Republic of South Africa

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

Case No: 19222/2020

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Date of hearing: 16 March 2021
Delivered electronically on: 5 May 2021

In the matter between:

GERHARD JACOBUS VAN DER MERWE N.O.	First Applicant
TRUDIE BROEKMANN N.O.	Second Applicant
MARC VAN ZYL N.O.	Third Applicant
GERHARD JACOBUS VAN DER MERWE	Fourth Applicant
TRUDIE BROEKMANN	Fifth Applicant
TRUDIE BROEKMANN ATTORNEYS	Sixth Applicant

and

DRENCHED BOXING (PTY) LTD	First Respondent
CRAIG ANTHONY KINNEAR	Second Respondent
FORMID TRIO CC	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent

JUDGMENT

MANGCU-LOCKWOOD AJ

I. INTRODUCTION

1. This is the return date of a *rule nisi* which was issued against the first respondent ("the gym") and second respondent, the owner and manager of the gym.

2. The first three applicants are trustees of a family trust which owns property in a multi-storey building situated at [….], Cape Town. Two of the three trustees are a married couple, Mr Van Der Merwe and Ms Broekmann, who live on the property, and Ms Broekmann also runs a law firm on the same premises. Ms Broekmann is cited in each of those three capacities - as second, fifth and sixth applicants, while Mr Van Der Merwe, is cited twice, in his capacity as a trustee and as an individual person.

3. The second respondent is the sole director and manager of the gym, which is situated approximately one metre from the applicants' premises, at the [….], Cape Town. The third respondent owns the property at which the gym operates. The City of Cape Town ("the City") is cited as the fourth respondent, although no relief sought against it.

II. THE INTERIM ORDER

4. On 30 December 2020 the applicants obtained an interim order which was to operate as a rule *nisi*, and it interdicted and restrained the first and second respondents from amplifying any music and/or undertaking any noise amplification at the gym, and/or in any other manner creating and/or causing any noise nuisance at their premises. The application for interim relief was heard in the absence of the respondents and without

the benefit of their opposing papers, although the third and fourth respondents delivered notices to abide the decision of the Court.

5. Subsequent to the granting of the interim order, the applicants sought to amend the notice of motion by firstly including the third respondent as a party against whom the *rule nisi* was to operate; and secondly by including a prayer that the third respondent should be ordered to prevent the first and second respondents from amplifying any music and undertaking any voice amplification or in any other manner creating or causing any noise nuisance at the premises. Although this amendment was initially opposed by the third respondent, I was informed from the bar that the opposition to the amendment was no longer being pursued, and the amendment was granted. The first, second and third respondents have delivered answering affidavits to oppose the granting of the final order.

6. It bears mentioning that the applicants have delivered no fewer than 6 affidavits in this matter, including two 'replying affidavits' delivered a month apart (27 January 2021 and 28 February 2021), and another styled 'supplementary replying affidavit' (deposed on 23 February 2021). For his part, the second respondent delivered two affidavits, both after the interim order was granted, with one called a supplementary answering affidavit, apparently for the purpose of placing an expert report before the Court. This *modus operandi* continued well into the stage of delivering submissions. First, the applicants' counsel requested an opportunity to file written submissions in order to complete his oral replying argument. However, his written submissions extended beyond the ambit for which the permission was requested and granted, thus attracting a request from the respondents to respond, which was also granted. Thereafter, the applicants' counsel requested an opportunity to make further written submissions in reply. All the affidavits and submissions filed by the parties have been taken into account in this judgment,

although it must be stated that the manner in which this matter has proceeded has not been *via* the normal rules and leaves much to be desired.

III. THE FACTS

7. The gym took occupation of its current premises, which are zoned for commercial use, in August 2020. The noise that is the subject of the applicants' complaint started on 23 August 2020. The gym runs scheduled classes on every day of the week from 6am to 6:45am; depending on the weekday from 8am to 8:45am, or from 8:30am to 9:15am; from 18:00 to 18h45; and between 8:30am and 9:15am on a Saturday. During classes the gym plays loud techno/dance music with a strong beat, and the instructor's voice is amplified by a microphone. It is in dispute whether or not the instructors also shout their instructions to the attendees of the classes.

8. The married applicants' bedroom window is just over a metre away from the window and balcony of the gym. They state that they are woken up by the noise emanating from the gym on about 6 days a week. The office entrance to Ms Broekmann's attorney's practice is adjacent to the building from which the gym operates. Ms Broekmann states that the noise emanating from the gym classes affects the running of her practice, as well as her times of study towards her Master's degree.

9. It is common cause that the properties are situated on the verge of the City central business district and just above Buitengracht Street, which produces substantial traffic noise. During the early morning the traffic noise is minimal and the City is very quiet, and, it is not disputed that that makes the noise produced by the gym particularly noticeable, although the third respondent attributes this partially to the national lockdown resulting from the covid-19 pandemic.

10. At first, Ms Broekmann directed her complaints about the noise to the second respondent and the third respondent's representative, one David Alexander, but, according to Ms Broekmann this yielded no results. She thereafter approached the City, first by lodging complaints on their online portal, and later by contacting the officials at the law enforcement arm. This also yielded no results. She thereafter approached the Bo-Kaap Civic and Ratepayers' Association, who contacted the City officials and the ward councillor. Only then did the City respond. The result was a meeting between Ms Broekmann, the second respondent and a Senior Technician: Noise Control, a Mr Peter Gossman from the City. According to the evidence, a written warning was issued in about October 2020. It is in dispute whether a verbal warning was also issued.

11. From the papers it appears that the engagements between the parties were unfruitful, resulting in the applicants approaching the Court on 24 December 2020 and obtaining the interim interdict on 30 December 2020. However, it is also clear from the evidence that before the launching of the proceedings, the second respondent had engaged the services of acoustic engineers to assist in mitigating the noise, and that the applicants were aware of these efforts. The applicants' complaint is that they were not advised of the outcome of the acoustic engineers' intervention by the stage at which the interim proceedings were launched.

12. The report of the acoustic engineers, who practice under the name Jongens Keet Associates ("Jongens") was attached to the second respondent's answering affidavit dated 14 January 2021, and contains two dates, namely 26 November 2020 and a date on which it was revised, namely 21 December 2020. It states that a visit was made to the gym on 19 November 2020 in order to investigate complaints regarding amplified sound generated from the gym; and that Jongens was requested to determine whether the sound was compliant with the Western Cape Noise Control

Regulations, 2013 (“the Noise Control Regulations”). It is also recorded in the report that Jongens held a meeting with Ms Broekmann on 19 November 2020, where the latter relayed her complaints that the gym noise wakes her at 6am every morning; was audible within her office and disturbed her work; and that ‘the pure tone sound during connection of the Bluetooth and the sound of amplified speech were considered to be particularly intrusive’. The report assessed the results of some measurements taken, and interpreted them as ‘considered annoying or otherwise intrusive to the next door neighbour’. The report notes that Jongens made recommendations to the second respondent for certain steps to be taken in order to mitigate the levels of noise. It was, however noted in the report that ‘cognisance needs to be taken of physical and practical limitations in reducing the levels of sound between the two spaces separated by a mere few metres’.

13. On 2 January 2021, there was more noise emanating from the gym, such that Ms Broekmann reported the incident to the police as contempt of the court order. According to the second respondent, he was in the Eastern Cape on that date, having informed the applicants that he would be returning on 4 January 2021. He was also unaware that a court order had been granted on 30 December 2020, or consequently that it was breached on 2 January 2021, until his return on 4 January 2021. He, however, admits that the police contacted him.

14. On 5 January 2021 the second respondent obtained the services of a company specialising in audio/video technology called AV Lifeline (Pty) Ltd (AV Lifeline) in order to implement the recommendations made by Jongens. Ms Broekmann was first advised of this in a letter dated 8 January 2021 from the second respondent’s attorneys. In support of these averments, the second respondent has attached to its papers a letter dated 14 January 2021 from AV Lifeline, which states that all the guidelines recommended in the Jongens Report were implemented.

15. On 12 January 2021 Ms Broekmann sent an email indicating that there was noise nuisance in the form of voice amplification emanating from the gym, which she could hear on that day. Twenty minutes later, on the same day the attorneys of the first respondent contacted her indicating that AV Lifeline was at the premises of the gym in the process of 'setting the DB level/reading to the legal and recommended limit', and were requesting access to her residence on 14 January 2021 in order to assess the DB levels from there. No immediate response was forthcoming from Ms Broekmann, but on 13 January 2021 she responded stating that *'the use of soundproofing implies and that your clients want to use sound amplification and so breach the court order. Of course I cannot condone that…'* After the third time that Ms Broekmann was requested to grant access to AV Lifeline for the purpose of assessing the DB levels, her response, dated 14 January 2021, was as follows:

> *'1. Foremost, this is a blatant contravention of the court order. As an officer of the court I cannot condone it, nor is it seemly for you to request this.*
>
> *2. Two of your clients' sound consultants have been given access to our premises in the past, and Mr Jongens did measurements while he was in my office.*
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> *3. In any event, the complaint is not that the decibel levels are too high, but rather that the noise from the [gym] constitutes a noise nuisance, so the decibel levels are irrelevant.*
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> *4. Our bedroom window is about 1 metre and 13 cm from your client's premises. Whatever your clients hear from the furthest corner of their balcony is pretty much identical to what we hear in our premises - they can check from there.*
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> *5. I find it tremendously invasive to have your client and his contractors in my personal office and my bedroom - the purpose of the court application was to stop the perpetual harassment via noise disturbance by your client. Your refusal to accept my answers and continued further requests after I have given you a reasonable and lawful answer, verges on harassment too.*
>
> *6. In any event, the affidavit is due today, so it is too late to undertake further sound impact studies – my understanding from your client was*

> *that he had already received Mr Jongen's report, which must be attached to the affidavit…..'*

16. On 20 January 2021 Jongens returned to the gym to perform an inspection, and to assess the sound mitigation measures implemented by AV Lifeline, and issued a supplementary report dated 21 January 2021. The supplementary report sets out the mitigation procedures implemented as a result of the initial report of 21 December 2020, and the results of sound measurements taken on 20 January 2021. Thereafter, the supplementary report concludes that the noise mitigation procedures recommended in the initial report of 21 December 2021 were *'well implemented resulting in music and amplified speech generated within the gymnasium not being audible or measurable directly outside of the gymnasium'*.

17. For their part, the applicants sought advice from Mackenzie Hoy acoustic engineers whose report ("the MacHoy report") is dated 19 February 2021 and attached to their supplementary replying affidavit of 23 February 2021. According to the report Mackenzie Hoy were appointed by the applicants to conduct an acoustic survey to determine whether amplified sound generated from the gym is in breach of the City's Regulations. The McHoy report has made a number of observations regarding the Jongens report, and notes firstly that Jongens did not measure or record the noise level on their first visit. As a result, there is no reference by which to measure the achievements of the subsequently installed soundproofing. Secondly, the McHoy report points out that despite the Jongens report noting that the sound from the gym is transmitted through the ceiling and the corrugated iron roof, none of the measures recommended for soundproofing in the initial report address the ceiling or the roof. Thirdly, it is pointed out that the Jongens report does not address the application of the Noise Control Regulations, and instead assesses the noise based on Table 1 of SANS 10103 which is only applicable for design purposes, not for noise intrusion. Fourthly,

the McHoy report criticises the method used by Jongens for determining the effectiveness of the soundproofing installed, pointing to a difference between whether one is on the balcony or inside the gym. The McHoy report also points out that no limiter is installed on the mixing desk in the gym studio, and that the sound levels can be adjusted by the operator. At the same time, the McHoy report notes that, according to the second respondent there is a limiter which is set to level 92 dBA. It is noted in the McHoy report that there is a separate powered loudspeaker in the training area towards the back of the gym, but that it was unclear whether sound from this loudspeaker is audible at Ms Broekmann's residence. It is concluded in the McHoy report that the noise measured does not constitute disturbing noise but could constitute noise nuisance in terms of the Regulations and in terms of the common-law. It is also concluded that the noise from the gym is audible in the house of the complainant, Ms Broekmann. It is also opined that there is no real reason for the instructor to use a microphone to amplify speech. The recommendations made in the McHoy report are that a limiter should be installed, which should limit the overall maximum volume to 80dBA; and that the unused loudspeaker should be removed from the premises of the gym; and the amplification of voices by microphone should not be permitted.

IV. THE LAW

18. The application for the confirmation of the *rule nisi* can only be granted if the applicants establish the requirements for a final interdict as set out long ago in *Setlogelo v Setlogelo*[1]. The applicants must establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy.

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

19. As stated in *National Director of Public Prosecutions v Zuma*[2], motion proceedings, unless concerned with interim relief are all about resolution of legal issues based on common cause facts. Unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.[3] Similarly, the question of *onus* does not arise, irrespective of where the legal or evidential onus lies.[4]

20. It is also generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute[5], and a final interdict may be granted on application if no *bona fide* dispute of fact exists.[6] In terms of the *Plascon-Evans*[7] rule where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.[8] It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[9] The Court has to accept those facts averred by applicant that were not disputed by respondents, and respondents' version insofar as it was plausible, tenable and credible.[10]

21. On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues

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[2] *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) paras [26] – [27].
[3] *NDPP v Zuma* para [26].
[4] *NDPP v Zuma* para [27].
[5] Harmse *Civil Procedure in the Supreme Court*, B6.45
[6] *Plascon-Evans* supra.
[7] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[8] Harmse *Civil Procedure in the Supreme Court* ,B6.45.
[9] *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).
[10] *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).

of fact and thus delay the hearing of the matter to the prejudice of the applicant.[11] In every case the court should examine the alleged disputes of fact and determine whether in truth there is a real issue of fact that cannot be satisfactorily resolved without the aid of oral evidence.[12]

22. Whether a factual dispute exists is not a discretionary decision; it is a question of fact and a jurisdictional prerequisite for the exercise of the discretion given by the rule.[13] It is not a question of any difference of character between the various kinds of claims being enforced, but a question of the proper method of determining in each case the facts upon which any claim depends.

V. THE APPLICANTS' CLEAR RIGHT

23. The applicants rely on the common law on neighbours' nuisance, and in the alternative, the Noise Control Regulations.

24. In common law, everyone is in general permitted to use their property for any purpose they choose, provided that the use of the property should not intrude unreasonably on the use and enjoyment by the neighbours of their properties. In terms of the Noise Control Regulations "noise nuisance" means any sound which impairs or may impair the convenience or peace of a reasonable person.

25. What was stated in *Laskey v Showzone* is apposite to this case:

> '…What constitutes reasonable usage in any given case is dependent on various factors, including the general character of the area in question – persons living and working in an urban area would, for example, reasonably

[11] *Petersen v Cuthbert & Co Ltd* 1945 AD 420 428. A hollow denial or a detailed but fanciful and untenable version does not create a dispute of fact: *Truth Verification Testing Centre CC v PSE Truth Detection Centre CC* 1998 (2) SA 689 (W) 698; *Rosen v Ekon* [2000] 3 All SA 23 (W) 39; *Ripoll-Dausa v Middleton NO* [2005] 2 All SA 83 (C), 2005 (3) SA 141 (C).
[12] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) pars 234-239. It has variously been called a "genuine" or "bona fide" dispute.
[13] *Plascon-Evans* supra 634-5; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162.

> be expected, in general, to be more forbearing about a higher level of noise intrusion into their lives than neighbours living in a rural housing estate. Social utility is another factor that might affect what owners and occupiers of property might reasonably be expected to put up with from their neighbour: Aircraft and railway trains are an unavoidable incidence of modern life and it is necessary for their functioning that airports and shunting yards should be able to operate. The operation of these facilities will often generate higher levels of noise than persons in residential areas might in other circumstances be reasonably expected to endure, but because of their social utility persons living near an airport or a railway yard will be required to put up with the associated noise levels, as uncomfortable as that might be, provided only that the airport or railway yard is not itself operated unreasonably, in a nuisancesome manner.
>
> Reasonableness in this context is a variable criterion dependent on the circumstances. The test for determining whether or not a particular usage or conduct is actionably nuisancesome has been aptly expressed by Prof. J.R.L. Milton as follows: '*The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man, but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference with the comfort of his existence or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm.*'[5] Lord Wright's description of the test in *Sedleigh-Denfield v O'Callaghan* **[1940] UKHL 2***;* **[1940] AC 880**[6], at 903 was crisper, but to the same effect: '*A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society.*'
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> A person setting up home in the inner city cannot expect the tranquillity of life in the leafy suburbs, but in the context of the realities of an urban environment including the phenomenon of a concentration of places of night time entertainment that is part and parcel of the 24 hour living city concept, such a person is still entitled to expect that his or her neighbour, whatever its character, will use its property in such a manner so as not to unreasonably intrude on the ordinary amenities of the inner city resident.'

26. The question is therefore whether the gym is being operated in a way which results in an unreasonable interference with the right of the applicants to use their premises. There is no dispute between the parties that the applicants have a right to enjoy the use of their property without being subjected to noise nuisance, but that this must be

balanced against the first and second respondents' right to conduct their business activities.[14]

27. What is clear from *Laskey v Showzone* is that the applicants' right to use and enjoy their property must be viewed in the context of reasonable usage of a property that is located in the City. As I have stated, the parties agree that the properties concerned in these proceedings are abutted by substantial traffic noise, although not necessarily in the early mornings. In that context, the applicants cannot expect the quiet serenity of the suburbs while living in the inner-city, which comprises a mix of commercial and residential properties, and particularly having purchased a property that is immediately adjacent to a commercially-zoned property.

28. The applicants' right must also be balanced against the respondents' right to conduct their business. In this regard, the applicants have sought to raise doubt about the legality of the running of the gym. This is done through the affidavit of the first applicant which was delivered together with the applicants' sixth affidavit. The first applicant states that he is a qualified senior architectural technician, and he 'strongly suspects' that the third respondent has breached section 4(1) of the National Building Regulations and Building Standards Act 1977 by failing to submit building plans and obtaining the City's approval before effecting alterations on its property. This allegation, which is raised at the last minute of the proceedings, amounts to a strong suspicion, and cannot sustain a clear right. Nothing else needs to be said about it.

[14] *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C). See also *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D); LAWSA Vol 19 (2nd Ed) paras 173-185.

29. The applicants argue that it is not necessary for the first and second respondents to use amplified sound in the gym, and that the latter have not made out any case this regard. In my view, whether or not the applicants may obtain a final interdict against the amplification of voice and sound at the gym is a question that relates to whether the amplification is such that it causes a nuisance. The applicants do not have a general or absolute right to prevent the respondents from amplifying sound or voices. It must be established that the amplification sought to be prevented constitutes a nuisance. This issue brings into focus the expert reports, and are discussed further under the heading discussing the requirement of an injury.

30. The other aspect that is relevant to the determination of the applicants' clear right is the relief sought against the third respondent. As I have already mentioned, the amended notice of motion seeks an order that the third respondent be ordered to prevent the any noise nuisance at their premises. The question arising is whether the claim brought against the third respondent is valid in law. The third respondent argues that the relief sought is legally incompetent in that a landlord cannot be ordered to force a tenant to comply with the law; nor can a landlord be ordered to evict a tenant or be held in contempt for a tenant's playing loud music. The applicants and the third respondent have exchanged numerous written submissions on this aspect. In view of the approach I have taken in this judgment, which becomes apparent in the next section, I do not consider it necessary to decide this point.

VI. INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

31. A court will not grant an interdict restraining an act that has already been committed – the injury must be a continuing one.[15] When the wrongful act giving rise to the injury has already occurred it must either be of a continuing nature or there must be in

[15] See Erasmus D6-14, and the authorities referred to therein.

reasonable apprehension that it will be repeated.[16] The test for apprehension of an injury is an objective one. The applicant must show objectively that his or her apprehensions are well-grounded. Mere assertions of his or her fears are insufficient.

32. The applicants state that an injury in the form of recurring noise nuisance was committed against them, even after the granting of the interim interdict. All the applicants' subsequent affidavits refer to further breaches of the interim court order on 2, 12, 14, 25, 26, 28 January 2021 and 22 February 2021. Regarding the events of 2 January 2021, I have already referred to the second respondent's version that he was away in the Eastern Cape, and was unaware that the interim court order had been granted. He, however, does not dispute that there was noise emanating from the gym, although it is stated in a letter dated 8 January 2021 that the gym had not made use of voice or sound amplification since 24 December 2020, the date on which the interim proceedings were instituted. What is clear from the evidence however, is that the recommendations of Jongens had not been implemented as at that date. Those recommendations were actioned with effect from 5 January 2021 when the services of AV Lifeline were obtained, and thereafter on 12 and 14 January 2021, when AV Lifeline attended at the premises of the gym to implement the recommendations and sought access to the applicants' property in order to assess the effectiveness of the measures implemented. Ms Broekmann refused to grant that access. The complaints regarding 14 January 2021 involve allegations that the second respondent loudly welcomed members of his gym in the street, and deliberately activated his car alarm on approximately eight occasions, both of which are denied by the second respondent. In my view, these latest complaints indicate that what the applicants expect is the tranquillity of life in the suburbs, which is an unreasonable expectation. The applicants are not entitled to interdictory relief if their sensibility to the noise is a manifestation of a

[16] Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa*

too refined or sensitive disposition or an unreasonably low tolerance level.[17] Similarly, the alleged incident of 28 January 2021 which involved a sparring session on the balcony of the gym was of a different nature to the noise and sound complaints that precipitated these proceedings, and had not occurred before that day, according to the applicants. Accordingly, there is no basis on which to conclude that there is a reasonable apprehension of its recurrence. This complaint is, in any event, raised in the last replying affidavit of the applicants, dated 22 February 2021, and the respondents did not have an opportunity to respond to it. The allegations regarding 25, 26 January and 22 February 2021 are similar in nature to the complaints that resulted in the launching of this application, and are included in the discussion below. For now, it is relevant to mention that the first applicant also states as follows in his affidavit of 22 February 2021: *'[T]he peacefulness of our home and my office since the [interim] court order, save for the instances of breach of a court order set out in my affidavits, have made such a wonderful change in our lives'*[18].

33. Relying on the measures they have taken upon the advice of the acoustic engineers, the first and second respondents argue that there is no longer unlawful, loud, noisy interference with the applicants' rights to live and work in relative peace and calm. The second respondent has set out the measures he has taken in this regard, and states that he has spent over R50,000 in sound proofing and sound engineering reports. He also states that he has been in extensive discussions with Mr Gossman from the City regarding the recommendations made in the Jongens report.

34. The applicants dispute the respondents' claims that there is no longer noise nuisance, on several bases. They dispute that the Jongens' recommendations have been fully implemented, or were effective. They dispute that the limiter fitted in by the second

[17] See *Laskey v Showzone* para [32].
[18] At p 336, para 13.

respondent in order to limit the sound output to a certain maximum level, is effective. They contend that the volume is set to exceed the legal limit. Further, according to the applicants, only two out of three problematic sound transmission paths have been addressed by the second respondent. The largest of the three areas, which is also the most expensive to soundproof, namely the corrugated iron roof, has not been addressed. According to the applicants, this means that the second respondent has not fully implemented the recommendations of the Jongens report. There is also a fair amount of speculation in the supplementary replying affidavit that the second respondent may have tampered with the limiter, and that the applicants suspect that only two speakers' output was limited instead of three.

35. It is clear that there are disputes of fact between the parties. The conclusions reached in the supplementary report of Jongens dated 21 January 2021, and those reached in the MacHoy report differ diametrically. According to Jongens, the cause for complaint has been mitigated, and according to the McHoy, it has not.

36. The disputes of fact, which were extant at the date of the hearing of the matter before me, are also indicated in the affidavit of the first applicant, which as I have already indicated was delivered at a very late stage of the proceedings, and states as follows: *'When Miss Viljoen [of McHoy] asked the second respondent whether the voice amplification was at the maximum volume, he admitted that it was not. She asked him to increase the volume, but he declined to do so, saying that they never play the volume that loudly during the classes. I dispute that. He was being manipulative….From our experience, as well as our sound recordings made on my wife's cellphone, many of which have been submitted to this honourable court, it is clear that the verbal commands over the microphone are the loudest noise. The voice amplification is amplified above the volume of the music… consequently the key aspect of the noise nuisance could not be measured by our experts as the second*

respondent refused to give a true reflection of the voice amplification despite a specific request from our expert. He manipulated this process in a dishonest and deliberate manner.' This is an example of a factual dispute that the Court is not in a position to resolve or decide in the applicants' favour as the papers stand.

37. It was revealed in Court that two weeks before the hearing of this matter, the first and second respondents made a proposal that the matter should be resolved by way of the reports of the respective experts being referred to the official of the City of Cape Town who is charged, in terms of the Noise Control Regulations, with assessing and investigating noise complaints, for the purpose of testing and assessing the sound mitigation measures put in place at the gym. It was furthermore proposed that the parties should abide the reporting and comply with any recommendations of such designated officer in regard to sound mitigation measures. The applicants rejected this proposal. Subsequently, the first and second respondents made an alternative proposal, that the respective experts should meet and prepare a joint minute, commenting on the implementation of the sound mitigation measures, and jointly recommending further steps to be taken, if any. This too was rejected by the applicants.

38. Given that there are clear disputes of fact between the parties, I consider that the Court would have been assisted, by either proposal, and particularly the second proposal from the respondents in adjudicating the nuisance dispute between the parties. In response to my query regarding this issue, the applicants' counsel argued that the issue about which the experts disagree is merely a dispute of opinion between experts and not a dispute of fact. I find this argument extraordinary. The question of whether there is noise that constitutes nuisance is the very issue that this Court is

called upon to determine, and that is the very issue on which the parties and their experts disagree.

39. The Court can further not ignore the fact that the respondents obtained the services of an acoustic engineer in response to the applicants' complaint even before the interim proceedings were launched. According to the second respondent Jongen's first visit was on 19 November 2020, and the first report was issued on 21 December 2020. The fact that the report was not issued to the applicants when it was issued may be an issue to consider when considering costs in the matter. However, the fact is that the respondents did react to the applicants' complaints by obtaining the first report, implementing its recommendations through AV Lifeline, and obtaining further advice from Jongens. Furthermore, it appears to be common cause that noise mitigation measures where indeed implemented. It is the extent to which they were effective that is in dispute. The supplementary report from Jongens says they were effective, and the later report from McHoy says they were not. The result is that there is a material dispute of fact in regard to the efficacy of the noise mitigation measures undertaken by the second respondent, and in regard to whether or not in the applicants continue to suffer unreasonable noise levels. In my view, this is an issue that goes to the heart of whether the applicants continue to suffer injury, and indeed, whether or not they are entitled to the final relief they seek.

40. The applicants' counsel argued that, despite the disputes of fact the applicants are entitled to the final relief they seek because they had made out a case at the interim stage of the proceedings. I do not agree. The Court must be satisfied, at the stage of granting the final order that a case has been made out for it. It is not sufficient to allege that the case was made out of the interim stage of the proceedings. Otherwise, that would render the final proceedings an academic exercise. A Court is entitled to interrogate the current circumstances before confirming an order. A confirmation of a

rule *nisi* is not granted merely by the asking therefor. As the case law referred to earlier indicates, a court will not grant an interdict restraining an act that has already been committed.

41. I am therefore not satisfied that the applicants have established the element of an injury.

42. Further, the question of whether there has been contempt of the interim court order is related to whether there is ongoing or apprehended injury. For the reasons discussed in this section, I am of the view that the applicants have failed to make out a case for contempt of the court order.

VII. ALTERNATIVE REMEDY

43. The requirement for a final interdict is that no other adequate remedy must be present. To qualify as an alternative remedy, a remedy must be adequate in the circumstances, be ordinary and reasonable being a legal remedy giving similar protection

44. The respondents have argued that the applicants have an alternative remedy, namely engaging with the second respondent to test the soundproofing. There is no merit to this complaint as the papers are replete with correspondence between Ms Broekmann and the second respondent – albeit fraught with contention.

45. The first and second respondents also complain that the applicants failed to approach the South African Police Service (SAPS) and lay a criminal complaint in terms of the

Noise Control Regulations. It is admitted, however, that the applicants did approach the SAPS and reported an alleged contempt of court order in about January 2021. In my view, this is not an alternative remedy in any event. The existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended.

46. Next, it is argued by the first and second respondents that the applicants have failed to comply with the mechanisms contained in the Noise Control Regulations for dealing with complaints, investigations, assessments and mitigation compliance procedures. The Regulations also provide for criminal sanctions in the case of contravention. The procedure for control of noise in terms of the Noise Control Regulations 10(3) and (4) when there is an allegation of noise nuisance involves a member of the public placing a complaint in the form of an affidavit before the City; obligatory investigation by the City; and if City is of the opinion that there is or may be a noise nuisance, the issue of instructions for the noise nuisance to cease or be mitigated within a specified period of time. There is no evidence submitted by the applicants to show that they have complied with these requirements. Instead, applicants point to their engagements with the City, which are set out earlier in this judgment which have yielded little to no fruit. In this regard, I note that, according to the common cause facts, Mr Gossman from the City was involved at some stage and issued a written warning to the second respondent. However, the applicants have not provided sufficient evidence in this regard; and pertinently, there is no evidence that an affidavit was provided to the City in terms of Regulation 10(3) in order to trigger the formal investigatory processes and the issue of a formal written instruction for the attention of the respondents envisaged in Regulation 10(4). In fact, because of the paucity of evidence in this regard, the third respondent has brought an application for various passages contained in the applicants' founding affidavit relating to Mr Gossman's involvement to be struck out on

the basis that they constitute hearsay evidence. Indeed, apart from the agreed facts between the applicants and the second respondent that I have already mentioned, the applicants have failed to substantiate averments relating to Mr Gossman's involvement by delivering a confirmatory affidavit or by explaining why one could not be provided. This, despite the numerous affidavits placed before this Court by the applicants. In light of the fact that the outcome of the process envisaged by the Noise Control Regulations is a cessation of the noise nuisance or its mitigation, I consider the process to be an adequate alternative remedy, not only for the City, but primarily for the applicants. The applicants' refusal to agree to the respondents' proposal to submit to the processes set out in terms of the Noise Regulations must also be seen in that light.

47. In light of all the above considerations, the applicants have failed to establish all the requirements for a final interdict.

VIII. THE STRIKING OUT APPLICATION

48. As I have already mentioned, the third respondent seeks to strike out various statements, including those relating to Mr Gossman. I have also already mentioned that it is common cause between the applicants and the second respondent that there were many interactions with Mr Gossman, but that it is denied that a verbal warning was issued by him. Apart from this evidence, the remainder of the allegations relating to Mr Gossman remain unsubstantiated, and accordingly, the objections relating to averments made regarding his involvement fall to be struck out. So too, the remainder of the allegations which the third respondent seeks to have struck out.

IX. COSTS

49. The applicants complain that the second respondent failed to apprise them of the outcome of the first visit by Jongens, in other words, the first report dated 26 November 2020 and 21 December 2020. I agree with the applicants that, had the second respondent done so, that might well have averted if not delayed the institution of the interim proceedings. In this regard, I take into account the fact that the second respondent was requested by Ms Broekmann to advise of the outcome of Jongens' intervention, but failed to do so. I therefore consider it appropriate in this regard that the first and second respondents should bear the applicants' costs in respect of the interim proceedings. No interim relief was sought against the third respondents at that stage, so no costs order is made against them in this regard.

50. As for the rest, I have found that the applicants have failed to establish the requirements for a final interdict, and there is accordingly no reason why the costs should not follow the result. I particularly find it appropriate that the applicants should bear the remaining costs of the proceedings in light of applicants' unreasonable conduct. First, in Ms Broekmann refusing to grant access to her premises so that the noise mitigation measures could be assessed. Then, in refusing to have the disputes of fact be resolved in a sensible manner. This, after the applicants produced an expert report at a very late stage of the proceedings, in their affidavit of 23 February 2021. In those circumstances, I do not find it unreasonable that, on 1 March 2021 the respondents proposed that the matter be dealt with in the manner that they proposed. Even if the proposal was made a mere two weeks before the hearing of the matter, the approach proposed would have been particularly useful in resolving the disputes of fact referred to earlier. By that point, the disputes of fact were clear on the papers, and I consider the applicants' rejection thereof to be unreasonable.

X. ORDER

51. In the result, the following order is made:

a. The application is dismissed, and the rule *nisi* is discharged.

b. The application for striking out is granted, save for the applicants' allegation, in paragraph 7.2 of the founding affidavit, that Mr Peter Gossman met with the fifth applicant and the second respondent and issued a written warning.

c. Applicants shall pay the first, second and third respondents' costs, save for the costs of the interim proceedings, which the first and second respondents shall pay.

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MANGCU-LOCKWOOD AJ

Appearances:

- For applicants:

  Adv Theo Nel (instructed by Trudie Broekmann)

- For first and second respondents:

  Adv Craig Webster SC (Instructed by Ulrich Rox & Associates)

- For third respondent:

  Adv Zach Joubert (Instructed by Walkers Inc.)