

1878.  
Nov. 22.

1879.  
Feb. 1.

Wessels vs.  
Gildenhuys.

the Magistrate to be at liberty to take evidence upon the first exception. The parties again appeared before the Magistrate, but no evidence was led, the parties wishing a decision upon the second exception, which was the one allowed by the Magistrate.

*Leonard*, for the plaintiff, submitted that the exception was bad, as the deed of transfer was not such a document as by the 10th Rule of the Magistrate's Court a copy was required to be served with the summons.

*Upington, A.G.*, appeared for the respondents.

The Court held that the second exception was not sustainable, and reversed the Magistrate's decision thereon.

Appeal accordingly allowed, with costs.

[Appellant's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]  
[Respondent's Attorneys, REDELINGHUIS & WESSELS.]

## DELL vs. THE TOWN COUNCIL OF CAPE TOWN.

### *Nuisance.—Interdict.*

*It is competent to any one of the public to take proceedings to abate a nuisance of a public nature.*

1879.  
Jan. 4.  
" 13.  
Dell vs. The  
Town Council  
of Cape Town.

James Dell, Traffic Manager of the Western Railways, petitioned the Court, stating that as such Traffic Manager he had control over the railway employes. That since the 1st January instant the Town Council of Cape Town, by their servants or agents, had deposited a quantity of town refuse and rubbish upon the beach between the Central Wharf and the Castle, in front of the railway goods station, the stench from which was not only a great nuisance, but was likely to be injurious to the health of the railway employes working near the spot, as well as to the general health of the neighbourhood. Wherefore he prayed a rule *nisi*, to operate as an interdict in the meantime, calling upon the Town Council to show cause why an interdict should not be granted restraining them from depositing refuse and other rubbish upon the said spot, or upon any other portion of the beach of Table Bay. The petition was verified in the usual way, and supported by the affidavit of Dr. Falkiner, who

stated that he had inspected the beach in front of the railway station, and found the stench arising from the town refuse and rubbish there deposited to be a great nuisance, and in his opinion likely to be injurious to the railway employés working near the spot, as well as to the general health of the neighbourhood; and that on the previous day the stench was so strong at his house in Adderley Street that disinfectants had to be used.

1879.  
Jan. 4.  
„ 13.  
Dell vs. The  
Town Council  
of Cape Town.

The Court, on the 4th January, granted a rule *nisi* as prayed, returnable on the 15th January.

On the return day of the rule,—

*Jacobs*, for the Town Council, objected to Mr. Dell making this application, and contended he had no *locus standi*. One of the affidavits put in was not intituled at all, and the other was intituled as between the Commissioner of Public Works and the Town Council. The Commissioner was not before the Court, and Mr. Dell did not assert his own health was in danger. This application should not have been made by any private person, but by the Attorney-General in his official capacity (*Kerr on Injunctions*, p. 333; *Russell on Crimes*, vol. i. p. 435).

The Court intimated its opinion that as Mr. Dell had stated he was traffic manager, it would presume that his place of business was at the station, and consequently his health was liable to injury from the alleged nuisance; and further, that it was competent to any individual to complain of a nuisance and have it abated. Cause must therefore be shown against the rule.

The affidavit of John Anthony Roos, Secretary of the Town Council, was then put in, in which Mr. Roos stated that the limits of City of Cape Town extended from low-water mark at Fort Knokke to low water-mark at Three Anchor Bay, but that the beach itself from the Breakwater to Fort Knokke was claimed by the Harbour Board as vested in them, on which matter the two bodies differed in opinion, but had not hitherto had any cause for litigation. That as far as he could recollect (which was upwards of forty years back), and, as he believed, ever since the existence of Cape Town, the refuse of the town was deposited on the beach of Table Bay, between the Amsterdam Battery and

1879.  
Jan. 4.  
" 13.

Dell vs. The  
Town Council  
of Cape Town.

the public shambles, and that a considerable portion of the present foreshore of Table Bay in front of the town consisted of ground thus formed and reclaimed from the sea by the annual deposit of town rubbish for so many years. That this foreshore had been greatly increased and consolidated since the construction of the causeway, and by the deposit of waste material from the docks, by which land of considerable extent and very great value has been reclaimed. That the town rubbish and refuse had not been invariably deposited on the very same spot, but sometimes on one part of the beach and sometimes on another, as circumstances suited, but at all times within the limits indicated, until about twelve years ago, when, in consequence of the representations of the Harbour Board that the rubbish impeded the operations in progress, as well as a desire on the part of the municipality to endeavour to utilise the town refuse, it was removed to Salt River, there to be converted into manure, but the experiment proved unsuccessful. That other efforts thereafter from time to time were made by the municipality to dispose of the town refuse elsewhere, but in every instance the town authorities were either interdicted or threatened with applications for interdicts. That an arrangement was then made with the railway authorities to carry the refuse out of town, first for £600 a year, then £800 a year, then £1000 a year; but recently the railway authorities refused to carry away any more refuse under £1500 a year, with an additional charge for all beyond a certain quantity, which would bring the cost of removal to upwards of £2000 a year. That the Town Council offered to pay £1200, but this was declined, and the railway authorities had declined to remove any more of the refuse. That under these circumstances the Town Council had reverted to their original rights and powers to deposit rubbish on the sea-beach at low-water mark. That the refuse now deposited had been deposited on the beach opposite the back of the shambles, where rubbish had been deposited from time immemorial, and where the refuse of the shambles was also deposited and had always been deposited within the memory of man. That this part of Cape Town was and always had been, in consequence of the shambles, sparsely built on, and then at a distance from the beach; and that the buildings now occupied by the Railway Department and the house occupied

by Dr. Falkiner had all been quite recently erected, and were nearer to the beach than the older erections, and were standing on ground reclaimed in the manner before mentioned. That, in fact, if there was a nuisance on this part of the beach, it was one of long standing, and that the Railway Department had gone to it.

*Jacobs*, in showing cause against the rule, contended that the Town Council had full power to revert to their old practice, which, if it caused a nuisance, was a nuisance that had existence from time immemorial. This was a matter that the Government should have taken up, and not Mr. Dell. The Attorney-General was the proper person to interfere, and not a private individual, who did not even allege that he personally suffered from the acts of the respondents (*Attorney-General vs. The Corporation of Kingston-on-Thames*, 34 L. J., Chy., p. 481). The alleged nuisance was not of such a gross nature as was alleged, and had previously been submitted to.

*Cole*, for the applicant, submitted that any private individual could set the law in motion (*Voet*, 43, 8, 1 and 2). It was not necessary to prove that a nuisance was injurious to health, but it was sufficient if it was offensive to the senses (*Rex vs. Neil*, 2 C. & P. 485).

*Jacobs* replied.

DE VILLIERS, C.J., in delivering the judgment of the Court, said:—In this case Mr. Dell, the traffic manager of the railway, has applied for an interdict to restrain the defendants from throwing the rubbish and other refuse of the Cape Town streets upon the beach of Table Bay in the immediate neighbourhood of the city. There can be no doubt, after reading the affidavits which have been made on behalf of the applicant, that the deposit of this rubbish is a nuisance to the persons in whose neighbourhood it is thrown. The evidence of Dr. Falkiner is very clear to that effect. He says that he inspected the beach in front of the station, where he found a quantity of town refuse and rubbish had been deposited, the stench arising from which is a great nuisance, and, in his opinion, is likely to be injurious to the railway employes working near the spot, as well as to the general health of the neighbourhood. He further says in his affidavit, "Yesterday the stench was so strong that dis-

1879.  
Jan. 4.  
" 13.  
Dell vs. The  
Town Council  
of Cape Town.

1879.  
Jan. 4.  
„ 13.

Dell vs. The  
Town Council  
of Cape Town.

infectants had to be thrown about the house to try and get rid of it.” Mr. Dell also made an affidavit to the same effect. There is one omission in these affidavits which has been much relied upon by Mr. *Jacobs*, on behalf of the respondents, namely, that Mr. Dell does not expressly state that his health is likely to suffer from the rubbish being deposited in the neighbourhood of the railway station; but he does state, as a fact, that he is employed by Government as traffic manager, and having stated that, the Court may draw the conclusion from it, that if he is traffic manager, his duties would compel him to go to both the passenger and goods stations, and that going to the latter his health would be liable to be affected by the stench on the beach. It would be absurd to say that Mr. Dell is to wait till his health is affected by the nuisance. If he shows to the Court that the probable effect of this nuisance would be to injure his health, and if his duties compel him to be in the neighbourhood of the nuisance, then I think he has made out a case to justify the Court in granting an interdict to restrain the respondents from throwing the rubbish in his immediate neighbourhood. Moreover, if this is a nuisance, it is a nuisance to the public of Cape Town at large, and Mr. Dell, as one of the public, according to the authority quoted from *Voet*, is entitled to make this application to restrain the nuisance in any public place in the town, and upon any part of this beach in the neighbourhood of the town. Mr. *Jacobs* has quoted several cases where the Attorney-General in England prosecuted, but it does not follow from that, that a private party would not be justified in coming to the Court for an interdict to restrain the nuisance. I think the affidavit made on behalf of the respondents does not alter the case in the least. They no doubt show that for some time past it has been the practice, first for the municipality, and afterwards the Town Council, to deposit the rubbish on this beach, but the mere fact that no objection was made in former days, surely cannot give them a prescriptive right to deposit it there now, if it is clearly injurious to the health of the inhabitants. In the present case, moreover, the nuisance had entirely ceased when the railway station was built. It is no doubt true that a great part of the land has been reclaimed by means of this rubbish being thrown there, but we all know that in course of time the worst rubbish

will be decomposed and its injurious effects destroyed. If, therefore, what was formerly a nuisance has ceased altogether, I think the Town Council ought to be restrained from causing a fresh nuisance in the same spot. Another objection has been raised, namely, that the rule *nisi* is too large in its terms, and that it would restrain the municipality from depositing rubbish on any part of the beach of Table Bay. There is no doubt it is too general. It is just possible that beyond Salt River, or at some other place within the limits, there may be some convenient spot where the municipality might deposit the refuse, therefore this part of the interdict will not be continued. The Court will, therefore, continue the interdict so far as to restrain the respondents from depositing any rubbish on the beach within the limits of the breakwater on one side, and Fort Knokke on the other. This interdict, however, will continue only until the last day of the ensuing term. I think it is a matter of so much importance that the Court will not make it perpetual at this stage. The matter requires still further argument before the Court would be justified in granting a perpetual interdict restraining the respondents hereafter at any time from depositing the rubbish on the beach. At present a *prima facie* case has been made out to justify the Court in restraining respondents for the time from depositing the rubbish within the limits already specified. The applicant will have an opportunity, in the meanwhile, of bringing an action to have the interdict made perpetual, or should he think that an action ought to be brought by some one in another position, then possibly it may be arranged for its being brought by the Attorney-General, or some person on behalf of the Government. If they refuse, then possibly it may be brought by Mr. Dell himself. The interdict will continue until the last day of next term, with liberty to Mr. Dell, if so advised, to bring an action in the meanwhile to make it perpetual. As this decision is not final between the parties, the question of costs stands over.

1879.  
Jan. 4.  
" 13.  
Dell vs. The  
Town Council  
of Cape Town.

[As the nuisance complained of was abated by the Town Council, no further proceedings were taken.]

[Applicant's Attorneys, REID & NEPHEW.  
Respondents' Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]