

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 27875/2022

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 23 September 2024

SIGNATURE OF JUDGE:

A handwritten signature in black ink, which appears to be "JGW Basson", is written over a black rectangular redaction box.

JGW Basson AJ

In the matter between:

**ESTATE D'AFRIQUE MASTER OWNERS
ASSOCIATION NPC**

First Applicant

VILLE D'AFRIQUE HOMEOWNERS ASSOCIATION **Second Applicant**

BEAU RIVAGE HOMEOWNERS ASSOCIATION **Third Applicant**

PORT PROVENCE HOMEOWNERS ASSOCIATION **Fourth Applicant**

and

CHRISTIAN GROSCH AIRBOAT AFRICA CC t/a AIRBOAT

AFRICA @ HARTIES

Respondent

JUDGMENT

Basson AJ

INTRODUCTION:

[1] This is an application for a final, *alternatively* temporary interdict to restrain Respondent from utilising and operating its airboat or any other vessel in the Crocodile river and Hartbeespoort dam area for commercial and recreational purposes.

[2] The relief sought in the Notice of Motion reads as follows:

"1. *That the Respondent be interdicted and restrained from utilising and operating its airboat or any other vessel in the Hartbeespoort Dam area and the Crocodile River for commercial and recreational purposes without due compliance with the relevant SAMSA and Merchant Shipping (National Small Vessel Safety) regulations, 2007 and/or other legal regulatory requirements.*

2. *That the Respondent be interdicted and restrained from operating or utilising its airboat or any other vessel in the Hartbeespoort Dam area and crocodile River for commercial*

and recreational purposes in a manner which constitutes a nuisance to the members of the Applicants and or any other interested parties, with noise pollution or in a manner which is otherwise detrimental or harmful to birds and wildlife as well as the Magalies biosphere.

3. Costs of the application.

Alternatively to prayers 1 to 3 above:

4. That a rule nisi be issued with return date to be allocated by the Registrar, calling upon the Respondent and any interested party to show cause why a final order to the following effect should not be granted:

4.1 That the Respondent be interdicted and restrained from utilising and operating its airboat or any other vessel in the Hartbeespoort Dam area and the Crocodile River for commercial and recreational purposes without due compliance with the relevant SAMSA and Merchant Shipping (National Small Vessel Safety) regulations, 2007 and/or other legal regulatory requirements.

4.2 That the Respondent be interdicted and restrained from operating or utilising its airboat or any other vessel in the Hartbeespoort Dam area and crocodile River for commercial and recreational purposes in a manner which

constitutes a nuisance to the members of the Applicants and or any other interested parties, with noise pollution or in a manner which is otherwise detrimental or harmful to birds and wildlife as well as the Magalies biosphere.

4.3.Costs of the application.

5. *That prayers 4.1 and 4.2 supra operate as an interim interdict with immediate effect pending final adjudication of this application.*

6. *Further and/or alternative relief."*

[3] The Parties, in their joint practice note of 10 May 2023, agreed to limit the issues to be determined, to only the following:

"8.1 Whether the operation of the airboat constitutes an infringement into the rights of the residents of the Applicants.

8.2 Whether the operation of the airboat and the disturbance constitutes an infringement of the rights to enjoy their properties and the natural fauna to such an extent that it justifies interdictory relief."

[4] Although it at first blush appears that the issues to be determined are uncomplicated it, on a thorough examination thereof, is more intricate.

- [5] Before turning to the aforesaid issues, I briefly deal with two issues, although it would appear to no longer to be in dispute, in order to avoid later uncertainty.
- [6] For ease of reference I will refer to the First to Fourth Applicants as "Applicants" jointly unless otherwise expressly referred to or context otherwise dictates.
- [7] I will also refer to Respondent as Mr Grosch as "Grosch". In doing so I mean no disrespect.

RESPONDENT'S CITATION:

- [8] Applicant, cited Respondent as Christian Grosch Airboat Africa CC t/a Airboat Africa @ Harties with registration number 2010/046512/23. Grosch, in his Answering Affidavit admitted this citation. This was evidently not correct. The records of the Companies and Intellectual Properties Commission ("CIPC") in "FA2" to the Founding Affidavit reflects the registered name to be Airboat Afrika CC with Christian Edzard Grosch as the only member.
- [9] Although Applicants filed a notice to correct Respondent's name on the pleadings, no formal application was made at the hearing. Nor does it appear, did Respondent object thereto. I was also not called upon to make a ruling thereon.

[10] The problem therefore seems to have resolved itself because the joint minutes reflect it to be common cause that Respondent is Airboat Africa CC (sic). Nothing however turns on this.

THE CONDONATION APPLICATION:

[11] Applicant, absent agreement thereto, should have delivered its Replying Affidavit by 24 August 2022. CaseLines reflects that this was only done on 8 November 2022. The joint minutes does not reflect that condonation was granted by Respondent, nor was this broached in court. It is evident from the exchanged correspondence (to which I will refer hereunder) that Respondent adopted the stance that Applicants should have foreseen that they will not be able to timeously file a Replying Affidavit. In light of this the Condonation Application still stand and need be adjudicated upon. The background to the Condonation Application is set out below.

[12] Applicants' attorneys, on 22 August 2022 requested permission from Respondent Attorneys to file their Replying Affidavit out of time, the reasons advanced *inter alia* being that numerous of Applicant's boards members had to be consulted and that Counsel was, in any event only available on 25 August 2022 to consult with. Respondent snubbed Applicant and stated that Applicants were *dominis litis* and should have foreseen the difficulties. There was therefore no consent to condone and, in the absence thereof, the application is still alive.

[13] It is evident from a reading of the Condonation Application and the Replying Affidavit, that Applicants did not sit idly by. Attorney Linda Erasmus ("Erasmus") who acts for Applicants, in her Confirmatory Affidavit declared that she, on 24 August 2022 managed to discuss the inspection and the installation of the mufflers on the Airboat with Mr Bosigo ("Bosigo"), the environmental specialist of the Madibeng Municipality. This discussion was necessitated by the fact that Grosch in his Answering Affidavit declared that he had mufflers installed and that Bosigo was happy with the outcome thereof.

[14] Erasmus after her discussion with Bosigo, on 1 September 2022¹ requested Respondent's attorneys to consent to an inspection of the Airboat in the presence of experts at a prearranged time in order to test the decibels that the Airboat emanated.

[15] This request was rejected out of hand by Respondent's attorneys on 8 September 2022² who expressed the view that Applicants, with this request, expected of Respondent to assist them in their case. In this letter Respondent's attorneys also requested the qualifications of Professor Du Toit and wanted to know why he should be present at the inspection.

[16] Erasmus dispatched Professor Du Toit's curriculum vitae to Respondent's attorneys on 21 September 2022.³ In her letter she

¹ Annexure "RA6" to the Replying Affidavit.

² Annexure "RA7" to the Replying Affidavit.

³ Annexure "RA8" to the Replying Affidavit.

indicated that although Bosigo confirmed the installation of a muffler system, he (Bosigo) told her that he requested Grosch to objectively obtain a report on the sound levels produced by the Airboat.

[17] Further reasons for the delay in filing the Replying Affidavit were that Applicants' attorney was on leave from 1 to 7 October 2022 and their Counsel from 22 September 2022 to 10 October 2022.

[18] Respondent thereafter filed its Heads of Argument on 10 October 2022 (as it was entitled to do) despite Applicants' request and despite fact that the attorneys were aware of the request (for extension) and that Applicants were busy collecting and collating evidence. This was also done despite the fact that Respondent's attorneys knew that Applicants wanted to inspect installed muffler system.

[19] Respondent in its Heads of Argument stated that:

"31 At the date that these heads of argument have been compiled, no replying affidavit has been forthcoming."

whilst acknowledging that it would in all probability contain new allegations and evidence, but that the Applicant

"must stand and fall by the founding affidavit and the facts alleged in it,".

There is nothing in the Uniform Rules of Court that compels a party to consent to the late filing of papers. As trite is the fact that Respondent could, if prejudicial new evidence or issues were raised

in a Replying Affidavit, have approached Court to file a further affidavit. This was not done. The fact is, in my, that Respondent forged ahead whilst the matter was not urgent.

[20] Prejudice is a requisite before an affidavit filed out of time, will be disregarded. Before me is an application for condonation. Respondent's counsel did not object this in the matter was heard nor raised any prejudice or objected to it being permitted.

[21] It is trite that an Applicant must set out all the necessary allegations upon which it relies in its founding affidavit. It will not generally be allowed to supplement the Founding Affidavit by adducing supporting facts in a Replying Affidavit.⁴

[22] In my view, no new facts or other supporting facts were adduced in the Replying Affidavit. It dealt with issues already raised in the Founding Affidavit and elucidated on issues raised in the Answering Affidavit and the request for inspection and invitation to conduct tests in order to establish whether the muffler system sufficiently reduced the noise. In my view, that an inspection mean consented to and had Applicants been satisfied with the noise reduction, this matter need not have proceeded to the stage.

⁴ Titty's Bar and Bottle Store (Pty) Ltd vs ABC Garage (Pty) Ltd 1974 (4) SA 360 (T) at 368H – 369B; Mostert v FirstRand Bank Ltd t/a RMB Private Bank 2018 (4) SA 443 (SCA) at 448D – F.

- [23] Because this was disputed, Applicants also appended a map of the estates reflecting the 323 residential erven whilst setting out the substance of Erasmus' meeting with Bosigo on 24 August 2022 and highlighting the discrepancies in Grosch' Answering Affidavit.
- [24] It is trite that a court will not permit an Applicant to make out his/its case in reply when no case at all was made out in the original application.⁵ I had difficulty in finding any facts that supplemented the Founding Affidavit by the inducement of supporting facts.
- [25] A distinction must be drawn between cases in which new facts or material are brought to light for the first time in a replying affidavit of which an applicant knew at the time the founding affidavit was prepared and those cases in which facts alleged in a respondent's answering affidavit revealed the existence or possible existence of a further ground for relief sought by the Applicant.
- [26] As trite is the principle that an applicant is entitled to introduce further corroborating facts in a replying affidavit to corroborate the contents of a founding affidavit if a response in an answering affidavit calls therefore. As was held in **eBotswana (Pty) Ltd v Sentech (Pty) Ltd**⁶, a commonsense approach, based on want of prejudice, should be applied in deciding to allow the further corroborating facts

⁵ Poseidon Ships Agencies (PTY) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd 1980 (1) SA 313 (D) at 316A.

⁶ 2013 (6) SA 327 (GSJ) at the 336 G – H. See also Bousaada (Pty) Limited v FCB Africa (Pty) Limited (unreported, GJ case nos 16949/2021, 29891/2021 dated 14 June 2023) at paragraph[16].

(if any) to be set out in the Replying Affidavit. This is exactly what happened in this instance.

[27] I am of the view that little or no additional facts or new evidence were introduced in the Replying Affidavit and that the only evidence introduced therein were corroborating facts elicited in the Answering Affidavit.

[28] Respondent did not make application to file a further affidavit (a rebutter), nor did it apply for the striking of the Replying Affidavit or raise any objections thereto.

[29] Having considered all the facts, I find no reason to not allow the Replying Affidavit for introduction into evidence.

[30] I therefore so order.

BACKGROUND:

[31] First Applicant declare its main objective to be to promote, advance and protect the communal interest, safety and welfare of its and of Second to Fourth Applicants' (who are also members of First Applicant) occupants and residents.

[32] The four Applicants are the Homeowners Associations of the four residential estates situated on the banks adjoining the inlet of the Crocodile river that flows into the Hartbeespoort dam. They

collectively represent 323 freehold residential erven of which 32 are riverfront stands whilst the balance of the erven are, at its furthest points, approximately 200 metres from the edge of the river.

[33] Many of the residents or owners are either retired or pensioners or persons who acquired a property as a second holiday or weekend breakaway home. First Applicant, in order to ensure that residents enjoyed the peace and tranquillity of nature, concluded a lease agreement with the owners of the opposite river fronting piece of land adjoining the Crocodile River.

[34] Deponent to the Founding Affidavit, Mr Havenga ("Havenga") stated that he created an online community petition ("the Petition") to support the banning of the operation of the Airboat which was supported by 79 members. The Petition (or the wording thereof) was however not appended to the application.

[35] The certificate of fitness of the South African Deep-Sea Angling Association⁷ reflects Christian Grosch (and not Respondent) as the "OWNER/OPERATOR" of a propeller driven Airboat Airscout vessel fitted with a Waterthunder V8 418 horsepower engine (the "Airboat"). It is common cause that this is the vessel complained about. The Airboat is propelled by a large wind turbine attached at the back thereof.

⁷ Annexure "AA6" to the Answering Affidavit.

[36] The Airboat is utilised by Grosch in his business for commercial purposes by offering tourists boat rides into the Hartbeespoort dam and on Crocodile River. These operations entail that the Airboat, when it frequents the portion of the Crocodile River where the Applicants' properties are situated, passes in close proximity to the properties where some of Applicants' members and/or other occupants reside.

[37] Applicants contend that, although people with recreational boats, at times scout into the influx portion of the Crocodile River and come close to the residential properties, they exercise discretion and do not cause a nuisance, noise pollution or negatively otherwise affect or endanger the bird- and wildlife or greater biodiversity of the surroundings, such as Respondent does.

[38] Applicants' umbrage lies in the manner in which Respondent operates the Airboat. They complain that the wind turbine at the back of the Airboat, when operated at high speed, emanates an inordinate loud noise in excess of what would often be the case with vessels of similar size which causes a nuisance and noise pollution, not only to Applicants' residents, but also other residents residing around and adjacent to the Hartbeespoort Dam area.

[39] When operated at high speed it displaces water which causes a significant wake in the water and create air flow or wind disturbances when operated near the peripheral part of the river. This ultimately

also affects the bird- and other wildlife and fauna in and around the river.

[40] To demonstrate the wake caused by the airboat and the proximity to some of the houses close to the riverbank, Applicants appended a series of photographs⁸ consisting of screenshots extracted from video footage taken by Havenga and a Mrs Roscoe ("Roscoe").

[41] Applicants also contend that the speed, the noise and the disturbances increases when the Airboat passes relatively close to the water's edge, especially at the "narrow" portions of the Crocodile River and therefore broach the peace and tranquillity the residents are entitled to. This happens in circumstance where Respondent uses the Airboat for commercial, pleasure and recreational purposes, sometimes on multiple occasions on a given day.

[42] In order to demonstrate that the operations of the Airboat also detrimentally affect other residents living in and around the Hartbeespoort Dam area, Applicants attached supporting affidavits from residents residing in *inter-alia* the Kosmos area near the dam wall and the adjacent De Lac residential estate. The issue in dispute is not about other residents residing in and around the Hartbeespoort Dam. I will refer thereto only briefly.

⁸ Annexure "FA6".

[43] A Mrs Cherry Grobler, residing in Kosmos near the Hartbeespoort Dam wall, personally observed and heard the operations of the Airboat which, she says, causes a nuisance, noise pollution and creates a danger and harm to the wild- bird- and plant life in and around the Hartbeespoort Dam area. The Airboat's noise is more excessive and much louder than that of other boats operating on the Hartbeespoort Dam.

[44] To bolster the application, a Mr Neil Gardiner ("Gardiner"), a resident of the De Lac Residential Estate adjoining that of the First Respondent also confirmed that the Airboat causes great noise and disturbance in close proximity to the De Lac Estate.

[45] A retired Professor du Toit ("Du Toit") who used to be a professor in Environmental Management and Science also deposed to an affidavit. He stated that in his view the operations of the airboat has an extremely detrimental effect on the natural environment, especially the birdlife whilst the area is a UNESCO natural protected area. Although an impressive curriculum vitae of Du Toit was appended to the Founding Affidavit, no professional environmental management report or an environmental impact assessment report was submitted to substantiate the view expressed by Du Toit.

[46] A confirmatory affidavit was obtained from a Mr M R Daniel ("Daniel") who says that the operator of the Airboat, on 30 December 2021 "revved" the engine to maximum revs and performed "doughnuts" on

the river. He however gave indication on how many occasions this happened. Then there is the affidavit of Mr Lyle Robert Crebo ("Crebo") who says he, also on 30 December 2021, saw the Airboat creating a nuisance.

[47] The frustration experienced by the Applicants with Grosch was expressed in three emails of Mr Van Edwards ("Edwards"), the estate manager of First Applicant on respectively 19 October 2020 and 10 and 24 May 2021⁹ wherein the umbrages and complaints were expressed.

[48] Although not relevant hereto, Applicants, in order to show that Respondent was not compliant with the requirements pertaining to inland dams, attach the affidavit of Mr Len Strohmer ("Strohmer") who identified himself as a Skipper Trainer and Director of Fincraft Skipper Training Academy ("Fincraft"). He explained that the inland dam rules, (also applicable to the Hartbeespoort Dam), stipulates (1) that no boats are allowed on the dam without the necessary permits, (2) that no person may use a boat propelled by means of an airscrew unless he is the owner of a permit authorising him to do so, (3) that no person shall let the boat for use or convey any person for reward therein unless he is the holder of a permit authorising him to do so and (4) that no person

⁹ Annexure "FA".

shall navigate a motorboat nearer than 50 metres from the banks of the river.

[49] He stated that he personally observed the Airboat in operation and confirmed that it does not comply with the dam rules, is causing a nuisance and noise pollution whilst endangering the wild- bird- and plant life in and around the dam area.

[50] Grosch, in his responses, denied that he engaged in illegal, wrongful and unlawful activities pertaining to the commercial and recreational use of the Airboat or that the operation of the Airboat causes excessive noise, is a noise disturbance or detrimentally affect the bird and wildlife.

[51] In his denials Grosch raised several skittles. He *inter alia* disputed Applicants' authority to act on behalf of its members, the number of freehold stands on the four estates, referred to the nuisance caused by other boats and watercraft on the dam, highlighted the importance of tourism and recreation whilst expressing the view that people who choose to reside in the relevant area must expect some nuisance because of the tourism and leisure activities.

[52] He contends that he acts and operates responsibly, is safety conscious, is professional, respectful and conscious of the environment and is mindful to, when the Airboat travels past the Applicants' properties (which he says, only occur on long trips), travel at idle speed. The only time, he says, when the revolutions of the

engine will be increased, would be when sandbanks are encountered in order to get over it. it was during one of these incidents that one of the residents threw rocks at the Airboat.

[53] Grosch says that he had mufflers installed on 25 May 2022 and that Bosigo was satisfied there with. He contends, Bosigo, on 28 May 2022 during a cleanup operation in which she partook, witnessed him launching the boat and indicated that he was satisfied with the measures taken and "*authorised the resumption of the Respondent's operations.*" ¹⁰ This is however a far cry from what Erasmus conveyed emanating from her discussion August 2022. I will return to this hereunder.

[54] He denies that Respondent's operations constitute thrill rides and states that he gives educational presentations on the history of the area, the geology, nature, and wildlife, pollution and the human impact on the environment.

[55] Respondent, Grosch says also only operate on a few weekends during the course of the year and rarely during the week and that the operations consist of an average of two trips alternating between short and long trips and that the short trips do not pass in front of the Applicants' estates. He emphasises that the long trips occur less because they are more expensive and that, when he passes in front

¹⁰ Answering Affidavit, paragraph 38.6, Caselines page 008 – 16.

of the Applicant's estates, he does so at idle speed, except, when approaching sandbanks.

[56] Grosch attached an email that he wrote to Edwards on 26 August 2020 wherein he bemoaned a lack of revenue, a shortage in cash reserves and a reduction of expenditure in order to financially survive.

[57] The picture Grosch attempts to convey is that he is responsible, respects the rights of the Applicants and takes part in the conservation of the area whilst not causing any nuisance or damage to, especially the environment. What Grosch does not address is his non responses to the email correspondence addressed. Nor does he give an explanation for not engaging the management of the Applicants to address the complaints. I highlight but only a few of these.

[58] Respondent explained that he did not traverse the river that often, complained about the scant income Respondent derived from the Airboat activities and attached affidavits of people that stay around or in the vicinity of the Hartbeespoort Dam. These are of no assistance and does not address the issue in dispute.

[59] Edwards wrote three emails to Grosch on 19 October 2020 and 10 and 24 May 2021. These emails were sent before Respondent had on Grosch's own evidence, the muffler system installed on 25 May 2022,

a year after Edwards' last email to him and, it would seem, only after Bosigo confronted him.

[60] Grosch says that he engaged with Edwards and was willing to amicably resolve the issues complained about. In doing so he attempts to create the impression that this was done after Edwards' aforesaid three emails to him. He however nowhere indicates whether he was willing to resolve the issues before or after the aforesaid three emails.

[61] It is in this process that he refers to his email of 26 August 2020¹¹. It however belies the chronological timeline of the email exchanges. Grosch's email of 26 August 2020 precedes the first email of Edwards of 19 October 2020. His email of 26 August 2020 could therefore not have been a response to Edwards' complaints.

[62] On a reading of Grosch's 26 August 2020 email, it is clear that he bemoans a lack of revenue, a shortage in cash reserves whilst mentioning the fact that he had reduce Respondent's expenditure in order to financially survive. The email is also rather a garnering of support for the removal of plastic, trash and general flotsam. Nothing is said there in about umbrages raised by Edwards.

[63] In the 26 August 2020 email Grosch admits that the Airboat is not a stealth craft and that for he, for that reason, tries to stay away from

¹¹ Annexure "AA4" to the answering affidavit.

the Applicants' properties. He therein also concedes that the engine need sometimes be "revved" up because of shallow sandbanks (apparently to lift the Airboat higher out of the water) in order to get over it which resulted therein that one of the residents repeatedly threw rocks at the Airboat and which he regarded as dangerous and a deliberate attack.

[64] The admission that the airboat is not a stealth craft and that he, for this reason tries to stay away from the Applicants' properties, but sometimes have to "rev" up the engine, is indicative that the Airboat emits a loud noise. It is apparent, on his own admission, that the Airboat causes distress to the owners on the riverbank.

[65] As with Edwards' emails, Grosch also ignored Erasmus' letter of demand of 10 February 2022. There was no response to this letter nor to the follow-up email of 26 April 2022 wherein Grosch was accused of not having furnished the requested permission to operate the Airboat on the Hartbeespoort Dam for commercial purposes.

[66] It is evident that Grosch simply ignored all approaches, correspondence and demands. It is evident that he only had a muffler installed when pressed therefore by Bosigo and thereafter Respondent only when this application was served on him .

[67] There is also the affidavit of Strohmenger. Grosch' disparaging response to Strohmenger's affidavit is that Fincraft is merely a company approved and accredited by SAMSA to conduct skipper

training. He says that his certification as a Skipper is not dependent on the approval of Fincraft nor does it have any authority over him.

[68] Strohmenger nowhere suggested that Grosch should be certified by Fincraft. He only set out the applicable requirements for inland dams. Grosch elected to attack Strohmenger's authority over him (which Strohmenger never indicated he had) whilst failing to provide an explanation as to whether Respondent complied with the requirements as stated by Strohmenger. His responses consists of bland denials, non- and or vague responses and in some instances disparaging remarks.

[69] The slanted version about the installation of the Muffler also elicits further comment. Grosch states that he, on 25 May 2022 had a muffler installed in order to address the noise nuisance complained of. This was more than a year after Edwards' first email to him and apparently only after formal complaints were made. He gives no description of the type of muffler installed, how or how much the installation lessened the noise whilst attaching no proof in the form of an invoice or other documentary proof that this was done.

[70] He also says that Bosigo, during a cleanup operation on 28 May 2022 (three days after he had the muffler installed) expressed satisfaction with the noise reduction achieved by the mufflers after Bosigo witnessed him launching the boat and indicated that he was satisfied

with the measures taken and “*authorised the resumption of the Respondent’s operations.*” ¹²

[71] This is contrary to what Bosigo told Erasmus. Bosigo told Erasmus on 12 May 2022¹³ that he discussed the noise pollution caused by the Airboat as well as the environmental concerns with Grosch. This was before the alleged installation of the mufflers on 25 May 2022 and the cleanup operation of 28 May 2022.

[72] When again consulted by Erasmus on 24 August 2022¹⁴ Bosigo told her that although mufflers were installed and that it reduced the noise, he required of Grosch to obtain a professional report to confirm that the noise levels were within regulatory standards and the prescribed decibels and that he also expected from Grosch to obtain an Environmental Impact Report to confirm that the Airboat was not harmful to the Environment.

[73] The dates do not add up. If the mufflers were installed, this had to have taken place between 12 and 24 August 2022. Bosigo could also not have “*authorised the resumption of the Respondent’s operations.*” ¹⁵ on 28 August 2022 because of the two outstanding requirements namely the professional report on the sound emissions and the environment impact report.

¹² Answering Affidavit, paragraph 38.6, Caselines page 008 – 16.

¹³ Annexure “FA11”.

¹⁴ Annexure “RA13”.

¹⁵ Answering Affidavit, paragraph 38.6, Caselines page 008 – 16.

[74] Grosch, it seems, rather selectively mention only what suits his purpose. He did not disclose the conditions set by Bosigo, something that was obviously not complied with by 24 August 2022. If what Bosigo told Erasmus was untrue, Grosch should have dealt with this in a rebutter.

[75] Grosch's evidence is opportunistically unsatisfactory and amounts to a parrying with facts. This is evidenced in the correspondence exchanges between Erasmus and the attorney representing Respondent, a Ms Hertenberger ("Hertenberger"). Erasmus in her 1 September 2022¹⁶ letter (consequent upon her discussion with Bosigo) indicated to Hertenberger that Respondent should appoint an independent professional to measure the decibels produced in order to ascertain whether the noise produced is within the regulatory standards. In the letter Hertenberger is requested to furnish a mutually convenient date to demonstrate the effectiveness of the newly installed muffler system.

[76] Hertenberger snubbed this request in her letter of 8 September 2022¹⁷ by remarking that it appears as if Applicants expected of Respondent to assist Applicant in their case against him. He also indicated that she did not understand the basis for the request. This response is most unfortunate. By that time there could not have been

¹⁶ Annexure "RA6".

¹⁷ Annexure "RA7".

any misconceptions of what it was about or what needed to be understood about the request. Erasmus again on 21 September 2022¹⁸ informed Hertenberger of Bosigo's requirements. There seems to have been no response after that.

[77] It need be said that Grosch's non-response to this last request is as disparaging as his non-reaction to Edwards' emails or Erasmus' letters of demand. He did not attempt to explain his absolute silence nor advance any explanation for the disregard. And then, when an explanation is forthcoming, it is vague or slanted. This is tenuous and most unsatisfactory

[78] Applicants apply to court for a final, alternatively interim interdict on whether the operation of the Airboat constitutes an infringement into the rights of the Applicants' residents to enjoy their properties and the natural fauna.

[79] Applicants elected to approach Court on application. In order for them to succeed, they must adduce sufficient objective cogent proof or evidence of each alleged fact which is substantiated by documentary or other means of proof in order to so entitle them to the relief sought. The Founding Affidavit therefore had to contain not only the facts to be proved (the *facta probanda*) in order to establish the cause

¹⁸ Annexure "RA8".

of the action, but also the evidence (*facta probantia*) to prove those facts.

[80] Miller J in **Hart v Pine Town Drive-In Cinema (Pty) Ltd**¹⁹ crafted the position as follows:

*"It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. For the reasons I have stated herein, I am of the opinion that there is a dearth of such facts as, if true, would support the allegations of unfair and oppressive conduct in the management of the company's affairs and the objection in limine must accordingly be upheld."*²⁰ (My Emphasis)

[81] This approach has been approved and consistently followed in a multitude of decisions thereafter such as **Kham and others v Electoral Commission and Another**,²¹ **Fisher and Another v**

¹⁹ 1972 (1) SA 464 (D).

²⁰ At 469C – E.

²¹ 2016 (2) SA 338 (CC).

***Ramahlele and Others*,²² *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*.²³**

[82] Although Respondent attempted to raise disputes, most of it on the relevant issue of excessive noise, (in light of the contradictory evidence and complete silence on relevant issues, particularly the peculiar facts regarding the dates on which the muffler was purportedly installed and the ignoring of the requirements set by Bosigo), are not “real” disputes of fact in the true sense. If it were, it would have had resulted in Applicants automatically falling foul of the ***Plascon-Evans Paints***²⁴ rule.

[83] On this aspect, Murray AJP in ***Room Hire***²⁵ pointed out a number of different ways in which a dispute of fact may arise:

[83.1] ‘When the respondent denies all the material allegations made by the various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or the witnesses to the contrary’

In other words, a simple case of two differing versions;

²² 2014 (4) SA 614 (SCA).

²³ 1999 (2) SA 279 (T).

²⁴ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

²⁵ Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T). See also King William's Town Transitional Local Council v Border Alliance Taxi Association 2002 (4) SA 152 (EC).

[83.2] *'The Respondent may admit the applicant's affidavit but allege other facts which throw a different light on the applicant's allegations, which facts the Applicant disputes'*

A classic scenario of 'confess and avoid'; or

[83.3] *The respondent may concede that he has no knowledge of the main facts stated by the Applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the Applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which Applicant and his deponents rely to prove the main facts are untrue'.*²⁶

(Own underlining)

[84] One way in which real dispute of fact will not arise is if a Respondent simply gives a bare denial. On this the court in ***Soffiantini v Mould***²⁷ said the following:

"If by a mere denial in general terms a Respondent can defeat or delay an Applicant who comes to court on motion, then motion proceedings are worthless, for a Respondent can always

²⁶ Room Hire *op cit* 1165.

²⁷ 1951 (3) SA 307 (O).

defeat or delay a petitioner by such a device. It is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavits."²⁸

(Own underlining)

[85] The only the dispute, as expressed by the parties in the joint minutes is whether the operation of the Airboat infringes on the right of the residents and their rights to enjoy their property and the natural fauna. Whether the "operation" thereof infringes on these rights depends on the manner in which the Airboat is operated. This, in turn, boils down to whether or not a muffler was installed and if so, whether it sufficiently addresses the problem of excessive noise.

[86] What is remiss in the application is objective substantive proof, (the essential evidence, or *facta probantia*), to substantiate the necessary allegations, the *facta probanda*.

[87] The complaint is that when operated at high speed, the Airboat emits an excessive and inordinate loud noise, causes a significant wake in

²⁸

At 308.

the river which impacts on the river edge and causes airflow and wind disturbances. These observances are, understandably subjectively inclined. What is excessive or loud for one person, may not necessarily be so for another. For this reason, an objective norm of measure is required.

[88] What is missing is a report from a professional sound engineer or similar expert who objectively measured the sound decibels emitted by the Airboat to demonstrate the severity albeit not of the sound emitted in order to objectively ascertain whether it is an infringement. Such a report will also set out the generally acceptable norms and standards that are applicable and will demonstrate the impact of the noise disturbance. These tests could have been conducted over time from the riverbank when the airboat passes which, on Applicants' version, occurs regularly. In the absence of such evidence, I fail to see how I can make a finding on the severity of the noise or whether that infringes on the residents' rights or their rights to enjoy the properties and the natural fauna.

[89] Paragraph 8.5 of the Founding Affidavit refers to a series of photographs of the airboat passing in front of the estates. Havenga stated that these photographs prove the "*significant noise and nuisance caused by the vessel*". The mentioned video footage was not introduced into evidence. I was therefore not privy to that. I am

hard pressed to accept that I can make a finding on the "*significant noise and nuisance caused by the vessel*" from the photographs only.

[90] Then there is the possible impact on the environment itself. I interpret this to mean to be a reference to the enjoyment of the natural fauna.

[91] Despite Professor Du Toit contending that the operations of the Airboat impacts on the environment, there is no objective norm (a report) to proof this. All that needed have been obtained was a report from an environmental specialist to explain the impact and severity that the wake had on the natural fauna on and around the banks of the Crocodile River. The same principle applies in respect of the alleged airflow and wind disturbances.

[92] In the absence of these reports, all that was before me are the subjective observations and no objective norm to measure that against.

[93] The photographs (Annexure "FA6") are mute. It does illustrate or prove "*the significant noise and nuisance caused by the vessel through the operation thereof.*" Nor does it show the speed at which the boat travels although it appears as if there is some displacement of the water. Based on the photos alone I cannot make any finding on the noise nuisance caused by the Airboat.

[94] Daniel and Crebo also both refer to an incident that occurred on 30 December 2021. Havenga in the Founding Affidavit vaguely states that various members of Applicant started observing regular high-speed noisy by-passes of the Airboat. There is however no evidence (except for that of Daniel and Crebo) to show when (with reference to date and time) and how regularly the noisy by-passes happened.

[95] Although it may be so that Applicants' members purchased their properties to enjoy the peace and tranquillity of the area and nature, they had to foresee and reconcile them with the fact that there will be interference therewith. They are expected to tolerate a reasonable level of interference resulting from the use of the river.

[96] It is only when the use thereof affects them in such way that it exceeds the level of reasonableness of what should be accepted or tolerated, that it becomes unlawful and actionable. The reasonableness standard therefore place a large part in reaching a conclusion.

[97] Continuing, ongoing and repetitive infringements (such as the continuous regular use of the river by Grosch in the Airboat at high speed) have become known as nuisance in the narrow sense. It is referred to as an annoyance which primarily hinders an owner in the use and enjoyment of the property and cause personal discomfort. It will only be if the infringement is of an ongoing and unreasonable nature that it will be unlawful and could be interdicted.

[98] Counsel for Respondent referred me to **Laskey**²⁹ where the court differentiated between disturbing noise and noise nuisance. Mr Roos, for Applicants is on the same page in his distinction between narrow and wide nuisance. He correctly referred me to the authorities in *Holland v Scott*³⁰ and *Prinsloo v Shaw*³¹ as well as the requirements for an interdict at common law.

[99] However, the lack of evidence, as expounded upon above, but especially the absence of proof of the excessiveness and unreasonableness of the infringement, is the cause of concern. Although I was referred to the provisions of the Environmental Conservation Act, 73 of 1989, the principles of a common-law interdict still remain. On a strict interpretation of Regulation 5(g)(iii) it could mean that no person who owns a motorboat may not be able to use it on the water if it causes or may cause it to cause a noise.

[100] The only evidence before me is that various members of the Applicant started observing regular high-speed noisy by-passes of the Airboat whilst Daniel and Crebo are the only other two who could attest to date and time. The regularity of the occurrences were not proven nor expounded upon. As difficult as it is to adjudicate on the unreasonableness of the passings, as difficult is it to reach a

²⁹ Laskey and Another v Showzone CC and Others 2007 (2) SA 48 (C).
³⁰ (1881 – 1882) 2 EDC 307 at 327.
³¹ 1938 AD 570 AT 590.

conclusion on the excessiveness of the noise and the impact on the fauna.

[101] As much as the demeanour and candour of Grosch is to be frowned upon and as much as the peace and tranquillity of the members should be respected and protected, I cannot on the evidence before me find sufficient substantive facts to grant an interim, let alone a final interdict.

[102] Applicant's recourse, in my view lies with the Madibeng Municipality. They are the regulatory authorities who should oversee compliance with and the enforcement of the legislative provisions and regulations.

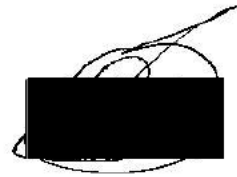
[103] In the circumstances, I can come to no other conclusion that the application should be dismissed with costs on a party and party scale.

[104] I was not addressed on the scale of costs to be awarded, but am of the view that costs on Scale B would be commensurate.

[105] **I therefore make the following order:**

[105.1] The application is dismissed.

[105.2] The Applicants, jointly and severally, the one to pay the other to be absolved are ordered to pay the costs of the application commensurate with Scale B of the Rules.



Basson AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Date Heard: 18 May 2023

Date of Judgment: 23 September 2024

Counsel for the Applicants: Adv. WJ Roos

Attorneys for the Applicants: Linda Erasmus Attorneys

For the Respondent: Adv T Eichner-Visser

Attorneys for the Respondent: Van Zyl Hertenberger inc.