

SOUTH AFRICA / JUDGMENT

SNAPS Shot Investments 1465 CC and Another v Centre for Autism Research And Education and Others (21618/2013) [2014] ZAGPJHC 227 (19 September 2014) [2014] ZAGPJHC 227

COURT

South Gauteng High Court, Johannesburg

BEFORE

SS Mphahlele

CASE / FILE NUMBER

21618/2013

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REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 21618/2013

DATE: 19 SEPTEMBER 2014

In the matter between:

SNAP SHOT INVESTMENTS 1465 CC.....First Applicant

DUNKELD VILLAGE ASSOCIATION.....Second Applicant

And

CENTRE FOR AUTISM RESEARCH AND EDUCATION.....First Respondent

ROZANNAH RIBACK.....Second Respondent

ROYAL IMMO PROPERTY (PTY) LIMITED.....Third Respondent

ROSALIND JOYCE COSTELLO.....Fourth Respondent

CITY OF JOHANNESBURG.....Fifth Respondent

GAUTENG DEPARTMENT OF EDUCATION.....Sixth Respondent

J U D G M E N T

MPHAHLELE, J:

1. The applicants seek interdictory relief restraining the respondents from conducting a business which they are currently operating from erf 68 Dunkeld West Township (better known as number 36 Bompas Road, Dunkeld West) and also at portion 1 of erf 205 Dunkeld Township (better known as number 40 Bompas Road, Dunkeld).
2. The business operated by the respondents on the properties is a school that offers education and tuition to its registered pupils and also conducts occupational and/or speech and/or physiotherapy under the name and style 'C.A.R.E'.
3. According to the applicants, neither of the land uses or zonings permits the operation of a school or the therapy type activities which are carried out on the properties. Accordingly, the respondents' activities on the subject properties to the extent that they fail to comply with the applicable town planning scheme are unlawful. The applicants accordingly request the court to grant the interdict against the first, second, third and fourth respondents from continuing with their unlawful activities. The applicants requested that the operation of the interdict be suspended for a period of sixty days to allow the respondents to find alternative accommodation.
4. The respondents made a concession that the applicants are entitled to the interdict as prayed for but prays that the operation of the interdict be suspended pending the respondents' pending applications for the right of use as "place of instruction" against the following background: the first respondent is a facility which treats the development of children suffering from autism – a behavioural disorder which is generally diagnosed in children between the ages of 2 and 3 years old. These children cannot attend normal educational facilities and require extensive treatment from specialised therapists. The facility can therefore never be compared to a normal school or medical facilities. The court is enjoined, when weighing up the applicants' rights as neighbouring property owners against the respondents' activities and development rights to promote an activity that is very needed, to interpret it against the value that underlie an open and democratic society based on human dignity, equality, health and freedom.
5. The respondents contend that although they were advised that the activities of the first respondent were permitted in terms of the existing zoning they, *ex abundanti cautela* instructed town planners to submit the appropriate town planning applications to the municipality to ensure that their use of the property complied with the town planning scheme. An application for consent for use on number 36 Bompas Road Dunkeld was submitted to the municipality and is still pending. This application has the support of the development management department of the municipality. The application in respect number 40 Bompas road was considered by the municipality on 08 May 2014 and was approved by the planning and development committee of the City of Johannesburg.

6. The applicants have since indicated that they intend appealing against the decision of the city council should the respondents' applications be successful.
7. The respondents deny that the use of the properties constitutes a school for autistic children and states that the primary function is a facility which provides intensive therapies for autistic children. In paragraph 17.1 of its answering affidavit the first respondent states the following "... the fact that the first respondent has, as a part of the holistic application of its therapies and by virtue of the fact that such children are physically present on the property, provides such children with certain elements of informal education does not change the primary purpose of the centre, which is that of professional suites, (occupational and speech therapy, physiotherapy etc) which is permitted in terms of the existing zoning of the property".
8. The respondents have since submitted applications in respect of both properties for use as "place of instruction". In terms of the Johannesburg Town Planning Scheme of 1979 ("the scheme") a "place of instruction" means 'a building designed for use, or a building or land which is used, as a school, college, technical institute, lecture hall or other educational centre, and includes a crèche, monastery, convent, public library, art gallery, museum and gymnasium and all uses which are ancillary, directly related to and subservient to the main use'. The respondents submit that, as it is possible under the scheme for activities to fall within two categories of land use, its activities may in addition be carried under the guise of the "professional suites". But they maintain that ideally the activities conducted on the properties by the first respondent best fall under the scope of a "place of instruction".
9. The respondents maintain that they do not conduct "medical suites" on the property because nobody is entitled to visit the premises for an appointment to consult the doctor, therapist or any medical expert. The only people who do attend the facility are the autistic children to receive their daily therapy, coupled with their associated education. These activities, it is submitted, are inextricably linked. The therapy administered to the children will not be completely effective without the education element and the education and development of the children will not be possible without the therapy.
10. I now deem it appropriate to deal with existing zonings of the properties. Both properties are zoned "Residential 1". Nevertheless an owner or user of the property with a "Residential 1" zoning may apply for the consent of the municipality for the use of such property as "place of instruction". In respect of 36 Bompas, in terms of clause 14 of the scheme the purpose for which buildings may be erected and used and for which land may be used for a "Residential 1" zoning is dwelling houses. 40 Bompas Road is zoned "Residential 1" in terms of the scheme, with the inclusion of provision for "offices in the existing structures" in terms of Notice number 205 of 2008. Offices are defined as including "professional suites, medical consulting rooms, banks and building societies", however banks, building societies, medical suites, canteens and restaurants have been specifically excluded. This leaves only "professional suites" under the definition of offices. Accordingly 40 Bompas can be utilised for a dwelling unit and professional suites only. In terms of definition xxxviA of the scheme

“medical consulting rooms” means a building ‘designed for use or a building or land which is used for the following consulting practices associated with restoring or preserving health: occupational, speech and dental therapist; physiotherapist.....: Provided that where the city council adds to such list such additions should also be deemed to be included in the above definition’.

11. As mentioned before the respondents maintain that its activities may in addition be carried under the guise of the “professional suites”. It is submitted that the first respondent is made up of a group of multi-disciplinary therapists who specialise in holistic treatment of autism. The treatment of autism requires a variety of intensive therapies including occupational and speech therapy on a daily basis. The detailed list of professionals listed under the definition of “medical consulting rooms” is a clear indication that they are excluded from the professionals that can practise under the land use described as “professional suites”. Therefore the respondents’ contention that its activities can also be carried under the guise of the “professional suites” cannot stand scrutiny.
12. Moreover, it is also submitted that the first respondent is an early intervention therapy centre exclusively for the treatment of autistic children which in addition, acts as a centre for focused learning. The respondents maintain that the primary purpose of the attendance at the first respondent’s centre is to receive intensive therapy from the various therapists who make up the first respondent.
13. The circumstances of this matter dictates that, over and above “the place of instruction” use applied for, the respondents also require “the medical consulting rooms” right of use. It is clear that the therapy offered by the respondent is neither incidental nor ancillary to the education element. The therapy and the education element were presented to this court as of equal weight.
14. As mentioned before the respondents have requested that the operation of the interdict be suspended pending the conclusion of the two town planning applications submitted by the respondents. Even if these pending applications were to be granted in the respondents’

favour, such use would remain unlawful as I have already determined that the respondents would also need “the medical consulting

rooms” right of use to operate lawfully on the properties.

15. According I hereby grant an order in the following terms:

1. The first, second, third and fourth respondents are hereby interdicted and restrained from conducting or allowing any other person to conduct, from erf 68 Dunkeld West Township, Province of Gauteng (situated at 36 Bompas road), and/or from portion 1 of erf 205 Dunkeld Township, Province of Gauteng (situated at 40 Bompas road):

1.1. a school or educational facility under the name and style C.A.R.E. or under any other name or style; or

1.2 a centre which offers or conducts occupational therapy, speech therapy, or physiotherapy under the name and style of C.A.R.E. or under any other name or style;

under such time as erf 68 Dunkeld West and portion 1 of erf 205 Dunkeld have been rezoned to, or consent has been granted for, “medical

consulting rooms”, and “place of instruction”.

2. The operation of the interdict is hereby suspended for a period of sixty days from the date of this judgment.

3. The first, second, third and fourth respondents are hereby ordered to pay the costs of this application.

SS MPHAHLELE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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INSTRUCTED BY: Coetzee Van Rensburg Inc.

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