REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 101/2013

In the matter between:

ERO CC	**FIRST APPLICANT**
RUDOLF WAGNER	**SECOND APPLICANT**
ERIKA ZAMZOW	**THIRD APPLICANT**

And

MARS PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
DR VAN WYK	**SECOND RESPONDENT**

Neutral citation: *Ero CC v Mars Properties (Pty) Ltd* (A 101/2013) [2014] NAHCMD 171 (30 MAY 2014)

Coram: MILLER AJ

Heard: 13 March 2014

Delivered: 30 May 2014

Flynote: Law of nuisance – conduct of the respondent must be unreasonable – whether or not conduct is unreasonable is a question of fact to be determined objectively – Onus on the applicant.

Motion proceedings – *Bona fide* dispute on questions of fact raised by the respondent – Approach to be adopted by the Courts.

Application dismissed.

ORDER

The application is dismissed with costs which costs shall include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] The first applicant is the owner of a farm situated in the district of Outjo. The second and third applicants reside on that farm. That property is described as Farm Moselle No. 102, Outjo District, Namibia. I shall refer to it simply as Farm Moselle or the applicant's farm. The farm is utilized primarily on a hunting farm, visited by tourists and presumably hunters.

[2] The first respondent is the owner of a neighbouring farm sharing a common border with Farm Moselle. The second respondent has been a Director of the first respondent since July 2011 when the Roedel (One) Trust become the sole shareholder

of the first respondent. The farm is described as Portion 1 (Terasse) of Farm Bertram No. 80, District Outjo. I shall likewise refer to it simply as Farm Terasse or the respondent's farm. Farm Terasse is used to farm with cattle.

[3] An inhibiting phenomenon in the area concerned is the propagation of what is described as invaded bush. These consist of several acacia and other species which limit the carrying capacity of the land and the availability of rangeland.

[4] The second respondent states, and it is not placed in issue, that the problem experienced on Farm Terasse with invader bush was such that it required some steps to be taken to manage the problem.

[5] One available solution, and the one adopted by the respondents, was to manually cut down and remove the invader bush. The respondents in addition utilized the bush so removed to manufacture charcoal. The process of removing the invader bush and turning it into charcoal commenced on Farm Terasse in 2011 and was still in progress when the applicants launched these proceedings in April 2013.

[6] It is common cause that the process by which charcoal is manufactured on Farm Terasse results in the emission of smoke and this is what the applicants complain about.

[7] They state that over a period since the commencement of charcoal production on Farm Terasse, the kilns were moved closer to the homestead on Farm Meselle. It is stated that as a result the presence of smoke is causing an unreasonable and continuing nuisance to the second and third applicants, their employees and their guests. The second applicant, who deposed to the founding affidavit describes the situation as follows:

’22. The proximity of the charcoal production business to the farm Moselle and particularly to our homestead, coupled with the use wood burning kilns is causing an unreasonable and on-going nuisance to the applicants. The nuisance, *inter alia*, in that-

22.1 the continuous emission of clouds of acrid, foul smelling smoke from the kilns is prejudicial the health of the third applicant and I, the health of the charcoal workers, the health of our own farm employees, the animal health on both farms and to the health of visiting guests to our hunting farm;

22.2 I say that the continuous emission of smoke is prejudicial to one’s health, as wood smoke contains numerous harmful substances which have caused the third and applicant and I to suffer almost every day since January 2013 from watering eyes, throat and chest complaints, burning sensation in the nasal passages and severe coughing. The aforesaid problems are also suffered by our employees on the farm and their families. These harmful substances include carbon monoxides, benzene and naphthalene, to mention a few;

22.3 moreover, the continuous burning of wood in the kilns on farm Terasse, emits foul, unpleasant orders, which, by their very nature, cause physical distress to human beings and as such constitute a material interference with the comfort of human beings;

22.4 clothes worn by ourselves and our guest, as well as linen and curtains smell strongly and unpleasantly of wood smoke;

22.5 there has been a rapid and noticeable decline in the number of various species of naturally occurring game on the farm Moselle, thus materially prejudicing the business activities of the first applicant and the utilisation (both consumptive and non-consumptive, i.e. game watching) of game;

22.6 the smoke ever-present over the farm is unsightly, to an greater extend in the early morning hours and under cold weather conditions, and disturbs the panoramic views on the farm, which negatively affects the tourism business operated on the farm.’

[8] Although the parties attempted to find a negotiated solution to the concerns of the applicant, these come to nought.

[9] The applicants, by way of motion proceedings now seek interdictory relief. The Notice of Motion reads as follows:

'1. No wood-burning kilns producing smoke or any foul odour shall be operated on farm Portion 1 (Terasse) of the farm Betram No. 80, Outjo District, Namibia in a proximity of more than five (5) kilometres of the boundary fence with farm Moselle No. 102, Outjo District, Namibia.

2. No more than five (5) wood-burning kilns shall be operative at any time on any part of the farm Portion 1 (Terasse) of the farm Bertram No. 80, Outjo District, Namibia.

3. The respondents who elect to oppose this application, shall pay the costs hereof jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

4. Further and/or alternative relief.'

[10] The applicants attach to their papers a copy of an order granted in their favour by Hannah J on 24 April 2001. In that matter the applicants were granted relief in terms which are for all practical purposes identical to the relief now being sought. The purpose and relevance of this piece of information escapes me entirely and I will have no regard to it.

[11] The respondents oppose the application. In the answering affidavit, deposed to by the second respondent, they take issue with the applicant's factual allegations regarding the frequency and density of the smoke emitted and dispersed to the applicant's farm. The respondents also question the symptoms described by the applicants as a result of the smoke generated.

[12] Both the applicants and the respondents seek support for their contentions with reference to photographs and other supporting affidavits.

[13] There is a dispute on the papers before me as to the following issues:

1) Does the smoke emitted by the respondents charcoal production reach the farm of the applicants.
2) If it does, how frequently does this happen.
3) How seriously if at all are the applicants detrimentally affected thereby.

[14] Inasmuch as the applicants seek final relief in the form of an interdict, the following requirements must be met:

1) A clearly established right.
2) An injury committed or one reasonably apprehended.
3) No other remedy is available.

(Setlogelo v Setlogelo 1914 AD 221*)*

[15] The injury committed and complained about by the applicants is that of nuisance.

[16] The wrong of nuisance is recognized as an actionable wrong in our law. The *locus classicus* is probably the decision in *Regal v African Superslate* 1963 (1) SA 102 (A) from which the following passage appears:

> 'We are concerned here in the main with what can be called neighbour law. As a general principle everyone can do what he wishes with his property even if it tends to be to the prejudice or irritation of another, but as concerns adjacent immovable property it almost goes without saying that there is less room for unlimited exercise of rights. The law must provide regulation of conflicting propriety and enjoyment interests of neighbours and it does this by limiting propriety rights and imposing obligations on the owners towards each other.'

[17] As is often the case in our law the concept of reasonableness is the yardstick by means of which it is determined in the exercise of proprietary rights is actionable or not.

[18] That in turn requires an evaluation of the prevailing circumstances, facts and the background against which the conduct complained occurs. That is entirely a question of fact.
(De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D).

[19] It is common cause, rightly so, that the burden of proof remains with the applicants.

[20] As I had indicated there are material issues of fact. That being the case the principles in *Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1983 (3) SA 623 (A) find application. They are the following:

1) Final relief will be granted if the facts averred in the applicants affidavits which are admitted by the respondent, together with the facts alleged by the respondent justify such an order.
2) If the denial of a fact by the respondent does not create a real bona fide dispute of fact and the Court is satisfied with the inherent credibility of the applicant's averments, a final order may be granted.
3) Where the denials of the respondent are clearly far-fetched and untenable, and capable of being rejected merely on the papers, no real dispute of fact arises.

[21] The hurdle the applicants must overcome is not to prove merely that there is some interference with their rights. Even if there is that per se does not entitle them to any relief.

[22] The applicants must prove in addition that the conduct of the respondents is not reasonable.

[23] In applying to principles of the *Plascon Evans* case (supra) to the issues raised in the papers before me the principles numbered 2 and 3 above in my view find no application. The facts deposed to by the respondents raises bona fide disputes of fact which are not far-fetched or untenable.

[24] The facts deposed to by the respondents on the control issue admit of no more than the fact that its charcoal production causes the emission of smoke. The remainder of the applicant's allegations as to that issue are disputed.

[25] The inevitable result for the applicants is that they had failed to discharge the onus.

[26] In the result the application is dismissed with costs which costs shall include the costs of one instructing and one instructed counsel.

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[15] P J Miller

[16] Acting Judge

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APPEARANCES

APPLICANTS: H SCHNEIDER
Instructed by Behrens & Pfeiffer, Windhoek.

RESPONDENTS: N BASSINGTHWAIGHTE
Instructed byEngling, Stritter & Partners, Windhoek

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