

NOTES / AANTEKENINGE

THE PROPOSED AMENDMENT TO THE DEFINITION OF “VELDFIRE” AS ARTICULATED BY THE NATIONAL VELD AND FOREST FIRE AMENDMENT BILL [B22–2016]

1 Introduction

It goes without saying that fire is an important factor in the development of humankind. When humans first discovered fire, it instantly became their best friend. Fire enabled early humans to light up the dark, indulge in cooked meals and provide warmth for their bodies and homes. However, even before they figured out how to manually reproduce fire, it existed in nature. Fire, and specifically “veldfire”, exists naturally and does not need the agency of man.

Today, severe drought (Forsyth, Le Maitre, Van den Dool, Walls, Pharoah and Fortune “The Knysna Fires 2017: Learning From the Disaster” (April 2019) <https://www.polity.org.za/article/the-knysna-fires-of-2017-learning-from-this-disaster-2019-06-07> (accessed 2019-11-06) 2), specific weather conditions (for example, high temperatures, high wind speed and low rainfall combine to induce favourable veldfire conditions) and an array of other factors (such as topography, land size, fuel type, population density (human influence) and climate change) all increase the possibility of a veldfire occurring (Schulze and Schütte “Fire Danger Rating Under Natural Conditions in South Africa and Climate Change” in Schulze *Handbook for Farmers, Officials and Other Stakeholders on Adaptation to Climate Change in the Agriculture Sector Within South Africa* (2016) 20). Owing to these contributing factors, fire has become both friend and, in some instances, deadly foe. For example, fire is used as a friendly management tool to prevent or lower the risk of veldfire (Teie *Fire Managers Handbook on Veld and Forest Fires 2ed* (2009) 471), while an example of fire as foe are what are now commonly known as the “Knysna Fires” of 2017, which remain a vivid reminder of what uncontrolled fires can do. This type of fire not only damaged social, economic and environmental assets, it also quickly escalated into an emergency incident. An “incident” is defined in s 30(a) of the National Environmental Management Act 107 of 1998 to mean “an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed.” (See Santam “Knysna Fires of 2017: Santam Releases Independent Disaster Report” (6

June 2019)). The Knysna Fires are a classic example of why managing veldfires in an integrated way is important within a South African context and are one of the main reasons for the promulgation of the National Veld and Forest Fire Act (101 of 1998) (NV&FFA) (s 3).

Regrettably, however, the NV&FFA defines neither “veld” nor “veldfire”. Instead, it defines “fire” to “include a veldfire” and goes on inadequately to explain that “veldfire” means “veld, forest and mountain fire” (s 2(1)(xix)). With no definition in the NV&FFA to explain what a veldfire is, one of the problems it may create is the following:

“Assume a scenario where a fire spreads from a railway reserve, through a field of pasture (this qualifies as veld), then through a dry maize field, passing onto a “werf” (the ground surrounding a farmhouse), burning down the farmhouse and then spreading into an area of uncultivated land. This will be a fire that is not a veldfire (in the railway reserve), then a veldfire (in the pasture), then a fire that is not a veldfire (in the maize field and the “werf”), then a veldfire again (in the uncultivated land). Surely the Act is concerned with the fire from its start to its demise, not portions of it, depending on what it happens to be burning as it spreads. Even more ridiculously, because the fire spreading through the “werf” is not a veldfire, it could be concluded that the farmhouse was not burnt down by a veldfire.” (Kidd “When is a Veldfire Not a Veldfire?” 2007 28(3) *Obiter* 607 612)

Taking the above reasoning into consideration, arguably one of the main challenges of the NV&FFA is the strict interpretation and inadequacy of the term “veldfire”. In refreshing contrast, however, the National Veld and Forest Fire Amendment Bill (the Bill) aims to provide more meaning to the term “veldfire” by proposing the following definition:

“Any vegetation fire that occurs outside a city, town, its adjoining industrial or residential area.”

The purpose of this note is therefore a critical analysis of the proposed amendment to the definition of veldfire by:

- providing legislative background to the term “veldfire”;
- investigating the way the courts of the past have interpreted the term “veld” and consequently “veldfire”;
- explaining why the proposal to amend the term “veldfire” is important;
- briefly looking at how other countries define their equivalent of South Africa’s “veldfire”; and, lastly,
- by providing remarks and suggestions.

2 Legislative background of “veldfire”

During the time of the seventeenth-century European settlers, a division grew between managers of forests and those of pastoral and grazing land on the management of veldfires (Teie *Fire Managers Handbook* 472). This was mainly because most laws passed at that time focused on preventing veldfires occurring in forests and not necessarily on agricultural land (Teie *Fire Managers Handbook* 472).

The Forest and Herbage Preservation Act (18 of 1859) (the Preservation Act) was the first piece of legislation drafted with the intention to combat veldfires specifically. It was also the first in South Africa (SA) to introduce and promote the idea of conservation (Anderson and Grove (eds) *Conservation in Africa* (1989) 26). Importantly, however, the Preservation Act did not define “veld” or “veldfire”. This Act was replaced by the Forest Act of 1888 and the Forest Act of 1984, which also provided for the prevention and combating of veldfires, but without defining “veld” or “veldfire”. Various other pieces of legislation aimed at preventing and controlling veldfires have also been passed. These include: “the Soil Conservation Act of 1946 (later replaced by the Conservation of Agriculture Resources Act 43 of 1983), the Natal Act of 1895, the Mountain Catchment Areas Act 63 of 1970, the Nature Conservation Ordinance 19 of 1974, the Occupational Health and Safety Act 85 of 1993, the Fire Brigade Services Act 99 of 1987, the Atmospheric Pollution Prevention Act 45 of 1965 (since replaced by the National Environmental Management: Air Quality Act 39 of 2004) and the National Environmental Management Act 107 of 1998). However, only the Conservation of Agriculture Resources Act (43 of 1983) (CARA) defines “veld”, which is discussed in more detail below.

More recently, two further Acts were passed almost simultaneously – the NV&FFA and the National Forest Act (84 of 1998) (NFA). One of the objectives of the NFA is to “promote the sustainable management and development of forests for the benefit of all” (s 1(a)). By contrast, the overall purpose of the NV&FFA is to prevent and combat veld, forest and mountain fires throughout the Republic (s 1(a)).

The NFA embraced most of the historical developments and ideas relating to preventing and combating veldfires, and most of the mechanisms put in place by the Forest Act for the preventing and combating of veldfires were incorporated into the NV&FFA. Important practices such as obliging landowners to have firebreaks were imported from the old Forest Act (122 of 1984) into the new NV&FFA. However, as already noted, there was no definition of “veldfire” in the Forest Act.

This brings us to the NV&FFA, where the definition of “veldfire” makes a debut – albeit insufficiently. As previously mentioned, the Act simply states that “fire” includes a “veldfire” (s 2(1)(vi)) and that a “veldfire” means “veld, forest and mountain fire” (s 2(1)(xix)). Strictly speaking therefore, the NV&FFA deals only with these three specific types of fire, none of which is defined in the NV&FFA. Of the three, only “forest” is specifically defined in another Act – namely, the National Forests Act (84 of 1998) (s 2(1)(x) provides that “forest” includes – (a) a natural forest, a woodland and a plantation; (b) the forest produce in it; and (c) the ecosystems which it makes up). Conceivably, the legislature at that time may have reasoned that no explanation is needed to explain the types of fire as these would be plainly understood.

Due to the lack of a definition, the South African courts were forced to provide clarity on the interpretation of the term “veld”. This was done in the case of *West Rand Estates v New Zealand Insurance Co Ltd* (1925 AD 245), where Solomon JA held that, generally, the concept of (grass) veld is not only identified by its uncultivated and unbuild state but also by the

characteristic that it does not occur within a residential or industrial yard (*West Rand Estates v New Zealand Insurance Co Ltd supra* 253). Kotze JA continued by providing the perfect summary of the above reasoning:

“By veld is generally understood the uncultivated and unoccupied portion of land, as distinct from the portion which is cultivated, occupied and built upon. It is that part of open and unoccupied land over which cattle and sheep and other stock are turned for grazing purposes.” (*West Rand Estates v New Zealand Insurance Co Ltd supra* 264)

Watermeyer J, in the case of *Van Wyk v Hermanus Municipality* (1963 (4) SA 285 (C)), confirmed the above interpretation and held further that, should a fire break out on a golf course, it cannot be considered a veldfire (264). This of course makes sense as a golf course is cultivated, occupied and built upon, as per the court’s interpretation. Both cases were quoted in the more recent case of *Gouda Boerdery BK v Transnet* (2005 (5) SA 490 (SCA)), in which Scott JA agreed with the *dicta* of both above cases (*Van Wyk v Hermanus Municipality supra* and *West Rand Estates v New Zealand Insurance Co Ltd supra*). (For an instructive evaluation of these cases, see Kidd 2007 *Obiter* 609.)

At this stage, it is worth noting that the CARA Regulations (GN R1048 in GG 9238 of 1984-05-25, commencement date 1984-06-01) (the Regulations) as alluded to earlier, are the only source of a specific definition of “veld”, which is defined as:

“land which is not being or has not been cultivated and on which indigenous vegetation, or other vegetation which in the opinion of the executive officer is or can be utilised as grazing for animals, occurs.” (CARA Regulations, reg 1)

As referred to earlier, the above definition is couched in the same terms used by the courts in interpreting and defining “veld” and thus “veldfire”. To this end, the Guide to Interpretation and Implementation of the NV&FFA (Version 3, 6 January 2005) published by the then-custodians of the NV&FFA, the Department of Agriculture, Forestry and Fisheries, states the following:

“The fires are specified as “veld, forest and mountain fires” to distinguish the scope of the Act as excluding fires in built-up areas, and we refer to them as veldfires”. (The Guide to Interpretation and Implementation of the National Veld and Forest Fire Act (V 3, 6 January 2005) 10)

We can see how the courts’ interpretation corresponds with this guiding document as it relates to the interpretation of the NV&FFA. Thus, technically speaking, the courts were correct in the way they interpreted veldfire at that stage. It is, however, surprising that even though the courts had in 1925 already shed light on what was considered to be “veld”, at the time of writing this note, the NV&FFA has still not been amended to reflect this interpretation. This brings us squarely to the purpose of this note – to critique the proposed amendment to the definition of veldfire.

3 The critique

As previously stated, the Bill proposes the following definition of “veldfire”:

“Any vegetation fire that occurs outside a city, town, its adjoining industrial or residential area.”

As a point of departure, it is important to note that, strictly speaking, the definition of “veldfire” is not being extended. As repeatedly pointed out above, there currently is no definition in the NV&FFA, but the intention is, for the first time, to attempt to define “veldfire” more accurately and appropriately. With this in mind, this note intends to unpack the proposed definition by focussing on two of its elements.

The first is the phrase “any vegetation”. “Any vegetation” would be broad enough to include grass and flower beds that are commonly found in yards of private home owners and even golf courses. This means that should you live outside a city, town, or its adjoining industrial or residential area, and your garden plants burn, this can be classified as a “veldfire”, which, as discussed through the case law and the Guide to Interpretation and Implementation of the NV&FFA, was not the intention of the NV&FFA.

Further, and practically speaking, the idea of “outside” a city, town or its adjoining industrial or residential area is possibly the biggest shortfall of the proposed amendment. The term “outside” in this context is vague as it may be interpreted to mean, among others, outside the district municipal boundaries, or outside a physical boundary, such as a boundary comprising a fence, wall or any other man-made structure, or even outside a natural boundary such as a body of water or mountains. The term “boundary” should be specifically defined to articulate the geographical locations of where veldfires can occur.

As a reminder, the NV&FFA caters solely for fires that occur in veld, forest or on a mountain. In accordance with case law, these areas would not be cultivated, occupied or built on. To now include all types of fire that occur outside a city, town, or its adjoining industrial or residential area would, at the very least, call for a change to the name of the NV&FFA. This is true as, historically, “veld” was plainly understood in terms of the above case law. Today, however, this understanding would have to be rethought – given factors such as the already-mentioned urbanisation challenge, where uncultivated and unbuilt-on land becomes scarce as human population increases and expands. The probability is that the legislature originally intended a narrower scope for the definition of “veldfire”, which the cases have endorsed. Strictly speaking, the proposed amendment clashes with the purpose (s 1(1)) of the NV&FFA. As pointed out, the definition, as it currently reads, is impractical – in the sense that, and as Kidd describes it, a veldfire will be able to morph between being a veldfire and then not a veldfire, depending on where and what it burns during the same event (Kidd 2007 *Obiter* 612).

As far as the division and ownership of land is concerned in South Africa (SA), there can never be an “outside” a city, town, or its adjoining industrial or residential area. This is true because whenever we find an end to any

municipal boundary line (for example), another is immediately identified. There is no “no-man’s-land” in SA, as all land is presumably owned by someone (whether privately or by government within its various spheres) and, as such, all land is demarcated. (The Constitution of the Republic of South Africa, Act 108 of 1996, states in s 151(1) that the whole territory of the Republic must be covered by municipalities.) This demarcation essentially means that, where one boundary line ends, another immediately commences.

On the other hand, one can appreciate that government has taken steps to address the issue of crafting a definition for “veldfire”, albeit with shortcomings. It is perhaps fitting at this juncture to look at how other jurisdictions have termed and defined the equivalent of “veldfire”.

The Food and Agricultural Organisation of the United Nations (UN) (Fire Management: Voluntary Guidelines Fire Management Working Paper FM17E (2006) 2) uses the term “wildfire” and defines it as “any unplanned and uncontrolled wildland fire that, regardless of ignition source, may require suppression response or other action ...” (Fire Management: Voluntary Guidelines Fire Management Working Paper FM17E 59). In the same breath, “wildfire” and “wildland fire” is also adopted throughout the United States of America (USA) (<https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA> (accessed 2019-11-10)). In other parts of the USA, the term “brushfire” is used and refers only to a fire involving low-growing plants, such as scrub and brush (<https://www.latimes.com/california/story/2019-10-21/brush-fire-in-pacific-palisades-threatens-homes> (accessed 2019-10-22)).

In Australia, the Rural Fires Act 1997 No 95 uses the term “bushfire” and defines it to include “grass fire” (Rural Fires Act s 4, read with the Act’s Dictionary found at the end of the Act).

Canada also refers to the term “wildfire” but defines it differently as: “An unplanned or unwanted natural or human caused fire, as contrasted with a prescribed fire” (“CIFFC Canadian Wildland Fire Management Glossary” Canadian Interagency Forest Fire Centre (2017) 31).

Among these various terms or phrases used, along with their respective meanings, it is the UN’s definition of “wildfire” that is the more forward thinking in its alluding to specific elements within the definition. The first of these elements is the phrase “uncontrolled wildland fire”. This is particularly important as not all “veldfires” are regarded as uncontrolled. The second is “may require suppression”. This is important as not all “veldfires” may need to be extinguished. The author is therefore in agreement with Kidd when he argues that not only should the definition of “veldfire” be reconsidered but should, at the very least, include these two elements (Kidd 2007 *Obiter* 613).

4 Closing remarks and proposed definition

Amending legislation with the aim of making it more relevant and practically implementable should always be at the forefront of national, provincial and municipal planning. Even though the definition can be seen as flawed, it is a

step in the right direction. The discussion on the different definitions illustrate that it is important and helpful to have a definition regardless of whether the term used be “veldfire”, “wildfire” or something else. In the case of the USA and Canada, both jurisdictions use the term “wildfire”, but each with different connotations. Journalists throughout the developing and developed world commonly refer to “wildfire” when describing a fire consuming vegetation and or structures on a large scale (examples of these include the already-mentioned reporting on the Knysna fires, the fires occurring in the rainforest (affecting Brazil, Peru, Bolivia, Paraguay), and in California in the USA, Lebanon, Alaska, Siberia, Greece, Spain, France and Russia).

As the proposed amendment to the definition currently reads, it remains unhelpful and impractical. Should the proposed amendment become law, the first hurdle to overcome would be to determine where, in terms of geographical location, a veldfire can occur in SA, if at all. By borrowing some concepts from the definitions discussed, perhaps the definition of “veldfire” could be more accurately reworked as:

“Any vegetation fire that may require suppression or other action and which occurs outside a residential or industrial plot where there is a potential threat to human life, environmental harm or damage to property.”

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