The history, development and future of public nuisance in light of the Constitution

Alton Samuels

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Supervisor: Prof AJ van der Walt

Faculty of Law

Department of Public Law

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

The objective of this thesis is to establish whether the notion of public nuisance has a legitimate purpose in post-apartheid South African.

Public nuisance originated in English law in the 12th century as a tort-based crime called tort against land and was used to protect the Crown against infringements. This special remedy of the Crown was used in cases of unlawful obstruction of public highways and rivers, damage or injury causing an inconvenience to a class or all of her majesty's subjects and a selection of other crimes.

The notion of public nuisance was adopted in South African law during the late 19th century. Between its inception and 1943, the notion of public nuisance was applied in line with its original aims, namely to protect and preserve the health, safety and morals of the public at large. Public nuisance regulated unreasonable interferences such as smoke, noise, violence, litter and blockage of roads which originated in a public space or land, as opposed to a private space or land.

However, the public nuisance remedy was indirectly used, in a number of cases during the 1990s, by private individuals to apply for an interdict to evict occupiers of informal settlements. In so doing, these private individuals bypassed legislation regulating evictions and in the process disrupted or frustrated new housing developments, especially those provided for in land reform programmes. In fact, it was established that this indirect application of public nuisance is unconstitutional in terms of section 25(1) of the Constitution.

Most of the public disturbances originally associated with the public nuisance doctrine are currently provided for in legislation. Since the remedy is now mainly provided for in legislation, the question is whether the doctrine of public nuisance as a Common Law remedy is still relevant in modern South African law.

It was concluded, especially after an analysis of two cases during 2009 and 2010, that the notion of public nuisance only has a future in South African law if it is applied

in the absence of statutory nuisance or any other legislation covering public nuisance offences and where it is not used as an alternative mechanism to evict occupiers.

Opsomming

Die doel van die tesis is om vas te stel of publieke oorlas as gemeenregtelike remedie ‘n geldige doel in post-apartheid Suid-Afrika het.

Die remedie bekend as publieke oorlas het ontstaan in 12de eeuse Engelse reg. Hierdie remedie het ontwikkel as ‘n delikteregtelike en kriminele remedie, met die doel om land wat aan die Kroon behoort te beskerm. Publieke oorlas het, onder andere, toepassing gevind waar daar onwettige obstruksie van publieke hoofweë en riviere was sowel as skade of nadeel wat vir die breë publiek ongerief sou veroorsaak. Ander misdade was ook gekenmerk as ‘n publieke oorlas.

Publieke oorlas is teen die laat 19de eeu in die Suid-Afrikaanse regoorgeneem . Tussen die oorname van die remedie in die Suid-Afrikaanse reg en 1943 is die remedie van publieke oorlas toegepas in lyn met sy oorspronlike doelwitte, naamlik om optrede wat die gesondheid, veiligheid en moraliteit van die breë publiek in gedrang kon bring, te verhoed. Volgens sy oorspronklike doel reguleer publieke oorlas onredelike inmenging soos rook, geraas, geweld en obstruksie van paaie wat op publieke grond of ‘n publieke spasie ontstaan het.

Die remedie van publieke oorlas is, in ’n reeks sake gedurende die 1990’s, deur privaat individue indirek gebruik om okkupeerders van informele nedersettings uit te sit. Sodoende het privaat individue die wetgewing wat spesiaal ontwerp is om uitsettings te reguleer vermy en in die proses nuwe behuisingsontwikkelinge ontwrig en gefrustreer, veral in gevalle waarvoor in grondhervormingsprogramme voorsiening gemaak word. Hierdie indirekte toepasing van publieke oorlas is ongrondwetlik omdat dit nie met artikel 25(1) van die Grondwet versoenbaar is nie.

Die meerderheid van steurnisse wat gewoonlik met publieke oorlas geassosieer word, word tans deur wetgewing gereguleer. Aangesien die remedie nou hoofsaaklik in wetgewing vervat is, ontstaan die vraag of die leerstuk van publieke oorlas as ‘n gemeenregtelike remedie nog van enige nut is in die moderne Suid-Afrikaanse reg.

Die slotsom, veral na die analise van twee sake in 2009 en 2010, was dat die publieke oorlas remedie slegs ‘n toekoms in Suid-Afrikaanse reg het, indien dit toegepas word in die afwesigheid van statutêre oorlas of enige ander wetgewing wat publieke oorlas oortredinge dek en waar dit nie as ‘n alternatiewe meganisme gebruik word om okkupeerders uit te sit nie.

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Chapter 1: Introduction: Outlining the research problem

1.1 Background

The aim of the thesis is to establish whether the doctrine of public nuisance still has a legitimate purpose in South African law. The major part of this investigation entails an analysis of the application of the public nuisance doctrine in a series of cases. The case law in which the doctrine of public nuisance has been applied is divided into four series extending from the late 19th century to 2010. The different periods of the cases in which the notion of public nuisance has been applied are distinguished to illustrate the difference between cases in which the doctrine was applied according to its original aims and where it was not.

Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others,[1] a case in the fourth and most recent series, could be used as an illustration to show which nuisances constitute a public nuisance, the origin of such a nuisance, the courts' interchangeable use of the common law notion of private and public nuisance and, finally, the role of legislation that covers public nuisance offences.

In this case, Intercape and the majority of applicants, together with the first and third respondent, owned or occupied premises in Montreal Drive, situated in Airport Industria, Western Cape. The first applicant was Intercape Mainliner, a luxury bus operator. The first respondent was the Minister of Home Affairs. The Department of Home Affairs (DoHA) rented premises for the purposes of running a refugee office

[1] (20952/08) [2009] ZAWCHC 100 (24 June 2009). Hereafter referred to as *Intercape*.

on land belonging to the third respondent, Cila. The applicants alleged that the operation of the refugee office by the DoHA contravened the applicable zoning scheme of the City of Cape Town and that it constituted a nuisance.

According to the facts, the office was visited by approximately four to five hundred asylum seekers on a daily basis. Because the officials at the DoHA can only help a limited number of people per day, applicants who were not assisted remained there overnight in order to be in the front of the queue the following day. As a consequence, there was an increased amount of litter, the streets were filled with remains of material to provide shelter and there was always a remainder of human waste and food. The large crowd of asylum seekers attracted illegal street vendors, who contributed to the increased amount of litter in the streets. The applicants complained that the increased littering and presence of human waste constituted a serious health risk, seeing that there were no refuse and sanitation facilities available to rectify the unhealthy conditions.[2]

The applicants further complained that the refugee office contributed to an increased level of noise. The noise generated by the crowd of approximately four to five hundred people was more than an industrial area would normally have to tolerate. Taxis that provided asylum seekers with transport to and from the office were a further source of noise, as they played loud music and hooted excessively to attract potential customers and warn people to clear the streets as they moved to or from the office.[3] Another source of noise was the large crowds outside the office, who screamed and shouted frantically. The noise stemmed from situations where

[2] Par 35.

[3] Par 38-39.

tensions between asylum seekers and criminals were about to erupt into violence. The police, who were called upon to restore order, made use of teargas, pepper spray and rubber bullets, which caused the crowd to scatter in various directions, with some entering the premises of the applicants.[4]

Applicants further complained that the operation of the refugee office detrimentally affected safety and security in the area. Although asylum seekers were robbed and mugged by criminal elements, the applicants only reported incidents where their employees fell victim to the same crimes, adding physical violence and intimidation to the list of complaints. In fact, conditions were of such a nature that some of the employees resigned and clients became disinclined to visit their premises. Moreover, the police interference as a consequence of the tensions between the asylum seekers and criminal elements posed an imminent threat to all who used the street and surrounding properties.[5]

Regular blocking of the roads by taxis, predominantly as a result of illegal parking, was intolerable and consequently added to the applicants' list of complaints. Intercape, being a bus company, complained that free-flowing traffic was no longer possible after the office had been opened. Traffic and police vehicles called upon to restore order in times of anarchy contributed to blocked roads.[6]

The first issue the court addressed was to determine whether the refugee office contravened the zoning scheme. The court established that Montreal Drive is

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[4] Par 36-37.

[5] Par 45.

[6] Par 38, 44.

subject to the Land Use and Planning Ordinance[7] (hereafter referred to as LUPO) and that the scheme was zoned for 'Industrial General' purposes. On the issue of whether the respondents complied with the zoning scheme, the court found that the scheme had been contravened.

The most interesting and relevant part of the judgement, for the purposes of this thesis, is the issue whether a nuisance was constituted. While the court was ready to grant relief on the basis that the zoning scheme had been contravened, it still addressed the cause of action based on nuisance. Without identifying which of the two categories of nuisance (private or public) would be applicable, the court accepted that the alleged nuisance was of a private nature when it stated:

> 'In the context of the present case, the term nuisance connotes a species of delict arising from wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference'.[8]

The court distinguished the facts in the *East London* case[9] from the facts it had to deal with. The court was of the opinion that in the *East London* case the unreasonable interference was an action by the respondent which infringed the rights of a neighbouring owner (applicant). On the other hand, on the facts in dispute, the unreasonable interferences not only affected the neighbouring owners, but in fact

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[7] 15 of 1985.

[8] Par 141.

[9] *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A).

'attract people to public areas immediately adjoining the property'.[10] This suggests that the nuisance in this case was of a public nature. However, the court stated that this distinction does not matter.

The court concluded that the continuous activity was objectively unreasonable. Therefore, the court found that a nuisance was constituted. Consequently the court ordered that using the premise for the purposes of a refugee office was unlawful and granted an interdict as an order to cease the operation of the office. However, the court suspended the interdict and allowed the DoHA time to find alternative premises.

According to Church and Church, a public nuisance can be defined as 'an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large.'[11] In other words, the aim of the remedy based on the doctrine of public nuisance is to protect the health and safety of the general public. In the *Intercape* case all the unreasonable interferences complained of, such as litter and noise, could constitute either a private or public nuisance. However, blocked roads and violence on public streets are usually associated with a public as opposed to a private nuisance. The court nevertheless found it difficult, and also unnecessary, to determine whether a private or public nuisance was established in this case. As a result, the court used the terms 'private nuisance' and 'public nuisance' interchangeably, without distinguishing between these two species of nuisance.

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[10] *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others* (20952/08) [2009] ZAWCHC 100 (24 June 2009) par 155.

[11] Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163.

In the process, the court failed to identify a crucial distinguishing factor between these categories of nuisance, namely that all the nuisances in the case occurred in a public area, namely the street. All those who were subject to contact with the nuisances were automatically victims thereof, and not just the owners or occupiers of neighbouring land. Therefore, it can be said that because the nuisance occurred in a public space or area, the nuisance affected the community at large and thus constituted a public nuisance, as opposed to the court's finding of a private nuisance.

Moreover, the court reached its conclusion that the running of the refugee office was unlawful on another basis than nuisance, namely the refugee office's failure to comply with legislation (LUPO). This raises the question whether the doctrine of public nuisance still has a legitimate purpose when legislation covers all the relevant offences. Many legislative measures known as statutory nuisance regulate unreasonable interferences which would normally be associated with the creation of public nuisance. In fact, the last time the common law notion of public nuisance was applied legitimately in South African law, in the absence of legislation, was probably as far back as 1943, in Q*ueensland v Wiehan*.[12]

1.2 Research question, hypothesis and methodology

Apart from the problems arising from the *Intercape* case, the notion of public nuisance was applied erroneously in what is categorised as the second series of

[12] 1943 EDL 134.

cases, which consists of just one case,[13] as well as in a series of cases between 1989 and 2001, here described as the third series. In all these cases private individuals inhabiting private land alleged the existence or possible future presence of a public nuisance, while it was clear that the nuisance affected them in their use of private land rather than on public land.

In view of these problematic applications of the doctrine, the research question is whether the common law remedy of public nuisance[14] has a legitimate purpose in post-apartheid South African law. This will be determined by testing its constitutional compatibility against sections 25(1), 25(2) and 26(3) of the Constitution of the Republic of South Africa of 1996.

My hypothesis is that the use of the doctrine of public nuisance, in series one to four, is problematic on three counts. Firstly, the courts used the species of private and public nuisance interchangeably, as in the *Intercape* case. As a result the courts often in fact resolved the issue from a private nuisance as opposed to a public nuisance perspective. As a consequence, in the cases where the court found the existence of a public nuisance, this was not according to its original definition.

Secondly, most of the public disturbances originally associated with the public nuisance doctrine, which derived from English Common Law,[15] are currently provided for in legislation.[16] The legislation serves as a mechanism for governmental

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[13] *Von Moltke v Costa Aroesa (Pty) Ltd* 1975 (1) SA 255 (C). Hereafter referred to as the *Von Moltke* case.

[14] Hereafter only referred to as public nuisance.

[15] See 1.2 below.

[16] See footnote 56 in chapter 3 below.

institutions to regulate public order. Actions resulting in infringements that disturb the rights of the public at large, in public spaces or on public land, are regulated by prohibiting or criminalising them.[17] Since the remedy is now mainly provided for in legislation,[18] the question is whether the purpose of public nuisance as a common law remedy is still of use in modern South African law.

Finally, the purpose for which the doctrine of public nuisance was used is especially problematic in a particular group of recent cases. The public nuisance remedy was indirectly used, specifically in the third series of cases, by private individuals to obtain an interdict to evict members of informal settlements. In so doing, these private individuals bypassed legislation regulating evictions[19] and in the process disrupted or frustrated new housing developments, especially those provided for in land reform programmes.[20]

In order to determine the legitimacy of public nuisance in post-apartheid South Africa, the following methodology will be followed: an examination of the origin and history of the doctrine of public nuisance; a comparative analysis of US and English law to determine the current use of public nuisance doctrine in those jurisdictions; an examination of the adoption of the public nuisance doctrine in South African law; an

[17] Smoke, noise, air pollution, security and health risks to the public. See the definition of public nuisance in chapter 2 below. Also see fn 8.

[18] In Church J & Church J 'Nuisance' in Joubert WA, Faris JA, Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163 it is called a statutory nuisance, which is defined as a condition or state of affairs which a legislative authority has declared to be a nuisance.

[19] For example, the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998.

[20] Section 25(5) – (9) of the Constitution provides land restitution and redistribution programmes for those who were subject to past discriminatory practices during the apartheid period. Examples of legislation promulgated to achieve this goal are the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998.

investigation of recent developments in South African case law; and a consideration of the constitutional compatibility of the public nuisance doctrine. The overview of each chapter follows below.

1.3 Chapter overview

Chapter 2, entitled the history of public nuisance and its adoption in early South African law, will commence by offering definitions of private and public nuisance, followed by an analysis of the differentiating factors between private and public nuisance. The rest of the chapter covers two main themes: an historical overview of the origins and development of the public nuisance doctrine in English and US law, followed by a discussion on the adoption and development of public nuisance in South African law.

The term 'nuisance' is derived from a French word which means harm. Nuisance may be defined as an interference with the use and enjoyment of land[21] or an action that causes annoyance, discomfort or inconvenience to another human being.[22] Anglo- American law divides nuisance into two categories, namely private and public nuisance.[23] The focus of this dissertation is on public nuisance in South African law. Private nuisance usually occurs between owners or occupiers of adjoining land (neighbours) or land in close proximity. According to Badenhorst, Pienaar and Mostert, private nuisance could be defined as 'conduct whereby a

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[21] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 997.

[22] Church J & Church J 'Nuisance' in Joubert WA, Faris JA, Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163.

[23] Milton JRL 'The law of neighbours in South African law' 1969 *Acta Juridica* 123-269 128.

neighbour's health, well-being or comfort in the occupation of his or her land is interfered,' in so doing causing damage or harm to the owner or occupier of land.[24]

Gray and Gray define the doctrine of public nuisance as follows: 'Public nuisance may arise in connection with an unlawful act which endangers lives, safety, health, property or comfort of the public or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.'[25] Public nuisance originated in English law in the 12th century as a tort-based crime called tort against land[26] and was used to protect the Crown against infringements. This special remedy of the Crown was used in the following circumstances: unlawful obstruction of public highways and rivers, damage or injury causing an inconvenience to a class or all of her majesty's subjects and a selection of other crimes. Therefore it is clear that the public welfare (health and safety) and public morality was protected by the remedy.[27] In the 14th century public nuisance was extended to the public through the protection of individual rights to use public property, such as having a safe passage in public roads[28] and the abatement of noise and smoke in a market.

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[24] Badenhorst PJ, Pienaar JM, Mostert H, *Silberberg and Schoeman's the law of property* (2006) 111.

[25] Gray K & Gray SF *Elements of land law* (5th ed 2009) 1358; also defined as 'A nuisance whose harmful effect is so extensive as to affect the general public at large, or at least a distinct class of persons within its field of operation' in *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W) 380B-C.

[26] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 543.

[27] Church J & Church J 'Nuisance' in Joubert WA , Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 212.

[28] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 545.

The rest of the sub-section will briefly describe the development of public nuisance after being extended to the general public in the 14th century. In so doing, I aim to provide a better understanding of the doctrine when determining the adoption and development of public nuisance in South African law. The comparative study, of which an overview is given below, will serve as a means to determine whether the notion of Common Law public nuisance, besides that promulgated in legislation, still had a legitimate purpose in English law and in the United States of America during the 20th century. US law, like South African law, also adopted the notion of public nuisance; therefore, it may be worth investigating what use the remedy had in that jurisdiction during the 20th century. In conclusion, it will be established whether this notion could still legitimately be applied in South African law.

In a recent article by researchers from the University of the West of England,[29] it was argued that the common law remedy of public nuisance could be used to protect the environment against 'uncontrolled scallop dredging'[30] and so serve a legitimate purpose as a Common Law remedy that complements legislation. Dredging damages the seabed that ultimately damages the ecosystem. The damage will affect the use of the seabed for recreational divers and commercial fisheries. According to the researchers, the available legislation gives little protection against the damage of the ecosystems through dredging.[31] It is therefore suggested that the Common Law remedy of public nuisance should be used until legislative action is

[29] See University of West England 'Public nuisance laws can control damage to ecosystems' http://info.uwe.ac.uk/news/UWENews/article.asp?item=1454 (29 June 2009).

[30] Scallop dredging is the use of a kind of dredge which is towed along the bottom of the sea by a fishing boat in order to collect oysters, starfish and other species.

[31] See University of West England 'Public nuisance laws can control damage to ecosystems' http://info.uwe.ac.uk/newsUWENews/article.asp?item=1454 (29 June 2009).

taken. Therefore, in the absence of environmental and other legislation that protects public interests, the notion of public nuisance could possibly also serve a legitimate purpose in South African law by providing a remedy for actions that harm the public, until legislation is amended or promulgated to cover the situation, as is suggested in English law. The possibility to do so will be established in chapter 2.

In the United States, public nuisance is mainly provided for in legislation (statutory nuisance).[32] However, 'in the absence of regulation, public nuisance became a substitute for governments that could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure and annoy the general public.'[33] United States lawyers relying on the doctrine of public nuisance filed lawsuits in the areas of environmental law[34] and product liability,[35] where it is not effectively provided for in legislation.

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[32] Example: Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

[33] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 545.

[34] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 548-549. In *Diamond v General Motors Corp* 97 Cal Rptr 639, 639 the applicants filed lawsuits for injunctive relief and damages against companies that allegedly contributed to air pollution. The court denied the application with the reasoning that 'public nuisance is ill suited for this type of litigation'. In *Alaska Native Class v Exxon Corp* 104 F3d 1196 (9th Cir 1997) the court denied an application for injunctive relief and damages by way of public nuisance for an oil spoil caused by Exxon. In *United States v Hooker Chemicals & Plastics Corp* 776 F2d 410 (2d Cir 1985) the public nuisance remedy was successfully used to clean up a toxic dump; also see Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 392. In *New York v Shore Reality Corp* 759 F2d 1032 (2d Cir 1985) there was a successful application or the removal of a toxic dump by way of public nuisance as a remedy.

As in English law, the possibility to use the notion of public nuisance for a legitimate purpose not provided for in legislation therefore exists in US law. The possible implications of this development in South African law will be examined in chapter 2 to establish whether public nuisance could still have a legitimate and constitutionally valid purpose outside of legislation.

The final theme in chapter 2 is the adoption and development of public nuisance in South African law. The Common Law public nuisance remedy was derived from English law and was partly provided for in legislation[36] and partly adopted in South African judicial decisions.[37] The term 'public nuisance' was used in judicial decisions as early as the late 1800s. In *Dickson v Town Council of Cape Town and another*[38] it was found that dirt in a barrel drain on the ground constituted

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[35] In *Detroit Board of Education v Celotex* Corp 493 NW2d 513 (Mich Ct App 1992) the court found that the notion of public nuisance cannot be used to keep sellers, manufacturers and installers of defective products liable. In the tobacco litigation case of *Texas v American Tobacco Co* 14 F Supp 2d 956 (ED Tex 1997) the court dismissed a claim that the public's rights were infringed on the basis of public nuisance, stating that the claim was not within the boundaries of the public nuisance theory. Also see Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553- 556.

[36] See Cape Act 2 of 1855 ('for abating public nuisances'); Cape Municipal Ordination Act 20 of 1974 as referred to in Church J & Church J 'Nuisance' in Joubert WA, Faris JA, Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 213; *R v Paulse* (1892) 9 SC 422 (statutory provision used to abate a public nuisance in the form of a brothel); *CP v Reynolds* (1901) 22 NLR 89 (pollution of a public stream).

[37] In *London & South African Exploration Co v Kimberly Divisional Council* 1887 HCG 287 the court granted an interdict against the construction of a tramline on the property of the London & South African Exploration Co for Mylchreest, after the argument was raised that the construction constituted a public nuisance. In *Queenstown Municipality v Wiehan* 1943 EDL 134 stray dogs constituted a nuisance after killing Wiehan's dogs and Wiehan then argued that the municipality was responsible. Also see Church J & Church J 'Nuisance' in WA Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 213.

[38] (1868) B 13.

a public nuisance and an interdict was granted accordingly.[39] *Dell v Town Council of Cape Town*[40] is another example where a public deposit of rubbish amounted to a public nuisance. However, in *Redelinghuys v Silberbauer*[41] the plaintiff argued that the erection of a flour mill would constitute a public nuisance and attempted to prevent the erection thereof. The application for the interdict failed as the applicant couldn't prove that the mill posed a threat to the health of the public and would cause an inconvenience to the rest of the neighbourhood. One might conclude that the remedy was denied in this case because the nuisance was held to be private rather than public, indicating that the remedy was still applied according to its original aims.

More examples of where a public nuisance was constituted and relief was granted include where a brothel was kept,[42] pollution of a public stream,[43] dirt in a barrel drain on the ground,[44] and noise caused by a blacksmith,[45] a business trading in animal skins[46] and stray dogs.[47] An overview of the abovementioned examples creates the impression that any offence interfering with the public health and safety constitutes a public nuisance. Certain public nuisances were even seen as criminal wrongs and the perpetrators were prosecuted accordingly.

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[39] Milton JRL 'The law of neighbours in South African law' 1969 *Acta Juridica* 123-269 139.

[40] (1879) B 2.

[41] (1874) B 95; See Milton JRL 'The law of neighbours in South Africa' 1969 *Acta Juridica* 123-269 139.

[42] *R v Paulse* (1892) 9 SC 422.

[43] *R v CP Reynolds* (1901) 22 NLR 89.

[44] *Dickson v Town Council of Cape Town* (1868) B 13.

[45] *Holland v Scott* (1882) 2 EDC 307.

[46] *Windhoek Municipality v Lurie & Co (SWA) (Pty) Ltd* 1957 (1) SA 164 (SWA).

[47] *Queenstown Municipality v Wiehan* 1943 EDL 134.

Therefore, public nuisance could be said to have been adopted in early South African case law and to have served two functions: firstly, regulating normal nuisances like smoke, noise and obstruction of a highway, which interfered with the public health and welfare of the public at large and, secondly, to stop any unacceptable moral and social behaviour regarded as a criminal offence (like keeping a brothel).

Public nuisance is currently used mostly by municipalities and city councils to regulate nuisances that affect the public. It is mainly provided for in legislation (statutory nuisance)[48] to regulate public nuisances,[49] where a specific action or situation poses a threat of or where actual harm already occurred to the broader public. The local authorities have to institute proceedings for the abatement of a public nuisance.[50]

The analysis in chapter 2 of the remedy of public nuisance in early South African judicial decisions (from the late 19th to mid-20th century) will determine the public nuisance remedy's original field of application in South African law, the relation of the application of public nuisance (in judicial decisions) between English and South African law and how far the Common Law remedy of public nuisance was promulgated into legislation.

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[48] See footnote 6 for a definition of statutory nuisance.

[49] For example the Atmospheric Pollution Prevention Act 45 of 1965; National Environmental Management Act 107 of 1998; Civil Aviation Offences Act 10 of 1972; Health Act 63 of 1977.

[50] Church J & Church J 'Nuisance' in Joubert WA, Faris JA, Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 211.

Chapter 3 will establish that the use of common law public nuisance in more recent South African case law is problematic. This is mainly as a result of the detrimental effect that the notion of public nuisance had when it was used in recent case law (which will be explained below) in post-apartheid South Africa.

As indicated above, public nuisance was originally used for the abatement of ordinary public nuisances (protecting the general public health and safety) and also in extreme situations, where it was used to prosecute members of the public against actions that were morally and socially unacceptable.[51] The Common Law remedy of public nuisance was not used for a long time after the decision of *Queensland v Wiehan* in 1943,[52] except in a series of recent cases from 1989. This is largely due to the aims of the remedy being embodied in legislation, as was indicated in chapter 2.

However, in recent case law, public nuisance has been used in a unique set of facts and circumstances. In most of these cases, private individuals, in predominantly white residential areas, formed landowners',[53] farmers',[54]

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[51] It is concluded in Church J & Church J 'Nuisance' in Joubert WA, Faris JA, Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 214 that 'the practice of prosecuting certain public nuisances as criminal offences at common law has fallen into disuse, largely as a result of the enactment of equivalent statutory offences.'

[52] 1943 EDL 134. The judicial decision of *Von Moltke v Costa Aerosa (Pty) Ltd* 1975 (1) SA 255 (C) is one exception where the Common Law remedy of public nuisance was used in the period between 1943 and 1989. The applicant contended that eradicating vegetation (in his vicinity) for the development of a new shopping mall would constitute a public nuisance. He applied for an interdict to restrain a public nuisance and had to show special injury/reason in order to have *locus standi*. The applicant failed because he could not show that 'he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general.' 258D-F.

[53] *Diepsloot Residents' Landowners Association and another v Administrator Transvaal* 1993 (1) SA 577 (T); 1993 (3) 49 (T); 1994 (3) SA 336 (A). Hereafter referred to as *Diepsloot*.

ratepayers'[55] and environmental associations[56] and applied for an interdict to abate future or present disturbances, alleged to constitute a public nuisance, caused by informal settlements being established or developed on state-owned land.[57] The applicants in these cases argued that establishing or developing an informal settlement in the vicinity of their properties would threaten their health, pose a safety

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[54] *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A).

[55] *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W). Hereafter referred to as *Three Rivers*.

[56] *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) (hereafter referred to as *Kyalami Ridge*). However, in *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) the private individuals never formed a specific group but still brought a joint application for the removal of occupiers believed to be causing a nuisance.

[57] See *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A), where the application for an interdict to abate a public nuisance, as a result of an informal settlement, was granted. In *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1994 (3) SA 336 (A) an application for an interdict preventing the establishment of the formal settlement was denied after the court considered policy considerations (see the statements made by Smallberger J, referred to in chapter 3). In *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) the application for an interdict to prevent the establishment of an informal settlement was denied because the occupiers of the informal settlement were protected as 'occupiers' under the Extension of Security of Tenure Act 62 of 1997. In *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W) an application for an interdict was granted after the local authority could not prove that it had taken reasonable steps to prevent a possible public nuisance caused by an informal settlement being established in the vicinity of the properties owned by the members of the Three Rivers Ratepayers Association. In *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) the court denied an application for an interdict to prevent a temporary transit camp from being established in the vicinity of farms and residential areas. Amongst the arguments presented by the applicants was that of a public nuisance being constituted, however, but no evidence could be given to support that argument and it failed in the Constitutional Court.

hazard and decrease the value of their property.[58] In fact, however, these applications were always aimed at protecting the individual interests of the property owners who were members of the associations that brought the applications. In addition granting the applications would always have the implication that new settlements would be prevented from being established and, in some cases that already settled residents of the new developments would have to be evicted.

Some of the cases in this third series preceded the constitution and land reform legislation, and in some the effort to obtain indirect eviction orders failed. The use of the public nuisance doctrine as a cause of action was successful in two of the five decisions, namely *East London* and *Three Rivers*. In both cases the courts suggested that the applicants' private right in land had been infringed and that, according to the principles of neighbour law, they were entitled to the reasonable use and enjoyment of land. Despite the applicants' alleging the presence of a public nuisance, the above-mentioned courts never established the existence of a public nuisance according to its original definition.

In contrast, the doctrine's use contrary to its original aims was not allowed in the *Diepsloot,*[59] *Rademeyer* and *Kyalami Ridge* cases.[60]

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[58] In *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1993 (1) 577 (T) the applicants applied for an interim interdict prohibiting the Administrator to establish the informal settlement. The applicants argued that establishing an informal settlement would cause a health and safety hazard and a drop in the value of their property. The court granted the interim interdict and referred the matter to trial.

[59] *Diepsloot Residents' and Landowners Association and others v Administrator, Transvaal* and others 1993 (3) SA 49 (T).

[60] See 3.2.2.

As seen in the South African and English judicial decisions, the remedy of public nuisance has been mainly used to abate a public nuisance that infringed or interfered with public health and safety. Public nuisance was never used to evict or prevent formal or informal settlements from being established, as happened in the recent case law. The decision to evict current occupiers or to prevent establishment of a new development is a drastic measure, since the state could prevent some of the problems complained of, for instance by installing proper services (water, tarred roads, sanitary services and electricity).[61]

Furthermore, the protection of public health and safety is mostly promulgated in legislation and regulated by local authorities. Therefore, there has to be extraordinary circumstances in order to use the Common Law notion of public nuisance to apply for an interdict to abate a nuisance that is largely regulated by legislation already. Such extraordinary circumstances were not proved in the cases referred to. The fact that there are no other reported cases where the notion of public nuisance was used after 1943 suggests that the legislation that has been promulgated to protect residents against new developments in their vicinity was largely successful. Reliance on the doctrine of public nuisance in these cases is therefore questionable.

More importantly, the use of public nuisance is especially problematic in the context of the new constitutional dispensation. The Bill of Rights specifically promotes land reform in section 25(5)–(9) of the Constitution of the Republic of

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[61] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 822.

South Africa.[62] The land reform programme provides protection to those who were subject to past racially discriminatory laws or practices (predominantly black South Africans).[63] The land reform framework in section 25(5)–(9) and legislation promulgated to give effect to it, such as the Extension of Security of Tenure Act[64] and the Prevention of Illegal Eviction from and Occupation of Land Act,[65] now provide rules and procedures that have to be followed before anyone can be evicted from their homes (whether they are there lawfully or unlawfully).[66] These rules and procedures are in effect bypassed by the use of public nuisance in the recent decisions such as *Three Rivers.* This is certainly a problem, as there is an urgent need for housing and a reciprocal duty on private landowners to act responsibly, especially in the view of transformation and increased urbanisation.[67]

Finally, the use of the public nuisance remedy to bypass eviction legislation leaves members of informal settlements homeless, in a process that is reminiscent

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[62] 1996. Hereafter referred to as the Constitution.

[63] Section 25(6)–(9).

[64] 62 of 1997. Hereafter referred to as ESTA.

[65] 19 0f 1998. Hereafter referred to as PIE.

[66] Section 4(6) of Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998 state that courts may only grant an eviction order if all the relevant circumstances were taken into account, including the rights of children and women-headed households. In *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) the court denied an application to evict people, due to the eviction process in the Extension of Security of Tenure Act 62 of 1997 not being complied with.

[67] See *Diepsloot Residents Landowners Association and another v Administrator Transvaal* 1994 (3) SA 336 (A) 348-349. See further Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 825.

of previous discriminatory practices which should be avoided at all cost, as stated by Van der Walt:[68]

> 'Given the history of forced removals and the explicit commitment in the Constitution, and in the land reform programme as a whole, to eradicating the legacy of apartheid land law and preventing its recurrence, we have to be conscious of and sensitive to this particularly unhappy history, and bear in mind that a substantial part of the land reform programme is aimed at dismantling the very structures and imbalances brought about, and cemented into current land holding patterns, through something akin to indirect planning and nuisance evictions.'

Chapter 3 will ultimately establish that the role that Common Law public nuisance played in the recent case law is problematic in the new constitutional dispensation and raise the question whether this doctrine has any other legitimate purpose in modern South African law, considering the fact that the remedy is largely provided for in legislation and that the current use of the remedy has detrimental effects on the housing process in South Africa.

As seen in chapter 3, it could be argued that the recent application of public nuisance in case law is problematic in South African law.[69] According to section 2 and section 39 (3) of the Constitution, common law that is inconsistent with the Bill of Rights is invalid. On the other hand, section 39(2) encourages the development of the common law to promote the spirit, purport and objects of the Constitution. Read with section 39(2), section 173 gives the inherent power to specified courts to develop the common law. However, the development of public nuisance as a common law remedy is uncertain, as it is not clear whether it has any further use in

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[68] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 827.

[69] See text at footnote 76 and 77.

South African law, especially in the light of the case law discussed in chapter 3. This uncertainty will be investigated further in chapter 4, entitled the constitutional compatibility of public nuisance. The development of non-statutory public nuisance will be determined after testing its constitutional compatibility against sections 25(1), 25(2) and 26(3) of the Constitution in chapter 4.

Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.[70] Van der Walt defines a deprivation as the restriction of the 'owner's use and enjoyment, exploitation and disposal of the property and so diminish its value or profitability, and is 'usually not compensated'.[71] There are two requirements for a lawful deprivation in section 25(1). Firstly, the deprivation must take place in terms of law of general application. Secondly, no law may permit arbitrary deprivation. Van der Walt suggests that, together with the two requirements, there is a third implicit requirement that a 'deprivation should serve a legitimate public purpose or public interest.'[72]

According to Van der Walt, the requirement of 'law of general application' in section 25(1) does not only refer to legislative provisions but is also applicable to common or customary law.[73] The question whether the use of a common law remedy such as public nuisance could also constitute an arbitrary deprivation, will be determined in chapter 4.

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[70] Section 25(1) of the Constitution.

[71] Van der Walt AJ *Constitutional property law* (2005) 124-125.

[72] Van der Walt AJ *Constitutional property law* (2005) 137.

[73] Van der Walt AJ *Constitutional property law* (2005) 144.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[74] the Court explained that 'arbitrary' meant that there was insufficient reason for the deprivation of the property. What could constitute sufficient reason is explained in the *FNB* case as follows: 'It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.'[75] Whether the reasons for a deprivation are sufficient has to be determined with reference to the circumstances under which the deprivation took place, the purpose of the deprivation and the relationships affected by it.

As indicated above, the common law notion of public nuisance qualifies as law of general application. It is therefore necessary to establish whether public nuisance, as applied in the case law, amounts to an arbitrary deprivation. In the recent case law mentioned in chapter 3, the occupiers of informal settlements were prevented from occupying land, or in some instances, lost their right to occupy the land. In some cases this effort to rely on public nuisance failed,[76] in others the Constitution, specifically section 26(3), and anti-eviction legislation did not apply yet.[77] In essence, loss of occupation is a deprivation of land, however, it has to be

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[74] 2002 (4) SA 768 (CC); hereafter referred to as the *FNB* case.

[75] Paras 99-100.

[76] *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE); *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[77] See *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) 577 (T); *Diepsloot Residents and Landowners Association and*

established whether the deprivation was arbitrary. It is known that the public nuisance doctrine was employed as the means to abate disturbances. However, it could be argued that the end sought was not a legitimate one. After a period of 40 years, the doctrine of public nuisance was wrongfully reincarnated by the various applicants to suit their specific needs. The original purpose of this remedy, the abatement of disturbances, became an ancillary objective. Further analysis will determine whether there is an arbitrary deprivation.

Once the deprivation passes scrutiny under section 25(1)[78] one can establish whether the notion of public nuisance infringes the rights envisaged in section 25(2). There will be no inquiry, testing the compliance of the deprivation with section 25(2), 'if the deprivation proves to be unconstitutional in terms of section 25(1) or if it cannot be justified' in terms of section 36 (the limitations clause).[79] At this stage I am of the opinion that the deprivation caused by an eviction order based on Common Law public nuisance would be arbitrary and therefore, no inquiry with regard to possible section 25(2) infringement would be necessary. However, that remains to be established in the remainder of chapter 4.

Furthermore, it will be argued in chapter 4 that the use of public nuisance in recent case law is an infringement in terms of section 26(3). Public nuisance is a remedy for the purpose of abating nuisances, not to allow private individuals to

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Another v Administrator Transvaal 1993 (3) 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A).

[78] Ackermann in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) par 59 concluded that 'the deprivation passes scrutiny under section 25(1) if it does not infringe section 25(1) or, if it does, is a justified limitation.'

[79] See the text of section 36(1) below.

bypass anti-eviction measures provided for in ESTA and PIE.[80] Therefore, this chapter will test the constitutional compatibility of public nuisance in light of section 26(3).

To summarize, the focus of the analysis is to establish whether the Common Law remedy of public nuisance is compatible with the Constitution and to determine the continued legitimacy of this remedy in post-apartheid South Africa.

1.4 Remarks

The primary focus of this thesis is on the continued legitimacy of the common law notion of public nuisance. Therefore no in-depth discussion on private nuisance is presented. However, throughout the thesis reference to private nuisance is made where it is necessary to illustrate the difference between a private and public nuisance.

Furthermore, there is no specific chapter dedicated to a comparative study in the thesis. However, a comparative analysis on English and US law is done in chapter 2. The aim of the analysis is to determine whether the notion of Common Law public nuisance, besides that promulgated in legislation, still had a legitimate purpose in English and US law during the 20th century.

[80] See footnote 62 and 63 above.

Chapter 2: The history of public nuisance and its adoption in South African law

2.1 Introduction

The chapter will commence by offering definitions of private and public nuisance, followed by an analysis of the differentiating factors between private and public nuisance. The rest of the chapter covers two main themes: an historical overview of the origins and development of the public nuisance doctrine in English and US law, followed by a discussion on the adoption and development of public nuisance in South African law.

The aim of the analysis is to establish in what context and for which purpose the common law notion of public nuisance originated in England and South Africa. The analysis will include an overview of various unreasonable interferences categorised as public nuisances; interferences not categorised as public nuisances; implementation of statutory nuisance; and available remedies for successful applicants who sought relief by using the public nuisance doctrine as a cause of action.

2.2 Definition of, and differences between, private and public nuisance

The term 'nuisance' is derived from the French word *nusans*, which means harm.[1] A nuisance is constituted when an act or omission unreasonably interferes with the rights of other private individuals or the general public.[2]

Nuisance is traditionally classified into two categories, private and public. Private nuisance can be defined as 'conduct whereby a neighbour's health, well-being or comfort in the occupation of his or her land is interfered with.'[3] According to Spencer, public nuisance can be defined as 'an act or omission that endangers the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.'[4]

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[1] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 56.

[2] Gray J 'Public nuisance: A historical perspective' (http://www.nuisancelaw.com/learn/historical) (17 March 2009).

[3] Badenhorst PJ, Pienaar JM, & Mostert H *Silberberg and Schoeman's the law of property* (5th ed 2006) 111. Private nuisance is also defined as 'an act or omission or condition or state of affairs that materially inconveniences another in the ordinary comfortable use or enjoyment of land or premises' in Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163.

[4] *News Group Newspapers Ltd v SOGAT '82* [1986] IRLR 337 346. See also Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 55. Another definition of public nuisance is given in *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 337 (W) 380B-C as 'a nuisance whose harmful effect is so extensive as to affect the general public at large, or at least a distinct class of persons within its field of operation.' In Milton JRL 'The law of neighbours in South African law' 1969 *Acta Juridica* 123-269 128, public nuisance is defined as 'a species of criminal offence amounting to an unlawful act which interferes with or endangers the life, health, property or comfort of the public.' Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163 define a public nuisance as 'an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large.'

In general, a private nuisance affects an individual (or individuals) living in the immediate vicinity of the perpetrator, for instance, a neighbour or neighbours. In contrast, a public nuisance is constituted when a public right of the public[5] is affected as a result of the nuisance. A public right is usually related to public health and safety or substantial inconvenience or annoyance to the public. Abrams and Washington[6] suggest three distinguishing factors that separate public from private nuisance. The distinguishing factors can be summarised as follows: first of all, a public nuisance affects the general public as opposed to only neighbours in the vicinity of the perpetrator; secondly, public nuisance is an infringement of a public right[7] in a public space instead of a private right on private land; and finally, proceedings for a public nuisance are instituted by an governmental authority - on behalf of private individuals who complained of a public nuisance - with the jurisdiction and *locus standi* to do so, rather than by private individuals, as in the case of private nuisance.[8]

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[5] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 364.

[6] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399.

[7] According to Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1001 'It is not, however, necessary that the entire community be affected, so long as the nuisance will interfere with those who come into contact with it in the exercise of the public right.' According to Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 364, a public right can be defined as a right 'usually relating to public health and safety or substantial inconvenience or annoyance to the public.'

[8] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after Boomer' (1990) 54 *Albany Law Review* 359-399 364-365.

The first factor that distinguishes public and private nuisance was illustrated in the English case of *Attorney-General v PYA Quarries.*[9] In this case Lord Denning LJ expressed the following opinion with regard to the difference between private and public nuisance:

> 'The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question, "When does a number of individuals become Her Majesty's subjects generally?" is as difficult to answer as the question "When does a group of people become a crowd?" Everyone has his own views. Even the answer, "Two's company, three's a crowd", will not command the assent of those present unless they first agree on, "which two". So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.'[10]

In this passage Lord Denning LJ expressed how difficult it is to ascertain the distinction between private and public nuisance. However, he is of the opinion that a private nuisance occurs when a specific or particular person is affected. On the other hand, a public nuisance occurs when the public in general is subject to an unreasonable act or omission, with those affected taking responsibility for the abatement of such a nuisance. If the unreasonable interference affects one individual or home in the vicinity or area where it occurs, then one could conclude that the nuisance is of a private nature. However, when the general public is affected by a bothersome activity, a public right is infringed and it constitutes a public

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[9] [1957] 2 QB 169. Hereafter referred to as the *Quarries* case.

[10] *Attorney–General v PYA Quarries* [1957] 2 QB 169 190.

nuisance. In the case of a public nuisance, the vicinity in which the affected members of the public experience a bothersome activity is not as important as in the case of a private nuisance dispute.

In the recent South African decision of *Three Rivers Ratepayers Association and Others v Northern Metropolitan,*[11] Snyders J found the 'public extent' of a public nuisance to be the main distinguishing factor between public and private nuisance. One could assume that the 'public extent of the nuisance' refers to two things: first of all, the number of people affected by a nuisance; and secondly, affecting a public instead of a private right.

It is not exactly clear how many individuals it would take to satisfy the requirement of 'public' in the context of public nuisance. Lord Denning LJ addressed this issue in the *Quarries* case, where he expressed the difficulty in determining what would constitute such a number. According to Lord Denning LJ, a public nuisance is constituted when the community at large is affected.[12]

In the earlier English judgement of *R v De Berenger*,[13] Bayley J was of the opinion that 'public' does not have to affect the community at large, but it is enough if it is prejudicial to a class of subjects.[14] However, in the English case of *R v Lloyd*[15] three applicants affected by a nuisance were not enough to satisfy the requirement

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[11] 2000 (4) SA 377 (W).

[12] *Attorney–General v PYA Quarries* [1957] 2 QB 169 190.

[13] [1814] 3 M & S 67.

[14] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 62.

[15] [1804] 4 Esp 200.

of being a 'community at large'[16] or a 'distinct class of persons.'[17] The Royal Commission of 1833[18] also expressed the difficulty of ascertaining what number of persons affected by an unreasonable interference would constitute a public nuisance. However, the Commission was of the opinion that some limit should be appointed. Thus one can conclude that some limit should be ascertained when establishing whether applicants satisfy the 'public' requirement.

It could be said that the courts have the discretion to decide what number of applicants affected by a disturbance would meet the requirements of 'public.' Furthermore, the number of people affected by an unreasonable interference has not caused substantial problems in the past.[19] The question is not raised very often and is therefore not considered to be extraordinarily problematic.

In the light of the discussion, two distinct categories of nuisance have been identified, namely that of private and public nuisance. Both categories envisage unreasonable interferences infringing the rights of either a private individual or the public at large. Private nuisance is applicable to particular individuals whose private rights have been infringed, while public nuisance is applicable in situations where a public right has been infringed that affects the public at large or a distinct class of persons.

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[16] *Three Rivers Ratepayers Association and Others v Northern Metropolitan* 2000 (4) SA 337 (W) 380B-C.

[17] *R v De Berenger* [1814] 3 M & S 67; ER 536.

[18] According to Milton, the Royal Commission was appointed in 1833. The Royal Commission's objective was to codify English criminal law during the 19th century. See Milton JRL *The concept of nuisance in English law* (1978) 145, 213.

[19] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1002.

An overview of the history and development of the Common Law[20] notion of public nuisance will establish the purposes for which, and the context in which, the notion of public nuisance originated and developed in English law. The analysis will provide the opportunity to compare the application of public nuisance (in judicial decisions) in English and South African law, and how far the Common Law remedy of public nuisance was promulgated into legislation.

2.3 Historical overview of public nuisance in English law

2.3.1 Introduction

Public nuisance originated in English law during the 12th century as a tort-based crime called 'tort against the land' and was used to protect the Crown against infringements. A public nuisance was primarily a criminal wrong, but it was later developed to accommodate plaintiffs with monetary compensation. Plaintiffs had to prove special or particular damage, as was decided in *Sowthall v Dagger*.[21] This remedy was a tort and known as the 'special injury rule.'[22] At the time the term

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[20] When reference is made to Roman-Dutch common law it will be written in the lower case, while if reference is made to English Common Law, the letters will be capitalised.

[21] [1536] YB 27 Hen 8f 27 pl 10. In the case the defendant obstructed the King's highway, which prevented the plaintiff from reaching his close. The plaintiff then sued for the damages. Baldwin J refused to allow the action on the basis that the damage suffered by the plaintiff could not have been a common nuisance to all Her Majesty's subjects. However, Fitzherbert J dissented and was of the opinion that when a plaintiff can prove special or greater damage other than the damage to the public at large, he had a valid cause of action to claim compensation. See Milton JRL *The concept of nuisance in English law* (1978) 145.

[22] There were many plaintiffs who successfully relied on the 'special injury rule' after the dissenting judgement of Fitzherbert J. Examples include: *Maynell v Saltmarsh* [1664] 1 Keb 847; *Hart v Basset*

'public nuisance' did not exist, nor did it have any legal meaning. Public nuisance, as a criminal wrong, was applied in the case of *purprestures,*[23] a French term denoting an enclosure. *Purprestures* were interferences such as unlawful obstruction of highways, rivers and encroachments which caused injury or an unreasonable inconvenience upon royal lands. This suggests that a differentiating factor is that the effects of public nuisance are felt on public land or in public spaces, not primarily or just on private land.

The court of the sheriff's *tourn* was a criminal court that prosecuted perpetrators accused of intruding on royal domain. The sheriff's duty was to represent the King and ultimately preserve public peace and order.[24]

During the reign of King Edward III in the 14th century the notion of public nuisance was extended to the public through the protection of individual rights to use public property, such as having a safe passage on public roads[25] and the abatement of noise and smoke in a market. Again, it can be said that public nuisance only applied on public land or in public spaces.

[1681] T Jones 156; *Baker v Moore* [1696] (unreported) cited in *Iveson v Moore* [1699] 1 Ld Raym 486 494. For the plaintiff to be successful, he had to prove special or particular damage that was different from damages suffered by the public at large. The remedy to claim a monetary amount for damages caused great confusion as to when an action should be based on private or public nuisance in the courts of the United States. See Hodas DR 'Private action for public nuisance: Common law citizen suits for relief from environmental harm' (1989) 16 *Ecology Law Quarterly* 883-908 884.

[23] Milton JRL *The concept of nuisance in English law* (1978) 23.

[24] Milton JRL *The concept of nuisance in English law* (1978) 21.

[25] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 541.

2.3.2 Early forms of public nuisances

In the early 15th century the court's *leet* succeeded the court of the sheriff's *tourn* and continued prosecuting those accused of unreasonably interfering on the King's land.[26] However, apart from the abovementioned nuisances, the court *leet* developed separate distinct nuisances (especially nuisances affecting the public health) such as dung heaps, refuse, ashes and soil.[27] These nuisances were different from those prosecuted in the court of the sheriff's *tourn*, namely encroachment on walls, gates and hedges on royal domain. More forms of nuisances, such as domestic waste (such as urine) flung from windows, or butchers disposing of feathers, horns and offal in streets, that were previously unknown were prosecuted and classified as common nuisances.[28] The introduction of these nuisances shaped the development of public nuisance for the betterment of public health, morality and ultimately public welfare. The court defined these nuisances as *ad commune nocumenta*, meaning 'common nuisance',[29] later to be known as 'public nuisance', as it is known today.

The public could lodge a complaint of a public nuisance to the sheriff or later the Attorney-General, but nobody was allowed to institute proceedings for the abatement of a public nuisance on their own. The idea was that a common nuisance was a complaint by the King brought on behalf of the public.[30]

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[26] Milton JRL *The concept of nuisance in English law* (1978) 75, 154.

[27] Milton JRL *The concept of nuisance in English law* (1978) 75.

[28] Milton JRL *The concept of nuisance in English law* (1978) 76.

[29] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 60.

[30] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 83.

In the beginning of the 18th century Hawkins published the first comprehensive book on criminal law entitled *Pleas of the Crown*. More importantly, Hawkins recognised the idea that common or public nuisance existed in terms of the Common Law. Hawkins defined a common nuisance as follows:

> 'a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires.'[31]

Bacon, in his book entitled *New abridgement of the law* (1736-1766),[32] gave a more detailed list of offences prosecuted under the heading of common nuisance. These included gaming and bawdy houses, all common stages for rope-dancers, obstruction of a highway (by ditches, hedges, gates, logs), diverting navigable rivers, and setting up of brew houses, glass-houses, chandler's shops and swine sties in areas where these places would cause an inconvenience to the public.[33] This illustrate that public nuisance affected any person subject to contact with an unreasonable interference originating from a public space or public land.

In Blackstone's *Commentaries* (1765)[34] he added another nuisance to Bacon's list, namely that of offensive trades and manufacturers that are detrimental

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[31] Hawkins W *Pleas of the crown* (1st ed 1716) Book 1, Chapter LXXV, Sect 1. However, according to Milton, Hawkins's definition of a common nuisance is too wide and vague as it includes many other offences that should not be regarded as a common nuisance. See Milton JRL *The concept of nuisance in English law* (1978) 157.

[32] Bacon M *A new abridgement of the law* (3rd ed 1768).

[33] See Milton JRL *The concept of nuisance in English law* (1978) 158. See further Holdsworth WS *A history of English law* (1903-1966) 169.

[34] Blackstone W *Commentaries on the laws of England* (20th ed 1841) 187.

to the public. An example would be *R v Pierce*,[35] where the defendant, who owned a soap boilery, constituted a nuisance while exercising his trade.[36]

At this point the interchangeable use of the words 'common' and 'public' nuisance has to be clarified. During the 18th and 19th centuries the notions of common and public nuisance were used interchangeably. It was later established that both terms had the same meaning. According to Spencer, 'when the word "common" began to mean "ordinary", rather than "of the community", they were usually called public nuisances instead.'[37]

All the above-mentioned nuisances were petty crimes that caused an unreasonable interference with the public health, safety and welfare of the community at large.[38] According to Milton, the judges in the 18th and 19th century introduced new forms of common or public nuisances, discussed under the following heading, by expressing more sophisticated public interests[39] derived from the idea of obstruction or annoyance of a public highway. The significant case law during the 18th and 19th centuries introduced two important forms of nuisances, namely smells or odours and noise.

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[35] [1683] 2 Show 327.

[36] Another example can be found in *R v Pappineau* [1762] 2 Str 678, where the defendant was found guilty of a public nuisance 'in that he kept stinking hides near a public highway.' See Milton JRL *The concept of nuisance in the English law* (1978) 163.

[37] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 58.

[38] Milton JRL *The concept of nuisance in English law* (1978) 60.

[39] Milton JRL *The concept of nuisance in English law* (1978) 165.

2.3.3 Significant case law

2.3.3.1 Introduction

This section discusses significant case law of both private and public nuisance. The questions in these cases were often not if a public nuisance were constituted but only that of a nuisance. The aim of the section is to illustrate that smells or odours and noise were introduced as nuisances during the 18th and 19th century.

2.3.3.2 Smells

R v Alfred[40] was the first reported case where an action for a public nuisance, based on the smell emanating from a pig sty, was allowed and successful. The same cause of action was considered in *R v White and Ward*,[41] where the defendants were charged for creating stinks and smells.[42] However, it couldn't be proved that the smell affected the public at large and the argument of a public nuisance was rejected. According to Milton, *Walter v Selfe*[43] is the leading case on odours constituting a nuisance during the 19th century.[44] Knight Bruce VC was of the opinion that the basis for the classification of smells as a public nuisance was derived from the inherent right to an untainted and unpolluted stream of air.[45] Knight Bruce VC concluded that the claim rested not so much upon the interest of physical

[40] [1611] 9 Co Rep 57. See Milton JRL *The concept of nuisance in English law* (1978) 398.

[41] [1757] 1 Burr 333. See Milton JRL *The concept of nuisance in English law* (1978) 398.

[42] Milton JRL *The concept of nuisance in English law* (1978) 399.

[43] [1851] 4 De G & Sm 315.

[44] Milton JRL *The concept of nuisance in English law* (1978) 400.

[45] [1851] 4 De G & Sm 315 at 321-322.

health or damage to property, but rather upon the interest in physical comfort as a normal incident of the occupation of land.[46] It could be said that Knight Bruce VC suggests that the nuisance complained of is of a private opposed to a public nature. The nuisance only affected Walter, a private individual exercising his use and enjoyment of land opposed to the public at large in public space or on public land.

2.3.3.3 Noise

Milton is of the opinion that nuisance in the form of noise developed as a result of increased production of machinery and mechanical manufacturing during the Industrial Revolution in the 19th century.[47]

The first reported case during the 19th century was that of *Elliotson v Feetham*.[48] The plaintiff successfully proved that heavy jarring, varying, agitating, hammering and battering sounds constituted a nuisance.[49] Similarly, in *Crump v Lambert*[50] Romilly J MR concluded that noise alone could be regarded as a nuisance. Romilly J MR thus concurred with the decision in *Elliotson v Feetham*[51] when he agreed that noise can constitute a nuisance.

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[46] Milton JRL *The concept of nuisance in English law* (1978) 400.

[47] Milton JRL *The concept of nuisance in English law* (1978) 401. See also 195.

[48] [1835] 2 Bing (NC) 134.

[49] Milton JRL *The concept of nuisance in English law* (1978) 402.

[50] [1867] LR 3 Eq 409 412.

[51] [1835] 2 Bing (NC) 134.

Other instances where noise, as a cause of action, was for example where noise originating from industrial operations;[52] trades and occupations;[53] construction works and building operations;[54] entertainments;[55] animals[56] and various other sources.[57]

The above-mentioned interferences such as noise and smells are found in the most significant case law pertaining to public nuisance during the 19th and 20th century.[58] However, one has to bear in mind that earlier forms of public nuisances such as obstruction of highways and navigable rivers, as well as the preservation of

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[52] See *Goose v Bedford* [1873] 21 WR 449 (steam hammer); *Beaumont v Emery* [1875] WN 106 (steam engine).

[53] See *Tinkler v Aylesbury Dairy* Co [1888] 5 TLR 52 (dairy) and *Polsue & Alfieri v Rushmer* [1907] AC 121 (printing trade).

[54] See *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 and *Howland v Dover Harbour Board* [1898] 14 TLR 355.

[55] See *Walker v Brewster* [1867] LR 5 Eq 25 (fair) and *Bellamy v Wells* [1890] 60 LJ Ch 156 (boxing contests).

[56] See *Ball v Ray* [1873] 3 Ch App 467 and *Rapier v London Tramways Co* [1893] 2 Ch 588.

[57] See *Jenkins v Jackson* [1888] 40 Ch D 71 (dancing lessons) and *Christie v Davey* [1893] 1 Ch 316 (music lessons). All the above examples are given in Milton JRL *The concept of nuisance in English law* (1978) 403.

[58] On the other hand, according to Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 362, 'a private nuisance is a tort that began in the early days of the common law as a remedy for a freeholder who was interfered with in the use of his land, but not dispossessed.' Also, in the sphere of private nuisance, significant developments on the grounds of noise and smells occurred during the Industrial Revolution. For example in, *Walter v Selfe* (1851) 4 De G & Sm 315 the court found that a landowner is entitled to an 'untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family.' This after the plaintiff complained of noxious odours drifting onto his land from a brick clamp. The court found that the neighbouring owner had constituted a nuisance. In *Rushmer v Polsue & Alfieri* 1906 1 Ch 234 the noise caused by the operation of machinery during night time was found to have constituted a nuisance.

public morality (rope dancers, gaming and bawdy houses), were (and still are) regarded as public nuisances.

Apart from these important cases signifying the development and recognition of public nuisance in English Common Law, there was other significant case law that did not recognise interferences to be public nuisances. These interferences are analysed below in 2.3.3.4.

2.3.3.4 Interferences not recognised as nuisances

Milton identifies four interferences that allegedly do not constitute a nuisance. These are actions creating fear, violating privacy, the prospect of experiencing an inconvenience and interference resulting in economic loss.

2.3.3.4.1 Fear

In *Baines v Baker*[59] the applicant approached the court for an injunction against the construction of a small-pox hospital. The applicant argued that the construction of a small-pox hospital would constitute a nuisance. In his judgement Lord Hardwicke expressed the opinion that the fear of mankind, although it might be reasonable,

[59] [1752] Amb 158.

cannot be regarded as a nuisance. It is clear that the claim had to have had more substance and not merely be based on anxiety or fear.[60]

2.3.3.4.2 Prospect

The prospect of experiencing an inconvenience, especially in situations where new buildings are to be erected, does not automatically constitute a nuisance. Lord Hardwicke in *Attorney-General v Doughty*[61] held that there is no Common Law rule prohibiting the construction of new buildings based on the grounds of the prospect of their effect on light and view. Lord Hardwicke went on to suggest that there would be no great towns if he had to grant injunctions based on the prospect of experiencing an inconvenience lodged by plaintiffs.[62]

2.3.3.4.3 Economic loss

The term economic loss could also be explained as the depreciation in value of land. During the 19th century, members of the public claimed to have been victims of nuisance which allegedly made them suffer economic loss. According to Milton, the Common Law never recognised economic loss as a ground to institute a successful

[60] In *Bendelow v Guardians of Wortley Union* [1887] 57 LJ Ch 762 the decision in *Baines v Baker* [1752] Amb 158 was upheld. See also Milton JRL *The concept of nuisance in English law* (1978) 407.
[61] [1752] 2 Ves 453.
[62] [1752] 2 Ves 453 453-454.

action for nuisance.[63] The following case law illustrates this point. In *Attorney-General v Nichol*[64] Lord Eldon concurred with Lord Hardwicke that a diminution of the value of the premises is not a sufficient ground to constitute a nuisance.[65] The later decisions of *Jones v Tapling*[66] and *Harrison v Good*[67] concurred with the reasoning of the earlier decisions that mere economic loss is an insufficient ground to constitute a nuisance.

It is not clear that applicants who alleged fear, prospect and economic loss were denied relief by the English courts because these allegations were not regarded as grounds for nuisance, specifically public nuisance. These cases merely illustrate that these alleged non-recognised interferences lacked the necessary evidence to prove the existence of a nuisance, be it a private or a public nuisance.

As it will appear from the discussion below, recognised unreasonable interferences characterised as public nuisances were later promulgated into legislation and known as statutory nuisance. The introduction of a legislative framework regulating public nuisances subsequently reduced the use of Common Law public nuisance. According to Milton, the diminishing number of reported cases was due to the enactment of statutory nuisance.

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[63]Milton JRL *The concept of nuisance in the English law* (1978) 410.

[64] [1809] 16 Ves 338 342

[65] Milton JRL *The concept of nuisance in the English law* (1978) 415.

[66] [1862] 31 LJ CP 342.

[67] [1871] LR 11 Eq 338 353.

2.3.4 Statutory nuisance in English law

Nuisance originated as a Common Law remedy. However, during the period of the Industrial Revolution (between 1760 and 1830) statutory provisions replaced some of the Common Law public nuisances. The Industrial Revolution led to increased urbanisation in the vicinity of major factories enabling employees to be closer to work. The population increased, which led to a devastating torrent of public nuisances.[68] These nuisances caused the deterioration of public health for many reasons: the housing provided for employees did not have toilets or drains; residents disposed of filth into the streets; and the dense population increased the amount of smoke which polluted the air. Machinery in factories caused continuous unbearable noise during the day and night that negatively affected the broader public.

This led to legislative measures being put into place to regulate these public nuisances.[69] In 1847 two statutes pertaining to public nuisance were enacted. The first is the Town Clauses Improvement Act of 1847,[70] which was aimed at improving sanitary living conditions. This was accomplished through the appointment of an inspector of nuisance, an officer of health and a surveyor responsible for paving and draining. Furthermore, the Act ensured that perpetrators were prosecuted for any public nuisance.[71] The second Act, namely The Police Town Clauses Act of 1847,[72] regulated the obstruction of highways and ensured that civilians guilty of

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[68] Milton JRL *The concept of nuisance in the English law* (1978) 197.

[69] There existed statutes regulating nuisance as early as the 16th century, namely the Statute of Sewers of 1532 and the Highways Act of 1555. See Milton JRL *The concept of nuisance in the English law* (1978) 167-168.

[70] Act 1847 c 34.

[71] Milton JRL *The concept of nuisance in the English law* (1978) 204.

[72] Act 1847 c 89.

endangering the lives of the public at large were prosecuted. Between 1847 and 1875 various other Common Law nuisances were regulated by legislation.[73]

These acts essentially served to ameliorate the appalling living conditions that arose as a result of the Industrial Revolution. Additionally, these acts provided a regulatory framework for the prosecution of Common Law nuisances such as smoke, noise, unhealthy conditions and the obstruction of highways. This resulted in the statutory regulation of Common Law public nuisances, subsequently referred to as statutory nuisance.

One can conclude that the regulatory framework, known as statutory nuisance, systematically substituted the Common Law public nuisance. It will later be established whether South Africa followed the same route by implementing a statutory framework to regulate common law public nuisances. It will further be established, in 2.5.4 below, whether the implementation of statutory nuisance reduced the number of reported case law pertaining to public nuisance.

As indicated, public nuisance was primarily seen as a criminal wrong. Perpetrators either faced a sentence or the payment of a fine for less serious wrongful actions. As it will appear below, not only was there an increase in the number of unreasonable interferences recognised as nuisances, but also an improvement in the remedies to plaintiffs. A brief overview of remedies extended to

[73] Between 1846 and 1848 the Nuisance Removal Act 1846 was enacted. The act ensured clean and sanitised towns. In 1855 the Nuisance Removal Act was replaced by the Nuisances Removal Act for England 1855. This new act went further by providing penalties for the pollution of waters by gas manufacturers and the keeping or sale of unwholesome food. Then in 1875 the Public Health Act was enacted to regulate nuisances such as smoke, filthy homes and factories. See Milton JRL *The concept of nuisance in the English law* (1978) 205-208.

successful plaintiffs who alleged a public nuisance as a cause of action is given below in order to determine whether South African law is different or similar to English law in this particular context.

2.3.5 Remedies: Injunctions

Public nuisance is primarily known as a crime and therefore subject to the prosecution of anyone posing a danger to the safety or health of the public at large. However, in the 18th and early 19th century private individuals sought an injunction as a remedy to abate a public nuisance. According to Spencer,[74] applicants initially started to use an injunction, otherwise known as an interdict, as a supplementary remedy to that of criminal prosecution. This was because of the fear that the nuisance could cause irreparable damage by the time a criminal trial commenced.

The initial attempt to seek an injunction appeared in *Baines v Baker,*[75] but failed when Lord Hardwicke denied awarding an injunction upon the application of a private individual. Lord Hardwicke wasn't sure whether the nuisance in the particular case amounted to a public or private nuisance. Since Lord Hardwicke was unsure, the jurisdiction of the court in which the case had to be decided was in question. The application was brought in the court of equity, which dealt with civil and not criminal proceedings pertaining to public nuisance. Lord Hardwicke was of the opinion that the suppression of a public nuisance was only possible if information was brought by

[74] Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 66.
[75] [1752] Amb 158.

the Attorney-General.[76] Therefore the judge held that nuisances affecting the public (being criminal offences) couldn't be enjoined in the court of equity.

However, after the decision in *Baines v Baker*,[77] the later decisions of *Mayor and Commonalty and Citizens of the City of London v Bolt*,[78] *Attorney-General v Forbes*[79] and *Attorney-General v Johnson*[80] established the practice of granting injunctions in public nuisance cases. There are two reasons to justify awarding an injunction, as appears from the case law. First of all, the judge in the *Mayor* case suggested that an injunction is a much more proper and effective remedy than a trial in the criminal court. Secondly, an injunction would prevent irreparable harm to the public or to the property of the applicants.[81] This stance was affirmed in the *Johnson* case.

The relevance of the discussion is that injunctive relief for a public nuisance (affecting public safety, morality and health) was available in early English judgements and this approach, as it will appear, was adopted in South African law.

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[76] [1752] Amb 158 159-160. According to Milton JRL *The concept of nuisance in the English law* (1978) 218 'an injunction was brought in the name of the Attorney-General rather than the victim of the offence, although it was really the victim who sued.' Also see Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 67.

[77] [1752] Amb 158.

[78] [1799] 5 Ves 129. Hereafter referred to as the *Mayor* case. The court awarded an injunction against ruinous houses on the basis that such houses constituted a public nuisance.

[79] [1836] 2 My & Cr 123. Hereafter referred to as the *Forbes* case.

[80] [1819] 2 Wils Ch 87. Hereafter referred to as the *Johnson* case.

[81] [1799] 5 Ves 129.

2.3.6 Conclusion

It can be concluded that those found guilty of committing Common Law public nuisances were criminally liable and prosecuted. However, as appears from the discussion above, injunctions systematically replaced substituted criminal liability during the 19th century.

These nuisances unreasonably interfered with public health, order, morality and safety. The interferences ranged from noise, smoke, smells and odours, disposal of domestic waste and obstruction of highways. Importantly, a clear distinction between private and public nuisance can be established from the cases analysed above. The consequences of an existing public nuisance not only affect private individuals on private land but particularly those in a public space and public land.

By contrast, the courts also identified actions not recognised as nuisances such as fear, prospect and economic loss. However, these non-recognised nuisances are not relevant to this thesis because the courts reached their conclusion in a very unconvincing way. In essence, the courts only had to state that the applicants failed to prove the existence of a public or any nuisance according to its definition. Moreover, these cases are the only examples where the courts had reached this conclusion.

This historical perspective provides a better understanding of the doctrine of public nuisance. The historical perspective serves as a platform to discuss the analysis and development of public nuisance in South African law in 2.5 below.

Before analysing the development of public nuisance in South African law, it is necessary first to establish by way of a comparative section on English and US law whether the doctrine enjoyed the same vitality in the 20th and 21st centuries as it had since its inception.

2.4 Nuisance in the 20th century

2.4.1 Introduction

Milton's dissertation[82] found the use of the Common Law notion of public nuisance in English law to be declining in the 20th century. The regulatory framework, known as statutory nuisance, substituted the Common Law notion of public nuisance. Milton is of the opinion that the implementation of more statutory nuisances, now regulating public health and safety in England, is the primary reason for the decline in the use of the Common Law notion of public nuisance.[83]

Only after an analysis of the adoption of public nuisance into South African law (2.5 below) would one be able to ascertain whether the introduction of statutory nuisance decreased reported South African case law pertaining to public nuisance, as it did in English law. However, in the following section a comparative study will serve as a means to determine whether the notion of Common Law public nuisance, besides that promulgated in legislation, still had a legitimate purpose in English law and in the United States of America during the 20th century. US law, like South

[82] Milton JRL *The concept of nuisance in the English law* (1978) 417.

[83] Examples would be that of public health, together with zoning and planning legislation. See Milton JRL *The concept of nuisance in the English law* (1978) 417-418.

African law, also adopted the notion of public nuisance; therefore, it may be worth investigating what use the remedy had in the 20th century. In conclusion, it will be established whether this notion could legitimately be applied in South African law.

2.4.2 The current use of public nuisance in English law

The concept of public nuisance was developed in English law and can be defined as 'the doing or failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public'.[84]

The use of the public nuisance doctrine declined during the 20th century. The reason for this decline, according to Spencer, was that public nuisance offences had been comprehensively covered by statute.[85] Milton supports Spencer, suggesting that the implementation of legislation particularly related to public health and zoning provisions led to a decline in the application of Common Law public nuisance doctrine in the last century.[86]

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[84] See *Commonwealth v South Covington* Ry 181 Ky 459, 205 S.W 581 (1918), discussed in Hodas DR 'Private actions for public nuisance: Common law citizen suits for relief from environmental harm' (1989) 16 *Ecology Law Quarterly* 883-908 883.

[85] Spencer provides the following examples of statutes that regulate public nuisance offences: Town Police Clauses Act 1847; Public Health Act 1936; Food Act 1984; Weights and Measures Act 1985; Trades Descriptions Act 1968; and Dangerous Wild Animals Act 1976. See Spencer JR 'Public Nuisance – A Critical Examination' (1989) 48 *Cambridge Law Journal* 55-84 76-77.

[86] See Milton JRL *The concept of nuisance in the English law* (1978) 417-418.

Apart from the abovementioned statutes that precipitated the decline in the use of public nuisance, its use as an offence is further limited by the enactment of the Summary Act of 2005. Section 6 of this Act states:

> 'Public nuisance
>
> (1) A person must not commit a public nuisance offence.
>
> Maximum penalty- 10 penalty units or 6 months imprisonment.
>
> (2) A person commits a public nuisance if-
> (a) the person behaves in-
> (i) a disorderly way; or
> (ii) an offensive way; or
> (iii) a threatening way; or
> (iv) a violent way; and
> (b) the person's behaviour interferes or is likely to interfere with the peaceful passage through, or enjoyment of, a public place by a member of the public.
> (3) Without limiting subsection (2)-
> (a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and
> (b) a person behaves in a threatening way if the person uses threatening language.'

The Act includes other unreasonable interferences which could also be categorised as public nuisances.[87] Section 6 limits the adaptability and flexibility of the Common Law notion of public nuisance in that it can only be applied if one of the listed unreasonable actions is committed. This limitation has contributed to the decline of charges on the ground of the Common Law notion of public nuisance.

[87] For example, section 7 prohibits urinating in a public place and section 10 prohibits being drunk in a public place.

More importantly, for the purposes of this sub-section one could argue that section 6 restricts any other application of public nuisance other than that which is encapsulated in the Act.

Apart from primarily constituting a criminal offence, public nuisance was also developed as a tort in English law. According to Hodas, 'a private plaintiff could bring an action for public nuisance only if the plaintiff could show particular, personal damage not shared in common with the rest of the public'.[88] The remedy is applied with strict adherence to the given requirements and thus its capacity for use for any other purpose is restricted.

It appears from the analysis above that public nuisance has no further use in modern English law. However, in a recent article by researchers at the University of the West of England,[89] it was argued that the Common Law remedy of public nuisance could be used to protect the environment against 'uncontrolled scallop dredging'[90] and in such a way serve a legitimate purpose. In this case, dredging large numbers of scallops would ultimately cause damage to the seabed and to the ecosystem. This damage would affect the use of the seabed for recreational divers and commercial fisheries. According to the researchers, the available legislation

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[88] Hodas DR 'Private actions for public nuisance: Common law citizen suits for relief from environmental harm' (1989) 16 *Ecology Law Quarterly* 883-908 884.

[89] Everard M & Appleby T 'Ecosystem services and the common law: Evaluating the full scale of damages.' See University of West England 'Public nuisance laws can control damage to ecosystems' http://info.uwe.ac.uk/news/UWENews/article.asp?item=1454 (29 June 2009).

[90] In scallop dredging a dredger is towed along the bottom of the sea by a fishing boat in order to collect oysters, starfish and other species.

afforded little protection against damage to the ecosystem caused by dredging.[91] They therefore suggested that the Common Law remedy of public nuisance be used until legislative action could be taken.

In conclusion, it appears that legislation has comprehensively substituted the original aims of the Common Law public nuisance doctrine in English law. As a result the public nuisance doctrine has no further use in the 21st century. However, public nuisance might be developed to protect the environment in the absence of legislation. In South African law, therefore, in the absence of environmental and other legislation that protects public interests, the notion of public nuisance could possibly serve a legitimate purpose until legislation is amended or promulgated, as is suggested by the examples provided in English law.

2.4.3 The current use of public nuisance in the United States

The United States of America adopted the public nuisance doctrine from English law.[92] Public nuisance originally served as a mechanism for prosecuting individuals who ran noisy businesses, helped a homicidal maniac, obstructed the road, and left a dead corpse on a doorstep, among many other unreasonable actions that are socially and morally wrong.[93] As in English law, any unreasonable action was an

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[91] See University of West England 'Public nuisance laws can control damage to ecosystems' http://info.uwe.ac.uk/newsUWENews/article.asp?item=1454 (29 June 2009).

[92] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 545.

[93] See Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 362.

offence against Her Majesty's subjects and was defined as an 'act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects'.[94]

According to Abrams and Washington, the use of public nuisance according to its original aims declined in the US in the late 20th century. The regulation of public nuisance offences by means of statutory provisions precipitated the decline of the Common Law notion of public nuisance. This decline in the use of the remedy was experienced in both English law and, as will be discussed later, South African law.

Although many commentators suggest that the use of public nuisance has declined, Abrams and Washington, together with other academics, are of the opinion that public nuisance has enjoyed renewed vitality in modern times. Furthermore, these academics suggest that the flexibility of the Common Law public nuisance remedy and its adaptability creates a renewed purpose for this doctrine in United States law.[95]

In the United States public nuisance is provided for mainly in legislation (statutory nuisance).[96] Schwartz and Goldberg state: 'In the absence of regulation, public nuisance became a substitute for governments that "could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might

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[94] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 362.

[95] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 391.

[96] An example of such legislation: Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

injure and annoy the general public"'.[97] Lawyers in the United States have filed lawsuits in the areas of environmental law[98] and product liability,[99] where public nuisance is not effectively provided for in legislation. In the absence or unavailability of environmental legislation, lawyers in the United States have used public nuisance as an alternative method to protect the wellbeing of the environment. During the 1970s and 1980s public nuisance was used especially as a means to diminish the dangers of hazardous waste and to force corporations to clean up this waste.

The first of three illustrations of the use of public nuisance to limit dangers to the environment is *United States v Hooker Chemicals & Plastics Corp*[100] (hereafter referred to as the *Love Canal* case). William Love, the respondent's predecessor, disposed of 40 million pounds of chemical waste in a trench three-quarters of a mile

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[97] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 545.

[98] See Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 548-549. In *Alaska Native Class v Exxon Corp* 104 F3d 1196 (9th Cir 1997) the court denied an application for injunctive relief and damages by way of public nuisance for an oil spill caused by Exxon. In *United States v Hooker Chemicals & Plastics Corp* 776 F2d 410 (2d Cir 1985) the public nuisance remedy was successfully used to force the clean-up of a toxic dump; see also Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 392. In *New York v Shore Realty Corp* 759 F2d 1032 (2d Cir 1985) there was a successful application for the removal of a toxic dump by way of public nuisance as a remedy.

[99] In *Detroit Board of Education v Celotex* Corp 493 NW2d 513 (Mich Ct App 1992) the court found that the notion of public nuisance could not be used to hold sellers, manufacturers and installers of defective products liable. In the tobacco litigation case of *Texas v American Tobacco Co* 14 F Supp 2d 956 (ED Tex 1997) the court dismissed a claim that the public's rights had been infringed on the basis of public nuisance, stating that the claim was not within the boundaries of the public nuisance theory. Also see Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553- 556.

[100] *Corp* 776 F2d 410 (2d Cir 1985).

long and thirty feet deep in Niagara Falls, New York. After the trench had been filled, Hooker sold the property to the Niagara Falls school board, who erected a school building on the ground. The toxic waste later surfaced and polluted ground and surface waters. A public health emergency was declared, leading to the evacuation of all the residents in the area surrounding the school and the demolition of the school building.[101] In the absence of environmental legislation the United States government used public nuisance as a cause of action with the desired result of compelling Hooker Chemicals to remove the toxic dump. By the time the court addressed the issue in the *Love Canal* case, many other cases had used public nuisance as a cause of action to clean toxic dumpsites.[102] The court granted a partial summary judgement on the allegation of a public nuisance, stating that the case offered a compelling set of facts and circumstances for finding its existence.[103]

The second example of how public nuisance served the purpose of protecting the environment occurred in South Carolina when lightning struck a tank filled with hydrochloric acid, belonging to the Suffolk Chemical company, and precipitated a spill. The tank leaked thousands of gallons of acid and as a consequence the community was ordered to evacuate the vicinity. At the time the accident occurred, the Department of Health and Environmental Control was in fact in its fifth day of hearings to determine whether the company should close as a result of causing a public nuisance. As a result of this accident, the Suffolk Chemical company agreed

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[101] See footnote 177 in Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 392.

[102] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 392.

[103] 393.

to close permanently, without the court reaching a judgment.[104] According to Harleston and Harleston, the flexibility and adaptability of the public nuisance doctrine was a more feasible cause of action than other environmental legislative measures available to enforce a clean-up or the closure of the company.[105] In their article Harleston and Harleston conclude that public nuisance still has a legitimate purpose in United States law, although statutory provisions now regulate the majority of public nuisance offences.

The final example of the application of public nuisance legislation is the judgement in *New York v Shore Realty Corporation*.[106] Shore Realty was the owner of property which had been contaminated by 70 000 gallons of toxic waste. Shore Realty bought the property despite being aware that it had been illegally filled with toxic waste. In fact, the authorities provided Shore Realty with a report stating that the property was a serious risk. A further 90 000 gallons of toxic waste was dumped on Shore Realty's property after the company had received this report. The government then approached the court for relief on the basis that the toxic waste constituted a public nuisance. In conclusion, the court agreed with the government's allegations that a public nuisance had been constituted and ordered Shore Realty to remove the toxic waste. In commentary on the *Shore* case, Abrams and Washington suggested that even though the government could have relied on a statute[107] to

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[104] Harleston J & Harleston KM 'The Suffolk Syndrome: A case study in public nuisance law' (1989) 40 *South Carolina Law Review* 379-418 379.

[105] Harleston J & Harleston KM 'The Suffolk Syndrome: A case study in public nuisance law' (1989) 40 *South Carolina Law Review* 379-418 418.

[106] 759 F 2d 1032 (2d Cir 1985). Hereafter referred to as the *Shore* case.

[107] Comprehensive Environmental Response, Compensation and Liability and Compensation Act of 1980 (CERCLA).

force Shore Realty to clean up the toxic dumpsite, the preferred cause of action was to apply the public nuisance doctrine. Abrams and Washington conclude their article with the following statement:

> 'Despite the adaptability and power of the public nuisance remedy, however, the number of reported public nuisance cases is quite small. This is partly because a good many cases are ultimately settled, but it may also be largely due to the lack of understanding of the law of public nuisance or even a lack of awareness of its availability. To the extent that there is confusion regarding the public nuisance and the tort of public nuisance, public officials may be deterred from recognising public nuisance as a useful weapon in the arsenal against environmental degradation.'[108]

From the perspective of South African law, two of the statements in the above remark are largely true: (a) the small number of reported cases; and (b) the lack of understanding of the law of public nuisance. As far as the confusion between public nuisance and the tort of public nuisance is concerned, it seems that South African law has never adopted the tort of public nuisance as there are no reported cases suggesting the contrary. As will be illustrated in Chapter 3, there is a lack of understanding of the law of public nuisance.

Apart from serving to protect and preserve the wellbeing of the general public, the public nuisance doctrine was developed to grant a private individual a remedy to recover damages. The developed public nuisance remedy was called the special injury rule, otherwise known as a tort of public nuisance. The individual claiming damages was obliged to prove he had suffered special or peculiar injury.[109] The

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[108] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 399.

[109] *Sowthall v Dagger* [1536] YB 27 Hen 8f 27 pl 10. In this case the defendant obstructed the King's highway, which prevented the plaintiff from reaching his close. The plaintiff then sued for damages.

special injury had to be more than that which the general public had suffered as a result of the same offence(s).

Apart from using public nuisance to limit an environmental threat to the general public; environmental lawyers in the United States have sought to use the special injury rule in order to file public nuisance class actions against companies, which had allegedly contributed to air pollution.[110] The aim was to claim compensatory and punitive damages from product manufacturers.

In *Diamond v General Motors Corp*[111] the court rejected the lawsuit, stating that 'public nuisance theory is ill-suited for this type of litigation'.[112] The court offered three reasons for rejecting public nuisance as a cause of action for the purposes of claiming damages. Firstly, it noted that because there were existing statutes regulating air pollution, introducing public nuisance as an alternative remedy would have the effect of adopting 'stricter standards over the discharge of air contaminants in the [United States]'.[113] Secondly, the court was of the opinion that only a government could institute proceedings for injunctive relief as it had a duty to protect

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Baldwin J refused to allow the action on the basis that the damage suffered by the plaintiff could not have been a common nuisance to all Her Majesty's subjects. However, Fitzherbert J dissented and was of the opinion that when a plaintiff could prove special or greater damage, other than the damage to the public at large, he had a valid cause of action to claim compensation. See Milton JRL *The concept of nuisance in English law* (1978) 145.

[110] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 548.

[111] 97 Cal Rptr 639 (Ct App 1971).

[112] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 548.

[113] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 549.

the public as a whole. If public nuisance were to be used to claim damages, then the supply of goods to those whom the plaintiff represented, namely, the general public, would be curbed. Finally, the court suggested that by using the tort of public nuisance, each individual in the class action would have to prove special or particular damage. In this case it would be well nigh impossible to prove that thousands or even millions had suffered a special injury.[114]

The use of public nuisance to claim damages was rejected in two other cases, *City of Bloomington v Westinghouse Electrical Corp*[115] and *Alaska Native Class v Exxon Corp*.[116] According to Antolini, although public nuisance is a powerful means of protecting the community against any environmental harm, the courts in the United States have not allowed 'broad access to this powerful tort'.[117] Environmental lawyers have failed to achieve their desired result of claiming damages when using the notion of public nuisance.

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[114] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 549.

[115] 891 F2d 611 (7th Circ 1990). The court stated that a manufacturer cannot be held liable under the public nuisance theory. See also Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 551.

[116] 104 F 3d 1196 (9th Circ 1997). The court stated that the plaintiffs failed to prove any special injury. See also Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 551.

[117] Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 551.

Public nuisance was also applied as a cause of action to claim damages in asbestos,[118] tobacco,[119] firearms,[120] lead pigment and paint litigation.[121] However, its application met with no success in these cases.

2.4.4 Conclusion

One can conclude, then, that United States law applied the public nuisance doctrine for purposes other than those for which it was originally designed. Firstly, government officials used public nuisance as a cause of action to effect the

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[118] All courts rejected the use of public nuisance in asbestos litigation. For example, in *Detroit Board of Education v Celotex Corp* 493 N.W.2d 513 (Mich.App.1992) the court suggested that 'manufacturers, sellers or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect' and 'all courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination'. Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553.

[119] In *Texas v American Tobacco Co* 14 F Supp 2d 95673 (ED Tex 1997) the plaintiffs alleged that the American Tobacco Company 'intentionally interfered with the public's right to be free from unwarranted injury, disease and sickness and have caused damage to the public health, public safety and the general welfare of citizens'. The court rejected these allegations, stating that the relief sought was not within the boundaries of public nuisance. Schwartz and Goldberg state that no court accepted public nuisance in tobacco litigation. See Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 554.

[120] Plaintiffs alleged that the marketing and distribution practices of manufacturers constituted a public nuisance. They further alleged that manufacturers aimed to supply illegal secondary markets and thereby interfered with the public health sector. Only a few courts accepted the application of the public nuisance theory, but it was rejected by most. See Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 556-557.

[121] In Schwartz VE & Goldberg P 'The law of public nuisance: Maintaining the rational boundaries on a rational tort' (2006) 45 *Washburn Law Journal* 541-583 553 557, the authors explain that lead pigment and paint public nuisance suits failed 'because plaintiffs could not satisfy the basic standards of products liability'.

abatement of serious threats to the health of the general public. Secondly, public nuisance was used to claim damages in class action lawsuits.

In the first type of application it appears that the courts allowed the application of public nuisance in *Love Canal*, *Shore Realty* and the situation in *Suffolk Chemical Company* for two reasons. Firstly, toxic waste poses a serious threat to the public health and has to be dealt with without delay: cleaning a toxic waste site is a matter of urgency and requires immediate attention. Secondly, the applicants were government officials who, instead of claiming damages on behalf of private individuals, approached the court to grant an order for the abatement of the toxic waste. The government's aim was to force the owners indirectly to clean up their contaminated property.

One could argue that on the basis of these two reasons, public nuisance could be used as a remedy in South African law (a) if the alleged nuisance constitutes an imminent danger to the health of the general public; and (b) if the applicants do not seek to claim damages but instead approach the court to force the owners of contaminated land, or those responsible for it, to clean it. The South African legal system has a number of environmental law statutes.[122] However, if a situation arises where environmental legislation does not provide an effective

[122] Section 24 of the Constitution of 1996 states that: 'Everyone has the right to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Other fundamental legislative measures governing environmental concerns are the National Environmental Management Act 107 of 1998 and the Environmental Conservation Act 73 of 1989.

remedy or might not cover or limit dangerous environmental threats such as a toxic waste or any similar unreasonable act, it seems the public nuisance doctrine could be applied as an effective alternative method.

Regarding the second area of the development of public nuisance, apart from being unsuccessful as an alternative in the protection of the wellbeing of the general public, it seems also to have failed in class action law suits. The majority of the courts rejected applications of public nuisance. The main reason for this rejection was that the relief sought fell outside the original aims of the public nuisance doctrine. In the asbestos, tobacco, lead and pigment, and some of the environmental law cases the applicants' sole purpose was to claim damages rather than to limit the nuisance. In fact, one could argue that the use of public nuisance in these cases was a last resort to claim damages rather than seek an effective remedy to limit unreasonable interferences. Therefore, a public nuisance is only constituted if the unreasonable interferences affect the public at large and originated in a public space or land opposed to private land or interest of the applicants.'

Even if the use of public nuisance had been an effective and successful remedy in the cases discussed above, the tort of public nuisance has not been adopted into South African jurisprudence.[123] Therefore South African courts would

[123] South African law adopted a large amount of English law specifically in the area of nuisance and neighbour law in general. However this adoption did not affect the law of delict which predominantly remained Roman Dutch law. See Du Bois F & Reid E 'Nuisance' in Zimmermann, Visser DP, Reid K *Mixed legal systems in comparative perspective* (2004) 576-604 577; Van der Merwe D 'Neighbour law' in Zimmermann R & Visser DP *Southern cross: Civil law and common law in South Africa* (1996) 759-762 783-784.

reject the use of public nuisance in class action law suits for the purposes of claiming damages against companies which have allegedly contributed to air pollution.

After having established the origin of public nuisance in English law and investigated its vitality in both English and US law during the 20th century, the subsequent section focuses on the adoption of public nuisance in South Africa. The aim of the analysis is to establish the purpose and field of application of public nuisance in South African law.

2.5 Adoption of public nuisance in South African law

2.5.1 Introduction

According to Milton:

> 'South African law has tended to accept and apply the concept of nuisance as it was evolved in English law. The term public nuisance had early been introduced into our law by way of legislation concerning public nuisance. Through this medium it became a familiar term in South African law.'[124]

As indicated by Milton, the Common Law public nuisance remedy was derived from English law and was partly provided for in legislation and partly adopted in South African judicial decisions, as indicated in the discussion below.

The analysis of the remedy of public nuisance in early South African judicial decisions (from the late 19th to mid-20th century) will determine the original field of application of the public nuisance remedy in South Africa. The cases discussed in

[124] Milton JRL 'The law of neighbours in South African law' 1969 *Acta Juridica* 123-269 130.

this section are the first public nuisance cases since the remedy's adoption into South African law. Therefore, these cases are categorised as the first series of public nuisance cases discussed in 2.5.2 to 2.5.4. The relation between the application of public nuisance in English and South African case law, and the extent to which the Common Law remedy of public nuisance was incorporated into legislation, are also established.

2.5.2 Early case law

The term 'public nuisance' was used in judicial decisions as early as the late 1800s. In *Dickson v Town Council of Cape Town and another*[125] it was found that dirt in a barrel drain on the ground constituted a public nuisance and an interdict was granted accordingly.[126] Similarly, in *Dell v Town Council of Cape Town*[127] it was found that a public deposit of rubbish amounted to a public nuisance. However, in the case of *Redelinghuys v Silberbauer*[128] the plaintiff tried to prevent the erection of a flour mill, arguing that it constituted a public nuisance. The application for the interdict failed as the applicant couldn't prove that the mill posed a threat to the health of the public or that it would cause an inconvenience to the rest of the neighbourhood. It could be argued that the remedy was denied in this case because the nuisance was held to be private rather than public, indicating that the remedy was still applied according to its original aims. In *London & South African Exploration Co v Kimberly Divisional*

[125] (1868) 1 B 13.

[126] Milton JRL 'The law of neighbours in South African law' 1969 *Acta Juridica* 123-269 139.

[127] (1879) 9 B 3.

[128] (1874) 4 B 95. See Milton JRL 'The law of neighbours in South Africa' 1969 *Acta Juridica* 123-269 139.

Council[129] the court granted an interdict against the construction of a tramline on the property of the London & South African Exploration Co for Mylchreest, based on the argument that the continual noise caused by the construction constituted a public nuisance. Although public nuisance is primarily regarded as a criminal offence, the case law illustrates how civil action was a popular means to suppress common (public) nuisances in South African law

2.5.3 Significant later case law

2.5.3.1 Introduction

Based on the preceding paragraphs, it is clear that English nuisance law was adopted and accepted in South African law. However, it is not clear to what extent the notion of public nuisance was adopted into South African law. The case law analysed below – besides being the most significant case law pertaining to public nuisance in South African law – is fundamental when investigating the adoption of public nuisance in South African law. After a discussion of these significant cases, the essential characteristics of public nuisance in these two legal systems will be compared in order to determine to what extent the public nuisance doctrine was adopted in South African law. This comparison will illustrate that the essential characteristics of public nuisance in English Common Law were adopted in South African law.

[129] (1887) 4 HCG 287.

2.5.3.2 Case law

Certain public nuisances were seen as entailing a criminal wrong and the perpetrators prosecuted accordingly. In *R v Paulse*[130] the defendant was convicted on the ground that his brothel was kept in such a manner that it constituted a public nuisance. The public was affected when it was found on the evidence that great damage had occurred to the persons residing in and passing through the neighbourhood of the house in question. The matter was taken on appeal, but the appellant failed to convince De Villiers J that the brothel was not kept in a disgraceful and disgusting manner. The appeal was dismissed.

Similarly, in *R v CP Reynolds*[131] the court *a quo* found that the pollution of a public stream – which as we know from English law constitutes a public nuisance – does not constitute a public nuisance in South African law. However, the decision was overturned on appeal. The court held that such an action did amount to a public nuisance. Another example of public nuisance adopted into South African law as a criminal offence is *Putt v Rex.*[132] The defendant was found guilty of erecting gates across a main road, which he closed and locked every twenty-four hours. In essence this was an obstruction of a highway and punishable under nuisance in English law as indicated in 2.3.1. In the court *a quo* the defendant was found guilty and summoned to pay a fine of 20 shillings. On appeal, it was found that section 30 of the Regulation of Railways[133] made provision for gates at level crossings to

[130] (1892) 9 SC 423.

[131] (1901) 22 NLR 89.

[132] 1908 EDC 25.

[133] 19 of 1861.

safeguard the public against injuries or fatalities caused by a train. The gates were only closed for seven minutes once every twenty four hours. The court was therefore of the opinion that this action couldn't be seen as a major continuous disturbance, but rather provide safety for the public. The conviction was quashed and the sentence set aside.

The abovementioned case law indicates that public nuisance was primarily seen as a crime in South African law. However, it will be established that, as in English law, injunctive relief and statutory nuisance systematically replaced criminal liability.

In *Queensland Municipality v Wiehan*[134] the plaintiff approached the court for relief by way of the common law notion of public nuisance. In the *Queensland* case Wiehan alleged that a nuisance was caused by stray dogs. Wiehan argued that the Queensland municipality had a duty to control stray dogs together with the permission to kill the dogs. As a result of some of Wiehan's sheep being killed by stray dogs, Wiehan instituted proceedings against the Queensland municipality to collect and destroy the dogs. The result seems to have been that the Queensland municipality had not caused a public nuisance by allowing the stray dogs to roam unchecked. The court held that the defendant was unaware of the nuisance and never authorised the dogs to stray and cause damage to the plaintiff. Thus the court held that the defendant had no duty to abate a nuisance of which is it was innocent.

[134] 1943 EDL 134. Hereafter referred to as the *Queensland* case.

To summarize, public nuisances were alleged in the following instances: where a brothel was kept,[135] pollution of a public stream,[136] dirt in a barrel drain on the ground,[137] noise when exercising a trade such as a blacksmith[138] and stray dogs.[139] An overview of the abovementioned examples creates the impression that any offence interfering with the public health and safety would fall within the category of public nuisance.

Therefore, public nuisance was adopted in early South African case law and served two functions: firstly, regulating normal nuisances such as smoke, noise and obstruction of a highway, which interfered with the public health and welfare of the public at large; and secondly, to stop any unacceptable moral and social behaviour regarded as a criminal offence (like keeping a brothel).

2.5.4 Statutory nuisance in South African law

Legislation regulating public nuisances has been implemented since the adoption of nuisance into South African law during the late 19th century. Statutory nuisance in most instances replaced the common law notion of public nuisance. In *Coetzee v R*[140] it was found that Coetzee was in contravention of section 5(11) of the Police Offences Act,[141] which prohibited the obstruction of streets. Coetzee, who was a

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[135] *R v Paulse* (1892) 9 SC 423.

[136] *R v CP Reynolds* (1901) 22 NLR 89.

[137] *Dickson v Town Council of Cape Town* (1868) B 13.

[138] *Coetzee v R* 1911 EDL 339.

[139] *Queenstown v Wiehan* 1943 EDL 134.

[140] 1911 EDL 339.

[141] 27 of 1882.

blacksmith, disturbed the free-flowing traffic when blocking the streets with carts and shoeing horses whilst exercising his trade. His conviction in the court *a quo* was overturned on appeal, when Kotze J found that the public health or safety was not endangered. Kotze J was of the opinion that the alleged obstruction was merely a temporary use of a portion of the street to exercise his occupation.[142] Thus the obstruction was not regarded as a public nuisance.

The judgement recognises statutory nuisance as a means to regulate public nuisances. These statutory provisions are implemented to ensure that public health and the safety of the public are protected.

Similarly, in *Champion v Inspector of Police, Durban*[143] the appellant was convicted when he unlawfully used a building for public entertainment purposes when prohibited from doing so by section 76 of the General Bye-Laws. Section 76 stated that '[n]o person being in any private premises within the Borough shall make any noise or disturbance so as to be a public nuisance in the neighbourhood of such private premises.'[144]

The defendant was found guilty of causing an unreasonable amount of noise. The court concluded that a noise had to be of such a degree as to constitute a public nuisance before it could be prosecuted. On appeal, the court was of the opinion that the neighbours in the vicinity where the defendant operated his entertainment

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[142] 1911 EDL 341.

[143] 1926 47 NPD 133.

[144] Besides regulating noise, another aim of the legislation was to regulate and ensure public safety by controlling the access of individuals to private and public places of entertainment. See *Champion v Inspector of Police, Durban* 1926 NPD 133.

business only complained of noise which caused an inconvenience and annoyance, but never contended that it amounted to a public nuisance. The appellant successfully proved that no public nuisance was constituted and his conviction was subsequently set aside.

The final example illustrating the implementation of statutory nuisance in South African law is the judgement of *R v Cohen.*[145] The defendant contravened section 170(8) of a special by-law of the Cape Town municipality.[146] Section 170(8) prohibited the keeping of a brothel in a scandalous manner and imposed a fine of £10 on any offender. The contravention led to the defendant being convicted and sentenced to a period of six weeks imprisonment for keeping a disorderly house for the purpose of fornication to the great damage and common nuisance of His Majesty's subjects.[147] On appeal the court found that the normal keeping of a brothel would not be an offence. The court held that keeping a brothel would be regarded as a public nuisance if it is kept in a scandalous and indecent manner.[148] Based on evidence from neighbours, the court found that the keeping of the brothel constituted a nuisance.

Despite the fact that public nuisances were suppressed by means of statutory nuisances – apart from the common law notion of public nuisance – the original aims adopted from public nuisance in English law remained intact. Statutory nuisance, similar to the purpose of Common Law public nuisance, regulated public safety,

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[145] (1902) 19 SC 155.

[146] Act 26 of 1893.

[147] (1902) 19 SC 157.

[148] (1902) 19 SC 158.

morality and health. The aim of these statutory provisions was to regulate nuisances on public land and in a public space, not only nuisances affecting private land and private space.

Currently public nuisance is mostly used by municipalities and city councils to control nuisances that affect the public. It is mainly provided for in legislation (statutory nuisance)[149] to regulate public nuisances,[150] where a specific action or situation poses a threat, or where actual harm has already occurred to the broader public. The local authorities have to institute proceedings for the abatement of a public nuisance.[151]

2.5.5 Conclusion

One can conclude – after the analysis of both the English and South African law pertaining to the doctrine of public nuisance – that the definitions of all unreasonable interferences regarded as public nuisances in English law were adopted in South African law. These unreasonable interferences are noise, smoke, keeping a brothel, obstruction of public roads and disposing of waste which originated in a public space or public land such as a street opposed to private land. On the other hand, none of the early significant South African case law allowed fear, prospect and economic

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[149] In Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163 a statutory nuisance is defined as 'a condition or state of affairs which a legislative authority has declared to be a nuisance.'

[150] For example, the Atmospheric Pollution Prevention Act 45 of 1965; National Environmental Management Act 107 of 1998; Civil Aviation Offences Act 10 of 1972; Health Act 63 of 1977.

[151] Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 215.

loss as justifiable interferences that constitute public nuisances. These non-recognised interferences were not allowed in the English law concept of public nuisance, and it seems South African courts (between the late 19th century and 1975)[152] adopted the same approach.[153]

Recognised unreasonable interferences were abated both by the institution of criminal and civil proceedings by local authorities. Initially the sheriff and later the Attorney-General[154] were entrusted to institute such proceedings for the abatement of public nuisances in English law.

In both English and South African law perpetrators were either criminally liable – with liability in the form of a fine or imprisonment – or civilly liable by means of an injunction, in that perpetrators were asked to stop causing an unreasonable interference that resulted to be a public nuisance. However, one can conclude that the English law remedy known as the special injury rule[155] was not adopted in South African case law. The remedy provided a victim with monetary compensation if a plaintiff could prove special or particular damage as a result of a public nuisance. The remedy was never granted in any decision, nor did a plaintiff approach the court

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[152] *Von Moltke v Costa Aerosa (Pty) Ltd* 1975 (1) SA 255 (C).

[153] See 2.3.3.3.

[154] An 'injunction was brought in the name of the Attorney-General rather than the victim of the offence, although it was really the victim who sued.' See Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 66.

[155] YB 27 Hen 8 fo 26 fo pl 10 (1536). This rule was adopted in an unreported decision in English law. The plaintiff had to prove special or particular damage that was different from damages suffered by the public at large in order to have a successful claim. The remedy to claim a monetary amount for damages caused great confusion as to when an action should be based on private or public nuisance in the courts of the United States. See Hodas DR 'Private action for public nuisance: Common law citizen suits for relief from environmental harm' (1989) 16 *Ecology Law Quarterly* 883-908 884.

for relief using the special injury rule as a cause of action. Compensation can only be claimed if the remedies provided in the law of delict are applied. This is an illustration that nuisance law did not influence or change the law of delict, which originated from Roman Dutch law.

Statutory nuisance systematically replaced the common law notion of public nuisance in South African law, as it did in English law. Because of the implementation of these statutory measures that regulate unreasonable interferences affecting the public at large, there was less need for the application of the common law. This ultimately resulted in a decline in the use of the common law notion of public nuisance in disputes; this is seen in the small number of cases during the mid-20th century. Thirty-two years passed (1943[156] to 1975[157]) before there was a reported case in South African law where a plaintiff sought relief arguing that a public nuisance had been constituted. Even during the early 20th century only a limited number of cases were reported, with the vast majority of them analysed in

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[156] *Queensland Municipality v Wiehan* 1943 EDL 134.

[157] *Von Moltke v Areosa Costa* 1975 (1) SA 255 (C). The decision of *Von Moltke v Costa Aerosa (Pty) Ltd* 1975 (1) SA 255 (C) is one exception where the Common Law remedy of public nuisance was used in the period between 1943 and 1989. The applicant contended that eradicating vegetation (in his vicinity) for the development of a new shopping mall would constitute a public nuisance. He applied for an interdict to restrain a public nuisance and had to show special injury/reason in order to have *locus standi*. The applicant failed because he could not show that 'he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general': 258D-F. The court did not indirectly apply the special injury rule discussed in 2.3.1 above. It seems the judge confused two distinct remedies: the abatement of a nuisance by way of proving the existence of a public nuisance and claiming damages which, in English law, is only possible if the plaintiff could prove he sustained particular or special injury over and above that of the general public.

this chapter. One can conclude that the implementation of statutory nuisance employed to curb and regulate public nuisances was successful.

One can conclude that the original aims to suppress an unreasonable interference by way of public nuisance was adopted and applied in early South African case law. However, as will appear from the next chapter, the notion of public nuisance was applied contrary to its original aims in more recent South African case law.[158] In most of these cases, categorised as the third series discussed in 3.1 and 3.2, private individuals in predominantly white residential areas formed landowners', farmers', ratepayers' and environmental associations and applied for an interdict to prevent future or present disturbances in the form of the establishment or formalisation of new residential settlements in their vicinity. The applicants alleged

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[158] See *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A), where the application for an interdict to abate a public nuisance, in the form of an informal settlement, was granted. In *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1994 (3) SA 336 (A) an application for an interdict preventing the establishment of the formal settlement was denied after the court considered policy considerations (see the statements made by Smalberger J, referred to in Chapter 3). In *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) the application for an interdict to prevent the establishment of an informal settlement was denied because the occupiers of the informal settlement were protected as 'occupiers' under the Extension of Security of Tenure Act 62 of 1997. In *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W) an application for an interdict was granted after the local authority could not prove that it had taken reasonable steps to prevent a possible public nuisance caused by an informal settlement being established in the vicinity of the properties owned by the members of the Three Rivers Ratepayers Association. In *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) the Court denied an application for an interdict to prevent a temporary transit camp from being established in the vicinity of farms and residential areas. Amongst the arguments presented by the applicants was that of a public nuisance being constituted. However, no evidence could be given to support this argument and it failed in the Constitutional Court.

that actions of the occupiers in the informal settlements, established in their vicinity would constitute a public nuisance. There are various arguments to support the argument that public nuisance doctrine was applied contrary to its original aims in these cases. First, the courts used the terms ‘private nuisance’ and ‘public nuisance’ interchangeably, which had the effect that the courts failed to clearly distinguish between a private and public nuisance. The courts’ failure to acknowledge this distinction led to them finding the presence of a public nuisance, but not according to the definition of a public nuisance. Secondly, as a result of the successful implementation of statutory nuisance, the common law notion of public nuisance was systematically substituted. This is seen in the decline of reported case law in both English[159] and South African law.[160] Thirdly, in the recent South African cases applicants approached the court for the prevention or eviction of occupiers living in informal settlements. This matter is sensitive in the light of the historical, social, economic and political context in South Africa. There are similarities between prevention or eviction in the case law and discriminatory practices in the apartheid era.

An elaboration of the cases and the problems associated with them follows in the next chapter.

[159] See 2.3.4.

[160] See 2.5.4.

Chapter 3: Recent South African case law

3.1 Introduction

Public nuisance was used for a different purpose from its original aim in a series of cases between 1989 and 2001.[1] In this series, the application of public nuisance were only successful in two out of the five cases in the series. The public nuisance doctrine was applied to evict or prevent occupiers of an informal settlement from establishing themselves in the vicinity of predominantly white property owners. This use is contrary to the original aims of public nuisance, namely protecting the wellbeing (health and safety) of the general public.

As indicated in chapter 2, the public nuisance doctrine was originally, in what has before been described as the first series of cases,[2] applied to protect the general public against any act which posed a threat to their health and safety by, for instance, prohibiting the pollution of a public stream[3] and the erection of a gate across a main road.[4] It was also originally applied to safeguard the public against

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[1] See *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A); *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE); *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W); *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[2] See 2.5.

[3] *R v CP Reynolds* (1901) 22 NLR 89.

[4] *Putt v Rex* 1908 EDL 25.

any actions which were socially and morally unacceptable by prosecuting the owners of brothels that were kept in a scandalous manner.[5]

There was one case in what has been described as the second series of cases,[6] in which the applicant tried to use the doctrine for private purposes, contrary to its original aims. The applicant approached the court for an interdict to prohibit the establishment of a shopping mall in his vicinity. The court denied the interdict on the basis that the applicant could only succeed if he proved 'injury, prejudice or damage or invasion of a right peculiar to himself and over and above that sustained by the members of the general public.'[7]

In the third series of cases, similarly to the application of public nuisance in the second series of cases, applicants attempted to apply the public nuisance doctrine mainly for private purposes. This application of public nuisance deviated from its original aims as illustrated in the first series of cases. As indicated above, the application of public nuisance was only successful in two of the five cases during this third series of cases. Applicants alleged that the actions of occupiers who were or would be established in their vicinity would create a public nuisance. Applicants then approached the court to prevent or evict occupiers from establishing themselves in their vicinity. An analysis of these cases is undertaken in the main part of this chapter to illustrate why the result, namely the application of public nuisance, is a problem.

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[5] *R v Paulse* (1892) 9 SC 423.

[6] *Von Moltke v Costa Areosa* 1975 (1) SA 255 (C).

[7] 258D-E.

The fourth and final series of public nuisance cases consist of two cases, namely *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others*[8] and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others.*[9] In both cases the applicants alleged that the presence of a refugee office in their vicinity contravened the City's zoning scheme and constituted a public nuisance. The courts found that the City's zoning scheme was contravened. On the issue of whether a public nuisance was constituted, the applicants complained that the presence of the refugee office created regular street blockages, noise, litter and violence. On the basis of the evidence presented by the applicants, the courts found that a nuisance was constituted, but the courts were of the opinion that a private instead of a public nuisance was constituted. However, the unreasonable actions that were complained of, together with the people affected thereby, are in fact in line with the definition of a public nuisance as opposed to a private nuisance. The reasons are set out in 3.4.

The following section discusses the facts and thereafter identifies the problems with the application of public nuisance in the second and third series of cases. Thereafter an elaboration of these problems is given followed by analysis of the fourth series of public nuisance cases.

[8] (20952/08) [2009] ZAWCHC 100 (24 June 2009).

[9] (26841/09) [2010] ZAWCHC 87 (3 May 2010).

3.2 Recent case law

3.2.1 Case summaries

Von Moltke v Costa Aroesa (Pty) Ltd[10] was reported thirty-two years after the decision in the *Queensland* case.[11] The applicant sought an interdict prohibiting the development of a township, shopping centre, game park and funicular railway in the Sandy Bay area. The applicant was the owner of a house in the area of Llandudno which, as Diemont J stated, 'was approximately one mile as the crow flies – or perhaps I should say the sea gull flies'[12] – from the area commonly known as Sandy Bay. After being made aware of the respondent's developments in the Sandy Bay area, the applicant visited the respondent company's offices to establish the details of the development and was shown a model and brochure of the development scheme. This drove the 'distressed' applicant to organise a petition for the prohibition of the development and file a written objection to the Secretary of the Provincial Administration. The applicant was aware in the meantime that bulldozing operations had already begun clearing land in Sandy Bay.

The applicant alleged that the bulldozing operations together with the future development in the Sandy Bay area would unreasonably interfere with the use and

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[10] 1975 (1) SA 255 (C). Hereafter referred to as the *Von Moltke* case.

[11] In *Queensland v Wiehan* 1943 EDL 134, Wiehan argued that the Queensland municipality had a duty to control stray dogs, together with the permission to kill the dogs. As a result of some of Wiehan's sheep being killed by stray dogs, Wiehan instituted proceedings against the Queensland municipality to collect and destroy the dogs. The result seems to have been that the Queensland municipality had not caused a public nuisance by allowing the stray dogs to roam unchecked. The court held that the defendant was unaware of the nuisance and never authorised the dogs to stray and cause damage to the plaintiff.

[12] *Von Moltke v Costa Areosa* 1975 (1) SA 255 (C) 256B.

enjoyment of his land. The applicant argued that the bulldozing and building plans would constitute a nuisance 'to the surrounding area, that irreparable damage was being done to the natural vegetation and also that the sand dunes were being disturbed.'[13] The applicant approached the court for an interdict prohibiting the respondent (Costa Areosa) proceeding with the development in Sandy Bay and a further order to restore the property to its condition prior to the commencement of the bulldozing operations. An affidavit was filed by the Secretary of the Divisional Council. In the affidavit the Secretary stated that the approval of the development was still pending and that all objections would be considered at a future meeting. In response to the applicant's allegations, the director of Costa Areosa argued that the applicant did not have *locus standi* to institute proceedings regarding the matter and denied that the bulldozing operations could be seen as the first steps of the development. Mr Friedman, on behalf of the respondent, supported the argument initiated by the director of Costa Areosa that the applicant did not have *locus standi* to institute proceedings. He suggested the applicant had to prove that the bulldozing operations constituted a nuisance and that he was in fact affected by that nuisance in order to have *locus standi* to approach the court for relief. Mr Friedman denied any destruction of vegetation by the bulldozing operations and confirmed the vegetation to be alien, not indigenous.

Apart from the arguments presented by the respondents, Diemont J considered the considerable distance between the applicant (who resided in Llandudno) and Sandy Bay. Diemont J also considered that the applicant never proved the Sandy Bay area to be visible from his home, which would have enabled

[13] 256H-G.

him to view the bulldozing operations. Furthermore, the applicant also never stated that he visited the Sandy Bay area, seeing that he never made this clear in his affidavit.

Based on these factors, Diemont J agreed with Mr Friedman that in order for the applicant to succeed he had to prove 'injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general'.[14] Diemont J concluded that it was not enough for the applicant only to allege a nuisance, but that he had to prove that he has a special reason to approach the court for a remedy. Counsel for the applicant made two further arguments, which the court rejected. Both these arguments suggested that the actions of the respondent have contravened section 13 of the Township Ordinance Act of 1943 and Town Planning Regulations, respectively. Again, the applicant could not prove any special injury[15] that affected him and that could be regarded as common to the general public. The court found that the applicant did not have *locus standi* and therefore rejected both arguments and denied the relief sought.

One can assume that when an applicant alleges an unreasonable interference with his property, including that of the general public, he must prove 'injury, prejudice or damage or invasion of right peculiar to him and over and above that sustained by

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[14] 258D-E. This is not an indirect application of the 'special injury rule' discussed in 2.3.1. The special injury rule had never been adopted in South African law. Damages can only be claimed in terms of the law of delict. It seems the judge confused two distinct remedies: the abatement of a nuisance by way of proving the existence of a public nuisance and claiming damages which, in English law, is only possible if the plaintiff could prove he sustained particular or special injury over and above that of the general public.

[15] See footnote 14.

the members of the public in general'.[16] Once he has proved such an injury or invasion of a right, he will have *locus standi* to approach the court for relief. On the other hand, if he fails to prove an injury or invasion, he will have no *locus standi* to approach the court for any relief, as seen in the case above.

Since the issue at hand was whether the applicant had *locus standi*, the notion of common law public nuisance was never substantially applied in the case. However, the applicant tried to use the public nuisance doctrine to advance his private interest when trying to prevent the establishment of a shopping mall in his vicinity. Similar to the use of public nuisance in this, the second series of cases, applicants in the subsequent third series of cases also attempted to apply public nuisance to protect their private interests. Applicants used public nuisance to abate alleged unreasonable interferences with the aim of protecting their private interests, as opposed to the use of public nuisance in the first series of cases, where the unreasonable actions infringed the interest of the general public (health and safety). Therefore these applicants failed to meet the requirements of the definition of a public nuisance. However, the application of public nuisance in the second series of cases differs from that in the third series. In the second series of cases (the *Von Moltke* case) the applicants attempted to use public nuisance specifically to prevent the establishment of a shopping mall, while in the third series of cases the aim of the applicants was to prevent occupiers from establishing (or evict them from) an informal settlement in their vicinity on the basis that the settlement would cause a nuisance.

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[16] 258D.

East London Western Districts' Farmers Association and others v Minister of Education and Development Aid and others[17] is the first of five recent South African cases referred to as the third series of public nuisance cases. In this series of cases applicants used the notion of public nuisance to restrict members of informal settlements from inhabiting land situated in their vicinity. The use of the public nuisance doctrine in this third series of cases is similar to its use in the second series, in which the plaintiffs used the doctrine to protect their private interests instead of applying its original aims (as applied in the first series of cases), namely to prevent any actions which pose an imminent threat to the health and safety of the general public. However, its application in the third series is problematic in both substance and time, as will be explained.

In the *East London* case the plaintiffs claimed that the establishment of a needs camp (for black refugees) in their vicinity was an unreasonable interference with their inherent right of use and enjoyment of land The applicants (hereafter referred to as farmers) sought an interdict prohibiting the establishment of a needs camp in the vicinity of their properties, or evicting the refugees already living there. The respondents, the third respondent being the Director of Land Affairs,[18] raised the defence of statutory authority when suggesting that the establishment of the needs camp was authorised by section 10 of the Development Trust and Land Act.[19] Kroon J agreed with the argument raised by the respondents and upheld the defence of statutory authority. Kroon J suggested that, based on the facts, the applicants could

[17] 1989 2 All SA 163 (A). Hereafter referred to as the *East London* case.

[18] Hereafter referred to as DLA.

[19] 18 of 1936. Hereafter referred to as DTLA.

only request a review of proceedings based on allegations of gross unreasonableness.[20] Therefore, the applicants failed in the court *a quo*.

On appeal Hoexter J (with Vivier and Steyn JA concurring) held that the needs camp constituted a public nuisance and that the appellants should have been entitled to an interdict prohibiting the establishment thereof rather than a review of proceedings, as was decided by Kroon J in the court *a quo*. As a point of departure, Hoexter J regarded the farmers and the members of the needs camp as neighbours. Based on this conclusion, Hoexter J applied the principle in *Regal v African Superslate (Pty) Ltd*,[21] which established that a legal relationship exists between neighbours, which entails reciprocal rights and obligations.[22] The court referred to Van der Merwe and Olivier,[23] who suggested that each neighbour – whether a landowner or occupier – has the inherent right to the reasonable use and enjoyment of land.

Hoexter J quoted Milton for a definition of public nuisance. According to Milton, public nuisance, in the South African context, 'has the simplified meaning of an ordinary nuisance so extensive in its effect or range of operation as to discomfort the public at large.'[24] Milton is of the opinion that an occupier or landowner whose proprietary right has been infringed by a public nuisance may sue in his own right. In

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[20] This does not refer to unreasonableness in nuisance terms but to the defence of statutory authority: when that defence is proved the applicant can only overcome the authority by proving bad faith or gross unreasonableness in the exercise of the authority. See footnote 26, 44.

[21] 1963 (1) SA 102 (A).

[22] 1989 (2) SA 63 (A) 66G.

[23] Van der Merwe NJ and Olivier PJJ *Die onregmatige daad in die suid-afrikaanse reg* (5th ed 1985) 504.

[24] 1989 (2) SA 63 (A) 67D.

this case the applicants did not claim damages, but approached the court for an interdict to abate the public nuisance. The court had to inquire whether the needs camp would unreasonably affect the public at large or interfere with the personal property rights of use and enjoyment of land.

As a point of departure, the court determined whether the actions of the occupiers of the needs camp constituted a public nuisance. Kroon J in the court *a quo* held that a public nuisance was created by the actions of the occupiers, but upheld the statutory defence argued by the respondents. Kroon J was of the opinion that section 10 of DTLA was a valid authorisation for the interference with the applicants' private rights. On appeal, Hoexter J held that the court ***a quo's*** conclusion – that the respondents had immunity to invade the private rights of the applicants – had to be reconsidered. Kroon J concluded that there was no legal principle in South African law that allows an administrative act to infringe individual rights just because the act is performed in the course of implementing a general policy.[25] Hoexter J found that the court *a quo* was bound to resolve the issue by testing the validity of the defence of statutory authority and heard the application for an interdict.

Hoexter J considered whether the third respondent had discharged the onus of showing immunity under the DTLA for such interference with private rights.[26] To determine whether the respondent had discharged the onus, the court analysed case law.[27] In all the analysed cases the applicants alleged that the government, when

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[25] 1989 (2) SA 63 (A) 70C.

[26] 1989 (2) SA 63 (A) 70F.

[27] In *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163, the respondents alleged that the construction of certain roads, drains and streets by the appellants was the cause of an increased

exercising its duties, interfered with common law rights. In response the respondents (usually a governmental body) argued that they were authorised by way of statute to interfere with the applicants' common law rights. The courts were of the opinion that the empowering legislation explicitly or tacitly authorised the government to interfere with the common law rights of third parties. The courts concluded that it would be impossible for the respondents to exercise their duties without reasonably interfering with the applicants' private rights. Such an interference is legitimate if it is done without any negligence and if it serves a public purpose. Although Hoexter J acknowledged that certain statutes empowering certain actions or works would necessarily and inevitably involve the disturbance of common law rights, he was of the opinion that in the present matter, the respondent did not discharge the onus of

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volume of water on the respondent's property. The municipality argued that the construction had been done under statutory authority without negligence. The court suggested that the onus of proving impossibility of avoiding prejudice rests upon the municipality. The court held that it was impossible to make a street or drain without increasing the flow of water and concluded that it had therefore been the legislature's intention that a reasonable interference with private rights could result from the works. In *Board v Brink* 1936 AD 359 the construction of an irrigation canal interfered with the natural flow of water, ultimately interfering with the private rights of residence in the vicinity where the construction occurred. The construction was authorised by statutory powers entrusted to the irrigation board. The court concluded that it was impossible to construct the canal without interfering with the natural flow of water and, as a consequence, the rights of private individuals. The court was of the opinion that the legislature intended that a reasonable interference with private rights might occur. In *Bloemfontein Town Council v Richter* 1938 AD 195 the municipality had a statutory right to maintain a dam. The municipality exercised the right to maintain the dam by removing silt from it. Richter alleged that the removal of silt caused damaged to his property and succeeded in the court a quo. On appeal the court concluded that the municipality's statutory right to maintain the dam could not be properly exercised if they are not allowed to remove silt. The court also found that the legislature had intended an interference with private rights. In *Germiston City Council v Chubb & Sons Lock and Safe Co (SA) (Pty) Ltd* 1957 (1) SA 312 (A) the respondent (an adjoining land owner) claimed damages from the local authority for causing flooding on his property as a result of road-making operations. The court found that the appellant was entitled to reasonably interfere with the rights of the parties in order to develop the township, unless the appellant exercised its duty negligently.

showing immunity under the DTLA for such interference with private rights. According to Hoexter J, the third respondent failed to discharge the initial onus of proving that the establishment would inevitably and necessarily create a public nuisance.[28] Hoexter J qualified his reasoning by stating that a public nuisance is not an automatic consequence when an informal settlement is established.[29] In essence Hoexter J concluded that the third respondent could not prove that it would be impossible to establish an informal settlement without interfering with the common law rights of the applicants.[30] The court was of the opinion that section 10 of the DTLA does not sanction any particular or specific settlement on trust land. The third respondent had to prove that a nuisance is a necessary consequence of any settlement, but failed to do so. The court, during its concluding remarks, stated that the 'bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens.'[31] The court concluded that the rights of the farmers had to be balanced with the alleviation of the lot of the refugees.

The court awarded the appellants an order for the abatement of the public nuisance. Since it was not realistic to move the 8000 members of the needs camp, the court ordered that a fence be erected enclosing the camp from the farmers and that police patrol the vicinity on a more regular basis during the day and night.

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[28] 1989 (2) SA 63 (A) 74C.

[29] 75D.

[30] 75F.

[31] 1989 (2) SA 63 (A) 75I.

Viljoen J and Nestadt J disagreed with the majority judgement. Both had different reasons for not concurring with Judges Hoexter, Vivier and Steyn. Viljoen J raised two arguments. His first argument was that the English law of nuisance was not applicable in South Africa. On the basis of this argument he argued that the applicants misconceived their remedy.[32] Finally, Viljoen J argued that the court acted *ultra vires* when delivering its judgement. Viljoen J suggested that the acquisition of trust land together with settlement of blacks on such land were executive acts which cannot be tested in a court of law. On the other hand, Nestadt J agreed with the decision in the court *a quo* that it was not necessary for the respondents to prove that the erection of a needs camp would inevitably cause a nuisance for the applicants.

The decision can be criticised on the basis of three reasons. Firstly, the court failed to establish whether the interferences constituted a nuisance. In fact, as far as the appeal court is concerned, no reference was made to any interference usually associated with causing a public nuisance, for instance, smoke and noise. Secondly, since the court established that a public nuisance was created, the second step would be to determine whether the applicants satisfied the definition of a public nuisance, namely whether the 'nuisance [was] so extensive in its effect or range of operation as to discomfort the public at large'.[33] Instead, the court posed the question whether the personal use and enjoyment of the applicants' personal right to land had been infringed. Establishing whether the applicants' personal interest was affected did not satisfy the requirement that the interferences caused extensive harm

[32] 1989 (2) SA 63 (A) 88C.

[33] 1989 (2) SA 63 (A) 67D.

or discomfort to the public at large, seeing that the focus was primarily on a specified individual or small group's private rights as opposed to the public's interest.

Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others[34] is the second in this third series of cases. In this case the applicants (an association representing residents and landowners of Diepsloot) alleged that the establishment of an informal settlement with squatters from an area known as Zevenfontein, together with other homeless households in their vicinity, would cause a (public) nuisance and as a consequence affect their right to the use and enjoyment of their respective properties. The applicants alleged that if the settlement would be established, its occupiers would cause extensive smoke (as a result of fires), dust (due to the absence of proper roads), pollution of underground water, increased crime in the vicinity and the decrease of the market value of their properties constituted a public nuisance. The applicants alleged that the decision of the Administrator of the Transvaal[35] (the respondent) to establish the informal settlement was reviewable. The applicants sought a temporary interdict to prevent the establishment of the settlement from taking place.

The Administrator argued that the settlement would not cause a (public) nuisance and denied that there were any grounds for reviewing his decision.[36] The Administrator relied on the Less Formal Township Establishment Act[37] as a defence of statutory authority in order to justify his decision to establish an informal

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[34] 1993 (1) SA 577 (T). Hereafter referred to as the *Diepsloot* case.

[35] Hereafter referred to as the Administrator.

[36] 1993 (1) SA (T) 578G.

[37] 113 of 1991. Hereafter referred to as the Township Act.

settlement in the applicant's vicinity. The Administrator countered the allegations advanced by the applicants, stating that firstly, Eskom would provide electricity and thus eliminate the unreasonable interference of smoke; secondly, proper water and sanitation would be provided, and finally, dust would be reduced or eliminated when collector roads received a 150mm layer of gravel, with other roads getting a 100mm layer.[38] After having countered the applicant's allegations, the Administrator was of the opinion that the allegations claiming a (public) nuisance were irrelevant in law. De Villiers J was of the opinion that a decision cannot be made solely on the basis of the allegations themselves.[39] He suggested that the extent of the alleged statutory authority as a defence, argued by the Administrator, ought to be investigated before a conclusion could be reached.

De Villiers J applied the test used in *Johannesburg Municipality v African Realty Trust Ltd*[40] to determine 'whether and to what extent the exercise of the powers conferred on the Administrator by the Township Act justifies an interference with the common law rights of third parties.'[41] De Villiers J concluded that the defence of statutory authority had to fail. He was of the opinion that, although the Township Act permitted the Administrator to establish a less formal settlement in a less formal manner,[42] it never justified any interference with the common law rights of third parties. De Villiers J concluded that the Administrator had failed to prove that the establishment of the less formal settlement would not constitute a public

[38] 1993 (1) SA (T) 579D.

[39] 581F.

[40] 1927 AD 163.

[41] 1993 (1) SA 583D-E.

[42] 584B.

nuisance. De Villiers J applied the reasoning adopted by Hoexter J in the *East London* case that the creation of a public nuisance is not a necessary consequence of the mere fact of a settlement.[43] On this basis, the court found that the Administrator failed to prove the absence of a public nuisance. The court granted the applicants an interim interdict with the aim of prohibiting the Administrator from proceeding with the resettlement of the squatters.

In the second judgement on appeal[44] there were three important unresolved questions, the first being whether the Administrator's decision to establish an informal settlement was reviewable. On this question McCreath J found that the Administrator's decision was not reviewable. McCreath J concluded that the applicants did not satisfy the requirements[45] for review, as provided in the judgement of *National Transport Commission and another v Chetty's Motor Transport (Pty) Ltd*.[46]

The second question before the court was whether the Township Act authorised the Administrator to invade the common law rights of third parties. It was concluded, after analysing the alleged nuisances raised by the applicants, that crime and air pollution would inevitably increase, no matter where the settlement was

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[43] 1989 2 All SA 163 (A) 75D-F.

[44] *Diepsloot Residents' and Landowners Association and others v Administrator, Transvaal* 1993 (3) SA 49 (T).

[45] According to the Appellate Division in *National Transport Commission and another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) 735E-H, a review is only possible, in the current context, if: (a) The Administrator's actions were mala fide, capricious, or arbitrary or if he had improper motives (the list is not exhaustive); or (b) the Administrator's decision was grossly unreasonable, to such an extent as to warrant the interference of a failure to apply his mind – a formidable onus.

[46] 1972 (3) SA 726 (A).

established.[47] The allegation of water pollution was no longer an issue, as it was settled before the adjudication of the final interdict. On the issue of whether the decrease in the value of the applicants' property constituted a nuisance, McCreath J concluded the following:

> 'if the nature of the settlement is such that it will of necessity affect the rights of the owners of the properties affected being those owners in the vicinity of the settlement, then the diminution in value is a consequence thereof and must be considered in conjunction with the legal principles relating to the exercise of statutory powers'.[48]

Based on the conclusion made on the alleged nuisances, McCreath J was of the opinion that the respondent had discharged the onus of establishing the defence of statutory authority. After the respondents discharged the onus, McCreath J suggested that the onus shifted to the applicants with a new question:

> 'whether the applicants proved that by the adoption of certain precautions reasonably practical, or by the adoption of another method, also reasonably practical, to achieve the purpose of the powers conferred on the Administrator, the extent of the interference will be lessened.'[49]

In answering the above question, the court established that the Administrator could not have taken any other reasonable steps to abate interferences impacting on the common law rights of the third parties. Furthermore, the court found that the Administrator acted within his powers when choosing Diepsloot as the place to establish the settlement. The court was also of the opinion that as a result of

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[47] 1993 (3) SA 49 (T) 71G.

[48] 1993 (3) SA 49 (T) 68H-I.

[49] 1993 (3) 49 SA (T) at 69B-C.

urbanisation, different socio-economic societies would inevitably have to live in the same vicinity in the future.

McCreath J concluded that the applicants had not proved that the Administrator could have taken other reasonably practical steps to prevent interference with the common law rights of third parties. The application for a final interdict failed.

On further appeal[50] the appellants approached the court to review the question of whether the Administrator possessed the authority to alleviate homelessness at the expense of unreasonably interfering with the common law rights of neighbouring property owners. To review the Administrator's authority, Smalberger J formulated the question as follows: 'whether the creation of a nuisance will be unlawful and constitute an actionable wrong.'[51] Smalberger J inquired whether the Township Act empowered the Administrator to create a nuisance. Smalberger J was of the opinion that the Township Act ought to be analysed against the background of significant developments that took place in South Africa with the purpose of dismantling the apartheid dispensation. These developments included the implementation of laws[52] enacted to repeal legislation that promoted racial discrimination. After an analysis of case law[53] and the Township Act, the court

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[50] *Diepsloot Residents' and Landowners Association and another v Administrator, Transvaal* 1994 (3) SA 336 (A).

[51] 1994 (3) 49 SA (T) 345C-D.

[52] For example, the Abolition of Racially Based Land Measures Act 108 of 1991 and the Upgrading of Land Tenure Rights Act 112 of 1991. See *Diepsloot Residents' and Landowners Association and another v Administrator, Transvaal* 1994 (3) SA 336 (A) 347D.

[53] Smallberger J, together with De Villers J and McCreath J, in the court a quo and Transvaal Provincial Division (as it was then known) referred to *Johannesburg Municipality v African Realty*

concluded that the legislature was aware of the urgent need for housing and, as a consequence, the necessity to establish new settlements speedily and in an orderly fashion. The legislature was also aware of the inevitable problem of urbanisation and recognised the need for these squatters to be close to work. Finally, the legislature recognised that establishing an informal settlement in an urban area would be sub-standard in terms of town planning and housing requirements, and would consequently necessarily decrease the value of the applicants' properties.[54] After taking all these factors into consideration, the court was of the opinion that the legislature empowered the Administrator to interfere with the common law rights of third parties and therefore found that the settlement was authorised by the Township Act.

The remaining issue to be resolved was whether the location of the settlement was reviewable. After an analysis of the evidence, the court held that the location was not reviewable. Smallberger J held that, although that the settlement could have been located anywhere else, the relocation of the settlement was necessary to reconstruct our society against the background of apartheid. The court, in its conclusion, upheld the decision in the Transvaal Provincial Division (as it was then known) that the appellants could not prove gross unreasonableness in order to justify review. Since all the grounds for review failed, the judgement went against the appellants. The court dismissed the appeal.

Trust Ltd 1927 AD 163, in which principles and guidelines regarding disputes concerning the exercise of statutory powers by public authorities are given.

[54] 1994 (3) SA 336 (A) 349C-G.

In *Rademeyer and others v Western Districts Council and others*[55] the applicant claimed that the actions of occupiers of an informal settlement on land owned by the respondent constituted a nuisance. The applicant approached the court for an interdict to abate the alleged nuisance. The aim of the interdict was to prohibit the respondent from allowing the erection of more houses on the land as well as to force the removal of the existing occupiers.

As a point of departure, the court established that during the early phase of the housing settlement the respondent had no knowledge of, and had not given consent for, the existing occupiers to inhabit the land. It was concluded that at the time when proceedings were instituted to abate the alleged nuisance, the respondent was aware that occupiers had settled on the land and requested that proper water and sanitation services be installed until alternative accommodation could be found. Based on the respondent's knowledge and reaction, the court held that the respondent gave tacit consent for occupiers to stay on the land.

Council for the respondent argued that if the occupiers had consent to settle on the land, the provisions in the Extension of Security of Tenure Act[56] applied to them. Nepgen J concurred with this argument and found that the occupiers satisfied the definition of an 'occupier' in ESTA.[57] This meant that an interdict could not be granted because, in the case of an eviction order, ESTA provides special protection

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[55] 1998 (3) SA 1011 (SE). Hereafter referred to as the *Rademeyer* case.

[56] 62 of 1997 (hereafter referred to as ESTA).

[57] According to section 6(1) of ESTA, an 'occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly'.

to those who qualify as occupiers under the Act. Therefore the court held that the application could not succeed.

However, Nepgen J stated that even if ESTA was not applicable, the relief sought would not be granted because the existence of a nuisance could not be proved. The court gave two reasons for reaching this conclusion. Firstly, the court followed the decision in the *East London* case that a nuisance must be of a continuous nature. Based on the evidence, the court was not convinced that this requirement was satisfied. Secondly, the applicants claimed that allowing the occupiers to stay would have serious consequences for the reasonable enjoyment of their property. The consequences included an increased security risk, increased crime and the imminent threat of a health hazard. In other words, the applicants alleged that these interferences would constitute a public nuisance. However, the court held that the installation of proper water and toilet facilities addressed the concern about a health hazard. The court found that the claims of increased crime and a possible security risk had to fail, since it could not be proved that the occupiers were criminals or that they would be susceptible to criminal activity. The existence of a nuisance could not be proved. The court dismissed the appeal.

In *Three Rivers Ratepayers Association and others v Northern Metropolitan*[58] the applicants approached the court for a mandatory interdict. They alleged that the actions of the occupiers, of an informal settlement in their vicinity, constituted a public nuisance. The applicants claimed that a nuisance was present because of a lack of water and sanitation, together with the threat of an increased risk of crime.

[58] 2000 (4) SA 377 (W). Hereafter referred to as the *Three Rivers* case.

They further alleged that the establishment of the settlement caused many neighbours to suffer financial loss as well as experience of a great deal of anxiety.[59] The applicants wanted to prevent and evict occupiers from settling on the respondents' land by instituting proceedings for an interdict.

The respondent (Northern Metropolitan Council) did not deny the allegations but argued that they had acted *bona fide*, that the interference was not of their making and that reasonable practicable steps were taken to avoid an unreasonable interference with the property interests of the applicants.[60]

The court defined a public nuisance as 'a nuisance whose harmful effect is so extensive as to affect the general public at large or at least a distinct class of persons in its field.'[61] However, the court went on to state:

> 'In considering the legal principles involved in a situation of public nuisance, one has to consider the rules of private nuisance as the concept is no different in law except for the public extent of the nuisance.'[62]

The court made no reference to the origins and functions of private and public nuisance in order to support the above statement, nor did the court refer to any authority that might have adopted the same reasoning.[63] The court followed the rule in *Regal v African Superslate*,[64] which dealt with a private nuisance. According to this principle, where third parties created a nuisance on the land of the respondent, an

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[59] 380D.

[60] 380F.

[61] 380B.

[62] 380F.

[63] This will be dealt with 3.3.1 when analysing the case law.

[64] 1963 (1) SA 102 (A).

interdict can only be awarded if the respondent had knowledge of the nuisance or, secondly, where he failed to take reasonably practicable steps to abate the nuisance.[65] Since the respondent was aware of the nuisance, the remaining question was whether reasonably practicable steps were taken.

The respondent argued that by engaging with the applicants to find solutions, as well as deploying patrol units and a security guard to minimize the risk of safety hazards and crime, steps were taken to reduce or abate the unreasonable interferences complained of by the applicants. However, the court held that the respondent had not taken reasonably practicable steps to abate the nuisance. Although the court expressed its awareness of the homelessness situation in the country, it nevertheless granted an interdict for the occupiers to be evicted. The court held that a public nuisance was constituted and that reasonable practicable steps were not taken to abate the alleged nuisance. The court ordered that the squatters be evicted within 48 hours.

Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)[66] is the last case in the third series of South African public nuisance case law. The applicants (an environmental association formed by residents of Kayalami Ridge) approached the High Court for an interdict prohibiting the establishment of a transit camp in their vicinity for members escaping the aftermath of a flood in the Alexandra Township. The applicants not only rely on public nuisance but primarily on statutory authority and compliance. However, the case is similar to the other cases discussed in this series.

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[65] 2000 (4) SA 377 (W) 380F-H.

[66] 2001 (3) SA 1151 (CC). Hereafter referred to as the *Kyalami Ridge* case.

The applicants claimed that, in the absence of empowering legislation, the Minister of Public Works (respondent) lacked the authority to provide flood victims with temporary alternative accommodation.[67] They contended that such an establishment would be in contravention of the relevant town planning scheme and environmental legislation.[68] The respondent countered these allegations by arguing that it had a constitutional obligation to provide assistance to victims of the flood.

According to the respondent, the transit camp would serve a temporary purpose. However, the court was of the opinion that the camp would be established for an indefinite period. After having reached this conclusion, the court agreed with the argument raised by the applicants that 'the legislation would not have been applicable if government's purpose was to provide temporary shelter for the Alexandra flood victims'.[69] The court made no reference to any environmental legislation or zoning scheme that would not be complied with, nor did it decide whether the decision to establish a transit camp without empowering legislation was unlawful.[70] The High Court ruled in favour of the applicants and awarded an interim interdict.

Since the situation required immediate attention, the respondent appealed directly to the Constitutional Court. The Court identified the issues to be resolved. These issues were premised on the allegations made by the Kyalami Ridge residents. The first and primary issue was whether the erection of a transit camp

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[67] 1160H.

[68] 1161A-B.

[69] 1161E-F.

[70] 1162A-C.

would be unlawful in the absence of empowering legislation. After the flood the government implemented policy in an attempt to provide relief for victims.[71] The Court held that providing relief for victims in the event of natural disasters is an important component of governmental duties in a democratic state and that the implementation of policy was a necessary means to provide help in the absence of adequate legislation. The Court concluded that the respondent did not act contrary to the rule of law, nor did it circumvent any legislative measures enacted by Parliament.[72] The applicant's argument failed.

The second issue was whether the transit camp would contravene the provisions of the following pieces of legislation: National Environmental Management Act (NEMA),[73] the Township Planning and Townships Ordinance (Gauteng), National Building Regulation and Building Standards Act,[74] and the Environmental Conservation Act (ECA).[75] After an analysis of NEMA, the Court held that the applicants could not prove that the establishment of the transit camp would have a significant detrimental effect on the environment.[76] Regarding the remaining legislation, the Court found that the allegations raised by the applicants are relevant to the implementation of the decision and not its validity. On the basis of the conclusion, the court decided that the state could and should still comply with all legislative procedures.

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[71] 1171A.

[72] 1171E-H.

[73] 107 of 1998.

[74] 103 of 1977.

[75] 73 of 1989.

[76] 2001 (3) SA 1151 (CC) 1171A-B.

Thirdly, the applicants contended that the respondent infringed their constitutional right to administrative action. The Court stated that for such a right to have been infringed, the administrative action would have had to be both unlawful and procedurally unfair. On the question of whether the administrative action was unlawful, the court held that it is not necessary to 'consider whether the decision to establish a transit camp would affect the rights of the Kyalami residents'[77] and in effect rejected the contention made by the applicants. In determining whether the administrative action was procedurally fair, the Court had to establish whether any of the applicant's rights or legitimate expectations were affected or threatened.[78] After an investigation, the Court concluded that the applicants' rights would not be affected by the establishment of a transit camp,[79] and that the site was ideal for the purposes since thousands were living there already;[80] it also rejected allegations that the neighbourhood's character and value would decrease.[81] In conclusion, the Court held that the administrative action was procedurally fair.

The only remaining issue was whether the transit camp would constitute a nuisance. The court found that the applicants did not prove any injury or inconvenience to the reasonable use and enjoyment of their property.[82] Thus the nuisance argument failed. In conclusion, the Court overturned the decision in the High Court and held that the respondent could establish a transit camp as urgent accommodation for victims of the flood.

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[77] 2001 (3) SA (CC) 1172D.

[78] Section 33 of the Constitution.

[79] 2001 (3) SA (CC) 1183G-H.

[80] 1183E-F.

[81] 1185I.

[82] 1183A.

3.3.2 Summary and remarks

After the *Von Moltke* case, a third series of case law (between 1989 and 2001) brought about the revival of the public nuisance doctrine. However, the case law indicated a significant deviation from the doctrine's original aims, as it was altered to suit the intentions of the applicants. The case law can be divided into two groups, namely that from the pre-constitutional[83] and from the post-constitutional era.[84] In most of these cases categorised as the third series, private individuals in predominantly white residential areas formed landowners',[85] farmers',[86] ratepayers'[87] and environmental associations[88] and applied for an interdict to prevent present or future disturbances. The applicants alleged that this limitation of the right to the use and enjoyment with their land – through the actions of the occupiers in the informal settlements established in the vicinity of their properties – would constitute a public nuisance. The applicants in these cases argued that establishing or developing an informal settlement in the vicinity would jeopardise their health (in the form of smoke and noise pollution), pose a safety hazard (through increased crime) and decrease

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[83] In *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A) and in *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A).

[84] In the cases of *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE); *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W); *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[85] In the *Diepsloot* case.

[86] In the *East London* case.

[87] *Three Rivers* case.

[88] *Kyalami Ridge* case. In the *Rademeyer* case the private individuals never formed a formal group, but brought a joint application for the removal of occupiers believed to be causing a nuisance.

the value of their property.[89] The applicants sought to use the public nuisance doctrine as a means to prevent the establishment of the settlement or to evict the occupiers of informal settlements who were (or would) only inhabit state-owned land in their vicinity.

The use of the public nuisance doctrine as a cause of action was successful in two of the five decisions, namely *East London* and *Three Rivers*. In both cases the courts suggested that the applicants' private right in land had been infringed and that, according to the principles of neighbour law, they are entitled to the reasonable use and enjoyment of land. Despite the applicants' alleging the presence of a public nuisance, the above-mentioned courts never established the existence of a public nuisance according to its definition. This is because the courts in all cases in the third series wrongfully used the species of nuisance interchangeably. In other words, the courts viewed private and public nuisance as two similar entities and therefore found it unnecessary to distinguish between them. In the *East London* case the court found it impossible to evict 8000 squatters and therefore ordered that a fence be erected that would enclose the camp to separate it from the farmers and that the police should patrol the vicinity on a more regular basis during the day and night. But in the *Three Rivers* case the court ordered the eviction of the squatters.

Besides the interchangeable use of private and public nuisance in all third-series cases, a further failure by the court in both the *East London* and the court *a quo* decision of *Diepsloot* cases could be noted here. In both cases the respondent

[89] For example, in the *Diepsloot* case.

contended that it had a statutory authority[90] to infringe the common law rights of the applicants. However, the courts, after having analysed the legislation, rejected the defence of statutory authority on the basis that, if the legislature had intended to infringe the common law rights, it would have made provision for compensation to the affected applicants. Van der Walt disagrees with the private law – or, as he refers to it, the individualistic – approach by the courts.[91] He contends that the court relied heavily on the principles of neighbour law to protect the interests of the applicants as landowners, without having any regard for the social function of government policy to eradicate homelessness. On the basis of the dissenting judgments of Viljoen and Nestadt J in *East London*, Van der Walt illustrates two different approaches the court ought to have considered. Firstly, Van der Walt refers to the minority judgement of Viljoen J in *East London* in support of his explanation that 'the acquisition of the farm in question and its use as informal settlement was effected as a direct result of government policy, and that as such it was not justiciable in a court of law except on the ground that it were *ultra vires*.'[92] In other words, Viljoen J was of the opinion that the applicants could not approach the court on the grounds that a nuisance was constituted. Viljoen further stated that if nuisance as a ground is allowed in this particular context, 'the courts in this country would be inundated with applications or actions founded on nuisance.'[93]

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[90] In *East London* and *Dieplsoot* the respondents based their argument of statutory authority on section 10 of the DTLA and The Township Act respectively.

[91] Van der Walt AJ 'The impact of the bill of rights on property law' (1993) 8 *SAPL* 296-319 307.

[92] Van der Walt AJ 'The impact of the bill of rights on property law' (1993) 8 *SAPL* 296-319 309.

[93] *East London Western Districts' Farmers Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 87I-88B.

Secondly, according to Van der Walt, Nestadt J 'approached the matter from the perspective of administrative law, and argued that the majority erred in deciding that the respondent did not prove its defence of statutory authority.'[94] According to Nestadt, it was unnecessary for the respondent, in the execution of its powers, to show that the common law rights of landowners will be affected in order to get immunity from liability for nuisance.[95] In other words, according to Van der Walt, Nestadt J is of the opinion that:

> 'the exercise of the powers by the relevant authority is limited by the provision that it must be carried out without negligence, which means that the state would enjoy the immunity provided by statutory authority unless the applicants could prove negligence with regard to the choice of land for the settlement or the way in which the settlement was established or administered.'

In contrast, the doctrine's use contrary to its original aims was not allowed in the *Diepsloot,*[96] *Rademeyer* and *Kyalami Ridge* cases*.* The judgement in the *Diepsloot* case was based on the following policy considerations: firstly, the squatters had to be close to their place of employment; secondly, increased urbanisation would in effect force individuals of different socio-economic backgrounds to live together; and finally, the legislation in question (the Township Act) was at the time part of significant developments to dismantle the apartheid dispensation. It could be said that these developments were at the forefront of abolishing any practice or legislation that was racially discriminatory to previously

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[94] Van der Walt AJ 'The impact of the bill of rights on property law' (1993) 8 *SAPL* 296-319 309.

[95] See *East London Western Districts' Farmers Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 90C; 91I and 92E-G. Also see Van der Walt AJ 'The impact of the bill of rights on property law' (1993) 8 *SAPL* 296-319 309.

[96] *Diepsloot Residents' and Landowners Association and others v Administrator, Transvaal* and others 1993 (3) SA 49 (T).

disadvantaged members of society. On the issue of whether the applicants' health and safety would be jeopardised, the court held that crime and air pollution are an inevitable consequence if an informal settlement is established. The court went further to suggest that the decrease in the value of the applicant's property is an integral part of the alleged nuisance and cannot be separated from it. This meant that (a) if the nuisance was allowed, the decrease of the value of the property would be justified; and, (b) if such a nuisance does not exist, the applicants would fail to contend that a nuisance could cause the decrease in the value of the property.

In the *Rademeyer* case it was decided that the squatters could not be evicted because they satisfied the definition of 'occupier' in the Extension of Security of Tenure Act (ESTA).[97] ESTA 'protects a particular class of indigent persons who has or has had permission to live on rural and semirural land, against eviction from that land'.[98] None of the courts, in the third series of cases, specifically those cases adjudicated in the post-constitutional era, considered any anti-eviction legislation, except in the *Rademeyer* case. Therefore, the courts displayed a total disregard for anti-eviction legislation. The *Rademeyer* court dismissed any allegations that public nuisance was constituted. The court further contended that a public nuisance could have been avoided if the state installed (or was given time to do so) proper water and toilet facilities and improved the safety and security in the vicinity of the applicants (if such a risk was proved). The courts' approach in both *Rademeyer* (applying anti-eviction legislation) and *Diepsloot* (allowing the state time to abate the

[97] The court applied the Extension of Security of Tenure Act 62 of 1997.

[98] See *Mkangeli and others v Joubert and others* 2002 (4) SA 36 (SCA) par 97.

public nuisance) avoids succumbing to the applicants' drastic demand to evict the occupiers.

In the *Kyalami Ridge* case the court found, without entering into an in-depth discussion, that the establishment of a transit camp would not constitute a public nuisance after having found that the applicants couldn't prove any interference with the right to reasonable use and enjoyment of land.

After highlighting the importance in each of the above discussed cases, one can assume that the judgement in the *East London* case is only significant because it was the first instance in which the public nuisance doctrine was applied for the benefit of the applicants' personal interests. Besides rejecting the court's reasoning in *East London*, both *Diepsloot* and *Rademeye*r adopted different approaches when dealing with the application of public nuisance. In contrast, one has to criticise the decision in the *Three Rivers* case. The case was adjudicated in terms of the constitutional dispensation but did not follow, as it should have, the *Diepsloot* case for its policy considerations or the *Rademeyer* case in which anti-eviction legislation was applied.

One can summarise the problems in applying the doctrine in the third series of cases in four points. Firstly, the courts failed to recognise the existence of a distinction between private and public nuisance. The failure to recognise a distinction inevitably caused the courts not to adjudicate the issue according to the definition of public nuisance, although applicants complained of such a nuisance. Secondly, besides failing to recognise a distinction between the two species of nuisance, the majority of the courts aimed to resolve the matter form a private or individual point of

view without considering any social factors. Thirdly, there is a clear indication of a decline in the use of public nuisance, after the *Queensland* case, seeing that the majority of public nuisance offences are now regulated by statutory provisions. Finally, and very significantly, the notion of public nuisance was used to bypass anti-eviction legislation. This is highly questionable in a post-constitutional framework, which provides for secure tenure and access to housing. Allowing the use of the public nuisance doctrine in an indirect manner (compared to its original aims) and in the light of it being regulated by legislation is a clear misuse of the doctrine. Furthermore, the application of public nuisance is a problem in light of the significant housing shortage in South Africa and arguably a reminder of past racially discriminatory practices that ought to be avoided in an open democratic South Africa based on human dignity, freedom and equality.[99]

After presenting these arguments, I aim to prove that the public nuisance doctrine should not be applied at all, or at least not in the way set out in the series of cases discussed above. The subsequent sections elaborate and discuss problems with the indirect application of public nuisance in the recent group of case law.

3.3 Elaboration of problems

3.3.1 Interchangeable use of private and public nuisance

As indicated in chapter 2, nuisance can be divided in two categories, namely private and public nuisance. Courts in the third series of cases failed to distinguish between

[99] Section 7(1) of the Constitution.

a private and a public nuisance and used both species of nuisance interchangeably. This is problematic seeing that the applicants in this series of cases alleged the presence of a public nuisance, while the courts applied the test for a private nuisance and hence did not adjudicate the issue according to the definition of a public nuisance.

A private nuisance affects the reasonable enjoyment of the land of an individual (typically a neighbour) who resides in the vicinity of the neighbour. A private nuisance 'denotes an infringement of a neighbour's entitlement of use and enjoyment so that it affects her quality of life, i.e. ordinary health, comfort and convenience, by an ongoing wrong.'[100] Nuisances are usually caused by smoke, noise, water, vibrations, fumes or other detrimental activity invading the neighbour's property. Each neighbour is 'entitled to the use and enjoyment of her property, exercised in a reasonable manner to avoid unreasonable infringement of the neighbour's similar entitlement.'[101] Each owner has a reciprocal duty to act in a way that does not have a detrimental effect on a neighbouring owner's rights.[102] In the case of private nuisance, the reasonableness test is applied, namely 'whether a normal person, finding him or herself in the position of the plaintiff, would have tolerated the interference concerned.'[103] A successful applicant is entitled to an

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[100] Mostert H, Pope A, Badenhorst PJ, Freedman W, Pienaar JM, Van Wyk J *The principles of the law of property in South Africa* (2010) 134.

[101]Mostert H, Pope A, Badenhorst PJ, Freedman W, Pienaar JM, Van Wyk J *The principles of the law of property in South Africa* (2010) 132.

[102] See *Regal v African Superslate* (*Pty) Ltd* 1963 (1) SA 102 (A) 120F.

[103] Badenhorst PJ, Pienaar JM, Mostert H, *Silberberg and Schoeman's The law of property* (2006) 112.

interdict,[104] abatement order,[105] self-help[106] or claim for damages.[107] In other words, a nuisance is of a private nature when an individual, with a right vested in land or a building is subjected to an unreasonable interference. On the other hand, a public nuisance can be defined as 'an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large.'[108] The doctrine was originally used for the abatement of ordinary public nuisances (protecting the general public health and safety) such as smoke,[109] noise[110] and smells.[111] These nuisances can be private nuisance too but is categorised as a public nuisance when they originate form a public space or on public land. It was also used to prosecute members of the public against actions that were morally and socially unacceptable,

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[104] According to Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 198 an interdict 'can serve to restrain an offender from establishing a threatened nuisance or from continuing an existing nuisance.'

[105] An abatement order occurs when 'a local authority or public officers are authorised under national or regional legislation to order owners or occupiers of land or premises to abate nuisances upon their property.' See Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 197.

[106] According to Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 196 self-help occurs only in exceptional circumstances, where an affected landowner is eligible to take the 'law into his or her own hands; however, it is only available in the most urgent cases of necessity and in ordinary cases resort to self-help is not justifiable.' Examples of urgent cases include imminent risk to health or circumstances so pressing as to admit of no delay in abating the nuisance.

[107] See Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 202.

[108] Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163.

[109] *Redelinghuys and others v Silberbauer* 1874 4 B 95.

[110] *London & South African Exploration Co v Kimberly Divisional Council* (1887) 4 HCG 287.

[111] *R v Le Rot* (1889-1890) 7 SC 7.

such as keeping a brothel,[112] obstruction of a road[113] and polluting a stream.[114] No reasonableness test is applied to determine whether a public nuisance was constituted. The perpetrator's action is unlawful if he or she is found guilty of causing injury, damage or inconvenience to the health and safety of the general public. Currently, the perpetrator's action is unlawful if it is found to be in conflict with certain statutory regulations. An interdict or abatement order is used to suppress or stop a public nuisance.

However, in the third series of cases some of the courts failed to recognise the distinction between these two separate species of nuisance. Courts rather used the notions of private and public nuisance interchangeably, without investigating which requirements the alleged nuisance would satisfy. In *Three Rivers* Snyders J stated that the concept of public nuisance is similar to that of private nuisance, except for the public extent of the nuisance.[115] In his attempt to resolve the dispute, Snyders J applied the legal principles used to adjudicate a private nuisance, namely determining whether the private landowner's common law rights of use and enjoyment of land were infringed, instead of investigating whether the nuisance complained of satisfied the definition of a public nuisance. In fact, in all the case law, the courts based their enquiry solely on whether the affected neighbour's intrinsic

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[112] *R v Paulse* (1892) 9 SC 423.

[113] *Putt v Rex* 1908 EDC 25.

[114] *R v CP Reynolds* (1901) 22 NLR 89.

[115] *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W) 380F.

right of reasonable use and enjoyment of land had been infringed before delivering a judgement.[116]

According to Abrams and Washington:[117]

> '[a] public nuisance does not necessarily involve an interference with the private enjoyment of property; rather the interference is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public.'[118]

In other words, in the context of a private nuisance, only a private right is infringed. Such a right is infringed if the reasonable use and enjoyment of the individual's land had been infringed. In contrast, in the context of a public nuisance a public right is infringed. A public right is violated if, for instance, the health and safety of the public in general have been infringed. Moreover, in a public nuisance case

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[116] In the *East London Western Districts' Farmers Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 66I the court stated that a landowner is entitled to the reasonable enjoyment of land for this is an intrinsic right of such an owner and nobody may unjustifiably interfere with it. The case was further decided on the basis that the constituted nuisance interfered with the legitimate property rights of citizens. See 75I for the basis of the judgement. In *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others* 1993 (1) SA 577 (T) 578F the court stated that the establishment of a settlement would constitute a nuisance and as a consequence affect the applicants' right to reasonable use and enjoyment of land. In *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) 1017F the court, with reference to the *East London* case, was of the opinion that in determining whether a public nuisance had been constituted, one has to establish whether the applicants' right to reasonable use and enjoyment of land had been infringed. In *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) 1182I-1183A the court stated: 'Under the common law an owner of property ordinarily has no right to object to the use to which neighbouring property is put. The general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others.'

[117] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399.

[118] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 364.

there are not necessarily any effects on private land or private rights, but even if there are, the effects go beyond that and are felt on public land and in public spaces. This is the fundamental distinguishing factor between a private and public nuisance. With the manifestation of this distinction, the aim is to illustrate that the courts failed to establish that such a public right was violated in a public space. None of the courts in the third series of cases made an effort to determine whether the nuisance complained of infringed upon the public right, namely the right to the health and safety of the community at large.

In using private and public nuisance interchangeably the courts further failed to distinguish between the purposes of the distinct species of nuisance. Although the primary remedies sought to abate both categories of nuisance are an interdict or abatement order, the purpose of the remedies in the case of private and public nuisance is different. In the context of a private nuisance, the purpose of the remedies is to protect the personal interest of the property owner, as opposed to a public nuisance, where the general public's interest is protected. Although private individuals are members of the public, the applicant who alleges a public nuisance has to prove that a public right had been infringed in a way that caused great injury or inconvenience to the public in general and does not merely have an impact on the interests of private individuals.

One could argue further that even if the courts found the existence of a public nuisance according to the original definition of a public nuisance, the decision to evict current occupiers or to prevent the establishment of a new development is a drastic measure. The state could prevent some of the problems complained of, for instance, by installing proper services (water, tarred roads, sanitary services and

electricity).[119] If such services are not installed at already established settlements, then the courts ought to grant the state a grace period to make such alterations that would reduce or prevent any possibility of injury or inconvenience to neighbouring owners.

One can conclude that the courts' interchangeable use of private and public nuisance is problematic. It allowed the applicants alleging an infringement of their intrinsic right in land an option to exercise an alternative mechanism to abate an unreasonable interference. On the basis of a clearer distinction between the two, one could argue that the courts erroneously allowed a small specific group of neighbours (the applicants), who alleged an unreasonable interference with the reasonable use and enjoyment of their land, the use of public nuisance as a cause of action without determining that a public nuisance was constituted, according to its original definition.

3.3.2 Private versus public approach

In the first two decisions, ie *East London* and *Diepsloot*,[120] the courts primarily sought to resolve the nuisance allegations advanced by the applicants from a private law or individual approach, without considering any social factors, for example,

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[119] The court in the *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others* case 1994 (3) SA 336 (A) and the *Rademeyer* case suggested that the installation of water and toilet facilities would diminish any health risk. See Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 822.

[120] *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others* 1993 (1) SA 577 (T).

alternative accommodation or the availability of employment or schools for occupiers. Courts in both these cases reasoned that landowners or lawful occupiers possess an intrinsic right to reasonable use and enjoyment of land that has to be protected against any infringements.[121] Both decisions at the time illustrate the courts duty to fulfil the wishes of the sovereign parliament,[122] which encouraged the protection of the landowners, who were predominantly white South African citizens. However, in the second judgement in the *Diepsloot*[123] case McCreath J took a different approach. McCreath J considered social factors apart from applying a strict private law approach when considering the following factors: (a) the availability of employment for occupiers in the vicinity; (b) because of increased urbanisation, people from different cultures and backgrounds would inevitably have to share the same vicinity; and (c) finally, the legislation (in this case the Township Act) was enacted to abolish all practices associated with the apartheid regime. On appeal[124] Smallberger J concurred with the statements of McCreath J and added that at the time South Africa was engaged in developments to dismantle any legislation or practices which once gave effect to racial segregation. Smallberger J also stated that the legislature was aware of the already serious housing crisis and the urgent need to find accommodation for occupiers.

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[121] See *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others* 1993 (1) SA 577 (T) 57B and *East London Western Districts' Farmers Association and others v Minister of Education and Development Aid and others* 66I.

[122] Van der Walt AJ 'The impact of the bill of rights on property law' 1993 SA *SAPL* 296-319 310.

[123] *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others* 1993 (3) SA 49 (T).

[124] *Diepsloot Residents' and Landowners Association and others v Administrator Transvaal and others.*

Although the two appeal decisions of the *Diepsloot* case moved away from the so-called individualistic approach, applicants in *Rademeyer*, *Three Rivers* and *Kyalami Ridge* sought to protect their private rights as landowners. Apart from the two appeal decisions in *Diepsloot*, the courts continued to apply the principles of private nuisance to adjudicate a dispute where applicants alleged a public nuisance without considering social factors or governmental policy to provide housing and secure tenure to occupiers who do not have any rights normally associated with private law in relation to land. As Van der Walt states, 'persons without any rights at all (such as unlawful squatters) have no chance against the right of an owner; in fact, they are never even allowed to enter the race.'[125] Importantly, as the case law shows, the applications were always aimed at protecting the individual interests of the property owners who were members of the associations that brought the applications.

In other words, the courts, by opting to use a private law approach, gave applicants the upper hand against the occupiers. In fact, it can also be argued that the applicants aimed purely to satisfy their personal desires by protecting their private rights in land. Courts are obliged, especially in the post-constitutional era, to consider all social factors, including government policy, and especially constitutional values before prohibiting occupation or evicting occupiers.

Moreover, Van der Walt is of the opinion that 'the protection of individual rights cannot be undertaken or considered without having due regard for the public

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[125] Van der Walt AJ 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) 11 *SAJHR* 169-206 179.

interest in property.'[126] He states that there ought to be an equitable balance between the interest of the private landowner and those without any rights in terms of section 25 of the Constitution. In other words, the traditional private law approach should not be given any automatic advantage, which would inevitably be to the detriment of those without property rights, as was the case in the third series of public nuisance cases. Van der Walt contends that in the light of the Constitution, particularly section 25, 'the constitutional property concept has to be different from the traditional private-law concept.'[127]

Furthermore, the need to move away from the absolute protection of private ownership of land, together with the social factors provided as a guideline in *Diepsloot*, received stronger support with the institution of the Constitution and its entrenched provisions on land reform and housing. The provisions on land reform are given effect by the Extension of Security of Tenure Act[128] (ESTA) and the Prevention of Illegal Eviction from Unlawful Occupation of Land (PIE).[129] Sachs J in *Port Elizabeth Municipality v Various Occupiers,*[130] supports this different approach when referring to Horn J in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*[131]

> 'He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications

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[126] Van der Walt AJ *The constitutional property clause* (1997) 166.

[127] Van der Walt AJ *The constitutional property clause* (1997) 55.

[128] 62 of 1997.

[129] 19 of 1998.

[130] 2005 (1) SA 217 (CC) par 33.

[131] 2000 (2) SA 1074 (SE).

and circumstances which would necessitate bringing out an equitably principled judgment.'

This brings us to the next sub-section, which deals with instances of some of the courts ignoring these anti-eviction provisions provided for in ESTA and PIE. Moreover, not only did some of the courts fail to acknowledge and apply these provisions, but in fact the applicants sought to avoid these provisions and in effect approached the court to obtain an indirect eviction order based on the grounds of nuisance.

3.3.3 Circumventing anti-eviction legislation

The Bill of Rights specifically promotes land reform in section 25(5)–(9) of the Constitution.[132] The land reform programme provides protection to those who were subject to past racially discriminatory laws or practices (predominantly black South Africans).[133] The land reform framework in section 25(5)–(9) and legislation promulgated to give effect to it – such as ESTA and PIE – now provide rules and procedures that have to be followed before anyone can be evicted from their place of occupation. These rules and procedures are in effect bypassed by the use of public nuisance in recent decisions such as *Three Rivers.*

However, the first anti-eviction legislation was introduced only during 1997 (ESTA), followed by PIE in 1998. Therefore, the legislation could only have been applied in the cases of *Rademeyer*, *Three Rivers* and *Kyalami Ridge*. However,

[132] 1996. Hereafter referred to as the Constitution.

[133] Section 25(6)–(9).

none of these cases except *Rademeyer* applied the relevant anti-eviction legislation, namely ESTA. The court in the *Rademeyer* case established that the occupiers satisfied the requirement of having acquired consent (tacitly) to occupy the land. Consequently, the court allowed the occupiers to enjoy protection under ESTA, which meant they could not be evicted. Although the anti-eviction legislation was applied in the *Rademeyer* case, it ought to be a cause for concern that there was no investigation, against the background of the facts in the *Three Rivers* or *Kyalami Ridge* decisions, to determine whether occupiers qualified to be protected under the two legislative measures. In fact, the mere effort to use public nuisance to circumvent anti-eviction legislation, no matter what the facts are, is certainly a problem, as there is an urgent need for housing and a reciprocal duty for private landowners to act responsibly, especially in view of transformation and increased urbanisation.[134]

According to Van der Walt these nuisance-based evictions (as he refers to them) should be a cause for concern on two accounts.[135] Firstly, the use of the public nuisance remedy to bypass anti-eviction legislation leaves occupiers of informal settlements homeless in a process that is reminiscent of previous discriminatory practices,[136] which should be avoided at all costs, as Van der Walt states:[137]

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[134] See the *Dieplsoot Residents' and Landowners Association and others v Administrator Transvaal and others* case 1994 (3) SA 336 (A) 348-349. See further Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 825.

[135] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 826.

[136] See http://africanhistory.about.com/library/bl/blsalaws.htm (accessed 17 February 2010). For example the Groups Areas Act 41 of 1950, which 'forced physical separation between races by creating different residential areas for different races and which led to forced removals of people living

> 'Given the history of forced removals and the explicit commitment in the Constitution, and in the land reform programme as a whole, to eradicating the legacy of apartheid land law and preventing its recurrence, we have to be conscious of and sensitive to this particularly unhappy history, and bear in mind that a substantial part of the land reform programme is aimed at dismantling the very structures and imbalances brought about, and cemented into current land holding patterns, through something akin to indirect planning and nuisance evictions.'

Moreover, Van der Walt states that 'apartheid land allowed evictions and forced removals that uprooted millions of black South Africans and left them politically, socially and economically marginalised and vulnerable. Land reform laws are meant to stop and where possible reverse this process.'[138] Van der Walt is of the opinion that greater caution is needed where landowners aim to prevent new housing developments in a time where South Africa is plagued with homelessness.[139] In order to avoid a repetition of evictions and forced removals such as occurred during the apartheid period, in this new constitutional dispensation the courts should be hesitant and sensitive when adjudicating an issue relating to nuisance.

According to Van der Walt, the second cause for concern arises when nuisance evictions are inevitable and justified should not be applied outside the post-

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in 'wrong' areas, for example in District Six in Cape Town.' Similarly, The Prevention of Illegal Squatting Act 52 of 1951 'Gave the Minister of Native Affairs the power to remove blacks from public or privately owned land and to establish resettlement camps to house these displaced people. See http://africanhistory.about.com/library/bl/blsalaws.htm (accessed 17 February 2010).

[137] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 827.

[138] Van der Walt AJ 'Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law' (2002) 18 *SAJHR* 372-420 373.

[139] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 827.

constitutional land reform framework. In all the third series cases applicants alleged that their private right to land in their capacity as private landowners had been infringed. As a result many of the courts considered resolving the issue by applying the principles of neighbour law. Not only did the courts fail to distinguish between the two distinct species of private and public nuisance, but this individualistic approach was applied outside the context of the constitutional provisions in some of these cases. Van der Walt expresses the opinion that the relevant constitutional provisions, namely sections 25(5)-(9) and 26 together with statutory provisions, dealing with land reform must be taken into consideration in adjudicating nuisance-based evictions. Van der Walt AJ finds further support in *Port Elizabeth Municipality v Various Occupiers,*[140] where Sachs J expressed the view:

> '[T]hose seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.'

In other words, simply using public nuisance as an alternative measure to evict occupiers not only bypasses section 26(3) together with ESTA and PIE, but contravenes the spirit, purport and object of the Constitution. These provisions ought to be considered in all cases seeking to evict occupiers. Although these anti-eviction provisions were applied in *Rademeyer*, they should have been considered in *Three Rivers* and should also be taken into account in any future case pertaining to nuisance evictions. Van der Walt's statement is supported by Scott, who states:

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[140] 2005 (1) SA 217 (CC).

> 'My suggestion is, however, that [a] court could make such orders, where it has found that there was a nuisance, provided that it takes into consideration that the procedures of the Extension of Security of Tenure Act and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act have to be followed by the person against whom the order is given. In this way the courts will also show sensitivity to both the plight of the homeless and the rights of land owners.'[141]

It could further be argued that the applicants' indirect approach to evict the occupiers could have been because the normal proceedings of an eviction application are time consuming, too expensive and it would be more difficult to get such an order in the light of the anti-eviction legislation. Although 'the common law favours current landowners by allowing them to obtain eviction orders relatively speedily and easily, while the land reform laws favour the security of tenure of non-owners by placing various substantive and procedural prohibitions'[142], these prohibitions in effect restrict the landowners from obtaining an eviction order.

Therefore, because the application of public nuisance in this third series is problematic, Van der Walt states that this common law remedy ought to be 'reconsidered in the view of the urgent and extreme nature of the South African land issue.'[143] He suggests that public nuisance ought to be non-applicable or 'requires

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[141] Scott S 'Recent developments in case law regarding neighbour law and its influence on the concept of ownership' (2005) 16 351-377 359.

[142] Van der Walt AJ 'Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law' (2002) 18 *SAJHR* 372-420 374.

[143] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 828.

substantial reconsideration and reinterpretation in the current field of land use development, planning and provision of housing.'[144]

3.3.4 Public nuisance offences regulated by legislation

A further question as to why the future use of public nuisance ought to be reconsidered or reinterpreted in the light of the Constitution is the fact that protection of public health and safety is now mostly promulgated in legislation regulated by local authorities. Public nuisance offences have been regulated by legislation since their adoption in South African law.[145] Regulation by way of legislation increased until the majority of offences were entrenched in statutory provisions. There are many examples of such legislation, for instance section 24 of the Constitution,[146] the

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[144] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 828.

[145] For example: Cape Act 2 of 1885 was promulgated for abating public nuisances. Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 213. Other examples of statutory provisions regulating public nuisance offences are recorded in early case law. For instance, in *Champion v Inspector of Police, Durban* (1926) 47 NPD 133 the court applied section 76 of General by-laws, which stated that 'no person being in any private premises within the Borough shall make any noise or disturbances so as to be a public nuisance in the neighbourhood of such private premises.' Similarly, in *R v Cohen* (1902) 19 SC 155 the court applied section 170 (8) of a special by-law of the Cape Town municipality, which imposed a fine on the owners of a brothel, if kept in a scandalous and disorderly manner.

[146] Section 24 of the Constitution of 1996 states that:

'Everyone has the right to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

National Environmental Management Act: Air Quality Act,[147] the Health Act,[148] the Aviation Act[149] and the Atmospheric Pollution Act.[150]

Therefore there have to be extraordinary circumstances in order to use the Common Law notion of public nuisance to apply for an interdict to abate a nuisance that is largely regulated by legislation already. Such extraordinary circumstances were not proved in the second and third series of cases. The fact that there is no other reported cases where the notion of public nuisance was used after 1943

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[147] 39 of 2004. Section 2 of the act states:

'The object of the act is (a) to protect the environment by providing reasonable measures for (i) the protecting and enhancement of the quality of air in the Republic, (ii) the prevention of air pollution and ecological degradation; and (iii) securing ecologically sustainable development while promoting justifiable economic and social development; and (b) generally give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well being of people.'

[148] 63 of 1977. Section 39(1) and (2) states:

(1) 'The minister may make regulations regulating, controlling, restricting or prohibiting any activity, condition or thing which constitutes a nuisance in terms of this act. (2) The Minister may declare any activity, condition or thing specified in such notice to be a nuisance for the purposes of this act.'

[149] 74 of 1962. Section 22(1)(m)(iv) states that:

'[t]he Minister may make regulations regarding (m) the provision of general operating rules, flight rules and air traffic rules in respect of civil aviation including (iv) the prevention of nuisances arising from air navigation, aircraft factories, aerodromes or other aircraft establishments, including the prevention of nuisance due to noise or vibration originating from the operation of machinery in aircraft on or above aerodromes, whether by the installation in aircraft or on aerodromes of means for the prevention of such noise or vibration.'

[150] 45 of 1965. For example, section 17 of the act states:

'(1) If as a result of representations made to it by any occupier of premises (hereinafter referred to as the affected premises), a local authority is satisfied that smoke or any other product of combustion emanating from any premises is a nuisance to the occupier of the affected premises, that local authority shall cause to be served on the person responsible for such nuisance a notice calling upon him to abate the nuisance within a period determined by the local authority after consultation with the chief officer and specified in the notice and to take all such steps as may be necessary to prevent a recurrence of the nuisance.'

suggests that the legislation that has been promulgated to protect residents against new developments in their vicinity was largely successful. This indicates that the recent use of public nuisance as a cause of action is therefore questionable and problematic, since the majority of offences which the applicants complained of, such as continuous interferences (smoke, noise, pollution together with that of safety and security), are now mostly regulated by legislation.

3.3.5 Remarks

The use of public nuisance in its revival after 45 years in the *Queensland* case is problematic for various reasons. As indicated above, the courts used the two separate species of nuisance interchangeably. In so doing, they not only confused two distinct doctrines, but also left the door open for applicants to use public nuisance as a cause of action to advance their personal intentions. It can be said that the applicants in the third series of case law used public nuisance to satisfy a private rather than a public right in a public space.

The use of public nuisance as an indirect mechanism to evict poor, black homeless people is a serious problem as it does not comply with the entrenched constitutional values of land reform[151] and the right of access to adequate housing.[152]

[151] Section 25(5)-(7) of the Constitution.

[152] Section 26 of the Constitution.

Furthermore, the majority of public nuisance offences are entrenched in legislation and regulated with great success. The introduction of statutory provisions to regulate these offences has had an impact on the use of the common law notion of public nuisance, which explains the decline in reported case law after 1943.

Therefore, the fact that the offences are now regulated by legislation makes one consider why the doctrine was revived and whether it still serves a legitimate purpose in South African law. On the basis of the finding that the application of public nuisance is problematic, one can either (a) apply the notion of public nuisance on the condition that courts reinterpret this remedy in the light of the new constitutional dispensation, or (b) it should not be applied at all.[153]

However, it appears that public nuisance might still serve a legitimate purpose against the background of the new constitutional era after the decisions in both *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others*[154] and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others*.[155] Unfortunately, in both cases, although the facts indicate that a truly public nuisance was probably constituted, the court again failed to distinguish between private and public nuisance and as a result confused the legal principles of these two separate doctrines.

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[153] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 828.

[154] (20952/08) [2009] ZAWCHC 100 (24 June 2009). Hereafter referred to as *Intercape*.

[155] (26841/09) [2010] ZAWCHC 87 (3 May 2010). Hereafter referred to as *Voortrekker*.

3.4 Intercape and Vootrekker

3.4.1 Case summaries

In *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others* the majority of applicants, together with the first and third respondent, own or occupy premises in Montreal Drive, situated in the Airport Industria, Western Cape. The first applicant is Intercape Mainliner, a luxury bus operator. Intercape occupies and owns various premises in the vicinity of the respondent. These premises include a head office (fifteenth applicant), a maintenance centre for buses, a call centre (tenth applicant) and a training centre.[156] The first respondent is the Minister of Home Affairs. The Department of Home Affairs (hereafter referred to as DoHA) rents premises for the purposes of running a refugee office on erf 115973 of the third respondent, Cila.

The applicants allege that the operation of the refugee office by the DoHA contravenes the applicable zoning scheme of the City of Cape Town and that it constitutes a nuisance. The refugee office was located in Customs House (Cape

[156] The remaining applicants can be divided into two categories; (a) those who are situated close to the refugee office namely the : sixth applicant operates a ice cream manufacturer with the premises being owned by eighteenth applicant; seventh applicant operates a funeral parlour; eighth applicant is a forwarding agent; ninth applicant is a transport broker; twelve applicant is a overland tour operator; thirteenth applicant operates a woodwork joinery with the premises being owned by the nineteenth applicant and fourteenth applicant is property investment broker; and (b) those situated further away from the refugee office, namely second applicant who's in the business of selling second-hand buses and trucks with the premises owned by the sixteenth applicant; the third applicant rebuilds and refurbishes passenger coaches with the premises also owned by the sixteenth applicant; the fourth applicant operates a tyre retailer with the premises being owned by the seventeenth applicant; the twentieth applicant operates a fuel station. The second to fourth applicants operate their business in Millpark Close and not Montreal Drive such as the other premises.

Town) prior to its relocation to the Airport Industria. The office was forced to move as a result of its failure to provide the refugees with the 'necessary facilities and proper opportunities to submit applications'.[157] The court found that the DoHA failed to provide a venue large enough to accommodate the volume of asylum seekers. This matter was adjudicated in *Kiliko and others v Minister of Home Affairs and others*.[158]

However, the situation did not improve when the office relocated to Montreal Drive in the Airport Industria. In fact, the situation seems to have worsened, seeing that it now also affected the normal use of the surrounding premises. This is seen in the evidence given by the applicants who, as stated earlier, alleged that the refugee office contravened the City of Cape Town's zoning scheme and constituted a nuisance. According to the facts, the office was visited by approximately four to five hundred asylum seekers on a daily basis. Seeing that officials at the DoHA can only help a limited number of people per day, they remained there overnight in order to be in the front of the queue the following day. As a consequence, there was an increased amount of litter, the streets were filled with remains of material to provide shelter and there was always a remainder of human waste and food. The large crowd of asylum seekers attracted illegal street vendors, who contributed to the increased amount of litter in the streets. The applicants complained that the increased littering and presence of human waste would constitute a serious health

[157] *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others* (20952/08) [2009] ZAWCHC 100 (24 June 2009) par 21.

[158] 2006 (4) SA 114 (C).

risk, seeing that there were no refuse and sanitation facilities available to rectify the unhealthy conditions.[159]

The applicants further complained that the refugee office contributed to an increased level of noise. The noise generated by the crowd of approximately four to five hundred people was more than an industrial area would normally have to tolerate. Taxis which provided asylum seekers with transport to and from the office were a further source of noise, as they played loud music and hooted excessively to attract potential customers and warn people to clear the streets as they moved to or from the office.[160] Another source of noise was the large crowds outside the office, who screamed and shouted frantically. The noise stemmed from situations where tensions between asylum seekers and criminals were about to erupt into violence. The police, who were called upon to restore order, made use of teargas, pepper spray and rubber bullets which caused the crowd to scatter in various directions, with some entering the premises of the applicants.[161]

Applicants further complained that the operation of the refugee office detrimentally affected safety and security in the area. Although asylum seekers were robbed and mugged by criminal elements, the applicants only reported incidents where their employees were victim to the same crimes, adding physical violence and intimidation to the list of complaints. In fact, conditions were of such a nature that some of the employees resigned and clients became disinclined to visit their premises. Moreover, the police interference as a consequence of the tensions

[159] Par 35.

[160] Par 38-39.

[161] Par 36-37.

between the asylum seekers and criminal elements posed an imminent threat to all who used the street and surrounding properties.[162]

Regular blocking of the roads by taxis, predominantly as a result of illegal parking, was intolerable and subsequently added to the applicants' list of complaints. Intercape, being a bus company, complained that free-flowing traffic was no longer possible after the office had been opened. Traffic and police vehicles called upon to restore order in times of anarchy contributed to blocked roads.[163]

The first issue the court addressed was to determine whether the refugee office contravened the zoning scheme. The court established that Montreal Drive is subject to the Land Use and Planning Ordinance[164] (hereafter referred to as LUPO) and that the scheme was zoned for 'Industrial General' purposes.

In August 1999 Cila applied to have the conditional use of Place of Assembly' extended to permit the DoHA to disburse unemployment funds. However, the applicants complained that the respondents did not comply with three of the conditions set out by the City's Urban Planning Committee (CUPC) before the premises could be used for the purposes that had been applied for. The three conditions were that 45 parking bays had to be provided; that there be a waiting room for at least 60 people and that a 'revised building plan in accordance with the

[162] Par 45.

[163] Par 38, 44.

[164] 15 of 1985.

Development Plan (Plan 3) attached to the report, be submitted to the Central Service Area for approval to ensure compliance with the National regulations'.[165]

After having established that the state was bound by LUPO, the court determined whether the department's use of the premises as offices was in line with the consent given by the city. Based on the application Cila made to the City, the court found that it was never the City's intention to give permission to sanction such use, that the refugee office fall under the auspices 'as offices'.[166] Furthermore, because of the respondent's non-compliance with the zoning scheme, the court had to determine whether the refugee office satisfied the three conditions required by the CUPC in response to Cila's application. The court found that: (a) the condition which required provision for 45 parking bays was violated; (b) it was inconclusive to establish whether there had been a waiting room for 60 people and additional ablution facilities; and (c) no revised building plan was submitted with plan 3, which meant that this condition was violated.[167] On the issue of whether the respondents complied with the zoning scheme, the court found the scheme had been contravened.

The most interesting and relevant part of the judgement, for the purposes of this thesis, is the issue whether a nuisance was constituted. While the court was ready to grant relief on the basis that the zoning scheme had been contravened, it still addressed the cause of action based on nuisance. Without

[165] Par 92.

[166] Par 123.

[167] Par 126-132.

identifying which of the two categories of nuisance would be applicable, the court accepted that the alleged nuisance was of a private nature when it stated:

> 'In the context of the present case, the term nuisance connotes a species of delict arising from wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference'.[168]

The court then determined whether the use of the premises as a refugee office was an 'unreasonable interference in the right of neighbouring owners and occupiers'.[169] The court accepted the majority of the material as evidence presented by the applicants. The material indicated that the streets were filled with large crowds, that violence erupted as a result of tensions between asylum seekers and criminals, that illegal parking disturbed the easy flow of traffic, the presence of illegal street vendors, and the remains of litter and human refuse in the street. The court was of the opinion that it is common sense that a crowd of four to five hundred individuals would produce levels of noise exceeding what would normally be expected to be endured in an industrial area. A video of approximately twenty minutes showed a violent fight and captured the noise of the crowd and hooting of vehicles, and shows congested streets, the condition of the mobile toilets and the litter.[170] Although the duration of the nuisance was at times only two to three hours, the court still regarded the nuisance to be of a continuous nature and unacceptable and intolerable.

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[168] Par 141.

[169] Par 147.

[170] Par 151.

Mr Albertus, acting on behalf of the respondents, replied to these allegations by stating that the large crowds in the street had to be dealt with by the law enforcement agencies such as the traffic and police officers. However, the court was of the opinion that (a) the gathering of such a large crowd was a consequence of the setting up of the refugee office; (b) even if the law enforcement agencies were to act, the nuisance would still remain; (c) law enforcement agencies are pressed for resources and the situation required them to be there on a permanent basis, which would be impossible; and (d), the law enforcement agencies' help would only be of a temporary nature and would not help eliminate the terrible conditions.[171]

The court distinguished the facts in the *East London* case[172] from the facts it had to deal with. The court was of the opinion that in the *East London* case the unreasonable interference was an action by the respondent which infringed the rights of a neighbouring owner (applicant). On the other hand, on the facts in dispute, the unreasonable interferences not only affected the neighbouring owners, but in fact 'attract people to public areas immediately adjoining the property'.[173] However, the court stated that this distinction does not matter.

The court then investigated whether litter and obstruction of roads are not in themselves unlawful. In their investigation the court referred to English case law to resolve this matter. The court accepted that although *Regal v African Superslate*

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[171] Par 154.

[172] *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A).

[173] Par 155.

(Pty) Ltd[174] rejected the adoption of English law into South African law, the concept of nuisance in both these systems of law is based on reasonableness.[175] In its analysis of English case law the court illustrated that 'an individual's actions' may give rise to an actionable nuisance, even though the nuisance is caused by persons who are attracted to the premises and congregate in the street.[176]

Mr Albertus, acting on behalf of the respondents, argued that the applicants could not expect the tranquillity of a leafy residential area in an industrial area. However, the court rejected this argument, suggesting that the ongoing activity was not typical of conditions in an industrial area and should not to be tolerated in the area. Although the court acknowledged the high social utility of the refugee office in promoting the general welfare, it contended that the refugee office should attend to its duties without unreasonably interfering with the business activities of others.[177]

The court concluded that the continuous activity was objectively unreasonable. Therefore, the court found that a nuisance was constituted. Consequently the court ordered that using the premise for the purposes of a refugee office was unlawful and granted an interdict as an order to cease the operation of the office. The court, however, suspended the interdict and allowed the DoHA time to find alternative premises.

The second case, namely *Voortrekker road*, is a direct consequence of the *Intercape* decision. After moving from their premises in the Airport Industria, the

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[174] 1963 (1) SA 102 (A).

[175] See par 157.

[176] Par 163.

[177] Par 167.

DoHA occupied alternative refugee offices in Maitland. Once again the applicants' argued that the refugee office contravened the City of Cape Town's zoning regulations and created a nuisance. Similarly to *Intercape*, the court found the contravention of the zoning scheme and the existence of a nuisance, but again failed to distinguish between a private and public nuisance. Once again, the court granted an interdict that obliged the DoHA to cease the unlawful operation of the refugee office.

However, different to the decision found in the *Intercape* case, the court gave the DoHA an option to address illegalities and thereby regulate the operation of the office at its current location, oppose to find alternative accommodation. The court was of the opinion that it would be impracticable to close the refugee office immediately.

3.4.2 Remarks

Although the court was correct to conclude that a nuisance was constituted, it erred when it automatically assumed, without relying on the facts to establish the character of the nuisance, that the unreasonable activities constituted a private nuisance. Therefore, the court failed to distinguish between a private and a public nuisance. As stated before, Church and Church define a public nuisance as nuisance 'of which the harmful effect is so extensive as to affect the general public at large or at least a distinct class of person within its field of operation'.[178] It was clear from the evidence

[178] Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163.

that it was not only the applicants but anyone – for example, clients, employees and visitors – who set foot in the vicinity of the refugee office would be negatively affected by having to endure noise, face the possibility of being mugged and robbed, be exposed to a health risk and be prevented from using the road as a result of illegal parking or road blockage. Furthermore, as stated above, Abrams and Washington define a public right as:

> '[a] public nuisance does not necessarily involve an interference with the private enjoyment of property; rather the interference is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public.'[179]

Based on this definition, one can ascertain that the nuisance affected a public right and not necessarily or merely a private right. Furthermore, the nuisance occurred in a public space, namely the street. A street is a place where the community at large can be in contact with the alleged unreasonable interferences. In fact, the first series of South African public nuisance cases covered the majority of unreasonable interferences complained of in the *Intercape* case, namely pollution[180] (whether it is litter or human waste), noise[181] and the obstruction of roads occurred in a public space or public land.[182] These first series of cases rightfully categorised these interferences as a public nuisance after having analysed the facts in the particular context. One can therefore reach the conclusion that the court erred in assuming that a private instead of a public nuisance had been constituted. The

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[179] Abrams R & Washington V 'The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*' (1990) 54 *Albany Law Review* 359-399 364.

[180] See *R v CP Reynolds* (1901) 22 NLR.

[181] *London & South African Exploration Co v Kimberly Divisional Council* (1887) 4 HCG 287.

[182] See *Putt v R* 1908 EDC 23; *Coetzee v R* 1911 EDL 339.

nuisance originated in a public space, namely the street. Therefore the nuisance complained of was a public nuisance and not a private nuisance.

The judgment can be criticised for failing to distinguish between the categories of nuisance but, more importantly, that it missed the opportunity to apply the public nuisance doctrine for its original purposes, especially after its indirect application in the third series of public nuisance case law, discussed above. As indicated above, these original purposes were applied in the first series of South African public nuisance case law. On the other hand, the fourth series of cases illustrates that public nuisance could still, depending on the situation, have a purpose to fulfil in South African law.

Furthermore, both cases were decided under LUPO, which raises the question whether the application of public nuisance was necessary or relevant at all. Therefore, it could be argued that public nuisance is only applicable in the absence of statutory or any other legislation such as LUPO which cover existing or future public nuisance offences.

3.5 Conclusion

In analysing the third series of case law my aim was to illustrate that the use of public nuisance was applied contrary to its original aims, namely protecting the well-being of the general public. Its application was rather used to evict occupants or prevent prospective occupiers from settling in the vicinity of the applicants; in so doing the applicants sought to circumvent anti-eviction legislation. Furthermore, the

effect of bypassing the anti-eviction legislation is reminiscent of forced removals during the apartheid era.

Seeing that public nuisance offences have been encapsulated in legislation and are regulated successfully, the question has to be asked whether the remedy still has a legitimate purpose in South African law. After having analysed the *Intercape* case, it could be argued that the original aims of public nuisance could still be applied in South Africa. All the facts in that case, especially the unreasonable interferences complained of, contravened laws (LUPO) and had constituted a public nuisance. However, the judge failed to establish that the unreasonable interferences constituted a public nuisance. Instead, the judge erroneously applied the principles of private opposed to public nuisance.

It can be concluded that public nuisance should only be applied in circumstances where its application is not misused to benefit particular parties. The indirect use in the third series of case law is unjustifiable and could be unconstitutional. This raises the question of whether the use of the public nuisance doctrine, as it was applied in the third series of case law, meets the requirements of section 25(1),[183] (2)[184] and section 26(3)[185] of the Constitution. This test is done in the following chapter.

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[183]Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[184] Section 25(2) of the Constitution provides that 'property may be expropriated only in terms of law of general application (a) for a public purpose or public interest; and (b) subject to compensation.'

[185] Section 26(3) of the Constitution provides that 'no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Chapter 4: Constitutional compatibility of public nuisance doctrine

4.1 Introduction

Up to this point, four series of public nuisance cases have been analysed in chapters 2 and 3. As indicated in chapter 2, the first series of cases strictly applied the original aims of public nuisance doctrine according to its definition, namely, 'an act or omission that endangers the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects'.[1] In other words, the original aims of public nuisance doctrine are to protect against any actions that would pose a threat to the health and safety of the public, as well as to protect the public against any immoral behaviour.

The remaining three series of public nuisance cases are analysed in chapter 3. The second of these consists in actual fact of only one case, namely, the *Von Moltke* case. In this case the applicant approached the court for an interdict to prevent the building of a shopping mall in the vicinity of his home. The applicant alleged that the erection of the mall constituted a public nuisance. The court rejected the interdict on the basis that the applicant could not prove 'injury, prejudice or damage or invasion of a right peculiar to himself and over and above that sustained

[1] *News Group Newspapers Ltd v SOGAT '82* [1986] IRLR 337 at 346. See also Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 55. Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163 define a public nuisance as 'an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large'.

by the members of the general public'.[2] In other words, the applicant sought to obtain an interdict to abate an alleged nuisance but intended essentially to protect his private rights as a landowner rather than the well-being of the general public, thus failing to comply with the requirements for success in alleging public nuisance.

In the third series of public nuisance cases, as in the application in the second series, applicants approached the court for an interdict to protect their private interest as landowners, in these cases the applicants alleged that the establishment of an informal settlement in their vicinity would create a public nuisance. They complained that the presence of an informal settlement would constitute a health risk, endanger their safety and decrease the value of their properties. They thus approached the court to obtain an interdict to prevent the establishment of the informal settlements, or alternately to evict the squatters. However, the application of public nuisance in this series was not successful in all the cases.[3]

The most recent cases concerning public nuisance are the *Intercape*[4] and *Voortrekker* cases.[5] These cases are regarded as the fourth series of public nuisance cases. As indicated in chapter 3, the courts in both cases found that the presence of a refugee office contravened the city's zoning system and constituted a nuisance. The nuisances complained of were regular street blockages, noise,

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[2] 258D-E.

[3] The application of public nuisance was rejected in the decisions of *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A); *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE) and *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[4] (20952/08) [2009] ZAWCHC 100 (24 June 2009).

[5] (26841/09) [2010] ZAWCHC 87 (3 May 2010).

violence and litter in a public place. As explained in 3.4.2, these unreasonable interferences were more likely to comply with the definition of a public nuisance than private nuisance in that the general public was indeed affected, on a public street. Nevertheless, the court decided both cases on the basis of private nuisance, without properly distinguishing private from public nuisance. In both cases this made no difference to the decisions, as the cases were ultimately decided on the basis of legislation.

As illustrated in chapter 3, it could be argued that the application of public nuisance doctrine between 1989 and 2001,[6] referred to as the third series of public nuisance cases, is problematic. In chapter 3 it was established that, on the basis of the analysis conducted in the first series of public nuisance cases, the applicants in the third series applied the common law notion of public nuisance contrary to its original aims. The unreasonable interferences[7] of which applicants complained were those usually associated with the creation of a public nuisance. But, as the applicants' intention was always to advance their own private interests as

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[6] See *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) 49 (T); *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1994 (3) SA 336 (A); *Rademeyer and Others v Western Districts Councils and others* 1998 (3) SA 1011 (SE); *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W); *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[7] The applicants complained that the establishment of an informal settlement in their vicinity would cause an increased risk to health (owing to dust from gravel roads together with a lack of sanitary and water facilities), increased crime (owing to a lack of security and an increasing number of unemployed occupiers in the township) and that the economic value of their property as landowners would decrease.

landowners, failing to prove the infringement of the public's right to health and safety, it could be argued that they did not satisfy the public extent required by the definition of public nuisance. Therefore, as indicated in chapter 3, applicants failed to prove the existence of a public nuisance in the third series of cases. More importantly, applicants used public nuisance doctrine not primarily to limit the unreasonable interferences but rather to obtain an interdict to evict squatters or to prevent the establishment of informal settlements. In so doing, public nuisance was used to bypass anti-eviction legislation. Under normal circumstances, it takes some time to obtain an eviction application; it is also expensive and difficult to obtain in the light of anti-eviction legislation. Therefore, the applicants attempted to use public nuisance doctrine as an indirect eviction remedy, which was contrary to its original aims.

In addition, the land reform framework provided in section 25(5)-(9) of the Constitution of 1996,[8] which promotes equitable access to land, security of tenure and restitution to those who were subject to past racially discriminatory practices, has been violated by the application of public nuisance doctrine in the third series of cases. These 'nuisance based evictions'[9] are reminiscent of the previous discriminatory practice of forced removals during the apartheid era. In essence, allowing public nuisance as a means to evict or prevent the establishment of homeless occupiers' amounts to the deprivation of land. Therefore, this chapter seeks to determine whether the common law notion of public nuisance is compatible with the Constitution, and ultimately to determine its legitimacy in a post-apartheid

[8] Hereafter referred to as the Constitution.

[9] See Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 825.

South Africa. I aim to prove that the use in the second and third of public nuisance doctrine in South African law constitutes an arbitrary deprivation of land and ought thus to be deemed unconstitutional.

According to section 2 of the Constitution, common law that is inconsistent with the Bill of Rights is invalid. On the other hand, section 39(2) encourages the development of the common law to promote the spirit, purport and objects of the Constitution. Read with section 39(2), section 173 gives the inherent power to specified courts to develop the common law. However, the development of public nuisance as a common law remedy is uncertain, as it is not clear whether it has any further use in South African law, especially in the light of the case law discussed in chapter 3 and the increased importance of statutory regulation.

The future use or application of the public nuisance remedy will be determined after testing its constitutional compatibility against section 25(1). Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.[10] Van der Walt defines a deprivation as the restriction of the 'owner's use and enjoyment, exploitation and disposal of the property'.[11] There are two requirements for an arbitrary deprivation in section 25(1). Firstly, the deprivation must take place in terms of a law of general application. Secondly, no law may permit arbitrary deprivation. Van der Walt AJ suggests that, together with the two requirements, there is a third implicit requirement that a 'deprivation should serve a legitimate public purpose or

[10] Section 25(1) of the Constitution.

[11] Van der Walt AJ *Constitutional property law* (2005) 124-125.

public interest'.[12] According to Van der Walt, the requirement of 'law of general application' in section 25(1) refers not only to legislative provisions but applies also in cases of common or customary law.[13]

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance[14] is the most authoritative case on the application of section 25. When applying this provision to the application of public nuisance, specifically in the third series of cases, I aim to prove that the occupiers were arbitrarily deprived of land. The means employed, namely, public nuisance, is an arbitrary mechanism to achieve the ends, which were to dispossess permanently the occupiers of the land.

The *FNB* case will therefore serve as the yardstick to determine whether the application of public nuisance meets the requirements of sections 25(1) and (2). On the one hand, I will test one or two cases from each series of public nuisance cases against the framework provided in the *FNB* case to determine whether the use of public nuisance amounted to an arbitrary deprivation in each of the series. In so doing, I will be able to establish whether the use of public nuisance ought to be disallowed entirely in terms of section 2, or developed in terms of section 39(2) to give effect to the object, spirit and purport of the Constitution.

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[12] Van der Walt AJ *Constitutional property law* (2005) 137.

[13] Van der Walt AJ *Constitutional property law* (2005) 144.

[14] 2002 (4) SA 768 (CC); hereafter referred to as the *FNB* case.

Before testing the constitutional compliance of public nuisance against the requirements of section 25 of Constitution, one must determine its applicability with regard to a horizontal application of the Bill of Rights.

Section 25 is subject to section 8 of the Constitution, which regulates the applicability of the Bill of Rights.[15] Section 8(2) provides that a provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Section 25 is horizontally applied where there is a dispute between landowners in the absence of state involvement. In the second series of cases namely, *Von Moltke*[16] it can be said that section 25 ought to be horizontally applied between the plaintiff and those responsible for constructing a shopping mall in the plaintiff's vicinity. Therefore, section 8(2) provides authority for the horizontal application of the Bill of Rights in this type of dispute. However, in the third series of cases, the state was always involved in that it was the party who implemented the settlements and it was always the second party to the dispute. Therefore, there is no horizontal issue in this series. Similarly, in series one[17] and four[18] the state is a party and the application is brought for the public, which means there is no horizontal issue in those cases. In fact, in any true public nuisance case, if the state and the public are not involved there is no public nuisance case. This is proved in the *Von Moltke* case; the court rejected the application of public nuisance where the state

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[15] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 525.

[16] *Von Moltke v Costa Areosa* 1975 (1) SA 255.

[17] *CP Reynolds v R* (1901) 22 NLR 89.

[18] *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others* (20952/08) [2009] ZAWCHC 100 (24 June 2009).

and the public were notinvolved. Therefore, horizontal application should be no issue on public nuisance cases.

4.2 General application of the FNB methodology

In the *FNB* case, the applicant was First National Bank (FNB), a financial institution that sells and leases vehicles. FNB leased two vehicles and sold another to companies in an instalment sale agreement. Three of FNB's vehicles were detained under section 114 of the Customs and Excise Act (hereafter referred to as the Act).[19] The companies to which FNB leased and sold these vehicles owed tax to the first respondent (SARS). In terms of section 114, SARS established a lien over the vehicles in relation to the debt. The implication was that the Commissioner could sell in execution of the tax debt the goods belonging to a third party, without a court order. In such a case, according to the legislation no *nexus* is required between the debtor and the goods belonging to a third party. The only requirement in this case was that the debtor was in possession of these goods.[20]

FNB challenged the constitutionality of section 114 of the Act that allowed the Commissioner, in order to collect debts owed, to sell goods without a prior judgement or other authorisation by the court. This section also allowed the Commissioner to sell the goods of a third party even if he had no connection to the

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[19] Act 91 of 1964. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 2.

[20] Par 4.

debt.[21] FNB contended that section 114 of the Act constituted an unjustified infringement of its constitutional rights, namely to have access to the courts in the settlement of disputes, the protection of property and freedom to choose a trade.[22]

FNB argued that the retention of the goods amounted to an expropriation without the payment of compensation as required by section 25(2)(b) of the Constitution.[23] However, Ackermann J determined that expropriation is a species of deprivation. This meant that if the deprivation could not be justified in terms of section 36 of the Constitution, section 114 of the Customs and Excise Act would be unconstitutional. If it could be justified, then the question would be whether it was an expropriation. This would be determined by applying the test set out in section 25(2)(a) and (b).

According to Ackermann J, the most important question was 'whether in the absence of a relevant *nexus* between the goods and the customs debtor, the sale by the Commissioner – under section 144 of the Act – of goods of someone who is not a customs debtor amounts to an unjustifiable infringement of the owner's section 25 property rights'.[24] As indicated above, section 25(1) of the Constitution[25] provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

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[21] Par 4.

[22] Par 5.

[23] Par 26.

[24] Par 38.

[25] Constitution of 1996.

Ackermann J formulated a framework that consists of seven questions which ought to be asked when applying section 25 of the Constitution:

a) Does that which is taken away from FNB by the operation of section 114 amount to 'property' for [the] purpose of section 25?
b) Has there been a deprivation of such property by the Commissioner?
c) If there has, is such a deprivation consistent with the provisions of section 25?
d) If not, is such deprivation justified under section 36 of the Constitution?
e) If it is, does this amount to expropriation for the purpose of section 25?
f) If so, does the deprivation comply with requirements of section 25(2)(a) and (b)?
g) If not, is the expropriation justified under section 36?[26]

On the first question designed to adjudicate issues regarding section 25, the court found that corporeal movable property, namely, the vehicles owned by FNB, could be regarded as property in terms of section 25. SARS responded that FNB's ownership of the vehicles was nothing more than a contractual device which reserves ownership of the vehicles in question.[27] In other words, SARS contended that FNB, as the rights holder of the property, had to use and enjoy it in order to claim constitutional protection under section 25.[28] However, the court found that limited use and enjoyment is irrelevant when determining whether an object falls

[26] Par 46.
[27] Par 53.
[28] Par 54.

within the ambit of constitutional property. In conclusion, the court stood by its finding that the right FNB had to the vehicles constituted property in terms of section 25.

On the second question, the court defined a deprivation as 'any interference with the use, enjoyment or exploitation of private property in respect of the person having title or right to or in the property concerned'.[29] On the basis of this definition, it is clear that FNB had been deprived as it had suffered an interference with its use and enjoyment or exploitation of its private property. After establishing that section 14 of the Act complied with the requirement of law of general application,[30] the court proceeded to determine what was meant by 'arbitrary'. Analysing comparative law,[31] Ackermann J defined arbitrary as 'meant by section 25 when the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'.[32]

Ackermann J went on to define 'sufficient reason' as follows:

'a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

b) A complexity of relationships has to be considered.

[29] Par 57.

[30] Par 61.

[31] Paras 63-96.

[32] Par 100.

c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.

d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for depriving law to constitute sufficient reason for the deprivation than in the case when property is something different and the property right less extensive. This judgment is not concerned at all with incorporeal property.

f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25.'[33]

Applying this test for arbitrariness, Ackermann J stated that section 114 of the Act amounted to an arbitrary deprivation. He went on to say that section 114 arbitrarily deprives a person's property under the following circumstances:

'(a) where the person has no connection with the transaction giving rise to the customs debt; (b) where such property also has no connection with the customs debt; and (c) where such person has not transacted with or placed the customs debtor in possession of the property that induced the Commissioner to act to his detriment'.[34]

On the basis of these conclusions, the court found that there exist no *nexus*, or differently formulated, no sufficient reason, for section 114 to deprive persons other than the customs debtor of their property. Therefore, the deprivation was arbitrary for the purpose of section 25(1).[35]

As indicated in the method designed by Ackermann J, once a deprivation has been found to be inconsistent with section 25(1) it must be determined whether the deprivation is justifiable under section 36 of the Constitution. In terms of section 36(1):

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[33] Par 100.

[34] Par 108.

[35] Par 109.

'the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

a) the nature of the right;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relation between the limitation and its purpose; and

e) less restrictive means to achieve the purpose.'[36]

Ackermann J found that the deprivation was not justifiable under section 36. He stated that the infringement by section 114 of section 25(1) 'was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[37] In terms of section 36(1)[38] (also known as the limitations clause), a limitation of a constitutional right will occur 'if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. According to Van der Walt, it is unlikely that any deprivation that fails the non-arbitrariness test can ever be justified in terms of section 36(1) on two accounts.[39] Firstly, as in section 25(1), section 36(1) also requires law of general application. Van der Walt is of the opinion that 'if a deprivation failed the section 25(1) test because it was not imposed by law of general application it must also fail the section

[36] Section 36(1) of the Constitution of 1996.

[37] Par 113.

[38] Section 36(1) of the Constitution.

[39] Van der Walt AJ *Constitutional property law* (2005) 55.

36(1) test'.[40] Secondly, he contends that it would similarly be 'unlikely if not impossible to hold that a deprivation is reasonable as meant in section 36(1) once it has been described as arbitrary for one of the reasons set out in *FNB*'.[41]

The provision was therefore declared unconstitutional. According to the court's 7 questions formulated by Ackermann J - when applying section 25 of the Constitution - the next step is to consider whether there was an expropriation if the deprivation was either constitutionally valid or justifiable. According to van der Walt, it is highly unlikely that a deprivation that is found to be arbitrary will be an expropriation or, even if it is, that it will comply with the requirements in section 25(2) and (3).[42] It was nevertheless done in *Nhlabati v Fick*,[43] where the court assumed (without deciding) that the deprivation was an expropriation and that (as there was no provision for compensation) it was in conflict with section 25(2), but decided that even then it would not comply with section 25(3) but will be justifiable in terms of section 36 for the same reason why it would be justifiable as an arbitrary deprivation.

The *FNB* methodology will be applied in the following subsection to determine whether public nuisance meets the requirements of section 25.

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[40] Van der Walt AJ *Constitutional property law* (2005) 55.

[41] Van der Walt AJ *Constitutional property law* (2005) 55.

[42] Van der Walt AJ *Constitutional property law* (2005) 237.

[43] 2003 2 All SA 323 (LCC).

4.3 General application of the FNB methodology to public nuisance

In order to establish this, the use of public nuisance in each of the four series of cases (as discussed in chapters 2 and 3), will be subject to scrutiny in terms of section 25. Only then will one have ascertained whether the common law notion of public nuisance is inconsistent and invalid in terms of section 2 of the Constitution, ought to be developed in terms of sections 39(2) and 173 of the Constitution, or ought only to be applied in certain instances, possibly by the implementation of legislation.

For purposes of this chapter, a case from each series will undergo constitutional scrutiny to determine whether public nuisance was applied contrary to its original aims and arguably inconsistent with the Constitution. Series two and three will be grouped and together undergo constitutional scrutiny seeing that it will be argued that there is no nexus between the purpose of the law in question, namely public nuisance doctrine, and the means sought, namely protecting private rights against infringement of use and enjoyment of land. In the third series of public nuisance cases, prospective occupiers were denied access to land and, even worse, at times current occupiers were evicted. As has been demonstrated in the section above, the *FNB* case provides the methodology to determine whether a deprivation is inconsistent with section 25(1). Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.[44] According to Van der Walt, the requirement of 'law of general application' in section 25(1) refers not only to legislative provisions

[44] Section 25(1) of the Constitution.

but also to common or customary law.[45] Therefore, deprivation caused by the common law notion of public nuisance meets the requirement of law of general application.

According to the methodology created in *FNB*,[46] the first two steps to determine the constitutional compliance in terms of section 25 are (a) to determine whether that which was taken away amounts to property and (b) whether there has been a deprivation. In terms of the first requirement, Ackermann J stated that it is 'practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25'.[47]In the *FNB* case the court accepted that corporeal property and land are definitely included as property in terms of section 25.[48] Furthermore, the court suggested that the more entitlements are affected, the stronger the justification for a deprivation is required.[49] However, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,[50] the court found that there was no universal formulation to describe property but added that property in terms of

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[45] Van der Walt AJ *Constitutional property law* (2005) 144.

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) par 46.

[47] Par 51.

[48] Par 51.

[49] Par 100.

[50]1996 (4) SA 744 (CC) par 72.

section 25 should allow sufficient scope to include all rights and interests that have to be protected according to international standards.[51]

According to *FNB*, land is property in terms of section 25.[52] In the present matter, occupiers' occupations were lawful, except in one instance.[53] The occupiers were either authorised by legislation, namely given a statutory right,[54] or in one instance, received tacit consent by governmental authorities[55] to inhabit land.

The second requirement in the *FNB* methodology is to prove that they had been deprived of property. Ackermann J defines a deprivation as 'any interference with the use and enjoyment or exploitation of private property in respect of the person having title or right in the property concerned'.[56] In the present matter,

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[51] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) paras 70-75.

[52] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 51.

[53] *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W).

[54] See *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A); *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1993 (1) SA 577; *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1993 (3) SA 49; *Diepsloot Residents and Landowners Association and another v Administrator Transvaal* 1994 (3) SA 336 (A).

[55] *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE).

[56] Par 58. In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and others v Buffalo City Municipality; Transfer Rights Action Campaign and others v Member of the Executive Council for Local Government and Housing, Gauteng and others* 2005 (1) SA 530 (CC) par 32 the Constitutional Court stated that whether a deprivation has occurred 'depend[s] on the extent of the interference or limitation of use, enjoyment or exploitation' and that 'at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'. This definition of deprivation is problematic in several aspects. According to Van der Walt it is odd that deprivation should be limited to that which

occupiers satisfied the deprivation requirement. On the one hand, occupiers who already inhabited land were deprived of their property by being deprived of the possession they had. On the other hand, section 26(1)[57] entitles everybody to have access to adequate housing while section 26(3)[58] protects any individual from being evicted, in other words deprived of their home, without an order of the court made after considering all the relevant circumstances. Occupiers were denied access to land and in so doing deprived of their section 26(1) and 26(3) rights.

The application of public nuisance, specifically in the third series of public nuisance cases, is arguably an insufficient reason for depriving occupiers of land as its use was contrary to its original aims in that it did not satisfy the public extent as required in the definition of public nuisance. Furthermore, public nuisance was applied as a means to evict or bar occupiers from land. In essence, the issue is whether public nuisance doctrine could ever satisfy the requirements in section 25(1); in other words, assuming that it will always establish a deprivation of property (in preventing someone from using property in some way they are otherwise entitled to), whether the reason for the deprivation would ever justify the deprivation of property that enforced abatement of the nuisance would involve. The subsequent section establishes that in series two and three, public nuisance had been applied for the purposes of protecting the private interest of the applicants, as opposed to the well-being of the public at large. The first and fourth series should show that it is possible - but not if applied for the wrong reasons, as in the second and third series

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exceeds restrictions that are normal, because all legitimate regulatory restrictions on the use and enjoyment of property are normal. See Van der Walt AJ *Constitutional property law* (2005) 127.

[57] Section 26(1) of the Constitution.

[58] Section 26(3) of the Constitution.

– to apply the public nuisance doctrine. In the first and fourth series, the *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others*[59] and *CP Reynolds v R*[60] cases illustrate that the notion of public nuisance could be used if the nuisance infringed the health and safety if the community at large in a public space opposed to private land. In those cases, the reason for forcing the affected property holder to abate the nuisance, namely to protect the public against a serious threat involving its safety or health or morals, could justify the deprivation of property that it would bring about.

To decide whether there is a sufficient reason for the deprivation, 'a complexity of relations' has to be considered, including the relationship between the means employed and the ends sought to be achieved; the relationship between the purpose for the deprivation and the person whose property is affected; and the relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation.[61]

4.4 Constitutional scrutiny: Series two and three

4.4.1 The Von Moltke case[62]

Von Moltke is the only case in the second series of public nuisance cases. In *Von Moltke*, the applicant alleged that the construction of a shopping mall and

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[59] (20952/08) [2009] ZAWCHC 100 (24 June 2009).

[60] (1901) 22 NLR 89. Herefater referred to as the *Reynolds* case.

[61] Van der Walt AJ *Constitutional property law* (2005) 153.

[62] *Von Moltke v Areo Costa* 1975 (1) SA 255 (C).

subsequent bulldozing of buildings in his vicinity would constitute a nuisance on the basis that it would infringe and ultimately deprive him of his use and enjoyment of land. In other words, the applicant sought to protect his own private rights as opposed to those of the public at large. He further alleged that the preliminary bulldozing of the land and erection of the mall would constitute a nuisance to neighbours in the surrounding areas and in the process result in damage to the vegetation and sand dunes. However, the court found that the applicant could not prove any 'injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general'.[63] The application was rejected.

According to the *FNB* methodology, in order to determine an arbitrary deprivation, one should ask whether the law in question, namely the common law notion of public nuisance, provides a sufficient reason for the applicant's alleged deprivation. In other words, is there a *nexus* between the means sought, the use of public nuisance as a cause of action and the ends, namely to abate an alleged infringement or threat to the applicant's property and that of his neighbours in the surrounding area? In this case there is no nexus. The application of public nuisance doctrine in this case would have established arbitrary deprivation because the only nexus that would justify the deprivation, protection of public health and safety narrowly understood, was absent. Moreover, seeing that he complained about the infringement of the use and enjoyment of his private property, as opposed to public land or a public place, the applicant should have alleged the infringement of a private instead of a public nuisance. Therefore it was correct that the court rejected the

[63] 258D-E.

application. Forcing the respondents to abate the alleged nuisance in this case would have caused a deprivation of property that could not have been justified by its purpose and would therefore have been arbitrary.

4.4.2 The Three Rivers case[64]

The application of public nuisance in *Three Rivers*, from the third series of public nuisance cases, is the next case in which a possible deprivation in conflict with section 25(1) will be determined. In this third series of public nuisance cases there is a complex relationship between landowners, the state and occupiers. Therefore, apart from the means and ends test applied in *Von Moltke*, the *FNB* methodology - formulated to determine whether an deprivation is arbitrary - further requires an investigation into the relationship between the purpose of the deprivation and the person whose property is affected, as well as the relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation.

As indicated in chapter 3, in the third series of cases public nuisance was applied with reference to a specific set of facts with a specific aim, either to prevent occupiers from residing in informal settlements on state-owned land in the applicants' vicinity, or evicting them. Applicants approached the court as farmers, residents, ratepayers and environmental associations. In the present matter, *Three Rivers*, a ratepayers' association, complained that the presence of the occupiers of an informal settlement in its vicinity constituted a public nuisance. The applicants

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[64] *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W).

alleged that a lack of water and sanitation together with increased crime would infringe their private rights as landowners. They further alleged that the informal settlement caused a decrease in the value of their properties and caused them fear and anxiety. On the basis of these allegations the applicants sought an interdict with the aim of evicting the occupiers. Applicants used the doctrine of public nuisance as a cause of action to obtain an interdict and consequently to evict the occupiers. The court defined a public nuisance as a nuisance whose harmful effect is so extensive as to affect the public at large or at least a distinct class of persons in its field. Thereafter, the court concluded that the legal principles of public nuisance are similar to that of a private nuisance because the concept is no different in law except for the public extent of the nuisance. Consequently, the court applied the legal principles of private nuisance and followed the rule formulated in *Regal v African Superslate.*[65] According to this rule, in the case of a third party creating a nuisance on the land of the respondent, an interdict can only be awarded where the respondent had knowledge of the nuisance or where the respondent took reasonable steps to abate the complained nuisance.

The respondents (Northern Metropolitan) contended that they had taken reasonable steps to avoid unreasonable interferences with the applicant's property interests. They argued that they had provided patrol units to avoid any safety concerns and had engaged with the applicants to find solutions. In conclusion, the court found that the respondents had failed to take such steps and ordered that the occupiers be evicted within 48 hours.

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[65] 1963 (1) SA 102 (A).

According to the *FNB* methodology, the most problematic question to be asked, when determining the existence of an arbitrary deprivation, is whether the law in question, namely public nuisance doctrine, provides sufficient reason for the deprivation that would follow if the application was successful: is there a *nexus* between the means sought, namely the use of public nuisance as a cause of action, and the ends, namely to prohibit or evict occupiers residing in informal settlements situated in the applicants' vicinity? One could argue that the application of public nuisance, not only in *Three Rivers* but in all the cases in the third series, arbitrarily deprived occupiers of land in terms of section 25(1) and was therefore unconstitutional.

The nature of the property is vacant land, which the occupiers inhabited either lawfully or unlawfully. As stated above, applicants alleged that the settlement of occupiers would increase smoke, noise and crime as well as constitute a health hazard. On that basis, the applicants argued that a public nuisance was constituted and they therefore approached the court to deprive occupiers them from gaining access to the land by either preventing occupation or evicting occupiers. Therefore, the applicants, otherwise referred to as landowners, sought to deprive the occupiers of their access to land. Landowners aimed to protect their land by claiming their right to uninterrupted use and enjoyment of the land. In other words, landowners were relying on their guarantee not to be deprived of their land in terms of section 25(1) of the Constitution.

On the other hand, occupiers were also affected as they were either prohibited from gaining access to or evicted from land. Those already in possession of land have occupation, of which they are deprived when evicted. Even though they

might not have had a right in terms of the traditional approach in private law, they could also contend that they too are deprived of land in the sense that they were either prohibited from occupying or were evicted from land. In fact, occupiers receive protection in terms of section 25(5)–(9) of the Constitution. Amongst other things, these provisions provide access to[66] and security of tenure in land.[67] Furthermore, these provisions specifically protect those who were subject to racially discriminatory practices in the past. Poor black occupiers, such as the occupiers in the third series of cases, who were affected by these evictions or who were prevented from settling in the vicinity of the applicants are mostly those who had been subject to past discriminatory practices and consequently fall within the ambit of the protection provided in section 25(5)-(9).

However, to prohibit and, more seriously, evict occupiers is a rather extreme deprivation in the given context. Therefore, it is argued that the law in question, namely the application of a public nuisance does not provide sufficient reason for the particular deprivation in question in terms of section 25(1). The reasons are set out below.

As correctly defined in *Three Rivers*, a public nuisance is a nuisance the harmful effect of which is so extensive as to affect the general public or at least a distinct class of persons in its field. However, in the present matter, applicants did not meet the requirements of a public right to the extent required by the definition of public nuisance. Their use of public nuisance was always aimed at advancing their own private interests rather than that of the general public: they used public nuisance

[66] Section 25(5) of the Constitution.

[67] Section 25(6) of the Constitution.

as a facade to protect their own private interest as land owners. The applicants failed to prove the infringement of a public right, namely the health and safety of the public at large. In other words, as indicated above, the effect was that the public nuisance doctrine was indirectly used by affected landowners to evict or prohibit the settling of occupiers in their vicinity because they failed to prove the existence of a public nuisance according to its definition.

This argument is further supported by the fact that very little public nuisance case law between 1943 to the present time is available. This is the result of the successful regulation of public nuisance offences by way of legislation, otherwise known as statutory nuisance. Therefore, the use of common law public nuisance in this context is suspicious as there are alternative legislative means for applicants to achieve their desired result, namely, to abate unreasonable interferences.

Furthermore, two arguments may be proffered: (a) the nuisance could have been abated or avoided if proper water and sanitary services were installed together with electricity in order to prevent excessive smoke, and patrol units were introduced to curb increased crime; and (b) in the light of entrenched constitutional values in section 25(5)-(9) of the Constitution, which promote access to, and security of, land for this particular affected group of people, the extent of the deprivation was excessive. Moreover, section 26(3), together with the anti-eviction legislation, namely the Extension of Security of Tenure Act[68] (ESTA) and the Prevention of Illegal

[68] 62 of 1997.

Eviction from Unlawful Occupation of Land Act (PIE)[69], provide substantial and procedural requirements for the eviction to be taken into account before such a deprivation is allowed

Applicants used public nuisance not to abate unreasonable interferences normally associated with public nuisance offences, but to bypass anti-eviction legislation, ESTA and PIE. Provisions in both PIE and ESTA were enacted to give effect to section 26(3) of the Constitution. Van der Walt explains that 'once legislation has been enacted to give effect to a right in the Constitution, litigants must rely on the legislation – and may not rely directly on the constitutional provision – when bringing action to protect that right against infringement'.[70] He goes further, stating that this is the subsidiarity rule which excludes the direct application of the 'infringed' constitutional provision once legislation has been enacted to give effect to that right.

ESTA is applicable in the case of lawful occupiers inhabiting rural land. As indicated in chapter 3, ESTA 'protects a particular class of indigent persons who has or has had permission to live on rural and semirural land, against eviction from that land'.[71] In effect, if one satisfies the definition of an occupier in ESTA this would prevent a court from granting an eviction order. According to section 6(1) of ESTA, an 'occupier shall have the right to reside on and use the land on which he or she

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[69] Act 19 of 1998. Before the enactment of the anti-eviction measures of ESTA and PIE, applicants could directly rely on section 26(3) of the Constitution. However, there is no case law wherein section 26(3) was directly applied in none of the case law in which the public nuisance doctrine was applied.

[70] Van der Walt AJ 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Law Review* 77-128 100.

[71] See *Mkangeli and others v Joubert and others* 2002 (4) SA 36 (SCA) par 97.

resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly'.

PIE, on the other hand, protects unlawful occupiers who inhabit urban or rural land against eviction. Section 4(6) requires that before an eviction order is granted, a court must be of the opinion 'that it is just and equitable to do so, after considering all relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women'. PIE has the objective of ensuring that courts promote constitutional values and consider all relevant circumstances before allowing an eviction order. *Rademeyer*, *Three Rivers* and *Kyalami Ridge* were all subject to section 26(3), together with either ESTA or PIE only, given the facts and context, where these anti-eviction measures were applicable.

ESTA was successfully applied in *Rademeyer*. The court rejected an eviction order on the basis that the requirements for such an order had not been met. However, seeing that the occupiers were unlawful in *Three Rivers*, PIE could have been applied but the court did not consider the constitutional protection afforded in section 26(3) and specifically PIE.

Therefore, bypassing these two legislative measures to obtain an eviction order indirectly, without complying with the constitutionally sanctioned anti-eviction legislation, is inconsistent with section 26(3) of the Constitution. Strict procedural and substantive requirements are set out in section 26(3), but the applicants blatantly ignored these. Instead, they sought an easier option by using public nuisance as a

primary premise to obtain an eviction, with the abatement of unreasonable interferences such as smoke, noise, endangered health and safety as the vehicle for achieving their private intentions.

Van der Walt suggests that 'given the recognised need for, and importance of, these provisions in the larger framework of land reform measures, any situation where evictions can be enforced without complying with, or even seriously considering, these provisions is a cause for concern'.[72]

In other words, simply using public nuisance as an alternative measure to evict occupiers not only bypasses section 26(3) as well as ESTA and PIE, but also contravenes the spirit, purport and object of the Constitution. These provisions ought to be considered in all cases seeking to evict occupiers. Although applied in *Rademeyer*, these anti-eviction provisions should have been considered in *Three Rivers,* and in any future case pertaining to nuisance evictions.

The application of public nuisance in this series of cases is a complete deviation from its original aims as applied in the first and second series of cases. For the reasons set out above, no rational and constitutionally legitimate link between public nuisance as the means employed, and the end sought, namely, the prohibition of occupiers from settling in the vicinity of predominantly white private landowners, or their eviction, can be established.

After having applied the framework provided in the *FNB* case, it must be said that the law, namely public nuisance in question does not provide sufficient reason

[72] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 833.

for the particular deprivation in question. The law, namely public nuisance, aims to protect the health and well-being of the general public but does not serve as an alternative eviction mechanism for landowners. In other words, landowners alleged that whenever occupiers constituted a nuisance they could be evicted on the grounds of smoke, noise, lack of water and sanitation as well as diminution of the value of their properties. Landowners did not have any regard for the severe housing backlog[73] and, more importantly, disregarded the constitutional protection provided in section 25(5)-(9), section 26(1)[74] and 26(3).[75] On the basis of the reasons given above, it must be said that the use of public nuisance in the third series of cases is not in line with section 25.

According to the framework provided in *FNB*, after a deprivation has been declared arbitrary, it should be determined whether it is justified under section 36 of the Constitution. On the basis of the contentions of Van der Walt, one can conclude that the use public nuisance, in the second and third series of cases,[76] would probably not be justifiable in terms of section 36(1). Therefore, its use is unconstitutional in terms of section 25(1).

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[73] See Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 825.

[74] According to section 26(1) of the Constitution 'everybody has the right to have access to adequate housing'.

[75] See 4.3.

[76] Van der Walt AJ *Constitutional property law* (2005) 55.

4.5 Constitutional scrutiny: series one and four

4.5.1 Introduction

After having established that the application of public nuisance in series two and three had been applied illegitimately, one has to ask the question whether the law public nuisance can still have a legitimate use. Ought it to be entirely abolished, or can it be adapted for purposes other than as a means of an indirect eviction, otherwise known as a nuisance eviction? At this stage, it is difficult to answer these questions as the following situations exist. On the one hand, the application public nuisance, in the second and third series of public nuisance cases, has been applied contrary to its original aims. Its application is not in line with the object, spirit and purport of the Constitution of 1996, making it illegitimate. This argument is further supported by the fact that the majority of public nuisance offences are now regulated by legislation. On the other hand, however, the subsequent section will establish that the application of public nuisance in the cases of *Reynolds*[77] and *Intercape*, serving as examples for the first and fourth series respectively, was legitimate and might therefore signify the possibility of using the doctrine in the future.

4.5.2 The Reynolds case

The *Reynolds* case, discussed in chapter 2, falls into the first series of public nuisance cases and is selected to undergo constitutional scrutiny in terms of section 25(1). In this case a summons was issued against the defendant in his capacity as

[77] (1901) 22 NLR 91.

the Managing Director of R Brothers on the basis that their company constituted a public nuisance. It was alleged that R Brothers disposed of treacle and other waste products into a public river and consequently polluted it. The defendant was accused of detrimentally affecting the health of the inhabitants in the vicinity of the river as well as of any member of the public who came into contact with it. The court a quo found that there is no offence or crime in either statute or common law to punish a perpetrator accused of polluting a public river.

However, on appeal, the court found that the pollution of a public stream, especially streams situated on the coast, constituted a grave danger to the public. In the absence of law reports and any other authority, the court relied on *Voet* as support. According to *Voet,* 'the pollution of water, lakes, and the like, is a public offence.'[78] On the basis of this statement by *Voet*, the court found that the charge in the summons is an offence which may be punished under the law of the colony.

The question to be asked here is whether such a deprivation is consistent with the provisions of section 25 - was the deprivation, namely prohibiting the defendant from disposing waste into a public river, situated adjacent to his land, an arbitrary deprivation? As stated earlier, the test for an arbitrary deprivation is to determine whether there is sufficient reason for the deprivation. On the basis of the facts, the law in question, namely common law public nuisance doctrine, provides sufficient reason for the alleged deprivation, which in this case was to stop the defendant from polluting a public river, which infringed the health and safety of the public at large. There does thus exist a *nexus* between the means employed, namely the use of

[78] (1901) 22 NLR 91.

public nuisance as a cause of action, and the ends sought, that is the abatement of a future threat to the community at large. There is a rational link between the means employed and the end sought, in that the public nuisance doctrine was employed to achieve its original aims, those of protecting the health and safety of the general public. The deprivation, if there was any, was therefore justified in terms of section 25.

4.5.3 The Intercape case

Intercape is one of two cases[79] in the fourth series of public nuisance cases. The applicants (Intercape) alleged that a refugee office in their vicinity contravened the City of Cape Town's zoning policy and constituted a nuisance. Having established that the zoning policy had been contravened; the court investigated the presence of a nuisance caused by the operation of the refugee office. Applicants complained that the large number of asylum seekers who visited the refugee office on a daily basis attracted vendors, criminal elements and taxis and in so doing, caused an increase in noise, violence, litter and street obstructions. Violence broke out when asylum seekers, victims of muggings, fought the criminal elements responsible. Applicants further alleged that a lack of sanitation and the regular presence of human waste in the street posed a danger to their health. In essence, these alleged nuisances are a classic example of a public nuisance as it was applied in the first series of cases. The operation of the refugee office constituted a direct infringement of the general

[79] The other case referred to is 410 *Voortrekker Road Property Holdings CC v Minister of Home Affairs and others* (26841/09) [2010] ZAWCHC 87(3 May 2010) which is referred to as the *Voortrekker case.*

public's right to health (by way of litter and human waste) and safety (increased muggings and violence) because any pedestrian or driver who was a client or employee of Intercape, or in fact any ordinary citizen, was subject to the violence, noise, litter and street obstructions. In other words, these interferences fit the definition of public nuisance rather than private nuisance. Although in the end the court concluded that a nuisance had been constituted, the court suggested it was a private rather than a public nuisance.

On the basis of the analysis above - that the nuisance is a public as opposed to a private nuisance - it will be assumed that a public nuisance was constituted and as a result this assumed application of public nuisance in the *Intercape* case will undergo constitutional scrutiny in terms of section 25. Now, as illustrated in the previous cases, in terms of section 25(1) in order to establish the existence of a arbitrary deprivation is to determine whether there is sufficient reason for the deprivation. On the basis of the facts, the law in question, namely common law public nuisance doctrine, provides sufficient reason for the alleged deprivation, which in this case was to stop the operation of the refugee which operation led to violence, litter, street blockages and noise in a public space, namely the street. The original aims of public nuisance are to protect the public at large against the infringement of the health and safety of the public at large. This was successfully done in the *Intercape* case.

However, in the *Intercape* case, the court reached a conclusion before addressing the allegations of nuisance. The court found that the respondents

contravened the zoning scheme in terms of the Land Use and Planning Ordinance[80] (hereafter referred to as LUPO). It could be argued that the application of public nuisance was not necessary seeing that the legislation covered the problem adequately. Therefore, it seems public nuisance is only applicable in the absence of legislation providing adequate cover for nuisance related offences.

Both cases in series one and four passed constitutional scrutiny in terms of section 25(1) of the Constitution. This is an illustration that the application of public nuisance might still serve a legitimate purpose in the absence of statutory nuisance.

4.6 Conclusion

In this chapter the application public nuisance in the four series of cases has been subject to scrutiny in terms of section 25(1) of the Constitution. Using the methodology formulated in the *FNB* case, my objective was to determine whether public nuisance doctrine provides a sufficient reason for the deprivation in question.

In both series two and three private landowners complained of an infringement of their vested rights to the use and enjoyment of their land. In series two the court concluded that the one landowner did not prove that there had been any injury or harm to him or the broader public. In other words, the landowner failed to meet the requirements for alleging a public nuisance. Instead, seeing that he was the only one affected, it is more likely that he ought to have alleged the existence of a private nuisance and not of a public nuisance. Similarly, in the third series of

[80] 15 of 1985.

cases, groups of private landowners alleged the presence or future existence of a public nuisance with the aim of protecting their private interest in their land. Applicants alleged that occupiers who were or would have been situated in their vicinity would constitute a public nuisance. However, as indicated in 3.3.1, the intention of these landowners was always to advance their own private interests. As a result, the application of public nuisance in series two and three did not meet the requirements in section 25(1) of the Constitution as there was insufficient reason for the particular deprivation. The deprivation was therefore arbitrary. When tested against the requirements of section 36(1) of the Constitution, it was found that the deprivation was not justifiable and consequently unconstitutional. Therefore, any application of public nuisance which is not in line with the definition of such nuisance – and more importantly, is used to bypass anti-eviction legislation – is unconstitutional and should not succeed in a court of law.

Furthermore, according to van der Walt, 'this does not mean that evictions based on a lack of compliance with planning laws or on public nuisance cannot or should not take place, but it does mean that such evictions have to be treated with great care and a healthy shot of scepticism and hesitance.'[81] Van der Walt contends that if a court is faced with a nuisance eviction case, it should ask certain questions before granting such an order. This framework is essential, especially in the light of nuisance-based evictions. The questions are as follows:

> 'does the eviction involve a single or group of occupiers; whether the respondents occupy state or private land, and (if it is private land) whether

[81] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 827.

they own land themselves or occupy it with the landowner's consent; whether the occupation is lawful or unlawful in general (apart from planning laws); whether the nuisance is related to public safety and health or to formalities; and whether the settlement could be formalized as an alternative to evicting the occupiers.'[82]

In contrast, the application of public nuisance in series one and four passed constitutional muster in terms of section 25. These cases illustrate the original aims of the public nuisance doctrine, namely to preserve the health and safety of the public at large. In the *R v CP Reynolds*, the defendant was found guilty of a public offence when he polluted a public river. It is clear that because the nature of the river was public, the community at large had access to it and would be detrimentally affected if the water was polluted. Therefore, the nuisance occurred in a public space as opposed to a private area accessible only to those who own the land. Similarly, in the fourth series of cases, the facts clearly indicate that the public at large were affected and that exposed litter, noise and endangered public health and safety because the nuisance occurred in a public space, namely the street. The community at large had access to the street and were as a result automatically subject to violence, humans waste, litter, noise and blockages of roads. According to Prosser, street blockages are a common example of a public nuisance.[83]

In essence, series one and four can be separated from the second and third series on the following basis: in order for a nuisance to be categorized as a public

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[82] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 827-828.

[83] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1002.

nuisance, it ought to have occurred in a public space in a way that would have infringed the rights of all who came into contact with it, as opposed to only affecting a particular individual or group of people in the enjoyment of their private property. In series two and three landowners sought to protect only their own use and enjoyment of private land in a private space opposed to their proving the nuisance had occurred in a public space affecting the community at large. Furthermore, according to Prosser,[84] a single complainant, as in the second series of cases, is insufficient to represent the public at large. In fact, one can go as far as to say that a large group of private landowners, as was the situation in the third series of cases, does not necessarily represent the community at large. Instead the focus ought to be on the space in which the infringement occurs or would exist and on whether the health and safety of the community at large were affected.

It is important to distinguish between, on the one hand, contrary use of the law of public nuisance in the third series of cases, namely to evict and prohibit occupation, and on the other hand, instances where there is a case of a genuine public nuisance. Therefore the application of public nuisance is still possible in instances where a nuisance occurs in a public space that would as a consequence infringe the rights to health and safety of the public at large.

However, in both the cases of *Intercape* and *Voortrekker*, the alleged nuisances were covered by planning legislation, namely LUPO.[85] Therefore, it could be said that the common law remedy of public nuisance would only be applicable where it is not covered by statutory nuisance or any other legislative measure which,

[84] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1001.

[85] 15 of 1985.

directly or indirectly, has the purpose to abate existing or future public nuisance offences.

Chapter 5: Conclusion and recommendations

5.1 Introduction

The aim of the thesis is to establish whether the public nuisance doctrine still has a legitimate purpose in post-apartheid South African law. This question has been investigated by analysing the history of public nuisance; doing a comparative study of English and US law in the 20th century; analysing the adoption of public nuisance into South African law; examining recent South African cases in which the notion of public nuisance was applied; and finally, testing the constitutional compatibility of the public nuisance doctrine. The conclusions reached at the end of each investigation are summarised below.

5.2 Conclusions

5.2.1 The history of public nuisance and its adoption in early South African law on public nuisance

The history of public nuisance and its adoption in early South African law are discussed in chapter 2. This chapter offered definitions of private and public nuisance and provided an analysis of the differentiating factors between private and public nuisance. The rest of the chapter covered two main themes: an historical overview of the origins and development of the public nuisance doctrine in English and US law, followed by a discussion on the adoption and development of public nuisance in South African law. The following conclusions were reached.

After analysing the history of the Common Law notion of public nuisance it was concluded that those found guilty of committing such a nuisance were criminally liable and prosecuted. The common feature of these nuisances is that they unreasonably interfered with public health, order, morality and safety. The interferences ranged from noise, smoke, smells and odours, disposal of domestic waste and obstruction of highways. Importantly, a clear distinction between private and public nuisance can be established from the cases analysed above. The consequences of a public nuisance not only affect private individuals on private land but particularly those in a public space and on public land, regardless of their ownership or use of private land. Distinguishing between a private and public space or land is the legitimate ground for the distinction between the two kinds of nuisance and for the existence of a separate remedy for public nuisance.

After having investigated the history of the Common Law notion of public nuisance, a comparative study on English and US law was undertaken in chapter 2 to establish whether the doctrine enjoyed the same vitality in the 20th and 21st centuries as it had since its inception. The following conclusions were reached.

It was found that legislation has comprehensively substituted the original aims of the Common Law public nuisance doctrine in English law. As a result the public nuisance doctrine has practically no further use in the 21st century. However, it has been suggested that the public nuisance doctrine might be developed to protect the environment in the absence of legislation. In South African law, therefore, in the absence of environmental and other legislation that protects public interests, the notion of public nuisance could possibly serve a legitimate purpose in protecting

certain public interests until suitable legislation is amended or promulgated, as is suggested by the examples provided in English law.

In United States law, it was found that the public nuisance doctrine was applied for purposes other than those for which it was originally designed. Firstly, government officials used public nuisance as a cause of action to effect the abatement of serious threats to the health of the general public. Secondly, public nuisance was used to claim damages in class action lawsuits. In the first type of application it appears that the courts allowed the application of public nuisance in a few cases relating to toxic waste for two reasons.[1] Firstly, toxic waste poses a serious threat to the public health and has to be dealt with without delay: cleaning a toxic waste site is a matter of urgency and requires immediate attention. Secondly, the applicants were government officials who, instead of claiming damages on behalf of private individuals, approached the court to grant an order for the abatement of the toxic waste. The government's aim was to force the owners indirectly to clean up their contaminated property. However, it is important to note that the doctrine of public nuisance was applied in the absence of legislation enacted to regulate public nuisance offences.

One could argue that on the basis of these two reasons, public nuisance could still be used legitimately as a remedy in South African law (a) if the alleged nuisance constitutes an imminent danger to the health of the general public; (b) if the applicants do not seek to claim damages but instead approach the court to force the

[1] See *United States v Hooker Chemicals & Plastics Corp* 776 F2d 410 (2d Cir 1985); *New York v Shore Realty Corporation* 759 F 2d 1032 (2d Cir 1985) and the situation in Suffolk Chemical Company.

owners of contaminated land, or those responsible for it, to clean it and (c) in the absence of legislation enacted to regulate public nuisance offences. The South African legal system has a number of environmental law statutes.[2] However, if a situation arises where environmental legislation does not provide an effective remedy or might not cover or limit dangerous environmental threats such as a toxic waste or any similar unreasonable act, it seems the public nuisance doctrine could be applied to provide an effective alternative remedy.

In a second area of the development of public nuisance, namely as an alternative remedy to claim damages in class action lawsuits, its application failed in United States law. The majority of the courts rejected applications of public nuisance in these cases. The main reason for this rejection was that the relief sought fell outside the original aims of the public nuisance doctrine. In the asbestos, tobacco, lead and pigment, and some of the environmental law cases, the applicants' sole purpose was to claim damages rather than to limit the nuisance. One could argue that the use of public nuisance in these cases was a last resort to claim damages rather than to seek an effective remedy to limit unreasonable interferences. In fact, the notion of public nuisance can only be used to abate a nuisance rather than claim compensation. Therefore, a public nuisance is only constituted if the unreasonable

[2] Section 24 of the Constitution of 1996 states that: 'Everyone has the right to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Other fundamental legislative measures governing environmental concerns are the National Environmental Management Act 107 of 1998 and the Environmental Conservation Act 73 of 1989.

interferences affect the public at large and originated in a public space or land opposed to private land or interest of the applicants.

Even if the use of public nuisance had been an effective and successful remedy in the cases discussed above, the tort aspect of the doctrine of public nuisance has not been adopted into South African jurisprudence.[3] Therefore South African courts would reject the use of public nuisance in class action law suits for the purposes of claiming damages against companies which have allegedly contributed to air pollution.

After having established the origin of public nuisance in English law and investigated its vitality in both English and US law during the 20th century, I commenced with an analysis of the adoption of the public nuisance doctrine in South Africa. The aim of the analysis was to establish the purpose and field of application of public nuisance in South African law. The following conclusions were reached.

After the analysis of public nuisance case law in South Africa it was established that all unreasonable interferences regarded as public nuisances in English law were adopted in South African law. These unreasonable interferences are noise, smoke, keeping a brothel, obstruction of public roads and disposing of waste which originated in a public space or public land, such as a street, as opposed to private land.

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[3] South African law adopted a large amount of English law specifically in the area of nuisance and neighbour law in general. However this adoption did not affect the law of delict which predominantly remained Roman Dutch law. See Du Bois F & Reid E 'Nuisance' in Zimmermann, Visser DP, Reid K *Mixed legal systems in comparative perspective* (2004) 577; Van der Merwe D 'Neighbour law' in Zimmermann R & Visser DP *Southern Cross: Civil law and common law in South Africa* (1996) 759-762 and 783-784.

Unreasonable interferences were abated both by the institution of criminal and civil proceedings by local authorities. Initially the sheriff and later the Attorney-General[4] were entrusted to institute such proceedings for the abatement of public nuisances in English law. In both English and South African law perpetrators were either criminally liable – with liability in the form of a fine or imprisonment – or civilly liable by means of an injunction, in that perpetrators were asked to stop causing an unreasonable interference that resulted to be a public nuisance. However, one can conclude that the English law remedy known as the special injury rule[5] was not adopted in South African case law. The remedy provided a victim with monetary compensation if a plaintiff could prove special or particular damage as a result of a public nuisance. The remedy was never granted in any decision, nor did a plaintiff approach the court for relief using the special injury rule as a cause of action. Compensation can only be claimed if the remedies provided in the law of delict are applied. This is an illustration that nuisance law did not influence or change the South African law of delict, which originated in Roman Dutch law.

Statutory nuisance systematically replaced the common law notion of public nuisance in South African law, as it did in English law. Because of the implementation of these statutory measures that regulate unreasonable

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[4] An 'injunction was brought in the name of the Attorney-General rather than the victim of the offence, although it was really the victim who sued.' See Spencer JR 'Public nuisance – A critical examination' (1989) 48 *Cambridge Law Review* 55-84 66.

[5] YB 27 Hen 8 fo 26 fo pl 10 (1536). This rule was adopted in an unreported decision in English law. The plaintiff had to prove special or particular damage that was different from damages suffered by the public at large in order to have a successful claim. The remedy to claim a monetary amount for damages caused great confusion as to when an action should be based on private or public nuisance in the courts of the United States. See Hodas DR 'Private action for public nuisance: Common law citizen suits for relief from environmental harm' (1989) 16 *Ecology Law Quarterly* 883-908 884.

interferences affecting the public at large, there was less need for the application of the common law remedy of public nuisance. This ultimately resulted in a decline in the use of the common law notion of public nuisance in disputes; this is seen in the small number of cases where the remedy was applied during the mid-20th century. Thirty-two years passed (1943[6] to 1975[7]) before there was a reported case in South African law where a plaintiff sought relief arguing that a public nuisance had been constituted. Even during the early 20th century only a limited number of cases were reported, with the vast majority of them analysed in chapter 2. One can conclude that the implementation of statutory nuisance employed to curb and regulate public nuisances was successful. In essence, South African law adopted the notion of public nuisance but its usefulness was reduced through the promulgation of legislation that regulated most of the interferences previously dealt with as public nuisance.

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[6] *Queensland Municipality v Wiehan* 1943 EDL 134.

[7] *Von Moltke v Areosa Costa* 1975 (1) SA 255 (C). The decision of *Von Moltke v Costa Aerosa (Pty) Ltd* 1975 (1) SA 255 (C) is one exception where the Common Law remedy of public nuisance was used in the period between 1943 and 1989. The applicant contended that eradicating vegetation (in his vicinity) for the development of a new shopping mall would constitute a public nuisance. He applied for an interdict to restrain a public nuisance and had to show special injury/reason in order to have *locus standi*. The applicant failed because he could not show that 'he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general': 258D-F. It could be argued that because the court required the applicant to prove special injury, it indirectly applied the special injury rule discussed in 2.3.1 above.

5.2.2 Recent case law

Chapter 3 analysed the application of public nuisance in three series of cases: an isolated case in 1975,[8] a selection of cases between 1989 and 2001,[9] and finally, two cases between 2009[10] and 2010.[11] I particularly analyzed the second and third series of case law to illustrate that public nuisance was applied contrary to its original aims, namely protecting the wellbeing of the general public. The following conclusions emerged.

In the *Von Moltke* case, described as the second series of cases,[12] the applicant tried to use the doctrine for private purposes, contrary to its original aims. The applicant approached the court for an interdict to prohibit the establishment of a shopping mall in his vicinity. The court denied the interdict on the basis that the applicant could only succeed if he proved 'injury, prejudice or damage or invasion of a right peculiar to himself and over and above that sustained by the members of the general public.'[13]

After the *Von Moltke* case, a third series of case law (between 1989 and 2001) brought about the revival of the public nuisance doctrine. However, the case law indicated a significant deviation from the doctrine's original aims, as it was

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[8] *Von Moltke v Costa Aroesa (Pty) Ltd* 1975 (1) SA 255 (C). Referred to as the second series of cases.

[9] See footnote 6 in chapter 4.

[10] *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others* Case no 20952/08 (24 June 2009) (WCHC). Referred to as the fourth series of cases.

[11] *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others* Case no (26841/09) WCHC (3 May 2010). Referred to as the fourth series of cases.

[12] *Von Moltke v Costa Areosa* 1975 (1) SA 255 (C).

[13] 258D-E.

altered to suit the intentions of the applicants. The case law can be divided into two groups, namely cases from the pre-constitutional[14] and from the post-constitutional era respectively.[15] In most of these cases categorised as the third series, private individuals in predominantly white residential areas formed landowners',[16] farmers',[17] ratepayers'[18] and environmental associations[19] and applied for an interdict to prevent present or future disturbances. The applicants alleged that this limitation of the right to the use and enjoyment with their land – through the actions of the occupiers in the informal settlements established in the vicinity of their properties – would constitute a public nuisance. The applicants in these cases argued that establishing or developing an informal settlement in the vicinity would jeopardise their health (in the form of smoke and noise pollution), pose a safety hazard (through increased crime) and decrease the value of their property.[20] The applicants sought to use the public nuisance doctrine as a means to prevent the establishment of the settlement or to

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[14] In *East London Western Districts farmers' association v Minister of Education and Development Aid* 1989 (2) SA 63 (A) and in *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A).

[15] In the cases of *Rademeyer and others v Western Districts Councils and others* 1998 (3) SA 1011 (SE); *Three Rivers Ratepayers Association and others v Northern Metropolitan* 2000 (4) SA 377 (W); *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC).

[16] In the *Diepsloot* case.

[17] In the *East London* case.

[18] *Three Rivers* case.

[19] *Kyalami Ridge* case. In the *Rademeyer* case the private individuals never formed a formal group, but brought a joint application for the removal of occupiers believed to be causing a nuisance.

[20] For example, in the *Diepsloot* case.

evict the occupiers of informal settlements who were (or would) only inhabit land in their vicinity.

The use of the public nuisance doctrine as a cause of action was successful in two of the five decisions, namely *East London* and *Three Rivers*. In both cases the courts suggested that the applicants' private right in land had been infringed and that, according to the principles of neighbour law, they were entitled to the reasonable use and enjoyment of land. Despite the applicants' alleging the presence of a public nuisance, the above-mentioned courts never established the existence of a public nuisance according to its original definition.

In contrast, the doctrine's use contrary to its original aims was not allowed in the *Diepsloot,*[21] *Rademeyer* and *Kyalami Ridge* cases.[22]

After highlighting the importance in each of the above discussed cases, I assumed that the judgement in the *East London* case is only significant because it was the first instance in which the public nuisance doctrine was applied for the benefit of the applicants' personal interests. Besides rejecting the court's reasoning in *East London*, both *Diepsloot*[23] and *Rademeye*r[24] adopted different approaches

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[21] *Diepsloot Residents' and Landowners Association and others v Administrator, Transvaal* and others 1993 (3) SA 49 (T).

[22] See 3.2.2.

[23] The judgement in the *Diepsloot* case was based on the following policy considerations: firstly, the squatters had to be close to their place of employment; secondly, increased urbanisation would in effect force individuals of different socio-economic backgrounds to live together; and finally, the legislation in question (the Township Act) was at the time part of significant developments to dismantle the apartheid dispensation. See 3.3.2.

[24] In the *Rademeyer* case it was decided that the squatters could not be evicted because they satisfied the definition of 'occupier' in the Extension of Security of Tenure Act (ESTA).[24] ESTA

when dealing with the application of public nuisance. In contrast, one has to criticise the decision in the *Three Rivers* case. The case was adjudicated in the context of the constitutional dispensation but did not follow, as it should have, the *Diepsloot* case for its policy considerations or the *Rademeyer* case, in which post-constitutional anti-eviction legislation was applied.

I then summarised the problems in applying the doctrine in the third series of cases in four points. Firstly, the courts failed to recognise or apply the distinction between private and public nuisance. The failure to recognise this distinction inevitably prevented the courts from adjudicating the issue according to the original definition of public nuisance, although applicants complained of such a nuisance. The courts failed to recognise the distinction between these two separate species of nuisance. Courts rather used the notions of private and public nuisance interchangeably, without investigating which requirements the alleged nuisance would satisfy. As a result, the courts based their enquiry solely on whether the affected neighbour's intrinsic right of reasonable use and enjoyment of land had been infringed before delivering a judgement. In effect, the courts' left the door open for applicants to use public nuisance as a cause of action to advance their personal

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'protects a particular class of indigent persons who has or has had permission to live on rural and semirural land, against eviction from that land'.[24] None of the courts, in the third series of cases, specifically those cases adjudicated in the post-constitutional era, considered any anti-eviction legislation, except in the *Rademeyer* case. Therefore, the courts displayed a total disregard for anti-eviction legislation. The *Rademeyer* court dismissed any allegations that public nuisance was constituted. The court further contended that a public nuisance could have been avoided if the state installed (or was given time to do so) proper water and toilet facilities and improved the safety and security in the vicinity of the applicants (if such a risk was proved). See 3.3.2.

interests. It can be said that the applicants in the third series of case law used public nuisance to satisfy a private rather than a public right in a public space.

Secondly, besides failing to recognise the distinction between the two species of nuisance, the majority of the courts aimed to resolve the matter from a private or individual point of view without considering any social factors.[25] By opting to resolve the matter from a private law point of view, the courts protected the rights of landowners who had a private right in land. On the other hand, the occupiers had no right in land and in effect had no chance against the rights of the landowners. According to Van der Walt, individual rights cannot be protected without having any regard for public interest in property. He states that there ought to be an equitable balance between the interest of the private landowner and those without any rights in terms of section 25 of the Constitution. In other words, the traditional private law approach should not be given any automatic advantage, which would inevitably be to the detriment of those without property rights, as was the case in the third series of public nuisance cases. Van der Walt contends that in the light of the Constitution, particularly section 25, 'the constitutional property concept has to be different from the traditional private-law concept.'[26]

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[25] In *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) 49 (T) McCreath J considered social factors apart from applying a strict private law approach when considering the following factors: (a) the availability of employment for occupiers in the vicinity; (b) because of increased urbanisation, people from different cultures and backgrounds would inevitably have to share the same vicinity; and (c) finally, the legislation (in this case the Township Act) was enacted to abolish all practices associated with the apartheid regime.

[26] Van der Walt AJ *The constitutional property clause* (1997) 55.

Thirdly, there is a clear indication of a decline in the use of public nuisance, after the *Queensland* case, seeing that the majority of public nuisance offences are entrenched in legislation and regulated with great success. The introduction of statutory provisions to regulate offences such as noise, smoke and violence has had an impact on the use of the common law notion of public nuisance, which explains the decline in reported case law after 1943.

Finally, and very significantly, the notion of public nuisance was used to bypass anti-eviction legislation. This is highly questionable in a post-constitutional framework, which provides for secure tenure and access to housing. Allowing the use of the public nuisance doctrine in an indirect manner (compared to its original aims) and in the light of it being regulated by legislation is a clear misuse of the doctrine.

According to Van der Walt these nuisance-based evictions (as he refers to them) should be a cause for concern on two accounts.[27] Firstly, the use of the public nuisance remedy to bypass anti-eviction legislation leaves occupiers of informal settlements homeless in a process that is reminiscent of previous discriminatory practices,[28] which should be avoided at all costs.

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[27] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 826.

[28] See http://africanhistory.about.com/library/bl/blsalaws.htm (accessed 17 February 2010). For example the Groups Areas Act 41 of 1950, which 'forced physical separation between races by creating different residential areas for different races and which led to forced removals of people living in 'wrong' areas, for example in District Six in Cape Town.' Similarly, The Prevention of Illegal Squatting Act 52 of 1951 'Gave the Minister of Native Affairs the power to remove blacks from public

The second cause for concern arises when nuisance evictions are inevitable and justified should not be applied outside the post-constitutional land reform framework. In all the third series cases applicants alleged that their private right to land in their capacity as private landowners had been infringed. As a result many of the courts considered resolving the issue by applying the principles of neighbour law. Not only did the courts fail to distinguish between the two distinct species of private and public nuisance, but this individualistic approach was applied outside the context of the constitutional provisions in some of these cases. The relevant constitutional provisions, namely sections 25(5)-(9) and 26 together with statutory provisions, dealing with land reform must be taken into consideration in adjudicating nuisance-based evictions.

Therefore, I concluded that on the basis of the finding that the application of public nuisance is problematic, one can either apply the notion of public nuisance on the condition that courts reinterpret this remedy in the light of the new constitutional dispensation, or it should not be applied at all.[29]

After analysing the decisions in the second and third series of cases, I commenced with an analysis of the fourth series of cases, namely *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others*[30] and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others*.[31]

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or privately owned land and to establish resettlement camps to house these displaced people. See http://africanhistory.about.com/library/bl/blsalaws.htm (accessed 17 February 2010).

[29] Van der Walt AJ 'Living with new neighbours: Landownership, land reform and the property clause' (2002) 19 *SALJ* 816-840 828.

[30] (20952/08) [2009] ZAWCHC 100 (24 June 2009). Referred to as *Intercape*.

[31] (26841/09) [2010] ZAWCHC 87 (3 May 2010). Referred to as *Voortrekker*.

Unfortunately, in both cases, although the facts indicate that a truly public nuisance was probably constituted, the court again failed to distinguish between private and public nuisance and as a result confused the legal principles of these two separate doctrines. However, the courts failed to establish explicitly that the unreasonable interferences constituted a public nuisance. Instead, the courts erroneously applied the principles of private, as opposed to public nuisance. Furthermore, the facts in these cases, especially the unreasonable interferences complained of, contravened legislation (LUPO) that regulates the public nuisances complained of. The courts decided the two cases with reference to both nuisance and the relevant legislation, without indicating what the relationship between the two sources are and whether the legislation replaces the common law remedy.

It can be concluded that public nuisance should only be applied in circumstances where its application is not misused to benefit particular parties. Furthermore, the notion of public nuisance can only be applied in the absence of any legislation - such as LUPO in the above mentioned cases - regulating public nuisance offences such as noise, smoke and public violence.

The indirect use in the third series of case law is unjustifiable and could be unconstitutional. This raised the question of whether the use of the public nuisance doctrine, as it was applied in the third series of case law, meets the requirements of section 25(1),[32] (2)[33] and section 26(3)[34] of the Constitution. In chapter 4, the

[32]Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[33] Section 25(2) of the Constitution provides that 'property may be expropriated only in terms of law of general application (a) for a public purpose or public interest; and (b) subject to compensation.'

application of public nuisance in all four series of cases was subject to constitutional scrutiny. The conclusion is set out below.

5.2.3 Constitutional compatibility of public nuisance

In chapter 4, a case from each series underwent constitutional scrutiny to determine whether public nuisance was applied contrary to its original aims and inconsistently with section 25(1) of the Constitution. Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.[35]The *FNB* case[36] provides the methodology to determine whether a deprivation is inconsistent with section 25(1). According to the methodology in the FNB case, a deprivation is inconsistent with section 25(1) when the law (in this case the common law doctrine of public nuisance) does not provide sufficient reason for the particular deprivation in question.

Furthermore, to decide whether there is a sufficient reason for the deprivation, 'a complexity of relations' has to be considered, including the relationship between the means employed and the ends sought to be achieved; the relationship between the purpose for the deprivation and the person whose property is affected; and the

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[34] Section 26(3) of the Constitution provides that 'no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances.' No legislation may permit arbitrary evictions. not sure where quote ends

[35] Section 25(1) of the Constitution.

[36] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation.[37]

Series two and three were grouped together for purposes of constitutional scrutiny. It was established that there is no nexus between the purpose of the law in question, namely public nuisance doctrine and the means sought, namely protecting private rights against infringement of use and enjoyment of land. In both series two and three private landowners complained of an infringement of their vested rights to the use and enjoyment of their land. In series two the court concluded that the one landowner did not prove that there had been any injury or harm to him or the broader public. In other words, the landowner failed to meet the requirements for alleging a public nuisance. Instead, seeing that he was the only one affected, it is more likely that he ought to have alleged the existence of a private nuisance and not of a public nuisance. As a result, it was established that the application of public nuisance, in series two, did not meet the requirements in section 25(1).

Similarly, in the third series of cases, groups of private landowners alleged the presence or future existence of a public nuisance with the aim of protecting their private interests in their land. Applicants alleged that occupiers who were or would have been settled in their vicinity would constitute a public nuisance. Prospective occupiers were denied access to land and, even worse, at times current occupiers were evicted.

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[37] Van der Walt AJ *Constitutional property law* (2005) 153.

The conclusion reached was that there was insufficient reason for the deprivation that resulted from the application of the public nuisance doctrine in these cases. The following reasons were given. Firstly, applicants did not meet the requirements of a public right to the extent required by the definition of public nuisance. The applicants failed to prove the infringement of a public right, namely the health and safety of the public at large. In other words, as indicated above, the effect was that the public nuisance doctrine was indirectly used by affected landowners to evict or prohibit the settling of occupiers in their vicinity because they failed to prove the existence of a public nuisance according to its definition.[38]

This argument was further supported by the fact that very little public nuisance case law between 1943 to the present time is available. This is the result of the successful regulation of public nuisance offences by way of legislation, otherwise known as statutory nuisance. Therefore, it was established that the use of common law public nuisance in this context is suspicious as there are alternative legislative means for applicants to achieve their desired result, namely, to abate unreasonable interferences.[39]

Furthermore, two arguments were proffered: (a) the nuisance could have been abated or avoided if proper water and sanitary services were installed together with electricity in order to prevent excessive smoke, and patrol units were introduced to curb increased crime; and (b) in the light of entrenched constitutional values in section 25(5)-(9) of the Constitution, which promote access to, and security of, land for this particular affected group of people, the extent of the deprivation was

[38] See 4.4.2.

[39] See 4.4.2

excessive. Moreover, section 26(3), together with the anti-eviction legislation, namely the Extension of Security of Tenure Act[40] (ESTA) and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE)[41], provide substantial and procedural requirements for the eviction to be taken into account before such a deprivation is allowed.[42] ESTA and PIE were both enacted to give effect to section 26(3) of the Constitution. Therefore, bypassing these two legislative measures to obtain an eviction order indirectly, without complying with the constitutionally sanctioned anti-eviction legislation, is inconsistent with section 26(3) of the Constitution. Strict procedural and substantive requirements are set out in section 26(3), but the applicants blatantly ignored these. Instead, the applicants' sought an easier option by using public nuisance as a primary premise to obtain an eviction, with the abatement of unreasonable interferences such as smoke, noise, endangered health and safety as the vehicle for achieving their private intentions.

As a result, the application of public nuisance in series three did not meet the requirements in section 25(1) of the Constitution. The deprivation was therefore arbitrary. When tested against the requirements of section 36(1) of the Constitution, it was found that the deprivation was not justifiable and consequently unconstitutional. Therefore, it was concluded that any application of public nuisance which is not in line with the definition of such nuisance – and more importantly, is

[40] 62 of 1997.

[41] Act 19 of 1998. Before the enactment of the anti-eviction measures of ESTA and PIE, applicants could directly rely on section 26(3) of the Constitution. However, there is no case law wherein section 26(3) was directly applied in none of the case law in which the public nuisance doctrine was applied.

[42] See 4.4.2.

used to bypass anti-eviction legislation – is unconstitutional and should not succeed in a court of law.

However, according to van der Walt, 'this does not mean that evictions based on a lack of compliance with planning laws or on public nuisance cannot or should not take place, but it does mean that such evictions have to be treated with great care and a healthy shot of scepticism and hesitance.'[43] Van der Walt contends that if a court is faced with a nuisance eviction case, it should ask certain questions before granting such an order. This framework is essential, especially in the light of nuisance-based evictions. The questions are as follows:

> 'does the eviction involve a single or group of occupiers; whether the respondents occupy state or private land, and (if it is private land) whether they own land themselves or occupy it with the landowner's consent; whether the occupation is lawful or unlawful in general (apart from planning laws); whether the nuisance is related to public safety and health or to formalities; and whether the settlement could be formalized as an alternative to evicting the occupiers.'[44]

In contrast with the cases discussed so far, the application of public nuisance in series one and four passed constitutional muster in terms of section 25. These cases illustrate the original aims of the public nuisance doctrine, namely to preserve the health and safety of the public at large. In the *R v CP Reynolds*, the defendant was found guilty of a public offence when he polluted a public river. It is clear that because the nature of the river was public, the community at large had access to it

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[43] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 827.

[44] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 827-828.

and would be detrimentally affected if the water was polluted. Therefore, the nuisance occurred in a public space as opposed to a private area accessible only to those who own the land. Similarly, in the fourth series of cases, the facts clearly indicate that the public at large were affected and that exposed litter, noise and endangered public health and safety because the nuisance occurred in a public space, namely the street. The community at large had access to the street and were as a result automatically subject to violence, humans waste, litter, noise and blockages of roads. According to Prosser, street blockages are a common example of a public nuisance.[45] However, in both the cases categorized as the fourth series, the court reached found that the noise, violence, street blockages and litter contravened legislation, namely LUPO. Therefore, it seems the notion of public nuisance can only be applied in the absence of any legislation covering public nuisance offences.

In essence, series one and four can be separated from the second and third series on the following basis: in order for a nuisance to be categorized as a public nuisance, it ought to have occurred in a public space in a way that would have infringed the rights of all who came into contact with it, as opposed to only affecting a particular individual or group of people in the enjoyment of their private property. In series two and three landowners sought to protect only their own use and enjoyment of private land in a private space opposed to their proving the nuisance had occurred in a public space affecting the community at large. Furthermore, according to Prosser,[46] a single complainant, as in the second series of cases, is insufficient to

[45] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1002.

[46] Prosser WL 'Private action for public nuisance' (1966) 52 *Virginia Law Review* 997-1027 1001.

represent the public at large. In fact, one can go as far as to say that a large group of private landowners, as was the situation in the third series of cases, does not necessarily represent the community at large. Instead the focus ought to be on the space in which the infringement occurs or would exist and on whether the health and safety of the community at large were affected.

It is important to distinguish between, on the one hand, indirect use of the law of public nuisance in the third series of cases, namely to evict and prohibit occupation of occupiers and in so doing by-pass anti-eviction legislation and on the other hand, instances where there is a case of a genuine public nuisance as established in the fourth series of cases. Therefore the application of public nuisance is still possible in instances where a nuisance occurs in a public space that would as a consequence infringe the rights to health and safety of the public at large. Furthermore, it would only be possible to apply the notion of public nuisance where it is not covered by legislation covering public nuisance offences such as smoke, noise, litter and violence which originated in a public space.

However, in both the cases of *Intercape*[47] and *Voortrekker*,[48] the alleged nuisances were covered by planning legislation, namely LUPO.[49] Therefore, it could be said that the common law remedy of public nuisance would only be applicable where it is not covered by statutory nuisance or any other legislative measure which, directly or indirectly, has the purpose to abate existing or future public nuisance offences.

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[47] See footnote 13 above.

[48] See footnote 14 above.

[49] 15 of 1985.

5.3 Recommendations

The aim of this thesis was to investigate the history, development and future of public nuisance in light of the Constitution. It was established that the notion of public nuisance originated in English law and subsequently adopted into South African law. Between its inception in South African law and 1943 the notion of public nuisance was applied in line with its original aims, namely to protect the health and safety of the general public. However, it was further established that the application of public nuisance in series two[50] and three[51] had not been applied according to its original definition and as a result caused various problems. In fact, it was found that the indirect application of public nuisance in these series of cases is unconstitutional in terms of section 25(1) of the Constitution.

On the other hand, the application of public nuisance in series one and four passed constitutional muster in terms of section 25. These cases illustrate the original aims of the public nuisance doctrine, namely to preserve the health and safety of the public at large. Furthermore, the fourth series if cases illustrate that public nuisance might still serve a legitimate purpose in South African law. However, both cases in the fourth series were decided in terms of planning legislation and not the notion of public nuisance.

The question left to be answered is: what is the future of public nuisance in South African law? In the light of this question, I put forward three recommendations that are aimed at addressing this issue.

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[50] See footnote 10 above.

[51] See footnote 6 in chapter 4.

Firstly, when faced with complaints of an alleged public nuisance, courts should: (a), distinguish between private and public nuisance in order to avoid using these two distinct species of nuisance interchangeably; (b) establish whether the alleged nuisances are in line with the definition of a public nuisance, namely to protect the health and wellbeing of the community at large; and (c) establish whether the nuisance occurred only or mostly on private land, as opposed to public land or public space.

Secondly, the application of public nuisance should not be used as an indirect means to evict occupiers. The notion of public nuisance applied in this way is unconstitutional.[52] However, according to van der Walt, 'this does not mean that evictions based on a lack of compliance with planning laws or on public nuisance cannot or should not take place, but it does mean that such evictions have to be treated with great care and a healthy shot of scepticism and hesitance.'[53] Furthermore, Van der Walt formulated a framework which courts should adopt before granting an eviction order.[54]

Finally, as indicated in the fourth series, the notion of public nuisance can still serve a legitimate purpose in South African law. But, it should be applied only in the absence of legislation covering nuisance offences as established in the fourth series of cases together with English and United States law in 2.4 above.[55]

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[52] See 4.4.2.

[53] Van der Walt AJ 'Living with new neighbours - Landownership, land reform and the property clause' (2002) 112 *SALJ* 816-840 827.

[54] See 5.2.3 above.

[55] See 3.3.4 and 5.2.2 above.

In essence, the notion of public nuisance has a future in South African law if it is applied in the absence of statutory nuisance or any other legislation covering public nuisance offences and where it is not used as an alternative mechanism to evict occupiers. Furthermore, the courts should in future, when dealing with an alleged public nuisance, always distinguish between a private and public nuisance to avoid using the two distinct species of nuisance interchangeably.

Abbreviations

SAJHR	*South African Journal on Human Rights*
SALJ	*South African Law Journal*
SAPL	*South African Public Law*
Stell LR	*Stellenbosch Law Review*
THRHR	*Tydskrif vir die Hedendaagse Romeins-Hollandse Reg*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*

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