THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Appeal Case No: A139/2019

Case No *a quo*: 10660/2016

In the matter between

JOHANNES HENDRIK JACOBS N.O.	**FIRST APPELLANT**
HELENA FRANCES JACOBS N.O.	**SECOND APPELLANT**
JOHANNES JACOBUS ESTERHUYSE N.O.	**THIRD APPELLANT**

and

HYLTON GRANGE (PTY) LTD	**FIRST RESPONDENT**
CHRISTOFFEL SLABBERT VAN WYK	**SECOND RESPONDENT**
MODDERDRIFT BOERDERY (PTY) LTD	**THIRD RESPONDENT**
PIETER JACQUES BEUKES	**FOURTH RESPONDENT**

Coram: Allie, Rogers and Cloete JJ

Heard: 27 January 2020

Delivered: 27 February 2020

JUDGMENT

Rogers J (Allie and Cloete JJ concurring)

Introduction

[1] This case is about an alleged unlawful nuisance in the form of offensive odours. The appellants and respondents in the appeal, which is with the leave of the court *a quo*, were respectively the respondents and applicants in the proceedings under appeal.

[2] The appellants are the trustees of the Modderdrift Trust ('MT'), which owns a farm, Modderdrift No 93 in the De Doorns area. To avoid confusion with the third respondent's farm, mentioned below, I shall refer to MT's farm as 'MD93'.

[3] The first and third respondents are companies which own or lease grape farms bordering on MD93. The second and fourth respondents are individuals associated with the first and third respondents respectively, and reside on the grape farms. I shall refer to the present respondents as they were in the court *a quo*, ie as the applicants. The first applicant's farm, which lies to the east of MD93, is called Hylton Grange. The third applicant leases and farms on a farm called Modderdrift, which lies to the south of MD93.

[4] The order under appeal was granted by Hack AJ on 13 December 2018, and reads thus:

> '(a) The respondents are ordered, subject to the provisions of paragraph (b) below, to cease all composting activities on the farm known as Modderdrift No 93 within a period of sixty days from the date of this order.

(b) The respondents are interdicted and restrained from recommencing any composting activities until such time as they have obtained leave from this Court to do so, upon reasonable notice to the applicants, which application is to be supported by evidence, including expert evidence that:

(i) all reasonable steps to abate the nuisance caused by the composting activities have been taken and are likely to be successful, and

(ii) the composting activities will be overseen by a suitably trained and qualified person.

(c) respondents shall pay the applicants' costs, jointly and severally, the one paying, the other to be absolved.'

[5] The composting activities mentioned in this order are carried out by MT as part of commercial mushroom farming. MT's trading name is Royal Mushrooms. The compost (or substrate) is the material in which the mushrooms grow. It is not in dispute that the making of mushroom substrate can emit gases with offensive odours, particularly ammonia (an acrid urine-like smell) and hydrogen sulphide (a smell like rotten eggs). It is thus unsurprising that successful nuisance cases against mushroom farmers have been mounted in other jurisdictions, where the complaints were similar to those made in the present case (see *Feiner v Domachuk* (1994) 35 NSWLR 485; *Adelaide Mushroom Nominees Pty Ltd v Devonport City Council* [1997] TASRMPAT 85; *Pyke v. Tri Gro Enterprises Ltd* 55 OR (3d) 257; 2001 CanLII 8581 (ON CA)).

[6] Unless substrate is made in an isolated area, steps must therefore be taken to keep these odours to a minimum. Although this can be done by totally enclosing the composting operation inside a building, this is expensive. The evidence in the court *a quo* was that there are other reasonable measures which, if implemented and diligently persisted with, would keep odours within acceptable limits.

[7] MT's operation was described thus in its expert report.

(a) The raw materials for the substrate are wheat straw, chicken manure, gypsum and water. These are mixed on a concrete preparation apron, water being continuously added to the dry elements to saturate the mixture. Water run-off (known as leachate) is collected and recirculated.

(b) The mixture is placed in bunkers to ferment for about two weeks, during which it is turned and aerated in accordance with a schedule.

(c) The fermented mixture (the growth substrate) is moved to a curing tunnel where it is fermented for another week.

(d) Mushrooms are spawned in the substrate, put in plastic growth bags, and placed in mushroom tunnels.

(d) After nine to ten weeks, when the mushrooms have been harvested, the spent growth substrate is taken outside and allowed to further decompose. This spent compost is alleged to be sought after as a soil conditioner for vineyards.

[8] The applicants launched their application in June 2016. In December 2016, and after delivery of answering and replying papers, Gamble J made an agreed order in terms whereof MT was, within one month of the order, to take 11 remedial steps envisaged in the reports of Dr Willem Smit, one of the applicants' expert witnesses, and in the report of Water & Waste Utilisation Solutions (Pty) Ltd ('WWUS'), MT's expert. The parties' experts were to conduct a joint inspection to monitor progress. The application was postponed for hearing on 11 April 2017, with leave granted to the parties to amplify their papers if necessary.

[9] The remedial steps listed in the agreed order were:

'1.1 Completely cover and enclose (at all times) the manure stockpile;

1.2 At no time store more chicken manure than is necessary so as to provide the materials for its normal operations;

1.3 Repair all leaks in the piping system as and when they occur;

1.4 Ensure the continuous operation of the fan(s) in the spawning barn;

1.5 Replace all broken or blocked air nozzles in the aeration system as and when it occurs;

1.6 Take all steps necessary so as to remove all leachate from the aeration system;

1.7 Take all reasonable steps so as to prevent the spillage and/or accumulation of leachate in all other areas;

1.8 Collected leachate should not be recirculated and should be removed from the premises;

1.9 The Respondents will adhere to their pasteurisation process to "cook" the compost in the pasteurisation tunnel for 6-8 hours at temperatures in a range of approximately 71°C before the spawning of the growth process commences and the compost is taken to the growth rooms. After the mushrooms are harvested, the growth rooms will be chemically sterilised;

1.10 Remove all spent compost off the premises when emptying the bunkers as soon as practically possible and not reserve same;

1.11 The composting process should be under constant supervision of a suitably experienced person.'

[10] A joint inspection scheduled for 10 January 2017 was aborted at MT's instance. It eventually took place on 21 February 2017. Although it seemed on the face of things that MT had implemented the 11 steps, Dr Smit detected a high level of nitrate nitrogen in the straw forming the basis of the substrate. I shall refer to this later, but it is convenient here to mention that MT's principal deponent, Mr Johannes Jacobs, called Dr Smit's expertise into question. I am satisfied that he was able to assist the court with expert opinions. He has a PhD in Microbiology (his specialisation being Mycology) and an MSc in Plant Pathology. He has undergone mushroom training courses at an institute in the Netherlands, a country which is a leader in mushroom cultivation. Although his current sphere of interest is gourmet mushrooms, he has knowledge and experience of the commercial cultivation of button mushrooms.

[11] The case was further postponed. In July 2017, the applicants filed supplementary affidavits, stating that the offensive odours persisted. Supplementary answering and replying papers were delivered, and the application was argued before Hack AJ in April 2018.

The facts

[12] It is necessary to determine what facts were established before applying the law to those facts. Because the applicants brought motion proceedings and did not ask for a referral to oral evidence, the *Plascon-Evans* rule applies. MT's counsel submitted that there were material disputes of fact, both in the lay evidence and in the expert evidence. In my view, this was a case where a fairly robust approach was justified. The odours of which the applicants complained were not present all the time. The intensity of the odours reaching their farms depended on the phase of MT's operations and on the direction and strength of the wind.

[13] The fact that the alleged odours are often either not present or particularly offensive does not mean that on other occasions they are not present and highly offensive. An inspection *in loco* by the court itself would for this reason quite possibly have been futile, unless the inspection happened to coincide with a 'bad day'. Because there is no objective measure of odours, there is inevitably an element of subjectivity in how they are perceived. Unless there was a particular reason for believing that witnesses for the applicants had an ulterior motive, little was likely to be achieved by cross-examining them about how they perceived the odours.

When did he problem start?

[14] The evidence as to when the problem of odours began to trouble neighbours is not very precise. The second applicant, Mr Christoffel van Wyk,

placed the start of the problem in 2010. Both sides made reference to evidence given by a Mr J W Botha in mid-2014 in earlier proceedings. Mr Botha was an environmental officer employed by the Winelands District Municipality. A transcript of his evidence formed part of MT's supplementary answering papers. Mr Botha himself was not very precise on dates, but said that he had first became aware of MT's mushroom operation nearly six years previously, ie around 2008. At that stage MT was not manufacturing its own substrate, and according to Mr Botha there were no complaints of foul odours.

[15] About a year later, in 2009, there was a petition of complaint, and Mr Botha learnt that MT was now manufacturing its own substrate. Mr Jacobs alleged that MT was making its own substrate 'long before 2010'. Mr Botha also testified that the mushroom operation was initially very modest, with only two mushroom tunnels. By mid-2014 this had grown to 18 tunnels. So complaints apparently predated 2010, but they probably intensified as MT expanded the scale of its operations.

The gap between 2010 and 2016

[16] During the period 2010 to June 2016 the applicants were hoping that the problem of offensive odours would be resolved by a finding that the manufacture of the substrate was an industrial operation not covered by MD93's agricultural zoning. The Breede River Municipality ('BVM') eventually launched proceedings in that regard against MT in June 2012, and the case was heard in mid-2014. (It was in these proceedings that Mr Botha testified.) In December 2014 the magistrate's court found for BVM and granted an interdict, but this order was taken on appeal. The appeal was argued in November 2015. When, by June 2016, no judgment in the appeal had been forthcoming, the applicants launched their nuisance application. Two days later this court handed down judgment in the appeal, reversing the magistrate's decision.

The applicants' evidence

[17] Mr van Wyk said in his founding affidavit that since 2010 the applicants, and other neighbours, started to experience offensive odours which at times were 'virtually unbearable'. These occasions were characterised by a highly offensive and invasive smell like rotten eggs and an offensive smell like very potent urine with a burning sensation inside one's nose. The smells were accompanied by plagues of flies.

[18] When the wind was blowing in their direction during certain stages of the composting operation – something which occurred relatively often (every few days) – he and his family and guests could not go outside, 'as the smell in the air is simply sickening and quite unbearable'. It was 'quite impossible' on such occasions to sit and relax outside, so much so that when he wished to entertain guests to braais he invited them to the local golf club, because he could not guarantee that conditions on his farm would be tolerable.

[19] During such periods he and his family had to close all the windows and doors, 'yet the smell invades the house and in fact pervades everything inside such as curtains, linen etc'. At such times his wife could not prepare food, 'as she just cannot will herself to do so in such a foul smelling atmosphere'.

[20] Pieter Beukes (the fourth applicant), Jacques Beukes and Eugene Beukes, who live in separate dwellings on Modderdrift, and whose homes are between 200 m and 800 m from MD93, made affidavits confirming that their experiences were the same as those of Mr van Wyk. There were confirmatory affidavits to similar effect by five other neighbours unassociated with the applicants and whose residences are between 100 m and 1 km from MD93.

[21] The founding papers included an affidavit by Ms Sanna Arendse, who resides on Modderdrift and is a domestic employee of Mr Pieter Beukes. She

stated, in plain Afrikaans, that sometimes the stink inside the kitchen is so strong that she cannot bear it. It is like the smell of a pigsty, it makes her feel nauseous and gives her a headache. At an earlier time she worked in the vineyards, and her co-workers often complained about the terrible smell. On these occasions they could see a thresher (*'dolmasjien*') working on the pile of compost. Children in other families who lived on the farm near her had sinus problems. Her daughter has from the age of eight struggled with pain in her head and eyes, and suffered from a blocked nose. She was taking monthly sinus pills. (Her initial affidavit incorrectly stated that her daughter was eight years old. In a later affidavit she corrected this, saying that her daughter was now 17 years old but that her sinus problems had started when she was eight, ie around 2008/2009.)

[22] Mr van Wyk also attached to his founding papers letters from three grape clients. One raised his concern about the unpleasant smell originating from the mushroom farm and the impact this might have on the grapes. Another referred to a recent visit, observing that they had found flies in most of the first applicant's grape punnets. During their visit they also noticed 'the unbearable stench'. A third client commented adversely on the smell and flies, and said that the first applicant needed to discuss remedial measures with its pest contractor.

[23] The applicants also relied on an expert report by DDA Environmental Engineers ('DDA'), a firm with extensive experience in air quality assessments and ambient air quality measurements. DDA visited Hylton Grange on 1 and 2 February 2016 in order to measure ammonia and hydrogen sulphide concentrations. There was a gentle south-westerly wind, ie from the direction of MD93. The most sophisticated measurements were taken with a Draeger X-am 7000 gas analyser. The readings for ammonia (NH_3) at nine different measurement points (six on the boundary with MD93, three at the homestead) ranged from 1500 $\mu g/m^3$ – 6750 $\mu g/m^3$. Three of the readings were at or above the

odour threshold of 3750 µg/m3. The readings were all above the 'Minimum Risk Levels' ('MRLs') set for 'acute' exposure (1-14 days) by the American Agency for Toxic Substances and Disease Registry ('ATSDR'), *viz* 1270 µg/m^3. The Draeger machine did not detect hydrogen sulphide (its minimum detection level is 750 µg/m^3).

[24] The operator also sampled ammonia and hydrogen sulphide at one of the boundary measurement points, using sorbent tubes in accordance with a method approved by an American agency, the National Institute for Occupational Safety and Health ('NIOSH'). The ammonia concentration was just over 1500 µg/m^3 while the hydrogen sulphide concentration 3,94 µg/m^3.

[25] DDA stated in its report that the fact that the Draeger did not detect hydrogen sulphide did not mean that a hydrogen sulphide odour was not detected. Although at some locations the ammonia concentrations were below the odour threshold, the sampling technician 'occasionally experienced strong pungent and unpleasant odours during the measurement, when the wind was of a south-westerly direction, ie from the Royal Mushroom Facilities'. DDA stated that, based on its experience, the nuisance potential of the compound mixture at the measurement points 'could be considered very offensive'. The operator noted that from time to time

> 'there was a strong pungent smell of ammonia (cat urine, sweat, ammonia containing cleaning products), with a mixture of sulphides (rotten eggs) and a smell similar to that from waste water treatment plant'.

The smell at the farm, DDA opined, could be considered as offensive as, and at times worse than, those experienced within waste transfer stations containing raw waste.

[26] Before I assess MT's contrary evidence, I shall summarise the further evidence put up by the applicants subsequent to the launching of the application. As to the frequency of unpleasant odours, Mr van Wyk responded to evidence of the absence of unpleasant odours on particular days by saying that while such odours were regularly experienced, it did not happen every day or even every week. He said that the applicants 'may experience the foul smells for hours, or even days on end, and then nothing'.

[27] As I have mentioned, a scheduled joint inspection by the experts on 10 January 2017 was aborted when MT refused to give them access. (MT alleged that the meeting had not been arranged with it and would have been disruptive on that particular day.) The applicants nevertheless asked its expert, DDA, to take further measurements, which was done. There were two measuring points on the common boundary between MD93 and Hylton Grange (ie on the eastern boundary of MD93) and a third point at Mr van Wyk's house. DDA used the same Draeger device as before. There was a light wind blowing from the direction of MD93.

[28] The ammonia readings ranged from 1500 µg/m^3-3000 µg/m^3. The readings at the farmhouse, taken 20 minutes apart, were 1500 µg/m^3 and 2250 µg/m^3. DDA did not test for hydrogen sulphide. The operator noted that over the measuring period – about half an hour – the odour was 'on and off pungent, with a mixture of fatty acids or amines smells'. Because the aborted inspection by the experts had been scheduled in advance, there is no question of the applicants having called their expert out on a 'bad day'.

[29] The applicants asked DDA to repeat its measurements a month later, because, despite Gamble J's order, they were still finding the odours unbearable. These further measurements were done on 10 February 2017. Again, only ammonia was measured. One measuring point (MP01) was on MT's eastern

boundary (ie on the Hylton Grange side of MD93), a second point (MP02) at Mr van Wyk's home, and a third point (MP03) on MT's northern boundary. Two measurements were done at each of these points, about 10 to 20 minutes apart. There was a gentle wind in the direction of Hylton Grange. At MP01 and MP02 the first measurements were 1500 µg/m^3 while the second measurements were 3000 µg/m^3. The measurements at MP03 on both occasions were 750 µg/m^3. DDA states that the lower reading at MP03 was explicable due to the fact that the wind from the mushroom farm was blowing primarily in the Hylton Grange direction, not towards MP03.

[30] DDA's conclusion, based on its inspections and measurements in January and February 2017, was that there had been no material improvement.

[31] In accordance with the order of December 2016, the applicants filed supplementary papers in July 2017. Mr van Wyk stated in his affidavit that he was present when DDA took its measurements in January and February 2017. On 10 January there was a 'clear noxious and foul odour in the air'. He confirmed that he asked DDA to take further measurements on 10 February 2017 'as the noxious smells were still unbearable'. He stated that it was still the case that when the wind blew in their direction during certain stages in the composting operation, they could not go outside 'as the smell in the air is simply sickening and quite unbearable'. Even with all windows closed, 'the smell seeps inside the house and clings to all the curtains and bedding, making the house itself unbearable'.

[32] Six supporting affidavits (apart from expert reports) were filed. A Capespan representative stated that during his business visits to Hylton Grange he had had the 'unfortunate experience of a terrible odour'. This had also happened on occasions when he had clients with him from overseas supermarkets.

[33] Two persons working at Boland Cartons, whose offices are situated near MD93, confirmed the presence of foul odours. One of these deponents stated that since she started working for the company in 2014 she had ‘noticed a bad smell that lingers in the air from time to time’. On some days it was much worse than others, and this made the working environment unbearable. When it was hot she liked to open her office window ‘but the smell makes it impossible during those times’. When the wind blew from MT’s direction, ‘the smell is really not pleasant’. Her colleague, the other deponent, stated that over a number of years he has experienced ‘a vile stench’, carried by the wind from MT’s direction. This happened regularly, depending on wind direction.

[34] Several of the applicants’ guests made affidavits describing their experiences when visiting the applicants’ farms. Mr Anthony Neilson and his wife had dinner with Mr Beukes on 28 April 2017. They had barely arrived when they became aware of ‘a terrible smell (of rotten egg) which was also pungent’. He did not want to say anything about it but then suffered a serious sinus attack and had to leave early: ‘It was frankly impossible to enjoy the dinner and company with the foul smell in the air.’

[35] Mr Joseph Gouws and his wife had dinner at Mr Beukes’s house on 5 May 2017. After several hours they noticed ‘a terrible smell (of rotten eggs)’ inside the house. They went outside and noticed that the wind was coming from MD93, whereas earlier in the evening it had been from the north-west. Not long after the foul odour started, Mr Gouws’s wife suffered a serious sinus attack which lasted for about half an hour. The smell started to abate when the wind direction changed again.

[36] A Mr Christoffel van Jaarsveld stated that he had visited Mr van Wyk's farm several times in 2017. On most of these occasions 'there was a prominent rotten and unbearable smell'.

[37] In response to allegations by Mr Jacobs about the ambient odours in De Doorns and the extensive use of kraal manure in the area, Mr van Wyk said that kraal manure is only used on vineyards when they are in bloom, which was for single weeks in September/October, and then only when the soil is thought to require fertilisation, typically once every three seasons. The manure used on these occasions is several weeks old, and is not wetted. It is worked into the ground. Both in time and extent, it is completely different to the offensive odours emanating from MD93. For the rest, farmers producing grapes seldom use manure or fertiliser. When they do, it is almost exclusively in pelt form, a product completely devoid of smells.

[38] The last piece of evidence from the applicants' side which I should mention was a DDA report filed as part of the applicants' supplementary replying papers in late March 2018. DDA took measurements on 8 March 2018, and obtained ammonia readings at three of the testing points ranging from 1390 µg/m^3 to 5560 µg/m^3. At a fourth testing point no ammonia was detected – this point was inside the Hylton Grange warehouse, and was measured in order to determine whether fertiliser used on the farm had any ammonia emissions. During the testing, which was conducted over a period of five hours, the operator noted 'pungent, ammonia smells, very strong and offensive from time to time, depending on the wind direction'. The report contained the following significant observation:

'… [T]he operator specifically travelled around the perimeter of the entire Royal Mushrooms farm and ascertained that the emissions and foul odours were only noticeable and measurable when the wind direction was coming specifically from the composting facility. When, at any given time, the operator moved from such point, the measured concentration and odours

decreased dramatically. As the mushroom composting facility covers but a small area of the Royal Mushrooms farm, this is a clear indication that the emissions and odours do not originate from any other source on the farm or any other farm in the area, other than the composting facility.'

[39] There was no evidence that the applicants or any of the other people who have made affidavits in support of the applicants' case had any reason to make false claims against MT. They must have incurred substantial legal fees and expert expenses, something they would not have done for a trifling annoyance. In view of the number of persons who have confirmed Mr van Wyk's description of the foul odours, it cannot be said that the applicants are unduly sensitive. It is fanciful to suppose that cross-examination of the applicants' witnesses would have revealed a picture differing materially from the one which the applicants painted.

MT's evidence

[40] I turn now to the lay evidence put up by MT. In Mr Jacobs's answering affidavit he said that the applicants failed to recognise the residual odour pollution levels created by the farming operations in the De Doorns area. In general terms he denied Mr van Wyk's claim of highly offensive odours and plagues of flies, and said that the latter's observations were 'subjective and not scientifically sustainable'. He denied that MT's composting processes regularly discharged offensive and harmful emissions, and denied that MT was causing a nuisance. He denied, in general terms, the complaints of foul odours.

[41] Apart from expert and technical evidence, the only lay witness to make an affidavit in support of MT's opposition was a Ms Lya Jafta, sister of Ms Sanna Arendse, whose evidence for the applicants I have already summarised. Ms Jafta is employed by MT and lives on its farm. She stated that Ms Arendse did not have an eight-year-old daughter. (It is this which gave rise to the correction made by

Ms Arendse.) For the rest, Ms Jafta said that she had worked on MD93 for 28 years, not far from her sister. Her sister and other workers living nearby had never complained about bad smells coming from MT's operations or that such smells were causing health problems.

[42] Ms Arendse attached, to her clarifying affidavit, medical records from Brewelskloof Hospital which show that in October 2008 her daughter, who was then eight years old (she was born in November 1999), presented with acute sinusitis. Medication was prescribed. In April 2011 she again presented with nasal trouble which was diagnosed as allergic rhinitis. In August 2014 there was a complaint of sinusitis, and medication was prescribed. This does not prove that the child's nose troubles were caused by emissions from MT's operations, but there is no reason to question Ms Arendse's truthfulness. Other witnesses, including Mr van Wyk, have complained of sinus attacks linked to emissions from MT.

[43] What is perhaps telling about Ms Jafta's affidavit is that she does not herself say that she has not noticed offensive odours. She simply says that her sister and other workers living nearby have not complained (at least, not to her) about the smell.

[44] It is convenient, at this juncture, to deal with the transcript of Mr Botha's evidence, given in mid-2014, since it was MT which introduced this material. Although the proceedings in which Mr Botha testified were concerned with zoning, not offensive odours, both sides sought to solicit some evidence from him on the latter topic. MT placed reliance on those passages in which Mr Botha had (a) acknowledged that the problem of odours was not continuous; (b) had confirmed that some of his inspection letters recorded the absence of offensive odours; (c) that Mr Jacobs had cooperated in trying to remedy the complaints.

[45] As against this, the applicants referred to passages in Mr Botha's evidence indicating that offensive odours were an ongoing problem. When being cross-examined about the alleged difference between substrate and compost, Mr Botha repeatedly stated that if the operation were the pasteurised process described by MT's then expert, the material ought not to give off odours, yet it did. The smell was particularly prominent when the substrate was being lifted and turned over on the preparation apron. There were occasions when there was virtually no odour if one stood up wind from the heap yet a distinctly rotten smell if one moved to the other side of the heap. On one occasion when he arrived for an inspection there was a terrible smell ('*ongelooflik erg*'), like dead rat. If, during an inspection of half an hour, he only picked up an unpleasant odour a couple of times for short periods, he would not have thought it fair to state in his inspection letter that there were offensive odours. He acknowledged that Mr Jacobs had been cooperative in trying to improve matters, but nevertheless the complaints continued to stream in.

[46] It cannot be said that Mr Botha's evidence, as hearsay testimony in the present proceedings, undermined the applicants' case. If anything, it provided support for it.

[47] In his supplementary answering affidavit, Mr Jacobs said that an interdict would have 'absolutely devastating consequences', as it would force MT to shut down, with resultant loss of employment for more than a hundred people. His own evidence does not take the question of offensive odours much further.

[48] Apart from affidavits from its own employees, the only other lay 'evidence' which MT offered was that of Mr Willem de Kock, who resides on a farm about 250 m from MT's mushroom facility. In the event, Mr de Kock declined to give MT a signed affidavit. According to MT's attorney, Mr de Kock said that he had signed the draft prepared for his signature but had decided not to

release it, because he did not want to upset the Beukeses. MT asked the court to receive the draft as hearsay evidence. In the draft Mr de Kock stated that he was unaware of any untoward foul smells emanating from MT, and that the ambient odours emanated from general farming activities. MT's attorney also attached a copy of an affidavit signed by Mr de Kock in November 2014 in other proceedings, in which he stated that there were no unusual bad smells emanating from MD93.

[49] The affidavits from employees comprised an affidavit from MT's administrative manager, Ms Melissa Hempel, and 146 identical affidavits from farmworkers. In her affidavit Mr Hempel made an identical statement to the one contained in Mr de Kock's draft affidavit. She also stated that since April 2017 she had been instructed by Mr Jacobs to monitor and record statistics regarding the composting yard on a daily basis. She attached this record, running from April 2017 to February 2018. One of the columns required her to indicate whether there were unpleasant smells. There were two entries per day, at 08:00 and 16:00. According to her log, there were never unpleasant smells. The only odours she noted (on only a handful of days) were 'molasses' and 'wet grass'.

[50] Ms Hempel's log includes the dates on which the Nielsens and the Gouwses dined with the Beukeses (28 April and 5 May 2017). Ms Hempel noted no unpleasant smells on either date and recorded that there was no wind. If that was accurate at the times she made her note, it was not the position later on those days.

[51] The affidavits from the farmworkers were in identical form. In this affidavit, each worker stated, in English

(a) that neither he/she nor any member of his/her family 'suffer from ailments or diseases that can be attributed to any odours or anything else that may emanate' from the mushroom farm;

(b) that the 'ambient odours in our vicinity emanate from general farming activities and the associated smells of animals, fertilisers, manure, chemicals and fuels normally associated with a farming area and normal farming activities';

(c) that it was 'standard farming practice in our area to utilise both chicken manure and "kraal" manure as fertiliser so as to release the organic nutrients therefrom which increases the structure of the soil and improves its ability to retain water and nutrients';

(d) that his/her livelihood and that of his/her family depended on his/her work on the farm, and that if his/her employment were terminated, he/she and his/her family would be left destitute without any fixed income and with little prospect of obtaining alternative employment.

[52] It strikes me as somewhat cynical on MT's behalf to have obtained these affidavits, in this form, from people who (and I mean no disrespect by this) are likely to be relatively unsophisticated labourers whose mother-tongue is not English. Words were put into their mouths, resulting in the making of claims which strike one as faintly absurd in the circumstances. It seems to have been conveyed to them that if the applicants succeeded, the mushroom farm would close down and they would all lose their jobs. It is perhaps unsurprising that they all signed.

[53] Mr Jacobs, Ms Hempel and the farmworkers cannot be regarded as disinterested witnesses. For Mr Jacobs, the profitability, and perhaps the survival, of MT's mushroom operation is at stake. For Ms Hempel and the farmworkers, their employment is implicated. It may be that when they balanced these

considerations against personal comfort, they concluded that the odours were not highly offensive.

[54] Further considerations of possible relevance, in assessing the evidence of MT's employees, are the following. First, both Dr Smit and WWUS stated that persons who are constantly exposed to ammonia can become less sensitive to the smell (WWUS described this as 'olfactory fatigue'). Second, because ammonia is lighter than air, and hydrogen sulphide heavier, the one rises and the other falls. This has the result, according to Dr Smit, that a person standing next to an emission source may not detect these gases.

[55] As part of its investigation, MT's expert put together a sniffing panel of eight people, five of them from outside De Doorns. This panel conducted its sniffing tests on 13 October 2016, the second of the two days on which WWUS was at the farm to take measurements. No affidavits from the members of the panel were filed, so the reported results are hearsay evidence, but they are not without some weight. Since the visit by WWUS had obviously been scheduled, MT was in a position to ensure that any departures from good practice were not allowed to take place on those two days.

[56] The sniffing panel were taken to ten testing locations in and around the mushroom facility. This would have been expected to generate 80 inputs, although only 76 were recorded. Of these 76 inputs, 64 (84%) were categorised by the sniffers as 'distinct but not annoying' or worse (levels 3-6). Of those 64 inputs, seven were categorised as 'strong annoying' (level 4), three as 'very strong more annoying' (level 5) and two as 'extremely strong, extremely annoying and disgusting' (level 6). The inputs at levels 4-6 comprised 16% of the total inputs.

[57] Of the 76 inputs, 28 identified 'pungent, irritating, urine' (ammonia) as the primary odour, some of these at levels 4-5. All the sniffers at the leachate testing

point assessed the smell at levels ranging from 3-6, with ‘rotten eggs’, ‘faecal nauseating, strong’ and ‘faecal nauseating’ as the primary odours. Hydrogen sulphide probably accounted for these descriptions.

[58] Although a majority of the 76 inputs were at levels 1-3, those at levels 4-6 call into question the evidence of MT employees to the effect that the operation does not cause offensive odours. Even when MT could have been expected to be on its best behaviour, there were definitely offensive odours associated with the mushroom operation.

[59] I turn now to the hydrogen sulphide and ammonia measurements commissioned by WWUS from Occupational Hygiene Monitoring Services (Pty) Ltd (‘OHMS’). OHMS stated that the odour threshold of hydrogen sulphide is very low, 1,50 µg/m^3. OHMS did its hydrogen sulphide measurements on 12 October 2016, at a time when the wind was blowing from the west, ie in the direction of Hylton Grange. There is a discrepancy between the OHMS and WWUS reports as to where the four perimeter measurements were taken. The OHMS report states that the four perimeter samples (P1-P4) were placed downwind, ie on the Hylton Grange perimeter.[1] This accords with their statement that their plan was based on monitoring concentrations downwind of the mushroom farm on the farm perimeter closest to MD93.[2] The WWUS report states that P1-P3 were on the Hylton Grange perimeter and P4 on the Modderdrift perimeter.[3] Since OHMS actually did the measurements, and since there was no reason to measure on the Modderdrift perimeter, I take the OHMS report to be authoritative. The four measurements on the boundary of Hylton Grange were all well above the odour threshold – 35 µg/m^3, 79 µg/m^3, 115 µg/m^3 and 354 µg/m^3. Readings within the mushroom facility itself ranged from 433 µg/m^3 to

[1] Para 2, record 3/305.
[2] Para 5, record 3/311.
[3] Table 3.2, record 3/281.

769 µg/m^3. These levels are well below safe occupational exposure levels, but nevertheless distinctly perceptible.

[60] I do not think that one can attach much significance to the fact that the hydrogen sulphide concentration of a control sample taken at P5, 3 km upwind from MD93, was 214 µg/m3. The surroundings and activities at P5 do not appear from the reports. The fact that there was a source of hydrogen sulphide 3 km away does not mean that there were not unpleasant hydrogen sulphide odours emanating from MD93. OHMS also noted in its report, as a general qualification, that there may have been chemical interference from crop spraying which was taking place on the same day.[4]

[61] OHMS's ammonia measurements are puzzling. They were taken on 13 October 2016, when the wind was blowing towards the south. The perimeter measuring points were thus placed on MD93's border with Modderdrift. OHMS's highest readings, and these were within the mushroom facility, were around 119 µg/m³. On the perimeter, three of the measuring points detected no ammonia while a fourth detected only 3 µg/m^3. So at the perimeter, OHMS's readings differed from DDA's by a factor of a thousand or more, while those within the facility were a hundred or more times lower than DDA's.

[62] One possible explanation is that OHMS's ammonia measurements were taken at a time when the operation was not emitting significant ammonia. WWUS stated that on 13 October 2016 the operation involved the moving and mixing of materials at the start of a new batch. Although WWUS stated that this was likely to produce a 'worst-case scenario', it is far from clear that this is so. If leachate is sprayed onto the straw as it is recirculated, it may well be that the worst odours

[4] Para 7, record 3/315.

come later in the process. Another possible explanation is that the operation was being conducted with particular care on 13 October.

[63] It is not only the large gap between the measurements that is puzzling. According to OHMS, the odour threshold for ammonia is 4310 µg/m^3. (DDA placed the odour threshold at 3750 µg/m^3, but nothing turns on this for present purposes.) OHMS's highest ammonia readings within the facility were around 119 µg/m^3, way below the odour threshold. Yet, as I have observed, on the same day ammonia was identified as the primary odour in 28 of the sniffers' inputs. Although some of those were at weak levels, others were distinct or strong and annoying. How could the sniffers smell ammonia if OHMS's results are right? This suggests that OHMS readings were either wrong or were taken at a time when ammonia was not being emitted in significant quantities.

[64] WWUS questioned the accuracy of DDA's measurements. In terms of 'elementary dilution calculations', a perimeter reading of 1583 µg/m^3 (such as DDA had obtained) would imply a reading of 405 000 µg/m^3 at source. Since ammonia is life-threatening at 225 000 µg/m^3, DDA's results did not make sense.

[65] In response, DDA's Mr Dracoulides stated[5] that there was no real possibility that his company's measurements were wrong. The Draeger device was more sophisticated than the solvent tubes/NIOSH method used by OHMS. The Draeger had been calibrated only a few days before the measurements were taken. The instrument captures the specific odour plume as it meanders away from source to receptor. The concentration levels at the receptor may vary significantly with small changes in wind direction. For this reason, grab samples, such as those used in the NIOSH method, may not capture the maximum levels that the measured compounds reached at that point over a period of time.

[5] See para 4 of his affidavit at 4/447, specifically confirming the statements attributed to him by Mr van Wyk in paras 7.2, 8 and 9 of the latter's replying affidavit (record 4/339-405).

[66] In regard to the detection of odours at source, he made the point I have previously mentioned about the relative weights of ammonia, hydrogen sulphide and air.

[67] WWUS's dilution calculations were, according to Mr Dracoulides, fatally flawed, because they assumed that there was only one puff of odour emitted at source, which was diluted throughout the entire volume of air between the source and the receptor. This ignored the fact that in the present case the emission would be continuous over a period of time. Moreover, an odorous gas is not spread evenly throughout the whole volume of air, and WWUS's selection of air volume was arbitrary.

[68] MT filed no further expert evidence in response to Mr Dracoulides's statements. MT could have done so as part of its supplementary answering papers delivered in March 2018. MT did not commission any further tests. There was no expert response to the further tests performed by DDA in January and February 2017 and in March 2018. It is simply not plausible that on four separate occasions, over a period of 25 months, DDA, using more sophisticated equipment than the solvent tubes, got readings which were mistakenly a thousand or more times higher than OHMS's measurements. It is not necessary to find that OHMS's measurements of 13 October 2016 were wrong. It is enough to conclude, as I do, that there is no genuine dispute of fact as to the accuracy of DDA's results.

Conclusions on the evidence

[69] The lay evidence contained in the applicants' supplementary papers, and the supplementary DDA reports covering the tests of January and February 2017 and March 2018, show that there was no material improvement pursuant to the order of December 2016. No programme for joint monitoring took place because

MT required the applicants to cover half of the costs *pro tem*, which the applicants declined to do.

[70] The joint inspection originally scheduled for 10 January 2017 took place on 21 February 2017. This was shortly after DDA's February 2017 measurements (at a time when the odours from MD93 were said by the applicants to be still unbearable) and several months before the two occasions at which dinner guests of Mr Beukes were nauseated by the offensive smells.

[71] Dr Smit stated that, visually, it seemed that MT had taken the steps stipulated in the order of December 2016, and no foul smells were present. However, he took a sample of wheat straw from the preparation slab. Chemical analysis revealed that the straw had a very high level of nitrate nitrogen – 317,87 mg/kg. Because this was very high, two further tests were conducted with the same result. Nitrate nitrogen in drinking water should not exceed 10 mg/kg. The nitrate nitrogen content of water in the Hex River is 0,31 mg/kg. Dry straw upon delivery to MT would contain very low levels of nitrate nitrogen. By contrast, the nitrate nitrogen content of leachate ranges from 100 mg/kg to 700 mg/kg.

[72] Dr Smit concluded that MT must either dipped the straw in a pond contaminated with leachate or have sprayed the straw with liquid organic manure or liquid inorganic fertiliser (leachate-rich water would be a liquid manure). Because the mixing occurs on a non-aerated cement slab and in the natural presence of iron, the nitrate nitrogen would be converted to ammonia gas and released into the air. Item 1.8 of the order of December 2016 had prohibited the recirculation of collected leachate.

[73] In his supplementary answering affidavit Mr Jacobs denied that MT submerged straw in water containing high levels of nitrate nitrogen or that straw

was wetted with liquid manure or liquid fertiliser. He claimed that if Dr Smit were an expert he would know that this was not good farming practice and that it would negatively affect the quality and yield of mushrooms produced.

[74] Dr Smit replied by pointing out, with reference to a statement contained on the website of the South African Mushroom Farmers' Association, that wetting straw with run-off water, which necessarily contained leachate, was often done. He stated that this use of leachate or other liquid manure is beneficial for the composting process, and would not be unusual where the operation is conducted far enough away from neighbours not to be offensive. And, as Dr Smit observed, Mr Jacobs failed to offer any alternative explanation for the high nitrate nitrogen level of the straw sample.

[75] Dr Smit also stated in his reply that he had viewed a video which showed a yellow liquid being sprayed onto MT's wheat straw. He said that leachate-containing water is often yellowish or brownish in colour. Mr van Wyk's supplementary replying affidavit recorded that this video had been taken by Mr Beukes in his (Mr van Wyk's) presence in January 2018. On a number of occasions during the first three months of 2018 the two of them had approached the composting site through Mr Beukes's vineyard and had seen the spraying of the yellow liquid. When they came so close that their presence was detected, the MT employees had switched the sprayers off. There had been foul smells on these occasions.

[76] Since Mr Jacobs did not challenge the chemical analysis of the straw sample, and offered no alternative explanation as to how the straw could have had such a high nitrate nitrogen level, I do not consider that there was any material dispute of fact that in some way or another leachate or liquid fertiliser was being used to wet the straw.

[77] On the question of causation, the evidence adduced by the applicants shows that the offensive smells emanate from MD93. It is not in question that the making of mushroom substrate is calculated to emit foul odours. The complaints started and intensified with the manufacturing by MT of its own substrate and the expansion of its operations. Ordinary farming operations, such as the cultivation of vineyards (which is the predominant agriculture of the Hex River), do not cause highly offensive odours. The applicants themselves are grape farmers. Clearly something out of the ordinary happened to cause them to complain so bitterly and to make them willing to spend the money which the court case and the engagement of experts required.

The legal principles

[78] It remains to apply the law to the facts as I consider them to have been established. Although the term 'nuisance' continues to be used in this country under the influence of English law, the question is whether the conduct of the person causing the alleged nuisance is, in the delictual sense, wrongful in relation to the party complaining of the nuisance. Since the applicants sought an interdict, not damages, the question of fault is not germane (*Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106A-B and 120G; *Intercape Ferreira Mainliner (Pty) Ltd & others v Minister of Home Affairs & others* [2009] ZAWCHC 100; 2010 (5) SA 367 (WCC) para 143), and I have already disposed of causation.

[79] In a case of nuisance, the neighbour complains that his right to enjoy the undisturbed use of his property with reasonable comfort and convenience is impaired (*De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) at 191H-192A; *East London Western District's Farmers' Association & others v Minister of Education and Development Aid & others* 1989 (2) SA 63 (A) at 66I-67B). Because the offending conduct does not cause physical damage to body or

property, wrongfulness is not presumed. Wrongfulness must be determined with regard to the particular circumstances of the case. The question is whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable; in short, whether it is objectively reasonable to impose liability (*Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZASCA 28; 2015 (1) SA 1 (CC) paras 20-21; *Za v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) paras 15-16).

[80] The proposition that conduct will be an actionable nuisance if it is unreasonable must be understood in this sense (cf *PGB Boerdery Beleggings (Edms) Bpk & another v Somerville 62 (Edms) Bpk & another* 2008 (2) SA 428 (SCA) para 9). All the factors bearing on this value judgment must be balanced, including those conventionally mentioned in the sphere of nuisance – the locality of the properties; the suitability of the respondent's use of its property; the extent and duration of the interference; the times at which it occurs etc. In *PGB Boerdery* the court approved the propositions that an interference will be unreasonable 'when it ceases to be a "to-be-expected-in-the-circumstances" interference and is of a type which does not have to be tolerated under the principle of "give and take, live and let live"'; that this involves 'an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred'; and that this is achieved, in essence, 'by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm'. These propositions should not be understood as laying down a different test to the one formulated in the authorities I have cited in my previous paragraph or as excluding any factor which, in accordance with constitutionally-informed policy and the legal convictions of the community, would bear on the reasonableness of imposing liability.

[81] The court *a quo* took its guidance from the lengthy discussion of wrongfulness in *Wingaardt & others v Grobler & another* 2010 (6) SA 148 (E). In that case the court said that the test for wrongfulness is determined 'with reference to society's perception of justice, equity, good faith and reasonableness'; that this is now permeated by the values and norms of the Constitution; that the test is objective; and that 'the concept of reasonableness, when used as the test for wrongfulness, is nothing less and nothing more than a reasonable appraisal of all the many elements and considerations which make up wrongfulness' (paras 50, 52, 53 and 69). These propositions appear to me to accord with the authoritative judgments I have mentioned above. Accordingly, and without necessarily endorsing everything stated in *Wingaardt*, I believe that the court *a quo* guided itself correctly on the essential enquiry.

[82] The trial judge remarked that his attention had not been directed to any South African decision specifically dealing with odours and that he had not found any. Since it is not in dispute that offensive odours can found a claim based on nuisance, this is neither here nor there, but for the sake of completeness I may mention that nuisance claims based on unpleasant smells were considered *inter alia* in *Herrington v Johannesburg Municipality* 1909 TH 179 and *Graham v Dittman & Son* 1917 TPD 288.

[83] MT's counsel submitted, with reference to authority, that a remedy will only be granted where the alleged nuisance is proved to be a continuing wrong and not merely isolated events. In one of the cases cited by MT's counsel, *Rademeyer & others v Western Districts Council & others* 1998 (3) SA 1011 (SE), the court referred to a passage in Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6 ed at 504 to the effect that 'nuisance' indicates '*'n herhaalde inbreukmaking op eiendomsreg*'. This passage was cited with apparent approval in *East London Western Districts Farmers'*

Association case *supra* at 66J-67B. The expression '*herhaalde*' means 'repeated'. This does not connote that the nuisance has to be operative without interruption. The question whether the frequency of the nuisance is sufficient to be actionable is part of the reasonableness inquiry, and the answer may differ from case to case.

[84] MT's counsel argued that Mr van Wyk moved to Hylton Grange in 2010, by which time the manufacturing of substrate was already occurring. He submitted that the fact that a complainant has 'moved to the nuisance', while not an absolute defence, is a relevant consideration, citing *Steenkamp & another v Knysna Local Municipality & another* [2011] ZAWCHC 512 para 30 and *Allaclas Investments (Pty) Ltd & another v Milnerton Golf Club & others* 2007 (2) SA 40 (C) paras 15-16. But see, *per contra*, *Laskey & another v Showzone CC & others* 2007 (2) SA 48 (C) para 27. Given the approach to assessing wrongfulness, I do not think it is possible to lay down an inflexible rule. There may be circumstances where the fact that the complainant has 'moved to the nuisance' will, as a matter of policy, be regarded as germane in assessing the reasonableness of imposing liability. This will particularly be the case where the complainant wishes to use his property for a purpose which has not hitherto characterised the area.

[85] In the present case, however, I do not think that the notion of 'moving to the nuisance' has any traction. First, although Mr van Wyk only moved to Hylton Grange in 2010, it may be assumed that Hylton Grange and other neighbouring farms have always been used as residences for the farmers and their workers. Mr van Wyk was not seeking to change the character of his and the neighbouring farms. Second, Mr van Wyk's move to the farm more or less coincided with the time when the offensive odours began to become a source of real discomfort to the neighbours. And third, even if the first and second applicants can be said to have 'moved to the nuisance', the same has not been shown to be the case in respect of the third and fourth applicants.

The wrongfulness assessment in this case

[86] Section 24(*a*) of the Constitution gives everyone the right 'to an environment that is not harmful to their health or well-being'. An environment will, in my view, be 'harmful' to a person's 'well-being' if it is repulsive to the senses of an ordinary person.

[87] Section 28(1) of the National Environmental Management Act 107 of 1998 states that every person who causes or has caused or may cause 'significant pollution or degradation of the environment' must take reasonable measures to prevent such pollution or degradation. If the pollution or degradation cannot be avoided or stopped, the person must 'minimise and remedy' it. 'Pollution' is defined in the same Act as including a change in the environment caused by substances and by odours emitted by an activity, where that change has 'an adverse effect on human health or well-being'.

[88] Section 35(2) of the National Environmental Management: Air Quality Act 39 of 2004 provides that the occupier of any premises 'must take all reasonable steps to prevent the emission of any offensive odour caused by any activity' on such premises. 'Offensive odour" is defined in the Act as meaning 'any smell which is considered to be malodorous or a nuisance to a reasonable person'.

[89] As against these provisions, s 22 of the Constitution guarantees to all citizens the right to choose their trades, occupations or professions freely, though the practice thereof may be regulated by law. Mushroom farming is a trade or occupation.

[90] MT's making of mushroom substrate has been held to be covered by MD93's zoning. However, the fact that it is not contrary to the zoning is a matter of relatively little importance. In most cases of nuisance, the conduct complained

of is not contrary to the property's zoning. If it were, that would be a short answer.

[91] What is more significant is that MT is conducting farming operations in a farming area. Conduct which might be unacceptable in an urban environment might reasonably have to be tolerated in an agricultural one. On the other hand, the farms in this area are relatively small. The average farm size is 18 ha, usually with two main dwellings and around six labourers' cottages. Viticulture predominates. In such a farming community, neighbouring farm houses would typically be closer to each other than on more expansive farms. Although agricultural activities are conducted in the area, the farms are lawfully and reasonably used for residential purposes by farmers and their employees. And employees, regardless of where they reside, have to spend many hours each day working on the farms.

[92] Mushroom farming is not a common agricultural activity. There is no evidence of any other mushroom farms in the Hex River Valley. Mushroom farming does not require the farmer to make his own substrate, so the manufacturing of substrate would be a feature of some but not all mushroom farms. It is an activity well-known to produce offensive odours.

[93] Mushrooms are not a staple crop. They are a luxury foodstuff. The social utility of MT's operation lies primarily in the employment it offers to around 150 people.

[94] MT conducts mushroom farming on a large scale. The operation is carried on seven days a week. Although offensive odours are not continuous, it is impossible for neighbours to know when they will occur. When the odours occur, they are powerful and disgusting, so that people cannot even enjoy a meal inside their own homes.

[95] The applicants use their farms for an agricultural activity which is common in the area, namely the cultivation of grapes. It would not be objectively reasonable to say to the applicants and other neighbours in reasonable proximity to MD93 that they have the choice of putting up with disgusting smells or moving elsewhere. Conversely, it does not seem to me to be objectively unreasonable to say to MT that if it cannot conduct its mushroom farming without emitting disgusting smells, it will have to find a more remote location for its operation.

[96] MT's counsel submitted that shutting down the mushroom operation would be catastrophic for the employees and their families. If it were indeed the case that the only way to abate the nuisance was to close the mushroom operation, I do not think that this unfortunate economic and social impact would justify a conclusion that an otherwise unlawful interference with the right of MT's neighbours to the reasonable enjoyment of their properties has to be tolerated. MT is engaged in a profit-making operation, one which is, as I have observed, unusual. It has chosen to do so in a relatively compact agricultural community, and in a location which is only a few hundred metres from the homes of its immediate neighbours. It only began to make its own substrate in around 2008/2009, at the same time expanding its operation. Complaints began at around that time and have been continuous since then.

[97] Although Mr Jacobs has alleged that success for the applicants would mean the closure of the mushroom farm, I do not think that this allegation can be taken at face value. The trial judge regarded Mr Jacobs' allegation as 'unfounded exaggeration', intended to create 'atmosphere', and I am inclined to agree. The evidence does not show that substrate cannot be brought in from outside. Doing so may reduce MT's profit, but it has not been shown that it would result in the operation becoming loss-making. As an alternative, MT could enclose its substrate-making activity in a building. I accept that this would be a substantial

once-off expense, but MT did not establish that the scale and profitability of its enterprise ruled this out. (MT provided no financial information about its mushroom business.)

[98] More importantly, on the evidence it ought to be possible, by taking reasonable steps, to abate the nuisance. If it proves not to be possible, the mushroom operation will not necessarily have to be discontinued altogether. As I observed earlier, MT might be able to find a more remote location. MT did not allege that there were no alternative sites in the region for its mushroom farming.

[99] I conclude that it is objectively reasonable to impose liability in this case, and that MT's conduct is thus wrongful. The court *a quo* thus reached the correct conclusion on this issue.

Conclusion

[100] In my view, the order which the court *a quo* granted was apposite in the circumstances. The order granted in December 2016, which did not entail the cessation of the compost-making activity, failed to achieve the desired result, either because the specified steps were not properly implemented and persisted with or because they were in themselves inadequate to bring an end to the nuisance. The order granted by the court *a quo* does not necessarily mean the closure of the mushroom operation. Only the manufacturing of substrate has been interdicted, and this might be temporary.

[101] MT's counsel urged that if we were to dismiss the appeal we should suspend the operation of the interdict for six months, so that MT could implement various steps specified in a draft order which counsel provided to us a few days after the hearing. Some of these steps repeat those contained in the order of December 2016. Others are new. Unfortunately we do not have evidence as to the appropriateness and adequacy of the various measures.

[102] In my view, a suspension of the interdict granted by the court *a quo* is not warranted. MT was given its opportunity by way of the order of December 2016. A further suspension would effectively require another court, on a future occasion, to decide whether the compost-making activity should cease. In my opinion, the time has been reached where it should now be for MT to satisfy a court on the future occasion that the said activity should be allowed to resume. In other words, the default position, until the court is so satisfied, is that compost-making is prohibited.

[103] As I have said, this ought not to have the consequence that the mushroom operation as a whole has to be discontinued. Until MT has satisfied a court, it will, however, need to buy rather than make its substrate. If MT is able to provide evidence of steps which will arrest the nuisance, it ought to be able to do so promptly. More than a year has elapsed since the court *a quo* gave judgment, and MT ought long since to determined what it will do in the event of its appeal failing.

[104] I would thus dismiss the appeal with costs.

Allie J

[105] I concur and it is so ordered.

Cloete J

[106] I concur.

Allie J

Rogers J

Cloete J

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