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FAQS: NATIONAL VELD AND FOREST FIRE ACT

THE RESPONSIBILITIES OF PEOPLE IN CONTROL OF LAND.

All owners on whose land a veldfire may start or burn or from whose land it may spread must:

- prepare firebreaks on their side of the boundary if there is a reasonable risk of veldfire
- have such equipment, protective clothing and trained personnel for extinguishing fires as are: prescribed (in the regulations)
- if there are no regulations, reasonably required in the circumstances
- take all reasonable steps to notify the FPO of the local FPA (if there is one) when a fire breaks out
- do everything in their power to stop the spread of the fire.

The Act also requires that if the owner is absent, he or she must have a responsible person present on or nearby his or her land to:

- extinguish a fire if one broke out, or assist others to do so
- take all reasonable steps to alert the neighbours and the FPA (if there is one).

The owner may appoint an agent to act on his or her behalf to perform these duties.

WHO IS AN 'OWNER' IN TERMS OF THE ACT?

'Owner' means any landowner with title deed as well as a lessee or other person legally controlling land, the executive body of a community, the manager of State land, and the chief executive officer of any local authority, or

their duly appointed agents in the cases of State land (including South African National Defence Force land).

State land owners.

State land means:

- national or provincial land (but not municipal land)
- land held in trust for communities by the Minister of Land Affairs or the Ingonyama Trust.

State land owners must become members of an FPA if one is registered in the area where the land is located. The Minister of the government department or member of the provincial executive council exercising control over the land, or a person authorised by him or her, must be represented on the FPA unless the land is controlled by:

- a person contemplated in s2(1)(xiii)(a) (a title deed holder, lessee, or person controlling the land in terms of a contract, will, law or order of the High Court) or
- a community.

LAND OWNED BY COMMUNITIES

Land controlled by a community could be private land (where the community owns it), or State land held in trust for the community by the Minister of Land Affairs or the Ingonyama Trust. The Act states that where land is controlled by a community, regardless of the ownership of the land, the executive body of that community is the owner. The executive body can exist in terms of:

- its constitution (where the community has formed a communal property association and owns the land)
- any law (for example, where a tribal authority was appointed by law) or
- custom or customary law (where a chief or headman and the tribal elders may control the land) The executive body of any community which controls land held in trust by the Minister of Land Affairs or the Ingonyama Trust must become a member of an FPA if one is registered in the area where the land is located. Several different communities might control portions of a single piece of State land held in trust. Each community should be represented in the FPA by its executive body.

WHY FORM AN FPA?

Co-operation among rural owners and managers of land is required for the effective management and prevention of veldfires. Government cannot take on the duties and responsibilities of landowners for fire protection.

The Act places this responsibility on landowners

- No presumption of negligence in civil claims for damage where a fire from the member's land causes damage or loss to another person (section 34).
- The benefits of co-operation in preventing and combating veldfires through the institution of the FPA, within the framework of an agreed veldfire management strategy.
- The cost saving that comes from avoiding duplication with for example disaster management plans and agricultural conservation programmes.
- The protection that comes from the enforceable rules of the FPA, as established in its constitution.
- The fact that FPA rules are enforceable in the FPA area protects members from the actions of non-members.
- Advice and assistance to members in meeting the statutory requirements for readiness for fire fighting, including skills development.
- The registered Fire Protection Officers (FPO) of an FPA receives powers to enforce the Act and FPA rules.
- Improved communication among members, for example, of fire hazard conditions.
- Improved communication between members and the Minister and other roleplayers.
- Free access to research commissioned by the Minister on the prevention and combating of veldfires and on the use of controlled fire in sustainable forest management.
- Possible relief from certain prevention measures, for example, the duty to create and maintain firebreaks, depending on the contents of the FPA's veldfire management strategy.
- The overall benefits of progressive building of capacity within the FPA and thus among its members, with overall reduction in the risks of veldfires.
- The possibility of assistance from the Minister.
- Possible decreased insurance premiums because the risk of veldfire is less.
- Improved powers of negotiation by virtue of being a member of a group of owners.

AM I OBLIGED TO JOIN AN FPA IF ONE FORMS IN MY AREA?

It is not compulsory for most owners to join an FPA if one is registered in the area they live in. This is because the right to freedom of association in the Constitution must be upheld, but also because landowners themselves need to make a firm commitment, voluntarily, to co-operate through FPAs. But certain owners must join an FPA when it has registered:

- The owners of State land, whether it is held by the national or provincial government
- The owners of land held in trust for communities by the Minister of Land Affairs or the Ingonyama Trust, which usually means the executive body of community exercising control over that land, because they are in control of land held in trust for them by the State.
- A municipality within the area of the FPA, if it has a fire service.

WHAT ABOUT NON-MEMBERS INSIDE AN FPA'S AREA?

Non-FPA members are not bound by the rules of an FPA. However, municipal land owners must be members of the FPA. It is possible for the local council to pass by-laws which are binding on everybody inside the municipal area. An FPA is able to object to the burning of firebreaks within its area, regardless of whether the party is a member or not. In this way, an FPA may enforce its own rules on members and non-members.

WHY AN FPA MUST REGISTER

An FPA must register in order to qualify for assistance under the Act and to receive the powers and duties provided for under the Act. For example, the FPA can make rules that bind members, like when and how firebreaks should be prepared. The registered Fire Protection Officer of an FPA can enforce the rules and inspect members' property to ensure that the Act is being complied with. This assists members of FPAs to better manage and control veldfires.

WHAT IS AN FPA'S BUSINESS PLAN?

Section 5 of the Act sets out the duties of an FPA. An FPA's business plan is a strategic document (not an

operational plan) explaining how it will tackle its duties using risk analysis and management. It must:

- demonstrate understanding of the veldfire problem in the FPA's area and the competencies necessary to deal with it
- illustrate that risks have been identified
- communicate the reasons for the rules that will be applied
- provide information that will develop a country-wide picture of veldfire risk.

DWAF has developed a guideline for FPAs to develop business plans. DWAF Fire Advisers can assist FPAs to draw up their business plans.

WHY DOES AN FPA NEED A BUSINESS PLAN?

Because South Africa is so diverse, it is impossible to have a blueprint for the management of veldfires for the whole country. Local knowledge and judgement must determine the way veldfires are managed. Veldfire management within an FPA must be a balance between the plans of the individual landowners, and the collective plans of the FPA, established for the common good. The business plan is a strategic document, not an operational plan. It is essential to the FPA because it provides a framework for a consistent, diligent and efficient approach to veldfire management, and for co-ordination with related aspects of managing resources and the environment.

REGISTERING THE FIRE PROTECTION OFFICER

In order to have powers under the Act, an FPO must be registered. He or she applies for registration by means of in Form 2. The DG will register the FPO if she or he is sure the FPO will be able to enforce the Act in a responsible manner. The DG will look at the skills of the FPO and the support that will be given to him or her by other role players or an umbrella FPA.

WHAT IS THE NATIONAL FIRE DANGER RATING SYSTEM?

The National Fire Danger Rating System rates the fire danger on any given day in a particular region, given a particular set of circumstances. The rating ranges from insignificant (code blue, where there is such a low fire danger that no precaution is needed) to extreme (code red, where the danger is so high That no fires may be allowed in the open air and special emergency fire measures must be invoked. This section of the Act (Chapter 3) has not yet been brought into effect because DWAF has not yet decided which fire danger rating model to use.

WHEN IS A FIREBREAK NECESSARY?

Landowners are required to prepare firebreaks on their side of the boundary where there is a reasonable risk of veldfire (section 12(1)). How do we know what a reasonable risk is? The courts use the “reasonable person test”:

- if a reasonable person in the position of the landowner would foresee that by not preparing a firebreak, a veldfire could start or spread across his or her land, causing harm to someone else,
- and therefore would prepare one,
- then the landowner should also prepare one.

The Act does not specify requirements for firebreaks because the specific requirements for an effective firebreak vary from place to place.

WHO MAY ENFORCE THE ACT?

A registered FPO, a forest officer, a police officer, and an officer appointed in terms of section 5 or 6 of the Fire Brigade Services Act, 1987 (Act No. 99 of 1987), have the power to enforce the Act. References to an FPO in sections 27, 28 and 29 includes all the abovementioned officials. An FPO must carry identification to be able to exercise these powers. An FPO may delegate any of his or her powers and duties, except the power to arrest, search and seize.

HOW SHOULD WE INTERPRET THE ‘PRESUMPTION OF NEGLIGENCE’ CLAUSE

If a fire which has started on your land, or has spread across your land from somewhere else causes a loss to your neighbour, your neighbour may lodge a civil claim against you for damages. In such a case, you are presumed to have been negligent, unless you can prove otherwise. However, if you are a member of an FPA, you are not presumed to have been negligent, so it is more difficult for your neighbour to successfully claim damages.

HOW DO WE INTERPRET SECTION 34?

Often people interpret s34 to mean that if you are a member of a FPA, you cannot be found guilty of negligence and so cannot be made to pay compensation for a fire that started on your land.

This is incorrect.

We will look at the law of delict to understand what s34 means.

DELICTUAL LIABILITY

Why do you need to know about the law of delict?

Because generally when someone suffers a loss due to fire they turn to the law of delict for a remedy. To win your case, you must show that all five elements of a delictual action are satisfied.

ELEMENTS OF A DELICTUAL ACTION

The five requirements (or elements) necessary for delictual liability are:

1. Conduct.
2. Wrongfulness.
3. Fault (intention or negligence).
4. Causation.
5. Harm.

Each requirement must be proved for a person to have committed a delict (and thus be held delictually liable).

1. CONDUCT

- The starting point in asking whether there is delictual liability is to determine whether there was conduct (i.e. something that was done or not done).
- This may be an act or an omission: doing something or failing to do something.

2. WRONGFULNESS

- Conduct must be legally wrongful in order for one to be liable. It cannot just be something which is morally wrongful.
- If someone's legal right has been violated then there has been a wrong. If I punch someone, this violates their right not to be harmed and is wrongful.
- Every violation of a duty in an Act is wrongful. Therefore, failing to prepare a firebreak when one is required to according to section 12(11) is wrongful.
- If a clearly defined right or duty cannot be found, one still may have conducted oneself wrongfully if the 'test' is satisfied.
- The 'test' to determine if there is wrongfulness is referred to as "the legal convictions of the community" test (also called boni mores).
- In other words, the courts ask whether the conduct was so unreasonable in the eyes of the community that one should be held to have committed, not merely a moral wrong, but a legal wrong.

DEFENCES TO WRONGFULNESS

There are defences to wrongfulness that allow a person to show that their conduct was not, in the special circumstances, wrongful. While there is no closed list (as the list is also a product of the “boni mores”) the most common defences include:

- consent and assumption of risk
- private defence or necessity
- impossibility
- superior orders
- statutory authority and official capacity.

3. FAULT

For delictual liability to exist, there must be fault.

- The conduct must have occurred intentionally or negligently.
- Intentional wrongdoing takes place where the wrongdoer intends to cause the harm.

NEGLIGENCE

Negligence arises where someone acts without taking proper care -they have not acted as a “reasonable person” would have acted. The test for negligence is:

- would a reasonable person in the position of the defendant [wrongdoer] foresee the possibility of his or her conduct causing damage to another person;
- would a reasonable person have taken steps to guard against the possibility of harm, and did the defendant fail to take the steps that a reasonable person would have taken to guard against this possibility of harm?

THE REASONABLE PERSON

Who is the reasonable person?

This fictional person is:

- the average man or woman,
- not reckless or overcautious,
- aware of their surroundings and the dangers inherent in various activities.
- Should the person concerned also have particular expertise, then their conduct is measured against that of the reasonable expert (e.g. electrician or mechanic).

DEFENCES TO NEGLIGENCE

The most straightforward defences are:

- that a reasonable person would not have:
 - foreseen the harm; or
 - taken the steps necessary to guard against the harm;
- that one acted reasonably (i.e. if a reasonable person would not have done it then I do not need to do it either).
- A partial defence is to establish that someone else was also at fault so as to have one's damages reduced according to the degree of fault of the other person.

DEFENCES TO CAUSATION

Defences include arguing that:

- the damage was too remote;
- that a new cause intervened; or
- that the damage was disproportional to the wrong and negligence on the part of the defendant.

5. DAMAGE/HARM

If there is no legally recognised damage, then there is no delict.

For instance if you break up with a boyfriend and his feelings are hurt. The only defence is that the harm caused is not legally recognised.

PROVING A DELICT

To prove that someone has committed a delict and therefore should compensate you (pay damages) you must generally prove each of the five elements of the delict:

1. Conduct.
2. Wrongfulness.
3. Fault.
4. Causation.
5. Harm.

HOW DOES S34 HELP?

Section 34 helps the person who is trying to prove the delict (the injured party -generally called the plaintiff).

It does this by saying that when the wrongdoer (defendant) is not a member of a FPA, the injured party does not have to prove negligence, because the court automatically presumes the wrongdoer is guilty of negligence.

- The wrongdoer can rebut the presumption by proving that s/he was not negligent e.g.:
 - a reasonable person would not have foreseen harm
 - a reasonable person would not have taken any steps to guard against the harm.
- The injured party will still have to prove the other four elements of the delict to succeed.
- However, where the wrongdoer is a member of a FPA, the injured party will have to prove negligence. This is because the presumption does not apply to members of FPAs.
- Therefore, the presumption assists the injured party only in cases where the wrongdoer is not a member of a FPA.

SUMMARY OF S34 PRESUMPTION

If the wrongdoer is not a FPA member, what must the injured party prove?

- conduct – yes
- wrongfulness – yes
- negligence – no – the presumption comes in
- harm – yes
- causation – yes



If the wrongdoer is an FPA member, what must the injured party prove?

- conduct – yes
- wrongfulness – yes
- negligence – yes
- harm – yes
- causation – yes

WEATHER

Forecast for Cape Town

Wednesday midday
16:00 – 22:00

 **20°** 

Fair. Moderate breeze, 6 m/s from south-southwest. 0 mm precipitation.

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TMNP Newlands Base: 021 689 7438/9 (o/h)

Call with Cell Phone: 107

Call with Telkom Line: 021 480 7700



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