Case No 281/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

H L & H TIMBER PRODUCTS (PTY) LTD Appellant

And

SAPPI MANUFACTURING (PTY) LTD Respondent

CORAM: NIENABER, HOWIE, SCHUTZ JJA, FARLAM *et* MTHIYANE AJJA

DATE OF HEARING: 18 September 2000

DATE OF JUDGMENT: 29 September 2000

J U D G M E N T

NIENABER JA/

NIENABER JA :

[1] On 22 August 1992 a runaway fire broke out on Langfontein, a timber farm belonging to the appellant and situated alongside the Melmoth-Babanango road in northern KwaZulu Natal. The exact cause of the fire was never established. It started in a narrow valley, also referred to as a ravine, some 50 to 70 m wide, which was covered in scrub and grass. The valley runs approximately north-east to southwest and is bordered on both sides by farm roads. The fire, fanned by a strong north-westerly wind, escaped on both sides of the valley. On the western side it destroyed some of the appellant's own timber plantations. On the eastern side it devastated timber plantations belonging to MTE Limited (referred to throughout the trial as "Mondi ") and eventually spread to the respondent's plantations, which adjoined the Mondi plantations further towards the east, some 2 to 3 km distant from where it started, where it caused the extensive damage to the respondent’s wattle and gum plantations which form the subject matter of these proceedings.

[2] The respondent, as plaintiff, sought to recover the losses it suffered as a result of the fire from both the appellant as the first and Mondi as the second defendant. Shortly before the commencement of the trial a settlement was reached with Mondi and the matter accordingly proceeded against the appellant as the only defendant. The trial court (Combrinck J sitting in the Natal Provincial Division) agreed to separate the issues of liability and quantum and to deal, at the outset, only with the former. I

shall refer to the parties remaining as the plaintiff and the defendant respectively.

[3] The plaintiff blamed the defendant for negligently failing to control and contain the fire which started on its property. The trial court agreed with the plaintiff and granted an order "that the first defendant is liable to compensate the plaintiff for any damage which it may prove it suffered as a consequence of the fire which originated on the first defendant's property, Langfontein, on 22 August 1992". This is an appeal, with leave granted by the court *a quo*, against that order.

[4] Saturday 22 August 1992 was a so-called code red day. It was hot and dry. A strong north-westerly wind was blowing and the fire danger index had moved from orange to red indicating that conditions were especially dangerous and conducive to the outbreak of fires. By 12 noon the wind speed was 70 km an hour and the fire danger index had reached 88. Just after midday smoke was detected on Langfontein from three separate lookout towers, the plaintiff's, Mondi's and the defendant's.

[5] The plaintiff's Nineve lookout tower reported to Van der Merwe, the plaintiff's forest manager at Mooiplaas, one of the plaintiff's properties, that a fire had been spotted on the defendant's property. Van der Merwe immediately notified the Kataza air strip. All the parties concerned belong to an association, the Zululand Inland Fire Protection Association ("the Association"), which provided air support in case of fire. The aircraft used were owned by a company which was contracted to the Association. The Kataza air strip was 2 to 3 minutes flying time from Langfontein.

Because of the day's red alert status planes were at the strip ready for take off at the first sign of crisis.

[6] The alarm having been raised, a spotter plane and a water bomber took off at 12:14. Jaco de Vries was the pilot of the spotter plane, Martin Buchler his spotter/observer and Willem Oosthuizen was flying the water bomber. All of them gave evidence for the plaintiff. The function of the spotter plane was to communicate by radio with the fire-fighters on the ground and to advise the bomber where to drop his load. Each load consisted of approximately 1 500 l of water and when dropped could cover an area of some 60 - 70 m by 20 - 30 m. They estimated the fire at that stage to be about 50 m in width and 100 m in length but spreading in all directions. The wind was fanning the fire towards the east but it was also burning against the wind and up the slope on the western side.

[7] Meanwhile the Mondi Ferncliff lookout tower, also having spotted the fire at Langfontein at more or less the same time, sent out a radio message to that effect which was overheard by Peter Walker. Walker was an independent forestry contractor, contracted to Mondi, who resided on a property not far from where the fire broke out. He testified for the defendant. On hearing the message at his home he went outside where he could see the fire. He immediately gathered his standby crew and drove towards the fire. Along the way he encountered Gilbert Plant, the defendant's forestry area manager, who was in his bakkie and told him that he was busy trying to establish radio contact. Walker informed Plant that he would in the meantime proceed to the fire. When he arrived there

he took up a position at the south eastern end. He could hear but not see (because of the pall of smoke hanging over the valley) planes operating and dropping water bombs. By means of backburning he was able to contain the fire at the southern end.

[8] Unbeknown to Walker Mondi had sent in its own tender and crew to the site of the fire where they took up a position along the Mondi boundary on the east, some 200 - 300 m from the fire. For reasons which were never properly explained they did not participate actively in the efforts of the others to battle the rapidly increasing blaze.

[9] The fire was also observed by the defendant's lookout tower which alerted Plant, also a witness for the defendant. He was, at that moment, on the road, not far from the site of the fire, on his way to the farm Wonderdraai some 10 km distant to inspect the fire-fighting crew there. He immediately radioed Wonderdraai and summoned the crew to the fire. They were already on their way. He then drove to the top of the hill to pinpoint the exact location of the fire. He tried, but did not succeed, in contacting the plaintiff's operations (or "ops") room as well as Mondi (Melmoth). He did succeed in raising Mondi (Babanango). The defendant's properties in the area consisted of four farms, two of which, Langfontein and Wonderdraai, together some 3 100 ha in extent, were managed as a single unit. Plant resided at Langfontein which was 2 - 3 km away from the site of the fire. One fire-fighting crew with full equipment was stationed at Wonderdraai and another at the farm Ntonjeneni some 25 km from Langfontein. The equipment at each station consisted of a 2 500

l tender, drawn by a tractor, with a crew of 12. After alerting both crews Plant returned to his homestead and workshop at Langfontein to load his bakkie-sakkie (a bakkie fitted with a water tank). He then drove to the fire where he stationed himself and operated his bakkie-sakkie on the western side of the valley. He could see Walker but he could not communicate with him. Some time later he was joined by the crew with equipment from Wonderdraai and eventually by a Mondi crew from Babanango. Plant agreed under cross-examination that Oosthuizen had a better overview of the situation than he had and that it was a real problem that he was not in two-way communication with the spotter plane, the plaintiff's ops room and the Mondi crew on the Mondi boundary.

[10] The combined forces (but excluding the Mondi reserves) fought the fire as best they could. By 13:31 Oosthuizen had dropped eight loads. It was his impression that by 13:00 the fire had started spotting into the plantations on the east and had effectively escaped the valley. It was common cause that once that happened the fire had for the time being become unstoppable. As stated earlier, the plaintiff, Mondi and the defendant itself lost large tracts of afforestation in the ensuing conflagration.

[11] The plaintiff's main complaint on the pleadings is that the defendant through its employees was negligent in failing to detect, control and extinguish the fire which originated on its property and eventually spread onto the plaintiff's property. Harm to the plaintiff in those circumstances was manifest. The central issue is therefore whether the defendant by the

exercise of reasonable care could have prevented the fire from jumping its own boundaries and spreading onto the plaintiff's land.

[12] It is in this connection that s 84 of the Forest Act 122 of 1984 ("the Act") plays a pivotal role. This section reads:

> "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."

It was common cause between the parties that the fire in this case was a veld or forest fire and that it occurred on land situated outside a fire control area.

[13] The overall effect of the section (which in a recent decision by the Constitutional Court was held not to be unconstitutional : *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC)) 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; d) a causal connection between (a) and (c). The section is only concerned 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).

[14] Conduct (element (a) above) can take the form of a *commissio*, eg 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,* eg 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) 194C-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.

[15] Ever since *Van Wyk v Hermanus Municipality* 1963 (4) SA 285 (C) 295A it has been received dogma that a mere allegation of negligence by a plaintiff will not be enough to activate the statutory presumption against his defendant. The reason is the use of the word "arise" in the section instead of "allege". (The word used in the Afrikaans text is "ontstaan".) Thus it was said by Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry* 1972 (2) SA 783 (N) 788H (with reference to the similarly worded precursor to s 84 of the Act):

> " I would prefer, therefore, to suggest that 'the question of negligence' in respect of veld or forest fires can be said properly 'to arise' in any proceedings only where -
>
> a) negligence is alleged against a party to such proceedings; and
>
> b) the party making such allegation has established a *nexus* or connection, between the fire and the party against whom the allegation is made, which is consistent with such negligence."

On appeal (*Ministry of Forestry v Quathlamba (Pty) Ltd, supra*) this court, while confirming that "the section cannot be invoked merely by averring negligence, without anything more" (84C), did not find it necessary to redefine the additional requirement. It was said (at 84H):

> "The effect of this was that the *onus* thereafter rested upon defendant to show either that in the particular circumstances harm to the plaintiff was not, and could not reasonably have been, foreseen or, alternatively, that, notwithstanding the exercise by him of such care as the circumstances reasonably required, defendant could not prevent the fire from extending beyond the boundaries of its property and occasioning harm to plaintiff."

(I do not read the concluding words "and occasioning harm to the plaintiff" as meaning that a defendant also bears the *onus* of disproving causation - element (d) referred to in par 13 above - eg that another fire caused the harm or that the ultimate harm was too remote in time, distance or circumstance.) Since there was proof, which satisfied the court, that the fire in question originated on and emanated from landed property owned and controlled by the defendant it was held that the *onus* thereafter rested upon it to show that the fire could not by reasonable means and measures have been prevented from extending beyond the boundaries of its property, thereby occasioning harm to the plaintiff

(84H). In *Steenberg v De Kaap Timber (Pty) Ltd supra* (where the fire was started by an employee of the defendant) this court once again reverted, albeit by dint of an assumption (175A-B), to the requirement formulated by Fannin J of a *nexus* between the fire and the defendant which "must be consistent with negligence." Whether such a *nexus* had to be proved *prima facie* or on a balance of probabilities was a point of contention deliberately left open in *Steenberg*'s case *supra* (at 178C-E).

[16] The stated requirement is a *nexus* between the fire and the defendant. That requirement will, in my opinion, be satisfied by proof by the plaintiff of conduct by the defendant, in the form of a *commissio* or an *omissio*, which would render the defendant answerable in law for the fire or its course. (Compare the manner in which the section has been applied in matters such as *Titlestad v Minister of Water Affairs* 1974 (3) SA 810 (N) and *Louw and Others v Lang* 1990 (3) SA 45 (E) 55C-D, 56E.) Such proof may well avoid an order of absolution at the end of the plaintiff's case. Otherwise the question of the *quantum* of proof required to establish such a *nexus* can be left open, as it was in *Steenberg*'s case *supra*.

[17] The justification for the further requirement that the *nexus* must be "consistent with negligence" is to be found in another dictum of Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry supra* at 788G:

> "But it may be argued with some force, I think, that to require only some *nexus* is not enough, for unless the *nexus* between the fire and the person alleged to have been negligent is such as to be at the least *consistent* with negligence, the plaintiff

will have taken the matter no further than if he had merely alleged negligence and done no more."

Such proof (by the plaintiff) if truly required will of course have to be on *prima facie* basis for otherwise it would be in direct conflict with the statutory presumption which requires proof (by the defendant) on a balance of probabilities. In my respectful view this additional requirement (that the proof of conduct constituting the *nexus* between the fire and the defendant must in addition be consistent with negligence) is perhaps an unnecessary refinement - but again it is not necessary to express a conviction on the point.

[18] In the instant case the necessary conduct constituting the *nexus* between the fire and the defendant (the failure to prevent the spread of the fire beyond the defendant's boundaries) was never in dispute. The statutory presumption accordingly applied. That meant that the defendant "at the trial bore the *onus* of proving on a balance of probabilities that its employees were not negligent either in causing the fire to start or in failing to prevent its spreading onto Broughton [a neighbouring property]."

per Botha JA in *Clan Syndicate (Pty) Ltd v Peattie and Others NNO* 1986 (2) SA 791 (A) 796G).

[19] The defendant, accepting that the *onus* rested on it, offered a two-fold defence:

a) that the court *a quo* erred in finding that the defendant's employees, Plant in particular, were and was negligent;
b) alternatively, that any negligence that may be found on Plant's part was essentially irrelevant since the fire would in any event have escaped the boundary of the defendant's property regardless of anything the defendant could reasonably have attempted to do to prevent it from happening.

According to counsel for the defendant the *onus* in respect of the first leg of its defence rested on it and in respect of the second leg on the plaintiff. I agree with the first proposition but, for the reasons that follow, not with the second.

[20] There is essentially but one question posed: whether the defendant acted reasonably in relation to the spread of the fire beyond its boundary. Had it not been for the section in the Act the *onus* in respect of the "question of negligence" (which arose in the action by the plaintiff against the defendant) would have been on the plaintiff to prove the two aspects of that question, namely a) that the defendant was negligent ie that harm which was reasonably foreseeable could reasonably have been averted and b) that such negligence was relevant to such harm ie to the spread of the fire from the defendant's property to that of the plaintiff. But because of the interposition of the section the situation is reversed and it is now for the defendant to prove on a balance of probabilities a) that it was not negligent in any of the respects alleged by the plaintiff; or b) if its conduct did fall short of the standards required of it, that such failings would have had no effect on and hence would not have been relevant in

relation to the escape of the fire ie to the ultimate harm suffered by the plaintiff.

[21] One of the principal objectives of the Act is the prevention and control of veld, forest and mountain fires (cf *Prinsloo v Van der Linde and Another supra* 1016E-H). 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. This philosophy is also reflected in s 84. Its purpose was described in these terms by Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry supra* at 788B-D:

> "It was argued on behalf of the plaintiff that the presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire whose origin he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated, whether it was lit by himself or by anyone for whose acts he is in law responsible and the manner in which the fire was dealt with, if at all, by him or by his servants or agents. This, I think, is undoubtedly correct.
>
> Furthermore, a person who has suffered as a result of a fire which has come from another's land will often not be in a position to embark upon any investigation as to the origin or cause of the fire, and will certainly have no right to enter upon that land to conduct any such investigation."

Similar considerations in my opinion apply when there is uncertainty as to whether the actions or inaction of a defendant had or would have had a bearing on the state and course of the fire. These are issues arising within

the context of the "question of negligence". The section as I read it fixes a defendant with the *onus* not only to justify the reasonableness of his actions or inaction but also to demonstrate the irrelevance of his unreasonableness, if that is indeed his case, to the harm complained of by the plaintiff. In short the legislature for reasons of policy encumbered a defendant with the *onus* to exonerate his conduct in circumstances where the presumption operates. It follows that if there is uncertainty (which cannot be determined as a matter of credibility or probability) as to whether the defendant's conduct fell short of the required standard and, if so, whether it had any bearing on the fact that the fire escaped his property, those issues must be resolved, by virtue of the operation of the presumption, against the defendant.

[22] Against that background I propose to examine the two aspects of the "question of negligence" raised by the defendant as a defence and referred to in paragraph 19 above.

[23] The first issue is whether Plant had been negligent. The presumption is that he was. The court *a quo* held that the defendant failed to rebut it. It is the correctness of that finding, based on the court *a quo*'s impression of the witnesses, its assessment of the facts and its reasoning in regard thereto, that is in dispute. The court *a quo* preferred the evidence of the eye-witnesses to that of the experts. As between the experts it preferred the opinions of the plaintiff's expert, Le Roux, to those of the defendant's expert, Venter. As between the eye-witnesses it ranked Oosthuizen above the others. He was described as an impressive witness. The court *a quo*

made no credibility findings against Walker and Plant but it regarded the evidence of Oosthuizen, Buchler and De Vries more highly because they were in a better position to observe the course and extent of the fire than Walker and Plant who were on the ground, enveloped in smoke and battling the fire. No compelling reasons were advanced in argument why this court should depart from the court *a quo*'s assessment of the various witnesses. It must accordingly follow suit.

[24] The court *a quo* accepted Oosthuizen's evidence that the fire was localized in the valley and that after he dropped his first two loads his clear impression was that the fire was "actually acting reasonably peacefully under the severe conditions that we had" and that it could have been contained in the valley if, in the initial critical stages, there had been adequate ground crew support. It was not then in De Vries's words, "a raging inferno". Even without proper ground support, according to Oosthuizen, "we were holding it, but we weren't beating it." That too was Buchler and De Vries's impression. It is an impression supported by the fact that it took almost an hour for the fire to escape from the valley. The witnesses were all agreed that the bomber was the most potent weapon available but that it tended to be ineffectual without adequate ground support.

[25] The problem, then, was the lack of adequate ground crew support in the initial stages for the bombing operations along the eastern side of the valley. Was Plant partly to be blamed for this state of affairs? He was certainly criticised both by the court *a quo* and by counsel for the plaintiff

in this court. These categories of criticism may conveniently be summarised as follows:

a) He was inadequately prepared to meet the crisis.

That a crisis was foreseeable (if not perhaps looming) is clear. It was a code red day and the north-westerly was picking up. Everybody concerned was on standby. There was no suggestion that the outbreak of the fire could not have been anticipated at the particular time and place where it eventually occurred or that its initial intensity was wholly unprecedented. By the time the bomber had arrived on the scene at 12:18 the Mondi crew was already in place alongside the Mondi boundary on the east, some 200 - 300 m from the site of the fire, and Walker had already commenced fighting the fire in the south. Only the defendant's fire-fighting team was conspicuous by its absence. Plant estimated that he received the message at 12:10 and that it would have taken him another 18 - 20 minutes to arrive at the scene - an estimate that was queried by counsel for the plaintiff but which may be accepted for present purposes. By that time the fire had already expanded alarmingly. The reason for the delay was, as stated earlier, that Plant, having been alerted by radio about the outbreak of a fire some 3 km from his homestead, had to return there in order to load his bakkie-sakkie. He was unaccompanied by any crew even though fire-fighting equipment for a crew of four as well as spares had been stored at his homestead. Not to have been accompanied by a crew during his tour of inspection that morning, having regard to the very real danger that a fire could break out anywhere at any time was, in my opinion, a lapse that was rightly criticised. The consequence was that

Plant, arriving at the scene of the fire without beaters, was ill-equipped to contribute to the efforts to combat the blaze.

b) Lack of communication.

Another aspect on which Plant was justifiably criticised was his failure to check his lines of communication during the course of that morning, particularly with the plaintiff's ops room which was the nerve centre of fire-fighting activities in that area. For the reasons discussed earlier he was not in two-way radio communication with the spotter plane or the ops room. That effectively disqualified him from assuming the position of "fire-boss" and from directing operations on the ground which, as the representative of the owner of the land on which the fire occurred, should primarily have been his responsibility. In turn that precluded the spotter plane from communicating with him in order to direct him to the eastern side where ground crew support was most needed. The court *a quo* said of this:

> "I consider that it has failed to produce evidence to prove that it was not at fault in regard to the breakdown of communication and that it had taken all reasonable steps to get its ground crew to the fire timeously. Given the extremely dangerous conditions prevailing on the day in question I would have expected Plant to have been in a greater state of readiness than he was. I would have firstly expected of him to have tested his radio either early in the morning or during the course of the morning when conditions got progressively worse to ensure that he was in contact with the Sappi Ops room and the Kataza air strip.
>
> Had he done so, he would have been aware that his radio was malfunctioning and he would have also had time to arrange a frequency upon which he could be contacted by Sappi."

c) The late arrival of the Wonderdraai crew.

As stated earlier the Wonderdraai crew arrived only some 30 - 40 minutes after the alarm was first sounded. It was argued that the defendant could not fairly be criticised for not having had a full crew stationed at Langfontein, since a fire could break out anywhere on the property which was an extensive one. That may be so, but to the extent that the Act, as stated earlier, places the initial responsibility on a landowner to confine a fire, if it occurs, to his own property, he runs the risk of an imputation of lack of foresight if his fire-fighting crew is unable to reach the location of a sudden flare-up within a reasonable time. What a reasonable time will be will of course depend on a number of factors, such as the distances involved, the nature of the terrain and the accessibility of the site of the fire. No evidence was led on these matters in this case. That the Mondi crew was able to reach the site of the fire without delay is some indication that the defendant should have done better. The court discussed the issue in these terms:

> "One would have expected that the bulk of your ground crew would be in the proximity of the large estate of 3,000 hectares or at least stationed in such a place that they could quickly and sufficiently be deployed should a fire break out on Langfontein or Wonderdraai. ... it must again be stressed that it is for SilvaCell [the defendant] to prove that it was reasonable to have the crews where they were and not for Sappi [the plaintiff] to prove that it was unreasonable to have the crews situated at Ntjonjeneni and Wonderdraai. The fact of the matter is that the one crew [the Wonderdraai crew] arrived 40 to 50 minutes after the fire was observed and the other [the Ntjonjeneni crew] at the stage when the fire had

> already escaped from the valley and nothing could be done to stop it. ... The reason for the fire not being contained was primarily the fact that there was no communication between Plant and the spotter aircraft but also because the ground crew were late in arriving at the fire..."

d) Plant stationed himself on the western side of the valley whereas his priority should have been to fight the fire on its eastern side.

Plant's decision to move to the western side was not *per se* negligent. It was based on his assessment of the situation on the ground. But that assessment was in turn informed by his inability to communicate with the spotter plane. Had he been in touch with the spotter plane and if he had a crew with him on the day and had arrived on the scene a little earlier, it is likely that he would have deployed his crew on the eastern side. One knows that Walker was able to contain the fire on the southern side. It is not unlikely that Plant would have been able to do likewise on the eastern side if he had been directed to position himself there, if he had arrived earlier and if he had some crew support. Admittedly that would then have left the western flank of the valley exposed. But the wind was driving the fire eastwards and his priority was, in order to protect the defendant against a claim for damages from his neighbours, to prevent the fire from escaping eastwards into the Mondi and thence into the plaintiff's property. Because he was on his own and largely *incommunicado* he was unable to render the ground support to the bombing operations which the situation demanded.

[26] There is a further consideration, not mentioned by the court *a quo*, to be taken into account. It is this. Because of Plant's earlier failure to properly check his lines of communication and the time he had to waste to return to his homestead to load his bakkie-sakkie he arrived at the fire at the wrong time and stationed himself at the wrong place. He thereby effectively disqualified himself from being able to testify at first hand about actual conditions on the eastern side. Such evidence might conceivably have supported a defence that it would have been unreasonable to have required him to fight the fire on that side. As it happened, there was no evidence from anyone as to the conditions on the ground on the eastern side where the action should have taken place. It was for the defendant as the landowner on whose property the fire occurred to adduce all the evidence which it needed to rebut the presumption of negligence against it. Its failure to do so, due to Plant's prior neglect, left a vital gap in the evidence and precluded the defendant from presenting a fuller picture which might have assisted it in its defence.

[27] The court *a quo* found that Plant acted unreasonably in the several respects mentioned by it. I agree with that conclusion. The call may be a marginal one. Even so, I believe that the defendant failed to show that Plant's management of the crisis that morning measured up to the standards required of a forester in his position. That finding does not, of course, conclude the enquiry. The defendant's alternative response, as stated earlier, was that the court *a quo*'s findings of negligence were irrelevant since the plaintiff failed to prove that the fire would not in any

event have escaped onto the Mondi property and thence onto the plaintiff's property. There are, in my opinion, two complete answers to this response. The first is based on the overall probabilities; the second on an aspect discussed earlier in this judgment, the *onus* in respect of non-causative negligence. I deal with them in turn.

[28] If Plant a) had arrived earlier at the site of the fire and b) had been accompanied by a crew, even a reduced one, with proper fire-fighting equipment and c) had been able to communicate with both the spotter plane and the Mondi crew, then I believe it is more likely than not that he would have been directed by the spotter plane to render ground support to the bomber on the eastern flank of the fire and, as Walker was able to do in the south with a mini crew at his disposal, that he would have been able, by concentrating all available resources on that side, to subdue or at least contain the fire when it was still manageable and so possible to do so. Thereafter he could have proceeded to the western side where the fire might well not yet have reached the ridge where it would have met the full force of the wind which could have caused "spotting" eastwards across the valley and onto the Mondi property. To illustrate the point I quote from certain exchanges that took place between the court *a quo* and Plant:

> "So, did you consider that Walker and his crew was sufficient ground back-up for the bomber? --- No, I didn't consider it sufficient, but it was all we had.
>
> And was it feasible at all that - I know it was an emergency situation, but that with your training you would throw all the resources that you had in assisting the bomber, and once everybody had extinguished and contained the fire on the

eastern side then the whole lot could then concentrate on the western side? Was that not feasible?

--- It would only have been feasible if we'd had a lot more people, M'lord. If I may just add something to that. I was expecting that Mondi, with their great numbers of labour and considerable equipment, would have been able to come in and then - I was absolutely certain they were aware of the fire because Mondi, Babanango certainly was - that they would have come in to help Peter on that side.

That's on the eastern side. --- Eastern side, yes. And that is because Mondi would be threatened as being the next in line? --- Absolutely. Absolutely, M'lord."

And further:

"Can I just ask you a hypothetical question? What would have happened if you did have radio contact with the spotter, and the spotter said to you, 'This is where the loads are going down,' and you knew where the bomber was going to put the loads? Just put yourself in that position. What would have happened? --- I would have told him to keep on the eastern side, to keep putting loads down on the eastern side, because of the danger of the fire running directly across the boundary if it didn't spot, and it was going to get ...(intervention)

Because of the prevailing wind. --- With the prevailing wind. And it was going to get into Mondi, and I knew that Mondi had this huge sea of brushwood just behind that first compartment.

Yes, and apart from that if he'd then said to you, as apparently he complained, 'There's insufficient - there's no ground support.' If he'd radioed that to you what would you have done? --- We're still working on the assumption that I had radio contact with people?

Yes. --- I'd have asked Mondi please to come in and give us the ground support to try and stop it where it was before it crossed over, but preferably on both sides of the valley, because I knew ...(intervention)

> But you and your crew would have remained on the western side? --- I still believe it would have been important to do that, M'Lord."

Plant obviously believed that he could have persuaded Mondi to enter the fray more actively that it did and that such intervention would have been significant. The chances are that he was right in thinking that. To answer the hypothetical question posed by the court *a quo* - a primary technique for testing probabilities: if Plant had been better prepared it could well have made a difference in the long run. On that basis and as a matter of probability I therefore believe that it has not been shown that the criticism of Plant's conduct on the day in question related to matters which were of no consequence.

[29] I turn to the further reason for concluding that the statutory presumption had not been rebutted by the defendant. As stated earlier the *onus* also rested on the defendant, as part of the "question of negligence", to show that a finding by the court (that its conduct was adjudged not to be reasonable) did not matter because the fire would in any event have escaped across the defendant's borders ie that any failure on its part would have made no difference to the eventual spread of the fire.

It was submitted by counsel for the defendant that the possibility cannot be excluded that spotting in the east took place from either the fire in the valley, even while it was being fought from the air and on the ground, or from the western ridge when the fire eventually reached the full force of the north-westerly. That may or may not be so. Because the *onus* is on the

defendant in that respect it does not avail the defendant to rely on speculation as a defence. Any uncertainty about the matter must count against the defendant, for it is the defendant which had to bear the brunt of placing evidence before the court which could have disposed of any such uncertainties. The evidence leaves many other questions similarly unanswered.

So, for example, one is left in the dark about the Mondi crew's reluctance to come to the defendant's assistance on the eastern flank. Mondi's reply given to Buchler and De Vries on the radio in response to their request for ground crew support, that there was a difficulty of access, is hard to square with the evidence. It was for the defendant to explain or clarify this and the many other obscurities in the case. It failed to do so.

[30] On either of the above approaches (the probabilities or the burden of proof in respect of non-causative negligence) the defendant failed to rebut the *onus* placed on it by s 84 of the Act. The appeal must accordingly fail. The following order is made:

"The appeal is dismissed with costs."

.....

P M NIENABER

JUDGE OF APPEAL

Concur :

Schutz JA

Mthiyane AJA

HOWIE JA:

I agree with the judgment of my colleague, Nienaber JA, as regards the nature and extent of the onus on defendant. It was to disprove causative negligence on the part of Plant and his crew. I also agree that defendant failed to show that Plant was adequately prepared, both as regards his own readiness to proceed to the fire and in respect of the efficiency of his radio communications. I shall also assume that, without negligence on their or Plant's part, the crew from Wonderdraai would have reached the fire appreciably sooner than they did and that they, under Plant's direction, would have focused their attention on the eastern side of the valley. However, I consider that defendant discharged the onus of showing that even had Plant and his men acted without negligence, the fire would still have spread to Mondi's and plaintiff's properties. I therefore respectfully disagree with my learned colleague's conclusion as to the fate of the appeal. Even had Plant been able to radio the Mondi crew I think that the evidence shows, as a probability, that they would have stayed where they were. De Vries testified that when he radioed them their response was that they were unable to get down to the fire area. That was certainly so if regard be had to Plant's evidence that the fire-break connecting the valley to the Mondi

boundary was unaccessible by vehicle. And although there were other alternative routes, taking any of them would have involved appreciable time in getting to the fire and, more importantly for them, valuable time in getting back to their boundary if events so required, which they would have left unguarded in the interim. Their predicament of choice - and, indeed, choice of predicament - was not unlike the one facing Plant. However, his position was worse. His task was to prevent the fire crossing into neighbouring land to the east as a result of spotting. Spotting obviously occurred from the eastern side of the fire but Plant's evidence was that spotting would have occurred in any case had the fire reached the western ridge bordering the valley. That evidence, which was not countered, was convincing. It reads –

> "My intention, when I saw that the fire was going onto the western side, was to try and prevent initially the spread of fire into the plantations on the western side, which would then have prevented a general spread of fire up a steep slope.
>
> In your experience how does a fire behave up a steep slope?---
>
> It accelerates.
>
> What was your concern about the fire going up that hill on the western side?--- Firstly the wind had a tendency to veer in that direction, which was more or less against the prevailing wind, but it definitely was pushing in that direction. My concern was that if the fire went up that slope and hit the ridge it would be subjected to the full force of the north-west wind, and cause the fire to run along the ridge and spread in a south-easterly direction, thereby causing a catastrophic spread of fire across in the direction of SAPPI and Mondi, and some severe

spotting, which would virtually certainly have occurred when the wind hit fire up at that level.

If a burning plantation at the top of a ridge is hit by a 70 kilometre per hour wind, can you give the Court an indication how far - over what distance can spotting take place?--- Two kilometres is to be expected.

Is that in your experience?--- Yes."

The position was aggravated, said Plant, by the presence of a great deal of highly inflammable forest litter under the trees on the west slopes of the valley. And it must be remembered that Oosthuizen's evidence was that when he first reached the fire it was spreading in many directions, also against the wind. This spread westwards and north-westwards against the wind was because of the topography, namely, the steep western slope of the valley.

Despite Plant's efforts and those of his crew when they joined him, they were unable to stop blocks 3A and 5A burning out and this occurred because the fire went up the western slope to the top of the ridge referred to. Obviously this would have happened much sooner had Plant and his crew fought the fire on its eastern front and left the western front totally unattended. This part of the fire would therefore have met the full force of the wind at the western ridge and, as the most probable inference, have spotted across the narrow valley and into Mondi's property. The

further probable inference is that the eventual course of the fire would have been no different from what it was in fact.

I would accordingly allow the appeal.

C T HOWIE
/FARLAM AJA:

FARLAM AJA

[1] I have had the advantage of reading the judgments written in this matter by my colleagues Nienaber JA and Howie JA.

[2] I agree with the conclusion to which Howie JA has come and the reasons given therefor in his judgment, save that I do not share his view (in respect of which he agreed with Nienaber JA) that the onus was on the defendant to disprove *causative* negligence on the part of Plant and his crew.

[3] In my view the onus cast by section 84 of the Forest Act 122 of 1984 on the defendant was to disprove the plaintiff's allegation that it was negligent. For the rest the plaintiff had to prove the other essential elements of liability on the part of the defendant: *viz,* wrongful conduct which caused loss to the plaintiff.

[4] I cannot agree that when "the question of negligence" arises the effect of the section is to fix a defendant with "the onus not only to justify the reasonableness of his actions or inaction but also to demonstrate the

irrelevance of his unreasonableness, if that is indeed his case, to the harm complained of by the plaintiff" (to quote the formulation given by Nienaber JA in paragraph [21] of his judgment).

[5] In my view if Parliament had intended the onus transferred to the shoulders of a defendant in a fire case covered by section 84 to extend that far it would have used the expression "causative negligence" or some equivalent to indicate its intention in this regard. The interpretation of the section favoured by Nienaber JA involves the amendment of the common law in two respects, firstly as regards the question as to whether the conduct of the defendant deviated from that of the reasonable forester in the circumstances and secondly as to whether such deviation caused the loss in the sense that if it had not occurred the damage in question would not have been suffered. The presumption against amending or altering the common law no more than is necessary (as to which see, *e g,* such cases as *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823, *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167 and *Commissioner of Taxes v First Merchant Bank of Zimbabwe Ltd* 1998 (1) SA 27 ZSC at 30 G - I) is well known and if Parliament had intended to go as far as Nienaber JA suggests there was nothing to prevent it from making its intention on the point plain.

[6] Parliament first enacted a provision providing for a presumption of negligence in respect of a forest or veld fire in section 26 of Act 13 of 1941. This section was replaced by section 23 of Act 72 of 1968, which was in turn replaced by section 84 of Act 122 of 1984.

[7] Parliament's purpose in enacting section 23 of Act 72 of 1968 was described by Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry*, 1972 (2) 783 (N) at 788 B - D in a passage quoted by Nienaber JA in para [21] of his judgment. I agree with this statement which clearly applies also to the purpose underlying section 84 of Act 122 of 1984. It indicates why Parliament must have considered it necessary to transfer the onus from the Plaintiff to the defendant in respect of the issue of negligence. I do not agree with Nienaber JA's statement that "similar considerations apply when there is uncertainty as to whether the actions or inaction of a defendant had or would have had a bearing on the state or course of the fire". Nienaber JA says that "[t]hese are issues arising within the context of the 'question of negligence' ". That may be so but what is important is that after speaking of the "question of negligence" Parliament provides merely that "negligence is presumed".

[8] There can be no unfairness (and questions of onus generally depend on reasons of experience and fairness: *Pillay v Krishna and Another* 1946 AD 946 at 954) in putting the onus of proof on a defendant to show

what he did in respect of a fire, *i e*, whether, *e g*, he or his servants started it and what, if anything, he or they did to prevent it from spreading on to the property of the plaintiff. These will be things a defendant will or should know and about which the plaintiff may well be ignorant. If the negligence which is being considered relates to the starting of the fire then, provided it is established that the fire in question is linked to the defendant's damage, no causation problem will arise because the fire will be a *causa sine qua non* for the damage suffered by the defendant: this must be so because if the fire had not been started the damage would not have been suffered. The situation becomes more complicated where, as here, it is common cause that the case against the defendant is not based upon an allegation that it or its servants started the fire but merely that they failed to prevent it from spreading.

[9] In the present case I agree that the defendant did not show that its servants did all that a reasonable forester would have done to prevent the fire from spreading. But it is not self evident that if they had done all that a reasonable forester would have done in the circumstances they would have been successful in preventing the spread of the fire. After all, some fires will spread even if all reasonable steps are taken in an endeavour to prevent their spreading and a defendant, even one who is unable to rebut the onus of showing that he or his servants acted without negligence in fighting the fire,

may not be able to show that if reasonable steps had been taken the fire would have been prevented from spreading. He may be unable to show this because no-one knows. I do not think that considerations of experience and fairness require the onus to prove this aspect of the case to be put on the defendant: *a fortiori* that these considerations are so compelling as to justify the conclusion that Parliament intended to amend the common law to that extent and that the language it used clearly indicates such an intention.

[10] It follows from what I have said that I disagree with the second part of the statement appearing (at 84H) in the judgment of Ogilvie Thompson CJ in the *Quathlamba* case on appeal to this Court (1973 (3) SA 69(A)), which was clearly *obiter* and which has been quoted by Nienaber JA in para [15] of his judgment, to the effect that the onus created by section 23 of Act 72 of 1968 rested upon the defendant in that case to show either that harm to the plaintiff was not reasonably foreseeable or "*that, notwithstanding the exercise by [it] of such care as the circumstances reasonably required, [it] could not prevent the fire from extending beyond the boundaries of its property and occasioning harm to [the] plaintiff"* (my emphasis).

[11] I agree, however, as I have said, with the rest of Howie JA's judgment. I accordingly share his view that on the facts of this case it was established that even if the defendant's servants had not been guilty of

negligence the fire would inevitably have spotted into the plantations on the east and thus become unstoppable.

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I G FARLAM