FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**:**

Dankbaar Safari (Pty) Ltd **APPLICANT**

and

Zillen Adolph John Beukes **RESPONDENT**

21. Case Number**: 855/2007**

22. High Court**: SOUTH EASTERN CAPE LOCAL DIVISION**

23. DATE HEARD: 1/11/2007

DATE DELIVERED: **24/07/2008**

JUDGE(S): **NEPGEN J**

LEGAL REPRESENTATIVES –

Appearances:

1) For the Applicant(s): **MR A R VAN DER MERWE**
2) for the Respondent(s): **MR B KNOETZE S.C**

Instructing attorneys:

286 Appellant(s): **MR HUXTABLE (Wheeldon Rushmere & Cole)**
287 Respondent(s): **MR POWERS (Borman & Botha**)

CASE INFORMATION -

25. *Nature of proceedings* : ***Civil Matter***
26. Topic:
27. *Key Words:*

FORM A

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No: 855/2007

In the matter between:

DANKBAAR SAFARI (PTY) LTD Applicant

and

ZILLEN ADOLPH JOHN BEUKES Respondent

JUDGMENT

NEPGEN, J :

[1] Many cases involving disputes between the occupiers of neighbouring farm properties are reported in our law reports. This is yet another of those cases. The farm properties in question are situated in the Colesburg/Venterstad area. Although this was initially disputed, it can be accepted that the applicant occupies the farm property known as "*Dankbaa*" as a tenant in terms of a written agreement concluded between it and the owner of the farm. The respondent is the owner and occupier of the farm property known as "*Nooitgedaght 58-Remainder" (Nooitgedaght*). These two farm properties are adjacent to each other. The natural boundary between the two farms is the Suurberg Creek, with Dankbaar being on the west of this creek and Nooitgedaght to the east thereof.

[2] At some stage in the past previous owners of the two farms concluded an agreement in order to provide for access to the Suurberg Creek, which resulted in the erection between the properties of a fence over the Suurberg Creek. This fence is a "give-and-take line" in terms of section 16 of the Fencing Act, No 31 of 1963 (the Act). Accordingly, the give-and-take line is deemed to be the

boundary line between the two farms "for the purposes of" the Act. It does not otherwise affect the titles to these properties. The give-and-take line is therefore in effect a boundary fence, separating the two farms.

[3] At a certain point along the Suurberg Creek, where it flows between the two farms, a weir, consisting of a stone wall that was constructed with a square opening through which water could flow, was constructed. Precisely when this weir was constructed is not known, but what is clear is that it has been there for a very long time. I state this on the basis of the allegation made in the answering affidavit by the respondent's father (who was born during 1938), that the weir was in existence when he first visited *Nooitgedacht*as a child. Inside the stone wall forming the weir a metal plate has been fitted which, when it is down, obstructs the flow of water through the square opening. However, this metal plate can be "cranked" up and down to open and close the weir. It can also be opened to a certain level, thus controlling the amount of water that will flow through. If the flow of water in the Suurberg Creek is in excess of that which can be dammed in the weir, it is channelled back into the creek as a result of flow occurring over the left bank of the weir. The Suurberg Creek does not have a constant flow of water. Apparently such flow occurs on a very limited basis. However, when there is a flow of water it dams up behind the wall of the weir. The respondent has referred to this as a reservoir ("opgaardam"), but the applicant disputes that the purpose of the weir is to allow water to be stored behind it. Be that as it may, as has been mentioned, the amount of water that is then allowed to pass through the creek can be controlled by means of the metal plate. Obviously such flow as does take place occurs in the channel of the creek.

[4] The relief sought by the applicant in this matter is couched in the following terms in the notice of motion:

> "1. That the Respondent and any of his family or employees, or any other person associated with or instructed by the Respondent, be interdicted from:

1.1 Crossing over the give-and-take fence erected between the property being leased by the Applicant and the property of the Respondent;

1.2 Damaging or interfering with the Game Fence erected by the Applicant on the Applicant's side of the give-and-take fence erected between the property being leased by the Applicant and the property of the Respondent;

1.3 Affect (sic) any damage to the soil, ground surface or the channel in any way whatsoever, on the Applicant's side of the give-and-take fence.

2. Costs of this application."

[5] In order to appreciate properly the basis upon which the Applicant contends that it is entitled to the relief it seeks, it is convenient to reproduce the allegations in the founding affidavit (I shall refer only to those paragraphs that I consider relevant). These allegations read as follows:

"15. Notwithstanding the aforesaid give-and-take line being in place, effectively constituting a boundary fence, the Respondent on or about 20th of February 2007, entered onto the property being controlled by the Applicant and on it's side of the give-and-take line and conducted certain earthworks in the Suurberg Creek on the Applicant's side of the give-and-take line.

16. In the process the Respondent damaged and altered the contours and ground surface of the farmland on the Applicant's side of the give-and-take line, and furthermore damaged the ecosystem as well as the game fence that was erected by the Applicant on it's side of the give-and-take line.

17. On our about the 22nd of February 2007 the Applicant's Attorney of Record required an undertaking from the Respondent that he will not cross over or enter into the property situated on the Applicant's side of the give-and-take line (boundary fence). A copy of the request is annexed hereto and marked as Annexure "B".

18. On our about 22nd February 2007 the Respondents Attorney of Record replied and relied on the fact that the portion of the property where the Respondent entered onto was still the registered property of the Respondent and therefore the Respondent was entitled to enter onto and effect construction on the aforesaid property. A copy of the reply is annexed to hereto and marked as Annexure "C".

19. It is respectfully submitted that the conduct of the Respondent, notwithstanding that it is admitted that the boundary fence between the property being leased by the Applicant and that of the Respondent is a give-and-take line, ignores the rights being derived from the fact that it is a boundary fence in terms of the Fencing Act.

21. It is respectfully submitted that the conduct of the Respondent by entering onto, across the give-and-take line and damaging the Applicant's game fences in the process and effecting construction work in the Suurberg Creek and refusing to give an undertaking that he will desist from doing this in future is a clear indication that the Applicant will suffer irreparable harm should the

Honourable Court not grant the order being sought, as it is clear that the Respondent is under the impression that he is entitled to cross over the give-and-take line and perform any construction and/ or damage any of the game fences erected by the Applicant on it's side of the give-and-take line because he is still the registered owner of the portion of the property on the Applicant's side of the give-and-take line.

22. Even though a criminal charge was laid against the Respondent for damaging the game fences in terms of the Fencing Act, the Applicant has no effective remedy at it's disposal to prevent the Respondent from crossing the give-and-take line and entering onto the property on the Applicant's side of the the give-and-take line and damaging the game fence that it erected on its side of the give-and-take line and/or effect construction in the Suurberg Creek situated on the Applicant's side of the give-and-take line (boundary fence).

23. It is respectfully submitted that the Applicant has a clear right to effectively control the portion of the land on it's side of the give-and-take line and that the Respondent not be allowed to cross over the give-and-take line, as the give-and-take line is accepted to be a boundary fence in terms of the Fencing Act

25. It is respectfully submitted that the Respondent damaged and altered the ground surface and the eco sensitive area of the Suurberg Creek. The Respondent also damaged the Applicant's game fence. I also annex hereto photographs 1 to 14 as confirmation of the damage the Respondent affected in respect of the fence and in respect of the land situated on the Applicant's side of the give-and-take line."

The photographs referred to in paragraph 25 of the founding affidavit were not annexed thereto. However, they were subsequently made available to the respondent's attorneys and have been annexed to the applicant's replying affidavit.

[6] The letter, which is annexure "B" to the founding affidavit, was apparently written on behalf of one C J Rothmann, who is presumably the owner of *Dankbaar*and the person who concluded the lease agreement with the applicant. In that letter it is recorded that unauthorised access was gained to Rothmann's property "by physically cutting the boundary game fencing", thereby allowing a tractor and other earthmoving machinery onto Rothmann's property. It is further stated that earthworks were carried out without consent or authorisation and that this "affected a great deal of damage to the extremely sensitive ecosystem". It goes on to advise that criminal charges have been laid against the respondent (although it is not exactly clear from the letter to whom reference is being

made where there is mention of "your client").s A demand is then made in the letter for a written undertaking not to cause any further damage to Rothmann's property; not to attempt to gain access to that property in any way whatsoever; and to furnish an unconditional acceptance of financial responsibility for all steps required to be taken by Rothmann "to rectify the damage and unlawful earthmoving your client has occasioned, including the damage to the boundary fence". This undertaking was requested by no later than midday on the day following the date of the letter, with litigation being threatened in the event of such undertaking not being received.

[7] The letter, Annexure "C" to the founding affidavit, records that the respondent did not proceed onto Rothmann's property and was merely on his own property. It then goes on to refer to the existence of the give-and-take line and the fact that this does not affect ownership of any property on either side of such give-and-take line. This letter concludes by stating that the writer will not react to the contents of the letter written on behalf of Rothmann but that any action that might be instituted will be opposed.

[8] A summary of the basis upon which the applicant alleges that it is entitled to the relief it seeks is to be found in paragraph 21 of the founding affidavit, which appears under the heading "REASONALBE APPREHENSION OF IRREPARABLE HARM". Noteworthy earlier allegations (in paragraph 16 of the founding affidavit) are that the contours and ground surface of the "farmland" were damaged and altered; and that the ecosystem and game fence were damaged. Of significance is that no detail was furnished of the damage allegedly caused. There was also no allegation that any consequential harm would flow from the damage to the ground and/or game fence. In addition to all this, the applicant gave no indication whatsoever why the alleged damage and/or alternation to the contours and surface of the ground and the ecosystem caused it any harm, bearing in mind that it is a tenant. There is not even a suggestion that this has in any way interfered

with any activity it carries out on the property.

[9] The respondents answering affidavit was deposed to by the respondent's father (Beukes), the respondent having being in the United States of America at the time. In this answering affidavit there is reference to a considerable amount of history relating to the farm properties and other farms. There is also reference to various agreements, including an agreement concluded during August 2001 between Rothmann on the one hand and the respondent and Beukes on the other hand. Reference is then made to correspondence between the parties' attorneys. While it is to an extent understandable that it could have been thought that all the aforegoing would be relevant to the issues with which I have to deal, it has unfortunately elicited a response in the replying affidavit which has given rise to a substantial dispute of fact. However, although the disputed issues are aspects which the parties may like to have resolved, I consider that this application can be disposed of without attempting to resolve any disputes and / or to deal with any of the issues that arise in that regard.

[10] The response of the respondent in relation to the allegations as to what occurred on 20 February 2007 must now be considered. After referring to the history mentioned above and to certain correspondence which passed between attorneys acting for the parties, Beukes avers that he and the respondent, after a consultation with their attorney, cleaned the canal in the Suurberg Creek by removing silt and plants therefrom. After stating that they were unable to clean the area above the weir (as mentioned there is a dispute as to whether this operates as a reservoir or whether the water merely dams up there) because the terrain was too wet, the following is stated in paragraphs 32 and 33 of the answering affidavit;

> "32.1 Op **20 Februarie 2007**, en omdat Rothmann strydig met die ooreenkoms 'n hek in die wildheining gemaak het wat nie groot genoeg was om 'n trekker met implemente deur te laat nie, het ek en Zillen onder deur die wildheining toegang tot die kanaal gekry. Wat ons gedoen het, was om die beweegbare mat in die kanaal wat met 'n bout en moer vasgemaak is, en wat bedoel is om die kanaal ondeurdringbaar vir wild

en vee te maak, aan die een kant los te maak en te skuif tot op die oorkantste wal.

32.2 As gevolg van die slik in die kanaal was die vrye hoogte toe egter nog steeds te min om ‘n trekker met bestuurder deur te laat en het ons die onderste vier drade van die wildheining losgemaak en opgelig sodat die trekkers kon deurkom. Daarna het ons, soos by vorige geleenthede, die slik uit die kanaal verwyder met behulp van die trekkers en die implemente wat daaraan gekoppel is. Na my skatting het ons ongeveer 37 kubieke meter slik uit die kanaal verwyder. Dit is rofweg ongeveer 44.4 ton slik.

32.3 Die helfte van die slik wat ons verwyder het, het ons soos voorheen naby die keerwal op ‘n hoop gegooi, en die ander helfte op *Nooitgedacht*. Die hoop slik wat naby die keerwal geplaas is, het ons, soos ons gevorder het, ook plat gestoot om dit netjies te maak. Deur dit te doen het ons geen ekologiese skade op die grond aangerig nie aangesien die plek waar ons daardie slik geplaas het, slegs begroei is met, onder andere, blou-dissels, Skotse-dissels, kakiebos, duwweltjies en ‘n verskeidenheid eenjarige grasse wat in daardie area voorkom. Dit dien vermeld te word dat behalwe vir die grasse, die voormelde plante almal ongewens is.

33. Die voormelde werk is in een dag afgehandel en daarna het ons die voormelde mat weer in posisie geplaas en styf gespan soos wat dit was voordat ons dit los gemaak het. Nadat ons daarmee klaar was, was die heining weer wildwerend soos wat dit was voordat ons met die voormelde werk begin het. Dit dien verder vermeld te word dat die mat se bokant ongeveer 1.7 meter bokant die normale grondvlak is, en dat dit dus ongeveer 1.7 meter bokant die onderste drade van die wildheining is. Verder is die mat ook wyer as die kanaal en steek dit ongeveer 2 1/2 meter weerskante by die kanaal verby.”

[11] In reply to the general allegations contained in paragraph 16 of the founding affidavit, the following is stated;

“52.1 Ek ontken dat ek en Zillen die kontoere en grondoppervlak aan die *Dankbaar*kant van die akkoordlyn verander of beskadig het.

52.2 Ek ontken voorts ook dat ons in die proses die ekosisteem en die wildheining beskadig het.

52.3 Die aard en omvang van ons aktiwiteite is reeds hierbo volledig uiteengesit en die bogenoemde Agbare Hof word eerbiedig daarna verwys.”

The respondent has denied that the applicant suffered or could suffer irreparable damage, with it being pointed out that it is significant that no attempt was made to describe the nature and extent of the alleged irreparable damage. The following allegations then appear in paragraph 56 of the answering affidavit:

“56.3 Soos reeds hierbo aangedui is, het ek en Zillen nadat ons die instandhoudingswerk op

> 20 February 2007 afgehandel het die betrokke wildwerende mat weer in posisie geplaas en styf gespan. Daarna kon geen wild wat bedoel is om deur die heining ingeperk te word, vanweë ons aktiwiteit uit *Dankbaar*ontsnap nie.

56.4 Voorts ontken ek, soos reeds hierbo aangedui is, dat ek en Zillen enige skade aan die ekologie veroorsaak het. Die slik wat ons aan *Dankbaar* kant van die akoordlyn gegooi het, is gedoen op 'n plek waar daar, soos reeds hierbo aangedui is, hoofsaaklik ongewenste plante gegroei het. Ons het ook die hoop platgestoot."

[12] It will be noted from the aforegoing that in contrast to the very general allegations made by the applicant, the respondent has furnished details of precisely what was done on 20 February 2007 and why he contends that this caused no harm to the applicant. The applicant's counsel referred to the fact that in the founding affidavit there was reference to the photographs (which had *per incuriam*not been annexed), submitting that the damage relied upon by the applicant was apparent from these photographs and that the respondent's denial was accordingly unacceptable. I am unable to agree. The photographs were merely referred to in paragraph 25 of the founding affidavit without any explanation having been furnished as to what they allegedly depict. It is quite impossible for me, merely by looking at the photographs, to determine that they indicate that actual damage was caused to either the property or the game fence. In the replying papers some attempt has been made to salvage the situation insofar as the photographs are concerned by specifying the damage some photographs allegedly depict. This has been done, not only by annexing the original 14 photographs referred to, but by referring to 6 other photographs. Despite this having been done, I remain unable to conclude that they indicate the damage contended for by the applicant. In any event, all this should have been dealt with in the founding papers.

[13] The replying papers also seek to elaborate on the alleged nature of the harm caused to the applicant. In reply to a denial by Beukes (in paragraph 56.1 of the answering affidavit) that any conduct by him or the respondent indicates that irreparable harm could be caused to the applicant or Rothmann, the following allegations are to be found in the replying affidavit:

"285 It is respectfully submitted that the respondent ignores the fact that he damaged the game fence when he knows that I have sheep presently on my farm and that the sheep can very easily walk through the channel underneath the damaged game fence.

288 If this happens and the sheep are lost, how am I going to prove that the sheep wandered through the hole in the game fence and then went missing as is the case with various sheep that I have already lost and cannot explain where they went.

289 The question is, how am I going to recover these damages?

290 It is consequently respectfully submitted that the respondent and Beukes's conduct clearly has the consequence and/or potential of irreparable harm."

There are numerous other instances of allegations, which in my view should have been made in the founding papers, being made for the first time in the replying affidavit. Not surprisingly, this led to an application to strike out. At this stage I can mention that applicant's counsel did not dispute that much of the matter complained of should have been raised in the founding affidavit, being content to resist the application on the basis that it had not been alleged nor shown that there was any prejudice to the respondent. In my view it is unnecessary to consider the application to strike out in any detail, and all that really requires to be considered are the costs involved in connection therewith. My reason for this approach is that there is nothing which is raised in the replying affidavit which detracts from the essential dispute that exists, which is whether or not the actions of the respondent on 20 February 2007 have caused or are likely to cause the applicant irreparable harm.

[14] The applicant seeks final relief in motion proceedings. The approach to be adopted in such a case is well settled. Where there is a dispute of fact, as in the present instance, final relief should only be granted if this is justified on the basis of the facts stated by the respondent and those stated by the applicant which are not disputed. This general rule is subject to the qualifications referred to in ***Plascon-Evans Paints Limited vs Van Riebeeck Paints (Pty) Ltd*** ,(3) SA 623 (AD) at 634 E-635 C. This is not a case where it can be said that the respondent's version, which has been furnished in reply to the very general allegations made by the applicant, can be rejected because that version is so far-fetched or clearly untenable (see ***Fakie NO vs CCII Systems (Pty) Ltd***, 2006 (4) SA 326 (SCA) at 347 F – 348 C). This leads to the inevitable conclusion that one of the requisites for a final

interdict, namely that an injury has actually been committed or is reasonably apprehended, has not being satisfied.

[15] No doubt aware of the difficulties facing the applicant in connection with the aforegoing, the applicant's counsel's main contention (or so it appeared to me) was that an interdict could be obtained even if no injury, in the sense in which this word is used, had been caused or is likely to be caused. It was submitted that if it was established that there was an infringement of a right which the applicant had, the applicant would be entitled to an interdict. In this regard, so it was argued, the provisions of section 18 of the Act were applicable. Applicants counsel contended that section 18 (1) of the Act provided for a person to have access to land under certain circumstances, whereas subsection (2) limited such right of access. What was ultimately contended was that the conduct of the respondent, on his own admission, in removing vegetation on the applicant's side of the give-and-take line amounted to something which was unauthorised by virtue of the provisions of section 18 of the Act; that it therefore infringed upon the rights of the applicant; and that an interdict should accordingly be granted.

[16] Section 18 of the Act reads as follows:

> "(1) Any person erecting, converting, altering or repairing any boundary fence, whether under this Act or otherwise, shall at all times have access to any land for himself and his servants, implements, materials, animals and vehicles for the purpose of carrying out the work reasonably required therefor.
> (2) Nothing in subsection (1) contained shall authorize the entry, without the consent of the occupier, upon land under cultivation or any garden, plantation, orchard of pleasure ground, or the cutting down, lopping or damaging of any fruit tree, ornamental tree or shrub."

[17] In my view there are many reasons why the contentions advanced on behalf of the applicant in relation to section 18 of the Act cannot be upheld. In the first place, section 18 (1) deals with the situation where work of some type is to be done in connection with a boundary fence. That is not

what occurred in the present instance. There is no suggestion that the give-and-take line, which is the boundary fence for purposes of the Act, was in any way dealt with. The fence that was dealt with was the game fence, which, so it is alleged in the founding affidavit, was erected on the applicant's side of the give-and-take line. Although there is reference, in the letter that is annexure "B" to the founding affidavit, to "the boundary game fencing", this is not contended to be the position in the founding affidavit. Section 18 of the Act accordingly has no application to the facts presently under consideration.

[18] However, even if it could be said that the respondent, in doing what it did on 20 February 2007, was entitled to have access to the property occupied by the applicant by virtue of the provisions of section 18 (1) of the Act, I do not agree with the applicant's counsel that the provisions of subsection (2) are of application in the present matter. In this regard it was contended that the effect of this subsection was to forbid, without the consent of the occupier, the "cutting down, lopping, or damaging" of any vegetation. The argument proceeded that by his own admission the respondent had cut down or damaged the vegetation referred to in the answering affidavit. What was contended was that the reference to "shrub" in section 18 (2) of the Act included such vegetation. In this regard I was referred to dictionary definitions of the word "shrub". I do not consider this to be of any assistance. It seems to me to be quite clear that what is intended by the subsection is to prevent (or, as the applicant would have it, forbid) the causing of damage to a certain species of plants, but more particularly plants that had either been planted or preserved in a specific area for a specific purpose. If the word "shrub" was tended to encompass all vegetation it would have quite unnecessary to refer to a fruit tree and/or ornamental tree. I do not accept for one moment that it was intended to include all vegetation, including weeds and other undesirable vegetation.

[19] The application must accordingly fail. Costs must follow the result. In my judgment such cost

should include the costs associated with the application to strike out. My reason for such conclusion is that the application would have succeeded, at least to some extent (for example the introduction, in the replying affidavit, of the disappearing sheep referred to above), and that this would have justified a cost order in the respondent's favour.

[20] The order that I make is that the application is dismissed with costs, which costs are to include the costs associated the application to strike out.

J J NEPGEN
JUDGE OF THE HIGH COURT