section 16, excluding the power referred to in this section, to a member of the service concerned; and*
>
> *(b) grant authority that a duty so assigned to him may be performed by such a member."*

(57) Section 19(2) stipulates that a power so delegated and a duty so authorised shall be exercised or performed subject to the directions of the Chief Fire Officer, who may at any time withdraw such delegation or authority.

In terms of subsection (3) a delegation does not prevent the Chief Fire Officer from exercising the power in question himself.

(58) In section 1 of the Fire Brigade Services Act the Chief Fire Officer is defined as "the person in charge of a service as contemplated in section 5". Section 5(1) provides that a controlling authority shall appoint a person who possesses the prescribed qualifications and experience, as Chief Fire Officer to be in charge of its service.

(59) In terms of section 1 of this Act "service" means a fire brigade service intended to be employed for, *inter alia*, preventing the outbreak or spread of a fire, fighting or extinguishing a fire and the protection of life or property against a fire. A "controlling authority" means a "local authority in control of a service" or the person in control of a designated service.

(60) It was submitted, with reference to these statutory provisions, that the fire fighters who had been combatting the fire on the 5th and 6th August 2012 were performing functions imposed upon them by statute and were therefore under the control of the Chief Fire Officer and not that of the second defendant. I cannot agree with this submission for the reasons stated below.

(61) First, according to its preamble the purpose of the Fire Brigade Services Act is to provide for the establishment, maintenance, employment, coordination and standardisation of fire brigade services and for matters connected therewith. The provisions of this Act should, as far as possible, be

read with the provisions of section 84(1)(j) of the Local Government: Municipal Structures Act, No 117 of 1998. It provides that a district municipality has, *inter alia*, fire-fighting services serving the area of the district municipality as a whole, as part of its functions and powers. It includes the planning, coordination and regulation of fire services. This implies, in my view, that a fire brigade service, the chief fire officer and the members are to perform their functions and duties under the authority and control of a district municipality, such as the second defendant, unless otherwise provided for. The fact that this Act assigns certain powers and functions to a fire brigade service and its Chief Fire Officer (including his power of delegation), does not detract from the control to be exercised by the local authority concerned. The purpose of this assignment of powers and functions, including that of delegation, is to comply with the principle that the exercise of power must be authorised by law. Every incident of public power must be inferred from a lawful empowering source, usually legislation. Put differently, if an action is performed without lawful authority it will be illegal or *ultra vires* (Hoexter, *Administrative Law in South Africa,* 2nd Ed, 255). It should also be pointed out that these powers and functions have not been delegated by a local authority (such as the second defendant), but by Parliament.

(62) Second, Mr Stemmet who was the Station Officer, Fire Protection during August 2012, confirmed in cross-examination that during this period he had always acted in the course and scope of his employment with the second defendant and that the Chief Fire Officer, Mr Visser and the Assistant Chief

Fire Officer, Mr Van der Westhuizen acted likewise. There is no reason to doubt his evidence in this regard. Furthermore, it was pointed out during argument that the plaintiff's case against the second defendant is not limited to the actions of the fire brigade service and its members, but it also includes the conduct of other employees and officials at the managerial level of the second defendant. This is, in my view, a valid submission. Having regard to all these considerations I have to conclude that there is no merit in this special plea.

SECOND SPECIAL PLEA

(63) In its second special plea the second defendant relies on the provisions of section 20 of the Fire Brigade Services Act. It relates to a statutory indemnity which is being granted to a controlling authority (i.e. a municipality in this case), Chief Fire Officer or member of a service.

(64) Section 20 provides as follows:

> *"Subject to the proviso to paragraph (e) of section 8(1), a controlling authority, Chief Fire Officer or member of a service of a controlling authority or an inhabitant referred to in section 8(2) shall not be liable for any damage or loss as a result of bodily injury, loss of life or loss of or damage to property which is caused by or arises out of or in connection with anything done or performed bona fide in the exercise or performance of a power, function or duty conferred or imposed in terms of this Act, the regulations*

contemplated in section 15 or the by-laws contemplated in section 16."

(65) In essence, the plaintiff's case is that the second defendant failed, in a negligent manner, to extinguish and/or prevent the fire from spreading to the plaintiff's property as a result whereof the plaintiff suffered damages. The question therefore arises whether this indemnity also applies to a delictual claim based on an alleged "negligent omission".

(66) It is a principle of our law that a statutory provision which purports to limit or exclude liability must be strictly construed. This has been explained as follows in *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185:

"Conditions which clog the ordinary rights of an aggrieved person to seek the assistance of a court of law should be strictly construed and not be extended beyond the cases to which they expressly apply."

(See also in this regard *Commissioner for SARS & Another v TFN Diamond Cutting Works (Pty) Ltd* [2005] 2 All SA 455 (SCA) par 12.)

(67) Powers, functions and duties conferred or imposed in terms of this Act are referred to in section 1 (the definition of "service") and section 8. There may be more in the regulations or by-laws, but no reference was made to them by any of the counsel.

(68) In terms of section 1 a fire brigade service is intended to be employed for, *inter alia*, preventing the outbreak or spread of a fire; fighting or extinguishing a fire; and the protection of life or property against a fire or other threatening danger. Section 8(1) provides that a member of a service, including a Chief Fire Officer, may, whenever he regards it necessary or expedient in order to perform his functions, "perform any act", and may also, *inter alia*, close any road or street; enter or break and enter any premises; and damage, destroy or pull down any property.

(69) It is important to point out that in terms of section 20 the indemnity relates to "anything done or performed" *bona fide* in the exercise or performance of a power, function or duty. It implies some form of action as opposed to inaction. The same underlying notion appears in section 1 (definition of "service") and section 8(1)(a) to (e).

(70) In *Simon's Town Municipality v Dews & Another* 1993 (1) SA 191 (A) the Court was essentially seized with an interpretation of section 87 of the now repealed Forest Act No 122 of 1984. It provided as follows:

> *"No person, including the State, is liable in respect of anything done in good faith in the exercise of a power or the carrying out of a duty conferred or imposed by or under this Act."*

(71) On appeal in that case it was contended that this section creates a legal immunity in favour of a person who in good faith exercises a power conferred by or under the Act, even in cases where the person concerned is

negligent, in the sense that in exercising the power he fails to take reasonable precautions to eliminate or minimise the risk of injury which his action may cause to others. Corbett CJ concluded as follows (at p 196 J) in this regard:

> *"The person sought to be held liable must show that he acted within the authority conferred by the power in question. It necessarily follows that if, owing to a failure to exercise due care or to take reasonable precautions, he exceeded the power and acted without authority ... his reliance on s 87 must fail."*

The Court also found that a failure to take adequate precautions to ensure that the fire did not break out and spread, means that the municipality cannot rely on the indemnity contained in section 87 (at 197 E-F).

(72) The similarities between the wording of section 20 of the Fire Brigade Services Act and that of section 87 of the now repealed Forest Act are striking. Both sections postulate two requirements for legal immunity: the act in question must have been done in good faith and it must have been performed in the exercise of a power or duty under the Act. Furthermore, the person seeking to rely on section 20 of the Fire Brigade Services Act bears the onus of establishing that his conduct falls within the ambit of this section (*cf Simon's Town Municipality v Dews & Another, supra*, p 196 G-H). I therefore see no reason why the interpretation with regard to section 87 should not also be applied to section 20 of the Fire Brigade Services Act. It means that the second defendant bears the onus to prove on a balance of

probabilities that the conduct of its employees on the days in question was not only performed *bona fide*, but also that it has been done in the exercise of a power or duty under this Act. Put differently, if it is found that the second defendant failed to take adequate or reasonable precautions to ensure that the fire did not break out and spread, it cannot avail itself of the indemnity provided for in section 20. A proper consideration of this question necessarily implies that the evidence should also be taken into account. This means that the second special plea cannot be dealt with in isolation. It also forms part of the merits. I shall later refer to it again and then make a finding.

THE MERITS

(73) As already pointed out above, the plaintiff's case is that the second defendant failed, in a negligent manner, to extinguish and/or prevent the fire from spreading to the plaintiff's property as a result whereof the plaintiff suffered damages. The plaintiff bears the onus to prove its case on a balance of probabilities. It entails proof of wrongfulness, negligence and causation (the quantum of damages having been postponed *sine die*).

Wrongfulness

(74) The case pleaded and presented in Court by the plaintiff focused mainly on the second defendant's alleged failure to act, more particularly the failure or omission to call for aerial assistance. The general principle is that where conduct takes the form of an omission, such conduct is *prima facie*

lawful (*ABSA Bank v Fouche* 2003 (1) SA 176 (SCA) at 181 A-B). In order to determine whether there is wrongfulness the question, in the case of an omission, is whether the defendant had a legal duty towards the plaintiff to act reasonably (*Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596 H). A defendant is under a legal duty to act positively to prevent harm to a plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm (*Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 (SCA) at 396 and 400). Wrongfulness, as far as an omission is concerned, can manifest itself in different ways, for example, breach of a common law right, a particular statutory duty or a duty of care (Harms, *Amler's Precedents of Pleadings,* 8th Ed, 236).

(75) The question is whether the second defendant had a legal duty towards the plaintiff to act. It is common cause (in terms of exhibit "X") that the second defendant is a district municipality with fire-fighting services as referred to in section 84(1)(j) of the Local Government: Municipal Structures Act with a fire brigade service as defined in the Fire Brigade Services Act.

(76) In terms of section 84(1)(j) a district municipality (such as the second defendant) has certain powers and functions which include fire-fighting services "serving the area of the district municipality as a whole". It includes: planning, coordination and regulation of fire services; coordination of the standardisation of infrastructure, vehicles, equipment and procedures; and the training of fire officers.

(77) In terms of section 1 of the Fire Brigade Services Act a "service" means a fire brigade service "intended to be employed for" preventing the outbreak or spread of a fire; fighting or extinguishing a fire or the performance of any other function "connected with any of the matters" referred to above. I have already concluded that such a fire brigade service, the chief fire officers and the members are to perform their functions and duties under the control of a local authority. This also applies to the second defendant and its fire brigade services. According to the evidence of Mr Van der Westhuizen, the assistant chief fire officer, all the people employed by the Tzaneen Fire Station are professionally trained fire-fighters. They make use of state of the art equipment and vehicles that comply with national standards. He also testified that the second defendant as a district municipality was and still is in a position to pull resources from different stations, i.e. Giyani, Modjadjiskloof, Phalaborwa and the Tzaneen Fire Station.

(78) Having regard to this evidence, the facts which are common cause and the statutory provisions referred to above, I am of the view that at the time of the fire on 5 and 6 August 2012 the second defendant had a statutory duty to provide fire-fighting services, including that of a fire brigade service, serving its area as a whole, preventing the spread of a fire as well as fighting or extinguishing a fire. This does not necessarily mean that the second defendant also had a duty, in addition to that already mentioned, to act positively by calling for aerial support to combat the fire. When considering this issue one should take into account, not only the general prevailing

circumstances, but also, for instance, the availability of preventative measures and the chances of their success; the cost involved, and whether or not other effective remedies were available (Van der Walt & Midgley, *Principles of Delict,* 3rd Ed, p 85 and the authorities cited there). In short, is it reasonable to expect of the second defendant to have taken positive measures by also calling for aerial support to prevent harm to the plaintiff?

(79) It is in dispute between the parties whether the second defendant, not being a member of the LFPA, would have been entitled to call for aerial support from the LFPA on 5 and 6 August 2012. Section 4(7) of the National Veld and Forest Fire Act provides as follows:

> *"Where a fire protection association has been registered in an area -*
>
> *(a) all or part of which is controlled by a municipality and that municipality has a service; or*
>
> *(b) in which there is a designated service,*
>
> *the municipality or designated service must become a member of the fire protection association."*

(80) The definition of "municipality" in section 1 of this Act includes a district council. A "service" means a fire brigade service as defined in section 1 of the Fire Brigade Services Act. It is common cause that the second defendant is a district municipality with fire-fighting services. The

evidence of Mr Phillips is to the effect that the Letaba Fire Protection Association was registered at the Department of Agriculture, Forestry and Fisheries and he has been the chairperson since 2007. The second defendant was therefore obliged to become a member of the fire protection association for the area concerned. Furthermore, according to the evidence of Mr Venter (the airbase manager and dispatcher at the LFPA) as well as that of Mr Phillips (the chairperson of the LFPA) the second defendant as a district municipality was entitled to request aerial and Working on Fire team support whilst not being a member, although it would have been liable for payment of the account. This evidence was corroborated by the undisputed fact that the second defendant had indeed commanded aerial support during the same week to combat a fire elsewhere close to the bird sanctuary. The fact that the second defendant failed or refused to become a member of the LFPA can therefore not be raised as a defence for not having been able to call for aerial support.

(81) It is also not in dispute that the second defendant was alerted of a fire burning on the first defendant's property on 5 and 6 August 2012 and that its employees attended at the scene of these fires. It has also been agreed that the second defendant was during August 2012 not impecunious and could have afforded it to make use of aerial support on both 5 and 6 August 2012 (exhibit "X"). According to the evidence of Mr Enslin the weather prediction for the Monday was a "high fire rating". This was confirmed by

Ms Altenroxel who testified that the fire danger index for 6 August 2012 would reach "orange this afternoon".

(82) It is also not in dispute that on both days in question a spotter and helicopter pilot was on standby duty. The spotter pilot testified that water was available and that they would have been able to do ten drops within one hour, which is 90 000 litres of water on that fire. According to him they could already have extinguished the fire on the Sunday afternoon. On the Monday they noticed that the smoke column was getting bigger and bigger and they were waiting for a callout signal. The logbook entries of the Disaster Management Centre indicate that on 6 August 2012 at 11:52 Mr Enslin reported that the fire "was going to get out of hand" and requested that aerial support be authorised. Finally, Mr Stemmet (Station Officer, Fire Prevention) confirmed that it was necessary to call for aerial support before the fire had become uncontrollable on 6 August 2012. According to him it was the first defendant's responsibility to do so and not that of the second defendant. No doubt, the reason why it was necessary to call for aerial support is because the services and equipment available on 6 August 2012 would not have been sufficient to contain the fire or even to extinguish it. Mr Stemmet explained it as follows:

> *"The only way that we were going to be able to control that fire with the prediction that we received the day beforehand already was with aerial support. We work on the principle that if you have aerial support you have got two systems working ... you take them with*

water, you draw waterlines, you stop the fire there and then you bring in ground crews to mop up and kill that fire."

(83) Having regard to the statutory provisions referred to above, the prevailing circumstances on both days in question, the availability and effectiveness of aerial support services, the risk that serious harm could materialise, the interests of the community and the function of the second defendant as a district municipality to provide fire-fighting services, I have to conclude that the second defendant had a legal duty to have taken positive measures by also calling for aerial support timeously, i.e. before the fire had become uncontrollable. Its failure in this regard constitutes a breach of this duty which results in its conduct being wrongful.

Negligence

(84) The question of negligence involves a twofold enquiry: first, was the harm reasonable foreseeable? Second, would the *diligens paterfamilias* have taken reasonable steps to guard against such occurrence and did the defendant fail to take those steps? (*MacIntosh v Premier, KwaZulu-Natal & Another* 2008 (6) SA 1 (SCA) par 12). Generally speaking, the answer to the question of negligence depends on a consideration of all the relevant facts and circumstances. The following dictum of Holmes JA in *Sardi v Standard & General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780 G-H is apposite in this regard:

> *"In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation."*

(85) The first question to be considered relates to foreseeability. Was the damage suffered by the plaintiff foreseeable? It is common cause that on 5 and 6 August 2012 there was a fire on the first respondent's property. The fire on 5 August 2012 was apparently extinguished. On 6 August 2012 another fire erupted. According to the logbook entry at 11:05 a fire was reported at Blacknoll. At 12:20 it was reported there was a fire, "the same one which was fought last night and ... that the wind was picking up". According to the evidence of Mr Enslin (as summarised in the Rule 36(9)(b) notice) he went to the first defendant's property to assist. At about 11:48 he requested that the fire brigade should call for aerial support as soon as possible. He also requested a grader to assist. Both requests came to nothing and at 13:34 it was reported by Mr Stemmet that the fire was out of control and that they could not do anything at that stage.

(86) It was suggested that on the Monday morning before 12:00, when it was still a normal day, the second defendant could not have foreseen that the fire would all of a sudden at a later stage become out of control. When this was put to Mr Phillips he disagreed. He pointed out that the second defendant who has a fire service and "who should know the nature of fire, and to know that under the conditions of the future forecast, the chances that

it will become uncontrollable are very high with the resources they had at the time". No evidence was led by the second defendant to contradict this explanation. On the contrary, Mr Stemmet (the second defendant's own employee) clearly indicated that the only way they would be able to control that fire "with the prediction that we received the day beforehand" was with aerial support. Having regard to the objective facts and the evidence, I have no doubt that the damage which the plaintiff suffered was indeed foreseeable by the employees and the officials of the second defendant.

(87) The next question to be considered relates to the reasonableness or otherwise of the second defendant's conduct. Put differently, would the *diligens paterfamilias* have taken reasonable steps to guard against the harm and did the second defendant fail to take those steps? The evidence clearly indicates that on 6 August 2012 there was a fire which had to be attended to. The spotter pilot testified that he and the helicopter pilot were on standby. They could see the smoke column was getting bigger and bigger and they were waiting for a callout signal. It was only at 13:40 that they were called out to go and assist people from Blacknoll, after the fire had become uncontrollable at 13:34. Prior to that Mr Enslin had already requested aerial support at about 11:48. Even Mr Stemmet conceded that the only way they would be able to control that fire was with aerial support. Taking into account the fact that there was a fire, the surrounding circumstances as explained by the witnesses and the availability of aerial support as well as the effectiveness thereof, I have to conclude that a reasonable citizen in the

position of the second defendant would have called for aerial support before the fire went out of control. The fact that employees and officials of the second defendant failed to do so, under circumstances when they could and should have done so, means that they were negligent.

(88) It was pleaded and argued (in the alternative) that employees of the plaintiff were also negligent. A defendant who alleges contributory negligence bears the onus to prove it (*South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A)). The main thrust of the argument can be summarised as follows:

- On 6 August 2012 the plaintiff left its Leobi Plantation unattended during the time when the fire was presumed to be out of control;

- The plaintiff left its Leobi Plantation unprotected when it moved all its fire-fighting equipment to another area;

- The plaintiff failed to call for aerial support when it could and should have done so;

- The plaintiff failed to make a firebreak when it could and should have done so;

- As a result of all these failures, the plaintiff was unable to protect its property and/or to minimise the damage which it has suffered.

(89) According to the evidence of Mr Sales (forestry manager of the plaintiff) he was living on the Leobi farm. On the Monday morning they were called out to their new Reeds Plantation which is 30 kilometres away from the Leobi Plantation. There was a fire in the vicinity of the new Reeds Plantation and as the wind was blowing towards their plantation, they went out in full force to prevent the fire getting to the new Reeds Plantation. Later that day at approximately 15:15 the fire protection association informed them that there is a serious threat to the Leobi Plantation. He and a colleague then left to ascertain the situation at the Leobi Plantation.

(90) This witness also testified that there was a firebreak at the boundary of their property facing the Hamabuya Farm. The width of this firebreak varied between 150 and 200 meters which, according to the witness, are much wider than what is required. He also explained that it would not be safe to do a back-burn on that particular day as "the wind was just too strong".

(91) In cross-examination he explained that they had mobilised all their fire-fighting equipment and personnel to fight the fire at the new Reeds Plantation. In the process the Leobi Plantation was left unattended. According to him it is accepted practice in forestry that when you have a fire threat you hit it "with everything you have". It would not make sense to keep people back for the possibility of another threat at another place as they do not have all that resources. No evidence was led by the second defendant to contradict the evidence of Mr Sales and I have no reason not to accept it.

(92) Mr Venter (the airbase manager and dispatcher at the LFPA) testified that aerial support was activated for the first time at 13:40 by Mr Enslin of the Farm Merensky to protect their own plantations. At 13:53 Mr Steyn who was the head of the Disaster Management Centre of the second defendant, stated over the radio that they had authority to call for aerial support, but it was too late as the aircraft was already being employed by Merensky at their plantation. He also reported that at 14:53 the plaintiff requested that the helicopter should go to the new Reeds Plantation after completion of the Blacknoll fire at Merensky. At 14:11 Mr Stemmet reported that the fire was making spots (jumps) of plus-minus three kilometres. At 15:42 it was reported that two employees of the plaintiff were on their way to the Leobi Plantation and that the fire which was out of control jumped to the Leobi Plantation at 16:29.

(93) In cross-examination it was put to this witness that if the plaintiff had requested aerial support before or immediately after Blacknoll, it would have been possible to provide that support. His reply was that the plaintiff's property is not in the same area where the fire was at that stage. According to him "they only got into part of this fire late that afternoon". This evidence was also not contradicted and there is no reason not to accept it.

(94) Having regard to the evidence it appears to me that the plaintiff was first confronted with a fire close to its new Reeds Plantation. At that stage there was no direct threat to its Leobi Plantation. There was sufficient reason for them to leave the Leobi Plantation unattended and to focus with all

the available support on the new Reeds Plantation. There is no reason to conclude that the plaintiff's employees were negligent by leaving the Leobi Plantation unattended when they had to attend to their new Reeds Plantation to protect it from a fire.

(95) It appears that a proper firebreak, between 150 and 200 metres wide, was already in place on 6 August 2012. According to the evidence it was not safe to also do a back-burn as the wind was just too strong at that stage. It was only at approximately 15:15 when the fire protection association informed employees of the plaintiff that there was a serious threat to the Leobi Plantation. At that stage the fire was already out of control. According to the evidence of Mr Venter (airbase manager and dispatcher) it would not have been necessary for the plaintiff to mobilise aerial support before or immediately after Blacknoll, because at that stage the fire was five to six kilometres away, on another property, not threatening the plaintiff directly. It would therefore not have been necessary for the plaintiff to request aerial support at that stage. Having regard to the objective facts and the evidence referred to above, I am unable to conclude that the employees of the plaintiff were negligent as alleged or at all.

Causation

(96) Finally, the plaintiff must also prove a factual and legal causal connection between the negligent act relied on and the damages suffered (*International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-

G). The test for factual causation is whether, but for the negligent act or omission of the defendant, the event giving rise to the harm in question would in any event have occurred. This test is otherwise known as that of the *conditio sine qua non* (*Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35 C-D). However, a demonstration that the wrongful act was *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue (*International Shipping Co. (Pty) Ltd v Bentley, supra*, at 700 H-I). I shall first consider factual causation.

(97) It was contended during argument that the omission to call for aerial support was a *novus actus interveniens,* suggesting that it was the first defendant's responsibility to do so and not that of the second defendant. A *novus actus interveniens*, or a new intervening cause, is an independent event which is not foreseeable and either caused or contributed to the consequence concerned (*cf Law of Delict, Neethling, Potgieter & Visser*, 7th Ed, 216 and 218). It is important to point out that if a reasonable person would have foreseen the independent event, that event will not qualify as a *novus actus interveniens* (*Kruger v Van der Merwe* 1966 (2) SA 266 (A) at 273 as well as Van der Walt & Midgley, p 207).

(98) Having regard to these principles, the contention that the first defendant's failure to call for aerial support should be regarded as a *novus actus interveniens,* cannot be supported. The evidence clearly shows that on

both days in question employees and officials of the second defendant were aware of the fire and no doubt, they were also aware of the fact that no aerial support was called for by the first defendant. This inference is supported by the evidence of Mr Stemmet who testified that he did not call for aerial support as this was, according to him, the responsibility of the first defendant. Furthermore, according to the evidence of Mr Enslin this dispute between the first and second defendant continued until late that afternoon when the fire was already out of control. This indicates that the first defendant's failure was not only reasonably foreseeable, but it was indeed known to employees and officials of the second defendant. Notwithstanding this knowledge and a request by Mr Enslin for aerial support, they allowed the fire to get out of control. The defence of a *novus actus* can therefore not succeed.

(99) According to the evidence of Mr Enslin the existing roads in the area where the fire was, had become overgrown with vegetation which prevented fire-fighters on both days in question to reach all the burning areas with their fire-fighting vehicles to extinguish or suppress the fire. Mr Khoza who was called as an expert witness was of the view that three or four drops of water by the helicopter would have extinguished the fire. This view was supported by Mr Enslin. The spotter pilot testified that water was close by and they would have been able to do ten drops within one hour, which is 90 000 litres water on that fire. According to him they could already have extinguished the fire on the Sunday afternoon. He was surprised that they were not called out on the Sunday, as the weather prediction for the Monday

was that the wind would start at approximately 10:30. Mr Stemmet, an employee of the second defendant, also testified that on the Monday that fire could only have been controlled by aerial support. Taking into account all the evidence in this regard it is clear that if the defendant had called for aerial support timeously, the fire could have been extinguished before any damage was caused to the plaintiff's property. I am therefore satisfied that the second defendant's omission is a factual cause of the damages suffered by the plaintiff.

(100) The second question to be considered is whether this omission as a wrongful act is linked sufficiently closely to the loss suffered by the plaintiff for legal liability to ensue. The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice (*S v Mokgethi* 1990 (1) SA 32 (A) at 40-41). This is a flexible approach where one should take into consideration, in a matter like this, the following: the fact that the second defendant is a district municipality with fire-fighting services who was obliged to become a member of the Fire Protection Association for the area concerned; the evidence that employees and officials of the second defendant were aware of the fire on both days concerned; the risk involved when a fire of this nature is not extinguished timeously; the evidence that on the Monday the fire could only be distinguished by means of aerial support; the availability and effectiveness of aerial support; the evidence that it was

possible for the second defendant to call for aerial support; the undisputed fact that the second defendant had commanded aerial support during the same week to combat a fire elsewhere close to the bird sanctuary; and finally, the interests of the community. Taking into account these facts I am of the view that a reasonable citizen in the position of the second defendant would have called for aerial support. I am therefore satisfied that the second defendant's wrongful omission is linked sufficiently closely to the loss for legal liability to ensue.

(101) This brings me finally to the so called second special plea which actually forms part of the merits. I have already indicated (par 72 above) that the second defendant bears the onus to prove on a balance of probabilities that the conduct of its employees on the days in question was not only performed *bona fide*, but also that it has been done in the exercise of a power or duty under this Act. Put differently, if it is found that the second defendant failed to take adequate or reasonable precautions to ensure that the fire did not break out and spread, it cannot avail itself of the indemnity provided for in section 20. There is no evidence to support this defence. On the contrary, there is sufficient evidence to conclude that the second defendant failed to take adequate or reasonable precautions to ensure that the fire did not break out and spread. I have already concluded in this regard that employees of the second defendant acted wrongfully and negligently by failing to call for aerial support timeously. The second defendant can therefore not avail itself of the indemnity provided for in section 20.

SUITABLE RELIEF

(102) It was indicated above (par 2) that payment of R1 817 355.10 was claimed against the first and second defendants jointly and severally pursuant to the damage caused to the plaintiff's Leobi Plantation. The case against the first defendant was settled on the first day of the trial on the basis that the first defendant would pay the plaintiff an amount of R1 000 000.00 plus 50% of the plaintiff's costs. This was not a settlement, as I understand it, to discharge the obligation for payment by the second defendant as well. It was, however, argued on behalf of the second defendant that, in the event this court finds that the second defendant is liable to compensate the plaintiff, an apportionment should be made with regard to the first and second defendants' relative degrees of blameworthiness.

(103) It was pointed out on behalf of the plaintiff that presently there is only one defendant before court and that no apportionment can be made in the absence of the first defendant. I agree with this submission. This court needs only to decide at this stage of the proceedings whether or not the second defendant is liable for the payment of the plaintiff's agreed or proven damages. Should the second defendant wish to seek a contribution from the first defendant at a later stage, it may do so as far as the law permits.

ORDER

1. In the result I make the following order:

1.1 It is declared that the second defendant is liable for payment of the plaintiff's proven or agreed damages with regard to its Leobi plantation suffered as a result of a fire on 6 August 2012;

1.2 The second defendant is ordered to pay 50% of the plaintiff's taxed or agreed costs for the action on the issue of liability up to and including the first day of the trial, which commenced on 23 August 2016;

1.3 The second defendant is ordered to pay the plaintiff's taxed or agreed costs for the action on the issue of liability from 24 August 2016 to date hereof;

1.4 The costs referred to above shall include:

1.4.1 The costs of senior counsel;

1.4.2 The reasonable costs of all the witnesses who testified on behalf of the plaintiff who are all declared necessary

witnesses, including their reasonable travel and accommodation costs as allowed by the Taxing Master.

1.5 It is noted that the first defendant has agreed to pay R1 million with regard to the same damages referred to in paragraph 1.1 above.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 25 January 2017