

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 15/2016

In the matter between:

FRIEDRICH WILHELM REDECKER

APPLICANT

and

GERHARD ERICH TJIPUEJA

1ST RESPONDENT

NONTEMBA TJIPUEJA

2ND RESPONDENT

MINISTER OF AGRICULTURE, WATER AND FORESTRY

3RD RESPONDENT

MINISTER OF LAND REFORM

4TH RESPONDENT

STATION COMMANDER

5TH RESPONDENT

INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

6TH RESPONDENT

Neutral citation: *Redecker v Tjipueja* (A 15/2016) [2018] NAHCMD 264
(31 August 2018)

Coram: OOSTHUIZEN, J

Heard: 30, 31 January 2018 and 1 February 2018.

Delivered: 31 August 2018

Released: 6 September 2018

Flynote: Jurisdiction of the High Court to adjudicate a dispute originating from the Fencing Proclamation 1921. Dividing fence constituting the give-and-take dividing line and boundary fence between two neighbouring farms. Nature and effect of a prior agreement in terms whereof a give-and-take dividing line was agreed between two former landowners of neighbouring farms.

Summary: Two neighbouring farmers locked down in a dispute regarding the validity and binding effect of a dividing fence erected on an alleged give-and-take line agreed upon by previous owners. Jurisdiction of the High Court.

Held, the Court has original jurisdiction to adjudicate the dispute and to consider declaratory and interdictory relief despite the provisions of section 25 and the second schedule of the Fencing Proclamation 1921.

Held, an agreed give-and-take dividing fence between two farm owners constitutes a boundary fence,

Held, the dividing fence so erected has a permanent nature which is not affected by change in ownership of one or both the owners of the neighbouring farms.

ORDER

IT IS ORDERED THAT

1 Declaring that the existing dividing fence between farms Westfalenhof, No 23 and Hiradaub, No 26, recorded and demarcated by Appendix A attached to this order, constitutes the southern border of Westfalenhof and the northern border of Hiradaub in accordance with a give-and-take agreement in terms of section 31 of the Fencing Proclamation 1921 concluded during the 1950^s between two previous owners of the said farms.

2 Declaring that the existing dividing fence recorded in Appendix A attached to this order, constitutes a boundary line between farms Westfalenhof, No 23 and Hiradaub, No 26 which is binding and effective between, upon and against the present owners of the aforesaid respective farms and that the provisions of the Fencing Proclamation 1921 apply thereto.

3 Directing and ordering the first and second respondents to —

3.1 restore and repair the dividing fence constituting the boundary line as in the preceding orders as well as to remove the two gates inserted in the dividing fence by the first respondent within 30 calendar days from this order's release.

3.2 remove all their livestock north of the dividing fence constituting the boundary line as in the preceding orders forthwith.

4 Directing and authorising the Deputy Sheriff for the district of Okahandja with the assistance of members of the Namibian Police (as far as it may be necessary or expedient) and the applicant, to restore and repair the dividing fence and remove the gates inserted by first respondent into the dividing fence in the event the first and second respondents failing to timeously comply with this Court's order thereanent and to remove the livestock of the said respondents found north of the dividing fence (boundary line) on the applicant's side.

5 Ordering and directing the first and second respondents to pay the costs occasioned by this application on a party and party scale, which costs shall include the costs of one instructing and one instructed counsel.

JUDGMENT

Oosthuizen J:

Background

1. Applicant is the owner of the farm Westfalenhof No 23, Okahandja District, since 1979 and measuring 14 278, 8 310 hectares. Applicant's father, grandfather and great grandfather were applicant's predecessors in title of farm Westfalenhof, No 23. The said farm being in applicant's family since 1896. The southern boundary of farm Westfalenhof runs along the middle of the Swakop river.
2. First and second respondents are the owners of the remaining extent of the farm Hiradaub No 26, measuring 8 504, 7 880 hectares, since 1998. The northern boundary of Hiradaub, No 26 runs along the innerbank of the Swakop river.
3. Farm Okamutambo, No 22 is adjacent to Hiradaub, No 26 on the eastern side of Hiraduab. Okamutambo's northern boundary is likewise on the innerbank of the Swakop river.
4. Farms Hiradaub and Okamutambo are situated south of Westfalenhof on the opposite side of the Swakop river.
5. The reason why Westfalenhof's southern boundary as per title deed runs along the middle of the Swakop river and the northern boundaries of farms Hiradaub and Okamutambo on the innerbank of the Swakop river, leaving an untitled portion of the Swakop river from its middle to the innerbank, is unexplained on the papers before court. In the Gloria Dawn Farming CC case (*infra*) the same trend is observed in the description of the title deeds concerning the boundaries of farms divided by a river, although in another location separated from the farms in question in this case.

6. Applicant's case is that during the 1950^s his father, the previous owner of Westfalenhof and a certain Mr Harry Heinze, an erstwhile owner of farm Hiradaub entered into a verbal agreement establishing a give-and-take dividing line between the respective farms where the farms bordered the Swakop river. This was done in accordance with section 31 of the Fencing Proclamation 1921. A certain Ms Hannelore Harms, daughter of Mr Heinze, confirmed the give-and-take line which was in place during the 1980^s when she resided on Hiradaub. Applicant attached the said dividing line depicted in Appendix A to the Notice of Motion. Applicant also attached the statement of a certain Mr De Wet, a qualified land surveyor, who drafted Appendix A on the applicant's instructions for purposes of the application. A fence was erected along the give-and-take dividing line as it traversed along the Swakop river basin and according to applicant the fence still exists today. This was also confirmed during an inspection in loco on 30 January 2018.

7. Applicant, by way of Notice of Motion filed on 28 January 2016, applied for declaratory and interdictory relief, as follows —

7.1 Declaring that the existing dividing fence running along the Swakop River watercourse shall constitute the borderline separating the farms Hiradaub and Westfalenhof as contemplated in terms of the provisions of Section 31 of Proclamation 57 of 1921 as more fully depicted in the diagram attached hereto marked "Appendix A".

7.2 Alternatively to paragraph 7.1 above, declaring that the give-and-take line more fully depicted in the diagram attached hereto marked "Appendix A" shall constitute the northern borderline of the farm Hiradaub and the southern borderline of the farm Westfalenhof along the Swakop River watercourse as contemplated in Section 31 of Proclamation 57 of 1921.

7.3 Directing and ordering the first and second respondents to forthwith but no later than 7 days from the date of the granting of this order -

7.3.1 restore and repair all fences broken down as well as remove all gates and other structures by either of them, their employees and/or

their agents acting on their behalf, with reference to the dividing fence which represents the give-and-take line as more fully depicted in "Appendix A" attached hereto and more specifically described in paragraphs 7.1 and 7.2 above;

7.3.2 remove all of their cattle and other livestock from that part of the Swakop River watercourse to which the applicant has a legal right of occupation as per the existing give-and-take line on the basis of Section 31 of Proclamation 57 of 1921 as more fully depicted in "Appendix A" attached hereto;

7.3.3 alternatively to subparagraphs 7.3.1 and 7.3.2 above, and in the event of the first and second respondents failing to timeously comply with this order, directing and authorising the Deputy Sheriff for the district of Okahandja to, with the assistance of the members of the Namibian Police as well as the applicant, restore the dividing fence and to remove all livestock belonging to the first and second respondents found inside that part of the applicant's portion of the river as contemplated hereinbefore.

7.4 Interdicting and restraining the first and second respondents, their employees and/or agents acting on their behalf from -

7.4.1 allowing their cattle and/or other livestock to trespass, enter onto and/or use for grazing purposes any part of the applicant's portion or in contravention of the give-and-take line separating the farms Hiradaub and Westfalenhof as more fully depicted in "Appendix A" attached hereto;

7.4.2 in any way removing, cutting and/or interfering with the dividing fence constituting the give-and-take line separating the farms Hiradaub and Westfalenhof as more fully depicted in "Appendix A" attached hereto;

7.4.3 opening and/or leaving open any gates which are situate in the dividing fence and/or the give-and-take line separating the farms Hiradaub and Westfalenhof as more fully depicted in Appendix A attached hereto;

7.4.4 in any way making derogatory and/or defamatory remarks, either verbally or in writing, concerning the applicant, his household and/or any member of his workforce.

7.4.5 assaulting, threatening to assault and/or making any threats of any nature towards the applicant, his household and/or any member of his workforce.

7.5 Further directing and ordering the first and second respondents to maintain and keep in good state of repair their part and responsibility of the dividing fence constituting the give-and-take line separating the farms Hiradaub and Westfalenhof as more fully depicted in "Appendix A" attached hereto.

7.6 In the alternative to paragraphs 7.1, 7.2, 7.3, 7.4, and 7.5, above and in the event of the honourable court finding that the current impasse between the parties constitute a dispute susceptible of being resolved and dealt with in accordance with Section 31 read with the Second Schedule of Proclamation 57 of 1921, then directing and ordering that the relief contained in paragraphs 7.1, 7.2, 7.3, 7.4, and 7.5 above shall constitute an interim order with immediate effect pending the resolution of a claim as contemplated in Section 31 of Proclamation 57 of 1921, and which claim shall be instituted within 30 days by the first and/or second respondents from date of this interim order being given and failing which the interim order shall become final.

7.7 Ordering and directing that the first respondent (and/or another respondents opposing) shall pay the costs of this application on a scale as between attorney and client, which costs shall include the costs consequent upon the employment of one instructing and one instructed counsel.

8. First respondent cannot and did not deny the alleged give-and-take agreement on any factual basis. First respondent however deny that such an agreement is binding on him and his wife and say that they were not party to such an agreement, that it and Appendix A is not registered in the deeds office and that he did not consent to Mr De Wet drawing Appendix A.

9. Section 31 (2) of the Fencing Proclamation 1921 clearly stipulates that any give-and-take line so agreed (between farm owners) or determined (by the Board) shall be deemed to be the boundary line for the purposes of the Proclamation, but shall not otherwise affect the titles to any such holdings.

10. A comparison between the diagram of Westfalahof and the diagram of Hiradaub (as in the attached title deeds) clearly mirror the limitations on the Hiradaub farm owners in respect of their rights of access to the Swakop river. The last-mentioned Hiradaub's No 26 diagram clearly depicts the line A to F (northern boundary) as outside the Swakop river bed dividing the two farms.

11. Despite this the agreed give-and-take boundary line accords the farm owners of Hiradaub access and ingress from point F, D, C, B and A (Appendix A) into the Swakop riverbed and onto the land of Westfalahof to the exclusion of the applicant. The fact that first respondent elected not to use the Swakop riverbed and applicant's land so depicted by the give-and-take boundary line, is not an excuse and validation for him not to adhere to the give-and-take fence erected between points E to Z on the give-and-take boundary line.

12. Subsequent to the inspection in loco it was recorded on behest of the applicant that —

12.1 The line depicted on Appendix A was the line inspected on 30 January 2018 during the inspection in loco.

12.2 It was stated by first respondent during the inspection in loco that when he came to Hiradaub during 1998 that it was the dividing borderline which he found in place.

12.3 The particular fence was also the fence maintained by applicant and first respondent.

12.4 The broken fence depicted in the photograph on p230 (FWR 25(c)) across the riverbed is the fence erected by applicant from point Z on Appendix A traversing the riverbed in a northern direction.

Point in *limine*

13. First respondent raises the High Court's lack of competence to adjudicate the dispute between the applicant and first and second respondents.

14. First respondent cites Section 25(d) of the Fencing Proclamation 1921 in saying that the High Court lacks jurisdiction to adjudicate the matter because the Fencing Proclamation provides that a dispute between two owners must be referred to the Board established in accordance with the Second Schedule of the said Proclamation, for determination.

15. First respondent finds his arguments on the word "shall" as appearing in section 25(d) and submits that the Proclamation provides for internal remedies, which he then sets out.

16. First respondent fails to inform the court whether he has endeavoured to follow any lawful remedies since 1998 (when he and 2nd respondent became owners of the farm Hiradaub) to date and seemingly has done nothing to date to resolve the dispute in terms of either the Fencing Proclamation or any other perceived lawful remedy in the past 20 years.

17. The Fencing Proclamation 1921 according to all the parties before court, is still valid and operative and the Court did not find any contrary indication.

18. The respondent refer to and finds his argument on the Namibian High Court's decision in *Gloria Dawn Farming CC v Van der Merwe (A 290/2003) [2014] NAHCMD [21 January 2014]*. The Court did not find that the Fencing Proclamation 1921 ousted the High Court's jurisdiction to hear and adjudicate a dispute between adjoining owners regarding dividing fences.

19. The present dispute before this Court is not only limited to dividing fences between the adjoining holdings, it is also concerning the first respondent's belief that he has a right to utilise and have access to the riverbed of the Swakop river although his title deed accord no such right and he is unable to advance any lawful ground for his belief. It also pertains to the actions/inactions of the Namibian Police and the complete absence of any basis advanced by third and fourth respondents why first and second respondents should enjoy such right. Fifth and sixth respondents are likewise unable to advance any lawful reason why first and second respondent should enjoy such privileges. In addition the applicant prays for declaratory and interdictory relief. See paragraph 7 above.

20. The Namibian Constitution and the High Court Act granted original jurisdiction to the High Court and the High Court in this instance shall exercise its jurisdiction as provided for in section 16 of Act 16 of 1990.

Law

Namibian Constitution

21. Article 1(6) make the Constitution the Supreme Law of Namibia.

22. Article 78(1) vests judicial power in the Supreme, High and Lower Courts of Namibia.

23. Article 78 (2) accords independence, subject only to the Constitution and the law, to the Courts.

24. Article 80 (2) accords original jurisdiction to the High Court to hear and adjudicate upon all civil disputes.

High Court Act, Act 16 of 1990

25. Section 16 enacts original jurisdiction for the High Court over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and in addition, and in its discretion at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation.....

Fencing Proclamation, No 57 of 1921

6. Section 2.

"dividing fence" shall mean, in relation to a holding, a fence erected on or as near as possible to any boundary thereof and separating that holding from another holding, including any necessary gate in such fence and having not less than five strands of well galvanded wire etc.

"holding" shall mean (a) any area of land held by any person under separate grant, deed of transfer, or certificate of title; but shall not include any erf, stand or lot or any block of erven etc situate within a municipality, village or township.....

27. Section 31

(1) If between two or more holdings a dividing line is formed by a watercourse or a river (not being of such a nature as to form a natural barrier for stock) or range of hills, outcrops or solid rock or kopjes, along which it is impracticable or inexpedient to erect a fence, the owners concerned may agree upon a fair give-and -take line as a dividing line to be fenced in accordance with this Proclamation or in default of such

agreement, any such owner may claim that the matter may be determined as a dispute in accordance with the provisions of the Second Schedule of this Proclamation.

(2) Any give-and-take line so agreed or determined shall be deemed to be the boundary line for the purposes of this Proclamation, but shall not otherwise affect the titles to any such holdings".

28. Section 25

"Whenever, under this Proclamation, two owners are unable to agree —

(a) as to the specifications of any dividing fence proposed to be erected or altered; or

(b)

(c)

(d) as to any other matter in respect of which a dispute has arisen between the two owners,

the provisions set out in the Second Schedule to this Proclamation shall apply".

Merits

29. First respondent's issue with the existing boundary line and fence depicted on Appendix A is that it prevents him to utilize the grazing in the Swakop riverbed for his livestock, and applicant is using same although applicant's title deed set the southern boundary of Westfalenhof only to the middle of the riverbed. First respondent claims an unspecified and in law an unfounded entitlement to have access to the Swakop riverbed. None of the other respondents, all represented by the Government Attorney (from third to sixth respondents) advanced any lawful justification on behalf of the first and second respondents to so have access and grazing rights to and in

the Swakop riverbed. Neither the title deed of Hiradaub nor any other grant or servitude advanced accords such rights to first and second respondents. Hiradaub's title deed stipulates its northern boundary as being the innerbank of the Swakop river. According to the undisputed affidavit of Mr De Wet, p260 sub-paragraph 8.2 it is also described as "in the north through the southern bank of the Swakop riverbed". The Court is at a loss to understand the perceived rights of first and second respondent to access of the Swakop river, save those accorded to it by the agreed give-and-take boundary line mentioned before.

30. Numerous violations of the agreed give-and-take boundary line on its eastern side were alleged and documented by the applicant over a period spanning from 2012 to 2015. First respondent is rationally unable to deny same due to his misconceived and misinformed belief that he is entitled to utilize and enjoy the Swakop riverbed for his livestock on the eastern side of Hiradaub's northern boundary. First respondent claimed that Hiradaub's northern boundary fence is his boundary fence and that he was entitled to install gates therein to allow his livestock access to the riverbed. Apart from exerting non-existing rights to the riverbed between Westfalahof and Hiradaub by neglecting to do maintenance to the border fence, installing access gates without the permission of the applicant and allowing his goats and cattle to graze the riverbed, first respondent went so far as to violate and injure a fence between point Z of Appendix A spanning the Swakop river in a northern direction, in order to obtain access to the Swakop riverbed between farms Westfalahof and Okamutambo. On one of these occasions the first respondent was aided by the servants of sixth respondent. First respondent explained that it was done to look for missing cattle, but neglected or refused to repair the cut fence, because, according to him, applicant in the first place was not allowed to fence the river as he did.

31. At first the Court was sympathetic to the view of the first respondent that a new give-and-take agreement has to be concluded between him and the applicant or be adjudicated by the Board in terms of the Second Schedule to the Fencing Proclamation 1921 because he was not satisfied and did not recognise the existing give-and-take boundary line, which he refuted on the strength that he was not party thereto and in argument advanced that it is not registered in the deeds office.

32. However and on the strength of the provisions of the Fencing Proclamation of which sections 25 and 31 form an important part, the Court is now of the view that the give-and-take dividing line agreed between the late father of applicant and Mr Heinze, which in terms of section 31(2) is deemed to be the boundary line between Westfalahof and Hiradaub and along which the boundary fence depicted in Appendix A was erected, has a permanent nature which is not affected through change in ownership of one or both the neighbouring farms.

33. Chief Justice Fagan in the case of *Marx v Lambrecht* held as follows during 1958 in respect of the Fencing Act, Act 17 of 1912, which was similarly worded than the later Fencing Proclamation 21 of Namibia —

“There is nothing in the Act to indicate that the reciprocal rights and obligations of adjoining owners in respect of a fence on the boundary line fall away on a change of ownership. Indeed, it would seem to me to be contrary to the character of those provisions if they did fall away. Their character is such that, as rights and obligations attaching to a fence remains on the land, they should run with the land, and be exercisable for and against the “owners” in their capacity as such, i.e those who happen to be owners at the time the issue arose”¹.

34. It was also found that the provisions of section 32(2) (akin to our 31(2)) have the effect that the agreed give-and-take line is regarded to be the fence on the boundary, hence falling within the scope and meaning of a “dividing fence” as defined in section 2^{2,3}.

35. First and second respondents argument that the Marx case⁴ provides less or no assistance in adjudicating the dispute in this matter, is not convincing and is rejected.

¹ 1958 (3) SA 277 AD at 282E.

² Marx v Lambrecht supra at 282 F-G.

³ See also Halgreen v Theron 1927 EDL 417 at 418 and 421.

⁴ Supra.

36. Section 25 (a) of the Fencing Proclamation 1921 address the specifications of any dividing fence proposed to be erected or altered, and not the removal or substitution thereof.

37. Section 25(d) address "any other matter in respect of which a dispute has arisen between the two owners" but as already found, does not oust the original jurisdiction of the High Court and specifically cannot prevent the High Court from adjudicating and ruling on declaratory and interdictory relief claimed as in the present instance.

38. Section 31 (1), of the Fencing Proclamation 1921, provides for an agreement (between the owners) and a determination (by the Board).

39. The moment an agreement was reached on a give-and-take line, such give-and-take line is deemed to be the boundary line, which will include the subsequent boundary fence (dividing fence) erected on the basis of the agreement⁵. The Court finds in favour of the applicant that the give-and-take agreement between the late father of the applicant and Mr Heinze (former owner of Hiradaub, No 26) resulting in the dividing fence depicted in Appendix A, was indeed concluded.

40. First and second respondents argue that the relief claimed by applicant that they remove their livestock from the Swakop river watercourse (on the eastern side of the mapped dividing fence) and be interdicted from allowing their livestock to traverse on applicant's side of the give-and-take dividing fence, will contradict the proviso in section 31 (2) that the boundary line shall not otherwise affect the titles of their respective farms, is not sound in law⁶. First and second respondents clearly do not appreciate the provisions of section 31 (1) and the nature of the give-and-take dividing fence agreed upon. They disregard the benefit constituted by the give portion of the agreement between points F, D and A of Appendix A.

⁵ Paragraphs 33 and 34 and the authority there quoted.

⁶ In the Court's view the words "shall not otherwise affect the titles of such holdings" indeed recognise that the full enjoyment of the land depicted in the titledeeds is limited by the extent of the give-and-take line, but not otherwise, between the adjoining land owners.

41. Fact of the matter is that first respondent refused to be bound by the constraints placed upon them by the boundary fence depicted on Appendix A, which happens to be erected on the basis of the give-and-take dividing line agreement entered into by the predecessors in title of farms Westfalenhof and Hiradaub, and the respective title deeds. By so refusing and acting accordingly the first defendant has apparently (but for his belief) contravened the offences created by sections 18, 20, 22 and 23 of the Fencing Proclamation 1921, and is prone to continue unabated if this Court fail to make declaratory and interdictory orders to restore law and order between applicant and first and second respondents.

42. Applicant moves for costs against the first respondent (and/or another respondent opposing) on a scale as between attorney and client, which costs shall include the costs consequent upon the employment of one instructing and one instructed counsel. No relief was claimed against third, fourth and sixth respondents who were only cited insofar as they may have an interest in the outcome of the proceedings. Third to sixth respondents have opposed the application although only the fifth respondent filed an answering affidavits.

43. First respondent has, according to him, where he referred to any law in his answering affidavit, done so based on advice of his legal practitioner of record. First and second respondents are co-owners of farm Hiradaub, No 26 and married in community of property. Second respondent also opposed the relief sought by applicant and has made a confirmatory affidavit. The Court is not satisfied that the fifth respondent acted with malice towards the applicant. The dispute forming the subject of this application is mainly between applicant and the first two defendants. The costs in the matter will follow the result.

44. In the premises, the Court makes the following orders -

44.1 Declaring that the existing dividing fence between farms Westfalenhof, No 23 and Hiradaub, No 26, recorded and demarcated by Appendix A attached to this order, constitutes the southern border of Westfalenhof and the northern border of Hiradaub in accordance with a give-and-take agreement in

terms of section 31 of the Fencing Proclamation 1921 concluded during the 1950^{ss} between two previous owners of the said farms.

44.2 Declaring that the existing dividing fence recorded in Appendix A attached to this order, constitutes a boundary line between farms Westfalahof, No 23 and Hiradaub, No 26 which is binding and effective between, upon and against the present owners of the aforesaid respective farms and that the provisions of the Fencing Proclamation 1921 apply thereto.

44.3 Directing and ordering the first and second respondents to —

44.3.1 restore and repair the dividing fence constituting the boundary line as in the preceding orders as well as to remove the two gates inserted in the dividing fence by the first respondent within 30 calendar days from this order's release.

44.3.2 remove all their livestock north of the dividing fence constituting the boundary line as in the preceding orders forthwith.

44.4 Directing and authorising the Deputy Sheriff for the district of Okahandja with the assistance of members of the Namibian Police (as far as it may be necessary or expedient) and the applicant, to restore and repair the dividing fence and remove the gates inserted by first respondent into the dividing fence in the event the first and second respondents failing to timeously comply with this Court's order thereanent and to remove the livestock of the said respondents found north of the dividing fence (boundary line) on the applicant's side.

44.5 Ordering and directing the first and second respondents to pay the costs occasioned by this application on a party and party scale, which costs shall include the costs of one instructing and one instructed counsel.

G H Oosthuizen
Judge

APPEARANCES

PLAINTIFF:

Strydom
instructed by Nakamhela Attorneys,
Windhoek

1ST AND 2ND RESPONDENTS:

Ipumbu
of Ipumbu Legal Practitioners,
Windhoek

3RD, 4TH, 5TH AND 6TH RESPONDENTS:

Mutorwa
of the Office of the Government
Attorney, Windhoek