VAN ECK v CLYDE BRICKFIELDS (PTY) LTD 2006 JDR 0312 (T)

Importance	This case was correctly marked 'unreportable', indicating that the court did not so much develop as apply the law, and that the points of law raised in the case were not novel. It is, however, an interesting case for purposes of illustrating the application of the principles of neighbour law to a mining-related context. Civil society organizations wishing to bring an application on the basis of nuisance should have regard to the nine criteria which the court applied in order to determine whether the nuisance was 'actionable' (i.e. worthy of action on the part of the court). The applicants in this case also seem to have made a number of key errors which civil society organizations may wish in future to avoid, as follows: (a) The form of relief they requested (an interdict related to the abatement of *noise* pollution) did not correlate with the scope of the forms of annoyance alleged (e.g. water pollution, dust pollution, increased traffic, etc). The court accordingly simply ignored the non-noise-related claims. It is important, therefore to align the relief sought with the claims being made. (b) The applicants supporting Van Eck's application had submitted identical affidavits supporting his claim. The court was interested in but was therefore unable to determine the detailed impact of the noise on these specific applicants. Specifics are therefore important. (c) The applicants had failed to submit an expert's report on the noise levels in their own homes. Where the test for determining whether a claim is actionable or not is objective (and not based solely on the plaintiff's subjective experience), it is important to back this up with expert evidence. (d) The applicants made a number of subjective claims regarding the first respondent's motives (e.g. he was only interested in making money, he laughed off all legal regulation; etc) which were not helpful or relevant to the court's deliberations. These kinds of allegations – while they may be significant in a non-legal context – should be eschewed in favour of allegations that establish the motive of the person causing the nuisance more objectively.
Parties	**Applicants:** Van Eck (and seven others who supported the application) **First Respondent:** Clyde Brickfields **Second Respondent:** Municipal Authority (not named) **Third Respondent:** Department of Mineral Resources
Facts	Clyde Brickfields owned several properties in the areas of Zesfontein and Putfontein within the former territory of the Transvaal and used these properties for the mining of clay with which it manufactured bricks. Operations were conducted on a 24-hour basis. It was common cause that these activities had been conducted on the property in question since 1972 (though it was not alleged that that the operations had been on a 24-hour basis since that time). The company had been granted a mining right from the Department of Mineral Resources and its environmental management plan had been

	approved in March 2002. The applicants were owners and occupiers of dwellings situated in the same area as Clyde Brickfields. The applicants also contended that, apart from the noise, the brick-making operations constituted various other forms of annoyance, including 'massive water pollution' caused by the first respondent's massive quarries, dangers caused from increased traffic, the plumes of smoke coming from the brickfield kilns, the dust pollution caused by the heavy vehicles and the demise in one of the applicant's caravan park business.
Relief sought	The applicants sought two final interdicts prohibiting the first respondent from bringing any machinery onto the farms in question and from making any noise between 16h30 and 07h00 on weekdays and from 13h30 on a Saturday till 07h00 on a Monday morning.
Legal Issues & Judgment	The court noted that the law generally applicable to the facts was neighbour law which forms part of the general principles of nuisance. Nuisance in the form of an annoyance is actionable whenever a landowner subjects his landowner to *unreasonable* annoyance, namely an annoyance or inconvenience which is greater than what a normal person can be expected to endure in his contact with fellow men (*Prinsloo v Shaw* 1938 AD 570; *Ferreira v Grant* 1941 WLD 186). This is related to the principle of *sic utere tuo ut alienum non laedas* – that the powers of ownership must be exercised in such as way so as to prevent prejudice to a neighbour (para 10). Unreasonable (actionable) annoyance may be based on substantial interference with either the physiological or psychological well-being of human beings (para 11). The test whether the nuisance is excessive is an objective one. Notice must be taken of the likely percipience of the reasonable man and not those who are 'perverse, finicking or over-scrupulous' (*Du Charmoy V Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D)). The court held, firstly, that save for the noise pollution, the other sources of annoyance mentioned in the applicant's founding papers were not covered by the relief sought (para 28). The court then applied the following criteria, deriving from the basis of neighbour law outlined above, to the facts of the case: • <u>The gravity of harm or potential harm to the neighbours:</u> The court found that the applicants had not proved that the noise to which they were subjected was excessive, primarily because they failed to submit a noise level expert's report on the actual noise experienced in their homes (para 31.1). • <u>The locality or neighbourhood in which the alleged nuisance occurred:</u> The court held that the fact that the brickfields had been operating since 1972 and that the Department of Minerals Resources had issued a mining right for the activities pointed to the area not being a normal urban residential area (para 31.2). • <u>The personality of the plaintiff:</u> The court was unable to form an opinion on the personalities of the applicants and the degree of harm which the noise inflicted upon them because their affidavits

	were identical and merely affirmed the content of the affidavit submitted by Van Eck (para 31.3). • The motive with which the landowner carried out the activity: The applicants had not proved on a balance of probabilities that the activity in question was motivated solely by an intention on the part of the landowner to harm his neighbours (para 31.4). • The benefit of the activity to the landowner: The law requires the courts to seek a balance between the benefit the activity brings to the landowner and the harm it inflicts upon his neighbours. Thus an activity that brings only a marginal benefit to the landowner but an abnormal harm to his neighbours would be regarded as unreasonable. On the facts of this case the court found that the first respondent's brickfield activities could not be regarded as marginal to it (para 31.5). • The social utility of the activity or its utility to the general public: The court took note of evidence which suggested that the operation of the brickfields on a 24-hour basis was justified because its closure would have 'caused more harm than good'. In the court's view the 'good' here referred to the public one which transcended that of the individual (para 31.6). • Whether the landowner could have achieved the same goal by employing measures less harmful to the applicants: The court found that the applicants' founding papers did not provide evidence that support a finding on this issue (para 31.7). • The practicability of preventing the alleged nuisance: The court found that the first respondent had taken a variety of measures to abate the noise levels of the operations which were reasonably practicable (para 31.8). • Whether the applicants had 'come to the nuisance': The court found that the applicants had indeed 'come to the nuisance' by establishing their dwellings in an area which had since at least 1972 been one in which there were mixed agricultural and industrial uses (para 31.9).
Outcome	The application for final interdicts relating to the operation of the brickfields at certain hours was dismissed.
Obiter	None.