BRUNO SIMÃO

ATTORNEYS

Practical Wisdom - Trusted Advice

Second Floor, The District
8 Kikuyu Road, Sunninghill
SANDTON

Tel : 011 234 0831
Fax : 086 616 5268
Email: info@brunosimaolaw.co.za
Website: www.brunosimaolaw.co.za

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LawDotNews

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June 2020

Lockdown! Nuisance Neighbours and How to Handle Them

"You can be a good neighbour only if you have good neighbours" (Howard E. Koch)

It looks as if we will still be under "restricted movement" orders for a while - even when we finally get down to Alert Level 2 and who knows when that will be.

Tensions between neighbours are no doubt at an all-time high, and whether you are working from home or just trying to stay sane until our "new normal" starts kicking in, you are no doubt noticing more than ever all those little irritants from next door that would normally fly below your radar or at least be tolerable.

And of course remember it's a vice-versa situation – your neighbour is in exactly the same position. That's a recipe for dispute, and going to war with a neighbour is a classic lose-lose option, in court or out of it. Any short-term victory you may think you can achieve will pale against the ongoing trench warfare that will inevitably result.

First prize: A negotiated win-win

Negotiation will always be your best path to a win-win outcome, and whether you open up dialogue with a friendly chat over WhatsApp or a socially-distanced masks-on discussion over your boundary wall, here is one bit of advice that will substantially increase your chances of a happy outcome for everyone: Understand your legal rights before you start negotiating!

Should your negotiations come to naught, consider as your next step mediation, arbitration or official intervention (more on possible municipal or police intervention options below). Remember that if you live in a “community scheme” such as a sectional title development or a Homeowners’ Association community, the CSOS (Community Schemes Ombud Service) provides a dispute resolution service to assist with a wide range of community disputes.

Then – and this should normally be your last option only to be resorted to when all other avenues have failed – you have the legal route, normally in the form of an interdict application and/or damages claim.

How can our law help you? It’s a balancing act…

The principles laid down by our courts in dealing with neighbour disputes over many years are firmly rooted in common sense. You are entitled to the use and enjoyment of your property – so long as you act lawfully - without unreasonable interference. “An interference” our courts have held, “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'.”

As the Supreme Court of Appeal (SCA) put it in 2016: “Nuisance involves the unreasonable use of property by one neighbour to the detriment of another.” It’s a balancing act between competing rights – yours and those of the other property owners around you.

Peacocks, a cherry tree, and the court’s wide discretion

It is also difficult to set out too much in the way of hard and fast rules here, for as our courts have put it “modern conditions require the exercise of a wide discretion in the adjustment of neighbour relationships”.

Thus the High Court, in a 2013 case involving nuisance peacocks, a “much loved” cherry tree on the boundary of two properties and in danger of being chopped down, and a partially-demolished boundary wall, both quoted and applied that principle with an order encapsulating a resolution of the neighbourly disputes in a detailed and pragmatic manner. The peacocks for example had made a major nuisance of themselves by being noisy, messy and destructive trespassers (they had damaged expensive vehicles by pecking at them when they saw themselves reflected in the rear-view mirrors and highly polished metal surfaces). The court order included both authority for them to be removed by either the municipality or by the SPCA (there being no municipal permit to keep them as required by the municipality’s bye-laws), and an admonition to find them “good and lawful homes”. The cherry tree on the other hand is now protected by an interdict against its removal, with detailed instructions in the court order as to the reconstruction of the boundary wall next to it.

Bear in mind therefore that what is said below is of necessity a simplified and brief summary only – every case will be different, our courts will take into account a whole range of factors in deciding a dispute, and in many instances technical questions of “wrongfulness”, “fault”, “moving to the nuisance” and so on may apply. If your dispute gravitates towards legal action, **specific advice is essential!**

What is a “nuisance”?

The range of potential disputes falling into the “neighbour law” and “nuisance” categories is wide. Some examples (from the SCA again – emphasis supplied) - *“repulsive odours, smoke and gases drifting over the plaintiff’s property from the defendant’s land, water seeping onto the plaintiffs property, leaves from the defendant’s trees falling onto the plaintiff’s premises, slate being washed down-river onto a plaintiff’s land, causing a disturbing noise, causing a common wall to become unstable by piling soil up against it, overhanging branches and foliage, an electrified fence on top of a communal garden wall, blue wildebeest transmitting disease to cattle on neighbouring ground, and occupants of structures on neighbouring land allegedly causing a nuisance.”*

Two common areas of dispute – noise and trees

Let's have a closer look at how those general principles have been applied to two of the more common areas of dispute –

1. **Noise:** If barking dogs, power tools, loud music or the like are making your life a misery – keeping you awake at night perhaps, or (a common concern in this time of remote working) unable to concentrate on that business project or to participate in your daily Zoom "office" meeting – sooner or later you will need to take action.

   Particularly relevant here are the various national statutes and local bye-laws dealing with noise pollution. Contact your local municipality or the police for help if you need to. If you live in a complex, Body Corporate or Home Owners Association rules and regulations will probably come into play as well. SAPS should respond to serious violations of our anti-noise laws, and just a warning visit from a blue uniform might solve your problem once and for all.

   If you end up in a legal fight, our courts will take into account factors such as "the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard". As we said above, every case will be different.

2. **Trees:** If your neighbour's trees are damaging your property (common complaints relate to boundary walls, underground pipes, building foundations, driveways and the like), or are causing a nuisance in the form of falling leaves or branches, or are blocking your views/depriving you of light, you are once again left with no hard and fast rules. A court will look at what is "objectively reasonable" in all the circumstances. As a general rule, don't count on much sympathy from a court if damage is minor and easily repaired, if the nuisance caused is controllable by you with regular maintenance (clearing leaves from gutters and so on) or if your only complaint is loss of your views. That last aspect is a whole separate debate with many twists and turns, but all based on the concept that you will have no automatic right to a view.

   Where you are dealing with an "overhanging branches" issue, old common law principles will usually apply unless factors such as local bye-laws, heritage protection of older trees etc come into play. You will generally have a right to cut overhanging branches back to your property line if the neighbour refuses to do so and to keep or dispose of the branches if your neighbour declines to take them.

Unemployed, Can't Pay Bond and Credit Instalments? "Credit Life Insurance" May Save You

If you are one of the many employees retrenched or put on short pay or unpaid leave as a result of the COVID-19 crisis and lockdown, you will be wondering how to cover the monthly instalments on your mortgage bond and other credit agreements. You have no doubt heard of the "payment holidays" banks are offering, but remember that although these are a lot better than losing your house, car etc, they are no free lunch. Interest and fees will still be building up.

Credit life insurance is not just death cover

That's why you need to check right now whether or not any of your credit agreements are covered by "credit life insurance". **Many people don't even realise they have this cover in place**, and those that do may look at the "life" part of the name and think "well

that's no good to me or my family, I'm unemployed not dead". The good news there is that most policies cover a host of other events leaving you unable to pay instalments – see below for more.

Do you have cover?

You may well have this cover in place without even realising it because it is commonly required when you take out any form of credit – think mortgage bonds, vehicle finance, credit cards, retail credit (store cards etc) and so on.

If you aren't sure, check your latest bond or credit statement for any sign of an insurance premium deduction (it may be called "balance protection" or the like). Then contact the bank (or whichever credit grantor you are with) and ask them to check. You may not have it for example if at the time you ceded another life policy to the credit grantor.

What are you covered for?

Check what the terms of your particular policy are, but the minimum cover required by National Credit Act Regulations (which only affect credit agreements entered into on or after 9 August 2017) is -

- **Death or permanent disability:** The outstanding balance of your total obligations under the credit agreement is covered.
- **Unemployment or inability to earn an income:** You are covered until you find employment or are able to earn an income, with a maximum of 12 months' instalments.
- **On temporary disability:** You are covered until you are no longer disabled, with a maximum of 12 months' instalments.

Exclusions – the Regulations allow a long list of exclusions to be incorporated in your policy so check which apply to you. Most of them are common sense – for example lawful dismissal, retirement or resignation from employment – but if you are told that a particular exclusion applies to you and you don't agree ask your professional advisor for advice before conceding anything. **Employers** may be able to assist in this regard when structuring crisis outcomes with staff, but remember to do so only after taking your own legal advice!

Self-employed people and **pensioners** should check what cover they have under their particular policy, and what terms apply to them.

Directors: Reckless Trading and Personal Liability in the Time of Coronavirus

"Better safe than sorry" (wise old proverb)

The COVID-19 pandemic and its ongoing economic fallout have left many businesses struggling with cash flow and even viability challenges.

The result is that an increasing number of companies are either trading in insolvent circumstances, or in grave danger of doing so.

Reckless trading and your risk of personal liability

To quote from the Companies Act (section 22(1)): “A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.”

And per section 77(3) any director “is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having … acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1)”.

That’s a lot of potential for liability and it demands very careful management at any time – but perhaps even more so in these times of uncertainty and heightened economic risk.

What is “reckless trading”?

As the Supreme Court of Appeal has put it: “If a company continues to carry on business and to incur debts when, in the opinion of reasonable businessmen, standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due, it will in general be a proper inference that the business is being carried on recklessly." A lot of companies must currently be in danger of falling into that net.

Who is at risk? Not just directors…

The Companies Act defines a “director" for the purposes of personal liability as including an “alternate director”, a “prescribed officer” (which brings many senior managers into the net), a “person who is a member of a committee of a board of a company, or of the audit committee of a company”, “irrespective of whether or not the person is also a member of the company's board”.

Does the CIPC Notice protect you?

On 24 March 2020 the Companies and Intellectual Property Commission (CIPC) issued a formal Notice to the effect that it will not exercise its power to issue a compliance notice to a company “which is temporarily insolvent and still carrying on business or trading” but only where “it has reason to believe that the insolvency is due to business conditions, which were caused by the COVID-19 pandemic.” That practice, said the CIPC, will lapse 60 days after the declaration of a national disaster has been lifted.

That announcement has been interpreted by some commentators as “allowing” reckless trading by companies, and indeed it may well be that at least some directors under attack will give that defence a try.

But that is not what the CIPC Notice actually says, and the more cautious view is that the Companies Act’s prohibition against reckless trading remains intact and that all that has changed is a temporary waiver by CIPC of its power to enforce statutory compliance.

So what should you do if your company is struggling?

We are in uncharted territory here with the pandemic, and on the principle of “better safe than sorry”, this is no time to take chances. If your company is financially distressed or the prospect of trading in insolvent circumstances looms, **take professional advice immediately** on how best to proceed. Business rescue or even liquidation may be unavoidable or you may be advised to pursue another route after full good-faith discussion with all role-players, but whatever the outcome quick and

decisive action is critical.

Domestic Violence and the Lockdown: Your Personalised Safety Plan

> ***"Preamble to the Domestic Violence Act: "To afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide"***

There is great concern that the COVID-19 crisis, particularly the mandatory "stay at home" lockdown phase, will see both an increase in the levels of domestic violence, and a decrease in the ability of victims to access help. It's a worldwide concern and as the World Health Organisation puts it: "Stress, the disruption of social and protective networks, loss of income and decreased access to services all can exacerbate the risk of violence for women."

South Africa's Domestic Violence Act ("domestic violence" isn't limited to cases of physical harm – it includes a very wide range of abusive conduct) provides legal protection to victims, especially to those most vulnerable such as women, children, disabled people and the elderly. If you are a victim (or helping a victim) you should be aware of a victim's rights to lay criminal charges and/or to apply for a protection order.

Police officers attending to such cases must help victims to lay criminal charges, find shelter and obtain medical treatment where necessary. The Supreme Court of Appeal has confirmed that SAPS members have a positive duty to render assistance to victims.

But how can you achieve that with the lockdown restrictions and its constraints on your freedom of movement and ability to escape the abuser?

Your personalised safety plan

> *Note that from 14 May 2020 new lockdown regulations specifically allow you to move to a new home where "the movement is necessitated due to domestic violence".*

Download **here** the National Shelter Movement of South Africa's free PDF document "Domestic Violence Safety Planning During the Time of COVID-19" which will help you with suggestions for developing a personalised and practical Safety Plan during lockdown under these headings –

- "Be Prepared" with a comprehensive list of helplines and contacts (both National and Provincial) and how to access them
- "Reaching Out"
- "Signalling for Help"
- "Delete Searches/Requests for Help"
- "Planning to Leave"
- "Legally Speaking"
- "Leaving"

- “Staying Safe”.

How a protection order works

The “Staying Safe” section above suggests that you apply for a protection order if you don’t already have one, and that you get help in doing so from a shelter or other organisation. Or you can yourself approach your nearest Magistrates Court and ask for assistance.

If an order is granted, the issue of a warrant of arrest is authorised at the same time. The warrant is suspended on condition that there is no breach of the terms of the protection order. To have the warrant executed, you will need to give details of any violation of the order on affidavit – be aware that you will both face criminal charges and risk a damages claim if you intentionally make any false allegations.

Website of the Month: A Complete Guide to Working from Home in 2020

"The secret of change is to focus all of your energy, not on fighting the old, but on building the new" (Socrates)

One wonders how many office-based businesses, having been forced to work remotely during the lockdown, will now abandon or minimise their office spaces on a permanent basis rather than return to the “old normal”.

Regardless, if you and your staff are currently working from home, you need to configure the arrangement for maximum productivity and quality of life.

Career Karma’s “A Complete Guide to Working from Home in 2020” on its **website** shares 10 tips on “How to Succeed as a Remote Worker”, offers a free PDF download “Remote Working: The Ultimate Guide”, and addresses 3 common myths about home working that both employers and employees should get to grips with.

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