



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5264/2021

In the matter between:

COBRA TOWING CC

Plaintiff

[Registration Number: 2005/050619/23]

and

MANGAUNG METROPOLITAN MUNICIPALITY

1st Defendant

**MUNICIPAL MANAGER: MANGAUNG METRO-
POLITAN MUNICIPALITY**

2nd Defendant

**CHIEF FIRE OFFICER: MANGAUNG METRO-
POLITAN MUNICIPALITY**

3rd Defendant

CORAM: VAN ZYL, J

HEARD ON: 5 MARCH 2024

DELIVERED ON: 5 SEPTEMBER 2024

[1] The plaintiff instituted a delictual action against the Mangaung Metropolitan Municipality and related parties (“the defendants”) for damages as the result of a fire which ignited at its premises situated at 17 Henry van Rooijen Street, East-End, Bloemfontein (“the premises”) on 16 November 2018. The amount claimed by the plaintiff amounts to R785 714.30, which amount, in terms of the particulars of claim, consists of the following:

“22.1 General Damages consisting of the value of the total loss of vehicles and spare parts as indicated in “E” appended hereto amounting to R648 542.02; and

22.2 Consequential Damages in the form of loss of income from the sale of the aforesaid vehicles and spare parts as indicated in “E” appended hereto amounting to R185 292.58.

[2] Ms Ferreira appeared on behalf of the plaintiff. On behalf of the defendants Mr Ayayee appeared during the trial and drafted the defendant’s heads of argument, whilst Mr Mabuda dealt with the oral arguments presented on behalf of the defendants.

The pleadings:

[3] The issues in dispute reflected on the pleadings, have been considerably restricted, firstly as a result of the admissions made by each party as reflected in the rule 37A(10) minute, and secondly, as borne out by the evidence. Although I deem it apposite to quote certain portions of the pleadings, it will be restricted to the averments pertaining to the interruption of the water supply and the defendants’ plea thereto. For the sake of ease of reading, I will combine the

quotations from the particulars of claim and the plea by quoting the relevant part of the particulars of claim and immediately thereafter I will quote the plea thereto:

"6.

The Premises, and more specifically the water supply to the Premises, is provided by the First Defendant in terms of the legislative framework as pleaded herein."

"AD PARAGRAPH 6:

7. Save to note that the terms of the legislative framework have not been pleaded, as alleged, it is admitted that it is the responsibility of the Municipality to ensure within its means and available resources, water supply to residents and businesses in its territory."

"12.

The Fire could have easily been contained had it not been for the wrongful and negligent omission of the First Defendant as set out below."

"AD PARAGRAPH 12:

19. The contents of this paragraph are denied. In amplification, the fire spiralled out of control and presented difficulty in extinguishing as a result of ..."

"13.

The sole cause of the spread and continuation of the Fire was the failure by the First Defendant to supply water to the East End area, and more specifically, the Premises on the day of the Fire."

"AD PARAGRAPH 13:

20. The contents of the paragraph are denied. In amplification...."

"14.

When connected to sufficient water supply and being fully operational, the System designed and installed by the Defendant at the Premises would have suppressed and extinguished the Fire at the Premises with limited damage, which damage would have been confined to the immediate surrounding area of the vehicle in which the fire ignited."

"AD PARAGRAPH 14:

21. The contents of the paragraph are denied. In amplification ..."

"15.

At the time of the Fire the System was however not operative due to the fact that there was no water supply for fire-fighting to the Eastern area and Premises by the Defendant."

"AD PARAGRAPH 15:

22. The contents of this paragraph are admitted."

"16.

If the Premises were supplied with water and same could have been utilized to suppress the Fire, then the extensive damage to the Premises and its contents, caused by the spread of the Fire, would not have occurred, and, *in the alternative*, would have been limited."

"AD PARAGRAPH 16:

23. The contents of the paragraph are denied. ..."

"17.

The Plaintiff suffered extensive damages as pleaded below. The aforesaid damages were suffered as a result of the Defendant's negligent and wrongful failure to supply water to the Premises, conduct which is contrary to the legal duty of the First Defendant as required both in terms of the Defendant's:

- 17.1 Constitutional mandate and functions;
- 17.2 Legislative mandate including its own by-laws;
- 17.3 The contractual relationship between the Plaintiff and Defendant."

"AD PARAGRAPH 17:

24. The contents of this paragraph are denied. In amplification, the Municipality's mandate is to provide access to water, within its available means.

25. It is denied that the Municipality acted negligently and was accordingly the cause and/or alternatively the sole cause of the damage suffered by the Plaintiff."

“18.

The Constitutional duties of the First Defendant imposes upon it a duty of care in the form of:

- 18.1 The right to lawful, reasonable and procedurally fair administrative action;
- 18.2 The duty to ensure the provision of services to communities in a sustainable manner;
- 18.3 The duty to promote a safe and healthy environment.”

“AD PARAGRAPH 18:

26. The contents of the paragraph are admitted.”

“19.

The First Defendant breached the aforesaid duty of care by failing to supply water to the Premises.”

“AD PARAGRAPH 19:

27. The contents of the paragraph are denied.”

“20.

The Plaintiff, at all material times, made payment of all amounts due and payable to the First Defendant in respect of the provision of services, including water supply. There is therefore no basis for the First Defendant’s failure to adhere to the aforesaid duty of care.”

"AD PARAGRAPH 20:

28. The contents of the paragraph are denied and the Plaintiff is put to the proof."

"21.

As a result of the Defendant's failure to provide water supply to the Premises, and the spread of the Fire which occurred as a direct result thereof, the Plaintiff suffered extensive damage to vehicles and spare parts situated at the Premises."

"AD PARAGRAPH 21:

29. The contents of the paragraph are denied. In amplification it is denied that the lack of water supply to the area was the cause of the fire and/or its spread."

"24.

The damages suffered by the Plaintiff was suffered as a direct result of the negligent and wrongful omission of the First Defendant."

"AD PARAGRAPH 24:

32. The contents of the paragraph are denied."

"WHEREFORE THE FIRST PLAINTIFF PRAYS FOR JUDGMENT AGASINT THE FIRST AND SECOND DEFENDANTS, JOINTLY AND SEVERALLY, THE ONE TO PAY, THE OTHER TO BE ABSOLVED, IN THE FOLLOWING TERMS ..."

"WHEREFORE, the Defendants jointly move for an order dismissing the Plaintiff's action with costs on an attorney and client scale."

Rule 37A(10) minute:

[4] The admissions made by each party were recorded in the said minute to be the following:

- “7.1 Condonation Notice in terms of Act 40 of 2002.
- 7.2 Citation and identities of Parties.
- 7.3 Date of incident 16 November 2018.
- 7.4 Plaintiff is the tenant of the property situated at 17 Henry van Rooijen Street, East End, Bloemfontein.
- 7.5 Plaintiff rents the property from Apex Trust IT: 187/2012.
- 7.6 Deed of transfer.
- 7.7 Plaintiff conducts the business of a Scrapyard from the premises.
- 7.8 That the Plaintiff occupied the premises.
- 7.9 The water supply to the premises is supplied by the First Defendant.
- 7.10 The premises are fitted with permanent fire-fighting equipment connected to the water supply of the First Defendant.
- 7.11 That it is the responsibility of the First Defendant to ensure within its means and available resources, water supply to residents and businesses in its territory.

- 7.12 Fire started as a result of utilization of grinder by the Plaintiff's employee.
- 7.13 Water interruption to the East End Area on the day of fire and premises had no water.
- 7.14 The system was not operational due to the fact that there was no water supply for fire-fighting to the East End Area.
- 7.15 Resultant fire damaged the building on the premises and some of the vehicle wrecks.
- 7.16 Municipality has a duty to provide water in terms of Constitution and Section 73 of Municipal Systems Act.
- 7.17 The business conducted by the Plaintiff from the Premises is by nature, a business in which fire hazards occur from time to time.
- 7.18 The Plaintiff requires a permanent fire-fighting system and fire-fighting equipment to be operative at the premises.
- 7.19 Annexure "C" and Annexure "D" to the Particulars of Claim were completed by Acting Station Officer of the First Defendant.
- 7.20 The content of Annexure "C" and "D" are admitted.
- 7.21 The Constitutional duties of the First Defendant imposes upon it a duty of care in the form:
- 7.21.1 The right to lawful, reasonable and procedurally fair administrative action;
 - 7.21.2 The duty to ensure the provision of services to communities in a sustainable manner;
 - 7.21.3 The duty to promote a safe and healthy environment.

7.22 It is admitted that the Plaintiff demanded payment from the Defendant.”

[5] The issues in dispute as recorded in the aforesaid minute are (or were at the time) the following:

“8.1 Joinder of the Chief Fire Officer dispute.

8.2 Extent of damages to the vehicle wrecks.

8.3 Whether the permanent fire-fighting equipment on the premises were serviced and in an operational state.

8.4 The adequacy of the permanently installed equipment at the premises as the first line of defence in containing or extinguishing the fire.

8.5 The obligation to maintain adequate fire-fighting equipment is not discretionary but one imposed by the stipulations of Part T of the National Building Regulations, issued in terms of the National Building Regulations and Building Standards Act, 1977.

8.6 That these legislative provisions are aimed at ensuring safety in the design construction and equipping of buildings against fire hazards, as are other pieces of legislation aimed at achieving occupational health and safety. Compliance with such legislation are not discretionary.

8.7 That the operator of the grinder was duly trained and qualified.

8.8 That the operator of the grinder acted diligently in operating such equipment around combustible material.

- 8.9 The interpretation of Annexure "C" and "D" is in dispute: the particular aspect in dispute is the meaning of the phrases '*bringing a fire under control*' and '*extinguishing the flames*'.
- 8.10 That the Defendants admit the time of ignition of the fire: In paragraph 12 of the Defendant's Plea the time at which the Fire ignited is 'noted' whilst in paragraphs 13 and 14 of the Defendant's Plea the issue is disputed.
- 8.11 Whether the fire was reported immediately by Plaintiff's representatives.
- 8.12 Plaintiff's employees first attempted to combat the fire utilizing the available equipment of the Plaintiff.
- 8.13 That the fire had already been raging for a period prior to it being reported.
- 8.14 Whether B5 and B2 (the fire engines) had water in when they arrived at the Premises.
- 8.15 That the fire could have easily been contained had it not been for the wrongful or negligent omission of the First Defendant.
- 8.16 That the fire spiralled out of control and presented difficulty in extinguishing as a result of:
- 8.16.1 The Plaintiff not having properly equipped the Premises with fire-fighting equipment (properly maintained) which fire extinguishers and/or other portable fire-fighting equipment should have been employed as a first line of defence.
- 8.16.2 The late reporting of the fire.

- 8.16.3 The haphazard layout of scrap at the Premises which prevented easy access to the fire by creating the danger of falling objects, as well as, aided the quick spread of the fire.
- 8.16.4 The risk of the fire spreading to the nearby administrative offices, which had to be protected first, prior to giving full attention to extinguishing the flames.
- 8.17 When connected to sufficient water supply and being fully operational, the system would have suppressed and extinguished the fire at the Premises with limited damage, which damage would have been confined to the immediate surrounding area of the vehicle in which the fire ignited.
- 8.18 Sufficiency of the Plaintiff's mobile fire-fighting equipment.
- 8.19 The issues of wrongfulness and negligence on the part of both Parties are in dispute.
- 8.20 The ambit of the obligations of the Municipality is in dispute.
- 8.21 The nature of negligence sought to be imputed on the pleadings is disputed.
- 8.22 It is denied that the First Defendant breached his duty of care by failing to supply water to the premises.
- 8.23 That the plaintiff, at all material times, made payment of all amounts due and payable to the First Defendant in respect of the provision of services, including water supply. There is therefore no basis for the First Defendant's failure to adhere to the aforesaid duty of care.
- 8.24 The damage suffered by the Plaintiff is denied.

8.25 Liability to make payment is denied.

8.26 It is denied that the damages suffered by the Plaintiff was suffered as a direct result of the negligent and wrongful omission of the First Defendant.

8.27 It is denied that as a direct consequence of the incident and the negligence of the First Defendant:

8.27.1 No water was available at the Premises to utilize to contain the fire.

8.27.2 The fire spread to such an extent that the Premises burnt down completely.

8.27.3 The Plaintiff suffered damages as set out in the Particulars of Claim."

[6] The defendants have at the commencement of the hearing of the action indicated that the quantum of the plaintiff's claim for general damages is no longer in dispute, only the liability aspect thereof. The claim for the consequential damages is, however, still in dispute.

[7] With regard to the duty to begin and onus of proof, the parties agreed as per the rule 37A(10) that the plaintiff carries the duty to begin as well as the onus of proof.

Witnesses / Evidence:

[8] On behalf of the plaintiff the following witnesses testified:

1. Mr Steyn Wepener ("Steyn"), who is the manager of the plaintiff. He was not at the scene on the day of the incident, since he was out of town. He, however, followed the events which occurred on the day by means of security cameras at the premises to which he had access via his cell phone.
2. Mr Eduan Wepener ("Eduan"), who is the son of Steyn and who was in the employment of the plaintiff at the time of the incident. He was at the scene when the fire ignited and throughout all the events and he therefore presented evidence as to the happenings on the day.
3. Mr Jeandré Wepener ("Jeandré"), who was also in the employment of the plaintiff at the time of the incident. Originally he was not at the scene of the incident, since he was collecting his daughter from school. However, Ms Bianca Fourie phoned him and informed him about the fire. He then rushed to the scene. He presented evidence as to what he observed on the day of the incident.
4. Ms Bianca Fourie, who was employed as personal assistant at the plaintiff at the day of the incident. She was advised by Eduan about the ignition of the fire and immediately attempted to phone the fire brigade, but was unsuccessful to make contact with them. She was the one who phoned Steyn and Jeandrè to advise them about the fire.
5. Mr Marius Whitehead was called as an expert witness and, *inter alia*, testified about the contents of his two expert reports, of which due notice had been given and the reports had been duly filed. He has been involved in the fire industry for the past 43 years, He is

currently the acting CEO of OFS Fire Services. He is also a director and founding member of the Cento Group, which group is collectively the largest fire entity in South Africa.

6. No disrespect is meant by referring to the Wepener-witnesses by means of their first names. It is merely for ease of distinguishing between the different Wepener-witnesses.

[9] On behalf of the defendants the following witnesses testified:

1. Mr Tsumi Radebe, who has been and still is in the employment of the Fire Department for the past 16 years as a fire fighter. He was one of the fire fighters who attended the scene in the fire truck B5. He testified as to what he observed on the day of the incident.
2. Mr Russell van Deventer, who is a Fire Safety Officer at Bayswater fire station and who attended the scene some time after the fire had already started. He used his drone to take photographs of the scene and stood on one of the border walls to look at the fire. Although the defendant attempted to present his evidence as that of an expert, it was objected against on the basis that no expert notice and report had been filed in respect of him. Mr Van Deventer consequently presented factual evidence regarding the observations he made on the day of the incident.

[10] In the particular circumstances of this case I do not deem it necessary to give a full exposition and summary of the evidence presented by all the witnesses. I have, however, considered all the evidence presented on behalf of the respective parties. I will deal

with particular aspects of the evidence of the respective witnesses later in the judgment when I address specific issues.

- [11] However, in order to provide a factual background to the present matter to place the respective issues in context of the events of the day, I will give an overall summary of the evidence of Eduan, being the only witness who was at the scene the whole time from when the fire first ignited to the evening and who observed, from his point of view, the relevant events.
- [12] A bundle of documents was presented in evidence on behalf of the plaintiff and all the witnesses referred to applicable documents and photo's contained in the said bundle during the presentation of their evidence.

Mr Eduan Wepener:

- [13] Prior to the incident Eduan saw an employee of the plaintiff grinding on one of the vehicle wrecks. The employee had a fire extinguisher with him and took preventative action by placing a bonnet in the area where he was grinding. According to Eduan the specific employee had received the required basic training to perform the grinding. It was also not for the first time that he was performing grinding on vehicle wrecks.
- [14] Eduan was at the desk in the office in the admin building doing sales, whilst the employee was performing the grinding in a store room adjacent to the admin building. He could not see the employee from his office.

- [15] Eduan did not know that there was no water on the day. He had not used water or restrooms earlier the day.
- [16] Eduan became aware of the fire when the employee shouted that there is a fire. He ran outside to where the grinding was taking place and saw the employee with the fire extinguisher in his hand, with its pin already extracted. Eduan instructed the employee to use the fire extinguisher to extinguish the fire. At that stage it was a small fire which was restricted to the particular vehicle wreck.
- [17] Eduan ran to the hose reel inside the building and rolled it off completely. When he opened it, there was no water. The hose was long enough to allow him to stand within about five metres from the fire.
- [18] Outside the building was a second hose reel which he then took, tested it for water, but there was also no water available.
- [19] The vehicle wreck where the fire ignited then set alight the vehicle which was packed on top of it.
- [20] Eduan ran to one of the other premises of the business which is situated approximately two blocks from the premises to fetch a second fire extinguisher. When he returned, people from Bronco next door was already at the scene with their own fire extinguishers trying to extinguish the fire. They had four fire extinguishers.

- [21] He estimated the time since the fire started to the time that he returned from the other premises to be approximately fifteen minutes, being five minutes from the start of the fire to when the worker called him and he arrived at the store, five minutes to collect both reels and find that there was no water and five minutes to run to the other premises and back.
- [22] The plaintiff also had a portable fire fighter which was full of water and parked on the other side of the street across the premises. One Louwtjie fetched the fire fighter on a forklift and they attempted to extinguish the fire with the water in the fire fighter, but was unsuccessful in doing so. They decided to take out some of the other vehicles, since they were told that the fire department was on its way and they wanted to remove the vehicles to make space for the fire department. They also removed some of the vehicles in an attempt to prevent the fire from spreading any further.
- [23] Eduan testified that the vehicles were stored two vehicles on top of the other with a distance of about two metres space between the vehicles next to each other, since the space is required for the doors of the vehicles to be opened when a vehicle is to be stripped or when a client wants to buy a whole door panel of a vehicle. After about 25 minutes after the fire started a fire truck arrived, which turns out to have been B5. The hoses thereof were rolled out, but the truck had no water. The fire fighters tried to connect the hoses to the fire hydrant outside, but there was also no water.
- [24] After approximately five to seven minutes later a water tanker of the fire brigade arrived. It did have water in and it was connected to the

fire truck in order for the fire truck to use the water from the water tanker to extinguish the fire. According to Eduan the fire was, at that stage, contained to the store and the vehicles inside the store.

- [25] At one stage, after approximately 10 to 15 minutes after the fire truck started spraying water, the water of the water truck was also emptied out. The fire was under control at that stage, although it was still smoking.
- [26] The water truck left to refill at Lemo Mall, but while it was away, the fire re-ignited. In the meantime, they had also filled their own fire fighter with water again and used it on the fire. Eduan and Jeandrè also used buckets to pick up water from the ground and threw it onto the admin building to keep it from also alighting.
- [27] According to Eduan the water truck was away for about 15 to 20 minutes to refill and in that time the fire started all over again. The vehicles outside the store also caught fire.
- [28] After the water tanker returned, the fire truck again sprayed water on the fire to extinguish it, but by that time it had spread.
- [29] According to Eduan the fire brigade did not use their water for the admin building. Although the admin building did burn lightly, they were successful in keeping it from alighting by throwing the buckets of water onto the building.
- [30] When the fire brigade left the scene, the fire was not fully extinguished. There were no flames, but Jeandrè and Eduan still

used the buckets to throw water onto the areas which were still smoking.

[31] During cross-examination Eduan testified that Bianca worked in the building down the street, being the building from where Eduan fetched the second fire extinguisher, and he informed her about the fire and instructed her to phone the fire brigade.

[32] Eduan testified that the fire brigade was able to access the premises for purposes of fighting the fire. He denied that the wrecks caused them not to be able to access the fire. Reference was made to the paragraphs to indicate how close the fire brigade could come to the fire and to demonstrate that their access was not blocked.

Findings on issues in dispute excluding the alleged wrongful and negligent conduct of the defendants regarding their failure to provide water:

[33] As far as the defendants allege that the plaintiff did not comply with the National Building Regulations and Building Standards Act, the undisputed evidence of Mr Whitehead was that the plaintiff was, in fact, compliant. Mr Whitehead testified that the third defendant itself declared the plaintiff to be compliant. He also referred to the documentation attached to his report in this regard.

[34] With regard to the question whether the permanent fire-fighting equipment on the premises were serviced and operational, the plaintiff provided invoices pertaining to the said equipment having been serviced and Mr Whitehead confirmed that his company has

in fact attended to the servicing of both the permanent and the temporary equipment.

[35] On the papers the training and qualifications of the grinder operator were placed in dispute. However, both Steyn and Eduan testified that he received the necessary training and that he was experienced in doing the grinding work. Eduan also testified about the precautionary measures which the employee took.

[36] The adequacy of the permanent installed fire-fighting equipment at the premises as a first line of defence in containing or extinguishing a fire, was also questioned. From the evidence of both Steyn and Eduan it was evident that the temporary or mobile equipment utilised could not contain the fire. A constant flow of water, which could only have been obtained from the hydrants, was necessary to have extinguished the fire. Had water been available, Eduan would have been able to extinguish and contain the fire by means of the hose reels which he attempted to use. Mr Whitehead testified that it ought to have been contained at the 5-minute inception stage, which would have been possible if there had been a constant flow of water. The fact that Eduan was not able to contain the fire, was not due to the inadequacy of the plaintiffs' permanent fire-fighting equipment, but due to the absence of water for the hose reels. The fire would therefore not have spread if it had not been for the absence of water when Eduan attempted to use the hose reels.

[37] In my view it is also evident from the plaintiff's witnesses that the "second" spreading of the fire occurred when the water tanker left to fill up with water. Had there been water in the fire hydrants, the water

tanker would not even have been necessary, as the fire truck would have extracted water directly from the fire hydrants. The re-ignition and the spreading of the fire during the time when the water truck was away and the fire truck could not spray water, consequently also occurred as a result of the absence of water in the fire hydrants.

- [38] The defendants disputed that the fire was immediately and promptly reported by the plaintiff. The evidence of Eduan is clear in this respect and it is evident that he reported the fire to Ms Fourie when he ran to fetch the extra fire extinguisher and she immediately attempted to phone the fire brigade. The fact that she could not get hold of them is irrelevant for present purposes, because it is evident that one "Rob" had reported the fire at approximately the same time.
- [39] The defendants initially disputed the fact that the plaintiff's employees themselves attempted to combat the fire. The evidence presented on behalf of the plaintiff in this regard is overwhelming in support of the fact that the employees in fact attempted to combat the fire and the evidence in this regard stand undisputed.
- [40] In so far as the defendants averred that the plaintiff did not pay the first defendant the amounts due and owing to it, Steyn's evidence regarding the payment of the accounts and that no amount was overdue, is to be accepted. It is in any event not the defendant's case on the pleadings that the water had been discontinued due to an overdue account and no notice in this regard had in any event been given to the plaintiff by the first respondent.

[41] With regard to the layout of the scrapyard, it is evident from the evidence of Eduan and the photos that the vehicle wrecks did not prevent the fire brigade from accessing the fire. The plaintiff's employees were also able to access the fire with the fire fighter on the forklift. Furthermore, the evidence of the plaintiff's witnesses was that no more than two cars were packed on top of each other. This was even confirmed by the defendants' witness, Mr Van Deventer, who pertinently testified that he did not see more than two cars packed on top of each other.

[42] The aforesaid issues have, in my view, been proven by the plaintiff on a balance of probabilities and the plaintiff consequently discharged its onus in respect thereof.

[43] The issue pertaining to whether B5 had water or not when it arrived at the premises, has, in my view, become irrelevant. When Mr Radebe's evidence is considered in relation to the capacity of the fire truck B5 and that of the water tanker, it is clear that even if B5 was filled with water when it arrived at the premises, it would in any event have run out of water in the absence of water in the fire hydrant and the water tanker would then in any event have had to leave the premises to go and fill up with water at Lemo Mall. I consequently consider it unnecessary to make a determination in this regard.

Contributory negligence:

[44] In terms of section 1 of the Apportionment of Damages Acts, 34 of 1956, a defendant may claim an apportionment of damages in his

plea because of the contributory negligence of the plaintiff. However, the defence must be pleaded and appropriate relief of apportionment must be sought in the plea.

[45] As already raised by Ms Ferreira during the trial, the defendants did not pertinently plead contributory negligence in this instance, nor are they claiming an apportionment of damages in their plea. No argument was raised to the contrary in the defendants' heads of argument nor was it raised in the oral argument presented on their behalf.

[46] Having said that, the plea of the defendants seems to contain a haphazard attempt to possibly have pleaded contributory negligence. In this regard, I refer, *inter alia*, to the following paragraphs of the plea:

"AD PARAGRPH 16

23. ... The cause of the fire and the difficulty to contain and/or extinguish a fire, were as a result of the plaintiff's actions as pleaded.

...

AD PARAGRAPH 17

24. ...

25. It is denied that the Municipality acted negligently and was accordingly the cause and/or alternatively the sole cause of the damages suffered by the plaintiff."

[47] In addition to the aforesaid, it was noted in the rule 37A(10) minute that one of the issues in dispute is the following:

"8.19 The issues of wrongfulness and negligence on the part of both - Parties are in dispute"

[48] In **Amler's Precedents of Pleadings**, LTC Harms, Ninth Edition at p. 274 the following is stated:

"A court may order apportionment in the absence of proper pleadings if the issue was fully canvassed."

See **A.A Mutual Insurance Association v Nomeka** 1976 (3) SA 45 (A).

[49] Therefore, in so far as it may be considered that the issue of contributory negligence had been fully canvassed in the evidence, I deem it necessary, for the sake of completeness, to make a finding in respect of contributory negligence.

[50] I have not yet made a determination about the defendants' negligence or the absence thereof. However, in so far as I may find against the defendants in this regard, I make the finding that in view of the findings I already made above in respect of those issues that were in dispute, it cannot be found that the plaintiff had been contributory negligent in any degree in having caused the damages suffered by the plaintiff.

Wrongfulness of the conduct of the defendant:

[51] For purposes of the law of delict, liability only follows if an omission was in fact wrongful and this will be the case only if in the particular

circumstances a legal duty rested upon a defendant to act positively to prevent harm from occurring, and the defendant failed to comply with that duty. See Law of Delict, J Neethling *et al*, Fifth Edition, at p.51, para 5.

[52] It is common cause between the parties that there was a water interruption to the East End area on the day of the fire and that there was consequently no water available at the premises of the plaintiff.

[53] For the sake of ease of reference, I repeat the following aspects which were agreed upon between the parties in terms of the rule 37(A)10 minute:

"7.9 The water supply to the premises is supplied by the first defendant.

7.11 That it is the responsibility of the first defendant to ensure within its means and available resources, water supply to residents and businesses in the territory. (My emphasis)

7.16. The Municipality has a duty to provide water in terms of the Constitution and section 73 of the Municipal Systems Act.

7.21 The Constitutional duties of the first defendant imposes upon it a duty of care in the form of:

7.21.1 The right to lawful, reasonable and procedurally fair administrative action;

7.21.2 The duty to ensure the provision of services to communities in a sustainable manner;

7.21.3 The duty to promote a safe and healthy environment."

[54] I also repeat the relevant issues in dispute that were noted:

- 8.19 The issues of wrongfulness and negligence on the part of both parties are in dispute.
- 8.20 The ambit of the obligations of the Municipality is in dispute.
- 8.22 It is denied that the first defendant breached its duty of care by failing to supply water to the premises. (My emphasis)

[55] In the heads of argument filed on behalf of the defendants the following contention was accentuated and also repeated by Mr Mabuda in his oral argument:

- “11. Whilst it is common cause that there was no water in the Eastern End area of Bloemfontein for fire-fighting purposes on 16 November 2018, the plaintiff did not address a single enquiry to the defendants’ witnesses, as to the reason why there was a water interruption. This is significant and we submit an insuperable hurdle to the plaintiff’s case. The plaintiff did not establish in evidence the reason why there was a water interruption.
- 12. To suggest as the plaintiff does, that any interruption in water supply, whatever the reason, would result in a situation where a municipality may be held strictly liable is an absurd notion. For example, a water interruption necessitated by a need to carry out critical maintenance works on Municipal water infrastructure, can never be construed as being either wrongful and/or negligent.”

[56] The defendants advanced the aforesaid submission in conjunction with their reliance on the fact that the plaintiff accepted the onus in terms of the rule 37A(10) minute.

Grounds of justification:

[57] Grounds of justification are special circumstances in which conduct that appears to be wrongful is rendered lawful. The violation of interests is therefore not unreasonable or *contra bonos mores*. A ground of justification therefore excludes wrongfulness by eliminating the apparent wrongfulness of the defendant's conduct. See Law of Delict, *supra*, at p. 70. Para 6.1.

[58] The onus to prove the existence of such a ground of justification rests on the defendant. See Mabaso v Felix 1981 (3) SA 865 (A) at 874.

[59] One such ground of justification is statutory authority which entails that a person does not act wrongfully if he performs an act (which would otherwise have been wrongful) while exercising a statutory authority. To determine whether the permitted act fell within the boundaries of the authorisation, the defendant's conduct must have been reasonable; in other words, it must not have been possible to prevent or limit the damage by other reasonably feasible measures or methods. Here the onus is on the plaintiff to show that reasonable alternative methods indeed existed and that the defendant had therefore acted unreasonably. See Law of Delict, *supra*, at p. 95 - 97. Para 6.6.

Pleadings in general:

[60] The following general principles regarding pleadings are contained in Amler's Precedents of Pleadings, *supra*, at p.1:

“**Purpose of pleadings:** A party must define its cause of action and defence in the appropriate pleading in the court of first instance, to inform the other parties to the matter of the case they must meet and of the relief sought against them in that court. This is a fundamental principle of fairness in the conduct of litigation, which promotes the parties' rights to a fair hearing guaranteed by section 34 of the Constitution.

...

The purpose of pleadings is to define the issues for the other party and the trial court and for any court of appeal. The duty of those courts is to adjudicate upon the disputes and those disputes alone.

...

The oft-repeated statement that 'pleadings are made for the court not the court for the pleadings' may be misunderstood. As mentioned, pleadings are made primarily for the parties. They are also made for the court, meaning that they circumscribe the function of the court in the matter. However, the court should not be hampered in deciding a matter by pleading technicalities.

Clarity and conciseness: Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for the claim, defence or answer, with sufficient particularity to enable the opposite party to reply thereto.

...

Fact and law: Pleadings are accordingly about facts from which legal conclusions may be drawn and not about law. ...”

Application to the facts:

[61] In the present instance the legal duty or statutory duty of the first defendant to ensure within its means and its available resources, water supply to residents and businesses in the East End area on the day of the fire, is not in dispute and has been conceded by the defendants. It is also common cause that a water interruption to the East End area in fact occurred on the day of the fire, which resulted in the premises and the fire hydrants to have been without water during the time of the fire. That omission of the first defendant was therefore *prima facie* wrongful.

[62] If the defendants wanted to rely on a ground of justification, such as that it was not within the first defendant's means and available resources and therefore it had the statutory authority not to supply water at that stage, they should have pleaded same, in which instance they would have had the onus to prove the pleaded justification. In that instance the plaintiff would probably not have agreed that it bears the onus on all the issues in dispute.

[63] The defendants are also relying on the Mungaung Metropolitan Municipality by-laws relating to water services promulgated in the Provincial Gazette, No. 60 of 25 October 2013, as general justification in the instance of any water interruptions, also the interruption in the present instance. Under the heading of "*General Conditions of Supply*" it, *inter alia*, determines as follows:

"33. (1) Subject to the provisions of the Act, the supply of water by the Municipality does not constitute an undertaking by it to

maintain at any time or at any point in time in its water supply system -

- (a) an uninterrupted supply;
- (b) a specific pressure or rate of flow in such supply; or
- (c) a specific standard of quality of water

...

- (3) The Municipality may, in an emergency, interrupt the supply of water to any premises without prior notice."

[64] Similarly as above, I am of the view that the defendants cannot rely on the by-laws without having pleaded same as justification. Let me immediately state that I know that one does not plead the law, but facts. Therefore, what should have been pleaded is again statutory authority in terms of the by-laws, without pleading the by-laws as such. That would also have granted the plaintiff the opportunity to have replicated thereto by pleading, for example, the illegality or unconstitutionality of the by-laws.

[65] In the circumstances I am satisfied that the plaintiff proved the wrongfulness of the first defendant's conduct due to its failure to have complied with its (conceded) legal duty or statutory duty.

Negligence:

[66] In my view a reasonable person in the position of the first defendant would have foreseen the reasonable possibility that the extended interruption of the water could injure another person's property and cause patrimonial loss and such a reasonable person would have taken reasonable steps to guard against such occurrence. The first

defendant failed to take such reasonable steps. The first respondent could easily have forewarned or informed, depending on the circumstances, the residents and businesses in the East End area of the interruption of water by means of different media - and social media platforms, which would have eliminated the risks. In this regard Eduan himself testified, when he was asked during cross-examination why they performed grinding operations well knowing that there was no water, he testified that he was not aware that the water supply had been interrupted and had he been notified about it, they would not have performed grinding activities.

[67] In the circumstances I am satisfied that the plaintiff also discharged its onus in respect of the element of negligence.

Damages:

[68] As previously indicated, the quantum of the plaintiff's general damages is not in dispute.

[69] With regard to the consequential damages claimed by the plaintiff, it is pleaded to be damages in the form of loss of income from the sale of the vehicles and spare parts lost in the fire.

[70] A plaintiff must allege and prove the quantum of damages suffered because of the defendant's wrongful and negligent act.

[71] Steyn testified about the plaintiff's damages with reference to annexure "E" to the particulars of claim. He attempted to explain how the amount of R 185 292.58 was compounded and calculated, but

was unable to do so. The calculation which he explained in court, totalled an amount far more than R185 292.58. Ms Ferreira submitted that since the amount claimed is a lesser amount than the calculation Steyn made in court, the lesser amount can be awarded.

[72] I can unfortunately not agree with the aforementioned submission. Damages and the basis for the calculation thereof are to be proven, not guessed. If the amount as calculated in court was more than the amount claimed, the correct calculation may just as well turn out to be less than the amount claimed. No proper and reliable evidence was placed before me on the basis of which I can award any amount of damages in respect of consequential damages.

Causation:

[73] Based on the findings I have already made in relation to the merits of this action, it is on balance of probabilities evident that the wrongful and negligent omission of the first defendant was the cause of the plaintiff's general damages and it should be held responsible for the payment thereof to the plaintiff.

Costs:

[74] The parties are *ad idem* that the general rule that costs follow the outcome, should be applied in this instance and I am in agreement therewith.

Order:

[75] The following order is made:

1. The first and second defendants are ordered to pay the plaintiff the following, jointly and severally, payment by the one the other to be absolved:
 - 1.1 The amount of R 648 542.02 (Six hundred and forty-eight thousand five hundred and forty-two rand and two cents.
 - 1.2 Interest *a tempora morae* on the aforesaid amount from the date of service of the Summons to date of payment.
 - 1.3 Costs of the action.



✓ C. VAN ZYL, J

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