

SOUTH AFRICA / JUDGMENT

Amitrix Investments (Pty) Ltd v Brambilla and Another In re: Brambilla and Another v Pecvest 6 (Pty) Ltd and Others (2012/21951) [2012] ZAGPJHC 276 (29 November 2012)

[2012] ZAGPJHC 276**COURT**

South Gauteng High Court, Johannesburg

BEFORE

AC Dodson

CASE / FILE NUMBER

2012/21951

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REPUBLIC OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2012/21951**DATE:** 29/11/2012**In the****matter between :**

AMITRIX
INVESTMENTS (PTY) LIMITED.....
Applicant
and

BRAMBILLA:

MATTEO.....
First Respondent

BRAGANTINI:

ALESSANDROSecond
Respondent

In re:**BRAMBILLA:**

MATTEO
.....First
Applicant

BRAGANTINI: ALESSANDROSecond
Applicant
PECVEST
6 (PTY) LIMITED
.....First
Respondent
BUILDING
ENERGY SpA
.....Second
Respondent
AMITRIX
INVESTMENTS (PTY) LIMITEDThird
Respondent

JUDGMENT

DODSON AJ:

Introduction

This is an interlocutory application in terms of rule 30A to compel the respondents, Messrs Brambilla and Bragantini, to produce a document said to be referred to in their founding affidavit in the main application. In the main application, the respondents as applicants seek an order for the winding up of a company by the name of Pecvest 6 (Pty) Limited on the grounds that it will be just and equitable to do so.

Factual background

Because answering affidavits have not been filed in the main application and because the background facts were not adequately traversed in the interlocutory application, I must rely on the founding affidavit in the main application to establish the factual background. However, I do not understand the facts which are material to this decision to be in dispute. I will as far as possible refer to the parties by name. If I refer to the “the respondents”, I refer to Brambilla and Bragantini.

In terms of the Renewable Energy Independent Power Producer Procurement Programme (“the procurement programme”), the government invited the submission of proposals from the private sector for the finance, construction, operation and maintenance of renewable energy power generation facilities.

Building Energy SpA is a corporation registered under the company laws of Italy and based in Milan. It specialises in the development,

construction and operation of photovoltaic powerplants. It is the second respondent in the winding up application. Brambilla is the group chief financial officer of Building Energy SpA.

Renewable Energy Investments South Africa (Pty) Limited (“REISA”) is a South African company. In response to the procurement programme it went about identifying a suitable site for a facility for photovoltaic renewable energy power generation. It identified an appropriate site in the Northern Cape province. It is known as the Kathu Project. Along with 52 others, it submitted a bid in response to the call for proposals made in terms of the procurement programme. It was selected as a preferred bidder. Its Kathu Project bid comprised the construction and operation of a 75 Megawatt solar photovoltaic powerplant from which electricity would be generated and fed into Eskom’s national grid.

Prior to REISA’s bid submission, Building Energy negotiated with the shareholders of REISA to purchase its entire share capital. The negotiations were successful and Building Energy became the sole shareholder of REISA. Thereafter it disposed of 40% of its shareholding to a local buyer to enable REISA to comply with the procurement programme selection criteria, particularly those requiring bidders to achieve certain broad-based black economic empowerment objectives.

REISA is the project company for the Kathu Project. If it is to go about the development of the project, it must bring in the necessary expertise and capacity to develop the facility and thereafter to operate and maintain the facility. For purposes of the development of the facility, it will be required to enter into an “engineering, procurement and construction” contract or EPC contract with an EPC contractor.

Building Energy has expertise and technical know-how in the field of renewable energy development. However, in order to enable it to act as EPC contractor to REISA, it needed to form a joint venture with local South African contractors. To this end, it entered into negotiations with Amitrix Investments (Pty) Limited (“Amitrix”). Amitrix is owned as to 70% of its shares by another Italian company, CMC Italy, and as to 30% of its shares by the Guma Group whose Chief Executive Officer is a Mr Robert Gumede.

The negotiations culminated in the conclusion of a written joint venture shareholders agreement between Building Energy, Amitrix and Pecvest 6 (Pty) Limited (“Pecvest”). Pecvest was to form the company through which the joint venture would operate. The shares in Pecvest are owned as to 50% by Amitrix and as to the other 50% by Building Energy. Brambilla and Bragantini, the respondents in the interlocutory application and the applicants in the main application, are directors of Pecvest.

During the latter part of 2011, negotiations took place with a view to the conclusion of “heads of terms” of an envisaged

EPC contract between REISA and Pecvest. It was hoped that these would be finalised before the bid submission date on 4 November

2011.

However, in the lead-up to the bid, disagreements surfaced between Building Energy and Amitrix. Apparently, Amitrix were unhappy with the profit margins, the risk they were required to bear and their duty to provide guarantees. The parties were unable to settle their differences before the bid date of 4 November 2011. As a result, the “heads of terms” were not agreed on. Nevertheless, on 6 December 2011, REISA was awarded “preferred bidder status” on the Kathu Project.

The disagreements between the parties continued into January 2012. The differences were aggravated when it later allegedly emerged that Amitrix had entered into an agreement with a different company, Tozzi Renewable Energy, for purposes of another bid in respect of the Olyven Kolk project, a different photovoltaic renewable energy project. Building Energy had hoped to compete for this project too in co-operation with Amitrix, through the acquisition of a company called Texforce.

The differences culminated in a letter being addressed on 23 February 2012 by Building Energy’s attorneys to Amitrix

cancelling the joint venture agreement between them on the basis of its alleged repudiation by Amitrix.

Subsequently, Building Energy have concluded a joint venture agreement with another company, WBHO Construction (Pty) Limited for purposes of carrying out the EPC works for the Kathu Project. It is this joint venture agreement which forms the subject matter of the present interlocutory application.

Issues in the application

In paragraph 87 of the founding affidavit in the winding up application, Brambilla says the following:

“Subsequent to the cancellation of the joint venture agreement by the second respondent and it becoming clear that there was no prospect of the first respondent [ie Pecvest] being contracted by REISA to perform the EPC contract in respect of the Kathu project, the second respondent has pursued its discussions with WBHO and a joint venture agreement has been concluded on 2 March 2012 to carry out the EPC works.”

On the basis of this reference to “a joint venture agreement” Amitrix issued a notice in terms of rule 35(12) identifying the agreement as one of the documents referred to in the founding affidavit which it required the respondents to produce. The

respondents filed a notice in which they declined to do so. Hence the current application. The grounds upon which the respondents

oppose the application are as follows:

The respondents argue that no document is referred to in the affidavit. All that is referred to is the “joint venture agreement”. That, it is argued, does not make clear reference to a document;

It is argued that WBHO and Building Energy are parties with a direct and substantial interest in the interlocutory application and ought to have been joined. The respondents point out that Amitrix and WBHO are competitors, that the order sought will require the production of a confidential commercial transaction between Building Energy and WBHO and that Building Energy (and presumably therefore Brambilla as director) is precluded from disclosing its contents to any third party without the consent of WBHO;

The respondents argue that the terms of the joint venture agreement are irrelevant to the issues in the main application and that those judgments which suggest that documents requested in terms of rule 35(12) must be produced regardless of relevance were clearly wrongly decided.¹

The appropriate starting point in dealing with these contentions is the non-joinder point because if it is good, the matter cannot

proceed further without the joinder being effected. Amitrix would have been obliged to join WBHO and Building Energy as parties if they have a direct and substantial interest which is affected by the relief sought in the interlocutory application.

Direct and substantial interest

In *Aquatour (Pty) Ltd v Sacks & Others*² Vivier JA summarised the principles pertaining to whether or not a party is required to be joined as an interested party as follows:

“The principles applicable to joinder are well established and appear from decisions such as Amalgamated Engineering Union v Minister of Labour 1949

- (3) SA 637 (A); *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 167 C-F, 169 in fin; *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 318 A at 318 D-H; *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotel Ltd and Another* 1972 (4) SA 409 C and *Wistyn Enterprise (Pty) Ltd v Levi Strauss & Co and Another* 1986 (4) SA 796 (T) at 801 B-G. For present purposes it is sufficient to refer to the following summary of these principles by Corbett J in the *United Watch & Diamond Co* case supra at 415 E-H:

‘It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and the duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court might make ... In *Henri Viljoen (Pty) Ltd v Awerbuch Bros* ... Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a “direct and substantial interest” and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169)

‘... an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation.’

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ... and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court...”

Coming to the facts of this matter, the respondents asserted in their response to the rule 35(12) notice that Building Energy “is precluded from disclosing the contents [of the joint venture agreement] to any third party without the consent of WBHO.”

In the answering affidavit in the interlocutory application, Brambilla says –

“It is a confidential commercial transaction, the terms of which neither Building Energy or WBHO should be compelled to disclose to the Applicant, especially not in circumstances where the Applicant is a self-confessed competitor of WBHO, involved in the same business of providing construction services in respect of photovoltaic projects in South Africa.”

Amitrix answered this by saying that confidentiality was no bar to discovery and further that there was in any event no admissible

evidence of confidentiality. It described the assertion of confidentiality in the answering affidavit as nothing more than an

opinion.

However, where Amitrix puts up as an annexure to its founding affidavit in the interlocutory application the respondents’

response to the rule 35(12) notice asserting that they are precluded from disclosing the contents without the consent of the WBHO, it seems to me that that assertion must form the basis for assessing who ought to be joined.

If, as the assertion suggests, Building Energy and WBHO contracted on the basis that the agreement would be confidential and the effect of the order sought is to force a party who is a director of Building Energy to breach the confidentiality and place the agreement in the hands of a competitor, that in my view gives rise to a direct and substantial interest in the outcome of the dispute from the perspective of Building Energy and WBHO. Their contractual rights are affected and there is potential prejudice.

It was argued on behalf of Amitrix that the case was analogous to the situation where a subtenant has no direct and substantial

interest (other than a commercial or financial interest) in a dispute between landlord and tenant.³ However those decisions are based on the fact that the subtenant is not a party to the main lease and only holds rights which are derived from the rights of the tenant. In this matter, the parties whose joinder is under consideration are direct parties to the contract in question.

It may well be that it is ultimately held that the confidentiality for which the parties contracted (if this is so) provides no basis for objecting to the production of the written record of the agreement. I express no view on that. However, the parties who are potentially prejudicially affected are entitled to participate in the debate in that regard, particularly where Building Energy was already a party to the main application.

In the circumstances, I am of the view that both Building Energy and WBHO ought to have been joined as parties to the interlocutory

application and the matter cannot proceed in their absence.

In those circumstances, it was agreed between the parties that the matter would have to be postponed and their joinder directed.

The respondents argued further that in such event, the wasted costs of the day's proceedings ought to be borne by the applicant,

Amitrix. I agree with this submission.

I accordingly make the following order:

The matter is postponed sine die;

Building Energy SpA and WBHO Construction (Pty) Limited are joined as the third and fourth respondents respectively in the

interlocutory application;

The third and fourth respondents so joined must -

if they intend opposing the interlocutory application, file a notice of intention to oppose within 5 court days of service on them of this order by the applicant; and

within 10 court days thereafter, file their answering affidavits, if any.

The applicant must file its replying affidavit, if any, within 10 court days after the filing of the last answering affidavit in terms of paragraph 29.3.2 above or the expiry of the period for doing so, whichever is earlier;

The applicant is ordered to pay the wasted costs of the proceedings on 10 October 2012;

Subject to paragraph 29.5, the question of liability for the costs of the interlocutory application is reserved.

AC DODSON AJ

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ADV PRJ STRATHERN

INSTRUCTED BY: BRIAN KHAN INC, UMLILO HOUSE, 2 BURNSIDE ISLAND, 110 JAN SMUTS AVENUE, CRAIGHALL PARK, JOHANNESBURG

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HEARD: 10 OCTOBER 2012

JUDGMENT

DELIVERED: 29 November 2012

1Magnum Aviation Operations v Chairman, National Transport Commission 1984 (2) SA 398 (W); Machingawuta and Others v Mogale Alloys (Pty) Ltd and Others 2012

(4) SA 113 (GSJ). Cf Universal City Studios v Movie Time 1983 (4) SA 736D; Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C); Unilever Plc and another v Polagric (Pty) Ltd 2001

(2) SA 29 (C); Penta Communications Services (Pty) Ltd v King and another 2007

(3) SA 471 (C).

2 1989

(1) SA 56 (A) at 62 A-F.

3United Watch above at 417A-D.

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