

What rights does my neighbour have? What does it mean to have the right to unimpeded enjoyment of your land?

In terms of our law, every person or every neighbour, for that matter, has a right to unimpeded enjoyment of his land. This right, means that a neighbour's health, well-being or comfort in the occupation of his land must not be interfered with.

A very common problem in neighbour relations is trees on a property causing nuisance to the adjacent property.

The issue of trees constituting a possible nuisance arose in the recent case of *Vogel v Crewe and Other* 2003(4) SA 509(T). Vogel and Crewe were neighbours who jointly erected a concrete fence between their properties. There were quite a number of trees planted on Crewe's property which trees were planted within two metres of the boundary wall.

The good neighbour relations which existed between the two parties were gradually being marred by these trees as Vogel was of the opinion that the trees were causing a nuisance to him.

Vogel then applied to the Court for an order to have the trees removed, alleging that the trees had given rise to problems caused by overhanging branches and encroaching root systems. According to Vogel overhanging branches and encroaching root systems were blocking gutters and sewage system, shedding leaves in his swimming pool and surrounding areas and also damaging the concrete wall as well as his parking area.

In its judgment the Court started by indicating that conduct which infringes upon a neighbour's health, well-being or comfort in the occupation of his land, can be called a nuisance. The Court indicated, however, that the test to be applied in deciding whether the nuisance complained of is actionable, in other words, is worthy to be determined by means of a Court action, is the objective reasonableness test which seeks to strike a balance between the competing

interests of the parties. This test requires from the complaining party to show that the inconvenience complained of is in fact more than fanciful, more than mere delicacy or fastidiousness; that it is inconvenience materially interfering with the ordinary comfort, physically of human existence not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions.

The Court indicated that the test of reasonableness should be applied taking into account the general norms acceptable to the particular society and that even if the nuisance does involve the actual inflicting of damages, the test is still one of reasonableness. It was further indicated that the test of reasonableness is an objective one and must be applied in the light of prevailing circumstances. The Court emphasised the fact that the enquiry into the dispute and the eventual decision involves finding a balance between the competing interests of the parties.

After laying the above foundation and applying the principles thereof to the case in question, the Court indicated that it is important to bear in mind, firstly, that the trees on Crewe's property were not planted directly against the wall but approximately two metres away from the wall. The Court further pointed out that it need to be remembered that trees form an essential part of our human environment, not only in terms of giving us aesthetic pleasure, but also functionally in the provision of shade and oxygen. The Court further interestingly pointed out that like any other living thing, trees also require in return for pleasure provided a certain amount of effort and tolerance, further, that in the light of our increasing awareness of the importance of protecting our environment, we need to become more tolerant towards the inevitable problems caused by the shrinking size of properties and greater proximity of neighbours and neighbour's trees.

Turning to the nuisance complained of, the Court indicated that on the evidence before it, it appeared that the concrete wall was not seriously damaged and could be easily repaired. The Court indicated that it would not be unreasonable to expect the parties to repair rather than to remove the trees. With regard to the complaint that the root system of the trees damaged Vogel's parking area, the Court indicated that this allegation was not supported by evidence. Also no case had been made out as to why the removal of the trees were necessary. The Court indicated that it was convinced that other less drastic measures could be taken to

deal with this problem instead of removing the trees.

As far as the hanging branches were concerned, the Court indicated that the problem could be resolved by way of Vogel requesting Crewe to prune his trees. If Crewe should refuse, Vogel will then be entitled to cut off the overhanging branches, in line with the boundary. Regarding the leaves in the swimming pool and gutters the Court indicated that although the leaves may have been from these particular trees, they were not exclusively from these trees as there were many other large trees in the area and specifically also on Vogel's property. As far as the blockage of the sewage system was concerned, the Court pointed out that no evidence was presented before it to involve the trees.

The Court therefore concluded that the evidence shown by Vogel, did not warrant an interdict and that the removal of trees could elevate the problem instead of solving it.

On that basis the Court was of the opinion that Vogel was not entitled to the relief claimed and his application was therefore dismissed.

You will not be blamed if you might think the Court's decision was perhaps too "environmentally friendly." There is also no doubt that the Court's remark that it is important to protect our environment and that trees like any other living thing also require in return for pleasure provided a certain amount of effort and tolerance, must have been music in the ears of environmentalists.

Many property owners who are potentially faced with similar problems might be disappointed by the Court's decision as it could be argued that the judge was biased in the sense that she put more emphasis on the importance of protecting the environment as opposed to damages caused to properties by trees.

This is, however, not the case as a proper analysis of the Court's judgment clearly indicates that the Court's referral to the importance of protecting our environment also served the purpose of illustrating that if the competing interests of the parties were taken into account, it should be clear that degree of inconvenience and alleged damages were not sufficiently serious enough to warrant the removal of the trees.

It is further also important not to lose sight of the fact that on the merits Vogel did not have a good case. You will recall that the Court found that he did not have

conclusive evidence with regard to the fact that:

- ..1. the damages to the parking area was caused by the root system of the trees;
- ..2. the blockage of his sewage system was caused by the leaves of the trees;
- ..3. that the leaves in the swimming pool and gutters were exclusively from the treesof his neighbour.

The Court further indicated that less drastic measures could be taken to deal with problems relating to the overhanging branches as the owner could simply request his neighbour to prune the trees and upon his neighbour's refusal, would be entitled to cut off the overhanging branches in line with the boundary. This should not be seen as an encouragement to neighbours to take the law into their own hands as our law does make provision that the owner of an adjacent property may cut overhanging branches himself only after he has requested his neighbour to do so and he has refused. It is important to note, however, that the branches can only be cut in line with the boundary. The Court further indicated that the concrete wall was not severely damaged and the parties could repair the wall rather than remove the trees.

It is therefore clear that the importance of protecting our environment was not the deciding factor in this case as on the evidence shown the Court was of the opinion that no case had been made out why the removal of the trees was necessary.

It therefore means that if you approach the Court and make out a good case why the removal of trees is necessary, the Court will grant you the relief sought. You must therefore be able to convince the Court why the removal of the trees should weigh heavier than your neighbour's right to retain them.

Any person who intends to pursue such an action, must therefore not only have conclusive proof that the roots and branches of his neighbour's trees are causing him inconvenience and damages, but must also convince the Court that the degree of such inconvenience and damages is sufficiently serious enough to constitute an actionable wrong.

A very important development which this case brought about, is the fact that the Court highlighted the changed times we are living in and the increasing awareness of the importance of protecting our environment which means that even if the inconvenience and damages are apparent, the Courts will not hastily

decide that trees be removed if there are other less drastic measures which could be taken to deal with the problem rather than removing the trees.