REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 278 / 05

In the matter between

THE MINISTER OF WATER AFFAIRS AND FORESTRY **FIRST APPELLANT**
THE WESTERN CAPE NATURE CONSERVATION BOARD **SECOND APPELLANT**
THE CITY OF CAPE TOWN **THIRD APPELLANT**

and

HENDRICK JACOBUS STORM DURR **FIRST RESPONDENT**
The trustees for the time being of the PENNY TAYLOR CHILDRENS' TRUST **SECOND RESPONDENT**
THE SOUTH AFRICAN FORESTRY COMPANY LTD **THIRD RESPONDENT**

Coram : **ZULMAN, PONNAN JJA and COMBRINCK AJA**

Date of hearing : **17 AUGUST 2006**

Date of delivery : **14 SEPTEMBER 2006**

SUMMARY

Veld fire – failure by landowner to prevent spread of fire to neighbouring farms – whether omission unlawful – whether presumption of negligence rebutted.

Neutral citation: This judgment may be referred to as

The Minister of Water Affairs and Forestry and Others v Durr and Others
[2006] SCA 101 (RSA)

J U D G M E N T

PONNAN JA

[1] The South African Forestry Company ('Safcol') and the City of Cape Town ('Cape Town') own adjoining plantations in the Wemmershoek River Valley of the Western Cape. The Wemmershoek River flows between their respective plantations. The course of the river altered during 1959 as a result of the construction by Cape Town of the Wemmershoek Dam. Separating the old and new river courses is an elevated piece of land described in the evidence as 'the island'. To the north, Safcol's land borders on a mountainous area in respect of which the risk of loss was borne by the Western Cape Nature Conservation Board ('Nature Conservation'). The farms of Hendrik Jacobus Storm Durr ('Durr') and The Trustees for the time being of the Penny Taylor Children's Trust ('Taylor') are situated several kilometres to the north-west of the Wemmershoek River Valley.

[2] On 13 February 1999, a fire, the exact cause of which was never established, broke out in the Wemmershoek River Valley immediately below the dam wall. The learned trial judge found that it had been conclusively proved that the fire originated on the island. From the island, the fire spread onto Safcol's property and from there in turn to the properties of Nature Conservation, Durr and Taylor. The fire raged uncontrollably for several days before finally running its course.

[3] Arising out of this fire three separate actions were instituted in the Cape High Court. In each Durr, Taylor and Safcol sought as plaintiffs respectively to recover the loss suffered by them in consequence of the fire. The first two were actions by Durr and Taylor against Safcol, the Minister of Water Affairs and Forestry ('the Minister') and Nature Conservation. In each of those matters Cape Town, the Minister and Nature Conservation were joined pursuant to the provisions of rule 13 by Safcol as a third party to the proceedings. The third was an action by Safcol

against the Minister, Nature Conservation and Cape Town.

[4] The trial, a consolidated hearing of all three actions, proceeded before Fourie J. The trial court agreed to separate the issues of liability and quantum and to deal, at the outset, only with the former.

[5] In each of the Durr and Taylor matters, the claim against Safcol was dismissed and the Minister and Nature Conservation were held jointly and severally liable for such damages as may in due course be proved. In the Safcol matter the Minister and Nature Conservation were held jointly and severally liable for 75 percent and Cape Town 25 percent of such damages as may be proved. The cost orders made in all three matters were to the effect that the Minister and Nature Conservation were to pay jointly and severally 75 percent and Cape Town the remaining 25 percent of the costs of Durr, Taylor and Safcol.

[6] It is against those orders that the present appeal lies, leave to do so having been granted by the learned trial Judge.

[7] Since approximately September 1997, employees of the Working for Water Project ('WFW') had been endeavouring to rid the banks of the Wemmershoek River of alien invasive flora. To that end they had felled vegetation, including wattle trees, which were stacked and left on the island and dry river bed. Although the WFW workers were in the employ of the Minister they took their instructions from Nature Conservation who acted as the implementing agent of the WFW. It was thus common cause between the parties that the Minister (as employer) and Nature

Conservation (as implementing agent in control), were vicariously liable for any delict committed by the WFW workers during their felling and stacking of wattle trees in the area below the dam wall.

[8] It was not in dispute that the WFW workers created an extreme fire hazard by stacking the felled wattle heaps in the manner in which they did. That increased fuel load created what the Judge in the court below rightly described as a ‘tinderbox’ during the hot, dry and windy summer months; the so-called fire season - a fact it would appear that everyone was acutely aware of. On 13 February 1999, when the fire danger index was orange signifying that conditions were dangerous and conducive to the outbreak and spread of fires, the tinderbox ignited. The fire spread through the dry river bed onto Safcol's plantation and from there it eventually reached the farms of Durr and Taylor.

[9] A conspectus of all of the evidence reveals that once the fire had spread on to Safcol's land and into its plantation, it was highly improbable that it could have been prevented from spreading on to Nature Conservation's land and from there to, inter alia, the farms of Durr and Taylor. No one seriously contended otherwise. The evidence shows that the fire crowned (burnt in the crown of the trees) immediately or soon after it entered Safcol's plantation. It was fuelled by the wind and after reaching the mountainous area on Nature Conservation's land, the rate of spread of the fire increased. It was then clearly out of control and could not have been contained by whatever means. The evidence of Dr De Ronde, Safcol’s expert, that fire belts would have had no effect on the raging fire once it spread onto Safcol's plantation and the phenomenon of spotting occurred (ie the propelling of burning

material by the wind over a vast distance), was not seriously contested by any of the parties. The evidence of Langenhoven, an employee of Safcol, who initially unsuccessfully attempted to contain the fire on the island, that even with more people at his disposal there would have been no prospect of containing the fire once it had entered Safcol's plantation, was also not seriously challenged. I am thus satisfied that Safcol has shown, on a balance of probabilities, that once the fire spread on to its land, notwithstanding the exercise of reasonable care, it would not have been able to prevent the fire from extending beyond its boundaries and occasioning harm to Durr and Taylor.

[10] The Minister, Nature Conservation and Cape Town challenge the judgment of the court below relating to liability, including the finding that there was no contributory negligence on the part of Safcol. This appeal raises questions of liability in delict for so-called pure economic loss resulting from the ignition and spread of the fire from the island to the neighbouring properties – this means dealing with the issue on the basis of liability for certain omissions. The approach by a court to that enquiry is hopefully by now well settled[1]. It is this:

[1]See F D J Brand's Inaugural Lecture as Professor Extraordinary in Private Law delivered at the University of the Free State on 8 March 2006, which inter alia provides: 'Starting with decisions such as *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* and *Minister of Safety and Security v Van Duivenboden*, the Supreme Court of Appeal has endeavoured on a number of occasions in recent years, to eliminate this state of confusion by restating the principles involved. Having regard to these judgments it is clear that the decision whether a particular omission or conduct causing pure economic loss should be regarded as wrongful is a matter of legal policy. When we say, in this context , that conduct is 'wrongful' we intend to convey that reasons of legal policy require that such conduct, if negligent, should be actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public policy considerations determine that there should be no liability; that the defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. It follows that, when a court is asked to hold a particular omission or conduct that gave rise to pure economic loss 'wrongful', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are considerations of public or legal policy, consistent with constitutional norms, which require that extension. And, as was pointed out in several decisions "what is called for in such event is not an intuitive reaction to a collection of arbitrary factors but a balancing against one another of identifiable norms." '
See also *Trustees*, *Two Oceans Aquarium v Katney & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) par 10 and 11.

'A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.'
(Per Nugent JA Minister of Safety and Security v Van Duivenboden 2002 (6) SA 440 (SCA) par 12).
Put differently, in order to succeed, the plaintiffs in the court below had to establish, first, that the omissions complained of were wrongful, second, that they were negligent and, third, that those omissions were causally connected to the loss suffered by them (*Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 23).

[11] It was common cause between the parties that the fire in this case was a veld, forest or mountain fire which occurred on land which fell outside a fire control area. In this regard s 84 of The Forest Act 122 of 1984 ('the Act'), which provides :

'When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved.' ;
plays a pivotal role. One of the principle objectives of the Act as this Court has already stated (*H L and H Timber Products (Pty Ltd v Sappi Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) ('*H L and H Timber*')) is the prevention and control of veld, forest and mountain fires. Parliament's purpose in enacting s 23 of Act 72 of 1968, the predecessor of s 84 was described by Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry* 1972 (2) SA 783 (N) at 788 B-D - a passage quoted with approval by Nienaber JA in *H L and H Timber* (para 21).

[12] Although initially in dispute, during the course of the trial it came to be admitted that the island was on land belonging to Cape Town. It follows, as was indeed held by the court *a quo* that the fire originated on Cape Town's land. The philosophy underpinning s 84 is that:

'Landowners in areas outside fire control areas are saddled with the primary responsibility, falling short of an absolute duty of ensuring that such fires occurring on their land do not escape their boundaries.'
(per Nienaber JA in *H L and H Timber* para 21.).

[13] It was submitted however that s 84 of the Act does not find application in this case. Foundational to that contention, which was advanced by all three of the

appellants, is the suggestion that Safcol knew of the dangerous situation on the island, which, so it was suggested, *was in its possession or under its control*, but that it failed to take steps to remove the danger prior to 13 February 1999. Accordingly, so the submission went, the negligent failure to eradicate the danger once it had been created by the WFW workers was Safcol's, as, any omission as may have been proved in respect of Cape Town was not wrongful inasmuch as Cape Town did not owe the adjoining landowners a legal duty. Such duty, so it was submitted, was owed by Safcol the bona fide possessor or occupier of the island.

[14] The argument advanced by Cape Town is that the construction of the Wemmershoek Dam altered the course of the river resulting in employees of both Cape Town and Safcol, who acquired the neighbouring property in 1993, labouring under the mistaken belief that the new wet riverbed was their common boundary and that the island and the dry riverbed formed part of Safcol's property. It is so that Cape Town by constructing the dam had changed the course of the river and that indeed may have caused confusion in the minds of some of the employees of both Cape Town and Safcol as to the actual boundary between the adjoining properties. That however could have been resolved quite easily by Cape Town itself calling in aid its own Land Survey Department.

[15] Would Cape Town have owed a legal duty to adjoining landowners had a fire occurred on the island in similar circumstances as are here present shortly after Cape Town had purchased the land in 1948? The answer would probably be yes. What, it must therefore be asked altered that situation? Cape Town suggests it is the following: First, during April – May 1998 Cape Town's manager of the

Wemmershoek Catchment Area approached Safcol's manager one Wilmot for permission to excavate a channel to the west of the dry river bed. Wilmot gave his consent provided no expense would be incurred by Safcol. Secondly, during November 1998 Wilmot gave written notice to Cape Town that he intended to burn heaps of stacked wattle in the area where the 'WFW teams have been working'. Accompanying the notice was a map which effectively depicted the entire width of the dry river bed. Wilmot subsequently burnt heaps of felled wattle thereby clearing the dry river bed for an area of 450 by 20 metres. Thirdly, on the day in question when the fire was first spotted by employees of Cape Town, believing that the fire was on Safcol's property they alerted Langenhoven, Safcol's manager then on duty, who proceeded to fight the fire. No other factors were relied upon in support of the contention that Safcol was in control of the island.

[16] Those factors in my view fall far short of establishing that Safcol in fact controlled the island. I can see no good ground for holding that the action of Safcol's employees in trying to extinguish the fire on the island imposed any greater duty on Safcol than if they had done nothing at all (*Van Wyk v Hermanus Municipality* 1963 (4) SA 285 (CPD) at 297A). The same it must be said holds true for Wilmot's burning of the felled wattle. Each of those instances could be construed as no more than an attempt by Safcol's employees to eradicate a source of danger to Safcol's property. Properly analysed, the factors relied upon by the appellants support the conclusion that the confusion in this case was initiated and thereafter compounded by Cape Town.

[17] Further insuperable obstacles stand, in my view, in the way of the appellants'

contention. The right of ownership in its unrestricted form confers the most comprehensive right of control over a thing. No evidence was adduced by Cape Town that it with deliberate intention abandoned or relinquished any of its rights, especially the right of control, in respect of the island. (Inst. 2.1.47; *Van Leeuwen* CF 1.2.3.14). On the available evidence it can hardly be said that Cape Town abandoned the island with the intention of no longer being the owner thereof *(Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 751 B – I; *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (AA) at 947 A – E). As to the argument that Safcol was the bona fide possessor of the island: Likewise, possession as well, it bears noting, comes into existence *et animo et corpore* (*Grotius* 2.2.4; *Voet* 41.2.10) – involving as it does the physical control (corpus) of a thing with the accompanying mental attitude (animus) towards the thing. Here again the evidence is wholly insufficient.

[18] The high water mark of the appellants' case is that employees of both Safcol and Cape Town laboured under a mistaken impression that the island and the dry river bed formed part of Safcol's property. That impression coupled with the instances alluded to in support of the proposition that Safcol exercised control over the island fall far short, in my view, of establishing that Safcol or its employees actually held the island in whatever capacity for itself. Not to be ignored as well is the fact that Cape Town, by its conduct in constructing the dam, for which purpose it specifically acquired the land in question, changed the course of the river. Moreover, for a local authority such as Cape Town that is vested with oversight over property within its jurisdiction to contend that it did not know the boundaries of its own property is untenable. In these circumstances the argument that Safcol was either in

possession or control of the island fails to be rejected.

[19] It has repeatedly been held by our courts that a landowner in our law is under a duty to control or extinguish a fire burning on its land (*Lubbe v Louw* unreported SCA case number 531/03 par13). In my view the legal convictions of the community would not on the aforegoing facts and considerations relieve Cape Town of that duty and visit it upon Safcol. I accordingly conclude that Safcol did not owe a legal duty to Durr, Taylor or any of the other adjoining landowners to prevent the ignition and spread of the fire from the island. Such duty, in my judgment, was owed by Cape Town.

[20] As the fire in question emanated from and originated upon property owned and controlled by Cape Town, the case in my judgment is brought within the ambit of s 84. This court has held per Nienaber JA *H L and H Timber* paras 13 and 14 that:

'The overall effect of the section … is to shift the onus in respect of the "question of negligence" from a plaintiff to a defendant. The plaintiff's claim in this case is founded on delict. As with delictual claims in general the essential elements are *(a)* conduct, initiating wrongfulness, by the defendant; *(b)* fault, in this instance negligence, by the defendant; *(c)* harm suffered by the plaintiff; and *(d)* a causal connection between *(a)* and *(c)*. The section is concerned only with element *(b)*, where negligence is the fault complained of. While the *onus* remains on the plaintiff to establish elements *(a)*, *(c)* and *(d)*, the section relieves him of, and instead encumbers the defendant with, the burden of proving or disproving element *(b)*.

Conduct (element *(a)* above) can take the form of a commission, for example where the fire causing the loss was started by the defendant (cf *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A)), or an *omissio* for example the failure to exercise proper control over a fire of which he was legally in charge (cf *Simon's Town Municipality v Dews and Another* 1993 (1) SA 191 (A) at 194 C-E), or the failure to contain a fire when, in the absence of countervailing considerations adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping onto a neighbouring property thereby causing loss to others (*Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A); and compare *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A)). This is such a case.'

[21] In the present case the necessary conduct constituting the nexus between the fire and Cape Town's failure to prevent its spread beyond its boundaries, thereby occasioning harm to the other landowners, was never really in dispute. Indeed the crux of Cape Town's case was that Safcol could and should have prevented the fire from spreading from the island to neighbouring properties. Well, if according to Cape Town, Safcol could and should have prevented the fire from spreading from the island, then it goes without saying that Cape Town itself could and should have done so. What all of this means is that at the trial Cape Town bore the onus of proving on a balance of probabilities that its employees were not negligent in failing to prevent the spread of the fire to neighbouring properties. Put differently it was for Cape Town to rebut the statutory presumption. That on any reckoning it failed to do. It must follow that Cape Town's appeal is devoid of any merit and must fail. I turn now to consider the appeal of the Minister and Nature Conservation.

[22] All of the witnesses agreed that by felling and stacking the wattle on the island, the WFW workers created what in the prevailing weather conditions was one of the worst fire hazards imaginable. Nature Conservation had knowledge of the dangerous situation as early as September 1997. That is when Safcol addressed a letter to it informing it of the danger being created by its workers. That letter failed to yield a response. Nor did another despatched during November of that year. Various discussions ensued regarding the heaps of felled wattle and the danger it constituted. During October 1998 a letter was received by Nature Conservation advising it that something had to be done about the fire hazard being created by its workers. Some three days later a meeting was held between representatives of

Safcol and Nature Conservation where specific reference was made to ‘hot spots’ being created by WFW workers in the Wemmershoek Valley. In the circumstances, I have no hesitation in finding as did the court below that the Minister and Nature Conservation, as well as the WFW workers, owed the surrounding landowners, including Safcol, Durr and Taylor, a legal duty to avoid negligently causing them harm during the activities of the WFW workers on the island. No one seriously contended otherwise.

[23] Quite clearly the conduct of the employees of the Minister and Nature Conservation was firstly, wrongful and, secondly negligent. Those conclusions by the court a quo were not seriously challenged. That however is not the end of the enquiry in so far as the Minister and Nature Conservation are concerned. It remains to enquire, as was argued by counsel, what steps, if any, a reasonable person in their position would have taken to prevent the harm from materialising (see *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 26). It was urged upon us that such ameliorating measures as could have been implemented were impractical and unduly expensive.

[24] It is so that the twin objectives of the WFW were: firstly, poverty alleviation by means of capacity building and job creation, and, secondly, the management and control of invasive and alien plant species which had an adverse impact on water resources and bio-diversity. As laudable as those dual socio-economic and environmental objectives may have been they can hardly in and of themselves operate to exculpate the Minister.

[25] Little, if any, thought, it would appear, went into how the vegetation was to be disposed of after it had been felled. The hypothesis advanced by WFW that the felled vegetation was to be abandoned to the elements and allowed to rot over a period of four to five years is no answer. To have commenced the felling without any coherent plan in place for the disposal of the wattle can only be described as foolhardy. Stacking felled wattle often as high as 1,5 metres was not just ill-advised but plain reckless. The recklessness was born of the knowledge that drying, felled wattle stacked in that fashion was an extreme fire hazard. Internal assessments of the WFW project are less than flattering. Training of employees was far from adequate and management and supervision barely existent.

[26] Both the Minister and Nature Conservation point to the high cost implications and limited available trained human resources to eradicate the danger. Surely those are factors that should have gone into the reckoning prior to the commencement of the project. That a decision could have been taken to commence with the felling without a coherent plan for the disposal of the cut wattle is nothing short of alarming. Given the extreme nature of the hazard created by their employees it ill-behoves the Minister and Nature Conservation to call in aid those factors to justify its failure to subsequently take steps to eradicate the danger. The attitude adopted by the Minister and Nature Conservation to the danger created by their servants can hardly be countenanced. Once it became obvious that a hazardous situation was being created the WFW workers should have been told to cease all activities in so-called hot spots, more especially as they lacked the capacity to deal with the danger created by their activities. That would have been the most effective, practical and least expensive way of dealing with the problem. After all, the Minister and Nature

Conservation were not under any statutory or other duty to rid the area of alien invasive species. Vegetation that had already been felled could have been disposed of, when conditions were favourable to do so, by controlled burning. Had there been proper consultation with landowners and had controlled burning occurred in conjunction with them the danger could have been eradicated in a most effective and relatively inexpensive way. Such cost as may have been incurred in implementing those measures would in financial terms have been materially insignificant when compared to the loss were the risk of harm to eventuate. It follows in my view that the appeal by the Minister and Nature Conservation is also without merit and must fail.

[27] As regards the question of costs. In my view the trial judge erred in ordering Cape Town to pay 25% of the costs in each of the Durr and Taylor matters, as neither Durr nor Taylor had sought, as plaintiffs, to recover damages from Cape Town. It was Safcol, who had joined Cape Town as a third party to the proceedings. It claimed a contribution from Cape Town in the event of it (Safcol) being held liable. The claim against Safcol was dismissed. There was thus no warrant in those circumstances for mulcting Cape Town with an adverse costs order. The costs in each of those matters ought to have been borne by the Minister and Nature Conservation who were held jointly and severally liable for such damages as may in due course be proved.

[28] In the result:

28.1 The appeal by the Minister and Nature Conservation is dismissed with costs such costs to include those consequent upon the employment of

two counsel.

28.2 The appeal by Cape Town is dismissed with costs such costs to include those consequent upon the employment of two counsel, save to the extent that the order of the court *a quo* that Cape Town pay 25% of the costs in the Durr and Taylor matters is set aside and replaced with an order that the Minister and Nature Conservation jointly and severally pay 100% of those costs.

V M PONNAN
JUDGE OF APPEAL
CONCUR:

ZULMAN JA

COMBRINCK AJA:

[29] I have read the judgment prepared by Ponnan JA. I agree that the first and second appellants' appeal must fail. I respectfully disagree that the third appellant's appeal should suffer the same fate.

[30] The facts I consider relevant to determination of the appeal are set out hereinafter. I shall refer to the parties concerned by their names, hence the first appellant as 'the Minister', the second appellant as 'Nature Conservation', the third appellant as 'Cape Town', the first respondent as 'Durr', the second respondent as 'Penny Taylor Trust' and the third respondent as 'Safcol'.

[31] Safcol and Cape Town own contiguous properties in the Wemmershoek valley near Franschhoek in the Western Cape. These properties are planted to trees. The boundary between the two properties described as Portion 2 Zachariashoek, (Cape Town's property) and Zachariashoek, Portion 3 (Safcol's property) is in the deeds office reflected as being the Wemmershoek river course as it was prior to 1958. In that year Cape Town built a dam upstream from the mentioned properties to augment the city's water supply. This caused the river to alter its course and for a distance to run to the east of its original course. It then rejoined its original course lower down thereby creating an island of some 550 m by 150 m.

In 1997 the Minister through the agency of Nature Conservation as part of the goverment's Reconstruction and Development Program ('RDP') launched a Working for Water project and deployed a number of unskilled, unemployed persons to eradicate alien vegetation in the Wemmershoek valley. In 1998 and early 1999 they progressed to the island referred to above and chopped down wattle trees and stacked the wood in heaps in order to rot. The stacks constituted an extreme fire hazard. Inevitably on the 13th February 1999 a fire broke out on the island, setting the heaps of wattle alight and then spreading west, with the assistance of an easterly wind over the dry river bed, and into Safcol's plantation. The fire raged for two to three days before it was brought under control. In the process it devastated part of Safcol's plantation, Nature Conservation property to the west of Safcol and ultimately the farms belonging to Durr and the Penny Taylor Trust.

[32] As a consequence of these events Durr and the Penny Taylor Trust in separate actions, sued Safcol, the Minister and Nature Conservation for damages. Safcol in each action joined the Minister, Nature Conservation and Cape Town as

third parties. In a third action Safcol sued the Minister, Nature Conservation and Cape Town for damages it alleged it suffered. The three actions were consolidated and the trial proceeded before Fourie J in the Cape Provincial Division on the issue of liability only.

[33] At the conclusion of a lengthy trial Fourie J made the following order in respect of both the Durr and Penny Taylor Trust matters:

'1. It is declared that second and third defendants (the Minister and Nature Conservation) are liable, jointly and severally, to pay to plaintiff (Durr) the amount of damages which plaintiff may prove he is entitled to as a consequence of the damage caused to the farm Hartebeeskraal, district Paarl, Western Cape, by the fire referred to in paragraph 9 of plaintiff's amended particulars of claim.
2. The plaintiff's claim against first defendant (Safcol) is dismissed.

3. The second and third defendants are ordered, jointly and severally, to pay 75% of plaintiff's costs of suit and 75% of first defendant's costs of suit.

4. The third third party (Cape Town) is ordered to pay 25% of plaintiff's cost of suit and 25% of first defendant's costs of suit.'

In respect of the Safcol action the order was the following:

'1. It is declared that first and second defendants (the Minister and Nature Conservation) are liable, jointly and severally, to pay to plaintiff an amount equal to 75% of the damages which plaintiff may prove it is entitled to as a consequence of the damage caused to the immovable property described as Portion 3 of Zachariashoek No 874, Paarl, Western Cape, by the fire referred to in paragraph 7 of plaintiff's particulars of claim.

2. It is declared that third defendant (Cape Town) is liable to pay to plaintiff an amount equal to 25% of the damages which plaintiff may prove it is entitled to as a consequence of the damage caused to the immovable property described as Portion 3 of Zachariashoek No 874, Paarl, Western Cape, by the fire referred to in paragraph 7 of plaintiff's particulars of claim.
3. The first and second defendants are ordered, jointly and severally, to pay 75% of plaintiff's costs of suit.
4. The third defendant is ordered to pay 25% of plaintiff's costs of suit.'

[34] The Minister, Nature Conservation and Cape Town with leave of the court *a quo* appeal to this court against these orders. The thrust of the Minister's appeal according to the Notice of Appeal and the argument advanced before us is that the

sole cause of the damage suffered by the farmers and Safcol was the negligence of Safcol. The Minister did not seek to join Safcol as a third party in the Durr and Penny Taylor Trust matters and there is no cross-appeal by the plaintiffs in those cases. If it were to be held that the Minister was not solely liable but was contributory negligent to a degree it would not assist him/her in the appeal as there existed no *lis* between him/her and Safcol. In the Safcol matter, contributory negligence and a prayer for apportionment having been pleaded, an apportionment on appeal may be made as between the Minister and Nature Conservation on the one hand and Safcol on the other.

[35] The court *a quo* had no hesitation in finding that the Minister and Nature Conservation, who were vicariously liable for the deeds of the RDP members, were negligent. The finding was worded thus:

'In my view, it has clearly been shown that a reasonable person would have foreseen that in the prevailing weather conditions, a fire could ignite on the island and fuelled by the stacks of dry wattle, it could spread to neighbouring land. A reasonable person in the position of the Minister, Nature Conservation and the WFW (Working for Water) workers, would, in my view, have taken steps to get rid of the fire hazard created on the island, by removing or destroying (eg by controlled burning) the stacked wattle.'

I am in full agreement with this finding and the reasons advanced for rejecting the Minister's defences. I agree with the judgment of Ponnan JA on this aspect. That effectively disposes of the Minister's appeal in the Durr and Penny Taylor Trust cases.

[36] In my view the real issue in this appeal is the finding that Cape Town was 25% liable and the exoneration of Safcol from all liability. To refine it further, the question

as I see it is whether it was wrongful conduct on the part of Cape Town, as held by the trial court, or Safcol which in part resulted in the harm.

[37] Much of the evidence before the trial court centered on the cause of the ignition of the fire and the steps taken by the various parties to fight the fire and prevent it from spreading. The trial judge found that on the evidence he could not make a finding as to who was responsible for the ignition. He further concluded that once the fire ignited the stacks of dry wattle nothing any party could have done would have prevented the fire from spreading into Safcol's plantations and from there eventually onto the Durr and the Penny Taylor Trust farms. I am inclined to the view that there was sufficient evidence to find on a balance of probabilities that it was an abandoned cooking fire of the RDP workers which was the primary cause of the blaze. I find it unnecessary to go into this issue as the Minister is in any event liable. I have no quarrel with the second finding. I consider the court was correct in accepting the evidence of the experienced foresters who were on the scene that the fire was out of control. Their evidence was rightly preferred to expert evidence which *ex post facto* attempted to reconstruct and theorize on what could have been done.

[38] Neither Safcol nor Cape Town were therefore held to have been negligent on the day of the fire, and correctly so. Cape Town was however held to be liable to the extent of 25% for negligent conduct preceding the date of the fire. The finding and conclusions by the trial court went thus:

(i) Cape Town was the owner of the land on which the fire started;

(ii) as owner of the island on which the fire hazard was created and the fire originated Cape Town owed neighbouring landowners a duty of care to prevent the possible ignition of a fire on, and the spreading thereof from, the island to neighbouring land;

(iii) the aforementioned duty stems from the owner's control which is one of the incidents of ownership;
(iv) Cape Town negligently failed to take preventative measures to ensure that the fire hazard in the form of the stacks of dry wattle on its land was not eliminated.

[39] Safcol, so the judgment went, could not be held liable for negligent conduct preceding the day of the fire because:

(i) it could not be expected of Safcol who was not the owner nor in occupation of the island to go onto Cape Town's land and remove the potential fire hazard;

(ii) there was accordingly no duty on Safcol to take precautions to avoid the possible ignition and/or spread of the fire on and from the island.

[40] On the face of it the reasoning cannot be faulted. There is however an important factor which causes me to differ from the trial judge. The evidence was overwhelming that everyone in the Wemmershoek valley who were concerned with the Safcol and Cape Town plantations believed that the boundary between the two's land was the Wemmershoek river as it now flows – referred to in the evidence as the 'wet river' as distinct from the 'dry river'. That this belief was held was graphically illustrated by what took place on the day the fire broke out. The first smoke was spotted by a Cape Town employee who reported it to his superior, one Adonis, the senior foreman. Adonis immediately telephoned Langenhoven, Safcol's resident forester in charge, and advised him that a fire had started on Safcol's side of the river. Langenhoven went to where the fire was burning on the island and with the help of a few workers and the use of two vehicles attempted to fight the fire. He at all times accepted that the fire was on Safcol's land.

Because Safcol forestry workers were on strike at the time Langenhoven appealed to Adonis for assistance in the form of Cape Town workers. Adonis's reply was that it was their duty to guard against the fire spreading into Cape Town's

plantation on the eastern side of the flowing river. He could accordingly not offer to release any workers to assist Safcol.

It is apparent that even in the aftermath of the fire no one on Safcol's side suggested that the fire had originated on Cape Town's land. It is only when the litigation started was it discovered where the true boundary was. Indeed, even in the pleadings Cape Town maintained that the island was not its property and it was during the trial after it had caused a survey to be done that it conceded that it was the owner of the island.

It is understandable that the parties held the belief that the flowing river was the boundary. The dry river bed had over the years become so overgrown that it was unrecognizable as a former river bed. For a period in excess of forty years it was accepted that the flowing river was the natural boundary. I have no doubt that had Safcol the day before the fire approached the court for an order that it had acquired the island by acquisitive prescription it would have succeeded.

[41] The trial court held on various grounds that the mistaken belief on the part of Safcol and Cape Town as to the boundary did not shift the well-established duty on a landowner to ensure that a fire did not spread from his land onto his neighbour's.

The grounds were these:

(i) Cape Town at no stage formally or expressly relinquished control of the island;
(ii) Safcol did not physically occupy or control the island;
(iii) Cape Town changed the course of the river by building the dam;
(iv) At no stage did Cape Town inform Safcol that it regarded Safcol as being in control of the island;
(v) Cape Town at all relevant times had the means to establish exactly where the boundary was;
(vi) the fact that certain employees of Safcol and Cape Town held the mistaken belief as to the boundary was of no moment as there was no evidence that the 'directing mind and will' of Safcol and Cape Town held such belief (*Anderson Shipping (Pty) Ltd* v *Guardian National Shipping Insurance* 1987(3) SA 506 (A)). Safcol and Cape Town, so the judgment went, are juristic persons and their knowledge can only be the knowledge of their directors and managers who represent their directing mind and will and control what they do.

[42] I consider the above reasons to be unpersuasive. The central and to my mind

decisive fact is that the responsible employees of both Safcol and Cape Town believed that the island formed part of Safcol's land. I will deal later with the 'directing mind' issue. It matters not that Cape Town did not expressly relinquish control nor advise Safcol that it considered it to be in control of the island. Neither Cape Town nor Safcol at any stage after the river changed its course considered that Cape Town had any say over the island. It belonged in their mind to Safcol. The fact that it was the dam built by Cape Town forty odd years previously is to my view irrelevant.

[43] I cannot agree with the finding that Safcol did not occupy and control the island. It is so that the piece of ground was an overgrown sort of no-man's land. Safcol did however on at least three occasions demonstrate its possession and control thereof. The first was in April or May 1998. When the river ran strongly it came so close to Cape Town's plantation that it undermined the trees on the fringe and caused them to collapse into the river. Viljoen, Cape Town's manager of the Wemmershoek catchment area, to alleviate the problem decided to dredge a canal bisecting the island and thereby diverting some of the flow away from the plantation. As he believed that Safcol was the owner he sought permission from Wilmot, Safcol's manager in charge of the area, to dredge the canal. Wilmot gave permission on the basis that there would be no cost to Safcol and Viljoen went ahead and dug the canal with a bulldozer. He again sought Wilmot's consent later when he burnt the trees and vegetation which had been uprooted in the course of the excavation. The second event was in November 1998. Wilmot in a letter to Viljoen advised that he intended burning . . . 'heaps of cut wattle in the area that the Work for Water teams have been working'. To the letter is attached a sketch plan indicating that the burning would take place on or adjacent to the island. The significance of the plan is that the

flowing Wemmershoek river is indicated and labeled as such and on the eastern side of the river the writer has added the caption ‘CMC Property Wemmershoek’ ie Cape Town property. Wilmot was not called as a witness by Safcol but other evidence established that Wilmot burnt the stacks of wattle in the old dry river bed. It is clear from the aforegoing that Wilmot regarded his activities to be taking place on Safcol’s property and the letter was a courtesy to the neigbour, Cape Town.

The third event demonstrating Safcol’s occupation and control is of course the fire itself. As mentioned earlier, when notified of the fire, Safcol’s fire fighting team, such as it was, sprang into action and for an hour or more fought the fire on the island.

[44] I turn now to the ‘directing mind and will’ issue. I am unable to agree with the trial judge that an omission on the part of a juristic body such as Cape Town and Safcol cannot be regarded as unlawful because the managers and directors were unaware of the facts as they existed in the Wemmershoek valley and were accordingly unable to act in accordance with such knowledge. It is not so that a corporation or company can only be held liable if there was actual knowledge on the part of the directors or managers. The correct position is set out in LAWSA (1st re-issue) volume 4, p 58-59 *viz*:

‘In addition to the attribution of knowledge to the company in terms of the directing mind doctrine, knowledge is also imputed to the company on the principles of the law of agency. Thus the knowledge of a director, officer, servant or agent of the company is imputed to the company where it was his duty to acquire that knowledge for the company.’

See further *R v Kritzinger* 1971 (2) SA 57 (A) at 59H-60F where Hoexter JA said the following:

‘Let me begin by quoting the following from the speech of Viscount Dunedin in the case of *JC*

Houghton & Co v Nothard, Lowe and Wills, 1928 AC 1 at p 14:
"The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties . . . ."'

(See further *North & Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A).)

I agree with counsel representing Cape Town that the job of determining on a day to day basis where Safcol's responsibilities ended and Cape Town's began and *vice versa* is not in the board rooms of either but on the ground with respectively, Wilmot the Safcol director in charge and Viljoen the Cape Town manager.

[45] I conclude therefore that Safcol under the mistaken belief that it was the owner, exercised possession and control over the island where to its knowledge the wattle was stacked creating a fire hazard. Cape Town, under the belief that it was not the owner and that Safcol was, exercised no control or possession and though aware of the fire hazard did nothing as it was aware of Safcol's knowledge of the hazard.

[46] The question then is: is the omission on the part of Safcol as possessor and controller to be regarded as wrongful or is it Cape Town as owner's omission which was wrongful.

[47] The importance of the element of control in matters of this nature was emphasized in *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A). The translated head note in part reads as follows:

'That the element of control is an important factor in the adjudication of the question of unlawfulness cannot be disputed. (At 359I/J.) It is however not practicable to lay down in an *a priori* manner the

degree and scope of the control-element which is required to establish liability. That should be determined on the basis of the facts of each case together with all the other circumstances which have to be taken into account and weighed. (At 360D-E.) The fact that the Administrator has control and supervision over the road in question is a necessary factor for the establishment of the Administrator's liability, but in itself it is not sufficient. (At 360G/H-H.)

In the absence of a positive danger-creating act, the mere control of property and the failure to exercise such control with resultant prejudice to another is not *per se* unlawful. The crucial issue is whether the precautionary measures which the controller should, according to the aggrieved party, have taken in order to prevent the prejudice can in the circumstances be reasonably and practicably required of him. The underlying philosophy is that a consequence is only unlawful if in the light of all the circumstances it can reasonably be expected of the defendant to act positively and take the suggested precautionary measures for the omission of which the plaintiff holds him responsible. (At 361F/G-H.)'

[48] This court has in the last number of years confirmed the test for wrongfulness involving an omission as formulated in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) and emphasized the difference between the requirements of wrongfulness and negligence necessary to establish liability. (See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at par 12, 16 and 21; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) par 12; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) par 14; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) par 10 and 11 and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) par 17.) It would be a matter of supererogation for me to attempt to add to this learning. The case does, however, I venture to add, illustrate the necessity to determine wrongfulness as distinct from the question of negligence. Section 84 of the Forestry Act, Act 122 of 1984 casts a reverse onus on a defendant in a case of this nature to prove absence of negligence. If it is found that the omission was not wrongful the question of negligence and the reverse onus does not arise.

[49] The test to be applied is that laid down in *Minister van Polisie v Ewels (supra*) as summarised by Nugent JA in *Minister of Safety and Security v Van Duivenboden*

(*supra*) at par 13:

'In *Minister van Polisie v Ewels* it was held by this court that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the "legal convictions of the community" require that it should be regarded as unlawful. Subsequent decisions have reiterated that the enquiry in that regard is a broad one in which all the relevant circumstances must be brought to account.'

See further the extract from FDJ Brandt's inaugural professorial lecture as Professor Extraordinary in Private Law (University of the Free State) 8th March 20006 (as yet unpublished) quoted in the judgment of Ponnan JA.

[50] Applying the above I am of the view that the legal convictions of the community on the facts of this case would determine that there was a legal duty on Safcol rather than Cape Town to guard against the fire hazard on the island and their omission not to do so was wrongful.

[51] The issue of negligence is not problematical. A reasonable person in Safcol's position with knowledge of the potential danger would have taken steps (as Wilmot in part did) to remove the hazard even though not created by it. I am in agreement with the trial judge that the Minister and Nature Conservation were negligent to a far greater degree than Safcol and that the apportionment should be 75% against the former. Safcol however in my judgment was at fault to the extent of 25%.

[52] It is not clear to me on what basis the trial judge ordered Cape Town to pay 25% of Durr and the Penny Taylor Trusts' costs. The latter did not sue Cape Town. It was joined by Safcol as a third party and would only have been liable as against Safcol had the court found Safcol to be liable which it did not. On any basis Cape Town's appeal against that part of the order must succeed.

[53] I consequently agree that the appeal by the Minister and Nature Conservation

falls to be dismissed. I would however allow Cape Town's appeal both against the costs order in the Durr and Penny Taylor Trust matters and the apportionment of 25% against it in the Safcol matter, and grant an appropriate order declaring Safcol to have been 25% at fault.

P C COMBRINCK

ACTING JUDGE OF APPEAL