IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11197/17P

In the matter between:

MARTINUS NICOLAAS KRUGER	FIRST APPLICANT
STAN FERGUSON PROPERTY INVESTMENTS CC	SECOND APPLICANT
and	
CATHERINE ANNE RAYNER	FIRST RESPONDENT
IAN SHEPSTONE RAYNER	SECOND RESPONDENT
MISTY MEADOWS FARM CC	THIRD RESPONDENT
UMNGENI MUNICIPALITY	FOURTH RESPONDENT
SCHOOL GOVERNING BODY OF MISTY MEADOWS SCHOOL	FIFTH RESPONDENT

JUDGMENT

Chetty J:

[1] The first applicant lives on Forry Hill Farm located at D17, Dargle, in the KwaZulu-Natal Midlands. He is the sole member of the second applicant, which is the registered owner of the property. The first and second respondents ('the Rayners') are the owners of the adjoining property and live on a farm called Misty Meadows, which is cited as the third respondent. The fourth respondent is the uMngeni Municipality ('the municipality') within whose jurisdiction the Rayners' farm is located and which is responsible for the implementation, at a local level, of the provisions of the Spatial Planning and Land Use Management Act[1] ('SPLUMA'). In terms of an order granted on 18 March 2019, the School Governing Body of Misty Meadows School was joined as a fifth respondent in these proceedings. It is common cause that the Rayners operate an independent school, which is not registered with the KwaZulu-Natal Department of Education.

[2] The applicants seek a final interdict against the Rayners from conducting a school on their property until such time as the municipality has granted the necessary permission in terms of the applicable planning legislation (being SPLUMA and the KwaZulu-Natal Planning and Development Act[2] ('Planning Act') as well as a certificate of occupation in respect of the buildings which constitute the school, in terms of the National Building Regulations and Building Standards Act[3] ('National Building Standards Act'). In the event of the Rayners not obtaining the necessary permission, the applicants seek an order that the sheriff be directed to evict all occupants from the school buildings and for an order declaring that the Rayners may not carry out any school activities on their property. The applicants further seek costs on a punitive scale against the Rayners.

[3] It is not in dispute that the Rayners commenced operating a primary school on their property without planning authority and that they do not have permission from the KwaZulu-Natal Department of Education to operate a school in terms of the South African Schools Act[4] ('the Schools Act'). It follows therefore that the learners attending the school are accommodated in buildings or structures which have not been approved by the municipality for such purpose.

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[1] Spatial Planning and Land Use Management Act 16 of 2013.
[2] KwaZulu-Natal Planning and Development Act 6 of 2008.
[3] National Building Regulations and Building Standards Act 103 of 1977.
[4] South African Schools Act 84 of 1996.

[4] According to the applicants, the Rayners' property is an agricultural farm, and is classified as 'agricultural' in terms of Schedule 2 of SPLUMA. The applicants' property and that of the Rayners fall outside the provisions of any town planning scheme. As such, the activities in areas situated outside the area of a land use scheme that require municipal planning approval is governed by the provisions of the uMngeni Municipality Planning and Land Use Management By-law, 2015, (Municipal Notice 6 of 2016) which commenced on 15 January 2016. Schedule 3 of the By-laws makes provision for an 'educational building', but this can only be permitted with planning approval from the municipality.

[5] According to the first applicant, Mrs Rayner first approached him during 2012 to inform him that she intended opening a pre-school catering for a few local children. He objected to this as he considered that the use of certain existing rondavels on her property was not appropriate for the use as a school, and that it interfered with his right of access to the main road, as he has a right of servitude over part of the Rayners' property. The applicant was also worried about the overall effect that a school would have for his amenities and that of the neighbourhood.

[6] Despite his objection, Mrs Rayner proceeded to open her pre-school. The first applicant, together with certain others, lodged complaints with the local farmers' union. The first applicant concedes that Mrs Rayner had, at that stage, lodged a planning application with the municipality, a draft of which was handed to him for his consideration and consent. He refused his consent, after which Mrs Rayner indicated that she would formally apply to the municipality for the necessary approval. According to him, this was the last that he had heard of the application, and nothing further was pursued by her.

[7] Over the years, the school population grew and there is now both a pre-school and a primary school. According to a brochure on the school, the primary school operates from 08h00 to 12h00, Monday to Friday, excluding school holidays, with children being dropped off at 07h30 and fetched by 12h30.

[8] The essence of the applicants' objection, and the intention behind applying for an interdict, is that the school is located in an area which is overwhelmingly agricultural, and in the applicants' view, it is 'totally out of place'. The first applicant further contends that his access to his property is compromised, particularly at the times when the school opens and closes because the road leading to his property is shared with the Rayners' farm, and the influx of additional traffic compromises his access to his property. He also takes issue with the absence of a dedicated parking area on the Rayners' property. He contends that the school is an intrusion into an agricultural surrounding, and the value or desirability of his farm as an investment has accordingly been diminished with potential buyers shying away from purchasing his farm.

[9] In light of these factors, the first applicant instructed his attorneys to write to the Rayners who were called upon to provide an undertaking that the school would close its doors by 7 December 2016, failing which the first applicant would apply to court for an interdict. In response, Mrs Rayner (writing under her maiden name of 'Janish') on 15 November 2016, recorded her surprise to the demand, particularly as her husband was currently engaged in negotiations with the first applicant on the possible purchase of Forry Hill Farm. She construed this to be an ultimatum that unless the Rayners purchased his farm, the first applicant would take legal action against her. She regarded this as strong-armed tactics and reiterated her commitment to trying to resolve the dispute in an amicable manner. She further pointed out that the first applicant stood alone in his complaint about the school as the remainder of the community was supportive of having a school in the area. None of the surrounding neighbours appeared to have made common cause with the first applicant.

[10] In response, the applicants' attorney clarified that the first applicant's complaint against the operation of the school was based on nuisance, sense of place, unlawfulness of use, and amenity interference. He further indicated that legal action against the Rayners would be suspended if they were to undertake a widening of the road through which access is acquired to the main road, to allow for two vehicles to pass alongside. In addition, the first applicant required a registered right of way servitude, an undertaking as to the maximum number of learners at the

school and the construction of a screen to eliminate 'ongoing noise from the school's activities'. This led to correspondence in which Mrs Rayner pointed out that the reason for the establishment of the school was to have a small and personal learning environment for local children, and that she had no intention of creating a large urban-like school. She further pointed out that out of the 51 children currently attending the school, eleven of these children live on Misty Meadows farm and are accordingly not dropped off at school by car. Any noise made by these children should be interpreted in the context of them residing next door rather than attributing it to them as learners at the school. Most of the remaining children arrive in family groups, using lift clubs.

[11] To the extent that the applicants complain of noise, Mrs Rayner pointed out that the school operates from 08h00 to 12h00, Monday to Friday, during the school term. In comparison, if the buildings in question had to be put to their designated agricultural use, there would be noise from chainsaws, cutters, chicken-feed trucks and tractors throughout the year, without interruption. Alternatively, if the Rayners operated a high-level or high-density farm that catered for poultry or pigs, the level of noise that would result from this would be significantly more than that from a primary school catering to less than 51 children. If such farming operations were to take place on the Rayners' farm, the applicants would have no basis in law to complain of any nuisance or amenity interference. When I enquired from counsel for the applicants what his submission was in response to Mrs Rayner's contention, it was conceded that the noise emanating from the farm in those circumstances would have to be accepted, as the source of the noise was considered 'lawful'. It was the unlawful operation of the school which Mr Pietersen submitted constituted the 'injury', and which formed the basis of the applicants approaching this court for interdictory relief.

[12] It is prudent to point out that in her answering papers, Mrs Rayner alluded to an occasion in 2015 when she was asked to look after a herd of 20 cows for a few months. Soon after the arrival of the cows, she was faced with complaints from the first applicant that she had too many cows on her property. Similar complaints, according to her, were levelled in respect of her dogs barking.

[13] Mrs Rayner has subsequently taken steps to mitigate the adverse effects of any noise from her property by planting a row of Liquid Amber and Bushwillow trees along the perimeter that is the closest to the applicants' property. In time, these would grow to form a visual and sound shield between the two properties. The first applicant, however, was not satisfied with her attempts to ameliorate the situation and consequently launched these interdict proceedings.

[14] In her correspondence to the applicants' attorney, Mrs Rayner pointed out that as far back as 2012 she begun the process of obtaining planning authority for the operation of the school through the municipality, but that the application had been put on hold due to the first applicant not providing his consent for a change of land use. As at February 2017, Mrs Rayner indicated that she had 'resumed' her application with the municipality and had every intention of ensuring that she complied with the relevant legislation to operate a school on her property. At the same time, she further indicated to the first applicant that she intended to share the details of his concerns regarding the operation of the school with the parents of the learners 'so that they are aware of the threat of closure that the school faces, and so that we can act accordingly as a group in response to this threat'.

[15] For reasons that are not entirely clear to the court, it appears that the Rayners did submit a new application in terms of SPLUMA to the municipality but this application was not placed before the court nor forwarded to the applicants' attorney as per their request. The closest that the Rayners have come to putting up proof of a submission to the municipality is an email dated 15 December 2016 from Erin Wynne, an architectural draughtsman engaged by the Rayners to submit their plans to the municipality. In the email, Wynne states that 'I attach the proof of submission to the municipality' and requests the Rayners to pay the submission fees directly to the municipality. These averments are not disputed by the applicants and there is no reason to doubt that a submission of a planning nature has been submitted on behalf of the Rayners to the municipality. The details of this submission are not before the court. Had the municipality taken an interest in these proceedings, the court would have had the benefit of their input on the nature of these submissions.

[16] In response to the founding affidavit, Mrs Rayner filed what she termed 'a statement of truth', which both the court and the applicants considered to be her answering affidavit, in which she reiterated the submissions set out in her correspondence to the first applicant and his attorney regarding the operation of her school. These have already been set out in some detail above and there is no need to repeat these. Additionally, she stated that the school grew organically from 2013 onwards while she was busy home-schooling her child. In 2016, she opened a small primary school with eight children, and subsequently received requests from a number of parents for enrolment as an alternative to mainstream schools. The children who currently attend the school are between the ages of seven and thirteen, and are from different and diverse backgrounds. Mrs Rayner currently has six children in the pre-school whose parents are workers on the surrounding farms. Her children, those of her sister, a tenant as well as those of the workers on her own farm, number 11 in total.

[17] As to the negotiations between the Rayners and the first applicant for the purchase of his farm, Mrs Rayner was of the view that she was unable to continue with negotiations under the threat of legal proceedings by the first applicant. She denies that the collapsed prospective sales of the farm were in any way attributable to the operation of her school. Regarding the buildings on her property, she admits to having constructed two additional classrooms, one during December 2016 and the second during 2017. She further concedes that she had not received planning permission prior to the construction of the classrooms but points out that she was compelled to build without permission or approval because of the slow pace of the municipality processing her planning application. It is trite that such conduct cannot be condoned by the court, whatever the circumstances.

[18] During November 2016, officials from the municipality visited Mrs Rayner's premises and informed her that she was required to make the necessary land use applications in order to comply with the municipality's by-laws. Although she engaged the services of a draughtsman to submit the plans, she has not put up proof of the submission to the municipality. She alluded to discussions which she held with municipal officials towards the end of 2017. It bears noting that when she approached the municipality during 2017 to inform them of the operation of the

school, the municipality requested a letter of 'approval' from the KwaZulu-Natal Department of Education. This was formally conveyed to the Rayners in a letter from the municipality dated March 2018. She then approached the KwaZulu-Natal Department of Education and was informed that such a letter could not be provided as the Schools Act was being amended to cater for the establishment of farm schools, and until such time, no applications for the registration of independent schools would be considered. The KwaZulu-Natal Education Department, like the municipality, has chosen not to make any input before the court in circumstances where this would have clearly been vital. Accordingly, Mrs Rayner contends that the document required by the municipality is incapable of being obtained and for so long as that situation remains, her application for a change in land use cannot be considered by the municipality.

[19] The school operates using existing and new structures as classrooms. It was evident from annexures to the answering affidavit that as early as October 2012, Mrs Rayner wrote to the departments of Agriculture, Health, Water Affairs and Forestry, and the farmers' union advising of her intention to operate a school on her farm, without detracting from the agricultural use of the property. None of these entities raised any objection to the proposed school. I digress to mention that Mrs Rayner does not mention any written correspondence being directed to the Department of Education (KZN) advising of their intention to establish an independent school. Section 46 of the South African Schools Act provides that 'no person may establish or maintain an *independent school* unless it is registered by the *Head of Department*.' However, in her answering affidavit Mrs Rayner does mention that early during 2012 she contacted both the municipality and the education department informing them of her plans to open a school. According to her, officials from both organs of state were 'helpful and supportive' of her plans, advising her of the requirement to submit an application for permission to operate the school on her property. The Rayners also wrote to their surrounding neighbours advising of their plans, with the only objection being from the first applicant. Some of the surrounding land owners were very supportive of the Rayners' initiative and commended them for being transparent regarding their plans to operate a school in the area.

[20] This matter first came before me on 8 August 2019, at which stage Mr Pietersen appeared for the applicants, and the respondents (with the exception of the fourth respondent) were represented by Mrs Rayner. I noticed that there were a few children present in court and I enquired from Mrs Rayner as to whether she had brought them with her. I was informed that the children were learners at the school. One of the learners, Bhekithemba Mlalazi, aged 14, informed me that his mother was not present as she was at work, but that he was in attendance to lend support to Mrs Rayner as he feared the possible closure of the school.

[21] I adjourned the matter for argument to 22 August 2019, and directed the applicants to serve a copy of the application papers on the KwaZulu-Natal Department of Education as I was of the view that they were an interested party to the proceedings, particularly if I were to grant an order for the closure of the school. This would result in at least 32 learners who attend primary school on the Rayners' property being left without access to education. I further directed that the applicants supplement their papers to include a satellite map of the applicants' and the Rayners' respective properties, as well as maps and photographs showing the layout of the properties, and their proximity to each other and the access road from the properties that connects to the D17 Main road. The first and second respondents were directed to furnish a list of the names of the children who currently attend the school and their personal details. In light of the learners having a direct interest in the outcome of the litigation, I approached Mr Dickson SC of the Pietermaritzburg Bar, to act *pro amico* on behalf of the learners. I am indebted to him, Ms Mamvura and Ms T Ngcobo, for their assistance to the court and the manner in which they approached the task, avoiding the issues in dispute between the applicants and the respondents and focusing on the interests of the learners, all of whom are minors.

[22] The *amicus* filed detailed submissions after having held consultations with a number of the learners at the school. In so doing, they placed before the court the exact sentiments of the learners attending the school. The Constitutional Court in *In re Certain Amicus Curiae Applications: Minister of Health & others v Treatment Action Campaign & others*[5] stated:

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[5] *In re Certain Amicus Curiae Applications: Minister of Health & others v Treatment Action Campaign*

'[5] The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.'

[23] I now turn to the merits of the matter argued before me on 22 August 2019. The applicants approach the matter on the basis that the operation of the school is without planning approval in terms of SPLUMA and that it constitutes an interference with the amenities of the neighbourhood. The applicants contend that their clear right to apply for an interdict is based on the unlawful operation of the school. As members of the public, they submit that they are entitled to enforce the applicable planning legislation as the school interferes with the use and enjoyment of their property.

[24] Insofar as their standing to apply for an interdict based on non-compliance with the National Building Standards Act, the court was not appraised of what sections of this Act the Rayners are alleged to have contravened. It is not in dispute that the Rayners have built new structures to accommodate learners, and that they have done so without first having obtained planning approval or a certificate of occupation. The applicants' main complainant is that the Rayners' property is zoned for agricultural purposes only. Neither the applicants' farm nor that of the Rayners' fall under a town planning scheme. In terms of Schedule 3 of the uMngeni Municipality Planning and Land Use Management By-laws in order for an activity such an 'educational building' (which is defined to include a 'school') to operate from the Rayners' property, the latter are obliged to apply for a change in use of part of the property from that of agricultural to educational.

[25] The applicants' contention is that the planning laws applicable to the Rayners' property are equally applicable to them and consequently they have locus standi to

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& others 2002 (5) SA 713 (CC) para 5.

approach the court to enforce the provisions of the relevant by-laws or planning legislation. In this regard they relied on *JDJ Properties CC & another v Umngeni Local Municipality & another*[6] which concerned the applicability of the Howick Town Planning Scheme, and whether a landowner across the road from a development had the standing to review the decision of a municipality pertaining to that property. The High Court dismissed the application of the landowner who sought to set aside the municipality's decision to relax the side space and parking requirements applicable to the new development. On appeal, the High Court's decision was set aside by the Supreme Court of Appeal, which stated the following:

'[27] Whether a litigant's interest is sufficient to clothe him or her with standing involves a consideration of the facts, the statutory scheme involved (in public-law disputes, a statutory power is almost inevitably involved) and its purpose: the issue must, in other words, be determined in the light of the factual and legal context.'[7]

[26] The difference between *JDJ Properties* and the facts of the present matter is that there is no town planning scheme for the Dargle area. This stands to reason, as most of this area is farmland. It is doubtful therefore whether any reliance could be placed on s 40(1) of the Town Planning Ordinance[8] which refers to the general purpose of a scheme being to achieve:

'. . . a co-ordinated and harmonious development of the municipal area . . . in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare. . . .'.

[27] As a general statement, town planning schemes are conceived not only in the interests of the general public, but in the interests of the inhabitants of the area covered by the scheme.[9] In this case the applicants contend that they are enforcing the applicable planning laws, being SPLUMA and the Planning Act. The question which arises is, even if these two Acts have application to the Rayners' property, what is the applicants' interest in a planning application? Do they have any sufficient interest in enforcing the provisions of the planning legislation? Is this not an

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[6] *JDJ Properties CC & another v Umngeni Local Municipality & another* 2013 (2) SA 395 (SCA).
[7] *JDJ Properties CC* para 27.
[8] Town Planning Ordinance 27 of 1949 (KwaZulu-Natal).
[9] See *The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D; and *BEF (Pty) Ltd v Cape Town Municipality & Others* 1983 (2) SA 387 (C) at 401F.

obligation that rests solely with the municipality, which is statutorily charged with the enforcement of its by-laws and planning laws? The answer, it seems to me, lies in the list of factors which Plasket AJA considered in *JDJ Properties*. These would include the following:

'. . . first, they are an owner . . . of property within the area covered by the . . . scheme in a modestly sized town; secondly, their properties and business are within the same use zone as the development to which the building plans relate; and thirdly, their properties and business are in such close proximity to the second respondent's development, being across a road, that no question of them being too far removed from the second respondent's development can arise.'[10]

[28] On the basis of *JDJ Properties*, the applicants would have locus standi to enforce the zoning provisions in any of the applicable land use and development legislation. In *Fourie v Centuria 266 (Pty) Ltd*[11] the court endorsed the principle in *JDJ Properties* regarding locus standi but dismissed an application for an interdict against a school operating on a neighbouring property in contravention of the zoning provisions which provided for the property to be used for agriculture, a farm stall or a dwelling house as a free entry use. It found that the applicants had failed to make out a case for a final interdict to close the school. In *Tavakoli & another v Bantry Hills (Pty) Ltd*[12] the Supreme Court of Appeal carefully considered its decision in *JDJ Properties* and, in determining whether a litigant had locus standi where it relied on a breach of a provision in a town planning scheme, the court held that a critical enquiry is to determine whether the zoning provisions relied on were imposed solely for the benefit of a specific class of persons, or whether they were intended for the benefit of the general public. Where the provision was imposed for the benefit of the general public, in order to determine whether the applicants have locus standi, they must establish that they have 'suffered harm from a contravention of the item beyond that which it may be supposed all owners and users' in the neighbourhood suffered.[13]

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[10] *JDJ Properties* para 34.
[11] *Fourie v Centuria 266 (Pty) Ltd & others* [2017] ZAGPPHC 4 (13 January 2017).
[12] *Tavakoli & another v Bantry Hills (Pty) Ltd* 2019 (3) SA 163 (SCA).
[13] *Tavakoli* para 18.

[29] According to the applicants, the Rayners' property is classified as 'agricultural' and requires planning approval for a change in the use of existing buildings or the development of new buildings or structures as a school on the Rayners' property.

[30] Applying the factors in *JDJ Properties* and *Tavakoli* to determine whether the applicants have locus standi to institute this application, it bears noting that there is no averment that the provisions of the by-laws apply to the applicants as a specific group of landowner. It must follow that the by-laws are enacted for the benefit of the general public in the area of the uMngeni Municipality. Based on the ratio in *Tavakoli*, the applicants need to prove that a violation by the Rayners has caused or will cause damage. The applicants rely on the failure of the Rayners to adhere to the by-laws and to obtain a certificate of occupation under the National Building Standards Act. Although the applicants attempted to suggest that they were acting in the broader interests of the others in the neighbourhood, this contention soon evaporated. One can safely assume that the interests which the applicants are seeking to protect are those personal to them alone. The complaint of the applicants refers to an interference with their amenities and sense of place on the basis that the school has a detrimental impact on the use and enjoyment of their property. On that basis, it was contended that the applicants have established a clear right.

[31] The applicants must, in accordance with *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others,*[14] show that the contravention of the by-laws complained of will impact on their interests. As Cameron J stated, an 'own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests. . . .'[15] No case has been made out by the applicants for the adverse impact arising from the operation of the school. They refer in general terms to nuisance, noise interference, sense of place, traffic congestion and lack of parking. They fail to provide facts from which it can be demonstrated the extent and manner in which the infringement has affected their interests or how the school interferes with the comfort of their human existence.

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[14] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC).
[15] *Giant Concerts CC* para 33.

[32] The high-water mark of the applicants' complaint is stated in their replying affidavit that the 'school has disturbed the sense of place that [we] have hitherto enjoyed in this agricultural environment'. However, in argument, counsel for the applicants submitted that the applicants' case is not based on nuisance but an 'infringement of rights'. This, I assume can only be a reference to the Rayners not having sought permission from the municipality to operate a school, thereby contravening SPLUMA. It is also difficult to see what interference can be complained of in circumstances where the first applicant contends that the distance between his homestead and the school is approximately 500 metres. Mrs Rayner estimated the distance to be more than a kilometre.

[33] In light of the applicants having attempted for some time to sell their property, even to the Rayners, I raised with counsel the utility of granting an interdict which would be final in effect and which would disrupt the learning of the children currently attending the school. The interdict sought by the applicants is based on their perceptions that the school is an intrusion into the agricultural environment. If an interdict is granted and the applicants' property is then subsequently sold, there is no certainty of the attitude of a new landowner towards the school. I raised with counsel what would be the situation where a new owner has no objection to the operation of the school. No clear answer was forthcoming, save to rely on the present owner's rights to use his property without interference.

[34] Mrs Rayner submitted that the only building for which planning authorisation is required are two rondavels measuring 50m^2 each. The other buildings are all pre-existing. She dismisses the complaint of traffic congestion caused by the parents of the learners, pointing out that many children arrive in groups, or use lift clubs thereby reducing the number of vehicles that access her property. The interference caused to the first applicant, if any, would in my view, be relatively minor. At worst, it would require, as a general courtesy, for one driver to give the other a right of way to pass in the event of a dual flow of traffic on what is essentially a farm road. Lack of parking is a non-issue as the school operates on a farm with ample parking area.

[35] Mrs Rayner reiterated that she engaged extensively with the first applicant in an attempt to accommodate his concerns, to no avail. Similarly, she has had no

success in obtaining the necessary authorisation from the Department of Education. Even after a copy of the papers in this application were served on the Department of Education, the latter have been supine in the manner in which they have approached this application. Their attitude is that since the school is a private, independent school, they do not wish to make any submissions nor to participate in the matter. This approach, in my view, fails dismally to appreciate that the right to education is not contingent in whether a child attends a private or public school. The Department of Education fails to appreciate that in the event of an interdict being granted, the learners attending Misty Meadows, in the absence of any information to the contrary, could be left without a school. That directly impacts on their fundamental right to education. The State is the primary agent responsible for ensuring access to this right. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*[16] the court made it clear that socio-economic rights (like the right to a basic education) may be 'negatively protected from improper invasion.' In *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)*[17] the court, referring to *Ex Parte Chairperson,* stated the following regarding the duty to negatively protect the right to basic education:

'Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection.' (footnotes omitted)

[36] Mr Dickson, for the learners, explained that a meeting had been held on 19 August 2019 with a number of the children who are attending the school. They were of all races, aged between five and 13 years old, and all conversed in English. They all expressed their love for the school and thought it would be the 'worst thing' for the school to close down. In addition, counsel met with the parents of the children. The *amicus* confirmed the averment by Mrs Rayner that the parents comprise a mix between farmers and workers, some of whom travel as much as 20 minutes to attend

[16] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 78.
[17] *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)* 2011 (8) BCLR 761 (CC) para 58.

the school. The enrolment presently at the school is 32 learners in the primary school aged eight to 13 years old, and 19 learners at the pre-school, aged from four to six years old.

[37] The intervention of the *amicus* highlights the importance of children's rights to be heard in matters like the present case, which have a direct impact on their fundamental right to education. The Constitution compels the courts to interpret these rights not as a luxury, but as substantive rights which must be respected. This is underscored by s 10 of the Children's Act[18] which provides that:

'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration.'

Similar provisions are found in the United Nations Convention on the Rights of the Child, 1989, and the African Charter on the Rights and Welfare of the Child, 1990.

[38] The applicants and the Department of Education (through their inaction) seem to have adopted the view that because the school is an independent school established on private property, the Department of Education cannot be drawn into the present application. The Constitutional Court in *Juma Musjid* was concerned with whether the court should have ordered the eviction of a public school operating on private land owned by a trust. The high court granted an order for the eviction of the learners in light of a dispute between the Department of Education and the trust. The court made the following point:

'This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application

[18] Children's Act 38 of 2005.

also depends on the "intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State".'[19] (footnotes omitted)

[39] The 'negative constitutional obligation' in this particular case requires, in my view, the applicants, as the adjacent landowners to the school, to 'minimise the potential impairment of the learners' right to a basic education'.[20] The court in *Juma Musjid* stated that the high court had 'failed to give consideration to the impact that the eviction order would have had on the learners and their interests'[21] and that it had 'privileged the right to property over the learners' right to a basic education.'[22] The new constitutional obligations of property owners was alluded to by *Port Elizabeth Municipality v Various Occupiers*[23] where Sachs J cautioned against 'privileging in an abstract and mechanical way the rights of ownership'[24] over other fundamental rights. Applied to the present matter, this calls for a balancing of the competing interests of the learners to obtain an education, and that of the applicant to retain his 'sense of place' with the operation of a school taking place between 0.5 to 1 km away.

[40] An interdict preventing the operation of a school, albeit an independent school, and which affects the right of education, can only be granted after a weighing of the competing rights. This balancing act was considered in *AB & another v Pridwin Preparatory School & others*[25] albeit in the context of an independent school's right to cancel the contracts for the schooling of two learners due to the bad behaviour of their parents. The majority affirmed this view, but in her dissent, Mocumie JA said that 'the right to be heard before any decision which affects the child is taken, is more precious in the context of our Constitution than the right to freedom of contract. . . .'[26]

[41] Although it could be contended in this balancing act that Misty Meadows is an independent school and therefore the Rayners are not discharging a primary positive

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[19] *Juma Musjid* para 58.
[20] *Juma Musjid* para 62.
[21] *Juma Musjid* para 68.
[22] *Juma Musjid* para 71.
[23] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[24] *Port Elizabeth Municipality* para 23.
[25] *AB & another v Pridwin Preparatory School & others* 2019 (1) SA 327 (SCA).
[26] *Pridwin Preparatory School* para 123.

obligation under the Constitution to uphold the right to education, there is, on the basis of *Juma Musjid*, a countervailing negative obligation not to interfere with that obligation. This was emphasised in *Pridwin Preparatory School* where the horizontal application of rights was explained as follows:

'While s 8(2) of the Constitution' provides that the Bill of Rights applies horizontally, it was pertinently pointed out in *Juma Musjid* that its purpose is not to obstruct private autonomy or to impose the duties of the state on private parties. Rather, it is to oblige private parties not to impede, interfere with or diminish the enjoyment of a right. A private party would thus breach the obligation directly if it failed to respect the right, and indirectly if there was a failure to prevent its direct infringement by another; or to take steps to avoid its diminution.'[27] (footnotes omitted)

[42] It is in this context that the Department of Education's inaction calls for comment. An interdict of the nature sought by the applicants has the potential to disrupt the education of young learners. The Department has failed to consider their plight should the school be ordered to cease its operations. The primary obligation to discharge the right to education falls on the State. In this instance, the Department has failed and neglected to inform the court of what alternatives exist, within reasonable distance to Misty Meadows, of other public schools that could absorb additional learners in the event of a closure. The municipality is equally complicit in its insistence on requiring from the Rayners a certificate of registration or similar document to be issued by the Department of Education as a precondition for the granting of a certificate of occupation. I can find nothing in the by-laws under SPLUMA, or in the National Buildings Standards Act which contain any such requirement. The issue confronting the municipality is one of planning approval. Nothing more is required from an applicant. The structures have already been constructed. A certificate of occupation is issued on construction, and has no relevance to the purpose to which the structure is put. If the buildings were already in existence as rondavels, in order for the Rayners' to operate a school therefrom, they would need to apply for a change of land use. Again, this would have nothing to do with the Department of Education.

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[27] *Pridwin Preparatory School* para 43.

[43] In so far as the relief sought by the applicants impacts on the lives of young children, the importance of taking into account the feelings of children, the court in *Christian Education South Africa v Minister of Education*[28] stated that:

'Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experimental foundations for the balancing exercise in this difficult matter would have been more secure.'

In *Child Law in South Africa*[29] Carina Du Toit summarises the developments in relation to the representation of children and their interests:

'There have been significant developments in case law and legislation to promote children's right to participate and in particular the child's right to have a separate legal representative assigned to him or her. Significantly, the Constitutional Court endorses an approach to litigation which respects the views, wishes and opinions of children in all matters where they are concerned. Furthermore, the international law and the Children's Act mandate the participation of children in all matters where their lives and well-being are concerned. There is therefore now a normative framework in South African law which calls on courts and practitioners to respect the child's right to participate when decisions are being made that affect them.'

See also *Minister of Welfare and Population Development v Fitzpatrick & others*[30] where the court held that s 28(1) of the Constitution 'is not exhaustive of children's rights' and s 28(2) 'creates a right that is independent of those specified in s 28(1)' of the Constitution.

[44] The issue for determination, *vis–à-vis* the learners attending Misty Meadows school and the applicants, is whether the interests of the learners not to have their basic rights negatively impacted is outweighed or 'privileged' by the competing interest of the applicants to live in relative peace and tranquillity that surrounds them, but for the school. In my view, the fundamental right of the learners at Misty Meadows school cannot be displaced by the singular objection of the applicants to the operation of what is essentially a small school serving the needs of children in a rural setting. Farm schools have operated for decades in rural areas. I am not aware of any planning requirement as a pre-condition for their existence. However, I recognise that in present times, considering that the Rayners have erected a

[28] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 53.
[29] T Boezaart *Child Law in South Africa* (2009) at 110-111.
[30] *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC) para 17.

structure which will accommodate learners, planning approval must be obtained from the municipality, if for no other reason other than for the health and safety of persons who may use such facilities. A certificate of occupation would be a pre-requisite for the use of those structures. That however is not reason enough to interdict the operation of the school. The clear right asserted by the applicants only extends to their rights as a landowner. The competing interests of the learners is based on a foundational right in our Constitution, which in my view must trump any 'interference' which may be experienced by the adjacent landowner. In any event, even if there is inference with the first applicant's use and enjoyment of his property (of which no substantive evidence has been provided), it is so minor that the complaint ought to be dismissed.

[45] To the extent that the applicants' case is based on the illegal operation of a school, that alone does not warrant this court interdicting such operation.[31] The court, in determining whether or not to grant an interdict, always has a discretion based on the facts of the matter and the interests sought to be protected from harm. In this case, the interests of the learners to be allowed to continue attending their school, should not be impeded. This court is incapable of exempting the Rayners from having to apply to the municipality for planning approval. The issue which arises is whether this court, in the interim, and while an application is being made for the regularisation of the structures on Misty Meadows, may authorise the continued operation of the school and the use of the structures for which planning approval has not been obtained. In my view, in light of the interests at stake, and the prejudice which the learners would suffer resulting from a disruption of their schooling, the balance of convenience clearly favours the first to third respondents and the learners.

[46] The law regarding the granting of a final interdict is settled:

'An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.'[32]

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[31] See *Fourie (supra)*.

[32] *Hotz & others v University of Cape Town* 2017 (2) SA 485 (SCA) para 29.

The first two of these criteria have been exhaustively canvassed in what has been set out above. As regards the lack, or absence, of an alternate remedy, there is no evidence before me that the applicants have attempted to bring any application against the municipality, who are the custodians of the by-laws which the respondents are accused of breaching. The applicants' case is that the respondents, through the operation of the school, have interfered with their 'sense of place'. This, as I interpret the applicants' case, is a complaint of an interference with the amenities of the neighbourhood. If so, the applicant ought first to have approached the municipality demanding the enforcement of the applicable provisions of SPLUMA or the National Building Standards Act before proceeding with the drastic relief of an interdict, with the attendant adverse consequences for the learners which has been detailed above. That option would have afforded the applicant no different relief to that which it seeks before this court. This is not to suggest that the applicants had no basis to approach the court, which resort is 'foundational to the stability of an orderly society' as it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help.'[33]

[47] In the result, I am unable to conclude that the applicants have met the requirements for an interdict. This is not a case where the municipality has come to court seeking the enforcement of a statutory provision such as that in *Lester v Ndlambe Municipality*[34] where the municipality sought an order to demolish a building s 21 of the National Building Standards Act on the basis that the building was unlawfully erected without any building plans as required in terms of the s 4(1) of the National Building Standards Act. Nor is this a matter where the applicants have come to court seeking a public law remedy under the National Building Standards Act. This case is also distinguishable from *Member of the Executive Council, Department of Education, Eastern Cape Province and Another v Eduplanet (Pty) Ltd*[35] where Plasket J considered an urgent application by the Department of Education that the operation by the respondent of an independent school, without it

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[33] *Chief Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC) para 22.
[34] *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA).
[35] *Member of the Executive Council, Department of Education, Eastern Cape Province & another v Eduplanet (Pty) Ltd* [2017] ZAECGHC 9 (1 February 2017).

being registered by the department, be declared unlawful, and that the respondent be interdicted and prohibited from operating as an independent school until such time as it was registered by the department in terms of section 46(1) of the Schools Act. Once it was established that the school was operating illegally and without the necessary statutory permission, the department was entitled to the interdict it sought, and there was no ground for the court to exercise its discretion to suspend the interdict. In that regard Plasket J found that the respondent had acted with impunity and with contempt for the laws that govern the operating of independent schools. It enticed learners to register with it, paying substantial amounts in school fees, in the belief that the school was registered with the Department of Education. This is not that case in the present matter where Mrs Rayner has been in communication with the Department of Education and the municipality for several years. Neither of these entities, despite having been served with a copy of the papers in this matter, have contended that Misty Meadows is operating illegally. The Department of Education simply states that it will not involve itself in the matter because Misty Meadows is an independent school. Neither the municipality nor the Department of Education has argued for the closure of the school on the grounds of its operation without formal registration under the School Act or the lack of planning approval.

[48] Despite the absence of planning authority for the structures on the Rayners' property which are used for the purposes of a school, I am of the view that this court can allow such operations to continue in light of the adverse consequences that would flow if the school were ordered to cease operating. Support for this approach can be found in *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*[36] where the court sanctioned the continued operation of a flawed contract with the State, taking into account the calamity that would befall social welfare beneficiaries if the contract were declared to be invalid and set aside. After referring to *Juma Musjid*, the court in *AllPay* made the following statement, which I believe is apposite to the present situation of allowing the school to operate while its owners pursue the avenues available to them to obtain the necessary planning approval:

[36] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC).

'[66] Where an entity has performed a constitutional function for a significant period already, as Cash Paymaster has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all.'[37]

[49] The role of Misty Meadows school cannot be equated with the role played by Cash Payment Services as alluded to in *AllPay*. However, in the context of the facts before me, the Department of Education has not provided the court with any information as to the availability of state or independent schools within a reasonable distance of Misty Meadows nor does it contend that the school is operating illegally. In any event, it is an important feature for the court to consider that the learners who attend Misty Meadows, as explained by the amicus, would be clearly distraught if the school were to close. It would be an injustice for the court to destroy that relationship, especially where the highest value must be placed on the influence that a sound and nurturing educational environment can have on the development of young children.

[50] In light of the above the application for an interdict must fail. The first and second respondents appeared in person, and the interests of the learners were advanced by the *amicus*. It is proper that no order as to costs should follow.

[51] For all of these reasons I make the following order:

1. The application for a final interdict to prohibit the first, second and third respondents from operating a school on the third respondent's property, namely Portion 72 (of 64) of the Farm Middle Bosch No.897, is dismissed;

2. The first, second and third respondents are directed to apply to the fourth respondent (uMngeni Municipality) within six (6) months of the date of this order, for the necessary permission in terms of the planning laws administered by it for the approval of 'educational buildings' operating as a school on the third respondent's property;

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[37] *Allpay* para 66.

3. The fourth respondent is directed to consider the application referred to in paragraph 2 above without the pre-condition that the first, second and third respondents are required to obtain registration for the school from the KwaZulu-Natal Department of Education in terms of the South African School Act 84 of 1996;

4. The first, second and third respondents are directed to apply forthwith to the Head of Department, KwaZulu-Natal Department of Education in terms of section 46 of the South African Schools Act 84 of 1996 for the necessary permission to establish and maintain an independent school on the third respondent's property.

5. No order as to costs.

CHETTY J

Appearances

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