# CASES / VONNISSE

# WHEN IS A VELDFIRE NOT A VELDFIRE?

## Gouda Boerdery Bk v Transnet
## 2005 5 SA 490 (SCA)

## 1 Introduction

How does one identify the land on which a veldfire starts? Most people would answer that it would be the land on which the fire originated. This is not really stating anything different from the question, which could lead one to conclude that the answer is self-evident. According to the Supreme Court of Appeal, however, the land on which a veldfire starts is *not* the land on which a veldfire starts, if the fire is not a veldfire when it is on that land. This suggests, certainly in the context of the National Veld Fire and Forest Fire Act 101 of 1998, that the answer to the question posed at the top of this paragraph is not so self-evident after all.

The case of *Gouda Boerdery Bk v Transnet* (2005 5 SA 490 (SCA)) is noteworthy for two reasons. First, it is the first reported case in which application of section 34 of the National Veld Fire and Forest Fire Act 101 of 1998 (hereinafter "the Act") is considered. Second, the Court's interpretation and application of the section are, in my opinion, wrong (as can be surmised from my introductory comments).

## 2 The facts

In February 2001, a fire started in a railway reserve (the narrow strip of land adjoining a railway track on each side of the track) and spread onto the farm, Nuwewater, owned by the appellant. The fire, fanned by a south-easterly wind, jumped over a firebreak on appellant's property immediately adjacent to the railway reserve, and entered a harvested wheat field (on appellant's land). The fire spread from there and damaged appellant's farm extensively, in addition to neighboring properties, being extinguished about six hours after it started. The cause of the fire was never established.

The appellant instituted an action for damages in the Cape High Court (presumably under the Aquilian action, although this is not stated in the judgment), but with the allegation that the fire in question was a veldfire, which would bring the claim within the ambit of section 34 of the Act, which would have the effect of placing the onus on the respondent (defendant) of

proving that it had not been negligent in respect of the spreading of the fire. The claim was dismissed in the Court *a quo*, because it was held that the fire was not a "veldfire" within the meaning of the section, and that the appellant had not proved negligence on the part of the respondent. The latter aspect seems, on the facts, uncontentious, and the focus of this note is on the applicability of section 34.

## 3 Legal analysis

Section 34 of the Act reads –

> "(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 on or spread from land owned by the defendant,
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> 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 Court, in interpreting subsection (b), which is potentially applicable *in casu*, states –

> "an ordinary reading of the section indicates, I think, that what is required is that the fire that starts on or spreads from the defendant's property must at that stage be a 'veldfire' and not some other kind of fire. In other words, the presumption does not operate if the fire that starts on, or spreads from, a defendant's property is not a veldfire on the defendant's property, but becomes one at some later stage" (par 5, 495G).

As a starting point, it is not clear why such emphasis is given to whether the fire is a veldfire when it originates. The Court provides justification for its view 'in the case of doubt' (which will be discussed below), but, in my view, on an interpretation of the plain language of the section, there cannot be any doubt as to the meaning of the subsection, and the meaning is not what the Supreme Court of Appeal says it is.

The relevant segment of section 34 provides that if a person who brings civil proceedings (*ie*, the plaintiff) proves that he or she suffered loss from a veldfire which started on or spread from land owned by the defendant, the presumption of negligence against the defendant comes into operation. The pertinent questions to ask in determining whether this section applies or not are as follows-

1 Did the plaintiff suffer loss from a veldfire?

2 Did the veldfire start on or spread from land owned by the defendant?

Neither of these questions was considered by the Court; as indicated above, the only consideration the Court entertained was whether the fire was a veldfire in the location (the railway reserve) where it originated. As for question 1, given the Court's interpretation of "veldfire", the answer is not clear from the facts. "Veldfire" is defined, rather unhelpfully, in the Act as "a veld, forest or mountain fire" (s 1). Since "fire" is defined as including a

veldfire, the Court concludes that 'of course … the Act contemplates a fire which is not a veldfire as defined" (par [7]).

The Court considers the meaning of "veld" and suggests that the word (when used on its own or as an epithet to describe a fire) has "an ordinary meaning which is well understood and is reflected in the definitions contained in both English and Afrikaans dictionaries" (par [8]). For example, the *Dictionary of South African English on Historical Principles* defines "veld" as "Uncultivated and undeveloped land with relatively open natural vegetation". The dictionary meaning is then augmented by reference to several dicta of the Appellate Division in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* (1925 AD 245). It is instructive to reproduce these dicta here. The first is that of Solomon JA, who said, after concluding that not every grass fire was a veldfire:

> "But generally it may be said that the expression grasveld conveys the idea of an area covered with veld grass of considerable extent and in its original rough state. Any land, therefore, which had been cultivated or which was immediately connected with buildings, either residential or industrial, would not, in my opinion, be included under the word veld. Thus the ground immediately about a farmhouse is spoken of as 'werf' and not veld, even though veld grass may be growing upon it. So that in determining in any case whether a certain area is veld or not, it is not sufficient that it should be covered with ordinary grass, but its extent and the use to which it is put must also be regarded" (par [9], 497B-C).

Kotze JA, in the same case, stated: "The mere fact that grass, which grows in the veld, happened also to be growing near and between the buildings destroyed, and that this grass caught fire within this area belonging to the appellants, does not constitute a veld fire" (par [9], 497D), and:

> "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" (par [9], 497 E).

Scott JA indicates that he is "unaware of any judicial interpretation to the contrary", noting that this interpretation was accepted in *Van Wyk v Hermanus Municipality* (1963 4 SA 285 (C)). It might be useful to add, at this juncture, that "veld" is also defined in the Conservation of Agricultural Resources Act 43 of 1983 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". This definition is not different in substance from the interpretation upon which Scott JA settled.

In the light of this finding, let us return to the first question identified above – did the plaintiff in *Gouda* suffer loss from a veldfire? After leaving the rail reserve, the fire "entered a harvested wheat field, referred to in evidence as 'stubble land'" (par [1]), after which it spread rapidly, causing damage on several farms, including the plaintiff's farm, Nuwewater. In the light of the interpretation accepted by the Court, the fire was not a veldfire when it first entered the farm, because this "stubble land" was cultivated land, and consequently not veld. It is not clear from the facts whether any damage was

caused to any portion of the plaintiff's farm that could be classified as "veld" (pasture, or uncultivated land, for example). If there was, then the question could be answered in the affirmative. If not, then the answer to the question would be no, and therefore section 34 would not be applicable. The Court, however, did not consider this at all.

Let us assume, for the sake of considering the second question, that there was loss caused by a veldfire. The second question asks whether the veldfire started or spread from the defendant's land. Essentially, therefore, the question (relevant to this case) is: where did the veldfire start? On the facts of the case, there can be only one answer to this question – the veldfire started in the railway reserve. The question to be asked here is not (as the Court asks) "was the fire a veldfire when (and where) it started?" but "where did the fire start"? If the Court's interpretation is correct, and assuming that the fire entered the veld at some stage after spreading from the stubble field, the veldfire would have started as soon as it left the stubble field and entered the veld. This is a tortuous interpretation of the word "started", caused by the Court's focusing on the word "veldfire" instead of the clause as a whole. By way of analogy, if one asks where the origin of a river is (or where the river starts), the answer is where the source of the river is found, not where the initial stream (which would constitute the first section of most rivers) becomes a river.

As indicated above, the Court justifies its interpretation, first, by observing that: "In the case of doubt, the section, containing as it does a so-called reverse *onus* provision, should in principle be given a restrictive rather than a liberal interpretation" (par [5], 495H). This is an acceptable rule of construction, but, as the Court indicates, it operates in the case of doubt. In my opinion, there is no doubt about the plain meaning of section 34: a veldfire starts where a veldfire starts.

The interpretation favoured by the Court is further buttressed by reliance on section 12(1) of the Act, which 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". According to the Court,

> "The section clearly contemplates the preparation and maintenance of firebreaks on land, ie veld, on which a veldfire may start, burn or from which it may spread. If s 12(1) and s 34 were to be construed as applying to some other kind of fire that may start on, burn on or spread from, a defendant's property and later develop into a veldfire, it would mean that an owner of a residential property in a township adjacent to veld would be obliged to prepare and maintain a firebreak. That could never have been what was intended" (par [5], 495I-496B).

This line of reasoning is erroneous because, first, it relies on an over-literal interpretation of section 12, and, second, there is no justification for reading section 12 and section 34 together. Section 12 should be read with section 13, which provides for the requirements for firebreaks:

> "An owner who is obliged to prepare and maintain a firebreak must ensure that, with due regard to the weather, climate, terrain and vegetation of the area –

(a) it is wide enough and long enough to have a reasonable chance of preventing a veldfire from spreading to or from neighbouring land;
(b) it does not cause soil erosion; and
(c) it is reasonably free of inflammable material capable of carrying a veldfire across it."

This is not an especially detailed set of requirements, which suggests that the preparation and maintenance of firebreaks must, to a significant extent, be situation-specific. What must be done must be reasonable in the circumstances. This is confirmed by the Department of Water Affairs and Forestry in its publication *Guide to the Interpretation and Implementation of the National Veld and Forest Fire Act 101 of 1998* (2005), where it is suggested that "owners can only be expected to take reasonable precautionary measures" (21). Clearly, it would be unreasonable to expect owners of residential properties to prepare and maintain firebreaks (just as it would be unreasonable to expect Transnet to do so in the railway reserve), as the Court rightly points out. But this is not because a veldfire cannot start in a residential area or in a railway reserve, but because it could never have been the intention of the legislature to require such owners to be subject to section 12. Section 12 applies not only where "a veldfire may start or burn or from [where] it may spread", but also where it is feasible for a firebreak to be prepared.

The reading together of section 12 and section 34 for the purposes of supporting the idea that section 34 revolves around whether a fire was a veldfire when it started is also problematic. Section 12 is concerned only with firebreaks, which, it is argued above, need only be prepared and maintained on certain types of land. Section 34 is concerned with liability for damage caused by veldfires, which can be avoided (or sought to be avoided) by various measures not confined to the preparation of firebreaks. The link between the two sections is not adequately explained by the Court and, in my opinion, completely tenuous.

On the basis of this approach, the Court concluded that the fire in the railway reserve was not a veldfire and, consequently, the presumption did not apply against the defendant, Transnet. Of course, the applicability or otherwise of the presumption is not the end of the matter. It may still be possible for the plaintiff to succeed in holding the defendant liable for damage by proving negligence (as well as the other requirements of Aquilian liability). The Court in *Gouda* considered this, but held that Transnet had not been negligent. Further discussion of this aspect of the judgment is not necessary for purposes of this note.

## 4 Discussion

The Supreme Court of Appeal's decision in *Gouda Boerdery v Transnet* in regard to the interpretation of section 34 was, in my view, wrong because it focused unnecessarily on the meaning of "veldfire" without paying sufficient attention to the word "started". Reading the section as a whole would lead to a different conclusion.

Whether I am right or wrong, this judgment does raise some concerns relating to the definition of "veldfire" and the intention of the Act. According to the memorandum accompanying the Veld and Forest Fire Bill 22 of 1998, the exemption from the presumption in section 34 is one of the benefits of membership of a fire protection association (s 34 is not motivated anywhere else in the memorandum). The *rationale* behind section 34 must, however, surely go further than this – it is reasonable to suggest that the justification for the presumption is to assist plaintiffs in proving liability for damage by veldfire in circumstances where it may be difficult to prove negligence. Support for this view can be obtained from previous cases in which certain sections in precursors to the National Veld and Forest Fire Act, also casting the onus on the defendant to disprove negligence, were considered. Although s 34 differs from these sections (s 84 of the Forest Act 122 of 1984, which was preceded by s 23 of Act 72 of 1968 and s 26 of Act 13 of 1941), in that it is narrower (see *Gouda Boerdery* par [5]), the *rationale* behind the sections must be the same.

To put this rationale into context, the current Act and its predecessors, envisaged fire control areas where landowners participate in schemes essentially to prevent and combat veld and forest fires. Involvement in such a scheme would necessarily involve sharing information and knowledge about fire risks and measures taken. In the light of this, it was stated by Fannin JA that the purpose of the presumption was as follows:

> "It was argued on behalf of the plaintiff that the presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire whose origin he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated, whether it was lit by himself or by anyone for whose acts he is in law responsible and the manner in which the fire was dealt with, if at all, by him or by his servants or agents. This, I think, is undoubtedly correct. Furthermore, a person who has suffered as a result of a fire which has come from another's land will often not be in a position to embark upon any investigation as to the origin or cause of the fire, and will certainly have no right to enter upon that land to conduct any such investigation" (*Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A) 788B-D).

This rationale was cited with approval in the more recent Constitutional Court decision of *Prinsloo v van der Linde* (1997 3 SA 1012 (CC)).

In the light of this, the definition of "veldfire", based on the definition of "veld", is problematic. It is difficult to fault the Court in *Gouda Boerdery* in its conclusions on the meaning of "veld", on the basis of its dictionary meaning (which corresponds to the generally understood meaning) and judicial pronouncements in *West Rand Estates*. This definition, however, when forming the basis for the definition of "veldfire", can lead to ridiculous results. 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.

If the objective of the Act is to address fires in rural areas (although even this is now not so clear-cut – consequent to urban sprawl, many residential areas are adjoining agricultural land and "veld") that are potentially dangerous and where the objective is to get such fires under control (or extinguish them), why should the provisions of the Act be confined to forests and "veld"? And if one focuses on the presumption in section 34 and its rationale, surely it would be equally difficult for a victim of fire damage to prove negligence whether the fire started in the "veld" or in a pasture or other land not qualifying as "veld" or forest? The Act should spread its ambit to –

> "any fire burning living or dead vegetation outside of the urban or structural environment. [This] covers all planned and unplanned fires in natural forests, planted forests, protected natural areas, rangelands, grasslands, shrubs, brush and other vegetation types, including fires in peatlands, swamps, mires and fens. It also covers surface or crown fires in landscaped, planted or tended agricultural vegetation when the fire is not planned and implemented as part of an accepted agricultural technique. In this context, it also comprises a fire that burns from a wildland or other area into a rural, urban environment or cultural or historical area, with structures becoming involved" (Food and Agricultural Organisation (FAO) *Fire Management: Voluntary Guidelines* Fire Management Working Paper FM17E (2006) 2).

It is recommended, therefore, that the definition of veldfire be reconsidered and replaced with something that would be more embracing of the countryside generally. In this regard, it is interesting to consider the focus of fire legislation elsewhere. In New South Wales, Australia, the focus of the Rural Fires Act of 1997 is a "bushfire", which is defined as: "includes a grass fire" (s 4, read with the Act's Dictionary). This definition would go further than the definition of "veldfire" accepted by the Court in *Gouda Boerdery*, although it is not clear whether it would extend to cultivated land.

In the United States of America, the term used is "wildfire", as in the Healthy Forests Restoration Act of 2003 (16 USC 6501). The FAO (above) also uses the term "wildfire", defining it as "any unplanned and uncontrolled wildland fire that, regardless of ignition source, may require suppression response or other action …" (59).

This is really the essence of what the National Veld and Forest Act ought to be addressing: not so much the location of the fire, but whether the fire is out of control and requiring suppression. Damage caused by an uncontrolled fire is just as harmful whether it spreads from (or starts) in a forest, the veld, cultivated land or a railway reserve. Surely potential victims of such fires ought to be protected by fire legislation irrespective of where they happen to start.

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