NOT REPORTABLE

/BB

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case No: A1888/2004

Date heard: 29/05/2006

Date of judgment: 05/06/2006

In the matter between:

MITCHELL G. T. NO + 1 **Applicant**

and

THE MPUMALANGA PARKS BOARD + 1 **Respondent**

JUDGMENT

Du Plessis, J

The appellants applied to this division of the High Court for the review of certain decisions taken or purportedly taken by the first respondent and for ancillary relief. The application was dismissed with costs. With the leave of the court a *quo* the appellants now appeal against the judgment and order of that court.

The appellants are the trustees of the Enkosini Property Trust. The trust owns 4300 hectares of farm property in the Mpumalanga Province. The appellants bought the property in order to establish thereon a game sanctuary. The trust owns eight hand-reared lion cubs that the appellants bought from a game farm in the Free State. The appellants, representing the trust, wish to take the cubs from a facility in Gauteng (where they are kept) to the farm and to keep them there[1].

In terms of the Mpumalanga Nature Conservation Act, 10 of 1998 the trust may not import the lions into[2] or keep them in[3] Mpumalanga without a permit. The first respondent, established by section 2 of the Mpumalanga Parks Board Act, 6 of 1995, is charged with the consideration of applications for such permits[4]. The

---

[1] This was the position in 2001 and 2002. It changed at some stage, but we have been informed that the cubs are presently in Gauteng and that the appellants still want to take them to the farm.

[2] See section 31 read with the definition of "wild animal" in section 1 of the Nature Conservation Act

[3] See section 29 read with the definitions of "game" and "protected wild animal" in section 1 and with section 4(l)(d) and Schedule 4.

[4] Section 88 of the Nature conservation Act.

second respondent is the relevant member of the Executive Council of Mpumalanga and was joined for such interest as she may have in the application. No relief was sought against the second respondent and she took part neither in the proceedings in the court a *quo* nor in this court.

On 8 October 2001 the appellants applied for a permit to import the lions[5] into Mpumalanga and for one to keep them on the farm. By way of a letter incorrectly[6] dated 5 January 2002, the first respondent informed the appellants that the application had been refused. In the review application now under appeal the appellants sought an order reviewing and setting aside this decision to refuse the application. I shall refer to this application as "the first application".

On 11 February 2002 the appellants made a second application to the first respondent for a permit to import the lions and for a permit "to provide sanctuary, protection, rehabilitation and quality of life to all indigenous Southern African wildlife"[7] By the time the review application was launched on 19 June 2002, the first respondent had not made a decision regarding the second application. In the review application the appellants contended that the first respondent had constructively refused the application and sought the review of that constructive refusal. In addition to the orders reviewing and setting aside the first respondent's decisions, the appellants also sought an order directing the first respondent to issue the permits.

It is convenient first to deal with the second application and its alleged constructive refusal. Mr Bam for the appellants contended that, when the second application is considered, the first application should be seen as part thereof. I

---

[5] The application related to ten lions. Mr Barn for the appellants assured us that the appellants are at the moment concerned only with the eight cubs that they bought in the Free State.

[6] The correct date of the letter is 15 January 2002.

[7] This is for a permit to establish and operate a game park or similar institution in terms of section 40(1) of the Nature Conservation Act.

assume in the appellants' favour that the contention is sound and I shall have regard to both applications as a composite second application.

A brief overview of the facts is necessary. The first application is contained in a document headed "Proposal to the Mpumalanga Parks Board". The introductory paragraph thereof states the appellants' objectives as obtaining import and holding permits "to keep these cubs on our property initially in a large boma but ultimately free-roaming after the entire property is game fenced". The document contains a number of mission statements including, under the sub-heading "Research", to test "the method undertaken by the Indian Government and the University of Calcutta when releasing a number of captive bred Gir lions back into the wild". Under the headings "Sanctuary Framework", "Logistics", "Release Research Project", "Game Fencing", "Bomas", "Feeding" and "Property", the document then sets out the way in which the appellants intend going about the establishment of the proposed sanctuary and how they intend to deal with the lions. Annexed to the application is a plan of the fencing that the appellants intended to use. Attached to the application there also is a "Project Summary" and an "Organisation History". I find it unnecessary to summarise these documents. It is sufficient to state that, while the documents state laudable objectives, they are wholly lacking in substance. There is no proper business plan, no credible projection of income with which to fund the project and no scientifically based plan regarding the keeping and rehabilitation of the lions. The appellants also submitted a copy of an e-mail communication from Professor R. L Brahmachary of the University of Calcutta. This communication is evidence of no more than that the appellants had been in contact with Professor Brahmachary and had in broad terms explained their intentions to him and also that he had shown interest.

Upon receipt of the first application, the first respondent forwarded a copy thereof to Mr Gerrie Camacho, a zoologist in the first respondent's employ and stationed at Lydenburg. Mr Camacho prepared a written report wherein he raised some concerns but expressed the view that the project could be viable if permits are issued subject to strict conditions. The first respondent's relevant officials, including Mr Camacho, then considered the application. In the process they consulted Professor Dewald Keet, the chief state veterinarian in the Kruger National Park. Professor Keet is a recognised expert in lion research and breeding. He was, to say the least, not supportive of the project. On 14 January

2002 the relevant officials met and unanimously resolved to refuse the permits. In its letter conveying this decision to the appellants, the first respondent wrote that its "policy relating to the hunting, keeping and trade of lion … states that no captive ("canned") cats may be imported into the province." The lion cubs in question fall into the category of "captive cats". In addition, the letter stated, a national moratorium on the establishment of new lion holding and breeding facilities was still in place and that the first respondent supported the moratorium.

Upon learning that their application had been refused, the appellants, among other actions that are not now relevant, met with Mr J. J. Muller, the first respondent's manager of regulatory services. There is a dispute of fact as to what Mr Muller told the appellants. The first respondent avers that Muller told the appellants in .detail why their application had been refused.

On 11 February 2002 the appellants submitted their second application. This application is equally lacking in substance and is to a large extent little more than a statement of intent. The first respondent sent the application to a number of its own experts and also to Prof. Keet whom I have mentioned earlier. All the experts raised concerns, including concerns about the lack of substance in the application. Some of these experts visited the farm and reported that it was by no means ready and equipped to serve as the intended wildlife sanctuary. The deponent on the first respondent's behalf describes the farm as "a cattle farm fenced in by ordinary cattle fence and on which a somewhat dilapidate dwelling is situate". In view of these reports, the first respondent dispatched to the appellants an e-mail communication dated 10 March 2002 that, for some reason or another, only reached the appellants on 16 April. In this communication the appellants were informed that experts had been consulted in regard to their application and of the views they had expressed. The communication raised a number of concerns and queries and concluded: "It is our considered opinion that the MPS, as a responsible conservation agency employed by the Province to manage biodiversity conservation, cannot support the Ekosini project as is.

Unless you address the above issues, come up with a thorough management plan, enlist a local academic expert in the field of lion care, plan the fate of

surplus animals in an acceptable manner and create a suitable financial support model, the MPB's position will unfortunately remain the same".

To the communication of 10 March the appellants responded by way of a letter dated 26 April 2002. Apart from containing a management plan, the response did not address the concerns that the first respondent had raised. As for the management plan, it again contained little more than statements of intent. From it one cannot determine the financial viability of the proposed project nor its scientific soundness. As regards existing facilities, it appears from the management plan that, even at that stage, the appellants had no more than a "temporary 12 hectare camp immediately available for the lions".

In reply to the appellants' letter of 26 April, the first respondent wrote to the appellants on 27 May 2002. In this letter the first respondent stated that it required more information on a number of aspects specified in the letter.

For the appellants Mr Bam submitted that a comparison between the first respondent's letter of 10 March and that of 27 May shows that the first respondent was merely repeating the same requests for information. In addition, counsel submitted that when the information was requested, the first respondent had already been furnished therewith. This, counsel argued, amounted to no more than procrastination and it evinces a constructive refusal of the application. I cannot agree. Some of the questions in the letter of 27 May are indeed similar to some of those asked in the letter of 10 March. The reason is clear however. The appellants did not adequately address the issues raised in the first letter. On the whole, the appellants submitted an application without substance and cannot complain if the first respondent, in the proper exercise of its discretion, seeks further clarification. It is concluded that the first respondent did not constructively refuse the second application. The court a *quo* thus correctly refused the application to review the alleged constructive refusal of the second application.

From the above conclusion it follows that to consider the application for review of the first application will be no more than an academic exercise. Suffice it

therefore to state that the first application was so lacking in substance that it would have been irresponsible for the first respondent to have granted it.

Both parties were represented by two counsel. Having regard to the bulk of the papers and the importance of the subject matter of the appeal, the employment of two counsel was warranted.

In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

B. R. DU PLESSIS

Judge of *the High Court*

I agree

JUDGE M. F. LEGODI

Judge of *the High Court*

I agree

J. R. MURPHY

Judge of *the High Court*

Appellant's Counsel: (Couzyn Hertzog & Horak Attorneys)

Adv. A. J. Barn (SC) with Adv. M. D. Du Preez

Respondents Counsel: The State Attorney

Adv. A. C. Ferreire (SC) with Adv. M. J. Botha

Heard on: 29 May 2006

Delivered: 5 June 2006