THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 471/2015

In the matter between:

CAINE BROS (PTY) LIMITED T/A TRIPLE A BEEF **APPELLANT**

And

THE DEVELOPMENT TRIBUNAL FOR KWAZULU-NATAL **FIRST RESPONDENT**

THE DEVELOPMENT APPEAL TRIBUNAL FOR KWAZULU-NATAL **SECOND RESPONDENT**

THE TRUSTEES OF THE SURREY ROAD PROPERTY TRUST BEING KANTHILALL PREMRAJH NO AND SITA PREMRAJH NO **THIRD RESPONDENT**

Neutral Citation: *Caine Brothers v Development Tribunal for KwaZulu-Natal* (471/2015) [2016] ZASCA 81 (30 May 2016)

Coram: Lewis, Leach, Tshiqi, Seriti and Pillay JJA

Heard: 20 May 2016

Delivered: 30 May 2016

Summary: An objector to an application for land development is not entitled to review a decision on the basis that it has not had a hearing prior to the decision being made when in fact it has been heard on more than one occasion and in more than one forum.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (D Pillay J sitting as court of first instance).

1 The appeal is dismissed, save as set out below, with costs.

2 The words in paragraph 1 of the order ‘on an attorney and client scale’ are deleted.

3 The order of the high court in respect of the costs of the interlocutory application is replaced with:

‘The costs of the interlocutory application are to be paid by the third respondent.’

JUDGMENT

Lewis JA (Leach, Tshiqi, Seriti and Pillay JJA concurring)

[1] The appellant, Caine Brothers (Pty) Ltd t/a Triple A Beef (Caine Brothers), is the owner of the largest cattle farm and feedlot, as well as an abattoir, in KwaZulu-Natal. It sought to review the decision of the first respondent, the Development Tribunal for KwaZulu-Natal (the tribunal) that approved a land development application in terms of s 25 of the Development Facilitation Act 67 of 1995 (DFA). Caine Brothers had appealed unsuccessfully against the decision to approve the development to the second respondent, the Development Appeal Tribunal for the province (the appeal tribunal). It was unsuccessful in that body too, and so applied to the KwaZulu-Natal Division of the High Court (the high court) for the appeal tribunal’s decision to be reviewed and set aside as well. The high court (D Pillay J) declined the application in respect of both decisions, awarding attorney and client costs against Caine Brothers, but gave leave to appeal to this court. The first and second respondents do not oppose the appeal.

[2] The application for development was brought in terms of the DFA. It should be noted at the outset that in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* [2010] ZACC 11; 2010 (6) SA 182 (CC) the Constitutional Court, confirming a decision of this court [2009] ZASCA 106; (2010 (2) SA 554 (SCA)), declared that chapters V and VI of the DFA were constitutionally invalid. It suspended the order of invalidity for two years after the order, made on 18 June 2010. The chapters dealt with land development and the application for development was made, and the tribunal and appeal tribunal made their decisions, in terms of their provisions. The procedures and tribunals in the litigation under appeal became inoperative by virtue of the court's declaration on 17 June 2012. The DFA has now been repealed, with effect from 1 July 2015, and replaced by the Spatial Planning and Land Use Management Act 16 of 2013. Nothing in this appeal turns on these changes to the legislation. The tribunal had concluded its work before the order of invalidity had taken effect, and the appeal to the appeal tribunal was treated as a matter pending.

[3] The third respondent is the Surrey Road Property Trust (the trust) represented by its two trustees. It does oppose the appeal. The trust had applied, in February 2009, in terms of the DFA to change the zoning of a portion of a farm so that it could erect various buildings for different uses on it. The proposed development was named Platinum Ridge and is in the district of Hanover. The trust also applied to the Minister of Agriculture for permission to subdivide the farm in terms of the Subdivision of Agricultural Land Act 70 of 1970, which was granted during the course of the proceedings that are the subject of the appeal.

[4] Caine Brothers objected to the proposed development on 20 April 2009. It would have included a fuel filling station, a garage, a commercial area for shops and offices, and a hospital. The essence of the objection was that the development would jeopardize agricultural activities nearby because the area was not fit for habitation by people using such facilities, given the proximity of more than 20 000 head of cattle,

the feedlot and the abattoir. The odours, cattle flies and other hazards attendant on such agricultural activities, Caine Brothers maintained, would make the proposed development unfit for the proposed activities.

[5] The tribunal to which the application was made convened for a prehearing conference on 28 April 2009, at which Caine Brothers was represented not only by a director but also by an advocate, Mr A J Dickson SC, who has represented it throughout the proceedings and has appeared for it on appeal. The tribunal called for further clarity on the application. It met again on 1 April 2011. Starting on 31 May 2011, the tribunal met and heard representations by a land use planner representing the trust, and by Mr Dickson, representing Caine Brothers, amongst several others. The hearing was adjourned twice and met, in all, over three days. At the end of the hearing the chairman indicated that the tribunal had deliberated for a brief period, and had already concluded that it would not approve a hospital on the site. It required the trust to submit an amended plan and conditions of establishment, which the trust did on 12 December 2011.

[6] The amended plan and conditions of establishment excluded a hospital, and proposed that the land on which it would have been built be zoned as agricultural. The trust also asked for a reduced site for commercial use. It did not ask expressly for a quick shop to be attached to the filling station, although that would have been permissible in the commercial zone.

[7] In June of the following year the tribunal met and announced its decision. In the course of doing so, it said that members had conducted a comprehensive inspection of the site, listened to representations and read voluminous reports. It had taken account of objections and serious reservations about the proposed development. It concluded that it could approve only the filling station, a quick shop attached to it, a garage site, service industry sites, agricultural sites and private open space. It rejected the development of the commercial site. In effect, the tribunal took

account of Caine Brothers' and others' objections, and granted the application in much more limited terms than originally asked for by the trust.

[8] Despite this, Caine Brothers lodged an appeal to the appeal tribunal, which was heard over two days in 2013. On the first day, Mr Dickson objected that Caine Brothers had not been furnished with the amended plan and had not had an opportunity to be heard on it – the audi alteram partem principle had been violated. The appeal tribunal afforded him the opportunity to furnish further heads of argument and adjourned for that purpose. The objections were once again considered and expert reports furnished by Caine Brothers considered.

[9] It should be noted at this point that the appeal was a full rehearing, taking into account further evidence and submissions. Cora Hoexter *Administrative Law in South Africa* 2 ed (2012), the leading authority on South African administrative law, points out that, in general, administrative appeals are established to deal with the merits of a decision, and the appellate tribunal will step into the shoes of the decision-maker (p 65). She refers to the classic decision in *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590F-591A, in which Trollip J distinguished between a wide appeal, which amounts to a complete re-hearing and redetermination on the merits of a matter, and a narrow appeal where the appellate body is confined to the record. This was a wide appeal.

[10] The principal objection raised was that the quick shop had not been part of the original plan and was not even referred to in the amended plan submitted by the trust. Had Caine Brothers known that the trust would have been given the right to establish a quick shop it would have objected to it. As it did not know, it was not afforded an opportunity to be heard.

[11] However, no new or material information actually came to light, even after the adjournment, and the appeal tribunal concluded that Caine Brothers, through Mr

Dickson, had had a full hearing on all the matters before the tribunal. Of course if new information is presented there is an obligation on an administrator to give an affected person a hearing in respect of it: *Huisman v Minister of Local Government, Housing and Works (House of Assembly) & another* [1995] ZASCA 151; 1996 (1) SA 836 (A) at 845F-G and *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & Another* [2005] ZAWCHC 7; 2005 (3) SA 156 (C) paras 62 and 63. But, at least before the appeal tribunal, if not the tribunal, objections to the quick shop had been heard.

[12] Caine Brothers also argued before the appeal tribunal that the tribunal's decision was irrational as it allowed the application, as limited after the first hearing, despite serious reservations about it. The appeal tribunal rejected that argument too, pointing out that the reservations had been taken into account in refusing the hospital and commercial sites. The appeal tribunal concluded that there had been no unfairness in the process and that the tribunal's decision had been entirely rational. The process indicated 'a desperate attempt by [Caine Brothers] to delay the development'.

[13] The grounds of review of this decision raised by Caine Brothers are that the tribunal failed to allow representations on the amended application (it was in fact an amended plan and conditions of establishment) and was thus in breach of the audi alteram partem principle, set out in s 3(2), s 3(3), s 6(2)(*c*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and was also substantially unfair and unlawful in terms of s 6(2)(*h*) and (*i*) of the PAJA. The decision of the appeal tribunal was alleged to be unlawful on the same grounds. The high court rejected both grounds of review.

[14] From the brief history of the matter that I have traced, it is immediately apparent that Caine Brothers was given more than a fair hearing at every stage of the process. Mr Dickson and Mr Caine made representations at every opportunity. The fact that the amended plan was not furnished to it for comment is of no moment.

The request by the tribunal for the plan and amended conditions of establishment, and the decision that followed on it, was precisely to take account of the objections made by Caine Brothers and others. The amendment was a result of the hearings that were afforded to Caine Brothers. And the appeal tribunal afforded Mr Dickson, representing it, yet a further opportunity to put its case, adjourning the proceedings so that he could furnish a second set of heads of argument.

[15] There comes a time when an end must be put to hearings and consultations or no administrative decision would ever be given effect. In my view, the high court correctly found that the decisions were not reviewable on the ground of procedural irregularity.

[16] As to the irrationality argument, it rests on the basis that an urban development is incompatible with the agricultural uses to which Caine Brothers puts its property. The tribunal, it was argued, had expressed serious reservations about the development of Platinum Ridge, yet approved the development of a filling station, a quick shop attached to it, and a garage. This, submits Caine Brothers, is irrational. For it has paved the way for other commercial uses in the future. The owner of the site, it argues, may apply to the municipality for a consent use to open the way for commercial development. The obvious response to that is that if and when such application is made, Caine Brothers may object, as it is entitled to do, and the municipality will have to take those objections into account.

[17] Ironically, Caine Brothers contended that its own business was a source of various diseases that could negatively impact on people within a radius of 20 kilometers. Despite that, it employs some 500 employees and has shown no evidence of ill-health that they have suffered. Moreover, during the course of these proceedings, a group of unlawful occupiers (represented by the Gonawakhe Informal Settlement Residents Association) living on a neighbouring farm, applied to court for an order compelling Caine Brothers to disclose to it the reports on the negative impacts of cattle farming that it had submitted to the tribunal. In opposing the

application, Caine Brothers denied that its farming activities had a negative impact on people and created health problems. (The application was dismissed: *Gonawakhe Informal Settlement Residents Association & others v Caine Brothers (Pty) Ltd & others*, KwaZulu-Natal Division of the High Court, Case 5480/2014, 7 October 2015.)

[18] Indeed, there are a number of other developments where there are shops and even a lodge and conference centre, closer to Caine Brothers' property than Platinum Ridge would be. There is no evidence to suggest that they have suffered the adverse effects of cattle farming. In my view, the tribunal and the appeal tribunal, correctly followed the general principles of land development laid down in the DFA. Section 3(1)*(j)* provided:

'Each proposed land development area should be judged on its own merits and no particular use of land, such as residential, commercial, conservational, industrial, community facility, mining, agricultural or public use, should in advance or in general be regarded as being less important or desirable than any other use of land.'

As the trust argues, the tribunal made a balanced decision, giving considerable weight to agricultural use but also recognizing the need for other uses in the development it approved. The argument that the decision is irrational must also fail, as the high court correctly found.

[19] The last issue is costs. Pillay J made a punitive costs award against Caine Brothers. She also ordered that the costs of an interlocutory application by the trust to introduce the papers in the *Gonawakhe* application into the review application should be borne equally by Caine Brothers and the trust. I shall deal with the latter costs first.

[20] The trust applied to introduce the *Gonawakhe* papers at a late stage of the proceedings. It asked for an indulgence. Caine Brothers did not oppose the application but argued that the papers were irrelevant. Pillay J considered that these

papers demonstrated that Caine Brothers, which had argued before the tribunal that cattle farming and feedlots were health hazards, had contradicted itself in the *Gonawakhe* papers because it denied that its farming operations were hazardous to the people living on the adjacent farm. However, Bezuidenhout AJ in *Gonawakhe* found that the applicants had not shown that there were health problems arising from cattle farming on the adjacent farm, such that their rights to a safe environment had been infringed. There was thus no contradiction in the versions of Caine Brothers. I see no reason why the trust should not fully bear the costs of the interlocutory application.

[21] One of the reasons for ordering attorney and client costs against Caine Brothers was its allegedly contradictory stance in different proceedings. As I have held, this was not justified. Moreover, Pillay J held that Caine Brothers' pursuit of the litigation was unreasonable as was its opposition to the development of Platinum Ridge. In fact, however, its opposition to the development was largely successful, hence the changes to the plan and conditions of establishment, which followed its, and others', opposition. This reason for an award of punitive costs is also based on faulty reasoning.

[22] A court of appeal will rarely interfere in the exercise of a discretion by a court of first instance. But in this case, in my view, interference is warranted. The order of punitive costs was not justified by the reasons advanced by the high court. The ordinary rule that party and party costs be awarded against the unsuccessful party to litigation should be made.

[23] I accordingly make the following order:

1 The appeal is dismissed, save as set out below, with costs.

2 The words in paragraph 1 of the order 'on an attorney and client scale' are deleted.

3 The order of the high court in respect of the costs of the interlocutory application is replaced with:

‘The costs of the interlocutory application are to be paid by the third respondent.’

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C H Lewis

Judge of Appeal

APPEARANCES

For the Appellant:	A J Dickson SC
Instructed by:	Stowell & Co, Pietermaritzburg Symington & De Kok, Bloemfontein
For the Third Respondent:	S Nankan (Heads of Argument also prepared by M G Roberts SC)
Instructed by:	Dev Maharaj & Associates, Pietermaritzburg Honey Attorneys, Bloemfontein