

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.5988/2006

In the matter between:

WAYNE ALAN LASKEY

FIRST APPLICANT

DAVID PETER ANDERSON

SECOND APPLICANT

and

SHOWZONE CC

FIRST RESPONDENT

RUSSELL ALEXANDER SHAPIRO

SECOND RESPONDENT

OFF BROADWAY

THIRD RESPONDENT

JOHN HUGHES

FOURTH RESPONDENT

JUDGMENT

Delivered on 30 October 2006

BINNS-WARD AJ

1] The applicants, who are the owners and occupiers of two inner city

apartments in Cape Town, seek the following substantive relief:

‘An order interdicting the First to Third Respondents from:

1. Causing or allowing to be caused from the premises at 88 Shortmarket Street, Cape Town, a “disturbing noise” and/or a “noise nuisance” as defined in the Noise Control Regulations...

and

2. Conducting any business from the premises...in a manner which constitutes a nuisance and/or disturbs the Applicants’ right to free and undisturbed use and possession of their properties situate at....’

2] By the time the matter was argued it was accepted that any interdict which might issue should be granted against only the first respondent, to whom, for convenience, I shall therefore hereafter refer simply as ‘the respondent’.

3] The respondent operates ‘On Broadway’, a well-known theatre-restaurant in Cape Town. The theatre was situated initially at an address in Green Point, but in April 2005 it moved premises to 88 Shortmarket Street, in the central business district. The new premises of On Broadway abut directly onto the building situate at 74 Loop Street, where the applicants’ apartments are situated on the third and

fourth floors, respectively. Indeed the applicants' apartments look out over the roof of On Broadway.

- 4] As may be deduced from the nature of the relief sought by them, the applicants' complaint is founded on what they contend to be the unacceptable level of noise, particularly music, emanating from On Broadway, during the performances which take place there on a regular basis.
- 5] The applicants claim that they are entitled to interdictory relief against the respondent because it is common cause on the evidence that the noise levels emanating from On Broadway during the evening shows qualify as '*disturbing noise*' as defined in the Noise Control Regulations made by the Provincial Minister of Environmental Affairs (Western Cape) in terms of s 25 of the Environment Conservation Act 73 of 1989 ('the ECA').¹ A '*disturbing noise*' is defined in the regulations as 'a noise level that exceeds the ambient sound level measured continuously at the same measuring point by 7 dBA [i.e. decibels²] or more'.

¹ Published in PN627/1998, dated 20 November 1998

² Reg. 1 defines 'dBA' as the value of the sound pressure level in decibels determined using a prescribed method and formula. The letter A in the abbreviation appears to denote the use of a particular frequency weighting value.

- 6] It is relevant in the context of the applicants' complaint to observe that a '*disturbing noise*' is defined in a technical manner measured as a sound level above a variable base, and without any indicated reference to its effect on the amenities of any person. The variable base is the prevalent ambient noise level- accordingly a much louder noise would be needed to qualify as a '*disturbing noise*' in a busy urban environment than would be the case in a quiet wilderness area. The repeated cry of a fish eagle in a quiet wilderness area, pleasing and evocative as it might be to the ear of the average human visitor, would nevertheless in all likelihood qualify as a '*disturbing noise*' in terms of the regulations. I make the observation merely to illustrate that it does not seem to follow that a '*disturbing noise*' as defined in the regulations would necessarily be disturbing in the ordinary sense of the word, or nuisancesome in the sense necessary to found a claim in neighbour law. By contrast, there is also reference in the regulations to a '*noise nuisance*', which is defined as a '*sound which **disturbs** or impairs or may **disturb** or impair the convenience or peace of any person*' (my emphasis). It is readily conceivable in my view that a '*disturbing noise*', as defined, may or may not, depending on the circumstances, also be a '*noise nuisance*'. The reason for the potential distinction provided in the regulations between a '*disturbing noise*' and a '*noise nuisance*' is less than clear.

7] Regulation 4 provides as follows:

‘4 Prohibition of disturbing noise

No person shall make, produce or cause a disturbing noise, or allow it to be made, produced or caused by any person, animal, machine, device or apparatus or any combination thereof.’

8] Regulation 5(a) provides that:

‘No person shall operate or play a....drum, musical instrument, sound amplifier, loudspeaker system or similar device that produces, reproduces or amplifies sound, or allow it to be operated or played so as to cause a noise nuisance’.

9] Regulation 9 provides that any person who fails to comply with regulation 3, 4 or 5 commits an offence punishable by fine or imprisonment.

10] The applicants contend that they are entitled to enforce compliance with the regulations, or put differently, that they are entitled to interdictory relief prohibiting the respondent from continuing in its failure to comply with regulation 4.

11] Referring to the well established requirements that an applicant for

final interdictory relief has to satisfy to obtain an order, Mr *Irish SC* who, together with Mr *Tyler*, appeared for the respondent, submitted that it is necessary if the applicants are to succeed in obtaining a prohibitory interdict based on the respondent's non-compliance with the regulations that they should establish that the regulations vested a right in them, the infringement of which was amenable to protection by an interdict. Mr *Irish* submitted with reference to *Knop v Johannesburg City Council 1995 (2) SA 1 (A)*; *Faircape Property Developers (Pty) Ltd v Premier, Western Cape 2000 (2) SA 45 (C)*³ and *Olitzki Property Holdings v State Tender Board and another 2001 (3) SA 1247 (SCA)* that on a proper construction of the regulations what he called 'civil relief' was not available to the applicants in the circumstances.

- 12] The aforementioned cases referred to by the respondent's counsel each concerned claims for compensation under the *lex aquilia*. The plaintiffs in those matters had sought to establish wrongfulness on the basis of a breach or non-compliance by the respective defendants of a statutory duty. The most recent judgment in this line of cases is that of the Constitutional Court in *Steenkamp v Provincial Tender Board of the Eastern Cape* Case CCT 71/05, handed down on 28 September

³ Reference might more pertinently have been made to *Premier of the Province of the Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA)*; [2003] 2 All SA 465 (SCA) at para 32-49.

2006. The courts declined to entertain the plaintiff's delictual claims for compensation in the matters referred to by Mr *Irish*, holding that the scheme of the relevant statutes limited the plaintiffs to availing of other types of remedy, such as domestic appeal or judicial review. The decisions in those cases were, in the respects currently relevant, based primarily on reasons of legal policy.

- 13] While being astute to the distinction which might fall to be drawn between a damages case and a claim for an interdict, Mr *Irish* nevertheless contended that the principles discernible from a consideration of the aforementioned judgments were applicable to the application for an interdict in this matter by parity of reasoning. I, however, think that Mr *Fitzgerald SC* who, together with Mr *Smalberger*, appeared for the Applicants, was right when he submitted that the matter must be approached on the basis of the principle stated in *Patz v Greene & Co 1907 TS 427*, read with *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop.) Ltd 1933 AD 87*, at 95-6, viz. that when it appears that a statute was enacted in the interests of a particular person or any class of persons, a party who shows that he or she is one of such persons or such class of persons and seeks judicial intervention by way of the grant of interdictory relief premised on the Act is not required to show harm as a result of the

contravention of the statute, such harm being presumed. But that when a statutory duty was imposed not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained, or apprehends actual harm in order to obtain interdictory relief on the grounds of a breach of the statute.

- 14] In determining into which, if either, of the aforementioned categories of legislation the noise control regulations fall, it is relevant to consider the provision in the ECA in terms of which they were made. Section 25 of the ECA provides:

‘25 *Regulations regarding noise, vibration and shock*

The Minister may make regulations with regard to the control of noise, vibration and shock, concerning-

- (a) the definition of noise, vibration and shock;*
- (b) the prevention, reduction or elimination of noise, vibration and shock;*
- (c) the levels of noise, vibration and shock which shall not be exceeded, either in general or by specified apparatus or machinery or in specified instances or places;*
- (d) the type of measuring instrument which can be used for the determination of the levels of noise, vibration and*

shock, and the utilization and calibration thereof;

(e) the powers of provincial administrations and local authorities to control noise, vibration and shock; and

(f) any other matter which he may deem necessary or expedient in connection with the effective control and combating of noise, vibration and shock.'

15] The enabling provisions of s 25 of the ECA fall to be construed with regard to the evident objects of the Act as a whole, which appear to me to be fairly summarised in the long title which proclaims that it was an '*Act ...to provide for the effective protection and controlled utilization of the environment and for matters incidental thereto*'.

16] The aforementioned contextual considerations support the conclusion that the regulations were intended to provide for the controlled utilisation of the environment and matters incidental thereto for the general benefit of the public. Nothing in the content of the regulations themselves detracts from the effect of the contextual considerations just described. On the contrary, it is apparent from the regulations that their principal object was to oblige local authorities to administer matters relating to noise pollution and to define uniform criteria by which such authorities are to do so. In the constitutional context, the regulations are recognisable as legislation or measures of the nature

contemplated in terms of s 154 of the Constitution (Act 108 of 1996).

- 17] Support for the conclusion that the regulations were not intended for the benefit of any particular person or class of persons in the sense referred to in the *Roodepoort-Maraaisburg* case, *supra*, is afforded by the provision in terms of regulation 7(2) and (3) of the power to local authorities, on application, to exempt any person from any provision of the regulations. It would obviously be for the local authority to determine in any given case whether notice of such application fell to be given to the public in general, or to any category of identified persons. No doubt in discharging its obligations under ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 in this connection the local authority would have regard to the potential detriment to third persons that might be occasioned as a result of the grant of any exemption. In this context, the local authority, in determining the potential interest of third parties in the decision of any application for exemption under regulation 7, would inevitably have to have regard in the broad to essentially the same considerations that a court must do in determining issues under what is variously labelled ‘private nuisance’, or ‘neighbour law’. In this regard I consider that the grant to an applicant by a local authority of an exemption from the provisions of regulation 4 would not be of cognisable interest to third parties unless

the noise that would be permitted in terms of the exemption amounted, actually or potentially, to a ‘*noise nuisance*’ as defined in the regulations, and which would be likely to affect such persons.

- 18] It follows that the fact that the respondent has been shown to be in apparent breach of regulation 4 read with regulation 9 of the Noise Control Regulations does not, without more, entitle the applicants to interdictory relief. In order for the applicants to obtain such relief it is necessary for them to show that the breach has occasioned them harm, or is likely to do so. I am of the view that in the circumstances of this case the requirement of harm would be established if the conduct of the respondent about which applicants complain gave rise to a private nuisance actionable at their instance. It is unnecessary in the circumstances to say anything at this stage about the argument by Mr *Irish* that the regulations are susceptible to impugnement on account of what the respondent contends to be their irrationality and arbitrariness (although I shall return to that subject in a different connection later). Indeed, the applicants have founded their claim, in the alternative, on the common law remedy and it is its consideration in that context that will therefore be determinative of the application.

- 19] Ignoring for the moment the effect of various regulatory systems that

characterise life in the modern age, such as zoning controls, building regulations and the like, everyone is in general permitted in common law to use their property for any purpose they choose, provided only that the use of the property should not intrude unreasonably on the use and enjoyment by the neighbours of their properties. What constitutes reasonable usage in any given case is dependant 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: 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.⁴

⁴ It is considerations of this nature that informed the judgments in *Du Toit v De Bot*; *Du Toit v*

- 20] 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] AC 880⁶, 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*

Zuidmeer 2 SC 213 (1883) (in which De Villiers CJ declined to grant an interdict for the abatement of an alleged noise nuisance to an applicant who had gone to live in a part of Paarl where a cooperage and other ‘manufactories’ carried on business) and *Jecks & Co v O’Meara & Co* 1904 TH 284 (in which Wessels J refused to come to the assistance of the applicant who complained of the vibrations and noise caused by machinery at a neighbouring flour mill, holding that the locality was a business locality in which the respondents were ‘carrying on a legitimate business in a legitimate manner’).
 5 LAWSA ed Joubert et al (First Re-issue) vol.19 *Nuisance* at para 189, pp135-6.

6 Also reported at 1940 (3) All E.R. 349 (HL).

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.'

21] The balance that falls be struck in the context of acknowledging the mutual rights of neighbours to the free use and enjoyment of their property on the one hand and the obligation on them on the other hand to exercise those rights in a manner which does not unreasonably impinge on the equivalent rights of the other implies the necessity for some degree of what Milton describes as 'mutual sacrifice', in accordance with a principle of 'give and take; live and let live'.⁷

22] Noise is not uncommonly a matter of contentiousness and a source of ill-feeling between neighbours and it is not surprising therefore that disputes comparable to the current matter have come before the courts over the years.⁸ The import of the principles just stated in general terms were rehearsed by Miller J (as he then was) in a noise nuisance case as follows:

⁷ See LAWSA (First re-issue) op cit supra, vol. 19 at para 187 and *Assagay Quarries (Pty) Ltd 1960 (4) SA 237 (N)* at 240H, where Warner AJ observed that the 'The homely phrases "give and take" and "live and let live" are much nearer the truth than the Latin maxim *sic utere tuo ut alienum non laedas*'.

⁸ See the judgments cited in the footnotes to para 203 in LAWSA (First Re-issue) op cit supra, vol. 19.

‘.....it goes without saying that, especially in contemporary conditions, some discomfort or inconvenience or annoyance emanating from the use of neighbouring property must needs be endured. Indeed, the Chief Justice expressly excepted (at p. 110) [of the judgment in *Regal v African Superslate (Pty) Ltd 1963 (1) SA 99 (A)*]

'die gewone, wederkerige laste wat die een buurman van die ander moet verduur'.

The difficulty in cases of this nature lies in determining the level at which a disturbance which results from the contiguity of two properties, each of which is a potential source of disturbance to the other, ceases to be a 'to-be-expected-in-the-circumstances' interference with rights of enjoyment of property and becomes an unwarranted and actionable interference. This is largely a question of fact and of judgment and opinion, but there are guiding considerations which should be borne in mind in the interests of fairness to both parties, many of which considerations have frequently been stated in South African decisions, borrowing freely from judgments in the English Courts. The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists in noise) the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of 'the reasonable man' - one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property. (Cf. Holland v Scott, 2 E.D.C. 307 at p. 324; Graham v Dittmann & Son, 1917 T.P.D. 288 at pp. 290 - 1; Leith v Port Elizabeth Museum Trustees, 1934 E.D.L. 211 at pp. 213 - 4; Ferreira v Grant, 1941 W.L.D. 186 at pp. 188 - 9; Prinsloo v. Shaw, 1938 AD 570 at p. 575). As has been pointed out in the African Superslate case, *supra*, the subject has not been worked out systematically or in detail by Roman-Dutch law commentators.’

See *De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) 188 (D&CLD)* at 192.

- 23] The following gloss was added in *Moskeeplein (Edms) Bpk en ‘n ander v Die Vereeniging van Advokate (TPA) en Andere*

1983 (3)SA 896(T) at 900H-901A.:

‘Dit is dus duidelik uit Regal se saak supra asook die De Charmoy saak dat die reg 'n reëling vir die botsende eiendoms-en genotsbelange van bure moet voorsien - met ander woorde, al word daar aanvaar dat daar 'n geraas gemaak word deur een buurman moet sy belange ook in oorweging geneem word om te bepaal of in die omstandighede daardie geraas onredelik oormatig is. By die bepaling daarvan moet onder andere die besondere omgewing waarin die geraas plaasvind in ag geneem word.

Waar egter, soos in die huidige geval, dit aanvaar kan word op die stukke dat 'n geraas gemaak word wat wel 'n stoornis veroorsaak, berus daar, na my mening, 'n plig op die persoon wat vir daardie stoornis verantwoordelik is om aan te toon dat daar nie redelikerwys stappe gedoen kan word om die stoornis te voorkom nie.’

- 24] The respondent contends that the applicants are not entitled to complain because the premises now occupied by On Broadway had been used for the best part of 40 years as ‘a place of night-time entertainment’ at which music had been played, one assumes at comparable volumes to that experienced by the applicants today, and because they had ‘come to the nuisance’. The contention proceeds that there are many restaurants and bars in the area and that having regard to the established character of the area the business of On Broadway ‘is being appropriately carried on at 88 Shortmarket Street, and in the circumstances constitutes the reasonable and natural use of those premises’, whereas the applicants’ use of 74 Loop Street

for residential purposes 'is inappropriate to its locality'.⁹

- 25] In my judgment the respondent's contentions argue the issues too bluntly. While it is correct that the central business district of Cape Town did suffer an almost complete loss of its residential component during the latter part of the twentieth century, there has been a drive in the last ten years or so to change the character of the inner city to make it once again a place where people both live and work. The change that has already been wrought in this respect is significant; it being a matter of common local knowledge that many formerly commercial premises have been transformed either in whole or in part into apartment buildings. This means that some longstanding users of inner city space now have new neighbours. The changing character of the inner city undoubtedly means that noise levels that went uncomplained about in the past because they caused no or insignificant disturbance to the neighbours might now invite attention in the altered context.
- 26] A person setting up home in the inner city cannot expect the

⁹ I quote from the respondent's heads of argument.

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. While established noise levels are certainly a consideration in assessing what the new class of inner city apartment dwellers might reasonably be expected to tolerate¹⁰, it cannot be an absolute answer for somebody responsible for creating a level of noise which exceeds what the inner city resident should reasonably be expected to tolerate at night to say simply 'I was making this noise before you moved in and therefore if you wish to live here you will just have to put up with it, or find a home elsewhere'. If an area is suitable for residential occupation, or has been popularly adopted for that use, other users of property in the area must be accommodating of the rights of such residents to the reasonable amenities of life.

10 Cf. *Allaclas Investments (Pty) Ltd and another v Milnerton Golf Club* CPD case no. 8552/04 (judgment dated 24 August 2004, as yet unreported, but which may be accessed on the internet at <http://law.sun.ac.za/cgi-bin/list.php>.)

27] In his chapter on ‘Nuisance’ in LAWSA¹¹, Milton records that

‘It is said to be no defence to an action for nuisance that the plaintiff voluntarily set up a residence or other occupation on premises within the ambit of the nuisance. Priority of occupation does not per se entitle a landowner to deprive his neighbours of reasonable physical comfort of human existence. Likewise, a landowner cannot be said to have acquiesced in an interference with rights of personal enjoyment by knowingly locating within the ambit of an existing nuisance.’ That is certainly the law in England¹², and in Canada¹³ and Australia.¹⁴

Howard Farrar, Robinson & Co Ltd v East London Municipality (1908) EDC 149 (a matter in which the plaintiffs, having taken up the lease of a site near an existing refuse dump,

11 LAWSA ed Joubert et al (First Re-issue) vol.19 *Nuisance* (by JRL Milton, revised by ES Pugsley) at para 226, p. 152.

12 The Law of Torts, JG Fleming, 9th ed (1998) at 491; *Sturges v Bridgman* (1879) 11 ChD 852; *Attorney-General v Corporation of Manchester* (1893) 2 Ch 87 at 95. Lord Denning MR’s judgment in *Miller v Jackson* 1977 QB 966 (CA); [1977] 3 All ER 338 (CA), which is cited by Milton, loc cit, as authority ‘that in certain circumstances the fact that nuisance existed at the time the plaintiff came within its ambit may constitute a defence’ was a minority judgment.

13 *Russell Transportation Ltd v Ontario Malleable Iron Co.* [1952] 4 DLR 719; *Douglas Lake Cattle Co. v Mount Paul Golf* 2001 BCSC 566 at para 15.

14 *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd & Anor* [2000] VSC 214, in which Gillard J held (at para 73-4):

‘It is well established that it is no defence to an action for nuisance that the plaintiff willingly came to occupy a property knowing that there was a nuisance or a potential for a nuisance. “The doctrine of coming to a nuisance may be looked on as exploded. A man is not precluded from maintaining an action or a suit by the fact that the business which creates the nuisance had been carried on before he took possession.” - see Kerr on Injunctions, 2nd ed. at p.208. See also the Law of Torts by Dr Fleming, 9th ed. at p.491.

But the important issue here concerns the obligations of the defendants in the operation and conduct of their golf course. They do not have superior rights to adjoining landowners merely because they were there first and conducting a golf course.’ See also *Campbelltown Golf Club Limited v Winton & Anor* [1998] NSWSC 257 (unreported, NSWCA CA No 40056 of 1996, judgment dated 23 June 1998), referred to in this court’s judgment in *Allaclas Investments (Pty) Ltd and another v Milnerton Golf Club* (see footnote 10, above).

later sought and obtained an interdict against the local authority operating the dump to abate the nuisance arising amongst other things from the offensive gases emanating from the dump) affords South African authority in accordance with the principle.

- 28] The applicants aver that despite realising, when they moved into the inner city, that they might have to tolerate certain intrusions into their comfort that suburban residents do not, life in the city centre in fact 'exceeded all expectations' and that their properties had been 'surprisingly quiet at all hours of the day' until the opening of On Broadway. It is clear from the actions of the applicants, by visiting the operator of On Broadway on more than one occasion and engaging in correspondence calling for remedial action to be taken, that the increased noise levels in the area attendant on the operation of the theatre were a cause of discomfort and displeasure. It is apparent that the applicants were not concerned with the noise generated by the chatter of the audiences and the background music played during the pre-show suppers, but that it was the amplified sound during performances that was the problem. In an email from the second applicant to the operator of On Broadway, and majority interest holder in the respondent, dated 16 May 2005, it was

stated ‘Remember that your building abuts directly onto mine and that you’ve effectively got a tin roof with just minimal insulation in some (but not all) parts between me and your system. You have issues with noise escaping and vibration from bass thump which runs straight up our shared wall. The noise on Tuesday 10 May 2005 when you had your opening party was deafening, turning it down slightly is not going to do the trick.’ Elsewhere in their founding papers the applicants say that they have tried to protect themselves from the discomfort experienced by them due to the noise generated during performances at On Broadway by closing their windows, but that this gives no meaningful relief. The applicants claim that they are subjected virtually nightly to what they describe as ‘a material or substantial nuisance which is unreasonable between neighbours’. It appears that the performances at On Broadway usually occur between about 20h30 and 22h30 of an evening.

- 29] Mr *Irish* however emphasised the absence of any allegations on the papers to the effect that the noise levels complained about are having any physically untoward effect on the applicants- the applicants do not claim to be sleep deprived, or to be suffering from any physical or psychological ill-effects as a consequence

of the noise. In this connection, he referred to a passage from the speech of Lord Westbury LC in *St Helens Smelting Co. v Tipping XI H.L.C. 642*, where the Lord Chancellor appeared to draw a distinction in the context of nuisance between usages of land occasioning personal discomfort and those occasioning injury to property, saying: *‘My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property*

and for the benefit of the inhabitants of the town and of the public at large.' As Mr Irish pointed out, this passage has enjoyed the approbation of South African courts on a number of occasions. He submitted that there was a distinction drawn in nuisance cases 'between activities which, on the one hand, threaten injury to property or health, and activities which, on the other hand, merely interfere with personal comfort'. He submitted that the approval by the courts in this country of Lord Westbury's statements in *St Helens Smelting Co.* had the effect that 'where conduct merely disturbs personal comfort, the question of the environment in which it occurs assumes heightened significance'.¹⁵

- 30] I do not consider, however, with respect, that the frequent approbation of Lord Westbury's words has either added to or derogated from the effect of the generally applicable principles in respect of private nuisance reiterated earlier in this judgment. In the modern urban milieu where noise is alleged to be nuisancesome in a situation such as that presented in this matter it is appropriate, using the approach described by Lord Westbury, on the one hand to accept that while restaurants and theatres are important facilities contributing to the social

¹⁵ The quotations are from the respondent's heads of argument.

amenities of the community and that therefore persons choosing to live in areas like Loop and Shortmarket Streets, where such amenities are appropriately situated, and have been for some time, should have to accommodate the inconveniences attendant on such voluntary propinquity, and on the other hand to acknowledge that the availability of modern technology to dampen and contain the volume and frequency of amplified sound that characterises modern theatre is a factor to be taken into account when judging what is reasonable or not in circumstances. As long ago as 1882, Barry JP pointed out, when granting an interdict to the plaintiff who complained about the noise emanating from a nearby workshop, that the interdict would not prevent the defendant from continuing to carry on his trade there if he constructed the building in which it was conducted of different material. See *Holland v Scott* 2 *E.D.C.* 307, at 316.

- 31] In the context of the emphasis placed upon them by Mr *Irish*, it is interesting to note that the remarks of Lord Westbury in *St Helens Smelting Co. v Tipping* were quite recently considered by the House of Lords in *Hunter and Others v. Canary Wharf Ltd*; *Hunter and Others v. London Docklands Corporation*

[1997] AC 655; [1997] 2 All ER 426; [1997] 2 WLR 684 in circumstances which suggest that they have also been susceptible to being misconstrued by English jurists; albeit in a different sense. . Lord Hoffman referred to the case, saying ‘St. Helen's Smelting Co. v. Tipping was a landmark case. It drew the line beyond which rural and landed England did not have to accept external costs imposed upon it by industrial pollution. But there has been, I think, some inclination to treat it as having divided nuisance into two torts, one of causing "material injury to the property," such as flooding or depositing poisonous substances on crops, and the other of causing "sensible personal discomfort" such as excessive noise or smells..... But the premise is quite mistaken. In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.’ These remarks, which highlight the treatment of nuisance in English law as a

‘tort against land’, serve as an illustration of the appositeness of the cautionary enjoinder by Steyn CJ in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 99 (A) at 106 that our ‘neighbour law’ (*Afr.* ‘buurreg’) and the English law of nuisance are by no means identical.¹⁶ See also LAWSA (First Re-issue) op cit supra, vol. 19 at para 185. English law would not seem to draw the distinction that Mr *Irish*, relying on *St. Helen's Smelting Co.* and *Gifford v Hare* (1897) 14 SC 244, at 259, sought to draw between nuisance having a physically adverse effect and nuisance affecting the sensibilities without a demonstrable physical effect. And, as I have said, I do not consider there is a proper basis in South African law for such a distinction either. Acts or events which interfere with the comfort of human existence are in fact the central subject matter of the South African law of private nuisance, whereas other grounds of action are primarily appropriate for acts causing material damage to property or physical injury to persons. The relevance of the observations of the Lord Chancellor in *St.*

16 The differences between the two systems have sometimes been obfuscated by the labelling of some cases which were in fact aquilian actions as ‘nuisance’ cases. For example, in *Wynberg Municipality v Dreyer* 1920 AD 439 (referred to again in a different connection later in this judgment), which concerned a claim for interdictory relief and aquilian damages arising from the pollution of the plaintiff’s water supply by offensive matter which the local authority had allowed to percolate from its nearby sewerage works, Innes CJ remarked, at p. 447, ‘Now one of the remedies for a delict of this nature, amounting to what the English law would call a nuisance, is the remedy of an interdict.’ (My underlining.) That passing reference to the English law of nuisance resulted in the editors of the law reports mislabelling the case in the headnote as a ‘nuisance’ case. There are several indications in the judgment itself, however, which demonstrate the Appeal Court’s conscious treatment of the claim in issue as one founded in delict, under the *lex aquilia*.

Helen's Smelting Co. must therefore be recognised as bearing only on the axiom that the nature of the locale is factor affecting the characterisation of particular usage as a nuisance or not. On my reading of the cases that is indeed the context in which they have on repeated occasions been approved by the South African courts.

- 32] I am mindful however that the applicants are not entitled to interdictory relief if their sensibility to the noise generated by the performances at On Broadway is a manifestation of a too refined or sensitive disposition, or an unreasonably low tolerance level and I accept that the measure of what stands to be tolerated is affected by the character of the milieu in which the matter complained of as a nuisance occurs. I am also mindful that it has often been observed by judges faced with cases like this that it can be difficult to decide where to draw the line. In this case I have derived considerable assistance in the latter respect from the technical evidence provided by noise measurements taken on site at appropriate times by qualified technicians, and from the consideration of those measurements by Professor J.L. van Niekerk, a professor in the department of mechanical engineering at the University of Stellenbosch, who

is an acknowledged expert in noise and vibration- with particular emphasis on human response to noise and vibration. Professor van Niekerk's affidavit was put in by the respondent.

33] Professor van Niekerk summarises the sound measurements conducted at the apartments of the applicants at different times by Messrs L.J. van Rensburg and T. Mackenzie-Hoy, at the instance of the respondent and the applicants, respectively. He expresses the opinion that the measurements taken by van Rensburg and Mackenzie-Hoy seem to have been recorded appropriately in accordance with the relevant noise regulations and the national standard published by the South African Bureau of Standards in SANS 10103/2004, which he describes as pertaining to 'the measurement and rating of environmental noise with respect to land use, health, annoyance and to speech communication'.

34] According to the SANS 10103 standard, the acceptable rating level for noise in residential districts situated within urban districts, measured indoors with windows open, is 45dBA in the daytime and 35dBA at night (defined as during the hours between 22h00 and 06h00). In non-residential districts of

central business districts, the equivalent acceptable rating levels for noise are 55dBA and 45dBA, respectively. With reference to these levels and the ambient noise levels measured in the applicant's apartments prior to the commencement of the performances at On Broadway (i.e. between 45dBA and 50dBA), Professor van Niekerk makes the point that the apartments are situated in what in any event might be characterised objectively as an unacceptably noisy environment.

¹⁷. This observation reassures me, in the context of their expressed general satisfaction with the noise levels in the area, that the applicants do not appear to be unduly sensitive to noise disturbance, or unrealistically unaccepting of the challenges of the environment in which they have taken up residence.

35] The provision in the noise regulations that a 5dBA upward adjustment of any noise reading is required where the sound involves a discernible pitch is contentious, but everyday human experience informs one that the tonal character of certain sounds such as the thud of bass sounds in amplified music, or the

¹⁷ The respondent referred in their answering affidavit to a table in a document published on the website of the City of Cape Town Department of Health which reportedly contains a table illustrating 'typical noise levels' and which describes 'common sounds' in the 30dB-50dB range as 'rainfall, quiet office', refrigerator, computer' with the perception of sound 'heard faintly'. I find it impossible to reconcile these indications with the evidence of the experts who have made affidavits in this application. Prof. van Niekerk, for example, describes an area with an ambient sound level of 45-50dBA as 'very noisy'. I can only speculate that the difference might be due to the 'A' weighting in the sound measurement.

shrillness of a ringing telephone have an especially intrusive effect over and above general background noise. It is unnecessary however to try to resolve the issue of whether or not the 5dBA adjustment is appropriate in the context of the definition of ‘disturbing noise’. It suffices to have regard to what Professor van Niekerk says with reference to table 3 of his report sv. *‘Subjective rating of an increase in noise levels’*. Table 3 lists what the expert describes as ‘the subjective assessment of a human of an increase in noise level’. According to the table, an increase in noise level of between one and two decibels is ‘not noticeable’; an increase of three decibels, ‘barely noticeable’; an increase of five decibels, ‘clearly audible’ and an increase of 10 decibels, ‘twice as loud’. Consistently with the information set out in table 3, Professor van Niekerk regards the approximately 10dB difference in ambient noise levels between those obtaining in apartments near the junction of Loop and Shortmarket Streets and those regarded as acceptable in an urban residential district as significant, and as affording the basis to characterise the area in question as ‘very noisy’.

36] The noise levels measured in the apartments at various times

during performances at On Broadway indicate, even leaving the 5dBA tonal character adjustment required in terms of the regulations out of consideration, that sound levels are typically increased by between four and eight decibels, and occasionally by more than ten decibels. Obviously the range is affected by the content of the various performances and the variable nature of audience reaction to the different shows. The nature of the contribution of sound from On Broadway appears to range from clearly audible to loud. If the five dBA upward adjustment is applied, the increased sound levels appear much worse.

- 37] It falls to be decided whether or not this contribution of sound by the activity at On Broadway in an area which, by its nature, is already very noisy, certainly from the perspective of residential suitability, is nuisancesome to an actionable degree. After considering all the relevant factors pointed to in the respondent's comprehensive and helpful written and oral arguments, a number of features have weighed especially in my conclusion that an actionable nuisance has indeed been proved. The extent of the increase in noise levels occasioned by the productions has been demonstrated on the evidence of Professor van Niekerk to be significant. His evidence in this regard

corroborates the cogency of the applicants' evidence that the comfort of their existence during the periods that performances are staged is materially affected. While it is true that the performances generally occur only for something between one and a half and two hours of an evening, they are a regular occurrence- not just an occasional intrusion into the applicant's comfort zone with which they might be required to put up, like everyone does when their next door neighbour throws the occasional party, for example. The performances occur, at least in part, during the late hours of the evening when most people would reasonably expect things to be quietening down, more or less in line with the indications in the SANS 10103:2004 table in respect of acceptable rating levels for noise in districts, mentioned above. I have considered it very significant that there are obvious steps that can be taken by the respondent to ameliorate the problem. I accept that the respondent has acted in good faith to institute measures to address the problem, and incurred not inconsiderable expense in this respect. But it is clear from all the expert reports that most of the money spent by the respondent in this connection has been wasted and that appropriate measures still need to be implemented.

38] Noise monitoring reports produced by Mr L.J. van Rensburg at the instance of the respondent indicated that the premises of On Broadway has a roof gallery about a metre in height with walls made of board-like material with a number of louvers and had a corrugated iron roof. He considered that the noise that was being heard by the applicants was emanating through the sides and roof of the gallery. An inspection by Professor van Niekerk on 14 September 2006 indicated that insulation material that had been installed by the respondent after the receipt of initial expert reports was ‘totally unsuitable’ for acoustic insulation and had been haphazardly installed, not covering the complete roof area, as would in his opinion have been necessary to effectively acoustically insulate the theatre. The September 2006 inspection revealed that ‘large openings between the roof sheeting and walls open to the outside were still evident and had not been acoustically sealed’. In addition large areas of the roof had received no treatment at all, including that above the back of the stage. Professor van Niekerk has recommended a number of steps for further action including the installation of an appropriately engineered acoustic treatment over the entire roof area. He points out that this will probably necessitate removing the gallery at the apex of the roof, removing all the roof sheeting

and installing the acoustic material before reinstalling the roof sheeting. He considers that in the process all openings from the theatre should either be sealed airtight or acoustically treated.

- 39] Professor van Niekerk considers that the achievement of what he regards as the necessary targeted reduction of noise by about 15 decibels might be ‘ambitious’, but possible if the offending noise is made up only of airborne noise emanating through the roof of the theatre. As I said, Mr van Rensburg, the other sound expert employed by the respondent, is of the opinion that this is primarily the case. It seems to me on a general view of the papers to be probable that if the steps mentioned above that have been recommended by Professor van Niekerk are implemented the nuisancesome noise levels will be abated materially, hopefully to the extent that any residual intrusion on the comfort of the occupiers of the nearby apartments could be addressed by the simple expedient of closing the windows.¹⁸ (There are some indications that there might also be a problem caused by sound vibration travelling up a common wall between the properties, but there is insufficient evidence to make a finding in this

¹⁸ Mr *Irish* submitted that the nuisance that the applicants complain about could be effectively addressed if they simply closed their windows during performances. The sound measurements taken, which are not in dispute, however, indicate that the performances would still be clearly audible above the already very noisy ambient levels even with the windows closed. In my judgment this is not a reasonably acceptable situation in the context of the overall conspectus of relevant considerations.

respect. There is also insufficient evidence on this aspect to enable a finding that the respondent should be liable in respect of any discomfort occasioned to the occupants of the applicants' apartments by vibration in the walls.)

40] Mr *Irish* informed me that in the event that an interdict as sought by the applicants were to be granted in these proceedings, the respondent would wish to implement the remedial measures recommended by Professor van Niekerk and requested that any interdictory order be framed in a way so as to enable the respondent to do so before the interdict became operational. Mr *Fitzgerald*, however, opposed the granting of any such indulgence to the respondent, relying on the authority of the judgment of the Full Bench of the Transvaal Provincial Division in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T)*, followed in *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SECLD)*, to submit that it was not competent for this court, having found that the applicants had made a case for final interdictory relief, to suspend the operation of the resultant order.

41] In the *United Technical Equipment* case, the appellant had been using its land for purposes not permitted in terms of the applicable town planning scheme, which constituted a criminal offence. The court of first instance had refused to suspend the operation of a prohibitory interdict obtained by the local authority, pending the determination of an application which the appellant had launched after the commencement of interdictory proceedings instituted against it by the municipality, which, if granted, would regularise the unlawful land use. The court of first instance appears to have considered that it was possessed of the discretionary power to grant the suspension sought, but in the exercise of such discretion had refused to accede to the appellant's request. The appeal was against that part of the judgment refusing to suspend the operation of the interdict. Writing for the Full Bench in the judgment on appeal, Harms J (as he then was) doubted the existence of a judicial discretion to *refuse* a final interdict when an applicant had satisfied the well-known requirements for final interdictory relief in accordance with the principles stated by Innes JA in *Setlogelo v Setlogelo* 1914 AD 221.¹⁹ His Lordship, referring to the remarks of Schreiner J (as he then was) in *Transvaal Property and*

¹⁹ '...a clear right: injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'

Investment Co Ltd and Reinhold & Co v SA Townships Mining and Finance Corp Ltd and the Administrator 1938 TPD 512 at 521, expressed the view that the discretion to refuse an interdict in such circumstances was limited to the case where the rights of the party complaining could be protected 'by any other ordinary remedy'. The court noted, however, that in *Kemp Sacs and Nell Real Estate (Edms) Bpk v Soll en 'n Ander* 1986 (1) SA 673 (O) at 689, it had been held, after consideration of the divergent views on the issue expressed in various academic texts, that the statement by Innes CJ in *Wynberg Municipality v Dreyer* 1920 AD 439 at 447 that 'the Court has a discretion to grant or not to grant [a final interdict]' afforded binding authority that there is a wide discretionary judicial power. Despite the court's inclination in *United Technical Equipment* against the existence of a wide discretionary power, the court nevertheless decided the appeal assuming the existence of such a power, holding on that approach that the court of first instance had not misdirected itself in the exercise of such discretion. Similarly, in the *Nelson Mandela Metropolitan Municipality* case, *supra*, Plasket AJ (as he then was), while endorsing the views expressed in *United Technical Equipment*, refused to suspend the interdictory order he had granted on the basis of assuming that to the extent that he

might have been vested with the discretionary power to do so, it was inappropriate on the circumstances of the case to exercise that power in favour of the respondents.

42] The issue discussed in *United Technical Equipment* was touched on in a Full Bench judgment of this court in *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C) at para 23, where Greisel J (Knoll and Moosa JJ concurring) stated '*The existence of a general, unqualified discretion to refuse a final interdict where all the other requisites have been established has been questioned. According to LAWSA such discretion "is very limited and depends exclusively upon the question whether the alternative remedy is adequate". On the other hand, there is authority – both in this Division and in the Appellate Division – acknowledging the existence of a seemingly unqualified discretion.*'

43] The Appellate Division authority to which Griesel J referred was *Wynberg Municipality v Dreyer*, supra, and the authority in this Division was the judgment in *Candid Electronics (Pty) Limited v Merchandise Buying Syndicate (Pty) Limited* 1992 (2)

SA 459 (C) at 464, in which Cooper J held that the principles in respect of the grant of specific performance of contractual obligations stated in *Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)* at 378E-F and *Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)*, at 782H-783B, applied ‘mutatis mutandis in an application for an interdict’. It is clear, however, that the learned judge did not accept that the ambit of the discretion to refuse an interdict was limited to a situation where a more appropriate alternative remedy (for example compensation in damages) was available.

- 44] In *City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C)*, at 72G-I, Selikowitz J expressed the view that the provisions of Uniform Rule 45A confirm that the court is empowered to suspend the operation of its orders. In the context of eviction cases under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the learned judge held that the provisions in the Act empowering the courts to delay the eviction of unlawful occupiers of land on just and equitable grounds was no more than a confirmation of ‘a discretion that the courts have frequently exercised at common law’. A consideration of the authorities cited by Selikowitz J in

support of this proposition²⁰ illustrates other instances in which the courts, including the Appellate Division, have been willing to act as if vested with a discretion to suspend orders for the enforcement of a legal right to which they had found a party to be entitled, albeit in some cases questioning the actual existence of such discretionary power in the absence of any statutory provision for it. A recent example of a case in which a court suspended the operation of an interdict for a period to enable the respondent 'to put its house in order' is the judgment of the Full Bench of the *Eastern Cape High Court in Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E)*.

45] As I have mentioned, the applicant's argument in this connection was founded on the dicta in the *United Technical Equipment* and *Nelson Mandela Metropolitan Municipality* cases. As both those matters were decided on the basis of an assumption of the existence of a wider discretion to refuse a final interdict than Schreiner J considered to be available, it is plain to me that neither of the judgments was intended to be resolute of what is clearly an uncertain area in our law.

²⁰ *Voortrekker Pers Beperk v Rautenbach 1947 (2) SA 47 (A)* at 50; *Lovius and Shtein v Sussman 1947 (2) SA 241 (O)* at 243; *Potgieter and Another v Van der Merwe 1949 (1) SA 361 (A)* at 374; *Van Reenen v Kruger 1949 (4) SA 27 (W)* at H 29; *Palabora Mining Co v Coetzer 1993 (3) SA 306 (T)* at 310J - 311B.

Schreiner J's remarks in the *Transvaal Property and Investment Co* case were predicated on what the learned judge considered to be the implications arising from the statement in *Setlogelo* that a person with a clear right and no adequate alternative ordinary remedy was entitled to a final interdict. The learned judge was not called upon to consider the extent of the courts' power, if any, to suspend the operation of an interdict. In my view the temporary suspension or postponement of the operation of a final interdict is a question quite distinguishable from the refusal of a final interdict in a context in which the applicant has satisfied the requirements for relief. No authority has been cited to me which makes it clear that this court lacks the discretionary jurisdiction to suspend the operation of a final interdict. On the contrary, as I have shown, precedent in this and other Divisions supports the existence of such a power. In the absence of any argument based on the common law to demonstrate the fallacy of such authority, I therefore intend to proceed on the assumption of the existence of such a discretion. Obviously the discretion must be exercised judicially.

- 46] Mr *Fitzgerald* submitted that a suspension of the interdict would be tantamount to condonation of criminal conduct and

accordingly contrary to public policy. This was a consideration which in the context of the facts in the *United Technical Services* and *Nelson Mandela Metropolitan Municipality* cases weighed heavily against the exercise of the assumed discretion against the respondents, and for good reason. In my view, however, whereas it was plain in those matters that the respondents had wittingly embarked on unlawful conduct, the same cannot be said of the respondent in this case. In the circumstances of the current matter it is not clear, even in the context of the finding that its conduct amounts to an actionable private nuisance, that the respondent is guilty of a criminal offence under the Noise Control Regulations. I referred earlier to certain relevant and peculiar anomalies in the regulations. It has been unnecessary for me to reach any conclusion on the matter, but Mr *Irish* has persuaded me that there is a prospect that the respondent might in the context of any prosecution for an alleged contravention of the regulations be able to persuade a court that the regulations are invalid in relevant respects on account of irrationality or arbitrariness. It would certainly be open to the respondent to advance such a defence in the context of a prosecution. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); ([2004] 3 All

SA 1 (SCA)) at paragraphs 32-35.

47] The remedy to which the applicants are entitled in this case is an interdict directing the respondent to abate the nuisance. They are not primarily entitled to an order directing the respondent to refrain from the conduct of its theatre-restaurant business. The respondent will need a reasonable period of time to do what is necessary to abate the nuisance.²¹ The social utility of its business, which provides not only an important facility of entertainment and culture, but also employment and theatrical career opportunities to many who are vitally dependent thereon, is such that in my view it outweighs the interest of the applicants in the immediate cessation of the nuisancesome noise that intrudes on their comfort for about two hours a day. Mr *Irish* has submitted, and I agree, that having regard to the fact that we are approaching the end of year period, when it is notoriously difficult to get anything in the line of building alterations done in Cape Town, it would be reasonable to afford the respondent a period of four months to undertake the work necessary to abate the nuisance. An order will issue accordingly.

²¹ Even the noise control regulations upon which the applicants rely provide for the giving of an instruction notice by the local authority stipulating a time by which noise nuisance must be abated. See reg. 2(c).

48] This application was brought as a matter of urgency and set down for hearing on that basis on 20 June 2006. On 22 June 2006 an order was made by agreement by Desai J postponing the matter for hearing in October on the semi-urgent roll and reserving all questions of costs. In my view, it was not appropriate for the applicants to have moved the application as a matter of urgency, and accordingly they will have to bear the costs occasioned by the setdown of the application for hearing in June.

49] In the result the following order is made:

- a) The first respondent's conduct of a theatre-restaurant business in the premises at 88 Shortmarket Street, Cape Town in circumstances in which the entire roof and roof gallery have not been acoustically insulated and the openings between the roof sheeting and exterior walls of the building have not been acoustically sealed is declared to occasion a noise nuisance actionable at the instance of the first and second applicants.
- b) The first respondent is hereby prohibited from conducting its theatre-restaurant business from the premises at 88 Shortmarket

Street, Cape Town until effective measures have been taken to abate the aforesaid nuisance by acoustically insulating the entire roof and roof gallery and acoustically sealing the openings between the roof sheeting and exterior walls of the building.

- c) The operation of the interdict granted in terms of paragraph (b), above, is suspended until 28 February 2007.
- d) The first respondent is directed to pay the applicants' costs of suit, including the costs of two counsel and the qualifying expenses of Mr. T. Mackenzie-Hoy, but excluding the costs attendant on the setdown of the application for hearing as a matter of urgency on 20 June 2006 and the obtaining of the directions order dated 22 June 2006.
- e) The applicants are directed, jointly and severally, to pay the first respondent's costs of suit incurred in respect of the setdown of the application for hearing as a matter of urgency on 20 June 2006 and the obtaining of the order dated 22 June 2006, including the costs of two counsel.

A.G. BINNS-WARD
Acting Judge of the High Court