

CHAPTER 33:03 FENCING

ARRANGEMENT OF SECTIONS

SECTION

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Schedule - Minimum Standard Fence

Law 6, 1961,
Law 14,
G.M. 62, 1962, 1964,
HMC Order 1, 1963,
L.N. 84, 1966.

An Act to make further and better provision for the construction of fences dividing farms, for the apportionment of the cost thereof and for matters incidental thereto.

[Date of Commencement: 22nd August, 1962]

1. Short title and application

(1) This Act may be cited as the Fencing Act.

(2) This Act shall apply to such areas of Botswana as the President may, by order published in the *Gazette*, appoint with effect from the date specified in such order.

2. Interpretation

In this Act, unless the context otherwise requires-

"arbitration" means arbitration in accordance with the provisions of the Arbitration Act;

"dividing fence" means a fence separating the farms of different owners together with any necessary gates and grids therein;

"farm" means any piece of land registered as a farm in the Deeds Registry, or any subdivision thereof of not less than 25 morgen in extent, but does not include any part of the Barolong Farms as defined in Schedule B to the Botswana Boundaries Act;

"owner", in relation to-

- (a) a farm owned in undivided shares, means the co-owners of that farm in proportion to their shares;
- (b) a farm lawfully occupied by a person in accordance with the provisions of an agreement which entitles that person to obtain ownership thereof on the fulfilment by him of certain conditions, means that person and no other person; and
- (c) a farm subject to an *usufruct* or *fideicommissum*, means the usufructory or fiduciary.

3. Cost of dividing fence to be shared

The owners of adjoining farms not divided by a sufficient fence or by some other feature, whether of natural origin or otherwise, which is capable of preventing the trespass of animals liable to be impounded, shall be liable to join in or contribute in equal proportions to the construction between those farms of a dividing fence of such type and in such position as may be determined in accordance with the provisions of this Act.

4. Notice to any person required to contribute towards construction of fence

Any owner desiring the owner of an adjoining farm to join in or contribute to the construction of a dividing fence under the provisions of section 3 may serve on that owner written notice to do so in the prescribed form.

5. Procedure if no agreement

(1) If within one month after service of a notice under the provisions of section 4, the owner serving and the owner served with the notice do not agree-

- (a) that, in terms of section 3, it is necessary to construct a dividing fence;
- (b) as to the type or position of the dividing fence to be erected; or
- (c) as to the manner in which each shall join in or contribute to the construction of the dividing fence,

the owner serving the notice may apply to any court of competent jurisdiction for an order

appointing an arbitrator to make a fair and reasonable settlement by arbitration of those matters on which there is no agreement.

(2) An arbitrator appointed in terms of subsection (1) shall, in making his award, be guided where necessary by the specification of the minimum standard fence set out in the Schedule.

6. Proceedings in the case of absent owners

(1) The owner of any farm who desires to construct a dividing fence between his farm and any adjoining farm the owner of which cannot with reasonable diligence be found may call upon that other owner to join in or contribute to the construction of such fence in accordance with the provisions of section 3 by publishing in the *Gazette* and in a newspaper circulating in Botswana, at monthly intervals for three successive months, a notice in the prescribed form.

(2) If within one month from the date of publication of a third notice published in terms of subsection (1), the owner publishing the notice and the owner to whom the notice was addressed do not agree as to the matters referred to in section 5(1)(a), (b) or (c) the owner publishing the notice may apply to any court of competent jurisdiction for an order appointing an arbitrator to make a fair and reasonable settlement by arbitration of those matters on which there is no agreement. If the whereabouts of the owner to whom the notice was addressed is still unknown, the application may be made *ex parte*.

(3) An arbitrator appointed in terms of subsection (2) shall, in making his award, be guided where necessary by the specification of the minimum standard fence set out in the Schedule.

7. Construction of dividing fence on failure to carry out agreement or award.

(1) If the owner serving and the owner served with a notice under section 4, or the owner publishing and the owner to whom the notice is addressed under section 6, agree as to the construction of the dividing fence, or if an arbitrator is appointed under section 5 or 6 makes an award, then if either of those owners fail, within the time named in the agreement or award, or, if no such time is named, within one month after the date of the agreement or award, to join in or contribute towards the construction of the dividing fence as agreed upon or awarded, the other of those owners may construct or complete the construction of that fence and may apply to any court of competent jurisdiction for an order for the refund by the owner who is in default of such sum as he may have paid or incurred for such construction in excess of half the reasonable cost thereof, if the whereabouts of the owner who is in default is unknown, such application may be made *ex parte*.

(2) Any order made in terms of subsection (1) shall have effect as if it was a civil judgment of the court making the order.

8. Tenant to pay additional rent or premium

(1) Where any dividing fence is constructed under the provisions of this Act along the boundary of any farm leased to a tenant, the tenant shall pay to the owner-

(a) during the continuance of his lease or for a period of 15 years, whichever period is the

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shorter, additional rent equal to eight *per cent* per annum of one half of the reasonable cost of construction of the fence; or

- (b) forthwith a premium equal to 90 per cent of one half of the reasonable cost of construction of the fence:

Provided that no tenant whose unexpired term of lease does not exceed one year shall be liable to pay any such additional rent or premium.

(2) Outstanding payments of additional rent payable under subsection (1)(a) may be compounded at any time by payment of the premium specified in paragraph (b) of that subsection less an amount equal to 75 per cent of the total sum already paid as additional rent.

9. Augmentation of purchase price of farm purchased by tenant in certain case

Where any dividing fence is constructed under this Act along any farm leased to a tenant who has an option to purchase the farm at a fixed price, that price shall be increased by a sum equal to 10 per cent of one half of the reasonable cost of construction of the fence plus an additional sum equal to the amount, if any, which the tenant would have to pay to compound all additional rent still payable in terms of section 8 at the time he exercised the option.

10. Liability for repairs

(1) The owners of adjoining farms divided by a sufficient fence which is out of repair shall, subject to the provisions of this Act, be liable to join in or contribute in equal proportions to the repairing of that fence.

(2) If any dividing fence has been damaged as a result of the negligence of one of the adjoining occupiers the occupier who has been responsible for the negligence shall repair the fence at his own cost.

11. Act to apply *mutatis mutandis* to repairs

(1) Any owner desiring any other owner to join in or contribute to the repairing of a dividing fence under section 10(1) may serve on that owner written notice to do so in the prescribed form.

(2) If within one month after service of a notice under subsection (1), the owner serving and the owner served with the notice do not agree that, in terms of section 10, it is necessary to repair the fence in question, or do not agree as to the manner in which they will join in or contribute to the repairing of the fence, the provisions of sections 5 and 7 shall, *mutatis mutandis*, apply thereto.

(3) If a notice under subsection (1) cannot be served because the owner of the other farm cannot with reasonable diligence be found, sections 6 and 7 shall, *mutatis mutandis* apply in regard to the repairing of that fence.

12. Bush may be cleared for fencing

Where in terms of this Act it is agreed or awarded that a dividing fence is to be constructed or repaired on land covered with bush, the person constructing or repairing the fence shall be entitled to clear the bush for a width not exceeding 1,8 m on each side of the fence, and the cost of that clearing shall for the purposes of this Act be added to and form part of the cost of constructing or repairing the fence, as the case may be.

13. Positioning of fences

(1) Where in terms of this Act it is agreed or awarded that a dividing fence shall be a ditch and bank fence, the owner of any farm in making such fence may make a ditch as near to the boundary as possible on the adjoining farm, and use the soil taken therefrom towards making a bank as near to that same boundary as possible on his farm, or he may make the ditch on his farm, and place the bank on the adjoining farm.

(2) Where in terms of this Act it is agreed or awarded that a dividing fence shall be made of posts and rails, wire or paling, the posts of the fence shall be placed on or as near as possible to the boundary line.

14. Damages against person neglecting to clear inflammable matter near dividing fence

If the occupier of any farm clears the same of inflammable matter for the space of 5,4 m from any dividing fence and the occupier of the adjoining farm neglects or omits so to clear his farm, and any damage from fire happens to that fence through that neglect or omission the occupier so neglecting or omitting shall, at his own cost, cause the fence to be repaired or re-erected within the space of one month after the same has been so damaged, and if he fails to repair or re-erect the said fence within that time, the first-mentioned occupier may repair or re-erect the dividing fence forthwith and may recover in any court of competent jurisdiction such reasonable sum as he may have paid or incurred for such repair or re-erection:

Provided that nothing herein contained shall be deemed to take away or interfere with the right of any person to sue for and recover compensation for or in respect of any damage or injury to any fence occasioned by the reckless or negligent use of fire.

15. Entry upon adjoining land where necessary

Every person engaged in constructing, repairing or re-erecting a dividing fence under this Act, may at all reasonable times enter as necessary upon any adjoining land with or without cattle, carts or other vehicles, and do thereupon anything reasonably required to be done to carry into effect the construction, repair or re-erection of the fence:

Provided that nothing herein contained shall authorise for the purpose aforesaid-

- (i) the entry upon any garden, plantation or cultivated land; or
- (ii) the cutting down, lopping or injuring in any way of any tree or shrub,

without the consent of the owner or occupier of the land.

16. Penalty for wilful damage to fence, gate or grid

Any person who wilfully and unlawfully damages or removes any fence, gate or grid or any part thereof, shall be guilty of an offence and liable to a fine of P200 and in addition may be ordered by the court by which he is convicted to pay the amount of damages sustained by the owner of that fence, gate or grid and the order shall have effect as if it were a civil judgment of that court.

17. Accidental injury to fence, gate or grid

(1) Any person who inadvertently or accidentally damages any fence, gate or grid or any part thereof shall, if he is able to do so, forthwith repair the same, but if he is unable to do so, shall forthwith report the damage and give his full name and permanent residential address to the owner or occupier of the land in which the same is situated, or to any member of the Botswana Police Force.

(2) Any person who fails to comply with any of the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding P20 or, in default of payment thereof, to imprisonment for a term not exceeding 14 days, and in addition he may be ordered by the court by which he is convicted to pay the cost of repairing that fence, gate or grid and the order shall have effect as if it were a civil judgment of that court.

18. Regulations

The President may make regulations prescribing anything which under this Act requires to be prescribed or for the purpose of giving effect to the provisions of the Act.

19. Saving

Nothing in any part of this Act other than sections 8 and 9 shall affect any agreement made or hereafter to be made, relative to fencing, between any owner and his tenant or between any owners of adjoining farms.

SCHEDULE MINIMUM STANDARD FENCE

(Sections 5 and 6)

A minimum standard fence shall consist of-

(a) four strands of barbed or plain wire of the following minimum dimensions:

Plain steel wire (oval)	2 mm x 2,8 mm
Plain galvanized iron wire	4 mm

Barbed iron wire 2,5 mm

High strain steel wire minimum 2 mm

the top strand being a minimum of 1,21 metres from the ground;

- (b) poles or standards of wood or iron placed at intervals of not more than 13,5 metres and substantially and well planted with a minimum of 18 inches depth in soil, with droppers placed at regular intervals of not more than 3,6 metres, between the poles or standards, in such a way that the droppers are at all times well clear of the ground; and
- (c) substantial straining posts not more than 364 metres apart, with recognized iron frames erected where necessary:

Provided that where high strain steel wire is used such straining posts shall be not more than 1,365 metres apart, and shall be planted in pairs with a minimum of 1,1 metres depth, the one supporting the other, and 0,91 metres distance from the other.

Where wooden poles are used-

- (i) wood other than any type known to be termite-proof shall be chemically treated against attack by termites;
- (ii) the minimum diameter shall be 127 mm in the case of straining posts, 76 mm in the case of standards and 38 mm in the case of droppers.

The provisions of this subparagraph shall not apply to any arbitration in terms of sections 5 and 6 commenced before the 22nd May, 1964;

- (iii) all bark shall be removed before planting; and
- (iv) poles shall be notched to the depth of six mm and the wire of the fence shall be fastened in the notches with wire of at least two mm thickness or with fencing staples.