THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Case No: 6661/16

KING COUNTRY INVESTMENT (PTY) LTD	**APPLICANT**
and	
CAPE TOWN ZIPLINES (PTY) LTD	**1st RESPONDENT**
DOUBLE FLASH INVESTMENTS (PTY) LTD	**2nd RESPONDENT**
SOUTHERN TIP TRADE (PTY) LTD	**3rd RESPONDENT**
CONSTANTIA RIDGE ESTATES (PTY) LTD	**4th RESPONDENT**
SILVERMIST MOUNTAIN LODGE BODY CORPORATE	**5th RESPONDENT**
CITY OF CAPE TOWN	**6th RESPONDENT**

Coram: ROGERS J

Heard: **20 SEPTEMBER 2016**

Delivered: 23 SEPTEMBER 2016

JUDGMENT

ROGERS J:

Introduction

[1] The applicant seeks a final interdict preventing the first to fourth respondents from conducting or permitting to be conducted a zipline business which is said to violate the relevant properties' zoning and to constitute an unlawful noise nuisance and unlawful invasion of privacy. The fact that the business currently violates the relevant properties' zoning is not in dispute. The main issue is whether the court in its discretion should refuse or suspend the operation of an interdict.

[2] The applicant was represented by Mr Gess and the second to fourth respondents by Mr Rosenberg. For convenience I shall refer to the parties represented by Mr Rosenberg as the respondents.

[3] The applicant is the owner of a unit in a sectional title scheme called Silvermist Mountain Lodge situated just below Constantia Nek on the Hout Bay side. The applicant's unit is called Mbali Lodge. The applicant's sole member is Ms Lorna King. She and her family reside in the United Kingdom though she is originally from South Africa. They bought the unit as a tranquil holiday destination which they could use for a few weeks each year. The applicant also lets out Mbali Lodge to paying guests.

[4] The sectional title scheme is located on Remainder Erf 1788 (for convenience I shall refer to it as Erf 1788). It is 18 ha in extent. On plans relating to the proposed development of Erf 1788 the land is divided into four sectors marked A, B, C and D. Sectors A, B and C are earmarked for residential units. The applicant's unit is in

sector C. Sector D is earmarked for mixed-use facilities which currently include wine-tasting, conference and function venues, a manor house offering accommodation suites and two restaurants. A site development plan ('SDP') for sector D envisages other facilities which have not yet been built, including a wellness centre/spa, a bistro/breakfast facility, camping facilities and a seasonal tented camp.

[5] Except for the individually owned units (including the units in sector D), the land comprising Erf 1788 is common property of which the registered owner is the fifth respondent, the scheme's body corporate. The fourth respondent ('CRE') was the scheme developer. Its rights included a real right of extension as contemplated in s 25 of the Sectional Titles Act 95 of 1986. This right of extension relates to sector D. During 1999 CRE ceded the right of extension to the third respondent ('STT'). CRE still owns units in sector D.

[6] Immediately above Erf 1788 is Erf 1783 which is about 25,5 ha in extent. The second respondent ('DFI') is the registered owner of Erf 1783.

[7] Erf 1788 and Erf 1783 fall within the area of the sixth respondent ('the City').

[8] The first respondent ('CTZ') is the company which conducts the zipline business. It has not given notice of opposition though its director has furnished the respondents with a confirmatory affidavit. A zipline is an elevated cable along which a suspended harness can run. At the one end is a launching platform, at the other end a landing platform. CTZ's operation, which started in November 2014, comprises seven ziplines. Visitors travel successively on all seven ziplines. The experience lasts one and a half to two hours. The business is conducted seven days a week, with the first group starting at 09h00 and the last group ending at about 18h00.

[9] As currently configured, ziplines 2,3 and 6 are located entirely on Erf 1783. Ziplines 1,4,5 and 7 each start on Erf 1783 and end in sector D of Erf 1788. Zipline 7 is the one closest to sector C, and in that sector the applicant's unit is closest to the zipline – about 231 m away.

The relevant zoning

[10] The relevant parts of the two properties are zoned Agricultural. The applicant alleges, and the respondents accept, that the zipline business does not fall within the primary uses permitted by this zoning.

[11] One of the consent uses for Agricultural zoning is 'Tourist Facilities', defined in the Development Management Scheme ('DMS'), constituting Schedule 3 to the City's Municipal Planning By-Law of 2015, as meaning

'amenities for tourists or visitors such as lecture rooms, restaurants, gift shops, rest rooms and recreational facilities, but does not include a hotel or tourist accommodation'.

It is common cause that the zipline operation falls within this definition. In order to legitimise the operation the relevant property owners will need to obtain permission from the City following a process in which interested parties are permitted to lodge objections.

Pre-litigation history

[12] The applicant bought its unit in April 2009 and took transfer in June 2011. As noted, the zipline operation began in November 2014.

[13] On 20 January 2015 the applicant's erstwhile attorneys wrote a letter to the entity which was then understood to be conducting the enterprise, complaining about noise and invasion of privacy and requiring an undertaking that the three ziplines closest to the applicant's property would be removed. The letter appears to have been prompted by complaints from the person to whom the applicant had let Mbali Lodge. This letter, and a follow-up letter by the applicant's current attorneys, Springer-Nel, dated 26 January 2015, elicited no response.

[14] During February 2015 the applicant obtained information from the City regarding the zoning of Erf 1788.

[15] In the latter part of February 2015 an acoustic engineer engaged by the applicant, Mr McKenzie Hoy, performed acoustic tests. He issued a report dated 4

March 2015 in which he concluded that the zipline operation contravened the Western Cape Noise Control Regulations ('the Noise Regulations'). At that time the closest zipline was about 100 - 150 m from the applicant's property.

[16] On 13 March 2015 Springer-Nel wrote a letter to STT repeating the complaint about noise and attaching Mr Hoy's report. They recorded that according to information supplied by the City the City had conducted its own tests and issued a noise compliance notice. Springer-Nel also stated that the zipline operation was contrary to the zoning regulations. STT was required to cease all zipline activity by 18 March 2015.

[17] On 16 March 2015 the respondents' attorneys ('STBB') responded, recording that the second, third and fourth respondents all had an interest in the matter. They said that the respondents were in the process of obtaining their own acoustic engineering report. They tendered an undertaking to remove and relocate any ziplines found by the respondents' expert to exceed permissible noise levels. STBB said that their clients denied that the zipline operation was contrary to the zoning regulations.

[18] On 25 March 2015 STBB wrote to Springer-Nel stating that the respondents' acoustic engineer had found that ziplines 6 and 7 'marginally exceeds' the noise levels prescribed in the Noise Regulations. These were the closest lines to the applicant's property. The respondents undertook to stop using those lines by 30 March 2015 and to have them removed by not later than 10 April 2015.

[19] Springer-Nel requested a copy of the respondents' acoustic report. On 2 April 2015 STBB informed Springer-Nel that they did not have their clients' authority to release the report.

[20] By early April 2015 only five ziplines were in operation. At that time the line designated line 5 was the closest operational line to the applicant's property. The respondents have subsequently reconfigured the zipline course. There are now seven lines again, but the old zipline 5, now re-numbered 7, is still the line closest to the applicant's property.

[21] On 7 April 2015 Mr Hoy conducted further acoustic tests. He found that the operation still contravened the Noise Regulations.

[22] The applicant allowed the matter to drift for some months. There is not much explanation for this though the zipline business is less busy during the winter months and the applicant's property may not have been much in use.

[23] Ms King says that in late February 2016 she received a complaint from a visitor who objected to the noise and who said that he would never have booked the house had he known about the ziplines. Ms King alleges that other foreign guests have made complaints and that she herself has experienced the noise and breach of privacy.

The litigation history

[24] The applicant launched the present proceedings on 21 April 2016. The respondents filed their notice of opposition on 23 May 2016. The answering papers were filed on 12 July 2016.

[25] In the answering papers the respondents said that in June 2016 STT and DFI had made application to the City for the necessary consent use ('the planning application'). The answering papers included a short affidavit from a town planner, Mr Roos, expressing the opinion that the planning application enjoyed good prospects of being favourably considered by the City and that one might expect it to be determined within about six months.

[26] The respondents attached the planning application to their papers. It appears therefrom that the decisions requested from the City comprise in respect of each of Erf 1788 and Erf 1783: (i) permanent departures to permit zipline apparatus (platforms) closer than 30 m from the common boundary lines (see item 109(b) of the DMS); (ii) Tourist Facility consent use. The respondents accept in their opposing papers that these approvals are required to 'fully regularise' the zipline operation.

[27] The respondents included in their answering papers an affidavit from their acoustic engineer, Mr Wade, attached to which was his report of 27 March 2015 (the one which the respondents had hitherto declined to make available) and a further report dated 6 July 2016. In the latter report Mr Wade commented on Mr Hoy's second report and concluded that the reconfigured zipline operation did not violate the Noise Regulations.

[28] The applicant filed its replying papers on 5 September 2016. The replying papers included evidence that on 5 August 2016 City officials had conducted an inspection and tests, concluding that the noise from the zipline operation violated the Noise Regulations. The City informed Springer-Nel that the City was preparing a noise summons. The applicant also furnished an affidavit from Mr Hoy commenting on and criticising Mr Wade's reports. There were also affidavits from several other owners supporting Ms King's complaints.

[29] In regard to the planning application, the replying papers alleged that according to a City official, Ms Walker, the planning application was defective and correspondence in that regard had been addressed to the respondents. Ms King said that the planning application had not yet even reached the advertisement stage.

[30] Shortly before the hearing the respondents filed several supplementary affidavits. STBB had written to the City on 9 September 2016 disputing the latter's noise conclusions. On 14 September 2016 the relevant official, Ms Petersen, replied to say that the City had re-evaluated the issue and concluded that there was no violation of the Noise Regulations and that the noise summons would be withdrawn. In regard to the planning application, there was a further affidavit from Mr Roos in which he acknowledged that his original six-month estimate would not be achieved because the City had delayed until 15 August 2016 before calling for additional information (the By-Law specifies 14 days in which this should be done).

[31] Mr Roos did not attach the City's letter of 15 August 2016. At the hearing I received without objection an affidavit from the applicant's attorney attaching a copy of the letter which the applicant had obtained pursuant to the provisions of rule 35(12).

[32] These were the circumstances in which the matter served before me on 20 September 2016.

The issues

[33] It is well established that a person in the applicant's position has locus standi to apply for an interdict to prohibit conduct in violation of applicable zoning regulations. Mr Rosenberg did not argue the contrary. It is also common cause that CTZ's zipline operation is occurring in contravention of the current zoning and that the respondents are permitting this to occur.

[34] In the answering papers the respondents' case, on the zoning issue, was in essence that the court should exercise its discretion to refuse an interdict or should exercise its discretion to suspend the operation of any interdict issued.

[35] Mr Rosenberg advanced a contention not pertinently made in the opposing papers, namely that the complaint procedure established by s 125 of the By-Law and the administrative and civil procedures available to the City pursuant to a complaint constituted a satisfactory alternative remedy. I did not understand him to go so far as to say submit that s 125 by necessary implication excluded a private right of recourse to the courts or that the failure to exhaust that procedure was an absolute bar to the present proceedings. His argument was that the applicant's failure to avail itself of this procedure was a matter which should weigh with me in deciding whether to exercise my discretion to refuse the interdict or to suspend its operation.

[36] In regard to the alleged noise and privacy violations, I asked Mr Gess whether it would be necessary for me to grant interdicts based on noise and privacy if I were in his favour that an interdict on the zoning issue should be granted without suspension. He agreed that this would not be necessary. I think the concession is fairly made. The applicant and other affected parties will be entitled to object to the planning application. Noise and privacy issues will feature in any objections lodged. The City will need to assess the validity of these objections. The planning application might be refused, in which case cadit quaestio. The planning application

might be granted on conditions which satisfactorily address the objections. If the planning application were granted unconditionally, a court considering interdicts claimed on the grounds of noise and privacy would need to assess whether affected owners are required to tolerate the intrusions given that they are caused by an activity permitted by planning approvals.

[37] It is thus unnecessary to decide whether and to what extent the applicant has established a violation of the Noise Regulations and precisely what the applicant would need to prove in order to make such a violation actionable at its instance (cf *Laskey & Another v Showzone CC & Others* 2007 (2) SA 48 (C)).

The remaining relevance of the noise complaint

[38] However the question of noise has some bearing on the discretion which the respondents ask me to exercise by refusing or suspending an interdict. One of their contentions is that there is no or minimal prejudice to the applicant.

[39] The zipline operation produces noise in two forms: the mechanical operation of the supplies (a whining/whistling sound) and the shouting and shrieking of the users.

[40] The noise from the users no doubt varies considerably. The zipline experience is by its nature meant to be thrilling and exhilarating. Expressions used in advertising material include ‘not for the fainthearted’, ‘blood pumping’, an experience aimed at getting ‘the vocal cords loose’. It is described as being great for year-end functions, bachelor parties and other celebrations. It is entirely natural that visitors will whoop with delight, shriek in actual or feigned terror and shout to their friends.

[41] There is a dispute as to whether the zipline operation constitutes a ‘disturbing noise’ as defined in the Noise Regulations. The expression ‘disturbing noise’ has a technical definition which excludes the unamplified human voice. One is thus concerned only with the mechanical noise. The part of the definition that Mr Hoy regards as applicable is para (c), which states that a noise is a ‘disturbing noise’ if

the ‘residual noise level’ is lower than the applicable ‘rating level’ and the noise during the complained of activity exceeds the residual noise level by 3 dBA. Mr Wade, by contrast, emphasises reg 10(1)(b) which provides that when a person lodges a noise complaint the designated official must ‘apply the rating level except where the residual noise level differs by more than 10 dBA from the rating level’. On the face of it there is a conflict between para (c) of the definition and para 10(1)(b).

[42] It is common cause that the applicable day-time rating level is 50 dBA. There is a dispute as to the ‘residual noise level’ and the actual noise level when zipline 7 (as currently configured) is in operation. This depends on measurements taken in a particular way. Mr Hoy measured the residual noise at 40 dBA and 37 dBA for purposes of his first and second reports respectively. The City’s measurement was 40,6 dBA. Mr Wade’s measurement was 47 dBA. As to the actual noise level, Mr Hoy’s measurements ranged from 45,7 – 47,8 dBA. The City measured 48,3 dBA. Mr Wade measured 47 dBA. If Mr Hoy and the City’s measurements are right, zipline 7 would a ‘disturbing noise’ in terms of para (c) of the definition because the residual noise level is lower than the rating level and the noise when the zipline is in operation exceeds the residual noise level by more than 3 dBA. However if reg 10(1)(b) is the touchstone, Mr Hoy’s first residual noise measurement and the City’s residual noise measurement do not exceed the rating level by more than 10 dBA and the actual noise when the zipline is in operation does not exceed the rating level. And if Mr Wade’s readings are correct, the actual noise level when zipline 7 is in operation does not really differ from the residual noise level, which is consistent with his assertion that it is ‘barely audible’.

[43] I do not intend to determine the proper interpretation of the Noise Regulations and whether there is a ‘noise disturbance’ as defined. However I do not accept Mr Rosenberg’s submission that on the *Plascon-Evans* rule I am bound to find that the operation of zipline 7 is ‘barely audible’. All that Mr Wade can say is that on the day he did his test (he only visited the site once) the residual noise level was 47 dBA and that the noise created by the current zipline 7 (the old zipline 5) did not increase the noise level materially, the sound being ‘barely audible’. This does not mean that Mr Hoy’s residual noise levels were not accurately measured on the several occasions that he attended at the site. It appears from Mr Wade’s own reports that

wind and other circumstance may affect residual noise levels. In his first report Mr Wade said that there was noticeable wind noise during his survey. There is no reason to doubt that on days with less wind the residual noise could be at the significantly lower levels measured by Mr Hoy and the City.

[44] Similar observations may be made about the actual noise level of the zipline operation. When Mr Wade measured the noise there were only two persons using the ziplines, both employees of CTZ, one male, one female. Both employees completed a single line before proceeding to the next line. Mr Hoy, in reply to Mr Wade's affidavit and reports, says that when he did his tests the ziplines were running at full capacity. There would be eight zipliners at any one time, all the lines being in simultaneous operation. This amplifies noise levels. The weight of the user also affects noise levels. These facts are not in dispute.

[45] I am thus satisfied that on the evidence there are occasions when the residual noise is materially lower than Mr Wade's measurement (I use residual noise level in a non-technical sense). On those occasions the noise from the operation of the ziplines, at least when zipline 7 is in use, would be distinctly audible. In his second report Mr Wade said that 10 dBA was a significant difference in residual noise levels – subjectively a 10 dBA increase would sound 'twice as loud'. It stands to reason that on those occasions where the residual noise level is in the vicinity of 40 dBA (and sometimes even less), actual noise levels of 45,2 – 47,8 would be distinctly audible.

[46] Quite apart from the mechanical noise, there is the added intrusion of shouting and shrieking by users.

[47] I may add that it is hardly plausible that the applicant would have incurred the expense of bringing these proceedings if the noise was generally 'barely audible'. It has not been suggested that Ms King has any motive apart from the annoyance caused by the zipline operation.

[48] Ms King is not alone in saying that the zipline operation creates audible and annoying noise. In the answering affidavit the respondents' deponent said that Ms

King had been rigid and uncompromising, and that the City and all other parties potentially affected appear to have been satisfied with the compromise of removing two of the ziplines. The respondents included affidavits from certain residents who said that they can barely hear the sound from the zipline operation. One of these persons was a Mr Otto who rented Mbali Lodge itself.

[49] In reply the applicant has furnished affidavits from various owners who say that the noise from the ziplines and the shrieks from the users are clearly audible and that they will be lodging objections to the planning application. Ms King and these owners also say that the residents who have filed affidavits for the respondents are not owners but persons who lease units from CRE.

[50] Mr Rosenberg submitted that the affidavits from other owners should be struck out as constituting new matter in reply. I disagree. Since the respondents chose to describe Ms King as a lone voice, I think the applicant was entitled to refute this by way of affidavits from other owners. In any event, the planning application was only submitted after the present proceedings were instituted and thus could only be dealt with in reply. Since the planning application was relied on by the respondents as a circumstance in favour of refusing or suspending the operation of an interdict, the applicant was entitled to provide evidence that it would not be the only person objecting to the application and that approval could not be safely assumed. If other owners had filed affidavits simply saying that they would be objecting to the planning application, Mr Rosenberg would no doubt have argued that such statements carried little weight because the owners had not explained why they would be objecting. In my view the applicant was entitled to provide evidence that other owners were going to object on the basis that they find the noise of the zipline operation disturbing.

[51] The fact that Ms King and other owners find the noise annoying does not mean that it is a ‘disturbing noise’ as defined or even that it is a ‘noise nuisance’ within the meaning of the Noise Regulations (the latter term is defined as meaning a sound which impairs or may impair the convenience or peace of a reasonable person – that could include the unamplified human voice). Conceivably the City may find that Ms King and the other owners are unduly sensitive and are demanding too

much peace and tranquillity. But that the zipline operation is often distinctly audible and annoying to some people, even if not to others, seems to me to be plain.

[52] As to invasion of privacy, Ms King says that zipliners using line 7 can see into Mbali Lodge's pool area. Zipliners sometimes wave at people in the pool area. The respondents' deponent says that a zipliner would need to 'crane over his or her left shoulder or pick it out in the distance'. Without a site inspection I am not able to form any clear view on this question and I thus do not attach weight to this particular complaint insofar as it bears on the exercise of my discretion.

Requirements for an interdict

[53] It is uncontentious that the first two requirements for a final interdict, namely a clear right and injury actually committed or reasonably apprehended, are satisfied in the present case. The applicant, as the owner of a unit on Erf 1788, has the right to insist on compliance with the zoning regulations applicable to Erf 1788 and Erf 1783. Injury exists in the form of the admitted continuing non-compliance with the zoning regulations.

[54] As to whether there is another adequate remedy (cf *LAWSA* 2nd Ed Vol 11 para 399), I do not think that ss 125 - 132 of the By-Law qualify as such. Planning legislation usually gives municipalities the right to take action against infringing owners, to issue desist notices and the like. Members of the public have always been free to bring alleged infringements to the attention of municipalities. I do not think that this has ever been regarded as constituting an adequate alternative remedy. The powers that a municipality has once an infringement has come to its attention are remedies available to the municipality, not members of the public. One may take judicial notice of the fact that municipalities' resources are stretched to the limit by the many demands on their time and resources. Without making any comment on the current administration of the City, I do not think it can be said that municipalities have a consistent record of prompt and strong action against infringers.

[55] If a member of the public brings an alleged infringement to the municipality's attention and the municipality declines to issue a desist notice, the 'remedy' would manifestly not be one resulting in similar protection to an interdict. If the municipality issued a desist notice with which the infringer complied, the result would be practically the same, from the infringer's perspective, as an interdict. The infringer in such circumstances would not be worse off because the applicant turned to the courts rather than the municipality, except perhaps in regard to costs.

[56] In the present case the City has been aware of complaints regarding the zipline operation since at least March 2015. The present application was served on it during April 2016. The planning application, from which the current unlawfulness of the operation appears, was lodged with the City in early June 2016. The City has not as a fact taken action against the respondents in terms of the By-Law and has not voiced any objection to the applicant's having sought relief from the court.

Discretion

[57] I need not decide whether the court has a discretionary power to refuse to grant an interdict where the usual requirements have been established (as to which see *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T)). If a case for suspension has not been made out, this would apply a fortiori to outright refusal.

[58] As to whether the court has a discretionary power to suspend the operation of an interdict, particularly where the infringement constitutes a criminal offence (which would be the case here in terms of s 133(1)(a) of the By-Law), differing opinions have been expressed. I adhere to the views I expressed in *Intercape Ferreira Mainliner (Pty) Ltd & Others v Minister of Home Affairs & Others* 2010 (5) SA 367 (WCC) para 184 and *Booth & Others NNO v Minister of Local Government, Environmental Affairs and Development Planning & Another* 2013 (4) SA 509 (WCC) para 65, namely that such a discretion exists but that a court would ordinarily be reluctant to allow the perpetuation of unlawful behaviour (see also *Laskey* supra paras 40-46 and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs & Others* 2010 (8) BCLR 785 (WCC) paras 43-59 and 78-81). In *United*

Technical Equipment Harms J said that if such a discretion existed it was for the infringer to prove facts justifying the suspension (347H-I). I agree.

[59] The main factors invoked by the respondents are the following:

- The violation of the zoning regulations was unwitting.
- Expenditure has been incurred in establishing the zipline operation and needs to recouped from the ongoing business operation.
- CTZ has eight permanent employees and employs further temporary staff during busy periods. The employees are mainly from informal settlements in Hout Bay.
- Sector D has always been earmarked for mixed-use facilities. The zipline operation is a low-impact tourist/adventure activity in keeping with the area.
- The respondents reconfigured the zipline operation in March/April 2015 to meet the applicant's legitimate noise complaints. By persisting with her complaints Ms King, unlike other potentially affected parties, has been rigid and uncompromising.
- No violation of the Noise Regulations or common law nuisance has been established. Even if there were some annoyance, Ms King and her family use the property relatively infrequently and for short periods.
- A regularising planning application had been filed and enjoys good prospects of success.

[60] As to the contention that the zoning violation has come about unwittingly, the respondents were alerted to the problem in March 2015. They have continued with the unlawful operation since then, only lodging the necessary planning application in June 2016 in the face of legal proceedings.

[61] STT and CRE appear to be property developers with valuable holdings and rights in respect of Erf 1788. I was informed from the bar that DFI, which owns Erf 1783, is an associated company. The preparatory work for the zipline operation took about four months in the latter part of 2014. The zipline operation is an unusual one.

There is nothing similar in the Cape Peninsular. It was intended to attract many visitors. I think the respondents could reasonably have been expected to investigate whether the infrastructure and activity were lawfully permitted by the current zoning. The respondents' deponent says that it did not initially occur to them that any additional planning approvals were required. If that is true, there appears at very least to have been a negligent failure to ascertain the correct position.

[62] The respondents say that CTZ incurred substantial expense in establishing the zipline operation. CTZ had to obtain development finance which it is servicing and repaying from the zipline operation. I observe that although CTZ's director, Mr Lerm, has made a confirmatory affidavit, CTZ is not opposing the application. The prejudice mentioned by the respondents is not theirs but CTZ's. In any event, the respondents have provided no information whatsoever as to the extent of the expenditure or the identity of the lender, the terms of the loan and the amount currently outstanding. They do not say how much of the expenditure has been recouped over the last 22 months. They do not allege that CTZ would fold if the zipline operation were interdicted until the planning application was finally determined, something which they predict will not take too long.

[63] It will obviously be unfortunate if the eight permanent employees lose their jobs. This is a circumstance which will often be present when property is unlawfully used for commercial purposes. If the respondents are right that the planning application will be determined within the next few months, the period of unemployment will be relatively short. CTZ might even decide to retain the employees rather than going through a retrenchment process only to re-employ them in the near future.

[64] In regard to the actual and intended character of sector D, I accept that purchasers such as the applicant acknowledged in their deeds of sale and by way of the conduct rules of the body corporate that sector D was a mixed-use area offering conference facilities, restaurants, entertainment facilities and other facilities that were not features of a purely residential nature. The right of extension which purchasers acknowledged was described with reference to an annexure to the deeds of sale. The annexure is missing from the applicant's deed of sale but it is

probably the s 25 plan ("LK19" to the founding affidavit) or the SDP (the current iteration of which forms part of the planning application). Nothing in the nature of the zipline operation is mentioned in these plans or in the conduct rules. The zipline operation has a unique character. The respondents do not say that a zipline operation was actually envisaged when the s 25 plan or SDP were prepared or when the applicant bought its unit.

[65] In regard to the allegation that Ms King has been rigid and uncompromising, there is evidence that her views are shared by several other owners. I have discussed the question of noise without reaching a definite opinion on whether there is any violation of the Noise Regulations. All the same, I am satisfied that the noise complaints are real for those who are complaining, even if other residents are more tolerant and relaxed.

[66] It is true that Ms King and her family generally spend only about three weeks per year at Mbali Lodge. However they bought the property as a holiday retreat for themselves and to rent out to guests. A holiday retreat ceases to be a pleasurable experience if it is marred by annoying noise. This would be so not only for Ms King's family but for paying guests who, like her, are seeking tranquillity and are sensitive to noise.

[67] As to the planning application, the respondents should have sought the necessary approvals much earlier than they did. Mr Roos initially predicted that the planning application would be disposed of within six months. By the time he filed his supplementary affidavit there had already been a slippage of about two months in the timetable. The respondents have not yet replied to the City's letter of 15 August 2016. If they were to do so within the next few days and the City were satisfied with the reply, the next step would be for the City to advertise the application. If there is no further deviation from Mr Roos' timeline, finalisation would take at least six months from the current date.

[68] There is evidence that the planning application will be opposed by a number of owners. Mr Roos' timetable makes allowance for the assessment of objections.

Whether the City and Tribunal would adhere to the prescribed periods in the case of a hotly contested application cannot be stated with confidence.

[69] Apart from the merits of owners' objections, the City's letter of 15 August 2016 foreshadows certain matters which may delay the planning application:

- The City has queried STT's right to make the application in respect of Erf 1788. The planning application must be made by the 'owner' as defined in the By-Law. For present purposes that would be the registered or beneficial owner of the property. The body corporate is the registered owner of the relevant part of Erf 1788. If the body corporate were required to make the application, it is far from clear that it would do so. Mr Rosenberg argued, with reference to several provisions in the deed of sale, that purchasers had granted various authorities in favour of the party holding the right of extension (currently STT) and that in practice the body corporate bears no expenditure and has no rights in relation to sector D. Mr Gess submitted that STT could not be regarded as the owner of the common property in sector D. I do not wish to prejudge the question save to say that the answer does not seem to be straightforward.
- The City has stated that a letter is required from the Department of Environmental Affairs and Development Planning stating that no environmental authorisation is required. The environmental consultant's letter supplied by the respondents is regarded by the City as insufficient. I should add that the consultant's letter[1] is not unequivocal in stating that environmental approval is not needed though he makes the case for that conclusion.
- The City requires comment from the Department of Transport and Public Works.

[70] It thus seems to me that the finalisation of the planning application may well take longer than six months, excluding any appeals or reviews which may follow.

[1] Record 574-576.

[71] Since the relevant bodies within the City must still assess the merits of the planning application, it would be inappropriate for me to express any firm views thereon. This is not, however, a case like *CD of Birnam (Suburban) (Pty) Ltd & Others v Falcon Investments Ltd* 1973 (3) SA 838 (W) where the history of the matter indicated that the planning application enjoyed a strong probability of success. In *Huisamen & Others v Port Elizabeth Municipality* 1998 (1) SA 477 (E) Leach J, writing for a full bench, said that the view expressed by the appellants to the effect that their planning application had reasonable prospects of success was 'a far cry from the almost inevitable success which was anticipated by Margo J' in *CD Birnam* 9485I-J). In *United Technical Equipment* the trial judge was willing to assume that the appellant's prospect of success in the planning application was evenly balanced. This circumstance, in conjunction with others, was found insufficient to justify a suspension of the interdict.

[72] In cases such as *Voortrekker Road*, *Intercape Ferreira* and *Booth*, where modest suspensions were granted, the overriding considerations were the interests of third parties (refugees in the first two cases, clients of the law firm in the third case). A case akin to *Booth* is *Buffalo City Metropolitan Council v Jikwana* [2014] ZAECELLC 8 where a one-month suspension was allowed. My research of the cases indicates that generally the courts are unsympathetic to infringing owners.

[73] Mr Rosenberg's submission that the respondents' prejudice significantly outweighs that of the applicant effectively reduces the test for a final interdict to a balance of convenience, which is contrary to authority. And in cases such as the present there is more at stake than the prejudice of the warring parties. An interdict upholds the principle of legality. To refuse an interdict or materially suspend its operation tends to dilute the rule of law (see *Lester v Ndlambe Municipality* 2015 (6) SA 383 (SCA) paras 23-24; see also *Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 683 (T); *United Technical Equipment* at 348I-J).

[74] Towards the end of his argument Mr Rosenberg said that the respondents were willing to tender an undertaking to cease the zipline operation for all periods during which Ms King was in occupation. I do not think that I should be swayed by this belated offer. The precise terms of the undertaking are unclear. Would Ms King

personally need to be in occupation or would occupation by her family suffice? How much notice would the applicant need to give the respondents of intended occupation, bearing in mind that customers of the zipline business can make advance bookings? Is the tender authorised by CTZ? What Mr Rosenberg did make clear is that the tender did not apply to the applicant's paying guests. That is a significant part of the applicant's dissatisfaction with the zipline operation.

Conclusion

[75] I have thus concluded that the interdict should not be suspended. The furthest I am prepared to go, though this was not raised in argument, is to defer the coming into force of the interdict for a few days so that groups who have already booked trips and whom the respondents may not be able to notify timeously are not disappointed by arriving at Silvermist only to find that the operation has been closed.

[76] Both sides delivered striking-out of applications at the commencement of the hearing. Para (f) of the respondents' striking-out application related to the affidavits of the owners filed by the applicant in reply. I have explained why I regard those affidavits as permissible.

[77] Para (f) also seeks to have struck out the affidavit by the applicant's attorney dated 2 September 2016 as constituting new matter in reply. One of the exhibits attached to the attorney's affidavit is a memory stick containing six videos taken by Ms King on her mobile phone. I agree that this material should have been contained in the founding papers. Mr Rosenberg submitted that the respondents have not had an opportunity to investigate the reliability of the clips, particularly the audio track. Also attached to the attorney's affidavit are emails from three owners associating themselves with Ms King's complaints. Although the respondents did not specifically attack this material as being hearsay, I think it should be struck out on that basis.

[78] Paras (a), (b) and (e) are directed at allegations and annexures in reply concerning the potential danger which the ziplines pose to helicopters engaged in firefighting, on the basis that such allegations constitute new matter and are partly of

a hearsay nature. These criticisms are justified and the material should be struck out.

[79] Paras (c) and (d) attack, as being hearsay, certain allegations made by the applicant's land surveyor, Mr Abrahamse, on matters pertaining to the planning application and the City's view that it is defective. The allegations are said to be of a hearsay nature. While that is true, I do not think that there is any prejudice to the respondents, particularly since the City's letter of 15 August 2016 has now been placed before me.

[80] The applicant seeks to strike out two documents purporting to express the views of two residents on the basis that the statements are not under oath. The one document, while purporting to be an affidavit signed by the resident, has not been completed or signed by a commissioner of oaths. The other document is an unsigned email. The criticisms are technically correct and the documents should be struck out.

[81] For the sake of completeness I should add that the conclusions I have reached in this judgment would not be altered if I were to have allowed any of the struck out material.

[82] The striking out applications did not occupy much time in argument and both sides have succeeded in having some matter excised. I thus do not intend to make any separate order in regard to the costs of the striking-out of applications.

[83] Mr Gess submitted that if I granted the interdict I should allow the qualifying costs of the land surveyor, Mr Abrahamse, and of Mr Hoy. Mr Abrahamse's affidavit was somewhat argumentative. I do not think it contained expert opinions which were of assistance in determining the application. Mr Hoy's qualifying expenses should be allowed. Although I have not determined whether there has been a violation of the Noise Regulations, Mr Hoy's evidence has had some bearing on the discretion which the respondents asked me to exercise in their favour. The qualifying expenses should not, however, include the costs associated with Mr Hoy's first report dated 27 March 2015. CTZ and the respondents reconfigured the ziplines

pursuant to that report. What was germane to the litigation is the noise caused by the reconfigured lines.

[84] I make the following order:

(a) In regard to the second, third and fourth respondents' application to strike out dated 19 September 2016, the material identified in paras (a), (b) and (e) thereof and the affidavit of Mr Nel identified in para (f) thereof is struck out. Save as aforesaid the striking-out is application is dismissed.

(b) In regard to the applicant's application to strike out dated 19 September 2016, the material identified in paras 1 and 2 thereof is struck out.

(c) It is declared that the carrying on by the first respondent, on Erf 1783 Hout Bay and on Remainder Erf 1788 Hout Bay ('the properties'), of the activity of conveying people on aerial cables known as ziplines ('the zipline operation') contravenes the zoning restrictions currently applicable to the properties.

(d) The first respondent is interdicted from continuing with the zipline operation, and the second, third and fourth respondents are interdicted from permitting the zipline operation to be continued, such interdict:

(i) to come into force as from Monday 3 October 2016;

(ii) to remain in force thereafter unless and until the zoning restrictions applicable to the properties have been altered so as to permit the zipline operation by way of a 'Tourist Facilities' consent use as contemplated in the City of Cape Town Municipal Planning By-Law of 2015.

(e) The first to fourth respondents jointly and severally are directed to pay the applicant's costs, the liability of the first respondent however being confined to the applicant's costs on an unopposed basis.

(f) The said costs shall include the qualifying expenses of Mr McKenzie Hoy, excluding however the costs associated with the preparation of his first report dated 27 March 2015.

(g) If the zoning restrictions applicable to the properties are altered so as to permit the zipline operation, the applicant shall be entitled, on the same papers duly

supplemented as needs be, to seek a further interdict on the grounds of alleged noise and/or invasion of privacy.

ROGERS J

APPEARANCES

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For 2nd, 3rd & 4th Respondents	Mr SP Rosenberg SC Instructed by: STBB Smith Tabata Buchanan Boyes 2nd Floor, Buchanan's Chambers

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