



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others

(Case no 925/2019) [2020] ZASCA 144

From: The Registrar, Supreme Court of Appeal

Date: 04 November 2020

Status: Immediate

The following summary is for the benefit of the media in their reporting of the case and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of the Western Cape Division of the High Court, Cape Town (Thulare AJ) concerning the nature and extent of a right of first refusal, as well as the remedies available to the holder of such a right in the event that it is breached. The appeal was dismissed with costs.

In October 2010 the appellant, Brocsand (Pty) Ltd (Brocsand), a mining contractor, entered into an agreement with Full Score Trading CC (Full Score), which held a mining right entitling it to exploit the minerals on a farm in the Malmesbury, Western Cape (Red Hill). The 2010 agreement essentially afforded Brocsand the right to extract laterite and sand on Red Hill from 1 November 2010 until 30 October 2015. The agreement also conferred on Brocsand the right of first refusal to enter into a new agreement with Full Score, upon termination of the 2010 agreement by effluxion of time, and again be appointed as the exclusive contractor for the purposes of extracting laterite and sand on Red Hill.

In January 2015, ie nine months before the 2010 agreement was to expire, Full Score entered into an agreement with the respondent, Tip Trans Resources (Pty) Ltd (Tip Trans), and Global Pact Trading 370 (Pty) Ltd (Global Pact). In terms of the 2015 agreement Full Score appointed

Tip Trans as its mining contractor, to extract laterite and sand on Red Hill and to buy it from Full Score; and Global Pact appointed Tip Trans as its mining contractor, on a different farm in Malmesbury, Western Cape (Doornkraal), to extract sand and to buy it from Global Pact.

When Brocsand became aware of this later in the year, it informed the three parties to the 2015 agreement that, by unilateral declaration of intent, it (Brocsand) had ‘stepped into the shoes’ of Tip Trans and accordingly become party to an independent contract (equivalent to the 2015 agreement) with Full Score and Global Pact. Brocsand averred that this deemed contract entitled it to replace Tip Trans as mining contractor both in respect of Red Hill as well as Doornkraal.

Tip Trans excepted on the basis that Brocsand’s claim did not disclose a case of action against it in terms of the Doornkraal aspect of the 2015 agreement. Tip Trans argued that neither it nor Global Pact were parties to the 2010 agreement, in respect of the extraction of laterite and sand on Red Hill. Accordingly, so the argument went, even on a successful application of the Oryx mechanism, Brocsand could not acquire rights as against Tip Trans or Global Pact, at least not in respect of the Doornkraal aspect of the 2015 agreement.

The high court essentially agreed with Tip Trans’s objections, noting that the Doornkraal aspect of the 2015 agreement did not breach Brocsand’s right of first refusal in relation to the extraction of laterite and sand on Red Hill. Brocsand had no contractual relations with Global Pact and was thus not entitled to step into the shoes of Tip Trans in respect of a contract concluded between Tip Trans and Global Pact. It was held that the Oryx mechanism did not extend to matters beyond the original agreement; it was limited to the subject matter of the original agreement, in this case the extraction of laterite and sand on Red Hill.

The SCA found that the Red Hill and Doornkraal aspects of the 2015 agreement were undoubtedly severable. Full Score granted rights in respect of the former, while Global Pact granted rights in respect of the latter. The two aspects involved the exploitation of different minerals at different prices. Brocsand’s right of first refusal was a right against Full Score, in respect of laterite and sand, on Red Hill. Yet Brocsand sought to step 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 2015 agreement. It argued that this extension of the Oryx mechanism was justified on grounds of equity, since the parties to the 2015 agreement acted mala fide, alternatively

improperly, with knowledge that their conduct would infringe upon Brocsand's right of first refusal.

The SCA rejected this line of reasoning and held 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 preferential right. Application of the Oryx mechanism could thus not vest rights in Brocsand that it would then be able to exercise against Global Pact and in respect of Doornkraal.

The SCA further held that Brocsand's reliance on the doctrine of notice, in order to strengthen its argument for an extended application of the Oryx mechanism, was misplaced. While the doctrine may allow a grantee to enforce its preferential right against persons other than the grantor of that right, it did not in any way extend the content of the right. It was held that the ambit of the Oryx mechanism could not be enlarged, with recourse to the doctrine of notice, so that a grantee is permitted to enjoy rights that were never the subject of the original grant. The Oryx mechanism and the doctrine of notice could only apply in respect of the Red Hill aspect of the January 2015 agreement, which was a separate and distinct contract from the Doornkraal aspect.

In the result the appeal was dismissed with costs, including the costs of two counsel. The SCA noted that Brocsand would be entitled to further amend its particulars of claim, if so advised.
