

TYDSKRIF VIR DIE SUID-AFRIKAANSE REG

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TYDSKRIF VIR DIE SUID-AFRIKAANSE REG

Journal of South African Law

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TSAR-STYL — RIGLYNE VIR OUTEURS

A MANUSKRIP — ALGEMEEN

- 1 *TSAR* oorweeg vir plasing na anonieme portuurevaluering oorspronklike manuskripte van artikels, aantekeninge, besprekings van regspraak en boekbesprekings in Afrikaans, Engels of Nederlands wat nie reeds vir publikasie elders aangebied is nie. Outeursreg van publikasies vestig in uitgewers.
- 2 Die oorspronklike manuskrip in *TSAR*-styl, vergesel van 'n weergawe op rekenaardisket of -skyf of per e-pos moet by die redakteur ingelewer word. Op die uitgedrukte manuskrip moet die outeur teenoor iedere verwysing met 'n ✓ aandui dat hy dit persoonlik ter hand gehad en gekontroleer het. Indien die redaksie meer as 15 stylverwante of spellingverwante veranderings moet aanbring, word die stuk aan die outeur vir versorging terugbesorg.
- 3 Lengte (tensy anders met die redakteur afgespreek): artikels met inbegrip van die voetnote, nie langer as 9 500 woorde nie, en aantekeninge en besprekings van regspraak nie langer as 8 000 woorde nie. Bydraes korter as 4 500 woorde word nie oorweeg nie.

B ARTIKEL

- 1 Alle bydraes moet vergesel wees van 'n kort samevatting van minstens 350 woorde in 'n ander van die A1 vermelde amptelike tale. ('n Artikel op Nederlands moet 'n Engelse samevatting bevat.) Die samevatting moet van 'n titel voorsien wees.
- 2 *Voetnote*
- 2.1 Die voetnote van artikels, deurlopend genummer, moet rekenaarmatig in die teks geïnkorporeer word en verskyn nie in die uitdruk aan die einde van die manuskrip nie, maar as voetnote.
- 2.2 In die teks verskyn die voetnootnommer gewoonlik ná die eerste toepaslike leestekens bv: Van der Merwe beweer dat die maan van kaas is.²
- 2.3 Identifikasie van 'n skrywer van 'n artikel (soos ook enige erkennings) word in die voetnote voor noot 1 aangedui met 'n * as : * Professor in Privaatreg, Universiteit van Johannesburg; Senior lektor in Handelsreg, Universiteit van Pretoria. Dit is belangrik met die oog op kruiskoppeling van latere voetnootnommers (sien 2.9 hieronder) dat outeurs verseker dat hul woordverwerkingsprogram nie hierdie * as eerste voetnoot tel nie.
- 2.4 Voetnote begin met kleinletters tensy die teks in die voetnoot self 'n volsin met werkwoord is bv: a 23(1); hierbo, maar Vgl/Sien Van der Merwe 12. In Engelse artikels word *Cf* of *cf*, *ie* en *eg* gekursiveer.
- 2.5 Alle voetnote eindig met 'n punt.
- 2.6 Verwys soos volg na vorige voetnote: n 16 hierbo, en na voetnote wat volg: sien n 34 hieronder [dws spasie tussen n en 16/34]. *Supra* en *infra* word normaalweg nie gebruik nie, indien wel, kleinletters as dit alleen staan.
- 2.7 In voetnote word wel 'n spasie tussen bladsynommer en *ev*/ *ff*/ *et seq* gelaat — bv 124 *ev*.
- 2.8 Indien na meerdere bronne in dieselfde sin verwys word, skei inligting met; behalwe die laaste twee bronne waar “en” gebruik word.
- 2.9 Kruiskoppel voetnootverwysings. Indien na 'n bron in 'n opvolgende voetnoot verwys word waarna reeds eerder volledig verwys is, word die volgende verkorte verwysingsstyl benut: Outeur se van of verkorte saaknaam (n #) 678 {waar # die eerste volledige voetnootverwysing na die bepaalde bron is}. Indien in dieselfde vorige voetnoot na meerdere bronne van dieselfde outeur verwys is, moet ten einde verwarring te voorkom, bykomstig tussen () die jaartal van die tersake bron vermeld word: Outeur se van (n # (1990)) 678, ten einde dit te kan onderskei van 'n ander bron van dieselfde outeur waarna eweneens in dieselfde voetnootnommer volledig verwys is. Hierdie verkorte verwysingsstyl geld nie by vonnisbesprekings en aantekeninge nie waar geen voetnote is nie. Daar word volstaan met die outeur se van en die tersake bladsy- of paragraafnommer — behalwe indien weens die verwysing in dieselfde bydrae na meerdere bydraes van dieselfde outeur 'n trefwoord uit die titel eweneens verskaf word.
- 2.10 By alle verwysings na vonnisbesprekings en boekbesprekings word slegs na die betrokke outeur, tydskrif en bladsy verwys. Geen verwysing na 'n moontlike titel van die vonnis- of boekbespreking word weergegee nie bv Van Wyk 1975 *THRHR* 152. Ten aansien van opvolgende verwysings na gerapporteerde regspraak word deurgaans in voetnote by artikels soos ook in aantekeninge en besprekings van regspraak volstaan met die verkorte verwysingsstyl waar slegs 'n trefwoord (gewoonlik die eerste party se naam) gekoppel met -saak benut word, gevolg deur die tersake bladsy uit die verslag.

3 Afkortings

- 3.1 Benewens enkele uitsonderings, geen afkortings of akronieme in die teks nie, maar aangesien in aantekeninge en in besprekings van regspraak en boeke geen voetnote gebruik word nie, word afkortings wel daar in die teks tussen hakies gebruik omdat die gedeelte tussen hakies die funksie van 'n voetnoot vervul. J of CJ ens word slegs in Engelse bydraes wel in die teks gebruik en kom dan direk na die van van die betrokke regter: Innes CJ.
- 3.2 In voetnote word sover moontlik van afkortings gebruik gemaak.
- 3.3 Vermoë punte na afkortings. Aanmekeer geskrewe woorde word sonder spasie afgekort — bv; asb; vgl.

C AANTEKENINGE EN BESPREKING VAN REGSPRAAK

- 1 Soos onder B by artikels maar
- 1.1 geen voetnote word benut nie — verwysings ens wat in 'n voetnoot sou kom, word in belang van leesbaarheid spaarsamig benut, en tussen () in die teks geplaas.

D VERWYSINGS

- 1 *Boeke*
De Wet en Van Wyk *Kontraktereg en Handelsreg* (1978) 136 [of (4e uitg) 136 indien die jaartal werklik onbekend is — nooit beide nie].
- 2 *Ongepubliseerde proefskrifte of verhandelings*
Van der Walt *Risiko-aanspreeklikheid uit Onregmatige Daad* (1974 proefskrif SA) 139-140.
- 3 *Werkstukke van die regskommissie*
Die Suid-Afrikaanse Regskommissie “Die instelling van 'n legitieme porsie of die verlening van 'n reg op onderhoud aan 'n langsewende gade” *Hersiening van die Erfreg* Werkstuk 13, Projek 22 (1986) 21-35.
- 4 *Tydskrifartikels*
Jansen “Die ontwikkeling van die nuwe vennootskapsreg” 1956 *SALJ* 593 598; Smith “The new European company” 1974 *Modern Law Review* (MLR) 683 691 [waar die tersake artikel op 593 of 683 begin en dit daarom vermeld moet word, maar juis na 598 of 691 verwys word].
- 5 *Koerante*
Beeld (15-01-1983) 12 of *Beeld* (15 Jan 1983) 12. *Staatskoerant* (in voetnote afgekort as *SK*) 6679 (28-09-1979).
- 6 *Regspraak*
Conradie v Rossouw 1965 2 SA 589 (K) 593F; *Green v Green* 1942 WLD 67 69, Saffii; *Dewel Trust v Scholsz* (11050/14) 2014 ZAWCHC 128 (18 Aug 2014). Meerdere verslae skei met : *Swart v Smit* 2004 7 BCLR 687 (KH), 2004 4 SA 490 (KH) par 44 – geen ; geen [] as verwysing na par nie. *Ongerapporteerde regspraak*
Hetsy in die teks, in voetnoot of as opskrif by die bespreking van regspraak: *Pienaar v Beukes* saak no 492/90 (K) (ongerapporteer); of *Pienaar v Beukes* 15-01-1989 (K) (ongerapporteer).
- 7 *Wetgewing*
Die Maatskappywet 61 van 1973 of verwysend na die Britse wet bv *Bills of Exchange Act* in 'n Afrikaanse bydrae.
- 8 *Onbronne*
D 9 2 11 8; De Groot *Inleiding* 2 2 12 en Voet *Commentarius ad Pandectas* 7 1 13 — dus sonder punte.
- 9 Internet verwysings word spaarsamig benut en bevat tussen () laaste benuttingsdatum.

E ALGEMEEN

- 1 Hoofletters: Gebruik hoofletters spaarsamig — appèlregter Malan maar “ar Malan” (noot Malan AR nie) in die voetnote.
- 2 Ander punktuasie: *TSAR*-styl is komma-arm. Benut 'n komma slegs waar dit moet. Aanhalingstekens: Gebruik die dubbele aanhalingstekens met die enkele binne 'n aanhaling. Aanhaling langer as drie gedrukte reëls word ingekeep en kleiner gedruk — maar steeds met aanhalingstekens.
- 3 Outeurs word aangeraai om indien hulle onseker is onlangse uitgawes van *TSAR* te raadpleeg of met die redakteur kontak op te neem.

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Nuisance laws and autism in South Africa: seeking a disability rights-compliant approach

WILLENE HOLNESS*

SAMEVATTING

OORLASWETTE EN OUTISME IN SUID-AFRIKA: SOEKE NA 'N BENADERING WAT VOLDOEN AAN REGTE VAN PERSONE MET GESTREMDHEDE

Sommige outistiese persone mag onwillekeurige selfregulerende gedrag toon, soos om te stimuleer, wat 'n impak kan hê op hul bure se genot van hul omgewing, veral waar sulke gedrag geraas veroorsaak. Deur te steun op 'n gelykenis afgelei van anekdotiese en mediaberigte oor hierdie buregeskille, oorweeg hierdie artikel die toepassing van oorlaswette met betrekking tot klagtes weens oormatige geraas deur outistiese persone in Suid-Afrika om 'n benadering te identifiseer wat voldoen aan gestremdheidsregte om die gemeenskapstigma wat outistiese persone in hierdie gevalle ly, aan te spreek – maar gebalanseer met die regte van bure. 'n Benadering wat voldoen aan gestremdheidsregte word uiteengesit met verwysing na internasionale en streeksreg en jurisprudentie, wat 'n belyning met 'n neurodiverse paradigma insluit. Verder word die Suid-Afrikaanse regstoets van redelikheid op die feitelyst toegepas en bevind dat dit meestal ooreenstem met 'n benadering tot gestremdheidsregte. Verdere wetgewende beskermings soos remedies in die Wet op Beskerming teen Teistering 17 van 2011 en die *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 van 2000 word ondersoek. Daar word aangevoer dat wette proaktiewe maatreëls moet bevat om neuro-afwykende ofte wel neurodivergente persone te erken en te akkommodeer, in plaas daarvan om hulle reaktief op versoek te akkommodeer of hulle heeltemal uit te sluit. Daar word verder aangevoer dat as 'n outistiese persoon stimuleer om sensoriese oorlading te hanteer, hul huisomgewing hierdie behoefte moet akkommodeer. Gevolglik moet bure nie net “verdraagsaam” nie, maar ook akkommodierend teenoor hierdie behoefte wees, en die staat moet maatreëls instel, soos subsidies vir aanpassings aan huisomgewings, om gesinne wat akkommodasie benodig, te help om neurodivers-vriendelike ruimtes te skep.

1 Introduction

Nadia and Simon¹ are neighbours. Nadia's parents rent a small A-frame suburban house which is a sectional title unit. Nadia, eighteen years old, is autistic and non-verbal and attends a private business skills educational centre in the city and dreams of becoming a pastry chef.

Nadia sometimes stims to self-regulate when she is anxious, fearful or upset. She may also have meltdowns after experiencing sensory meltdowns. This may involve very loud echolalia, jumping, flapping, and spinning. Her preferred way of calming down is to jump on the trampoline in their very small, enclosed back yard, which borders neighbours on both sides. This may take five to forty minutes. She is usually calm afterwards. It can happen at any time of the day or night, although her parents do try to keep her indoors after 22:00.

Simon, their immediate neighbour on one side, cannot abide the noise generated by Nadia's stimming. He complains to her parents that the noise is incessant, too

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¹ These names are fictitious. These instances occur with autistic children, too. The application of nuisance laws in relation to autistic children would require also including an analysis of children's rights such as the best interest of the child, which is outside the scope of this article.

loud and affects his peaceful existence at home causing sleepless nights and mental anguish. Simon complains bitterly to everyone he encounters on the common property about the unacceptable noise that Nadia makes. He exhorts Nadia's parents to institutionalise her.

Over a few weeks, Simon's complaints escalate and he shouts at Nadia and her parents when she stims in the back yard, raps on their doors, and threatens to call the police to arrest her, or to call social development so that a social worker can remove her to a place "fit for people like her".

Simon also lodges a complaint with the body corporate. The trustees and managing agent send a notice to Nadia and her parents requesting them to stop the noise nuisance, failing which a fine will be issued for a violation of the conduct rules of the body corporate.

Nadia's parents suggest mediation to the body corporate. At the mediation, they agree to adjust their home to mitigate the sound impact on their neighbours, including soundproofing, raising the height of the fence between the properties, and planting a tree line to absorb some of the sound. Simon requests that they remove the trampoline, but they refuse, citing its beneficial effect on Nadia. Without it, they fear she would be unable to manage her emotions at times. For Simon, this is a deal breaker and the mediation fails. He now threatens to obtain an interdict from the court to force her parents to stop her from causing disturbances that affect his mental and physical health.

The above vignette is an amalgamation of facts based on different queries made to the author from autistic persons (minors and adults) and their families who encounter nuisance complaints brought against them for their noise disturbances. This article accordingly evaluates nuisance laws at national and municipal levels to identify a disability rights-compliant approach where neighbours complain about the "noise nuisance" (elsewhere known as "anti-social behaviour"²) occasioned when autistic persons³ exhibit self-regulatory behaviour in their communities. This is necessitated by the disproportionate prejudice occasioned by the operation of these laws, which unfairly discriminates against autistic persons as a result of their disability.

This article considers the application of nuisance laws in relation to noise complaints about autistic persons in South Africa in order to identify a disability rights-compliant approach to address the community stigma suffered by autistic persons in these instances – but balanced with the rights of neighbours. Firstly, the incidence of nuisance complaints of this nature is described. Secondly, a disability rights approach to nuisance laws is explicated. Thirdly, the experiences of autistic persons living in communities in South Africa are discussed. Fourthly, the interpretation and application of nuisance laws and relevant statutory laws are explained. Lastly, recommendations are made to promote a disability-compliant approach to these instances.

² Fyson and Yates "Anti-social behaviour orders and young people with learning disabilities" 2011 *Critical Social Policy* 102 103.

³ The preference of the term "autistic person" or "autistics" is based on the wish to use non-ableist terminology, and this is preferred by autistic persons themselves. Cf Bottema-Beutel *et al* "Avoiding ableist language: Suggestions for autism researchers" 2021 *Autism in Adulthood* 18 20. Person-first or identify-first terminology pervades the literature (eg person with autism or autistic person, respectively). Neither term is problematic, but it depends on the preference of the person affected. In this study identify-first language is used as the study considers that the behaviour of autistic persons is negatively perceived by neurotypical persons.

2 Nuisance complaints in relation to self-regulatory behaviour

Some autistic children and adults may use “stimming”, which is self-stimulatory behaviour or “stereotypical” repetitive motor movements, including vocalisations, to cope with sensory input and overload and to self-regulate, particularly as emotional regulation may be challenging for some autistics.⁴ This behaviour may be exhibited by autistic persons who are non-speaking and those who use augmentative and alternative communication (AAC)⁵ and speech. Community awareness of the benefits and uses of this behaviour for the emotional health of autistic persons is generally low.⁶ Veerasamy explains:

“While stimming may be alarming to outside observers or considered socially unacceptable, it serves an important purpose, especially for autistic people: it helps to regulate their emotions, cope with feelings of over- or under-stimulation, or better manage physical pain.”⁷

Stigma and discrimination against autistic persons – often based on negative stereotyping – is rife.⁸ Some autistic children are deemed to be “unmanageable” and ineducable by members of communities, partly due to experiencing stigma.⁹ The circular effect of stigma can be described as follows:

“Social isolation was used to manage challenging behaviours, which had positive and negative consequences. Sensory overload provoked tantrums, meltdowns and elicited negative public reactions towards the child’s behaviour, thereby cultivating stigma, hence families limited socialising to reduce stress. However, as seen in other studies, this served only to strengthen stigma and deprive the child of opportunities to socialise, which was hindered by cultural opinions.”¹⁰

Autistic persons may also experience challenging behaviour such as burnout, inertia, meltdown and shutdown.¹¹ In particular, meltdowns, sometimes wrongly characterised as tantrums, occur when autistic persons are emotionally dysregulated because of sensory overload, anxiety, or fear.¹² The diagnosis of autism is not understood and there is a perception in some South African (and other) societies that autism is caused by the parents of the child being cursed or as a result of witchcraft,

⁴ Kapp *et al* “‘People should be allowed to do what they like’: autistic adults’ views and experiences of stimming” 2019 *Autism* 1782 1788; Bradley *et al* “Current knowledge of emotion regulation: the autistic experience” in Rodríguez (ed) *New Insights into Emotional Intelligence* (2023) 35 40.

⁵ Bornman “Preventing abuse and providing access to justice for individuals with complex communication needs: the role of augmentative and alternative communication” 2017 *Seminars in Speech and Language* 321 322.

⁶ Charlton *et al* “‘It feels like holding back something you need to say’: autistic and non-autistic adults accounts of sensory experiences and stimming” 2021 *Research in Autism Spectrum Disorders* 1 2.

⁷ Veerasamy “Managing self-regulatory behaviour in young autistic children in the Western Cape, South Africa” 2024 *South African Journal of Childhood Education* 1 4.

⁸ Turnock *et al* “Understanding stigma in autism: a narrative review and theoretical model” 2022 *Autism Adulthood* 76-78.

⁹ Department of Basic Education and UNICEF “Study on children with disabilities from birth to four years old” (2015) 55 <https://www.unicef.org/southafrica/media/1666/file/ZAF-study-on-children-with-disabilities-from-birth-to-4-years-old-2015.pdf> (3-06-2024).

¹⁰ Reddy *et al* “Parents’ voices: Experiences and coping as a parent of a child with autism spectrum disorder” 2019 *South African Journal of Occupational Therapy* 43 48 – references omitted.

¹¹ Phung *et al* “What I wish you knew: insights on burnout, inertia, meltdown, and shutdown from autistic youth” 2021 *Frontiers Psychology* 1 2.

¹² Cf Belek “Articulating sensory sensitivity: From bodies with autism to autistic bodies” 2018 *Med Anthropol* 30 36.

which then affects community acceptance of autistic persons.¹³ Community members deem autistic persons' dysregulated behaviour to result from ill-discipline or bad parenting.¹⁴ For example, in one study, a parent noted community stigma: "The fact that he shouts and has meltdowns make it difficult with neighbours. They looked at me funny, especially during the lockdown. He screams at the top of his lungs; other people think I'm hitting him; they don't understand."¹⁵ Furthermore, autistic persons may also have other co-occurring disabilities, such as intellectual disability or psycho-social disability, which compounds stigmatisation.¹⁶ Autistic persons may also "mask" or "camouflage" their autism in order to meet societal expectations of fitting in.¹⁷

Autistic persons have articulated that their self-stimulation or stimming is often negatively perceived by neurotypical persons (without neurodiversity such as autism), which results in autistic persons feeling "weird", frustrated, ashamed and confused, as well as emotionally depleted when their conduct is considered socially unacceptable, and they may then seek to minimise or suppress their stimming to garner "acceptance".¹⁸ Community responses to stimming, however, may escalate beyond generalised (unacceptable) stigma and discrimination¹⁹ and lead to harassment and may also affect the housing rights of autistic persons and their families through harassment and evictions.²⁰ Community members may call on the police to attend to noise complaints.²¹ Unfortunately, the police are not generally sensitised to the needs of autistic persons and are often the perpetrators of violence against autistic persons.²² Even further down the continuum of outcomes, the discrimination and harassment of the autistic person may escalate to a hate crime. A hate crime is an anti-citizenship phenomenon that seeks to identify the outsider (the person with the disability) as being unworthy of the rights that accrue to insiders (those without the status or perceived or associated status).²³ Prohibition

¹³ Van der Merwe *Sepedi Cultural Views on Autism Spectrum Disorder* (2020 MEd thesis, UP) 86. Shilubane and Mazibuko "Understanding autism spectrum disorder and coping mechanisms by parents: An explorative study" 2020 *International Journal of Nursing Science* 413 414.

¹⁴ Dixon *Exploring Autism Spectrum Disorder in African Children Using Multiple Case Study Methodology* (2015 MA thesis UKZN) 59.

¹⁵ Karritt *Parenting a Child with Autism Spectrum Disorder (ASD) in the Context of COVID-19 in South Africa: A Qualitative Study* (2022 MA thesis US) 68.

¹⁶ Mkabile *et al* "African families' and caregivers' experiences of raising a child with intellectual disability: a narrative synthesis of qualitative studies" 2021 *African Journal of Disability* 1.

¹⁷ See *Morgan v Buckinghamshire Council* 2022 EAT 160 (28 Oct 2022) par 122, where the court found that the employer's reference to the masking behaviour of the autistic employee constituted harassment, in particular as the inference was that the employee was deceitful and this affected her dignity. In a letter dismissing the employee (a social worker), the employer noted that "you chose to withhold your autism through 'masking' throughout much of your employment potentially putting at risk the vulnerable children with which you were working" (par 74).

¹⁸ Kapp *et al* (n 4) 1787.

¹⁹ Cleary *et al* "Autism, discrimination and masking: disrupting a recipe for trauma" 2023 *Issues in Mental Health Nursing* 799 800.

²⁰ Phalisa "Mom, autistic son struggle to find home" *IOL News* (24 Jan 2017) <https://www.iol.co.za/news/mom-autistic-son-struggle-to-find-home-7489796> (24-09-2024).

²¹ Jarwala and Singh "When disability is a 'nuisance': how chronic nuisance ordinances push residents with disabilities out of their homes" 2019 *Harvard Civil Rights-Civil Liberties Law Review* 875 877.

²² Costello "Disability as 'abnormal': court sanctioned violence against individuals with disabilities" 2022 *Harvard Civil Rights-Civil Liberties Law Review* 755 760.

²³ Roulstone "Disabled people, hate crime and citizenship" in Watermeyer *et al* (eds) *The Palgrave Handbook of Disability and Citizenship in the Global South* (2019) 339 341.

of hate crimes targeted at persons with disabilities has been explicitly legislated in South Africa.²⁴

Persons with other neurological or neurodevelopmental disabilities, psycho-social or intellectual disabilities may also vocalise in certain ways, often involuntarily.²⁵ These vocalisations may be very loud. Generally, society may then deem self-regulatory or involuntary vocalisations or behaviour as being “anti-social” behaviour. This conduct may negatively affect the exercise of a neighbour’s rights, in particular when this noise is deemed excessive.²⁶ Inappropriately high levels of noise can be deleterious to the health of community members.²⁷

Nuisance lawsuits have been brought in some countries by neighbours seeking to obtain abatement notices and enforcement of their rights to an undisturbed and peaceful environment, sometimes to the extent of threatening the family’s eviction. In San Diego in the United States, a mother of an autistic child identified that “it was deeply hurtful” when her neighbour sued her to declare her son a “nuisance”, which prompted her to counter-sue for harassment.²⁸ Such examples of noise complaints against persons with disabilities occur across the globe and rarely make it to the courts.²⁹

There are also *ad hoc* anecdotal accounts of this happening in South Africa. One account identifies a nineteen-year-old autistic adult and his parent being harassed by a neighbour in a sectional title scheme (apartment block) because his stimming

²⁴ The Prevention and Combating of Hate Crimes Act 16 of 2023 was assented to by the president on 6 May 2024 and made a hate crime on the basis of various characteristics, including disability, unlawfulness. See s 3(1) of the act. Cf Holness “Hate crime based on disability in South Africa: lessons for law reform” 2021 *SA Crime Quarterly* 2 15.

²⁵ Mainka *et al* “The spectrum of involuntary vocalizations in humans: a video atlas” 2019 *Movement Disorders* 1774 1775.

²⁶ *R (on the application of Susan Fisher) v Durham County Council* 2020 EWHC 2020 EWHC 1277 (Admin).

²⁷ World Health Organization *Guidelines for Community Noise* (1999) par 27 <http://whqlibdoc.who.int/hq/1999/a68672.pdf> (10-04-2024).

²⁸ Trujillo “‘It was deeply hurtful’: lawsuit asks court to declare San Jose boy with autism a ‘nuisance’” *NBC Bay Area* (14 Mar 2024) <https://www.nbcbayarea.com/news/local/san-jose-lawsuit-autism-nuisance/3481996/> (19-05-2024).

²⁹ Delogierung wegen autistischen Buben (“Eviction because of autistic boy”) *Der Standard* (4-11-2010) <https://www.derstandard.at/story/1288659500797/delogierung-wegen-autistischen-buben> (Vienna, Austria) (29-05-2024); Startsat60 Writers “Angry letter to neighbour with noisy disabled son divides community” <https://startsat60.com/media/health/4074-group-mum-with-disabled-son-sent-angry-letter-about-noises-in-community> (Australia) (29-05-2024); Zytaruk “Whalley family evicted, says neighbour complained child with special needs is too noisy” (29-05-2024) <https://www.surreynowleader.com/news/whalley-family-evicted-after-neighbour-complains-special-needs-child-is-too-noisy-2973315> (British Columbia, Canada) (29-05-2024); Bright “Charity pleads for tolerance as autistic youngsters face Asbos” *The Guardian* (22-05-2005) <https://www.theguardian.com/society/2005/may/22/youthjustice.politics> (United Kingdom) (29-05-2024); Mashburn and Headrick “Renter claims discrimination over son’s autistic behavior” *KSL News* (28-10-2013) <https://www.ksl.com/article/27426852/renter-claims-discrimination-over-sons-autistic-behavior> (Utah, USA) (29-05-2024); Scott “Riverdale parent faces eviction over special needs child” *North Jersey* (26-06-2016) <https://www.northjersey.com/story/news/morris/butler/2016/06/26/riverdale-parent-faces-eviction-over-special-needs-child/94870922/> (Alexan Riverdale, New Jersey, USA) (29-05-2024); Krieg “King County Housing Authority to evict single mother because her autistic toddler is too loud” *The Stranger* (May 2022) 9 (Seattle, USA); “Harwood Heights mom of autistic infant claims landlord is unfairly evicting her family” *CBS News* (22-08-2018) <https://www.cbsnews.com/chicago/news/autistic-baby-eviction/> (Chicago, USA) (29-05-2024); “Autistic boy’s noise leads to eviction notice” *(CBC News* 12-10-2013) <https://www.cbc.ca/news/canada/ottawa/autistic-boy-s-noise-leads-to-eviction-notice-1.1991921> (Ottawa, Canada) (29-05-2024); Fragomeni “Autistic Hamilton boy’s family gets eviction reprieve” *The Hamilton Spectator* (8-08-2014) (Ontario, Canada);

caused a “nuisance”. The neighbour threatened to have the young person removed by the police or that he would call the department of social development to have the child “removed” and “institutionalised” as his parental care was neglectful.³⁰ In Gauteng, zoning laws have been used, ostensibly, to restrict the activities of educational and therapy provision to autistic children.³¹ This may result from community stigma against autistic persons. Nuisance complaints against autistic persons have been studied in limited circumstances.³²

In light of international law’s espousal of the need for states to employ anti-discrimination measures in relation to community living and independent living of persons with disabilities,³³ the question arises as to the extent to which states may continue to rely on municipal by-laws and national legislation aimed at addressing anti-social behaviour to impose prejudicial measures on persons with disabilities exhibiting this behaviour. Or may states turn a blind eye to the harassment of persons with disabilities by their neighbours in the scope and course of such interactions? It also highlights the tendency to neglect the needs of autistic individuals to have a home environment that caters to their unique circumstances, or so-called neurodiverse spaces, which may promote better emotional regulation.³⁴

3 A disability rights approach

3.1 Introduction

Loosely, a disability rights approach seeks to foreground the person with the disability as the rights holder³⁵ and to dismantle the ableism³⁶ inherent in many institutional frameworks, including laws and policies, which exclude the needs and concerns of persons with disabilities. This is a move away from charitable and

Hendricks “Noise complaints may lead to eviction for Winnipeg family of boy living with autism” *CTV News Winnipeg* (10-01-2024) <https://winnipeg.ctvnews.ca/noise-complaints-may-lead-to-eviction-for-winnipeg-family-of-boy-living-with-autism-1.6718789> (Winnipeg, Canada); Defensoría de la Discapacidad “Juez de policía local acoge nuestra defensa: Ruidos que emite niño autista no pueden ser considerados ruidos molestos” (“Local police judge accepts our defense: noises made by an autistic child cannot be considered annoying noises”) (10-01-2022) <https://www.facebook.com/defensoriadeladisapacidad/photos/a.752829504778599/4836640353064140/?type=3> (Chile) (19-05-2024).

³⁰ Holness and Aziz “COVID-19 – the impact on children with autism, their parents and/or caregivers” <https://law.ukzn.ac.za/covid-19-the-impact-on-children-with-autism-their-parents-and-or-caregivers/>, discussed in Holness “Parent-led activism and children with disabilities in South Africa” in Rioux *et al* (eds) *Handbook of Disability: Critical Thought and Social Change in a Globalizing World* (2022) https://doi.org/10.1007/978-981-16-1278-7_11-1 (19-05-2024).

³¹ *SNAPS Shot Investments 1465 CC v Centre for Autism Research and Education* (21618/2013) 2014 ZAGPJHC 227 (19 Sept 2014) par 11 and 15.

³² Jarwala and Singh (n 21) 875 888. In a different context, see Van den Eede *The Right to Protection Against Noise Nuisance as a Threat to the Right of the Child to Play: An Analysis of the Case of Belgium* (2012 M thesis, Università degli studi di Padova) (the author in this thesis in human rights and democratisation considered noise made by children playing: in the European context) 1 24.

³³ a 5 and 19 of the UN Convention on the Rights of Persons with Disabilities.

³⁴ Clément *et al* “The need for sensory-friendly ‘zones’: learning from youth on the autism spectrum, their families, and autistic mentors using a participatory approach” 2022 *Frontiers Psychology* 1 11.

³⁵ Degener “Disability in a human rights context” 2016 *Laws* 1 13.

³⁶ Ableism is understood to be a system of oppression when discrimination is perpetrated and targeted at persons perceived to be “disabled”, and relies on socially constructed expectations of what is “normal” and the abilities that individuals should possess in order to be granted social rights, agency and personhood; Billawala and Wolbring “Analyzing the discourse surrounding autism in the *New York Times* using an ableism lens” 2014 *Disability Studies Quarterly* <https://dsq-sds.org/article/view/3348> (19-05-2024).

medical approaches to disability, and towards a human rights approach of disability.³⁷ Kanter's exposition of some of the articles in the United Nations' Convention on the Rights of Persons with Disabilities (CRPD), such as those on provision of support, accessibility, reasonable accommodation and independent and community living, supports a persuasive argument that these "new" entitlements under international law are substantive.³⁸ Lawson and Beckett suggest that the social model of disability and the human rights model to disability are complementary.³⁹ They explain that the social model acts as a "tool" to assist in questioning and with the reorientation of law and policy responses to disability in addition to the transformation of social structures and systems, while the human rights model is "prescriptive" and seeks to put forward appropriate legal and policy responses to disability.⁴⁰ The social model identifies what needs to change and the human rights model may suggest how to go about doing so.

To reiterate, the human rights model of disability clearly identifies persons with disabilities as rights holders, so creating obligations on both sides for ensuring that rights are respected, protected, and fulfilled.⁴¹ The African commission on human and peoples' rights foregrounds the human rights approach to disability in its (so far limited) jurisprudence on the rights of persons with disabilities.⁴² Building on this interpretation of the provisions of the African Charter on Human and Peoples' Rights (ACHPR), the Protocol to the ACHPR on the Rights of Persons with Disabilities (the African Disability Protocol) "is capable of transforming the rights experience of persons with disabilities in Africa" as it builds on the CRPD's provisions and existing African regional provisions to ensure contextual application to problems faced by our peoples.⁴³

3.2 Neurodiversity and human rights

The neurodiversity paradigm is aligned with the social model of disability, as it proposes "a pluralistic view of human ability that rejects normative constructions of functional and dysfunctional".⁴⁴ This paradigm seeks to unmask that neurodivergent persons are "dis(abled)" by socio-cultural structures that privilege these normative

³⁷ Retief and Rantoo "Models of disability: A brief overview" 2018 *HTS Teologiese Studies* 1 7; Stein and Lord "Human rights and humanitarian assistance for refugees and internally displaced persons with disabilities" in Grobbelaar-Du Plessis and Van Reenen (eds) *Aspects of Disability Law in Africa* (2011) 31 42.

³⁸ Kanter *The Development of Disability Rights under International Law: From Charity to Human Rights* (2014) 9.

³⁹ Lawson and Beckett "The social and human rights models of disability: towards a complementarity thesis" 2021 *The International Journal of Human Rights* 348 350.

⁴⁰ Lawson and Beckett (n 39) 364.

⁴¹ Lawson and Beckett (n 39) 368.

⁴² Msipa and Juma "The African Disability Protocol: Toward a social and human rights approach to disability in the African human rights system" in Rioux *et al* (n 30) 231 237 (referring to *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHR LR 96 (ACHPR). Cf Abay "An evaluation of disability human rights under the African regional human rights system" 2015 *African Journal of International and Comparative Law* 476-479.

⁴³ Msipa and Juma (n 42) 245.

⁴⁴ Fox "Re-writing the "rules of engagement": using critical reflection to examine ableist social work practice" 2021 *Aotearoa New Zealand Social Work* 44 45 citing Dinishak "The deficit view and its critics" 2016 *Disability Studies Quarterly* 5. Cf Ne'eman and Pellicano "Neurodiversity as politics" 2022 *Human Development* 149 151.

categorisations of functioning”.⁴⁵ When living in their communities, autistic persons are subjected to the social norms of functioning under nuisance laws, which may disproportionately categorise their behaviour as being anti-social. This paradigm supports what Lollini calls “brain plurality” and accepts human variation and difference (diversity) as a response to hegemonic constructions of disability, including being autistic.⁴⁶

In this context, autistic persons are rights holders, as are other residents. The autistic person at the centre of the nuisance dispute has a vertical relationship with the state, which should implement measures of anti-discrimination and positive measures in relation to their housing situation, including adjustments where needed to enable their full participation in community life; and a horizontal relationship with the neighbour in terms of cordial relations that promote a safe and peaceful environment for both. It has been proposed that urban spaces should be neurodiverse in their design.⁴⁷

Vanolo explains that the “spatial condition of difference” is attached to autistic identities in neighbourhoods, in particular as communities seek to inscribe “regimes of normativity” to urban spaces when it separates what is deemed to be “appropriate” and “acceptable” from “inappropriate” and “intolerable” in relation to the conduct of autistic neighbours.⁴⁸ As a result, autistic persons may be driven to attempt to “negate, normalize, mask or morph their natural characteristics and behaviors” in order to comply with social norms. Furthermore, he explains that the sensorial stimuli and social experiences that characterise urban spaces (lights, sounds, smells or tactile stimuli) may be a constant sensorial challenge for autistic persons, which necessitates urban design that is more “sensory-friendly” and which caters for neurodiversity.⁴⁹ Lastly, Vanolo explains that neighbourhoods act as spaces where rights are contextual and processes of disablement may occur when “everyday rights” are negotiated, but that these spaces may also offer social inclusion and transformative encounters.⁵⁰ The creation of autism-friendly spaces, he suggests, should include designs that limit sensory stimuli – visual, acoustic and olfactory – as these can contribute to higher incidences of stimming and meltdowns and affect the quality of life of autistic persons when they experience these extreme versions of emotional distress.⁵¹ It also affects their interactions with community members – and here the inclusionary aspect of *autism-friendly spaces* comes in.

Universal design is a relatively new concept in South Africa,⁵² and its provision has been incorporated into legislation.⁵³ The groundwork has been laid for consideration of autism-friendly homes and neighbourhoods – placing the needs of the autistic person at the centre of our human settlements’ planning and community relationships. Such a focus would comply with the disability rights approach.

⁴⁵ Fox (n 44) citing Den-Houting “Neurodiversity: An insider’s perspective” 2019 *Autism* 271.

⁴⁶ Lollini “Brain equality: legal implications of neurodiversity in a comparative perspective” 2018 *NYU International Law and Politics* 69 72.

⁴⁷ Vanolo “Autistic cities: critical urbanism and the politics of neurodiversity” 2023 *City* 190 191.

⁴⁸ Vanolo (n 47) 191.

⁴⁹ Vanolo (n 47) 191.

⁵⁰ Vanolo (n 47) 192.

⁵¹ Vanolo (n 47) 191. Cf Toronyi “Hidden geographies: design for neurodivergent ways of hearing and sensing” 2021 *Cities & Health* 133 133.

⁵² Department of Women, Youth and Persons with Disabilities *National Strategic Framework on Universal Design and Access* GN 606 in GG 45328 (15-10-2021).

⁵³ s 9(c) of PEPUDA.

The implementation of such an approach in the context of low- to middle-income countries, and in particular South Africa, has not been studied.

3.3 Sustainable development and inclusive homes and public spaces

The 2030 Agenda for Sustainable Development has not benefited persons with disabilities to the extent expected. This is because of, *inter alia*, inadequate monitoring of the implementation of the Sustainable Development Goals (SDGs), in part due to inadequate collection of disability-disaggregated data despite the requirements to do so set out as a specific SDG.⁵⁴ Disability-disaggregated data, not only from national surveys such as censuses but also obtained from small-scale community-based surveys, may assist with planning for service delivery for particular populations.⁵⁵ Part of the problem of the invisibility of autism-related needs is the lack of data in relation to autistic persons living in communities. Furthermore, the invisibility of the harassment and discrimination they experience is the fact that these matters do not make it to court, with the conduct then being contained within communities and cloaked with respectability under the guise of social norms often contained in body corporate rules or nuisance laws.

The SDG goal to render urban spaces and human settlements “inclusive, safe, resilient and sustainable” includes accessible transport and universal access to safe, inclusive and accessible green and public spaces,⁵⁶ in particular for those with disabilities.⁵⁷ For autistic persons, access to green spaces (and blue spaces)⁵⁸ and inclusive public spaces and amenities is vital for their well-being and to promote community living.⁵⁹ The policy guidelines developed to help states track their progress in relation to the SDGs for persons with disabilities identify that systemic inequalities may be perpetuated by by-laws and policies that do not include reasonable accommodations for persons with disabilities.⁶⁰

For autistic persons then, a disability rights approach includes the principle of inclusion, not exclusion, and this may require reasonable accommodation, where necessary, of the particular needs of a person with a disability. Laws should contain proactive measures to recognise and accommodate neurodiverse persons, instead

⁵⁴ Lockwood “Disability rights monitoring: focus on the sustainable development goals” 2022 in Rioux (n 30) 663. See SDG 17.18: “By 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, *disability*, geographic location and other characteristics relevant in national contexts”.

⁵⁵ Maart *et al* “Disability prevalence-context matters: A descriptive community-based survey” 2019 *African Journal of Disability* 17.

⁵⁶ Indicator 11.7.1 is the “average share of the built-up area of cities that is open space for public use for all, by sex, age and persons with disabilities”.

⁵⁷ Aghabozorgi *et al* “Assessing the impact of blue and green spaces on mental health of disabled children: A scoping review” 2023 *Health & Place* 12.

⁵⁸ McAllister *et al* explaining that a green space refers to “an area of grass, trees or other vegetation set apart for recreational or aesthetic purposes in an otherwise urban environment” while a blue space refers to “water in a city such as a river, streams, canals, lakes and fountains” – “Autism spectrum condition and the built environment” 2022 *Cities & Health* 1164 1176.

⁵⁹ McAllister *et al* (n 58) 1164.

⁶⁰ OHCHR *Policy Guidelines for Inclusive Sustainable Development Goals: Foundations* (2020) 1 35 and 36 <https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SDG-CRPD-Resource/Foundations/policy-guideline-foundations-final.pdf> (10-04-2024).

of reactively accommodating on request.⁶¹ The question then is whether the law of nuisance is compliant with the disability rights approach.

3.4 Disability rights approach compliance

3.4.1 Introduction

A core right for persons with disabilities is the right to adequate housing. This right, generally, is understood to confer “legal security of tenure” and to demarcate “availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location and cultural adequacy”.⁶² For South Africa to meet its obligations in international law to not discriminate against autistic persons who stim when in the comfort of their home, the laws, policies and conduct of persons need to comply with the normative guidelines. These include not only the disability-specific laws (the CRPD and the African Disability Protocol) – anti-discrimination and housing-related instruments would also be relevant (International Covenant on Economic, Social and Cultural Rights (ICESCR), for example). The United Nations resolved in 2012 that its member states should, in order to

“enhance access to appropriate support services and equal opportunities for inclusion and participation in society, [provide], as appropriate, training to public administrators, service providers, carers, caregivers, families and non-professionals on the needs and rights of persons with autism spectrum disorders”.⁶³

A similar neurodiversity-cognisant approach has not yet been called for in Africa.

International law requires states to implement measures to meet a variety of interlocking rights where a person with a disability (in this instance an autistic person) interacts with a neighbour. One important keystone right is the right to live independently and in the community.⁶⁴ The committee on the rights of persons with disabilities has decried the continued barrier of “[n]egative attitudes, stigma and stereotypes preventing persons with disabilities from being included in the community and accessing available assistance”.⁶⁵ It has called on states to “[c]reate awareness programmes that tackle negative attitudes and stereotypes about persons with disabilities and secure community transformation in an effort to develop individualized and accessible mainstream services”.⁶⁶ The recognition of this right to community living also requires a distinct affirmation of the deinstitutionalisation imperative that a human rights approach to disability requires.⁶⁷ Simon’s threat of having Nadia “institutionalised”, then, is not in line with the imperative in

⁶¹ Mpedi “The law must adapt to recognise and accommodate neurodivergent individuals” *Daily Maverick* (6 March 2024) <https://www.dailymaverick.co.za/opinionista/2024-03-06-law-must-adapt-to-recognise-accommodate-neurodivergent-people/> (10-04-2024).

⁶² Marutlulle “An exploration of the impact of inadequate housing on health in South Africa” 2022 *Administratio Publica* 52 53.

⁶³ UN General Assembly Resolution 67/82: Addressing the socioeconomic needs of individuals, families and societies affected by autism spectrum disorders, developmental disorders and associated disabilities, 12 Dec 2012 par 1.

⁶⁴ a 19 of the CRPD.

⁶⁵ Committee on the Rights of Persons with Disabilities *General Comment no 5 on Living Independently and being included in the Community*, 27 Oct 2017, CRPD/C/GC/5 par 15.

⁶⁶ *General comment no 5* (n 65) par 97(h).

⁶⁷ Kanter “There’s no place like home: the right to live in the community for people with disabilities under international law and the domestic laws of the United States and Israel” 2012 *Israel Law Review* 181 183.

international law to deinstitutionalise and ensure discrimination-free community living.

This right is correlated with the right to an adequate standard of living and social protection:⁶⁸

“States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right *without discrimination on the basis of disability*.”⁶⁹

The implementation of this right, Basson explains,⁷⁰ obligates states parties to provide persons with disabilities “access to the means to ensure such full and equal participation” and to use measures articulated such as the adoption of legislative measures to recognise the rights of persons with disabilities and the abolition of discriminatory laws and policies.⁷¹ While the right to adequate housing is subject to the limitation of progressive realisation, the prohibition on discrimination is not – and is immediately realisable.⁷²

The committee on the social, economic and cultural rights, in their General Comment no 4, identify a “degree of priority” to be awarded to particular groups, including the “physically disabled” and “persons with persistent medical problems, the mentally ill”.⁷³ Autistic persons could arguably be included in this definition, although the comment suffers from the usual drawback that preference is given to those with physical or psycho-social disabilities and that neurodevelopmental disabilities remain invisible as they are not explicitly mentioned in the provision.

The African Disability Protocol takes a firm stance on stigma, with its provision on prohibition of harmful practices⁷⁴ which also includes a clause mandating states parties to “take measures to discourage stereotyped views on the capabilities, appearance or behaviour of persons with disabilities, and they shall prohibit the use of derogatory language against persons with disabilities”.⁷⁵ This provision is crucial in the context of the community stigma faced by families such as Nadia’s.

The challenge with retaining laws such as nuisance laws in domestic frameworks is the disproportionate impact on specific categories of persons – in this instance, persons with disabilities who make involuntary noises, and where they live with their families associational discrimination may also be suffered by family members. Associational discrimination is prohibited by many treaties.

Protection of the rights to peaceful and undisturbed property of neighbours is an important public good. But the making of what is deemed to be “excessive” noise by

⁶⁸ a 28 of the CRPD and a 20 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (the African Disability Protocol). This also correlates with a 9 and 11 of the ICESCR; Fasciglione “Article 28 [Adequate standard of living and social protection]” in Fina *et al* (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 509.

⁶⁹ a 28(1) of the CRPD – emphasis added.

⁷⁰ Basson “The right to an adequate standard of living in the Protocol to the African Charter on Human and Peoples (Regional Developments)” in *The African Disability Rights Yearbook* (2019) 258 261.

⁷¹ a 4 of the CRPD and a 4 of the African Disability Protocol.

⁷² Committee on the Rights of Persons with Disabilities *General Comment 6: Equality and Non-Discrimination* (2018) CRPD/C/GC/6 (26-04-2018) par 12.

⁷³ Committee on Economic, Social and Cultural Rights *General Comment no 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)* E/1992/23 par 8(e).

⁷⁴ a 11 of the African Disability Protocol.

⁷⁵ a 11(2).

a person without a disability should not be treated in the same way as that made by a person with a specific disability which renders their conduct involuntary.

3.4.2 International and regional jurisprudence

Next, the analogous situation of petty crimes is considered. The disproportionate application of vagrancy or loitering laws to homeless persons, resulting in “criminalisation” of this group of persons, has been explored not only in the literature but also by regional and international bodies.⁷⁶ In that context, the argument has been made that the implementation of by-laws results in “police harassment, criminalisation of life-sustaining activities, community stigmatisation and rights infringements” such as the rights to dignity, movement and property, whose impact is “demeaning and harmful – both physically and psychologically” to those targeted by the law.⁷⁷ This situation is comparable to that of persons in Nadia’s situation, as nuisance by-laws stipulating specific social norms may be impossible for some persons to comply with, resulting in the criminalisation of their behaviour.

In 2020, the African court on human and peoples’ rights (African court) issued an advisory opinion brought by Pan African Lawyers Union (PALU) “On the compatibility of vagrancy laws with the African Charter on Human and Peoples’ Rights and other Human Rights Instruments in Africa” (PALU opinion) relating to diverse petty offences.⁷⁸ In the African court’s opinion, states with vagrancy offences violate several provisions of regional law because they target persons based on their status, such as being a homeless person. The court also opined that this disproportionate impact discriminates against various persons such as women and persons with disabilities who are more likely to experience homelessness and so denies them the equal protection of the law.⁷⁹ The rationality of these offences was also found wanting in that the enforcement of those laws did not meet the stated objectives, which were crime prevention.⁸⁰ Holness argues that this opinion underscores the need for states to audit laws that target persons based on their status or conduct.⁸¹ It could be argued that autism is a status (as a disability) and that stimming behaviour is so intrinsically linked with the autism diagnosis and life experience of some autistic persons that nuisance laws effectively act similarly to how they do in relation to petty crimes, in targeting persons who are *unable* to comply with the restrictions made on them.

Add to this the reality that access to green and blue spaces for children with disabilities, including playgrounds for autistic children, is rare.⁸² A perfect storm

⁷⁶ Holness “eThekweni’s discriminatory bylaws: Criminalising homelessness” 2020 *Law, Democracy and Development* 468 482; UN General Assembly *Breaking the Cycle: Ending the Criminalization of Homelessness and Poverty* Report of the Special Rapporteur on extreme poverty and human rights A/HRC/56/61/Add.3: par 26 (26-06-2024); African Commission on Human and Peoples’ Rights (African Commission) *Principles on Decriminalisation of Petty Offences in Africa* ACHPR/Res 366 (EXT.OS/XXI) (2017) par 1 (Decriminalisation Principles).

⁷⁷ Holness (n 76) 489.

⁷⁸ African court *PALU opinion* Advisory Opinion no 001/2018 (4 December 2020) <https://www.african-court.org/cpmt/details-advisory/0012020> (17-02-2026).

⁷⁹ *PALU opinion* (n 78) par 73-75.

⁸⁰ *PALU opinion* (n 78) par 82.

⁸¹ Holness “Decriminalising vagrancy offences in Africa beyond the African court’s advisory opinion: *quo vadis?*” 2021 *African Human Rights Yearbook* 377 399.

⁸² United Nations Committee on the Rights of the Child *Concluding observations on the combined 5th and 6th periodic reports of Norway* CRC/C/NOR/CO/5-6 1 June 2018 par 30. *Cf* United Nations Committee on the Rights of the Child *General comment no 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31)* CRC/C/GC/17 par 24 and 50.

is then created for the unmet needs of autistic persons to become a target for anti-social measures. Furthermore, the jurisprudence of prohibition of hate crime and harassment is a strong indicator at an international level of the duty on states to take positive steps to protect persons with disabilities who are subjected to unfair discrimination or harassment and their families or caregivers who suffer from associational discrimination or harassment.

For example, in *Dorđević v Croatia* a mother and her son with intellectual and physical disabilities were both physically and verbally harassed by neighbourhood children over four years, with no attempt by authorities to protect them.⁸³ The child was left “disturbed, afraid and anxious”. Despite numerous complaints, including to the police, they were not assisted. The police, in one instance, found the harassing children to be under the age of criminal responsibility. The European court of human rights (ECtHR) found that this was a matter where the state’s positive obligations arose, outside of the limited sphere of criminal law, as the authorities were aware of serious harassment directed at this person with disabilities. The ECtHR found violations by the state of the prohibition on inhuman or degrading treatment and that the Croatian authorities had not done enough to address the harassing treatment.⁸⁴ The court indicated that policy decisions were not taken, monitoring mechanisms were not implemented, nor were interventions offered by social services or counselling offered to the young man. Ultimately, it found that “no relevant action of a general nature to combat the underlying problem” was taken. Furthermore, the court commented on “disability hate crimes” which were raised as an issue by a third party at the trial, the European disability forum. The ECtHR explained that “the response of the authorities to that phenomenon [disability hate crimes] should shift from reactive to proactive and be aimed at protecting persons with disabilities from all acts of violence”. Weinberg opines that this case also implicated the young person’s right to freedom of movement because each time he ventured outside his apartment he was harassed, to the extent that the school authorities stated he should remain at home to avoid such harassment.⁸⁵ For autistic persons such as Nadia, the converse is also true and just as prejudicial: they may be banned from their own homes as a result of exhibiting involuntary behaviour and because of harassment from their neighbours.

In *GL v Italy*,⁸⁶ the Italian state’s lack of provisioning for the specialised learning support that the non-verbal autistic child required for two years, despite a domestic legal obligation to do so,⁸⁷ was found to violate the prohibition of discrimination and the right to education of the European Convention on Human Rights.⁸⁸ The ECtHR stressed that the discrimination was egregious as it occurred in the context of her primary education “when the foundations are laid which provide the bases for overall education and social integration and the first experiences of living

⁸³ 2012 ECHR 1640 (24 July 2012) par 149.

⁸⁴ a 3 of the convention.

⁸⁵ Weinberg “Disability hate crimes and the State’s responsibility to protect the vulnerable: *Dorđević v Croatia* 2012 ECHR 1640 (24 July 2012)” *Human Rights Law Centre* <https://www.hrlc.org.au/human-rights-case-summaries/dordjevic-v-croatia-2012-echr-1640-24-july-2012> (10-04-2024).

⁸⁶ 59751/15 (2022) ECtHR.

⁸⁷ A 38 of the Italian constitution provides that persons with disabilities have a right to education and vocational training. A 3, 8 and 12 of Italy’s Framework Law no 104 of 5 Febr 1992 deals with assistance for, the social integration of, and the protection of the rights of persons with disabilities.

⁸⁸ *GL v Italy* par 72. A 14 (prohibition of discrimination) in conjunction with a 2 (right to education) of Protocol No 1 to the convention.

together”.⁸⁹ This finding on social integration – inclusion – is telling, particularly for children with disabilities. Their homes communities and schooling are key sites for social inclusion and community living.

In *Guberina v Croatia*,⁹⁰ a father sought a tax exemption in order to purchase a smaller home that was appropriate for his youngest child, a boy with multiple physical and intellectual disabilities. Their previous home, a third-floor apartment, was unsuitable as it did not have an elevator, which limited the child’s right to leave the apartment. The Croatian government found that the family was not eligible as their current apartment met the basic requirements of the family, and disregarded the child’s needs. The lower courts had found that “the flat in issue was equipped with the basic infrastructure and hygiene and technical requirements”.⁹¹ The constitutional court complaint lodged by the family noted that their collective specific needs due to the child’s disability were not considered and that they were therefore discriminated against based on an unfair application of the tax legislation;⁹² however, it was unsuccessful. In that court the father argued that the competent administrative authorities had failed to address the factual inequality of the family’s situation with regard to the ordinary meaning of the term “basic infrastructural requirements” meeting the housing needs of his family.⁹³

The father then lodged an application before the ECtHR and argued that the administrative authorities’

“assessment of the basic infrastructural requirements for appropriate housing had been conducted with regard to the needs of able-bodied people, ignoring the fact that the existence of a lift for a disabled person was a fundamental and indispensable feature for housing necessary for easy and unencumbered access”.

The authorities had therefore discriminated against the child by failing to interpret the term “property that satisfies a family’s housing needs” in a way that considered the accessibility of the property in question. This discriminatory treatment, in the applicant’s view, had no reasonable justification, in particular given that the problem of accessibility impeded his son’s ability to leave the flat, thereby restricting all his other rights, such as those to adequate health treatment, education, and personal development. That consequently affected the entire family, which had had to cope with the problem of accessibility and also to bear a significant financial burden related to the son’s disability.⁹⁴ The third-party interveners’ argument that discrimination by association was prohibited under international law (the family being discriminated against as a result of the child’s disability status and needs) and that failure to offer reasonable accommodation amounted to discrimination was supported by the ECtHR.⁹⁵ Furthermore, the court held that persons with disabilities should be able to exercise their rights (including to property) without discrimination and to live in “inaccessible homes impeded participation in the life of the community and led to isolation and the segregation of disabled individuals and their entire families”.⁹⁶

⁸⁹ the *GL* case (n 86) par 71, also referring to *Ponomaryovi v Bulgaria* no 5335/05 ECtHR 2011 par 56-57.

⁹⁰ 23682/13 ECtHR 22 March 2016.

⁹¹ the *Guberina* case (n 90) par 16.

⁹² s 11 of the Real Property Transfer Tax Act (*Zakon o porezu na promet nekretnina*, Official Gazette no 69/1997, 26/2000, 127/2000 and 153/2002).

⁹³ the *Guberina* case (n 90) par 18.

⁹⁴ the *Guberina* case (n 90) par 56.

⁹⁵ the *Guberina* case (n 90) par 58.

⁹⁶ the *Guberina* case (n 90) par 65.

The ECtHR considered the domestic law on anti-discrimination, including on accessibility⁹⁷ and found in favour of the family that the failure to consider the child's disability and needs violated their right not to be discriminated against under article 14 of the convention. The domestic authorities had "failed to recognise the factual specificity of the applicant's situation with regard to the question of basic infrastructure and technical accommodation requirements to meet the housing needs of his family" and in particular disregarded "the applicant's arguments concerning his family's specific needs arising out of his child's disability".⁹⁸ The Croatian government had not offered an "objective and reasonable justification for their failure to consider the inequality inherent in the applicant's situation when assessing his tax obligation".⁹⁹ The ECtHR commented that "individualised evaluation" of the "capacities and needs" of persons with disabilities is needed, to avoid "legislative stereotyping".¹⁰⁰

From this case, it can be seen that families finding themselves in the position of Nadia and her family would also suffer associational discrimination because of her disability and, furthermore, that her and therefore the family's needs would have to be assessed in a situation where their rights are weighed against those of others (their neighbours).

An example of attempts at good practice in relation to a disability rights-compliant approach being an unmet reality is found in the United Kingdom. There, youth with psycho-social or intellectual disabilities may be disproportionately subjected to anti-social behaviour orders, and the context and use of these orders is understudied.¹⁰¹ The introduction of the Disability Discrimination Act in 1995 (and key amendments in 2005)¹⁰² saw a duty created on local authorities and registered social housing landlords to eliminate unfair discrimination and harassment based on the disability of the person and to take steps to ensure that their needs are met, even when it requires more favourable treatment. However, Hunter *et al* found that "subjects of anti-social behaviour interventions often have mental health problems, learning difficulties and neurological disorders". They questioned the extent to which the use of "potentially punitive control mechanisms" such as nuisance laws used against persons with disabilities can be justified.¹⁰³

⁹⁷ A 14, 34, 35 and 38 of the Constitution of the Republic of Croatia on prohibition of discrimination, the inviolability of the home, and the right to respect for and legal protection of his or her private and family life, dignity, reputation and honour (*Ustav Republike Hrvatske*, Official Gazette no 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010 and 5/2014); s 1, 2, 7, 9 and 12 of the by-law on the accessibility of buildings for persons with disabilities and reduced mobility, referring to accessibility requirements, including lifts for persons with mobility impairments (*Pravilnik o pristupačnosti građevina osobama s invaliditetom i smanjene pokretljivosti*, Official Gazette no 151/2005 and 61/2007); s 1 and 17 of the Prevention of Discrimination Act (*Zakon o suzbijanju diskriminacije*, Official Gazette no 85/2008) on anti-discrimination measures.

⁹⁸ the *Guberina* case (n 90) par 84-86.

⁹⁹ the *Guberina* case (n 90) par 98.

¹⁰⁰ the *Guberina* case (n 90) par 73.

¹⁰¹ Hunter *et al* *Disabled People's Experiences of Antisocial Behaviour and Harassment in Social Housing: A Critical Review* (2007) Centre for Education Research and Social Exclusion <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/hodge-ASBO-Final-Report.pdf> (17-02-2026).

¹⁰² s 22(3)(c) and 25 of the Disability Discrimination Act, 1995; s 13 of the Disability Discrimination Act, 2005.

¹⁰³ Hunter *et al* (n 101) 10.

3.4.3 Concluding remarks

Overall, then, international law and jurisprudence require positive measures from states to not only protect persons with disabilities from discrimination but also to ensure that their housing and community living needs are met in a way which complies with their rights to equality (including non-discrimination) and dignity.

The Netherlands, like other Western societies, established noise abatement societies as an attempt to address rising noise levels in the first half of the twentieth century.¹⁰⁴ However, parliament bought into a campaign called “Let’s be gentle with each other”, premised on subjective decisions about what neighbourly noise is annoying and an exhortation to resolve the noise complaint amicably with one’s neighbour.¹⁰⁵

In Germany, civic minded laws promote quiet time (*Ruhezeit*), which has a legal foundation in municipal noise laws (*Lärmschutzverordnung*) and administrative laws such as the *Ordnungswidrigkeitengesetz* – *OWiG*). The noise generated by children is socially accepted after law reform exempting the noise of children playing in particular neighbourhood contexts.¹⁰⁶ Unsurprisingly, a study found that “a better relationship to neighbours is linked to lower neighbour noise annoyance” with the inverse being associated with neighbourly conflicts.¹⁰⁷ The idea of explicit exemptions granted to noise generated in particular circumstances, eg noise produced by an autistic person when stimming within particular bounds is not far-fetched. International and regional law emphasises a more communitarian and transformative perspective, much more in line with what van der Walt terms “good neighbourliness.”¹⁰⁸

4 The context of “being” and “living” as an autistic person in South African communities

A recent study identified the astounding acknowledgement from South African government stakeholders that the provision of services to the autistic community is “overlooked” due to competing demands on government resources.¹⁰⁹ In South Africa, accessible housing for persons with disabilities remains a challenge.¹¹⁰ As elsewhere in Africa, segregation of persons with disabilities in institutions is less prominent than in the Global North; instead, social isolation occurs where

¹⁰⁴ Bijsterveld “‘The city of din’: decibels, noise, and neighbours in the Netherlands, 1910-1980” 2003 *Osiris* 173.

¹⁰⁵ Bijsterveld (n 104) 191.

¹⁰⁶ S 1a of the Federal Immission Control Act of 2011 (*Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge* (*Bundes-Immissionsschutzgesetz* – *BImSchG*)) states: “Noise which is emitted by children in day care centres, on playgrounds, or similar places like ball courts is generally not a harmful environmental effect. Emissions limits and benchmarks shall not be used to evaluate the noise” (own translation from German).

¹⁰⁷ Benz *et al* “Contributors to neighbour noise annoyance” 2021 *International Journal of Environmental Research and Public Health* 1 10 <https://doi.org/10.3390/ijerph18158098> (26-12-2025).

¹⁰⁸ Van der Walt *The Law of Neighbours* (2010) 6.

¹⁰⁹ Pillay *et al* “‘We are doing damage control’: government stakeholder perspectives of educational and other services for children with autism spectrum disorder in South Africa” 2024 *Autism* 73.

¹¹⁰ Chenwi “Housing for persons with disabilities in South Africa” 2022 *International Journal of Housing Policy* 321 (considered the accessibility for persons with *physical* disabilities only); McKinney and Amosun “Impact of lived experiences of people with disabilities in the built environment in South Africa” 2020 *African Journal of Disability* 1 2 (four participants with disabilities, but none with autism).

persons with disabilities live in communities.¹¹¹ There is a dearth of literature on the experience of autistic persons living in the community.¹¹²

Hanass-Hancock *et al* identify the barrier posed by the out-of-pocket costs of being disabled in South Africa and accessing socioeconomic rights and suggests that “[i]n order to enable meaningful participation in home, community and the workplace, we need innovations for universal design¹¹³ and reasonable accommodation, which target major cost drivers related to communication, housing, road infrastructure and transport”.¹¹⁴ In relation to the design of urban spaces or community spaces that are autism-friendly, South Africa lags (much like most of the world) behind the potential identified in the literature to address sensory overload in urban spaces and to mitigate the potential for emotional dysregulation.¹¹⁵ The challenge with access to autism-friendly housing in South Africa is not only the lack of relevant design standards, but also the socioeconomic reality that most families with an autistic member face. Housing for indigent families with disabilities is scarce and not generally accessible, despite access to a disability grant (for those children requiring 24-hour care), or housing subsidies (for those qualifying for RDP houses). For middle-class families with autistic members, the cost of caring for an autistic person is very high.¹¹⁶ Many families with autistic children live on “a relatively low monthly household income and spend a significant amount on school fees, transportation, medical insurance payments, and extracurricular therapeutic services”.¹¹⁷ Accordingly, families with autistic children have a “high financial burden and require additional financial support from the government”.¹¹⁸ Retrofitting a home to address the sensory needs of an autistic child is also costly. Unlike in some socialist countries, the South African government does not provide funding for adjustments to homes of persons with disabilities who do not meet the means test (eligibility for the subsidy) nor does it provide it to those who are eligible for the grant.

Autistic children face the daunting prospect of waiting lists to enter schools, whether special or mainstream.¹¹⁹ Few specialised schools for autistic children are

¹¹¹ Lord and Stein “Prospects and practices for CRPD implementations in Africa” 2013 *African Disability Rights Yearbook* 97 104.

¹¹² A notable exception is Mupaku *et al* “Transitioning to adulthood from residential childcare during COVID-19: experiences of young people with intellectual disabilities and/or autism spectrum disorder in South Africa” 2021 *British Journal of Learning Disabilities* 341 343. Cf Franz *et al* “Autism spectrum disorder in sub-Saharan Africa: a comprehensive scoping review” 2017 *Autism Research* 723 724.

¹¹³ Universal design refers to “the design of products, environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or specialised design”.

¹¹⁴ Hanass-Hancock *et al* “These are not luxuries, it is essential for access to life”: disability related out-of-pocket costs as a driver of economic vulnerability in South Africa” 2017 *African Journal of Disability* 1 8.

¹¹⁵ Nagib and Williams “Toward an autism-friendly home environment” 2017 *Housing Studies* 140 163.

¹¹⁶ Clasquin-Johnson and Clasquin-Johnson “How deep are your pockets?” Autoethnographic reflections on the cost of raising a child with autism” 2018 *African Journal of Disability* 1 2.

¹¹⁷ Erasmus *et al* “Families raising children attending autism-specific government funded schools in South Africa” 2019 *Journal of Family Studies* 54 59.

¹¹⁸ Erasmus *et al* (n 117) 65; Nasi Hako “South African autism community says ‘government has overlooked us for long enough’” *News24* (18 Feb 2022) <https://www.news24.com/life/archive/south-african-autism-community-says-government-has-overlooked-us-for-long-enough-20220218> (10-04-2024).

¹¹⁹ Pillay *et al* “Who’s waiting for a school? Rates, socio-demographics, disability and referral profile of children with autism spectrum disorder awaiting school placement in the Western Cape Province of South Africa” 2022 *Autism* 1849 1850.

available.¹²⁰ This situation means that a significant proportion of autistic children are, at one point or another, not in the formal education system and most do not receive other interventions while waiting for placement. These children are then living in communities without the necessary support for their education, stimulation and well-being. Early intervention for autistic children is generally not offered and indicates a lack of an intersectoral approach and a lack of autism-specific knowledge among stakeholders.¹²¹

Young and older autistic adults may also continue to live with ageing parents in communities, in particular those with higher support needs, as ultimately, caring for an autistic person may be a life-long task.¹²² Furthermore, their employment opportunities, and therefore living independently, are further circumscribed by few opportunities in the open labour market or support to live independently from family.¹²³ Poor provision of the necessary human and financial resources to autistic persons affects the delivery of “evidence-based interventions, particularly for autistic children”.¹²⁴ From a policy perspective then, the needs of autistic persons remain relatively invisible in South Africa.¹²⁵

During the Covid-19 pandemic, lockdown regulations restricted community and communal living and complaints against autistic children and adults were reported.¹²⁶ Limitations on the ability of autistic persons to self-regulate in confined living spaces caused by the lockdown regulations prompted disabled persons organisations to (unsuccessfully) seek relaxations of the regulations to allow autistic persons to access community spaces to exercise and self-regulate.¹²⁷ Community stigma increased when autistic children experienced more regular meltdowns.¹²⁸ In one study, early childhood education teachers exhibited a lack of understanding of how to support autistic children during the pandemic, with one participant stating: “I do not know how to teach these children, sometimes I just tell them to sleep on their mattresses because they disturb other children. So, when the centre was closed, I did not bother myself to give them any activities to do at home.”¹²⁹ The situation was so dire that there was litigation to facilitate schools’ re-opening for

¹²⁰ Sumbane *et al* “The McKinsey’s 7-S model framework for assessment of challenges faced by teachers of children with autism spectrum disorders in the Limpopo province, South Africa” 2023 *South African Journal of Childhood Education* 1 4.

¹²¹ Franz *et al* “Providing early detection and early intervention for autism spectrum disorder in South Africa: Stakeholder perspectives from the Western Cape province” 2018 *Journal of Child and Adolescent Mental Health* 149 160.

¹²² Marsack-Topolewski and Wilson “Coping strategies used by aging parental caregivers of adults with autism spectrum disorder” 2021 *Families in Society* 119 129.

¹²³ Mhlekwana *et al* “The needs of individuals with autism spectrum disorder when transitioning into the labour market” 2023 *South African Journal of Occupational Therapy* 8 9.

¹²⁴ Viljoen *et al* “Parent/caregiver perspectives of functioning in autism spectrum disorders: A comparative study in Sweden and South Africa” 2019 *Autism* 2112 2127.

¹²⁵ with the exception of the National Integrated Early Childhood Development policy, cited in Rieder *et al* “Improving access to early intervention for autism: Findings from a proof-of-principle cascaded task-sharing naturalistic developmental behavioural intervention in South Africa” 2023 *Child Adolescent Psychiatry Mental Health* 1 3 <https://doi.org/10.1186/s13034-023-00611-0> (10-04-2024).

¹²⁶ Action in Autism submission to South African Law Reform Commission (2020), copy with the author.

¹²⁷ Holness and Aziz (n 30). Cf Broughton “Covid-19: Autism community pleads for relaxed lockdown rules” 2020 *Ground Up* (26 Apr 2020) <https://www.news24.com/news24/southafrica/news/covid-19-autism-community-pleads-for-relaxed-lockdown-rules-20200426> (10-04-2024).

¹²⁸ Karritt (n 15) 87.

¹²⁹ Mzimela “Inclusion of young children with autism spectrum disorder during the Covid-19 lockdowns” 2023 *South African Journal of Education* S1 S7.

autistic children (and children with other disabilities) who did not resume education once regulations were relaxed as the pandemic eased.¹³⁰

Further afield, in countries where social support is more likely to be provided to autistic children and their parents, the Covid-19 lockdown resulted in restrictions on this support and negative impacts on the coping ability of the children and their families.¹³¹ For example, an increase in autistic persons' challenging behaviour occurred, such as frustration, aggression and "outbursts".¹³² Also, additional stressors were reported as a result of

"abrupt and unpredictable disruptions to the child, caregiver, and family daily routines, loss of respite (*ie* limited or no access to support workers as well as grandparents and extended family), loss of caregiver employment leading to financial instability, and loss of recreational and community-based opportunities".¹³³

The pandemic therefore made society much more aware of the peculiar spatial needs of autistic persons.

Autistic children transitioning into adulthood during the pandemic faced significant barriers, including in relation to their mental health.¹³⁴ Generally, support for youth in relation to appropriate accommodation and vocational support when they transition into adulthood is severely lacking in South Africa.¹³⁵ Considering the above short description of the educational, vocational and housing constraints faced by autistic persons in South Africa, it is imperative to consider the state's obligations in this regard.

France was found to have violated its obligations to autistic persons in relation to education by the European committee of social rights – proportionally, autistic children were not educated in mainstream or special schools compared to the non-disabled and children with other disabilities and in relation to support facilities for autistic adults.¹³⁶ Palmisano argues that this decision suggests that a state obligation to adopt positive measures for guidance, education and training for autistic persons will not be met by the adoption of action plans alone, but requires that these are implemented within a reasonable time.¹³⁷ Also, the court made it clear that "an apparently neutral provision or practice" such as public budget restrictions in social policy matters may disadvantage particular persons such as those dependent on community care for independent living and that those restrictions cannot "be equally applied to the field of autism and disability, since this would result in a difference

¹³⁰ *Centre for Child Law v Minister of Basic Education* High Court of Pretoria case 3123/2020 (unreported), discussed in Kamga "COVID-19 and the inclusion of learners with disabilities in basic education in South Africa: a critical analysis" 2020 *African Human Rights Law Journal* 558 582.

¹³¹ Humphreys *et al* "The impact of Covid-19 lockdown on parents and young people with autism spectrum disorder (ASD)" 2024 *Australian Social Work* 183 184.

¹³² Lee *et al* "The impact of Covid-19 on the mental health and wellbeing of caregivers of autistic children and youth: a scoping review" 2021 *Autism Research* 2477 2486.

¹³³ Lee *et al* (n 132) 2487.

¹³⁴ Mupaku *et al* (n 112) 343.

¹³⁵ Meiring *et al* "Transition for adolescents with autism spectrum disorder: South African parent and professional perspectives" 2016 *Frontiers Psychiatry* 1 2.

¹³⁶ *International Association Autism-Europe (IAAE) v France* Compl no 13/2002, Decision on the Merits (2003) par 54; *cf Action Europe'enne des Handicape's (AEH) v France (European Action of the Disabled (AEH) v France)* Compl no 81/2012, Decision on the Merits (2013) par 145.

¹³⁷ Palmisano "The protection of people with autism in the framework of the Council of Europe and the European Union" in Fina and Cera (eds) *Protecting the Rights of People with Autism in the Fields of Education and Employment* (2015) 1 2.

in treatment indirectly based on disability”.¹³⁸ This finding has implications for how South Africa should proceed in relation to its obligations to this population.

When autistic persons interact with the justice system, the lack of adjustments affects their experience of accessing justice.¹³⁹ In fact, they may experience higher levels of mental distress than non-autistic persons, including meltdowns and shutdowns, as a result of their involvement in the justice system.¹⁴⁰ Involvement in community disputes such as noise complaints also puts autistic persons and their families at a distinct disadvantage. A definitive diagnosis of autism, generally understood to constitute a disability, is notoriously difficult to obtain and is often only obtained after a lengthy period of medical assessments and interventions. However, the courts have found that a specific diagnostic label, for example as being autistic, is not necessary to access services or for a person to claim disability discrimination.¹⁴¹

Community participation of autistic persons is generally negatively affected by the stigma they and their families encounter.¹⁴² Yet, a community’s exposure to autistic persons has been positively correlated with addressing harmful stigma/misconceptions.¹⁴³ Generally, then, community support¹⁴⁴ and inclusion in community activities¹⁴⁵ can mitigate stigma and discrimination. Examples of reasonable accommodations abound¹⁴⁶ in the housing context but have not yet been sought in South Africa. McConkey recommends – after reviewing 29 reviews documenting 1 000 studies on the mental health of autistic persons and their families – that low-cost interventions such as family-focused and community-based support to autistic persons and their families may “enhance social communication, extend social connections and promote an individual’s self-esteem, self-determination and social motivation” to mitigate mental health concerns.¹⁴⁷

The challenge then is an old conundrum – how to balance the rights of persons with competing interests – neighbours seeking a home environment free from excessive noise and persons with disabilities seeking to enjoy quality of life in their homes and communities, free from discrimination and harassment.¹⁴⁸ Importantly,

¹³⁸ Palmisano (n 137) 21.

¹³⁹ Slavny-Cross *et al* “Are autistic people disadvantaged by the criminal justice system? A case comparison” 2023 *Autism* 1438 1445.

¹⁴⁰ Slavny-Cross *et al* “Autism and the criminal justice system: An analysis of 93 cases” 2022 *Autism Research* 904 911.

¹⁴¹ *Kelly vs Department for Communities, Department of Finance* Court of Appeal in Northern Ireland 22/025736 (2023) NICA 91 par 43 <https://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2023/Court-of-Appeal-Judgement-PKelly-v-DeptsCommunities-Finance.pdf> (10-04-2024).

¹⁴² Simpson and Adams “Parent-reported environmental factors and strategies to support home and community participation in children on the autism spectrum” 2023 *Disability and Rehabilitation* 3970 3977.

¹⁴³ Jacoby *et al* “Community perspectives on adults with autism spectrum disorder” 2019 *Occupational Therapy in Mental Health* 72 91.

¹⁴⁴ Hall “Families of children with autism: behaviors of children, community support and coping” 2012 *Issues in Comprehensive Pediatric Nursing* 111 132.

¹⁴⁵ McConkey *et al* “Promoting the social inclusion of children with autism spectrum disorders in community groups” 2012 *Early Child Development and Care* 827 832.

¹⁴⁶ Braddock and Rowell “Making homes that work: A resource guide for families living with autism spectrum disorder + co-occurring behaviors” (2011) <https://www.communitylivingbc.ca/wp-content/uploads/2018/03/Making-Homes-That-Work-A-Resource-Guide.pdf> (10-04-2024); Bettarello *et al* “Indoor acoustic requirements for autism-friendly spaces” 2021 *Applied Sciences* 1 19.

¹⁴⁷ McConkey “Nurturing the positive mental health of autistic children, adolescents and adults alongside that of their family care-givers: A review of reviews” 2023 *Brain Sciences* 1.

¹⁴⁸ Nagib and Williams “Toward an autism-friendly home environment” 2017 *Housing Studies* 140 155.

environmental laws and municipal laws are not generally steeped in a disability rights approach. This study therefore seeks to promote a disability rights approach in this area of law.

Environmental protection laws seeking to keep ambient noise at acceptable levels and local government by-law regulation of neighbourly disputes is premised on colonial constructs.¹⁴⁹ One such colonial construct is that certain persons as “undesirable” members of society and their anti-social behaviour need to be curtailed to ensure the undisturbed needs of those deemed to be upstanding members of society. Such undesirable elements have previously included persons who beg or live on the streets. Often, those constructs have not been abolished and remain in municipal laws.¹⁵⁰ Contemporary perspectives of quality of life posit this as a distinct human rights issue requiring a diametrically opposite approach to the historical treatment of the phenomenon.

5 South African law and cases

5.1 Rights framework

The Constitution of the Republic of South Africa, 1996, favours recognition of the rights of persons with disabilities, including autistic persons, to equality, dignity, security of the person (including protection from violence), access to adequate health care and a healthy environment and access to adequate housing.¹⁵¹ It also seeks to balance these rights with those of the rights of neighbours and community members to a healthy environment, and not to be deprived of the enjoyment of their property/housing.¹⁵² Some of the above rights are now considered in turn below:

5.1.1 Housing

The right to housing of persons with disabilities in particular has not been the subject of judicial interpretation. In 2012, the South African government conceded the need to comply with the obligations created by the CRPD for persons with disabilities “to live independently, be included in the community and have access to in-home, residential and community support services, for their personal mobility to be enhanced, and for public housing, services and assistance”.¹⁵³ A constitutional right to access housing “must be framed in a disability rights compliant manner”.¹⁵⁴ Our constitutional jurisprudence has held the executive to account to implement appropriate measures where needed to address the needs of vulnerable groups of persons, even where the government’s finances are affected, and has held departments liable for non-compliance with court orders – often through the use

¹⁴⁹ See Killander “Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality” 2019 *South African Journal on Human Rights* 70 78.

¹⁵⁰ Holness (n 76) 497.

¹⁵¹ s 9, 10, 12, 24, 27 and 29 of the constitution.

¹⁵² s 24 and 27.

¹⁵³ Parliamentary Monitoring Group “Implementation of UN Convention on Rights of Persons with Disabilities: Department Human Settlement response” Committee of the National Assembly on Women and Persons with Disabilities (19 Sep 2012) <https://pmg.org.za/committee-meeting/14908/> (10-04-2024).

¹⁵⁴ Sperrin “A disability rights approach to a constitutional right to housing” 2023 *The International Journal of Disability and Social Justice* 80 90.

of structural interdicts.¹⁵⁵ Despite the promise of such retrospective action, the implementation of positive measures to address the barriers to accessing inclusive and non-discriminatory housing rights of persons with disabilities in South Africa remains elusive, as alluded to earlier. The provision of support to families of persons with disabilities, including autistic persons, such as personal assistance, respite care, and adjustments to housing (such as soundproofing, for example in the context of excessive noise) or subsidies by the state is practically non-existent.¹⁵⁶ South African jurisprudence on housing rights emphasises consultation and meaningful engagement with affected persons, in particular in the eviction context for vulnerable persons including persons with disabilities who are liable to be rendered homeless.¹⁵⁷

The White Paper for Human Settlements mentions persons with disabilities but in a manner that harkens back to the medical model – mentioning “wheelchair dependent” persons and the “disabled”.¹⁵⁸ It identifies an intervention in housing for “special housing”, stating that the department uses a variation manual to determine a precautionary adjustment of subsidy to cater for extraordinary development conditions, including special needs housing: “Regarding the special housing needs of certain categories of disabled beneficiaries, the variation option is focused on the specific housing needs of disabled beneficiaries, or beneficiaries with disabled dependents, and enhancement to their houses to afford them the opportunity of independent living.”¹⁵⁹ Whether and how such a subsidy could be applied in contexts such as that of Nadia is unclear.

5.1.2 Equality and reasonable accommodation

Reasonable accommodation as part of the right to equality is embedded in equality legislation and jurisprudence.¹⁶⁰ The right to equality for persons with disabilities and the prohibition against discrimination on the basis of disability,¹⁶¹ in addition to the positive steps required to be taken by public and private actors, are clearly delineated in case law.¹⁶² At a policy level, the White Paper on the Rights of Persons with Disabilities¹⁶³ and national strategic frameworks on reasonable

¹⁵⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 97. Cf Viljoen “The systemic violation of section 26(1): an appeal for structural relief by the judiciary” 2015 *SAPL* 42 43.

¹⁵⁶ A laudable exception is found in the Department of Public Works *Framework to Enhance the Participation of Persons with Disabilities in the EPWP* (2024) 1 15 http://www.publicworks.gov.za/PDFs/quotations/Other_Doc_RFQ203A0420.pdf (10-10-2025).

¹⁵⁷ McLean “Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo” 2010 *Constitutional Court Review* 223 228.

¹⁵⁸ Department of Human Settlements *The White Paper for Human Settlements* GN 5801 GG 52013 (31-01-2025) par 2.4.7 and 2.3.22.

¹⁵⁹ Department of Human Settlements (n 158) par 2.3.22.

¹⁶⁰ s 9(c) of the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 and *MEC for Education: KZN v Pillay* 2008 1 SA 474 (CC) par 74.

¹⁶¹ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) par 52.

¹⁶² Holness and Aziz (n 30), citing equality court jurisprudence such as *Oortman v St Thomas Aquinas Private School and Bernard Langton* 2010, equality court of Witbank case no EC 1/2010 (unreported) 1 6 <https://www.sahrc.org.za/home/21/files/MPL%20Judgment.pdf> (4-10-2024).

¹⁶³ Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2016) GN 230 in GG 39792 (9-03-2016).

accommodation¹⁶⁴ and universal design and access¹⁶⁵ oblige duty bearers to take steps to create inclusive communities. Reasonable accommodation is explained as “necessary and appropriate modification and adjustments, as well as assistive devices and technology, not imposing a situation, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.¹⁶⁶ The experience of the person with a disability is at the centre of a determination of the adequacy of the accommodation – meeting his or her support needs.¹⁶⁷

The White Paper mentions autism twice.¹⁶⁸ It reflects on some of the needs in relation to sensory requirements needing reasonable accommodation and assistive devices, technology, personal assistance, and workplace adaptations.¹⁶⁹ The White Paper lists building cohesive communities and neighbourhoods as a key priority.¹⁷⁰ Its discussion on accessible homes and neighbourhoods¹⁷¹ does not identify the discrimination that neurodiverse persons face from neighbours and community members due to a lack of understanding of their behaviour, whether they live in sectional title schemes, informal settlements, farms and rural areas, or suburban homes and estates. It does, however, task local and provincial governments to put in place “plans and budgets [that] must make provision for coordinated and integrated community living support plans, focusing in particular on access to the built environment, integration of transport nodes and human settlement spatial design” and to incorporate and prioritise universal design in “[s]mall site-specific and ad hoc improvement of urban and rural dwellings, facilities, services and open spaces for dwellings inhabited by persons with disabilities”.¹⁷²

5.2 Legal remedies

5.2.1 Remedies for the complainant

Complainants experiencing noise disturbances could access legal remedies such as lodging a complaint in terms of their body corporate conduct rules (where relevant in a sectional title), seek an interdict to stop the alleged disturbance from the high court,¹⁷³ or complain to the municipality in terms of applicable by-laws that

¹⁶⁴ National Strategic Framework on Reasonable Accommodation for Persons with Disabilities GN 605 in *GG 45328* (15-10-2021) 131.

¹⁶⁵ The National Strategic Framework on Universal Design and Access GN 606 in *GG 45328* (15-10-2021) defines universal design as “the design of products, environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or specialised design”.

¹⁶⁶ National Strategic Framework on Reasonable Accommodation (n 164) 117.

¹⁶⁷ National Strategic Framework on Reasonable Accommodation (n 164) 131: “The actual experience of the rights-holder for which reasonable accommodation measures were provided, must be the ultimate litmus test as to determine the adequacy of the support provisions”.

¹⁶⁸ in relation to access to information and communication (the need for recognition of alternative and augmentative communication) and lifelong education and training (the need for education in appropriate languages and means of communication and environments that maximise their development).

¹⁶⁹ Department of Social Development (n 163) par 6.6.1.4.

¹⁷⁰ par 6.3.1.1.

¹⁷¹ par 6.3.1.3.

¹⁷² par 6.3.1.3.

¹⁷³ Church and Church “Nuisance” in 31 *LWSA* (2006) 115-145 par 198 explain that an interdict may be used to halt a threatened disruption or continuation of a disruption.

would involve the issuance of an abatement order – an order to cease the offending conduct.¹⁷⁴

Body corporate rules have to comply with the Sectional Titles Schemes Management Act 8 of 2011, which in sections 13(1)(d) and (e) provides that an owner or occupier may not use common property in a way that unreasonably interferes with its lawful use by others, or use a section or exclusive use area in a way that is a nuisance to other persons who occupy sections.

The act contains conduct rules (Annexure 2) that may be amended by the body corporate. Rule 7 pertains to noise complaints:

- “(1) The owner or occupier of a section must not create noise likely to interfere with the peaceful enjoyment of another section or another person’s peaceful enjoyment of the common property.
- (2) The owner or occupier of a section must not obstruct the lawful use of the common property by any other person.
- (3) The owner or occupier of a section must take reasonable steps to ensure that the owner or occupier’s visitors do not behave in a way likely to interfere with the peaceful enjoyment of another section or another person’s peaceful enjoyment of the common property.
- (4) The owner or occupier of a section is obliged to comply with these conduct rules, notwithstanding any provision to the contrary contained in any lease or any other grant of rights of occupancy.”

In addition, in terms of section 39(2)(a) of the Community Schemes Ombud Services Act 9 of 2011, an application may be lodged free of charge to resolve a dispute in relation to “an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way”.¹⁷⁵ Very few nuisance complaints have, however, been handled by the ombud.¹⁷⁶ Those instances would be adjudicated in line with the existing interpretation of nuisance laws.

5.2.2 Remedies for the respondent

Aside from answering the noise complaint under the legislation or the common law of nuisance (discussed below), the respondent in a noise complaint may also potentially use a discrimination or harassment complaint.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) prohibits discrimination on the basis of disability, which includes denial or removal of “any supporting or enabling facility necessary for their functioning in society”; contravening “the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility”

¹⁷⁴ Moosa “How loud is too loud? Competing rights to religious freedom and property and the Muslim call to prayer (Adhan or Azan) in South Africa” 2021 *Religions* 1 2.

¹⁷⁵ The definition of “community scheme” is “any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional title development scheme, a share block company, a home or property owner’s association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative and ‘scheme’ has the same meaning”.

¹⁷⁶ See eg *Trustees of Tokai Villas Burgundy Body Corporate Executors of Estate of Late R. Blomkamp Dianne Grebe* CSOS 7211/WC/23 <https://csos.org.za/wp-content/uploads/2024/06/CSOS-7211-WC-23-ADJUDICATION-ORDER-39-2-a.pdf> (10-07-2024); *Mark Swart v VB Rozier* 2796/WC/23 (banging noises by children considered a nuisance) <https://csos.org.za/wp-content/uploads/2023/11/Final-Order-CSOS2796WC23.pdf> (10-04-2024) and *Directors of Antalya Homeowners Association v M Merafe* CSOS 123/GP/23 (rowdy behaviour, noise disturbance) <https://csos.org.za/wp-content/uploads/2023/09/Directors-of-Antalya-Homeowners-Association-and-Moloto-Merafe-12-July-2023.pdf> (10-04-2024).

(not applicable in this dispute); or failure to eliminate barriers that “unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons”.¹⁷⁷

It could be argued that persons like Nadia, whose stimming is a supportive facility (behaviour) without which she cannot function, should have this behaviour accommodated in order to live in the comfort and protection of their home and in their community. It could also be argued that Simon’s ableist behaviour discriminates against her on the basis of her disability (non-speaking, autism), and also that her parents are discriminated against on the basis of associational discrimination. Furthermore, should the body corporate’s conduct rules be interpreted without regard to reasonable accommodation of her needs, then those rules and the body corporate would be liable to answer claims of unfair discrimination. This complaint mechanism, however, is underused by persons with disabilities.¹⁷⁸

The Protection from Harassment Act 17 of 2011 could be used by the respondent. That legislation defines harassment as:

“directly or indirectly engaging in conduct that the respondent knows or ought to know—

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—
 - (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
 - (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues ...”.

The harm alleged may include “any mental, psychological, physical or economic harm”. The respondent, for example, Nadia or her parents, could allege harassment suffered at the hands of the complainant and they could seek a protection order to stop the harassing behaviour.¹⁷⁹ Protection orders are not usually used in instances such as this. While the preamble mentions that this legislation is aimed at protecting the harassed person’s rights to equality, privacy, dignity, and freedom and security of the person, it does not explicitly mention disability or gender, for example.

These legislative protections are not well known and are cold comfort when a family faces an abatement order or the police knocking on their door to cease the noise complained of. Before considering nuisance law’s compliance with the disability rights approach, however, it is necessary to highlight the potential of the disability-specific legislation, the Promotion and Protection of Persons with Disabilities Bill,¹⁸⁰ recently drafted, to offer some hope, as it seeks to integrate inclusion in different sectors that would include housing and human settlements.

¹⁷⁷ s 6(a) to (c) of the Equality Act.

¹⁷⁸ Holness and Rule “Barriers to advocacy and litigation in the Equality Courts for persons with disabilities” 2014 *PEL* 1907 1927.

¹⁷⁹ s 2 of the Protection from Harassment Act. Cf Batchelor and Tapiwa “Combating harassment under the Protection from Harassment Act 16 of 2011 in South Africa: Does it punish victims and protect perpetrators?” 2021 *Obiter* 268 284.

¹⁸⁰ annexed to the South African Law Reform Commission’s Discussion Paper 163 *Domestication of The United Nations Convention on The Rights of Persons With Disabilities* (2024) <https://www.justice.gov.za/salrc/dpapers/dp163-prj148-UNCRPD.pdf> (24-08-2024).

5.2.3 The legal test in nuisance law

Nuisance laws in South Africa rely on the principle of “live and let live” and “give and take”¹⁸¹ and disturbances are measured on the standard of reasonableness.¹⁸² The reasonableness test is based on two legs: the reciprocal obligation on neighbours to “tolerate” a reasonable level of interference by their neighbour in respect of their property; and unlawfulness if the interference exceeds the reasonable expectation (or as required by legislation) of what neighbours ought to tolerate.¹⁸³

Tolerating one’s neighbours took on a racist angle around 1994 (the advent of democracy) when there was an attempt to evict particular groups of persons on the basis of race using nuisance laws.¹⁸⁴ Of course, exclusions due to “unequal assumptions of power” continue in urban and rural spaces of the democratic South Africa, sometimes still on the basis of race, but also based on other statuses.¹⁸⁵ The diversity of land use in South Africa has prompted commentators to extend the application of these nuisance laws to groups previously excluded from its ambit and, in particular, based on their “status”.

In the past, neighbour law was mostly concerned with mutual respect and tolerance between neighbours from largely similar social, cultural and economic backgrounds; in future, mutual accommodation and tolerance may have to include respect for land use related to extreme poverty and homelessness, even when such use causes annoying and possibly unlawful effects for neighbours.¹⁸⁶

Kotzé and Boggendoel take this extension further and rely on the principle of *ubuntu*, applied in varied legal contexts in South Africa,¹⁸⁷ to argue that neighbourhood law has moved away from the pitting of neighbours against each other. Rather, it has moved towards incorporating the notion of *ubuntu* into the legal test of reasonableness to ensure that good neighbourly relations are underpinned by “sharing, co-responsibility” and the enjoyment of the rights of all.¹⁸⁸ *Ubuntu* is readily applicable to neighbourhood disputes, as it has been used in housing/eviction cases. This social justice premise¹⁸⁹ is explained by Sachs J:

“[The courts are] called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the

¹⁸¹ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club Estate (Stelzner Intervening)* 2007 2 SA 40 (C) par 21.

¹⁸² Kotzé and Boggendoel “Living together as neighbours: rethinking the reasonableness standard in nuisance law under the constitution” 2021 *PELJ* 1 3.

¹⁸³ Van der Walt (n 108) 240.

¹⁸⁴ These so-called nuisance eviction cases are discussed in Van der Walt “Living with new neighbours: Landownership, land reform and the property clause” 2002 *SALJ* 816 820, referring to *East London Western Districts Farmers’ Association v Minister of Education and Development* 1989 2 SA 63 (A) 67E; *Diepsloot Residents’ and Landowners’ Association v Administrator Transvaal* 1993 3 SA 49 (T) 69B-H; *Diepsloot Residents’ and Landowners’ Association v Administrator Transvaal* 1994 3 SA 336 (A) 345B; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) par 95; and *Joubert v Van Rensburg* 2001 1 SA 753 (W).

¹⁸⁵ Coggin “Recalibrating everyday space: using section 24 of the South African Constitution to resolve contestation in the urban and spatial environment” 2021 *PELJ* 1 26.

¹⁸⁶ Van der Walt (n 108) 383.

¹⁸⁷ *S v Makwanyane* 1995 3 SA 391 (CC) par 306; Bennet “Ubuntu: an African equity” 2011 *PELJ* 30 32; Keep and Midgley “The emerging role of ubuntu-botho in developing a consensual South African legal culture” in Bruinsma and Nelken (eds) *Recht der Werkelijkheid* (2007) 29-56, 47-48.

¹⁸⁸ Kotzé and Boggendoel (n 182) 6.

¹⁸⁹ Mostert “Nuisance” in Visser and Reid (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 256 286.

whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”¹⁹⁰

Legally, then, owners or users ought to conduct themselves and the use of their property or home to avoid causing unnecessary or unreasonable discomfort or harm to neighbours and communities.¹⁹¹ The determination of whether the particular disturbance is unreasonable (and therefore is an actionable nuisance) is context-specific.¹⁹² The objectivity of the reasonableness standard has been established in case law.¹⁹³ The factors, context-specific, which are considered in this regard include:

“the locality (zoning) and use of the property in the neighbourhood in which the disturbance takes place (the milieu);¹⁹⁴
the gravity, extent and duration of the interference;¹⁹⁵
the personality or sensitivity and motive of the person affected;¹⁹⁶
the utility (the benefit) for neighbours and the community;
the economic conditions and customs prevalent in the community;
the practicality of preventing the disturbance; and/or whether there are less restrictive means or measures available to minimise the neighbour’s discomfort or harm.”¹⁹⁷

The legal test of reasonableness, considering these contextual factors, has been phrased as whether a reasonable “normal man of sound and liberal tastes and habits” and not one who is “perverse or finicky or over-scrupulous” would have tolerated the disturbance or interference.¹⁹⁸ However, let us set aside the ableist construction of what a “normal man” would be and consider the utility factor. Van der Merwe has explained that:

“The social utility of the activity complained of or its utility to the general public is an important factor in assessing the reasonableness of the landowner’s conduct. Implicit in this factor is that one type of land use activity may have greater social utility than the utility representing the ordinary comfort of human existence. Consequently, this type of activity ought to be allowed even at the expense of another’s comfort and convenience.”¹⁹⁹

The utility of stimming for autistic persons may, accordingly, be a weighty factor in favour of protecting such conduct as not constituting a nuisance unless it is “unreasonable”. Coggin, in relation to the application of social utility as a concept in nuisance laws where persons without property entitlements are concerned (eg refugees), argues that a recognition of the diversity of our communities and the human rights approach of our constitution demand a move away from the apartheid legacy of our nuisance laws which determined the “normal use” or “reasonableness”

¹⁹⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 36-37.

¹⁹¹ Muller *General Principles of the South African Property Law* (2019) 95; Van der Merwe “Neighbour law” in Zimmermann and Visser (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) 759.

¹⁹² Van der Walt (n 108) 272.

¹⁹³ *Holland v Scott* 1882 2 EDC 307; *Prinsloo v Shaw* 1938 AD 570. Also, see *Vogel v Crewe* 2004 1 All SA 587 (T) par 4.

¹⁹⁴ *Malherbe v Ceres Municipality* 1951 4 SA 510 (A) 517G-518B.

¹⁹⁵ *Laskey v Showzone CC* 2007 2 SA 48 (C) par 39.

¹⁹⁶ the *Holland* case (n 193) 322 and the *Prinsloo* case (n 193) 590.

¹⁹⁷ See cases discussed in Kotzé and Boggenpoel (n 182) 13 n 75.

¹⁹⁸ the *Prinsloo* case (n 193) 590. See, further, Van der Walt (n 108) 275-276.

¹⁹⁹ Van der Merwe “Things” in 27 *LAWSA* (2014) par 150.

“within a politics of race-based and socioeconomic sameness, of social and class homogeneity.”²⁰⁰ Spatial justice respects the diversity of humanity. Coggin explains that nuisance laws should be seen as being grounded in their interaction with the individuals they affect.²⁰¹ Such social utility would support the idea of multi-sensorial approaches to the built environment, including in homes and communities, an approach that seeks to dismantle ableist approaches to spatiality.²⁰²

Simon’s comfort and convenience would, according to this conception of utility, need to be weighed against the utility of the noise emanating from Nadia’s stimming to promote her self-regulation.

This legal test is constitutionally compliant, it has been argued.²⁰³ However, constitutional rights, such as the right to movement, for example, affect the understanding of the legal test in nuisance law.²⁰⁴ This test has been consistently applied in our jurisprudence. A recent noise nuisance case illustrates how the courts can still get it wrong.

The high court in *Ellaurie v Madrasah Taleemuddeen Islamic Institute*²⁰⁵ found that the right to property trumped the right to practise one’s religion, when it found against a Madrasah which used the Muslim call to prayer. The neighbour successfully obtained an interdict prohibiting the sound generated by the call to prayer (Azaan) from being heard on the property of Ellaurie. It has been argued that the court misapplied the reasonableness test and “disregarded the diversifying nature and the prevailing social conditions and customs of the neighbourhood as a whole” and did not sustain the “interests and rights of the broader community”.²⁰⁶ The high court required the Madrasah to demonstrate that the Azaan was an essential practice for its religion and the only onus on the complainant, the neighbour, was to prove interference with the enjoyment of his “private space”.²⁰⁷

Fortunately, on appeal, the supreme court of appeal correctly applied the reasonableness test in *Madrasah Taleemuddeen Islamic Institute v Ellaurie*.²⁰⁸ The supreme court of appeal exhorted that “[m]utual tolerance is a civic value that is restricted by the legal yardstick of reasonableness”.²⁰⁹ The court reiterated the legal test in South African law that requires serious and material interference with the neighbour’s “ordinary comfort and existence”.²¹⁰ It found that the high court erred in relation to the onus to be proved and found that the complainant had to satisfy the court that the interference with his comfort was unreasonable. The respondent did not need to demonstrate that the call to prayer was an essential religious practice.²¹¹ Ellaurie had not given evidence on the nature and level of the noise complained of and its duration and did not indicate what a “reasonable” call to prayer would have been. The court was persuaded that the reasonableness determination in this particular case “had to take into account and balance the countervailing constitutional rights”

²⁰⁰ Coggin “Redressing spatial apartheid: the law of nuisance and the transformative role of social utility and the right to the city” 2016 *SALJ* 451, citing Van der Walt (n 108) 15.

²⁰¹ Coggin (n 200) 434.

²⁰² Rieger *Design, Disability, and Embodiment: Spatial Justice and Perspectives of Power* (2023) 1 14.

²⁰³ Kotze and Boggenpoel (n 182) 25.

²⁰⁴ Du Bois and Reid “Nuisance” in Zimmerman *et al Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 576 595; Mostert (n 189) 271-272.

²⁰⁵ *Ellaurie v Madrasah Taleemuddeen Islamic Institute* 2021 2 SA 163 (KZD).

²⁰⁶ Kotzé and Boggenpoel (n 182) 23.

²⁰⁷ the *Ellaurie* case (n 205) par 17.

²⁰⁸ *Madrasah Taleemuddeen Islamic Institute v Chandra Giri Ellaurie* 2023 2 SA 143 (SCA).

²⁰⁹ par 7.

²¹⁰ par 7, referring to *Holland v Scott* 1882 2 EDC 307 324-325.

²¹¹ par 11.

– which here was the right to practise religion.²¹² The complainant was intolerant of the Islamic faith, as his averments to the court showed, and was hypersensitive to the noise complained of, particularly because of his religious intolerance.²¹³

Intolerance of the *status* of the respondent Madrasah, as a religious institution exercising its religious freedom through the call to prayer, was the underlying cause of Ellaurie’s complaint. Similarly, then, racist, sexist or ableist premises of noise complaints would not be actionable in law.

Attempts to mediate between Ellaurie and the Madrasah made by the municipality and the South African human rights commission (SAHRC), which took place sixteen years prior to the high court interdict application, were unsuccessful. The constitutional court dismissed Ellaurie’s appeal to it from the supreme court of appeal, citing a lack of jurisdiction.

A similar matter to the *Ellaurie* case that dealt with a noise complaint emanating from neighbours to a mosque which used an amplified call to prayer, was decided on a different basis.²¹⁴ In this case, a contractual clause had sought to mitigate the level of sound of the call to prayer, according to which the respondent had agreed to use only unamplified calls to prayer (with the human voice, and not with loudspeakers). Accordingly, the court found that the limitation to the religious rights agreed to in the contract was reasonable – electronic amplification was not a requirement of Islam for this practice.

Kotzé and Boggenpoel argue that the reasonableness test will withstand constitutional scrutiny with its correct application, which includes the contextual factors developed over time and the value of *ubuntu*. In this way, they argue, “a wider range of rights and interests” may be incorporated into the law to ensure outcomes that are “fairer and more equitable”.²¹⁵ Such wider rights and interests should include the needs of persons with disabilities and, in particular, in the context of this case, the needs of autistic persons.

In relation to Simon and Nadia’s dispute, a court would consider and balance the countervailing constitutional rights – his right to an undisturbed environment and her rights to dignity, equality, bodily and mental integrity, and freedom of movement. Ultimately, the reasonableness refers to the activity complained of, and not the complainant. If particular autistic persons need to stim in order to cope with sensory overload, then their home environment needs to accommodate this need. Taken to its natural conclusion, neighbours need to be not merely “tolerant” but also accommodating of this need.

Another factor relevant in such disputes is the practicality of preventing the disturbance and/or whether there are less restrictive means or measures available to minimise the neighbour’s discomfort or harm. In this instance, adjustments such as soundproofing implemented by Nadia’s parents would likely be considered to be reasonable measures. Requiring that the noise be, as much as possible, restricted to particular times, for example, and that it ceases by a particular time of day, may also be a less restrictive means to minimise the harm suffered by Simon.

²¹² par 18.

²¹³ par 12.

²¹⁴ *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 2 SA 268 (C) regarding freedom of religion.

²¹⁵ Kotzé and Boggenpoel (n 182) 25.

5.2.4 Concluding remarks

It is rare to come across a response to a nuisance complaint that is in line with a disability rights approach. One exception found after a rigorous literature review in South Africa was the empathetic and pragmatic response of a property manager to a nuisance complaint. This response came from a person with an autistic family member and therefore he had awareness of the challenges faced by autistic persons.²¹⁶ Knowledge of autism and kindness education have been found to be a good combination for addressing autism stigma.²¹⁷ This is strongly reminiscent of the exhortation to use *ubuntu* as a framework for nuisance laws.

The legal test in nuisance law is, *prima facie*, disability-rights compliant. The key is ensuring that the conception of the “normal man of sound and liberal tastes and habits” is not ableist, and for factors such as utility and less restrictive means to be understood in line with evidence of the social utility of the action towards the person with the disability and carefully considered ameliorating measures to least compromise the rights of the complainant.

6 Conclusion

Resolution of conflicts such as that between Simon and Nadia, whether through abatement notices, mediation or litigation, will be constitutionally compliant if these methods are disability rights-compliant. The procedures involved in these methods should aim to unmask the ableism inherent in a subjective determination of what is “tolerable”, as the legal test for reasonableness is an objective one.²¹⁸

Self-regulation is a human trait. Some people exaggerate typical ways of regulating their emotions. How then do we ensure a peaceful and safe home and community environment for all persons, including autistic persons? There are a few options.

Firstly, in a dispute such as the one between Nadia and Simon, where mediation fails, the courts would have to intervene – a costly option. The statutory prohibition of unfair discrimination on the basis of disability is a mainstay, and equality courts could be used to deal with instances of discrimination against autistic persons. It is perhaps time for litigation to be brought to address the disproportionate use of nuisance laws (or the threat thereof) against autistic persons and for their rights to equality, dignity, freedom from violence and access to justice to be upheld.

Secondly, an important remedy is subsidising the cost of mitigation measures (reasonable accommodations) undertaken by families, particularly since the provision of social housing is restricted by means. The alternative of not subsidising such accommodations, even to a small extent, is a violation of the rights of persons with disabilities. Special housing policies, plans and budgets should include concrete measures in this regard.

Thirdly, undoubtedly, the provision of disability inclusion training is an imperative for body corporates, the police and metropolitan police and neighbourhood organisations.

²¹⁶ Paddocks “Special needs children and resultant noise nuisance” 2021 *Paddocks Press* <https://www.paddocks.co.za/paddocks-press-newsletter/qa-2021-12/> (20-10-2022).

²¹⁷ Datu “Knowledge with kindness is power! Knowledge about autism and kindness relate to better attitude towards persons with autism spectrum disorder” 2023 *International Journal of Developmental Disabilities* 452 455.

²¹⁸ *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D) 192.

Fourthly, considering the amendment of by-laws, body corporate rules and environmental legislation to include the requirement of reasonable accommodation may more explicitly embed the reasonableness of the legal test in nuisance law in disputes where there is a person with a disability or other statuses requiring the accommodation, and not mere toleration, of diversity.

Fifthly, access to information on redress options such as relying on the provisions of the Protection Against Harassment Act, the Equality Act and anti-hate crime protections for autistic persons facing harassment in the community is sorely needed in all our communities.

In conclusion, stimming is a critical adaptive function to assist self-regulation. Suppressing stimming can be harmful to the person who requires it. Neurodiverse-friendly communities, cognisant of the principle of *ubuntu*,²¹⁹ require a strong policy framework and clear legal mechanisms to ameliorate and avoid the harms in disputes such as those in the vignette. An alignment with the requirements of international law to promote inclusive community living is needed and should be explored in future research.

²¹⁹ Kotzé and Boggenpoel (n 182) 25.

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