



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Court case no: 2025-3779

In the matter between:

TOM STRESO JORDAAN N.O.

FIRST APPLICANT

MARIAAN JORDAAN N.O.

SECOND APPLICANT

JOHAN JACOB DU PLESSIS N.O.

THIRD APPLICANT

[The first, second and third applicants

are cited in their capacities of the

AANDSON TRUST – IT 1009/97]

and

TRANSNET SOC LIMITED

RESPONDENT

[Registration number: 1990/00900/30]

Neutral citation: *Jordaan N.O. and Others v Transnet SOC Ltd* (2025-3779) [2026]
ZAFSHC 283 (11 May 2026)

Coram: CRONJE AJ

Heard: 12 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is

deemed to be 14h00 on 11 May 2026.

Summary: Fencing Act 31 of 1963 – servitude registered over farms in favour of Transnet
- Act places respective obligations on Transnet and owners of holdings to fence the servitude and boundaries of holdings - railway line decommissioned, inoperative and under deconstruction – no risk for life and limb over the servitude except at the entry points – Transnet not obliged to fence inoperative railway line over holdings – Transnet ordered to repair servitude entrances to holdings and roads – Transnet pays the costs of the application.

ORDER

1 The respondent is ordered to repair the fences, and/or insert gates, and/or insert contrivances across the servitude openings by fencing the openings across the servitude, which include the servitude opening/s at the public road/s, to prevent stock from entering and exiting at the servitude openings. The repairs do not include repairs to the railway fencing next to and along the railway line.

2 The respondent pays the costs of the application on Scale B.

JUDGMENT

Cronjé AJ

[1] The applicants (collectively, the Trust) are the registered owners of agricultural land, namely the Remainder of the Farm Papelotte 557, the Remainder of the Farm Planchenoit 306, and Portion 1 (Dankbaar) of the Farm Papelotte. Portion 1 of the farm Planchenoit 306, and the Farm Vredewater 368, all in the district of Zastron. The respondent (Transnet) is a state-owned company registered in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 (SATS Act). A railway line (the line), the property of and under the control of Transnet, traverses the Trust's properties. Transnet exercises a servitude over the land on which the railway line lies, and it is not the owner of the land. The Trust seeks an order that Transnet repair the railway fences, including the gates, along the railway line. The obligation arises from s 20(1) of the Fencing Act 31 of 1963 (the Act).

The Fencing Act

[2] The Act consolidates the laws relating to fences and fencing of farms and other holdings. Section 1 of the Act provides a number of relevant definitions. A boundary fence

is defined as any fence together with any necessary gates 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. A holding is defined as land held by any person other than the state under a separate grant, deed of transfer or certificate of title. It includes other land which vests in the state. An owner is the person registered as the owner of the land comprising the holding. Where such land comprises a holding, the definition of holding includes a person registered as the holder of the relevant lease, licence or allotment. It defines repair in relation to any boundary fence, to include putting and maintaining such fence in good order by trimming, cutting or any other means.

[3] The Trust primarily relies on s 20 of the Act, whereas Transnet additionally relies on ss 7, 10, and 29 read with the Second Schedule of the Act. Section 7 provides that an owner of a holding situated in an area in which contributions are obligatory, and who intends to erect a boundary fence between that holding and any other such holding, shall, if he requires the owner of such other holding to contribute to the cost of the fence, give to that owner written notice of his intention to erect the fence, setting out the specifications and the estimated cost of the fence and the proportion of such cost which he requires that owner to contribute. Transnet is not the registered owner of the land, the land on which its line lies is not a separate holding as defined, and its fences are not *stricto sensu* boundary fences between holdings.

[4] Section 10 provides that 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 the Act be liable to contribute to the cost of such fence. Section 20 provides:

'20. Fencing-off of railway lines.—(1) The owner of any railway line which traverses any holding shall, at his own expense, erect and maintain on either side of such line a sufficient fence with adequate crossing facilities at every place where a public road traverses such line and at any other place where such facilities are reasonably necessary in order to enable livestock to cross such line from one part of such holding to another: Provided that half the cost of any such facilities required at any such other place shall be paid by the owner of the holding affected.

(2) Subject, in any case where a public road traverses the line, to the approval of the road authority concerned, gates of such number and structure as may be agreed on between the owner of such line and the owner of such holding or as may, in default of agreement, be determined in accordance, *mutatis mutandis*, with the provisions of the Second Schedule, shall be erected in such fence at any place where such crossing facilities are provided.

(3) The Minister may by notice in the *Gazette* exempt any area from the operation of this section.'

The Trust's case

[5] The Trust avers that Transnet, as owner of the line, has a legal duty to maintain the fences along the line even where it does not constitute a boundary of a holding. Photographs attached to its affidavit depict the condition of the fences separating the farm Planchenoit from the line and the road crossing, and show where a cow entered the road and collided with a vehicle on the R26. The photos depict extreme disrepair, with the fences in some instances entirely absent. The rails are rusted, and in one of the photos, a cattle grid lies across the line, with grass between the two rails.

[6] Between 1977 and 1983, the Minister of Transport, and later the South African Transport Services, and finally Transnet, concluded written agreements with the late father of the first applicant, the predecessor of the Trust's ownership of the farms. The agreements state that the land on which the railway line lies is government/Transnet property. The maps attached to the affidavit do not show that any portions are separately registered in favour of the government or Transnet and therefore would constitute servitudes. The user must pay annual compensation to the government for the use of the land and for its maintenance. The user was provided with the right of a private crossing with gates and locks. The agreements could be terminated with three months' notice. They, *prima facie*, only created personal rights for the father, not real rights.¹

[7] The Trust has communicated with Transnet regarding the poor condition of the fences since June 2014. In one email, the Trust offered to repair the fences if Transnet could not do so itself, provided that Transnet supplied the material. On 11 July 2014, Transnet informed the Trust that a section was closed to traffic, but the branch line manager gave the go-ahead to supply the material. Transnet would determine the exact quantity of material required, but the next (supply) contract for fencing material would not

¹ See: *Ex parte Geldenhuys* 1926 OPD 155 at 163 -164: 'The point, however, which I am attempting to elucidate is that, when it is said that "personal 1926 OPD at Page 164 rights" cannot be registered against the title to land, the reference is not to rights created in favour of a "person," for such rights may be real rights against the land. The, reference is to rights, which are merely binding on the present owner of the land, and which thus do not bind the land, and do not constitute jura in *re aliena* over the land, and do not bind the successors in title of the present owner. These are the "personal rights" which are not registrable, according to the above cited case of *Hollins v Registrar of Deeds* 1904 TS 603 and the case of *Kotze v Civil Commissioner of Namaqualand* (17 CSC 37). One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the dominium, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right in personam, and it cannot as a rule be registered.'

be in place until closer to December 2014. On 30 July 2014, the Trust informed Transnet that one of the fences measured 32.2 kilometres with 35 gates. On 21 April 2017, the Trust informed Transnet that the fences on both sides of the farm Papelotte were in poor condition, to the extent that cattle were walking along the R26 road, and that the Trust had no control over this. It was noted that the Trust could no longer keep stock in a camp and that the lack of fencing threatened motorists' lives. It was recorded that the Trust had contacted Transnet more than three years earlier, yet to no avail.

[8] On 25 June 2020, the Trust requested permission to use a portion of the railway reserve for grazing and to fence certain portions of the camps. It was recorded that the railway line is presently unused and in very poor condition. It was required that, should Transnet decide to sell the rails, the Trust be offered the opportunity to purchase them. On 15 June 2022, Transnet was informed that one Lebohang had attended the farm and that pictures of the fence and of an accident between a bakkie and a cow were provided. On 20 June 2022, the Trust informed Transnet that it had visited Transnet's offices for the past five years and had been told there was no money to repair the fence. A claim was submitted for the loss of the cow and the vehicle repair co-payment. On 8 May 2023, the Trust informed Transnet that Transnet employees had visited the farm and agreed that the fences were in poor condition but that there were no funds to repair them. Apparently, out of frustration, the Trust informed Transnet on 28 July that it is not satisfied with Transnet's inaction and that it will deconstruct the railway line and sell the material to cover expenses.

[9] On 25 August 2023, the Trust's attorney recorded what had occurred over the years. On 22 September 2023, Transnet replied, denying liability for damage to the cow and the vehicle. It recorded that the collision occurred approximately four kilometres from the railway line. The line has not been operational for many years, and it is not reasonably necessary for Transnet to repair the fences and crossing facilities. It further recorded that the Trust has the obligation in terms of s 10 of the Act to repair the fence on its farm. Transnet did not consent to the removal of its fence to utilise the material on the other side of the line and referred to the contravention provisions in s 24 of the Act. It is also recorded that processes have to be followed for the disposal of Transnet's assets. The Trust's offer to utilise Transnet's material to erect or repair a fence on only one side was again conveyed. Transnet, however, confirmed the contents of its letter of 22 September 2023. It is the Trust's case that s 10 of the Fencing Act deals with the repair of boundary

fences and that the railway fence is not a boundary fence, and it is therefore not liable to repair the railway fence.

[10] Section 29(d) is not peremptory, given the use of the word 'may' as used in the section. It is also not a prerequisite that the Magistrate's Court has exclusive jurisdiction.² In respect of the interpretation of the wording of s 20(1), it argues that Transnet seeks to substitute what Transnet regards as reasonable or sensible for the words actually used. This is legally untenable. It does not rely on a common-law duty of care but rather on the provisions of the Act. The Trust is not a party to the right-of-use agreements. The farm Waterloo forms part of the farm Papelotte and is not registered in the name of another person, and that entity does not have to be joined.

Transnet's answer

[11] Transnet raised four points in *limine*. It first attacks the jurisdiction of this Court to entertain the application. It states that the Trust seeks to circumvent s 29 and the Second Schedule of the Act, which provides that whenever two owners are unable to agree on any other matter in respect of which a dispute arises between them, the provisions set out in the schedule shall apply. I am of the view that this point is not good. The provision applies to owners of the land. It also refers to s 30 of the Act, which vests jurisdiction in the Magistrate's Court. For reasons to follow, this point is also not good in law.

[12] The second point in *limine* concerns the Trust's failure to satisfy the requirements for a mandatory interdict. In respect of a clear right, it refers to s 10 of the Act, which obliges the Trust to erect its own boundary fences. This point may be good, and I will address it later in the judgment. The third point in *limine* concerns the availability of an alternative remedy under s 29.

[13] The fourth point in *limine* is the failure to join the neighbouring landowner. This pertains to the adjacent land to Papelotte and the farm Waterloo. Since these two portions also belong to the Trust, this point cannot succeed. Although there are lessees, the rights and obligations in this matter, in my view, rest on both the Trust and Transnet.

[14] Transnet does not dispute its obligations regarding the maintenance of the fences adjacent to the railway reserves. It states that s 10 has to be read with s 7 of the Act. I

² *Van Wyk v Daberas Adventures CC* [2021] ZANHC 62.

already found that neither applies. According to it, meaning should be interpreted by reference to the wording of s 20(1), which must be read in context and having regard to the purpose of the provision and the Act as a whole.³ The underlying purpose of s 20 is derived from the common law duty of care, which imposes an obligation on entities in control of dangerous premises to exercise reasonable care to protect the safety of persons and property. It would be irrational to assert that the legislature intended s 20(1) to apply where the risk is not present. A duty of care is not triggered in respect of a non-operational line. At worst for Transnet, it may be called upon to repair, where needed, such access points to the railway line, which will effectively address animals escaping into the roads, but the Trust, insofar as it wishes to keep its animals on its farms, has to meet and fulfil its obligations as owners in terms of s 10 read with s 7.

[15] Railway activities have ceased for several years, and the imminent removal and demolition of the railway line are underway. According to Transnet, the question is essentially whether the obligations imposed by s 20(1) are triggered by the mere existence of the railway, and if so, whether they are absolute given the provisions of the remainder of the Act, specifically s 10 read with s 7, or by the foreseeable risk from railway operations. According to it, the criterion for establishing whether a duty of care by Transnet exists is whether Transnet ought reasonably to foresee the likelihood of its railway operations causing risk to the Trust. As it has not been operational for several years, it cannot be argued that the infrastructure falls within the ambit of a railway line as contemplated by the Act. The intention of the legislature could never have been to absolve landowners from their duties and obligations under s 10 read with s 7 where a railway line runs on and/or forms the boundary between two adjacent properties. The dual responsibility for maintaining at the boundary fence between two properties falls on the landowners and the owner of the railway line in equal parts.

[16] On 5 November 2024, Transnet issued a notice stating that it had appointed a contractor to collect all railway ferrous/steel components between Sannaspos and Aliwal North. It notes that the contractor will reinstate the broken fences of the holdings.

The Trust's submissions

³ *Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited* [2022] ZASCA 144; [2023] 1 All SA 1 (SCA) para 15.

[17] Mr Groenewald, for the Trust, refers to *Van Wyk v Daberas Adventures CC*⁴ where the court held that the Fencing Act does not oust the High Court's jurisdiction.⁵ There is a strong presumption against the ouster of the High Court's jurisdiction, and the mere fact that a statute vests jurisdiction in one court is insufficient to create an implication that the jurisdiction of another court is ousted.⁶

[18] The requisites for the *mandamus* are the same as for a final interdict.⁷ The Trust did not erect the railway fence and had no intention to do so. Section 7 of the Act does not therefore apply, nor does s 10. Reference is made to *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd*⁸ (*Marine Sands*), where the Court held:

'[14] *Thistledown*, which in effect altered the statutory provision rather than interpreting cannot be supported. Although the judgment alluded to the trite principle of interpretation, it failed to give the words "their ordinary, literal, grammatical meaning" or for that matter, any meaning. In effect, it simply put a red line through the proviso, thereby rendering it nugatory. "Once the meaning of a statutory provision is clear and unambiguous it is the function of a court to give effect thereto. It is not then permissible to have recourse to pre-existing legislation for the purpose of construing the statutory provision." Nor, can subsequent amendments of the Act be relied upon as an aid to the construction of the section. It bears reiteration that it is for a court to consider the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears and the apparent purpose to which it is directed. It is not for a court to substitute what it regards as reasonable, sensible or businesslike for the words actually used, as this would cross the divide between interpretation and legislation.

"Courts are not entitled, under the guise of absurdity, to avoid the legislature's clear intention because they regard the particular consequences to be harsh or unwise." Moreover, once the intention of the legislature is clearly established, it can be dangerous to speculate as to why the

⁴ *Van Wyk v Daberas Adventures CC* [2018] ZANHC 31.

⁵ *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) ; [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA). It was decided in the context of labour disputes. The Court held: '[25] But the state might also create special courts to resolve disputes of a particular kind. Generally those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by (a) conferring power on the special court and simultaneously (b) excluding the ordinary power of the high court in such cases (it does that when 'exclusive jurisdiction' is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the high court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the high courts). In the latter case the claim might be brought before either court.'

⁶ *Parch Properties 72 (Pty) Ltd v Summervale Lifestyle Estate Owner's Association and Others* [2025] ZASCA 155; 2026 (1) SA 449 (SCA).

⁷ *Lipschitz v Watrus NO* [1980] 3 All SA 527 (T). *Kaputuaza v Executive Committee of the Administration for the Hereros* [1984] 4 All SA 36 (SWA); *Hotz and Others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC).

⁸ *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161; 2020 (2) SA 61 (SCA).

legislature would have intended a particular result.⁹ (Own emphasis and footnotes omitted.)

[19] It is submitted that a proper interpretation of s 20(1) is that an owner of a railway line shall, *inter alia*, erect and maintain an adequate crossing facility at every place where a public road traverses and, in addition, at any other place where such facilities are reasonably necessary to enable livestock to cross such line from one part of a holding to another. Notwithstanding that it no longer operates the line, Transnet, through its correspondence, was aware and admitted its duty to maintain the fences. It relies on the publication wherein Transnet stated: 'NB: Please note that Transnet servitude still exists, for future development and should not be interfered with.'

Transnet's submissions

[20] Mr Mothapo submits that the risk that the Trust seeks to avert is not a risk associated with the operations of the railway as contemplated in s 20, but risk associated with livestock escaping due to the absence of any boundary fences to the farms in question. It is maintained that the dispute had to be determined by the Board and this Court does not have jurisdiction. The Act reserved the jurisdiction of the Magistrate's Court and no other court. Reliance is placed on *Chirwa v Transnet Limited and Others*.¹⁰

[21] With reference to failure to comply with the requirements for a mandatory interdict, reliance is placed on *N.S v N.L.S*,¹¹ *Setlogelo v Setlogelo*,¹² *Padayachee v Van Den Heever N.O. and Others*,¹³ and *Lipschitz v Watrus NO*¹⁴ where it was held that all the requirements for an interdict have to be established. He maintains that the Trust has not attempted to address these requirements in the founding papers. Reference is made to *Lombardy Development (Pty) Limited and Others v City of Tshwane Metropolitan Municipality and Another*¹⁵ where the principles for a *mandamus* (final interdict) were affirmed. My view is that on reading of all the pleadings. The Trust may well have met the requirements.

⁹ See also: *Mereki and Others v Moladora Trust and Another* [2025] ZACC 16; 2025 (6) SA 35 (CC) para 67.

¹⁰ *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC). In that matter, the employee referred a dispute of unfair dismissal, which falls squarely within the statutory dispute resolution structures in the Labour Relations Act, 66 of 1995, including the Labour Court and is therefore distinguishable.

¹¹ *N.S v N.L.S* [2025] ZAECELLC 12 at para 10.

¹² *Setlogelo v Setlogelo* 1914 AD 221 at 227.

¹³ *Padayachee v Van Den Heever N.O. and Others* [2023] ZAGPJHC 174 paras 9 and 10.

¹⁴ *Lipschitz v Watrus NO* 1980 (1) SA 662 (T) 673C-D.

¹⁵ *Lombardy Development (Pty) Limited and Others v City of Tshwane Metropolitan Municipality and Another* [2024] ZAGPPHC 17; 2025 (2) SA 516 (GP) para 71-74.

[22] In *Matjhabeng Local Municipality v Eskom Holdings Soc Ltd and Others*,¹⁶ the Court held:

'... No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.' (Emphasis added and footnote omitted.)

[23] My view is that even if it is accepted that there are lessees or that the cow belonged to a lessee. They will not be adversely affected. For this reason, too, the decisions in *Member of the Executive Council for Health, Gauteng v Lushaba*¹⁷ and *Judicial Service Commission and Another v Cape Bar Council and Another*¹⁸ are distinguishable.

[24] Transnet does not dispute the existence of the statutory duty in principle but disputes the applicability to the factual circumstances of the matter. Section 20 must be interpreted purposively and in context, with regard to the mischief the legislature sought to address. Properly construed, the section is directed at mitigating risk inherently associated with the operation of railways, including the movement of trains, transportation of goods, and attendant danger posed to persons and livestock on adjoining agricultural land. It too relies on *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁹ (*Endumeni*). Interpreting the provision of s 20 as imposing an absolute obligation on Transnet notwithstanding the permanent cessation of the railway operations, the ongoing extraction of the railway would yield an insensible result, contrary to the statutory purpose of advancing Transnet's duty of care. Reference is made to *Khanyisile v Transnet Soc Limited*.²⁰ There was a cursory reference to s 20 of the Fencing Act:

'The facts of this case show that the defendant indeed foresaw the possibility of its failure to fence its premises could result in injury to members of the public. Regarding the steps taken to guard

¹⁶ *Matjhabeng Local Municipality v Eskom Holdings Soc Ltd and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC) para 92.

¹⁷ *Member of the Executive Council for Health, Gauteng v Lushaba* [2016] ZACC 16; 2016 (8) BCLR 1069 (CC); 2017 (1) SA 106 (CC) para 15.

¹⁸ *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA).

¹⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) [18].

²⁰ *Khanyisile v Transnet Soc Limited* [2019] ZAGPJHC 357 paras 50 and 65-67.

against such an occurrence, namely the employment of four security guards on foot and a single patrol vehicle, the presence of two traffic signs, the presence of three bridges (used by vehicles) and two level crossings (used by vehicles), are measures which are so inadequate that I find they are unreasonable.

Section 20 of the Fencing Act 31 of 1963 imposes a legal duty on the defendant to fence off its premises. Section 20 states;

"(1) The owner of any railway line which traverses any holding shall, at his own expense, erect and maintain on either side of such line a sufficient fence with adequate crossing facilities at every place where a public road traverses such line and at any other place where such facilities are reasonable necessary" (Own emphasis.)

[25] Accordingly, it is the movement of trains that gives rise to foreseeable risk. Where there is no foreseeable risk, a duty of care will be triggered as well as Transnet's obligation to implement reasonable measures to prevent foreseeable harm during the train's operation. A statutory duty under s 20 is not engaged where there is no train movement creating a risk. The only risk the Trust relies on arises from cattle wandering off and being exposed to motorists. In respect of the applicants' case that a cow entered onto the S1055 road and walked to the R26 tar road, it is argued that the case of the applicants is premised on the repair of the boundary fence to safeguard livestock from harm caused by motorists travelling on the S1055. Section 10 places an obligation on an owner of land to repair a boundary fence, and the legislature's intention with reference to s 20 could never have been to absolve landowners of their duties and obligations in terms of s 10 read with s 7. Transnet submits that if due regard is had to the Act as a whole and then in particular, the provisions of s 7, 10 and 20 (in context) in light of the cessation of operations and extraction of the railway, the responsibility of maintaining a fence next to a railway line which forms the boundary fence between two holdings of farms, falls on the landowners and the owner of the railway line in equal parts.²¹ However, the railway line is no longer in use; therefore, the provisions do not apply. With reference to the obligations under the right of use agreements, reference is made to *Beadica 231 CC and Others v*

²¹ It appears that this is not a correct view of the legal position. In Van der Merwe CG The Law of South Africa (LAWSA) Servitudes (Volume 24 - Second Edition), it is stated: 'In accordance with the maxim *servitus in faciendo consistere nequit* a servitude either entitles its holder to do something with regard to the servient tenement or compels the owner of the servient tenement to refrain from doing something on his or her land. It cannot, however, impose a positive duty on the owner of the servient tenement (the principle of passivity). The principle of passivity was firmly entrenched in Roman-Dutch law and was justified on the dogmatic consideration that the imposition of positive duties on the servient owner was irreconcilable with the nature of a servitude as a real right as opposed to a personal right, which fundamentally entails the performance of an obligation.' At para 550

Trustees for the time being of the Oregon Trust and Others.²²

Discussion

[26] It can be accepted that a mere allegation that an entity in control of a dangerous object lacks the financial means to protect third parties is insufficient. In *Khanyisile v Transnet Soc Limited*²³ (*Khanyisile*) it was stated:

'[61] Mr Makhubo confirmed that the fish grade area, the block road area, the vacuum yard and the sorting yard are not fenced. To date there is still no fence and Mr Makhubo stated that it would be too expensive for the defendant to erect a fence. As stated by the case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (*supra*) an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints.'

[27] It would have been easy for the court in *Khanyisile* to state that the statutory obligation is clear and that no further consideration is necessary. The court, however, continued to discuss the principles of common-law delict and contributory negligence.²⁴

[28] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*²⁵ (*Metrorail*), decided before *Endumeni*, dealt with subsections 15(1) and 23(1) of the SATS Act to be interpreted in light of the Constitution as imposing positive obligations upon the railway operator to protect the rights of rail commuters to dignity, life and security of the person when they travel on trains. This should be read in the context of a contractual, legal, and Constitutional duty to protect affected persons. It is, however, relevant to take note of some principles stated:

'[88] What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer– the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-

²² *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) [35].

²³ Footnote 20.

²⁴ In *Titchener v British Railways Board* [1983] 1 WLR 1427 the Court denied the claimant relief on the basis of foreseeability notwithstanding that the fence was in disrepair: 'The pursuer here, on her own evidence, was fully aware of the danger of crossing a line on which trains ran, and, in my opinion, she must be taken to have consented to assuming the risk.'

²⁵ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. ... The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities.' (Own emphasis and footnotes omitted.)

[29] Van der Walt²⁶ states that the relationship between a servitude holder and a servitude owner must be explained in a way that accounts for the role that peremptory and default property principles play in the creation, shaping and adjudication of servitude rights. 'The third peremptory principle that is used to calibrate the relationship between the owner and the servitude holder is the *civilliter* principle. In terms of this principle, a servitude holder must exercise a servitude so that it does not impose an unreasonable burden on the servient owner. The purpose of the principle is to protect the owner against the negative effects that the exercise of the servitude could have on the ownership of the servient land. These negative effects typically manifest as unnecessary or unwarranted burdens on the servient land that are not necessary for the effective use of the servitude, or included (specifically or tacitly) in the agreement or grant. ... Stated differently, the *civilliter* principle regulates the reasonable exercise of a servitude. This requires that a balance must be struck between the servitude holder's right to effective use and the residual rights of the servient owner to use her property to the extent that this does not interfere with servitude holder's use. the servitude." For purposes of non-consensual servitudes, the required balance may be determined with reference to considerations that are external to the agreement or grant.' (Own emphasis and footnotes omitted.)

[30] Servitudes are passive in character, which means that, traditionally, a servitude cannot impose an active or positive duty on the owner of servient land. A servitude does not oblige the servient owner to render a performance. Instead, it requires the servient owner either to allow the holder of the servitude to do something with or on the servient tenement or refrain from doing something with the land himself.²⁷ Where the servitude is

²⁶ AJ Van der Walt *The Law of Servitudes* (2016) Juta at 187.

²⁷ H Mostert *et al The Principles of the Law of Property in South Africa* (2010) Oxford University Press at 241.

granted by agreement, and by way of analogy, statutorily, it will be interpreted strictly.²⁸ Generally, the owners of adjacent land have similar rights and duties in respect of a fence.²⁹

Interpretation of the Act

[31] There are a number of theories of interpretation. A useful collection can be found in LAWSA.³⁰ According to the literalism theory in its crude, unqualified form, the meaning of a statutory provision can (and must) be retrieved from the *ipsissima verba* in which it is couched, regardless of manifestly unjust or even absurd consequences. Legislative authority is unquestioningly deferred to, and no one dares tamper with the very words that the legislature used to express its will. It is assumed that statutory language, as it stands, on the condition that it is clear and unambiguous, is a reliable expression of legislative intent.

[32] However, strict adherence to the words of a provision may produce an interpretive result so absurd and repugnant to common sense that the legislature could hardly be believed to have intended it – hence the golden rule of interpretation of which Lord Wensleydale's *dictum* is a classical exposition: “[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.”³¹ (Own emphasis.) This theory was supported in *Manyasha v Minister of Law and Order*.³² According to Devenish,³³ unqualified literalism has reached its apogee and is on the wane.

[33] The theory of intentionalism gives expression to the idea that even though legislative processes are not driven by a single, discernible legislative will, all enacted law is meant to be of effect.

‘This notion of “the intention of the legislature”, rescued by its very fictitiousness as it were and proclaiming the operational efficacy of enacted law, brings intentionalism into the vicinity of

²⁸ Ibid at 245.

²⁹ Ibid at 144.

³⁰ 25(1) LAWSA 2 ed.

³¹ Ibid para 314

³² *Manyasha v Minister of Law and Order* [1998] ZASCA 112; 1999 (2) SA 179 (SCA); [1999] 1 All SA 242 (A).

³³ Devenish *Interpretation of Statutes* (1992) at 26.

purposivism. What the legislature intended and the broad as well specific purposes it sought to achieve by enacting a provision, are equated.³⁴

[34] In *Endumeni*³⁵ the Court cautioned against this approach:

'[20] Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the Legislature or the draftsman, nor would I use its counterpart in a contractual setting, "the intention of the contracting parties", because these expressions are misnomers, in so far as they convey or are understood to convey that interpretation involves an enquiry into the mind of the Legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself. Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether they are helpful. Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of Parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware.' (Footnotes omitted.)

[35] According to the theory of contextualism, the purpose of a provision can only be ascertained by looking at it in context. Traditionally, contextual interpretation is referred to as interpretation *ex visceribus actus*.³⁶ This theory found support in *Bastian Financial Services v General Hendrik Schoeman Primary School*³⁷ where the Court held:

'[17] It is, however, also a well-established rule of construction that words used in a statute must be interpreted in the light of their context, and that, in this regard, the 'context' – '[I]s not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background . . . the legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be interpreted without sufficient attention to the contextual scene.' (Own emphasis.) (Footnote omitted.)

[36] The judicial theory is often described as a 'free' theory of statutory interpretation. In its moderate form, it recognises and justifies, and, in its more radical form, strongly advocates judicial activism. It is premised on the belief that judges have a creative role to play in the interpretation and application of statute law. The judiciary, with the help of the common law, must intervene in order to remedy defects in statute law, since legislative

³⁴ Footnote 31 para 315.

³⁵ See also the criticism at para 24 in the judgment.

³⁶ Footnote 31 para 317.

³⁷ *Bastian Financial Services v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA).

processes are not sufficiently expeditious and streamlined to cope with deficiencies that show up in day-to-day practice.³⁸ On the other hand, objectivism, also known as the 'delegation theory', entrusts the function of concretising statutes, that is, bringing them to completion in life's concrete situations, to the courts, which are said to be acting as the legislature's delegates.³⁹

[37] The linguistic turn in legal interpretation emphasises, from the perspective of the openness of language as a complex system of signifiers, why the meaning of a statutory provision will always (only) be meaning-in-context. It thereby lends credence to purposive theories of interpretation that emphasise the inevitability of ascertaining the purpose of a provision by reading it in context. An interpreter *always* has a choice; The linguistic turn is a *turn* away from the belief that statutory language can be clear and unambiguous and that only one meaning (and therefore an absence of choice) is inevitable.⁴⁰

The approach in *Endumeni*

[38] Both parties understandably relied on *Endumeni* in support of the approach to the interpretation of, especially, s 20. *Endumeni* fused the literal and contextual approaches to interpretation. In considering the various theories, the upsides and downsides of the various theories, the Court concluded that:

'[19] All this is consistent with the "emerging trend in statutory construction". It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO & another*, namely, that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

More recently Lord Clarke SCJ said "the exercise of construction is essentially one unitary exercise". (Own emphasis and footnote omitted.)

³⁸ Footnote 31 para 318.

³⁹ Footnote 31 para 319.

⁴⁰ Ibid para 320.

[39] In *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Limited*⁴¹ (*Motor Industry*), the Constitutional Court approved *Endumeni*:

'[143] . . . It is consistent with the accepted approach to statutory interpretation. What the proper approach to the interpretation of a statute or any other document is, was dealt with by the Supreme Court of Appeal in *Endumeni* and received the approval of this Court. Aptly described by this Court as a "unitary exercise" in *University of Johannesburg*, it is the process of attributing meaning to the words used in the legislation by giving consideration to the:

"nature of the document, . . . the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the apparent purpose of the document. . . . The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[144] This approach accords with the second of the two approaches mentioned by Schreiner JA in *Jaga*, namely that from the outset one considers the context and the language together, and not the one after the other. Of further importance, particularly in the context of the present matter, is the point emphasised by Schreiner JA in *Jaga*, that:

"the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the [subject] matter of the statute, its apparent scope and purpose, and, within limits, its background." (Footnotes omitted and own emphasis.)

[40] I am satisfied that the Trust met the requirements for a *mandamus* and that the Magistrates' Court does not enjoy exclusive jurisdiction. It is uncontested that Transnet holds a servitude over all the farms for conducting railway activities and that a railway line poses potential risks for any person or animals that may cross it. It is for this purpose that the legislature enacted s 20(1) that obliges Transnet to erect fences on both sides of the railway line. If Transnet exercises the servitude or demands continued use of the servitude, that obligation principally remains. I use the word principally intentionally, as will become

⁴¹ *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Limited* [2024] ZACC 29 (CC); [2025] 4 BLLR 337 (CC).

clearer later herein. Section 20(1), purely read literally, does not make the erection of a fence or the maintenance thereof subject to usage of the line.

[41] However, imposing a strict, if not absolute obligation on a servitude holder where there is no danger to the holding owner's property or that impedes it from enjoyment of its holding inside the boundary fences it has to erect, would at best for the Trust be unreasonable. Transnet is deconstructing the railway line. If it operates an active railway in the future, the obligation to comply with s 20 will remain.

[42] The Trust, similarly, on its own version, has the obligation to repair any boundary fence over its holdings. It denies that it is obliged to maintain the railway fence, which can be accepted. Perusing the map attached to the Trust's affidavit, the S1055 road is not clear, but was not disputed. What is apparent from the map is that the line meanders through most – it is not clear that it runs through all the holdings, not creating boundary fences. Where the line runs through a holding, the absence of the railway fence leaves a continuous holding.

[43] Two issues arise from these statutory obligations. The one issue is whether the Trust remained obliged to fence its holdings where railway lines run along their boundaries. It can be accepted that the Trust has an obligation to fence all its holdings. My view is that the railway fence is convenient for the Trust but does not absolve it from fencing the holdings itself. Looking at the state of the railway fences and uprights on the photos, it is doubtful that Transnet would be able to use those fences again in future. It may be opportune for Transnet to make them available to the Trust for its use in fencing if Transnet has no use for it. The second issue is whether Transnet has a continued obligation to repair the railway fences, notwithstanding that it does not use the railway line. It is undisputed that it has appointed a contractor to decommission the line. It is not clear how far this has been done.

[44] It cannot be doubted that Transnet's railway line crosses the public roads. There are photos showing cattle grids. There are, however, no fences running up to the cattle grids. It can be accepted that the entry point at the cattle grid belongs to and is under the control of Transnet. If it maintained all the fences on the relevant holdings, the cattle would not have been able to enter the servitude and bearing photo FA11.5 in mind, which shows a cattle grid between the two rails, and on both sides of the rails, cattle would not have

been able to enter the servitude from the road. In the absence of the railway fence, and of a boundary fence of the Trust, the area is open, and cattle can walk past the cattle grid with no hindrance.

[45] If not for the servitude, the Trust would have been obligated to fence the holdings itself also at the entrances to the servitude. As Transnet exercises its servitude, it has the obligation to ensure that no danger is posed to stock entering or exiting the holdings through the servitude towards the road.

[46] Bearing the cautions enunciated in *Marine Sands*⁴² in mind, can it then be said that absolving Transnet from maintaining the fences would be an unreasonable, insensible or unbusinesslike interpretation of s 20 for the words used? This would subscribe to the literalism theory where the meaning⁴³ must be gathered from the *ipsissima verba* of the section, regardless of manifestly unjust or even absurd consequences, even if it leads to some absurdity, or some repugnance or inconsistency with the rest of the instrument.

[47] *Endumeni* brought the literalist and intentional theory to an end. It is unhelpful to try to read the legislature's mind. To the extent that this intention is relevant, it can be accepted that the intention was to protect life and limb. That rationale is accepted by both parties.

[48] Although on different facts and circumstances, the views of the Supreme Court of Appeal in *Linvestment CC v Hammersley and Another*⁴⁴ shed light on the issue of reasonableness in the application of servitudes. The Court held:

'[30] Even from this brief, and necessarily superficial, survey it is apparent that widespread civilised practice favours a flexible approach to the relocation of servitudes. If that flexibility is soundly based I think we would be wrong to adhere blindly to an inference drawn from the views of Voet expressed at the end of the 17th century, albeit affirmed as late as 1920 by this court.

[31] I am persuaded that the interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different

⁴² Footnote 8.

⁴³ Also implied in the linguistic and contextual theories.

⁴⁴ *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; [2008] 2 All SA 493 (SCA).

environment. Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Why should a present owner, on no rational ground, be entitled to rely on his *summum ius* derived from the alleged sanctity of a contract or a grant or prescriptive acquisition to which he was not privy.

Properly regulated flexibility will not set an unhealthy precedent or encourage abuse.

Nor will it cheapen the value of registered title or prejudice third parties.' (Footnote omitted and own emphasis.)

[49] These principles were confirmed largely in *Morganambal Mannaru and another v Robert MacLennan-Smith and others*:⁴⁵

'[13] Often the relationship arising from the exercise of a servitude is fraught with tensions that sometimes develop into disputes, for the most part, between the user rights of the dominant owner and the rights of the servient owner. The approach adopted by our courts in resolving such disputes is reliance on the principle of *civiliter modo*. Relying on J Scott, it has been pointed out that:

'the principle of *civiliter*...is a particular expression of the principle of reasonableness...' And at 242-243 'in modern South African servitude law the Latin phrase *civiliter modo* is consistently read as a set of adverbs that both qualify the conduct of a servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (*civiliter*) manner (*modo*).' In modern South African servitude law the Latin phrase *civiliter modo* is consistently read as a set of adverbs that qualify the conduct of the servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (*civiliter*) manner (*modo*).'

[14] In this regard, Van der Walt (p249) states:

'According to the *civiliter* principle, the servitude holder must exercise the servitude so as to impose the least possible burden on the servient owner. This implies that a balance must be struck between the right of the servitude holder to do anything that is necessary for proper and effective exercise of the servitude; the right of the servitude holder to exercise those entitlements that are clearly granted in the servitude; and the residual right of the servitude owner to use her servient property insofar as that does not interfere with legitimate exercise and enjoyment of the servitude entitlements.'

[15] The approach of adopting a wider and relaxed interpretation of the common law to accommodate modern day imperatives, was endorsed by this Court in *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; 2008 (3) SA 283 (SCA), where the common law's strict interpretation of the terms of the servitudes was developed in terms of s 173 of the Constitution. In that case, the owner of the servient tenement wanted to relocate the right of way. This Court concluded that the owner of the dominant tenement had no acceptable reason to subject the

⁴⁵ *Morganambal Mannaru and Another v Robert MacLennan-Smith and Others* [2022] ZASCA 137; 2023 (2) SA 150 (SCA).

servient tenement to the terms of the servitude as it was registered. The circumstances had changed since the servitude had been registered, and *considerations of convenience and prejudice* determined whether the relocation should be granted. . . ' (Footnotes omitted and own emphasis.)

Conclusion

[50] The Trust seeks an order that Transnet repair all the fences on its farms. Following *Endumeni*, there can be no doubt that s 20 is clear in this respect. However, one must consider the context. The purpose of the fence can, in my view, only be for protection against an operational line. The Trust is not entitled to demand the repair of the fences as a substitute for its own obligations in the Act. The Trust sought to purchase the line's metal from Transnet. It would not have done this if it had not been aware of the line's decommissioning.

[51] The Trust also seek that Transnet repair the gates on either side of the railway line. The word 'gate' is found in the definition of a boundary fence, which is described as any fence together with any necessary gate or any contrivance forming part or serving the purpose of such a gate, erected on or near a boundary of any holding and separating such holding from any other holding.

[52] The servitude forms part of the Trust's holding. The entry to the holdings from the road can be seen as a gate or other contrivance. Contrivance is defined as a mechanical device,⁴⁶ 'any man-made object or artificial arrangement . . .',⁴⁷ a gadget or device that can be used for some particular purpose,⁴⁸ and a clever or complicated device or tool made for a particular purpose.⁴⁹ As far as I can gather, the term contrivance was only used in a remotely similar context in our law in *Suliman v Rex*.⁵⁰

[53] For so long as Transnet reserves its right to use the servitude, which it expressed it may, it has a statutory obligation to either fence (repair) the servitude openings running *across* the servitude by linking the boundary fences of the holdings at the servitude openings to prevent stock from entering or exiting the holdings at the servitude. These do

⁴⁶ Merriam-Webster Online Dictionary.

⁴⁷ As defined by the Hawaii Department of Land and Natural Resources in the Amendment and Compilation of Chapter 13-230, Hawaii Administrative Rules at 13-230-8.

⁴⁸ <https://www.dictionary.com/browse/contrivance>.

⁴⁹ Oxford Learner's Dictionary.

⁵⁰ *Suliman v Rex* 1935 NPD 175.

not presently include the fencing along the railway line over the holdings.

[54] I am mindful of the way that the relief is couched. Although the owner/s of the farms apparently contented themselves over the years with using the railway fence as a *boundary fence*, they were always obliged to maintain their own boundary fences. The Trust benefited from the railway fence, but that advantage does not justify compelling Transnet to resurrect dysfunctional fences.

Conclusion

[55] The Trust therefore succeeds to a limited extent. There is no reason why Transnet should not pay the costs of the application.

Order

[60] In line with practise, the following order is made:

- 1 The respondent is ordered to repair the fences, and/or insert gates, and/or insert contrivances over the servitude openings by fencing the openings across the servitude, which include the servitude opening/s at the public road/s, to prevent stock from entering and exiting at the servitude openings. The repairs do not include repairs to the fencing next to and along the railway line.
- 2 The respondent pays the costs of the application on Scale B.


PR CRONJÉ

ACTING JUDGE OF THE HIGH COURT

Appearances

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