



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

In the matter between:

Case No: **A296/2017**

FULL SCORE TRADING 145 CC

Appellant

and

BROCSAND (PTY) LTD

First Respondent

GLOBAL PACK TRADING 370 (PTY) LTD

Second Respondent

TIP TRANS RESOURCE (PTY) LTD

Third Respondent

JUDGMENT DELIVERED ON MONDAY, 5TH MARCH 2018

SALIE-HLOPHE, J:

1] This is an appeal to the full bench of this division against the judgment of

Desai, J. This appeal proceeds with his leave. The judgment of the court a quo dismissed an application by appellant to compel the first respondent to arbitration as a result of a contractual dispute.

BACKGROUND:

2] The appellant is the holder of a mining right in relation to certain minerals on a property near Malmesbury, Western Cape. In 2010, appellant appointed first respondent in terms of an agreement (“Redhill Agreement”) as the exclusive contractor to conduct the mining operations for five (5) years from 1 November 2010, on behalf of appellant. This period ended on 30 October 2015.

3] The agreement aforementioned provides for mandatory arbitration of disputes, as per, clause 17.1 which reads:

“A dispute between the parties relating to any matter arising out of this agreement or the interpretation thereof, shall be referred to arbitration by either of the parties, by way of a notice to the other party”

4] Clause 3.2 of the agreement provides for a right of first refusal to first respondent as contractor, upon expiry of the agreement (being 30 October 2015), to enter into a new agreement with applicant for the re-appointment as the contractor to mine the minerals at the particular property.

5] On 30 January 2015, appellant received a written offer by third respondent (“Tip Trans”) to act as contractor at the Red Hill mine from 1 November 2015. It is

not in dispute that Tip Trans was aware of the existence of the right of first refusal of first respondent. This offer was signed by Mr. JB. Krige ("Krige") on behalf of the appellant. The reason for signing the offer is in dispute, as Krige maintains that he signed it in order to make the document more "formal" for purposes of presenting same to first respondent under its right of first refusal. Clause 30 reads as follows:

*"Die partye kom ooreen dat hierdie 'n bindende ooreenkoms is en dat geen verandering tensy ooreengekom en op skrif gestel, geldig sal wees nie."*¹ Krige also acts for the second respondent ("Global Pact"). Krige and his brother are both the controlling shareholders of applicant and Global Pact.

6] First respondent took the view that as the 30 January 2015 agreement ("Tip Trans agreement") was a signed agreement, it constitutes a binding agreement and that, consequently, its right of refusal has therewith been denied or breached. It thereby invoked the principle of stepping into the shoes of Tip Trans by means of a *"unilateral declaration of intent"*, with the result that a new contract came into existence between appellant and Global Pact. The Tip Trans agreement included Global Pact as a party who has the rights to mine sand at a farm called Doornkraal. In terms of this agreement, Tip Trans acquires from Global Pact the right to mine sand at Doornkraal.

7] First respondent maintains, that, by means of this right of first refusal, it has effectively been appointed as contractor for the new period after 30 October 2015. Appellant disputes this, and maintains that first respondent's right of first refusal, if it applies, has not been properly exercised as first respondent has not matched the

¹ Translated as: *"The parties agree that this is a binding agreement and that no variation of it will be valid unless agreed to between the parties and reduced to writing."*

offer of the new contractor, that being third respondent. The appellant views this dispute as one which need to be adjudicated by way of arbitration as provided for in the compulsory arbitration clause.

8] First respondent opposed the application to submit to arbitration on the basis that although the underlying dispute between the parties may in a certain sense have been triggered by the first respondent's right of first refusal – the Red Hill agreement, – it does not rely directly and mainly on the contents of that agreement. Instead, it relies on the document attached as annexure “JK5” to the founding affidavit, which is the agreement dated 30 January 2015. Whilst the appellant claimed that the document was no more than an offer, the case for the first respondent was that *ex facie* the document, it was intended to be a binding agreement. This agreement not only triggered the right of first refusal, but also entitled it to a special remedy, that being, the choice to become a party to the offending agreement via a unilateral expression of intent.

GROUND OF APPEAL:

9] That the court a quo had erred in its discretion to disregard a contractual arbitration clause and that it should have exercised its discretion to hold the parties to their agreement to arbitrate the dispute between them.

10] There exists no compelling reason to disregard the arbitration clause.

11] The finding that two parties, namely, the second and third respondents, who were not parties to the Red Hill agreement containing the arbitration clause, had an interest in the outcome of the dispute to be arbitrated is misplaced.

12] The agreement signed on 30 January 2015, in terms of which appellant, second respondent and third respondent agreed on appointing the latter as contractor at Red Hill and Doornkraal is not only severable, but stands to be severed, given the uncontested evidence that third respondent knew of first respondent's right of first refusal in relation to Red Hill.

13] The finding that the 30 January 2015 agreement is binding, and that it constitutes a breach of first respondent's right of first refusal, and that no contradictory evidence could be heard by virtue of the parole evidence rule is misplaced.

14] That the court a quo erred in finding that there was a conspiracy to sabotage the first respondent's right of first refusal.

APPLICABLE LEGAL PRINCIPLES:

15] The doctrine, or principle of "unilateral declaration of intent" upon which first respondent relies, was established in the case of Associated SA Bakeries (Pty) Ltd v Oryx Vereinigste Backereien (Pty) Ltd² where it was held, that if a seller concludes a contract of sale with a third party to a pre-emptive right, the holder of the right of pre-

² 1982 (3) SA 893 (A)

emption can, if he or she chooses, unilaterally declare his or her intention (to purchase the property), and thereby automatically stepping into the shoes of the third party, binding the owner / seller to transfer the property to him or her on the same terms as concluded with the third party.³

16] The breach is the “trigger” upon which the first respondent relies to bring into motion the Oryx principle whereby it steps into the shoes of Tip Trans.

17] Section 3(2)(b) of the Arbitration Act⁴ reads:

“(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

(a)

(b) Order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration;

(c)”

18] It has been stated in various authorities dealing with this question, that a party who wishes to convince the court not to enforce an arbitration agreement, bears an “*onus which is not easily discharged*”,⁵ that a court should exercise its discretion to refuse arbitration only when a “*very strong case*” for its exercise had been made out,

³ Commonly known as the Oryx principle

⁴ Act 42 of 1965

⁵ *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W)*, ad 391 B-H, page 753

and that there should be “*compelling reasons*” for refusing to hold a party to his contract to have a dispute resolved by arbitration.⁶

19] The Oryx principle is subject to the doctrine of notice. In terms of this doctrine, any rights which third parties may have in circumstances where the Oryx scenario is invoked, are trumped by the rights of the person holding the right of first refusal to the extent that the third parties had prior knowledge of the right of first refusal, but nevertheless went ahead and contracted with the grantor.⁷ Fraud is not a requirement. Actual knowledge on the part of the third party suffices even in the form of *dolus eventualis*.⁸

ISSUES IN DISPUTE:

20] The appellant denies that there had been a breach of the Red Hill agreement, and that the right of first refusal does not apply in the present case. However, even if there had been a breach and the right of first refusal applies, it argues that the first respondent has not properly exercised its right in that it did not match the offer of Tip Trans. The appellant submits that there exists a dispute between the appellant and the first respondent which centres on first respondent’s right of first refusal as contained in clause 3.2 of the Red Hill agreement. This, in turn, it is argued, is a dispute as contemplated in the arbitration clause, thereby invoking the mandatory

⁶ Quoted with approval by Coleman J in the matter as per footnote 5 supra the decision of *Rhodesian Railways v Mackintosh* 1932 AD 359 and *Halifax Overseas Freighters Ltd v Rasno Export* 1958 2 Lloyd’s List Law Rep 145

⁷ *Cussons en Andere v Kroon* 2001 (4) SA 833 (SCA) paragraphs 9 – 10 and 12 – 13. See also *Mokone v Tassos Properties CC and Another* [2017] ZACC 25

⁸ *Mathavha NO v Sibeko* 2010 JOL 26088 (SCA) paragraph 5; *Meridian Bay Restaurant (Pty) Ltd and others v Mitchell NO* 2011 (4) SA 1 (SCA) paragraph 17; *Anthony and another v Japies and others* 2017 JOL 38806 (WCC) paragraph 24.

referral to arbitration. The appellant submits that what is relevant is merely that a dispute exists as to whether or not, first respondent can correctly claim that it had been appointed as the contractor for the new period. The dispute is therefore contemplated in the agreement for an arbitrator to decide.

21] The appellant argues that the question as to whether there was a breach or not, and what the consequences thereof are, is a dispute for the arbitrator to decide, and this issue falls within the ambit of the arbitration clause. The case for the appellant is that the only issue for a court to decide is whether or not first respondent should not be held to the arbitration clause, and whether, compelling reasons exist for the clause not to be enforced.

22] The argument for first respondent is that the dispute is wider than the ambit portrayed by the appellant, and that cogent and compelling reasons exist which justified the court a quo in disregarding the arbitration clause. Further to that, Tip Trans and Global Pact Trading have an interest in the outcome of the dispute (arbitration)⁹ and, therefore, the arbitration clause should not be enforced.

23] The case for the first respondent is further that the present case is *sui generis* and, in any event, every case must be decided on its own particular facts and with reference to what is required for a just and equitable outcome. A legal principle may be quite well-settled, without being trite in the sense of not being obscure, and arising frequently in legal proceedings. The Oryx mechanism, it is submitted, falls into this category. The application of the Oryx principle and the kind of arbitration

⁹ Were the arbitration clause to be invoked and appellant and first respondent have the dispute decided through arbitration

issue arising *in casu* is a combination which does not appear to have been decided upon in previous authorities.

DISCUSSION:

24] The appellant sought to avoid the first respondent from stepping into the shoes of Tip Trans, by contending that the 30 January 2015 agreement was in fact only an offer which was made subservient to the first respondent's right of first refusal. In amplification of the latter, Krige stated in his founding affidavit that he signed the offer merely for the purposes of making it appear more formal. This averment is unsound, which is also disputed by the first respondent, and falls to be rejected for the following reasons as set out below:

24.1] It contradicts the explicit wording of the document, illustrating that it could not possibly have been a mere offer. Clause 30 reads: **"Die partye kom ooreen dat hierdie 'n bindende ooreenkoms is en dat geen verandering, tensy ooreengekom en op skrif gestel, geldig sal wees nie."**¹⁰ The document speaks for itself in establishing that it amounted to a breach of the first respondent's right of first refusal. The conduct of the parties to the 30 January 2015 agreement, further confirms that the document in question was a binding agreement in that they attempted to "cancel" it subsequently. A signed memorandum from Tip Trans (represented by Mr Pieter Visser) confirmed that any such possible agreement was cancelled.¹¹

¹⁰ Translated as: The parties agree that this is a binding agreement and that no amendments shall be valid and binding unless agreed to by the parties and recorded in writing. Record page 39 – clause 30 (emphasis own)

¹¹ Record page 64 – Annexure to founding affidavit - JK10 – signed 8 September 2015

The very notion of a “cancellation” is consistent only with the proposition that the 30 January 2015 agreement was, in fact, a binding agreement. However, cancellation would have had no effect. The trigger event had already taken place by the conclusion of the agreement between appellant and Tip Trans. The first respondent had already, by the time of the purported cancellation, exercised, in writing, its unilateral declaration of intent as contained in paragraph 8 of the letter by the first respondent dated 21 August 2015.

24.2] There is nothing in the 30 January 2015 agreement which could support the version of the appellant that the agreement was conditional upon the first respondent’s right of first refusal.

24.3] Appellant brought the proceedings on motion and the factual dispute in terms of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹² must be resolved in favour of the first respondent.

25] The appellant argues, that because of the very fact that it and the third respondent knew of the first respondent’s right of first refusal, they must be taken to have acknowledged it, and to have concluded the 30 January 2015 agreement subject to such right of first refusal. I cannot on these facts find that to be the only logical conclusion, or inference to be drawn. The events as it had unfolded, the wording of the agreement, and the subsequent conduct of the parties, bring to the fore a far more probable and plausible conclusion. The Tip Trans offer (as appellant prefers to call it), was an agreement concluded with a view to complicate matters

¹² 1984 (3) SA 623 (A) 634 – 635

and thereby obfuscating the first respondent's ability to exercise its rights of first refusal. The latter is in my view an irresistible inference. The notion that because the second and third respondents knew of the first respondents right of first refusal, they had "contracted" in subservience to such right is opportunistic and flies in the face of the equitability that the doctrine of notice establishes in our law. The fact that they bore notice of the first respondent's right and contracted with the appellant, triggers the Oryx legal mechanism. Notice on their part cannot simultaneously serve to excuse them from the equitable protection afforded to the holder of the right. It is the very "notice" which brings into effect the holder's rights to take the place of the third party in its contract with the grantor of the right.

26] The dispute and adjudication thereof has evolved beyond the parameters of the Red Hill agreement and, in particular, the scope contemplated in its arbitration clause. The breach of the Red Hill agreement does not stand alone in this case. The Oryx principle is engineered by the second agreement of 30 January 2015. The consequences of the application of the Oryx mechanism, empowering the first respondent to step into the shoes of Tip Trans, in fact, hails from the 30 January 2015 agreement. The party entering into a fictitious contract such as the first respondent herein, does not have to match the offer by a third party. The first respondent had stepped into position of the third party, on the same terms and conditions as soon as it had exercised its rights by way of unilateral declaration of intent.

27] The appellant further argued that the Oryx mechanism, cannot be used to impose obligations upon the second respondent, specifically, given that the latter

had no prior dealings and has no contractual relation with the second respondent. The exact legal consequences resulting from the first respondent's usurp of the rights of the third parties, in this case, that of second and third respondent were not for the court a quo to decide, nor could the plausibility thereof, be taken into account in determining whether to enforce the arbitration clause or not. It is not competent for this court, as a full bench, to pronounce on the legal arguments advanced for, and on behalf of the parties as to the impact that the legal consequences may hold for the parties. That is for a court seized with that issue to decide.

28] For the purposes of deciding this matter, it suffices to bear in mind that appellant, second and third respondents chose to enter into a contract where the mining at Red Hill and Doornkraal were mixed up in one agreement. It is common cause that second and third respondents bore notice of the first respondent's right of first refusal in respect of mining at Red Hill. The consequences of contracting on this basis, and in this manner has the effect that disputes centred around this agreement would impact on them and the adjudication thereof. Given their participation in the 30 January 2015 agreement and their prior knowledge, they were participants in the breach of first respondent's right. The fact that they were not parties to the Red Hill agreement is in my view irrelevant.

29] The equity which the underlying remedies seeks to impose in our law where a grantor of a right contracts with a third party fully aware of the rights of an aggrieved would by common sense dictate that such party cannot excuse itself on the basis that the very events it had participated in, are now imposing inconvenient, or unfair consequences for itself. In this case it does not behove of the appellant to argue that

the third parties with whom it contracted in breach of first respondent's right out to be excised from adjudication of the dispute. It is artificial to construe that situation as merely a breach by the appellant alone of the Red Hill agreement. The breach by the third parties (not parties to the Red Hill agreement) is not a breach in the classical sense where party "A" has a contractual obligation towards party "B" and then simply fails to fulfil them, amounting to party "A" being the only person in breach. It is axiomatic under the Oryx mechanism that the party in breach (that being the grantor of the right of first refusal) would not have acted alone but must by definition have involved a third party. The Oryx principle operates when the grantor of the right concludes a contract with a third party in breach of the right of first refusal and with the third party having born knowledge of the holder of the right. Elementary justice requires that second and third respondents, not the first respondent, suffer the consequences of having participated in an agreement that amounted to a breach of the Red Hill agreement. In *Loureiro and Others v Invula Quality Protection (Pty) Ltd*¹³ the Constitutional Court held that: *"the [harm causing] conduct goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."* Our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness has been established in limited categories of cases, like intentional interferences in contractual relations where the plaintiff can show a right or legally recognised interest that another had

¹³ 2014 ZACC 4; 2014 (3) SA 394(CC); 2014 (5) BCLR 5111 (CC) at page 53

infringed.¹⁴ The defendant wrongdoer has been held to become an accessory to the primary wrong: the breach of contract.

30] Whilst the issue in casu does not turn on whether fault or wrongfulness is in question on the part of the second and third respondents, the recognition in our law to the interference and “breach” by third parties to a contract, at the very least, would mean that this dispute ought to be resolved with the second and third parties being intricate parties in the determination of the underlying dispute which had arisen between them. Clearly the dispute has metamorphosed into issues far beyond the realm of the Red Hill agreement and exceeding the relationship between appellant and first respondent and the arbitration mechanism to resolve disputes purely between them as contemplated by its arbitration clause.

31] The second and third respondents are necessary parties to the resolution of the underlying dispute. They cannot be joined in arbitration proceedings. The rationale that parties who had contracted to resolve a contractual dispute via a certain mechanism such as arbitration, must be held to such undertaking, and is not applicable to scenarios where the dispute includes persons who are not parties to the arbitration agreement. The court maintains a discretion, whether to hold a party to arbitration. I am of the view that the court a quo correctly exercised its discretion against arbitration. All the parties in the dispute are not parties to the arbitration agreement, thereby, avoiding a multiplicity of proceedings in different forums which may further bring conflicting decisions and increased costs.

¹⁴ Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng [2014] ZACC 28

32] The possibility that the dispute between the appellant and the first respondent may be resolved in favour of the first respondent, clearly makes the second and third respondents necessary parties to its resolution. The test for establishing whether a person is a necessary party to certain legal proceedings is whether, that person has a legal interest in the subject matter of the proceedings which may be affected prejudicially by the judgment in those proceedings. The underlying dispute cannot be said to be a dispute purely between the appellant and the first respondent.

33] The facts and circumstances of this case are compelling factors against the enforcement of an arbitration clause. The court a quo, in my view, was correct in dismissing the application to compel the first respondent to arbitration proceedings. The court a quo had properly exercised its judicial discretion and I cannot find any basis upon which to interfere therewith.

34] For the reasons aforesaid and in all circumstances of this case I would propose an order as follows:

“The appeal is dismissed with costs, including the costs of two counsel.”

SALIE-HLOPHE, J

I AGREE.

STEYN, J

I AGREE AND IT IS SO ORDERED:

ERASMUS, J

CORAM:

ERASMUS, J et STEYN, J et
SALIE-HLOPHE, J

JUDGMENT BY:

SALIE-HLOPHE, J

DATE OF HEARING:

2 FEBRUARY 2018

JUDGMENT DELIVERED ON:

5 MARCH 2018

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