

Electrical Fence Certification Revisited

To certify or not to certify that is the question!

Controversy continues to rage over the matter of electrical fence certification and I have been asked to prepare a commentary which will hopefully help to bring an end to the debate. I am really sorry that the commentary is so long but if it is to be respected it must be properly motivated.

It is now common cause that during March 2011 the government promulgated a regulation in terms of the Occupational Health and Safety Act (the Act) which included a regulation which deals with electrical fencing. That portion (Regulation 12(4)) of the regulation became effective on 1 October 2012.

The regulation (a little abbreviated by me) reads as follows *“Every user or lessor of an electric fence system shall have an electric fence system certificate ...in respect of such electric fence system.”*

What does this regulation actually mean? **In my view what the regulation is clearly saying is that no one can use an electrical fence system unless it is certified as safe and compliant with regulated standards.**

There is equally clearly nothing in this regulation which places any obligation on any seller of immovable property on which an electrical fence system exists to provide such certificate to the purchaser of such property and furthermore nothing which prohibits the transfer of ownership of such property to the purchaser thereof without such certification.

Before concluding that there is no obligation at all on the seller of immovable property to confront the matter of certification of electric fences one must have reference to Section 22 of the Act which provides that *“If any requirement ...in respect of any article... or for the use or application thereof has been prescribed, no person shall sell ...in any manner whatsoever such article ...unless it complies with that requirement.”*

What Section 22 is saying is that you cannot sell any article in respect of which a regulation has been made unless the article complies with the requirements of that regulation. As electrical fence systems have now been regulated a cautious lawyer would argue that Section 22 means that you cannot sell any immovable property on which an electrical fence system exists if it is not certified. Although I have personal doubts about the matter I will for the sake of this article accept that Section 22 has that effect.

I am therefore advising that by virtue of Section 22 it is unlawful to sell any immovable property on which an electrical fence system exists if such system is not certified.

If the legislation ended at this point then there would be no controversy at all. It would be clear that every seller of immovable property on which an electrical fence system exists would be obliged in law to give a certificate of compliance to his purchaser. The legislation does however not end at this point. There is further legislation which changes the position.

The first bit of additional legislation is to be found in Regulation 12 (5). What this regulation says is that *“Regulation 12 (4) shall not apply to an electric fence system that existed prior to the coming into force of these Regulations. Provided that if there is a change of ownership of the premises on*

which such electric fence system exists after 1 October 2012, the user or lessor shall obtain an electric fence system certificate for the electric fence system, whereafter the provisions of regulation (4) shall be applicable.”

What this regulation means is that that the new regulation dealing with electrical fences and therefore the entire Section 22 of the Act does not apply to an owner who on 1 October 2012 was already the owner of the property with an existing electrical fence. There is therefore clearly no legal obligation on a seller of any immovable property which contains an electrical fence system to confront the matter of certification if such seller was already the owner of the property as of 1 October 2012 and if the fence system already existed on such property as of that date. Such owner can therefore freely sell the property without the need to deal with certification.

The effect of this regulation is to create two categories of sellers. One category (which I will refer to as ‘existing owners’) are exempted from the new regulation in the Regulation 12 (5) circumstances and others (which I will refer to as ‘new owners’) are not exempted. At this point the majority of sellers will be existing owners and the minority will be new owners. As time passes and more properties are sold, these ratios will change.

The fact that an existing owner can freely sell his property without certification does not however mean that the purchaser of that property will be permitted to use the electrical fence system without certification. On the contrary Regulation 12 (5) makes it clear that the purchaser cannot use the electrical fence system until and unless it has been certified and the purchaser will have to bear that cost. As estate agents are ethically bound to inform the purchaser of this risk, it goes without saying that when it becomes clear to the purchaser that he will be “walking into” a compliance issue relating to the electrical fence, the matter of that compliance will become an issue of interest and negotiation at the time of sale. The net result from a practical point of view is that even though the existing owner might have no obligation to ensure certification of the fence, the matter of certification and the cost thereof will inevitably become a matter of negotiation between the owner and the purchaser.

Does this then mean that as new owners are not exempted from the regulations in terms of Regulation 12 (5) , such new owners are inescapably obliged in law to give a certificate of compliance to their purchaser? The answer is no and in this regard I refer you to Section 10 (4) of the Act which (again abbreviated by me) provides that *“Where a person ... sells or supplies an article ...to another person and that other person undertakes in writing to take specified steps sufficient to ensure, as far as is reasonably practicable, that the article or substance will comply with all prescribed requirements the undertaking shall have the effect of relieving the first mentioned person from the duty imposed upon him by this section.”*

What the section means is that in circumstances where there is an obligation upon a seller of an article to comply with some or other regulation in respect of such article it is permissible for the seller and purchaser of such article to agree that the purchaser will assume the legal responsibility of ensuring compliance with the regulation in respect of such article. It is therefore permissible for a new owner of immovable property on which an electrical fence system exists to include a clause in the sale agreement of the property placing an obligation on the purchaser to cause such electrical fence system to be certified as compliant at the cost of the purchaser. The net result from a practical point of view is that even though the new owner does have an obligation to ensure certification of the fence, the matter of certification and the cost thereof can become a matter of negotiation between the new owner and the purchaser.

Cutting through all the academic analysis it should be clear that even though the cause or reason differs in each category, the bottom line outcome is that for both existing owners and new owners the matter of electrical fence certification is negotiable. I therefore in all instances give the following simple and practical advice to the real estate industry and to buyers and sellers of immovable property on which electrical fence systems exist, namely:

- 1) The matter of who will be responsible for electrical fence certification must be addressed in every contract of sale of immovable property.**
- 2) The matter of who will be liable for the costs of the electrical fence certification is negotiable between the buyer and the seller.**
- 3) Property practitioners should inform the parties that the issue is a negotiable one. It would be unethical to allow either of the parties to believe that they have an unalterable obligation to bear the costs associated with certification.**

Applying this advice to ordinary freestanding properties is easy. This is unfortunately not the case when dealing with properties which are subject to a Home Owners Association (group housing) or Sectional Title properties and I will now endeavour to provide practical advice on how to deal with such properties.

Insofar as Sectional Title Complexes are concerned it is my advice that the electrical fence regulations do apply to sales of sectional title units if there is an electrical fence system situate on common property. As the regulations do not distinguish between normal free standing properties and sectional title properties the matter of how sectional title properties should be approached will be a matter of debate and opinions will differ. I have concluded that the regulations do apply for the following reasons. The seller of a sectional title property is not just selling his unit / section. He is in fact and in law selling two things to the purchaser. One is the unit / section and the other is an undivided share in the common property. This is in fact clear from the standard wording which appears in every title deed for sectional title properties. As electrical fence systems are situate on common property, the seller is also selling part ownership of the fence system. This has the effect of triggering the applicability of the fence regulations. It is of course ridiculous for an individual seller of a sectional title unit in a development which contains an uncertified electrical fence to face the obligation to negotiate with his purchaser over the matter of responsibility for the certification of that fence. Body corporates should take this step themselves as all members of the body corporate will eventually wish to sell their sections and will find themselves embroiled in a debate over the matter of electrical fence certification if the certification has not yet been issued. It is in fact possible to argue that continued use of an uncertified electrical fence after a transfer of a section has occurred constitutes an offence which renders all members of the body corporate liable to prosecution. If I were the seller of a section in a sectional title development where the body corporate has omitted or refused to have an electrical fence certified I would have no option but to either pay for the certification myself or insist that my buyer accept responsibility for the certification of the fence. Whether my buyer will accept such condition is of course debatable.

Group housing complexes are different. When I refer to group housing complexes I am referring to a situation where a relatively large piece of land has been subdivided into a number of individual erven and where a perimeter wall on which an electrical fence is established has been built around all the erven. Most of the erven within the wall will be owned by individuals and will be developed with a home on each erf. Some of the erven (normally internal roads and common facilities such as clubhouses and tennis courts etc.) will be owned by a Home Owners Association (HOA). Such erven are generally referred to as "common property" but they are not in truth common property at all

and are certainly not the same kind of common property which is found in sectional title complexes. They are generally owned outright by the HOA. When an individual sells a residential erf in such developments such individual is definitely not selling any part of the common property. He is only selling his own erf. Erven situate within the heart of the complex will have no electrical fence situate on the erven at all and the fence regulations clearly do not apply to such erven. The erven which abut onto the perimeter wall which carries the electrical fence are more problematic. Although opinions might differ, it is my view that the seller of such an erf is not selling an electrical fence system. After all there is no complete system on such seller's property. There is only a few meters of a total system which surrounds the whole development. The entire system is in fact the property of the HOA which generally maintains the system. I am therefore of the view that even with erven which abut the perimeter walls which carry part of an electrical fence, the fence regulation does not apply. **The bottom line is that it is my advice that with group housing complexes one can ignore the electrical fence regulations unless an individual within the complex has chosen to install a fence system on his erf.** Having said this I think it would be wise and prudent for HOA's to have electrical fences in their complexes certified and to thereby spare their members the trouble of a legal debate about the matter of certification when they try to sell their properties.

Before ending this discussion it is appropriate to mention that the regulation stipulates that **once a certificate has been issued it is valid for ever and is freely transferable from one owner to the next.** It only loses its validity if some addition or alteration is effected to such electric fence system after the certificate is issued.

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