



THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 23172/17

In the matter between

BROCSAND (PTY) LTD

PLAINTIFF

AND

FULL SCORE TRADING 145 CC
 GLOBAL PACK TRADING 370 (PTY) LTD
 TIP TRANS RESOURCE (PTY) LTD

FIRST DEFENDANT
 SECOND DEFENDANT
 EXCIPIENT/THIRD DEFENDANT

JUDGMENT DELIVERED 26 MARCH 2019

THULARE AJ

[1] This is third defendant's exception against the particulars of claim on the ground that they disclose no cause of action; and plaintiff's application under Rule 28(4) for leave to amend its particulars of claim. It was agreed between the parties that the two issues be heard together.

[2] Plaintiff's underlying case is based on a combination between the doctrine of notice and the special mechanism pertaining to rights of first refusal recognized in *Associated SA Bakeries (Pty) Ltd v Oryx & Verenigde Backereien (Pty) Ltd* 1982 (3) SA 893 (A) at 907. The special mechanism, hereinafter referred to as the Oryx mechanism, was translated as follows in *Mokone v Tassos Properties CC and another* 2017 (5) SA 456 (CC) at para 56:

"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 [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 between the seller and the holder of the right of pre-emption."

[3] The first defendant was the holder of a mining right in relation to certain minerals on Bloemendaal Fonteyn 702 and 703 near Malmesbury, known as the Red Hill Mine (Red Hill). The second defendant was the holder of a right to mine sand at Doornkraal 831 near Malmesbury (Doornkraal).

[4] On 12 October 2010 first defendant appointed plaintiff as the exclusive contractor to mine the minerals on Red Hill and plaintiff would purchase the minerals from first defendant. The agreement would endure until 30 October 2015. The agreement contained a proviso that upon expiry of the agreement the plaintiff shall have the right of first refusal to enter into a new agreement with the first defendant as the exclusive contractor to render mining services in respect of the minerals on Red Hill.

[5] On 30 January 2015 the first defendant, the second defendant and the third defendant concluded an agreement. In terms of the agreement the third defendant would be entitled to act as mining contractor at Red Hill and Doornkraal with the underlying mining rights held by the first and second defendants respectively. The takeover at Red Hill would be 1 November 2015. The takeover at Doornkraal commenced on 22 May 2015 and endured until 21 May 2035. The third defendant was given the right of first refusal for further mining-related activities. First, Second and third defendant had prior knowledge of the plaintiff's right of first refusal in respect of Red Hill when they entered into the 30 January 2015 agreement.

[6] Plaintiff became aware of the 30 January 2015 agreement when it was disclosed. On 21 August 2015 the plaintiff conveyed to the defendants its unilateral declaration of intent to the effect that it stepped into the shoes of the third defendant and that an independent contract equivalent to the 30 January 2015 agreement but involving the plaintiff as a party came into existence.

[7] According to plaintiff, as regards Red Hill, it was effectively entitled to replace the third defendant as mining contractor. According to plaintiff, as regards Doornkraal, it was effectively entitled to replace third defendant as mining contractor until 21 May 2035. It is plaintiff's case that the Red Hill aspect of the 30 January 2015 agreement (directly involving first and third defendant) and the Doornkraal aspect of the same agreement (directly involving only the second and third defendant) were deliberately mixed up and conflated by the defendants

through embodying them in the same document in a legally impermissible attempt to frustrate or circumvent the plaintiff's right of refusal.

[8] In its exception, the third defendant's case is that the plaintiff is currently in occupation and is actively mining on Red Hill. The third defendant has no interest in that mine, has never interfered with the plaintiff's mining activities on that mine and that plaintiff has no claim against it in relation to that mine. In respect of Doornkraal, third defendant said that plaintiff's particulars of claim fail to disclose a cause of action against it in that:

(a) neither second nor third defendant were party to the Red Hill agreement which made provision for the plaintiff's pre-emptive rights in relation to Red Hill.

(b) if the court found that plaintiff's pre-emptive rights in terms of the Red Hill agreement have been infringed the plaintiff cannot by unilateral declaration of intent and by implementation of the Oryx mechanism acquire newfound rights against the second and third defendants.

(c) The Oryx mechanism is aimed at preserving existing rights and not creating new rights.

(d) The plaintiff cannot avail itself to either the Oryx mechanism or the doctrine of notice to create new contractual rights against the third defendant in relation to Doornkraal.

(e) Alternatively, if it is found that the plaintiff is entitled to assume the rights and obligations of the third defendant in terms of the 30 January 2015 agreement as regards Doornkraal, the plaintiff, on its own version, replaces the third defendant as a party to that agreement;

(f) the effect thereof is that the third defendant is no longer a party to the 30 January 2015 agreement or any “deemed agreement”.

[9] As regards the plaintiff’s claim for damages against the third respondent the plaintiff’s particulars of claim do not disclose a cause of action according to third respondent in that:

(a) no contractual obligation exists between the plaintiff and third defendant as regards Doornkraal.

(b) plaintiff cannot by way of a unilateral declaration of intent acquire rights against second and third defendants who were not party to the Red Hill agreement.

(c) alternatively, if the court found to the contrary, by operation of law, the plaintiff would have stepped into the shoes of the third defendant and have effectively replaced it as a party to the agreement and would not have vested a new multilateral agreement to which the plaintiff and all three defendants are party.

[10] As regards the ejectment of the third defendant from Doornkraal, the third defendant said the particulars of claim do not disclose any cause of action in that:

(a) no contractual rights and obligations exist between the plaintiff and the third defendant which contractual rights the plaintiff may rely upon to eject third defendant.

(b) plaintiff does not aver that it has *locus standi* to claim the ejectment of the third defendant nor does it aver that the defendant is in unlawful occupation of Doornkraal.

[11] The plaintiff seeks to amend paragraph 25 and 27 by insertion of words, identified by my underlining, to the existing paragraphs. The envisaged paragraph 25 amendments read as follows:

"The first, second and third defendants have generally repudiated the deemed contract in the case of the third defendant, not on the basis that it is a party to that contract, but on the basis and in the sense that it refuses to accept that as a consequence of the deemed contract it has been ousted from the 30 January 2015 agreement and that the plaintiff has accordingly stepped into its shoes as pleaded in paragraphs 16.3, 20.2 and 22.2 above, and have unlawfully refused to recognize its existence and implications, including (without thereby implying any limitation) by virtue of the following circumstances and conduct on their part."

The envisaged paragraph 27 amendment read as follows:

"The first, second and third defendants have accordingly breached the deemed contract, in the case of third defendant not on the basis that it is a party to the contract, but on the special basis pleaded in paragraph 25 above, and continue to be in breach thereof despite repeated written demands by the plaintiff that they cure such breach."

The envisaged amendment is opposed on the grounds that it does not rectify and remove the cause of complaint as set out in the exception and that the particulars remain excepiable as it does not disclose a cause of action.

[12] The plaintiff never had any agreement with the second defendant, the holder of the mining rights over Doornkraal, in respect of Doornkraal. Third defendant had not at any stage occupied Red Hill or conducted business activities there. In essence, plaintiff seeks to rely on its agreement with first defendant in respect of Red Hill, to step into the shoes of its competitor, third defendant, and replace third defendant as the mining contractor in a contractual relationship between third defendant and second defendant in relation to Doornkraal.

[13] The issue is whether the Oryx mechanism extends to allow for a person to step into the shoes of their competitor and replace such competitor in a contractual relationship between such competitor and a different person in relation to a different subject. In this case, the question is whether the right to bring about an agreement through a unilateral declaration of intent by the holder of the right to first refusal, to wit the plaintiff, extends to all the terms of a written instrument with the third party, including matters beyond the original agreement or whether it is limited to only the subject matter of the original agreement between the seller and the holder of the right of refusal. Can the Oryx mechanism result in a deemed contract with plaintiff in respect of Doornkraal?

[14] The point of departure should be the agreement between the parties in my view. In their agreement, plaintiff and first defendant defined the material terms as follows:

(i) *“Contractor” means Brocsand (Pty) Ltd a company duly incorporated with registration number 2001/022698/07;*

(vi) *“Holder” means Full Score Trading CC a duly incorporated closed corporation with registration number 2002/066484/23;*

(xii) *“the Property” means the farm Bloemendaalfonteyn 702 & 703, District of Malmesbury.”*

[15] The further material term of the agreement is clause 3.2 which reads as follows:

“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 with the Holder for the appointment as the exclusive contractor to render mining services in respect of the Minerals on the Property.”

Plaintiff’s right of refusal in terms of the agreement is in respect of Red Hill only.

[16] An excipient has the duty to persuade the court that upon every interpretation which the plea can reasonably bear, no cause of action is disclosed [*Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* at para 9].

[17] What is clear in this matter is that plaintiff has no right of first refusal in respect of Doornkraal. As a consequence, there is no breach of plaintiff’s right of first refusal in respect of Doornkraal. There is no wrong which amounts to an infringement of plaintiff’s interest, which entitles the plaintiff, as an injured party, to a claim on Doornkraal. There is no unlawfully inflicted injury to plaintiff in respect of Doornkraal which would invoke the Oryx mechanism, whose essential character is liability and resultant remedy for such wrongs. There is no harm to plaintiff, to which the Oryx mechanism would be redress in respect of Doornkraal. In the absence of harm for which the mechanism is invoked to award compensation, there is no basis to assuage and as a consequence no basis for liability in respect of Doornkraal. There are no facts that beget the plaintiff’s cause of action. The mechanism itself, as a conclusion of law, can only be drawn and invoked from the facts upon which the plaintiff rely to establish a cause of action.

[18] In my view, the application of the Oryx mechanism is the second stage of an enquiry as to the ultimate liability. The first stage is the establishment of the facts that beget the invocation of the mechanism. The essence of the mechanism is

that the plaintiff steps into the shoes of the third respondent in the other agreement which breached the right of first refusal agreement. In the first stage of the enquiry the size, make and fitness for purpose of the shoes should be determined. In this matter, the inclusion of Doornkraal, amongst others, present a bigger shoe size to that ordinarily worn by plaintiff on Red Hill in respect of the agreement. The purity of the mechanism, on its own, is not sufficient to merit application of the rule in respect of Doornkraal. The plaintiff, without more, cannot just walk into the shoes of third defendant in respect of Doornkraal. It is simply not the same shoe size to the Red Hill shoes which found the right of refusal, on the facts. The shoe does not fit.

[19] The damage-producing activity together with its consequences for a plaintiff, which makes it actionable harm, is required to undergo the value judgment. The mechanism is invoked not by its mere existence in our law, but when there are interests which should enjoy legal protection. As a matter of policy, it is applicable where the plaintiff's loss merits the intervention of the law. The conduct of a party, the nature of the fault and the nature of the harm are determining factors at the root of the value judgment, in order to correctly reflect what is reasonable and proper. Conscious and careful judicial attention is necessary to keep this legal remedy within the bounds of reason and morality.

[20] It seems to me that plaintiff seeks an interpretation of the mechanism which develops it to be far-reaching in its scope, without pleading any facts upon which such development is justifiable. The Oryx mechanism is not a bargaining chip to be used to gain an advantage when trying to make a business deal. The

mechanism is also not a springboard that can bend and with its embedded spring help others to jump higher in legal gymnastics. It remains a doctrine, which is a framework established through precedent in the common law. It is a concept and a value. It is a rule that has to be followed as part of our law. It finds its utility in law when it is applied to the facts with an underlying cause of action. The essence of its character is in the nature of redress for harm suffered by the pleader for its application.

For these reasons I make the following order.

The exception is upheld with costs. The application for amendment is dismissed with costs.

DM THULARE
ACTING JUDGE OF THE HIGH COURT

Counsel

Appellant: Advocate A De La V La Grange

3rd Respondent: Advocate A Moller

Instructing Attorneys

Appellant: Werksmans Inc

1st Respondent and 2nd Respondent: Smit Kruger Incorporated

3rd Respondent: Lucas Deyssel Crouse

JUDGMENT READ AND DAY(S) IN COURT: 26 March 2019