IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE **CASE NUMBER: 6020/2002**
DATE: 7/4/06

In the matter between:-

J F VAN ECK AND 12 OTHERS Applicants

and

CLYDE BRICKFIELDS (PTY) LTD First Respondent

EKURHULENI METROPOLITAN COUNCIL Second Respondent

THE MINISTER OF MINERAL AND ENERGY AFFAIRS Third Respondent

JUDGMENT

SITHOLE A.J.

(A) INTRODUCTION

1 Judgment in this matter was reserved and has been outstanding since then. It is about time that it be given. The delay was on account of the recurrent ill health which I suffered since the hearing of the matter. I am now able to give my judgment in the terms below.

2 In this matter the Applicants have launched an application for two final interdicts couched in their notice of motion as follows:

"*1.* *Dat die Eerste Respondent verbied word om enige masjinerie en voertuie (ingesluit swaar vragmotors, ligte afleweringsvoertuie, laaigrawe en/of vurkhysers) op sy werkterrein geleë te onderskeidelik Gedeeltes van Zesfontein en Putfontein tussen 16h30 en 07h00 vanaf Maandae tot Vrydae en vanaf 13h00 op Saterdae tot 07h00 op Maandae te bedryf;*

2. *Dat die Eerste Respondent verbied word om enige lawaai en/of geraassteurnis en/of geraasoorlas voort te bring en/of te maak en/of te veroorsaak tussen 16h30 en 07h00 gedurende weeksdae en vanaf 13h00 op Saterdae tot 07h00 op Maandae;*

3. *Dat die Eerste Respondent gelas word om die koste van hierdie aansoek te betaal; en*

4. *Dat verdere en/of alternatiewe regshulp aan die Applikante verleen word.*"

It is clear from the above that no relief is sought against the Second and Third Respondents.

3 At the inception of the hearing the Court was called upon to give a ruling on an application brought on behalf of the First Respondent that the replying affidavit filed by the Applicants be struck out in its entirety for the following reasons:

3.1 that it raises completely new evidence to which the Respondent was never given occasion to respond to;

3.2 that such new evidence ought to have been included in the founding papers; and

3.3 that it does not comply with Rule 23 of the Uniform Rules of Court as well as with the practice which has crystallised in our Courts.

4 After hearing argument on this issue the Court ruled in favour of the First Respondent that the Applicants' replying affidavit is struck out and that the decision to be reached by the Court on the merits of the matter would be based on the contents of the founding papers and of the answering affidavit only.

(B) <u>THE FACTS</u>

5 The facts of this matter are, fortunately, uncomplicated. They can briefly be set out as follows:

5.1 The First Respondent is the owner of several properties in the vicinity of Zesfontein and Putfontein within the area of jurisdiction of this Court. It uses these properties for the mining of clay with which it manufactures bricks. It uses earth-moving equipment to do so.

5.2 The Applicants are occupiers/owners of dwellings which are situated in the same area as the First Respondent's brickfield. Some of these dwellings border on the First Respondent's property.

(C) THE ISSUE TO BE DECIDED BY THE COURT

6 The Applicants' case is that the after-hours business activities of the First Respondent cause so much noise that they unreasonably encroach upon the Applicants' standard of living and quality of life.

7 The First Respondent denies that the noise levels emanating from its brickfield are of such a nature as to be a disturbance or nuisance to the Applicants as alleged by them. In support of its case the First Respondent has annexed an affidavit by one Kenneth Martin du Plessis ("Du Plessis"), a qualified occupational hygienist who conducted noise tests at the brickfield in question and compiled a report thereon.

8 It follows that the only issue to be decided is whether or not the after-hours brickfield operations of the First Respondent on the properties in question constitute a noise nuisance to the Applicants as alleged by them.

(D) THE LAW

9 The general applicable law to this set of facts is Neighbour Law, which is part of the general principles of nuisance. *Stricto sensu*, the term "nuisance" denotes conduct on the part of a landowner in terms of which a neighbour's health, comfort and convenience are interfered with. This type of conduct is usually referred to as an annoyance, and it would appear *ex facie* the papers that this is the sort of thing the Applicants are complaining about.

10 In our law nuisance in the form of an annoyance is actionable whenever a landowner subjects his neighbour(s) to unreasonable annoyance, namely, an annoyance or inconvenience which is greater than a normal person can be expected to endure in his contact with fellow men. (See ***Prinsloo v Shaw* 1938 AD 570 at 575**; also ***Ferreira v Grant* 1941 WLD 186**). Our law expects an owner of a thing to exercise his powers of ownership in such a way that his neighbour is not prejudiced (*sic utere tuo ut alienum non laedas* - the age-old maxim enjoins).

11 Unreasonable (actionable) annoyance occurs whenever the physiological and psychological well-being of human beings is substantially interfered with by, *inter alia*, noise, odours, smoke or the keeping of animals. Thus noises emanating from a Blacksmith's workshop, a chicken hatchery, dog kennels, a divice for scaring animals, a skittle alley, an engineering works, building operations, and a seal have been held to be unreasonable and therefore to constitute an actionable nuisance. Some relevant case law pertaining to the examples mentioned above will be cited by name at a later stage.

12 Apart from the general principles of nuisance, the statutory legal framework applicable to this matter is Mining Law, in particular the Minerals Act, No 50 of 1991 (which has since been repealed by Act 28 of 2002).

(E) THE EVIDENCE

13 The evidence, as gleaned from the founding papers of the application and the First Respondent's answering affidavit, indicates that:

13.1 Except for the fact that the Third Applicants (Jan Hendrik Du Plessis) has failed to sign his affidavit, and

is therefore no longer a party to these proceedings, the identity of all the parties is not in issue.

13.2 Having regard to the stated purpose of the application, namely, to restrict the times during which the First Respondent operates machinery and vehicles on the brickfield so as not to cause an annoyance by making noise or causing a disturbance during such times, any other nuisance such as ground or air pollution, safety breaches and environmental misdemeanours falls outside the relief sought by the Applicants in this application.

13.3 It is common cause that the First Respondent is the owner of the properties attributed to it by the Applicants.

13.4 It is also common cause that since 1972 the main activity carried out on the properties by the First Respondent is to mine clay by means of heavy earth-moving equipment and to make / manufacture bricks thereby. According to the First Respondent clay has been mined from these properties long before 1972, that is for over 50 years.

13.5 While the First Respondent does not place the photographs depicting its brickfield in issue, it,

however, does so in respect of the site plan of the area in question, referred to by the Applicants in their founding papers. The First Respondent also places in issue the Applicants' allegations that the earth berms it constructed were a failure and that they had facilitated crime in the area. On the contrary, the First Respondent maintains that earth berms are a recognised noise-reduction mechanism and they had the effect of screening the brickfield from the surrounding area. In any event, such berms do not form part of the relief sought, the First Respondent contends.

14 The Applicants' allegations in respect of the failure to rehabilitate the properties in question, water pollution and traffic danger are placed in issue by the First Respondent, and it maintains that they are irrelevant to the relief sought by them.

15 While the First Respondent admits that smoke is generated when kilns are lit for the baking of bricks, it says an expert (Du Plessis) has found that the effect of such smoke on the surrounding area is negligible. The First Respondent has attached a report by the expert in this regard. The First Respondent also points out that smoke or any form of air pollution also falls outside the relief sought by the Applicants.

16 It is not in issue that the First Respondent submitted an environmental management plan to the Third Respondent in September 2000. The First Respondent, however, states that revised versions of such plans were subsequently submitted to the Third Respondent in August and November 2001, and these were approved in March 2002. As to the noise generated by trucks and loaders, the First Respondent points out that the environmental management plan indicates that the noise level is one at the source of generation, that is, right next to the trucks operating under load and the loaders but not at the boundary. Also, that noise-level readings have been taken by a noise-control expert, and that these readings are reflected in reports attached to the First Respondent's answering affidavit. As to the brick-making plant the environmental management plan clearly indicates that this is a low-noise operation which has no significant impact.

17 The First Respondent denies that he has failed to implement any rehabilitation programme, otherwise the Third Respondent would not have approved of his environmental management plans. The First Respondent also states that he fails to see the relevance of the allegations made by the Applicants that "*die Eerste Respondente net maak en breek soos wat hy wil ... slaan geen ag op enige Wet en/of regulasie nie ...*".

18 The First Respondent also places in issue the Applicants'

allegation that its brickfield activities constitute an unreasonable noise nuisance during the evening. In this respect it refers the Court to the reports of Du Plessis attached to its answering affidavit.

19 The allegations by the Applicants that the First Respondent has not taken any steps to contain the noise generated by its activities on the property, and that the First Respondent's management is concerned only with money and financial gain as opposed to the lifestyle and quality of life of the surrounding residents are placed in issue by the First Respondent. It states that it has expended a substantial sum of money (±R260 000,00) to contain the noise within the site. It has as yet to build a sound absorbent wall around the property, over and above the grass berms and vegetation it has already planted.

20 The Applicants' allegation that "*al waarop die Eerste Respondent uit is, is om soveel geld as moontlik in die kortste moontlike tyd te maak, sonder om aan die gevolge van hul aktiwiteite te dink*" is also placed in issue by the First Respondent. It states that it has at all times behaved in a responsible manner and has taken steps at great cost to itself to ensure that the noise generated on the site is properly contained.

21 The First Respondent also denies that the demise of the

caravan park business belonging to the Eighth Applicant is attributable to activities conducted on the First Respondent's property. It points out that readings taken by a noise expert do not indicate that there is any noise generated to the extent that it was any disturbance at all to the caravan park.

22 The allegation by the Applicants that the noise generated by the First Respondent's employees in communicating with one another results in "*die inwoners in die omgewing ook nie op 'n normale stemtoon met mekaar kommunikeer nie*" is also denied by the First Respondent. It states that inasmuch as its employees may occasionally raise their voices or shout, this is not a regular occurrence which the Court ought to consider as a triviality.

23 While the First Respondent admits that the Second Respondent did purport to grant a consent use in terms of its Town Planning Scheme on 6 March 1996 as alleged by the Applicants, it, however, denies that the second Respondent has any legal authority to govern land use of the kind it is operating on because its operations constitute mining activities which fall under the authority of the Third Respondent.

24 As to the alleged requests to the First Respondent by one Mr C Hoek, a director of the Third Respondent that the First Respondent should adhere strictly to certain noise

management measures, the First Respondent contends that it was granted verbal authorisation by the Third Respondent to continue operations on a 24 hour basis. This fact is supported by one Daniel Christiaan Richter in a confirmatory affidavit attached to the First Respondent's answering affidavit.

25 The First Respondent also places in issue the allegations that he ignored the guidelines and request by the Third Respondent given through Mr Hoek. It points out that a noise study has been undertaken and sound barriers (including berms) have been established. It states that the barrier wall is due to be erected shortly.

26 The First Respondent reiterates its denial that it has ever created a disturbing noise for the reasons it has already given and submits that it has taken all reasonable steps to ensure that its activities do not constitute a threat or disturbance to the surrounding area. It contends that its activities on the property are monitored on a scientific and regular basis and that all steps have been taken to ensure that the activities do not result in nuisance. It therefore submits that there is no basis for the Applicants to argue that their properties are being devalued by the activity on the property or that the health of the population is in any way threatened.

F. ANALYSIS AND FINDINGS

27 Nuisance has been described as a "*catch-all for a multitude of ill-sorted sins*" [See Fleming: The Law of Torts (4th ed) at 338 cited by C G Van der Merwe: Sakereg (1979) at p 123]. It is, therefore, not surprising that the Appellants, in their founding papers, are complaining about multifarious forms of annoyance which they attribute to the brick-making activities of the First Respondent. These include the following:

27.1 the massive water pollution danger created by the First Respondent's massive quarries;

27.2 the danger to traffic created by the quarries next to the main road;

27.3 the plumes of smoke coming from the First Respondent's brickfield kilns;

27.4 the dust pollution caused by the First Respondent's heavy vehicles;

27.5 the extreme noise pollution in the area which has resulted, *inter alia*, in the demise of the caravan park business of the Eighth Applicant.

28 Suffice it to say that save for the noise pollution, the rest of the sources of annoyance are not covered by the relief sought by the Applicants. I, therefore, am inclined to agree with the First Respondent, and I accordingly find, that such other forms of nuisance are not relevant to the application.

29 As to the excessive noise complained of by the Applicants, the onus rests on them to convince this Court, on a balance of probabilities, that owing to the conduct of the First Respondent they are each subjected to annoyance or inconvenience greater than that to which a normal person must be expected to submit in contact with their follow-men (see **Prinsloo v Shaw, supra**, at 575.)

30 In **De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D) at 191F-G**, the Court, per Miller J, enunciated the relevant legal position in the following terms:

"*The principle in our law is this: although an owner may normally do as he pleases on his own land, his neighbour has a right to the enjoyment of his own land. If one of the neighbouring owners uses his land in such a way that material interference with the other's rights of enjoyment results, the latter is entitled to relief.*"

The Court also pointed out that before relief may be sought, the nuisance must be material or substantial (at **192A**), and that the test whether the nuisance is excessive, is an

objective one, and notice must be taken of the likely percipience of a reasonable man (at **192D-F**), that is:

"*One who, according to the ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property*."

31 In order to test whether the First Respondent's conduct is objectively reasonable under the circumstances, the following factors have to be taken into account:

31.1 <u>The gravity of harm or potential harm to the neighbours</u>.

To ascertain this the duration of the annoyance and the time when the annoyance takes place have to be considered. *In casu* the manufacture of bricks occurs as a 24 hour activity every day, but the Applicants want the First Respondent to be interdicted from making any noise whatsoever between 16:30 and 07:00 during weekdays and from 13:00 on Saturdays until 07:00 on Mondays. This means that the Applicants want their weekday nights and their weekends to be noise-free. Whether the annoyance is *in casu* material or substantial is a moot point and not clear, especially if one keeps the following factors

in mind:

Firstly, that the materiality test is objective, viz, an annoyance that a normal person residing in the locality (such as the Applicants) would consider an excessive or intolerable interference with the comfort of human existence. [**Die Vereeniging van Advokate (TPA) v Moskeeplein (Edms)Bpk 1982 (3) SA 159 (T) 163**]; Secondly, that in the noise survey conducted on the night of 20 September 2001 at the First Respondent's mine / brickfield and at other strategic points situated outside the boundaries of the mine / brickfield by Mr K M du Plessis, an occupational hygiene expert, which report is attached to the First Respondent's answering affidavit as annexure "GB2", the following, *inter alia*, is recorded in the summary:

"*It would not be possible to say with any certainty that the noise measured in the vicinity of the mine was only being generated by the mine. There are a number of other noise sources, both during the day and night which influence noise measurements* ...".

"*It is suggested that the only way to determine actual noise exposure to the complainants would be to measure the noise in their houses. This of necessity would require their*

(Applicants') co-operation a it would cause discomfort and upheaval in the households during the night time hours ...".

In the absence of a noise level expert's report in the founding papers, I find that the Applicants have not made out a case that the noise they are bitterly complaining about is excessive or material.

31.2 The locality or neighbourhood in which the alleged nuisance occurs.

Actionable nuisance differs from place to place because certain places or areas are devoted to certain uses or activities, e.g. agriculture, industry, commerce or residential dwellings. *In casu* the area in question is, according to the First Respondent, not a normal urban residential area. The brickfield in question is situated in an area which is a combination of agricultural holdings an industry. The First Respondent has been operating from the property in question since 1972. Prior to that the property was used for the same purpose, namely, the mining of clay and the making of bricks therefrom. Counsel for the First Respondent submitted that the brickfield has been in existence for the last 50 years and anyone who became a resident in the area was aware of this fact. To my mind, the fact that the Department of

Minerals and Energy has granted the First Respondent a mining licence to mine for clay on the properties in question lends force to the argument that the area is not a normal residential area but that it has industrial utility. I therefore find that this fact has to be taken into consideration in favour of the First Respondent.

31.3 The personality of the plaintiff.

The personality of the plaintiff is important in determining the gravity of the harm inflicted on him. In this instance the test to be employed is "*not (that) of the perverse or finicking or over-scrupulous person, but (that) of the normal man of sound and liberal tastes and habits*". (**Die Vereeniging van Advokate (TPA) v Moskeeplein (Edms) Bpk, supra, at 163**). It follows that plaintiffs who are abnormally or extraordinarily sensitive will not be entitled to relief even though they may personally suffer substantial discomfort and inconvenience. (**De Charmoy v Day Star Hatchery (Pty) Ltd, supra, at 192**). *In casu* the Court is unable to form an opinion about the personalities of the applicants more so that all other Applicants, save for the third, have signed identical affidavits which merely say that they confirm the content of that of Van Eck, and that no particular instances of where they have

been harmed, disturbed or bothered are revealed by them. All the Court knows about their case is that the activities of the First Respondent's brickfield result in excessive and intolerable noise to such an extent that "*mens en dier word teen die mure uitgedryf*", as they allege.

31.4 The motive with which the landowner carries out the activity.

The motive behind a particular activity may determine its objective reasonableness. If the activity is motivated solely by an intention on the part of the landowner to harm his neighbours (*animo vicino nocendi*) this fact may turn an otherwise lawful activity into an unreasonable activity which cannot be expected to be tolerated. (**Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A) 107-108**). *In casu* the Applicants have attempted to characterise the motive of the First Respondent as that of a shameless, uncaring, wreckless, lawless, profit-driven person. This is evident from, *inter alia*, the graphic and serious allegations by the Applicants that:

31.4.1 "*Die Eerste Respondent skroom nie om die bolaag grond te verniel en om dit sonder enige vorm van rehabilitasie te misbruik nie.*"

31.4.2 "*... Die Eerste Respondent maak en breek net soos wat hy wil.*"

31.3.3 "*Die Eerste Respondent slaan geen ag op enige Wet en/of regulasie nie en lag alle reëls, regulasies en/of Wette doodeenvoudig af.*"

31.4.4 "*Die Eerste Respondent is die enigste party wat 'n aansienlike finansiële voordeel uit die Applikante en omliggende grondeienaars se elende (**sic**) trek.*"

The first Respondent, in his answering affidavit, has denied the aforegoing allegations and has placed before Court countervailing evidence which points to the contrary.

31.5 <u>The benefit of the activity to the landowner.</u>

The benefit and utility of the activity to the landowner must be weighed against the harm suffered by the Plaintiffs. Harm to the Plaintiffs' ordinary comfort and convenience may not be regarded as unreasonable if it is caused by some activity which is so beneficial to the landowner that it outweighs the harm suffered. But an activity which is marginally beneficial to a landowner will be considered unreasonable if it

causes abnormal harm to the Plaintiffs neighbours (**Gien v Gien 1979 (2) SA 113 (T)**).

In casu the First Respondents' management is accused by the Applicants of being concerned only with money and financial gain as opposed to the lifestyle and quality of life of the surrounding residents. The First Respondent has denied this allegation and has given reasons for its denial.

The First Respondent is also accused of being so money-minded that:

"*Al waarop (hy) uit is, is om soveel geld as moontlik in die korste moontlike tyd te maak, sonder om aan die gevolge van hul aktiwiteite te dink.*"

This accusation has also been denied by the First Respondent and it states that it has taken steps at great cost to itself to ensure that the noise generated on its site is properly contained.

The finding I arrive at is that the First Respondent's brickfield activities cannot be regarded as being marginally beneficial to it even if the above allegations against it signify that the noise-levels in the neighbourhood in question are relatively abnormal.

31.6 The social utility of the activity or its utility to the general public.

The social utility of the activity complained about or its utility to the general public can serve as a determinant of the reasonableness of the conduct of a landowner. This implies that a particular type of land use may, in certain circumstances, have greater social utility than the one representing the ordinary comfort of human existence.

In casu the only indication of such utility can be gleaned from the confirmatory affidavit of MR Daniel Christiaan Richter, the Assistant Director Environment: Department Minerals and Energies, in which he confirms the First Respondent's allegation that it has been given verbal permission to operate on a 24 hour basis because closure of the mine and brick-making activities would have caused more harm than good. In my view, and also my finding, the "good" referred to here is the public one which transcends that of the individual.

31.7 Whether the landowner could have achieved the same goal by employing measures less harmful to the Applicants.

The reasonableness of the landowner's conduct can also be determined by establishing whether the landowner could have achieved the same goal by measures less harmful to his neighbour. This implies that the greater the possibility of preventing harm by precautionary measures, the more likely that the landowner's conduct will be considered unreasonable. For example, an interference with the comfort and convenience of a neighbour which could have been prevented or at least diminished by the defendant carrying on the activity at a different time, in a different manner, at a different place, or with greater expertise is more likely to be considered unreasonable than one which could not have been prevented by such measures (*Cf* **Die Vereeniging van Advokate TPA v Moskeeplein (Edms) Bpk, supra, at 164; Gibbons v SAR&H 1933 CPD 521 at 531-535; Ingelthorpe v Sackville-West 1908 EDC 159 at 161** and **Regal v African Superslate (Pty) Ltd, supra, at 103**).

In casu the papers are silent on the question whether or not the First Respondent's activities can be carried out in a different manner or place. As to a different time, the relief sought by the Applicants indicates that they wish to have a cessation of the First Respondent's activities between 16:30 and 07:00

during weekdays and between 13:00 on Saturdays to 07:00 on Mondays. The critical question which arises here is: have the Applicants made out a sufficient and convincing case for the relief they are seeking? In the absence of empirical proof of the noise levels and its source in their founding papers, I find that no such case has been made out.

31.8 The practicability of preventing the alleged nuisance.

The unreasonableness of the landowner's activities can also be assessed by considering whether it is practicable for him to prevent the nuisance from occurring to his neighbours. This is so, especially in those instances where the landowner has inherited a certain state of affairs which is injurious to his neighbours. It is expected of the landowner to take steps which are reasonably practicable in the circumstances.

In casu evidence points to the fact that the First Respondent has constructed earth berms around the property in accordance with recommendations by a noise control expert. Besides, the First Respondent has, on more than one occasion, commissioned noise surveys conducted by an occupational hygiene expert called Du Plessis. Furthermore, the First Respondent

has expended a substantial sum of money (approximately R260 000,00) in compliance with an Environmental Management Plan recommendations on erecting grass berms; on planting vegetation on such berms; on enclosing the clay compacting equipment and on the construction of a wall around the brick-making plant. Another wall, built of sound absorbent material has yet to be built. Although the Applicants complain and allege that the berms which the First Respondent has constructed have facilitated crime in the area, I find that the steps taken by the First Respondent to contain the noise complained of are reasonably practicable.

31.9 The inquiry whether the plaintiff or Applicants have "come to the nuisance".

A final consideration in the assessment of the reasonableness of a landowner's activity is whether the activity complained about was carried on prior to the plaintiff (Applicant) "coming to the nuisance". "Coming to nuisance" occurs as a result of the expansion of township developments extending outside the boundaries of a town or city up to the boundary of an existing plot or farm where, for example, there is a clay mine or foundry or hatchery or pig farm or brick-making plant.

In casu evidence indicates that the area occupied by the parties is not a normal urban residential area but one which is a combination of agricultural holdings and industry. This is apparent *ex facie* the photographs of the area annexed as exhibit "C" to the founding papers of the Applicants. Besides, it is common cause that the First Respondent has been operating a brickfield in that area since 1972 and that a brickfield has been operated on the site for the past 50 years. For this reason, it was contended and argued on behalf of the First Respondent that anyone (including the Applicants) who became a resident in the area was aware of this fact. On the basis of the abovementioned facts I find that, on the probabilities, the Applicants, by establishing their dwellings in the area, came to the nuisance they are complaining about. This finding does not, in any way, imply that this Court allows the First Respondent to raise the plea or defence that the Applicants voluntarily set up their residences in the area within the ambit of the nuisance.

G. **CONCLUSION**

32 In the light of the foregoing facts, analysis and findings, I arrive at the inescapable conclusion that the Applicants have

not succeeded to prove, on a balance of probabilities, that the nuisance they are complaining about is material or that they are entitled to the relief they are seeking and that accordingly the application has to fail and be dismissed with costs.

H. **THE ORDER**

33 The application is dismissed with costs.

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SITHOLE M N S
ACTING JUDGE
THE HIGH COURT
PRETORIA
3 March 2006