

APPENDIX J: MEMORANDUM OF ADVICE PROVIDED BY BLC ATTORNEYS

MEMORANDUM OF ADVICES TO IKAMVA LETHU FARMS (PTY) LTD

7 March 2017

RE: **Concerns raised regarding EIA for Remainder of Farm 653**

CONCERNS RAISED

1. Ikamva Lethu Farms (Pty) Ltd proposes that an area of approximately 920 ha on the Remainder of Farm 653 be developed to establish approximately 708 ha of citrus orchards and associated infrastructure. The owner of one of the neighbouring properties (Mr van der Westhuizen's property) has expressed the following concerns:
 - 1.1 There is a shooting range on their farm which may cause a threat to the farm workers working on the proposed development;
 - 1.2 They carry out commercial hunting operations, and have dangerous game such as Rhino, which could threaten the safety of the farm workers/occupants of the adjacent farm;
 - 1.3 There may be an increased potential for poaching as a result of the proposed development;
 - 1.4 The view of citrus orchards and the necessary construction of infrastructure may detract from the safari experience offered by their business which may result in a loss of clientele, and consequently a loss of income.

RESPONSES

2. As a result of the perusal of the applicable legislation and case law, the following conclusions were reached:
 - 2.1 *The Firearms Control Act 60 of 2000 (FCA), and the Firearms Control Regulations, 2004 (the Regulations) govern the operation of a shooting range on a game farm. They impose strict regulations that aim to ensure minimal risk to adjoining land owners. Thus, it is Mr van der Westhuizen's responsibility to ensure compliance with the FCA and the Regulations and to ensure his clients use their firearms sensibly and lawfully.*

2.2 Commercial hunting operations on game farms have to adhere to strict safety and security regulations in terms of the *Nature Conservation Ordinance 19 of 1974* (the Ordinance) and the *Biodiversity Act 10 of 2004: Threatened or Protected Species Regulation, 2015*. In terms of the Ordinance read with the Threatened or Protected Species Regulations, the owner of the game farm is required to control and closely monitor the conduct of its clients on hunting trips through the employ of hunting outfitters and professional hunters. Furthermore, it is Mr van der Westhuizen's responsibility to ensure that his property is adequately enclosed. Adjacent property owners cannot be held liable for damages to persons or property caused directly or indirectly by the introduction of animals such as Rhino. Thus, the concerns of poaching, security and safety must be addressed by Mr van der Westhuizen.

2.3 The proposed development of the citrus orchard is objectively reasonable, and does not materially and substantially affect Mr van der Westhuizen's business interests or the use and enjoyment of his property. The reasons for this are as follows:

- a. nuisance in terms of noise levels will be temporary in nature until the end of the construction period;
- b. there are other citrus orchards presently bordering Mr van der Westhuizen's farm, thus the view overlooking the proposed development will not differ substantially from other areas on Mr van der Westhuizen's farm;
- c. citrus farming with the presence of orchards is the predominant established activity in that area;
- d. the further development of Remainder of Farm 653 for agricultural purposes extending to the proposed citrus farms was foreseeable by Mr van der Westhuizen as such activity is in line with the primary zoning of the property;
- e. as previously mentioned, it is Mr van der Westhuizen's responsibility to ensure that his game are adequately enclosed and do not interfere with adjacent farms;
- f. Ikamva Lethu will ensure that their site is adequately fenced to prevent theft of citrus and other products. The fence will be monitored on a weekly basis;
- g. the proposed construction that includes the presence of farm workers is necessary and reasonable for the establishment of the citrus orchard;
- h. the farm workers access to and from the development site will be monitored;
- i. there is no evidence of damage suffered as a result of the other orchards in the area;
- j. and there is no evidence to suggest that Mr van der Westhuizen will suffer any damages in the future.

2.4 The temporary inconvenience which may be suffered by Mr van der Westhuizen does not outweigh the utility of the establishment of the property for citrus by Ikamva Lethu Farms and

the ongoing farming activities. The reasoning behind this is explained in detail under clause 3.3.2 below.

- 2.5 The common law states that there may be instances where there will be no good reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect its own interests. In other words, Mr van der Westhuizen may impose reasonable and effective measures to mitigate any inconvenience posed by the development on the adjacent farm. This may include changing the usual route of his game hunting party to avoid his clients viewing the development of the citrus orchard.

The rationale behind the abovementioned responses is discussed in detail below.

LEGAL REASONING

3.1 Operation of a Shooting Range

The Firearms Control Act 60 of 2000 (FCA), and the *Firearms Control Regulations, 2004* (the Regulations) govern the operation of a shooting range on a game farm. There are strict regulations that aim to ensure minimal risk to adjoining land owners.

Section 8 of the FCA requires accreditation before a license for shooting ranges or hunting associations can be issued. Regulation 6(3) states that the Registrar may only accredit a shooting range on proof by the applicant that the shooting range complies with the applicable compulsory specifications set in terms of the *Standards Act 29 of 1993*. Section 19(5) further provides that a firearm in respect of which a licence has been issued in terms of this section may only be used on an accredited shooting range in accordance with the rules of that shooting range and in accordance with such conditions as the Registrar may impose.

Section 16 states that a licence is required to possess a firearm for dedicated hunting and dedicated sports shooting. Furthermore section 16(3) provides that a firearm in respect of which a licence has been issued in terms of this section may be used where it is safe to use the firearm and for a lawful purpose.

Clearly the abovementioned provisions set out standard requirements for the establishment of a shooting range on one's property. It is assumed that Mr van der Westhuizen's property has conformed to these legal requirements since his shooting range has been in use for a long period of time, and is cognisant of ensuring his clients use their firearms responsibly and lawfully. This is crucial in terms of security and safety obligations owed to adjacent property owners.

3.2 Commercial Hunting Operations

Commercial hunting operations on game farms have to adhere to strict safety and security regulations in terms of the *Nature Conservation Ordinance 19 of 1974* (the Ordinance) and the *Biodiversity Act 10 of 2004: Threatened or Protected Species Regulation, 2015*.

Section 72C of the Ordinance governs the hunting of wild animals by a client. In terms of the definitions in section 1, a client is a person who is not a South African citizen who rewards another person for, or in connection with, the hunting of wild animals or feral animals. Section 72C(1) states that a client shall not hunt a wild animal unless the hunt is organised or conducted by a hunting outfitter (a person who organises the hunting of wild animals for clients), and the client is escorted by a professional hunter. This provision provides further that a professional hunter who escorts a client shall ensure that the client does not hunt contrary to the provisions of this Ordinance and may give the client any lawful instruction. The client is obliged to obey the instructions of the professional hunter. Furthermore, section 72D provides that a hunting outfitter shall not present for hunting or organise the hunting of, a wild animal or a feral animal for a client unless the hunting outfitter is the holder of a written permission from the owner of the land on which the hunt is presented or organised.

Evidently, the owner of the game farm is required to control and closely monitor the conduct of its clients on hunting trips through the employ of hunting outfitters and professional hunters. A person, who under false pretences presents, organises or conducts a hunt contemplated in this Chapter for a client shall be guilty of an offence in terms of section 72E of the Ordinance.

In addition to the Ordinance, Regulation 44(b) of the Threatened or Protected Species Regulations states that an application for the registration of a game farm must include a certificate of adequate enclosure or comparable document issued by the provincial issuing authority in terms of provincial conservation legislation. Regulation 47(3) states further that when considering an application for the registration of a game farm, the issuing authority must take into account whether the game farm is adequately enclosed for the species to which the registration application applies. The Department of Economic Development and Environmental Affairs of the Eastern Cape published operational guidelines entitled "Certificate of Adequate Enclosure & Dangerous Game Fencing Specifications". This document states, on page 3, that the introduction of any wild animals is the full responsibility of the owner of the property.

Mr van der Westhuizen's property is a game farm with dangerous animals such as Rhino present. It is Mr van der Westhuizen's responsibility to ensure that his property is adequately enclosed. Adjacent property owners cannot be held liable for damages to persons or property caused directly or indirectly by the introduction of such animals. Thus, the concerns of poaching, security and safety must be addressed by Mr van der Westhuizen.

3.3 Rights and Duties of Adjacent Landowners

It is clear from the above that Mr van der Westhuizen has certain onerous legal responsibilities with regard to the hazardous activities on his farm. However, one of the ancillary issues is whether the concerns expressed by Mr van der Westhuizen with regard to the proposed development of necessary infrastructure for the citrus orchard give rise to a duty by Ikamva Lethu Farms to address such concerns. This is governed by the common law, particularly the principles of the Law of Delict and Neighbour Law in the form of nuisance.

The elements of Delict, according to Van Der Walt and Midgley, are:

- harm suffered by the plaintiff;
- wrongful conduct on the part of the defendant;
- a causal connection between the plaintiff's harm and the defendant's conduct;
- and fault on the part of the defendant.

In order for a party to be held liable for negligent misconduct, there must exist a legal duty to act by the party in that situation, otherwise the conduct will not be regarded as wrongful. This is a factual question based on the prevailing norms and convictions of society. Ikamva Lethu Farm's conduct (the construction of the proposed orchard) will only give rise to action for damages by Mr van der Westhuizen if all the elements of a Delict are present.

In terms of nuisance, the test for whether Ikamva Lethu Farms could be held liable is whether their conduct is reasonable. This will be discussed in detail below.

3.3.1 Reasonable Care

In the case of *King v Dykes*,¹ the court held that if a landowner is aware of a dangerous condition on his land which may damage his neighbour's property and if by reasonable care he can prevent such damage, a duty to take reasonable steps to avoid such harm arises. Thus, Mr van der Westhuizen has a responsibility to ensure his game is adequately enclosed, and Ikamva Lethu Farms has a corresponding obligation to ensure that the construction of infrastructure is done by reasonable means which do not unduly harm the business activities on Mr van der Westhuizen's farm.

In the case of *PGB Boerdery Beleggings and Another v Somerville and Another*,² the applicant sought an interdict preventing a neighbour from introducing allegedly infected game onto his farm. The court held that the applicant must show that the game would interfere with his rights of ownership by posing an unreasonable risk to his farming operations. In this regard, the court quoted the learned author JRL Milton:

"An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a 'to-be-expected-in-the-circumstance' interference and is of a type which does not have to be tolerated under the principle of 'give and take, live and let live.'"

The court held that the test in such circumstances is that of reasonableness. This involves an objective evaluation of the circumstances in which the alleged nuisance has occurred. The purpose is to decide whether it is fair and appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. One must compare the gravity of the harm caused with the utility of the conduct which resulted in the harm. It was held further that the interference with the neighbour's right of enjoyment must be material or substantial, and some inconvenience or annoyance emanating from the use of neighbouring property must be tolerated. In this case there was no damage suffered when the application was brought. There was also no evidence to show that there was a likelihood of damages ensuing. Thus the appeal was dismissed.

Furthermore, the court in the case of *Malherbe v Ceres Municipality*³ accepted that the consequences of the usual use of a piece of ground by its owners cannot be regarded as an unlawful interference of his neighbour's land. In other words, it is reasonable to use the land for the purpose for which it was intended.

¹ 1970 (4) SA 369 (R).

² 2008 (2) SA 428 (SCA).

³ 1951 (4) S.A. 500 (AD).

The case of Gien v Gien,⁴ reaffirmed that the reasonable normal use of the property is lawful. In this case the respondent had erected a scaring apparatus on his farm to chase away baboons and other wild animals. The apparatus made explosive noises at regular intervals. The applicant argued that this activity seriously affected him and had the effect that he, his family and employees could not enjoy a proper night's sleep. Furthermore, his animals, including his stud cattle, became difficult to handle. Therefore, his farming activities were adversely affected. The court held that an adjacent owner was entitled to require of his neighbour that he did not cause a greater noise than the reasonable carrying out of his economic activities demanded. Furthermore, given that the interests which the respondent wished to protect were of such a limited extent and of little economic value, the nature of the measures used were drastic and the respondent had completely exceeded the rights conferred on him by his right of ownership to protect those economic interests. Therefore, the respondent had unlawfully infringed the applicant's rights as owner of the adjoining property.

3.3.2 Material and Substantial Adverse Effect

In addition to the element of unreasonableness, Mr van der Westhuizen needs to prove that the construction and presence of farm workers on the adjacent farm materially affects his business interests. For example, in the case of *Pelser and Another v Stang*,⁵ the appellants and the respondent owned adjacent farms. The respondent sued the appellants for damages arising from the death of his 10 stud dairy cows. He alleged that the death of his stud dairy cows had been occasioned by a disease transmitted by a virus from the appellants' blue wildebeest. In this case the respondent proved that he had suffered extensive damages and that the danger was real and imminent. The respondent owned a relatively small farm and there was no opportunity for the respondent to separate the infected cattle from the uninfected cattle. Expert evidence revealed that once cattle were infected with the virus the chances are 100% that they will die. Furthermore, the farm was the respondent's source of livelihood. Thus, the appeal was dismissed.

It is submitted that the proposed development of the citrus orchard is objectively reasonable, and does not materially and substantially affect Mr van der Westhuizen's business interests or the use and enjoyment of his property. The reasons for this are as follows:

- nuisance in terms of noise levels will be temporary in nature until the end of the construction period;
- there are other citrus orchards presently bordering Mr van der Westhuizen's farm, thus the view overlooking the proposed development will not differ substantially from other areas on Mr van der Westhuizen's farm;
- citrus farming with the presence of orchards is the predominant established activity in that area;
- as previously mentioned, it is Mr van der Westhuizen's responsibility to ensure that his game are adequately enclosed and do not interfere with adjacent farms;
- the proposed construction that includes the presence of farm workers is necessary and reasonable for the establishment of the citrus orchard;
- there is no evidence of damage suffered as a result of the other orchards in the area;
- and there is no evidence to suggest that Mr van der Westhuizen will suffer any damages in the future.

⁴ 1979 (2) SA 1113 (T).

⁵ (820/2012) [2014] ZAGPPHC 615.

Thus, the temporary inconvenience which may be suffered by Mr van der Westhuizen does not outweigh the utility of the establishment of the property for citrus by Ikamva Lethu Farms and the ongoing farming activities.

3.3.3 Vulnerability to Risk

Another issue dealt with in Neighbour Law is that of the complainant's vulnerability to risk. In the case of *Cape Empowerment Trust v Fisher Hoffman Sithole*,⁶ the court referred to the judgment of *Perre v Apand (Pty) Ltd*,⁷ which stated that:

"In many cases there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself...If the plaintiff has taken or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss."

It is clear from the abovementioned provisions that Mr van der Westhuizen has the responsibility to ensure that his game is adequately enclosed for safety and security reasons. Furthermore, Mr van der Westhuizen may impose certain measures such as changing the usual route of his game hunting party to avoid his clients viewing the development of the citrus orchard. These are reasonable and effective measures to mitigate any inconvenience posed by the development on the adjacent farm.

In the case *Allaclas Investments (Pty) Ltd and Others v Milnerton Golf Club Others*,⁸ the appellants sought an order interdicting the first respondent from permitting the use of the sixth hole on the Milnerton Golf Course for the playing of golf until it introduces effective measures to avoid or reduce the danger of badly aimed golf balls striking the first appellant's property. These measures included re-siting the direction of the hole, or by the construction of appropriate screens, whether natural or artificial, or a combination of both. The court held that it would be reasonable for the appellants "to tolerate some ingress of badly hit golf balls". However, what they had to endure clearly went substantially further than what a neighbour is obliged to put up with on the application of the principle of "give and take, live and let live", which forms the basis of our law on this point. The first appellant knew at the time that the property was purchased that it was adjacent to a golf course and would be susceptible to being hit by golf balls. But it is clear that the appellants did not know that the hole was badly designed and gave rise to an excessive and unreasonable amount of golf balls entering the first appellant's property.

Despite the fact Ikamva Lethu Farms is aware that they are developing a citrus orchard next to a game farm which has dangerous wild animals and operates as a commercial hunting farm, Mr van der Westhuizen has the responsibility to ensure adequate safety measures are taken to prevent harm to his neighbours. Furthermore, the further development of Remainder of Farm 653 for agricultural purposes extending to the proposed citrus farms was foreseeable by Mr van der Westhuizen as such activity is in line with the primary zoning of the property.

⁶ *2013 (5) SA 183 (SCA)*.

⁷ *(1999) 198 CLR 180*.

⁸ *2008 (3) SA 134 (SCA)*.

CONCLUSION

Ikamva Lethu Farms are not exceeding the rights of ownership conferred upon them in terms of developing the proposed citrus orchard. Any concern raised by Mr van der Westhuizen can effectively and reasonably be dealt with by Mr van der Westhuizen taking the prescribed measures to prevent harm. The responsibility is on Mr van der Westhuizen to:

- ensure the safety and security of his game in terms of the applicable legislation and the common law;
- to protect his business activities;
- and to operate his shooting range in terms of the legislation and lawfully in terms of the common law.

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