THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 925/19

In the matter between:

BROCSAND (PTY) LTD	**APPELLANT (Plaintiff in the Court *a quo*)**
and	
TIP TRANS RESOURCES (PTY) LTD	**RESPONDENT (Third Defendant/Excipient in the Court *a quo*)**
FULL SCORE TRADING 145 CC	**(First Defendant in the Court *a quo* cited as inactive historical party)**
GLOBAL PACT TRADING 370 (PTY) LTD	**(Second Defendant in the Court *a quo* cited as inactive historical party)**

Neutral Citation: *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others* (Case no 925/2019) [2020] ZASCA 144 (4 November 2020)

Coram: MBHA, VAN DER MERWE and MOCUMIE JJA and MABINDLA-BOQWANA and UNTERHALTER AJJA

Heard: 31 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9h45 on 4 November 2020.

Summary: Contract – right of first refusal – grantee cannot, by application of the Oryx mechanism and the doctrine of notice, acquire more rights than those afforded by the grantor – particulars of claim do not disclose cause of action – exception upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Thulare AJ, sitting as court of first instance): judgment reported *sub nom Brocsand (Pty) Ltd v Full Score Trading 145 CC and Others* [2019] ZAWCHC 32.

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

JUDGMENT

Mbha JA (Van der Merwe and Mocumie JJA and Mabindla-Boqwana and Unterhalter AJJA concurring):

[1] This appeal is directed against an order of the Western Cape Division of the High Court, Cape Town (Thulare AJ), which upheld the exception raised by the respondent, Tip Trans Resources (Pty) Ltd (Tip Trans), against the particulars of claim of the appellant, Brocsand (Pty) Ltd (Brocsand), on the ground that they did not disclose a cause of action. It also dismissed Brocsand's application for leave to amend its particulars of claim under Rule 28(4) of the Uniform Rules of Court.[1] The court a quo granted leave to Brocsand to appeal to this court.

[2] The appeal concerns the nature and extent of the rights of the holder of a right of first refusal and the remedies available upon the breach thereof. Of particular relevance is the so-called Oryx mechanism, recognised by this court in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien*

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[1] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa, originally published under GN R48 in *GG* 999 of 12-01-1965 (the Uniform Rules of Court).

(Pty) Ltd en Andere,[2] as well as the doctrine of notice. The Oryx mechanism was formulated in *Mokone v Tassos Properties CC and Another*[3] as follows:

'In the event that a seller concludes a contract of sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been [concluded] between the seller and the holder of the right of pre-emption.'[4]

[3] Although originally formulated in the context of sale agreements, this court has recognised that the application of the Oryx mechanism is not limited to sale agreements.[5] Thus, the Oryx mechanism has been applied in various cases, including by this court,[6] and by the Constitutional Court.[7]

[4] The facts leading up to the dispute are set out hereafter. On 12 October 2010 Brocsand, a mining contractor, and Full Score Trading CC (Full Score), the first defendant in the court a quo, concluded an agreement in respect of the minerals on the farm described as the remainder of the farm Bloemendaalzfontein 702 and 703 in the district of Malmesbury (Red Hill). Full Score was entitled to exploit the minerals on Red Hill by virtue of a mining right it had acquired under the provisions of the Mineral and Petroleum Resource Development Act 28 of 2002 (the MPRDA).[8] In terms of this agreement (the Red Hill Agreement), Brocsand was appointed as the mining contractor 'to render mining services in respect of the Minerals' on Red Hill. In essence, the Red Hill Agreement afforded Brocsand the right to mine for laterite and sand on

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[2] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 907E-F.
[3] *Mokone v Tassos Properties CC and Another* [2017] ZACC 25; 2017 (5) SA 456 (CC).
[4] Ibid para 56. This is Madlanga J's (own) translation of the Afrikaans dictum in *Oryx & Vereinigte Bäckereien (Pty) Ltd* (above fn 1). The original Afrikaans text reads as follows:
'Indien 'n verkoper in stryd met 'n voorkoopsreg 'n koopkontrak met 'n derde aangaan, kan die koper deur 'n eensydige wilsverklaring in die plek van die derde tree. 'n Koopkontrak word dan geag aangegaan te gewees het tussen die verkoper en die houer van die voorkoopsreg.'
I have merely inserted '[concluded]' ('aangegaan') into the second sentence of Madlanga J's translation.
[5] *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 932E-F and 935B-C.
[6] See eg *Soteriou* (ibid); *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A) at 760I-761C.
[7] *Mokone* (above fn 3).
[8] See ss 22 and 23 of the MPRDA.

Red Hill until 30 October 2015. Clause 3.2 of the agreement gave Brocsand a right of first refusal in these terms:

'3.2 this agreement shall commence on 1 November 2010 and, unless terminated in accordance with the provisions of clause 18 or the other provisions of this Agreement shall endure until 30 October 2015 -: Provided that upon expiry of the Agreement the Contractor shall have the right of first refusal to enter into a new agreement as the holder for the appointment as the exclusive contractor to render mining services in respect of the Minerals on the Property.'

'Holder' is defined in s 1 of this agreement as Full Score Trading CC. 'Minerals' means 'laterite and sand', while the 'property' means the farm Bloemendaalzfontein 702 and 703, District of Malmesbury.

[5] On 30 January 2015, Tip Trans, Full Score and Global Pact Trading 370 (Pty) Ltd (Global Pact) (the defendants), concluded a written agreement (the January 2015 Agreement) in terms of which:

(a) Full Score appointed Tip Trans as its mining contractor on Red Hill to extract laterite and sand, and to buy it from Full Score Trading (Red Hill aspect); and

(b) Global Pact appointed Tip Trans as its mining contractor on the farm described as Doornkraal 831, in the district of Malmesbury (Doornkraal), to extract sand and to buy it from Global Pact (the Doornkraal aspect).

[6] This caused Brocsand to issue summons against Tip Trans, Full Score and Global Pact as the first, second and third defendants, respectively. Brocsand averred in its particulars of claim that it first became aware of the conclusion of the January 2015 agreement and consequently of the fact that its right of first refusal had been breached, on or about 10 June 2015, when a copy of this agreement was disclosed to it. As a result, on 21 August 2015, Brocsand conveyed to the defendants that by unilateral declaration of intent, it had stepped into the shoes of Tip Trans and therefore became party to an independent contract, equivalent to the January 2015 Agreement, with Full Score and Global Pact.

[7] Brocsand averred further that by virtue of the deemed contract it was effectively entitled to replace Tip Trans as mining contractor in respect of Red Hill as it had already *de facto* done. As regards Doornkraal, Brocsand claimed that it was effectively entitled to replace Tip Trans as mining contractor until 21 May 2035. Brocsand claimed that the defendants had deliberately entered into the January 2015 agreement despite having had prior knowledge of Brocsand's right of first refusal and of the fact that the conclusion of the January 2015 agreement would amount to a breach thereof. Brocsand also claimed that the Red Hill aspect of the January 2015 agreement, directly involving Full Score Trading and Tip Trans, and the Doornkraal aspect thereof, directly involving Global Pact and Tip Trans, were deliberately mixed up and conflated by the defendants in a legally impermissible attempt to frustrate or circumvent Brocsand's right of first refusal. Brocsand accordingly claimed, in essence, an order permitting it to mine on Doornkraal and payment of damages consisting of loss of profits in respect of the period that it had allegedly been prevented from doing so.

[8] Tip Trans excepted to Brocsand's particulars of claim on the basis that they failed to disclose a cause of action against Tip Trans in respect of the mining of the minerals on Doornkraal. The essence of Tip Trans's objection was that the Red Hill Agreement conferred rights on Brocsand in respect of mining of Red Hill only, and not on Doornkraal. There was no reference to mining of any minerals on Doornkraal in the Red Hill Agreement.

[9] Tip Trans's exception can be summarised as follows:

(a) Neither Global Pact nor Tip Trans were party to the Red Hill Agreement which made provision for Brocsand's pre-emptive rights in relation to Red Hill.

(b) If it were to be found that Brocsand's pre-emptive rights in terms of the Red Hill aspect of the January 2015 agreement have been infringed, Brocsand cannot, by unilateral declaration of intent and by implementation of the Oryx mechanism, acquire new found rights against Global Pact and Tip Trans.

(c) The Oryx mechanism is aimed at preserving existing rights and not creating new rights. Consequently, Brocsand cannot avail itself to either the

Oryx mechanism or the doctrine of notice to create new contractual rights against Tip Trans in relation to Doornkraal.

[10] In upholding Tip Trans's exception, the court a quo found that prior to the conclusion of the January 2015 agreement, Brocsand had not obtained rights from Global Pact Trading in respect of the mining of any minerals on Doornkraal. Consequently, so it reasoned, the Doornkraal aspect of the January 2015 agreement did not breach Brocsand's right of first refusal in respect of the mining of minerals on Red Hill.

[11] The court a quo found that Brocsand could not, by means of the Oryx mechanism, 'step into the shoes' of Tip Trans in relation to a contract concluded between Tip Trans and Global Pact, with whom Brocsand had no contractual relationship. The Oryx mechanism did not, the court a quo concluded, extend to matters 'beyond the original agreement', ie the Red Hill agreement, and was limited only to the subject matter of the original agreement, namely the mining of laterite and sand on Red Hill.

[12] After receipt of Tip Trans's exception, as referred to above, Brocsand filed a Notice of Intention to Amend its particulars of claim in terms of Rule 28(1). It sought to amend paras 25 and 27 of its particulars of claim to reflect that Tip Trans had repudiated the deemed contract by refusing to accept that as a consequence of the deemed contract it had been ousted from the January 2015 agreement and that Brocsand has accordingly stepped into its shoes. Tip Trans filed its objection thereto on the basis that the amendment would not remove the cause of complaint, and that the particulars of claim remained excipiable as they did not disclose a cause of action. By agreement between the parties the application for leave to amend was heard simultaneously with the exception. The court a quo consequently dismissed the application to amend.

[13] It is apposite to mention that after leave to appeal to this court was granted on 31 July 2019, Brocsand withdrew on 26 September 2016 its action against Full Score Trading and Global Pact Trading, on the basis that the matter

had been settled between them. Accordingly, only the excipient, Tip Trans Resources, is before us. There is substance in the argument on behalf of Tip Trans that Brocsand's claim could not be determined in the absence of Global Pact, but that was not a basis of the exception and is a matter for another day.

[14] Before I consider the parties' respective positions, I recall certain trite relevant legal principles. First, since these are proceedings on exception, the court must accept as true the factual allegations in the claim as proposed to be amended, and merely decide whether they disclose a cause of action.[9] The alleged defect must appear ex facie the pleading. The excipient may not rely on his or her own plea or affidavits supporting the exception.[10]

[15] Secondly, a court hearing an application for an amendment has a discretion whether or not to grant it. Such a discretion must be exercised judicially, in the light of all the facts and circumstances.[11]

[16] There can be no doubt that the Red Hill and Doornkraal aspects of the January 2015 agreement were severable. In terms thereof, as I have said, Full Score granted rights in respect of Red Hill and Global Pact granted rights in respect of Doornkraal. The aspects involved the exploitation of different minerals at different prices. Clause 14 of the January 2015 agreement, relied upon by Brocsand in this regard, merely referred to the combined monthly extraction of minerals and makes no difference to this conclusion.

[17] Brocsand's right of first refusal had a specific content. It was the right 'to enter into a new agreement with the Holder for the appointment … to render mining services in respect of the Minerals on the Property', that is, a right against Full Score in respect of laterite and sand on Red Hill. As a matter of logic, the content of a right cannot change because of a breach thereof, not

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[9] *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9.
[10] *YB v SB and Others NNO* [2015] ZAWCHC 109; 2016 (1) SA 47 (WCC) para 12; *Baliso v First Rand Bank Ltd t/a Wesbank* [2016] ZACC 23; 2017 (1) SA 292 (CC) para 33.
[11] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565F-G; *YB v SB* (above fn 7) para 9.

even when the breach takes place by collusion. This, therefore, begs the question: How, according to the particulars of claim, did Brocsand obtain rights against Global Pact in respect of the minerals on Doornkraal?

[18] The main premise for Brocsand's claim to rights on Doornkraal was that, by invoking the Oryx mechanism, it had 'stepped into the shoes' of Tip Trans not only in respect of the Red Hill aspect, but also in respect of the Doornkraal aspect of the January 2015 agreement. In other words, Brocsand sought to 'step into the shoes' of Tip Trans in respect of both parts of the January 2015 agreement.

[19] In addition, it contended that the application of the doctrine of notice 'bridges the gap which might otherwise have existed'. It emphasised that Brocsand had alleged that Tip Trans not merely had knowledge of Brocsand's right of first refusal, but deliberately participated in the January 2015 agreement with the intent to frustrate it.

[20] With regard to the first-mentioned contention *vis-à-vis* the applicability of the doctrine of notice, Brocsand relied on the following relevant averments in the particulars of claim:

'22.2 ... the Third defendant, by virtue of the fact that it deliberately entered into the 30 January 2015 agreement with the First Defendant and the Second Defendant, despite having had prior knowledge of the Plaintiff's right of first refusal and of the fact that the conclusion of the 30 January 2015 agreement would amount to a breach of such right of first refusal;

...

23.5 By virtue of their common prior knowledge of the Plaintiff's right of first refusal and their consequently *mala fide*, alternatively and in any event deliberate participation in the conclusion of the 30 January 2015 agreement ... and by virtue further, generally, of the doctrine of notice, all three Defendants are fully subjected to the operation of the deemed contract and its consequences ... despite the fact that

23.5.1 the First Defendant (being the grantor of the Plaintiff's right of first refusal) is directly involved only in the Red Hill aspect of the 30 January 2015 agreement;

23.5.2 the Second Defendant is directly involved only in the Doornkraal aspect of the 30 January 2015 agreement;

23.5.3 only the Third Defendant is directly involved in both the Red Hill and Doornkraal aspects of the 30 January 2015 agreement.'

[21] As appears from Brocsand's formulation of its claim in the particulars of claim, the gravamen of Brocsand's complaint is the mala fide, alternatively improper conduct of the defendants in relation to the January 2015 contract, with knowledge that their conduct would infringe upon Brocsand's right of first refusal. This is the essence of Brocsand's case, namely, that an extended application of the Oryx mechanism, was justifiable on the grounds of equity.

[22] In the case of *Hirschowitz*,[12] this court stated:

[In *Oryx*[13]] ... Van Heerden AJA emphasised that, although the holder (grantee) of the right of pre-emption is said to step into the shoes of the third party ("in die plek van die derde tree"), he does not take the place of the third party in relation to that contract. The true position is that upon the grantee exercising his rights after the conclusion of a contract of sale with a third party, a new independent contract – and not a substitutionary one – comes into existence between the grantor and the grantee and this does not affect the validity of the contract between the grantor and the third party (at 919 C-E).'

[23] Therefore, this court made it very clear that the metaphoric 'stepping into the shoes' in terms of the Oryx mechanism does not make the grantee a party to the contract between the grantor and the third party. An independent contract between the grantor and grantee comes into existence. It follows that the Oryx mechanism permits the grantee to obtain rights only as against the grantor and only in respect of the subject matter of the preferent right, here the right of first refusal. Thus, the Constitutional Court in *Mokone*[14] aptly stated that:

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[12] *Hirschowitz* (above fn 10) at 761G-I.
[13] Referring to the eponymous case of *Oryx & Vereinigte Bäckereien (Pty) Ltd* (above fn 2) and not the Oryx mechanism.
[14] *Mokone* (above fn 3) at para 59.

'Court-coerced compliance by the grantor will be doing nothing more than to require her or him to honour what she or he had bargained for. It will not be an imposition. Ultimately, the holder of the right of pre-emption may be able to purchase on the exact terms on which the third party purchased and thus 'step into the position of the third party'.

[24] Thus the application of the Oryx mechanism cannot vest rights in Brocsand that it may exercise against Global Pact and in respect of Doornkraal. And, as I shall explain, Brocsand has also misconceived the meaning and import of the doctrine of notice.

[25] It is trite that the effect of the doctrine of notice is to enable the grantee to enforce his preferential personal right, not only as against the grantor, but also as against third parties who have interfered with the right and have knowledge of it. Its application will typically enable the grantee to reclaim property that was delivered to a third party who has taken the property with knowledge of the grantee’s rights. The content of the grantee’s right remains the same. The doctrine of notice, in this context, simply permits the right to be enforced against parties in addition to the grantor. Mala fides does not add to the rights enjoyed by the grantee. The extent to which Tip Trans may have acted improperly in relation to the conclusion of the January 2015 agreement cannot enlarge the ambit of the Oryx mechanism, by recourse to the doctrine of notice, so as to permit the grantee to enjoy rights that were never the subject of the original grant.

[26] From the aforegoing it follows that the Oryx mechanism and the doctrine of notice can be applied in the context of the present matter, but only in respect of the Red Hill aspect of the January 2015 agreement, which is a distinct and separate contract from the Doornkraal aspect. In my view it appears that Brocsand in essence seeks compensation for Tip Trans's alleged wrongful conduct in relation to the conclusion of the January 2015 agreement. Brocsand has thereby ventured in the realm of the law of delict, under the guise of the doctrine of notice. In fact, Brocsand acknowledged in its heads of argument that 'the doctrine is rooted in the unlawfulness of the offending party's conduct'. In

this regard, Brocsand referred to the unreported case of *Saligee-Quickfall v Daniels and Others*,[15] where the court stated that the ratio for the application of the doctrine of notice, in the case of double sales, is the wrongfulness of the third-party buyer's conduct. The court also pointed out that this conclusion accords with the principle that the intentional interference with another party's contractual relationship amounts to a delict.

[27] The contract between Global Pact and Tip Trans in respect of the mining of sand on Doornkraal did not, therefore, breach Brocsand's right of pre-emption. Thus, the gravamen of the particulars of claim was legally untenable. It follows that the court a quo correctly upheld the exception and dismissed the application to amend on the ground that it would not cure the legal gap in Brocsand's pleaded case. Although the court a quo did not spell it out, Brocsand is in law entitled to further amend its particulars of claim, if so advised.

[28] Because the Red Hill and Doornkraal aspects of the January 2015 agreement were severable parts thereof, it is not necessary to deal with the law in respect of so-called 'package deal' cases. At the hearing counsel for Brocsand disavowed any attempt to persuade this court to develop the applicable law.

[29] For all of these reasons, I make the following order:
'The appeal is dismissed with costs, including the costs of two counsel where employed.'

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B H Mbha
Judge of Appeal

[15] *Saligee-Quickfall v Daniels and Others* [2015] ZAWCHC 115 para 34.

APPEARANCES

For Appellant:	Mr A le Grange SC (with him Mr C Cilliers)
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