IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8552/04

In the matter between:

ALLACLAS INVESTMENTS (PTY) LTD	**First Applicant**
ALEXANDER SIMONIS	**Second Applicant**

and

MILNERTON GOLF CLUB	**Respondent**
R.G.L. STELZNER & 4 OTHERS	**Intervening Parties**

JUDGMENT : 24 AUGUST 2006

TRAVERSO, DJP :

[1] The applicants in this matter are all owners/occupiers of properties bordering on the Milnerton Golf Course ("MGC").

[2] The MGC is a body corporate with an existence independent of its members. The Milnerton Golf Course has been in existence since 1925. The land upon which the course is situated was leased by the MGC from the owner until the early 1990's, when the owner of the land decided to develop that part of the land adjoining the golf club which did not form a usable part of the golf course. Pursuant thereto MGC acquired ownership of the land upon which the golf course is situated and the adjoining land was turned into a residential development known as Sunset Links.

[3] It is common cause that 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.

[4] The first applicant purchased one of these properties during March 2002 and caused a house to be built on it. This property borders the fairway of the sixth hole of the golf course. The sixth hole is a par five and is approximately 400 meters long. It is parallel to the ocean and is located to the north of the tee. The second applicant and his family took occupation of the property during March 2003. The second applicant contends that since then the property has on several occasions been struck by golf balls hit by players playing the 6th hole.

[5] In an attempt to alleviate the position the second

applicant caused a 4.7 meter high net to be erected around part of the property, but he contends this did not help. I return to this aspect later.

[6] The jurisprudential basis upon which the applicants' claim is founded is the common law of private nuisance.

[7] In Roman Dutch law the relations between neighbours were regulated in a peculiarly local way, with local custom, by-laws and a system of interlocking urban and rural servitudes playing a prominent role. In the South African jurisprudence, English cases were relied on liberally. But the notion that the South African neighbour law is based on the English Law was put to rest by Steyn, CJ in Regal v. African Superslate (Pty) Ltd 1963(1) SA 102 (A) at 106:

> ***"Ons gemenereg behandel die onderwerp nie onder 'n enkele rubriek wat met die Engelsregtelike 'nuisance'***

sou ooreenstem nie. Die behandeling is fragmentaries en hou verband met verskillende regsmiddels en prosedures. Sommige daarvan is nie meer gebruiklik nie, maar dit, meen ek, is van minder belang. Van meer belang is die substantiewe reg insake doen en late van die een waarteen die ander beskerm word."

See too E.L. Farmers' Association & Others v. Minister of Education & Development Aid & Others, 1989(2) SA 63 (A).

[8] Although Steyn, CJ stressed that the difference between the two common law systems should not be overlooked, Professor J.R.L. Milton commented as follows:

"Since the principles and policies of the South African action for nuisance are substantially identical to those of Anglo-American nuisance law, and since the courts have always freely borrowed from this source, the action for nuisance by way of interference with the comfort of human existence can be said to be based upon principles drawn from both the civil law and

English common law as shaped and interpreted in the judgments of the South African courts."

LAWSA (First re-issue), Vol. 19, para. 183, p. 128 – 129).

[9] A dispute between neighbours invariably involves, amongst other things, the question whether there has been an abuse of a right. The facts should therefore be examined to determine whether the neighbour whose conduct is being complained of exceeded his powers of ownership. This issue must be answered with reference to considerations of reasonableness and fairness (Regal case, *supra* at 111 F - G and H *ad fin*; 112 A - B; 114 D - E). It has been said that an interference will become unreasonable when it ceases to be "*expected in the circumstances"* or when it becomes such that a neighbour need not tolerate it under the principle of "*give and take*" or *"live and let live"* (See LAWSA, op cit supra para. 189, p. 135 - 136).

[10] The powers of ownership extend only as far as there is a duty on his neighbour to endure the exercise of those powers. If a neighbour exceeds these powers he infringes the right of his neighbour. This constitutes wrongful conduct. (See Gien v. Gien, 1979(2) SA 1113 (T) at 1121 A-D.) How to approach the question of balancing the right of the owner of a property to do with his property as he likes and the right of the neighbour not to be interfered with will always be difficult to establish.

[11] In Sedleigh-Denfield v. O'Callaghan, [1940] AC 880 at 993, Lord Wright expressed himself as follows:

> ***"A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind to living in a society, or more correctly, a***

particular society.” (Emphasis supplied)

[12] From this *dictum* it is clear that what is reasonable must be assessed objectively and with regard to the circumstances of each particular case.

[13] Several factors have to be considered in deciding this question. In this case the applicants accept that by virtue of the fact that they own/occupy a property which borders on a fairway of a golf course, their right to free and undisturbed use of their property will be interfered with to some extent. They accept that it would be reasonable for them to tolerate some ingress of badly hit golf balls. Their complaint relates to the number of golf balls which land on their property, which they contend is excessive, and further that many of the golf balls which have landed on the property have caused damage to their home.

[14] It is common cause that the MGC have, without admitting liability to do so, taken certain precautionary measures. They have planted trees and have caused the 6th hole to be played as a par 4 on all days except Wednesdays and Saturdays. The respondent's stance has however always been that the applicants have not made out a case that the conduct of the golf course constitutes nuisance.

[15] I will therefore, as a point of departure consider whether such a case was made out. Mr. Binns-Ward, for the applicants, placed great emphasis on the fact that "*coming to the nuisance*" is no defence in a case such as this. In this regard he referred me to several decisions from foreign jurisdictions. See, *inter alia*, Campbelltown Golf Club Ltd v. Winton & Another, [1998] NSWSC 257 (unreported, NSWCA CA No. 40056 of 1996) and in

particular the following *dictum* :

> ***"Undoubtedly the respondents bought into a subdivision which bordered a golf course. The benefit of this to them was that they overlooked a degree of open space at the rear of the premises. If it were not for the problems created by golf balls coming on to their land, the outlook would have been a pleasant one increasing their enjoyment of the property.***
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> ***The problem with the appellant's submission is that it endeavours to relegate houses built on land in the subdivision to an inferior position to that occupied by the golf course. In the appellant's submission, the golf course was the focal point. If it created a problem for residents, that was something which the residents had to tolerate. That is not the law.***
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> ***What was required was that the golf course should so adjust its activities as not to interfere unreasonably with the peaceful enjoyment by residents of their land. At the same time, the residents, bordering as they did a golf course, had to accept the fact that the game of golf was going to be played on land adjoining their properties and that it could be expected that from time to time some golf balls might come on to their land.***

[16] There is nothing contentious about the abovementioned *dictum*, or the principles enunciated in any of the other cases to which I have been referred. In my view none of these cases elevate "*coming to the nuisance*" to a legal principle which is at variance with the basic principles of the law of delict. It is, as a matter of first principle, clear that priority of occupation (in this case the golf course) does not give an owner carte blanche to deprive his neighbours of the reasonable physical comfort of their existence on their properties. The question will always remain whether it can be said, objectively and with reference to all the facts, that the golf course acted wrongfully. There can be little doubt that the fact that the applicants bought a property bordering the 6th hole of the golf course is a relevant factor to be taken into account in assessing the reasonableness of the respondent's actions. In itself, it can however never be a decisive factor.

[17] In assessing the reasonableness of the respondent's actions, the following facts should, in my view, be taken into consideration:

17.1 The fact that the respondent has conducted a golf course in Milnerton since 1925.

17.2 The applicants' complaint is not that the respondent has recently commenced using the property differently to the way in which it has been used for the past 80 years, i.e. for the playing of golf.

17.3 The applicants do not suggest that any unnatural or inappropriate activity is being carried on on the golf course. They accept that golf is being played on a locality designed for

that purpose.

17.4 A very important factor is that at the time when the property was purchased, and in fact at all relevant times hereto, the applicants knew and understood that golf would be played on the property immediately adjacent to their property and that they would be exposed to the consequences inherent in being in such a position. They knew that the property would be susceptible to being hit by golf balls. In fact during 2002, while the construction of the applicants' property was in progress, the second applicant approached certain members of the respondent while they were busy playing golf and asked them to hit their balls into certain windows of the second applicant's property in order to assess whether the windows were

armour-plated. The respondent says that this request was made as part of an attempt to resolve a dispute which the applicants had with their supplier. Whatever the situation might be, it does not detract from the fact that the applicants were aware of the probability that the property would be hit by golf balls in a manner that can cause damage, and took precautions in this regard. This fact is inconsistent with the second applicant's statement that he and/or his wife had made enquiries from people who led them to believe that the danger to the property was minimal, as the property was too far from the 6th tee.

17.5 What is also clear is that the respondent was prepared to go to great lengths to try and alleviate the problem of which the applicants

were complaining of. The respondent has already planted trees which will protect the applicants' property once they are fully grown. The respondent has further 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.

[18] Subsequent to the launch of this application, an application for intervention was brought (and granted), by certain other property owners adjoining the 6th hole. This application, so it appears, was precipitated by the fact that the proposed solution to the first and second applicants' complaints impacted negatively on their rights as property owners. It is against this background that it was submitted by Mr. Newdigate that the stance of the applicants which demands the respondent to make certain changes in order to accommodate their difficulties would result in one way

or another to the prejudice of not only the respondent, but of its neighbours too.

[19] On the papers there are disputes as to the precise number of balls that entered the second applicant's property. Reliance was placed by the applicants on various cases from foreign jurisdictions to support their contention that the number of golf balls entering the second applicant's property are unreasonable. This exercise is not helpful. Whether the respondent's conduct is reasonable or not must be determined with reference to the facts of this particular case. In this regard it is important to bear in mind that the applicants' case relates not to golf balls merely entering its property, but to golf balls being struck onto their property in such a manner that they are likely to cause damage to the property or personal injury.

[20] The mere fact that a golf ball enters the second applicants' property or is found there does not, and cannot, in itself constitute a nuisance. This is significant because analysing the evidence of the applicants, it becomes clear that a large portion of the golf balls found on the property were merely found on the property at various places. The applicants could not in respect of those golf balls submit that they were reflected in a manner which would lead to the conclusion that they were likely to have caused material damage. In my view the applicants have failed to show that the respondent's conduct is unreasonable in the sense that the number of golf balls exceeds what could reasonably have been expected by them to strike their property in the circumstances of this case. Nor have they shown that the damage caused to their property exceeds what can reasonably be expected in the normal course of a property situated on a golf course.

[21] The attitude of the second applicant is also significant. Firstly the second applicant requires the respondent to reduce the length of the 6th hole from a par 5 to par 4. On the respondent's version (which I have to accept) all that would happen is that the houses further along the same hole would become more susceptible to being hit by golf balls. In addition it would reduce the golf course from a 72 par to a 71 par. It is significant that if the respondent were to make the changes suggested by the second applicant it would result in prejudice not only to the respondent, but to other neighbours. In addition the applicants state that the 4.7 meter net that they erected, had little effect and their property was still subject to "*unacceptably high incidence of golf ball strikes*." This rather bald statement does not bear scrutiny. As a matter of simple logic it must follow that if a net of adequate dimensions is erected by the applicants, it will prevent golf balls striking the protected areas. This is also made clear

in the evidence of the respondent's expert witness. It appears that the applicants' real objection to the net is that it is an eyesore which obscures their view of Table Mountain. The applicants therefore appear to be reluctant to take relatively inexpensive measures in order to protect themselves. This they cannot do.

[22] Considerations of fairness will 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. In this regard see Rand Waterraad v. Botma & 'n Ander, 1997(3) SA 120 (OPD) at 137 F:

> ***"Aan die billikheidsideaal word ook uitdrukking verleen in die Romeinsregtelike cautio damnum infectum (D 39.2) en die Romeins-Hollandse protestatio (Voet 39.2.15). Volgens hierdie beginsels het 'n persoon die reg gehad om homself teen skade wat vanaf sy buurman***

> ***se grondgebied 'n bedreiging gevorm het, te beskerm. Doen hy geen stappe om homself te beveilig nie het hy geen remedie teen die ingetrede skade gehad nie.*"**

Hattingh, J continued to point out that in harmonising the property interests of neighbouring property owners, reasonableness and fairness were prominent factors. In considering the reasonableness of another actor's conduct, his mental disposition plays an important role. (See Gien v. Gien, *supra* at 1121; Rand Waterraad v. Bothma, *supra* at 134.)

[23] As stated above, the respondent has shown its willingness to take reasonable measures to minimise the risk of damage by golf balls to the applicants' property. The applicants, on the other hand, seem to adopt the attitude that this responsibility lies with the respondent alone. This is a further factor which I have to consider in deciding whether the respondent has acted unreasonably.

[24] Living next to a golf course brings certain benefits in relation to the environment in which one lives. However, it 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.

[25] In view of all the factors set out above, I conclude that the respondent has not interfered unreasonably with the rights of the applicants.

[26] In view of this finding it is not necessary to deal with the applications of the intervening parties.

[27] In the circumstances, the application is dismissed with costs.

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TRAVERSO, DJP
24 August 2006