

## SMELLY: AGRICULTURAL LIVING OR ACTIONABLE NUISANCE?

Jacobs NO and Others v Hylton Grange (Pty) Ltd and Others (A139/2019) [2020] ZAWCHC 14 (27 February 2020)

*This judgment deals with smells originating from activities on a farm which are sometimes so severe that neighbouring farm owners cannot open windows or entertain guests outside. When will a court allow the suffering owner an interdict to prohibit his neighbour from continuing with his farming activities? This judgment illustrates the considerations.*

The Judgment can be viewed [here](#).

### FACTS

The Modderdrift Trust ('MT') owns the farm, Modderdrift ('Modderdrift') in the De Doorns area. Hylton Grange and X are two companies which own and lease grape farms bordering Modderdrift.

As part of its commercial mushroom farming business, MT conducted composting activities on Modderdrift. The compost (or substrate) is the material in which the mushrooms grow. The making of mushroom substrate can emit gases with offensive odours, particularly ammonia (an acrid urine-like smell) and hydrogen sulphide (a smell like rotten eggs). (Unless substrate is made in an isolated area, strong odours are emitted).

Hylton Grange and X complained of odours that emanated from the substrate cultivation business. The intensity of the odours reaching their farms depended on the phase of MT's cultivation operations and on the direction and strength of the wind. Sometimes the odours were not present or not particularly offensive, but on other occasions they were highly offensive. When the wind was blowing in the direction of neighbouring farms (including that of Hylton Grange and X) during certain stages of the composting operation – something which occurred relatively often (every few days) – the farmers, their families and guests could not go outside, 'as the smell in the air is simply sickening and quite unbearable'. It was 'quite impossible' on such occasions to sit and relax outside, so much so that when they wished to entertain guests to braais, they invited them to the local golf club rather as they could not guarantee that conditions on the farm would be tolerable. During such periods they had to close all the windows and doors, though the smell invaded their homes and pervaded everything inside such as curtains and linen.

Hylton Grange and X's application for an interdict in the Magistrate's Court was successful. The Court ordered that MT had to cease all composting activities on its farm within a certain period. MT was further interdicted and restrained from recommencing any composting activities until such time as they have obtained leave from the Court to do so, which application had to be supported by evidence, including expert evidence that: (i) all reasonable steps to abate the nuisance caused by the composting activities have been taken and are likely to be successful, and (ii) the composting activities will be overseen by a suitably trained and qualified person.

MT appealed.

### HELD

#### **Nuisance**

- The question is whether the conduct of the person causing the alleged nuisance is, in the delictual sense, wrongful in relation to the party complaining of the nuisance. Since Hylton Grange and X sought an interdict,

not damages, the question of fault was not germane to the present matter.

- In a case of nuisance, the neighbour complains that his right to enjoy the undisturbed use of his property with reasonable comfort and convenience is impaired. Because the offending conduct does not cause physical damage to body or property, wrongfulness is not presumed. Wrongfulness must then be determined with regard to the particular circumstances of the case, the question being whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable. In short, whether it is objectively reasonable to impose liability.
- All the factors bearing on this value judgment must be balanced – the locality of the properties; the suitability of MT's use of its property; the extent and duration of the interference; the times at which it occurs and the like.

### ***The wrongfulness assessment in this case***

- Relevant legislation provides as follows:
  - Section 24(a) of the Constitution gives everyone the right 'to an environment that is not harmful to their health or well-being'. An environment will, in my view, be 'harmful' to a person's 'well-being' if it is repulsive to the senses of an ordinary person.
  - Section 28(1) of the National Environmental Management Act 107 of 1998 states that every person who causes or has caused or may cause 'significant pollution or degradation of the environment' must take reasonable measures to prevent such pollution or degradation. If the pollution or degradation cannot be avoided or stopped, the person must 'minimise and remedy' it. 'Pollution' is defined in the same Act as including a change in the environment caused by substances and by odours emitted by an activity, where that change has 'an adverse effect on human health or well-being'.
  - Section 35(2) of the National Environmental Management: Air Quality Act 39 of 2004 provides that the occupier of any premises 'must take all reasonable steps to prevent the emission of any offensive odour caused by any activity' on such premises. 'Offensive odour' is defined in the Act as meaning 'any smell which is considered to be malodorous or a nuisance to a reasonable person'.
- As against these provisions, section 22 of the Constitution guarantees to all citizens the right to choose their trades, occupations or professions freely, though the practice thereof may be regulated by law. Mushroom farming is a trade or occupation. It has also been shown that MT's making of mushroom substrate is allowed by the relevant zoning.
- However, the fact that it is not contrary to the zoning is a matter of relatively little importance. In most cases of nuisance, the conduct complained of is not contrary to the property's zoning. What is more significant is that MT is conducting farming operations in a farming area. Conduct which might be unacceptable in an urban environment might reasonably have to be tolerated in an agricultural one. On the other hand, the farms in this area are relatively small, usually with two main dwellings and around six labourers' cottages. Viticulture predominates. In such a farming community, neighbouring farm houses would typically be closer to each other than on more expansive farms.
- Mushroom farming is not a common agricultural activity. Mushroom farming, in addition, does not necessarily require the farmer to make his own substrate, so the manufacturing of substrate would be a feature of some but not all mushroom farms. It is an activity well-known to produce offensive odours. Mushrooms are not a staple crop. They are a luxury foodstuff.

- MT conducts mushroom farming on a large scale, seven days a week. Although offensive odours are not continuous, it is impossible for neighbours to know when they will occur. When the odours occur, they are powerful and disgusting, so that people cannot even enjoy a meal inside their own homes. Against this, Hylton Grange and X use their farms for an agricultural activity which is common in the area, namely the cultivation of grapes.
- It would not be objectively reasonable to say to Hylton Grange and X and other neighbours in reasonable proximity to Modderdrift that they have the choice of putting up with disgusting smells or moving elsewhere. Conversely, it would not be objectively unreasonable to request MT to find a more remote location for its operation, if it cannot conduct its mushroom farming without emitting disgusting smells.
- Although MT alleged that success for Hylton Grange and X would mean the closure of the mushroom farm, this was not substantiated. It appeared from the facts that substrate could be brought in from outside or MT could enclose its substrate-making activity in a building. The Court accepted that this would be a substantial once-off expense, but MT did not establish that the scale and profitability of its enterprise ruled this out. As such, it was objectively reasonable to impose liability in this case, and that MT's conduct is thus wrongful.

## CONCLUSION

The appeal failed.