REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 673/06
Reportable

In the matter between:

ALLACLAS INVESTMENTS (PTY) LTD	**FIRST APPELLANT**
ALEXANDER SIMONIS	**SECOND APPELLANT**

and

MILNERTON GOLF CLUB	**FIRST RESPONDENT**
ROBERT GL STELZNER	**SECOND RESPONDENT**
SUSAN STELZNER	**THIRD RESPONDENT**
STEPHEN MORIARTY	**FOURTH RESPONDENT**
LIYAQUAT ALLIE PARKER	**FIFTH RESPONDENT**
GAIL TUNESI	**SIXTH RESPONDENT**

CORAM: FARLAM, BRAND, MLAMBO, COMBRINCK JJA et MHLANTLA AJA

HEARD: 5 NOVEMBER 2007

DELIVERED: 29 NOVEMBER 2007

SUMMARY: Neighbour law – nuisance – golf course – reasonable steps to avoid excessive strikes by badly hit golf balls.

Neutral citation: This judgment may be referred to as *Allaclas Investments (Pty) Ltd & Another v Milnerton Golf Club & Others* [2007] 167 SCA (RSA).

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Traverso DJP, sitting in the Cape High Court, refusing an application brought by the appellants for an order interdicting the first respondent from permitting the use of the sixth hole on the Milnerton Golf Course for the playing of golf until it introduces effective measures to avoid or reduce the danger of badly aimed golf balls striking the first appellant's property.

[2] The judgment of the learned judge in the court *a quo* has been reported: see *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Stelzner and others Intervening)* 2007 (2) SA 40(C).

[3] The first appellant, Allaclas Investments (Pty) Ltd, is the owner of a dwelling house situated at 32 Tanglewood Crescent, erf 27482, Milnerton, otherwise known as Sunset Links, Milnerton, which is occupied by the second appellant, who is a director of the first appellant, and his wife and children. The property is adjacent to the fairway of the sixth hole at the golf course, which is owned and controlled by the first respondent, the Milnerton Golf Club.
During the course of the proceedings in the court *a quo* five persons, who owned other properties adjoining the golf course, were given leave to intervene. They were cited as respondents in the appeal but as they took no part therein it is unnecessary to make further reference to them.

[4] The golf course, which has been in existence since 1925, was originally leased by the first respondent from its then owner, Milnerton Estates (Pty) Ltd. In April 1994 Milnerton Estates (Pty) Ltd applied for the rezoning of certain land which was part of the property on which the golf course is situated in order that a residential township, to be known as Sunset Links Residential Estate (which I shall call in what follows 'Sunset Links') could be established thereon. The application was approved in July 1995. The portion of land on which the existing golf course is

situated remained zoned for private open space purposes. Thereafter in December 1997 the local authority approved a subdivision application providing the detailed residential layout and the extent of the land use rights for Sunset Links. As a result of this the first appellant's property was zoned for single residential purposes.

[5] On 18 March 2002 the first appellant purchased erf 27482 Milnerton, and in March 2003 the second appellant and his family moved into a dwelling house which they had had built on the property.

[6] The property is situated approximately half-way along the fairway, which in that vicinity runs parallel to the ocean in a strip of land about 60 metres wide between the property and the sea. The sixth hole is a par five, approximately 400 metres long. The garden and outdoor living area of the property are situated adjacent to the fairway.

[7] After the second appellant and his family moved into the property they became aware that it was, as their counsel put it in the course of his argument, 'subject to a high incidence of strikes by badly aimed golf balls struck off the tee of the sixth hole'. It appears from the papers that the total of such 'badly aimed' golf balls which found their way on to the property during the period from December 2003 to March 2006 was 875. It appears further from the papers that while there were what can be described as quiet period there were also busy periods. Indeed the second appellant's evidence that golf balls are hit on to the property with such regularity that the second appellant's family's ability to use it in a normal fashion is significantly affected is not challenged.

[8] It is also relevant to note that during August 2003 the second appellant caused a 4.7 metre high net to be constructed around the western and southern aspect of the property but this did not prevent golf balls from being struck on to the property, as the high incidence of strikes thereafter shows.

[9] Both Mr Bruce Weller, the appellants' expert, and Mr Philip Jacobs, the first respondent's expert, were agreed that there was what was described as a 'safety issue' at the sixth hole which called for a solution.

[10] In a part of his report which was not criticized by Mr Jacobs, Mr Weller identified the following seven safety concerns:

'1. 32 Tanglewood Crescent lies just 35.7m from the centre of the fairway. As a rule of thumb 60m to 80m is more appropriate.

2. The house is situated on the right side of the fairway at between 184m and 250m from the tee. This is the prime landing zone for most average to poor golfers.

3. The house lies well within the 15 degree zone either side of the perceived line of play where the majority of golf balls land (92%).

4. The tee shot is narrow with severe penalty down both sides of the fairway. Difficult drives often have the effect of making the golfer tense up which more often than not results in a shot pushed out to the right.

5. The presence of an inanimate object such as a house does not alert the golfer to possible injury risk in the same way that the presence of, say, a walker on a footpath near the landing zone would. Neither the golfer teeing off nor the house-owner [is] able to see one another.

6. The hole lacks any space either side to "design in" a more comfortable or obvious target area (i.e. there is little clearly defined space for the golfer to aim, which frequently results in a poorly executed swing).

7. Being a relatively short par five, its "Heroic" nature will actually encourage golfers to take a driver and try and get on or as near as possible to the green in two. Additionally the [hole] actually gets wider and therefore easier the longer the tee shot.'

To this he added what he called four 'outside' influences, as follows:

'There has been a dramatic increase in club and ball technology in the last ten years, allowing golfers to hit the ball not only much further but higher. This has unfortunately greatly increased the span of error.

The majority of golfers slice the ball to the right.

The golf course is quite exposed and windy, which both increases the degree of error and the amateur's ability to swing consistently and accurately (balance speed).

Casual and corporate golf is on the increase as clubs strive for a share of what is an increasingly competitive market. Such golfers tend to be infrequent players and as such more prone to errant

shots.'

[11] He suggested a way of solving the problem which involved changing the hole to a par 4 dog-leg with an entirely new tee location.

[12] Mr Jacobs was of the opinion that the solution to the problem in relation to the sixth hole proposed by Mr Weller was far more drastic than is necessary in the circumstances. He suggested three alternative solutions, the first of which being in his opinion the most suitable. This solution involves the erection of a system of barriers (preferably trees or vegetation or netting which is see-through) just in front of and to the right of the regular tee, in a particular position and at a particular height, which would intercept virtually all golf balls that start off at an angle which would otherwise see them ending up in the houses to the right of the sixth hole as it plays. He pointed out that the first respondent had already planted trees so positioned that they would act as an effective barrier in 3 to 5 years when they had grown to a sufficient height. In the interim, he said, while the trees are growing, the first respondent could implement a netting system as more fully described in his affidavit. His conclusion was that this solution should be implemented.

[13] Counsel were agreed that the main issue to be decided was whether the conduct of the first respondent in the circumstances was unreasonable and therefore unlawful. As appears from her judgment the learned judge in the court below (see para 25 of her judgment) found that the first respondent had not interfered unreasonably with the rights of the appellants. Her reasons for coming to that conclusion appear from paras 15 to 24 of her reported judgment and need not be repeated here. It is relevant, however, to point out that part at least of her reasoning was based on a consideration of the attitude of the second appellant as it was expressed in the papers before her. She found that the action the appellants expected the first respondent to take was unreasonable and that they were not prepared on their side 'to take reasonable steps to alleviate the situation'.

[14] In para 17.5 she said that the first respondent had adopted the measure of playing the 6th hole as a par 5 on Wednesdays and Saturdays, and as a par 4 on all other days. This, counsel were agreed, was incorrect. The first respondent had

initially done this but subsequently, in reaction to pressure from its members, it changed the hole back to a 5 par.

[15] Mr *Binns-Ward,* who appeared on behalf of the appellants, based his argument on three passages in the judgment delivered in this court by Steyn CJ in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) which, as Professor DP Van der Merwe put it in his valuable thesis *Oorlas in die Suid-Afrikaanse Reg* (LL.D., University of Pretoria, 1982) at 537, was the first attempt in a judgment to give a comprehensive survey of the common law principles in respect of civil law nuisance situations. The passages on which Mr *Binns-Ward* relied are to be found at 106H-107B, 107E-G and 110F-H and read (in my translation) as follows:

1. '[106H-107B] We are concerned here in the main with what can be called neighbour law. As a general principle everyone can do what he wishes with his property, even if it tends to be to the prejudice or irritation of another but as concerns adjacent immovable property it almost goes without saying that there is less room for unlimited exercise of rights. The law must provide regulation of the conflicting proprietary and enjoyment interests of neighbours and it does this by limiting proprietary rights and imposing obligations on the owners towards each other. Some of the limitations arise directly from the fact that an owner's rights of ownership end on his boundaries (Dernburg *System* 1 par. 162). Although it is not a rigid rule it is not permitted for him to perform an action which causes something to come on to his neighbour's land or has a direct result thereon. He acts for example wrongfully if he breaks stones on his property in such a way that chips fall on his neighbour's land (Dig 8.5.8.5) . . .'

2. '[107E-G] The usual disturbance by smoke one has to endure from the other, but not excessively (Dig 8.5.8.5 and 6). So also the normal dampness caused by a bath against a common wall, but not constant moisture which arises from all too frequent use thereof (Dig 8.2.19). It is obvious that the same principle would be able to find application as regards other disturbances such as noises or smells. (Cf Christenaeus, *In Leg Mechl* 14.29; 14.32 and 33; 14.43). In *Malherbe v Ceres Municipality,* 1951 (4) SA 500 (A.D) at p 517, it is accepted
"that the consequences of the usual use of a piece of ground by its owners cannot be regarded as an unlawful interference of his neighbour's land".'

3. '[110F-H] It is not alleged, and it would scarcely be able to be maintained that exploitation of slate quarries in this area is an unusual use of land. That would however, not be conclusive without more. Also the manner in which he did it would be relevant. To break stones on a piece of ground is not an unusual activity and also not to plant trees. As appears from the sources cited both can, however, lead to liability. According to *Malherbe v Ceres Municipality, supra,* at p 518, a neighbour would be able to claim that overhanging branches that block his gutters be removed. This is in

accordance with the principle that he may not use his ground in such a way that objects such as dangerous objects come therefrom beyond his boundaries on to his neighbour's land. Thereby he would, unless it falls under the usual reciprocal burdens which one neighbour must endure from the other, infringe his neighbour's rights of enjoyment, even if his own use, regarded in general, is not an unusual one.'

[16] Mr *Binns-Ward* referred to the fact that Traverso DJP had (in para 15 of her judgment) quoted with approval a passage from an unreported judgment delivered by Sheppard AJA in the New South Wales Court of Appeal in *Campbelltown Golf Club Ltd v Winton* [1998] NSWSC 257 and pointed out that immediately after the passage quoted Sheppard AJA said:

'But what they were not bound to accept was a situation such as was suffered by the respondents in which their property was peppered with golf balls on a daily basis, thus posing a threat, not only to the respondents' property but also to their physical safety. The golf course was obliged so to construct the hole as to divert balls hit normally away from their property. This could be done by resiting the direction of the hole or by appropriate screens, whether natural or artificial, or a combination of both as indeed has apparently happened.'

[17] The whole passage from Sheppard AJA's judgment, including the portion not cited by Traverso DJP, as Mr *Binns-Ward* submitted (correctly in my view), when considered as a statement of what might reasonably be expected between a golf course owner and its residential neighbours, reflects precisely what a South African court would have held in the closely analogous factual circumstances of this case.

[18] The evidence in my view, establishes a sufficiently high incidence of badly aimed golf balls entering the first appellant's property to entitle the appellants to relief. I cannot agree with the comment made by Traverso DJP (in para 20 of her judgment) that the appellants 'have failed to show that . . . the number of golf balls exceeds what could reasonably have been expected by them to strike their property'. This comment is based on her earlier statement that

'a large portion of the golf balls found on the property were merely found on the property at various places. The [appellants] could not in respect of those golf balls submit that they were deflected in a manner which would lead to the conclusion that they were likely to have caused material damage.'

[19] I do not agree with that statement. It will be recalled that from August 2003 a 4.7 metre high net has been in position around the western and southern aspect of the property. It follows that at least since August 2003 every golf ball that has come

onto the property must have been struck over this net. It follows further that all these balls must have come there in circumstances where they were likely to cause damage to any property they came into contact with or any person who was in their path of travel. In fact, according to the respondent's own records of golf ball strikes on the first appellant's property from November 2004 to January 2005, 21 of the 57 strikes counted by the first respondent's ball counters were observed going into the swimming pool. The papers contain a photograph of the effect of a golf ball strike on the pool cover fitted for child protection, which provides graphic illustration of what the second appellant and his family have been subjected to.

[20] I am accordingly satisfied that the amount of golf balls entering the first appellant's property was clearly excessive and unreasonable in all circumstances.

[21] I accept that the first respondent's use of its land for a golf course does not constitute unusual use. It is also correct, as *Mr Binns-Ward* readily conceded, that it would be reasonable for the appellants 'to tolerate some ingress of badly hit golf balls'. (Cf *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) 192A-B.) But what they have had to endure clearly goes substantially further than what a neighbour is obliged to put up with on the application of the principle of 'give and take, live and let live', which forms the basis of our law on this point: see *Assagay Quarries (Pty) Ltd v Hobbs* 1960 (4) SA 237 (N) at 240 G, *Cosmos (Pvt) Ltd v Phillipson* 1968 (3) SA 121 (R) at 126 H and *Lawsa* (1st reissue) par 189 (a passage approved by this court in *PGB Boerdery Beleggings Edms Bpk v Somerville 62 (Edms) Bpk* [2007] SCA 145 (RSA) at par 9). It is true, as pointed out by Traverso DJP, that the land in question has been used as a golf course since 1925 and that the first appellant knew at the time of the property was purchased that it was adjacent to a golf course and would be susceptible to being hit by golf balls. But even if that is relevant, which I am prepared to assume for present purposes, it is clear that the appellants did not know that the hole was badly designed and gave rise to the safety concerns expressed by Mr Weller and not disputed by Mr Jacobs.

[22] As regards the remedy to which the appellants are entitled, *Mr Binns-Ward* submitted that the court should order the first respondent to implement the first solution suggested by its own expert, Mr Jacobs, and which he said in his report

should be implemented.

[23] Mr *Newdigate,*who appeared with Mr *Kantor* for the first respondent, stated that his client was prepared to consent to an order in the terms proposed by Mr *Binns-Ward* (which are set out in para 25 below), which involves the implementation of Mr Jacobs's preferred solution. He contended, however, that, subject to this order, the appeal should be dismissed with costs.

[24] I do not agree. The first respondent came to this court to defend a judgment in which the court *a quo* held that it had not interfered unreasonably with the appellants' rights and that the appellants' application for an appropriate interdict had to be dismissed. I am satisfied that there was (and will continue to be) an unreasonable interference with the appellants' rights unless an interdict, based on the first respondent's own expert's opinion, is granted. The appeal in the circumstances has to be upheld and costs must follow the result.

[25] The following order is made:

1. The appeal is upheld with costs;

2. The order of the High Court dismissing the application with costs is set aside and replaced by an order in the following terms:

'(i) The application is upheld with costs, including the qualifying costs of Mr Bruce Weller.

(ii) The First Respondent (the Milnerton Golf Club) is interdicted from permitting the use of the sixth hole on the Milnerton Golf Club's golf course until such time as it implements a system of barriers near the tee off position in accordance with the system described at paragraphs 12-14 of the affidavit of Phillip Jacobs, iurat 3 March 2006.

(iii) The operation of the interdict granted in terms of paragraph 2.2 above is suspended for a period of one month from the date of this order in order to afford the First Respondent an opportunity to implement the necessary measures.'

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
BRAND JA
MLAMBO JA
COMBRINCK JA
MHLANTLA AJA