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An evaluation of the legal framework governing noise control in South Africa

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DECLARATION

I, Waheeda Banoobhai do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the day of

Signature: -----

ABSTRACT

Rapid industrialisation in countries around the world has resulted in an increase in various types of pollution. Noise pollution is one example of such pollution. Like other types of pollution, for example water and air pollution, uncontrolled noise pollution can have detrimental consequences for human beings and animals. There is therefore an urgent need to control noise pollution in order to prevent or reduce these negative consequences.

This dissertation focuses on the control of noise pollution in South Africa. In chapter one a general background will be provided in order to define and explain what noise is and describe the detrimental effects of uncontrolled noise on human beings. The remainder of the dissertation will critically evaluate the common law and statutory rules that are applicable to the control of noise pollution in South Africa. In addition to discussing the applicable common law and legislation I will also discuss noise pollution from the perspective of human rights by providing a discussion of the environmental right contained in the Bill of Rights. A few decisions of the European Court of Human Rights, where noise was considered to be a factor that breached a fundamental right enshrined in the European Convention on Human Rights, will also be analysed. Finally, some general conclusions will be made in the chapter five, together with recommendations on possible ways to enhance the current legal regime governing noise pollution control in South Africa.

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CHAPTER ONE

“Unnecessary noise is the most cruel absence of care which can be inflicted on either sick or well” (Florence Nightingale)

1.1 INTRODUCTION

1.1.1 Background

In early civilisations sound was viewed as an asset rather than a nuisance. This is because it served many purposes, foremost as a means of communication. Over the past century, however, this perception has changed and today sound in the form of noise¹ is recognised as a form of pollution² in many countries around the world, including South Africa.

Section 1 of the National Environmental Management Act (‘the NEMA’),³ thus, defines pollution as ‘any change in the environment caused by –

- (a) substances;
- (b) radioactive or other wastes; or
- (c) *noise*, odours, dust or heat, emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or wellbeing or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future’. (my emphasis).

¹ The term ‘noise’ is derived from the Latin word ‘nausea’ implying ‘unwanted sound’ or sound that is ‘unpleasant or unexpected’.

² ‘Pollution’ may be defined as ‘the introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity, or interferences with legitimate uses of the environment’ (see MW Holdgate *A Perspective on Environmental Pollution* (1979) p 7).

³ 107 of 1998.

Although there are a number of reasons why sound in the form of noise is recognised as a pollutant today, among the most important are:

- (a) first, that as a result of the industrial revolution and the development of means of transport and communication, human beings are exposed to noise from a much wider range of sources today than ever before;⁴ and
- (b) second, that noise affects both the physiological and psychological health of human beings. As Singh and Davar have pointed out, 'noise is a low and subtle killer, and is a hazard to the quality of life'.⁵

1.1.2 Sources of noise

(a) Introduction

In the modern world noise originates from a variety of sources. Among these are industrial noise, transportation noise, construction and building noise and domestic noise. Each of these sources is discussed briefly below.

(b) Industrial noise

Different types of machines used in the industrial process create substantial noise problems.⁶ The noise created by the machines and other equipment will affect both workers in the industry as well as people who live in the areas surrounding of the factory or construction site.⁷ The noise generally increases with the power of the machine used.⁸

⁴ G Firdaus and A Ahmed 'Noise Pollution and Human Health: A Case Study of the Municipal Corporation of Delhi' (2010) 19 *Indoor and Built Environment* 648.

⁵ N Singh and SC Davar 'Noise Pollution – Sources, Effects and Control' (2004) 16(3) *Journal of Health Ecology* 181.

⁶ B Berglund, T Lindvall and H Schwela(eds) *Guidelines for Community Noise* (1999), available at <http://www.who.int/docstore/peh/noise/guidelines2.html>, Accessed on 5 January 2012

⁷ Ibid p25.

⁸ Ibid.

(c) Transportation noise

The varied modes of transport used in modern society also create significant noise problems.⁹ Transportation noise is one of the major causes of the increase in noise pollution in the world today, the main sources of which are rail, road and air.¹⁰ The noise generally increases with the size and weight of the vehicle.

Insofar as road vehicles are concerned, most of the noise they emit is generated from the engines as well as the contact between the vehicle with the road surface and the air.¹¹ In countries where trains are a popular means of transport, noise emissions will depend on the speed of the trains.¹²

Aircraft noise has long been considered to be one of the major contributors to noise pollution in many countries throughout the world.¹³ A substantial noise is generated by aircraft in areas close to airports.¹⁴ On take-off a plane it produces intolerable noise. A bigger plane, because it is heavier, will cause more noise than a smaller and lighter aircraft.¹⁵ The main source of the noise is the engine of the aircraft, which in modern times has been mechanically adapted to produce less noise than older aircraft.¹⁶

(d) Construction and building noise

The construction industry is responsible for high noise emissions.¹⁷ The source of the noise is the machinery used for the purposes of construction, for example, cement mixers, cranes, drills, and hammers and so on.¹⁸ The reason is that the equipment used in the industry is often inadequately silenced and maintained, and that the consequences of environmental noise are often neglected in building operations.¹⁹

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² Ibid p 26

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid.

(e) Domestic noise

Noise in residential areas comes from a variety of sources and is arguably the most difficult to control.²⁰ Music, barking dogs, loud voices, lawn mowers, vacuum cleaners as well as other household equipment are the most frequent generators of noise.²¹ Moreover, religious activities, such as the ringing of church bells, the call to prayer by the muezzin from a mosque and other religious festivals have also lead to noise complaints.²²

1.1.3 Effects of noise

(a) Introduction

Given that noise originates from so many sources in the modern world, it is not surprising that it may have an adverse effect on the physical, physiological and psychological health of human beings.

(b) Physical effects

The effect of severe noise for a continuous period of time can lead to severe trauma in human beings. Very loud sounds, for example noise from blasting operations will cause substantial trauma in human beings, and will in addition also cause physical damage to structures and buildings.²³

²⁰ Ibid

²¹ Ibid

²² Ibid.

²³ CJ Johnston 'Noise' in RF Fuggle and MA Rabie *Environmental Management in South Africa* (1992) 569 at 571.

(c) Physiological effects

The effects of noise are not limited to the physical, as noise can also have significant physiological effects. The most important physiological effect of noise is loss of hearing acuity.²⁴ Recurrent exposure to high levels of noise, from nightclubs or construction machinery could ultimately lead to hearing loss.²⁵

(d) Psychological effects

The psychological effects of noise represent the most significant effect from an environmental point of view. Noise causes annoyance which ultimately leads to negative community reaction. This will inevitably lead to a diminished quality of life based on the lack of tranquillity and the inability to enjoy leisure time as well as your property.²⁶

(e) Other effects

In addition to the physical, physiological and psychological effects set out above, noise also has other adverse effects on humans. Among these are sleep deprivation and a loss of productivity. Sleep deprivation is one of the most widespread sources of distress caused by noise, as chronic sleep disorders adversely affect mental health and physical health and well-being.²⁷

²⁴ Ibid

²⁵ See (note 6) p 48-49. There is also a growing body of evidence that points to the fact that noise pollution has a temporary and permanent effect on humans and other mammals by way of the endocrine and autonomic nervous systems. This is based on the fact that noise acts as a biological stressor and elicits a reaction that prepares the body for a fight or flight response. Given this fact, it has been argued that noise can trigger endocrine and autonomic nervous system responses that affect the cardiovascular system which can then put an individual at risk for cardiovascular disease. The effects become apparent with long term exposure to noise (see L Goines and L Hagler 'Noise Pollution: A Modern Plague' (2007) 100 *Southern Medical Journal* 290).

²⁶ See (note 6) p49 and SA Stansfeld and MP Matheson 'Noise Pollution: non-auditory effects on health' (2003) *British Medical Bulletin* 247 -248.

²⁷ See (note 6) p45.

1.1.4 Controlling noise

(a) Introduction

Although noise is recognised as a form of pollution in South Africa, it is submitted that it is very difficult to control. This is due to the transient nature of noise which prevents it from collecting in the environment like other types of pollution. As Kerse points out ‘noise leaves no visible scars; nor fish floating dead in the stream, no besmirched buildings and sculptures’.²⁸ Despite this, it is nevertheless possible to control noise pollution at three different points, namely: at its source; during its transmission path; or at its receiver.²⁹

(b) At the source

Noise spreads very easily. The most cost effective method of preventing noise pollution therefore, is to control it at its source.³⁰ Noise may be controlled at its source by including noise standards in the design and planning stages.³¹ The public must be made aware of noise and its impact of the wider society. It is suggested that noise awareness programmes must be implemented, so as to educate the public about noise in the same manner as is done in respect of other forms of pollution.³²

(c) In the transmission path

If noise cannot be abated at the source, the next approach is to control noise while it is en route to the hearer. ‘This can be done by enclosing the source, by the erection of suitable barriers, and by ensuring that buildings provide reasonable attenuation to noise generated internally and externally.’³³

²⁸ CS Kerse *The Law Relating to Noise* (1975) at 1.

²⁹ See Johnston (note 23) p575.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid p 577

Noise can also be controlled *en route* to the hearer, by some form of barrier. These barriers can be in form of *physical barriers* such as roadside embankments or sound insulation; or they can take the form of *spatial barriers*, through town planning and zoning.³⁴

(d) At the receiver

Controlling noise at this point is the least economical option. At this stage, the victim of the noise has to be isolated or relocated because of the lack of attention to the possible effects of noise during the planning process.³⁵ If noise from traffic or industry is intolerable for the recipient, the soundproofing of houses and offices is the only solution.³⁶ If these attempts do not succeed, it then becomes necessary to move the victims of the noise.³⁷

1.2 RESEARCH QUESTION

Although noise is recognised as a pollutant in NEMA, the effects of noise pollution; the manner in which it is regulated in South Africa; and the human rights consequences of noise pollution have not been given as much attention as they deserve.

The aims and objects of this dissertation, therefore, are to critically examine the legal principles and rules governing the regulation of noise pollution in South Africa.perspective.

More particularly, the aims and objects of this dissertation are to:

- (a) set out and critically discuss the statutory provisions regulating noise pollution in South Africa;
- (b) set out and critically discuss the common law provisions regulating noise pollution in South Africa;
- (c) set out and discuss noise pollution from a human rights perspective in South Africa; and
- (d) provide recommendations on how noise pollution control may be improved in South Africa.

³⁴ Ibid p577.

³⁵ Ibid p578.

³⁶ Ibid.

³⁷ Ibid.

1.3 RESEARCH METHODOLOGY

This is a desk-top study. It is based largely on primary and secondary legal materials. These materials include statutes, law reports and the old authorities. In addition, they also include textbooks, journal articles, reports and internet websites.

1.4 STRUCTURE OF THE DISSERTATION

This dissertation is divided into 5 chapters.

Chapter One

The aims and objects of the dissertation are set out in chapter one. Apart from the aims and objects, the backgrounds, the research methodology, the structure of the dissertation and the definition of key concepts and terms are also set out in chapter one.

Chapter Two

The statutory principles and rules that govern noise pollution in South Africa are set out and critically discussed in chapter two.

Chapter Three

The common law principles and rules that govern noise pollution in South Africa are set out and critically discussed in chapter three

Chapter Four

This chapter provides a discussion on human rights and noise pollution both in South Africa and in Europe. Some recently cases decided by the European Human Rights court relating to noise are also discussed.

Chapter Five

This chapter provides conclusions on the efficacy of the current legal framework in dealing with noise pollution control in the. Recommendations are made on changes that may enhance the current legal framework.

1.5 KEY TERMS AND CONCEPTS

Before turning to discuss the statutory principles that regulate noise pollution in South Africa, it will be helpful to define certain key terms and concepts.

1.5.1 Noise

Noise is defined as ‘a sound without agreeable musical quality or unwanted or undesired sound’.³⁸ Noise is made up of sound which is undesired or unwanted.³⁹

1.5.2 Sound

Sound is essentially what we hear. If the fluctuations in the static air pressure around us occur approximately between 20 and 16 000 times per second, our ears hear these rapid fluctuations as audible sound.⁴⁰ The pitch of the sound is dependent on how rapidly the fluctuations occur, whilst the frequency of the sound is determined by the ‘rate at which the fluctuations occur, in cycles per second’.⁴¹ Frequency of sound is measured in hertz.

The loudness of the sound will depend on the ‘amount by which the air pressure deviates from its static value’.⁴² The pressure deviations are referred to as the amplitude. If the deviation is greater, the amplitude increases and the human ear then perceives this as a louder sound. Sound pressure is measured in terms of a logarithmic scale.

³⁸ A Bell ‘Noise – An occupational Hazard and Public Nuisance’ (1966), available at <http://www.who.int/iris/handle/10665/39744>, accessed on 15 January 2012.

³⁹ See Kerse (note 28) at 1.

⁴⁰ See Johnston (note 23) p 569.

⁴¹ Ibid.

⁴² Ibid.

The unit to measure sound is the decibel. A sound which has a sound pressure of 0dB would be hardly audible, whereas a sound pressure of around 140dB would be that of a jet aircraft taking off. In the average home setting during the day, 50dB would be regarded as normal, whilst a normal loudness in the same home at night would be 40dB.⁴³

1.5.3 Measuring noise

Understanding how to regulate noise, requires an understanding of how noise is measured. Sound is described by wave theory. It is the amplitude or height of the sound wave that determines the loudness or volume of the sound.⁴⁴ The pitch or tone of the sound is determined by the compression or frequency of the waves.⁴⁵ The effect of noise is also determined by the pressure.⁴⁶ Sound is described as the physical variation of atmospheric pressure.⁴⁷ It is measured in terms of the logarithmic scale due to the large variations that may occur.⁴⁸ The measurement is expressed in units of the decibel. The frequency of the sound is the rate at which fluctuations occur, in cycles per second.⁴⁹

The common measure of noise is the decibel (dB), which is a logarithmic measure. Instruments that measure noise in South Africa are equipped with circuitry to mimic the ear's sensitivity to sound.⁵⁰ The human ear is not equally sensitive to all frequencies, and as a result the sensitivity of the noise measuring instrument was adapted so that it reacted in the same manner as the human ear.⁵¹ The consequent adaptation is referred to as frequency weighting.⁵² It is known as the A-weighting and is used for this purpose.⁵³ In order to indicate sound measurements that employ the A-weighting, dBA or dB(A) are used. Using the A scale means that when the loudness is doubled, it is roughly equal to an increase in the sound level of 10dBA.⁵⁴

⁴³ Ibid p 573

⁴⁴ J Glazewski *Environmental Law in South Africa* (2000) p739.

⁴⁵ Ibid.

⁴⁶ Ibid

⁴⁷ Ibid p740.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ A Semmelink and MA Rabie 'Noise' in RF Fuggle and MA Rabie *Environmental Concerns in South Africa* 1983 366 at 367.

⁵¹ See Johnston (note 23) p572.

⁵² Ibid.

⁵³ Ibid p572.

⁵⁴ R Taylor *Noise* (1979) p 60.

Noise is subjective as different people will react differently to the same noise or sound.⁵⁵

This therefore poses problems when the impact of the noise requires assessment and furthermore, when one intends to set limitations. The criterion that has been adopted in practice is, in any given situation, to look at the 'level beyond which a significant number of reasonable people could be expected to start complaining'.⁵⁶

⁵⁵ See Johnston (note 23) p574.

⁵⁶ Ibid.

CHAPTER TWO: THE STATUTORY CONTROL OF NOISE POLLUTION

2.1 INTRODUCTION

The purpose of this chapter is to set out and discuss the statutory provisions that regulate noise pollution in South Africa. Before doing so, however, it will be helpful to briefly set out and discuss the manner in which the power to make laws is divided amongst the three spheres of government. This is because noise pollution is expressly listed as a functional area of exclusive provincial competence in Part B of Schedule 5 of the Constitution.⁵⁷

2.2 THE CONSTITUTIONAL FRAMEWORK

Legislative and executive authority in South Africa is divided amongst the national, provincial and local spheres of government.

2.2.1 The legislative authority of Parliament

At a national level, legislative authority is vested in Parliament. The legislative authority vested in Parliament is set out in section 44 of the Constitution which provides that Parliament has the authority to:

- (a) amend the Constitution;⁵⁸
- (b) pass legislation with regard to any matter, including those matters over which it shares concurrent legislative authority (set out in Schedule 4) with the provinces, but excluding those matters over which the provinces have exclusive authority (set out in Schedule 5);⁵⁹ and
- (c) assign any of its legislative powers, except the power to amend the Constitution, to any other legislative body.⁶⁰

⁵⁷ The Constitution of the Republic of South Africa Act 108 of 1996.

⁵⁸ Section 44(1)(a)(i).

⁵⁹ Section 44(1)(a)(ii).

⁶⁰ Section 44(1)(a)(iii).

2.2.2 The legislative authority of the provincial legislatures

At a provincial level, legislative authority is vested in the Provincial Legislatures. The legislative authority vested in the Provincial Legislatures is set out in section 104(1) of the Constitution which provides that the Provincial Legislatures have the authority to:

- (a) adopt a provincial Constitution;⁶¹
- (b) assign any of their legislative powers to a municipal council in the province concerned;⁶²
- (c) pass legislation on any matter set out in Schedule 4;⁶³
- (d) pass legislation on any matter set out in Schedule 5;⁶⁴
- (e) pass legislation on any matter outside of Schedule 4 and 5 which has been assigned to the provinces by Parliament;⁶⁵ and
- (f) pass legislation on any matter which has been assigned to the provinces by the Constitution.⁶⁶

2.2.3 Legislative authority of the municipal councils

At a local level, legislative authority is vested in the Municipal Councils. The legislative authority vested in Municipal Councils is set out in section 156(2) of the Constitution which provides that Municipal Councils may adopt and administer by-laws for the effective administration of matters which they have the power to administer. Municipal Councils have the power to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. This means that Municipal Councils may adopt by-laws in respect of the matters listed in Parts B of Schedule 4 and 5.

⁶¹ Section 104 (1)(a).

⁶² Section 104(1)(c).

⁶³ Section 104(1)(b)(i).

⁶⁴ Section 104(1)(b)(ii).

⁶⁵ Section 104(1)(b)(iii).

⁶⁶ Section 104 (b)(iv).

2.2.4 Federalism limits on the authority to pass legislation

The division of legislative competencies between the different spheres of government set out above imposes important limits on each legislature. This is because a law passed by a legislature which did not have the necessary competence to pass that law will be invalid. One of the most important aspects of this division of legislative authority is that, as a general rule, only the provincial legislatures may enact laws in respect of the functional areas set out in Schedule 5 of the Constitution. Or to put it another way, Parliament does not, as a general rule, have the power to legislate in these areas.⁶⁷

2.2.5 Schedule 5 of the Constitution

(a) Introduction

The functional areas of exclusive provincial competence set out in Schedule 5 are divided into two categories: first, those set out in Part A of Schedule 5⁶⁸ and those set out in Part B of Schedule 5.⁶⁹ While the authority to pass legislation on a subject matter set out in part A of Schedule 5 is vested in the Provincial Legislatures only, the authority to pass legislation on the subject-matters set out in Part B of Schedule 5 is vested in both the Provincial Legislatures and the Municipal Councils.

The functional areas of exclusive provincial competence set out in Part B of Schedule 5 include ‘noise pollution’. In principal this means that Parliament has no authority to pass a law that falls into this functional area. The authority to pass laws that fall into the functional

⁶⁷ See DW Freedman ‘Constitutional Law: Structures of Government’ *LAWSA Vol 5 Part 3* 2ed (2012) at para 223

⁶⁸ The functional areas of exclusive provincial competence set out in Part A of Schedule 5 are as follows: Abattoirs; ambulance services; archives other than national archives; libraries other than national libraries; liquor licences; museums other than national museums; provincial planning; provincial cultural matters; provincial recreation and amenities; provincial sport; provincial roads and traffic; veterinary services, excluding the regulation of the profession.

⁶⁹ The functional areas of exclusive provincial competence set out in Part B of Schedule 5 are as follows: Beaches and amusements facilities; billboards and the display of advertisements in public places; cleansing; control of public nuisances; control of undertakings that sell liquor to the public; facilities for the accommodation, care and burial of animals; fencing and fences; licensing of dogs; licensing and control of undertakings that sell food to the public; local amenities; local sport facilities; markets; municipal abattoirs; municipal parks and recreation; municipal roads; noise pollution; pounds; public places; refuse removal, refuse dumps and solid waste disposal; street trading; street lighting and traffic and parking.

area of ‘noise pollution’ vests exclusively in the Provincial Legislatures and Municipal Councils.

(b) The power to intervene in Schedule 5

The fact that Parliament does not have the authority to pass legislation that falls into the functional area of ‘noise pollution’, however, is subject to an exception. This exception is set out in section 44(2) of the Constitution which provides that Parliament may intervene and pass a law dealing with a Schedule 5 matter if it satisfies the criteria listed in section 44(2) of the Constitution.

In terms of s 44(2) Parliament may only enact such legislation if it is necessary to:

- (a) maintain national security;
- (b) maintain economic unity;
- (c) maintain essential national standards;
- (d) establish minimum standards required for the rendering of services; or
- (e) prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

Although the grounds upon which Parliament may intervene are broadly defined it is important to note that Parliament may only intervene if it is ‘necessary’ to achieve one of the objectives set out in paragraphs (a) to (e). As a result, Parliament’s powers of intervention are considerably limited. The term ‘necessary’ appears to mean that there must be no other alternative to achieve the objectives other than by national intervention.

In *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill*,⁷⁰ for example, the Constitutional Court explained that the mere fact that something is important does not mean it is necessary. And in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996*⁷¹ the Court held that the power of intervention under section 44(2) is defined and limited. ‘If regard is had to the nature of the schedule 5 powers

⁷⁰ 2000 (1) SA 732 (CC) (hereafter the *Liquor Bill* case).

⁷¹ 1996 (4) SA 744 (CC) (hereafter the *First Certification Judgment*) at para 257. See also *Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC) at para 106.

and the requirements of section 44(2), the occasion for intervention by Parliament is likely to be limited’.

These statements indicate that the Constitutional Court will not easily allow Parliament to intervene in a Schedule 5 matter in terms of section 44(2).

(c) The scope and ambit of the functional areas set out in Schedule 5

The scope and ambit of the functional areas set out in Schedule 5 was discussed by the Constitutional Court in the *Liquor Bill* case.

The facts of this case were as follows. After being passed by both Houses of Parliament, the Liquor Bill was sent to the President for his assent and signature. The President, however, had reservations about the constitutional validity of certain provisions of the Bill and, acting in terms of section 79(4)(b) of the Constitution, he referred it back to the National Assembly for reconsideration. Unfortunately, the National Assembly failed to address the President’s concerns and, acting in terms of section 79(4)(b) of the Constitution, he then referred it to the Constitutional Court for a decision on its constitutional validity.

The President’s concerns about the constitutional validity of the Bill were based on the following grounds: (a) that the Bill divided the liquor industry into three categories, namely, manufacturing, distributing and retail selling; (b) that it treated manufacturing and distributing as national issues and retail selling as a provincial issue; and (c) that it contained detailed provisions regulating the manner in which the national government should licence manufacturers and distributors and the manner in which the provincial governments should licence retail sellers.

The problem with these provisions, the President stated in his referral, is that they appeared to fall into the functional area of ‘liquor licencing’ which is a functional area of exclusive provincial competence listed in Part A of Schedule 5 of the Constitution.

The Constitutional Court found that while the provisions regulating the manner in which the national government should licence manufacturers and distributors did not fall into the functional area of ‘liquor licencing’, those regulating the manner in which the provincial

governments should licence retail sellers did and, consequently, that they fell outside of Parliament's legislative competence. In addition, the Court also found that these provisions could not be classified as an authorised intervention because they did not satisfy the criteria set out in section 44(2). The provisions regulating the manner in which the provincial governments should licence retail sellers, therefore, were unconstitutional and invalid.

In arriving at this decision the Constitutional Court interpreted the matters set out in Schedule 5 very narrowly. Essentially, the Court held that while Schedule 4 encompasses those activities that take place inter-provincially (across provincial boundaries), Schedule 5 only encompasses those activities that take place primarily intra-provincially (within provincial boundaries). In other words, the matters set out in Schedule 5 encompass only those activities that take place within the boundaries of a province. As soon as an activity takes place across provincial boundaries it is no longer a Schedule 5 matter.

Insofar as noise pollution is concerned this seems to mean that while Parliament can pass legislation regulating noise pollution that takes place across provincial boundaries (for example, transport (aircraft and trains) noise), it cannot regulate noise pollution that takes place within the boundaries of a province (for example, building, industrial and domestic noises), unless that legislation in question satisfies the criteria set out in section 44(2) of the Constitution.⁷²

Having set out the manner in which the power to pass legislation regulating noise pollution is divided amongst the three spheres of government, we may now set out and discuss the statutory provisions that regulate noise pollution in South Africa.

⁷² I Currie and J de Waal *The New Constitutional & Administrative Law* (2001) 167-169.

2.3 THE ENVIRONMENT CONSERVATION ACT

When it comes to the control of noise pollution, the Environment Conservation Act ('the ECA')⁷³ contains the most important and comprehensive statutory provisions. In terms section 25 of the ECA, the Minister of Environmental Affairs is empowered to make regulations aimed at controlling noise, vibration and shock. Although most of the Act has been repealed by the NEMA,⁷⁴ section 25 still remains in force.⁷⁵

Apart from conferring the power to make regulations aimed at controlling noise on the Minister, section 25 of the ECA also provides that the Minister may:

- (a) define what is meant by noise;⁷⁶
- (b) prevent, reduce or eliminate noise, vibration and shock;⁷⁷
- (c) stipulate levels of noise, vibration and shock which may not be exceeded, either in general or by specified apparatus or machinery or in specified instances or places;⁷⁸
- (d) specify the types of instruments which can be used to determine levels of noise as well as the manner in which these instruments must be calibrated and utilised;⁷⁹
- (e) confer the power to control and combat noise on provincial and local governments and determine the ambit of these powers;⁸⁰ and
- (f) deal with any other matter that the Minister deems necessary or expedient to effectively control and combat noise.⁸¹

Although section 25 of the ECA confers the power to make regulations aimed at controlling noise on the Minister, the concurrent administration of section 25 has been assigned to a 'competent authority' in each provincial government.⁸² This is usually the Member of the Executive Council responsible for environmental affairs.

⁷³ 73 of 1989.

⁷⁴ See (note 3).

⁷⁵ Besides section 25 of the ECA, section 152 of the KwaZulu Nature Conservation Act 29 of 1992 and section 93 of the Limpopo Environmental Management Act 7 of 2003 confer almost identical powers on the MEC responsible for environmental affairs in each province.

⁷⁶ Section 25(a).

⁷⁷ Section 25(b).

⁷⁸ Section 25(c).

⁷⁹ Section 25(d).

⁸⁰ Section 25(e).

⁸¹ Section 25(f).

⁸² See GN R43 in *Government Gazette* No. 17354, dated 8 August 1996.

The power to make regulations, consequently, is shared between the Minister and the MECs. The Minister and the MEC's power to make such regulations, however, must be read in light of the fact that noise pollution is now a functional area of exclusive provincial competence listed in Part B of Schedule 5.

2.4 THE NATIONAL NOISE CONTROL REGULATIONS

2.4.1 Introduction

Acting in terms of section 25 of the ECA, the Minister of Environmental Affairs has promulgated noise control regulations on a number of occasions.

A first set of National Noise Control Regulations was promulgated in 1990,⁸³ a second set in 1991⁸⁴ and a third set in 1992.⁸⁵ An important feature of these regulations is that they only applied in those municipalities that consented to their application. This is because section 28 of the ECA provided that regulations which affected a local authority could apply in the area of a local authority only if the local authority agreed to this. In other words, they functioned as model regulations which could be adopted by a municipality.⁸⁶

In 1992, however, the ECA was amended and section 28 was repealed. Following this amendment, a draft set of new National Noise Control Regulations was published in 1994.⁸⁷ In contrast to the earlier regulations, these draft regulations were intended to apply throughout the country, unless a local authority applied to be exempted from them. The draft regulations, however, have never been formally promulgated. Although no explanation for the failure to promulgate these draft regulations has been provided, it is most probably because noise pollution is now a functional area of exclusive provincial competence.

⁸³ GNR 2544, Government Gazette 12816, 2 November 1990.

⁸⁴ GNR 314, Government Gazette 13029, 22 February 1991.

⁸⁵ GNR 154, Government Gazette 13717, 10 January 1992.

⁸⁶ A list of the municipalities that have adopted these model regulations is set out in P Henderson *Environmental Law of South Africa* Appendix 1 at LA1-LA2A. The model regulations adopted by municipalities in the Free State, Gauteng and the Western Cape, however, have been repealed. This is because these provinces have adopted their own Provincial Noise Control Regulations as set out below.

⁸⁷ GNR 55, Government Gazette 15423, 14 January 1994.

The 1992 National Noise Control Regulations deal with various issues pertaining to the control of noise. Regulation 2 thus confers the power on local authorities to carry out various actions aimed at controlling noise; regulation 3 imposes a general prohibition on certain specified activities; regulation 4 prohibits disturbing noises; and regulation 5 prohibits noise nuisances. Regulation 6 deals with the use of sound measuring instruments; regulation 7 with exemptions from the regulations; and regulation 8 with the attachment of vehicles that are causing an offence in terms of the regulations.

Finally, regulation 9 deals with penalties. It provides in this respect that a person who contravenes regulation 3, 4 and 5 commits an offence and is liable on conviction to a fine not exceeding R20 000 or imprisonment for a period not exceeding two years, or both; and, in the event of a continuing contravention, to a fine not exceeding R250, or to imprisonment not exceeding twenty days, or both, for each day on which the contravention continues..

Among the most significant concepts dealt with under the regulations are the concept of a 'disturbing noise' and the concept of a 'noise nuisance'.

2.4.2 A disturbing noise

A disturbing noise is defined in regulation 1 as a 'noise level that exceeds the zone sound level or, if no zone sound level has been designated, a noise level that exceeds the ambient sound level at the same measuring point by 7dBA or more'. This is an objective measurement.

Ambient sound level is defined in regulation 1 as the 'reading on an integrating impulse sound level meter taken in the absence of any alleged disturbing noise' and a noise level is defined as the 'reading taken at a measuring point in the presence of any alleged disturbing noise at the end of a total period of at least ten minutes after such meter was put into operation'.

Insofar as a disturbing noise is concerned, regulation 4 provides that every person is prohibited from making, producing or causing a disturbing noise. In addition, regulation 4 also provides that every person is prohibited from allowing a disturbing noise to be made, produced or caused by any other person, animal, machine, device or apparatus.

2.4.3 A noise nuisance

A noise nuisance, on the other hand, is defined in regulation 1 as ‘any sound which disturbs or impairs or may disturb or impair the convenience or peace of any person’. Unlike a disturbing noise, therefore, a noise nuisance is subjectively determined. Insofar as a noise nuisance is concerned, regulation 5 provides that every person is prohibited from causing a noise nuisance. Regulation 5 goes on to provide, however, that this prohibition only applies to those noises caused by the specific activities identified in the regulation.

A wide range of activities are identified in regulation 5 which provides that ‘[n]o person shall:

- (a) cause a noise nuisance, or allow it to be caused, by operating or playing any radio, television set, drum, musical instrument, sound amplifier, loudspeaker system or similar device producing, reproducing or amplifying sound;⁸⁸
- (b) offer any article for sale by shouting or ringing a bell, or by allowing shouting or the ringing of a bell, in a manner which may cause a noise nuisance;⁸⁹
- (c) allow an animal owned or controlled by him to cause a noise nuisance;⁹⁰
- (d) build, repair, rebuild, modify, operate or test a vehicle, vessel or aircraft on residential premises, or allow it to be built, repaired, rebuilt, modified, operated or tested, if it may cause a noise nuisance;⁹¹
- (e) use or discharge any explosive, firearm or similar device which emits impulsive sound, or allow it to be used or discharged, if it may cause a noise nuisance, except with the prior consent in writing of the local authority concerned and subject to such conditions as the local authority may deem necessary;⁹²
- (f) on a designated piece of land move about or in a recreational vehicle or exercise control over a recreational vehicle, as owner or person in control of the piece of land concerned, allow these actions on that piece of land, or in the airspace above, if it may cause a noise nuisance;⁹³

⁸⁸ Regulation 5(a).

⁸⁹ Regulation 5(b).

⁹⁰ Regulation 5(c).

⁹¹ Regulation 5(d).

⁹² Regulation 5(e).

⁹³ Regulation 5(f).

- (g) except in an emergency, emit a sound, or allow a sound to be emitted, by means of a bell, carillon, siren, hooter, static alarm, whistle, loudspeaker or similar device, if it may cause a noise nuisance;⁹⁴
- (h) operate any machinery, saw, sander, drill, grinder, lawnmower, power garden implement or similar device in a residential area, or allow it to be operated, if it may cause a noise nuisance;⁹⁵
- (i) load, unload, open, shut or in any other way handle a crate, box, container, building material, rubbish container or similar article, or allow it to be loaded, unloaded, opened, shut or handled, if it may cause a noise nuisance;⁹⁶
- (j) drive a vehicle on a public road in such a manner that it may cause a noise nuisance.⁹⁷

2.4.4 The distinction between a disturbing noise and a noise nuisance

Despite the important role they play in the noise control regulations, the distinction between a disturbing noise and a noise nuisance appears to have given rise to some difficulty. In *Laskey v Showzone CC*,⁹⁸ for example, Binns-Ward AJ pointed out that while a disturbing noise may or may not, depending on the circumstances, also be a noise nuisance, the reason for the potential distinction between a disturbing noise and a noise nuisance is ‘less than clear’.

Kidd, however, argues that the reason why the regulations distinguish between these two types of noises is because a disturbing noise is one which is objectively determined, while a noise nuisance is one which is subjectively determined.⁹⁹ If loud music is played in the middle of the night in a residential neighbourhood, it might not be loud enough to exceed the ambient sound level by 7dBA and thus amount to a disturbing noise, but it could disturb or impair the convenience or peace of a neighbour and thus amount to a noise nuisance.¹⁰⁰ A noise may qualify as a noise nuisance, therefore, without it necessarily being a disturbing noise.¹⁰¹

⁹⁴ Regulation 5(g).

⁹⁵ Regulation 5(h).

⁹⁶ Regulation 5(i).

⁹⁷ Regulation 5(j).

⁹⁸ 2007 (2) SA 48 (C) at 79.

⁹⁹ M Kidd ‘Muzzling the Crazy Zebra: Noise Regulation in *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (E)’ 2005 *SAJELP* at 175

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

Apart from the points set out above, Freedman argues that the inclusion of the concept of a noise nuisance has also extended the ambit of the regulations.¹⁰² This is because the inclusion of a noise nuisance allows a person to rely on the regulations in those circumstances where he or she cannot access (or afford) the technical equipment or scientific expertise necessary to determine whether a particular noise is 7dBA above the ambient sound level and thus a disturbing noise.¹⁰³ He argues further that by including the concept of a noise nuisance, the ambit of the regulations has been widened, but the way in which this has been achieved is open to criticism.¹⁰⁴ This is due to the fact that ‘unlike the common law, the regulation does not provide that a noise must be unreasonable before it may be classified as a noise nuisance’.¹⁰⁵ The regulation simply provides that it has to disturb or impair the convenience of peace of a person. It would appear therefore that the definition of a noise nuisance, is unjustifiably biased in favour of a complainant.¹⁰⁶

2.5 THE PROVINCIAL NOISE CONTROL REGULATIONS

The 1992 National Noise Control Regulations have been repealed and replaced by provincial noise control regulations in three provinces, namely: the Free State;¹⁰⁷ Gauteng;¹⁰⁸ and the Western Cape.¹⁰⁹ These provincial noise control regulations are modelled on the national noise control regulations and are similar to one another. With one exception, therefore, it is unnecessary to discuss them in any detail.

¹⁰² W Freedman ‘Hear No Evil: Noise pollution, the common law of nuisance and the noise control regulations *Laskey v Showzone* CC 2007 (2) SA 48 (C)’ 2007 *SAJELP* at 86.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* See also Kidd (note 99) at 176. In this respect it is interesting to note that the Western Cape Department of Environmental Affairs and Development Planning has published Draft Noise Control Regulations (see PN 14 in *Western Cape Extraordinary Provincial Gazette* No. 6412, 25 January 2007). Unlike the existing regulations, the draft regulations strike a more appropriate balance by providing that a noise must be unreasonable before it can be classified as a noise nuisance. Clause 1 of the draft regulations thus states that a noise nuisance means ‘any sound which impairs or which may impair the convenience or peace of any reasonable person’.

¹⁰⁷ See PN 24 in *Free State Provincial Gazette* No. 35, 24 April 1998.

¹⁰⁸ See PN 5479 in *Gauteng Provincial Gazette* No. 75, 20 August 1999.

¹⁰⁹ See PN 627 in *Western Cape Provincial Gazette* No. 5309, 20 November 1998.

The one exception is to be found in the Gauteng Noise Control Regulations which, unlike the Free State Noise Control Regulations and the Western Cape Noise Control Regulations, make provision for so-called ‘neighbourhood noise watch committees’.¹¹⁰

The Gauteng Regulations begin in this respect by providing that a local authority may publish a notice in the *Provincial Gazette* requesting applications for the establishment of a neighbourhood noise watch committee, or any group of individuals, or an organisation may, of its own initiative, make application to the local authority concerned to be declared as the Neighbourhood Noise Watch Committee for one or more neighbourhood.¹¹¹

Apart from establishing neighbourhood noise watch committees, the regulations also provide that ‘a majority of all residents in any neighbourhood may by agreement lodge draft by-laws in relation to any such neighbourhood with the local authority concerned regarding the control and reduction of noise nuisance in the neighbourhood, including provisions regarding restrictions of certain activities that may lead to noise nuisance at specific times and days’. If a person contravenes or does not comply with the by-law, he or she is guilty of an offence.¹¹²

Regulation 5 of the Gauteng Noise Control Regulations also gives the neighbourhood noise watch committee the power to issue a notice to the infringing party if a by-law has been contravened or if there has been a failure to comply therewith. The notice must be in writing and must give the owner, or occupier of the property concerned 14 days to rectify the contravention.

If the offending party fails to comply with the notice within the prescribed time, a member of the Neighbourhood Noise Watch Committee, or any owner or occupier of any premises in the neighbourhood concerned who feels aggrieved thereby, may act as complainant in any criminal proceedings instituted against such owner or occupier.¹¹³

¹¹⁰ Regulations 2-7.

¹¹¹ Regulation 2.

¹¹² Regulation 3.

¹¹³ Regulation 5.

Finally, the regulations also provide that the aggrieved person shall have the legal capacity to apply to a competent court for a peremptory or prohibitory interdict in connection with the contravention of the by-law or failure to comply with a provision of the by-laws.¹¹⁴

The introduction of regulations providing for the formation of Neighbourhood Noise Watch Committees and supporting by-laws is indeed innovative and empowering for ordinary people who live in these neighbourhoods, and are subjected to noise which impairs the peaceful enjoyment of their homes.

It is hoped that these by-laws will be utilised by residents and supported by all the authorities necessary for their implementation. If successful, this may provide the impetus for other provincial authorities to introduce them in existing regulations, and for those provinces where Noise Regulations do not exist, it may be a welcome inclusion if Noise Regulations are ever promulgated.

Although the regulations are provincial laws, they are applied by local authorities. In the remainder of the country regulations published under the new political dispensation as well as local authority by-laws from the old regime have to be considered.¹¹⁵ Insofar as the by-laws are concerned, several local authorities have enacted by laws dealing specifically with noise. These by-laws define a 'disturbing noise' objectively as a noise level exceeding the ambient sound level by 7dBA or more.¹¹⁶ This is an objective criterion as it is measured on a sound-level meter. 'It is an offence to cause or permit to be made by any person, machine, animal, device or apparatus or any combination of these, a noise which is a disturbing noise'.¹¹⁷

¹¹⁴ Regulation 7.

¹¹⁵ Glazewski (note44) p 753.

¹¹⁶ A Semmelink and MA Rabie 'Noise' in RF Fuggle and MA Rabie *Environmental Concerns in South Africa* (1983) 366 at 379.

¹¹⁷ Ibid.

2.6 THE COURTS AND THE NOISE CONTROL REGULATIONS

2.6.1 Introduction

The noise control regulations have been considered by the courts on a few occasions, namely: *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*;¹¹⁸ *Laskey v Showzone CC*;¹¹⁹ *University of Pretoria v Partnership, Firm or Association known as Springbok Bar*;¹²⁰ and *University of Pretoria v Free Fall Trading 17 CC t/a Aandklas*.¹²¹ Each of these judgments will be discussed in turn.

2.6.2 *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*

The facts of this case were as follows. The applicants applied to the High Court for an interdict prohibiting the respondent, who owned a restaurant and bar called the Crazy Zebra and which was situated in a residential suburb in Port Elizabeth, from carrying on its business in an unlawful manner. The applicant based its application on two grounds: first, that the respondent used its land in a manner that contravened the applicable zoning conditions and, second, that it ran its business in a manner that caused a nuisance either in terms of the common law or in terms of the National Noise Control Regulations.¹²²

Insofar as the second ground was concerned, the applicants argued that noise surveys carried out by two expert witnesses on three separate days indicated that the noise levels emanating from the Crazy Zebra exceeded the ambient sound level by 7dBA or more and thus constituted a ‘disturbing noise’ as defined in regulation 1 of the National Noise Control Regulations. In addition, these expert witnesses also argued that the noise levels that emanated from the Crazy Zebra constituted a noise nuisance in respect of the neighbouring residential properties.

¹¹⁸ 2004 (2) SA 81 (SE).

¹¹⁹ See (note 98).

¹²⁰ [2011] ZAGPPHC 83 (16 February 2011).

¹²¹ [2011] ZAGPPHC 85 (16 February 2011).

¹²² GNR 154, Government Gazette 13717, 10 January 1992.

The noise emanating from the Crazy Zebra was particularly problematic, these experts also argued, when live bands performed and/or recorded music was played in the outside alfresco dining area. This was because it is virtually impossible to soundproof an open area where sound waves travel in different directions and there was no barrier between the Crazy Zebra's premises and the complainant's premises which could absorb some of the sound generated by the playing of amplified music.¹²³

In their defence, the respondents argued that the noise emanating from the Crazy Zebra was not as bad as alleged by the applicants and that it did not cause a noise nuisance either in terms of the noise control regulations or the common law. In support of their defence, the respondents also relied on two witnesses, one who lived next to the Crazy Zebra and another, a businessman who worked in the sound industry.

In delivering judgment, the High Court found that the applicants had discharged the onus of establishing that a noise nuisance did exist. The High Court based its decision on the fact that evidence and conclusions of the experts engaged by the applicants remained unchallenged, as well as on the evidence of the residents attesting to the excessive noise that they had to endure. Based on the weight of the evidence provided by the applicants, the High Court reached the conclusion that the respondents ran their business in contravention of the Noise Control Regulations and as a result caused 'a noise nuisance on Friday and Saturday nights by allowing music to be played at unacceptably loud volumes'.¹²⁴

The High Court also concluded, based on the evidence of the sound experts, that the sound that emanated from the Crazy Zebra was a 'sound that disturbed and impaired (or may disturb or impair) the convenience or peace of the second, third, fourth and fifth applicants, and probably of other people living in the area too'.¹²⁵ The finding of the High Court, therefore, was consistent with the definition of a noise nuisance in the regulations, and the conduct of the respondents was deemed to be unlawful.

¹²³ At para 81.

¹²⁴ At para 88.

¹²⁵ At para 89.

2.6.3 *Laskey v Showzone CC*

The facts of this case were as follows. The applicants, who owned two apartments in an apartment block located near to the centre of Cape Town, applied to the High Court for an interdict prohibiting the respondent, who owned a restaurant and theatre called On-Broadway in a neighbouring building, from causing a disturbing noise and/or noise nuisance as defined in the Western Cape Noise Control Regulations.¹²⁶

The applicants based their claim on the grounds that the noise that emanated from the theatre during evening performances exceeded the ambient sound level by 7dBA or more and thus constituted a ‘disturbing noise’ as defined in regulation 1 of the Western Cape Noise Control Regulations. The High Court granted the interdict. In arriving at this conclusion, the High Court had to decide two issues: first, whether the noise did infringe the Regulations; and, second, whether the applicants had standing to enforce the Regulations.

Insofar as the first issue was concerned, the High Court began by explaining that a ‘disturbing noise’ is defined in a technical manner and is measured as a sound level above a variable base, without any reference to its effect on the comfort and convenience of any person. Given that the variable base is the prevalent ambient noise level, this means that a much louder noise would be required for the noise to qualify as a ‘disturbing noise’ in a busy urban environment than in a quiet wilderness area. A ‘disturbing noise’, therefore, is not necessarily disturbing in the ordinary sense of the word, or nuisancesome in the sense that a litigant would be able to found a claim in the law of nuisance.¹²⁷

After considering what is meant by the concept of a ‘disturbing noise’, the High Court turned to consider concept of a ‘noise nuisance’. A ‘noise nuisance’, the High Court explained in this respect, is defined as a ‘sound which disturbs or impairs or may disturb or impair the convenience or peace of any person’. It follows, therefore, the High Court explained further, that a ‘disturbing noise’, as defined in the regulations, may or may not, depending on the circumstances, also be a ‘noise nuisance’. The reasons for the distinction between the two concepts, however, the High Court concluded, was not entirely clear.¹²⁸

¹²⁶ Regulation 1.

¹²⁷ At para 5.

¹²⁸ Ibid.

After making these points, the High Court went on to apply them to the facts and found that there was no doubt that the noise made by the respondents was a disturbing noise, and that in so doing they had infringed the applicable Noise Control Regulations.

The High Court then turned to consider whether the applicant had standing to enforce the Regulations by means of an interdict. Insofar as this issue was concerned, the High Court began by explaining that in terms of the common law an individual seeking to protect his or her environment must prove a direct interest in proceedings in order to have necessary standing to proceed. The High Court pointed out that a person may bring an action to enforce a statute that is enacted in the interests of a particular group of people if he or she falls into that group. The person may also bring an action to enforce a statute enacted in the interests of the general public if he or she has suffered harm due to the infringement of the statute.¹²⁹

In the present case the High Court concluded that the Noise Control Regulations had been enacted in the interests of the general public and consequently the applicants could only enforce the Regulations if they could show that they had suffered some harm as a result of the infringement of the regulations.¹³⁰ The applicants would be able to succeed if they could show that their right of ownership, more specifically their right to peaceful use and enjoyment of their property had been infringed by the noise caused by the respondents. Essentially they would be granted the interdict if they could show that the noise made by the respondents amounted to a common law nuisance.¹³¹

After setting out the common law principles governing nuisance, the High Court applied them to the facts and came to the conclusion that the noise in question did amount to a common law nuisance. The applicants did therefore have standing to enforce the Regulations.¹³²

¹²⁹ At para 13.

¹³⁰ At para 14-17.

¹³¹ At para 18.

¹³² The aspect of the judgment relating to *locus standi* to enforce the noise control regulations will be dealt with in chapter three.

2.6.4 *University of Pretoria v Partnership, Firm or Association known as Springbok Bar*

The facts of this case were as follows. The applicant owned and operated two student hostels called ‘Asterhof’ and ‘Vergeet-My-Nie’. These hostels were located next door to a restaurant and bar owned by the respondent called the ‘Springbok Bar’. After the applicant’s students complained about the excessive noise emanating from the Bar, the applicant applied to the High Court for an interdict prohibiting the respondent from carrying on its business in an unlawful manner. The applicant based its application on two grounds: first, that the respondent was using its land in a manner that contravened the Pretoria Town Planning Scheme; and, second, that it ran its business in a manner that contravened the Gauteng Provincial Noise Control Regulations.

Insofar as the first issue was concerned, the High Court found that the business conducted by the respondent contravened the Pretoria Town Planning Scheme. This is because the erf on which the business was situated was to be used for ‘places of refreshment’¹³³, business buildings, dwelling units and . . . which are normally associated with a shopping centre and create no danger or nuisance of noise, dust . . .’¹³⁴, and it was quite clear from the facts that the Springbok Bar was not a place of refreshment as contended by the respondents and as was required in terms of the Town Planning Scheme. Instead, it was being operated illegally as a place of amusement.¹³⁵

¹³³ A place of refreshment is defined in the Pretoria Town Planning Scheme as ‘land and buildings or a part of a building used for the preparation, sale and consumption of refreshment on the property such as a restaurant, cafe, coffee shop, tea room, tea garden, sports bar, pub, bar, and may include take-aways and a maximum of two table games, two dartboards, two electronic games, television screens and soft background music for the customers but excludes a place of amusement. The kitchen layout shall comply with the Municipality’s health regulations’.

¹³⁴ At para 25.

¹³⁵ A place of amusement is defined in the Pretoria Town Planning Scheme as ‘land and buildings or a part of a building used for entertainment purposes such as a theatre, cinema, music hall, concert hall, table games, skating rink, dancing, amusement park, casino, electronic games, night club, an exhibition hall or sports arena/stadium used for live concerts or performances’.

Turning to the second issue, the High Court noted that the Gauteng Noise Control Regulations were applicable to the area in which the bar was situated. The High Court referred to the regulation which prohibited a disturbing noise and concluded, that based on an acoustics report that formed part of the evidence, that the Springbok Bar was conducted in violation of the applicable Noise Control Regulations in that the noise emanating from the premises constituted a disturbing noise. The High Court also stated that the noise emanating from the premises of Springbok Bar, created an actionable nuisance.¹³⁶

Based on the evidence contained in the acoustics report and the evidence of the applicant as to the effect the noise had on the students who resided in ‘Asterhof’ and ‘Vergeet-My-Nie’, the High Court interdicted the respondents from causing and/or making a disturbing noise as defined in the Gauteng Noise Control Regulations as well as excessive and/or disturbing noise as forbidden in the aforesaid regulations and in associated legislation and the common law.¹³⁷

2.6.5 University of Pretoria v Free Fall Trading17 CC t/a Aandklas

This case was dealt with together with the previous case and the facts are substantially the same. The applicant owned and operated two student hostels called ‘Madelief’ and ‘Magrietjie’. These hostels were located near to a restaurant and bar owned by the respondent called ‘Aandklas’. Following complaints from its students, the applicant applied to the High Court for an interdict prohibiting the respondent from carrying on its business in an unlawful manner. The applicant based its application on two grounds: first, that the respondent was using its land in a manner that contravened the Pretoria Town Planning Scheme; and, second, that it ran its business in a manner that contravened the Gauteng Provincial Noise Control Regulations.

¹³⁶ At para 38.

¹³⁷ At para 40.

Insofar as the first issue was concerned, the High Court found that the business conducted by the respondent contravened the Pretoria Town Planning Scheme. This is because the erf on which the business was situated was to be used for ‘places of refreshment,¹³⁸ business buildings, dwelling units and . . . which are normally associated with a shopping centre and create no danger or nuisance of noise, dust . . .’, and it was quite clear from the facts that the Aandklas was not a place of refreshment, but a place of amusement.¹³⁹

Insofar as the second issue was concerned, the High Court stated that the Gauteng Noise Control Regulations were applicable to the area in which the bar was situated. The court referred to the regulation which prohibited a disturbing noise¹⁴⁰ and thereafter turned to consider an acoustics report pertaining to the noise emanating from Aandklas. The report indicated that the noise levels exceeded the laid down norms and was excessive. Based on the report and the corroborating evidence of the residents of the hostels, the court found that the applicant had conclusively proven an actionable nuisance against the respondent.¹⁴¹

The High Court interdicted the respondents from causing and/or making a disturbing noise as defined in the Noise Control Regulations – Gauteng as well as excessive and/or disturbing noise as forbidden in the aforesaid regulations and in associated legislation and the common law.¹⁴²

¹³⁸ A place of refreshment is defined in the Pretoria Town Planning Scheme as ‘land and buildings or a part of a building used for the preparation, sale and consumption of refreshment on the property such as a restaurant, cafe, coffee shop, tea room, tea garden, sports bar, pub, bar, and may include take-aways and a maximum of two table games, two dartboards, two electronic games, television screens and soft background music for the customers but excludes a place of amusement. The kitchen layout shall comply with the Municipality's health regulations’.

¹³⁹ At para 26.

¹⁴⁰ At para 21.

¹⁴¹ At paras 10 and 20.

¹⁴² At para 36.

2.7 OTHER NATIONAL LEGISLATION

2.7.1 Introduction

Apart from the regulations made in terms of section 28 of the ECA, noise pollution is also regulated by the National Environmental: Air Quality Act¹⁴³ and a number of sector specific statutes or regulations. Among these sector specific statutes and regulations are the Civil Aviation Act;¹⁴⁴ the Criminal Procedure Act;¹⁴⁵ the National Building Regulations and Building Standards Act;¹⁴⁶ the National Road Traffic Act;¹⁴⁷ and the regulations made in terms of the Occupational Health and Safety Act.¹⁴⁸

2.7.2 The National Environmental Management: Air Quality Act

The National Environmental Management: Air Quality Act, replaced the Atmospheric Pollution Act. Section 34 of the Air Quality Act empowers the Minister of Environmental Affairs to prescribe national noise control standards. This may be of a general nature or it may be in respect of specified machinery or activities in specified places.¹⁴⁹ The application of these standards would bind both provincial and local government spheres.

2.7.3 The Civil Aviation Act

The Civil Aviation Act incorporates into South African law the Convention on International Civil Aviation.¹⁵⁰ In terms of section 155(1)(m)(iv) of the Act the Minister of Transport is empowered to make regulations with respect to noise and vibrations caused by air navigation and associated activities.

¹⁴³ 39 of 2004.

¹⁴⁴ 13 of 2009.

¹⁴⁵ 51 of 1977.

¹⁴⁶ 103 of 1977.

¹⁴⁷ 93 of 1996.

¹⁴⁸ 85 of 1993.

¹⁴⁹ Section 33(1)(a).

¹⁵⁰ Section 2(1).

2.7.4 The Criminal Procedure Act

Section 341 of the Criminal Procedure Act contains a section that applies to vehicular noise. The Act makes it an offence to drive a vehicle that is defective or not properly adjusted and thus causing a noise, as well as causing undue noise by using a vehicle.¹⁵¹

2.7.5 The National Building Regulations and Building Standards Act

Section 17 of the Act provides for the creation of National Building Regulations and Directives, which can provide specifications relating to the transmission of sound.¹⁵²

2.7.6 The National Road Traffic Act

In terms of this Act, the Minister is empowered to create regulations pertaining to ‘excessive noise owing to the design or condition of any vehicle or the loading thereof, or to the design, condition or misuse of a silencer, or of a hooter, bell or other warning device, when any such vehicle is operated on a public road’.¹⁵³

2.7.7 The Occupational Health and Safety Act

Noise in the work place is governed by regulations made in terms of the Occupational Health and Safety Act. In terms of regulation 3 ‘no employer or self-employed person shall require or permit any person to enter any workplace under his or her control where such person will be exposed to noise at or above the 85dBA noise-rating limit’. The Act also requires an employer to provide training on risks to health and safety caused by exposure to noise. The employer must also instruct employees on steps that must be taken to protect against the health risks associated with the exposure to noise, which includes the wearing and use of earplugs and protective earmuffs. The impetus behind the regulations is to ensure that noise exposure of employees is minimized.

¹⁵¹ Schedule 3, par(e)

¹⁵² Section 17(1)(f).

¹⁵³ Section 75(1)(f)

2.8 CONCLUSION

After a discussion of the legislative framework used to control noise pollution in South Africa, the following general observations can be made:

- (a) South Africa has fairly sophisticated and comprehensive statutory provisions in place to control noise pollution. The statutory regime governing noise is however, very fragmented. This is because legislation governing noise has been passed by all three spheres of government. This is not the case in practice, because most of the provincial and local statutes governing noise are modelled on the National Noise Control Regulations.
- (b) The most significant and comprehensive statutory provisions pertaining to the control of noise pollution are contained in section 25 of Environment Conservation Act¹⁵⁴, which empowers the Minister of Environmental Affairs to make regulations aimed at controlling noise; vibration and shock.
- (c) The regulations have created a sophisticated and comprehensive system for dealing with noise pollution
- (d) The two most important concepts in the National Noise Control Regulations are the concepts of a disturbing noise and the concept of a noise nuisance.

¹⁵⁴ See (note 73).

- (e) The Noise Control Regulations have been successfully applied in a few cases in South Africa. In respect of the judgment in the *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*,¹⁵⁵ Kidd has argued that the court fails to adequately distinguish between a noise nuisance and a disturbing noise. This is a valid criticism and is based on the fact that evidence in the judgment also that the noise was a ‘disturbing noise’ as well as a ‘noise nuisance’ in terms of the regulations.¹⁵⁶ This is a valid criticism and may also be made in respect of the judgments in the *University of Pretoria v Partnership, Firm or Association known as Springbok Bar*¹⁵⁷ and *University of Pretoria v Free Fall Trading17 CC t/a Aandklas*.¹⁵⁸ Despite this criticism, the finding of the courts in these cases was correct and the interdicts were granted.
- (f) In terms of Schedule 5 of the Constitution noise pollution control is a provincial function. The administration of these laws is assigned to local authorities.
- (g) Although legislative provisions to deal with noise exist, the most significant challenge is the effective implementation of the legislation. I agree with Glazewski who proposes that in order to do so it is necessary to build local government capacity in this regard because local government is responsible for implementing noise control laws.¹⁵⁹
- (h) A criticism that may be raised in respect of the judgment in *Laskey v Showzone CC*,¹⁶⁰ is the fact that the court failed to take into account the provisions of section 38 of the Constitution as well as section 32 of the NEMA¹⁶¹ which would have allowed the applicants the necessary standing to enforce the relevant Noise Control Regulations. A more detailed discussion of this aspect is beyond the scope of this dissertation.

¹⁵⁵ See (note 118).

¹⁵⁶ See (note 99) p 174.

¹⁵⁷ See (note 120).

¹⁵⁸ See (note 121).

¹⁵⁹ See (note 44) 754.

¹⁶⁰ See (note 98).

¹⁶¹ See (note 3).

CHAPTER THREE: THE COMMON LAW AND THE CONTROL OF NOISE POLLUTION

3.1 INTRODUCTION

Apart from the statutory provisions that are aimed at controlling noise pollution, a person who is suffering from the effects of noise pollution may also rely on a number of different areas of the common law for a remedy. Amongst these are administrative law, criminal law, the law of delict and the law of property. For the purposes of this dissertation, however, we are going to focus on the law of property and, in particular, the law of neighbours. This is because most disputes about noise arise in the context of neighbouring landowners.

3.2 THE LAW OF NEIGHBOURS

The law of neighbours is that branch of the South African legal system which is aimed at harmonizing the competing interests of neighbouring landowners in a just and equitable manner by weighing up their different rights and obligations and imposing restrictions on their entitlements as landowners.¹⁶²

The law of neighbours is divided into: (a) restrictions imposed by the general concept of nuisance which have been borrowed largely from English law; and (b) restrictions imposed by certain traditional Roman-Dutch remedies aimed at protecting an owner's full use and enjoyment of his or her property.¹⁶³

The South African law of neighbours, therefore, is derived from both English and Roman-Dutch law. This is because Roman-Dutch law does not have a general set of principles and rules governing relations between neighbours. Instead, Roman-Dutch law consists of a combination of remedies which are applicable only in certain specific situations.¹⁶⁴

¹⁶² AJ van der Walt and GJ Pienaar *Introduction to the Law of Property* 6ed (2011) p 88.

¹⁶³ Ibid.

¹⁶⁴ The specific situations in which the Roman-Dutch remedies are available are: the encroachment of buildings or plants upon land; the removal of lateral or surface support; and the interference with the natural flow of surface water.

When faced with a conflict between neighbours that does not fall into one of the specific Roman-Dutch remedies, therefore, the South African courts have frequently applied principles and rules drawn from the English tort of nuisance.

This does not mean, however, that South African law has simply taken over and adopted the whole of the English law of nuisance. Instead, the South African courts have remodelled the principles and rules of the English tort of nuisance so that they conform to the principles of South African private law, thus creating a unique and indigenous law of nuisance.¹⁶⁵

Modern South African neighbour law is consequently a fragmented system of principles and rules which have been drawn from both English law and Roman-Dutch law. Apart from being based on both English and Roman-Dutch law, the South African law of neighbours also straddles both the law of delict and the law of property.

For example, if a landowner's bodily integrity is impaired, or if a landowner's land is damaged, as a result of the manner in which a neighbour is using his or her land, then the landowner has a remedy in the law of delict. On the other hand, if a landowner's entitlement to use and enjoy his or her land is impaired as a result of the manner in which a neighbour is using his or her land, then the landowner has a remedy in the law of property.

3.3 THE LAW OF NUISANCE

The word 'nuisance' is derived from the Latin word *nocere* which means hurt, harm or injury and it is defined in modern English as that which causes annoyance, inconvenience, discomfort, vexation or harm.¹⁶⁶ In the language of the law, however, the word nuisance in its broadest sense encompasses at least three different concepts, namely a public nuisance, a private nuisance and a statutory nuisance.¹⁶⁷

¹⁶⁵ Where the courts have simply relied on English law in order to decide a case, this has been sharply criticised by the Supreme Court of Appeal, particularly in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) and *Williams v Harris* 1998 (3) SA 970 (SCA).

¹⁶⁶ J Church and J Church 'Nuisance' in WA Joubert (ed) *LAWSA Vol 19* 2ed (2006) at para 163.

¹⁶⁷ *Ibid.*

A public nuisance is ‘an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large’¹⁶⁸. A private nuisance is ‘an act or omission or condition or state of affairs that materially inconveniences another in the ordinary comfortable use or enjoyment of land or premises’.¹⁶⁹ And a statutory nuisance is ‘a condition or state of affairs which a legislative authority has declared to be a nuisance.’¹⁷⁰

3.4 PRIVATE NUISANCE

3.4.1 Introduction

As we have already seen, a (private) nuisance is an act or omission or condition or state of affairs that materially inconveniences another in the ordinary comfortable use or enjoyment of land or premises.¹⁷¹

The concept of a nuisance has also been defined as ‘conduct whereby a neighbour’s health, well-being or comfort in the occupation of his or her land is interfered with . . . as well as the causing of actual damage to a neighbour’.¹⁷²

As this definition indicates, South African commentators often draw a distinction between two types of nuisance, namely a nuisance in the narrow sense and a nuisance in the wide sense.

3.4.2 The concept of a nuisance in the narrow sense

In its narrow sense the concept of a nuisance refers to conduct on the part of a neighbour that interferes with a landowner's health, comfort and convenience.¹⁷³ This is the usual form that a nuisance takes and it is commonly referred to as an *annoyance*.

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoemann's The Law of Property* 5ed (2006) 111.

¹⁷³ See (note 162) p90.

A landowner's health, comfort and convenience is usually infringed by the invasion of foul odours;¹⁷⁴ smoke;¹⁷⁵ gas;¹⁷⁶ dust;¹⁷⁷ noise;¹⁷⁸ vibrations;¹⁷⁹ and so on. In the past our courts have held that noises emanating from by a blacksmith's workshop;¹⁸⁰ a chicken farm;¹⁸¹ a restaurant;¹⁸² and a music theatre¹⁸³ amount to an actionable nuisance.

Nuisance in the form of annoyance may amount to either an infringement of a personality right or an infringement of the right of ownership.¹⁸⁴

An individual's right of personality includes his or her bodily integrity, dignity, reputation and privacy. An infringement of a personality right occurs when the nuisance causes personal discomfort. In these circumstances the nuisance amounts to a delict and the landowner would have a delictual remedy in the form of the *actio injuriarum*.¹⁸⁵

An infringement of the right of ownership occurs when the nuisance adversely affects a landowner's entitlement to occupy his or her land in personal physical comfort, convenience and well-being. In these circumstances the landowner would have property law remedies, most probably an *interdict*.¹⁸⁶

3.4.3 The concept of a nuisance in the wide sense

In its wide sense the concept of a nuisance refers to abnormal or unusual use of land by a neighbour in terms of which actual *damage* is caused to a landowner's land or the landowner is threatened with potential damage.¹⁸⁷

¹⁷⁴ See *Bell v East London Municipality* 1928 EDL 354 and *Inglethorpe Sackville-West* 1908 EDC 159.

¹⁷⁵ See *Blacker v Carter* (1905) 19 EDC 223.

¹⁷⁶ See *Winshaw v Miller and Another* 1916 CPD 439.

¹⁷⁷ See *Liss Shoe Co (Pty) Ltd v Moffett Building and Contracting Co (Pty) Ltd* 1952 (3) SA 484 (W)

¹⁷⁸ See *Holland v Scott* (1881-1882) 2 EDC 307 and *Graham v Dittmann & Son* 1917 TPD 288

¹⁷⁹ See *Redelinghuis v Silberbauer* 1874 Buch 95 and *Jecks v O'Meara* 1904 TH 284.

¹⁸⁰ See *Holland v Scott* (1881 – 1882) 2 EDC 307 and *Graham v Dittman & Son* 1917 TPD 288.

¹⁸¹ See *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D).

¹⁸² See (note 118)

¹⁸³ See (note 98).

¹⁸⁴ Supra (note 166) at para 170.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ See (note 162) p90.

In such a case the landowner suffers actual patrimonial loss. Patrimonial loss includes expenditure incurred in seeking to prevent the nuisance and the loss arising from material damage caused to corporeal property.

In the past our courts have held that allowing oil from a storage tank to seep onto a neighbour's land;¹⁸⁸ animals on neighbouring properties being held under unhealthy conditions causing unpleasant smells as well as a health risk;¹⁸⁹ and planting trees with extensive root systems which threatened the foundations of a neighbouring house¹⁹⁰ amounted to actionable nuisances.

A nuisance in the wide sense involves the actual infliction of patrimonial damage.¹⁹¹ The focus here is not on personal discomfort or inconvenience but on actual damage to the land. In such circumstances compensation can be claimed in terms of the law of delict by means of the action for damages, or the infringement can be prohibited by means of an interdict in terms of the law of property.¹⁹²

3.4.4 The test for reasonableness

When it comes to deciding whether the conduct of a neighbour is unlawful and therefore constitutes a nuisance the courts have to balance conflicting entitlements:

- (a) The entitlement of a landowner to the free use her land for her own benefit or profit, which might include creating odours, or noises or even some damage to a neighbour's land.¹⁹³
- (b) The entitlement of a neighbour to the peaceful use and enjoyment of his land ("the ordinary comfort of human existence") and thus to be free of odours, or noises, or damage.¹⁹⁴

¹⁸⁸ See *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C).

¹⁸⁹ See *Whittaker v Hime* (1912) 33 NLR 72 and *Van der Westhuizen v Du Toit* 1912 CPD 184.

¹⁹⁰ See *Bingham v Johannesburg City Council* 1934 WLD 180.

¹⁹¹ See (note 162) p91.

¹⁹² Ibid p90.

¹⁹³ See (note 166) at para 173

¹⁹⁴ Ibid.

The conduct of a landowner will only be unlawful and as a result be actionable as a nuisance if that conduct is unreasonable.¹⁹⁵ The test is not that of a reasonable person, rather it is an objective evaluation of the circumstances in which the interference has taken place. It is a test for unlawfulness or wrongfulness.¹⁹⁶

The question that must be answered is whether a normal person finding him or herself in the position of the plaintiff, would have tolerated the interference in question.¹⁹⁷ In order to answer this question a court must take into account various factors. These factors are usually divided into two categories: (a) those related to the seriousness of the harm;¹⁹⁸ and (b) those related to the utility of the conduct which caused the harm.¹⁹⁹

3.4.5 Criteria relating to the seriousness of the harm

The factors that are usually taken into account when the courts consider the seriousness of the harm are as follows:

- ‘(a) the extent of the interference;
- (b) the locality of the land;
- (c) the suitability of the plaintiff’s use;
- (d) the time the interference took place;
- (e) the duration of the interference;
- (f) the sensitivity of the plaintiff to the harm; and
- (g) the possibility of mitigating the harm.’²⁰⁰

Each of these will be discussed in turn below.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid at para 174.

²⁰⁰ Ibid.

(a) The extent of the interference

In order to be considered unreasonable the harm suffered must be substantial and therefore harm which is trifling is not unreasonable.²⁰¹ The test is an objective one and is expressed as the test of what a normal person residing in the area would consider to be an excessive or intolerable interference.²⁰² A normal person is defined as one who is not over-scrupulous or finicky or sensitive, but a normal person of 'sound and liberal tastes and habits.'²⁰³

(b) The locality of the land

There is no universal standard of comfort of the comfort human existence and what may be unreasonable in one area may not be unreasonable in another.²⁰⁴ This is because different areas are devoted to different uses (agricultural, commercial, industrial, residential and so on). Different levels of tolerance, therefore, apply to different areas. A person living in an urban area, for example, cannot expect the peace and quiet of a rural area.²⁰⁵

(c) The duration of the interference

The seriousness of the harm suffered by the plaintiff will usually be determined by the duration of the interference with his or her comfort.²⁰⁶ An interference must persist for a significant period of time in order for it to be considered unreasonable.²⁰⁷ An occasional interference or one which is temporary will not usually be considered to be unreasonable.²⁰⁸

²⁰¹ Ibid at para 174.

²⁰² Ibid at para 175.

²⁰³ Ibid.

²⁰⁴ Ibid

²⁰⁵ Ibid.

²⁰⁶ Ibid at para 177.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

(d) The time the interference took place

The seriousness of the harm suffered by the plaintiff will also be determined by considering the time of day or night at which the interference occurs.²⁰⁹ An interference which is reasonable at midday may not be reasonable at midnight.²¹⁰ An interference with sleep is usually considered to be more serious than one that does not.²¹¹

(e) The suitability of plaintiff's use

How suitable the locality is for the uses that plaintiff devotes the land or premises to, will also be an important factor that will be considered in determining the seriousness of the harm suffered.²¹² In circumstances where a plaintiff chooses to use the land or premises in manner which is inappropriate to the locality, the plaintiff will be required to tolerate more interference with his comfort than he would in a locality which was appropriate for the use to which he put the land.²¹³

(f) Avoidance or mitigation of the harm

The seriousness of the harm may be affected by the extent to which the landowner could have taken steps to avoid or mitigate the harm suffered.²¹⁴ If the harm could have been inexpensively or easily avoided or lessened by the landowner, it will be considered less serious in the circumstances.²¹⁵

²⁰⁹ Ibid at para 178.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid at para 176.

²¹³ Ibid.

²¹⁴ Ibid at para 180.

²¹⁵ Ibid.

(g) The plaintiff's sensitivity to harm

In order to determine the gravity of the harm suffered, the standard used is that of the ordinary person living in that area. If the plaintiff is extraordinarily sensitive to the activity carried on by the defendant, the interference will not be considered unreasonable.²¹⁶ This applies to both the physical and moral sensitivity of the plaintiff.²¹⁷

3.4.6 Criteria relating to the utility of the conduct causing the harm

The factors that are usually taken into account when the courts consider the utility of the conduct that caused the harm are as follows:

- ‘(a) the nature of the activity;
- (b) the motive or purpose of the defendant;
- (c) the practicability of preventing harm occurring.’²¹⁸

Each of these will be considered in turn below.

(a) The nature of the activity

If the activity or conduct which causes the harm has a utility which outweighs the harm suffered, the interference will not be considered to be unreasonable.²¹⁹ In appropriate circumstances the harm arising out of a nuisance caused by normal land-use activities may have to be tolerated as a part of living together in society.²²⁰ The social utility of the land is based on a common sense approach and as a general rule the use of the land for promoting public welfare is regarded as having a high social utility.²²¹

²¹⁶ Ibid at para 179.

²¹⁷ Ibid.

²¹⁸ Ibid at para 181.

²¹⁹ Ibid at para 182.

²²⁰ Ibid.

²²¹ Ibid.

(b) The motive or purpose of the defendant

If the defendant, by engaging in a particular activity, has the intention to harm his neighbours or acts out of malice or spite, the resulting interference and harm inflicted on the plaintiff will be considered unreasonable.²²²

(c) The practicability of preventing harm

The greater the possibility of preventing the harm the more likely it is that the harm is unreasonable.²²³ Therefore if an interference could have been prevented or at least lessened by the defendant carrying on the activity at a different place or in a different manner, or with more skill is more likely to be considered an unreasonable interference than one which could not have been prevented by such measures.²²⁴ A defendant is, however, only expected to take steps which are reasonable to implement and thus prevent the harm being caused.²²⁵

3.5 REMEDIES FOR NUISANCE

3.5.1 Introduction

A landowner who has been harmed or threatened with harm by a nuisance has the following remedies: (a) self-help; (b) an abatement order; (c) an action for damages; and (d) an interdict. In the majority of nuisance cases, the applicant applies for an interdict.

3.5.2 Self-help

This remedy allows a landowner in the most urgent cases of necessity to take the law into his or her own hands. “The circumstances in which self-help is permissible include ‘an imminent risk to health or circumstances so pressing as to admit of no delay in abating the nuisance’”.²²⁶

²²² Ibid at para 183.

²²³ Ibid at para 185.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid at para 196

It is clear, therefore, that self-help is only justifiable in limited and exceptional circumstances.²²⁷

3.5.3 An abatement order

This remedy relates to conditions defined as nuisance by legislation. In terms of the relevant legislation, public officers are authorised to order persons responsible for causing the nuisance, to abate same on their premises.²²⁸ If a victim is suffering the effects of nuisance from a neighbouring landowner, he or she must apply to the local authority for an order of abatement to be issued against the offending party.²²⁹

3.5.4 An action for damages

An action for damages can lie in respect of a nuisance where the nuisance has caused actual patrimonial loss.²³⁰ There is no certainty as to whether the action may be brought under the *actio legis Aquiliae* or under some other form of liability.²³¹ The victim of nuisance may recover damages arising from:

- ‘(a) expenditure incurred in seeking to prevent the interference with the comfort of human existence caused by the nuisance;
- (b) the loss arising from material damage caused by the nuisance;
- (c) depreciation in the value of immovable property which is permanent and not merely of the sort that will disappear with the removal of the nuisance.’²³²

A victim will be able to claim damages if the nuisance is found to be unreasonable.²³³

²²⁷ Ibid.

²²⁸ Ibid at para 197.

²²⁹ Ibid.

²³⁰ Ibid at para 202.

²³¹ Ibid.

²³² Ibid at para 204.

²³³ Ibid at para 205.

3.5.5 *An interdict*

(a) Introduction

An interdict is a court order in terms of which a person is instructed to either do something (mandatory interdict) or to stop doing something (prohibitory interdict). The purpose of an interdict is to stop an on-going infringement of property rights or to prevent an imminent infringement.²³⁴ It cannot be granted once the infringement had stopped.

The application for an interdict usually takes place in two stages: first an interim (temporary) interdict is granted and then later a final (permanent) interdict is granted.²³⁵ An interim interdict is usually granted at short notice and on an urgent basis, while a final interdict is granted only after both parties have been given a proper opportunity to prepare and present their cases.

(b) An interim interdict

A person who applies for an interim interdict must prove the following requirements :

- ‘(i) a *prima facie* right;
- (ii) apprehended harm which may be irreparable;
- (iii) a balance of convenience; and
- (iv) the absence of a satisfactory alternative remedy.’²³⁶

The first requirement is met when the applicant proves the probability that an actionable nuisance exists.²³⁷ In order to determine this, the court will look at whether the applicant is suffering from nuisance which is unreasonable. This will be determined in accordance with the factors set above.

²³⁴ Ibid at para 198.

²³⁵ Ibid at para 199.

²³⁶ Ibid at para 200.

²³⁷ Ibid.

Insofar as the second requirement is concerned, the applicant must show that if the order is refused, he or she will suffer irreparable harm.²³⁸ The harm suffered would be that which could not normally be assessed in monetary terms. This would include: annoyance, mental distress, or discomfort, which are usually caused by nuisance and cannot be quantified in monetary terms.²³⁹ A threat of harm to the life or physical health of the person would also be considered as irreparable harm.²⁴⁰

Insofar as the third requirement is concerned, the court must be satisfied that the granting of the interdict will not cause greater harm to the respondent or the general public welfare in relation to what the applicant complains of.²⁴¹ Before the court determines a nuisance to be actionable the interests of the victim and perpetrator must be considered.²⁴²

The final requirement places a burden on the victim to show that the granting of the interdict is the only effective relief to the nuisance and additionally, that an award for damages would not provide the same relief.²⁴³ Whether or not the interdict will be granted, despite the applicant having established the requisite requirements, is still within the discretion of the court.²⁴⁴

(c) A final interdict

A person who applies for a final interdict must prove:

- ‘(i) a clear right;
- (ii) injury committed or apprehended; and
- (iii) the absence of a satisfactory alternative remedy.’²⁴⁵

The plaintiff is required to prove on a balance of probabilities that he has a clear or definite legal right. In the case of a nuisance he must show that he or she is the owner of the land or is lawfully vested with legal rights of use and enjoyment.²⁴⁶

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid at para 201.

²⁴⁶ Ibid.

In relation to the second requirement, the plaintiff must show that his or her legal right has been infringed by the defendant to his or her prejudice, this could be an actual or potential prejudice.²⁴⁷ In nuisance matters it is required that the plaintiff establish that the defendant's conduct constitutes an actionable nuisance.²⁴⁸ Finally, the plaintiff must also establish that the final interdict is the only form of relief and that no other adequate remedy exists.²⁴⁹

3.6 DEFENCES TO A NUISANCE

3.6.1 Introduction

In certain circumstances a defendant cannot be held liable for a nuisance. These are:

- '(a) statutory authority;
- (b) a servitude; and
- (c) coming to the nuisance.'²⁵⁰

A defendant may raise these defences where a nuisance has been found to be actionable.

3.6.2 Statutory authority

This is where a statute authorises the infliction of the harm caused by the nuisance.²⁵¹ The power conferred by the statute, however, must be exercised so as to take all reasonably practicable measures to ensure that the harm inflicted is minimised.²⁵² The defence will fail if these measures are not taken into account.²⁵³

3.6.3 A servitude

This is where a valid servitude authorises the carrying of a particular activity in a manner that amounts to a nuisance.²⁵⁴

²⁴⁷ Ibid.

²⁴⁸ Ibid

²⁴⁹ Ibid.

²⁵⁰ Ibid at para 207.

²⁵¹ Ibid at para 208.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid at para 209.

3.6.4 Coming to the nuisance

This is where the applicant has voluntarily set up residence on premises within the vicinity of the nuisance. This defence is not usually accepted by the courts.²⁵⁵ This is because prior occupation does not relieve the landowner of the duty of using his or her land in a reasonable manner.²⁵⁶

3.7 EXAMPLES FROM THE CASE LAW

3.7.1 Introduction

As the discussion set out above indicates, when it comes to determining whether a particular noise is unlawful and therefore a nuisance, the courts have to determine whether it is unreasonable or not and when it comes to determining whether a noise is unreasonable or not they take into account a variety of factors. The manner in which the courts go about performing this task is clearly illustrated in the following cases: *Prinloo v Shaw*;²⁵⁷ *De Charmoy v Day Star Hatcheries (Pty) Ltd*;²⁵⁸ *Gien v Gien*;²⁵⁹ and *Lasky v Showzone CC*.²⁶⁰ Each of these cases is discussed in turn below.

3.7.2 *Prinsloo v Shaw*

The facts of this case were as follows. The applicant, who owned a house in a residential suburb in East London, applied for an interdict prohibiting the respondent, who owned the neighbouring property and who was the leader of a religious group known as the Latter Rain Assemblies, from committing a nuisance by conducting religious services in his house accompanied by very loud and strident chanting, clapping, groaning, praying, singing, yelling and whining.²⁶¹

²⁵⁵ Ibid at para 210.

²⁵⁶ *Howard Farrar, Robinson and Co v East London Municipality* (1908) EDC 149 and *Laskey v Showzone CC* 2007 (2) SA 59 (C).

²⁵⁷ 1938 AD 570.

²⁵⁸ See (note 181).

²⁵⁹ 1979 (2) SA 1113 (T).

²⁶⁰ See (note 98).

²⁶¹ At 571.

Apart from being very noisy, the facts showed that these religious services were held three times a day on three days of the week and four times a day on the remaining four days of the week. In addition, the facts also showed that these noisy religious services took place between six am and ten pm each day. Besides using the house for religious purposes, the respondent also used it for residential purposes.

The key issue that the Appellate Division had to determine was whether the noise in question materially interfered with the ordinary comfort and convenience of the occupiers of the applicant's house and diminished their ordinary comfort and convenience.²⁶² The Court found that it did and granted the interdict.

In arriving at this decision, the Appellate Division began by stating that '[a] resident in a town, and more particularly a resident in a residential area, is entitled to the ordinary comfort and convenience of his home, and if owing to the actions of his neighbour he is subjected to annoyance or inconvenience greater than that to which a normal person must be expected to submit in contact with his fellow-men, then he has a legal remedy'.²⁶³

The standard which must be adopted in these sorts of cases, the Appellate Division stated further, is not 'the standard not of the perverse or finicking or over- scrupulous person'. Instead, it is the standard of a 'normal man of sound liberal tastes and habits'.²⁶⁴

After setting out these principles, the Appellate Division turned to apply them to the facts. In this respect the Court began by pointing out, first, that the religious services were conducted on the premises of the respondent in close proximity to the premises of the applicant; second, that the religious services took place between three or four times daily and were always accompanied by the stamping of feet and loud clapping; and, third, that the noise could be heard more than 200 feet away. Given these fact, the Court concluded it was quite clear that the applicant's peaceful and undisturbed use and occupation of his property was unduly interfered with.²⁶⁵

²⁶² At 575.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

3.7.3 *De Charmoy v Day Star Hatchery (Pty) Ltd*

The facts of this case are as follows. The plaintiff applied for an interdict prohibiting the respondent, who owned the neighbouring property and who carried on the business of breeding and raising chickens on its property, from committing a nuisance by switching on the lights in the hatchery at 2h30 in the morning, following which approximately 7000 chickens would be woken up and would begin to cackle and crow very loudly.²⁶⁶

As a result of the noise caused by the chickens, the applicant's wife's sleep was disturbed and her nerves and general health began to deteriorate. The structures housing the chickens were situated very close to her bedroom window and if she left the windows open at night she was usually woken at 2.30 am. Due to these factors she was compelled to seek medical advice and was prescribed medication to sedate and tranquillise her.

The adjoining properties were also located in a relatively quiet rural area. The Court granted the interdict. In arriving at a decision, the Court approved the dictum of Steyn in *Regal v African Superslate*²⁶⁷ and restated the Roman-Dutch principle that although an owner may normally do as he pleases on his land, his neighbour has a right of enjoyment of his land. If one of the neighbouring land 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.²⁶⁸

The Court pointed out that the difficulty in cases such as these was in 'determining the level at which a disturbance which results from the contiguity of two properties, each of which is a potential source of disturbance to the other ceases to be a "to- be-expected-in-the-circumstances" interference with the rights of the enjoyment of property and becomes an unwarranted and actionable interference. It is also a question of fact and of judgment and opinion, but there are guiding considerations which should be borne in mind in the interests of fairness to both parties'.²⁶⁹

²⁶⁶ In the opinion of an expert called by the defendant, the light acted as an ovarian stimulant and in response to the artificial lighting the egg laying of the hens became more consistent and followed a uniform pattern which in turn stimulated the business of the defendant as prices were more consistent when production was steady and consistent (at 190A-C).

²⁶⁷ 1963 (1) SA 102 (A).

²⁶⁸ See (note 181) at 191F.

²⁶⁹ Ibid at 192C.

The Court then turned to consider the material factors in determining whether a nuisance was actionable and stated as follows:

‘The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists in noise) the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of “the reasonable man” – one who, according to ordinary standards of comfort and convenience, and the 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.’²⁷⁰

In this judgment the Court reaffirmed the fact that the test is an objective one, and concluded that the noise caused by the defendant company in pursuance of its business activities unreasonably interfered with the rights of the plaintiff to enjoy his property and granted the order sought.

3.7.4 Gien v Gien

The facts of this case were as follows. The applicant applied for an interdict prohibiting the respondent, who was his brother and who owned the adjoining property in a rural cattle-farming district, from committing a nuisance by erecting an apparatus called a ‘Purivox’ on his farm which chased away wild animals and birds from his vegetable garden by making loud noises.

The facts showed that this apparatus not only made loud explosive noises, but was also configured so that it worked day and night. The effect was that the noises disturbed and interrupted the sleep of people in the house and caused the animals of the applicant great distress. One example of the effect on the animals was that of a normally tame horse, who threw its rider when it heard the sound. It was only possible to control the horse when it was removed from the farm.

²⁷⁰ Ibid at 192D.

The applicant also contended that the cattle were affected by the noises in that they appeared to be restless and became problematic when they had to be dipped. In general, the apparatus caused disturbance to his peace and enjoyment of his property and given the effect on his animals, was also affecting his farming business. Ultimately, this was causing the applicant financial loss. Although it was possible for the respondent to switch off the apparatus during the night, or muffle the sound of it without reducing the efficacy, the respondent refused to do so. The stance adopted by the respondent was that he was simply doing on his property what was necessary to protect his property. He also stated that he was not under an obligation to modify his lawful actions simply to accommodate the neighbouring landowner.²⁷¹

In delivering the judgment, the court cited with approval the dictum of Steyn CJ in *Regal v Superslate*,²⁷² acknowledging that ownership is the most extensive rights that one may have with regard to a thing.²⁷³ The exercising of this very powerful right must be done in a manner so as to take into account the rights of adjoining land owners. The court found that the respondent had unlawfully infringed the applicant's rights as owner of the adjoining property and granted the interdict.

In handing down the judgment the court approved the standard of reasonableness as expounded in *Prinsloo v Shaw*.²⁷⁴ Essentially that standard of reasonableness is an objective standard. The court also approved the factors relevant to determining reasonableness in the case of *De Charmoy v Day Star Hatchery (Pty) Ltd*.²⁷⁵

²⁷¹ Ibid at 1119E.

²⁷² See (note 267).

²⁷³ Ibid at 1120H.

²⁷⁴ See (note 257).

²⁷⁵ See (note 181).

3.7.5 *Laskey v Showzone CC*

The facts of this case were as follows. The applicants were the owners of residential apartments situated in a mixed business/residential area in the Cape Town CBD. The respondent conducted a theatre-restaurant business known as ‘On- Broadway’ in the adjoining building. The complaint was based on the unacceptable levels of noise that emanated from the theatre. The main source of the complaint was the amplified sound during performances. As a result of the unbearable noise the applicants sought an interdict to restrain the respondents from contravening the Western Cape Noise Control Regulations²⁷⁶, in that the noise emanating from On-Broadway constituted a disturbing noise as envisaged by the Regulations. The applicants asked the court to interdict the respondents from causing a disturbing noise and/or a noise nuisance.²⁷⁷

The interdict was granted by the court. In arriving at this decision, the Court explained that the applicant would only be entitled to enforce the Regulations if he could show that the noise made by respondent amounted to a nuisance. Essentially the applicants had to show that their right of ownership and more specifically, their right to peaceful use and enjoyment of their property had been infringed as a result of the noise made by the respondents. The court went on to explain (and in this respect echoed the various judgments set out above), that a landowner is entitled to use his property as he likes, provided he does not unreasonably interfere with a neighbour’s entitlement to use his property as he likes.

²⁷⁶ The Western Cape Noise Regulations have been discussed in chapter two, p 20; 23 & 24.

²⁷⁷ The concepts of a ‘disturbing noise’ and a ‘noise nuisance’ have been discussed in chapter two, p 20 – 22.

In order to determine whether a landowner's use is reasonable or not, the Court then set out and explained the factors that must be taken into account to determine this. The character of the area being an important consideration. The court stated as follows :

'Ignoring for the moment the effect of various regulatory systems that characterise life in the modern age, such as zoning controls, building regulations and the like, everyone is in general permitted in common law to use their property for any purpose they choose, provided only that the use of property should not intrude unreasonably on the use and enjoyment by the neighbours of their properties. What constitutes reasonable usage in any given case is dependent on various factors, including the general character of the area in question – persons living and working in an urban area would, for example, reasonably be expected in general, to be more forbearing about a higher level of noise intrusion into their lives than neighbours living in a rural housing estate. Social utility is another factor that might affect what owners and occupiers of property might reasonably be expected to put up with from their neighbours: aircraft and railway trains are an unavoidable incident of modern life and it is necessary for their functioning that airports and shunting yards should be able to operate. The operation of these facilities will often generate higher levels of noise than persons in residential area might in other circumstance be reasonably expected to endure, but because of their social utility person living near an airport or a railway yard will be required to put up with the associate noise levels, as uncomfortable as that might be, provided only that the airport or railway yard is not itself operated unreasonably, in a nuisancesome manner'.²⁷⁸

The court thereafter clarified that the test for reasonableness is not the test of the reasonable man, but rather an objective assessment of the circumstances in which the alleged nuisance occurred and made the following points:

'Reasonableness in this context is a variable criterion dependent on the circumstances. The test for determining whether or not a particular usage or conduct is actionably nuisancesome has been aptly expressed by Prof JRL Milton as follows:

"The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man, but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred.

²⁷⁸ See (note 98) at para 19.

The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference with the comfort of his existence or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm”.

Lord Wright’s description of the test in *Sedleigh-Denfield v O’Callaghan and Others* [1940] AC 880 at 903 was crisper, but to the same effect:

“A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of the neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usage of mankind living in society, or more correctly, in a particular society”.²⁷⁹

After the court set out and explained the factors relevant in determining reasonableness, the court then turned to consider the facts of the case at hand. The court concluded, after applying these factors to the facts of the case, that the noise that the respondents made amounted to an actionable nuisance. The court highlighted the following factors as the reasons for the decision:

(a) It was shown by the evidence of an expert that the increase in noise caused by the shows held at On-Broadway was significant. This evidence corroborated the evidence of the applicants that the comfort of their existence was materially affected²⁸⁰

(b) The noise made by the shows held at On-Broadway did interfere with the use and enjoyment of the applicant’s property (even though they closed their windows it did not help);

(c) Although the performances were short-lived, normally between one and a half and two hours per evening, they took place on a regular basis and occurred late at night; when most people would expect it be quieter; and

²⁷⁹ Ibid at para 20.

²⁸⁰ Ibid at para 37.

(d) finally, the respondent had failed to take any suitable steps to lessen the amount of noise being made at its premises, for instance it had failed to properly sound-proof its roof and walls.²⁸¹

The defence raised by the respondents was that the applicants were not entitled to complain due to the fact that they had ‘come to the nuisance’. This was based on the fact that the premises used by On Broadway had been used as ‘a place of night-time entertainment’ for approximately 40 years.

The court rejected this defence based on the fact that ‘prior occupation’ does not release a landowner from the obligation of exercising his entitlements in a reasonable manner. The court highlighted that fact that even in a commercial area, a landowner is not permitted to make a noise which an ordinary or normal person located in that area would regard as being unreasonable.²⁸²

‘The respondent contends that the applicants are not entitled to complain because the premises now occupied by On-Broadway had been used for the best part of 40 years as ‘a place of night-time entertainment’ at which music had been played, one assumes at comparable volumes to that experienced by the applicants today, and because they had ‘come to the nuisance’. The contention proceeds that there are many restaurants and bars in the area and that having regard to the established character of the area the business of On-Broadway ‘is being appropriately carried on at 88 Shortmarket Street, and in the circumstances constitutes the reasonable and natural use of those premises’, whereas the applicants’ use of 74 Loop Street for residential purposes ‘is inappropriate to its locality’.²⁸³

The court also noted that the area where the theatre was located was no longer a purely commercial area. While at one stage it was used purely for commercial purposes, the preceding ten years had seen drastic transformation. The area had become a place where people both lived and worked in. The respondent was therefore not entitled to make a noise which an ordinary or normal person living in a mixed commercial/residential would consider to be unreasonable.

²⁸¹ At paras 33-39.

²⁸² At para 24.

²⁸³ Ibid.

‘A person setting up home in the inner city cannot expect the tranquillity of life in the leafy suburbs, but in the context of the realities of an urban environment, including the phenomenon of a concentration of places of night time entertainment that is part and parcel of the 24-hour living city concept, such a person is still entitled to expect that his or her neighbour, whatever its character, will use its property in such a manner so as not unreasonably to intrude on the ordinary amenities of the inner-city resident. While established noise levels are certainly a consideration in assessing what the new class of inner-city apartment dwellers might reasonably be expected to tolerate, it cannot be an absolute answer for somebody responsible for creating a level of noise which exceeds what the inner-city resident should reasonably be expected to tolerate at night to say simply, ‘I was making this noise before you moved in and therefore if you wish to live here you will just have to put up with it, or find a home elsewhere’. If an area is suitable for residential occupation, or has been popularly adopted for that use, other users of property in the area must be accommodating of the rights of such residents to the reasonable amenities of life’.²⁸⁴

The court recognised and accepted that inner-city dwellers must accept higher levels of noise than in other areas. However they should not have to tolerate every type of noise or disturbance. It could well be the case that the pre-existing noise levels could very well exceed what can reasonably be tolerated even in that area. ‘The contextual application of the reasonableness and normal use principles means that a person who moves into an area should be relatively tolerant of the levels of noise that may be customary there, but the mere fact of prior existence would not justify the disturbance automatically’.²⁸⁵

3.8 CONCLUSION

As the cases discussed in this chapter show the particular factors the courts will take into account in order to determine whether a noise is unreasonable and therefore a nuisance turns largely on the facts of each case. In *Prinsloo v Shaw*, for example, the Court appears to have relied heavily on the location of the property, the degree of persistence of the noise and the distance at which the noise could be heard and in *De Charmoy v Day Star Hatcheries (Pty) Ltd* the Court appears to have relied on the location of the property, the time at which the

²⁸⁴ At para 26.

²⁸⁵ AJ van der Walt *The Law of Neighbours* (2010) 289.

noise was made and the seriousness of the harm caused by the noise. Somewhat similarly, in *Gien v Gien*, the Court appears to have relied on the location of the property, the social utility of the noise and the motive of the defendant and in *Lasky v Showzone* the Court relied on the fact that the area where the theatre was located was no longer purely a commercial area.

An important consequence of the common law approach of dealing with noise is that while it is very flexible, and may therefore be adapted to the circumstances of each case, it is also very uncertain. From this point of view, the common law may not be adequate in dealing with the difficulties of the industrialised twenty- first century society we live in and the need exists for a more objective way of dealing with the problem of noise.²⁸⁶ It must also be appreciated that using the common law as a means of controlling noise pollution can be relatively burdensome and costly as the litigants must themselves, out of necessity, approach a court for relief.

It is, accordingly, not entirely surprising that the legislature has intervened and adopted more precise and scientific standards.²⁸⁷ In particular section 25 of the Environment Conservation Act²⁸⁸ empowering Provincial Legislatures to put in place Noise Control Regulations which must be implemented by municipalities to ensure that noise is controlled. If noise control legislation exists in a municipality, the responsibility of pursuing an action against the individual creating the noise rests on the municipality concerned. This effectively removes the burden on the person suffering the nuisance.

²⁸⁶ J Glazewski *Environmental Law in South Africa* 2ed (2005) p610.

²⁸⁷ See the discussion of the Noise Control Regulations promulgated in terms of the Environment Conservation Act in Chapter two.

²⁸⁸ See (note 73).

CHAPTER FOUR: THE BILL OF RIGHTS AND THE CONTROL OF NOISE POLLUTION

4.1 INTRODUCTION

The two previous chapters have focussed on the control of noise from a statutory and common law perspective. This chapter focusses on the control of noise from a Bill of Rights perspective. The South African Constitution contains a number of rights which may be infringed by excessive noise. Among these are the right to freedom and security of the person;²⁸⁹ the right to a healthy environment;²⁹⁰ and the right not to be arbitrarily deprived of property.²⁹¹

The most significant, however, is the right to a healthy environment. This is because it provides not only that everyone has a the right “to an environment that is not harmful to their health and well-being”,²⁹² but also that everyone has the right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that [*inter alia*] prevent pollution”.²⁹³ Section 24 thus appears to impose a negative obligation on the state to refrain from causing noise pollution and a positive obligation to take steps to prevent third parties from causing noise pollution and to create a noise pollution free environment.

Before turning to consider the scope and ambit of this right and in particular the extent to which it may be infringed by excessive noise, however, it will be helpful to examine the scope and ambit of the right of respect for privacy and family life guaranteed in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the Convention’). This is because the European Court of Human Rights (the ‘ECHR’) has held on a number of occasions that Article 8 applies not only to physical invasions of a person’s home, but also to non-physical invasions such as noise.

²⁸⁹ Section 12.

²⁹⁰ Section 24.

²⁹¹ Section 25(1).

²⁹² Section 24(a).

²⁹³ Section 24(b)(i).

4.2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

4.2.1 Introduction

The Convention was adopted in 1950 and came into force in 1953. It has 47 member states and gives practical form to certain of the rights and freedoms embodied in the Universal Declaration of Human Rights.²⁹⁴ It is divided into three sections. The fundamental rights and freedoms protected by the Convention are set out in Section I.²⁹⁵ Section II establishes the European Court of Human Rights and sets out its operational rules.²⁹⁶ Section III contains a number of miscellaneous provisions.²⁹⁷

Among the fundamental rights and freedoms guaranteed in Section I of the Convention are:

- the right to life (Article 2);
- the right not to be tortured (Article 3);
- the right not to be held in slavery (Article 4);
- the right to liberty and security of the person (Article 5);
- the right to a fair trial and access to court (Article 6);
- the right not to be punished without a law (Article 7);
- the right to respect for private and family life (Article 8);
- the right to freedom of thought, conscience and religion (Article 9);
- the right to freedom of expression (Article 10);
- the right to freedom of assembly and association (Article 11);
- the right to marry (Article 12);
- the right to an effective remedy (Article 13); and

²⁹⁴ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom (see Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms: Chart of Signatures and Ratifications*

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=10/01/2014&CL=ENG> accessed on 28 January 2014).

²⁹⁵ Article 2-18.

²⁹⁶ Article 19-51.

²⁹⁷ Article 52-59.

- the right not to be discriminated against (Article 14).²⁹⁸

Apart from the fundamental rights and freedoms set out above, a number of other fundamental rights and freedoms are set out in various Protocols to the Convention. Among these are the following:

- the right to property (Article 1 of Protocol 1);
- the right to education (Article 2 of Protocol 1);
- the right to free elections (Article 3 of Protocol 1);
- the right not to be imprisoned for debt (Article 1 of Protocol 4);
- the right to freedom of movement (Article 2 of Protocol 4);
- the right of nationals not to be expelled (Article 3 of Protocol 4); and
- the right of aliens not to be collectively expelled (Article 4 of Protocol 4).²⁹⁹

As a result of the Convention, human rights have been extended to millions of Europeans due largely to the highly effective methods of enforcement through both domestic and international mechanisms.³⁰⁰ In terms of Article 1 of the Convention, contracting states are required to secure to everyone within their jurisdiction the fundamental rights and freedoms that are contained in the Convention. Furthermore, in terms of Article 13, these states must also ensure that their municipal law provides an effective remedy in cases of infringement. The body responsible for the enforcement of the fundamental rights and freedoms enshrined in the Convention is the ECHR.

²⁹⁸ European Convention on Human Rights available at http://www.echr.coe.int/Documents/Convention_ENG.pdf accessed on 5 December 2013.

²⁹⁹ A number of other rights are also guaranteed in Protocols 6, 7, 12 and 13. Protocol 6 restricts the application of the death penalty to times of war or imminent threat of war; Protocol 7 protects certain procedural rights as well as the right to equality between spouses. Protocol 12 extends the grounds on which a person may not be discriminated against in Article 14 to the exercise of any legal right and the actions of public authorities and Protocol 13 completely abolishes the death penalty.

³⁰⁰ J Dugard *International Law: A South African Perspective* 3ed (2005) p332-333

4.2.2 The European Court of Human Rights

The ECHR was established in 1959 and is responsible for the enforcement of the Convention. Individuals who believe that their fundamental rights and freedoms have been violated, and who are unable to successfully remedy their claim through their national legal systems, may apply to the ECHR to have their case heard. The ECHR is also empowered to hear cases brought by states and may award financial compensation to successful litigants. A decision of the Court will often require changes to national law.³⁰¹

The ECHR is comprised of 40 judges and normally works in seven-judge chambers. The Court is also divided into four sections and also comprises of a Grand Chamber of 17 judges. A matter is referred to the Grand Chamber in circumstances where a seven-judge panel has concluded that a serious issue of interpretation is involved or that the decision of the panel might contravene existing case law. Apart from the parties to each case, the Court's decisions are binding on all signatories as well.³⁰²

Under Article 54 of the Convention, the Committee of Ministers supervises the execution of Court judgments. Finally, Article 52 authorises the Secretary General to request parties to explain how their internal law ensures the application of the Convention.³⁰³

³⁰¹ JG Merrills 'European Court of Human Rights' available at <http://www.britannica.com/EBchecked/topic/196097/European-Court-of-Human-Rights-ECHR> accessed on 5 January 2014

³⁰² Ibid

³⁰³ See (note 300) p 331 - 332

4.2.3 Environmental Rights and the Convention

Although the Convention does not make explicit reference to the environment, the ECHR has derived “environmental rights” – such as the right to be free from air pollution, from noise pollution and from toxic waste – from the fundamental rights and freedoms that are explicitly referred to in the Convention. Among these are the right to life (Article 2); the right to private and family life (Article 8); and the right to property (Article 1 of Protocol 1). Insofar as noise pollution is concerned, however, the most important of these fundamental rights is the right to private and family life guaranteed in Article 8. This Article provides as follows:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

The purpose behind Article 8 is to protect the private life of individuals against arbitrary interference by public officials. In order to ensure that it achieves this purpose, Article 8 is set out in very broad terms and encompasses four distinct areas of a person’s life, namely: his or her private life; his or her family life; his or her home; and his or her correspondence.³⁰⁴

Like many of the other rights protected in the Convention, Article 8 is a qualified right. The first paragraph sets out the content of the right, while the second paragraph sets out the specific grounds on which the state may interfere with the private life, family life, home and correspondence of an individual. The second paragraph, therefore, is commonly referred to as a derogation clause.³⁰⁵

³⁰⁴ Ivana Roagna *Protection the right to respect for private and family life under the European Convention on Human Rights: Council of Europe Human Rights Handbook* (2012) at 9 available at <http://www.coe.int/t/dghl/cooperation> accessed on 29 January 2014.

³⁰⁵ Ursula Kilkelly *The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights* (2003) at 6 9 available at <http://refworld.org/pdfid/49f17e212pdf> accessed on 29 January 2014.

In terms of Article 8(2) an interference with a person's private life, family life, home or correspondence must be:

- (a) lawful;
- (b) legitimate; and
- (b) necessary in a democratic society.

An interference will be legitimate if it is aimed at achieving any of the goals set out in Article 8(2). In other words, an interference will be legitimate if it is aimed at:

- (i) protecting national security, public safety or the economic well-being of the country;
- (ii) preventing disorder or crime;
- (iii) protecting health or morals; or
- (iii) protecting the rights and freedoms of others.

Given the manner in which Article 8 is structured, it is not surprising that the ECHR has adopted a two-stage test when it comes to determining whether it has been infringed. In terms of this test, the Court first has to decide whether the complaint falls within the scope of one of the rights protected in Article 8(1). In order to answer this question, the Court will have to determine the scope and ambit of the right. This will usually involve discussion of what constitutes private life, family life, home or correspondence.³⁰⁶

If the ECHR finds that the complaint does fall into the scope of Article 8(1), it will then have to go on to the second stage of the test. During this stage, the Court has to determine whether there has been an interference with Article 8(1) and, if so, whether the interference can be justified in terms of Article 8(2). When it comes to determining whether the interference can be justified in terms of Article 8(2), the Court usually accepts that it is lawful and legitimate and focuses on whether it is necessary in a democratic society. Most disputes, therefore, turn on the question of whether the interference is necessary.³⁰⁷

When it comes to determining whether an interference is necessary, the ECHR applies a proportionality test. In *Olsson v Sweden*, for example, the Court held that "the notion of necessity implies that an interference corresponds to a pressing social need and, in particular,

³⁰⁶ Ibid at p8.

³⁰⁷ See (note 304) p 9.

that it is proportional to the legitimate aim pursued”.³⁰⁸ The test of proportionality recognizes that human rights are not absolute than that they may be limited by the interests of the general public. The goal of this test, therefore, is to strike a fair balance between the interests of the general public and the fundamental rights of the individual.³⁰⁹

In order to decide whether an interference is proportional, the ECHR takes into account a number of factors. Among these are the nature and importance of the rights that have been infringed, the severity of the infringement and the pressing social need which the state is aiming to fulfil. The ECHR has also held, however, that states enjoy a margin of appreciation when it comes to determining the steps to be taken to ensure compliance with the Convention.

Finally, it is important to note that although the essential object of Article 8 is to “protect the individual against arbitrary action by the public authorities”, the ECHR has held that there may in addition be positive obligations inherent in effective respect for the values it contains. This means that apart from the negative obligation not to interfere arbitrarily with a person’s private life, family life, home and correspondence, Article 8 also imposes a positive obligation on the state to protect a person’s private life, family life, home and correspondence from interference by third parties or even to take steps to provide them with these rights.³¹⁰

The positive obligations Article 8 imposes on the state are derived from the fact that it expressly provides that everyone has the right to *respect* for his private and family life, home and correspondence. In *X and Y v Netherlands*, for example, the ECHR held that “[Article 8] does not merely compel the state to abstain from . . . interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life . . . These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves”.³¹¹

³⁰⁸ 10465/83 (1988) ECHR 2 (20 February 1988)

³⁰⁹ See (note 305) p31.

³¹⁰ Ibid p20.

³¹¹ (1988) 8 EHRR 235.

4.2.4 Environmental Rights and Article 8 of the Convention

Article 8 of the Convention has been successfully invoked to cover environmental factors on a number of occasions by the ECHR. This process may be traced back to the ECHR's judgment in *Powell v United Kingdom*.³¹² In this case, the applicants, who lived near to Heathrow Airport, applied to the Court for an order declaring that their right to respect for their private lives and their homes had been infringed by the excessive noise caused by aircraft taking off and landing at the Airport during the day.

The ECHR dismissed the application. In arriving at this conclusion, the Court began by accepting that the "quality of [each] applicant's private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by the aircraft using Heathrow Airport. Article 8, therefore, was a material provision in relation to both of the applicants."³¹³

After setting out these principles, the ECHR turned to consider whether a fair balance had been struck between the conflicting rights of the applicants and the interests of the community as a whole. In this respect the Court found that it had. This is because the Airport played a central role in the United Kingdom's economy;³¹⁴ the United Kingdom had taken a number of steps to abate the noise; and the reasonableness of these steps fell within the state's wide margin of appreciation.³¹⁵ The Court, therefore, could not substitute its views on how best to deal with the noise caused by the Airport for those of the United Kingdom.³¹⁶

A similar approach was adopted in *Lopez Ostra v Spain*.³¹⁷ In this case, the applicants, who lived in the town of Lorca, applied to the ECHR for an order declaring that their right to respect for their home guaranteed by Article 8 had been infringed by the gas fumes, pestilent smells and contaminants released by a waste treatment plant located on municipal land near to them and which was operating without a licence. The applicants had been evacuated from

³¹² (200) 30 EHRR CD 362

³¹³ At para 40.

³¹⁴ At para 42.

³¹⁵ At para 43.

³¹⁶ At para 45.

³¹⁷ 16798/90 [1994] ECHR 46 (9 December 1994). This was the first case in which Article 8 of the Convention was successfully applied to the environment.

their home for a three month period as a result of contaminant being released from the plant and their daughter suffered from clinical nausea, vomiting, allergies and other symptoms.

The ECHR upheld the application and granted the order. In arriving at this conclusion, the Court began its analysis by confirming that Article 8 could include a right to protection from severe environmental pollution. This is because severe environmental pollution “may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”³¹⁸

After setting out these principles, the ECHR once again turned to consider whether a fair balance had been struck between the competing rights of the applicants and the interests of the community as a whole. In this respect, the Court found that a fair balance had not been struck. This is because the Spanish authorities themselves had failed to take action against the waste treatment plant despite being aware of the fact that it did not have a licence and that it was causing serious environmental problems.³¹⁹

Following the judgments in *Powell* and *Lopez Ostra*, the application of Article 8 to the environment was confirmed by the Grand Chamber of the ECHR in *Hatton v United Kingdom*.³²⁰ In this case, the applicants, who also lived close to Heathrow Airport, applied for an order declaring that their rights to a private life and home had been infringed by the excessive noise caused by an increase in the number of aircraft taking off and landing at the Airport at night after 1993. The number of aircraft taking off and landing at Heathrow at night began to increase in 1993 following the adoption of a new scheme regulating night flights. This scheme replaced an earlier system of movement limitation with a system which gave airline operators a choice of flying fewer noisy aircraft or more less-noisy aircraft.

The Grand Chamber dismissed the application. In arriving at this conclusion, the Court began by stating that while “there is no explicit right in the Convention to a clean and quiet environment, . . . where an individual is directly and seriously affected by noise or other

³¹⁸ At para 51.

³¹⁹ At para 56.

³²⁰ 36022/97[2003]ECHR 338 (8 July 2003).

pollution, an issue may arise under Article 8”.³²¹ At the same time, however, the Court stated further, it was important to reiterate the fundamentally subsidiary nature of the Convention. “The national authorities have direct democratic legitimation and are . . . in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight . . .”.³²²

After setting out these principles, the Grand Chamber turned to consider whether a fair balance had been struck between the competing rights of the applicants and the interests of the community as a whole. In this respect, the Grand Chamber found that a fair balance had been struck essentially for the same reasons in *Powell v United Kingdom*, namely that night flights made a positive contribution to the United Kingdom’s economy;³²³ that the United Kingdom had taken a number of steps to abate the noise caused by night flights;³²⁴ and that the reasonableness of these steps fell within the states margin of appreciation.³²⁵

In addition, the Grand Chamber also found that house prices in the area had not been significantly affected by the increase in noise caused by night flights. This meant that the applicants and other affected parties could, if they chose to, leave the area without financial loss.³²⁶

4.2.5 Noise pollution and Article 8 of the Convention

(a) Introduction

As we have already seen, Article 8 of the Convention was applied to noise pollution in both *Powell v United Kingdom* and *Hatton v United Kingdom*. Apart from these two cases, the ECHR has also applied Article 8 to noise pollution in a number of other judgments. Amongst

³²¹ At para 96.

³²² At para 97.

³²³ At para 126.

³²⁴ At para 127.

³²⁵ Ibid.

³²⁶ Ibid.

the most significant of these are *Moreno Gomez v Spain*;³²⁷ *Oluic v Croatia*;³²⁸ and *Dees v Hungary*.³²⁹ Each of these cases will be discussed in turn.

(b) Moreno Gomez v Spain

In this case the applicant lived in a flat in a residential area of Valencia in Spain. She applied to the ECHR for an order declaring that her right to a home guaranteed in Article 8 had been infringed by the excessive noise generated by bars, discotheques and nightclubs situated close to her home. The facts showed in this respect that since 1974 the Valencia City Council had allowed bars, discotheques and nightclubs to open in the vicinity of the applicant's home. Unfortunately, these establishments generated an excessive amount of noise and following complaints from the applicant and other residents the City Council decided in 1983 that it would not allow any more nightclubs to open. This decision, however, was never implemented and new licences were granted.

Approximately ten years later, following renewed complaints from the applicant and other residents as well as a police investigation, the City Council passed by-laws limiting the amount of noise that could be made between 10 pm and 8 am in residential areas.

In addition, the by-laws also set out conditions that had to be satisfied for an area to be declared as an "acoustically saturated area" and the consequences of such a designation, which included a ban on any new activities, such as bars, discotheques and nightclubs, that lead to acoustic saturation. Like the City Council's decision in 1983, however, these by-laws were never implemented and soon after they were enacted the City Council granted a licence for a discotheque to be opened in the applicant's building even though it was located in an acoustically saturated area.

The applicant then applied unsuccessfully to the Spanish courts for relief and thereafter to the ECHR. The ECHR upheld the application and granted the order. In arriving at this decision, the Court began by stating that Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. It is important to note, however, the Court stated further, that an individual's right to respect for his or her

³²⁷ 4143/02 [2004] ECHR 633 (16 November 2004).

³²⁸ 61260/08 [2010] ECHR 686 (20 May 2010).

³²⁹ 2345/06 [2010] ECHR 1772 (9 November 2010).

home does not simply mean “a right to the actual physical area, but also a right to the quiet enjoyment of that area”. This means that an infringement of the right is not “confined to concrete or physical breaches, such as the unauthorised entry into a person’s home, but could also include those that are not concrete or physical, such as noise, emissions, smells and other forms of interference”. If a serious breach prevents a person from enjoying the amenities of his home, the Court went on to state, it may result in the breach of that person’s right to respect for his home.³³⁰

After setting out these principles, the ECHR turned to consider whether a fair balance had been struck between the competing rights of the applicants and the interests of the community as a whole. In this respect, the Court found that a fair balance had not been struck. This was because, first, the applicant had suffered a serious infringement of her right to respect for her home;³³¹ and, second, even though the City Council had adopted measures, in the form of the by-laws, to protect the rights of the applicant and other residents, it had failed to adequately enforce its own rules.³³²

The state, therefore, had failed to discharge its obligation to guarantee the applicant’s right to respect for her home and her private life and as such it was in breach of Article 8 of the Convention.³³³

(c) Oluic v Croatia

In this case the applicant owned and lived in part of a house with her family in the town of Rijeka in Croatia. She applied to the ECHR for an order declaring that her right to respect for her home had been infringed by the excessive noise caused by a bar located in the other part of the house. Approximately three years after the bar was opened the applicant wrote to the County Sanitary Inspection (a public authority responsible for noise nuisance abatement in the area in which she lived) complaining that her home had been constantly exposed to excessive noise from the bar which was open from 7am until midnight each day.

³³⁰ At para 53.

³³¹ At para 61.

³³² Ibid.

³³³ At para 62.

In 2001 the noise produced by the bar was measured by an independent expert who found that exceeded the permitted level, especially at night. Following these findings, the Sanitary Inspection ordered the owner of the bar to reduce the level of noise coming from the bar. This decision, however, was set aside by the Ministry of Health and the case was remitted to the Sanitary Inspection. New measurements were then carried out and these also confirmed that the noise produced by the bar exceed the permitted level, especially at night. The Sanitary Inspection then ordered the owner to add sound insulation to the walls and floors of the bar.

After several delays, the owners complied with the order and added the sound insulation to the walls and floors of the bar. It was subsequently discovered, however, that the sound insulation installed by the owner was not sufficient and that the noise produced by the bar still exceeded the permitted level. The owner then moved the bar from the first floor of the building to the ground floor. Following this move, the Sanitary Inspection terminated all proceedings on the grounds that the noise produced by the bar was no longer excessive.

The applicant then applied unsuccessfully to the Croatian Courts for an order reversing the Sanitary Inspection's decision. After this application was dismissed, the applicant turned to the ECHR for relief.

The ECHR upheld the application and granted the order. In arriving at this conclusion the Court began by reiterating the principles it has set out in *Moreno Gomez v Spain*, namely that the right to respect for the home does not apply only to a physically defined area, but also to quiet enjoyment of that area within reasonable limits. Breaches of the right to respect of the home, therefore, are not confined to concrete breaches, such as an unauthorised entry into a person's home, but may also include those that are diffuse, such as noise, emissions, smells or other similar forms of interference. This means that a serious breach may result in the breach of a person right to respect for his home if it prevents that person from enjoying the amenities of his or her home.³³⁴

In handing down judgment, the Court stated that despite the fact that there was no right to a clean and quiet environment under human rights law, an individual who is affected by noise and other forms of pollution could rely on Article 8. The Court went on to state that although

³³⁴ At para 21.

Article 8 is primarily aimed at protecting the individual against interference by public authorities, it may also place a duty on the authorities to adopt measures aimed at securing respect for private life as between private individuals. In order to determine whether Article 8 has been breached the court must have regard to the competing interests of the individual and of the community.

The court then turned to consider whether the noise to which the applicant had been subjected breached Article 8. The court noted that the noise levels to which the applicant had been exposed had exceeded the permitted levels in terms of the applicable bylaws and had exceeded international standards set by the World Health Organisation.³³⁵ The volume of the noise and the duration of the exposure that the applicant endured, required the authorities to put in place measures in order to protect the applicant in terms of Article 8. The Court thus concluded that Croatia had failed to discharge its positive obligation, in violation of Article 8.

(d) Dees v Hungary

In this case, the applicant lived in a house in the town of Alsonemedi in Hungary. He applied to the ECHR for an order declaring that his right to respect for his home had been infringed by the noise and vibrations caused by a significant increase in the number of trucks using the street on which his house was located. The facts showed in this respect that the number of trucks using the applicant's street began to increase after a toll was introduced on the neighbouring, privately owned motorway. In order to avoid paying this (rather expensive) toll many truck drivers choose to use alternative routes, including the street on which the applicant's house was located.

In order to deal with this problem, the Hungarian authorities adopted various measures. These included building three bypass roads; imposing a 40 km/h speed limit at night; prohibiting access for vehicles over six tons; and re-orientating traffic. In addition, monitoring was also enhanced by increasing the number of police officers in the neighbourhood and in the applicant's street. The applicant argued, however, that none of these measures was effective and he sued the government for compensation. Despite the fact that an expert report indicated

³³⁵ See (note 6).

that the noise levels continued to exceed the statutory limit, his claim was dismissed by the Hungarian Courts on the grounds that the state had done everything that they could reasonably be expected to do. The applicant then applied to the ECHR for relief.

The ECHR upheld the application and granted the order. In arriving at this conclusion the Court once again reiterating the principles it has set out in *Moreno Gomez v Spain*.³³⁶ After reiterating these principles, the Court turned to consider whether a fair balance had been struck between the competing rights of the applicants and the interests of the community as a whole. In this respect, the Court found that a fair balance had not been struck. This was because even though infrastructural issues give rise to very complex problems, none of the measures taken by the state in this case were successful and as a result the applicant was exposed to excessive noise for a considerable period of time. In addition, the Court held, in those cases where the evidence clearly shows that the noise in question significantly exceeds statutory levels, the measures adopted by the state must be appropriate.

Unfortunately, the measures adopted by the state in this case were not appropriate. This is because they did not succeed in bringing the noise caused by the increase in the number of trucks using the applicant's road down to the relevant statutory levels.³³⁷

(e) Comment

The ECHR appears to follow a two-stage approach when it applies Article 8. This is similar to the approach followed by the Constitutional Court. In terms of this two-stage approach, the ECHR first has to determine whether the right infringed falls into the scope of Article 8 and, if so, whether the infringement of Article 8 is justifiable. Most cases seem to turn on the question of justifiability. In order to determine whether an infringement is justifiable, the ECHR has to balance the rights of the applicant against the interests of the community as a whole.

When it comes to determining whether the steps taken by the state to address noise pollution are reasonable, the ECHR applies a wide margin of appreciation. Fourth, when it comes to

³³⁶ At para 21.

³³⁷ At para 23.

determining whether a noise infringement is justifiable the ECHR appears to apply the following rules:

- (a) If the state has not taken any steps to deal with the noise pollution, the Court will inevitably find that the infringement is unjustifiable.
- (b) If the state has adopted laws to deal with noise pollution, but has failed to implement those laws, the Court will inevitably find that the infringement is unjustifiable (*Moreno Gomez v Spain*).
- (c) If the state has adopted laws and taken steps to implement those laws, but the noise pollution continues to significantly exceed statutory limits (in other words, if the steps fail), the Court will find that the infringement is unjustifiable (*Dees v Hungary*).
- (d) If the state has adopted laws and taken steps to implement those laws and those laws and steps fall into the state's margin of appreciation (in other words they are laws and steps over which reasonable people can disagree), the Court will find that the infringement is justifiable (*Powell v United Kingdom* and *Hatton v United Kingdom*).

4.3 THE SOUTH AFRICAN BILL OF RIGHTS

Having examined the scope and ambit of Article 8 of the Convention, we will now turn to consider the scope and ambit of the right to a healthy environment guaranteed in section 24 of the Constitution. Section 24 provides in this respect that:

“Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.

Subsection (a) is a fundamental right, while subsection (b) places a positive duty on the state to protect the environment for the benefit of future generations.³³⁸ In terms of subsection (a), all citizens have a right to an environment that is not harmful to their health and an environment that is not harmful to their well-being.³³⁹ The concept of health concerns human health and encompasses mental and physical health.³⁴⁰ The World Health Organisation (hereafter, the WHO), has defined health as a “state of complete physical, mental and social well-being”.³⁴¹ The conservation of biodiversity, flora and fauna are included under the concept of well-being.³⁴²

The environmental clause has been engaged in the case of *Minister of Health and Welfare v Woodcarb (Pty) Ltd and other*.³⁴³ to promote environmental concerns and protect people in communities exposed to pollution. This case involved an interpretation of the environmental right in terms of the interim Constitution.³⁴⁴

³³⁸ M Kidd *Environmental Law* 2ed (2011) p23

³³⁹ Ibid.

³⁴⁰ I Currie and J de Waal *The Bill of Rights Handbook* 5ed (2005) p526

³⁴¹ Preamble to the Constitution of the WHO <http://www.who.int> accessed on 5 December 2013

³⁴² See (note 340).

³⁴³ 1996 (3) SA 155 (N)

³⁴⁴ Republic of South Africa Constitution Act Act 200 of 1993.

The applicant approached the Court for an interdict to stop the respondent from operating an incinerating process without the necessary registration certificate which was required in terms of the Atmospheric Pollution Act.³⁴⁵ In addition to the fact that the respondent had breached the provisions of the Act, the applicant had also received complaints from the occupiers of neighbouring properties about smoke emissions from the plant operated by the respondent.

The Court held that the respondent had been operating the incineration process without the necessary certificate and held further that the generation of the smoke by the respondent was an infringement of the right of the respondent's neighbours to "an environment which is not detrimental to their health or well-being" enshrined in section 29 of the interim Constitution.³⁴⁶ It is suggested by Glazewski that as a result of this decision, the principle of reasonable use in the law of neighbours that is based on the common law maxim *sic utere tuo ut alienum non laedes* (use your property in a way which does not harm another) has been brought into the realm of public law.³⁴⁷

In terms of subsection (b) of the environmental clause, the state has a positive duty to protect the environment for future and present generations through reasonable legislative and administrative measures. Through these means the state is required to prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources whilst also promoting justifiable economic and social development. As we have seen, the word pollution as defined in the NEMA and includes noise pollution.³⁴⁸ In addition, and in terms of subsection (b), the State must not cause pollution or ecological degradation. A failure by the state to take steps to ensure these goals, will result in the violation of the right to have the environment protected.³⁴⁹

If a citizen suffers the effects of uncontrolled noise he or she can allege that his or her right to an environment that is not harmful to health and well-being, enshrined in section 24(a) has been violated. Excessive and uncontrolled noise can have severe consequences for both mental and physical well-being of human beings. As we have seen, the State is responsible for putting in place measures and legislation to prevent pollution, therefore the State will be

³⁴⁵ 45 of 1965.

³⁴⁶ See (note 344).

³⁴⁷ See (note 44) p 87.

³⁴⁸ See Chapter 1, p1.

³⁴⁹ See (note 340) p 528.

in violation of this right if it has failed to put in place the required legislation to control noise pollution.

The interpretation of Article 8 of the Convention by the ECHR may assist a South African Court in circumstances where there is an alleged breach of the environmental right due to noise. As stated previously in this chapter, the ECHR follows a two-stage approach when it applies Article 8 which is similar to the South African Constitutional Court. The first step is to determine whether there is an infringement of the right and if this is the case, to then determine whether the infringement is justifiable.

In determining whether the infringement is just, the court is required to balance the interests of the affected individual against the interests of the community. This process requires an examination of the steps taken by the State to address noise pollution and whether these steps were reasonable. Insofar as this is concerned, a South African court will have to consider whether the state has taken any steps to deal with the noise pollution (for example enacting legislation to prevent such pollution) and if it has not, the Court will find that the infringement is unjustifiable. If the State succeeded in putting in place legislation to curb the noise complained of, and the State has put in place the necessary legislation to deal with the noise pollution but has failed to enforce these laws, the infringement of the right will be regarded as unjustifiable (*Moreno Gomez v Spain*). The jurisprudence of the ECHR is also helpful in that it may be argued that even if the state has enacted laws and taken steps to implement those laws but the noise pollution continues, the Court will find that the infringement is unjustifiable (*Dees v Hungary*).

4.4 CONCLUSION

Section 24 of the Bill of Rights protects the right of person to an environment that is not detrimental to health and well-being. A person who is suffering the effects of uncontrolled noise pollution may bring a claim against the authority responsible for ensuring that this right is not breached. A constitutional challenge may also be based on the right to property as well as the right to freedom of security of person.

The ECHR has consistently held, that if the State fails protect an individual from noise pollution, because of its failure to put in place measures to stop the noise, the State will be in breach of the right to respect for private; family life and home. The decision in *Oluic v Croatia* is significant as the court took into account the World Health Organisation environmental noise standards to hold that the State was in breach of the duty to protect the applicant from excessive noise. These decisions, although not binding on courts in South Africa, may nevertheless provide persuasive value.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

Noise is a recognised pollutant in South African environmental law. The adverse effects of uncontrolled noise on the physical and psychological health of human beings is well documented.³⁵⁰ As a result, The WHO has stated that it is the responsibility of governments in countries around the world to implement and enforce policies and legislation for controlling noise in order to prevent the potentially harmful impact that uncontrolled noise can have on people.³⁵¹ Although noise is viewed largely as a ‘luxury’ problem of the first world, it would appear that noise exposure in developing countries is often higher because of bad planning and poor building construction.³⁵² As a result the effects of noise are the same, and the need for intervention to control noise exposure is imperative.³⁵³ Research has shown that there is a direct relationship between development and the amount of noise pollution impacting on the population of a country, based on the fact that as society develops and grows, urbanisation; industrialisation and traffic will also increase.³⁵⁴

The WHO has highlighted the fact that unlike other pollutants, the control of noise has to a large extent been hampered by the lack of knowledge on the effects of noise on people.³⁵⁵ If governments do not intervene, the level of noise will increase and the adverse health effects as a result of the uncontrolled noise will escalate.³⁵⁶ It is necessary for governments to implement strong regulations, which must also be effectively enforced.³⁵⁷

In South Africa, noise pollution has traditionally been addressed by means of the common law rules of the law of nuisance. Whilst the common law has been relatively successful in controlling noise, it must be appreciated that using the common law as a means of controlling noise pollution can be relatively unwieldy and costly as the litigants must themselves, out of necessity, approach a court for relief. A court will use the standard of the reasonable person to determine whether the noise in question amounts to a nuisance.

³⁵⁰ See Chapter one, p 4-5.

³⁵¹ See (note 6).

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid

³⁵⁶ Ibid.

³⁵⁷ Ibid.

It has been suggested that the common law standard of the reasonable person, may perhaps be inadequate in the highly industrialised modern world that we live in and that there is a need for a more objective standard to deal with noise control.³⁵⁸ Whilst this may indeed be so, the standard of the reasonable man is also advantageous in that it is flexible and can therefore be adapted to any given set of facts.³⁵⁹

In addition to the common law, there is a fairly sophisticated and comprehensive framework of statutory provisions in South Africa to address the problem of noise pollution. The most important and comprehensive statutory provisions relating to the control of noise pollution are contained in section 25 of Environment Conservation Act.³⁶⁰ In terms of section 25, the Minister of Environmental Affairs has the power to make regulations aimed at controlling noise; vibration and shock. Noise Control Regulations have been enacted by three provinces, namely: the Free State;³⁶¹ Gauteng;³⁶² and Western Cape.³⁶³ These Provincial Noise Control Regulations have been modelled on the draft National Noise Control Regulations³⁶⁴ and thus bear a close resemblance to each other.

In the rest of the country regulations published under the new political system as well as local authority by-laws from the old political dispensation are applicable. In addition, by-laws to deal with noise have been enacted by several local authorities. A person who is the victim of noise will report the noise to the authorities who must then enforce the relevant regulations or by-laws on his or her behalf. In municipalities that do not have noise control regulations or equivalent by-laws in place to control noise, the victim of noise will have to rely on the principles of the common law for an appropriate remedy.

³⁵⁸ See (note 44) p 747.

³⁵⁹ Ibid.

³⁶⁰ See (note 47).

³⁶¹ See PN 242 in *Free State Provincial Gazette* No. 35, dated 7 November 1997.

³⁶² See PN 5479 in *Gauteng Provincial Gazette* No. 75(4), dated 20 August 1990.

³⁶³ See PN 627 in *Western Cape Provincial Gazette* No. 5309, dated 20 November 1998.

³⁶⁴ See (note 61).

Whilst it is acknowledged that comprehensive and sophisticated legislation does indeed exist to deal with noise, the criticism that may be raised, is that noise control legislation is selectively applicable and fragmented. It would be far more advantageous to have a national legislative framework for noise control legislation which will allow for the incorporation of noise standards into development planning.³⁶⁵ If noise standards are incorporated into planning and development, any potential problem of excessive noise can be dealt with in the initial stages of a project. Solutions to problems are far more expensive and difficult to enforce once a building project is completed.

The efficacy of noise control legislation will depend largely on its effective implementation. The administration of noise control legislation, in terms of Schedule 5 of the constitution, is a function of local government. It would therefore be necessary for local government to have the necessary capacity and resources to adequately carry out the function of enforcement. Government must take steps to ensure that the capacity of local government to do so is bolstered.

Although noise is a recognised pollutant in South Africa, there has been no constitutional challenge based on noise. The Bill of Rights protects the right of person to an environment that is not detrimental to health and well-being. It is submitted that person who is suffering the effects of uncontrolled noise pollution may bring a claim against the authority responsible for ensuring that this right is not breached. Ensuring that a person is not exposed to pollution is the responsibility of government, and consequently this right will be breached by government if it fails to put a stop to polluting activities. A constitutional challenge may also be based on the right to property as well and the right to freedom of security of person.

Noise will continue to be a problem plaguing the modern world as technology; industrialisation; and urbanisation increase. Legislation will not be effective unless it is effectively enforced and more importantly, people must be educated about the negative impacts of uncontrolled noise.

³⁶⁵ See (note 338) p 200.

In the Guidelines on Community Noise³⁶⁶, the WHO proposes that successful management of noise should be based on the fundamental principles of precaution, the polluter pays and prevention.

1. ‘The precautionary principle. In all cases, noise should be reduced to the lowest level achievable in a particular situation. Where there is a reasonable possibility that public health will be damaged, action should be taken to protect public health without awaiting full scientific proof.

2. The polluter pays principle. The full costs associated with noise pollution (including monitoring, management, lowering levels and supervision) should be met by those responsible for the source of noise.

3. The prevention principle. Action should be taken where possible to reduce noise at the source. Land-use planning should be guided by an environmental health impact assessment that considers noise as well as other pollutants.’³⁶⁷

It is submitted that this approach to noise management should inform any future legislation or policies put in place to address the problem of noise pollution.

³⁶⁶ See (note6)

³⁶⁷ See (note 6) p 67.

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