



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

2013.06.13

DATE

JM Malane

SIGNATURE

CASE NUMBER: 55926/12

DATE: 13 June 2013

TOTAL SOUTH AFRICA (PTY) LTD

INTERVENING PARTY

In re:

BP ATLAS ROAD; trading name of
ALLADIN SERVICE STATION CC

FIRST APPLICANT

ROOKSANA AND RASHID SOOBRAYAN

JOINT SECOND
APPLICANT

AZITEX CC Reg No. 2010/153454/23

FIRST RESPONDENT

EDOPAX CC Reg No. 2010/153457/233

ALTERNATIVE FIRST
RESPONDENT

STAND 13 EASTWOOD ROAD DUNKELD (PTY) LTD
Reg No. 2000/003022/07

SECOND RESPONDENT

ENGEN PETROLEUM LIMITED

Reg No. 1989/03754/06

THIRD RESPONDENT

THE MEC; DEPARTMENT OF AGRICULTURE,
CONSERVATION AND ENVIRONMENT;
GAUTENG PROVINCIAL DEPARTMENT

FOURTH RESPONDENT

EKURHULENI METROPOLITAN MUNICIPALITY

FIFTH RESPONDENT

THE CONTROLLER OF PETROLEUM PRODUCTS

SIXTH RESPONDENT

THE MINISTER; NATIONAL DEPARTMENT OF
MINERALS AND ENERGY

SEVENTH RESPONDENT

THE MINISTER; NATIONAL DEPARTMENT OF
ENVIRONMENTAL AFFAIRS AND TOURISM

EIGHTH RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO INTERVENE

MABUSE J:

1. This is an application brought under the provisions of Uniform Rule 12 read with Uniform Rule 6(14) in terms of which Total South Africa (Pty) Ltd ("Total") seeks

an order to intervene (“the intervention order”) as the Ninth Respondent in an application issued out of this court on 27 September 2012 under case number 55926/12 (“the Main Application”) by BP Atlas trading as Alladin Service Station CC, the First Applicant and Rooksana and Rashid Soobrayan (“the Joint Second Applicant”). For reasons of convenience, I will refer to the First Applicant and the Joint Second Applicant in the Main Application as the “Applicants”.

2. When the Total issued this application, it had sought, among others, the following order:

“The costs of this Application be costs in the cause in the Main Application, alternatively, the costs of this Application be paid jointly and severally by all such parties as oppose the relief sought herein.”

Notwithstanding the said prayer, the Applicants have seen it fit to oppose the application to Intervene. They do so through the opposing affidavit of Rooksana Soobrayan which was supported by the affidavit of Yaseen Soobrayan.

3. I now proceed to deal with the circumstances that led to Total's application to be part of the Main Application. The sequence of the relevant steps preceding the launch by Total of this application is of some importance. Mrs. Rooksana Soobrayan and her husband, Mr. Yaseen Soobrayan, are both members of a closed corporation called Alladin Service Station CC. Through this closed

corporation they conduct a business of a petrol station and related activities in Kempton Park under the name of BP Atlas Road.

4. By way of notice of motion initially issued on an urgent basis on 27 September 2012 referred to as the main application, the Applicants seek firstly, a permanent and final interdict against the development and operation of a retail fuel filling station and the related activities on Erf 1094 Parkhaven Extension 7, otherwise known as a Portion of Portion 2000 of the Farm Witkoppies No. 64 I. R; hereinafter referred to as “the property” in so far as such development and operation are based on:

- 1) any licences issued by the Sixth Respondent;
- 2) any rezoning by the Fifth Respondent; and,
- 3) any Environmental Authorisation granted by the Fourth Respondent.

Secondly, they seek a declaration of invalidity of a decision of the Fourth Respondent taken on 13 September 2010 to the effect that the Environmental Authorisation issued in respect of the property in terms of the Environmental Authorisation Act No. 73 of 1989 has not lapsed; thirdly, a declaration of invalidity of the decision of the Fourth Respondent dated 6 December 2007 in which it granted the Authorisation and the consequent declaration of the invalidity of the Authorisation itself; fourthly, and finally, they seek a declaration of the invalidity and their setting aside of any site and retail licences issued by the Sixth Respondent in respect of the property together with certain relief.

5. It is clear, as it appears from the notice of motion in the Main Application, that Total was not cited as a party in the Main Application despite the fact that Engen Petroleum Ltd (“Engen”), a company which is a large distributor of petrol in South Africa, was cited therein as a party. Total contends that it would appear that at the time the Applicants launched the application the First and Second Respondents had not provided full details to Total or the precise details that the Applicants sought. However the First and Second Respondents had reassured Total that they had filed the papers opposing the Main Application and that they would in due course report back to Total. Subsequently Total was informed by the First and Second Respondents that the Main Application had been dismissed by the court due to lack of urgency.
6. During the early part of 2013 it was ascertained that the Applicants had set the Main Application down on the ordinary court roll and that it was accordingly still proceedings. Total made investigations and requested from the Applicants’ attorneys a copy of the pleadings in the main action so as to enable it to peruse and understand the matter and determine whether it needed to intervene in order to protect its interests. This was done on 15 of April 2013 when the Applicants’ attorneys in the Main Application provided Total with a lever arch file containing the pleadings in the Main Application. Attached to the pleadings was a covering letter dated 11 February 2013. The said letter was written by the attorneys of the Applicants. The said letter stated, among others, that:

- “1. We refer to the matter of BP Atlas Road trading as Alladin Service Station CC and Another v Azitex CC and Others, In the North Gauteng High Court, Case No. 55926/2012 where we act for BP Atlas Road trading as Alladin Service Station CC and Rooksana and Rashid Soobrayan (“client”).
2. We attach hereto for your attention the full set of Court Papers in the aforementioned matter.
3. We do not believe you are a necessary party to the subject matter of litigation and that there is any need for our client to involve Total South Africa (Pty) Ltd (“Total”), there being no connection between Total and our client and we are of the view that Total has not committed in any overt action, so to justify their citation as a Respondent.
4. We, however, draw attention to paragraph 38.4 at page 179/180 of the papers where Azitex CC and Stand 13 Eastwood Road, Dunkeld (Pty) Ltd have averred that Total should be joined.
5. We reject the averment aforesaid as baseless. However, should Total require to intervene in the manner we will not be opposed to the intervention.
6. Kindly advise us within 3 (Three) working days from date of receipt of this letter, whether you wish to intervene and wish to file any papers herein.
7. We also include for your convenience, Heads of Argument filed by each of the advocates and confirm that we are proceeding to seek the interdict and revocation of the Site and Retail Licences on the grounds set out in the Applicants’ Heads of Argument.

8. *In conclusion we point out that should Total proceed as suggested by Azitex CC we might consider seeking damages from Total but that would be a matter of a separate and new action which will require Total to be sued and summonsed.*

Yours faithfully

Venn & Muller

Murray Kotze."

7. On 18 February 2013 a copy of the voluminous pleadings in the Main Application was handed to one Gavin Schár, a director at Knowles Husain Lindsay Inc ("KHL"), Total's attorneys of record in this matter. On the same date a formal letter was immediately addressed by Total's attorneys to the Applicants in the Main Application which stated that Schár was in the process of considering the voluminous court papers with the view to advising Total of its rights. KHL, Total's attorneys made it clear that it would in due course revert to the Applicants' attorneys. They stated in the said letter as follows:

- " 1. *We act for Total (Pty) Ltd .*
2. *We refer to your letter to our client dated 11 February 2013, a copy of which appears only to have been delivered to our client on 15 February 2013.*
3. *The writer today received a copy of our letter and a set of voluminous court papers attached thereto. We are in the process of considering same with the view to advising our client. In the circumstances we shall revert to you in due course with respect to our client's possible intervention in the matter.*
4. *Naturally our client's rights remain strictly reserved.*

Yours Faithfully

Knowles Husain Lindsay Inc."

8. In order to enable KHL to attend to this matter properly they proceeded to schedule a meeting with the appropriate Total representatives who were conversant with the matter in order to responsibly discuss the matter and to determine the grounds on which Total could intervene in the Main Application and the necessity for such an intervention. By way of an affidavit by its legal advisor, one Nonna Metja Donald Mahlafonya ("Mahlafonya"), Total contends that it has a direct and substantial interest in the outcome of the Main Application. The said direct and substantial legal interest in the outcome of the Main Application is evidenced by the following that Total has:

- 1) signed a long term lease agreement with the Second Respondent as the owner of the premises, in terms of which Total, along with the First Respondent, is a joint lessee of the property;
- 2) agreed to and has entered into a servitude in favour of Total over the property enduring for a period of twenty (20) years which prohibits the sale or distribution of petroleum products on or from the premises other than those provided by Total;
- 3) retained ownership of certain valuable assets some of which are of a permanent nature that already have been installed on the premises; and,
- 4) entered into a long term sales agreement with the First Respondent for the delivery and sale of Total petroleum products on the premises.

9. The said Mahlafonya contends furthermore in his affidavit that Total stands to suffer severe prejudice if the relief it seeks, that is of intervention in the Main Application, is not granted. Total justifies its Application for Intervention on the basis that the Applicants had, in the Main Application deemed it appropriate to cite Engen Petroleum Ltd as the Third Respondent. They are of the view that this was done because at the time the Applicants launched their Main Application, they had believed that the First and Second Respondents had contacted with Engen. It is clear on that point that they were not aware that the arrangements had in fact been done with Total. Accordingly Total contends that once the Applicants became aware that Total as a petroleum company should be involved and not Engen, they should have cited Total as an interested party. That was not done. It was on that basis that he had conversed extensively with his colleagues and with Total's legal representatives and where after he made a decision to intervene in the matter in order to protect Total's substantial interest. The reason they did this was based on Total's rights to do so and was not intended to sabotage the Applicants' legal process.
10. It is important, however, to point out that while the Applicants admit that they had cited Engen as a party to the Main Application, they, however deny vehemently that it was for the reasons mentioned by Total. They contend that they had cited Engen as a party to the Main Application because Engen was a co-grantee, by name and title, of the Environmental Authorization ("EA") issued by the Fourth Respondent. The relevant EA is still the subject of the Main Application according to them. The circumstances under which the relevant EA was issued

to Engen are now known. They have been placed on the record by the Applicants. It was never argued by Mr. Du Toit, counsel for Total, that the same circumstances that led to the applicants citing Engen exist also in the case of Total. Total does not, apart from relying on the citation of Engen, claim entitlement to be part of the main application on the existence of similar circumstances. I must therefore find that their reliance on the citation of Engen is therefore without any substance.

11. By way of extrapolation, during the last quarter of 2011, Total was approached by Carl Nord ("Nord") who at the time was acting on behalf of the First and Second Respondents. He proposed to develop certain filling stations in Gauteng in conjunction with Total. One such proposed filling station was to be developed on the property. This approach eventually led to the conclusion of agreements and servitudes which I already have referred to herein above in paragraph 8. On 26 January 2012 Nord sent an email message to Andre Cloete ("Cloete") of Total, confirming that the First and Second Respondents had received the requisite Site and Retail Licences for the premises and had started bulk earthworks at the premises. Bulk earthworks involve, among others, the levelling of the land in preparation for construction thereof.
12. Then in early 2012, Total commenced its detailed internal investigation to determine the viability of the proposed filling station. In doing so Total took into account, inter alia, the area in which the proposed development was to take place, the prospects of doing business in that area, which of course included

analysing the historic growth and potential for the future growth and development area, the existing competitors in the area, the estimated fuel sales by such competitors, the effect that the new proposed site may have on the competitors and whether it would attract business. Upon completion of the foregoing analysis, Total decided during or about July 2012 to proceed with the project and to engage formally the First and Second Respondents. Accordingly the parties commenced negotiations in contemplation of concluding written agreements. Finally on 22 February 2013 the signed agreements were concluded between the parties.

13. The Lease Agreement between Stand 13 Eastwood Road, Dunkeld (Pty) Ltd and Total South Africa (Pty) Ltd and Azitex CC attached to the Total's application an marked DM10, the Sale Agreement between Total South Africa (Pty) Ltd and Azitex CC trading as Total Atlas Road attached to the application and marked DM11 as well as the Notarial Deed of Servitude attached to the Total's Application for Intervention marked as DM12, all illustrate and confirm Total's substantial and direct interest in the property and in the outcome of the Main Application. In his affidavit Mahlafonya pointed out that the servitude agreement between Total and the Second Respondent provides, among others, the following that:

- 1) no petroleum products other than products provided by Total shall be installed, handled, sold or distributed on or from the premises without Total's prior written consent;

2) no person shall occupy and/or take possession of the premises other than Total or a nominee of Total;

3) the premises shall not be transferred to any person who has not undertaken in writing in a form satisfactory to Total to be bound by the lease agreement; and,

4) the servitude, duly registered on 30 May 2013, in favour of Total shall endure for a period of 20 years from the date of registration thereof and shall be a restrictive burden and servitude over the premises for the full period and shall be binding on the Second Respondent and its successors entitled and assigned.

14. According to Mahlafonya should the relief sought in the main application by the Applicants not be granted, Total stood to suffer severe loss. as illustrated herein below, of:

- 1) the costs of installation referred to above of R1,550,000.00;
- 2) R200,000.00 for the removal of the tanks which remain Total's property;
- 3) R214,000.00 in respect of professional fees; and,
- 4) A substantial amount as yet uncalculated in respect of the lost time and expenses involved in the negotiations and preparation of the agreements.

15. The Applicants opposed Total's Application for Intervention order on the grounds, firstly, that such an application is baseless and discloses no right of action. They contend so on the basis that on 27 September 2012, that is the date on which the Main Application commenced, there existed no basis on which Total had any right to be cited and furthermore that no such basis has accrued or arisen since then.

16. Secondly, they contend that whatever agreements Total has concluded with the other Respondents in the Main Application do not, and legally cannot, create any rights for the Applicant or in addition to the rights held by such Respondents and already in issue in the Main Application; thirdly, that in view of the fact that the centrepiece of the Main Application is the legality of the licences referred to in paragraph 4 supra, Total has in law, no say, no rights or no standing and no legal interest. Fourthly, and by way of adumbration, the Applicants contend, firstly, that no one who manufactures or wholesales petroleum products in this country can per se have any say, standing or rights in the retail sector or in any manner affecting or stemming from the deployment of the licences issued to persons by the Sixth Respondent and furthermore that no such entity which holds a wholesale licence issued to it by the Sixth Respondent may enter into any agreements to supply any retail site with petroleum.
17. The Applicants contend furthermore that Total's claim that they had initially cited Engen had no basis by reason of the fact that the citation of Engen depended on the fact that it was a co-grantee, by name and title, of the Environmental Authorisation ("EA") issued by the Fourth Respondent which is the centrepiece of the Main Application.
18. With regard to Total's reliance on the letter dated 11 February 2013 which Total regards as a waiver of the Applicants' right to oppose any application by Total for Intervention, the Applicants contend that the said letter, although containing an invitation to participate in the Main Application, was short-dated and was not

taken up by Total in the time allowed. Secondly, about the said letter, the Applicants contend that the said letter was not unconditional and did not contain any acknowledgement that the Applicants were in any way prepared to show support to Total's participation unless that was done at Total's costs and risk. The Applicants contend furthermore that Total should have been seen the said invitation as an attempt to open a door for the two sets of attorneys to open chance of negotiations.

19. In order to succeed with its application for intervention, Total has to satisfy the court that it has a direct and substantial interest in the order that the court might make in the Main Application. This principle was stated in the following manner in *Amalgamated Engineering Union v Minister of Labour* 1949(3) S.A. 637 AD:

"If a party has a direct and substantial interest in any order the court might make or if such an order could not be carried into effect without prejudicing that party, it is a necessary party and should be joint in the proceedings."

A direct and substantial interest has been held to be *"an interest in the right which is the subject matter of the litigation and not merely financial interest which is only an indirect interest in such litigation"*. See *Henri Viljoen (Pty) Ltd v Awerbach Brothers* 1953(2) S.A. 151(O) at p. 169.

20. Mr. Du Toit listed the following factors and argued that they establish that Total has direct and substantial interest in the Main Application; that Total has a registered long term lease of the property; that it has a registered servitude on the

property; and thirdly, that it has invested in infrastructure on the property. He also argued that the court should take into account the fact that for the duration of the long term lease Total shall have the right to be the sole and exclusive supplier of petroleum products to the premises and the business conducted on the premises and other related terms.

21. In the supporting affidavit by Mahlafonya dated 3 June 2013, it is stated in paragraph 2 that: *"I depose to this affidavit in order to bring it to the above Honourable Court's attention that the filling station on Erf 1094 Parkhaven Extension 7, commenced trading on 8 May 2013."* In my view this creates a compelling case for Total to be granted leave to intervene. It now has a vested right in the business of the petrol station.

22. While I would concede that Total may have a commercial interest in the Main Application to the extent that it is indirectly and financially interested in making sure that the First Respondent is at liberty to continue honouring its contracts with it; I am satisfied though that Total has now, even more than before, a direct and substantial interest in the *Main Application*.

23. Mr. Savvas, counsel for the Applicants, had argued, following the contention of the Applicants in their affidavit, that Total did not have any right to participate in the proceedings of the Main Application when it commenced on 27 September 2012. There is, in my view, no substance in this argument. I say so because

Rule 12 of the Uniform Rules of Court provides that a party may join in as a defendant or plaintiff "*at any stage of the proceedings*".

24. Total did not anticipate any opposition against its application for intervention. It relied on a sentence in the letter dated 11 February 2013 from the Applicants' attorneys to it. Paragraph 4 of the said letter created an impression that, if total brought an application the Main Application as one of the parties to it, the Applicants would not oppose it. That part of the letter that created that impression is the following:

"However, should Total require intervention in the matter, we will not be opposed to the intervention".

This sentence is as clear as crystal and contains no ambiguity. Contrary to the Applicants' contention, this letter contains neither proposition nor any invitation to open talks. While it set out the Applicants' rejection of Nord' statement in paragraph 38.4 of the Main Application and the whole idea of Total joining it as a party, it however at the made Total believe that there would be no opposition to an application by Total to join the Main Application.

25. The argument that the said letter did not contain any unconditional invitation carries, in my view, no substance. In paragraph 9 of the opposing affidavit, it stated that: "*There never was any acceptance or acknowledgement that I would be prepared to accept the risk of the Applicant's (referring to Total) costs and I*

reject such a risk.” This goes against the grain of the sentence I referred to in the preceding paragraph and the fact that Total did not ask for costs if the application had not been opposed.

26. In the result this application stands to be granted. Accordingly I make the following order:

1. Total is hereby granted leave to intervene as the Ninth Respondent in the Main Application issued on 27 September 2012, under case no. 55926/2012, by the First Applicant and Joint Applicants (“the Main Application”).
2. The First Applicant and Joint Applicant are hereby ordered to pay the costs of this application jointly and severally.



P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:

Adv. B.G. Savvas

Instructed by:

Venn & Muller Attorneys

Counsel for the 1st and 2nd Respondents:

Adv. S.J. Grobler (SC)

Adv. LGF Putter

Instructed by:

Hirshowitz Flionis Attorneys

Counsel for the 5th Respondent:

Adv. S Mitchell

Instructed by:

Matsemela, Krause & Ngubeni Inc.

Counsel for intervening party:

Adv. S. Du Toit (SC)

Adv. J.J. Meiring

Instructed by:

Knowles Husain Lindsay Inc.

Date Heard:

10 June 2013

Date of Judgment:

13 June 2013