

SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 16

Project 119

**UNIFORM NATIONAL LEGISLATION ON
THE FENCING OF NATIONAL ROADS**

Closing date for comment: 29 September 2000

ISBN: 0-621-30188-4

July 2000

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

Madam Justice Y Mokgoro (Vice-Chairperson)
Advocate J J Gauntlett SC
Madam Justice L Mailula
Professor R T Nhlapo
Mr P Mojapelo
Ms Z Seedat

The position of Chairperson is vacant as a result of the demise of Chief Justice I Mahomed.

The Secretary is Mr W Henegan. The Commission's offices are on the 12th floor, Sanlam Centre, Corner of Andries and Schoeman Streets, Pretoria.

Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA
0001

Telephone: (012) 322-6440

Fax: (012) 320-0936

E-mail: mpalumbo@salawcom.org.za

This document is also available on the Internet at <http://www.law.wits.ac.za/salc/salc.html>

PREFACE

This issue paper (which reflects information gathered up to the end of December 1999) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place full submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 29 September 2000 at the address appearing on the previous page.

The project leader responsible for this project is Professor R T Nhlapo. The issue paper was compiled by Advocate Nazreen Bawa of the Cape Bar.

CONTENTS

The page numbers refer to the hard copy and may differ in electronic versions

INTRODUCTION.....	i
PREFACE	ii
TABLE OF CASES.....	v
GLOSSARY OF TERMS.....	vi
1. INTRODUCTION	
Introduction.....	1
The origin of the investigation.....	1
The scope of the investigation	2
The Commission’s working methodology	3
2. THE EXISTING LAW	
Introduction.....	4
The Constitution	4
The National Roads Act 7 of 1998.....	5
The Fencing Act 13 of 1963.....	6
Provincial Ordinances.....	8
The Provinces of the Western Cape, the Northern Cape and the Eastern Cape: The Roads Ordinance 19 of 1976	9
The Free State.....	12
The Local Government Ordinance 8 of 1962	12
The Roads Ordinance 4 of 1968	13
The Provinces of Mpumalanga, Gauteng, Northern Province and North West: The Roads Ordinance 22 of 1957	14
The Pounds Ordinance 13 of 1972	14
The Province of KwaZulu-Natal: The Roads Ordinance 10 of 1968 and the regulations relating to the control of roads and resting places	15

Conclusion.....	16
3. THE PROBLEMS	
Introduction.....	18
The extent of the problem.....	18
The legal duty to erect a fence along a public road: The position in common law with reference to reported judgments.....	20
4. CONCLUSIONS	25
5. THE WAY AHEAD: ISSUES AND OPTIONS TO BE DECIDED	29

TABLE OF CASES

Botes v Van Deventer 1966 (3) SA 182 (A)

Brook v Richards 1951 (1) K.B. 529

Coreejes v Carnarvom Munisipaliteit en 'n Ander 1964 (2) SA 454 (C)

Jamneck v Wagener 1993 (2) SA 54 (C)

Moubray v Syfret 1935 AD 199

R v Venter 1959 (2) SA 520 (E)

Rabie v Kimberley Munisipaliteit 1991 (4) SA 243 (NC)

S v Kasselmann 1977 (3) SA 1064 (T)

Searle v Wallbank 1947 A.C. 341

Van der Merwe v Austin 1965 (1) SA 43 (T)

GLOSSARY OF TERMS

“the Agency” means the national roads agency envisaged for the Republic by section 2 and which in terms of that section, is established by the incorporation of a company, named The South African National Roads Agency Limited, in accordance with section 3 of the National Roads Act.

“boundary fence” means any fence (including 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.

“common law” is the law of the land created by customs and judicial decisions but excluding that created by legislation.

“cost” in relation to the erection, alteration or repair of any fence, means any cost of or incidental to such erection, alteration or repair, including the cost of transport of materials.

“Department” means the Department of Transport in the national sphere of government.

“erect” in relation to a fence includes the re-erection of a fence, the entire replacement of the material of a fence and the addition to a fence of any material not required for the purpose of repairs and maintenance.

“fence” means any structure or device which serves the purpose of a fence, together with any necessary gate or any contrivance forming part or serving the purpose of such a gate, irrespective of the materials used in or the manner of its construction and includes a wall and a hedge.

“land” means land with or without improvements and includes a real right in or over any land.

“large stock” means cattle, horses, mules, donkeys and ostriches.

“maintenance” means the maintenance of any road, together with all bridges, ferries, and drifts in the line of such road, all road signs and all approaches, excavations, embankments, subways, furrows, drains, dams, kerbs, fences, parapets, guards, drainage works within or outside such road, and any other work or thing forming part of or connected with or relating to such road and “maintain” has a corresponding meaning.

“Minister” means the Minister of Transport in the national sphere of government.

“motor-grid” means a track through an opening in a fence designed to permit the free passage of self-propelled vehicles while preventing the passage of livestock.

“national road” means any road or route declared a national road under section 40 (1) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 and includes -

- (a) any road or route which was declared a national road under section 4(1)(a) of the National Roads Act, 1971 (Act No. 54 of 1971) and which immediately before the date of incorporation of the National Roads Agency existed as a national road;
- (b) any part of the road which is a toll road as defined in the National Roads Act; and
- (c) any bridge across the boundary between adjoining provinces in the Republic and any bridge across the boundary between the Republic and any adjoining country which is used in conjunction with a national road.

“owner” in relation to land means -

- (a) save as provided in paragraph (b), the person or persons in whose name that land is registered and includes any person in whose name any lease of or other right or interest in or over the land is registered and the legal representative of an owner (as herein defined) who has died, become insolvent, is a minor, is of an unsound mind, or is otherwise under any legal disability, and the liquidator of a company owning land;
- (b)
 - (i) the person other than the State who holds the land under separate grant, deed of transfer or certificate of title;
 - (ii) the person who holds the land 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;
 - (iii) the person who holds land which he or she has purchased but which has not yet been registered in his or her name;
 - (iv) the usufructuary where land is subject to a usufruct and where any person aforementioned is dead or any person or usufructuary aforementioned is a minor or is or becomes insolvent or of unsound mind or subject to some other legal disability, it includes any executor, administrator, guardian, trustee, liquidator, curator or other person having the control of the estate or assets of, or representing that person or usufructuary.

“Premier” includes the member of the Executive Council of a province designated by the Premier of the province.

“public road” means a road which the public has the right to use.

“repair” in relation to any boundary fence, includes putting and maintaining such fence in good order by trimming, cutting or any other means.

“road” means a public road and includes, in addition to the roadway-

- (a) the land of which the road consists or over which the road reserve in question extends;
- (b) anything on that land forming part of, connected with, or belonging to the road, including but not limited to all works or things of whatsoever nature forming part of, connected with or belonging to a road, motor by-passes, sidewalks, traffic circles, traffic islands, kerbing, embankments, cuttings, subways, culverts, sluits, drains, dams, fences, parapets, guards, bridges, ferries, causways, fords, approaches, direction signposts, distance indicators, signposts, directions, warnings and any portion or diversion of a road; and
- (c) land acquired for the construction of a connection between a national road and another road.

"small stock" means sheep, goats and pigs.

“Statutory law” is the law created by legislation.

"stock" means a bovine animal, horse, donkey, mule, sheep, goat, pig or ostrich.

"sufficient fence": when applied to a wire fence a fence of so many wires and of such construction as the local authority in whose area the fence is situated shall from time to time decide; in other cases a wall, fence or barrier at least 1400 centimetres high and through which no animal could pass without breaking it.

“the Constitution” means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

Should “the owner” of the land be more broadly defined in any proposed legislation? And if so, would this include those who may not legally own the land adjacent to the public road but have effective control over the land, for example the tenant, lessee or subtenant? Or should it read as follows: "owner" means the owner, lessee or occupier of a piece of land, or his or her lawful representative"?

1. INTRODUCTION

Introduction

1.1 The South African Law Commission's consideration into Uniform National Legislation on the Fencing of Public Roads emphasises the need for a single law to regulate the problems currently encountered by broken fences resulting in animals straying into roads which cause accidents to occur.

The origin of the investigation

1.2 In August 1997 the South African Agricultural Union (SAAU) requested the Commission to investigate the possibility of enacting uniform national legislation on the fencing of public roads.

1.3 The request originated from a SAAU conference during which the problems encountered by farmers whose farms are adjacent to public roads were discussed.

1.4 From the conference it emerged that farmers were encountering the following problems:

- * Fences alongside public roads were sometimes wilfully removed or damaged.
- * Where fences are unintentionally damaged by motor vehicle accidents farmers or land owners are often not informed of the damage and as a result suffer losses.
- * As a result of damaged or stolen fencing, farm animals strayed on to public roads causing accidents.

1.5 According to SAAU these problems are exacerbated as farmers are more often than not held accountable for the maintenance of fences along public roads. This gives rise to maintenance expenses, payment of insurance premiums, the loss of stock life and liability for damages all of which arise from accidents caused by farm animals which stray on to public roads. The SAAU is of the opinion that this places an unfair burden on farmers.

- 1.6 The Minister approved the inclusion of an investigation regarding possible national uniform legislation on the fencing of *national* roads in the Commission's programme and the appointment of Advocate N Bawa of the Cape Bar as a consultant was confirmed to draft an issue paper relating to the enactment of national legislation of the fencing of national roads.

The scope of the investigation

- 1.7 This issue paper is titled "Uniform National Legislation on the Fencing of Public Roads". As such it covers the issue of fencing on all public roads.
- 1.8 Fencing occurs on both national and provincial roads. The scope of the investigation is thus guided by whether all public roads should be included in the investigation.
- 1.9 It is important to point out that the South African National Roads Agency Limited and National Roads Act No. 7 of 1998 ("the National Roads Act") makes provision for a national roads agency for the Republic to manage and control the Republic's national roads system and take charge, amongst others, of the development, maintenance and rehabilitation of national roads within the framework of government policy.
- 1.10 In addition, various provincial ordinances regulate the management and control of the Republic's public roads other than national roads. These provincial ordinances lack uniformity as regards the fencing of public roads.
- 1.11 As the scope of the investigation will have a fundamental bearing on the investigation, guidance is required as to the following questions:

What should the scope of the investigation be? Should it include both national and provincial roads? Are the problems which the legislation is aimed at remedying not happening on local roads as well? Stock farmers are essentially concerned about the following aspects: who bears the responsibility for the erection of fences and who bears responsibility for the maintenance of existing fences and liability which arises as a consequence of the failure to maintain fences. Would clarity be obtained in respect hereof if the scope of the proposed uniform legislation is restricted to only national roads? Thus

should the investigation focus only on national roads or should it be broadened to include other roads as well?

The Commission's working methodology

- 1.12 This issue paper introduces the investigation into uniformity in respect of fencing legislation relating to public roads. Its purpose is to provide a basis for discussion of the topic among all interested parties, including farmers, the relevant local and provincial authorities and the National Roads Agency Limited.
- 1.13 In order to facilitate a focussed debate, the factual position is first discussed briefly. Where appropriate, this discussion is followed by questions contained in a text box. Interested parties are invited to respond to the factual position and or to the questions, to comment on any other related issue, to suggest solutions and to indicate whether there are other questions, issues or options that should also be investigated.
- 1.14 Following this issue paper, a discussion paper will be prepared. The discussion paper will take the submissions on the issue paper into account, will contain draft legislation and will be circulated for general comment. On the strength of these submissions elicited a report will be prepared which will be submitted to the Minister of Justice for his consideration.

2. THE EXISTING LAW

Introduction

2.1 It is believed that this investigation – with its focus on changes to the present legislation – should be guided by:

- * The Constitution of the Republic of South Africa Act, No. 108 of 1996 (“the Constitution”).
- * The South African National Roads Agency Limited and National Roads Act, No. 7 of 1998 (“the National Roads Act”).
- * The Fencing Act, No. 31 of 1963.
- * The various provincial ordinances.
- * The common law.

The Constitution

2.2 In terms of Part A of Schedule 5 to the Constitution “provincial roads and traffic” is a functional area of exclusive provincial legislative competence.

2.3 In terms of Part B of Schedule 5 to the Constitution “fencing and fences” and “municipal roads” are local government matters which fall within the functional area of exclusive provincial legislative competence to the extent set out for provinces in section 155(6)(a) and (7) of the Constitution.

2.4 Section 155(6)(a) provides that each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of sections 155(2) and (3) of the Constitution and, by legislative or other measures, must provide for the monitoring and support of local government in the province.

2.5 Section 155(7) of the Constitution provides:

“The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).”

Does the national government have the legislative competence to promulgate laws in respect of fencing along provincial roads and municipal roads, or is this a matter of exclusive provincial competence? If so, should the contemplated uniform legislation only pertain to national roads and should there also be draft legislation which the provinces could adopt? Would that solve the problems complained of?

The National Roads Act

2.6 The South African National Roads Agency Limited (“the Agency”), a public company wholly owned by the State was created to manage and control the Republic’s national roads system and take charge, amongst others, of the development, maintenance and rehabilitation of national roads within the framework of government policy. The National Roads Act defines the Agency’s powers and functions; regulates its functioning and prescribes measures and requirements with regard to, *inter alia*, the Government’s policy concerning national roads; the use and protection of national roads; to repeal or amend the provisions of certain laws relating to or relevant to national roads; and to provide for incidental matters.

2.7 For present purposes, the following provisions of the National Roads Act are of importance:

- * In terms of section 25(1) of the National Roads Act the Agency, within the framework of government policy, is responsible for, and is empowered to perform all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, and is responsible for the financing of all those functions in accordance with its business and financial plan, so as to ensure that government’s goals and policy objectives concerning national roads are achieved.
- * The Agency is further empowered by section 26 of the National Roads Act to, *inter alia*, provide, establish, erect and maintain facilities on national roads for the convenience and safety of road users and to fence any national road.

- * In terms of section 58 of the National Roads Act the Minister, after consultation with the Agency, may make regulations pertaining to traffic on a national road or the use or protection of a national road or the use or presence of vehicles or animals or any other thing on a national road, provided such a regulation is not in conflict with any road traffic law or the National Roads Act.

2.8 In respect of fencing the powers of the Agency is restricted to fences alongside national roads.

The Fencing Act 13 of 1963

2.9 The purpose of the Fencing Act is to consolidate the laws relating to fences and the fencing of farms and other holdings and matters incidental thereto.

2.10 Section 21 of the Fencing Act provides for the duties and obligations placed on the owner of any fence crossing a public road. In this instance the owner bears the responsibility of allowing an opening of not less than 4.5 metres across the road and shall erect and maintain in good order a gate made of iron or wood or of an iron or wooden frame spanned with wire, placed as near as possible at right angles to the road and properly fixed by hinges or pivots to posts erected for the purpose, so as to facilitate the opening and closing of the gate and to ensure that it will swing clear of the ground. In terms of subsection (b) the responsibility to specify the details of the gate rests on the road authority, if any.

2.11 In terms of subsection (2) a provincial council may make ordinances in regard to contrivances in gaps in fences crossing or near public roads, which are designed to permit the passage of motor vehicles but to prevent the passage of livestock over or through such contrivances.

2.12 In respect of willful damaging or removal of fences section 24 of the Fencing Act specifically provides that any person who willfully damages or removes any fence or gate or any contrivance forming part or serving the purpose of a gate, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred and fifty

and or, in default of payment, to imprisonment for a period not exceeding six months, or to such imprisonment without the option of a fine.

- 2.13 In terms of section 26 of the Fencing Act where damage to fencing or a gate situated on a holding or on a public road within a holding is unintentional, the person who unintentionally damages any fence, shall forthwith repair the damage or, if he is unable to repair it, report the damage and his inability to repair it to the owner or any lessee of the holding and deposit or give security for such sum as may be reasonably sufficient to cover the cost of the repair, and the owner or such lessee shall thereupon on request give such person a written acknowledgement of the sum deposited or secured.
- 2.14 Section 31 provides that no owner or occupier of a holding shall be held liable in damages in respect of an injury or damage caused to any person or property by such person or property coming into contact with any fence, unless the injury was occasioned by the negligence of such owner or occupier in erecting, altering, maintaining or repairing such fence.
- 2.15 The Fencing Act primarily regulates the fencing of *boundaries* of land on which farming operations are carried on. It is silent in respect of fences adjacent to public roads, irrespective whether the roads are national, provincial or local.
- 2.16 The fencing of public roads is not specifically regulated by national legislation. Nor do the existing national legislation place a specific legal duty on the authorities, be it national or provincial, to fence public roads.

Should any legislation pertaining to fencing along public roads not be contained in the Fencing Act? Should it be administered by the National Roads Agency and/or its provincial counterpart, if any? If so, would this be part of the Agency's responsibilities in terms of the National Roads Act? Possibly, stock-farmers would prefer a situation where the legislator imposes a statutory duty on the relevant authorities to maintain fences. Were the legislator to impose a statutory duty to maintain (and control) a fence on a specific person or body, such a person or body would generally be held liable for damages arising from a failure to comply with this duty. Should this be the case?

Provincial Ordinances

2.17 Various provincial ordinances regulate the management and control of the Republic's public roads other than national roads. These provincial ordinances lack uniformity as regards the fencing of public roads. For present purposes, it is efficacious to briefly refer to the legal position in the respective provinces.

The provinces of the Western Cape, the Northern Cape¹ and the Eastern Cape: The Roads Ordinance 19 of 1976

2.18 Section 12 of the Roads Ordinance 19 of 1976 provides:

- “(1) A road authority may, and in the case of a road authority which is a council which has been so directed by the Administrator, shall erect a fence -**
- (a) along the boundary of the statutory width of any public road or public path of which it is the road authority; provided that the Administrator shall not so direct in respect of a minor road;**
 - (b) around any land from which materials are being or have been raised and removed, and**
 - (c) around any water supply provided or used by such road authority.**
- (2) A road authority -**
- (a) shall contribute not less than sixty per cent of the costs incurred by any other person in erecting a fence along the boundary of the statutory width of a main road or divisional road of which such road authority is the road authority -**
 - (i) as a result of the issue of a notice in terms of section 13(4) in respect of such road, or**
 - (ii) as a result of the removal of one or more gates from such road in terms of section 14, and for the purposes of this paragraph "costs" means the cost of erecting a fence in accordance with the standards of materials and construction generally or specially determined by the road authority;**

¹ The administration of the whole of this Ordinance has under Proclamation 108 of 1994, published in Government Gazette 15813 of 17 June 1994, been assigned to the Province of Northern Cape with effect from 17 June 1994.

- (b) which is a council which has been so directed by the Administrator, shall contribute such percentage as the Administrator may generally or specially determine of the costs incurred by any other person in erecting a fence along the statutory width of any public road or public path (other than a minor road) 1 of which such council is the road authority, and
- (c) may contribute to the costs incurred by any other person in erecting a fence in accordance with the standards of materials and construction generally or specially determined by the road authority along the boundary of the statutory width of any public road or public path of which such road authority is the road authority and in respect of which no notice in terms of section 13(4) has been issued.
- (3)(a) No person other than the road authority may erect a fence on the boundaries of the statutory width of a public road or public path except with the written permission of and in accordance with standards and specifications determined by such road authority.
- (b) No person other than the road authority may remove a fence lawfully erected in terms of paragraphs (a) or (d) except with the written permission of such road authority.
- (c) If a fence which, at the commencement of this ordinance, is situate on the boundary of the statutory width of a public road or public path is, as a result of the amendment of this ordinance or the alteration of the statutory width of such public road or public path under this ordinance, at any time after such commencement situate outside such boundary, the provisions of this ordinance shall apply in respect of such fence as if such fence were situate on such boundary; provided that the road authority shall not grant permission in terms of paragraph (b) for the removal of such fence for any reason other than that the condition of such fence necessitates its replacement unless the owner of the land over which such fence runs undertakes in writing to defray the total cost of such removal and of the re-erection of such fence in accordance with standards and specifications determined by such road authority on such boundary.
- (d) All fences lawfully erected on or within the boundaries of the statutory width of a public road or public path prior to the commencement of this ordinance and in existence at such commencement shall be deemed to have been erected with the permission of and in accordance with standards and specifications determined by the road authority in terms of paragraph (a).
- (e) Any permission deemed to have been granted in terms of paragraph (a) in respect of the erection of a fence within the boundaries of the statutory width of a public road or public path may at any time be withdrawn by the road authority and in such event such fence shall be

removed by such road authority and re-erected by it on such boundary at the cost of such road authority.

- (4)(a) Any person who contravenes the provisions of subsection (3) shall be guilty of an offence and on conviction be liable to a fine not exceeding two hundred Rands or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine or to both such fine and such imprisonment.
- (b) The provisions of section 64(2), (3) and (4) shall apply *mutatis mutandis* in respect of any contravention of this section and the road authority concerned shall -
 - (i) remove any fence which has been erected in contravention of this section and re-erect such fence on the boundary of the statutory width of the public road or public path concerned, and
 - (ii) re-erect any fence which has been removed in contravention of this section on the boundary of the statutory width of the public road or public path concerned.
- (5) Where a public road or public path is diverted the road authority may if it has contributed to the cost of any fence alongside thereof, remove such fence to the new location of such public road or public path.
- (6) Subject to the provisions of the Fencing Act, 1963 (Act 31 of 1963), the owner of the land abutting on the boundary of the statutory width of any public road or public path shall be responsible for the maintenance of any fence lawfully erected on or within such boundary.”

2.19 In accordance with section 12 the relevant Road Authority *may* erect a fence along a public road. However, should the relevant Road Authority be a municipal or divisional council, the Administrator has the power to direct that it erect such a fence, provided that it is not a minor road (classified as a such in terms of section 4 of the Road Ordinance).

2.20 In terms of subsection 6 the owner of the land abutting on the boundary of the statutory width of any public road or public path shall be responsible for the *maintenance* of any fence lawfully erected on or within such boundary. Even though this is subject to the Fencing Act, the latter Act does not specifically deal with fences abutting public roads.

2.21 Section 60(1) of the Ordinance specifically provides that no action shall lie against a road authority or any employee, agent or contractor of a road authority for or in respect of any damage or injury sustained or alleged to have been sustained by any person in, *Inter alia*, using any part of a public road or public path other than the roadway of a public road and in using a public road or public path merely by reason of the fact that such road

authority has contributed towards the costs of construction, repair, improvement or maintenance of such road or path.

2.22 In terms of subsection (2) if a person uses a public road for bona fide trekking with stock no action shall lie in respect of damage caused by such stock within a distance of forty-five meters from the boundary of such road on any side thereof on which it is not fenced, and such stock shall not be liable to be impounded while within such distance and for the purposes hereof a person shall not be deemed to have used a public road for the bona fide trekking with stock unless such trek was completed within twenty-four hours after its commencement, or unless during any twenty-four hours during which the trek lasted, a distance of at least ten kilometers in the case of small stock and twenty kilometers in the case of large stock, was covered in the same direction.

The Free State

The Local Government Ordinance 8 of 1962 (Free State)

2.23 In terms of section 146(14) of the Local Government Ordinance 8 of 1962 a municipal council may make regulations in respect of fences in order to -

- * compel owners of land to fence in their properties;
- * prohibit the use of barbed wire, or such other material as the council may determine, in the erection of fences, gates or other structures abutting on any public place, and for compelling the removal or reconstruction, within a specified time, of existing fences, gates or other structures so abutting, which are wholly or partly constructed of barbed wire or such other material; and
- * regulate and control the erection of fences or structures (other than buildings) or the planting of trees or hedges on land abutting on any street or public place, and providing for the repair, alteration or removal of any such fence or structure or the trimming or removal of any such tree or hedge by the owner of such land or by the council at the cost of the owner, in the case where any such fence, structure, tree or hedge is unsightly, or encroaches upon any street or public place, or is dangerous, or causes annoyance to the inhabitants of the neighborhood, or obstructs traffic, or interrupts the view necessary for the safety of traffic approaching any intersection.

The Roads Ordinance 4 of 1968²

2.24 In terms of section 13 of this ordinance, the Head of Department of Public Works, Roads and Transport of the Provincial Administration of the Free State may fence in or move or remove a fence alongside a public road provided that the width of a road thus fenced in shall not exceed the width prescribed for such road in the Ordinance.

2.25 Section 53 deals with animals on public roads and, *inter alia*, states:

- “(1) When an animal is on a public road, outspan, rest or road camp contrary to the provisions of this Ordinance or the Road Traffic Act, 1989 (Act 29 of 1989), or trespasses thereon, a traffic officer, as defined in section 1 of the last-mentioned Act, or any other person authorised thereto by the responsible Member, may impound such animal in accordance with the provisions of the Pound Ordinance, 1952 (Ordinance 18 of 1952): Provided that the prohibition contained in section 19 of the last-mentioned Ordinance shall not apply in connection with the impounding of such animal.**
- (2) Notwithstanding anything to the contrary contained in any Ordinance, the owner of land situated within eight meters of a public road shall not be entitled to impound an animal trespassing on such land or to claim compensation for damages caused by such animal on such land unless the land is properly fenced in.”**

The provinces of Mpumalanga, Gauteng, Northern Province and North West:

The Roads Ordinance 22 of 1957³

2.26 In terms of section 71 of the Ordinance no person shall without the written consent of the Administrator, erect a fence, gate or motorgrid on or across a public road. The Administrator may grant such consent in his discretion and subject to such conditions as he may deem necessary and he may at any time withdraw such consent.

2.27 In accordance with section 72 of the Ordinance the Administration only accepts responsibility for the erection and maintenance of fences, gates, etc. necessitated by deviations and new roads.

² As amended by the Roads Ordinance Amendment Act 17 of 1998. The administration of the whole of this Ordinance has under Proclamation 113 of 1994, published in Government Gazette 15813 of 17 June 1994, been assigned to the Free State Province with effect from 17 June 1994. The provisions of the Free State Land Administration Act 1 of 1998 do not apply to any matter regulated in this Ordinance.

³ The administration of the whole of this Ordinance has under Proclamation 114 of 1994, published in Government Gazette 15813, 17 June 1994, been assigned to the Province of Gauteng with effect from 17 June 1994.

2.28 In fact subsection (2) provides that:

“When the making of a new road or a deviation of an existing road necessitates the removal and re-erection of an existing fence or gate or motorgrid, such removal and re-erection and the making of by-passes leading to such grid shall be undertaken at the expense of the Province.”

2.29 Other than these provisions, the Ordinance does not specifically regulate the erection and maintenance of fences along public roads.

The Pounds Ordinance 13 of 1972

2.30 Section 22 of this Ordinance holds the owner of any stock found trespassing on any land liable to the owner of such land for any damage caused by such stock to any crop or fence on such land. There is no similar provision relating to liability which may arise if stock trespasses on roads.

The Province of Kwazulu-Natal: the Roads Ordinance 10 of 1968⁴ and the regulations relating to the control of roads and resting places

2.31 Section 71 of this Ordinance empowers the Administrator to make regulations in respect of permission relating to fences and the conditions subject to which fencing shall be permitted on main, district and by-roads.

2.32 Section 72 authorises the Administrator to make grants-in-aid towards the costs incurred in respect of the fencing of main roads as well as the maintenance of roads, other than main roads falling within the area of jurisdiction of a local authority.

2.33 In terms of section 24 of the regulations headed “*Fencing Alone Declared, Main and District Roads*” any person who wants to erect a fence along a declared, main or district road shall consult the Director of Roads,⁵ who shall indicate to her or him the boundary of the road reserve, and no fence shall be erected within such road reserve nor shall any fence be erected on the road reserve boundary in such a way as to interfere with existing road works.

⁴ The administration of the whole of this Ordinance has under Proclamation 107 of 1994, published in Government Gazette 15813 of 17 June 1994, been assigned to the Province of Kwazulu-Natal with effect from 17 June 1994.

⁵ Referred to in section 1 of the Director of Roads Designation Ordinance, 1974 (Ordinance 13 of 1974).

2.34 Should any person erect a fence along a declared, main or district road without having consulted the Director or otherwise in contravention of the Regulations, the Director may order the removal of the fence from the road reserve. The Director may also exercise his or her discretion in that he or she can grant written consent to the fence remaining in the position in which it has been erected, subject to conditions determined by the Director and set out in the consent.

2.35 The responsibility for the erection and maintenance of fences is as set out in Schedule E⁶ to the Road Traffic Regulations. The Administration bears the cost of the erection of fences. The adjoining landowner is responsible for the maintenance of such fences. Damage caused by a motor vehicle is repaired by the Administration if advised of such damage.

2.36 Should it be necessary to replace such fences, the administration is obliged to contribute 80% towards the cost of materials required.

2.37 The Director *may* undertake the maintenance of fences along district roads.⁷

2.38 In the case of by-roads, the District Road Advisory Committee, as established by the Administrator, has the power to determine, as between parties involved, by whom and in what proportion costs should be borne arising from the provision of fences and the maintenance of a by-road.⁸

Conclusion

2.39 The current legislative framework leaves the decision as to whether or not a specific road is to be fenced to the discretion of the relevant agency or administration. In other words, the relevant agency or administration has permissive powers in respect of the erecting fences. There is not even a specific obligation placed on the Agency to fence national roads.

⁶ Schedule E as substituted by P.N. 112/1987.

⁷ Section 38 of Ordinance 10 of 1968.

⁸ Section 42 (1)(e) and Section 47 of Ordinance 10 of 1968.

2.40 There is also a lack of uniformity in respect of who bears the responsibility for the cost of the erection of fences and furthermore in respect of the responsibility for maintenance, and the cost thereof, of fences along roads, national or provincial.

2.41 Furthermore the legislative provisions do not contain any express provisions on who is liable for damages incurred where animals stray on to public roads because of damaged or non-existent fencing.

2.42 It does not appear as if there are irreconcilable differences in the existing legislation.

2.43 The provincial ordinances of the Western Cape, Northern Cape, Eastern Cape and KwaZulu-Natal hold owners of land responsible for the maintenance of fences abutting public roads and the landowners are in control of the fences.

2.44 The provincial ordinances of the Northwest Provinces, Mpumalanga, Gauteng, Northern Province and the Free State do not explicitly deal with the question of who controls the fences abutting public roads and the question of control is determined on a case by case basis.

The current provincial road ordinances lack uniformity, but not only in respect of the fencing of public roads. Although in principle this may not be desirable, does this aspect alone necessarily warrant the attention of the legislator? Do conditions differ from province to province requiring the respective relevant agencies to exercise a discretion or should there be uniformity in respect of which roads should be fenced? Is there a need for uniformity in provinces in respect of which party bears the cost and absorbs the liability of the maintenance costs associated with fences along roads? Should this be distinguished depending on whether it is a national, provincial or local road? Also should this be borne solely by the relevant provincial government, the local authority or the national government? Or should this be a shared expense between owner or farmer on the one hand, and the relevant government organ on the other? Furthermore, should we not have regard to the how different provinces implement the existing ordinances?

3. THE PROBLEMS

Introduction

- 3.1 The problems were highlighted by the submission made by the South African Agricultural Union (SAAU) to the Commission.
- 3.2 Stock-farmers complain that fences along public roads are increasingly wilfully removed, damaged or destroyed, resulting in animals straying into the roads and causing accidents.
- 3.3 The fencing laws as set out in Chapter 2 reflect a lack of uniformity, This is regarded as the cause for a great deal of confusion and legal uncertainty – particularly in rural areas - in respect of liability in respect of broken fences.
- 3.4 The existing statutory provisions in respect of fences do not contain any express provisions on who is liable for damages caused when animals stray into public roads.
- 3.5 It is apparent that the following aspects are of vital concern to especially stock-farmers:
 - * Who is responsible for the erection of fences?
 - * Who is responsible for the maintenance of existing fences?
 - * Who is responsible for any damages incurred by animals straying into roads because fences are broken, damaged or destroyed?
- 3.6 Stock-farmers are also concerned about the various differing arrangements concerning the responsibility for the cost of erection and maintenance of fences.

The extent of the problem

- 3.7 The SAAU submits that stock-farmers are increasingly exposed to claims for damages arising from accidents caused by animals straying on to public roads and that the current legal position places an unduly heavy burden on stock-farmers which burden is exacerbated by the judicial system as the courts are currently more inclined to hold the stock-farmer responsible for such damages.

- 3.8 According to the legal opinion obtained by SAAU the person in control of the fence will ordinarily be held liable for damages incurred as a result of the fence being removed or being in disrepair and causing animals to wander into public roads.
- 3.9 There is currently no express provisions in national legislation or provincial ordinances relating to liability for damages caused by animals straying into public roads because of damaged fencing.
- 3.10 The SAAU submission primarily concentrates on the stock-farmers' possible *liability for damages* and the submission is made that the current legal position places an unduly heavy burden on farmers.

Are the farmers experiencing increasing claims for damages caused by broken or stolen fences? Is the owner of the farm more likely than not the person who is in control of the fence? Where the owner of the land is not in control of the fence, (does not farm the land) should the farmer be held liable for broken fences? In other words should there be a differentiation between the liability of the owner and that of the farmer?

- 3.11 Stock-farmers and landowners in KwaZulu-Natal enjoy some assistance from the local government as far as the erection of fences along *provincial main roads* and the maintenance thereof is concerned.
- 3.12 Generally, in instances where fencing is wilfully removed or damaged, the landowner - be it for example a municipality or a stock-farmer - bears the responsibility to repair such fencing. This appears to be the position in the whole of the Republic.
- 3.13 However, as will be discussed *infra*, in the absence of legislation, the questions are regulated by the common law. The courts take cognisance of all the facts and circumstances of a specific case and have established the principle that the person in **control** of the fence is obliged to repair and maintain a fence.

Would each and every public road require fencing? What should the criteria be to exempt certain roads from being fenced? Is control synonymous with ownership or should it mean factual control?

The legal duty to erect a fence along a public road: the position in common law with reference to reported judgments

3.14 A legal duty to erect and maintain fences may be established by circumstances.

3.15 In Moubray v Syfret 1935 AD 199 at 202 it has been held:

"(T)hat in order to determine whether in a particular case there was or was not negligence, we must take into account all the surrounding circumstances, time, place, custom, local habits, as well as the special and peculiar facts of the case."

3.16 In R v Venter 1959 (2) SA 520 (E) at 525 the court considered the English law and after having regard to the authorities concluded that in English law a landowner is under no duty to maintain a fence to prevent his or her animals from straying on the road: nor can he or she be held liable if cattle are negligently allowed to stray on the highway and there collide with a vehicle.⁹

3.17 The court further relied on the following passages in Searle v Wallbank 1947 A.C. 341 at 356:

"Much if not most of our country was unfenced, and indeed a not unsubstantial portion still is, and passers along the highway had to take it as they found it and run such risks of traffic as are inevitably imposed on those who use it. They too must take reasonable care to avoid what they find on the road, and the obligations of the owners of beasts or the users of the highway are not, in my view, altered by an increase in the fencing of the country or by an increase in the speed of traffic."

And further at 361:

"The truth is that, at least on country roads and in market towns, users of the highway, including cyclists and motorists, must be prepared to meet from time to time a stray horse or cow just as they must expect to encounter a herd of cattle in the care of a drover. An underlying principle of the law of the highway is that all those using the highway,

⁹ Charlesworth on Negligence, 3rd ed. paras. 190 and 191; Mazengarb, Negligence on the Highway, 3rd ed. pp. 72 - 73; Heath's Garage Ltd v Hodges, 1916 (2) K.B. 370; Searle v. C Wallbank, 1947 A.C. 341; Brook v Richards, 1951 (1) K.B. 529; Wright v Callwood, 1950 (2) K.B. 515 as cited in R v Venter *supra*.

or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the farmer's cattle: the farmer must endure the motorist.”

3.18 In Brook v Richards 1951 (1) K.B. 529 at 534 the court stated:

"It must now be taken to be clearly established that there is no obligation upon the owner or occupier of a field adjacent to a highway to maintain a fence on the border of a highway. And it is clear, in my judgment, that the law is founded upon our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of fields and highway, the nature of the highway, or the amount of traffic upon it.'in the absence of statutory provisions the owner of a farm is under no obligation to erect fences along a public road on his property.”

3.19 The following passage from the judgment of Chief Justice Wessels in Moubray v Syfret (supra) has often been referred to:¹⁰

“Prima facie the owner of a farm is entitled to allow his cattle to roam over his farm, so that at times they may be found straying on the public road. In a country where cattle ranching is an important industry we must see that we do not make it intolerable for the owner by imposing upon him unnecessarily onerous conditions, and we must assume that persons, who use public roads running through cattle farms, are acquainted with the ordinary conditions appertaining to such farms. In other words, that a person who uses a public road passing over a cattle farm will know that he may encounter cattle on the roadand if he is a motorist he must act prudently and not disregard the obvious customs and habits of the country. On the other hand the owner of cattle which are apt to stray on a public road must use reasonable care to see that he does not on his farm expose the travelling public to dangers from his cattle which he ought both to foresee and to avoid.”

3.20 In Van der Merwe v Austin 1965 (1) SA 43 (T) the court held that the owner of the farm in a cattle area through which a national road runs and where it can be expected that cattle could be found on and along the road has no obligation towards traffic in respect of any of his horses which may for no reason run across the road in an unusual manner.

3.21 In Van der Merwe supra at 47C-D the court held:

¹⁰ See also Botes v Van Deventer 1966 (3) SA 182 (A) at 188H; Van der Merwe v Austin 1965 (1) SA 43 at 47F.

“Daar bestaan geen wetgewing, sover as wat ek kon vasstel, wat 'n boer verplig om die nasionale pad oor sy grond af te kamp nie. In die Transvaal kom so 'n plig alleen totstand waar die Administrateur in terme van art. 77 van die Padordinansie, 22 van 1957, optree.”

- 3.22 In **S v Kasselmann 1977 (3) SA 1064 (T)** the appellant was convicted of contravening section 125 (1) of the Road Traffic Ordinance No. 21 of 1966 (T) Section 125 (1) provides:

"Subject to the provisions of sub-sec. (2), no person shall leave or allow any bovine animal, horse, ass, mule, sheep, goat, pig or ostrich to be on any section of a public road where that section is fenced or in any other manner enclosed along, both sides, and no person shall leave such animal or ostrich in a place from where it may stray onto any such section of a public road."

- 3.23 In **Kasselmann supra** at 1064 the court held that the effect of the use of the words "*leave*" and "*allow*" was to make applicable the test of reasonableness. Thus in order to find a conviction it must be shown that the farmer acted negligently. In terms of the Ordinance however the onus of disproving such negligence rests on the farmer.

- 3.24 In **Coreejes v Carnarvom Munisipaliteit en 'n ander 1964 (2) SA 454 (C)** the court held that where the owner of a farm erected a wire fence alongside a public road the duty vests in the owner of that fence to see that the fence is effective in so far as this can reasonably be achieved. Thus where the fence is damaged or broken and animals enter the road causing road accidents the owner of the fence is negligent and bears the liability for the damage caused. The owner has to take all reasonable steps to ensure that the fence serves the purpose for which it was erected. The court held further:

"Doen hy dit nie, dan skep hy 'n wanindruk by die publiek wat daardie pad gebruik; die publiek wat die pad gebruik en sien dat dit omhein is, is geregtig om aan te neem dat dit doeltreffend omhein is in soverre dit deur 'n redelike versigtige man gedoen sou word."

- 3.25 The court in **Coreejes supra** further considered that the factors which should be taken into account would change from time to time and place to place with regard to all the circumstances in the case, in particular the road, the area, where the collision

occurred, the kind of animal involved in the accident and the distance of the fence from the roads.¹¹

- 3.26 In **Jamneck v Wagener 1993 (2) SA 54 (C)** the full bench of the Cape Provincial Division held the person who was in control of a fence (but not the owner of either the fence or the animal which caused the damage) liable in an action for damages sustained when a horse strayed through a damaged fence into a public road causing an accident.
- 3.27 The court found on the facts that the person who exercised control over the fence, in the circumstances of this case, had a legal duty towards road users to take such steps as were necessary and *reasonably possible* to maintain the fence in such a condition that it would fulfil its function of keeping animals grazing on the leased property out of the road.

¹¹ at 458A-C.

4. CONCLUSIONS

- 4.1 A public road is fenced to protect users of the road as well as livestock. It is obviously not only stock-farmers who benefit from such a fence.
- 4.2 The person in control of a fence is ordinarily regarded as the person responsible for the maintenance of the fence.
- 4.3 It is important to remember that modern traffic conditions, the customs and habits of the country, the expectations and perceptions of the modern motorist, the motorist's knowledge of prevailing farming conditions and modern considerations of policy may well have changed dramatically since 1935.
- 4.4 The common law raises the question whether a legal duty to erect a fence should in fact be established by circumstances (location, farming activity, whether a danger is created etc) which would dictate that a farmer should clearly be obliged to ensure that his activities do not create a new danger or source of danger.¹²

Would this require legislation and if so, does it have to be uniform legislation throughout the country or should the substance of the legislation be dictated by regional considerations?

- 4.5 In **Botes v Van Deventer 1966 (3) SA 182 (A)** the defendant submitted that the owner of the farm (plaintiff) could have fenced the road, thereby protecting both his horses and users of the public road. In dealing with this contention, Van Blerk JA remarked as follows at 189H:

“Of dit redelikerwys van eiser verwag kon word om enigeen van die hierbo genoemde stappe te neem hang af van die besondere omstandighede van die geval. Eiser het verduidelik dat hy nie die perde snags in een van sy ander kampe kon jaag nie want die ander kampe was kaal gewei, en as die swaardragtige merries na 'n kaal geweide kamp verskuif word sal dit, soos hy dit uitdruk, 100 persent nadelig wees vir die diere. Wat die afkamping van die pad betref sou dit 'n onbegonne taak wees om dit aan te durf vanweë al die draaie en hoeke in die pad. Wat meer is, 'n verlegging en herbelyning van die pad was destyds al 'n uitgemaakte saak. Nie alleen sou 'n afkamping van die pad vanweë die onkoste verbonde daaraan nie redelikerwys van eiser

¹² In **Rabie v Kimberley Munisipaliteit 1991 (4) SA 243 (NC)** the local authority by its failure to properly investigate problems in a traffic light system, was held to have created a dangerous situation for road users, resulting in an accident and responsibility for damages to a vehicle.

verwag kan word nie, maar sou dié maatreël des te meer onredelik wees omdat dit slegs van tydelike nut sal wees.”

- 4.6 It is apparent that a court will only find that a legal duty to fence a specific road exists after careful consideration of all the relevant facts and circumstances. Depending on the facts and circumstances, a court may therefore rule that either the landowner or the relevant authority is obliged to erect a fence along a public road.
- 4.7 Therefore, it may well be undesirable and difficult to impose a general statutory obligation on either landowners or the authorities to erect fences along public roads.
- 4.8 From the **Jamneck** case *supra* it is apparent that the court did not consider that the legal duty to maintain a fence in a reasonable condition was an unduly onerous duty.
- 4.9 It is also apparent that the onus which generally rests on the farmer/owner/tenant to prove that he or she was not negligent in maintaining the fence is not a particularly onerous burden. The plaintiff on the other hand would have to prove that the animal was on the road; that the fence was damaged; that the specific animal probably strayed through the damaged fence into the road and that the farmer/owner/tenant was in fact in control of the fence. Furthermore, the plaintiff will have to show that the damage to the fence was of such a nature that the farmer/owner/tenant should have been aware of the damage had he or she inspected the fence properly or regularly.
- 4.10 Thus, if the farmer/owner/tenant is able to place evidence before the court regarding the manner in which he or she had attempted to comply with this duty and the court is satisfied that he or she had taken reasonable steps in this regard, the plaintiff's claim will fail.

Would the farmer/owner/tenant not fulfil his or her legal duty if he or she periodically inspected the fence and repaired damaged sections? What about areas where there are no fences? Who should erect them? The local, provincial or national authorities or the person in control of the land? Or are they not required? In light of the foregoing does the common law in respect of liability and the legal duty imposed on a person in control of the fence impose an unduly onerous burden on such a person?

- 4.11 Legislation regulating the fencing of *national* roads may have very little impact on the position of stock-farmers. The vast majority of public roads are not national or even provincial main roads.
- 4.12 The extent and exact nature of the problem from the perspective of stock-farmers and the SAAU is unfortunately not clear. The contention that the courts are currently more inclined to hold the stock-farmer responsible for such damages is not borne out by the reported case law.
- 4.13 It is also unclear how changes to the national legislation in respect of national roads will in any way alleviate the problem.
- 4.14 It may well be that the primary concern is about the financial implications of the maintenance of existing fences, rather than the liability which arises from accidents which occur as a result of animals straying into roads. The extent of the financial implications is not known.

Why should the government (provincial or national) bear the costs of erection and maintenance of fencing and by implication be liable for damages arising from damaged and broken fencing?

5. THE WAY AHEAD: ISSUES AND OPTIONS TO BE DECIDED

- 5.1 Is this really a matter upon which uniform national legislation is required? Should the national legislature be proposing guidelines for provinces to adopt or propose draft provincial legislation, if at all?
- 5.2 The current legal principles and position pertaining to *the liability of the person in control* of an existing fence do not appear to require the attention of the legislator as generally speaking, in the absence of express statutory provisions, the landowner or occupier of land adjoining public roads will in any event be held responsible for the maintenance of existing fences.
- 5.3 Is it practical or feasible to impose a statutory duty to maintain a fence on any person or body other than the adjoining landowner or occupier?
- 5.4 In Kwazulu-Natal, the administration is obliged to make a contribution to the costs of such maintenance to fences in respect of certain roads and under certain conditions. Is this a feasible example which should be followed nationally?
- 5.5 As far as national roads are concerned, it is certainly possible for the legislator to impose similar duties on the Agency.
- 5.6 Whether it is necessary or even desirable for the legislator to impose a statutory duty on any person or authority to erect fences, is debatable.
- 5.7 The Agency as well as the relevant provincial department, currently enjoy a discretion to erect fences. Whether it is necessary for the legislator to provide guidelines for the exercise of this discretion, is debatable.
- 5.8 Possibly the Agency should pass regulations relating to the responsibilities which it will perform in respect of fences pursuant to section 26 of the National Roads Act.
- 5.9 Similar regulations from the respective provincial administrations could better address the problems complained of.
- 5.10 Clearly, financial considerations are of importance, and any discussions on possible legislation will primarily relate to financial implications. Information in this regard will be indispensable.