

IN THE KWAZULU–NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No. 10234/11

In the matter between:

CLASS A TRADING 6099 (PTY) LTD

Applicant

and

**MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

Respondent

J U D G M E N T

KOEN, J:

[1] In the Notice of Motion dated 28 October 2011, the applicant claimed the following relief:

‘1.

That the applicant’s failure to comply with the time limits and forms as provided for in the rule 6 be and is (sic) hereby condoned and that the matter be enrolled and heard as a matter of urgency.

2.

That a rule *nisi* do hereby issue calling upon the respondent and all other interested parties to show cause before this Honourable Court on the day of
2011 at 09h30 or as soon thereafter as the matter may be heard why an order in the following terms should not be made:-

- 2.1 That respondent be and is hereby interdicted from taking any further steps in the process of allocating the farms Portion 15 of Spioenkop No 283, Portion 1 of Rondefontein, No 307, Remainder of Kromdraai No 306, Remainder of Dummy No 308, Portion 2 of Nooitgedacht No 309 and Portion 4 of Nooitgedacht No 309 to a beneficiary or beneficiaries in terms of respondent's Land Reform and Rural Development programme.
- 2.2 That respondent comply with its obligations in terms of section 5 of the Promotion of Administrative Justice Act, Act 3 of 2000 and provide reasons to applicant for holding applicant's application to be allocated the farms mentioned in paragraph 2.1 above to be unsuccessful.
- 2.3 Costs of this application.

3.

That paragraph 2.1 above operates as an interim interdict subject to the provisions of paragraph 4 below.

4.

That applicant be directed to institute review proceedings to set aside the non-allocation of the farms mentioned in paragraph 2.1 above within 21 (twenty one) days of respondent complying with its obligations in terms of section 5(2) of the Promotion of Administrative Justice Act, failing which the interdict will lapse.

5.

Granting applicant further and/or alternative relief.'

[2] By the time the applicant filed its replying affidavit, amended relief was sought. When the matter was argued and 'an amended order prayed' was handed up from the bar setting out the relief claimed. The only relief persisted with is:

'1.

That pending the outcome of the review proceedings contemplated in paragraph 2 hereof, the respondent be and is hereby interdicted from implementing any decision relating to the allocation of the farms Portion 15 of Spioenkop No 283, Portion 1 of Rondefontein No. 307 Remainder of Kromdraai No 306 Remainder of Dummy No

308, Portion 2 of Nooitgedacht No. 309 and Portion 4 of Nooitgedacht No 309, or any other designated farm in the Kokstad area to a beneficiary or beneficiaries in terms of the respondent's Land Reform and Rural Development programme or the respondent's pro-active land acquisition strategy.

2.

That the applicant be and is hereby directed to institute the review proceedings to set aside the allocation alternatively the non allocation of the farms mentioned above within 21 days of the grant of this order.

3.

That the respondent is directed to pay the costs of this application, such costs to be paid on the attorney and client scale.'

[3] The application was launched on the basis that the applicant wished to avail itself of the benefits of the respondent's land redistribution for agricultural development programme, and had submitted an application to that effect to the respondent. The application related to the farm comprising the properties above, commonly referred to as 'Grove Park'.

[4] The applicant, represented by the deponent to the founding affidavit, had attended a number of briefing sessions on the farm and attended an interview at the regional offices of the respondent in Pietermaritzburg. By October 2011 he states that he had 'every reason to believe that it was simply a matter of a few weeks before my application to lease the farm property in question would be successful'. The applicant had invested approximately two million rand in capital equipment and had entered into a suspensive sale agreement to take over about 450 cattle from the seller.

[5] On 13 October 2011 the deponent however received a letter from the respondent, being annexure 'BN6' to the founding affidavit, advising that his application for the lease of the farm had been unsuccessful. This letter, which is dated 12 October 2011 signed by a Ms Zandile Khumalo, who described as the 'Acting Deputy Director: Port Shepstone District Office', stated:

'APPLICATION TO LEASE FARM STIOENKOP (sic)

Your application to lease the above property refers.

It is with regret to inform you that your application has been unsuccessful.

Your profile will be kept on the data base of the potential lessees and you will be considered if there are other farms available'.

[6] No reasons or grounds for the aforesaid decision were stated.

[7] The applicant responded by on the same day addressing a letter to the Deputy Director of the respondent's department giving until the close of business on the 17 October 2011 to confirm that the deputy director 'withdraw any letters issued or about to be issued to successful applicant(s)...'.

[8] No reply was received and all subsequent attempts to contact the relevant officials at the respondent's offices either at Port Shepstone or Pietermaritzburg proved unsuccessful. A meeting was arranged in Pietermaritzburg for 19 October 2011, but cancelled by the respondent thirty minutes before the start.

[9] On 1 November 2011, the day the application was set down for hearing, the respondent however provided an undertaking not to appoint any beneficiary in respect of the farm in question pending the finalisation of the application. The undertaking from the State attorney was in the following terms:

‘Pursuant to the discussions held between the legal representatives at Court, the Department hereby gives the undertaking not to appoint any beneficiary in respect of the farm in question pending the finalisation of this application. However, we point out that the Department will appoint a care taker to look after the farm until the matter is resolved’.

[10] The respondent subsequently delivered an answering affidavit deposed to on 15 December 2011. In that affidavit it is stated that:

- (a) the letter from the acting deputy director of the Port Shepstone district office was issued ‘in error and this error was *bona fide*’;
- (b) only the selection committee can approve the allocation of leases;
- (c) the selection committee is accountable to the chief director of the Department’s office in the particular province;
- (d) the author of the letter had no authority or power to issue the letter, which therefore was issued in violation of the principle of legality.¹
- (e) no decision had as yet been made by the selection committee as to which of a number of applicants was to be allocated the farm in question for the purpose of leasing such farms.

¹ *Pharmaceutical Manufacturer association of South Africa, In re:Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 20.

[11] Accordingly, the respondent states that there is no decision to be reviewed, and accordingly there are no reasons it can deliver as requested, and that, in those circumstances, the review application was premature.²

[12] On the aforesaid facts, on the accepted test in *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints*³, this application falls to be decided on the basis that no decision has yet been taken on the applicant's application. Accordingly, the application for review would indeed be premature and should be dismissed.

[13] I have however been urged by the applicant to find that the respondent's allegations that no decision has been taken, are equivocal, and that its statement that no decision has been taken should not be accepted.

[14] The applicant contends that although the answering affidavit records⁴ that 'the fact of the matter is that no decision has yet been made by the Selection Committee as to which Applicant is to be allocated the farm in question for the purpose of leasing them', the deponent thereto further on states⁵ that:

'Furthermore, I point out that by virtue of these allegations the Applicant is now on its version aware of the beneficiary allocated the farm and still the Applicant has not joined the beneficiaries who have been allocated the farm who according to the applicant are Daxicab CC and Themba Qha Agricultural Cooperative'.

² *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd: Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA).

³ 1984 (3) SA 623 (A).

⁴ At paragraph 37 of the respondent's answering affidavit.

⁵ At paragraph 65 of the respondent's answering affidavit, which is a response to paragraph 6 of the applicant's supplementary affidavit dated 16 November 2011.

This statement was in answer to the allegations in the applicant's supplementary affidavit where it was stated that he had attended the Eskom offices in Kokstad on 15 November 2011 and had had sight of forms confirming the transfer of the Eskom services from the former farmer in question into the name of beneficiaries, three new accounts for services having been created in the name of one of the allocated beneficiaries Daxicab CC with two deposits having been paid by them and another beneficiary Themba Qha Agricultural Cooperative having completed forms and submitted them to Eskom, which was still processing the application.

[15] The aforesaid statement relating to the alleged non joinder, properly construed, does not detract from the statement that no decision has as yet been taken. Although perhaps inelegantly phrased, what was sought to be conveyed clearly was that if it was the applicant's version that the farm had indeed been allocated to these beneficiaries, then on the applicant's version they should have been joined as interested parties. The respondent's version in the answering affidavit is unequivocal that no decision has been taken allocating the farm to anyone, including these alleged beneficiaries.

[16] The applicant was of course understandably under the impression initially after receipt of annexure 'BN6' that a decision had been made and therefore beneficiaries determined. It might even have been distrustful of any initial suggestion that the offending letter was written in error, because of what it allegedly discovered at the offices of Eskom. But the objection raised here by the respondent was a technical one relating to a possible non joinder based on the applicant's version. It would however

simply be of no substance and fall away in the light of the respondent's case in the answering affidavit that no decision had been taken, which version prevails where the applicant has elected to argue the matter on the papers.

[17] In the alternative to the above argument relating to its distrust that no decision had been taken, the applicant argued that the respondent's failure to have allocated the farms since having received the applicant's application during the latter part of 2011, should be reviewed.

[18] The applicant's heads of argument deal comprehensively with the authorities establishing the constitutional imperative that administrative decisions of this nature should be taken expeditiously.

[19] The respondent's objection to any review being sought on the basis of an alleged delay or failure to have taken a decision is that this was not the case pleaded by the applicant. Accordingly, the respondent was never afforded an opportunity to respond thereto. There was also no prior request for the respondent to provide reasons as to why no decision had been taken by the respondent. In short the complaint is that this alternative basis for review and the factual basis on which it might be sought, was never raised in the papers and that it was now raised for the first time in the applicant's heads of argument.

[20] It is trite law that an applicant is required to identify clearly both the facts upon which it basis its cause of action and the legal basis for any cause of action⁶ in its founding papers.

[21] The respondent's objection is well founded. Until the answering affidavit was delivered, which appears to have been on or about the 15 December 2011,⁷ the applicant was entitled to persist with its application. But thereafter the application should not have been persisted with.

[22] There is no decision yet to review. No basis has been laid in the founding papers for reviewing the failure to take a decision, or for reviewing any delays which might have followed after the applicant's application was submitted.

[23] Accordingly, the applicant has not on the papers made out a case for the interdict claimed. However, based on the erroneous letter, it was justified initially to bring the application and to have persisted therewith until the answering affidavit was delivered and it could take instructions in regard thereto not to persist with its application.

[24] As regards costs, the applicant should not be out of pocket for having brought an application based on an erroneous letter addressed to it on behalf of the respondent. In the exercise of my discretion I determine that the respondent should pay the applicant's costs of the application on the attorney and client scale up to and including

⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25.

⁷ That is the date the answering affidavit was deposed to.

receipt of the respondent's answering affidavit and the applicant obtaining advice thereon. Thereafter, the applicant's persistence with the application, having regard to the factual basis on which it was premised, became untenable in law. The applicant must pay the respondent's costs of the application from that date.

[25] The order I grant is accordingly as follows:

1. The application is dismissed.
 2. The respondent is directed to pay the applicant's costs of the application on the attorney and client scale up to and including the delivery of the respondent's answering affidavit and the applicant obtaining legal advice in regard thereto.
 3. The applicant is directed to pay the respondent's costs of the application subsequent to the filing and service of the answering affidavit and the applicant obtaining legal advice in regard thereto.
-

DATE OF HEARING: 20 NOVEMBER 2012

DATE DELIVERED: 5 DECEMBER 2012

APPLICANT'S COUNSEL: ADV. A A GABRIEL S C

APPLICANT'S ATTORNEYS: GARLICHE & BOUSFIELD INC

C/O VENN NEMETH & HART

Ref: D Schaup

RESPONDENT'S COUNSEL: ADV TSI MTHEMBU

RESPONDENT'S ATTORNEYS: STATE ATTORNEY

Ref: Ms S Naidoo

C/O CAJEE SETSUBI CHETTY INC.

Ref: A Essa