



OLDMUTUAL

FIRES AND LEGAL LIABILITY



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INTRODUCTION

Large areas of South Africa are stricken by runaway fires affecting agricultural producers in particular, and causing incalculable damage.

A fire is inherently hazardous and the owner of a farm where a fire is raging, should take heed of the serious obligation to ensure that neighbouring landowners do not incur damage as a result of the fire.

Several legal actions have been instituted as a result of veldfires and good-neighbourliness has been ruined in many instances. The start and spreading of many veldfires could have been prevented.

It is important to be aware of the obligation that rests on a landowner and the legal implications of veldfires, as well as the most general causes of fires on farms:

- lightning
- spontaneous combustion
- arson
- controlled fires running out of control
- cooking fires
- smoking
- burning of garbage
- the collection of honey
- the use of equipment and tools
- trains and railway lines
- power lines
- fireworks, emergency flares, firearms, ammunition and
- smouldering material, to name a few.

In this document regular reference is made to court cases to illustrate the legal position.

This document is intended to provide information and not legal advice.

LANDOWNERS' DUTY

Veldfires not only result in big losses to farmers in terms of the damage caused and loss of income, but may have serious legal consequences.

According to **the National Veld and Forest Fire Act no. 101 of 1998 (as amended)** the word "owner" also means the lessee or any other person who is in charge of the land.

A fire is inherently hazardous and the owner of a farm where a fire is raging, should take heed of the serious obligation to ensure that neighbouring landowners do not incur damage as a result of the fire.

In the matter of *Van Wyk vs Hermanus Municipality 1963 (4) SA 285 (KPA)* the Supreme Court emphasised that a person who starts a fire has a duty to prevent the fire from spreading. Undertaking a hazardous task, such as lighting a fire, is considered negligent unless the person has the required expertise and equipment to control it.

In the matter of *Simon's Town Municipality vs Dews 1993 (1) SA 191 (A)* the Appeal Court warned that anyone starting a fire in an open field has a duty to take all reasonable precautions to control the fire and prevent it from spreading further than planned.

Due to the inherent hazardous nature of a fire, high standards of care and diligence are required. The person involved should have the required expertise and equipment to control the fire. Wind is a particular danger during veld burning as it may cause a fire to spread easily and quickly, running out of control.

This duty does not only apply to a fire started by a landowner or occupants, but also to a fire arising or spreading on the land through no involvement of the landowner or occupants.

In the matter of *Minister of Forestry vs Quathlamba (Pty.) Ltd. 1973 (3) SA 60 (A)* the Appeal Court ruled as follows: As soon as a landowner or an occupant in a rural area becomes aware of a fire which originated on or spread to his property and foresees (or should reasonably foresee) that it may spread to and cause damage to the property of another, South African law requires the landowner or occupant to take reasonable action, with the means available to them, to control or extinguish the fire.

In such case the landowner therefore has an obligation to take reasonable action in an attempt to prevent foreseeable damage to others.

SOME GENERAL CAUSES OF VELDFIRES

LIGHTNING

This is a common cause of fires, especially in areas where thunderstorms are a frequent phenomenon. Lightning can set the veld on fire, but can also be an indirect cause of a fire – e.g. when lightning strikes a power line, causing a fire.

In South African law this cause is often defined as *vis major* – i.e. not directly due to human intervention and not preventable. However, the onus resting on a landowner

or an occupant as described in the Quathlamba case above should be taken into account. So a landowner on whose land a fire is ignited due to lightning is obliged to take reasonable action, with the means available to the landowner, to control or extinguish the fire.

SPONTANEOUS COMBUSTION

Fires can also start as a result of spontaneous combustion of bunker silos, as well as peanut shells, sawdust, etc.

In the matter of *Durban City Council vs S.A. Board Mills Ltd 1961 (3) SA 397 (A)* a fire started in a municipal refuse dump – presumably as a result of spontaneous combustion. The fire spread to the plaintiff's neighbouring property and, inter alia, damaged a factory.

The court ruled that the defendant should have ensured that there were no flammable material such as loose pieces of paper, cardboard boxes or cement bags on the refuse dump which could catch fire and be blown away by the wind. The defendant was found negligent.

ARSON

Arson is a common cause of veldfires. Various motives can be involved – e.g. labour unrest, such as in the matter of *McMurray vs H.L. & H. (Pty.) Ltd. 2000 (4) SA 887 (NPA)*.

In this matter the plaintiff claimed damages as a result of fires allegedly started deliberately by employees of the defendant on the defendant's farm. The defendant was the owner of forest plantations. The fire spread to the plaintiff's farm causing damage. The plaintiff alleged that the defendant was negligent in taking disciplinary action against his employees under the following circumstances:

- the defendant was aware of the fact that conditions were favourable for veldfires to spread
- the defendant knew that his employees would start fires on his farm in reprisal for the disciplinary action and
- nevertheless, the defendant continued with disciplinary action which led to the dismissal of his employees.

At the hearing the points at issue were limited to the following:

- whether the defendant's dismissed employees were responsible for the alleged arson
- whether the defendant's action to continue with the disciplinary measures and dismissal of the employees caused the fires and resultant damage
- whether the defendant's continuation of the disciplinary action and dismissal of the employees on the day of the fire constituted unlawful action against the plaintiff.

The court ruled that if the defendant's employees had known that they would not be disciplined or dismissed on account of misconduct during the fire season; there would have been no motivation for them to act productively. The forestry industry would have been adversely affected if the defendant's actions were branded unreasonable.

Therefore it could not be said that the defendant's actions were unreasonable according to the legal convictions of the community. Accordingly, the plaintiff's claim was dismissed.

CONTROLLED FIRES RUNNING OUT OF CONTROL

Runaway veldfires often arise when controlled fires (e.g. when firebreaks are made) run out of control. Due to the inherent hazardous nature of fire, it is imperative for the landowner to be extremely careful when a controlled fire is started on a farm.

The matter of *Van der Eecken vs Salvation Army Property Co. and Another 2008 (4) SA 28 (TPA)* is an example of a case where damage was caused when a controlled fire ran out of control. The plaintiff instituted legal action when his house burnt down as a result of a fire arising and spreading from the defendants' nearby (but not adjacent) property. The defendants started a controlled fire. Fanned by the wind, the fire ran out of control, eventually reaching the claimant's property.

The court confirmed that landowners in a rural area have a legal duty not to cause damage to each other by negligently allowing fires to spread beyond their own property.

The court ruled that the defendants breached this legal duty by failing to:

- inform their neighbours of their intention to start controlled fires
- obtain their neighbours' permission or give them adequate notification
- determine the fire hazard index and
- ensure that enough trained people are present in the area of the controlled fire.

Furthermore, conditions were not favourable for controlled fires. Accordingly, the court ruled that the defendants were negligent and hence liable to pay damages to the plaintiff.

VICARIOUS LIABILITY

The term "vicarious liability" indicates indirect instead of direct (personal) liability; in other words, one person is held legally liable for the wrongful act of another person. Some kind of legal relationship must exist between these two persons.

The most common legal relationship which establishes vicarious liability is that of an employer and employee. When an employee commits a wrongful act within the nature and scope of his employment, his employer is vicariously liable for



damage arising from the employee's wrongful act. An act (a deed or failure to act) by the employer is not required, but he is held liable for the act of his employee.

SMOKING

It is well-known that cigarette stubs can cause veldfires. In cases where an employee smokes while he is on duty and a fire arises, the question is often whether he acted within the nature and scope of his employment.

In the matter of *Viljoen vs. Smith 1997 (1) SA 309 (A)* the plaintiff instituted action against the defendant for the recovery of damages which he had allegedly suffered as a result of a veldfire on his farm. The defendant farmed on a farm adjoining the plaintiff's farm. The plaintiff alleged that an employee of the defendant had caused the fire negligently in the course of his work and within the scope of his employment, and that consequently the defendant was vicariously liable.

The employee had apparently, while busy with his work in the vineyard, walked away to defecate. There were no toilet facilities available other than those at home and workers were expected to use those facilities before they began work in the mornings or during lunchtime. If they had a need in the interim, they could do the necessary in the veld or if necessary in the vineyard.

Climbing through the fence and trespassing on neighbours' land for that or any other purpose was strictly forbidden and punishable by fines. Contrary to his employer's prohibition, the employee had climbed through the fence and walked about 70 metres further to a place in the bushes on the plaintiff's property where he had defecated and attempted to light a cigarette. The heads of the matches had snapped and shot off, causing the fire. That point was about 300 metres from the place where he had been working.

The court ruled that the question whether an employee had indeed left his employment was a factual question which in any particular case had to be judged on the probabilities – chiefly, if not exclusively, on the basis of the degree of the deviation.

The court ruled furthermore that there could not be agreement with the defendant's argument that the point where the employee had defecated and attempted to light a cigarette (about 300 metres from the place in the vineyard where he had been working) was such a substantial deviation that it could justifiably be said that he had left his work temporarily or, stated differently, that he had not acted within the scope of his employment during his excursion.

Consequently it was found that the employee had indeed acted in the scope of his employment and therefore the defendant was vicariously liable.

REMOVAL OF HONEY

The activities of bee farmers and attempts to remove honey have at times resulted in veldfires.

In the matter of *Meter NO vs. Geo Parkes & Son (Pty.) Ltd. [2006] SCA 161 (RSA)* the owner of beehives on the defendant's farm and a friend of the owner had been doing maintenance work on the beehives. A bee smoker filled with burning pine needles was used for calming the bees. A fire had broken out, spread to the plaintiff's farm and caused extensive damage.

The plaintiff instituted action against the owners of the farm, and the court found that they (as defendant) had not succeeded in refuting the suspicion of negligence, as created by section 34(1) of Act 101 of 1998.

In the matter of *Lubbe vs. Louw (2006) 4 All SA 341 (A)* the defendant had sent an employee, Kotelo, to one of his other farms to switch off the irrigation system. Kotelo had given a lift to a co-worker, Rolls, and to another person, Draadmaker.

On the way back, Draadmaker asked Kotelo to stop. Draadmaker and Rolls attempted to smoke out bees in order to remove honey from a poplar tree. Kotelo warned them not to do so because of the danger that the veld could catch fire, but they had not bothered about him. Kotelo remained at the vehicle. Draadmaker and Rolls returned without honey and assured Kotelo that they had extinguished the fire they had made.

A short while later however they noticed a fire near the relevant poplar tree. Their attempts to extinguish the fire were in vain.

It had spread and caused damage to the plaintiff's property. The court found that the defendant had not refuted the statutory suspicion of negligence and that he was therefore liable for compensating the plaintiff for his damage.



BURNING OF GARBAGE

Fires often start when household garbage or other waste material is burned in ash holes, garbage drums, etc. Dead or pruned plant material is also often collected in heaps and set alight. Many fires have been caused in this way. The burning of stubble fields is also a fire hazard.

If any such activities are carried out negligently, this could naturally lead to the liability of the person doing the activity and/or his employer.

USE OF EQUIPMENT MAY CAUSE FIRES

Veldfires can start suddenly and are often unforeseen, for example when ignited by a spark from a power line or mechanical components. A duty rests on landowners to ensure among other things that their equipment is in good working order and that they or their employees are not negligent.

Fires can start in many ways – the list is endless, herewith a few of the common causes.

THE USE OF EQUIPMENT AND TOOLS

Fires can be ignited by the use of mechanical equipment. Some examples of this are:

- friction (for example faulty metal components grinding against one another and causing sparks)
- fuel (for example leaks or spilled fuel)
- mechanical breakdowns, such as electrical short-circuits that cause sparks
- the hot parts or components of a vehicle (such as a hot engine or exhaust system coming into contact with dry grass)

- carbon from exhaust systems (for example small particles of hot carbon being emitted from a tractor's exhaust pipe) and
- welding and the cutting and sharpening of metals.

The matter of *Clan Syndicate (Pty.) Ltd vs. Peattie 1986 (2) 777 (A)* is an example of a case where a fire was caused by the use of a mechanical tool. In this case, a fire started in a timber plantation on the defendant's farm and spread to the timber plantations on the plaintiff's farm, and as a result of this fire, the plaintiff suffered damage.

The plaintiff instituted action against the defendant and alleged that the defendant's employees had been negligent, in respect of the starting as well as the spread of the fire. It was evident during the trial that the fire had started in the plantations during the peak fire period, due to very dry conditions.

On the day concerned, a group of workers were present in the vicinity of the plantation. These workers were not accompanied by a team of fire-fighters. While the rest of the workers were having breakfast, one of them remained in the plantation and was cutting down 25-year-old pine trees, using a petrol-driven chainsaw. While he was felling the trees, the pine needles behind him caught fire. The rest of the workers tried to extinguish the fire, but the fire, which was being fanned by the strong mountain wind, got out of control. Nearly a thousand hectares of forest were destroyed and extensive damage was caused to the plaintiff's plantations.

It was clear from the evidence that the chainsaw could emit hot particles of carbon if there was a build-up of carbon in the exhaust system. Such a carbon build-up would occur if the exhaust system was not cleaned regularly, which process should consist of a comprehensive monthly service.

The court ruled that the use of the defective chainsaw was the most probable cause of the fire and that the defect could have been prevented by the regular routine servicing of the chainsaw. The court consequently ruled that the defendants were liable.

TRAINS AND RAILWAY LINES

Damage is also sometimes caused by burning objects emanating from trains.

Examples of these are:

- sugar-cane plantations damaged by a fire caused by a burning object from a train locomotive – *Moonsamy vs. South African Railways and Harbours 1962 (4) SA682 (NPA)*
- a wheat field, a number of bags of harvested wheat as well as pasturage damaged by a fire caused by burning material from train locomotive – *South African Railways and Harbours vs. du Preez 1952 (1) SA 81 (KPA)*.

In the matter of *Gouda Boerdery Bpk. vs. Transnet 2005(5) SA 490(A)* a fire started in a railway reserve and spread from there to the plaintiff's property where it caused damage. The plaintiff relied on the presumption of negligence as created by section 34 (1) of the National Veld and Forest Fire Act, No. 101 of 1998.

This section provides that if someone who brings civil proceedings proves that he suffered loss from a veldfire caused by the defendant or which started on or spread from land owned by the defendant, the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved – unless the defendant is a member of a fire protection association in the area where the fire occurred.

In order to determine what a veldfire is, the court first had to determine what "veld" is. After considering five authoritative dictionaries' definition of the word "veld" as well as two previous court decisions, the court came to the conclusion that a rail reserve did not comply with the requirement for "veld". Therefore the particular fire was not a veldfire. Consequently the defendant was not affected by the presumption of negligence in section 34.

POWER LINES

Fires may also sometimes start underneath or in the vicinity of power lines. Cases are known where fires were caused by the following:

- power lines touching each other (for example due to wind), emitting a spark and setting the veld on fire
- lightning strikes a power line and as a result, a fire starts
- an electric pole falls over or breaks off and the power lines cause a short circuit, leading to a fire
- trees under or in the vicinity of power lines come into contact with the power lines, or a tree (or a branch) falls onto a power line and
- animals (such as cats and baboons) climb up electric poles and cause short circuits.

FIREWORKS, EMERGENCY FLARES, FIREARMS AND AMMUNITION

It is well-known that fireworks and firecrackers can start fires. Children who play with fire (for example, with matches, firecrackers or fireworks) have caused fires which led to extensive damage.

Firearms and ammunition may also ignite fires, although this seldom occurs. Fires can also be caused by emergency flares, though this is rare. For example a fire was allegedly caused near Hermanus in the Western Cape in February 2010 when a farm worker fired an emergency flare at a troublesome baboon. The farm worker allegedly found the emergency flare in a garbage drum where it had presumably been discarded by a boat owner.

SMOULDERING MATERIAL

After a veldfire it is essential to take steps to ensure that smouldering material does not reignite. Certain material (for example tree stumps and dry cattle dung) can continue to smoulder long after a fire. The wind can cause it to flare up again or can cause pieces of burning material to be uplifted and deposited in dry grass. For this reason it is essential to extinguish smouldering material properly after any fire.

A farmer who has had a fire on his land must notify his insurer as soon as possible – especially if the fire has spread to other people's property.

LEGAL LIABILITY AND YOUR INSURANCE CONTRACT

It is important to note that where an insurance contract comes into being, there will only be cover if the insured is **legally liable**, subject to the defined events, terms, limits, conditions, exceptions, proviso, warranties, extensions and special proviso of the insurance contract.

The Law and your insurance contract goes hand in hand.

A neighbour or third party can therefore not decide that you are **legally liable** and that your insurance contract must pay compensation.

This document is intended to provide information, not legal advice.

Sources:

- The National Veld and Forest Fire Act no. 101 of 1998 (as amended)
- Christo Potgieter, Director of Honey Attorneys, Cape Town and John Smit, Senior Legal Advisor, (Mutual & Federal)/Old Mutual Insure, Cape Town (*placed with the permission of Landbouweekblad*)

SUMMARY

In an unpredictable environment that has an impact on your farming business, it is important to choose the right insurance partner to protect your agricultural assets and liabilities.

As a leader in specialist agricultural asset insurance, **Old Mutual Insure Agri** has already provided financial peace of mind and protection against multiple risks for more than a century.

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The **Old Mutual Insure Agri** specialists are there to provide information and the necessary insurance cover.

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