



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.


SIGNATURE

DATE: 04 MARCH 2025

CASE NO: A2024/046516

In the matter between:-

Nunostax (Pty) Ltd

Asvin Paraboo

First Appellant

Second Appellant

and

Mohammed Said Docrat

Fatima Docrat

The City of Johannesburg

First Respondent

Second Respondent

Third Respondent

Neutral citation: Nunostax (Pty) Ltd and another v Docrat and others (A2024/046516)

[2025] ZAGPJHC (4 March 2025)

Coram: Twala J, Mahosi J and Allen AJ

Heard: 26 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14:00 on 4 March 2025.

Summary: Appeal against final Interdict granted- was the Plascon-Evans rule applied correctly- Were the three requisites for a final Interdict met- Did respondents exhaust their alternative remedies prior to approaching court- Which entity is clothed to police noise disturbances and building encroachment- Is Regulation 7 in terms of the Occupational Health and Safety Act, Act No. 85 of 1993 (Noise Monitoring) applicable outside the workplace.

ORDER

On Appeal from: Gauteng Division of the High Court, Johannesburg (Trisk AJ sitting as a court of first instance):

1. The appeal is upheld with costs on scale B, such costs to include the costs for the application for leave to appeal.
2. The order of the court *a quo* of 24 October 2023 is set aside and substituted with the following order:
 - 2.1 The application is dismissed;
 - 2.2 The first and second applicants are directed to pay the costs of this application on scale B, jointly and severally, the one paying the other to be absolved.

JUDGMENT

ALLEN AJ (TWALA J and MAHOSI J concurring):

INTRODUCTION

[1] This is an appeal against the whole of the judgment of the court *a quo* handed down by His Lordship Mr. Acting Justice Trisk on 24 October 2023 to the full court of this court's division. The first and second respondent (respondents) had successfully brought an application for a final interdict against the appellants.

[2] Third respondent was joined as a party, but from the papers service was not effected on them. The third respondent also did not take part in the proceedings in the court *a quo*.

BACKGROUND

[3] Respondents launched an application on 30 June 2021 for a final interdict. The order granted reads as follows:

3.1 *"the First and Second Respondents are directed to abate the nuisance forming the subject matter of the Applicant's application by:*

- a. *removing the generators, compressors and extractors ("the machinery") which are affixed to or form part of the First Respondent's property and which currently face onto or are in close proximity to the boundary wall separating the First Respondent's property from the Applicant's property ("the boundary wall") and, in so doing, to relocate the machinery so as to exclude it from the Applicant's line of sight and to*

move it to a position which is on or adjacent to the First Respondent's property which is as remote as is structurally feasible from the boundary wall;

- b. removing the staircase, goods lift, roller shutter door, the widows immediately adjacent to the boundary wall and/or any other vantage points which overlook the Applicants' property or which could be used to overlook the Applicants' property ("the structures") and to relocate the structures to a different aspect of the First Respondent's property so as to ensure that the structures do not intrude on or constitute objects which fall within the Applicants' line of sight and to so position them as to ensure that they are as remote as possible from the boundary wall; and*

3.2 the First and Second Respondents are interdicted and restrained from permitting:

- c. any noise in excess of that envisaged by Edition 6 of SANS 10103: 2008 to emanate from the First Respondent's property;*
- d. any vantage point on the First Respondent's property to be used for the purposes of overlooking the Applicants' property or any portion thereof; and*

3.3 the First and Second Respondents, jointly and severally, the one paying the other to be absolved, are to pay the Applicants' costs of the Application on the scale as between party and party".

[4] It is against the whole of this judgment appellants noted an appeal.

[5] Appellants filed heads and set out the issues to be resolved, namely, whether the court applied the trite Plascon-Evans rule correctly, or not, and the errors/ misdirections of the court a quo.

[6] Respondents filed heads and a practice note out of time on 21 February 2025. Respondents brought an application for condonation in this regard and proffered the lack of funds for the lateness. As the condonation application was not opposed by the appellants, and it appeared to be in the interests of justice that the whole conspectus of evidence be placed before the court, condonation was granted.

THE MERITS

[7] The parties are neighbours and separated by a boundary wall. Respondents' property is used for residential purposes and appellants' property for business purposes.

[8] The respondents have lived in their home since 1984. First appellant purchased its property in 2015 and it was rezoned to "Business 1" in 2016. Construction ensued on the property thereafter. The respondents were at all relevant times aware of the construction and could also follow the construction of first appellant's property.

[9] The respondents, after the construction, were not satisfied with the business noise at first appellant's property and initially obtained a noise report to substantiate their complaints, but later obtained a new noise report attached to their supplementary replying affidavit.

[10] The respondents' complaint is not only limited to noise, but also about a variety of intrusions on the enjoyment of their property and intrusion of their privacy. It appears from the record that there is also a history of acrimony between the parties.

[11] It appears further that the second noise report was for an "urban district" noise level measurement. First appellant's property is a "business premises" zoned as such and situated in a residential area. The exceeding of noise levels by appellants should have been taken up with the third respondent as it is the third respondent who makes

the by-laws and police transgressions thereof ¹. Respondents elected to not involve the City of Johannesburg ("COJ").

[12] It is common cause that the first appellant's property is in accordance with approved building plans and does it not appear from the papers whether respondents ever objected to the said plans, building structure and possible outcome. Since appellants complied with the process for approval of plans, possible objections thereto, the only deduction to be made is that respondents elected not to object to the approval of such plans for building alterations, even after having seen the building alterations and the effect it has on respondents' property. It is therefore not respondents' case that what was constructed on first appellant's property does not comply with the building plans, be it unsightly or not.

[13] In the case of *Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd* ² CORBETT, JA on page 634 and 635 stated:

"Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:

'... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted'.

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D).

¹ Noise Control Regulations, 1999 for the Gauteng Province, Provincial Gazette No. 75 of 20 August 1999

² *Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* **1949 (3) SA 1155 (T)** at 1163 - 5; *Da Mata v Otto* NO **1972 (3) SA 858 (A)** at 882D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* **1983 (4) SA 278 (W)** at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, supra at 924A)".

[14] The Plascon-Evans rule does not prevent relief from being granted on motion, however, in motion proceedings the court works from the version of the respondent as stated in *Brisley vs Drotsky*³.

³ In *Brisley vs Drotsky* **2002 (4) SA 1 (SCA)** ad paragraph 2 it was stated: "Hoe dit ook al sy, die saak is en sal beoordeel word op die huurder se weergawe omdat die verhuurder mosie-prosedure gekies het".

[15] In *National Director of Public Prosecutions vs Zuma* 2009⁴ it was stated:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version"⁵.

[16] In the case of *Titty's Bar and Bottle Store (Pty) Ltd vs ABC Garage (Pty) Ltd And Others*⁶ on page 368H it was said:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp. 75, 94. In my view this practice still prevails".

[17] In this matter it is apparent that factual disputes exist as to the correct noise levels on first appellant's property as per the zoning and as to the building alterations done. The only entity able to clarify this position is the COJ who make and enforce by-laws but who was not approached in this matter, although cited, prior to the launching of this application. No evidence was proffered as to whether an environmental impact assessment was done or was necessary. Based on the facts it appears necessary. The supplementary replying affidavit seek to introduce new evidence which should have been included in the founding affidavit. It should have been disallowed.

⁴ *National Director of Public Prosecutions vs Zuma* **2009 (2) SA 277 (SCA)**

⁵ See also *Sewmungal and Another NNO v Regent Cinema* **1977 (1) SA 814 (N)**; *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* **1978 (4) SA 281 (A)**.

⁶ *Titty's Bar and Bottle Store (Pty) Ltd vs ABC Garage (Pty) Ltd and Others* **1974 (4) SA 362 (T)**

[18] The COJ's involvement in our view is critical since it is the entity clothed with the responsibility to, in terms of its building regulations, to determine whether first appellant's building and alterations thereto are in accordance with building plans approved and whether any objections were raised to such plans and the outcome thereof. In addition, to determine the correct noise levels subsequent to the building alterations and possible transgressing thereof in terms of the by-laws, respondents should have first approached COJ to lay a complaint and absent any action or assistance to approach court for relief.

[19] The three requisites for the granting of a final interdict are⁷:

- “(a) A clear right on the part of the applicant.
- (b) An injury actually committed or reasonably apprehended.
- (c) The absence of any other satisfactory remedy available to the Applicant”.

[20] In the case of *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annelene Restaurants CC t/a O'Hagans*⁸ it was stated:

“[15] All of the requisites must be present for the court to grant a final interdict. In other words, the court has no discretion to grant the final interdict, if the applicant fails to meet all the requisites.

[16] The discretion of the court is limited. If the applicant shows on a balance of probability that he has no alternative legal remedy, the court then exercises its discretion whether or not to refuse an interdict.

[17] Bar any dispute of fact, which will be resolved by applying the *Plascon-Evans* test to the matter, the applicant carries the heavier onus to show that his case is stronger than the respondent's case”.

[21] The absence of an alternative remedy is a necessary ingredient for an application for a final interdict and where such is available, a final interdict cannot be granted. In the case before us the only evidence available is a noise report to be

⁷ Erasmus, Superior Court Practice, 2nd Edition, Vol. 2, D6-14 to D6-16C.

⁸ *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annelene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C)

considered in respect of alleged noise transgressions by appellants. Appellants also took issue with this report. No evidence was proffered for alleged transgressions of appellants' building plans. This court can only interfere once it is established that first appellant's property is not in accordance with building plans and once the COJ confirmed that appellants have transgressed the building regulations and by-laws, alternatively failing to enforce transgressions of the regulations and by-laws.

[22] Respondents elected to join second appellant, who is a director of first appellant, in his personal capacity and not in his capacity as director. No evidence was proffered for alleged transgressions by him personally.

[23] It is common cause that first appellant's property was utilized for business purposes prior to 2015 when the property was acquired.

[24] Prior to the launching of the application, appellants disputed⁹ in detail denying that appellants contravene any law and act in accordance with the relevant zoning requirements and deny any noise or disturbance to the neighbouring property, etc.

[25] Respondents obtained a noise report "for urban districts, such as those applicable at our home and to the neighbouring property". This is incorrect. The national noise control regulations¹⁰ (repealed in Gauteng) and the Gauteng provincial regulations¹¹ by definition only refer to a "controlled area". In Gauteng it is defined as follows in section 1:

"controlled area" means a piece of land designed by a local authority where, in the case of-

- (a) road traffic noise in the vicinity of a road-
 - (i) the reading on an integrating impulse sound level meter, taken outdoors at the end of a period of 24 hours while such meter was in operation, exceeds 60 dBA; or
 - (ii) the outdoor equivalent continuous "A"-weighed sound pressure level at

⁹ Annexure "MSD 12" to the founding affidavit

¹⁰ NOISE CONTROL REGULATIONS IN TERMS OF SECTION 25 OF THE ENVIRONMENT CONSERVATION ACT, 1989 (ACT NO. 73 OF 1989)

¹¹ Fn 1, *supra*

a height of at least 1,2 metres, but not more than 1,4 metres, above the ground for a period of 24 hours as calculated in accordance with SABS 0210, and projected for a period of 15 years following the date on which the local authority has made such designation, exceeds 60 dBA;

- (b) air traffic noise in the vicinity of an airfield, the calculated noisiness index, projected for a period of 15 years following the date on which the local authority made such designation, exceeds 65 dBA;
- (c) industrial noise in the vicinity of an industry-
 - (i) the reading on an integrating impulse sound level meter, taken outdoors
at the end of a period of 24 hours while such meter was in operation, exceeds 60 dBA; or
 - (ii) the calculated outdoor equivalent continuous "A"-weighted sound pressure level at, a height of at least 1,2 metres, but not more than 1,4 metres, above the ground for a period of 24 hours, exceeds 60 dBA; or
- (d) noise from any other source in the vicinity of that source-
 - (i) the reading on an integrating impulse sound level meter, taken outdoors
at the end of a period extending from the time when such source of noise became active until the time when it was no longer active, while such meter was in operation, exceeds 65 dBA; or
 - (ii) the outdoor equivalent continuous "A"-weighted sound pressure level at a height of at least 1,2 metres, but not more than 1,4 metres, above the ground, as calculated in accordance with acceptable mathematical/ acoustic methods for a period extending from the time when the source of noise became active until the time when it was no longer active, and projected for a period of 15 years following the date on which the local authority made such designation, exceeds 65 dBA: Provided that methods of calculation as described in SABS ARP 020 may be used for the calculation".

[26] The founding affidavit, paragraph 28, states: "...the plethora of correspondence had moved us a little closer to resolution.....". A letter of demand¹²

¹² Annexure "MSD 11" to respondents' founding affidavit

was served via Sheriff which letter of demand dealt with “noise” and “building encroachment”. In annexure “MSD 12” appellants replied thereto and in annexure “MSD 17” “that the parties are committed to resolving the disputes”. Respondents could have foreseen a dispute of fact regarding the building alterations and resultant noise in any legal steps taken against appellants.

Noise Report

[27] The noise report was done by Innovative Occupational Hygiene Solutions CC¹³, an approved inspection authority registered with scope of accreditation¹⁴, amongst other, in terms of Regulation 7¹⁵ which reads as follows:

“Noise monitoring

7.(1) Where an assessment of noise exposure or a review of such assessment indicates that any employee may be exposed to noise at or above the noise-rating limit, an employer contemplated in regulation 2 shall ensure that a measurement programme of noise exposure at that workplace is-

- (a) carried out in accordance with the provisions of these regulations;
- (b) carried out only after the relevant health and safety representative or relevant health and safety committee has been informed thereof and given a reasonable period, as mutually agreed upon, to comment thereon;
- (c) carried out by an approved noise inspection authority; and
- (d) representative of the employees’ exposure to noise, in accordance with sub regulation (2).

(2) In order to comply with sub regulation (1)(d), an employer shall ensure-

- (a) that the measurement programme, in the case where a number of employees work in an area of approximately equal noise level, makes provision for the selection of not less than three locations

¹³ Annexure “RA 1” page 04-28 and 04-29

¹⁴ Annexure “RA 1” page 04-31

¹⁵ In terms of Section 43 of the Occupational Health and Safety Act, Act No. 85 of 1993, Government Gazette No.R.307 of 7 March 2003 which contains the NOISE-INDUCED HEARING LOSS REGULATIONS.

which are representative of the positions occupied by employees well distributed over the area under investigation, and for the taking of measurements at each position as contemplated in SABS 083;

- (b) that the measurement programme, in the case of an employee working at an approximately fixed location relative to the noise source, makes provision for the measurement to be taken at the approximate position of the person's ear that receives the higher noise level as contemplated in SABS 083; and
- (c) that representative measurements are carried out at least every 24 months: Provided that whenever the noise is at or above the noise-rating limit, the provisions of regulation 10(1) shall apply.

- (3) An employer shall ensure that the results of measurements as contemplated in sub regulation (2)(c) are recorded in the record required by regulation 11".

[28] Section 1 of the same regulation reads as follows:

"'approved noise inspection authority' means an approved inspection authority for the monitoring of noise in the workplace".

[29] Section 2 reads as follows under the heading:

"'Scope of application':

These regulations shall apply to an employer or self-employed person who, at any workplace under his or her control, carries out work that may expose any person at that workplace to noise at or above the noise-rating limit".

[30] The regulation specifically refers to noise in the workplace of employers and employees only. It cannot be assumed that noise outside the workplace or on an adjacent property that may affect individuals who are not employees in the workplace be also included where the legislator expressly did not include it.

[31] In addition, the report relied on cannot be expanded to include the adjacent property which is outside the scope of accreditation of the inspection authority and amounts to overreaching.

[32] If the reports may find application to this matter, which they have not, then in any event respondents should have exhausted their remedies in terms of the applicable law first prior to approaching the court. Respondents' reliance on these reports are therefore ill-founded.

[33] Respondents elected not to approach the COJ, clothed with the authority to police noise disturbances in terms of its by-laws, for assistance and/or enforcement thereof and, premised on their failure to do so, renders the application fatally defective for the relief sought.

Building Encroachment

[34] Respondents elected to, "given the disturbances and unsightly features of the respondents' property" object to the valuation of their property¹⁶. Respondents' objection to the COJ¹⁷ deals with an objection to the increase of the value of respondents' property only. It states that the value should decrease and in the last sentence it is stated "unless the Joburg Council is prepared to take action against my neighbour"¹⁸.

[35] Respondents elected not to formally address the complaints with appellants, but to focus on the value of their property only and left it to the COJ to decide. The COJ acknowledged an objection¹⁹ to the general evaluation role of 2018 and notified respondents of the outcome of the objection²⁰.

[36] The property was valued lower with the following comments: "The information submitted by the objector concerning the physical attributes of a property has resulted in the valuation being adjusted downwards, but not to the extent claimed by the objector." Respondents were also informed of their right of appeal in terms of Section

¹⁶ Paragraph 31 of the founding affidavit

¹⁷ Annexure "MSD 19", page 04-143 of the record

¹⁸ Page 04-148 of the record

¹⁹ Annexure "MSD 19" page 04-160 of the record

²⁰ Annexure "MSD 20" page 04-161 of the record

54(1) to the valuation appeal board against the decision. The decision and grounds for decision were not appealed by respondents as no evidence was proffered.

CONCLUSION

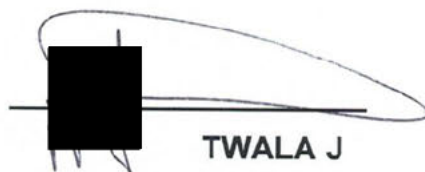
[37] The inescapable conclusion is that the respondents' noise report cannot find application in this matter, and that the respondents have not exhausted their alternative remedy of lodging a complaint with the COJ prior to approaching the court on both building encroachment and the noise levels.

[38] The appeal therefore should succeed with costs to follow the result.

ORDER

[39] In the result the following order is made:

1. The appeal is upheld with costs on scale B, such costs to include the costs for the application for leave to appeal.
2. The order of the court *a quo* of 24 October 2023 is set aside and substituted with the following order:
 - 2.1 The application is dismissed;
 - 2.2 The first and second applicants are directed to pay the costs of this application on scale B, jointly and severally, the one paying the other to be absolved.

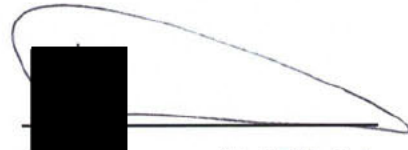
A handwritten signature in black ink, consisting of a stylized, elongated loop that starts above a solid black rectangular box and ends below it, with a horizontal line passing through the box.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**




MAHOSI J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**




ALLEN AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

For the Appellants:

Mr JW Steyn

Instructed by Swart Redelinghuys Nel Gauteng Inc

For the Respondents:

Mr A Laher

Instructed by Mobeen Moosa Attorneys