

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1089/2016

In the matter between:

HENDRIETHE KATJIVIKUA

OLGA HUMAUVA

DANIEL TUAPEUA KATJIVIKUA

FIRST PLAINTIFF

SECOND PLAINTIFF

THIRD PLAINTIFF

And

DANIEL BELTSAZAR DELPORT

DEFENDANT

**Neutral citation:** *Katjivikua v Delport* (I 1089/2016) [2020] NAHCMD 79 (21 February 2020)

**Coram:** UEITELE, J

**Heard:** 12, 13, 15, 17, 18 & 19 October 2018, 28, 29, 30 & 31 January 2019, & 27 June 2019

**Delivered:** 21 February 2020

**Flynote:** *Practice - Parties* - Damages claimed in respect of Veldfire - Who can sue - the right in given circumstances of a person other than the owner to claim compensation under the Aquilian action for damage to property.

*Negligence - Action for damages - Apportionment of Damages Act 34 of 1956 - 'Fault' in s 1(1)(a) - Meaning of - It is the causal relationship between the negligence of the plaintiff and the harm which he suffered, not the event, to which regard must be had - It is competent in law for Court to find that the plaintiff's negligence contributed to the harm which he suffered, even though his negligence arose after the event and did not contribute to it.*

**Summary:** During April 2016 the third plaintiff, Daniel Katjivikua, initiated proceedings in this court to recover damages from Daniel Beltsazar Delpont, the defendant arising from a veld fire that started on the defendant's farm (Farm Otjimanga). At the time of the fire the plaintiff was leasing farm Waldhohe from, Hendriethe Katjivikua and Olga Humauva, cited as first and second plaintiffs. The fire caused extensive damages to the wires, poles and droppers of the camps on farm Waldhohe and allegedly destroyed over 62% of the grazing land on that farm. The quantum of the damages is alleged to be N\$ 247 908-80 for which plaintiff holds defendant liable. The defendant entered notice to defend the plaintiff's claim. In his plea the defendant raised a special plea with respect to the plaintiff's *locus standi* citing that the third plaintiff lacks *locus standi*.

*Held that*, the critical question is whether Delpont owed Katjivikua a legal duty not to cause him injury. Thus the key to liability is the existence of a legal duty on the part of the defendant, not to conduct himself or herself in a way that will infringe the plaintiff's rights.

*Held further*, that the legal duty is, however, not an absolute one. It simply requires the defendant to take reasonable care not to cause injury to the plaintiff.

*Held further that*, Katjivikua leased farm Waldhohe, he was in occupation of that farm, he was responsible for the maintenance of the farm and the infrastructure on the farm. This is indicative that Katjivikua's interest in Farm Waldhohe is not too remote; the interest is actual not abstract or academic; and it is a current interest and not a hypothetical one. Delpont was a neighbour to farm Waldhohe.

*Held further that* a special relationship thus existed between Delport and Katjivikua as the occupier of farm Waldhohe and that Delport, had a legal duty not cause injury to the occupiers of farm Waldhohe. The Court thus found that, Katjivikua has *locus standi* to institute action to recover damages that he suffered as a result of the breach of the legal duty owed to him, in this instance by Delport.

*Held further that* 22 km of the fence was damaged by the fire of 14 and 15 October 2015 and that 70% of the total 22 kilometers of the fences were damaged by the fire.

*Held furthermore that* if a matter was not raised in the pleadings it must not be available and cannot be open for the parties to raise it at the pre-trial stage at all.

*Held furthermore that* contributory negligence refers to the negligence contributing causally to the damage, but not necessarily to the event giving rise to the damage. And the test whether a party negligently contributed to the damage is whether the plaintiff deviated from the norm of the *bonus paterfamilias*.

*Held furthermore that* the onus is thus on Delport to prove that the failure by Katjivikua to maintain firebreaks and to maintain farm Waldhohe 'in a proper state to avoid the spreading of veld fire' is a deviation from the conduct of a reasonable man (the *bonus paterfamilias*).

*Held furthermore that* the testimony by the defendant that Mr Katjivikua's fences were not well kept and scrubs and grass were growing wild, does not say much, it does not tell the court the degree or extent to which the grass and shrubs which grew along the fence or under the fences contributed to the damages suffered by Katjivikua.

*Held furthermore that* the evidence by the defendant does also not reveal the extent to which the poles, droppers and fence would have been damaged or not damaged by the fire if the fences were cleared of the grass and shrubs. The court is not satisfied that the defendant has discharged the onus resting on him to prove the extent to which the plaintiff's conduct (failing to maintain fire breaks) falls short of what a reasonable person in the position of the plaintiff would have done. The court declined

to, in accordance with section 1 of the Act, apportion the damages suffered by the plaintiff.

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### ORDER

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- a) The defendant must pay to the plaintiff the sum of N\$ 169 400.
- b) The defendant must pay the plaintiff's costs of suit.
- c) The matter is regarded as finalised and is removed from the roll.

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### JUDGMENT

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**UEITELE, J**

Introduction

[1] On Wednesday, 14 October 2015, a fire which started on a farm commonly known as Farm Otjimanga No. 258, in the Gobabis District of the Omaheke Region swept through a farm commonly known as Farm Waldhohe No 257 in the Gobabis District of the Omaheke Region. I will in this judgement refer to Farm Otjimanga No. 258 simply as farm Otjimanga and Farm Waldhohe No 257 as farm Waldhohe.

[2] It is common cause that the fire started at around midday on the day in question (that is on 14 October 2015), when a contractor rendering coal producing services on farm Otjimanga No. 258 allowed a fire to escape from a coal producing kiln. The fire spread quickly over farm Otjimanga No. 258 and eventually encroached on farm Waldhohe No 257 and other neighbouring farms.

[3] The owner of farm Otjimanga and some owners of land neighbouring both farms Otjimanga and Waldhohe came out to assist but there was little that they could do to

stop the runaway fire, other than to take preventative measures to prevent the fire from spreading. The fire was ultimately brought under control on 15 October 2015. The fire destroyed extensive areas of grazing on farm Waldhohe, and caused damage to, *inter alia*, farm fences on farm Waldhohe` in the process.

[4] The registered owners of farm Waldhohe are Hendriethe Katjivikua, who is the first plaintiff in this matter and Olga Humauva, who is the second plaintiff. These two plaintiffs did not actively participate in this matter. Daniel Katjivikua, who is the third plaintiff in this matter, leases the farm from the first and second plaintiffs and conduct his agricultural activities, mainly cattle farming on the farm (i.e. farm Waldhohe). The registered owner of farm Otjimanga is Daniel Beltsazar Delpport, the defendant.

[5] During April 2016 the third plaintiff, Daniel Katjivikua (who I will, in this judgment for ease of reference, refer to as the plaintiff<sup>1</sup>) initiated proceedings in this court to recover damages from Daniel Beltsazar Delpport (who, I will, in this judgment for ease of reference, refer to as the defendant) allegedly arising from the fire. But where the context of the judgment requires of me to refer to the plaintiff or defendant by their names I will respectively refer to them as Katjivikua or Delpport as the case may be.

### The pleadings

[6] The plaintiff in his particulars of claim, amongst other matters, alleged that:

a) On or around 14 and 15 October 2015, a veld fire started at the defendant's farm where he produces or burns charcoal.

b) At the time of the fire, the plaintiff was leasing farm Waldhohe from Hendriethe Katjivikua and Olga Humauva, cited as first and second plaintiff respectively.

c) The fire that started on the defendant's was ignited by the defendant or his employees or servants or persons acting under his control, spread to neighbouring farms and especially farm Waldhohe leased by the plaintiff. The spreading of the fire was the result of the negligence by any of the persons mentioned, having been negligent in all or a number of or one of eight respects listed in paragraphs 12 and 13 of

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<sup>1</sup> I refer to the third plaintiff as the plaintiff because both the first and second plaintiffs did not take any part in these proceedings.

the plaintiff particulars of claim which I do not intend to repeat here.

d) The fire caused extensive damages to wires, poles and droppers of the camps on farm Waldhohe and allegedly destroyed over 62% of the grazing land on that farm.

e) The *quantum* of the damages is alleged to be N\$ 247 908-80 for which plaintiff holds defendant liable.

[7] The defendant entered notice to defend the plaintiff's claim. Initially the defendant denied that he caused the fire or that the fire was caused by the negligence of any of his employees or servants or person under his direction or control. In his plea, the defendant raised a special plea with respect to the plaintiff's *locus standi*. The defendant raised that special plea in the following terms:

'1.1 It appears from paragraphs 6 and 7 of the Particulars of Claim that the Third Plaintiff instituted action against defendant for damages suffered by him on the strength of his lawful tenancy of the property in question.

1.2 In the premises it is pleaded that the Third Plaintiff lacks *locus standi* to litigate.

1.3 Defendant therefore specially pleads that Third Plaintiff's claim against the defendant to be dismissed with costs.'

[8] The matter was then subjected to case management and at the pre-trial stage, the defendant abandoned his denial that he or his employees were responsible for the fire. He at the pre-trial conference conceded that the fire was caused by his employees or persons under his direction and control. The parties, on 18 May 2018, filed a draft pre-trial order as required under rule 26 (6) of this Court's rules. On 22 May 2018, this court made the draft pre-trial order an Order of this court. In that order, the parties identified 4 factual issues that this court is required to determine. The core questions that the court is, in the event that it finds that Katjivikua does have *locus standi* to claim from the defendant, required to determine, being:

(a) What the exact distance of the fence that was affected by the fire is;

- (b) Once the distance of the fence that was affected by the fire is determined, what percentage of the fence was damaged by the fire;
- (c) Whether the damages so determined must be apportioned between the plaintiff and the defendant; and
- (d) Whether the plaintiff maintained fire-breaks on Farm Waldhohe or employed other means of mitigating damages that may be caused by veld fires.

[9] In the same pre-trial order, the parties agreed that amongst the questions of law to be resolved at the trial is the questions whether or not the damages allegedly suffered by the plaintiff must be apportioned in terms of the Apportionment of Damages Act, 1934.

[10] The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled him to bring the action.

Does Daniel Katjivikua have *locus standi* to claim damages from the defendant?

[11] Ms Delpont who appeared for the defendant argued that the defendant raised the special plea of *locus standi* against the plaintiff after he had decided to join the registered owners of farm Waldhohe, namely Hendriethe Katjivikua as the first plaintiff and Olga Humauva as the second plaintiff.

[12] She proceeded and argued that Katjivikua's (the third plaintiff) claim is essentially founded on his expectation to become the legal owner of the farm. She continued and argued that it was conceded by him that no clear right has as of date been established hence, the fact of his legal status remains as a mere occupier of the farm in question. This does not automatically entitle the third plaintiff to a damage claim, save for him proving patrimonial damage suffered by him, as holder of the thing, argued Ms Delpont.

[13] Ms Delpont further argued that it is trite that Katjivikua's claim is based on an *Aquilian* action for patrimonial damages suffered through a wrongful and negligent act of the defendant and the *onus* rest on him to prove the actual damage suffered by him. She proceeded to argue that the first and second plaintiff's claim is based on the

principle of an owner of a thing obviously having a right to claim for damage to it and he or she automatically retains title to claim damages

[14] She concluded by arguing that Katjivikua's personal right over the property that allegedly founded his *locus standi* was voluntarily waived when he joined the first and second plaintiffs as active prosecutors of the claim. The two causes of action are totally distinct and cannot run concurrently. The inherently different causes of action were not brought in the alternative and as a result, Katjivikua's standing was voluntarily reduced to a mere witness on behalf of the first and second plaintiffs, so the argument went.

[15] In order to answer the question as to whether or not Katjivikua has *locus standi* to institute this action, I will briefly outline the principles governing *locus standi*. *Locus standi in judicio* (*locus standi* or standing) is the set of principles that governs whether an individual or group may bring an action in court with respect to a specific issue. An applicant's *locus standi* depends on the relationship between the applicant seeking redress and the right that has been violated.<sup>2</sup>

[16] Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one<sup>3</sup>. The duty to allege and prove *locus standi* rests on the party instituting the proceedings.<sup>4</sup>

[17] This court and the Supreme Court have interpreted "*direct and substantial interest*" to require an applicant to show a "legal interest" in the case,<sup>5</sup> and not merely an indirect financial or commercial interest.<sup>6</sup> In addition, an applicant's interest must be

<sup>2</sup> Cheryl Loots, "*Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation*", 104 SALJ 131 (1987) at p.132.

<sup>3</sup> D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 1 (loose-leaf) at D1-186.

<sup>4</sup> *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G-H.

<sup>5</sup> *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16; *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H, quoted in *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) at 7D-F; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 170H; *Alexander v Mbumba and Others* (A 179/2007) [2012] NAHC 303 (6 August 2012).

<sup>6</sup> *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 11; *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.



“current” and “actual”; standing cannot be based on an interest that is abstract, academic, hypothetical, or remote.<sup>7</sup>

[18] The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in the matter of *Dalrymple & Others v Colonial Treasurer*<sup>8</sup> where he said:

‘The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.’

[19] The plaintiff’s testimony was that he is a full-time farmer at farm Waldhohe, and that he is a tenant since the year 2003. He farms with cattle, goats and sheep. He further testified that he on the one side and the first and second plaintiffs on the other side, concluded an oral rental agreement in terms of which he leases farm Waldhohe from the first and second plaintiffs.

[20] He further testified that in terms of the oral rental agreement, he is fully responsible for the maintenance of the farm which includes renovation of farm houses, camps, existing fencing, water installations and machinery, maintenance of camps, buying of cattle feeds, injections, and payment of workers. He continued to testify that during the October 2017, he and the first and second plaintiffs concluded a sales agreement in terms of which he buys and the first and second plaintiffs sell Farm Waldhohe.

[21] In the matter of *Theron v Nieuwenhuizen*,<sup>9</sup> the plaintiff sued for damages in the sum of R10 for trespass upon his farm in Windhoek. The defendant excepted that the plaintiff was not the owner of the farm. The plaintiff produced a lease of the farm in his favour but the magistrate granted absolution from the instance on the ground that the plaintiff was neither the owner nor had he any authority, in terms of the lease, from the owner to sue for trespass. On appeal, the magistrate’s judgment was set aside by De Villiers, C.J., who, in his judgment, said:

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<sup>7</sup> *Theron v Nieuwenhuizen* (1898) 15 S.C. 27.

<sup>8</sup> *Dalrymple & others v Colonial Treasurer* 1910 TS 372 at 379.

<sup>9</sup> *Theron v Nieuwenhuizen* (1898) 15 S.C. 27;

'It is clear that the magistrate has erred in his judgment. He allowed the exception to the summons on the ground that, as there was no clause in the lease to the plaintiff empowering him to sue for damages for trespass, the action was wrongly brought by him. If the plaintiff, as lessee, could not sue for damages for trespass, it is difficult to say who could. The damages were done to him as lessee and not to the owner. He had lawful occupation of the land and that gave him a sufficient *locus standi* to institute the action.'

[22] In *Smit v Saipem*,<sup>10</sup> the plaintiff sued for compensation consequent upon damage caused by the defendant to certain immovable property consisting of three erven. In his particulars of claim, the plaintiff alleged that he was '*in civil possession*' of the properties by virtue of three separate deeds of sale which provided that possession and occupation was given to the plaintiff/purchaser on date of signature, from which date all risk of damage to the properties passed to the purchaser.

[23] The defendant in *Smit v Saipem* pleaded to the claim as follows:

'In the event of the above Honourable Court finding that the plaintiff was at all material times to this action in civil possession of the said erven, having acquired same by virtue of the deeds of sale referred to in ... plaintiff's declaration upon the terms set out... [therein], all of which is denied, then the defendant states that, as the plaintiff was not the owner of the said erven at all material times to this action, it, the defendant, is not in law liable to the plaintiff in respect of the matters referred to in ... the plaintiff's declaration as a result thereof or any damages.'

[24] The plaintiff in *Smit v Saipem* noted an exception to the defence pleaded in the terms set out above. The relevant grounds of the exception were framed as follows:

'(a) In the event of the above Honourable Court finding that plaintiff was at all material times to this action in civil possession of the said erven, having acquired same by virtue of the deeds of sale referred to in ... the plaintiff's declaration upon the terms set out ...[therein], then : (b) the fact that plaintiff was or is not as yet the owner of the said erven does not constitute or disclose a defence in respect of the matters referred to in ....plaintiff's declaration and the damages flowing as a result thereof.'

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<sup>10</sup> *Smit v Saipem* 1974 (4) SA 918 (A).

[25] Jansen JA formulated the question before the court as being whether the plaintiff, as lawful possessor (*'regmatige houër'*) of the properties in his own interest, enjoyed a right of recovery against the defendant who had damaged the properties – and in particular in respect of the consequent diminution in value of the properties. The learned judge of appeal, after an extensive and illuminating historical review of the development of the law in this connection held that, 'if the thing is lost, or obliterated, or damaged, not only the owners who have the mere or beneficial right of ownership may institute an action, but also everyone who has an interest in it, such as, for example a borrower for use (*'bruikleener'*), creditor or possessor, to the extent of their interest.'

[26] In view of the authorities that I have refer to in the preceding paragraphs, the critical question is whether Delpport owed Katjivikua a legal duty not to cause him injury. Thus, the key to liability is the existence of a legal duty on the part of the defendant, not to conduct himself or herself in a way that will infringe the plaintiff's rights. The legal duty is, however, not an absolute one. It simply requires the defendant to take reasonable care not to cause injury to the plaintiff. Whether there is a legal duty on a party, depends on the circumstances of each case.

[27] In the case before me, the facts that I find established are that, Mr Katjivikua leased farm Waldhohe, he was in occupation of that farm, he was responsible for the maintenance of the farm and the infrastructure on the farm. This is indicative that Katjivikua's interest in Farm Waldhohe is not too remote; the interest is actual, not abstract or academic; and it is a current interest and not a hypothetical one. Delpport was a neighbour to farm Waldhohe. A special relationship thus existed between Delpport and Katjivikua as the occupier of farm Waldhohe. These circumstances, in my view, indicate that Delpport, had a legal duty not cause injury to the occupiers of farm Waldhohe. I am thus satisfied that Katjivikua has *locus standi* to institute action to recover damages that he suffered as a result of the breach of the legal duty owed to him, in this instance by Delpport.

[28] Having found that the plaintiff (Katjivikua) has *locus standi* to institute action to recover the damages that he alleges he suffered, I now proceed to consider the first and second question agreed to by the parties at the pre-trial namely; what the exact

distance of the fence that was affected by the fire is, and what percentage of the fence was damaged by the fire.

What is distance of the fence that was affected by the fire and what percentage of the fence was damaged by the fire?

[29] Prior to hearing the evidence in chief of the plaintiff, the court, on Saturday 13 October 2018, travelled to farms Otjimanga and Waldhohe, which are situated approximately 110km northwest of Gobabis, to conduct an inspection *in loco*. After the inspection *in loco*, the court, on 15 October 2018, recorded the following observations with respect to the distances travelled along the fences on the south eastern, eastern and north eastern parts of farm Waldhohe that was under fire:

- a) From the border between farms Waldhohe and Otjimanga we travelled a distance of 3.3 km in the eastern direction towards the T-junction of District Roads 1639 and 1638.
- b) From the T-junction of District Roads 1639 and 1638, we travelled along the fence on the western side of District Road 1638 northwards covering a distance of 2km. On the opposite side of the road, that is on the eastern side of District Road 1638, we travelled a distance of 900m southwards (back to the T-junction).
- c) After travelling the 900 m route, we travelled (on foot) for a distance of 1km in the eastern direction. We did not cover the entire distance on this route but agreed that the fence on this route spanned over a distance of 1,5 km.
- d) After covering the 1km route, we travelled southwards along the border of farm Waldhohe and farm Okamukaru. We observed that on this route, the fence was not damaged by the fire at all. We then travelled eastwards and turned northwards covering a distance of 1.4km. We observed that the fence along this route was repaired with “geelhout droppers” and poles.
- e) After travelling the 1.4km route mentioned in paragraph d) above, we turned eastwards and travelled for a distance of 2.7km. Along the route referred to in this paragraph, we observed two camps situated to the northern side of this route where the fence was repaired. We did not travel along the repaired fences but the parties agreed

that the fences of these camps were entirely destroyed by the fire and the distances of those two camps were *1.5km and 1.4km* respectively.

f) After travelling the *2.7km* route mentioned in paragraph e) above, we turned south- east and travelled a distance of *1.7km*. From this route we turned eastward and travelled a distance of *1.4 km*.

The parties, however, agreed that the distance and the damage caused to the fence along this *1,4km* route must be discounted and not be taken into consideration when computing the distance of the fence damaged by the fire which started on Farm Otjimanga. The reason for this agreement was the fact that the parties were not entirely sure whether the fire that damaged the fence along this route was caused by the back fire started by the neighbours on the eastern side of Waldhohe or the fire that started on farm Otjimanga.

[30] After travelling the south eastern, eastern and north eastern parts of farm Waldhohe, we proceeded to the western, north western and western parts of farm Waldhohe.

a) From the main homestead of Waldhohe, we travelled to the western direction up to a cattle post. We observed that on this route, the fence was not affected by the fire. From the cattle post, we travelled westward for a distance of *1,7 km* up to the border of farm Waldhohe and Farm Otjimanga.

b) After travelling the *1,7 km* mentioned in paragraph (a) above, we turned northwards and travelled a distance of *900m* along the border of farms Waldhohe and Otjimanga. After travelling the *900 meters* route, we turned eastwards and travelled for *600m*. We observed that the distance of *900m* was not affected by the fire at all but the fence along the *600m* route was totally destroyed by the fire.

c) We returned to the fence along the border of farms Otjimanga and Waldhohe and turned eastwards and travelled a distance of *1.9km*. There is a stretch of this route which joins the fence on the western side of District Road 1638. We did not travel that stretch and the parties estimated that stretch to be *1.4km*. There was then the final distance of *1.2 Km* which we also did not travel. I record that I did not take the final stretch of *1.2 m* into account when I computed the ultimate distances of the fences

affected by the fire for the simple reason that from the record, it is clear that the parties were not in agreement as to whether the fire on this stretch was a 'back fire' or part of the fire that started on 14 October 2015.

[31] Adding up all the distances that we travelled as I recorded in paras [29] and [30] of this judgment, I find as a fact that the distance of the fences that was affected by the fire that started on 14 October 2015 on farm Otjimanga is 22 Km.

[32] During the travel along the different routes I recorded in paras [29] and [30] of this judgment, I observed that some of the fences were entirely (100%) damaged by the fire, others were partially (60% and 80%) damaged by the fire. I therefore find as a fact that on average, 70% of the 22 km of the fence was damaged by the fire of 14 and 15 October 2015.

[33] The plaintiff and the defendant agreed that the cost of repairing the fence that was damaged by the fire is approximately N\$ 11 000 per kilometer. I indicated that in my view, only 70% of the total 22 kilometer of the fences were damaged by the fire. It thus follows that the plaintiff suffered damages in the amount of N\$ 11 000 x 15.4km which amounts to N\$ 169 400.

[34] Having found that the damages that that the plaintiff suffered amount to N\$ 169 400 I proceed to consider the third question agreed to by the parties at the pre-trial; namely; whether the damages suffered by the plaintiff must be apportioned between the plaintiff and the defendant.

Must the damages suffered by the plaintiff be apportioned between the plaintiff and the defendant?

[35] I find it appropriate to, before I deal with the question whether or not the damages that the plaintiff suffered must be apportioned, make a comment. It has been held by the courts that factual issues which form the basis of a party's case must be pleaded and not only raised during the trial. In *Robinson v Randfontein Estates Gold Mines Co Ltd*,<sup>11</sup> Innes CJ held as follows:

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<sup>11</sup> *Robinson v Randfontein Estates Gold Mines Co Ltd* 1925 (AD) 173 at 198.

'The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.'

[36] In *Makono v Nguvauva*,<sup>12</sup> this court per Frank J said:

'To start off, pleadings are supposed to elucidate and define the issues between the parties and not obfuscate them so as to leave either the parties or the Court to guess at what the true issues are. Thus, the following has been said in this regard ...

2. The purpose of pleadings is to define the issues in the litigation and to enable the other party to know what case he has to meet. A litigant is not entitled to conceal material allegations in order to obtain the advantage of placing the onus on his opponent. The *onus* must be determined on genuine and not artificial allegations in the pleadings and if the onus should be on a particular party he must accept it. Litigation is not a game where a party may seek tactical advantages by concealing facts from his opponents and thereby occasioning unnecessary costs. Nor is a party entitled to plead in such a manner as to place the onus on his opponent if the facts as known to the pleader place the onus on him. (*Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 84I - 85A.)'

[37] In the present case, the defendant did not anywhere in his pleadings plead that the plaintiff was partly at fault for the damages that he suffered. The issue of the plaintiff's contributory fault was raised for the first time (ostensibly as a question of law) in the pre-trial minute which agreement between the parties was made an order of court. In my view, the question whether or not the plaintiff partly contributed to the damages that he suffered is not a question of law but a question of fact and the facts around the question must be resolved, must be pleaded and placed before court.

[38] I have observed the trend (where parties do not plead certain facts but agree at pre-trial to have a factual scenario that is not pleaded to be considered by court) becoming common in the manner in which pleadings are conducted these days. I hold the view that if a matter was not raised in the pleadings, it must not be available and cannot be open for the parties to raise it at the pre-trial stage for the parties at all.

[39] I reluctantly will consider this point, although not pleaded by the defendant, in this matter for two reasons. Firstly I did not raise this point with the parties during their

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<sup>12</sup> *Makono v Nguvauva* 2003 NR 138 (HC) at p140.

oral submissions and secondly by the time the file was allocated to me, the draft pre-trial order which was ultimately made an order of this court was already made.

[40] I have indicated earlier in this judgment that the defendant conceded that he is liable to the plaintiffs for the damages they suffered because of the fire that started on farm Otjimanga on 14 October 2015. The concession was, however, qualified with the contention by the defendant, that the damages which the plaintiff suffered must be apportioned as plaintiff failed or neglected or both failed and neglected to maintain fire breaks on farm Waldhohe and also failed to maintain the farm in a manner which could have prevented the extend of the damage.

[41] Ms Esmerelda Katjaerua, who appeared for the plaintiff, urged me to apply the test for contributory negligence as articulated by Van der Walt & Midgley<sup>13</sup> as follows

“The criterion for determining the existence of contributory negligence is similar to that for establishing negligence on the part of a defendant. A failure to exercise reasonable care in one’s own interest constitutes contributory negligence on the part of the plaintiff. The court must therefore determine whether the claimant’s acts or omissions, casually linked to the harm, deviated from the norm of the *bonus paterfamilias* in the plaintiff’s position ...

Of course apportionment cannot take place unless there is casual connection between the defendant’s conduct and the loss, and the plaintiff’s conduct and the loss. The appropriate test of causation is the concept on *condition sine qua non*. The harm in issue is, according to this approach, caused if the harmful event would probably not have occurred but for the negligent conduct of each party.’

[42] Ms Ankia Delport, who appeared for the defendant, urged me not to apply the concept on *condition sine qua non* because, so Ms Delport argued, that concept can only be applied in a direct delictual liability enquiry and not in a claim for “counter-liability”.

[43] Fault refers to the defendant’s conduct, *contributory fault* refers to the conduct of the plaintiff. Contributory fault is primarily relevant in limiting the extent of the defendant’s liability.<sup>14</sup> The general rule in Roman-Dutch law was that fault on the part

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<sup>13</sup> Van der Walt & Midgley, *Principles of Delict*, Third Edition (2005): LexisNexis Butterworths, Durban.

<sup>14</sup> Neethling, Potgieter & Visser: *Law of Delict* (2005): LexisNexis Butterworths, Durban. At p 144.



of the plaintiff precluded him from claiming damages from the defendant who was also to blame for causing the damage. Thus, if two people were at fault, neither could claim damages unless one was to blame than the other.<sup>15</sup>

[44] The doctrine of the contributory negligence as applied initially in our courts was taken over from English law. Our courts initially accepted, as in English law, that if the negligence of two people contributed to the causing of particular results, and one or both of them suffered damage as a consequence therefore, neither party could institute an action unless the negligence of one of them was the decisive cause of the accident.<sup>16</sup> In that event, the negligence of the other party was completely ignored and he could succeed in full with his claim. In order to determine whose negligence was the decisive cause of the accident, the enquiry was usually, as in English law, directed at determining who had the last opportunity of avoiding the accident. The so-called last opportunity rule did not work well in practice and in time resulted in such an untenable situation that the legislature was compelled to intervene and enacted the Apportionment of Damages Act, 1956<sup>17</sup> (the Act).

[45] Section 1(1) of the Act deals with the apportionment of liability in cases of contributory negligence.<sup>18</sup> Until recently, it was a rather controversial issue in South African law as to whether a plaintiff's failure to take reasonable precautions in minimizing his or her damage, both before and after the event causing the harm, constituted 'fault', despite the fact that the event would nevertheless have occurred, had the precautions been taken, though the harm would have been less.

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* p 145

<sup>17</sup> Apportionment of Damages Act, 1956 (Act No.34 of 1956).

<sup>18</sup> Section 1 of the Act reads as follows:

'(1)(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.

(3) For the purposes of this section "fault" includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.'

[46] The interpretation of s 1 of the Act presented itself for decision in the matter of *King v Pearl Insurance Co Ltd*.<sup>19</sup> The brief facts of that case are that a certain Ms West, suffered bodily injuries which she is alleged to have sustained in a collision between a motor scooter which she was riding and a motor car insured by *Pearl Insurance Co Ltd*. King, the *curator ad litem* for Ms West, instituted action to claim damages for the bodily injuries suffered by Ms West. At the pleadings stage, the defendant sought to amend its pleadings and the intention to amend was opposed necessitating the defendant to bring an application for leave to amend its plea.

[47] The application to amendment was designed to add a further defence, to the defences already pleaded. The plaintiff opposed the amendment on the ground that the defence sought to be raised thereby was bad in law. The particulars of claim took the ordinary form in an action for damages arising out of a collision, and the plea which was filed also followed the customary lines. There was a denial by the defendant that the driver of the insured car was negligent, coupled with an averment that the collision was caused solely by the negligence of Mrs. West in one or more of a number of specified respects.

[48] In an alternative paragraph it was pleaded that, if the driver of the insured car was negligent, his negligence neither caused nor contributed towards the collision. In a further alternative averment, the defendant pleaded (on the assumption that the car driver was guilty of negligence which caused or contributed to the collision) that Mrs. West was also negligent in one or more of the respects set out earlier in the plea, that the collision was caused partly by her negligence, and that her damages, if any, therefore fell to be reduced in terms of the Apportionment of Damages Act, 34 of 1956.

[49] The defendant sought to introduce into the plea an averment to the effect that Mrs. West '*was further at fault in relation to the said damages in that she failed to wear a crash helmet or similar protective device which in the circumstances it was her duty to do*', and that for that reason also her damages fell to be reduced in terms of the Apportionment of Damages Act.

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<sup>19</sup> 1970 (1) SA 462 (W).

[50] The court disallowed the application for amendment. It argued that the purpose of s 1 (3) of the Apportionment of Damages Act, 1956, was to define, with a desire to restrict, the word 'fault' in relation to the conduct of a plaintiff. The word 'fault' simply means conduct which would have grounded a defence of contributory negligence at common law. It does not include the omission of a plaintiff to wear a crash helmet and does not operate to reduce the quantum of damages to which a plaintiff who has sustained head injuries is entitled on account of such failure or omission.

[51] In *Bowkers Park Komga Co-operative Ltd v South African Railways and Harbours*,<sup>20</sup> the plaintiff claimed damages from the defendant, in consequence of damage to its property on 20 August 1977 in King William's Town as the result of fire. The plaintiff alleged that the fire started on the defendant's property and then spread onto the plaintiff's adjoining property where the damage occurred. The plaintiff contended that the fire 'was occasioned by a locomotive engine' owned and operated by the defendant and that, in terms of s 69 of the Railways and Harbours Control and Management (Consolidation) Act 70 of 1957, it is presumed in law that the fire was 'occasioned' by the negligence of the defendant.

[52] In addition to other defences raised in its plea, the defendant invoked the provisions of s 1 (1) (a) of the Apportionment of Damages Act, 1956 in the following terms:

'9 (a) In the event only of this Honourable Court holding that the fire which damaged the plaintiff's buildings and materials spread from the defendant's property to the plaintiff's property and was occasioned by a locomotive engine operated by the defendant's servants within the scope of their authority and in the course of their employment by the defendant and that such fire was occasioned by the negligence of the defendant (all of which is not admitted), the defendant pleads that the resultant damage to the plaintiff's buildings and materials was due partly to the fault or negligence of the defendant and partly to the fault or negligence of servants of the plaintiff acting in the course and within the scope of their employment as such in that the said servants:

(i) permitted grass and other vegetation to grow on the plaintiff's said property and in particular between or near creosoted poles which had been stacked on or near the boundary;

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<sup>20</sup> *Bowkers Park Komga Co-operative Ltd v South African Railways and Harbours* 1980 (1) SA 91.

(ii) failed to clear the plaintiff's said property and in particular the area where the said poles had been stacked of grass and other vegetation; notwithstanding that such grass and vegetation, by reason of its inflammable nature, constituted a fire hazard which resulted in the said fire spreading from the defendant's property onto the plaintiff's property and causing the said damage;

(iii) having taken control of the said fire prior to its spreading from the defendant's aforesaid property to the plaintiff's aforesaid property, failed to extinguish it properly and/or failed to take adequate steps to ensure that the said fire did not flare up again and/or spread to the plaintiff's aforesaid property.

(b) In the premises the defendant pleads that any damages suffered by the plaintiff fall to be reduced to such extent as this honourable Court may deem just and equitable having regard to the degree that the plaintiff, through its aforesaid servants, was at fault in relation thereto in terms of the provisions of s 1 (1) (a) of the Apportionment of Damages Act 34 of 1956'.

[53] The plaintiff replicated to the plea as follows:

1. *Ad* para 9 thereof:

(a) Plaintiff denies that in law the alleged conduct of plaintiff (through its servants as alleged) constitutes 'fault' within the meaning of the word 'fault' in terms of, and for the purposes of, s 1 (1) (a) of the Apportionment of Damages Act 34 of 1956'.

[54] The court formulated the issue for decision as whether the facts alleged in sub-paras (i), (ii) and (iii) of the plea constitute 'fault' for the purposes of s 1 of Act 34 of 1956. Answering that question, the court per Addleson J said:

'In so far as the learned Judge ought to base his conclusion on the necessity for there being a causal connection between the plaintiffs negligence and "the event" (the accident) I am respectfully constrained to disagree with that conclusion for the reasons given above, namely that it does not reflect a correct interpretation of the effect of s 1 (1) of the Act. The event with which the present case is concerned, is the starting of a fire and the spread of that fire; the damage which the plaintiff has suffered, is the destruction or diminution in value of its property which resulted from that event. If there is found to be a causal connection between any negligent acts or omissions on the part of the plaintiff and that damage, then in my view it is open to a court to hold that such acts or omissions constitute "fault" as contemplated by s 1(1) of

the Act. On hearing the evidence the Court will have to determine whether the plaintiff ought to have foreseen the harm which could ensue if a locomotive owned and operated by the defendant started a fire where it did and whether the plaintiff ought to have taken steps to guard against, or minimise; such harm if it occurred. That will of course be a factual decision in the first instance and will depend on whether the harm was reasonably foreseeable and the precautions such that a reasonable man should have taken them. If both such conditions are fulfilled it does not seem to me that a finding that the plaintiff was at 'fault' offends either against the ambit of s 1(1) of the Act or ... against "one's sense of justice".

[55] In *Union National South British Insurance Co Ltd v Vitoria*,<sup>21</sup> the Appellate Court of South Africa overruled the decision in *King v Pearl Insurance Co Ltd*. The court held that 'fault' as defined in s 1(3) of the Act does not limit the content of 'fault' as intended in s 1(1)(a) and (b). In specific cases of contributory negligence, there can therefore be fault in respect of an act or omission which caused the damage and in specific cases of contributory negligence there can be fault in respect of the damage without there being fault in relation to the event causing the damage. Consequently, failure to buckle up a safety belt in a motor car can be contributory negligence in terms of s 1 of the Act.

[56] The court furthermore held that in s 1(1)(a) of the Act, the Legislature specifically used the wide words '*just and equitable*' in order to indicate that all relevant factors in connection with the fault ought to be taken into account. The court went onto comment that in our law, in the case where there was an omission to wear a safety belt, and it is proved that the plaintiff, because of this omission, suffered more damage than he would have done if he had in fact worn a safety belt, there is no problem of causation. The negligence of the driver of the motor car which caused the collision as well as the omission of the plaintiff to wear the belt caused that additional damage. However difficult it may be, in our law, the scope of the fault of the plaintiff and the scope of the fault of the negligent driver must be determined in each case. Only then can the claim for damages in respect of the extra damage be reduced in a 'just and equitable' manner said the Court.

[57] In view of the authorities that I have referred to above, I am of the view that contributory negligence refers to the negligence contributing causally to the damage, but not necessarily to the event giving rise to the damage. And the test whether a party

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<sup>21</sup> *Union National South British Insurance Co Ltd v Vitoria* 1982 (1) SA 444 (A).

negligently contributed to the damage is whether the plaintiff deviated from the norm of the *bonus paterfamilias*.

[58] The question that must be answered in this case is thus whether the alleged failure by Katjivikua to maintain firebreaks and to maintain farm Waldhohe 'in a proper state to avoid the spreading of veld fire', is a deviation from the conduct of a reasonable man (the *bonus paterfamilias*). This is a factual and legal question.

[59] Where a defendant raises the defence of contributory negligence on the part of the plaintiff, he or she has to prove such defence on a balance of probability.<sup>22</sup> The *onus* is thus on Delport to prove that Katjivikua's failure to maintain firebreaks and to maintain farm Waldhohe 'in a proper state to avoid the spreading of veld fire' is a deviation from the conduct of a reasonable man (the *bonus paterfamilias*).

[60] The defendant's evidence with respect to the alleged failures of plaintiff can be discerned from paragraphs [12] and [13] of his witness statement which was read into the record where he testified:

'[12] Whilst we were busy extinguishing the fire we realised that all of Mr. Katjivikua's dams were empty, therefore we were unable to refill the firefighters (tanks), resulting in us having to travel long distances to neighbouring farms and back which obviously aggravated the situation and hindered the effective firefighting methods employed.

[13] Mr Katjivikua's fences were not well kept and scrubs and grass were growing wild. I submit that it is the responsibility of each farmer to ensure that fire breaks are made, keep fences and keep them in good condition as old droppers and poles incinerates quite easily.'

[61] Under cross examination, Mr Katjivikua was asked whether he maintained firebreaks on his farm. He replied as follows:

'...the kind of bricks (sic) [it should be firebreaks] that I have put on my side maybe could be that firebreaks were such that on one point there was 100%, 100%, or 50% or 30%. If I did not have any firebreak at all the fence could have been burned 100%.'

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<sup>22</sup> *Schoeman en 'n Ander v Unie en Suidwes-Afrika Versekeringsmaatskappy Bpk* 1989 (4) SA 721 (C).

[62] I pause here to observe that during the inspection *in loco*, Ms Delport, counsel for the defendant, did on a few occasions observe and pointed out to areas along the fence where the plaintiff had no fire breaks and where grass and shrubs were growing under or along the fence. The difficulty that I have with the pointing out and observations by Ms Delport is the fact that the fire occurred during the October 2015 and the inspection *in loco* took place during October 2018, this is three years later. The observations by Ms Delport are thus of little assistance because no evidence was placed before court to indicate what the state of affairs was during October 2015.

[63] As to the testimony by the defendant that Mr Katjivikua's fences were not well kept and scrubs and grass were growing wild, that evidence also does not say much. That evidence does not tell the court the degree or extent to which the grass and shrubs grew along the fence or under the fences. The evidence does also not reveal the extent to which the poles, droppers and fence would have been damaged or not damaged by the fire if the fences were cleared of the grass and shrubs. I however take cognizance of the plaintiff's evidence that at times, he maintained firebreaks on the entire farm and at times, only on half of the farm or a third of the farm.

[63] Because of the paucity of evidence, I am not satisfied that the defendant has discharged the *onus* resting on him to prove the extent to which the plaintiff's conduct (failing to maintain fire breaks) falls short of what a reasonable person in the position of the plaintiff would have done. I therefore refuse to, in accordance with s 1 of the Act, apportion the damages suffered by the plaintiff.

#### The costs

[64] I finally turn to the question of costs. Ms Katjaerua for the plaintiff urged this court to award cost to the plaintiff. She argued that the defendant persistently and during the four years of litigation maintained that he was not responsible for the fire and only admitted at the pre-trial stage. She further argued that the admission of liability was not unequivocal but was qualified by the introduction of the plaintiff's alleged contributory negligence. She thus further argued that if this was not the defendant's stance, the matter would long have been settled.

[65] Ms Delpont for the defendant, however, argued that the argument that the denial of liability protracted litigation is simply devoid from any truth. She argued that, it is and always was the defendant's stance that he felt obliged to compensate the plaintiffs for damages they suffered, his first 'offer' which was made immediately after the incident is indicative of his intent. Ms Delpont further argued that the defendant offered the plaintiff 5000 droppers and 500 poles.

[66] According to Ms Delpont, the 5000 droppers and 500 poles would have covered an area of roughly 20 km in respect of dropper replacement and 10 km of pole replacement. Ms Delpont continued to argue that the offer to replace droppers and poles was made directly after the fact, but the numbers were only mentioned at the formal mediation session. Defendant also offered the third plaintiff grazing, they exchanged telephone numbers, but never heard from third plaintiff again. His gesture of goodwill was subsequently met with a claim for N\$ 734,781 argued Ms Delpont and accordingly urged the court to order each party to pay its costs.

[67] The courts in this country have over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs.

[68] One of the exceptions where a party may be deprived of its costs is where the circumstances contemplated under rule 64 find application. Rule 64(1) & (5) read that:

'(1) In an action where a sum of money is claimed, either alone or with other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim and the offer must be signed either by the defendant or by his or her legal practitioner if the latter has been authorised in writing to sign ...

(5) Notice of an offer or tender in terms of this rule must be given to all parties to the action and it must state whether the –

(a) offer or tender is unconditional or without prejudice as an offer of settlement;



(b) offer or tender is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made and further whether it is subject to conditions stated in the offer or tender;

(c) offer or tender is made by way of settlement of both the claim and costs or of the claim only; and

(d) defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer must be given and the action may then be set down on the question of costs alone.

[69] It thus follow that for rule 64 to apply, a particular proposal must constitute an offer in law, it must be in writing and must indicate whether it is conditional or not, whether it was made without prejudice as settlement offer. It must also be accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made and further whether it is subject to conditions stated in the offer or tender.

[70] Ms Delport did not indicate whether the offer by the defendant to the plaintiff was made in terms of rule 64 and whether the requirements stipulated in that rule was met. I am therefore of the view that the exception contended for by Ms Delport is not applicable to in this matter. I therefore do not find any reason why I must depart from the general rule.

[71] I accordingly make the following order:

- (a) The defendant must pay to the plaintiff the sum of N\$ 169 400.
- (b) The defendant must pay the plaintiff's costs of suit.
- (c) The matter is regarded as finalised and is removed from the roll.

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SFI Ueitele  
Judge

**APPEARANCES****PLAINTIFF:**

E Katjaerua  
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Windhoek.

**DEFENDANT:**

A Delport  
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