Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No A20/11

In the matter between:

DIANE LOUISE STEENKAMP	First Appellant
NEIL DESMOND STEENKAMP	Second Appellant
and	
KNYSNA LOCAL MUNICIPALITY	First Respondent
MILLWOOD GARDENS t/a LEISURE GARDENS	Second Respondent

Court:	GRIESEL, STEYN and HENNEY JJ
Heard:	27 July 2011
Delivered:	22 August 2011

JUDGMENT

GRIESEL J:

Introduction

[1] This appeal arises from an urgent application launched by the appellants, Mr and Mrs Steenkamp, against the respondents for certain interdictory relief based on an alleged noise nuisance. The first respondent is the Knysna Local Municipality ('the municipality'), whereas the second respondent, Millwood Gardens, is a voluntary association which operates an old age facility under the name *Leisure Gardens* on erf 1786, Leisure Isle, Knysna. The appellants own the adjoining erf 1789 at 1 School Road, where they reside, together with their two young children.

[2] In their founding affidavit the appellants alleged that the second respondent was responsible for an actionable noise nuisance in that it created (and still creates) a disturbing noise on its property. In the notice of motion, the appellants sought, as against the municipality, a rule *nisi*, calling upon it to show cause on the return day why a mandamus should not be issued compelling the municipality to enforce against the second respondent the 'Public Nuisance – stop order' issued by the municipality on 23 September 2009 in terms of certain legislative enactments;[1] and, secondly, a mandamus to enforce against the second respondent certain other legislative provisions[2] in regard to the further noise nuisance created by the drop-off by taxis of the second respondent's staff at the second respondent's premises and/or the removal of the second respondent's kitchen waste slops and/or the delivery trucks' noise

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[1] Sections 2(1)(b) and (p) of the municipality's Nuisance By-laws, published in the Province of the Western Cape: Provincial Gazette 6282 on 8 July 2005; and s 181(2) of Municipal Ordinance 20 of 1974.

[2] Noise Control Regulations, promulgated in terms of s 25 of the Environmental Conservation Act, 73 of 1989, published under PN627 of 1998 (PG 5309 of 20 November 1998); and/or s 181 of Municipal Ordinance 20 of 1974; and/or the municipality's Nuisance By-laws referred to above.

created by deliveries to second respondent at the second respondent's premises.

[3] In the same application the appellants also sought two interdicts against the second respondent, firstly to restrain the second respondent from causing or allowing to be caused from the premises of the second respondent a 'noise nuisance' as defined in the legislation referred to earlier; and, secondly, an interdict to restrain the second respondent from 'conducting any business from the second respondent's premises in a manner that constitutes a nuisance and/or disturbing the appellants' right to free and undisturbed use and possession of their property'.

[4] On 7 December 2009 the urgent application came before N C Erasmus J, who issued a rule *nisi* against the municipality in the terms as prayed in the notice of motion. (On the return day, being 2 February 2010, the rule *nisi* was duly confirmed by Thring J against the municipality, who did not oppose the application and played no role in the appeal before us.) The second respondent opposed the application stating that the matter was not urgent and, in any event, that a dispute of fact existed. Erasmus J found that the matter was urgent and referred the dispute of fact for oral evidence on the issue as to whether or not an 'actionable noise nuisance' as alleged by the appellants did exist, as well as the question whether the appellants had made out a case for the final interdictory relief as claimed in the notice of motion against the second respondent.

[5] After the hearing which took place at Knysna, Erasmus J dismissed the application against the second respondent and ordered the

appellants to pay the second respondent's costs on an attorney and client scale. An application for leave to appeal against this judgment was likewise dismissed with costs, but the Supreme Court of Appeal subsequently granted leave to appeal to this court.

[6] Although a large volume of evidence – both oral and documentary – was placed before the court a quo,[3] very few factual disputes actually emerged from such evidence. In the end, the court found it unnecessary to make any credibility findings regarding the respective versions of Mrs Steenkamp, on the one hand, and the manager of Leisure Gardens, Mrs Berrange, on the other. The court 'accepted that [Mrs Steenkamp] experiences the effects of noise emanating from the operations of the second respondent and she experiences that as a disturbance'. The court held, however, that the appellants had failed to prove that the conduct of the second respondent was unreasonable in the circumstances and that in any event the appellants are expected to tolerate these disturbances on the principal of 'give and take, live and let live'. In the result, so it held, the nuisance created by the second respondent was not actionable. This finding forms the crux of the appeal presently before us.

Factual background

[7] It is common cause that Leisure Isle has traditionally been a quiet and upmarket suburb of Knysna, where an atmosphere of peace and quiet exists and is jealously guarded by that community. On one of the road signs welcoming visitors to the island it is described as a 'haven of

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[3] The record on appeal occupies some 18 volumes.

peace'. The stands in general are small and the houses are built relatively close to each other. The roads are narrow and the only link to the main-land is through a causeway, the only road on the island that can carry two-way traffic with ease. The maximum speed allowed on the island is 40 km per hour. Many of the roads have interspaced speed bumps. Special areas are demarcated for buses and taxi drop-offs and pick-ups. The general ethos of Leisure Isle is described by Mrs Steenkamp as 'to live and let live, to act reservedly and not to engage in nuisance creating activities'.

[8] The second respondent's property was originally zoned for educational purposes. During the early 1980s the land was transferred inter-governmentally and sold to the second respondent. The sale as well as the subsequent application by the second respondent for rezoning and for approval of its building plans met with stiff opposition from the local community. The residents' concerns included the anticipated increased traffic flow in the neighbourhood, the proposed situation of the kitchen, the location of the service gate and the potential noise disturbance likely to be caused by the proposed facility. However, the relevant authorities eventually approved the project and the second respondent has been conducting the operations of Leisure Gardens for the past twenty years or so.

[9] During May 2007 the appellants purchased erf 1789, which is immediately adjacent to and shares a common boundary with the second respondent's property on erf 1786. The appellants have a double storey home and the northern side of their home is approximately five paces from the boundary wall, with the second respondent's kitchen another

ten paces beyond the wall. The appellants' bedroom is situated on that side and overlooks the second respondent's backyard and kitchen. When the appellants viewed the property with a view to buying it, they did not anticipate any problems arising from the operation or proximity of the second respondent's facility. However, on the first morning in their new home, during October 2007, the applicants were woken early in the morning by the noises emanating from the second respondent's kitchen, where staff were washing dishes and cleaning up. Subsequently, this became a daily pattern.

[10] The noises complained of fall into three main categories, namely kitchen and courtyard noises; staff pick-up and drop-off noises; and delivery vehicle noises. With regard to the first category, the appellants said the following in their founding affidavit:

'Every day there is a constant noise that emanates from the second respondent's kitchen during the day and during the night. We are woken up at all hours of the night by dishes being washed, by loud staff conversations and by a door chime that rings at all hours of the day and night. There is also an electric mixer that is often used early in the mornings. When dishes are washed, very early in the mornings or late at night, the noises that accompany this activity is unmistakeable. Noises from plates, dishes, cutlery and the clattering of pots and pans is part of what we have to endure. On top of this the staff talk to each other inside the kitchen and these noises also travel for us to endure. In addition staff leave the kitchen at times and move into the courtyard, speak to each other in the courtyard, sometimes shout at each other in the courtyard, and this we also have to endure. Also as mentioned, at the wash-rooms.'

[11] As far as the second category of noise is concerned, the appellants complained that the area of School Road right in front of their property was being used as a 'taxi rank' for the delivery and pickup of staff for Leisure Gardens. This, according to the appellants, gives rise to the following problems:

'Every morning at 6:20 a vehicle arrives, parks outside our house, doors open and shut and a noisy alarm is set when the driver locks his car. A minivan is then reversed up the street and staff are collected. We are subjected to their voices at top volume. Just after this, the minivan drives off, and a taxi rattles up the street. The staff open and close all the doors numerous times, often music is blaring from this vehicle and the staff voices are incredibly loud. This vehicle waits in School Road for staff from Leisure Gardens, who then leave, also making a noise. Then, the minivan arrives back, and staff are once again dropped off. The doors open and close a few times and once again their voices are at top volume. The engine continues running the entire time that the staff are being off-loaded. The minivan is then parked and the driver then opens his car and drives off. This is all by 7am in the morning. Please note that this happens every day of the year and despite our requests, none of the management [of the second respondent] have witnessed the arrival of staff in the morning despite promising to investigate the noise.'

[12] With regard to deliveries, the appellants sketched the following picture to the municipal manager in their letter, dated 8 December 2008 (i.e. more than a year after they had first moved in):

'There are delivery vehicles every day of the week, including Saturdays, Sundays and Public Holidays. A pig farmer arrives anytime from 05:00 and he will arrive and keep his engine running whilst waiting for the gates to open, he then drives in, and proceeds to move rubbish bins around, and also to clean his bins using running water. The bread delivery van arrives anytime from 05:50 am, including Saturdays, Sundays and Public Holidays. This entails the opening of a delivery van, with bolts

squeaking open and shut, and the moving of bread baskets and the slamming of doors.

The complex is twenty years old, and things have changed from when they first began operations. There is no proper delivery bay, suitable for the size vehicles that are being used. Hence the big trucks (well over the 3T limit as per the sign at the entrance to Leisure Isle) are using the pavement directly opposite our home, or using the road itself to park, run their refrigeration motors and offload their goods.

We have seen delivery staff urinating on surrounding property walls, and also been told to F*** off by one delivery member after asking him to switch off his refrigeration motor – this whilst parked the wrong way in a one way, and blocking the entire road.

The number of deliveries and size of the vehicles being used could be likened to that of a small supermarket, and this is in a residential area.'

[13] From the outset these concerns were raised by the appellants and conveyed to the employees of the second respondent, mainly to Mrs Berrange. The record is replete with email messages addressed by the appellants to the second respondent, recording specific incidents of noise disturbance in all three categories. Although Mrs Berrange initially adopted a co-operative attitude and undertook to take steps to abate the noise, this did not bring any lasting relief. This led the appellants to invoke the municipality's assistance to take appropriate action in terms of available legislation, including the municipality's own nuisance by-laws. When these efforts too did not serve to abate the noise, the appellants engaged the services of an attorney, who wrote a comprehensive letter to the municipality, again urging the municipality to enforce the available statutory remedies, indicating that the court would be approached for urgent relief. The appellants also acquired a

video camera and furnished the municipality with hard evidence, in the form of a DVD recording, of what they were being subjected to.

[14] Eventually, after more than 18 months of complaints, correspondence and threats of litigation by the appellants, the municipality, during September 2009, issued a so-called 'stop order' whereby the second respondent was ordered in terms of relevant legislation to take steps to refrain from the activities infringing on the rights of the appellants. The validity of this 'stop order' was disputed by the second respondent, but no steps were taken to set it aside. In any event, as mentioned earlier, this court has already granted an order compelling the municipality to enforce such order, an aspect that will be considered in a different context later in this judgment.[4]

[15] The stop order also did not serve to alleviate the problems experienced by the appellants. Finally, a meeting was convened at the offices of the municipality in order to seek a solution to the problem. The appellants, however, experienced the atmosphere at the meeting as hostile and felt that there was no prospect of reaching a settlement with the second respondent. They accordingly proceeded to launch the application which gave rise to the present appeal.

[16] The application was supported by a very comprehensive founding affidavit deposed to by Mrs Steenkamp, documenting the history of the matter with reference to copious documentary and photographic attachments. Her husband also deposed to a brief confirmatory affidavit, adding one or two observations of his own.

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[4] See para 21 below.

Second respondent's response

[17] In the answering affidavit of the second respondent, deposed to by Mrs Berrange, she repeatedly denied that any noises emanating from the second respondent caused an unlawful infringement of the appellants' rights of free and undisturbed use and enjoyment of their property. She was of the view that these noises were reasonable and therefore lawful and that the appellants had to endure the noise. She sought to justify her position by claiming that the second respondent was acting within its constitutional rights as owner and operator of the home and the relief sought against it would 'unreasonably infringe upon the second respondent's constitutional and ownership rights'. Moreover, she alleged that the same operating practises had been followed by the second respondent for twenty years, generating the same level and nature of noise as that complained of by the appellants. According to Mrs Berrange, the appellants are the first neighbours in the twenty years of existence of the home for seniors to complain about noises emanating therefrom and the manner in which the home is being operated.

[18] Mrs Berrange also laid great stress on the fact that certain measures had been put into place by the second respondent to address the appellants' complaints. Thus, she explained that meetings had been held with the staff to inform them of the applicants' complaints; the staff were monitored to ensure that they do not cause noise nuisances; the telephone was moved out of the kitchen into the passage way; the early morning telephone ring to the kitchen from the matron was stopped; a dishwasher was installed; the ring level of residents' emergency bells were reduced; the tree at the School Road entrance was cut back to allow

vehicles delivering goods to drive onto the premises; the pick-up and drop-off positions of the staff were moved away from the applicants' property; a visible notice was put up at the School Road entrance requesting 'quiet please, no noise, no shouting, no music'; delivery drivers were given notices requesting them that they turn off their engines during deliveries if possible; the time table for collection of vegetables scraps was changed; and the fanlight windows of the kitchen are being closed whilst the kitchen is being used. According to her, nothing further could be done that would not jeopardise the second respondent's operation.

[19] In her oral evidence Mrs Berrange was constrained to concede that she had never visited the appellants' home and did not have personal knowledge of incidents reported which took place in the mornings before 08h00. She accordingly could not deny the noises complained of by the appellants.

The appellants' cause of action

[20] Although they invoked a whole battery of subordinate legislation in support of their application,[5] the appellants' claim is essentially based on the common law principles of nuisance. In our law a private nuisance occurs when someone interferes with a neighbour's use and enjoyment of his or her land or when events occurring on a particular property interfere with the comfort of human existence of a neighbour.[6] In this regard it is an everyday fact of life that noise, as one form of private

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[5] See footnotes 1 and 2 above.
[6] *Nuisance* 19 *Lawsa* 2 ed para 169.

nuisance, can adversely affect the physiological and psychological well-being of human beings and may amount to a material interference with the comfort of human existence.[7] As such, noise is not uncommonly a matter of contentiousness and a source of ill feeling between neighbours.[8]

[21] Not every noise nuisance is 'actionable', though. In deciding whether or not a particular nuisance is actionable, our courts have over the years applied different tests and expressed the applicable principles in various ways. The appropriate test was recently authoritatively restated by the Supreme Court of Appeal in *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk*,[9] where Harms AP, writing for the court, quoted JRL Milton's summary with approval:[10]

'An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a "to-be-expected-in-the-circumstances" interference and is of a type which does not have to be tolerated under the principle of "give and take, live and let live". The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used *is not that of the reasonable man but rather* involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. *This is*

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[7] *Lawsa, op cit,* para 187 and the cases cited in footnotes 2 and 5–14.
[8] *Laskey v Showzone CC* 2007 (2) SA 48 (C) para 22.
[9] 2008 (2) SA 428 (SCA) para 9.
[10] As contained in 19 *Lawsa* 1st reissue para 189.

achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm.'[11]

[22] In *De Charmoy v Day Star Hatchery (Pty) Limited*,[12] Miller J gave a useful summary of factors relevant to the enquiry relating to reasonableness:

'The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists in noise) the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test, moreover, 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.'[13]

[23] With regard to the type of noise, the authorities make it clear that the harm suffered by the complainant must be material or substantial and not 'merely slight or trivial'.[14] The locality in which the noise occurs is also highly relevant. Thus, harm arising from an activity appropriately carried on in the locality in which it takes place is less likely to be considered unreasonable than an activity carried on in an inappropriate locality.[15]

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[11] Harms AP pointed out that the words italicised in the above quotation had 'unfortunately' been omitted from the second edition of the work by Church and Church in para 173 thereof.
[12] 1967 (4) SA 188 (D) at 192D–E.
[13] Cf also C G van der Merwe, *Sakereg* 2 ed pp 191–196; *Lawsa op cit* paras 174–180.
[14] *Lawsa, op cit*, para 175.
[15] *Lawsa, op cit*, para 184.

[24] As for the time of day when the noises are experienced, this is crucial. *Lawsa*[16] states the position succinctly: '[t]hat which is reasonable at midday might be unreasonable at midnight. The more likely an interference is to interfere with repose or slumber the more grave it will be considered'. Support for this self-evident truth (if required) may be found in a publication by the World Health Organization to which the appellants' acoustics expert, Dr Burger, referred, to the effect that '[u]ninterrupted sleep is known to be a prerequisite for good physiological and mental functioning of healthy persons'. To the same effect is a later report by the same organisation, [17] where it is stated that 'there is plenty of evidence that sleep is a biological necessity, and disturbed sleep is associated with a number of adverse impacts on health'. The same report makes the following obvious point:

'Since people are less tolerant of the noise their neighbours make at night-time than of their neighbours' evening or daytime noise, it may be assumed that much of the annoyance associated with noise from neighbours relates to the influence of such noise on sleep.'

In the light of these principles, it can be accepted, I would suggest, that any noise that disturbs the sleep of a neighbour in the sense of waking him or her at an inappropriate time is prima facie unreasonable.

[25] Counsel for the appellants strongly relied on the judgments of the erstwhile Transvaal Provincial Division in *Die Vereniging van Advokate (TPA) v Moskeeplein*,[18] in the court of first instance and, on appeal to the

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[16] *Op cit* para 178.
[17] *Night Noise Guidelines for Europe* (2009), accessed at http://www.euro.who.int/en/what-we-publish/abstracts/night-noise-guidelines-for-europe on 15 August 2011.
[18] 1982 (3) SA 159 (T).

full bench, in *Moskeeplein v Die Vereniging van Advokate (TPA).*[19] Although counsel for the second respondent submitted that the case is distinguishable from the present one on the facts, counsel on both sides were in agreement with the principle laid down in that case, namely that once the noise which causes a disturbance has been admitted or proved, unreasonableness is assumed and the creator of the noise would carry the duty to indicate that it cannot reasonably put measures in place to prevent the disturbance.

Discussion

[26] Applying the aforementioned principles to the facts of the present case, it can be accepted (as did the court a quo) that the appellants experience the effects of noise emanating from the operations of the second respondent as a disturbance. There can be no doubt that the appellants' lives and their enjoyment of their property have been severely affected by the noises that emanate from the second respondent's property. As it was put by them in one of their first letters to the municipality: 'We are at our wits end, as we are unable to sleep later than 06:20 every morning, we cannot sleep at night and we cannot sleep during the afternoons.'

[27] The test, as pointed out above, however, is objective and not subjective. Although some attempt has been made on behalf of the second respondent to portray the appellants as 'paranoid and over-sensitive and totally unreasonable', this was not the finding of the court a quo, nor can such a finding in my view be justified on the evidence. A

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[19] 1983 (3) SA 896 (T) at 900H–901B.

reading of the record does not suggest to me that the appellants fall into the category of 'the perverse or finicking or over-scrupulous persons'[20] when it comes to noise. In the circumstances, I have no hesitation in finding that a reasonable person in the position of the appellants would also find the noises experienced by them disturbing in the sense as indicated above.[21] It follows that the appellants have succeeded in proving noises emanating from and associated with the second respondent's property which objectively speaking cause a disturbance. In line with the *Moskeeplein* judgment, *supra,* the corollary to this finding is that unreasonableness is assumed and the second respondent carries the duty to indicate that it cannot reasonably put measures in place to prevent the disturbance.

[28] Apart from this presumption of unreasonableness, I am in any event satisfied that the appellants have succeeded in proving unreasonableness on the part of the second respondent. The following factors weigh with me in this regard:

[29] As is apparent from the uncontroverted evidence summarised above, the noises emanating from and associated with the second respondent's business occur at awkward times in that it regularly disturbs the appellants' sleep, starting early in the morning. This complaint is obviously the main bone of contention, which needed to be addressed by the second respondent. Unfortunately the staff of the second respondent did not take any steps to ascertain the true nature and cause of the appellants' complaints. For the same reason the steps taken

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[20] As it was put in *Prinsloo v Shaw* 1938 AD 570 at 575.
[21] *De Charmoy, supra.*

by the second respondent in this regard did not go far enough to abate this nuisance. Mrs Berrange's evidence to the effect that the noises are reasonable and have to be endured by the appellants is not based on fact or personal knowledge and simply cannot be accepted.

[30] As pointed out above, the locality in which the parties find themselves is also highly relevant.[22] In this regard much was made of the fact that the second respondent has been conducting its business at the property in question for a period of some 20 years without any complaint from the neighbours. The appellants' arrival on the scene in 2007 must accordingly be regarded as 'coming to the nuisance', as it is put in English law.[23] The applicable principles in this regard are formulated as follows by Van der Walt:[24]

'The net result of recent case law could perhaps best be summarised by saying that, although the mere fact of prior existence would not necessarily provide an adequate defence in a nuisance case, it might influence the question whether the nuisance was unreasonable. Although the defence of coming to the nuisance might not be dispositive, courts may under certain circumstances have sympathy with defendants who have used their land in the same way for a long time. This sympathy is relevant in neighbour law and finds expression in the principle that a plaintiff in nuisance cannot expect a higher level of comfort than is customary in the particular context – locality principle. In the cases the idea of coming to the nuisance was not accepted as an absolute defence, but the courts have been adamant that landowners should be reasonably tolerant of disturbances that could be described as normal and reasonable or that should be expected in the area.'

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[22] *Lawsa, op cit*, para 184.
[23] Cf A J van der Walt *The Law of Neighbours* 288–291.
[24] *Id* at 288–289.

[31] It is precisely because of the locality principle that the second respondent's argument can be turned on its head, as it was the second respondent who chose to come to Leisure Isle and to conduct its operations in the heart of a quiet single-residential suburb – a 'haven of peace'. The noises emanating from the second respondent's premises might have been unobjectionable, had it occurred in an industrial or highly urbanised area.[25] However, having single residential dwellings right on its doorstep necessarily places certain constraints on the way in which the second respondent should be permitted to conduct its business. It is thus the second respondent that must adjust its operations to fit in with the locality where it finds itself; not the appellants who must grin and bear it because they happen to find themselves next-door to a noisy neighbour who happened to have been there first.

[32] The present case can be compared with the analogous situation that pertained in *Allaclas Investments (Pty) Limited v Milnerton Golf Club*,[26] where the land had been used as a golf course since 1925. Notwithstanding this fact, and notwithstanding the fact that the appellant knew at the time when its property was purchased that it was adjacent to a golf course and would be susceptible to being hit by golf balls, this did not non-suit the appellant in that case. In the result, an interdict was granted, restraining the golf club from using the hole in question until such time as a system of barriers, as recommended by an expert, had been implemented to eliminate the nuisance created.

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[25] Cf *Laskey's* case, *supra*, para 26.
[26] 2008 (3) SA 134 (SCA) para 21.

[33] As for the fact that previous neighbours had not complained against the manner in which the second respondent conducted its business, this factor should not receive undue weight as we do not know the reasons for the absence of complaints from them. Thus, it may be due to the fact (as suggested by Mrs Steenkamp in her evidence) that the previous owners used the house merely as a holiday home; or to the fact that they were simply more stoical or long-suffering than the appellants or perhaps hard of hearing. We also do not know what caused the appellants' predecessors to abandon their vigorous opposition to the second respondent's proposed development in its embryonic stage, when they raised precisely the kind of concerns that the appellants complain of in this case.

[34] Further examples of unreasonableness on the part of the second respondent is to be found in the attitude displayed on occasion towards the appellants by the second respondent's employees:

- Thus, it was suggested to the appellants by Mrs Berrange that the solution to their problems lies in selling their home. (Mrs Berrange tried to explain, though somewhat unconvincingly, that this remark was not intended as a serious suggestion, but a 'casual one, without malice'.)

- When the appellants, after months of suffering and fruitless negotiations, purchased a video camera and started filming members of second respondent's staff making a noise, Mrs Berrange added insult to the appellants' injury by threatening them with legal action for alleged invasion of privacy and 'harassing' the staff.

- Notwithstanding the fact that the second respondent's kitchen has been identified as the main source of the noise, and notwithstanding an earlier undertaking to do so, the second respondent refuses to close those windows while working in the kitchen. When the appellants telephoned the matron, Ms Maureen Clunas, on a particular Sunday to request that the windows be closed in accordance with what had been discussed, she replied: 'You are harassing me. . . it's ridiculous to expect us to change.'

- During an open day at the second respondent's facility, the same matron told the appellants: 'We make noise here, that is what we do.'

- On another occasion, when Mrs Steenkamp was woken at 5h50 from the noise of dishes being washed, she telephoned the staff phone number and asked the member of staff to please stop washing the dishes, whereupon the member of staff hung up the telephone and 'proceeded to have a "conversation" at full volume with another staff member in the kitchen' with the door wide open.

- The appellants testified that the behaviour of the second respondent's staff deteriorated and the noise levels escalated since the appellants first complained about the noise and that they got the impression that 'staff had been told to make as much noise as they want to, in an attempt to get rid of us'. Although it would be almost impossible to prove, a reading of the record (not limited to the examples cited above) leaves one with the uneasy feeling that the appellants' impression may not be entirely unjustified. In this regard, it is important to bear in mind that where someone intends to harm a neighbour or acts from malice or

spite, the interference with physical comfort so occasioned will be considered unreasonable.[27]

[35] Finally, regarding the issue of unreasonableness, it is important to bear in mind that the municipality, as the responsible local authority, has already found, for purposes of the subordinate legislation referred to above, that 'we are convinced that a public nuisance does exist on the second respondent's premises. Having regard to the definition of 'public nuisance' contained in the applicable By-law,[28] this finding was undoubtedly justified in the light of the evidence summarised above. Furthermore, Erasmus J himself added his stamp of approval to this finding by issuing the rule nisi against the municipality, which was later confirmed by Thring J, as mentioned earlier. Although I accept that this order does not raise an issue estoppel as far as the second respondent is concerned,[29] it is nonetheless incongruous that there should be conflicting findings by the same court in the same case (a) vis-a-vis the municipality, that a public nuisance exists on the second respondent's property, which the municipality is ordered to stop; and (b) vis-a vis the second respondent, that the appellants have failed to prove the existence of *any* nuisance, whether public or private. For the avoidance of any doubt that may exist in this regard, I wish to state that in my view the 'stop order' issued by the municipality on 23 September 2009 was justified in the circumstances, as was this court's endorsement of that order on 2 February 2010.

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[27] *Lawsa, op cit*, para 183.

[28] '"*public nuisance*" means any act, omission or condition on any premises . . . which materially interferes with the ordinary comfort, convenience, peace or quiet of the occupiers of property in the neighbourhood . . .'

[29] A question that was raised with counsel during oral argument before us on appeal, and in respect of which helpful supplementary heads of argument were filed.

[36] In all the circumstances, I am accordingly satisfied that the appellants have proved on a balance of probabilities that the noise that emanate from the second respondent's premises is unreasonable and consequently that an actionable noise nuisance does exist.

Remedy

[37] The next enquiry is whether the second respondent has shown that it cannot reasonably put measures in place to prevent or attenuate the disturbance. As mentioned earlier, the second respondent attempted to persuade the court that it had in fact done all that can be required of it to abate the nuisance and that nothing further can be done without jeopardising its operations. I am unpersuaded by this argument. It is evident that the steps taken did not serve to alleviate the main problem complained of by the appellants, namely being woken early in the morning by kitchen noises and staff off-loading noises.

[38] With regard to kitchen noises, a suggestion that the kitchen windows be closed while staff was working was initially implemented, but was later retracted, according to Mrs Berrange because 'the kitchen does get hot – especially with the weather we have had recently [26 February 2008], thus to keep all windows and doors closed is impossible'. On 21 April 2008 she bluntly told Mrs Steenkamp: 'We cannot close **all** the kitchen windows! This is a busy kitchen and needs ventilation.'

[39] I do not accept this argument. First, it is not clear why the kitchen should get too hot and should need ventilation before 7h30 – summer or winter. No reason has been advanced on behalf of the second respondent

why all kitchen windows and doors should not be kept firmly closed, at least until that hour. This is something that the appellants have been urging the second respondent to implement almost since day one. It is so simple to implement and could have alleviated, if not eliminated, many of the problems. This has also been ordered by the municipality in its 'stop order'. Secondly, should ventilation be required at that hour, the appellants' expert, Dr Burger, stated as his opinion that 'the best solution would be to enclose the kitchen building and provide mechanical ventilation'.

[40] Further reasonable steps that can be taken to attenuate the noise nuisance have been spelt out in the municipality's 'stop order', namely '. . . 2. Instruct staff members not to raise their voices when working in the court yard; 3. Ensure that staff reduce the amount of noise emanating from the kitchen as a result of the clattering of pots, pans and cutlery.' There is no reason why, as a minimum, those steps should not be implemented and strictly adhered to by the second respondent. A provision to that effect will be included in the proposed order.

[41] With regard to the kitchen noises, Dr Burger also described further steps that could be taken to reduce kitchen noise, eg by rendering the kitchen ceiling 'highly sound absorbent'. This, according to Dr Burger, 'will not only reduce the reverberant sound level in the kitchen, and hence the sound radiation through the open windows, but make the kitchen environment a more pleasant working space. The reduced noise will make communication easier and lead to reduced fatigue of the staff'. He also recommended that a roof over the 5 m wide and approximately 10 m long open passage between the kitchen and the garden wall, plus

sound absorbent cladding of the wall surface facing the kitchen would reduce noise levels significantly and he described this solution as 'first prize'. No evidence was adduced on behalf of the second respondent to show that any of the proposed solutions were unreasonable or impractical.

[42] In the circumstances, the appellants are entitled to the interdict they sought.

Conclusion

[43] I would accordingly propose that an order be granted in the following terms:

1. The appeal is upheld with costs, including the application for leave to appeal.

2. The order of the trial court is set aside and substituted with the following order:

(a) The second respondent is interdicted and restrained from conducting any business from the second respondent's premises that constitutes a nuisance and/or disturbs the applicants' right to free and undisturbed use and possession of their property situate at 1 School Road, Leisure Isle, Knysna.

Without detracting from the generality of the foregoing, the second respondent is specifically ordered to comply with the directions issued by the first

respondent in its 'Public nuisance – order to stop', dated 23 September 2009.

(b) The second respondent is ordered to pay the costs of the application, including the costs occasioned by the hearing and the qualifying expenses of Dr Burger.

B M GRIESEL
Judge of the High Court

STEYN J: I agree.

E T STEYN
Judge of the High Court

HENNEY J: I agree.

R C A HENNEY
Judge of the High Court