IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

23/3/2026 ______________________

DATE SIGNATURE

CASE NO.: 136811/2024

In the matter between:-

PRETORIA EDUCATIONAL CENTRE (PTY) LTD Applicant

v

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
REGISTRAR OF DEEDS OFFICE	Second Respondent

Heard on: 24 February 2026

Delivered: 23 March 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 23 March 2026.

ORDER

It is ordered:

1. The first respondent is ordered to within 8 (eight) months from the rezoning, consolidation and notarial tying of the undermentioned immovable properties ("*the immovable properties*"), provide the applicant with the approved as–built, building plans ("*the building plans*"), in respect of all structures on the immovable properties, sold by first respondent to applicant:

    1.1. Portion 9 of the Farm Prinshof 349 J.R.;

    1.2. Portion 30 of the Farm Prinshof 349 J.R.;

    1.3. Remaining extent of Portion 1 of Erf 5[...], Arcadia;

    1.4. Portion 2 of Erf 5[...], Arcadia;

    1.5. Remaining extent of Erf 9[...], Arcadia.

2. That applicant's agents and representatives are authorised to make application in terms of the relevant laws and statutes of the Republic of South Africa, for the

rezoning, consolidation and notarial tying of the immovable properties, and once submitted to the first respondent they are to be completed within 18 months of receipt of the applicant's application.

3. It is declared that:

   3.1. applicant is not, and cannot, be held liable to move or otherwise legalise the built over sewerage line, traversing the immovable properties;

   3.2. first respondent is to within 8 (eight) months from date of this order, take all steps necessary to register a servitude in respect of the sewerage line referred to in paragraph 3.1 *supra*. Such servitude to contain the standard restrictive conditions as are normal in circumstances of this nature wherein the first respondent has built over the sewerage line. Such servitude is to be registered, and be in line with, the building structures as they currently exist on the properties. The registration of the servitude may not impede the approval of the building plans.

4. The first respondent is ordered to, 8 (eight) months from the approval of the building plans, or at least 18 months from the granting of the order, take all the necessary steps to provide applicant with valid occupational certificates, for all structures erected and situated on the immovable properties as well as signed-off and approved Site Development Plan ("SDP") for the immovable properties.

5. Pending the final execution of the orders *supra*, the first respondent is prohibited from taking any steps of whatsoever nature against applicant, in respect of the non-compliance and/or violation of any legislation that this order seeks to address

and remedy.

6. The first respondent is ordered to pay the cost of the application, including cost of two counsel on Scale C.

JUDGMENT

KOOVERJIE J

THE APPLICATION

[1] The applicant, Pretoria Educational Centre, seeks both mandatory and interdictory relief in this application. It requests the City of Tshwane Metropolitan Municipality ("the City") to do all things necessary so that the applicant's occupancy of the properties are "legalized" and further that the City be interdicted to take any steps as a result of the non-compliance with the relevant legislative prescripts.

[2] The five properties located in the central business district of the City measuring approximately 8761m², were sold to the applicant for an amount of R2.5 million ("the properties").

[3] The applicant contends that the purpose of this application has always been to legalize its occupancy of the properties which the City had failed to do whilst it was the owner.[1]

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[1] The relief initially crafted in the notice of motion was:

1. That First Respondent be, and is hereby ordered to, within six (6) months from the rezoning, consolidation and notarial tying referred to in Prayer 2 *infra*, provide Applicant with approved as-built building plans ("the building plans"), in respect of all structures erected on the undermentioned immovable properties ("the immovable properties"), sold by First Respondent to Applicant:

    1.1 Portion 9 of the Farm Prinshof 349 J.R.;

    1.2 Portion 30 of the Farm Prinshof 349 J.R.;

    1.3 Remaining extent of Portion 1 of Erf 5[...], Arcadia;

    1.4 Portion 2 of Erf 5[...], Arcadia;

    1.5 Remaining extent of Erf 9[...], Arcadia.

2. The applicant's agent and representative, i.e SJA Town and Regional planners and Jobel Services, be and are hereby authorised to make application in terms of the relevant laws and statues and the Republic of South Africa for:

    2.1. The rectification of the zoning and/or rezoning of Portion 2 of Erf 5[...], Arcadia and the Remaining Extent of Portion 1 of Erf 5[...], Arcadia from Residential 4 zoning, to an Educational Zoning.

    2.2. The rezoning of Portions 9 and 30 of the Parm Prinshof No. 349 JR, from a Municipal Zoning to an Educational Zoning.

    2.3. The subsequent consolidation of Portion 2 of EF5[...], Arcadia, and the Remaining Extent of Portion 1 of Erf 5[...], Arcadia, with Remaining Extent of Erf 9[...], Arcadia.

    2.4. The notarial tying of the immovable properties referred to in Prayers 2.2 and 2.3 *supra*.

    2.5. The above applications, once submitted by the City of Tshwane Metropolitan Municipality, are to be completed within 12 months.

3. That it be declared that:

    3..1.1 Applicant is not and cannot be held liable to move otherwise legalise the built over sewerage line transversing the abovementioned properties;

        3.1.2 First Respondent is to, within Four (4) months from date of this order, take all steps necessary to register a servitude in favour of itself (if required), In respect of the sewerage line referred to in Prayer 3.1.1 supra. Class Such servitude to contain the standard restrictive conditions as are normal in circumstances of this nature wherein the municipality has built over the sewage line. Such servitude, to be registered, to take into consideration, and to be in line with, the building structures as they currently exist on the properties. The registration of this servitude may not impede the approval of the building plans.

4. The First Respondent and is hereby ordered to, four months from the approval of the building plans, or

[4] The City however argued that the true reason behind the application was to cause the City to incur the costs of preparing and approving the as-built building plans as well as the costs involved for the relocating and rerouting the sewerage line that currently traverses over the properties. Ultimately it is about the reduction in the purchase price. The applicant, however, demonstrates the papers that this is not the case.

CURRENT RELIEF SOUGHT

[5] The applicant no longer seeks relief directing the City to register the properties in the applicant's name. By the time this matter was heard, the registration of the properties in the applicant's name had taken effect. I was advised that the registration of the property occurred around October 2025.

[6] The applicant also does not seek relief in terms of prayers 2.1 to 2.4 as it accepts that by virtue of the sale agreement and now that it has become the owner of the properties, it is responsible for the rezoning, consolidation as well as a notarial

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latest within eighteen (18) months from the date of granting this order, take all steps necessary to provide Applicant with valid occupation certificates, for all structures erected and situated on the immovable properties as well as a signed off and approved Site Development Plan (SDP) for the immovable properties.

5. The pending final execution of the orders here by granted, First Respondent be and is hereby prohibited from taking any steps of whatever nature against Applicant, in respect of the non-compliance and or violation of any legislation that this order seeks to address and remedy.

6. That First Respondent be ordered to pay the cost of this application on an attorney and client scale, jointly and severally with any other opposing party, on scale C, inclusive of cost of two counsel, one of whom is Senior Counsel.

tying of the properties, which is in accordance with clause 7.3.3 of the agreement.[2]

[7] The applicant however persists with the following relief namely:

7.1. Prayer 2.5 - where the City is required to complete the process, within 12 months of the applicant submitting the relevant documents which includes the rectification of the zoning and/or rezoning, the consolidation of the properties and the notarial tying of the immovable properties;

7.2 Prayer 3 – where in effect the City be ordered to take the necessary steps to register the servitude in respect of the sewerage line, and furthermore that the applicant cannot be held liable to move or legalize the build over sewerage line;

7.3. Prayer 4 - where the City within a period be ordered to provide the applicant with valid occupational certificates for all the structures erected and situated on the immovable properties and further provide the signed off and approved site development plan for the said properties;

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[2] Clause 7.3 both agreements (2006) and)2024) are identical and reads:

"7.3. The PURCHASER will at his own costs:

7.3.1 Obtain any required geotechnical report pertaining to the properties as may be required; and/or

7.3.2 Ascertain the relevant accesses and/or entrances to the Properties in conjunction with the SELLER and take also steps to procure an event approval for each access or entrance as the Municipality may require.

7.3.3 Ascertain the present Sewage, stormwater, drainage, electrical and water systems are available on and to the Properties and in conjunction with the SELLER take all the necessary steps to procure such systems and for their Properties as the Municipality may require.

7.3.3 Apply to the relevant competent authority for consolidation of the Properties if required by the SELLER, and the PURCHASER will be responsible and liable for payment of all costs, in connection with, and pertaining to such application, and inclusive of land surveyors and/or Townplanners costs and fees."

7.4 Prayer 5 – that pending the execution of the orders, the City is prohibited from taking any steps against the applicant in respect of non-compliance and/or violation of any legislation that this order seeks to remedy and address.

[8] The applicant claims that it was guided by an expert when setting out the basis of the relief sought. The expert, in his report, had set permissible timelines for the City to approve the rezoning and consolidation of the properties in issue.[3]

ANALYSIS

[9] At the heart of the dispute is the enforceability of the voetstoots clause The applicant's case is that since the properties in question cannot be used for the purpose they were purchased, the voetstoots clause is unenforceable. Furthermore, it contended that it was not aware of the defects. This City, on the other hand, contended that the applicant was aware of the defects pertaining to the as-built building plans and that the sewerage line transversed over the properties when it signed the 2024 sale agreement.

[10] The "voetstoots" clause as set out in both the 2006 Sale Agreement as well as the 2024 agreements stipulated:

"4.1 The property is hereby sold or registered in the name of the seller and are sold subject to all the conditions and servitudes as mentioned or referred

[3] The experts envisaged the rezoning application will take 14-16 months to finalize; and the consolidation 4-5 months to be approved and further 6 - 8 months until it can be registered.

to in the present, and all previous title deeds of the properties and are subject to any applicable town planning scheme/s.

4.2 The properties are acquired by the purchaser "voetstoots", the purchaser accepting all risk in respect thereof, and declaring that it is fully acquainted with the nature, meaning, and extent of the description "voetstoots"."

The sale agreement

[11] The parties part ways as to when, in fact, the contract of sale had been concluded. The date has particular bearing on when and if the applicant was aware of the defects or not. The applicant holds the view that the agreement was concluded in terms of the 2006 sale agreement. The 2024 sale agreement had come about due to the court order that directed the City to transfer the properties into the applicant's name. Consequently, the applicant argued that when the parties entered into the agreement in 2006 it was not aware of the defects, in particular, that there were no "as-built" building plans and that the sewerage line traversed over the properties.

[12] The City, on the other hand, contended that the relevant agreement is the 2024 agreement and when the applicant signed the 2024 agreement, it had been aware of the defects. Hence it could not rely on the latent defect defence.

[13] The applicant explained that subsequent to signing the agreement (2006), a court order was granted in 2007 in favour of the Mandela Development Corridor ("the MDC"), where the City was compelled to register the property into the applicant's name. The City was further ordered to sign all the documentation required by

MDC to effect registration of the transfer of the properties to the applicant; (Du Plessis J order).

[14] As the City failed to comply with the order, a further application was instituted claiming the enforcement of the August 2007 order. Much later the City instituted a rescission application in order to rescind the August 2007 order. Tuchten J dismissed the rescission application on 7 May 2024. This was followed by the Joyini J and the Nthambeleni J orders respectively, that were in favour of the applicant. Eventually the City being unsuccessful in appealing Joyini J's order, agreed to the sale and transfer of the property. This resulted in the additional sale agreement on 27 August 2024 (the 2024 Sale Agreement). According to the applicant, the 2024 Sale Agreement incorporated the 2006 Sale Agreement.

<u>The City's case</u>

[15] The thrust of the City's contentions were that:

15.1 the 2024 Sale Agreement is the effective agreement as the 2006 agreement was replaced with the 2024 agreement.

15.2 the respective orders of the courts are to be challenged and the City's consent to sell the properties are to be reviewed. It was explained that the relief granted by the respective courts were incompetent and unlawful since the sale agreement had to be approved by the Municipal Council. As this was not done, it is incompetent for the City to claim ownership;

15.3 the applicant was well aware of the 'voetstoots' clause specifically when it signed the 2024 agreement;

15.4 the 2006 sale agreement could not have effect as it was subject to the fulfilment of a statutory condition which required the successful advertising in terms of Section 79(18) of the Ordinance. The suspensive condition set out in Clause 23 of the 2006 agreement stipulated:

"SUSPENSIVE CONDITION

This agreement is subject to the suspensive condition that the property is successfully advertised in terms of Section 79(18) of the Local Government Ordinance (Ordinance 17 of 1939)."

As since the suspensive condition was not fulfilled, the contract does not have effect.

[16] In my view, the City's contention that the reliance should only be placed on the 2024 agreement is untenable. It was evident that the 2024 agreement simply gave effect to the previous court orders of 28 August 2007 and 22 May 2024 respectively, where the City was directed to *inter alia* conclude the sale and effect transfer of the properties into the applicant's name. The relevant extract of the Preamble to the 2024 agreement recorded:

"Now THEREFORE in implementation of the order of the High Court of South Africa, Gauteng Division, Pretoria 28 August 2007 and one dated 22th May 2024 the parties agreed as follows…"

[17] The City's reliance on clause 14.2 of the Municipal Finance Management Act 2003, which required the Municipal Council's approval of the sale of the

properties, further has no merit. I have again noted that in the “Preamble” of the 2024 agreement, a recordal was made that the City had complied with Section 14(2) of the said agreement. The relevant extract of the Preamble read:

“AND WHEREAS the seller on the 17 September 2020 formally complied with the provisions of Section 79(18) of the Local Government Ordinance, 1939 and Section 14(2) of the Municipal Finance Management Act, 2003 by approving the sale of the properties in question, and ordered on the 28 August 2007.”

Building Plans

[18] With regard to the building plans, I find that the applicant justifiably persisted with its contentions that:

18.1 the City, was the owner of the property up until October 2025 and as a local authority it was required to oversee the process of approving the building plans and ensure they were in place. It is therefore untenable for the City to argue that there were no building plans alternatively the building plans may have been destroyed in the “Munitoria fire”;

18.2 the applicant was unaware that there were no building plans until the City brought this fact to its attention;

18.3 at all relevant times, particularly when the present application was instituted, the City was the registered owner. The applicant only acquired ownership in October 2025. As the previous owner and the local authority, the City was, in law, responsible for complying with the National Building

Regulations and Building Standards Act (the Act),[4] Sections 4(1) and 4(2) stipulated:

"4(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which the plans and specifications are to be drawn and submitted in terms of this act.

(2) Any application for approval referred to in sub-section (1) shall be in writing on a form made available for the purpose by the local authority in question.";

18.4 Clearly when the buildings were erected, the City, as the owner of the properties had to ensure that the building plans were in place. Section 7 of the said Act makes provision for the local authority to approve the erection of such buildings;

18.5 more importantly, the City had to be satisfy itself that the premises could only be used for the purpose reflected on the approved building plans;[5]

18.6 the impugned letter issued by the City in December 2022 was irregular as the applicant was not the owner at the time. The applicant nevertheless, upon receipt of the said letter, proceeded to prepare the building plans at its own cost. Even then the City refused to issue a power of attorney until the new purchase contract was signed with the applicant;

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[4] Act 103 of 1977

[5] Section A25(1) of the Building Regulations stipulates:

"No person shall use any building or cause or permit any building to be used for the purpose other than the purpose shown on the approved building plans of such building, or for a purpose which causes a change in the class of occupancy as contemplated in these regulations, whether such plans were approved in terms of the Act or in terms of any law enforced at any time before the date of commencement of the Act, unless such building plan is suitable, having regard to the requirements of these regulations, for such first mentioned purpose or such change in class of occupancy."

18.7 on 10 August 2023, the City issued another impugned notice informing the applicant that the properties leased by the applicant do not comply with the South African National Building Regulations, despite the City being the owner of the properties at the time.

` **The sewerage line issue**

[19] The applicant demonstrated that when the 2006 sale agreement was concluded it had no knowledge that the sewerage line traversed the properties, not even when it rented the properties since the 1990's.

[20] Clearly the City was aware that the 160 meter municipal sewerage line traversed the properties and had was constructed without the requisite approval. The particular resolutions taken by the City's officials is evidence thereof:

20.1 both the 2007 and 2020 resolutions recorded that the owners, beneficiaries or successors of the properties will be liable for the costs for, *inter alia*, the protection of the municipal services and the rerouting of the services. It read:

"Cognisance must be taken of the fact that the current buildings were apparently unknowingly constructed over municipal services, also the future owners or beneficiaries of these properties will, at their cost, have to protect these municipal services with absolute servitude to be registered in favour of the COT to the satisfaction of the division ….";

20.2 The 17 November 2020 resolution read:

"All existing sewers transversing the properties must be protected and should the sewer need to be rerouted it would be at the cost of the successor entitled. Furthermore should any rezoning require water and sanitization services to be upgraded, the cost thereof will be the responsibility of the successor entitled to the satisfaction of the division."

The City's further contention that the applicant was aware of the said resolution remained unsubstantiated.

21.3 The applicant contended that by virtue of the agreement, its only obligation was to comply with Clause 7.3.3 which stipulated:

"Ascertain the present sewerage, storm water, drainage, electrical and water assistance available and to the properties and in conjunction with the seller take all necessary steps to procure such systems and for the properties as the municipality may require".

Notably the agreement is silent on the liability of the applicant pertaining to sewerage line.

<u>Reliance on an implied term in the agreement</u>

[22] During argument the applicant advised that it no longer persisted with the latent defect defence and, in particular, conceded that it would be unable to prove that the City failed to disclose the defects with the intention to defraud. Instead, it argued that the City delivered properties that was different to the properties the applicant intended to purchase. As a result, the voetstoots clause cannot be enforced. The City objected to the new point raised. It pointed out that this defence was never pleaded in the papers nor was the point raised.

[23] I have noted the applicant's explanation that the facts as pleaded remain the same. Its case still is, as alleged in the papers, that it was not aware of the defects when the agreement (2006) was signed. It had always been under the impression that the properties complied with the relevant legislative prescripts when they were occupied. The agreement expressly stated that a school is being conducted on the premises. Hence it was an implied term of the sale agreement that the properties should be capable of being lawfully utilized for the intended purpose (for educational purposes).

[24] Furthermore in law, it was permissible to advance legal arguments (even if such arguments are not specifically mentioned in the papers), provided that the argument arises from the facts and evidence before the court. The applicant referred to the **Swissborough *Diamond Mines*** matter[6] when the court in upholding previous authorities, in essence expressed:

"In Heckroodt N.O. v Gonut 1959 (4) SA 244 T at 246 A-C and Van Rensburg v Van Rensburg en Anderee 1963 (1) SA 505 A at 509 E – 510 B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged …"

[6] Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa and Others 1992 (2) SA 729.

[25] It is common cause that the voetstoots clause appeared in both the 2006 as well as the 2024 agreements. As aforesaid, the applicant in essence relied on the proposition in law - that the voetstoots clause cannot be enforced if the purchaser is able to establish that the seller delivered something different from what was purchased by the buyer.

[26] The applicant illustrated that the City, at all relevant times, had been aware that the buildings situated on the properties were utilized only for the operation of the school. This was recorded in various documents which included:

26.1 the lease agreement, which at paragraph 5 stipulated:

"The lessee undertakes to use the leased premises only for educational purposes as may be permissible in terms of the Pretoria Town Planning Scheme, 1974."

26.2. clause 7.1 of the 2006 sale agreement recorded that the use of the property was primarily for education purposes.

26.3 Further clause 22.3 of both the agreements stipulated that:

"22.3 The purchaser undertakes to use the properties, primarily for educational purposes, as per the current use/zoning set out in Annexure 'C' attached hereto …"

[27] On these facts, it can therefore not be disputed that since 1991 when the applicant took occupation of the property, the City was aware that the property was occupied to conduct a school. Since then, the buildings on the properties were utilized as a composite unit to only conduct a school for educational purposes.

[28] The applicant further pointed out that during its entire period of occupancy, it had not effected any structural changes to the properties. It was therefore reasonable to assume that the properties were legally compliant. At no point, prior to the receipt of the impugned letters, was the applicant aware of the defects. Clearly, in these circumstances, it was unlawful for the City not to have complied with the relevant legislative prescripts and moreover allow the school to conduct its activities on properties that were not legally compliant.

[29] In support of the point made, the applicant relied on ***Dutch Reformed Church Council*** matter,[7] which endorsed the proposition in law that if an article is sold at the instance of the seller and the "article" is to be used by the latter for a particular purpose, and if such article cannot be used for that particular purpose, the seller cannot insist on enforcing the voetstoots clause, even if the purchaser has undertaken to purchase the particular.

[30] The salient facts in the ***Dutch Reformed Church Council*** matter were that: the purchaser undertook in terms of clause 11 of the contract to use the property as a funeral parlour and not for any other purpose without the consent of the seller. Moreover, the property was sold voetstoots. The defendant relied on the defence that the property was situated in an area which was zoned as a residential area. Consequently, the property could not be used as a funeral parlour without the permission of the Municipal Council. The plaintiff, however, succeeded in its

[7] Dutch Reformed Church Council v Crocker 1953 (4) SA 53 C

defence, arguing that if the property was sold for the purposes of conducting a funeral parlour, the agreed voetstoots clause cannot find application as it defeats the agreed purpose for which the property was acquired.

[31] In ***Ornelas***[8] the court upheld the said proposition. On the particular facts thereof it confirmed that a voetstoots clause does not exempt the seller from its the obligation to deliver a lawful business, that of a restaurant. It endorsed the **Dutch Reformed Church** matter and cited therefrom:

"*In my view however if an article is sold and if, at the instance of the seller, it is stipulated in the agreement between the seller and the purchaser that it is to be used by the latter for a particular purpose the seller cannot insist upon the sale being implemented if the property cannot be so used, even though the purchaser may have undertaken to buy it voetstoots. Though the defendant purchased the property voetstoots, he - inferentially, at the instance of the plaintiff - gave an undertaking to use it for the purposes of a funeral parlour and not otherwise, save with consent of the plaintiff. Postulating a right to repudiate the purchase because of the inability to comply with the agreed stipulation, viz to use the property for the purposes of a funeral parlour, it seems to me that the presence of the voetstoots provision does not necessarily operate to defeat that right*."

[8] Ornelas v Andrews Café and Another 1980 (1) SA 378 (W) (Ornelas) at page 390 read with the Dutch Reformed Church Council Matter at page 59

The court in **Ornelas** then concluded: "*my conclusion on this part of the case is therefore that the part of the business, that had to be delivered was a restaurant which could not be lawfully operated".*[9]

[32] Similarly, in this matter the applicant relies on the said proposition in law and submitted that the City was required to deliver properties which the parties had agreed upon, namely premises to conduct a school lawfully on the properties that were legally compliant.

[33] To counter the applicant's argument, the City pointed out that statutory non-compliance cannot be a ground for excluding the voetstoots clause and it relied on the findings in **Odendaal**[10]. I find the City's reasoning to be flawed. This matter is clearly distinguishable from **Odendaal** scenario**.** The prevailing consideration in matters of this nature is to appreciate that each matter is considered on its own set of facts. The Supreme Court of Appeal in **Odendaal** had regard to the particular set of facts and distinguished them from the facts in **Ornelas**. It expressed:

"[20] The court (Nestadt J) construed this clause restrictively, holding that the 'state or condition of the business' should be 'confined to the physical or visible qualities of the business'. <u>It thus held that the clause did not exempt the sellers from their obligation to deliver a business that could lawfully be</u>

[9] Ornelas page 390
[10] Odendaal v Ferraries 2009 (4) SA 313 SCA at page 59

conducted, that is, with a license - there being an implied warranty to this effect - and thus that this was not a 'case of a defect in the res vendita 'but in truth a case of delivery to the buyers' of something different from what was bought'.

[21] In my view, Ornelas's case is quite distinct from both Van Nieuwkerk and the present case. The absence of a license to operate the premises as a restaurant or eating house meant that the buyers could not use it for the express purpose for which it had been purchased. 'The whole tenor of the agreement', Nestadt J pointed out, was that such a business would 'be conducted at the premises'. The voetstoots clause therefore did not 'exempt the sellers from their obligation to deliver a business which includes a restaurant able to be lawfully operated'."

[34] In ***Odendaal***, the issue centered on the absence of statutory approval for building alterations *"or the other authorizations that render the property compliant with prescribed building standards does not render the property unfit for the purpose for which it was purchased".* The court further noted that the respondent did not allege that the defects relating to the outbuilding and carport rendered the property unfit for habitation. The court concluded that in such an instance, the appellant did not deliver *"something different from what was bought as in* ***Ornelas****"*. On the contrary, the court found that *"he received exactly what he purchased, namely an ideally located spacious dwelling house with ample parking space".*

[35] The City further in attempting to rely on **Odendaal**, advanced argument that the school can operate without the properties being legally compliant. The applicant had since 1991 operated the school and continues to do so to this day. In my view, this reasoning is once again flawed. Clearly the issue herein is whether the premises are lawfully conducive to conduct a school therefrom.

[36] The strength of the applicant's case in this matter is premised on ***Ornelas*** where the applicant illustrated that the properties were purchased for the sole purpose to lawfully operate a school on the properties. The City had been aware of this fact since 1991.

[37] I find that the applicant's version has merit, particularly if one has regard to its conduct and interaction with the City. When the City informed the applicant that the properties were non-compliant, the applicant did not merely sit back and continue with the affairs of the school. Instead, it immediately commenced in procuring the "as built" plans and did so at its own expenses. It's submission that it had always been under the impression that the properties were legally compliant, has substance.

[38] It further advised that since its occupation, in 1991, it had not effected any structural changes to the buildings on the properties. It could thus not have been aware of the defects.

[39] In my view, the City's further reliance on the ***Haviside*** matter[11] does not come to its assistance. The facts in **Haviside** are similar to the ***Odendaal*** scenario. In ***Haviside***, a carport was converted into a garage and such conversion took place without approved plans. Further on the facts, even the seller was not aware that there were no approved plans. In this instance, the City was aware of the defects and whilst it had been the owner.

[40] In fact the court in ***Haviside*** acknowledged that the facts before it, were similar to the ***Odendaal*** scenario. It also acknowledged that the court in **Odendaal** found the facts and circumstances of **Ornelas** to be distinguishable. It expressed:

"*It is clear that the **Ornelas** matter is quite distinct from **Van Nieuwkerk** as well as from **Odendaal** and the case before me. The absence of a licence to operate premises as a restaurant simply meant that the buyers could not use it for the express purpose for which it had been purchased. By contrast, the absence of statutory approval for building alterations, or other authorisations which render a property compliant with prescribed building standards, such as were in issue in **Van Nieuwkerk** and in **Odendaal,** and in my view are in issue here, do not necessarily render the property unfit for habitation."*

At page 241 it confirmed:

*"This case in my view is therefore distinguishable from **Ornelas**, which in any event does not support the reasoning or conclusion reached in both **Van Nieuwkerk** and in **Odendaal**."*

[11] Haviside v Heydricks and Another 2014 (1) SA at 235

CONCLUSION

[41] In conclusion I am satisfied that the principles set out in the Dutch Reformed Church matter and endorsed In **Ornelas** finds application. The City was required to have delivered the properties for the intended purpose which it had not. It can therefore not rely on the voetstoots clause in the circumstances. It was illustrated that the sole objective for which the properties were to be used was clearly recorded in the agreement and the City was well versed with the fact that a school was conducted on the properties all these years. It was an implied term of the agreement that the properties should be capable of being lawfully utilized for the intended purpose.

[42] With regard to the relief sought, after having considered the experts' estimation of when the City would be able to attend to the necessary approvals, the proposed time periods set out by the applicant as well as the respondent submissions that the City has an extensive backlog in its administration, I am of the view that the time periods set out in the orders are manageable and fair.

[43] Furthermore the interdictory relief sought is warranted in the circumstances. The City had previously, in no uncertain terms, threatened to take necessary steps against the applicant for failing to comply with the necessary prescripts to have the properties legalized.

COSTS

[44] The applicant as the successful party is entitled to its costs. In my view, costs on Scale C and upon the employment of two counsel, is justified.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:	*Adv. GF Heyns SC*
	Adv. M Jacobs
Instructed by:	*Klagsbrun Edelstein Bosman du Plessis Inc*
Counsel for the third respondent:	*Adv. M Rip SC*
	Adv. M Rasekgala
Instructed by:	*Mahumani Inc*
Date heard:	*24 February 2026*
Date of Judgment:	*23 March 2026*