

# DISPUTE RESOLUTION ALERT

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### A DECEASED ESTATE GOES TO THE DOGS

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### **INSURANCE:**

#### RECENT DEVELOPMENTS IN LIABILITY ARISING FROM VELD FIRES

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But Mrs K met someone else and fell in love. In the next three months Mr and Mrs K were divorced, the ex-Mrs K remarried, Mr K passed away – of natural causes – and on the night he died the ex-Mrs K and her new husband moved into Mr K's house. The ex-Mrs K then lodged Mr K's will with the Master of the High Court describing herself as Mr K's surviving spouse.

Then things got even more complicated when the Master referred the ex-Mrs K to a very important little provision in the Wills Act.

Section 2B of the Wills Act effectively says that the death of Mr K within three months after the divorce means that the ex-Mrs K is deemed to be have predeceased Mr K and is thus unable to inherit, unless it appears from the will itself that Mr K intended to benefit his ex-wife. The Wills Act assumes that you didn't get around to changing your will in those three months between your divorce and your death and assumes also that you would have changed your will to exclude your ex. The three months is a "grace period" and failure to alter a will during that time will leave the will – and any bequests to the ex-spouse – intact, should the testator pass away after the three-month grace period.

The ex-Mrs K took the Master to the Western Cape Division of the High Court in 2016, insisting that she should inherit because there was no evidence from which it could be deduced that it was Mr K's intention that she should not

inherit. The ex-Mrs K did not challenge the meaning of s2B but said simply that the will did make it clear that Mr K intended to benefit her and she asked the court to interpret the will in her favour. Mr K's executor opposed the ex-Mrs K in court.

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The court found Mr K's will to be clear. It did not call for interpretation. But the ex-Mrs K's counsel argued that the application of s2B was subject to a finding as to what the intention of the testator was, that Mr K's intention was clearly that the longest living should inherit upon the death of the first dying and that the ex-Mrs K could inherit. If Mr K had not wanted her to inherit, he would either have expressly said so in the will or changed his will the day after the divorce. It was argued that s2B could not be enforced if the court found that Mr K intended the ex-Mrs K to inherit the estate.

The court made the crucial point that the ex-Mrs K's argument would give Mr K the power to override a provision in an Act of Parliament. The court held that neither the period of a marriage nor the harsh consequences of the timing of death would impact on the statutory disqualification imposed by s2B. The

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*The consequences of not having a will and, indeed, not updating it regularly can be quite severe. Be sure to update your will regularly and seek guidance on the presumptions created by the Wills Act.*



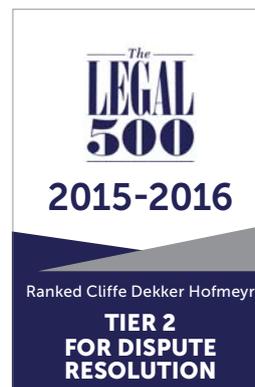
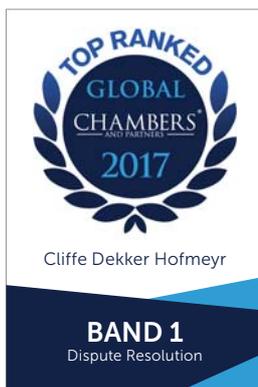
court found the reverse of the ex-Mrs K's argument to be true. Had Mr K intended the ex-Mrs K to inherit after divorce he would have explicitly stated so in his will or made a new will after the divorce indicating that to be his wish.

The consequences of not having a will and, indeed, not updating it regularly can be quite severe. Our experts are able to assist you in crafting a document that meets your needs. Be sure to update your will regularly and seek guidance on the

presumptions created by the Wills Act. To encourage people to execute wills, the Law Society of South Africa hosts National Wills Week annually and this year it will be held from 11 to 15 September 2017. During this week participating attorneys draft basic wills free of charge.

Oh yes, the SPCA did inherit the entire estate of Mr K.

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*Tim Fletcher and Megan Badenhorst*



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# INSURANCE: RECENT DEVELOPMENTS IN LIABILITY ARISING FROM VELD FIRES

*Damages claims arising from veld fires are delictual in nature. To succeed, a plaintiff has to prove all the elements of a delict.*

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**We have seen an increase in veld fires and resultant litigation. This leads to increased exposure for insurers in the agricultural sphere.**

The provisions of the National Veld & Forrest Fire Act, No 101 of 1998 (Act) and in particular s34 thereof are of interest. This section reads as follows:

Presumption of negligence

- (1) If a person who brings civil proceedings proves that he or she suffered loss from a veld fire which
  - (a) the defendant caused; or
  - (b) started on or spread on or spread from land owned by the defendantthe defendant is presumed to have been negligent in relation to the veld fire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.
- (2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful.

Damages claims arising from veld fires are delictual in nature. To succeed, a plaintiff has to prove all the elements of a delict.

In *MTO Forestry (Pty) Ltd vs A H Swart N.O.* (420/2016) [2017] ZASCA 57 (22 May 2017) the Supreme Court of Appeal (SCA) had to determine whether wrongfulness and negligence were established. Briefly, the facts were that the appellant was the beneficial owner of a forest and conducted a forestry business. A fire

started on an adjacent farm owned by the respondent. Fuelled by strong winds this fire spread onto the appellant's plantation and burnt for several days. It was not disputed that the fire was a veld fire and that respondent was not a member of a fire protection association. As such, the respondent was presumed to be negligent in accordance with s34 of the Act.

The court referred to the debate that started among academics around 2006 as to whether the elements of wrongfulness and negligence should remain as two separate elements of a delict. It referred to various articles by respected academics. The conclusion was reached that notwithstanding academic discourse wrongfulness and negligence are two separate elements of delictual liability which should not be confused. In delivering judgment, Leach JA reiterated that wrongfulness is a matter of legal and public policy. It has as a focus, the duty not to cause harm. It also functions as a limitation ensuring that liability does not attach where doing so would be undesirable or overly burdensome. In the past, foreseeability of harm, a requirement of negligence, was considered as a factor when determining wrongfulness. It is crucial to note that the SCA held that this practice added to the confusion between negligence and wrongfulness and that the time has come to abandon this approach. The role of foreseeability of harm should therefore be restricted to the assessment of negligence and causation.

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*This judgment is welcomed in that it aids the interpretation of the provisions of s34 and the nature of the duties of an agricultural landowner.*

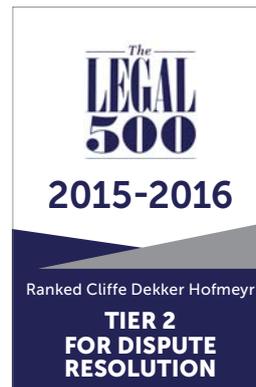


It was recorded that s34 of the Act recognises the distinction between negligence and wrongfulness and that it relates to negligence and not to causation. Further, the presumption of negligence created in s34 is an evidentiary aid, and its role is truncated when the essential facts are known. Importantly, it was held that a reasonable landowner does not have an absolute duty to prevent a fire that started on its property from spreading beyond its boundaries. It only has the obligation to take reasonable steps to prevent this. If, notwithstanding reasonable steps, a fire still spreads to adjoining land, negligence will not attach to the landowner.

The court concluded that the respondent had adequate firefighting measures in place and that its failure to remove natural vegetation that increased the risk of fire spreading was not unreasonable. The fire occurred during a severe drought and strong winds played a significant role in its spreading. This created doubt that earlier action by the respondent to extinguish the fire would have prevented it from spreading onto the appellant's land.

This judgment is welcomed in that it aids the interpretation of the provisions of s34 and the nature of the duties of an agricultural landowner.

*Roy Barendse*



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## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Janet MacKenzie**  
Director  
T +27 (0)11 562 1614  
E janet.mackenzie@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)21 481 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Jonathan Ripley-Evans**  
Director  
T +27 (0)11 562 1051  
E jonathan.ripleyevans@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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