Gien v Gien 1979 2 SA 1113 T

The applicant and respondent were brothers living on neighbouring livestock farms in the former Western Transvaal. They used to farm in partnership but fell out over their mother's will and now detested each other. The respondent kept a vegetable garden, but had a problem with baboons raiding it. He bought and installed an apparatus which emitted gas explosions every two minutes day and night.

The applicant applied for an interdict restraining the respondent from using the apparatus in such a way as to cause a nuisance. He alleged that the explosions disturbed his daily peace of mind and his sleep, as well as his family and workers. Everyone on the farm had become short-tempered and easily irritated. One of his horses became so volatile as a result of the noise that it threw its rider and had to be taken off the farm in order to calm it. The cattle were restless and resisted dipping. Generally, the effect of the noise was to disrupt his farming activities.

An application for an interdict requires the applicant to show that he has:

(a) A clear right (ie, the applicant must prove the existence of a right on a balance of probabilities);
(b) That there has been an infringement of the right by the respondent, or that an infringement is threatened;
(c) That there is no adequate remedy other than the interdict to protect the applicant's right.

What is the 'right' on which the applicant relies? It is the right to protect your rights of ownership (the right to peaceful and undisturbed enjoyment of a thing) against an unreasonable exercise by a neighbour of their rights of ownership. In *Gien* there was no dispute over (a) or (c). Instead the litigation turned on (b), whether the respondent had infringed the applicant's right.

See p41 of the casebook:
'Where there is a clash between the entitlement of an owner to use their property and the entitlement of another owner to peaceful and undisturbed enjoyment of their property, the rights of both owners are limited by placing duties on both. An owner's rights of use extend only to the extent that there is a duty on his or her neighbour to tolerate the exercise of those rights. In other words an owner has a duty not to exceed that limit, not to use the property in a way that infringes the rights of a neighbour. If the limit is exceeded, it is unlawful conduct that can be stopped by an interdict.'

Did the respondent exceed or abuse his rights of ownership? The test is whether the respondent's use of his property could be considered reasonable in the sense of conforming to the standards expected by the legal convictions of the community.

The court looked at a number of factors. Note that some of these factors may outweigh others, or all factors together may create a different picture than the picture created by focusing on one or two of them. These are factors, considerations, not absolute requirements.)

a. Locality: this was a quiet area where people farm with livestock. Reasonableness dictated that a farmer should not make more noise than is reasonably necessary for ordinary farming activities and to safeguard his or her economic interests. (So if it had been a fruit farming area it might be reasonable to have such an apparatus to protect the orchards).

b. Materiality: Only the causing of harm or discomfort, inconvenience which is material or substantial will be unreasonable. The materiality test is objective, namely the discomfort experienced by a normal person residing in the vicinity. See the quotation from *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) at p42: 'the test . . . is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of the "reasonable man" – one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property'.

Here, much was made of the fact that the noise exceeded SABS standard comfort levels. The duration of the noise (all day and night) and the interval between explosions was added to the objective considerations of materiality. The sound clearly created problems for the farming operations of the applicant, in that the cattle and horses were disturbed by it.

c. Personality of the plaintiff or applicant: it is insufficient for a plaintiff to show that prejudice is substantial as far as he is concerned. One has to show that the average person would find it prejudicial. So if the plaintiff is excessively sensitive, then the nuisance would not necessarily affect an average person. (Here again the SABS standard was given great weight.)

d. Motive: since Roman Law even reasonable, conduct is usually considered unlawful if it is done with the sole intent of prejudicing a neighbour. The example given in the Digest is of an owner digging a borehole with the sole intent of cutting off a neighbour's water supply. Or the facts of Hollywood Silver Fox Farm v Emmett 1936 2 KB 468 in which a landowner standing on his own property fired shots with the sole purpose of interfering with the breeding of silver foxes on a neighbour's land. The defendant intended to develop a housing estate and the noise made by the foxes was detrimental to these plans. It was argued that the defendant was entitled to shoot on his land, and even if his conduct was malicious this would not make it an actionable wrong.) The difficulty is that of proving sole intent. In *Gien* there was no direct evidence of a malicious motive on the part of the respondent. The court was not prepared to infer a malicious motive. But, where the advantages secured by particular conduct are slight in relation to the substantial disadvantages caused to a neighbour, the court may be prepared to assume a malicious motive on the part of the respondent. If the advantages were outweighed completely by the disadvantages, the court would be able to infer a malicious motive. So a matter of proportionality.

Here the respondent's conduct was intended to secure a vegetable garden of about $100m^2$. The respondent's major farming activity was livestock. In the context of the overall farming activities conducted by the respondent, the vegetable garden was of very little importance. It might be possible on such a basis to infer malicious motive, but the court made its decision on the basis of other factors and not this one.

e. Proportionality: conduct must be reasonable in terms of the benefit it secures, so it must be proportional to the benefit secured. The end must justify the means. Here the court clearly found the conduct to be excessive: The respondent "het 'n hamer gebruik om 'n vlieg dood te slaan" (used a hammer to kill a fly) .

f. Public interest, social utility of the activity: this was area which was dry and unsuitable for vegetable farming. If it were vegetable territory, the respondent might be able to show that the development of a vegetable farming operation was in the public interest. The applicant would then be required to endure the nuisance in the public interest. (But one can't look at the public interest in isolation from the other factors. If the conduct was disproportionate this would possible override the social utility of the conduct, making it unreasonable.)

g. Whether any other, less harmful measures were available: This is related to the proportionality factor (e) above. A important element was the fact that the apparatus could have been muffled and would still have achieved the same results. Moreover there was no proof of any need to use it at night. These considerations contributed materially to the decision that the behaviour of the respondent was unreasonable.

h. Practicability of reducing harmful effects: Regal is illustrative here. Evidence was that the cost of erecting a barrier in the river to prevent slate washing down the river made it reasonably impractical to take steps to prevent the reoccurrence of the harm. So the omission to do so is not unreasonable. The ratio of the Regal case seems to be that in an action for an interdict restraining the respondent from continuing a nuisance which he himself did not cause, relief will be refused unless it can be shown that there are reasonably practicable means by which the defendant can abate the nuisance.

Did the respondent in Gien act unreasonably in the light of the legal convictions of the community? It was found here that he did, and therefore that he acted unlawfully. 'The interests the respondent wished to protect were of such a restricted scope and the nature of the steps he took to protect them were so drastic in relation to his goal and to the particular environment that he exceeded his powers to protect those interests granted to him by the law of property. As a result he unlawfully interfered with applicant's rights as owner of the neighbouring property. Under these circumstances, the applicant is entitled to an interdict'. (p44)