



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: 3368/2017

In the matter between:

KAYA KATSA CC
(REGISTRATION NO: 2009/217157/23)

APPLICANT

and

HUY LE CAO

1ST RESPONDENT

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

2ND RESPONDENT

CORAM: M OPPERMAN, J

HEARD ON: 2 AUGUST 2018

JUDGEMENT BY: M OPPERMAN, J

DELIVERED ON: 12 SEPTEMBER 2018

Context of the case

1. The motion is for the following orders:
 - 1.1 That it be declared and ordered that the first respondent is liable for half of the reasonable expense incurred by the applicant in the fencing-out of the right of way.¹
 - 1.2 That the first respondent be ordered to pay costs referred to in prayer one in the amount of R100 000-00 i.e. half of the expense incurred by the applicant in the fencing-out of the right of way referred to in prayer one to the applicant.²
 - 1.3 That it be declared and ordered that the first respondent is to co-operate with the exercise of reasonable control of access to and over the right of way referred to in prayer one³ inclusive of making payment of half of all expenses reasonably incurred in the control of access to and over such road, immediately upon incurrence of the mentioned expenses.⁴
 - 1.4 That the first respondent be interdicted and ordered not to utilise his farm known as Portion 3 of farm Verliesfontein 341, district Fouriesburg, in contravention with the agriculture zoning thereof and in particular that the first respondent be interdicted from utilising the mentioned farm for tourism accommodation and/or the conducting of business within the hospitality and /or accommodation industry.⁵
 - 1.5 The first respondent to be ordered to pay the costs of this application.⁶

¹ Declaratory order.

² Judgement in the amount of R100 000-00

³ Final interdict.

⁴ Final interdict.

⁵ Final interdict.

⁶ Payment of costs.

2. The final prayers that were placed before court in conclusion of oral argument by counsel for the applicant was for: "Prayer one, not two. Prayer three as qualified by agreement,⁷ prayer four, and that costs should follow the result." The applicant conceded that prayer two could not have been determined on application and requested that this relief be referred for oral evidence. Counsel did however hint that an allocation of 50/50 liability be made if the first prayer succeeds and that quantum will be dealt with later. The judgement will, nevertheless, deal with the issues in full.
3. A letter written on instruction by the applicant to the first respondent speaks volumes and sets the tone of the dispute. The letter is dated 6 May 2014 and forms part of the undisputed evidence before court.

Sir/Madam

FARM VERLIESFONTEIN 341

As you are aware Mr Eduard du Plessis bought the remaining portions of the farm Verliesfontein owned by Mr van Blerk. We are assisting with the transfer of the property.

Mr Du Plessis requested us to confirm the following in writing, in order to ensure good neighbourliness:

1. Mr Du Plessis instructed us to do a thorough research of all registered Servitudes on all portions of the Farm Verliesfontein. The applicable Servitudes are:
 - 1.1 Electricity Servitude-and access in favour of Eskom;
 - 1.2 Water Servitude-and access in favour of the Republic of South Africa.

From the abovementioned it is clear that there are no registered Servitudes constituting right of way. *Although writer is of the opinion that Mr du Plessis must ensure a right of way to your property it means in practise the following:*

- 1.3 Mr du Plessis can determine the lay-out of the road;
- 1.4 You as the user must maintain the road at your own cost or maintenance must be shared by the road users; (Accentuation added)

⁷ The agreement was not defined.

It is thus clear that you must adhere to Mr du Plessis` requirements for the use of the roads, which in the interim and until a final solution has been reached, are:

- 1.5 All gates must be closed at all times and cannot be left open;
 - 1.6 If you wish to make use of the road past the house, prior permission must be obtained from Mr du Plessis, EACH AND EVERY TIME, you use the road.
2. Mr du Plessis is very concerned to have learned from you that you intend to build a lodge on the eastern side of your property (undeveloped side of the gorge). Please note that you are not allowed to build a lodge in terms of the agricultural zoning of property. Mr du Plessis confirmed that he will strongly oppose any application for the re-zoning of your property to allow for the erection of a lodge. Mr du Plessis will not allow any business activities.

However, to ensure good neighbourliness, Mr Du Plessis is willing to meet with you for possible exchange of land. Should the negotiations be successful, Mr Du Plessis will assist you with a new road, without gates to be passed, except your own gate. He will further more have no objection to a new building or the re-zoning of the exchanged part. (Accentuation added)

Mr Du Plessis will make an appointment with writer hereof in order for both parties to engage in negotiations; if you find the proposal acceptable.

4. In other words; if the first respondent is and was willing to part with his land to the satisfaction of the applicant, the litigation in this case would not have happened and will cease and desist. This is indeed a bizarre basis for litigation.
5. The reply from the first respondent was the following:

Dear Sir/Madam

OUR CLIENT: HUY LÈ CAO

Right of way

We act on behalf of Mr Huy Lè Cao.

Our client Is your neighbour and has a right of passage across your farm. It is the only way he can access his own farm. Therefor guests and clients should not be denied access to this passage on the farm.

According to our client some difficulties have been experienced to exercise the above right. We trust that you will understand that it is our client's common law right to access this road and that you will allow the same. (Accentuation added)

If there is a problem regarding same, our client is willing to round table discussions about the matter.

6. The state of affairs deteriorated and neighbourliness, proposed negotiations and round table discussion fell to the wayside. "A final solution" was clearly also not endeavoured hence the matter *in casu*
7. The structure of the judgement hereafter will be as follows:
 - 7.1 The declaratory order in South African Law.
 - 7.2 The factual matrix of the fencing and access control.
 - 7.3 The Law of Neighbours: The law on fencing and access control on agriculture land.
 - 7.4 The land usage aspect; the facts, the law applicable to land usage in the specific area, final interdicts and dispute of facts.

The declaratory order

8. The case of Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre [2017] 4 All SA 150 (GP) explained the law at [51] to [85].
9. The relief that applicant seeks is located in section 21(1)(c) of the Superior Courts Act 10 of 2013. It provides:

Persons over whom and matters in relation to which Divisions have jurisdiction:

21.(1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power – c) in its discretion, and at the instances of any interested person to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

10. The exercise of the court's jurisdiction in terms of section 21(1)(c) follows a two-legged enquiry; the court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.
11. Factors courts have considered to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief include:⁸
 - i. The existence or absence of a dispute;
 - ii. the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;
 - iii. whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;
 - iv. considerations of public policy, justice and convenience;
 - v. the practical significance of the order; and
 - vi. the availability of other remedies.
12. In this case, the first stage of the enquiry relates to whether the applicant is authorised by law to claim the relief? The first answer to this question lies in the constitutional principle of legality. As will be shown later the law is clear. The applicant is only empowered to act to the extent that his rights are defined and conferred by the Constitution and/or by statute. Any conduct or claim beyond its constitutional and/or statutory powers violates the principle of legality. The Fencing Act 31 of 1963 comes into play at this stage.
13. A further aspect *in casu* is the relationship between the parties. If contractual; the letter of the contract must be proven and followed. If legislatively created the

⁸ See Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, Volumes (5ed), 2009 Ch 43 pp 1438-1440.

letter of the law must dictate the consequences. The Supreme Court of Appeal in *Bredenkamp and others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA)/[2010] 4 All SA 113 (SCA) found that the relationship between the bank and its client is contractual in nature. The bank may terminate the relationship in its discretion, on reasonable notice to the client, provided the reasons for terminating the account do not violate public policy or constitutional values. It is imperative that the relationship between the parties in regard to the right of way be coined.

14. *Ex Parte Nell* 1963 (1) SA 754 (A) settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by revoking this requirement. However, *Ex Parte Nell* did not render declaratory orders justified in all cases where there is no live dispute.

The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by all or one of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a Court even without there being an already existing dispute.

15. Therefore, post *Ex Parte Nell*, the absence of a live dispute remains a factor to be considered where the legal position to be determined is uncertain. In *Ex Parte Nell* the court dealt with “an uncertain legal position which could be contested”.

The factual context of the fencing of the right of way and access control

16. The farm of the first respondent, Verliesfontein, is blocked-in by the farms of the applicant. The state of affairs was allowed in law when the registration of the deeds happened.
17. It is not clear why The Registrar of Deeds, Bloemfontein was cited as second respondent in this matter.

18. The applicant realised the dilemma and the effect it will have on his property at the time he acquired his property. His legal representative advised that the obligation is:
Although writer is of the opinion that Mr du Plessis must ensure a right of way to your property it means in practise the following:
19. Added to the above: “By means of a verbal agreement, the applicant granted the first respondent a right of way over the farms of the applicant.”⁹ The “agreement” was entered into before the venture into exotic game farming.
20. There is no prove of this agreement or the content thereof in the papers before court. This is strongly indicative of the non-existence thereof on the facts.
21. The inference of the absence of an agreement between the parties is reinforced by the fact that the applicant, without any notice or consultation, fenced-out the right of way.
22. The fencing serves the exotic game farming. First respondent has no interest or benefit or involvement in it whatsoever.
23. The first respondent had no control over the development but is dependent on the right of way. This places first respondent in a vulnerable position. It; substantively so, places applicant in a position of power. The balance of justice is skewed by the factual reality.
24. The first respondent does not deny the applicant`s right to farm with exotic game or to erect game fencing, but merely his liability for contribution towards this expenditure in regard to the right of way.
25. It is the case for the applicant that first respondent has always financially contributed towards the maintenance and upkeep of the route over which the right of way is exercised by payment of 50% of the actual expense of such

⁹ Paragraph 2.13 of the Applicants Heads of Argument on page 6.

maintenance and upkeep.¹⁰ Therefor this application is not concerned with his obligation to contribute towards the maintenance and the upkeep of the right of way.

26. The first respondent, Huy Lè Cao (Cao) is a retired Director of a Secondary School in France and the owner of the said farm Verliesfontein in the district of Fouriesburg, Free State. He is a French national with a duly issued residency permit.
27. Cao has resided on said farm since 15 January 2007. The applicant only came into the picture on 20 April 2014 when he purchased the neighbouring farms.
28. Prior to this the farm was owned by the Enslin Van Blerk Family Trust IT 1368/2000 (Van Blerk Trust). Van Blerk farmed with cattle and crops and the borders were properly and suitably fenced for that purpose.
29. The right of way was peacefully managed between the neighbours. Cao and his family and friends accessed the farm without any problems or issues per agreed routes. These routes existed in 2009 and at the time when the applicant became the landowner in 2014.
30. Cao does not claim any transfer of rights from the agreement with the Van Blerk Trust to the applicant.
31. The main access road grants a way to one part of his farm and residence. The second access road is used to gain access to the other section of Cao`s farm. Due to challenging topography he cannot travel by vehicle to the second part and one has to travel through the applicant`s land with the second access road. The main access road does not pass the applicant`s house. The second access road was agreed with the previous owner Van Blerk since the property is divided by a deep gorge. When Cao decided to build his residence on the Westside, the

¹⁰ Applicant Heads of Argument paragraph 2.19 page 7.

erstwhile owner improved the access road to his property crossing the Van Blerk property.

32. From 2007 until 2013 Van Blerk was authorised by first respondent to use the second part of the farm for grazing by his cattle. There are not any residential facilities on this part of the farm. It is kept in its natural habitat.
33. Cao and his spouse live a self-sustainable green lifestyle. They grow all produce that sustain a simple lifestyle with the assistance of their employees. They respect the natural habitat and they live completely off the grid and welcome social interaction.
34. His family and increasing network of friends led to more people of the community visiting as friends. There has not been a drastic increase in guests.
35. It is stated by Cao that:
The applicant is irritated in that his attempt to isolate us has failed. We are part of the community. We also have friends from overseas and adult children with their family that visit regularly. These family and friends do not reimburse us for lodging. We inform visitors unfamiliar with the area not to stray from the road. Applicant will not allow us to put up signs directing visitors to our house. All the applicants game camps are locked and electrified and entry is impossible without keys.
36. As Cao rightly remarked; the letter referred to above does not portray neighbourly conduct. This court finds it to be rather repressive. There is also an undercurrent of ulterior motives. The rest of the judgement will illuminate this. The claims in itself in the action is contrary to law and basic constitutional values.
37. It is the contention of Cao; and that is indeed correct, that he fails to see how a court can resolve the matter and an arbitration would have been a more appropriate approach. The dispute is entirely self-made by the applicant.
38. The real issue is the costs pertaining to the reasonable costs of fencing-out the right of way.

39. The applicant chose to start the exotic game farming. On the facts first respondent cannot be held accountable for or requested to carry any cost therefor. The previous fences were effective for the right of way. The Fencing Act 31 of 1963 again, becomes applicable.
40. The applicant cannot define the declaration they want the court to make. It is a fluid situation that may end up in a gross abuse of the “rights”. The applicant cannot refer to law that would support this absurdity. What if he starts to farm with elephants and more specialized fencing must be erected; will it be claimed that first respondent be liable for that too? The bizarre effect will be that if the court grants the order the applicant and cadres of similar mindset will be able to make the same claims in future on the precedent set in this case in the rest of the Republic of South Africa. This will cause injustice *en masse*. The unjustness of the demand strikes clearly.
41. Even should first respondent be liable for the upkeep of the right of way it cannot be expected from him to comply with every whim and change the newly ventured farming caused or might cause in future. On the facts, the plaintiff caused the need for the fence and he should bear the total cost for this on the facts.
42. It is misleading to say applicant granted Cao access. It already existed and is it the law on the facts of this case that a right of way must be facilitated. The applicant’s legal representative advised him as such.¹¹
43. The right of way exists *ex lege* and not *ex contractu*.
44. It is a fact that applicant did however, change the route since then. This caused some new issues for the first respondent. There is, nevertheless no gripe in regard to the route in the case. The first respondent abides by it and the right of the applicant to prescribe it.

¹¹ The 6-May-2014 letter.

45. The applicant contends that because it has a clear right to control access over its farm, it would be right and equitable for the court to order that the first respondent to be legally liable to co-operate with all reasonable control measures and to be 50/50 liable for all associated cost.
46. "Reasonable control measures" on the prevailing facts and law have not been defined by the applicant. The claim is vague and untenable.
47. The access was originally controlled with a gate and locked with a padlock to which the first respondent also had a key. There was an event and the sliding gate was apparently removed. The evidence is vague on this. Suffice to say that there was conflict.
48. The applicant, at grave expense, employed guards. The first respondent denied that the guards were appointed after the gate incident. It is also denied that the access control is to prevent farm attacks and cattle theft. It was rather always applicants' intention to employ guards for the protection of the exotic game investment; not the control to the access of the right of way.
49. The first respondent has always been willing to discuss ways of securing access to the property without infringement on freedom of movement and even went as far as to draft a Code of Conduct which was submitted to the applicant's attorney in Clarens.
50. Already in his opposing affidavit Cao viewed that a motorized gate secured by a key pad with a revolving code would be a sensible solution, but the applicant refused to engage him. On the day the matter served before the court the issue was apparently settled on this basis with reasonable contribution by the parties for the expenditures.

51. Although the applicant has a right to control access to its property, the applicant cannot employ measures that interfere with the first respondents' use and enjoyment of the right of way unlawfully and unreasonably.¹²
52. Again, is it abundantly clear that the applicant is not vested with the right to make unilateral decisions on the access control.
53. The law on the issues is established.

The Law of Neighbours: The law on fencing and access control on agriculture land.

54. AJ van der Walt & GJ Pienaar wrote extensively about the subject.¹³
55. The rights and obligations of owners of agricultural land (described as holdings¹⁴) with regard to fences¹⁵ between their properties are regulated by the Fencing Act 31 of 1963 (Fencing Act). The right on a right of way creates a *sui generis* entity on the facts of the case. It does limit the absolute right of the applicant to this portion of property. The applicant chose to erect a physical boundary fence between the two rights. The context of the facts places the definition of the fencing-out of the right of way within the definition of a boundary fence in terms of the Fencing Act.

¹² *Stuttaford v Kruger* 1967(2) 166 (C), *Roeloffze NO & another v Bothma NO & others* 2007 (2) SA 257 (K), *Malan v Green Valley Farm Portion 7 Holt Hill 434 CC* 2007 (5) SA 114 (ECD).

¹³ 2010, *The Law of Neighbours*, first edition by AJ van der Walt & GJ Pienaar.

¹⁴ In section 1 of the Fencing Act 'holding' means-(a) land held by any person other than the State under separate grant, deed of transfer or certificate of title; (b) land held under lease, licence or allotment from the State with an option to purchase it, provided the lease, licence or allotment is registered in a deeds office or other registration office; (bA) other land which vests in the State; but does not include any erf, stand or lot situated within a municipality or borough or proclaimed town, village or township unless such erf, stand or lot is at least three morgen in extent and is one of a number contiguous to each other on which farming operations are carried on.

¹⁵ Section 1 of the Fencing Act: In this Act, unless the context otherwise indicates- 'boundary fence' means any fence (including, in an area in respect of which a proclamation under section three is in force, a jackal-proof fence), together with any necessary gate or any contrivance forming part or serving the purpose of such a gate, erected on or as near as possible to the boundary of any holding and separating such holding from any other holding;

56. The definition of a boundary fence includes: “any necessary gate” and will correlate to access or entry control.
57. The Act distinguishes between proclaimed areas where contributions to the cost of fencing are obligatory, and unproclaimed areas where contributions are not obligatory, unless the fence is rendered of beneficial use to the neighbour because of said neighbour’s use of his or her land. Once an area has been proclaimed, all owners in that area are compelled to contribute to the cost of fencing in accordance with the procedures set out in the Act.
58. Owners are liable to contribute to the cost of repair of a boundary fence on the same basis that they are liable to contribute to the cost of its erection. Section 10 states:
- 10 Repair of boundary fences
- (1) An owner shall be liable for the cost of repairs to any boundary fence in respect of his holding to the extent to which he would under this Act be liable to contribute to the cost of such fence.
- (2) An owner may serve upon the owner of the adjoining holding separated by such fence a notice in writing requiring him to assist, within a period of one week, in repairing such fence and, if the owner of the adjoining holding fails to comply with the notice, may repair such fence and recover from that owner the proportion of the cost
59. The applicant did not follow the process in sub-section 2 above.
60. Owners are entitled to replace an existing fence with a superior one, but in that case adjoining owners are not obliged to contribute to the higher cost, unless he takes actions that render the superior fence 'of beneficial use' to him. First respondent did not alter the use of the right of way. The right of way for the first respondent will be the same with or without a fence. Section 11 states that:
- 11 Alteration of boundary fences
- An owner may at any time alter any boundary fence in respect of his holding so as to make it a fence of a superior type; Provided that the owner of the adjoining holding separated by such fence shall not be liable to contribute to the alteration unless and until he derives beneficial use from the type of the fence as altered.

61. This principle that owners who are not generally obliged to contribute will become obliged to contribute when their use of the land implies benefiting from the fence applies generally throughout the Act. First respondent does not benefit from the type of fence or a fence at all.
62. The extent of contributions to be determined by agreement or in terms of the procedures laid down in the Act. Section 5 states that:
Boundary fencing in an area where contributions are not obligatory
If the owner of a holding situated in an area in which contributions are not obligatory, has lawfully erected a boundary fence in respect of that holding, and the owner of an adjoining holding adopts means whereby that fence is rendered of beneficial use to himself, either owner may, in default of agreement, claim that the value of the fence to each owner (regard being had to the extent to which such use is being or has been made) be determined in accordance with the provisions of the Second Schedule, and, upon the value being so determined, it shall be obligatory on the owner who has made beneficial use of the fence to contribute to the cost of the fence in accordance with the determination.
63. Neighbour law in particular should, in contrast with the way it functioned under apartheid, focus on control over the actions (as opposed to the presence) of others who occupy and use property in their near vicinity. There is a real lack of due process in the past conduct of the applicant in regard to the fencing, access control and; as will be shown later, the objection to the use of the land by first respondent.
64. Neighbour law attitudes, principles and remedies that are informed by absolutist claims such as *Gien v Gien* 1979 (2) SA 1113 (T) where the landowner claimed that he could do whatever he pleased on his land as long as his actions were not actually illegal and that he was not obliged to take the effect on neighbours into account; is constitutionally illegal.
65. The law is coined in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). The non-property rights of others that have to be considered are not restricted to competing property rights, but include the foundational rights of

freedom, equality and human dignity, as well as other constitutional rights such as privacy or personal integrity.

The land usage aspect and final interdict

66. A further demand by the applicant is:
- That the first respondent be interdicted and ordered not to utilise his farm known as Portion 3 of farm Verliesfontein 341, district Fouriesburg, in contravention with the agriculture zoning thereof and in particular that the first respondent be interdicted from utilising the mentioned farm for tourism accommodation and/or the conducting of business within the hospitality and/or accommodation industry.
67. The same applicant addressed a letter to the first respondent on 6 May 2014 wherein it was stated that:
- However, to ensure good neighbourliness, Mr Du Plessis is willing to meet with you for possible exchange of land. Should the negotiations be successful, Mr Du Plessis will assist you with a new road, without gates to be passed, except your own gate. He will further more have no objection to a new building or the re-zoning of the exchanged part.
68. The identity of the land to be exchanged is not part of the evidence but it is clear that the applicant wanted some of the land of the first respondent. It involved the farm Verliesfontein that is the property of the first respondent adjacent to the applicant. There will remain a need for a right of way.
69. The above agreed-upon rezoning will cause the prejudice of increased traffic and movement on the land of the applicant that he utilizes as basis for the interdict. The oxymoron is glaring.
70. The Dihlabeng Municipality is a category B municipality situated in the Thabo Mofutsanyana District in the Free State. It is one of six municipalities in the district. It was established in terms of section 12 of the Local Government Structures Act 117 of 1998.

71. The land in issue resorts under the above jurisdictions. Section 24, section 32 and Schedule 2 of the Spatial Planning and Land Use and Management Act 16 of 2013 is applicable.
72. It is the case for the first respondent that:
- 72.1 The primary use of the land is for residential and subsistence living,
 - 72.2 there are not four chalets on the property as alleged,
 - 72.3 the first respondent only has a self-catering cottage and bachelor flat available for rental,
 - 72.4 the area of the cottage (80m²) and bachelor flat (40m²) is miniscule in relation to the extent of the first respondent`s farm (132,7625 hectares).
 - 72.5 The bachelor flat is seldom in demand.
 - 72.6 The accommodation is mainly for weekend tourists and then perhaps only every second week and the odd guest week.
 - 72.7 It is exceptional for the cottage and the flat to be rented together.
 - 72.8 The first respondent`s farm is located in a tourist hub of South Africa.
 - 72.9 The first respondent receives his friends from overseas with their children that visit on regular basis.
 - 72.10 All visitors are informed of the rules when traveling on the farm roads and no guests or visitors have ever caused damage or nuisance for the applicant.

- 72.11 The cottage and the flat do not amount to a hospitality and/or accommodation business as it is far secondary to the primary use of land.
- 72.12 The applicant has not referred to any regulations, by-laws or legislative provisions that supports their application.
- 72.13 The first respondent denies an increase in the number of people.
73. Even if first respondent`s use of the land is unlawful in terms of zoning the applicant has other effective remedies at its disposal. The municipality is empowered to investigate complaints and impose sanctions.
74. Based on the provisions of SPLUMA and the By-laws the Dihlabeng Municipality has a clear and direct interest in the fourth prayer and should have been cited. In the least they could have contributed to a fast and permanent solution.
75. The legislation also prescribes a due process that the applicant was supposed to have followed. He, again, disregarded it.
76. There is an insurmountable dispute of fact that should have been foreseen. The application for grant of the final interdict may either be by way of application (on notice of motion). The choice of procedure depends on the likelihood of dispute, if there is no real factual dispute a final interdict may be granted on application.
77. In order to obtain a final interdict:
- 77.1 The applicant must prove a clear or definite legal right. This means that the applicant must show that he or she is an owner of land or is lawfully vested with the rights of use and enjoyment of the land in question or that there is vested in him or her a legal right.

77.2 The second requisite requires applicant to establish that his or her “clear” legal right has been infringed by the first respondent to his or her prejudice; actual or potential.

77.3 The third requisite in effect requires applicant to show that the extraordinary remedy of a final (“perpetual”) interdict is the only appropriate form of relief and that there is no other adequate remedy.

78. The applicant failed the onus on the second and third requisites.

Order

1. The relief sought in prayers 1, 2, 3 and 4 is dismissed.
2. The applicant to pay the cost of the application

M OPPERMAN, J

COUNSEL FOR APPLICANT

GF HEYNS

GROENKLOOF CHAMBERS

PRETORIA

COUNSEL FOR THE FIRST RESPONDENT

JMC JOHNSON

CHAMBERS

BLOEMFONTEIN