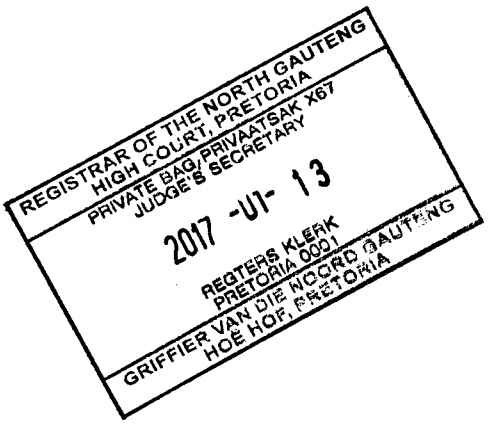
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

13/01/2017

Case number: 97146/2016



In the matter between	
LUKAS PIETER FOURIE	Applicant
And	
CENTURIA 266 (PTY) LTD	First Respondent
EADVANCE (PTY) LTD	Second Respondent
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Third Respondent
THE MEC:GAUTENG DEPARTMENT OF EDUCATION	Fourth Respondent

JUDGMENT

BAM J

1. The applicant, on an urgent basis, lodged an application against the first and second respondents for a final interdict to prohibit them from operating a school on a property on the Eastern side of Pretoria, previously known as Holding 1, Shere Agricultural Holdings. The application was opposed by the second respondent, on both urgency and the merits. First respondent filed a Notice to Abide.

2. On 11 January 2017, after having heard argument, due to time constraints, I decided that it would be in the interests of the parties to record my conclusion and to furnish my reasons later. I then made the following order:
   1. The application is urgent;
   2. The application is dismissed in its entirety;
   3. The applicant is ordered to pay the costs, including the costs of two counsel.

REASONS (Due to time constraints not fully comprehensive.)

3. The property in question is situated on the North-Western corner of Lynnwood Road and Dudley Avenue. Lynnwood Road, which became Graham Road, is a main road, stretching from almost the centre of the city to the extreme eastern areas. Dudley Avenue is a secondary gravel road, giving access to small holdings to the North. The property is registered in the name of the first respondent. The second respondent, who refers to itself as *Spark School Silver Lakes*, leases Holding 1 from the first respondent with the intention to use it as an education facility for previously disadvantaged children.

4. The applicant is since 1998 the registered owner, and occupier, of two adjacent small holdings, Holdings 2 and 3, measuring respectively 1.2ha and 2ha. Properties 2 and 2 are in close proximity of Holding 1, almost adjoining. In this respect it was pointed out by the respondents that Holding 1 is not immediately adjacent to holding 2 but that there is another property in between Holdings 1 and 2.

5. In 2004 the previous owner of Holding 1 was granted the right to conduct the operation of a conference facility, a chapel, a restaurant of 1300 square metres and covered outside seating of 400 square metres, on the premises. This was granted in terms of the then Peri-Urban Town Planning Scheme of 1975. The restaurant business, however, closed in 2014.

6. In September 2016 the applicant became aware that the second respondent intended to open a school on Holding 1 when the second respondent attached an advertisement depicting this on the outside fence wall of Holding 1. Upon instructions by the applicant enquiries were then made to the third respondent by a Mr Johan vd Merwe, a Town and Regional Planner, about the zoning of the said premises and whether any application was lodged by the respondents to procure rights for an educational facility. Despite several written requests, third respondent did not respond.

7. It is the applicant's case that the conducting of a school on Holding 1 is unlawful and constitutes a criminal offence in view thereof that the small holdings in that area are restrictively zoned, reflected in the *Zoning Certificate* dated 26 /09/2016 (Annexure LF 11, page 56 of founding affidavit), referred to as *"UNDETERMINED"*, in terms of

the Tshwane Town Planning Scheme of 2008, revised in 2014, providing that it may only be used for purposes of agriculture, a farm stall and a dwelling house.

8. In terms of the said *Zoning Certificate* the following purposes for which land and buildings may not be erected are: *Industry; "Noxious Industry; Scrap yard;* and *mini storage."*

9. In opposing the application the applicant denied that establishing the school was unlawful in that no restricting conditions apply anymore. In this regard it was contended that the grant to conduct the business of a restaurant, conference facility etc. negated the restrictive condition and zoning referred to above. Accordingly the second respondent endeavoured to persuade the court that the establishment of a *small school* fell within the ambit of the meaning of *conference centre* and *training,* granted to the previous owner of Holding 1. I do not find it necessary to deal with each and every argument of the second respondent in that regard. It suffices to say that that contention was not substantiated. The establishment of a school on Holding 1 was clearly not authorised.

10. It is clear, and indeed common cause, that the applicant, in his capacity as owner of properties in close proximity of Holding 1, which are subject to the same zoning, had locus standi to bring this application. See *JDJ Properties v Umgeni Local Municipality* 2013(2) SA 395 SCA at 407, par [29], to 408, par [30], and the decisions referred to.

11. Whether the applicant should succeed with his application, however, is not a foregone conclusion. The applicant based his case solely on the allegation that the school was unlawfully established. What, in my view, has to be considered, and taken into account, are the surrounding circumstances, the probable impact on the applicant's rights in establishing the school, and any possible prejudice and damage that may be caused to the applicant.

12. The following aspects are therefore relevant:
    12.1 The school opened on 11 January 2017 (the day the matter was argued) and about 97 children, in the *small school,* were accommodated. The court took judicial cognisance of the country wide problems with educational facilities and a news clip that on 11 January 2017 about 40 000 children were not yet

accommodated. In this regard first respondent mentioned a figure of 3000 in the province of Gauteng. On behalf of the second respondent the issue of education of previously disadvantaged children was submitted to be of cardinal importance. I agree. The argument also referred to the situation, should the applicant succeed, that the children will be deprived of their right to education;

12.2 The previous owner of Holding 1, as alluded to above, was permitted to conduct a restaurant on the premises as well as a conference facility and a church. (See par 3 above).There is no indication that the applicant ever complained about this enterprise .

12.3 It appears that, according to the respondents, that the main access gate to Holding 1 is in Lynwood Road and not in Dudley Avenue, the street from where the applicant enters his properties.

12.4 Dudley Street is a gravel road, a public road, used by members of the public, including people who previously visited the restaurant and other facilities on Holding 1. Despite the applicant's complaint that the street will carry more traffic, there is no proof of any probable damage to the road that may cause him prejudice.

12.5 Despite applicant's complaints about the possible impact on the service infrastructure on the water and electricity supply, etc., in the area, it appears that those amenities are supplied from different lines or sources to the respective holdings which, in any event, render services to the existing facilities on Holding 1. In this respect the school facility will therefore have no direct impact on the applicant's properties.

12.6 The complaint that the school will alter the rural character of the applicant's properties is unfounded, especially in view of the previous situation on Holding 1 and the neighbouring shopping centre in which several other business ventures, including *Crawdaddy's Restaurant* and *The Fishing Pro Shop,* are situated, the latter directly adjoining Holding 3. This situation is clearly depicted in Annexure L5, a google map of the area. In this regard it was contended by the second respondent that the area is rapidly developing and not a rural area anymore.

12.7 The third respondent did not file any papers. According to the applicant he was verbally informed that the third respondent would interfere when something illegally is committed on Holding 1.

12.8 The respondents have already submitted a re-zoning application to the third respondent with the intention to increase the number of pupils to that of a large school.

13. In argument it was submitted by Mr Rip that the applicant, seeking a final interdict, failed to establish the requirements of such legal assistance.

    (a) In respect of the issue whether the applicant has proved a clear right it has to be considered whether the applicant has established the right he seeks to protect.
    (b) Secondly the applicant was called upon to prove that the establishing of the school interfered with his rights. That includes that the applicant had to show that the alleged interference with his rights would cause prejudice.
    (c) Thirdly it was required of the applicant to prove that he had no alternative remedy.

14. It is trite that before an application for final interdict can succeed, all three requirements have to be present. *HOTZ and OTHERS v UCT* 2016(4) All SA 723 SCA par[29].

15. In this regard I concluded as follows:
    15.1 In respect of the requirement of a clear right, I have already indicated that the applicant did have locus standi. However, in considering all the relevant circumstances to which I have alluded above, a clear right had not been proved.
    15.2 Taking into account the relevant circumstances, it was clear that the establishment of the school did not interfere with any rights of the applicant and did, or will not, cause him any prejudice.
    15.3 In regards to an alternative remedy, in view thereof that the third respondent, the City of Tshwane, is the official body clothed with jurisdiction and a duty to monitor and control any alleged unlawful conduct, the applicant, in the circumstances had an alternative remedy at his disposal, if the third respondent was reluctant to investigate the situation, to apply for a mandamus compelling the third respondent to attend to the matter. It went unexplained why that was not done. On the probabilities the whole issue could have been laid to rest after such steps had been taken.

16. Accordingly I arrived at the conclusion to dismiss the application.

A J BAM JUDGE 12 January 2017