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

Case No: 22089/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 22/02/2025
SIGNATURE

In the matter between:

BERNARD THEUNIS BOTHA First Applicant

LEONORE BOTHA Second Applicant

and

DIE HOËRSKOOL MENLOPARK First Respondent

THE PRINCIPAL: DIE HOËRSKOOL MENLOPARK Second Respondent

THE GOVERNING BODY: DIE HOËRSKOOL MENLOPARK Third Respondent

MEMBER OF THE EXECUTIVE COUNCIL:

GAUTENG DEPARTMENT OF BASIC EDUCATION Fourth Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Fifth Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Sixth Respondent

**THE PROVINCIAL GOVERNMENT: GAUTENG
PROVINCE**

Seventh Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment shall be deemed to be 24 February 2025

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION:

[1] This is an opposed application brought by Barnard Theunis Botha ("the first applicant") and Leonore Botha ("the second applicant") for a spoliation order and a final interdict against Die Hoërskool Menlopark ("the first respondent"), the Principal: Die Hoërskool Menlopark ("the second respondent" or "the Principal") and the Governing Body: Die Hoërskool Menlopark ("the third respondent" or "the Governing Body").

[2] The first and second applicants are referred to collectively below as "the applicants" and the first, second and third respondents are referred to collectively below as "the School". The first respondent is a public school as defined in section 1 of the South African Schools Act, 84 of 1996 ("the South African Schools Act"), read with Chapter 3 thereof.

[3] The fourth respondent - the Member of the Executive Council: Gauteng Department of Basic Education, the fifth respondent - the City of Tshwane Metropolitan Municipality, the sixth respondent - the Government of the Republic of South Africa, and the seventh respondent - the Provincial Government: Gauteng Province (which was formally joined as a party at the commencement of the proceedings) did not file papers or heads of argument. Notwithstanding this, Mr M Rakgoale ("Mr Rakgoale") appeared on behalf of the fourth respondent and confirmed that the fourth respondent is in agreement with the

grounds of opposition raised by the School. Mr JA Venter (“Mr Venter”) who appeared for the applicants objected to Mr Rakgode making representations as no papers or heads of argument had been filed by the fourth respondent. This objection is sound and, at best, Mr Rakgoale was on a watching brief.

[4] Since 27 August 2015, the applicants have been the registered owners and occupiers of a residential property situated at 3[...], T[...] R[...] Street, M[...] P[...], Pretoria, which is also known as the Remaining Extent of Erf 7[...], M[...] P[...] (“the applicants’ property”).

[5] The School occupies and operates a public school on two properties, namely:

[5.1] the Remaining Extent of Erf 7[...], M[...] P[...], Registration Division JR, Pretoria (“the Remaining Extent of Erf 7[...]”); and

[5.2] Portion 43 of the Farm Hartebeespoort, 326, JR Gauteng (“Portion 43”).

[The aforesaid properties are referred to collectively below as “the School property”.]

[6] This dispute concerns a borehole servitude which is registered in favour of the applicants’ property over Portion 43 (which forms part of the School property) in terms of which the applicants are entitled to extract no more than 1 239 818.10 litres of water per month (“the servitude”). The borehole is situated near the corner of Lynnwood and Atterbury Roads and has a pump station.

[7] The borehole and pump station require municipal electricity and the applicants accordingly caused a separate electricity connection and meter to be installed by the Municipality on Portion 43, exclusively for purposes of providing electricity to the pump station.

[8] The applicants are not connected to the municipal water supply and exclusively make use of water obtained from the borehole situated on Portion 43.

[9] The current dispute arose during March 2021 when the applicants became aware that the School had caused a peg to be driven into the ground to prevent the opening of a specific pedestrian gate which had been used by the applicants to gain access to the area where the borehole, pump station and electricity meter are situated (“the servitude tenement” or “the servitude area”). As will be explained in more detail below, with reference to the correspondence which has been exchanged between the parties, the School, without consulting the applicants, also unilaterally placed additional restrictions on the manner in which the applicants could access the servitude tenement during March 2021. Up until then (save for some instances which will be referred to below), the applicants and their predecessor in title had unfettered access through gates to the servitude tenement.

[10] In terms of the amended notice of motion, the applicants’ spoliation and interdictory relief is phrased as follows:

“SPOLIATION:

2. *That the First to Third Respondents immediately restore the Applicants’ undisturbed access to their borehole servitude registered over Portion 43 of the Farm Hartebeespoort 362, Registration Division JR, Gauteng, registered in favour of the remainder of Erf 7[...], M[...] P[...], Pretoria, which servitude was originally registered in notarial deed no. 633/1984S and dated 10 August 1948.*

INTERDICT:

3. *That the First to Third Respondents be interdicted from, in any way whatsoever, infringing upon the Applicants’ rights emanating from the servitude described in paragraph 2 above, which inter alia will include:*
 - 3.1 *Prohibiting the drilling or utilisation of any new borehole or the drawing of water from the same aquifer which may detrimentally affect the yield of the Applicants’ borehole servitude;*
 - 3.2 *Impeding or in any way restricting the Applicants’ undisturbed access to their borehole pump station and*

pipeline situated on Portion 43 of the Farm Hartebeespoort 362, Registration Division JR, Gauteng; and

- 3.3 *Impeding or in any way restricting the Fifth Respondent's access to the Applicants' electricity meter (1[...]) situated on Portion 43 of the Farm Hartebeespoort 362, Registration Division, JR, Gauteng Province (4[...] A[...] Road, M[...] P[...], alternatively 4[...] A[...] Road, M[...] P[...])."*

[11] The School brought a counter application wherein it seeks to cancel the servitude based on section 133 of the National Water Act, 36 of 1998 ("the Water Act"). In the *alternative* to the cancellation relief, the School has requested a declaratory order which is aimed at regulating and restricting access to the servitude area. The School was represented by Mr A Vorster and Mr A Kruger.

[12] The relief sought in the counter application is phrased as follows:

- "2. *In terms of Section 133 of the National Water Act 36 of 1998 ('the Water Act') that the servitude that was over Portion 43 of the Farm Hartebeespoort 362, Registration Division JR, Province Gauteng in extent 7,2491 hectares (held by Deed of Transfer no. T14778/2000) (the other property) in favour of Erf 7[...], M[...] P[...] Extension 1 (held by Deed of Transfer T000074601/2015) (the Applicants' property) as contained in Annexure 'FA4' annexed to the Founding Affidavit be cancelled;*
3. ***In the alternative*** to prayer 2 above and only in the event of the Honourable Court finding that the said servitude should not be cancelled then and in that event that a declarator be issued declaring that the School is entitled to limit the Applicants and the Applicants' successors in title's rights in respect of the execution of the servitude as follows:
- 3.1 *That access to the servient tenement, for whatsoever reason by the Applicants or any person acting on behalf of the Applicants only be obtained:*
- (i) *for routine maintenance within 24 hours prior notification to the School; and*

- (ii) *for emergency access by contacting the persons nominated from time to time by the School which persons are at present Mr Hannes Lombard with cell phone no. 0[...] or Mr Mafalo with cell phone no. 0[...];*
- (iii) *that neither the Applicants nor any party acting on their behalf shall enter upon the servient tenement without being accompanied by a representative of the school; and*
- (iv) *that for [as] long as the Covid 19 virus pandemic and the Standard Operating Procedures for the Prevention, Containment and Management of Covid 19 in Schools and Schools communities are relevant and applicable that the Applicants and/or any party acting on their behalf with comply with the provisions thereof.” (sic)*

[13] Before dealing with the relevant legal principles and merits, it is necessary to have regard to further relevant background facts and, in particular, the correspondence which was exchanged prior to this application being launched, as it provides context and constitutes the fundamental backdrop against which this application must be adjudicated.

B. RELEVANT BACKGROUND FACTS:

[14] The parties provided a summary of common cause facts and, *inter alia*, agreed that the content of the correspondence dated between 1977 and 2019 is not in dispute.

[15] The servitude was registered over Portion 43 between 1945 and 1948. At that time, the applicants' property was the old farmhouse. That property was later subdivided into numerous portions.

[16] The applicants' property was purchased by them from the André De Klerk Familie Trust (“the Trust”). Prior to applicants and the Trust becoming the registered owners of the applicants' property, a deed of sale was concluded

between Frank Edward Beattie Struben (“Mr Struben”) and Eileen Mary Chapman (“Ms Chapman”) and as an integral part of the deed of sale a servitude was registered entitling Ms Chapman to a servitude to withdraw 60 000 gallons of water per month from an existing borehole that was situated near the junction of Lynnwood Road and Garstfontein Road (which is now known as Atterbury Road), which servitude was also granted to her successors in title or assigns.

[17] The proclamation of the township of Menlo Park Extension 1 took place in 1948. Pursuant to the terms of the township proclamation, the servitude was restricted to Erf 7[...] (i.e. the applicants’ property) by way of Notarial Deed No. 633/1948.

[18] Since 1948, upon transfer and re-transfer of the applicants’ property, the notarial deed of servitude was incorporated in the title deed and to date remains registered over the School property.

[19] As early as 13 October 1977, correspondence was exchanged between the School’s attorneys, Van Zyl, Le Roux & Hurter, and Mr André De Klerk (“Mr De Klerk”) representing the applicants’ predecessor in title. In a letter titled “/S: HOËRSKOOLOF MENLO PARK – POMPHUISIE”, the following is stated:

“Ons verwys na ons gesprek met u ‘n tyd gelede met betrekking tot die pomphuisie op die skool se terrein en u reg om daar water te pomp volgens ‘n tans ge-registreerde Serwituut. Teneinde die onooglikheid uit die weg te ruim en om aan ander behoeftes te voorsien (naamlik die uitbreiding van die netbalbane) het ons ooreengekom:-

- 1. dat die skool op sy eie koste die terrein sal skoonmaak en in stand hou;*
- 2. dat die oorspronklike hoekpenne behoue bly en sou dit op een of ander manier verwyder raak, sal die skool verantwoordelik wees om dit terug te plaas;*
- 3. dat alhoewel u onderneem het om die pomphuisie te herstel, is die skool tog bereid en bied hiermee aan om dit self te herstel, om sodoende ‘n mooi konstruksie te kry wat by die omgewing pas. U sal dan geken word in die uitvoering daarvan; en*

4. ***dat u ten alle tye onbelemmerde toegang tot die pomphuisie gewaarborg word.***

Graag ontvang ons u bevestiging hiervan. Die Beheerraad se dank en waardering word ook aan u oorgedra vir u samewerking en aanbiedings van die verlede.” (Emphasis added)

[20] From the aforesaid letter, it is evident that the registered servitude was acknowledged by the School and the School offered to maintain and repair the pump station or the pump house but guaranteed Mr De Klerk unrestricted access to the pump station.

[21] On 28 October 1977, Mr De Klerk wrote a letter to the School’s attorneys stating, *inter alia*, the following:

“I/S: HOËRSKOOL MENLO PARK – POMPHUISIE:

...

Die terme van die ooreenkoms waarna u verwys is vir my aanvaarbaar op die uitdruklike voorbehoud dat indien die bestaande boorgat om een of ander rede sou opdroog en nie meer die volume water verskaf wat dit tans verskaf nie, ek geregtig sal wees om op enige ander plek op die Serwituut grond te boor, of te laat boor vir water, en indien dit gevind word ‘n boorgat-pomp en pomphuis op die nuwe boorgat op te rig.

‘n Verdere voorbehoud is dat ek redelike toegang tot die Serwituut grond sal hê vanaf Lynnwoodweg, met ander woorde daar moet, indien die bestaande draad verwyder word en met ‘n hoër of nuwe draad vervang word ‘n hek regoor die pomphuis aangebring word sodat ek my reg van toegang gerieflik kan uitoefen.

Indien die vermelde twee voorbehoude vir die skool aanvaarbaar is mag hulle dan voortgaan om uitvoering aan ons ooreenkoms te gee.” (Emphasis added)

[22] In essence, Mr De Klerk stated that should the borehole not deliver the necessary yield or run dry, in terms of the servitude, he would be entitled to drill another borehole and equip the same for the purposes of drawing water. He

further referred in his correspondence to his reasonable and convenient access to the servitude from Lynwood Road which he advised should remain in place.

[23] On 3 October 1996, Mr De Klerk addressed a letter to the Municipality wherein he referred to the servitude in a paragraph which reads as follows:

“Gedurende uitlegging van die voormelde dorpe het [M]nr Struben die boorgat wat op die Menlo Park Hoërskool se gronde geleë is, behou en ‘n servituut van waterpypleiding in die oorspronklike aktes opgeteken ten gunste van erf 7[...] in terme waarvan die eienaar en opvolgende eienaars van die eiendom geregtig is om water te pomp vanaf die boorgat op die gronde van Menlo Park Hoërskool langs Lynnwoodweg en oor die parkgedeelte aangrensend aan Die Randstraat tot by Erf 7[...].”

[24] In the aforesaid correspondence Mr De Klerk also referred to fact that some of the Municipal infrastructure work that was conducted ignored the said servitude to the Trust’s detriment.

[25] On 4 March 1999, Mr De Klerk sent a letter to the Headmaster of Hoërskool Menlo Park stating the following:

“I/S VODACOM MAS

Op versoek van Mnr Sakkie Burger verwittig ek u hiermee dat ek geen beswaar het teen die Vodacom mas wat op die servituut gebied langs die pomphuis opgerig is nie. ”

[26] In the abovementioned correspondence, Mr De Klerk simply noted that he had no objection to a Vodacom cell phone tower being erected in the servitude area next to the pump station.

[27] On 6 September 2007, Mr De Klerk received a letter from the School, wherein the School again acknowledged his borehole servitude rights. Furthermore, even though mention was made of the relocation of the netball courts and the erection of a new boundary wall, Mr De Klerk was given the assurance that his rights would not be infringed upon and his access to the

servitude would remain intact. Attached to the letter was a sketch depicting the pump station as well as the access gate that existed at that time. Mr De Klerk was requested to sign the letter, which he duly did.

[28] The letter states, *inter alia*, the following:

"I/s Netbalbane

...

Ons wil dit net graag bevestig dat met die verskuiwing van die netbalbane en die oprigting van 'n nuwe grensmuur ons nie u belang t.o.v. die boorgat-pomp sal benadeel nie. Ons sal die stelsel soos, in die verlede gebruik waar ons, ons slot vas aan u sin sal sluit en dan behou u, u eie slot en sleutel wanneer die nuwe skuifhek geïnstalleer is, sodat u nog steeds toegang tot die boorgat, kan hê.

Ons voorsien u ook van 'n plan van wat ons beoog om te doen ter insae. Ons versoek u vriendelik om hierdie brief te onderteken en aan ons terug te besorg." (Emphasis added)

[29] On 6 May 2009, Mr De Klerk addressed a further letter to the School. This letter states, *inter alia*, the following:

"Ek het toegestem tot die voorstel deur u gemaak op die uitdruklike voorwaarde dat daar 'n hek in Lynnwoodweg sal wees, waar ek direkte toegang tot my pomphuis kan verkry.

Die nuwe muur aan die noordekant van die nuwe netbalbane is opgerig, maar geen voorsiening is gemaak vir die installering van 'n hek soos ooreengekom nie.

Mnr Manie Geldenhuys het my meegedeel dat ek die hek by die hokkievelde kan gebruik, maar dit is uiters ongerieflik. Dit is nie alleen ver van die pomphuis nie, maar daar is ook voortdurend probleme met die slot aan die hek by die hokkievelde wat verander word, wat meebring dat ek dan geen toegang tot my pomphuis het nie, in besonder gedurende vakansie periodes.

Ek versoek u vriendelik om asseblief toe te sien dat daar 'n hek geïnstalleer word waar die vorige hek was, sodat ek gerieflik toegang tot my pomphuis kan hê.”

[30] In summary, in the aforesaid letter again made reference to the direct and convenient access that Mr De Klerk had to the pump house via Lynwood Road. Mr De Klerk confirmed that the erection of a new wall had made no provision for the installation of an access gate as was agreed upon and it seems that one Mr Manie Geldenhuys of the School informed Mr De Klerk that he could utilise the gate at the hockey field instead which he indicated would be extremely inconvenient.

[31] On 5 August 2009, Mr De Klerk addressed another letter to the School. In that letter he stated, inter alia, the following:

*“Ons verwys na bogenoemde aangeleentheid en u skrywe van September 2007 asook die telefoniese gesprek met mnr Manie Geldenhuys op 21 Mei 2009 **toe u voorgestel het dat u ’n ingangshekkie in die skuifhek sal installeer in plaas daarvan om dit in die grensmuur te doen.***

In my skrywe van 22 Mei 2009 het ek hierdie voorstel aanvaar, maar ek het nog niks verder van u in die verband verneem nie. Ek sal die waardeer om dringend van u te verneem.” (Emphasis added)

[32] In the aforesaid letter, reference was made to previous correspondence exchanged and the agreement reached on installing a new access gate. Mr De Klerk pointed out that nothing had happened since 22 May 2009 and requested that the matter be addressed urgently.

[33] On 13 May 2011, Mr De Klerk again wrote to the School. He (again) complained about the inconvenience of the access as provided by the School and stated that the same was inconvenient and not freely accessible. In this letter, *inter alia*, the following was stated:

“...Die reëlins om gebruik te maak van die skuifhek is nog steeds nie gerieflik en ten volle toeganklik vir my nie. So ook die klein hekkie wat in die skuifhek voorsien is.

Nie alleen is die klein hekkie in die skuifhek baie ongerieflik wat betref toegang tot die slot nie, maar is die hek ook ’n aansienlike afstand geleë vanaf my pomphuis.

Toe die ooreenkoms aanvanklik aangegaan is, op 6 September 2007, het ek ook soos sal blyk uit my skrywe van 6 September 2007, toegestem tot die voorstel deur u gemaak op die uitdruklike voorwaarde dat daar ’n hek in Lynnwoodweg sal wees, waar ek direkte toegang tot my pomphuis sal kry. Ek het ook ’n laasgenoemde skrywe versoek om asseblief toe te sien dat daar ’n hek geïnstalleer word waar die vorige hek was, sodat ek gerieflik toegang tot my pomphuis kan hê.

Daar was verskeie geleenthede, veral oor lang naweke en vakansiedae waar dit nie vir my moontlik was om toegang tot my pomphuis te verkry nie. Dit was veral weer die geval tydens die onlangse paasvakansiedae vanaf 22 April 2011 tot en met 3 Mei 2011, toe ek glad nie toegang tot die pomphuis kon kry nie omrede daar ’n ketting aan die skuifhek aangebring is met ’n nuwe slot waarvan ek nie ’n sleutel gehad het nie.

Die resultaat was dat ek die hele naweek nie toegang tot my pomphuis gehad het nie. Eers op Saterdag die 30ste Mei 2011 kon ek ’n sleutel van die terreinopsigter verkry om self ’n duplikaat laat maak van die sleutel en toegang tot die boorgat te bekom.

Hierdie omstandighede is uiters ongerieflik vir my en enige lid van my gesin, en ek sou beslis nie toegestem het tot die gebruik van die servituut area waarop ek geregtig is, vir die netbalbane nie, indien ek bewus was dat daar soveel ongerief vir my veroorsaak sal word nie.

Al wat ek wil hê is dat daar in die muur waar die ‘off ramp’ begin, ’n hek geïnstalleer word, waaroor ek beheer het.”

[34] In the aforesaid correspondence Mr De Klerk again complained about the inconvenience of the access being provided by the School and stated that the borehole and pump station were not freely accessible to him. He raised the difficulty that over the long weekends and public holidays it was impossible for

him to obtain access to the pump station as the lock had been changed at the access point and he did not have a key for that lock.

[35] On 11 July 2011, Mr De Klerk addressed a further letter to the School. In this letter he thanked the School for installing a more convenient access gate in Lynwood Road close to the pump station. The correspondence stated, *inter alia*:

“Ek verwys na ons onlangse telefoniese gesprek en wens u te bedank deurdat u ’n nuwe hek in Lynnwoodweg nader aan die pomphuis geïnstalleer het. ”

[36] On 19 January 2012, Mr De Klerk again addressed a letter to the School. In this letter he made reference to the fact that a contractor that had to go out for purposes of attending a leak in the relevant pipeline, which required some work to be conducted by a contractor, for which Mr De Klerk seemingly held the School liable. This correspondence demonstrates that on some occasions it is necessary to obtain the services of a contractor and such services could involve and require access for a truck or heavy-duty vehicle to the pump station and pipeline servitude. The letter states, *inter alia*, the following:

“Ek verwys u na die onlangse telefoniese gesprek wat ek met u [M]nr Manie Geldenhuys gehad het asook die verskeie persoonlike gesprekke wat ek met Hannes en Seef gehad het in verband met die waterpyp wat vanaf my boorgat die water gelei na die sypaadjie in Lynnwoodweg, en vandaar na my woning in die Die Randstraat.

Ek het gebruik gemaak van die dienste van Wikkies Pompe om te bepaal waar die lekkasie van water voorgekom het.

In die teenwoordigheid van ’n werknemer van Wikkies Pompe en Seef, het ons vasgestel dat die lekkasie onder die opgeboude oprit aan die weste kant van die netbalbane is.

Ons het in oorleg met Seef, bespreek of ons die oprit moet opkap alternatiewelik of ons die pypleiding moet herlei. Ons het die laasgenoemde moontlikheid besluit en Wikkies Pompe het die nodige in die verband gedoen.

Ek het letterlik ure spandeer om die leksels op te spoor, en ek is net dankbaar dat ons 'n oplossing kon vind het.

Soos met Seef oorgekom, heg ek hierby aan die drie fakture, ...

Totaal R5 339-00.

Volgens Seef was die plastiese waterpyp onder die 'ramp' aanvanklik gelé in 'n staal koppeling.

Waar die lekkasie vandaan gekom het sal 'n mens net kan vasstel, indien die oprit en die plaveisel opgekap word...." (sic)

[37] The applicants' Title Deed confirms that the applicants' property is entitled to the following condition:

"A. Portion 32 OF THE FARM HARTEBEESPOORT NO 362 Registration Division JR (formally No 304) district Pretoria, (of which the property hereby transferred is a portion) is SUBJECT and ENTITLED to The Following Conditions:

(a) ...

(b) at the cost of ten cents 10c per 20663,64 litres (payable monthly) the Transferee, her Successors in Title or Assigns, shall be entitled for use upon the said PORTION 32, to not more than 1239818,10 litres of water per month from supplies available in the existing borehole situated near the junction of Lynnwood Road and Garstfontein Road on the aforesaid remaining extent of the said farm; FRANK EDWARD BEATTIE STRUBEN shall erect such pumping plant as he may deem necessary for the purpose aforesaid, and for his own use, and the transferee, her successors in title or assigns, shall use and operate such plant for the purpose of pumping the aforesaid quantify of water and shall be responsible for the maintenance thereof; and shall further be obliged to deliver into the said FRANK EDWARD BEATTIE STRUBEN's reservoir situate[d] outside the Eastern boundary of the said Portion 32, not more than 20663,64 litres of clean water per week direct from the said borehole for the use of the said FRANK EDWARD BEATTIE STRUBEN, his successors

in title or assigns, as varied by Notarial Deed NO 633/1948-S dated 10 August 1948.”

[38] In the Title Deed in respect of the School property, the following restrictive title condition appears:

“A.(1) Subject to a servitude whereby EILEEN MARY CHAPMAN a widow, (born on the 9th of May, 1906), and her successors in title or assigns as owners of Erf Number 7[...], situate[d] on Main Road, in the township of MENLO PARK EXTENSION No. 1, District Pretoria, measuring 1,1411 (one comma one four one one) hectares, and held by her by Deed of Transfer No. 27584/1945 dated the 3rd day of November, 1945, are entitled to use upon the said erf not more than Sixty thousand (60,000) gallons of water per month from supplies available in a borehole existing on the 3rd November, 1945, and situate[d] near junction of Lynnwood Road and Garstfontein Road on the property hereby transferred; which servitude is to be enjoyed subject to certain conditions, as more fully set out in Notarial Deed No. 633/1948S dated the 10th day of August, 1948.”

[39] On 22 January 2019, after the applicants became the registered owners of the property, it was necessary to engage the services of an attorney because the School decided to cause new boreholes to be drilled adjacent to the applicants’ servitude area but in the applicants’ aquifer, without the applicants’ consent.

[40] In a letter dated 22 January 2019, the applicants’ attorneys, Dr TC Botha & Prokureurs, demanded that the School cease the drilling operation and that it undertake not to equip the new boreholes in order to utilise the same. At that stage, the applicants’ attorneys threatened the School with an urgent application if the School was to persist with the unlawful conduct. The School was advised that the applicants would appoint an expert, Dr Roger Diamond (“Dr Diamond”) of the University of Pretoria to conduct tests on the applicants’ borehole in order to determine its yield and the possibility of it being detrimentally influenced by

any new borehole in close proximity. It was pointed out that if the applicants' access to the servitude area was hampered in future a court would be approached to protect the applicants' rights.

[41] In response to the aforesaid letter, the School's attorneys provided the undertakings as sought and it was therefore not necessary to approach a court at that time.

[42] In the interim, Dr Diamond was appointed to do the necessary investigation and compile an expert report on the applicants' borehole and the possible impact that would result if new boreholes were being drilled and utilised in close proximity to each other.

[43] On 1 February 2019, an email was addressed by the applicants' attorney, Conrad Botha ("Mr Botha") to the School's attorneys. In this correspondence, *inter alia*, the following was stated:

"Na verwagting sal die Landmeter se verslag beskikbaar wees teen Woensdag 6 Februarie 2019. Verder, soos reeds aangedui, wag ons kliënt op die verslag van Dr Roger Diamond welke verslag aanduidend sal wees van die negatiewe impak wat u kliënt se boorgat (gate 1 and 2) sal hê op ons kliënt se waterlewing in ag genome die feit dat u kliënt se boorgat in ons kliënt se hoof wateraar gesink is. Wat betref die gate van u kliënt reeds geboor het bestaan die dispuut slegs rondom boorgate 1 en 2 en nie rondom boorgat no 3."

[44] On 28 March 2019, the applicants' attorneys addressed a letter to the School's attorneys, Anders Ingelyf. A copy of the expert report of Dr Diamond was attached and the content thereof were also brought to the School's attention. In the paragraph titled "*Conclusions and Recommendations*" the following was stated by Dr Diamond:

"Conclusions

Within hundred segments of pumping at 2 L/s from the old farm borehole, the newly drilled boreholes began to show a drop in water level. This confirms that the three boreholes draw water from the same

aquifer. Pumping from any one of them will cause a drawdown in the water level in the other two.

The smooth profiles of the drawdown curves suggest the primary porosity aquifer. There is no indication of fracture flow. This means the effects of pumping will be roughly equal in all directions from the pumping borehole.

After 5 hours of pumping 2 L/s, the old farm borehole was almost empty. This is an unsafe pumping rate. A rate of 0.5 L/s is probably a 'safe yield'. Safe yield is that which can be pumped continuously without damage to the borehole, pump or aquifer. The 'unsustainable yield' is usually lower than the safe yield, as this considers the broader environment and other water users. A reliable sustainable yield cannot be given after this limited amount of work.

Recommendations

To estimate a sustainable yield, a water balance calculation for the area will have to be done, using rainfall, runoff, recharge estimates and so on, and including a hydrocensus of all groundwater users in the area (1-2 km radius).

Monitoring of water usage should be done. This includes pumped groundwater, as well as any additional irrigation from municipal supply. Monitoring of water levels in boreholes should be done monthly. These should ideally be monitoring boreholes, where no nearby pumping has taken place in the previous 2-3 days. If only pumping boreholes can be accessed, then ideally a week of no pumping should precede the water level measurements. In addition, rainfall should be monitored.

Water quality may also be an issue. Typical concerns in this setting are septic tanks, leaking sewer pipes, dirty runoff from roads or workshops, nutrients (nitrate, phosphate, etc.) from fertilisers and petrol filling stations. Groundwater users need to be aware of such risks."

[45] A confirmatory affidavit by Dr Diamond was also filed on behalf the applicants confirming the content of his report.

[46] Although the applicants initially thought the new boreholes had been drilled in the servitude area, they later realised that the new boreholes were drilled just outside of the servitude area but advised that this didn't detract from the findings of Dr Diamond and the severe detrimental impact it would have had on the existing boreholes.

[47] In response to the correspondence and the expert report, a letter was received from the School's attorneys, Anders Incorporated, dated 2 April 2019 enquiring about a report from Mr Retief Strydom and suggesting a round table conference. Thereafter, the School appears to have appointed Boshoff Incorporated Attorneys ("Boshoff Inc.") to deal with the matter.

[48] In early March 2021, the applicants became aware that they were deprived of their free and unrestricted access to the pump station and servitude area as a result of the School unilaterally locking both the access gates (the pedestrian gate as well as the vehicle access gate), which access gates had been used for a number of years by the applicants to obtain access to the servitude area.

[49] On 11 March 2021, the applicants' attorneys addressed a letter to Boshoff Inc. In the letter, it was confirmed that the applicants had been deprived of access and a photograph was attached demonstrating the peg that had been driven into the ground preventing use of the convenient gate which the applicants had usually used. It was demanded that the School restore the access by no later than Friday, 12 March 2021, failing which urgent application proceedings would be brought. On the same day, a short email was received from Boshoff Inc. stating that they had taken notice of the letter and were awaiting feedback from the School.

[50] On 12 March 2021, a further email was received from Boshoff Inc. – In this email, the writer apologised for the School's actions and indicated that, as a result of an internal oversight, notice had not been given to the applicants of the steps that had been taken by the School.

[51] The aforesaid email reads as follows:

"More Conrad,

Ek vra onverskoning vir wat soos 'n eensydige handeling kon lyk vir julle welke nie die geval was nie. Die skool het 'n skrywe aan my gestuur wat ongelukkig nie deur my vroegtydig, as gevolg van interne oorsig, aangestuur was aan u nie. Ek heg die skrywe se inhoud hierby aan vir u kennisname. Die sluit van die hekkie is geensins gemik daarop om u regte op inbraak te maak nie.

"Beste Dr en Mnr Botha,

as deel van 'n vernuwingsprojek, verhoogte misdaad en inbrake by openbare skole en die vereiste streng toegangsregulasies ten aansien van die Covid-19 pandemie, bou die skool tans 'n nuwe heining in Lynnwoodweg. Ons wil julle graag hiermee in kennis stel dat die bestaande toegangshekkie in Lywoodweg om bestaande redes sal verdwyn.

Daar sal steeds toegang wees tot die boorgat.

Vir roetien-onderhoud kan toegang 24 uur vooraf gereël word met die hoof van sekuriteit by die skool, mnr Hannes Lombaard (0[...]) of die terreinbestuurder, mnr Mathys Buitendag (0[...]).

Skakel ons vir mnr Lombaard as daar dringende toegang na-ure nodig is. Hy is voltyds op terrein.'

Ek vertrou u vind bogenoemde in orde en vra weereens omverskoning vir die oorsig in kommunikasie na u." (Emphasis added)

[52] In the notice the applicants are advised that the access gate in Lynnwood Road would be totally removed and a new fence was being erected as a result of, *inter alia*, increased crime and break-ins at public schools as well as the strict Covid 19 regulations. Of significance is that this was the first time that the School had not engaged in discussions to try and reach agreement about access measures to be put in place as a result of changes which needed to be implemented.

[53] I interpolate to point out that, with reference to the Rule 34 tender which is dealt with under a separate heading below, this may have been the ideal time to negotiate a possible solution to ensure continued unfettered access by the applicants but which would ensure no access to the school grounds.

[54] On 15 March 2021, a further letter was received from Boshoff Inc. stating, *inter alia*, that:

"SPOILIATION

...

1. *We take note of your client's intention to proceed with an urgent spoliation application against our client. We confirm that our client's conduct was not intended on depriving your client of his rights with regard to the servitude and we place on record that our client's conduct was not unlawful.*
2. *Our client is a public-school governed by a governing body whose functions, obligations and powers [are] regulated by the South African School's Act of 1996 and the regulations thereto. The governing body is obliged to manage the school and their limited functions with regard to the property upon which the school is erected, in accordance with the said Act.*
3. *The governing body has responsibility to ensure safety of the learners, educators and other staff admitted to the school and they are guided by the Constitution, the Children's Act and the School's Act with regard to the best interest of the children in a school. In all actions concerning children the best interest of a child must be the primary consideration and the governing body of our client is guided by this principle when making decision.*
4. *We confirm that the school occupies the property owned by the Government of South Africa and all the rights and obligations with regard to the property is conveyed upon our client in terms of the South African School's Act.*
5. *As you are aware, the safety of the learners [is] one of the main factors it considers when acting in the best interest of children. The governing body is prohibited to allow any activity on school*

property that is hazardous or disruptive to the learners. In terms of the regulations for safety measures at public schools, no person shall enter the school premises without permission of the Principal or the Head of the Department.

- 6. The governing body is obliged to continuously develop action plans to counter threats of violence and to ensure the safety of learners, staff and educators during school activities. They are also required to adapt their action plans for the safety of the learners as circumstances change and new threats to the safety and health of the learners come to light.*
- 7. You are also referred to the regulations regarding covid 19 protocols in schools, attached hereto for your ease of reference. The school must adhere to these regulations. Should your client require access to the school, the proper screening for covid 19 symptoms would have to be done. Our client implements these regulations not only because of their legal obligations but also because of their commitment to the best interests of their learners.*
- 8. In light of the above, our client will act unlawfully by allowing your client unauthorised and unsupervised access to the school's property. All persons who require access to the school require permission to do so prior to accessing the school, not only your client. Your client's right to access the property to maintain the borehole is ancillary to the right given by the registered servitude. Your client's rights must be exercised reasonably (civilliter modo).*
- 9. We place on record that our client did not deprive your client of the right to draw water from the borehole and our client did not refuse access by your client for maintenance purposes. Our client received no notice or request from your client to access the school's property. We are of the opinion that our client's request that your client give reasonable notice to access the property and your client's legal obligation to obtain prior authorisation, is lawful and reasonable."*

[55] Although there was reference in the above letter to a “*proposed agreement*”, none was reached.

[56] This application was launched on 5 May 2021 in the ordinary course. In the founding affidavit, the first applicant explained that the application would only be rendered urgent if the applicants required immediate access to the pump station, borehole or pipeline situated in the servitude area.

[57] Before dealing with the merits of the application and the counter application, it is necessary to have regard to the relevant legal provisions and authorities.

C. RELEVANT LEGAL PROVISIONS AND AUTHORITIES IN MAIN APPLICATION:

(a) Spoliation:

[58] It is trite that spoliation is a robust remedy and the rule *spoliatus ante omnia* is absolute.¹

[59] To succeed with spoliation relief, an applicant must allege and prove:

[59.1] that it was in peaceful and undisturbed possession of the property or has a real right;²

[59.2] there has been the unlawful deprivation of the property by the respondent. “*Unlawful*”, in this context, refers to dispossession without the applicant’s *consent* or due legal process.³

[60] Partial deprivation of possession is sufficient to warrant the grant of spoliation order.⁴

[61] If the application is brought within a year of the active spoliation, special circumstances have to be present for the relief to be refused merely on the basis of excessive delay.⁵

¹ *Le Riche v PSP Properties* CC 2005 (3) SA 189 (C) at 193G (“*Le Riche*”).

² *Amler’s Precedents of Pleadings (9th Edition)* (“*Amler’s*”), p 341, and *Impala Water Users Association v Lourens N.O.* 2008 (2) SA 495 (SCA).

³ *Amler’s*, p 341; and *George Municipality v Vena* 1989 (2) SA 263 (A) at 269D – 272C.

⁴ *Van Rooyen v Burger* 1960 (4) SA 356 (O) at 363.

(b) Requirements for final interdictory relief:

[62] The requirements for the right to claim a final interdict are:⁶ (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of similar protection by any other ordinary remedy.

[63] Whether or not one has a “*clear right*” is a matter of substantive law.⁷

[64] The term “*injury*” must be understood to mean infringement of the right which has been established and results in prejudice.⁸

[65] Prejudice is not synonymous with damages and it is sufficient to establish potential prejudice.⁹

[66] The discretion of the court to refuse a final interdict, provided the abovementioned three requisites are present, is very limited¹⁰ and depends exclusively upon the question whether the alternative remedy is adequate.¹¹

(c) Interpretation:

[67] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“the *Endumeni case*”)¹² the Supreme Court of Appeal (“SCA”), per Wallis JA, summarised the legal principles of interpretation and stated, *inter alia*, that:

[67.1] interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the

⁵ *Le Riche*, para [25] at 198D/E.

⁶ *Setlogelo v Setlogelo* 1914 AD 221 at 227 (“*Setlogelo*”).

⁷ *Minister of Law & Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (BG) at 97-98.

⁸ *Setlogelo* at 221.

⁹ *Capital Estate and General Agencies (Pty) Ltd & Others v Holiday Inns Inc. and Others* 1977 (2) SA 916 (A) at 930-932.

¹⁰ *Tvl Property and Investment Co Ltd v Reinhold & Co v SA Townships Mining & Finance Corporation Limited and the Administrator* 1938 TPD 512 at 521.

¹¹ *Setlogelo* at 221 and 227.

¹² 2012 (4) SA 593 (SCA) at para [18].

document as a whole and the circumstances attendant upon its coming into existence;

- [67.2] whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors;
- [67.3] the process is objective, not subjective;
- [67.4] a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document; and
- [67.5] Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used as to do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.

[68] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*¹³, the SCA referred with approval to *Endumeni* case and indicated that, in interpreting a document, whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.

(d) Relevant provisions of the South African Schools Act and the Regulations promulgated thereunder:

¹³ (802/2012) [2013] ZASCA 176, para [12].

[69] According to the School, changing circumstances, including the need to comply with the provisions of the South African Schools Act and the Regulations promulgated thereunder made it necessary to change the manner in which the applicants had previously accessed the School property.

[70] in particular, the School relies on the need to employ measures to ensure the safety of the learners, personnel and parties lawfully attending the premises and submits that this justifies the implementation of the measures suggested by it to regulate the applicants' rights in respect of the servitude.

[71] The court was, *inter alia*, referred to the provisions of sections 16(1), 20(1)(g), 21(1) and the Regulations promulgated by the Minister of Education in terms of section 61 of the South African Schools Act for Safety Measures at Public Schools in terms of Government Gazette Notice 1040 published in Government Gazette No. 22764, dated 12 October 2001, which came into effect on 12 October 2001 ("the Safety Regulations").

[72] Section 16(1) of the South African Schools Act reads as follows:

"6 Governance and professional management of public schools

(1) *Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act."*

[73] Section 20(1)(g) of the South African Schools Act provides as follows:

"20 Functions of all governing bodies

(1) *Subject to this Act, the governing body of a public school must-*

...

(g) *administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of*

the Executive Council or Head of Department in terms of any law or policy;”

[74] In terms of Regulation 1 of the Safety Regulations, “HOD” means the *“Head of the Education Department in the Province”* and “Public School Premises” is defined to include *“a building, structure, hall, room, office, convenience, land enclosure, which is under the control of a public school, to which a member of the public has a right of access, or is usually admitted, or for which he or she may be admitted”*.

[75] Regulation 5 of the Safety Regulations is titled *“Access to public school premises”* and provides, *inter alia*, as follows:

- “(1) Subject to the Constitution, laws and national and provincial policies, the HOD or principal of any public school may and for such timeframes as may be necessary -*
- (a) take such steps as he or she may consider necessary for the safeguarding of the public school premises, as well as for the protection of the people therein; and*
 - (b) direct that the school may only be entered in accordance with the provisions of subregulation (2).”*

[76] Regulation 6 of the Safety Regulations is titled *“Exemption of certain persons”* and provides as follows:

“6. Exemption of certain persons

The provisions of regulation 5 do not apply in respect of any member of a police service established by or under any law, a member of the South African Defence Force, the Minister of Education, the Minister of the Executive Council responsible for education in a province or an official of the Department of Provincial Departments of Education who is required in the performance of his or her functions to enter or enters upon any public school premises and it produces proof of his or her identity to the satisfaction of the principal or HOD concerned.”

[77] Regulation 8A is titled “School activities” and Regulation 8A(2) provides as follows:

- “(2) a public school must take measures to ensure the safety of learners doing any school activity including –*
- (a) ensuring against accidents, injuries, general medical expenses, hospitalisation and theft that may occur, depending on the availability of funds; ...”*

[78] Regulations 9(5) and 9(6) of the Safety Regulations provide as follows:

- “(5) Public schools must develop action plans to counter threats of violence which have the potential to have a negative impact on school activities and to implement regulation 4(1).*
- (6) The plans in subregulation (5) must ensure the safety of all learners, staff members and parents during school activities.”*

[79] The respondents further referred to the responsibility of the School and the Governing Body to ensure the safety of learners, educators and other staff in terms of the Constitution and the Children’s Act, 38 of 2005. Furthermore, it was stated that in all actions concerning children the best interest of a child must be the primary consideration and that is the guiding principle of the School when making any decision.

(e) Applicability of the City of Tshwane Metropolitan Municipality: Water Supply Bylaws:

[80] The School’s counsel argued that Bylaw 59 which had been published by the City Manager of the City of Tshwane Metropolitan Municipality in terms of sections 5 and 6 of the Local Government: Municipal Property Rates Act, 6 of 2007, read with section 7 of the Gauteng Rationalisation of Local Government Act, 10 of 1998, section 13 of the Local Government Municipal Systems Act, 32 of 2000 and section 162 of the Constitution, demonstrated that the applicants use of the borehole water is unlawful.

[81] Bylaw 59 reads as follows:

“59(1) No person may use or permit the use of water from a source other than the water supply system except for a rainwater tank that is not connected to a water installation, provided that –

(a) the prior written consent of the Engineer has been obtained for the use of water from a source other than the water supply system or rainwater tank, as the case may be; and

(b) the use of water is in accordance with the conditions that the Municipality may impose for domestic, commercial or industrial purposes.”

[82] A “water supply system” is defined in the Bylaws to mean:

“...the water supply system of which ownership vests in the Municipality and which is used or intended to be used by the Municipality in connection with the supply of water, and includes the structures, aqueducts, pipes, valves, pumps, meters or other apparatus relating to the water supply system and any part of the water supply system.”

[83] A “water installation” is defined in the Bylaws to mean:

“...the pipes and water fittings which are situated on any premises and ownership of which vests in the owner of the premises and which are used or intended to be used in connection with the use of the water on the premises, and includes a pipe and water fitting situated outside the boundary of the premises, which either connects to the connection pipe relating to the premises or are otherwise laid with the permission of the Municipality.”

[84] Bylaw 59 which is relied upon by the School falls under Part 9, Chapter V, which pertains to “*unauthorised water supply services*”.

[85] The applicants’ counsel referred the Court to the fact that “*Boreholes*” are dealt with under Part 8, Chapter V.

[86] Bylaws 39(1)(a) and 39(3) provide for the “Notification of boreholes” and read as follows:

“39.(1) In respect of any area of the Municipality, the Municipality may by public notice require –

(a) the owner of any premises on which a borehole exists or, if the owner is not in occupation of the premises, the occupier of the premises to notify the Municipality of the existence of a borehole on the premises and to provide it with such information about the borehole as it may require; ...

(3) In respect of an owner or occupier of premises who has an existing borehole on the premises that is used for water supply services, the Municipality may by notice to the owner or occupier or by public notice –

(a) require the owner or occupier, as the case may be, to obtain approval from the Municipality for the use of the borehole for potable water supply services in accordance with sections 6.7 and 22 of the Act; and

(b) impose conditions in respect of the use of the borehole for potable water supply services.”

D. RELEVANT LEGAL PROVISIONS AND AUTHORITIES RELATING TO THE COUNTER APPLICATION:

[87] The counter application was brought based on section 133 of the Water Act. Section 133 of the Water Act provides as follows:

“133 Cancellation of servitude

An owner of land subject to a servitude of abutment, aqueduct or submersion may-

(a) if the relevant authorisation associated with the servitude is terminated;

(b) if the rights and obligations in respect of the servitude have not been exercised on the land subject to the servitude for a continuous period of three years; or

(c) for any other lawful reason, apply to a High Court for the cancellation of that servitude.”

[88] Counsel for the School referred me to *De Kock v Hänel and Others*,¹⁴ where the court was faced with the argument that once the utility for which a servitude was created no longer exists, the servitude itself ceases to exist. The court stated the following in this regard:

“The issue of utilitas was carefully canvassed by both counsel. Mr Sholto-Douglas appeared to argue as follows: Once the utility for which a servitude is created no longer exists the servitude itself ceases to exist. This principle referred to as a requirement of utilitas demands that the servitude must offer some permanent benefit to the dominant tenement and not merely serve the personal pleasure or caprice of the owner of the land.”

[89] The School’s counsel also referred me to *Pickard v Stein and Others*¹⁵ where the court considered whether a praedial servitude had fallen away because it no longer had any utility. In doing so, the court referred to the following statement of the SCA in *Linvestment CC v Hammersley and Another* (“*Linvestment*”)¹⁶.

“[31] I am persuaded that the interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment. Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Why should a present owner, on no rational ground, be entitled to rely on his summum ius derived from the alleged sanctity of a contract or a grant or prescriptive acquisition to which he was not privy. Properly regulated flexibility will not set an

¹⁴ 1999 (1) SA 994 (C) at 998 F-G.

¹⁵ [2014] 3 All SA 631 (GJ).

¹⁶ 2008 (3) SA 283 (SCA), para [31] at 292 E/F.

unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties.”

E. MERITS OF THE MAIN APPLICATION:

[90] The applicants allege, *inter alia*, that:

[90.1] the conduct of the School amounts to spoliation (or at least partial spoliation) and constitutes an infringement of the applicants' rights in terms of the Notarial Deed of Servitude;

[90.2] it is “*cold comfort to the applicants that 24 hours' notice must be given to obtain access and a Mr Lombaard should be contacted on his cell phone if urgent access is required*”;

[90.3] the School has deprived the applicants “*of the convenient access situated close to the pump station and servitude area and not only is it impossible for [the first applicant] to obtain access through the pedestrian gate, but it is also impossible for any vehicles or maintenance trucks to have access to the servitude area to, in case of an emergency, attend to any difficulties encountered at the pump station*”; and

[90.4] officials of the Municipality, by virtue of the School's conduct, can also not obtain access to the aforesaid electricity meter and will not make contact with either Mr Lombaard or Mr Buitendag in order to obtain access for purposes of reading the electricity meter.

[91] What is clear from the chronology of events and common cause facts listed by the parties is that there is no dispute that: (i) there is a borehole servitude registered in favour of the applicants over Portion 43 (which forms part of the School property); the applicants have been the registered owners and occupiers of the applicants' property since 27 August 2015 (i.e. for almost 9 and a half years); (iii) from 1977 to up until March 2021, the School acknowledged and accepted the applicants' and their predecessor in title's rights in terms of the servitude and from time to time reached agreement to ensure convenient and unfettered access to the applicants or their predecessors in title to the servitude tenement; and (iv) from March 2011, the School unilaterally changed the

conditions of access without any consultation, consent or due process, but still undertook to provide the applicants with access to the servitude tenement.

[92] In explaining the change in stance in providing unfettered access to Portion 43, the School relies on the Governing Body's and Principal's responsibility to protect the safety of the children and teachers in terms of the Constitution, Children's Act and the need to comply with the provisions of South African Schools Act and the Regulations promulgated thereunder. Although, the applicants contend that these are irrelevant considerations, I do not agree. I am of the view that they are considerations which may require a different approach to how the servient tenement can be accessed. The School also referred to restrictions that arose as a result of the Covid 19 pandemic but those considerations are no longer relevant. Having said that, the Covid 19 pandemic undoubtedly changed the way people lived their daily lives and required strict access control to avoid the virus spreading.

[93] What is apparent from the correspondence is that over time, since 1945, the landscape changed and there were agreements reached to allow for changes, such as, for example, the building of netball courts and the building of new boundary walls. All of these changes, at least until March 2021, were effected after consultation with the applicants or their predecessor in title.

[94] It is also apparent that from time to time there were complaints when convenient access was interrupted, i.e. where reference was made by Mr De Klerk to locks being changed, him being requested to use alternative gates or the inability to access the servitude tenement over holiday weekends.

(a) Technical arguments raised on behalf of the School:

[95] The School raised various technical points, some of which were addressed by the applicants in the replying papers and were not persisted with at the hearing.

[96] The first challenge was that the applicants had no cause of action. This argument was based on the fact that there was an erroneous reference to the

servitude being registered in respect of the Remainder of Erf 7[...] and not Portion 43. This was rectified in the replying papers and by means of the amended notice of motion and was not persisted with.

[97] The second challenge was the non-joinder of the seventh respondent. This was also addressed by the applicants by bringing an application for joinder, which was unopposed and the joinder was granted at the commencement of the hearing.

[98] The third challenge was that the spoliation relief had been rendered moot because there was a delay in having the matter heard until November 2023.

[99] The School submitted that although the SCA in *Le Riche* considered the period between the act of dispossession (which in this case was 11 March 2021) and the bringing of the application (which in this case was 5 May 2021), by parity of reasoning the applicants' election not to "*expeditiously prosecute the application*" rendered the relief moot. I do not agree. The dispossession came to the applicants' knowledge on 11 March 2021 and this application was brought on 5 May 2021 (i.e. in less than 2 months). There can be no question of the applicants displaying a state of mind which demonstrated acquiescence of the alleged disturbance of their possession. The applicants have, in my view, provided an adequate explanation for not proceeding with an urgent application. Absent grounds for urgency, the applicants were wisely advised not to bring the matter as an urgent application.

[100] The fourth argument advanced by the School is that the relief sought in terms of the *mandament van spolie* is rendered moot by the further prayers for a final interdict. The respondents' argument that the spoliation relief would somehow be "*subsumed through the determination of the substantive relief sought*" is also, in my view, unsustainable. Spoliation relief is aimed at restoring possession (whether partial or not) whilst the interdictory relief sought is very specific and is aimed at achieving a different result. These forms of relief also have their own distinct requirements.

[101] In the circumstances, I am of the view that there is no merit in the technical arguments raised by the School.

(b) Spoliation relief:

[102] Turning to the spoliation relief, the correspondence demonstrates that until March 2021, the applicants utilised a pedestrian access and a larger access gate to accommodate vehicle access.

[103] I agree with the applicants that the fact that they had unrestricted and undisturbed access until March 2021 is not disputed in any meaningful way.

[104] It is common cause that access to the pedestrian access and vehicle access were removed as a result of the School placing new conditions on how access could be achieved. Having said that the School did still say that access would be provided, albeit under different conditions.

[105] It would also appear that, despite some disagreements over time and this dispute, throughout the applicants' occupation of their property they have obtained water from the borehole.

[106] I am of the view that, in this instance, there has only been partial deprivation of possession without consent or due legal process and that the requirements of spoliation have been met.

[107] Having said that, the question that arises is what the court is to make of the safety concerns raised by the schools as a result of increased crime and theft at public schools and the fact that the Governing Body and Principal must act in accordance with certain legislation in protecting the safety of children and staff and, in doing so, act in the best interest of the children? In my view, just as changes to the manner of access were rendered necessary due to other issues and developments at the school, safety concerns and legislation promulgated over the years could also justify a change in the way access is given. In this sense, the alternative relief in the counter application is somewhat intertwined

with the question of whether unfettered access should be given or should be restricted as requested by the applicant. I deal with this in more detail below when I deal with the counter application.

[108] In this regard, I wish to make it clear that there is no evidence of the applicants ever having done anything to jeopardise the security of children or safety of anyone at the school. However, unfortunately, in this day and age, one cannot exclude the possibility, in circumstances where crime is said to have increased in the area, that the access key in the possession of the applicants could be taken and / or be innocently misplaced or lost and/or be utilised by an unknown person.

[109] The Court accordingly needs to weigh the interests of the School (including safety of pupils and staff) and the applicants (having unfettered access to the servitude tenement as opposed to having access subject to reasonable conditions) in reaching a decision on the terms of access. I deal with this in more detail below where I address the alternative relief sought in the counter application.

(c) Interdictory relief:

[110] In the original notice of motion and the amended notice of motion the applicants sought an interdict in the following terms:

“Prohibiting the drilling or utilisation of any new borehole or the drawing of water from the same aquafer which may detrimentally affect the yield of the applicants’ borehole servitude; ...” (Emphasis added)

[111] According to the School, in the replying affidavit, there is a partial abandonment, *alternatively* a refinement of the prayer in that the applicants concede that the drilling of boreholes in itself is not the issue, instead, it is the act of drawing water from the specific aquafer which would detrimentally impact the applicants’ yield. In this regard, the court was referred to:

[111.1] paragraph 6.44.2 of the replying affidavit which reads as follows:

“Although the school is entitled to drill new boreholes outside the servitude area, it is precluded from doing so if

the water abstraction from such new boreholes would detrimentally affect the applicants' rights in terms of the borehole servitude.”;

[111.2] paragraph 6.48.3 of the replying affidavit which reads as follows:

“The school is entitled to drill as many boreholes it wishes outside the servitude area, but the abstraction of water from those boreholes may not infringe upon the applicants' rights vesting in the borehole servitude.”

[112] I do not read the relief sought as quoted above as being restricted or refined by the quoted paragraphs. The question is whether new boreholes drilled or utilised by the school will or could detrimentally impact upon the applicant's rights under the servitude.

Clear right

[113] Turning to the requirements to succeed with interdictory relief, the School's main attack is that the applicants have not established a clear right. The School further indicates that the clear right *“has not been articulated beyond a broad reference to the wording of the registered servitude.”*

[114] In this regard, the applicants and the School confirmed that what is required is an interpretation of the servitude in line with the principles of interpretation summarised by our Courts, including *Endumeni*.

[115] Counsel for the applicants also referred me to *Unica Iron & Steel (Pty) Ltd and Another v Mirchandani*¹⁷ where the SCA stated that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a dispute term as the parties' subsequent conduct may be probative of their common intention at the time they made the contract.

[116] According to the School, the applicants' right as the dominant tenement to the yield of the aquafer is not an unqualified one *“nor is it on equal footing with*

¹⁷ 2015 (2) SA 307 (SCA) at para [21].

that of the servient tenement". As a result of the use of the words "*from supplies available*" it is submitted by the School to be clear and unambiguous.

[117] According to the School, the applicants have a right to the yield of the aquifer from whatever supplies are available and submit that this does not prohibit abstraction from any other boreholes nor does it infer a minimum entitlement or unlimited entitlement but quite the opposite: It illustrates a conditional right in terms of both payment and maximum use. According to the School, the applicants have also failed to show compliance with the payment condition which would create a right of abstraction upon which an interdict may be based and have further failed to provide any basis upon which they would be entitled to a minimum yield of some kind.

[118] In my view, if interpreted in a sensible and businesslike manner and in light of the context (and the parties' conduct over the years), there can be no doubt that the registered servitude provides the applicants with a clear right to extract a maximum of 1 239 818.10 litres of water from the borehole per month. The right does not only arise upon proof of payment.

[119] The School has dealt with the issue of a clear right separately with reference to the different nature of the interdicts sought: (i) the first interdict is aimed at prohibiting drilling or utilisation of any new borehole or the drawing water from the same aquifer which may detrimentally affect the yield of the applicants' borehole servitude (put differently, it will result in it not being able to obtain its maximum amount of water per month to which it is entitled in terms of the servitude); (ii) the second interdict is aimed at impeding in any way or restricting the applicants' "*undisturbed access*" to their borehole pump station and pipeline; and (iii) the third interdict is aimed at impeding in any way or restricting the Municipality's access to the Applicant's electricity meter (1[...]).

[120] All of the interdicts sought flow from the clear right the servitude provides. Having said that I am of the view, for reasons already explained above that it may be necessary to regulate the access and restrict "*unfettered*" access.

[121] Insofar as School's reliance on Bylaw 59 is concerned, it argues that: (i) no person may use, or permit to be used, potable water obtained from any other source than the Municipality's water supply system for domestic use; (ii) water from other sources, such as boreholes, may only be used as a potable water source with permission from the Municipality; (iii) as the applicants use the water extracted from the borehole for domestic use and not merely to irrigate the garden, they are, on their own version, disconnected from the Municipality's water supply system; and (iv) the applicants do not have permission from an Engineer to do so; and (v) the use of water for domestic purposes from the borehole is an offence.

[122] Counsel for the School further argued that: (i) the responsibility to comply with Bylaws rests squarely on the shoulders of the applicants and referred the Court to Bylaw 65 in this regard; (ii) the owner of the premises is responsible for ensuring compliance with the Bylaws in respect of all or any matters relating to any water installation on the premises; and (iii) the relevant owner would be the owner of the premises where the transgression takes place.

[123] Counsel for the applicants pointed out that Bylaw 59 falls under Part 9, Chapter V, and pertains to "*unauthorised water supply services*" and that, as neither the School nor the applicants supply water services, it is not relevant. Furthermore, it is common cause that the applicants' borehole has been utilised for decades and long before bylaw 59 came into operation in 2014 and based on the presumption that legislative provisions do not have retrospective effect, "*prior written consent*" could not find application. I agree with counsel for the applicants in this regard.

[124] In addition, counsel for the applicants argued that, insofar as Bylaw 39 dealing with "*boreholes*" is concerned (which was not referred to in the answering affidavit or relied upon by the School), sub-section (3) pertains to existing boreholes and prescribes conditions if boreholes are used for "*water supply services*". Mr Venter submitted that: (i) at best, the applicants are required to notify the Municipality of the existing borehole and then, within the discretion of the Municipality, it may prescribe certain conditions; and (ii) the

applicants have notified the Municipality of the borehole and this was acknowledged without the Municipality raising any contravention of the bylaw.

[125] There is accordingly no merit in the arguments regarding the application of Bylaws which demonstrate any unlawful conduct on the part of the applicants or detract from their clear right.

Irreparable harm:

[126] It is common cause that the applicants exclusively make use of the water from their borehole and they will therefore suffer irreparable harm if their rights are infringed to the extent that they can no longer be supplied from the borehole.

[127] It should not be forgotten that the price paid for the applicants' property would have included the benefit of the servitude.

[128] It has also been demonstrated in Dr Diamond's report that the newly drilled boreholes (albeit that they were drilled outside of the servitude area) showed a drop in water level and that after five hours of pumping 2L/s the borehole was almost empty. Bearing in mind that the School's use of water is likely to be much more and would probably include irrigation purposes and the like and probably be much more extensive than water usage at a single residence, irreparable harm or potential irreparable harm is likely as the School's boreholes may have a detrimental impact upon water available in the borehole utilised by the applicants.

[129] That said, the School is not prevented from investigating whether other borehole sites are available on the School Property which could be utilised and would not affect the applicants' maximum yield.

No alternative remedy

[130] A claim for damages in an instance like this would not be an adequate alternative to interdictory relief, particularly as damages would be very difficult to quantify.

[131] As final relief was persisted with, there is no need to deal with the balance of convenience.

F. MERITS OF THE COUNTER APPLICATION:

[132] The cancellation relief in the counter application was brought based on section 133 of the Water Act.

[133] With reference to *De Kock*, I do not agree that it has been shown that the servitude merely serves the personal pleasure or caprice of the owner of the land.

[134] This is also not an instance where the servitude benefits neither party and operates prejudicially in respect of one of them as referred to in *Linvestment*.

[135] For the reasons referred to above, I am of the view that there is no merit in the Bylaw arguments.

[136] I accordingly see no basis upon which the cancellation relief can or should be granted.

[137] That brings me to the *alternative* relief aimed at controlling the applicants' access.

[138] Certain of the restrictions suggested in the *alternative* relief seem somewhat rigid and unreasonable, however, I am of the view that having regard to safety concerns of the School arising from the increase in crime and break-ins at public schools and the provisions of the South African Schools Act and the Regulations promulgated thereunder, it is justifiable to put certain reasonable access control measures in place.

[139] Turning to the proposed measures, first, the request for 24 hours' notice of routine maintenance is, in my view, reasonable, particularly as Wikkies Pumps

indicated after inspecting the borehole pump station that routine maintenance will not be required often.

[140] Second, for emergency access, the Court is not sure if the information is outdated as this application was issued in May 2021. Although it is indicated that two (2) people can be contacted and one is always onsite, I think that is inadequate. I think contact details of at least three (3) persons should be provided and the School is obliged to ensure that at least one (1) of those persons is on site every day and contactable. I will adjust the order sought by the School accordingly;

[141] Third, as the applicants have had unfettered access to the school for almost a decade, once they are permitted to enter the school there is no need for them to be accompanied as suggested. Having said that, that requirement may, however, be justified when dealing with any third party or contractor acting on the applicants' behalf or any successor in title who is not known to the School. I will, hence, also amend the order sought accordingly;

[142] Fourth, there is no need to consider the Covid 19 restrictions so no order need be made to this effect.

G. THE “WITHOUT PREJUDICE” RULE 34 TENDER AND COSTS:

[143] It appears from the Rule 34 tender that Vodacom has its own access to the Vodacom tower via what was referred to as “a cubicle”. This enables Vodacom to access the tower without being subjected to the restrictions sought to be imposed on the applicants.

[144] Contrary to the Rules (which are dealt with below), a “*without prejudice*” offer of settlement in terms of Rules 34(2), 34(4) and 34(5), dated 26 April 2023, was made available to the Court on CaseLines under section 019. As will be apparent from what is stated below, the Rules provide that the disclosure of a “*without prejudice*” settlement before judgment by a party can result in an adverse cost order against such a party.

[145] The relevant provisions of Rule 34 appear below:

“34 Offer to settle

- (2) ***Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender, either unconditionally or without prejudice, to perform such act. Unless such act must be performed by the defendant personally, he shall execute an irrevocable power of attorney authorising the performance of such act which he shall deliver to the registrar together with the tender.***

...

- (4) ***One of several defendants, as well as any third party from whom relief is claimed, may, either unconditionally or without prejudice, by way of an offer of settlement make a written offer to settle the plaintiff's or defendant's claim or tender to perform any act claimed by the plaintiff or defendant.***
- (5) *Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state —*
- (a) *whether the same is unconditional or without prejudice as an offer of settlement;*
 - (b) *whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;*
 - (c) *whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;*
 - (d) *whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.*
- (6) *A plaintiff or party referred to in subrule (3) may within 15 days after the receipt of the notice referred to in subrule (5), or thereafter with the written consent of the defendant or third party or order of court, on such conditions as may be*

considered to be fair, accept any offer or tender, whereupon the registrar, having satisfied himself that the requirements of this subrule have been complied with, shall hand over the power of attorney referred to in subrule (2) to the plaintiff or his attorney.

...

- (10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.***
- (11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.***
- (12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs.***
- (13) Any party who, contrary to this rule, personally or through any person representing him, discloses such an offer or tender to the judge or the court shall be liable to have costs given against him even if he is successful in the action.***
- (14) This rule shall apply mutatis mutandis where relief is claimed on motion or claim in reconvention or in terms of rule 13."***

[146] The provision of the Rule 34 "without prejudice" tender to the Court prior to judgment is contrary to Rule 34(10).

[147] During argument, I was referred to the fact that the tender was not accepted by the applicants but noted that it had provided for an entrance gate to be erected and that access be granted to the applicants to a cubical similar to the entrance gate and the access provided to Vodacom. That would result in the applicants not being subjected to any restrictions to access. *Prima facie*, that solution would have appeared to cater for “*unfettered*” access and the Court noted that the School offered to incur the costs in relation thereto. Whilst this may have been a suitable outcome, the settlement was rejected by the applicants.

[148] As the tender was not accepted, the only relevance it has is in relation to the issue of costs. The Court has already had sight of the tender and the option to disclose it after judgment as envisaged in Rule 34(11) and an opportunity to reconsider costs in terms of Rule 34(12) is no longer available.

[149] The School’s counsel suggested I hold over the issue of costs as certain correspondence which was not before the Court may be provided to it after judgment and may influence the question of costs. Mr Venter advised that he was unaware of what correspondence was being referred to and, despite the Court stating that such correspondence should be sent to Mr Venter (albeit under a suitable confidentiality regime), this did not happen.

[150] In my view Rule 34 makes it clear that the “*without prejudice*” tender should not form part of the record and that after judgment and the Court granting a cost order, a party can request the Court to reconsider the cost order made. At that stage, the Rule 34 tender is made available to the Court. That did not happen in this instance and there is no provision for correspondence to be forwarded to the Court to reconsider its cost order as suggested by the counsel for the School.

[151] It is also clear from Rule 34(10) that, notwithstanding the Rule, nothing affects the Court’s discretion to award costs, it merely provides a mechanism by which the cost order can be considered afresh (after judgment) with reference to the tender.

[152] In the circumstances, there is no basis for me to hold over the question of costs.

[153] I was urged by the applicants to grant a punitive cost order against the School. In this regard it was alleged that this litigation is vexatious. I was referred to the matter of *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*¹⁸ where the SCA applied the *dicta* in the matter of *In re: Alluvial Creek Limited*¹⁹ which states the following with regards to a punitive cost order:

“Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon that party whether proceedings are vexatious, and by vexatious I mean whether they have the effect of being vexatious, although the intent might not have been that they should be vexatious. There are people who enter into litigation with the utmost upright purpose and a most firm belief in the justice of their case, and yet those proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.”

[154] In my view there is no evidence of malice or vexatiousness on the part of the School and both parties have achieved some success. I am also cognisant of the fact that the Rule 34 tender provided for each party to pay its own costs and only regret that the tender was not made before the unilateral decision of the school to deprive access to the servitude area and to impose unilateral terms of restricting access without consultation.

[155] In the circumstances, I am of the view that each party should bear its own costs.

H. ORDER

¹⁸ 2015 (5) SA 38 (SCA) at para [27].

¹⁹ 1929 CPD at 535.

In the light of what is stated above, the following order is granted:

1. The School must immediately restore the applicants' access to their borehole servitude registered over Portion 43 of the Farm Hartebeespoort 362, Registration Division JR, Gauteng, registered in favour of the remainder of Erf 7[...], Menlo Park, Pretoria, which servitude was originally registered in notarial deed no. 633/1984S and dated 10 August 1948 ("the servitude") subject to the following conditions:
 - 1.1. for routine maintenance in the servitude tenement, there must be 24 hours' prior notification to the School;
 - 1.2. for emergency access, three (3) persons nominated from time to time by the School, two (2) of which persons were identified in the counter application as being Mr Hannes Lombard with cell phone no. 0[...] or Mr Mafalo with cell phone no. 0[...] can be contacted and must provide access within at least three (3) hours;
 - 1.3. the School must provide the contact details of the third (3rd) contact person to the applicants within five (5) days of the date of this order;
 - 1.4. the School must ensure that, at all times, at least one (1) of the designated contact persons is onsite and able to give access to the applicants within three (3) hours;
 - 1.5. the School is ordered to immediately advise the applicants of any replacement of the three (3) designated persons and to provide the applicants with the contact details of the newly designated person(s);
 - 1.6. after the applicants are given access to the School property, they need not be accompanied by a representative of the school to the servitude area;
 - 1.7. in the event of any concerns regarding the applicants' conduct in attending the servitude, the School is entitled to approach the Court for further directions on supervision required; and

- 1.8. in the event of a third party or agent of the applicants requiring access to the servient tenement, they shall be accompanied by a representative of the school;
2. The School is interdicted from, in any way whatsoever, infringing upon the applicants' rights emanating from the servitude which will include:
 - 2.1. drilling or utilising any new borehole or the drawing of water from the same aquifer which will detrimentally affect the yield of the applicants' borehole servitude; and
 - 2.2. impeding or in any way restricting the fifth respondent's access to the Applicants' electricity meter (1[...]) situated on Portion 43 of the Farm Hartebeespoort 362, Registration Division, JR, Gauteng Province (4[...] A[...] Road, M[...] P[...], alternatively 4[...] A[...] Road, M[...] P[...]);
3. The applicants and the School are ordered to pay their own costs in the main application and the counter application.

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Date of hearing:	26 November 2024
Date of judgment:	24 February 2025
For the Plaintiff:	Adv JA Venter
Instructed by:	Dr TC Botha Inc. Attorneys
For the Defendant:	Adv A Vorster and Adv A Kruger
Instructed by:	Boshoff Inc.