REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PRETORIA)

Case Number: 99521/15

18/10/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

13 OCTOBER 2016 **SK HASSIM AJ**

In the matter between:

BROWNS AIRSIDE	**APPLICANT**
and	
THE AIRPORTS COMPANY OF SOUTH AFRICA	**FIRST RESPONDENT**
TOURVEST HOLDINGS (PTY) LTD	**SECOND RESPONDENT**
MY LIGHT HOLDINGS (PTY) LTD	**THIRD RESPONDENT**
BROWNS THE DIAMOND STORE (PTY) LTD	**FOURTH RESPONDENT**

JUDGMENT

S K HASSIM AJ:

THESE PROCEEDINGS

[1] I have before me two applications for an interdict. The applicant ("*Browns Airside*") seeks a *mandamus* that the first respondent ("*ACSA*") implements a tender that was awarded to it on 23 February 2015 ("*the tender award*"). I refer to this application as the "main application". The third respondent, Tourvest Holdings (Pty) Ltd ("*Tourvest*"), the only respondent opposing the application, counter applies for an interim interdict restraining ACSA from giving effect to the tender award pending the finalisation of an application reviewing ACSA's decision to award the tender to Browns Airside.

[2] The main application was launched on 14 December 2015. The counter application was filed simultaneously with Tourvest's answering affidavit on 14 January 2016. I was informed at the commencement of the hearing that the review application is enrolled for hearing during February 2016.

[3] In the main application, Browns Airside seeks a final interdict in the following terms:

> *"1. Directing that the First Respondent [ACSA] forthwith take any and all steps of whatsoever nature so as to implement First Respondent's award of Opportunity DFS 13 to the Applicant."*

[4] Tourvest, in its counter-application seeks an interim interdict in the following terms.

> *"1 . , pending the adjudication of the review application ... under case number 66825/2015, the first respondent be interdicted from implementing Opportunity DFS 13;*
>
> *2. That the main application be stayed pending the adjudication of the review application."*

REVIEW APPLICATION

[5] On or about 20 August 2015, Tourvest launched an application to review the decision by the first respondent, the Airports Company of South Africa ("*ACSA*"), to award the tender to Browns Airside.

[6] Tourvest sought the following order in the original notice of motion.:

"*1. Reviewing and setting aside the decision taken by the ACSA to award opportunity DFS 13 in terms of the RFB to the Second Respondent [Browns The Diamond Store (Pty) Limited];*

2. Awarding opportunity DFS 13 to the applicant on the terms of the Applicant's bid, alternatively that the award in respect of Opportunity DFS 13 in terms of the RFB be referred back to ACSA for re-evaluation of the bids of the applicant, Browns and Shimansky which were submitted in respect of this opportunity, with appropriate directives from this court that the Objective Criteria set out in clause c7 on page 35 of the RFB ("the Objective Criteria") should be disregarded in the adjudication process."

[7] Browns Airside was not a party to the review application. Instead "Browns The Diamond Store (Pty) Ltd (i.e. the fourth respondent) was.

[8] Tourvest believed that "Browns The Diamond Store (Pty) Ltd" had been awarded the tender but this was not so. The tender had been awarded to Browns Airside CC (the applicant in the main application), who is a corporate entity separate from Browns The Diamond Store (Pty) Ltd.

[9] However, when the record was delivered in terms of rule 53(1)(b) Tourvest discovered that neither Browns the Diamond Store (Pty) Limited nor My LighT Holdings (Pty) Limited had submitted bids. The persons who had submitted bids were Browns Airside CC which trades under the names Browns Jewellers and

Rapivest 12 (Pty) Limited trading as Shimansky. The latter was also an unsuccessful bidder.

[10] Tourvest supplemented its founding affidavit and amended the notice of motion in the review application after the record had been received. The relief which it sought in the amended notice of motion was the following:

> "*1. Reviewing and setting aside the decision taken by the ACSA to award opportunity DFS13 in terms of the RFB to the Second Respondent [Browns The Diamond Store (Pty) Limited];*
>
> *2. Awarding opportunity DFS13 to the applicant on the terms of the applicant's bid, alternatively that the award in respect of Opportunity DFS 13 in terms of the RFB be referred back to ACSA for re-evaluation of the bids of the applicant, Browns and Shimansky which were submitted in respect of this opportunity, with appropriate directives from this court that the Objective Criteria set out in clause 7 on page 35 of the RFB ("the Objective Criteria") should be disregarded in the adjudication process.*"

[11] The record contained among others a submission by ACSA's Bid Evaluation Committee ("*BEC*") to the Bid Adjudication Committee ("*BAC*"). On 13 April 2015 after ACSA had awarded the bid to Browns Airside CC, the Bid Evaluation Committee recommended to the National Bid Adjudication Committee that the awardmade to Browns Airside CC on 23 February 2015, should be "*rescinded and*

cancelled". It further recommended that the bid should be awarded to Shimansky. It appears from the record that prior to this recommendation being made to the Bid Adjudication Committee, Shimansky had launched legal proceedings challenging ACSA's award to Browns Airside.

JOINDER OF BROWNS AIRSIDE CC AND SHIMANSKY IN THE REVIEW APPLICATION

[12] Tourvest amended the notice of motion and delivered a supplementary affidavit. The names of Browns Airside CC (the applicant in the main application) and Rapivest 12 (Pty) Ltd trading as Shimansky ("*Shimansky*") as fourth and fifth respondents respectively, were inserted into the heading.

[13] The amended notice of motion and supplementary affidavit were served on Browns Airside and Shimansky. So too was the review application. I have my doubts as to whether the joinder of Browns Airside and Shimansky was procedurally correct. I would have thought that the procedurally correct way to do so would have been to bring an application for the joinder of these parties. Browns Airside was at liberty to bring an application in terms of rule 30 to set aside an irregular step. It has not done so. To the contrary, it has agreed to its joinder. Shimansky's position is different it has neither consent to being joined nor has it refused to be joined.

THE COUNTER APPLICATION

[14] The question whether Browns Airside has been joined in the review application is important. In deciding whether Tourvest has demonstrated a *prima facie righ,t* a court has to consider Tourvest's prospects of success in the review application. In my view if there is no pending *lis* between Tourvest and Browns Airside in the review application, Tourvest would not be able to establish a *prima facie* right to an interdict. The joinder of Browns Airside has removed the obstacle to the main application and the counter application because it is before the court in the counter application. Whether Shimansky must be joined to the counter application or not does not arise because if the counter application is granted Shimansky would not be adversely affected by the order. To the contrary, it may welcome it. It too attacks the decision awarding the tender to Browns Airside. It would be very surprising that it would favour the implementation of the award.

[15] In my view the main application and counter application are related such that a finding on the one affects the other. By reason of my decision on the main application and the counter application I do not have to examine whether Tourvest has made out a case for an interim interdict. I do not think it would be proper to express any view on the counter-application except on the question of costs.

MAIN APPLICATION

[16] The non-joinder of Shimansky in the application for a *mandamus* by Brown Airside is entirely on a different footing from itsnon- joinder in the counter application. Shimansky is also challenging ACSA's decision to award the tender to Browns Airside. While I do not have that application before me I can safely assume that Shimansky's case is that the tender should have been awarded to it. Implementing the award will affect Shimansky. It may want to say something about that. It is trite that if a party as a direct and substantial interest in any order that a court might make or if such order could not be sustained or carried into effect without prejudicing that party, that party is a necessary party and should be joined. It is trite that all necessary parties should be afforded the opportunity to be heard on matters which affect them. It is so that the main application was served on Shimansky. In my view that is not sufficient.

[17] If Shimansky is not a party to the main application, it is entitled to take the position that because it was not a party to the application it is not bound the court order and may refuse to allow the execution of the court order. This is unsatisfactory. There also exists the possibility that Browns Airside will have to bring an application to which Shimansky is a party to enable it to execute the order. Then there is also the possibility that Shimansky would bring an application to stop the execution of the

order. Launching such an application will be warranted. (Whether it will succeed is another matter. The facts and other issues will determine this).

[18] The order which Browns Airside seeks, will affect Shimansky. Shimansky has the same interest which Tourvest has. Clearly Browns Airside considered Tourvest to be a necessary party which it brought before court. The same right has not been accorded to Shimansky.

[19] Shimansky is a necessary party and it must be joined. Where a necessary party has not been joined the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises. [1]

[20] I am alive to the fact that Browns Airside has brought the main application to Shimansky's attention and Shimansky has not taken any steps to intervene in the proceedings. Mere notification is not sufficient. The fact that the main application has been served on Shimansky does not alter the position. In this regard it was stated in in Amalgated Engineering Union v Minister of Labour[2] that:

"*Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as res judicata.*"

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1 Khumalo v Wilkens & Another 1972 (4) 470 (N).

2 1949 (3) SA 637 (A)

[21] Tourvest has raised a non-joinder of Shimansky squarely on the papers. It was submitted on behalf of Tourvest that because Shimansky has not been joined to the proceedings, the application should be struck from the roll. I am in agreement that Shimansky must be joined to the proceedings. I however disagree that the appropriate order should be that the matter is struck from the roll. In my view the appropriate order in such circumstances would be for the main application to be postponed *sine die*. Browns Airside can then decide whether it wishes to join Shimansky to the application.

[22] I find that Shimansky is a necessary party and it must be joined. This brings me to the question as to the fate of the main application. A court may dismiss an application if there has been a non-joinder of a necessary party.

THE APPROPRIATE ORDERS

[23] Mr Swart who appeared for Tourvest did not move for an order dismissing the application. He submitted that the application should be struck from the roll. The postponement of an application has the same effect as one struck from the roll. I am not inclined to make an order striking the application from the roll but am prepared to postpone the main application. This will give Browns Airside an opportunity to join Shimansky.

[24] The main application and the counter application in my view are mutually exclusive. I am not inclined to grant the counter application. If I do so, I will effectively be refusing the main application. If I consider the counter application and make a finding in Tourvest's favour that will effectively put an end to the main application. If I am to afford Browns Airside an opportunity to join Shimansky by postponing the main application and at the same time grant the counter application, the effect thereof would be that Browns Airside cannot proceed with its application because a court has already made a decision interdicting the implementation of the award. To grant the counter application and at the same time grant an indulgence to Browns Airside by postponing the main application will hold no benefit for Browns. On the other hand, Tourvest will not be prejudiced if the applications are postponed. If Browns Airside enrols the main application in due course Tourvest will be able to pursue its counter application. The just and equitable order in the circumstances is to postpone both applications.

[25] I turn to consider who should bear the wasted costs occasioned by the postponement. The postponement is caused by Brown Airside failing to join Shimansky. Had Shimansky been joined there would have been no need for a postponement. Browns Airside has caused the postponement. In the circumstances it is unfair for Tourvest to be burdened with costs. The appropriate order insofar as costs are concerned would be for Browns Airside to pay the wasted costs occasioned by the postponement of the main application and counter application.

[26] I therefore make the following order:

(a) The main application and counter application are *postponed sine die*.

(b) The applicant is to pay the wasted costs occasioned by the postponement.

SK HASSIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

Appearances:

For the Applicant: Adv A Katz SC

JL Kaplan

For the Respondent: Adv BH Swart SC