Onlangse regspraak/Recent case law

Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and others intervening)
2007 2 SA 40 (C)

Golf as nuisance in law

1 Introduction

"Golf, a game (Dutch). First mentioned AD 1538. The name is from that of a Dutch game played with a club and ball. – Dutch kolf, a club used to strike balls with..." (Skeat The Concise Dictionary of English Etymology)

1.1 Legal Issues

The decision dealt with the legal issue as to whether it amounted to nuisance when the playing of golf on a golf course resulted in a neighbour’s property being struck by golf balls on several occasions.

1.2 A Brief History of Golf

Golf is a game played on a large outdoor course with a series of nine or eighteen holes spaced far apart. The object of this game is to propel a small, hard ball with the use of various clubs into each hole with as few strokes as possible (http://www.thefreedictionary.com/golf (accessed 2007-08-13)). It has generally been accepted that the game of golf has been in existence for at least 500 years because James II of Scotland, in an Act of Parliament dated 3 June 1457, banned golf and football because they were interfering with archery practice sorely needed by the loyal defenders of the Scottish realm! It has been suggested that bored shepherds tending to flocks of sheep near St Andrews became adept at hitting rounded stones into rabbit’s holes with their wooden crooks (http://www.tourcanada.com/golfhist.htm (accessed 2007-08-13)). Various forms of games resembling golf were played as early as the fourteenth century by sportsmen in Holland, Belgium and France as well as in Scotland. However, it was a keen Scottish Baron, James VI, who brought the game to England when he succeeded to the English throne in 1603. For many years the game was played on rough terrain without proper greens, just crude holes cut into the ground where the surface was reasonably flat (http://www.tourcanada.com/golfhist.htm (accessed 2007-08-13)). In South Africa (SA), golf was first played in the Wynberg Military Camp, situated in Cape Town, in 1885. Thus the Cape Golf Club, the first in SA, was born (http://www.royalcapegolf.co.za/history.asp (accessed 2007-08-15)).

1.3 What is Nuisance?

In the sphere of neighbour relations, nuisance includes both conduct whereby a neighbour’s health, well-being or comfort in the occupation of
his or her land is interfered with and the actual causing of damage to a neighbour (Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 5ed (2006) 111). A distinction is made between nuisance in the strict sense, which is restricted to conduct which annoys or causes discomfort or inconvenience ("annoyance"), and nuisance in the broader sense connoting abnormal or unusual use of land by an owner in terms of which actual damage is caused to a neighbour’s land or the neighbour is threatened with potential damage (Van der Merwe in Joubert (ed) *LAWSA 27* (2002) par 227). Nuisance in the latter sense is also linked with the doctrine of the abuse of rights (*ibid*).

Other considerations are also important:

(a) Nuisance may infringe the exercise of ownership and/or personality rights of the neighbouring owner, or constitute such a threat (Van der Merwe *LAWSA 27* (2002) 228; Badenhorst, Pienaar and Mostert 111);

(b) differing remedies, such as an interdict, *actio injuriarum* or a delictual claim based on either fault or strict liability may then come into play (Van der Merwe *LAWSA 27* (2002) 228; *Dorland v Smits* 2002 3 All SA (C) 699c; 2002 5 SA 374 (C) 383B–C; see in general, Knobel “Inbreukmaking op die estetiese as oorlas – *Dorland v Smits* 2005 2 SA 374” 2003 *THRHR* 500 503–504), which again may have a bearing on the question whether conduct is actionable or not;

(c) the test for nuisance may differ for purposes of nuisance in the narrow sense or in the broad sense (see Van der Merwe *LAWSA 27* (2002) 227–228 who does not state it explicitly);

(d) SA law of nuisance has its roots partly in Roman-Dutch law and partly in English case law (*Allaclas* case 43E); and

(e) “nuisance” may straddle property law and the law of delict.

For nuisance to be actionable:

(a) in the narrow sense, continuous conduct is required for nuisance to be actionable (see *Wright v Cockin* 2004 4 SA 207 (E) 218H) which is unreasonable (see Van der Merwe *LAWSA 27* (2002) 227–228; Badenhorst, Pienaar and Mostert 111–122); and

(b) in the broad sense, it requires abnormal or unusual use of land which causes patrimonial damage or threatens to cause such damage (see Van der Merwe *LAWSA 27* (2002) 228 and Badenhorst, Pienaar and Mostert 114).

According to Van der Merwe (*LAWSA 27* (2002) 230–231) in order to ascertain whether the conduct of a land owner is objectively reasonable under the circumstances the following criteria are taken into account:

(a) The locality or neighbourhood in which the alleged nuisance took place;

(b) the proportionality of benefit of the activity to the landowner and harm suffered by the neighbour;

(c) the sensitivities of the complaining neighbour;

(d) the motive with which the landowner carries out the activity;
(e) the social utility of the activity complained of or its utility to the general public;

(f) whether the same goal could have been achieved by the owner of land by employing measures less harmful to his neighbour;

(g) the practicality of preventing the alleged harm; and

(h) whether the activity complained of was carried out prior to the applicant complaining of the nuisance ("has come to the nuisance").

Whether the use of land can be regarded as abnormal or unnatural is determined in the light of the prevailing notions of the community (Van der Merwe LAWSA 27 (2002) 228). The test for abnormal or unusual use of land is also one of reasonableness. De Vos J held as follows in Vogel v Crewe ([2004] 1 All SA 587 (T) 589b; 2003 4 SA 509 (T) 512C(D)):

"The test of reasonableness should be applied taking into account the general norms acceptable to the particular society. Even if the nuisance does involve the actual infringing of damages the test is still one of reasonableness. This is so because a neighbour has to tolerate the natural consequences of the ordinary use of land."

In more recent times it has been suggested that the retention of numerous "traditional" rules of neighbour law, each with its own restricted field of application and requirements, creates confusion. It is argued that the principles and policies that form the basis of these rules could be accommodated within the general principles of the law of nuisance (Van der Merwe and Pope in De Bois (ed) Wille's Principles of South African Law (9ed) (2007) 488). It is true that case law dealing with encroaching roots (Bingham v City Council of Johannesburg 1934 WLD 180; Cosmos (Pty) Ltd v Phillipson 1968 3 SA 121 (R) and Vogel v Crewe supra 588e–f; 511G–512A) have been decided in accordance with the general principles of nuisance rather than the traditional common-law rules regarding overhanging branches of trees and intruding roots (see Badenhorst, Plenaar and Mostert 126–127). However, such an approach is not free from problems. For instance, encroachment could not be dogmatically construed as a type of nuisance. Scott ("Recent developments in case law regarding neighbour law and its influence on the concept of ownership" 2005 Stell LR 351 368) clearly explains the differences between encroachment and nuisance:

"In the case of encroachments the owner whose ownership is infringed does not do anything on his/her property, but the encroacher invades his/her land. The encroacher is not exercising his/her ownership entitlements. In nuisance an owner exercises his/her ownership on his/her own land in such a way that this act infringes the entitlements of use and enjoyment without physically invading the neighbouring owner's property. This prima facie lawful act can be unlawful if the owner's act was unreasonable. In an encroachment the encroacher acts unlawfully. He/she interferes with the neighbour's use of his/her land without having a right to do so. Equity-fairness only becomes an issue when the owner claims removal of the encroachment and the court has to exercise its discretion to order such removal or award compensation to the owner on whose land the encroachment occurred."

2 Facts

The applicants are all owners or occupiers of properties bordering the Milnerton Golf Club ("MGC"). The respondent, the MGC is a body corporate
with an existence independent of its members. The MGC has been in existence since 1925 (42F–G). During the early nineties the MGC (as former lessees) acquired ownership of the land upon which the course is situated, and the adjoining land was turned into a residential development known as Sunset Links (see 42G–H). The Sunset Links development was marketed on the basis that the houses would be built on a golf course. It is also common cause that the golf course was a fundamental component of the nature of the individual properties (42H–I).

The first applicant purchased one of these properties during March 2002 and erected a house on it. This property borders the fairway of the sixth hole of the golf course. The sixth hole is a par 5 and is approximately 400 metres long. It is located to the north of the tee. The second applicant took occupation of the property during March 2003 (42I–43A). Since then golf balls, hit by players on the sixth hole, have strayed onto the property on several occasions. The second applicant caused a 4.7 metre high net to be erected around part of the property, but contended that this did not help to alleviate the problem (43A–B).

3 Legal Issue

In the words of the court, it was at issue whether the playing of golf, that resulted in balls being struck onto neighbouring properties in a manner likely to cause damage to property or personal injury, constituted a private nuisance in common law (see 43B–C and 46D). In the present case, Traverso DJP held that it did not.

4 Decision

As to the origin of the sources of neighbour law, the court explained that the relations between neighbours were regulated in Roman-Dutch law in a particular local way, with local custom, by-laws and a system of interlocking urban servitudes playing a prominent role (43C). Although the court accepted, with reference to Regal v African Superslate (Pty) Ltd (1963 1 SA 102 (A)) that SA neighbour law is not based on English law, it was correctly pointed out by the court that English cases were relied on liberally (43C–E). Scott (2005 Stell LR 367) correctly argues that “very little can be gained by trying to ‘purge’ this branch of the law of English law by means of attempts to determine the Roman-Dutch law on these issues or to establish general principles based on Aquilian liability”. She proposes, in pragmatic fashion, that efforts to reconcile English and Roman-Dutch principles are unnecessary in that the existing SA case law provides sufficient answers to the issues under discussion. Much can be learnt, however, from English case law, should it be necessary (367). According to Scott, existing SA case law, and not English case law, should be the starting point in a search for authority (367). She also proposes, (like Milton “The law of neighbours in South Africa” 1969 Acta Juridica 123 253) the development of an indigenous SA law of neighbours by drawing on the best of civil and common-law systems (367). The court refered favourably to a similar statement by Milton (43E/F–G) but did not have the benefit of Scott’s opinion on recent developments in neighbour law.
On a lighter note, etymologically and historically speaking both Roman-Dutch law and English law could apply to the problem of flying golf balls hitting neighbours!

As to nuisance, the court teed off with the question whether an abuse of a right has taken place or whether ownership rights have been exceeded (43H). As indicated in 1 2 above, nuisance in the broad sense is linked to the doctrine of abuse of rights and should perhaps rather be seen as a possibility in the case of nuisance and not a necessary point of departure. The court proceeded to explain the general principle of neighbour law that the entitlements of ownership extend only as far as there is a duty on a neighbour to endure the exercise of the entitlement. If an owner exceeds these entitlements, he or she infringes the ownership rights of his or her neighbour (see 43J-44A). The court labelled such conduct as “wrongful conduct” (44A/B). The court acknowledged the difficulty of balancing the interests of competing neighbouring owners (44B). In an attempt to achieve such balance, the court relied on the test of reasonableness and accepted that what is reasonable must be assessed objectively and with regard to the circumstances of each particular case (44D). Strictly speaking, the court need not have relied on the English decision of Sedleigh-Denfield v O'Callaghan (1940 AC 880 (44B) for this proposition. This test is to be found in various SA cases and standard works on the law of property (see eg. Wright v Cockin 2004 4 SA 207 (E); Du Bois 477–481). The court listed the following factors to be considered in deciding the question of reasonableness:

(a) By owning or occupying property which borders a fairway of a golf course the applicant’s entitlement to free and undisturbed use of their property will be interfered with to some extent (44E);

(b) the number of golf balls which landed on the property of the applicants and have caused damage to the homes of the applicants (44E-F);

(c) the taking of precautionary measures by the MGC (44F);

(d) the applicants’ “coming to the nuisance” (44H);

(e) the MGC has conducted a golf course in Milnerton since 1925 (45E-F);

(f) the MGC has used the property in the same way for the past eighty years, that is, for the playing of golf (45F);

(g) playing of golf on the golf course took place on a locality designed for that purpose and was not unnatural or inappropriate (45G);

(h) at the time the property was purchased by the applicants and thereafter, the applicants knew and understood that golf would be played on the property immediately adjacent to their property, that they would be exposed to the consequences inherent in being in such a position and their property would be susceptible to being hit by golf balls (45G-H);

(i) the attitude of the second applicant (47B);

(j) the mental disposition of the actor (47H); and
(k) the benefits of living next to a golf course in relation to the environment (471–J).

The weight of the abovementioned factors were considered by the court. Factor (a) as identified by the court, concerned the locality or neighbourhood. Without expressly referring to locality as one of the determining factors the court found that it was accepted as reasonable by the applicants for them to tolerate some ingress of badly hit golf balls (44E–F).

Factor (b) above related to the harm caused by the activity of the MGC and the locality of the property. The court found that the mere fact that a golf ball entered the second applicant’s property, or has been found there, does not and cannot in itself constitute nuisance (46H). The court further found that it was not shown that the number of golf balls that struck their property exceeded what might reasonably have been expected by the applicants. It was also not shown that the damage caused exceeded what might reasonably be expected in the normal course on a property situated on a golf course (461–47A).

Factor (c) above, dealt with the enquiry whether less harmful measures could have been taken by the respondent. The court found that it was common cause that the respondent took precautionary measures. Trees were planted which would protect the applicant’s property once they were fully grown. The respondent adopted the measure of playing the sixth hole as a par 5 on Wednesdays and Saturdays and as a par 4 on all other days (44F–G; 46B–C). This meant that the applicants would be free from risk on all days other than Wednesdays and Saturdays as the teeing area would be moved forward taking the applicants’ house “out of play” so to speak. The court found that the respondent showed its willingness to take reasonable measures to minimise the risk of damage to the applicant’s property (47H–I).

Factors (e), (f) and (h) all related to the defence of coming to the nuisance (namely factor (d) above). The court held that it is clearly a matter of first principle that priority of occupation (the golf course) does not give an owner carte blanche to deprive his or her neighbours of the reasonable physical comfort of their existence on their properties (45C). The court found that the fact that the applicants bought property bordering the sixth hole of the golf course is a relevant factor to be taken into account in assessing the reasonableness of the respondent’s action. The court decided that “coming to the nuisance” can never be a decisive factor in itself (45D–E). At times, however, the court leaned towards the defence of volenti non fit iniuria of the law of delict: “[Living next to a golf course] also entails a real danger that the properties so situated will be susceptible to being hit by golf balls. That is a risk that any reasonable person will accept” (47J). In Dorland v Smits (supra 699)–700a; 384A–B) Comrie J held:

“It may be accepted that danger, or potential danger, emanating from one property to a neighbouring property may constitute a nuisance. But the presence or threat of danger is not nuisance per se. It is a question of degree. The enquiry is whether the offending owner is acting unreasonably in all the circumstances.”
If this set of facts is seen as an instance of abnormal use of land, only factor (g) needed to be considered. The court found that playing golf on the course was a natural use of land because it took place on a locality designed for that purpose (45G).

As to factor (i) above, the practicality of preventing the alleged nuisance was taken into account. The court found that the respondent had taken reasonable measures to minimise the risk of damage by golf balls to the applicant’s property (47H–I). The court found that the applicants were reluctant to take relatively inexpensive measures, such as erecting a net, in order to protect themselves because they regarded the net as an eyesore obscuring their view of Table Mountain (see 47C–E). The court did not take into account that a view of Table Mountain is very important to Capetonians for tranquility, balance and direction! The court decided that considerations of fairness did not permit the applicants to simply sit back and expect the respondent to take unreasonable action to avoid any damage to their property, while they are not prepared to take reasonable steps to alleviate the situation (47E–F). The court did not have much appreciation for the applicants’ attitude that the responsibility to minimise the risk of damage by golf balls lies with the respondent alone (47H–I).

Factor (j) above, dealt with the motive with which the owner of land carried out its activity. The court decided that in the considering the reasonableness of the actor’s conduct, his or her mental disposition plays an important role (47H). The court found that the respondent had shown its willingness to take reasonable measures to minimise the risk of damage caused by golf balls to the applicant’s property (47H–I); as to the role of motive, see further Knobel 2003 THRHR 504–505 and Lombard v Fischer 2003 1 All SA 698 (O) 702e–703i).

Factor (k) dealt with the social utility of the activity complained of. The court found that living next door to a golf course brings certain benefits in relation to the environment in which one lives (47J–J; see also Vogel v Crewe supra 589d–e; 512F/G). No further explanation of this benefit is given by the court. The gravity of harm suffered by the aggrieved owner (see factor (c) above), must be weighed against the utility of the conduct causing the harm (Dorland v Smits supra 700b–c; 384C/D).

The court concluded that, in view of all the factors set out above, the respondent did not interfere unreasonably with the rights of the applicants (48A). The court found that the applicants failed to show that the respondent’s conduct was unreasonable (see 46I). The application was dismissed with costs (48B).

5 Discussion

The correctness of the judgment cannot be faulted. This decision would have served as an example of nuisance in the broad sense, if the neighbour’s ownership was infringed as a consequence of abnormal or unnatural use of land. It is submitted that the test for nuisance should be the same in both the narrow or broad sense. A distinction is unnecessary when the reasonableness of the conduct of an actor vis-à-vis his or her neighbour is determined. As shown in the present decision, a list of factors
to determine unreasonable use in the case of nuisance in the narrow sense could apply in both instances. This would probably also be in line with Van der Merwe and Pope’s more recent argument of applying general principles of the law of nuisance to neighbour law (Du Bois 476–482). The same could apply to the test of natural use of land. In the present case it was just one of many factors considered by the court. The distinction between nuisance in a narrow or broad sense may, however, still be maintained to ascertain the appropriate remedy available to the aggrieved owner.

One cannot help but think that if one of the applicants or a family member had been blinded or a Ming vase had been shredded by a misdirected golf ball that an appropriate delictual action would have been a preferable remedy, rather than a property law orientated remedy premised upon the doctrine of nuisance.

6 Conclusion

Golfers playing golf at established golf courses or golf estates may heave a sigh of relief and continue to play golf, even if not as skillfully as they may wish. The playing of golf in the right area resulting in a neighbour’s property being struck on several occasions by golf balls simply does not constitute nuisance. After all, the “normal man of sound and liberal tastes and habits” plays golf. Whether liability would lie in delict is another issue. The decision, however, does not give a golfer carte blanche to engage in target practice.

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Progress Office Machines v South African Revenue Services Case
[2007] SCA 118 (RSA)

Impostion of anti-dumping duty in terms of Customs and Excise Act 91 of 1964 – effect of retrospective imposition of duty – interpretation of date of imposition

On 25 September 2007 the Supreme Court of Appeal (the SCA) per Malan AJA passed a judgment that will have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa (SA).

“Dumping” is defined in the International Trade Administration Act (71 of 2002 (the ITA Act)) as taking place when the export price of a product is less than the normal value of such product. The normal value is normally defined as the selling price in the exporting country (s 32(2)(b)(i) of the ITA Act). Certain adjustments need to be made to the export price and