CITY LIVING AND ACCEPTABLE NOISE: TRICKY, BUT FOLLOW THE RULES

Van der Merwe and Others v Drenched Boxing (Pty) Ltd and Others (19222/2020) [2021] ZAWCHC 93 (5 May 2021)

We have often before reported here on judgments that dealt with the levels of nuisance that property owners should reasonably bear from their neighbours. City living poses its own challenges, as this judgment illustrates. Importantly, it is prudent to remember that it is always necessary to exhaust existing remedies offered by a local authority before approaching a court.

The Judgment can be viewed here.

FACTS

Van der Merwe and others ("the owners") reside in a multi-storey building situated in the Cape Town City Centre. In August 2020, Drenched Boxing (Pty) Ltd ("the gym") opened doors. The gym is situated approximately one metre from the property of the owners.

The gym's premises are zoned for commercial use. The noise that is the subject of the dispute 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.

The owners' bedroom window is just over a metre away from the window and balcony of the gym. They are woken up by the noise emanating from the gym on about 6 days a week. Also, the owner runs a business from premises adjacent to the building from which the gym operates, and the noise affects the running of that business as well.

It was common cause that the properties are situated on the verge of the City central business district in Cape Town (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 gym owner attributes this partially to the national lockdown resulting from the covid-19 pandemic.

At first, the owners directed complaints about the noise to the manager and owner, but no results were achieved. The owners then approached the City of Cape Town ("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. They also approached the Ratepayers' Association, who contacted the City's officials and the ward councillor. Only then did the City respond. The result was a meeting between the parties and this resulted in a written warning being issued in about October 2020.

It appeared that the engagements between the parties were unfruitful, resulting in the owners approaching the Court on 24 December 2020 and obtaining an **interim interdict** on 30 December 2020. Subsequent thereto, the gym manager engaged the services of acoustic engineers to assist in mitigating the noise and the owners were aware of these efforts. The report of the acoustic engineers included an assessment of the noise levels and suggestions to address the levels so as not to be intrusive. On 5 January 2021 the gym obtained the services of a company specialising in audio/video technology, AV Lifeline, to implement the recommendations made by the sound engineers. The owners were advised of this in a letter dated 8 January 2021.

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Nonetheless, on 12 January 2021 the owners again mentioned that there was noise nuisance in the form of voice amplification emanating from the gym. The report from the gym's engineer was however that the remedial actions were 'well implemented resulting in music and amplified speech generated within the gymnasium not being audible or measurable directly outside of the gymnasium'.

For their part, the owners obtained the services of an alternate acoustic engineer. That report was diametrically opposed to the one of the gym's engineers, issued after the remedial work was done.

The present matter deals with the **return day** of the interim order, i.e. an application to make the interim order a final order.

HELD

- The application for the confirmation of the interim order (rule nisi) can only be granted if the applicants establish the requirements for a final interdict, which are that the owners 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.

A clear right

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

- 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.

- 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 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. For example, 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, so as to constitute a nuisance.

- 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 nuisance is not based on the criterion 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.

- A person setting up home in the inner city cannot expect the tranquility 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.

- 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 this must be balanced against the gym's right to conduct its business activities.

Injury actually committed or reasonably apprehended

- A court will not grant an interdict restraining an act that has already been committed – the injury must be a continuing one. The owners stated that an injury in the form of recurring noise nuisance was committed against them, even after the granting of the interim interdict. It appeared 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. Certain additional improvements were actioned with effect from 5 January 2021 when the services of AV Lifeline were obtained.

- The gym owners stated that there was no longer nuisance, which was denied by the owners.

- It is clear that there were disputes of fact between the parties in regard to the efficacy of the noise mitigation measures undertaken by the gym and in regard to whether or not the owners continued to suffer unreasonable noise levels.

- This is an issue that goes to the heart of whether the owners continue to suffer injury, and indeed, whether or not they are entitled to the final relief they seek.

- It therefore uncertain whether it was certain that the owners had established the element of an injury.

Alternative remedy

- 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.

- The gym argued that the owners had failed to comply with the mechanisms contained in the Noise Control Regulations for dealing with complaints, investigations, assessments and mitigation compliance procedures. These 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 the 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.

- No evidence was submitted by the owners to show that they had complied with these requirements. Instead, they point to their engagements with the City which had yielded little to no fruit. However, there was no proof that the engagement was in terms of Regulation 10(3) in order to trigger the formal investigatory processes.

- 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, the Court considered the process to be an adequate alternative remedy, not only for the City, but primarily for the owners.

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CONCLUSION

In light of all the above considerations, the owners had failed to establish all the requirements for a final interdict.

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