IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/9/16

Case number: 45861/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

21/9/16
DATE SIGNATURE

In the matter between:

CAINE BROTHERS (PTY) LTD **APPLICANT**

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES **FIRST RESPONDENT**

THE TRUSTEES OF THE SURREY ROAD PROPERTY TRUST
Being KANTHILALL PREMRAJH N.O.
And
SITA PREMRAJH N.O. **SECOND RESPONDENT**

Heard: 23 September 2016
Delivered **3 March 2016**

JUDGMENT

A.A.LOUW J

Introduction

[1] The application is a review of the decisions made by the first respondent (and her delegate) to grant consent to divide immovable property in terms of the sub-division of Agricultural Land Act, 70 of 1970.

[2] The applicant trading as Triple A Beef is the owner of the largest cattle farm and feedlot, as well as an abattoir in KwaZulu Natal. It is clear that the applicant wants to expand its agricultural activities to the property owned by the Surrey Road Property Trust, represented by its two trustees herein as second respondent.

[3] Since the second respondent acquired the property it continuously sought the necessary permissions to enable it to use the property for business purposes. The exact nature thereof has changed during extended hearings before the development tribunal for KwaZulu Natal which heard the case in terms of the Development Facilitation Act, 67 of 1995. These proceedings were also opposed by the present applicant.

[4] After the decision of the tribunal to approve a land development application in terms of section 25 of that act, the appellant had an appeal to the development appeal tribunal for the province. It was unsuccessful there as well and in review applications to the KwaZulu Natal Division of the High Court as well as the Supreme Court of Appeal.

[5] The SCA gave judgment on 30 May 2016 and except for varying costs orders of the trial court, the appeal by the present applicant was dismissed. Thus, at present the consent granted to the trust to utilise the property for commercial purposes stand. It is not necessary for purposes of this application to define exactly the scope and detail of the commercial enterprises. The other hurdle the second respondent had to clear was to obtain consent to the sub-division of its agricultural land in terms of Act 70 of 1970 (the Act). On 27 June 2011 a delegate of the first respondent signed a decision confirming that the second respondent's application had been granted by consent number 46184. In terms of this consent the property was divided into nine smallish portions which were consistent with the second respondent's intended use as set out above, leaving a remainder of 162,83ha. This was notwithstanding the applicant's opposition of the application.

[6] The applicant appealed to the minister against the decision to grant this consent. In a letter signed by Ms Tina Joemat-Pettersson on 13 March 2013 the following is stated:

> *"I have carefully assessed your appeal to withdraw the consent granted by the committee responsible for the assessment of*

applications lodged in terms of sub-division of Agricultural Land Act, Act 70 of 1970 and decided to not withdraw their decision." (sic)

The letter then proceeds to furnish reasons set out in eight sub-paragraphs.

The record

[7] In terms of uniform rule 53 (1)(b) the minister is obliged to furnish a record of the proceedings. Astoundingly, she did so on 16 September 2013 delivering a slim bundle of documents – a mere 21 pages.

[8] The astonishment grows when it is noted that pages 7-15 of that bundle relate to a sub-division decision in respect of a farm in Mpumpalanga and therefore has got nothing to do with this case at all.

[9] There is no chronology to this bundle. The first six pages are a memorandum by applicant's attorneys forwarded to the Department summarising the applicant's representations in objecting to the sub-division. However the annexures referred to in this memorandum are not to be found anywhere. It is further of importance to note that there were two other objectors besides the applicant and that letters from them were also appended to the letter from the attorney. These are not contained in the bundle.

[10] The duty of an administrator in a review application in regard to the furnishing of a record is trite. It has been stated that every scrap of paper relevant to the deliberation process must be furnished.

[11] At a later stage a number of lever arch files divided into 22 volumes (some 2100 pages) were delivered, I am not sure by whom. These papers are marked "supplementary record". The provenance of these documents is not clear to me. There is no affidavit by the minister to deal with the defective first record and to place the further documents furnished in proper context.

[12] What is however clear to me is that the documents in these bundles, on a scanning through thereof, are primarily the documents that served before the development tribunal. The cardinal problem that I have is that a number of these documents in these 22 volumes came into being after the decision now under review was taken.

[13] Counsel for the first respondent agreed with me that the failure to provide a proper record makes it impossible for me to make a finding on the merits of the review. Counsel for the second respondent was constrained to argue that, although some documents came into being later, I must have regard to documents which, to paraphrase him, "must clearly have been considered by the minister". I may not embark on such a road. It will be guess-work for me, to in the light of the above, take a definite stance on what documents the minister had considered or not, or perhaps more correctly stated, which documents did in fact form part of the record.

[14] This conclusion leaves only the remedy to be granted to be decided upon. The failure to provide a proper record, so as to provide an aggrieved party a remedy in court, breach constitutional rights including the s 33 and s 34 rights[1].

[15] As a fair review is now unattainable to the applicant, the only solution is that the decision of the minister has to be set aside. If the second respondent still wishes to get sub-division in terms of the Act, the only solution seems to be that a fresh application be delivered. Obviously all the parties as set out in the letter from applicant's attorney dated 7 July 2010 have to be given notice of such an application.

Inspection in loco

[16] I proceed to remark in an obiter way about the fact that an inspection in loco was held without the applicant having had any notice of such an inspection. The applicant only became aware from the answering affidavit of second respondent herein that an inspection was held during which officials of the department were present, together with representatives of the first respondent.

[17] It is laudable to hold an inspection of agricultural land before such a momentous decision as sub-division is taken, however at such an inspection all parties or none of the parties should be present. It is unacceptable that the second respondent's deponent and other representatives of the trust were

[1] Hoexster *Administrative Law in South Africa* (2nd edition) p 528

present as they could have made statements at such an inspection which may not have been correct and in respect of which the applicant thus had no opportunity to make corrections, should it have wished to do so.

[18] To hold an inspection without the presence of the applicant in this case as well as the other objectors referred to in the attorneys letter of 7 July 2010, is a violation of the *audi alteram partem* rule

Costs

[19] I can see no reason for burdening the second respondent with a cost order. The review cannot be properly decided on the record and for present that reason only the applicant is successful. Too hold the second respondent liable for costs would be to hold it responsible for the gross ineffectiveness of the Department and the lack of professionalism exhibited by the attorneys of the first respondent. Cost therefore has to be paid by the first respondent.

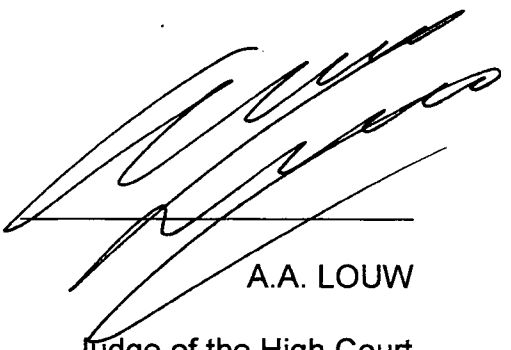
[20] As to the costs occasioned by the interlocutory application to the evidence in the case between *Gonawakhe Informal Settlement Residents Association and Others v Caine Brothers (Pty) Ltd and Others* under case number: 5480/14 in the KwaZulu Natal Division of the High Court of South Africa, I share this sentiments of the Supreme Court of Appeal.

[21] I fail to see the relevance of these extra volumes introduce in this review application. The second respondent has to pay the applicant's costs occasioned by the introduction of these papers.

Order

[22] The following order issues:

1. The decision by the first respondent dated 13 March 2013 is reviewed and set aside.
2. The first respondent is ordered to pay the applicant's costs of this application. These costs exclude the costs set out in the next paragraph.
3. The second respondent is ordered to pay the applicant's costs in regard to the interlocutory application for the introduction of the evidence in the *Gonawakhe Informal Settlement Residents Association* case number 5480/14 in the High Court of KwaZulu Natal Division.



A.A. LOUW

Judge of the High Court