# OWNERSHIP, PLANNING AND NUISANCE

In the next several lectures, we will discuss the common law concept of ownership. Our discussion will include –

- The nature and limits of the concept of ownership;
- The acquisition and termination of ownership rights; and
- The protection of ownership and its limitations.

This discussion will take us into the second semester.

## The Nature of Ownership

Ownership is the most complete or "perfect" real right. It is generally understood as the right **use**, **enjoy**, **encumber**, **alienate** or **dispose** of and/or **vindicate** property in any way whatsoever. In its purest form, it is a completely unlimited, abstract concept, and so extends beyond these particular incidents of the right. However the rights associated with ownership, though theoretically absolute, are limited for all practical purposes. It is only through an understanding of the limits placed on the otherwise absolutist conception of ownership that we can come to grips with what ownership really is in law.

As set out in **Gien v Gien**, limitations on ownership come from two sources –

"*Ownership is the most complete real right a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of any owner exist within the boundaries of the law. The restrictions can emerge from either* ***objective law*** *or from* ***restrictions placed upon it by the rights of others****. For this reason, no owner ever has the unlimited right to exercise his entitlements in absolute freedom and in his own discretion*." (see p 1120 of the Law Report – reproduced here in translation).

These two sources of limitation – "**the objective law**" and "**the rights of others**" – are the subject of this lecture. But what are they?

- The "**objective law**" refers to any legal principle which impinges on the use and enjoyment of property. So, for example, we can all agree that "using" and "enjoying" your pump action shot gun by taking pot shots at shoppers at the local mall, is an incident of the right of ownership which is prohibited by the objective law – the criminal and delictual law relating to murder and wrongful killing. Less dramatic examples include restrictions on land use imposed by planning and environmental regulations, to which we shall turn later.
- The "**rights of others**" is a broad concept, however. It forms the basis what is known as "neighbour law" or the "law of nuisance".

**Neighbour Law**

Neighbour law applies to people who own adjacent or closely proximate immovable property. It deals with the limitation of the rights of ownership or use in the name of the rights and interests of owners or users of neighbouring land. The classic exposition of the purpose of neighbour law can be found in **Gien v Gien**.

In that case, the respondent had created a device which produced loud cracking noises at regular intervals. Its purpose was to scare baboons and other monkeys away from a vegetable garden and store. The device was so potent that it could be heard on a neighbouring farm, where it disturbed the sleep of the inhabitants and made the farm animals restless. The respondent could have switched the device off at night and taken steps to reduce the noise it made – without making it any less effective. But the respondent refused to do so. The applicant applied for an interdict

to restrain the respondent from using the device in a manner which caused the nuisance complained of.

The decision of the court (per Spoelstra AJ) set out the basic principles applicable to neighbour law. Where the rights of neighbours conflict, the limits of the conflicting rights have to be determined on the facts of the particular case. The general rule is that a neighbour is obliged to tolerate the "normal" use of an adjacent property. But where the use of neighbour property is so "abnormal" or unreasonable that it causes a nuisance, it can be interdicted. The questions to be considered, in each case, are as follows –

1. Are the acts of the respondent reasonable and fair? The criterion of reasonableness is the over-arching consideration in matter of neighbour law.
2. Is the respondent acting in bad faith or with express and single intention to cause harm or discomfort for the applicant?
3. Is the respondents' use of his property normal or abnormal?
4. Are the respondents' actions harmful to the applicant because he is an abnormally sensitive individual?

It is apparent from the above that the test for nuisance in neighbour law is highly fact specific and value laden. Both later and earlier decisions of the courts have treated the test as very flexible and open to adaptation.

In **Regal v African Superslate** the court emphasised the over-arching principle of reasonableness in adjudicating disputes between neighbours. In that matter, the appellant and respondent owned adjacent properties on a river. There was a slate quarry on the respondent's land, and a great deal of waste product from the quarrying of slate deposited next to it. The river ran such that large deposits of waste

from the slate quarry were regularly washed down to the appellant's land. The appellant applied for an interdict to abate the nuisance by compelling the respondent to take the necessary steps to prevent the waste from accreting on the appellants land.

> The evidence disclosed that the impact on the appellant's use and enjoyment of his property was only marginally affected by the accretion of the slate waste, while the cost of building a wall on the respondents' land to stop the waste from accreting would be very high.

The Appellate Division affirmed a fundamental principle of neighbour law: **that although a landowner can in principle do with his or her property as he or she pleases, those rights are limited where they unreasonably or unfairly prejudice the rights of neighbours to use and enjoy their property**. However, a landowner can only be held responsible for damage caused to a neighbour where it is fair to expect him or her to avert that damage. Similarly, an interdict can only be granted against possible future harm, where it is fair to expect the person subject to the interdict to take measures to avert the harm.

On the facts, Steyn CJ held that, given the substantial cost of building a wall to retain the waste on the respondent's land, and the relatively minor inconvenience caused to the appellant, it would be neither reasonable nor fair to expect the respondent to build the wall. Accordingly, the application for an interdict was dismissed.

The cases emphasise that interdicts for the abatement of nuisance will not normally be granted where the nuisance is caused by the "normal" use of neighbouring land (see **Regal v African Superslate** p 107E – G). But even this principle has been adapted and limited.

In **Allaclas Investments v Milnerton Golf Club**, the Supreme Court of Appeal held that, even the "normal" use of one's property can cause an actionable nuisance, so long as the nuisance is sufficiently acute.

In that matter a family lived in a house on a golf estate in Milnerton. Their house was adjacent to the sixth hole fairway of the Milnerton Golf Course. Over a 28 month period, approximately 875 badly aimed golf balls landed on the family's property, causing a substantial safety risk and an obvious nuisance. The family applied to the Cape High Court for an interdict preventing the Golf Club from using the sixth hole until it introduced effective measures to prevent golf balls striking their property. The applicants put up expert evidence that the sixth hole was badly designed – and that the design flaw would lead the average golfer to hit a bad shot virtually directly at the applicants' house.

The applicants had moved into a golf estate, and had selected a property immediately adjacent to a fairway. They would obviously have expected that golf balls would be driven down the fairway. They could also have reasonably been expected to accept that some golf balls would occasionally strike their property. The use of the adjacent land as a golf course could hardly be described as "abnormal".

The High Court found that the applicants "*failed to show that . . . the number of golf balls exceeds what could reasonably have been expected by them to strike their property*".

The Supreme Court of Appeal disagreed. Farlam JA, writing for a unanimous court, held as follows –

> "*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 and Another 1960 (4) SA 237 (N) at 240G, Cosmos (Pvt) Ltd v Phillipson1968 (3) SA 121 (R) at 126H and Joubert et al (eds) The Law of South Africa (LAWSA) (first reissue) para 189 (a passage approved by this court in PGB Boerdery Beleggings Edms Bpk and Another v Somerville 62 (Edms) Bpk and Another [2007] SCA 145 (RSA) in para 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 that 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*."

The parties were ultimately in agreement that the construction of a net at strategic points along the fairway would stop most golf balls reaching the appellants' property. That was the solution ordered by the Court.

**Planning Law**

Land use is also regulated by statute and regulation. In certain circumstances landowners have standing to enforce planning and land use regulations on an adjacent piece of land. A good illustration of an (unsuccessful) attempt to do so is the Constitutional Court decision in **Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others**. In that matter, the state had established a temporary resettlement area on its own land at Leeuwkop Prison to alleviate the plight of victims of the flooding of the Jukskei River in Alexandra.

The decision to establish a transit camp was challenged by adjacent landowners and residents, ostensibly on the basis that the relevant planning and land use legislation had not been complied with. They relied on a range of statutes, including –

1. The National Environmental Management Act. (The residents claimed that the state had not produced the environmental management and implementation plans required by that statute).

2. The Gauteng Town Planning and Townships Ordinance. (The residents contended that the transit camp did not meet the requirements for the establishment of a township).

3. The local Town Planning Scheme. (The residents contended that the scheme did not provide for the establishment of a transit camp, and so the establishment of a transit camp would violate the scheme).

4. The National Building Standards and Building Regulations Act. (The residents contended that the temporary structures provided for in the transit camp did not meet the building standards set out in the Act).

The High Court sided with the residents and interdicted the state from establishing the transit camp. The state appealed. The principles laid down by the Constitutional Court in deciding the appeal may be summarised as follows –

- The state, at all levels, has a constitutional duty to take reasonable measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. This includes the provision of relief to persons who, such as the flood victims in *Kyalami Ridge*, find themselves in situations of housing crisis.[1]

[1] *Kyalami Ridge*, paras 37 and 39.

- Where the state decides to use its own property in order to discharge its obligations under section 26 (2) of the Constitution, its decision to do so is not normally reviewable as administrative action. This is the corollary of the common law principle that a landowner's reasonable use of his property is not subject to restrictions, even if such use causes prejudice to others.[2]

- It cannot be said that the state's decision to use its own land to provide relief to people in situations of housing crisis is unreasonable.[3]

- Even assuming that the decision to use state land for the purposes of temporary settlement of persons in situations of desperate need is reviewable, the need to respond to the urgent needs of desperately poor people with temporary shelter will normally outweigh the interests of owners of neighbouring land in stable property values and a peaceful environment.[4]

- Nonetheless, the decision to accommodate persons facing housing crises in temporary shelter on state-owned land will always have to be implemented lawfully. The state must accordingly comply with legislation applicable to it as a landowner.[5]

- Much of the legislation that would normally be applicable to permanent housing developments is not applicable to the use of land for temporary resettlement purposes.[6]

[2] Ibid para 95. See also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106H.
[3] Ibid para 98.
[4] Ibid paras 104 and 105.
[5] Ibid para 92.
[6] See, generally, the discussion of statutory application at paras 65 to 90.

- Whether and to what extent a planning or land use statute is applicable to the provision of temporary shelter on state-owned land is a question which should generally be decided on the facts of a particular case. However, such legislation can only ever be relevant to the implementation of a temporary resettlement plan. It will never be relevant to the validity of the decision to establish temporary shelter on state owned land itself.[7]

- Having regard to above principles, it is clear that a party seeking to oppose the use of state-owned land for the provision of temporary shelter to persons desperately in need of it cannot rely on speculative allegations of future non-compliance with legislation which may possibly be applicable. It is instead required to challenge aspects of the implementation of the decision on the basis of discrete facts said to constitute an infringement of applicable legislation. The party must also establish that it has appropriate standing to advance its complaint.

In the event, the Court ruled that there was no evidence that the state's decision to establish a transit camp could not be implemented lawfully, and that the decision was not inherently unlawful. The residents had not made out a case that any particular statute had or would inevitably be breached by the establishment of the camp, and so it dismissed their objections and upheld the state's appeal.

Kyalami Ridge raises important questions about when and to what extent a landowner should be permitted to object to the use of state land for a public purpose – especially where the state is responding to an emergency situation and cannot

[7] Ibid, especially paras 59, 63, 105 and 109.

comply with “ordinary” land use statutes and regulations. We will discuss this further in class.