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Fencing Act, 1904

Act 7 of 1904

Legislation as at 1 December 1998

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Fencing Act, 1904

Act 7 of 1904

Commenced on 30 January 1904

[This is the version of this document at 1 December 1998.]

An Act to regulate the erection and maintenance of dividing fences.

Part I – Preliminary

1. Short title

This Act may be cited as the Fencing Act, 1904.

2. Interpretation

In this Act, unless the context otherwise requires—

“**dividing fence**” means a fence separating the lands of adjoining owners, of specifications which such owners may agree upon or, in the event of disagreement, which may be settled by the District Commissioner, situate either along or close to the surveyed line of common boundary;

“**fence**” means a substantial stock proof fence, with gates at places where it crosses public or private roads, and suitable appliances where it crosses other obstacles, and any such fence shall be deemed to be a sufficient fence within the meaning of the Stock Theft Act, [No. 6 of 1904](#);

“**Minister**” means the Minister for Agriculture;

“**owner**” except for the purposes of [section 3](#), includes—

- (a) the person registered as the owner of land in the office of the Registrar of Deeds;
- (b) the grantee or lessee of Government land, under any law relating to Government land;
- (c) the Minister in respect of any Government land on which indigenous timber, within the meaning of the Forest Preservation Act, [No. 14 of 1910](#) is growing;
- (d) in relation to land set apart under the Concessions Partition Act, [No. 28 of 1907](#) or any other law for the sole and exclusive use and occupation of the Swazi people, the duly appointed chief in respect of the area in which such land is situated; and in relation to Land Registered in the name of the Ngwenyama and held in trust by him for the Swazi nation, the Ngwenyama;
- (e) in relation to any land in a township or urban area, the duly appointed local authority for such township or area.

Part II – Proclaimed areas

3. Application

- (1) The provisions of this Part shall be in force in any district to which the Minister, by notice in the *Gazette*, may apply them; but no such notice shall issue unless and until the resolution mentioned in subsection (7) shall have been carried in such district.
- (2) The District Commissioner shall convene a public meeting of all owners of land in his district registered in the Land Register kept in his office and not included within any township or urban

area, when requested to do so by not less than ten of such owners, to determine whether this Part shall be applied to such district.

- (3) Such meeting shall be held at the headquarters of the District Commissioner, or at such other convenient place in the district as he may appoint.
- (4) The notice convening such meeting shall be published by the District Commissioner in the *Gazette*, and in some newspaper circulating in the district, for a period of at least thirty days prior to the date for which such meeting is convened, and shall also be affixed to the door of the building in which the District Commissioner holds his Court, and a copy of such notice shall be posted and addressed to every registered owner of land in the district.
- (5) Such notice shall state the day, hour and place of meeting, and the object for which it is convened.
- (6) No person shall be allowed to vote at such meeting unless he is such a registered owner of land in the district as is mentioned in subsection (2) and resides therein.
- (7) If at such meeting there are at least twenty persons present and entitled to vote, and a majority consisting of two-thirds of such persons pass a resolution in favour of putting this Part in force in such district, the Minister may by notice in the *Gazette* declare the provisions of this Part in force in such district:

Provided that if such resolution is not carried, at that meeting the District Commissioner shall not convene a subsequent meeting for the same or similar object until six months after the date of the last meeting.

4. Arbitration

The District Commissioner shall hear and determine all disputes in regard to the erection, repair, maintenance and specifications of dividing fences in his district as if he were the sole arbitrator appointed by the parties under the provisions of the Acquisition of Property Act, [No. 10 of 1961](#).

5. Notice to fence

In the absence of any agreement, the owner of a holding intending to erect a dividing fence along his boundary or any part thereof along which there is no fence shall notify the District Commissioner and the owner of the adjoining holding of his intention to do so and of the specifications of the intended fence.

6. Effect of failure to agree or receive notice

If no agreement in respect to the erection of a dividing fence is made between the parties nor notice to the contrary received from the owner of the adjoining holding within six weeks, then any time thereafter the owner giving the notice may proceed to erect such dividing fence according to the specifications contained in his notice and shall be entitled to receive one-half the cost from the adjoining owner.

7. Objections to specifications

- (1) The person receiving a notice under [section 5](#) who considers the specifications of fence in the notice unsuitable may within six weeks after receiving such notice notify the other party of the specifications he desires instead; and shall within the same period forward a copy of such last-mentioned specifications to the District Commissioner with a request that he determine the matter together with the sum of four emalangenis towards the cost of hearing; and in default of sending such copy and sum such person shall be deemed to have agreed to the erection of a fence as specified in the first-mentioned notice.
- (2) The District Commissioner on receiving such request and deposit, shall fix a place and day for the hearing, shall notify the parties accordingly, shall determine the specifications of such intended fence, and permit thereupon a dividing fence to be erected according to such specifications and apportioning the cost of the erection equally between the adjoining owners.

8. Natural barrier

If a permanent river or other natural obstacle forms an effective natural barrier against the passage of stock the person receiving the notice under [section 5](#) may give notice to the other party and the District Commissioner that he considers the fence specified or a part thereof unnecessary, and the District Commissioner shall on being notified determine the matter and the specifications of fence, if any, to be erected.

9. Give and take line

- (1) The persons whose holdings are divided by a dry watercourse or river (not forming a natural barrier for stock) or range, along which it is impractical or inexpedient to fence, may agree on a fair give and take line as a dividing line to be fenced according to the provisions of this Act or in default of such agreement the owner of either holding may apply to the District Commissioner who shall cause such fair give and take line to be surveyed at the joint cost of the parties.
- (2) The fair give and take line so agreed upon or so surveyed shall be taken to be the boundary line for the purpose of this Act but shall not otherwise affect the title to the respective holdings.

10. Payment by instalments

- (1) If the person receiving notice under this Act to join in or contribute to the construction of a dividing fence is unable to pay the amount or part thereof, and within one month after such amount has been fixed gives notice to the person calling upon him to join in or contribute that he desires to pay such amount in instalments, the amount payable by such person or such part thereof as he shall not be able to pay together with interest thereon at the rate of six per cent per annum shall be paid by such person by equal yearly instalments.
- (2) Such instalments shall be so calculated and fixed that the said capital sum and interest shall be wholly paid off in a period of five years from the date of the last-mentioned notice if such capital amount does not exceed two hundred emalangeneni and of ten years if it exceeds two hundred emalangeneni as more particularly shown in the First and Second Schedules to this Act.
- (3) Notwithstanding such notice and the payment of any such instalment such person may at any time during the said period of five or ten years pay the value at that time of the unpaid instalments in one sum as shown in the Third Schedule to this Act.
- (4) For the purposes of this section a person shall be deemed to be unable to pay the amount he is called upon to contribute towards the construction of a fence if the estimated cost of fencing the whole of his holding exceeds ten per cent of the value of such holding less the amount of any special mortgage bond thereon.

11. Service of notices

Notice under this Act unless otherwise expressly provided shall if possible be served personally upon the person to whom it is addressed but, if the residence of such person is unknown or if he has no known representative in Swaziland it shall be sufficient service of such notice if it be sent through the post by registered letter to the last-known place of abode or business in Swaziland of such person and copy thereof be published once in the *Gazette* and once in some newspaper, if any, circulating in the district in which the holding which is the subject of such notice is situated and be also forwarded to the District Commissioner of the district, who shall cause the same to be affixed to the door of his Court.

12. Existing fences

A person along the boundary of whose holding there was a fence erected prior to the date of the notice applying this Part may apply to the District Commissioner after such notice to have the fence recognised

as a dividing fence within the meaning of this Act, and the District Commissioner shall fix a place and day for considering the application, and shall notify the parties interested, and may—

- (a) either recognise such fence and order a contribution to the extent of one-half its value at the time of the hearing; or
- (b) may order such additions or alterations in it as, in his opinion, are requisite to render it a fence within the meaning of this Act, and, on the same being carried out, may allow a claim for contribution under this Act.

13. Cost of repairs

If any dividing fence shall be out of repair or become insufficient the occupiers of land on either side thereof shall be liable for the cost of repairing such fence in equal proportions.

14. Notice to repair fence

The occupier of land separated from adjoining land by a dividing fence may serve a notice upon the occupier of such adjoining land requiring him to assist in repairing such fence and if such occupier refuses or neglects for the space of one week after the service of such notice to assist in repairing such fence first-named occupier may repair such fence and recover from such occupier his portion of the cost of repairing the same in manner provided in [section 15](#):

Provided that if a dividing fence or a portion thereof is destroyed by accident the occupier of land on either side may immediately repair it without notice and shall be entitled to recover his proportion of the cost thereof from the occupier of the adjoining land; and

Provided further that if such destruction is due to the act or default of one of such adjoining occupiers he shall be liable for the whole cost of repair.

15. Mutual rights of recovery of costs

All costs recoverable under this Act in respect of the construction or repair of any fence may be recovered from the person or from any one of several persons liable to contribute to the cost of such construction or repair and served with notice as prescribed; or from any person who may come in and defend under the provisions of this Act any proceeding consequent on such notice and all such moneys recoverable by any person served with such notice may be recovered from the person serving the same or any person liable to contribute to the construction or repair of such fence.

16. Mortgage bonds as security for payment of money owing

- (1) A person to whom any amount shall be due by way of contribution in respect of the construction of any dividing fence under the provisions of this Act may call upon the person liable for such amount to pass a mortgage bond upon the land owned by him and separated from the land of the first-mentioned person by the dividing fence in respect of which the said amount is owing; such bond being conditioned to secure payment of the amount so owing or such portion of it as may from time to time be due whether the amount be payable by instalments or otherwise.
- (2) If the person called upon to pass such bond fails to do so, the person calling upon him to do so may notify the Registrar of Deeds in writing that the amount referred to in the preceding subsection is owing by the person aforesaid and that no mortgage bond has been passed to secure the same.
- (3) The Registrar upon receipt of such notice shall by letter notify the person named therein of the receipt by him of such notice and the particulars contained in it, and shall inform such person that unless the amount is objected to within one month from the date of such letter a note will be made thereof in terms of this section on the folio of the Land Register whereon the ownership of the land affected is registered.
- (4) If no objection is received within such period, the Registrar shall note the said amount in the Land Register accordingly and shall deliver to the party to whom the debt is owing a certificate setting

forth the land affected, the amount, the date and the Schedule under which payment is regulated; but if objection is received within the said period no note shall be made except with the consent of the said person or upon the order of some competent Court.

- (5) From and after the date of the note it shall not be lawful without the order of a competent Court to transfer or mortgage the land owned by the said person in respect of which the note was made until such note has been deleted by the Registrar of Deeds.
- (6) Every notice to the Registrar of Deeds under subsection (2) shall as far as possible set forth—
 - (a) the full name and address of the person liable and the amount for which he is liable and also the full name of the person giving such notice;
 - (b) the fact that the amount has been agreed upon or ascertained according to law;
 - (c) the fact that the person liable has been called upon to pass a mortgage bond in accordance with the provisions of subsection (1) and has failed to do so;
 - (d) a clear description of the property in respect of which the mortgage bond was demanded.
- (7) Such note shall be deleted by the Registrar of Deeds as soon as the mortgage bond mentioned in subsection (1) has been passed, or upon receipt of written notice from the person to whom the amount is owing that such amount has been paid.

17. Trespass

After two years from the date when an area has by notice been brought under the provisions of this Part, no person shall, unless at the time his holding is surrounded by a fence—

- (a) bring an action for trespass committed by stock upon his land other than wilful trespass; or
- (b) impound any stock trespassing upon the land after the termination of such period.

18. Quarantine in case of unfenced holdings

If the stock of any class on a holding within an area to which this Part has been applied are declared to be infected with any infectious or contagious disease by the proper authority appointed in that behalf, then the stock of that class (or of any class which is declared to be capable of carrying such infection) on any holding adjoining or separated from such first-mentioned holding only by a road or outspan or other unfenced holding, shall be subject to the same regulations as to quarantine as the stock on such first-mentioned holding, unless such adjoining holding is surrounded by a fence which is stockproof in respect of such class or classes of stock.

19. Certificate of joint ownership

- (1) Two or more owners of adjoining portions of the same farm, or of divided portions situated on the same farm, with an adjoining area thereon held in common, may apply to the District Commissioner for their holdings to be considered as one for the purpose of this Act, and naming one of them who shall sue or be sued in the name of all.
- (2) Upon such owners satisfying the District Commissioner that to separate their respective portions by lines of fence would be injurious to their holdings, the District Commissioner may issue a certificate to them to that effect, and may register the person so named by them as the representative of all of such owners for the purposes of this Act.
- (3) For the purposes of this Act two or more owners shall be deemed owners of undivided portions in proportion to the extent of their holdings and the two or more holdings shall be regarded as one holding and such owners will have like proportionate claims and liabilities between themselves as though their portion were undivided.

20. Adjustment between joint owners

If there are more than one owner or occupier of a holding and one of such owners or occupiers is under this Act compelled to pay a contribution in respect of the erection, alteration or maintenance of fencing he may in any competent Court sue for and recover from such other owners or occupiers such proportion thereof as in the opinion of the Court is fairly proportionate to their respective rights and interest.

21. Holdings under lease

- (1) The lessee of any holding within an area to which this Part has been applied having not less than five years of his lease still to run and desiring to erect a fence on any portion of the boundary of such holding shall give notice thereof to the owner of the adjoining holding as well as the owner of such first-mentioned holding in manner similar to that prescribed in [section 5](#) of this Act and such notice shall be replied to by the persons receiving it and shall be dealt with by the District Commissioner in the manner prescribed in this Part for replying to and dealing with notices to fence between adjoining owners.
- (2) Such lessee shall be entitled to recover against the lessor up to half the value of the fence:
Provided that such lessee pay to such lessor during the remainder of the term of his lease a sum equivalent to eight per cent per annum to cover interest and depreciation on the amount so recovered which payments shall be made with the rent and shall to all intents and purposes form part thereof.
- (3) If a holding held under lease has substantially been enclosed by fences during the term of the lease the lessor shall be entitled to receive from the lessee as from the date when such holding becomes so enclosed as aforesaid a like payment of eight per cent per annum on any sum or sums he may have paid or contributed to the erection of any portion thereof which payment shall be made with the rent and shall form part thereof.

22. When adjoining holdings are in different districts

If the dividing line between two holdings forms portion of the boundary between two districts the case shall be heard before and the specified notices given to the District Commissioner for the district in which the holding is situate against which the claim is made.

23. Trustees

Any person in whom any holding is vested in trust for any other person may raise money by mortgage of such holding for the purposes of this Act as if such power had been given in the instrument creating such trust.

24. Minister's power to grant loans

The Minister may on the application of any person grant loans for the purpose of erecting dividing fences under the provisions of this Act and may frame rules regulating the terms and conditions, as to security and otherwise, on which such loans shall be granted.

Part III – Provisions applicable to Swaziland

25. Operation of Part III

The provisions of this Part of this Act shall be in operation throughout Swaziland.

26. Persons using another's fence to pay interest on half its cost

If the owner or occupier of a holding has erected or hereafter erects a fence on the boundary of his holding, and any other person adopts any means by which such fence is rendered of beneficial use to himself and avails himself of such fence or portion thereof, such person shall be liable to pay such owner or occupier interest on half the then value of so much of such fence as such person shall use or avail himself of at the rate of eight per cent per annum for so long as he continues to use or avail himself of such fence and shall also so long be liable for one-half the cost of repairs of so much of such fence.

27. Bush may be cleared for fencing

If a fence is to be erected on land covered with bush the person erecting such fence shall be entitled to clear the bush for a width not exceeding one and half metre on each side of such fence and may remove any tree standing in the immediate line of such fence and the cost of such clearing shall form part of the cost of the erection of such fence and if the person erecting such fence is entitled to recover any costs of erection from any other person, he shall also be entitled to have the cost of such clearing apportioned accordingly.

28. Ditch-and-bank fence

The owner or occupier of land may, in making a ditch-and-bank fence to divide his land from any adjoining land, make a ditch on adjoining land and use the soil taken therefrom towards making a bank on his own land or he may make the ditch in his own land and place the bank on adjoining land:

Provided that if a dividing fence is made of posts and rails or wire or palings, the posts of such fence shall, as nearly as may be, be placed on the boundary line.

29. Access for persons erecting fence

Any person erecting or repairing a fence under the provisions of this Act along any dividing line shall have reasonable access to the adjoining holdings, and to any holdings he may have let on lease, for himself, his servants, horses, implements, materials, carts or other vehicles employed on the work as he may reasonably require for the convenient erection thereof or bringing materials therefor:

Provided that nothing herein shall authorise the entry for such purposes upon any land under cultivation or in or upon any garden, plantation or pleasure ground without the consent of the occupier thereof or shall authorise any person to cut down, lop or injure any fruit or ornamental trees or shrubs without such consent.

30. Access to surveyors and inspectors

For the purpose of making any inspection, valuation or survey or performing any act necessary for carrying out the provisions or intention of this Act the District Commissioner or a surveyor or other person authorised by him may enter on lands and value, measure, survey, take grades and levels, fell trees, cut fences and perform all acts necessary:

Provided that all damage done shall be as far as possible repaired or compensation paid, such compensation to be determined by the District Commissioner in the same manner as disputes in respect of the erection or repair of fences are determined by him.

31. Landlord may defend proceedings against tenant

Any person may intervene and defend any proceeding under this Act against any lessee of his in consequence of which he may ultimately incur any liability and any defence which the person originally proceeded against may set up shall be available to the person so intervening.

32. Magistrate's Courts to have jurisdiction

Proceedings for the recovery of sums of money under this Act may be taken before the Magistrate's Court of the First Class of the district in which the defendant resides notwithstanding that the amount claimed shall be beyond the ordinary jurisdiction of such Court and such Court shall have jurisdiction to give judgment for the full amount claimed.

33. Act not to affect agreements between occupiers

Nothing in this Act shall be deemed or taken to affect any covenant, contract or agreement made or hereafter to be made relative to dividing fences between lessor and lessee or between owners or occupiers of adjoining lands:

Provided that any such agreement made to frustrate the purposes of this Act shall be *ipso facto* null and void.

Part IV – Offences

34. Leaving gates open

Any person who opens and leaves open, or finding open on passing through neglects to shut and fasten a gate in a fence shall on conviction be liable for the first offence to a fine not exceeding twenty emalangeni and in default of payment to imprisonment not exceeding fourteen days and upon any subsequent conviction to a fine not exceeding forty emalangeni and in default of payment to imprisonment not exceeding six weeks.

35. Persons damaging fences refusing to give names and addresses

Any person who damages any fence and on being requested so to do by the owner or occupier of the land on which it is situated or by some person authorised by such owner or occupier refuses to give his true name and usual address or gives an untrue name or address shall upon conviction be liable to a fine not exceeding fifty emalangeni and in default of payment to imprisonment not exceeding three months.

36. Misapplication of material or money

Any person who misappropriates or diverts any money advanced under [section 24](#) to or for any purpose other than that for which it was advanced, or who sells or otherwise wrongfully disposes of any of the material so advanced shall be liable on conviction to imprisonment not exceeding two years, and any sums owing for materials or money advanced with interest, if any, shall immediately become due and payable in respect thereof.

37. Malicious damage to fencing

Any person who wilfully injures or removes a fence, gate or other appliance or contrivance forming part thereof shall be liable on conviction to a fine not exceeding one hundred and fifty emalangeni and in default thereof to imprisonment not exceeding six months, and shall in addition be ordered by the Court by which he is convicted to pay the amount of damage sustained by the owner of such fence, gate or other appliance and the order shall be executed in the same way as a judgment of the Court in a civil case is executed.

38. Accidentally damaging fencing

- (1) Any person who inadvertently or accidentally injures a fence situated on a holding or on a proclaimed road within a holding shall forthwith repair it and in the event of his being unable to do so shall forthwith report it to the owner of the holding and deposit such sum as may be reasonably sufficient to cover the cost of repairing it and he shall be entitled to receive a receipt therefor.

- (2) Any person failing to repair such fences or to give such notice with such reasonable sum or refusing to give a receipt therefor shall on conviction be liable to a fine of twenty emalangeni and in default of payment to imprisonment not exceeding fourteen days, and shall in addition pay such sum or such sum in addition to any already paid as will cover the cost of repairs by way of damages.

39. Climbing over fences

- (1) Any person who climbs over or through a fence or gate without the permission of the owner or lessee of the land upon which such fence is situate shall be guilty of an offence, and liable on conviction to a fine not exceeding twenty emalangeni, and in default of payment to imprisonment not exceeding fourteen days.
- (2) For the purposes of this section "fence" means any dividing fence erected on or near to the boundary of any farm and separating such farm from any other land.

First Schedule

Table of equal instalments at the end of each year for five years corresponding to amounts payable under section 10 of this Act.

Amount payable	Equivalent amounts payable at the end of each year for five years
E	E. c.
1	0,23½
2	0,47½
4	0,95
6	1,42½
8	1,90
10	2,37½
12	2,85
14	3,32½
16	3,80
18	4,27½
20	4,75
40	9,50
60	14,24
80	18,99
100	23,74
120	28,48
140	33,23
160	37,98

180	42,73
200	47,48

Yearly instalments for any sum not mentioned in this table such as E178,67 may be obtained as follows:

E. c.		E. c.
160,00	gives	37,98
18,00	”	4,27½
0,67 or $\frac{2}{3}$ of E1	”	0,16
Therefore E178,67	”	E42,41½

Second Schedule

Table of equal instalments at the end of each year for ten years corresponding to the amounts payable under section 10 of this Act.

Amount payable	Equivalent amounts payable at the end of each year for ten years
E	E. c.
1	0,13½
2	0,27½
4	0,55
6	0,72
8	1,09
10	1,36
12	1,63
14	1,90
16	1,17½
18	2,85
20	2,71
40	5,43
60	8,15
80	10,87
100	13,59
120	16,31
140	19,02½
160	21,74

180	24,46
200	27,17½
400	54,35
600	81,52
800	108,70
1,000	135,87
1,200	163,04
1,400	190,21
1,600	217,39
1,800	244,57
2,000	271,73
4,000	543,48
6,000	815,21
8,000	1 086,94
10,000	1 358,68

Yearly instalments for any sum not mentioned in this table such as E2,548.50 may be obtained as follows:

E. c.		E. c.
2,000.00	gives	271.73
400.00	”	54.35
140.00	”	19.02½
8.00	”	1.09½
0.50 or ½ of E1	”	0.07
Therefore 2,548.50	”	346.27

Third Schedule

Aggregate value of unpaid instalments each E200 in amount of which the first is payable at once and subsequently at yearly intervals.

Number of instalments	Aggregate value
E200 each	E. c
1	200.00
2	388.68
3	566.67½
4	734.60
5	893.02
6	1 042.47½
7	1 183.47
8	1 316.47½
9	1 441.96
10	1 560.34

Note.— The aggregate value of instalments of any other amount may be readily obtained from the above table by simple proportion.