



**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**NOT REPORTABLE**

**Case no: 590/05**

In the matter between

**CORNELIS ARJEN METER NO  
RITA ELLA METER NO  
ALIDA ELIZABETH BERMAN NO**

**First Appellant  
Second Appellant  
Third Appellant**

**and**

**GEO PARKES & SON (PTY) LTD**

**Respondent**

**Coram: FARLAM, HEHER JJA and CACHALIA AJA**

**Heard: 10 NOVEMBER 2006**

**Delivered: 30 NOVEMBER 2006**

**Neutral citation: This judgment may be referred to as *Meter NO v Geo Parkes & Son (Pty) Ltd* [2006] SCA 161 (RSA)**

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**JUDGMENT**

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**HEHER JA:**

HEHER JA:

[1] This appeal concerns liability for the consequences of a 'veld fire' within the meaning of s 2 of the National Veld and Forest Fire Act 101 of 1998.

[2] The appellants are the trustees of the A E Berman Children's Trust. The Trust was at all material times the registered owner of portion 33 of Farm Hoogekraal 182 in the registration division of George in extent some 10 hectares. The respondent is the owner of portion 32, a portion of portion 6, of the Farm Hoogekraal 182 in extent about 1800 hectares on which it has carried on a forestry undertaking for many years. The Trust's farm is contiguous with a stretch of the respondent's property.

[3] The first defendant in the court below (who is cited as the first appellant in this court notwithstanding his demise before the trial began) lived in George. Until about the beginning of the year 2000 he carried on an apiary operation on the property of the Trust which was not otherwise permanently occupied. Because of advanced age and serious physical infirmity he found it impracticable to continue his activities on the property. On 17 March 2000 he entered into an agreement with a masters student in apiculture at the Port Elizabeth Technikon, André de Jager, who worked at Saasveld Agricultural Station. He sold to De Jager beehives, bees and equipment kept by him on the Trust farm and at other locations.

[4] The agreement, which was little more than a series of hand written points, contained two terms relevant to the occupation of the property phrased as follows:

- '7. 'n Tydperk van Gratis okkupasie op Hoogekraal 33 tot Junie 2001 word voorlopig toegestaan.
8. Toegang is reeds bevestig deurdat die Plaas en Hut se sleutels aan André oorhandig is op sy risiko en sal vollediger bespreek word so gou moontlik.'

[5] It is common cause that De Jager duly occupied the farm for the contemplated purposes. Apparently he visited it in order to carry out his bee-keeping activities but did not reside there. He did not testify at the trial but an affidavit made by him on 10 October 2000 was handed in by consent and the parties accepted the correctness of its contents. Since this statement is the only direct evidence of what took place at the crucial time I shall quote *in extenso* from its contents. In De Jager's words,

5.

As deel van die byeboerbedrywighede word dit vereis dat 'n persoon opgelei moet word in die hantering van 'n byeroker. Ek is behoorlik opgelei en vertrouwd met die hantering en werking van 'n byerokertoestel. Tydens my opleiding onder Mnr Meter het hy op talle vorige geleenthede die byeroker aangesteek op 'n geplaveide area voor die motorhuis op die betrokke plaas.

6.

Op die 23ste September 2000 om ongeveer 08h00 die oggend het ek op die betrokke plaas gearriveer tesame met my vriend, Mnr Heinrich Kemp, 'n B.Tech-student aan die Port Elizabeth Technikon Saasveld Kampus. Sekere onderhoudswerk moes aan die betrokke byekorwe gedoen word en Mnr Heinrich Kemp moes my daarin bystaan soos wat hy alreeds op vorige geleenthede gedoen het. Ek self was verantwoordelik vir die opleiding van Mnr Kemp en het hom behoorlik in die hantering van die byeroker opgelei.

7.

Op die bogemelde datum het Mnr Kemp, onder my toesig, dennenaalde op die bogemelde geplaveide area aan die brand gestek waarna dit in die byeroker geplaas is vir gebruik. Ons het tesame 'n kort afstand geloop tot by die byekorwe. Mnr Kemp het die byeroker gebruik om die bye te kalmeer waarna ek inbeweeg het en die onderhoudswerk op die korwe volbring het. Mnr Kemp het te alle tye die byeroker behoorlik en met redelike sorg, onder my toesig, hanteer.

8.

Wanneer dit nodig was om die byeroker te hervul met brandende dennenaalde, het Mnr Kemp dit te alle tye op die bogemelde geplaveide area, onder my toesig, gedoen soos voorheen aan my gedemonstreer is deur Mnr Meter.

9.

Na ongeveer vier ure se werksaamhede, om ongeveer 12h00 namiddag, terwyl Mnr Kemp agter my was, het ek hom hoor uitroep waarna ek omgedraai het en gesien het dat die gras rondom sy

voete aan die brand was.

10.

Mnr Kemp het die byeroker in sy hand gehad en was besig om die vlamme met sy voete te probeer blus.

11.

Terwyl Mnr Kemp die vlamme met sy voete probeer blus het, het ek 'n klein denneboompie afgepluk waarmee ek self die vlamme probeer blus het maar weens die buitengewone droë plantegroei en die wind, het die vlamme vinnig buite beheer geraak.

12.

Mnr Kemp het hom gehaas na die plaashuis waarna hy teruggekeer het met 'n emmer water en 'n streepsak. Met die streepsak en water het hy gepoog om die vlamme te blus maar sonder sukses. Ek was deurentyd ook besig om die vlamme te probeer blus, maar sonder sukses.

13.

Ek het my sellulêre telefoon by my gehad en het onmiddellik die noodnommer 112 geskakel waartydens ek die noodbeampte versoek het om dringend die brandweer te ontbied.

14.

Ek en Mnr Kemp het beide besef dat die vlamme besig was om in te beweeg na die rigting van die plaashuis en het ons brandbestrydingspogings gefokus op die area rondom die gemelde woning.

15.

Die eenaar van die aangrensende eiendom, Mnr Beatty, het op die toneel gearriveer waarna ek aan hom meegedeel het wat gebeur het.'

[6] Mr Kemp was also not called as a witness at the trial. Mr Beatty, who owned and resided on a property adjoining to the Trust property, testified about the observations which he made within half an hour of the fire breaking out. It will be necessary to refer to his evidence in this judgment.

[7] What De Jager does not mention in his statement is that the fire spread across the boundary fence into the respondent's plantations where it burned for several weeks before being finally extinguished. The damage which it caused was, as can be imagined, substantial.

[8] In August 2002 the respondent issued summons against the trustees and De Jager. It alleged that, at the time the fire started, the Trust property was in possession of the Trust and under its control. Alternatively, it averred, the fire originated on a portion of that farm which was under the control of De Jager.

[9] The respondent alleged that the Trust and/or De Jager were negligent in the following respects:

- (a) in failing to take any or adequate precautions to prevent the fire from starting;
- (b) in allowing the smoking of bees on the farm;
- (c) in failing to take any or adequate steps to prevent the fire from burning in an uncontrolled fashion and spreading to the respondent's farm;
- (d) in so far as the Trust failed to ensure that adequate firebreaks were constructed and maintained between its farm and the respondent's farm as required by s 12(1) of the Act;
- (e) in failing to take reasonable steps to ensure that the fire could be timeously extinguished or contained.

[10] The respondent further alleged that in March 2000 the Trust had appointed De Jager as its agent to discharge on its behalf its obligations and duties as owner of the farm, including the duty to refrain from negligent conduct on and in relation to the Trust property which might cause a fire to originate on the property and to burn in an uncontrolled fashion and spread to the respondent's farm. The respondent averred in the premises, that the Trust was vicariously liable for damages caused by the negligent conduct of De Jager in relation to the origin, control and spread of the fire.

[11] The respondent contended that the fire had caused loss and damage to it and claimed payment of R393 448,08 as damages against the defendants jointly and severally.

[12] The trustees, while admitting ownership of the farm, pleaded what was, in effect, a general denial. In the alternative and in the event of negligence being proved against the Trust, they raised contributory negligence on the part of the respondent alleging that:

- (a) the respondent had failed to construct and maintain adequate fire breaks, 20 metres wide, between its property and the adjoining properties;
- (b) the respondent had failed to keep fire fighting equipment on its property and that such equipment had not been immediately available to extinguish the fire or stop its spread;
- (c) the fire fighting personnel on duty had no training in the fighting of fires;
- (d) the said personnel and other employees did not take immediate steps to fight the fire;
- (e) the respondent had no fire fighting plan;
- (f) the respondent did not have an adequate number of trained personnel on duty to combat a fire during a yellow to red fire danger index day;
- (g) the respondent had no vehicle available for the fire fighting personnel on duty and other employees to convey themselves or the fire fighting equipment to the scene of the fire except for a bell and a tractor;
- (h) the respondent did not have a fire look out.

[13] De Jager did not enter an appearance to defend the action. At the trial the respondent called lay and expert witnesses, while the appellants relied on the evidence of the third appellant, who was managing trustee at the time of the fire, and an expert witness, Mr Cornelis de Ronde.

[14] The trial judge, Zondi AJ, in a carefully considered judgment, found for the respondent. His reasons may be summarised as follows:

1. De Jager was negligent in conducting bee-smoking operations on the day in

question; he should have foreseen the danger that the fire would spread and have guarded against it.

2. There existed no relationship between the Trust and De Jager on which vicarious liability in the former for the acts and omissions of the latter could be founded.

3. The evidence proved that the fire had started on and spread from the land owned by the Trust. Section 34(1) of the Act applied and the Trust was presumed to have been negligent in relation to the fire until the contrary was proved. (It was common cause that the Trust was not a member of a fire protection association in the area where the fire occurred.)

4. The failure of the Trust to create and maintain firebreaks on its side of the common boundary to prevent the escape of a fire started on its property was wrongful and contrary to the legal convictions of the community and was also negligent.

5. The Trust failed to prove on a balance of probability that the fire would not have spread to the respondent's property even if a firebreak had been created on its side of the common property, and, applying *H L & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA) at 823H-I, the issue had to be resolved against the Trust.

6. It would not be just and equitable to give judgment separately against each of the defendants in accordance with their respective degrees of fault.

7. The first to third defendants did not succeed in establishing the defence of contributory negligence.

8. The court fixed the respective measures of fault in relation to the damage suffered by the respondent at 70% (De Jager) and 30% (the Trust).

[15] In the result the learned judge made the following order:

'1. Declaring First to Third Defendants, in their capacity as Trustees of the AE Berman Kinders Trust to be jointly and severally liable with the Fourth Defendant, the one paying

the other to be absolved, for damages as the Plaintiff may prove.

2. Directing that in terms of section 2(8)(a)(iii) of the Apportionment of Damages Act No 34 of 1956, the damages payable by the Defendants between themselves inter se are apportioned at the rate of 70% for the Fourth Defendant and 30% for the First to Third Defendants.
3. The costs of action to date to be paid by the First to Third Defendants, in their aforementioned capacities, save that in respect of the costs of the proceedings on an unopposed basis, the First to Third Defendants are jointly and severally liable with the Fourth Defendant, the one paying the other to be absolved.'

[16] The appellants appeal to this Court with leave of the court *a quo* against the whole of the judgment and order.

### **The negligence of De Jager**

[17] De Jager (or Kemp who was assisting him and was subject to his direction and control) was beyond any doubt guilty of several negligent acts and omissions on the day of the fire. Without attempting to be comprehensive, these included –

- (i) his decision to embark on and continue with bee-smoking activities on a day which was hot and dry, while there was a berg wind blowing;
- (ii) undertaking the operation on or near veld grass instead of on the impervious base which the first defendant had laid for the purpose;
- (iii) commencing the operation without having at hand buckets of water and beating equipment to deal with the foreseeable possibility that embers or sparks might be brought into contact with the grass;
- (iv) carrying out the operation in such manner as to cause a fire to break out in the grass.

### **The liability of the Trust**

[18] I have quoted from the contract between the Trust and De Jager in terms of which he occupied the property. The surrounding circumstances are insufficient to establish an employment relationship or, possibly, one of agency, which gives rise to vicarious liability on the part of the Trust for De Jager's conduct, even on the basis that he was to take care of or manage the property on behalf of the Trust in exchange for obtaining free use and access to the property. The agreement suggests rather that they contemplated some sort of tenancy with the obligation to look after the property as a *quid pro quo*.

[19] The Trust has its own independent problems of negligence. Section 12(1) of the Act provides:

'Every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land.'

It was common cause at the trial that the Trust had not at any material time before the fire constructed firebreaks along the margin of its property (including its common boundary with the property of the plaintiff). When the first appellant entered into the agreement with De Jager he knew that the latter intended to carry on an activity which would involve the use of fire and, as the evidence shows, he foresaw the inherent dangers, because he not only instructed De Jager in the proper techniques of bee-smoking but also specifically warned him against doing so at any place other than the fire-proof base which he had laid for the same purpose. Yet there is no indication that the first appellant drew to his attention the absence of firebreaks or took reasonable steps to ensure that De Jager was provided with adequate firefighting equipment in the form of knapsack pumps and beating equipment (as distinct from mere 'streepsakke', which were available) both of which the plaintiff's expert witness Mr Wilson regarded as reasonably necessary. The evidence disclosed that the construction and maintenance of firebreaks is a basic precaution that serves several purposes including

- (a) stopping the spread of fire from one property to another by depriving the fire of fuel at ground level;
- (b) providing a means of access to men and equipment to reach and extinguish fires; and
- (c) forming an area from which other fire fighting techniques such as back burns can be used.

The Trust offered no explanation for its failure to take any of these relatively simple steps to protect itself and its neighbours. Its default was wrongful in the legal perceptions of the community and negligent inasmuch as the Trust could thereby readily have avoided or minimised the foreseeable harm which the omissions presaged.

[20] Section 34 of the Act provides:

- ‘(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which –
- (a) the defendant caused; or
  - (b) started 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.’

The onus cast by the section embraces proof by an owner that it was not causally negligent in relation to the damage suffered by a plaintiff: *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*, supra, at 823F-I.

[21] The Trust sought to discharge this onus through reliance on the evidence of an acknowledged expert in the determination of the causes and consequences of veld and forest fires, Dr de Ronde. He investigated the weather conditions that prevailed on the day of the fire, visited the property and observed its physical and topographical features and the vegetation both on the property and the land contiguous to it. He searched for indications of the path, breadth and intensity of the

fire. He was aware of De Jager's description of its beginnings and he was in possession of contemporaneous photographs which showed certain of the damaged areas on both properties. As a tool to determine the movement and effects of the fire he used a computer programme developed overseas called 'Behave Plus' into which he fed data which he considered to be relevant. Its accuracy is dependent on the parameters put into the programme such as fuel load, wind speed and wind direction. Dr de Ronde explained the caution with which fire simulation models must be approached. In particular

'reliable factual evidence is still the best ...fire simulation should only be used selectively, and then only for specific purposes/objectives. Where possible fire simulation results should also be used in tandem with other wild fire investigation methods, to verify and test results, where possible.'

In a number of passages in his testimony Dr de Ronde emphasised that the computer model is used principally to verify other data.

[22] Dr de Ronde concluded that the fire started by De Jager and Kemp at first spread rapidly in a southerly direction fanned by the wind. After a while (the length of time is uncertain but the indications are that it occurred at about 1 o'clock in the afternoon) the wind swung around some 140° and became south-westerly. The immediate result was that the back of the fire became its head. It burned fiercely over grassland and through scattered pine trees into what Dr de Ronde described as a narrow belt of gum trees running approximately west to the fence between the Trust's property and that of the respondent. At that point, the witness said, the fire was probably burning in the tops of the trees. Burning embers were carried by the wind over the 10m firebreak on the respondent's boundary and into the pine trees of the plantation. Dr de Ronde expressed the opinion that, although De Jager and Kemp could have put out the fire if they had had water, buckets and beating equipment ready to use, the fire became uncontrollable within five minutes of ignition. Moreover, the blaze was so intense (causing a tremendous updraught) and

the wind so strong that spotting across the boundary from the gum belt was inevitable and not even a 20m firebreak would have prevented the fire entering the plantation. (The actual distance that embers can be carried in such circumstances was debated between the experts, but 300m seems to represent a not unusual occurrence.) For that reason, testified Dr de Ronde, the absence of a 5m fire-break on the Trust's side of the common boundary contributed not at all to the spread of the fire to the neighbouring property.

[23] The critical input factors in the programme employed by Dr de Ronde were (1) the fuel load of combustible material available and (2) the wind speed. The validity of the conclusions which he drew from his observations is also important in the overall assessment of his evidence. Both experts were agreed that wind strength was a decisive factor in determining the probability of whether the fire would have been carried across the Trust's firebreak (if there had been one) by spotting.

[24] The witness first visited the site on 18 August 2004 some four years after the fire. In his own words, he was obliged to rely on 'very restricted field evidence'. He examined the density and compaction of the existing surface material and he estimated the degree to which its content must have been influenced by extensive needle fall from the pine trees in the area. His task was necessarily one of reconstruction. Mr Wilson, the expert called by the plaintiff, by contrast, expressed the view that the amount of needle drop from young and vigorous pine trees would have been minimal. The conflict between them was not resolved by the evidence. As to the wind speed, Dr de Ronde's *modus operandi* was to make a careful analysis of the records kept at the automated weather stations at George (28 kms south west of Hoogekraal) and Knysna (32,5 kms to the south east) from which relative humidity, air temperature, wind speed and direction at those places could be ascertained. There was no weather station located closer to the site of the fire. In order to render the information relevant Dr de Ronde had of necessity to extrapolate

it to the site, building in the variables of distance, altitude and landscape (all of which were, as he conceded, significant) and a further, unpredictable element which he described as the 'extremely variable' state of a berg wind 'particularly when it is gaining strength'. The witness did not conduct any tests at the site in order to compare the results which might be obtained there with results within the same time frame recorded at George or Knysna. A further uncertainty arose from the slope of the ground – a veld fire burns more quickly uphill and certain parts of the Trust property sloped at 8° - Dr de Ronde clearly did not understand how the programme coped with such a complication, although he maintained that it was able to do so.

[25] Neither did the witness take into account the evidence given at the trial by the first outsiders at the scene both of whom testified for the respondent. Mr Beatty went on his motorcycle to look for the source of the fire after a neighbour phoned him. It was 'around midday, around lunch time'. Some 10-15 minutes later he walked through the gate of the Trust property and saw a fire burning around the house. The grass was burning and there were flames on the surrounding smallish pine and wattle trees and a lot of smoke. He spoke to De Jager and Kemp who had no fire fighting equipment and were doing nothing to extinguish the fire. Having approached from the north, he was able to breathe normally, probably because (he assumed in evidence) the wind was behind him (ie it had not yet turned). The fire was not in the blue gum belt on the northern part of the Trust land. He realised that he had no way of controlling the fire as it was already too big, so he rode back to his house, got into his bakkie and drove off to collect as much help as possible. He picked up two men who were aware of the fire (one was the witness Nqala) and offloaded them at the site about half an hour after his first arrival and then returned home to evacuate his own dwelling. As to the wind, he said that he did not recall there being a strong wind from behind during his first visit to the scene. There was however a berg wind blowing from the north, hot and dry, which changed direction after his initial visit. He did not take particular notice of the strength of the wind but

conceded that the fire was spreading quickly. I think it is fair to summarise his recollection by saying that he realised that a wind was blowing but that it made no impression on him beyond that fact.

[26] Mr Thobile Nqala was one of those taken to the scene by Beatty. He was employed by the plaintiff, inter alia to drive the tractor which pulled the water tank to a fire scene. He was on his way to investigate the source of the fire when Beatty met him. On his arrival the fire was already burning in the crowns of the pine trees on the Trust property as well as in the grass and bushes. From there it crossed to the plaintiff's side of the boundary and burned in the pine needles on the floor. At second point lower down (further south) this was repeated. Both these points were to the south of the gum belt but the gum trees were also already burning at the boundary. There was a mild wind blowing towards him as he stood on the plaintiff's property (ie the wind had already turned). He then went to fetch the tractor and trailer and returned with that and other equipment and assistance to fight the fire. Asked about the state of the wind when he first arrived he said 'Well the wind was blowing but it was not that strong, it was not a storm wind as they say . . . No it was not a breeze, it was wind . . . if my memory serves me well the smoke and everything was blowing towards my direction.' This witness too seems not to have been unduly conscious of or disturbed by the force of the wind. De Ronde conceded that the low point of the range of wind speeds (25 km) which he had entered into the programme could not fairly be described as 'mild'. All in all it seems that his assessment of the wind speed at the relevant time was dependent upon the success with which he was able to adjust the hard information obtained from Knysna and George. The measure of that success is impossible to gauge since there is no objective evidence against which it can be tested. That a berg wind was blowing is clear; whether it was such as to overcome the obstacle of a properly cleared firebreak on the Trust property is not. In addition it must be borne in mind that the spotting which de Ronde postulated as emanating from the gum belt apparently occurred at a point where that

belt met the boundary. If the firebreak had been cleared the trees which provided the material for spotting would presumably not have been there because a strip of some 5 metres along the boundary would have been free of vegetation.

[27] It appears therefore that Dr de Ronde's primary reliance on both fuel load and wind speed are open to legitimate criticism. In so far as the Behave Plus programme depended on the reliability of such input, the value of its assessment of the behaviour of the fire is also an open question. That the fire followed a path which involved spotting from the gum trees into the respondent's plantation remains a theoretical possibility but has to contend with the direct evidence of Nqala which appears the more reliable. But according to his observations also, the source seems to have been trees within the uncleared firebreak, which spotted on the pine needles in the respondent's forest. Whether the same would have happened if the Trust had cleared the firebreak one cannot know.

[28] For these reasons the trial court did not err in finding that the appellants had failed to discharge the onus of showing that their negligence was causally unrelated to the respondent's damage. It follows that the main appeal must fail.

[29] The appellants also appealed against the finding of the trial judge that they had not proved contributory negligence on the part of the respondent. Of the original grounds relied on only two were persisted in, both owing such strength and persuasion as they possessed to de Ronde's opinions.

[30] The first derived solely from the witness's insight into certain photographs taken shortly after the fire which appeared to show signs of burgeoning vegetation within the 10 m strip of the respondent's firebreak on the common boundary which should have been clean of such growth. On this evidence de Ronde was of the opinion that the firebreak had not been properly maintained. The contention

followed that such neglect contributed to the damage suffered by the plaintiff. Of course if de Ronde's evidence is taken at face value the absence or overgrowth of both firebreaks was causally unconnected to the damage and the respondent must be exonerated. In order to succeed the Trust had to prove that the omission was indeed a contributing factor. The Trust is in a cleft stick. The trial judge was unable to find that spotting across the firebreaks was the cause of the spread of the fire and I agree with him. But neither has that possibility been excluded. The probabilities are in my view equally balanced. The Trust is thus unable to discharge the onus on this issue either. I would, however, also add that the evidence of a few photographs which do not adequately depict the condition of the firebreaks before the conflagration is hardly sufficient to prove that, if the fire crossed the respondent's boundary on the surface, it did so because of, or was assisted by, poor maintenance in that area.

[31] The second ground of contributory negligence was that the respondent failed to have adequate personnel and equipment available to fight the fire, given that there was a high fire danger index on that day. The respondent ran forestry operations at Hoogekraal and in the Knysna area (half an hour by road). It divided its resources between the two plantations of which Hoogekraal was materially the smaller. On Hoogekraal it located four men and equipment more or less in the middle of the property. There were tractor which pulled a water tank (of which two such were available) and portable knapsack sprayers as well as beating instruments. Speaking for myself, I would hesitate to impugn the judgment of a farmer in circumstances such as the respondent's where the problem is not neglect but more a case of a considered though perhaps incorrect decision.

[32] However I think the matter may be disposed of on other grounds. The failure to maintain a firewatch originally raised in the pleadings was not persisted in and the Trust does not contend that the fire should have been discovered earlier than it was by the respondent's employees. Nqala testified that he had barely set out to

investigate before Beatty stopped to offer him a lift. He thus first came to the scene at least as rapidly as the Trust requires of him. It is true that he arrived unequipped to deal with what he found. Wilson did not agree that he was negligent in embarking on a reconnaissance to see where the fire was and what, if anything was required to fight it. I agree. There is no suggestion that he possessed an inkling of either before he saw the problem. Whether to set the whole team in motion was also a matter of judgment and the decision which he made was one which could reasonably have been reached. But the evidence shows that by the time he arrived the fire was already burning fiercely on the ground and in the crowns of trees in three different places along the boundary with some spotting already apparent. The course of destruction was in all likelihood already irreversible or close to that stage. In the circumstances, even if one assumes that Nqala had arrived at the scene with his whole team at that time or at least within a reasonable time of being called out, the defendant failed to establish as a probability that the plaintiff could have prevented or mitigated the damage which it suffered.

[33] The trial court gave judgment against the trustees and De Jager jointly and severally. In his heads of argument counsel for the Trust submitted that the appropriate order would have been separate judgments against the parties in terms of s 2(8)(a)(ii) of the Apportionment of Damages Act 34 of 1956.

[34] The same submission had been addressed to the trial judge but he considered that it would not be just and equitable to give judgment separately against each defendant in accordance with their respective degrees of fault. He was persuaded by the real prospect that the plaintiff's attempt to recover the apportioned amount from De Jager would be frustrated by an inability to pay – there was an unequivocal statement to that effect in correspondence from attorneys representing him. That probability was regarded as a valid reason for limiting the order to the terms of s 2(8)(a)(i) by this Court in *Grobbelaar v Federated Employers Insurance Co Ltd*

1974 (2) SA 225 (A) at 230E-231E. Zondi AJ exercised a proper discretion in regarding it as of importance in the case before him. There are no grounds for interference.

[35] I have in the result upheld all the findings of the trial court. The appeal must be dismissed with costs.

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**J A HEHER**  
**JUDGE OF APPEAL**

**FARLAM JA     )Concur**  
**CACHALIA AJA)**

