8 DECEMBER 2020

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

A bridge (and perhaps a shoe) too far...

Despite the ubiquitous application of preferential rights in various branches of our law, the residual rules regarding the nature and scope of the rights and remedies afforded to the grantee, as well as the duties of the grantor, remain somewhat uncertain. The Supreme Court of Appeal sought to provide some clarity in this regard, in the recent case of *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others* (Case Number 925/2019) [2020] ZASCA 144 (4 November 2020).

Telecommunication mast invasion – upholding your property rights

The wide-reaching powers afforded to licensed network operators have created conflict between the interests of municipalities, licensees and property owners. *Telkom SA SOC Limited v City of Cape Town and Another* 2020 (10) BLCR 1238 (CC) is just one example of how our courts have dealt with these competing interests.

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE
FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

A bridge (and perhaps a shoe) too far...

Brocsand contended that by proffering its unilateral declaration of intent to the defendants – in turn, invoking the Oryx mechanism – it had, as a result, *"stepped into the shoes"* of Tip Trans, and thus became party to a separate agreement (deemed contract) with Full Score and Global Pact on identical terms to that of the Tripartite Agreement.

Despite the ubiquitous application of preferential rights in various branches of our law, the residual rules regarding the nature and scope of the rights and remedies afforded to the grantee, as well as the duties of the grantor, remain somewhat uncertain. The Supreme Court of Appeal sought to provide some clarity in this regard, in the recent case of *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others* (Case Number 925/2019) [2020] ZASCA 144 (4 November 2020).

Genesis of the dispute

On 12 October 2010 Brocsand (Pty) Ltd (Brocsand) entered into a written agreement with Full Score Trading CC (Full Score) in terms of which, Brocsand was contracted to render mining services in respect of certain minerals located on a farm in Malmesbury (Red Hill Farm). Full Score was entitled to exploit the minerals pursuant to a mining right it had acquired in terms of the Mineral and Petroleum Resource Development Act 28 of 2002 (MPRDA). The agreement (Red Hill Agreement) afforded Brocsand the right to mine for laterite and sand until 30 October 2015, and upon expiry thereof, clause 3.2 conferred upon Brocsand, *"the right of first refusal to enter into a new agreement as the holder for appointment as the exclusive contractor to render mining services in respect of the minerals"* on Red Hill Farm.

On 30 January 2015, Tip Trans Resources (Pty) Ltd (Tip Trans), Global Pact Trading 370 (Pty) Ltd (Global Pact) and Full Score entered into a written agreement (Tripartite Agreement) in terms of which:

(i) Full Score appointed Tip Trans, as the mining contractor, to extract laterite and sand from the Red Hill Farm, and to procure it from Full Score (Red Hill segment); and

(ii) Global Pact appointed Tip Trans, as the mining contractor, to extract sand from a farm in Doornkraal (Doornkraal Farm) and to procure it from Global Pact (Doornkraal segment).

Upon becoming aware of the conclusion of the Tripartite Agreement, Brocsand issued summons against Tip Trans, Full Score and Global Pact (defendants) averring, inter alia, that its preferential right had been breached. Brocsand contended that by proffering its unilateral declaration of intent to the defendants – in turn, invoking the Oryx mechanism – it had, as a result, *"stepped into the shoes"* of Tip Trans, and thus became party to a separate agreement (deemed contract) with Full Score and Global Pact on identical terms to that of the Tripartite Agreement.

Brocsand averred further that by virtue of the deemed contract, it was entitled to replace Tip Trans as the mining contractor in respect of both the Red Hill and Doornkraal segments of the Tripartite Agreement. Moreover, or so Brocsand's argument went, should the Oryx mechanism be found wanting in any respect, the application of the

CDH
CLIFFE DEKKER HOFMEYR

A bridge (and perhaps a shoe) too far...*continued*

The court remarked that the doctrine merely allowed the grantee to enforce its preferential personal right against the grantor, as well as against third parties who had knowledge of the right yet proceeded to frustrate it.

doctrine of notice would bridge the gap that might otherwise have existed. In this regard, the kernel of Brocsand's contention was that the defendants had purposefully concluded the Tripartite Agreement despite being privy to Brocsand's preferential right and the sole purpose behind this was to circumvent its preferential right. Thus, Brocsand sought an order permitting it to mine on the Doornkraal Farm, in addition to damages for the loss of profit it had incurred during the period it had allegedly been precluded from mining.

Tip Trans contended that Brocsand had failed to disclose a cause of action with regard to the Doornkraal segment of the Tripartite Agreement, and thus excepted to Brocsand's particulars of claim. Tip Trans' core contention in this regard was that the purview of the rights conferred by the Red Hill Agreement, with respect to mining, only pertained to the Red Hill Farm and did not extend to the Doornkraal Farm. Moreover, neither Global Pact nor Tip Trans were party to the Red Hill Agreement and therefore, a mere invocation of the Oryx mechanism could not, on its own, create new contractual rights against Global Pact and Tip Trans with respect to the Doornkraal Farm.

Merits of the exception

The court thought it prudent to first consider the contents of the Tripartite Agreement. It intimated that the respective obligations contained in the Red Hill and Doornkraal segments of the agreement were evidently divisible. According to the court, the fact that the two segments of the Tripartite Agreement pertained to the exploitation of different minerals at different prices, made the fact of their divisibility all the more clear.

Turning to Brocsand's preferential right, the court noted that it had a particular content, namely, the right to enter into a new agreement with Full Score to render mining services in respect of the laterite and sand on Red Hill Farm. Accordingly, common sense suggests that the content of the preferential right could not simply alter by virtue of the breach thereof – which led the court to question how exactly Brocsand could be said to have (ostensibly) obtained contractual rights against Global Pact, with respect to the minerals on Doornkraal farm.

The court proceeded to examine the justificatory claims put forward by Brocsand, namely, the doctrine of notice and the Oryx mechanism respectively. According to the court, the doctrine of notice claim was predicated on the argument that Tip Trans had actual knowledge of Brocsand's preferential right and, despite this, deliberately concluded the Tripartite Agreement with the aim to frustrate it. As a result of the defendants' common prior knowledge and concomitant *mala fides*, or so the argument went, Global Pact, *inter alios*, was fully subjected to the operation of the deemed contract and its consequences. Therefore, despite the absence of a prior contractual nexus between Brocsand and Global Pact, the doctrine of notice – according to Brocsand – bridged the gap which might have otherwise existed.

The court, however, was not persuaded by Brocsand's contentions in this regard, noting that Brocsand had misunderstood the meaning and import of the doctrine of notice. The court remarked that the doctrine merely allowed the grantee to enforce its preferential personal right against the grantor, as well as against

CDH
CLIFFE DEKKER HOFMEYR

A bridge (and perhaps a shoe) too far...*continued*

The court held that Brocsand's assumption that recourse to the Oryx mechanism could contractually bind Global Pact, notwithstanding the absence of a prior contractual nexus was ill-founded. As a result, the court correctly upheld Tip Trans' exception.

third parties who had knowledge of the right yet proceeded to frustrate it. In the ordinary course, the doctrine would allow the grantee to reclaim property that had been delivered to the third party who had knowledge of the grantee's prior preferential personal right. However, the grantee's enforcement of the personal right could not go further than the content of the obligation assumed by the grantor, under the contract giving rise to the preferential right. The court held that recourse to the doctrine of notice could not, on its own, confer upon Brocsand rights in respect of the Doornkraal Farm that did not previously exist. Consequently, contrary to Brocsand's assumption, the doctrine of notice proved a bridge too far.

As far as Brocsand's Oryx mechanism argument was concerned, the court was equally unconvinced. In a similar vein to its previous contention, Brocsand's extended application of the Oryx mechanism rested squarely on the *mala fides* of the defendants, in relation to the conclusion of the Tripartite Agreement. The court noted that although the grantee is said to have "*stepped into the shoes*" of the third party when invoking the Oryx mechanism, the oft-quoted phrase ought not be taken literally. Rather, upon invoking the Oryx mechanism, a separate independent contract is concluded between the grantee and the grantor, but only within the confines of the subject matter of the preferential right. The court held that Brocsand's assumption that recourse to the Oryx mechanism could contractually bind Global Pact, notwithstanding the absence of a prior contractual nexus was ill-founded. As a result, the court correctly upheld Tip Trans' exception.

Conclusion

It is submitted that the court's reasoning cannot be faulted. The mere fact that the conclusion of the Tripartite Agreement had breached the preferential right did not mean that all of the parties thereto were, as a consequence, contractually bound to an identical agreement with the grantee, when the preferential right itself only bound the grantor. The obvious point of departure should always be the content of the preferential right, as it determines both the obligation assumed by the grantor, and by corollary, the remedies available to the grantee.

Roy Barendse and Khoro Makhesha

CLIFFE DEKKER HOFMEYR

Telecommunication mast invasion – upholding your property rights

At the heart of the Telkom matter was the question of whether ECNS licensees are obliged to comply with property zoning bylaws and policies when exercising their rights in terms of section 22 of the ECA.

The wide-reaching powers afforded to licensed network operators have created conflict between the interests of municipalities, licensees and property owners. *Telkom SA SOC Limited v City of Cape Town and Another* 2020 (10) BLCR 1238 (CC) is just one example of how our courts have dealt with these competing interests.

In terms of section 22 of the Electronic Communications Act, 36 of 2005 (ECA), an electronic communications network service (ECNS) licensee (that is, a telecommunications network operator) may:

1. enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;
2. construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and
3. alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

In doing so, the licensee must have due regard to applicable law and the environmental policy of the Republic.

Background

At the heart of the Telkom matter was the question of whether ECNS licensees are obliged to comply with property zoning bylaws and policies when exercising their rights in terms of section 22 of the ECA.

During 2015, Telkom, a state-owned ECNS licensee concluded a lease agreement with the owner of a property in a residential suburb which Telkom identified as a suitable site for a mast. In terms of the lease agreement, Telkom was permitted to erect a mast on the property but the residential property was zoned as single residential zone 1 under the bylaws of the City of Cape Town (City), which did not allow for the construction of cellular masts.

In January 2016 Telkom applied for the rezoning of a portion of the property so as to permit the construction of a mast. Telkom built the mast on the property before receiving the City's approval for rezoning. Local residents objected to the mast and complained to the City which responded by imposing an administrative penalty on Telkom and putting its application for rezoning on hold pending payment of the penalty.

Telkom approached the High Court challenging the validity of the City's bylaw and policy. It contended that the City lacked power to make the bylaw and the policy, which impacted on the field of electronic communications which fell under the competence of the national sphere of government. Telkom also argued that both the bylaw and the policy were invalid for being in conflict with section 22.

CDH
CLIFFE DEKKER HOFMEYR

Telecommunication mast invasion – upholding your property rights

...continued

An attempt to curtail municipal powers in the fashion proposed by Telkom was contrary to the Constitution's aim to provide municipalities with powers to control and regulate the use of land within their jurisdictions.

The City opposed Telkom's application and brought a counterapplication seeking an order declaring that Telkom had built the mast unlawfully in breach of the National Building Regulations and Building Standards Act, 103 of 1977 (Building Standard Act) which required that the City's consent be obtained before the mast was erected. In response, Telkom contended that the Building Standards Act did not apply to it because it was part of the State.

The High Court found in favour of the City and held that Telkom could not erect masts without the City's consent. Telkom's argument that it was not subject to the Building Standards Act as well as its argument that a mast was not a building were apparently abandoned in the High Court.

The Supreme Court of Appeal (SCA) in turn accepted that Telkom abandoned the arguments relating to the Building Standards Act and ultimately rejected Telkom's argument that the City's zoning bylaws and mast policy conflicted with section 22 of the ECA.

Decision of the Constitutional Court

In a unanimous judgment handed down on 25 June 2020, the Constitutional Court dismissed Telkom's application for leave to appeal against the decision of the SCA, which had dismissed an appeal by Telkom.

Telkom's case in the Constitutional Court (CC) rested on two main arguments, namely the competence argument and the conflict argument.

Competence

Telkom argued that the City did not have legislative power to regulate telecommunications and that municipal planning, insofar as it affected the building of telecommunications infrastructure, went beyond the scope of municipal powers. Telkom implored the CC to apply a narrow interpretation of municipal planning and effectively exclude "*the control and use of land for laying down telecommunications infrastructure*" from the scope of municipal powers.

The CC pointed out that municipal planning forms part of the powers and functions conferred on municipalities in terms of section 156(1) of our Constitution and that municipalities alone exercise the power to zone and subdivide land. The notion that other spheres of government could disregard municipal zoning schemes or bylaws giving effect to municipal planning and use land as they wish, would amount to a serious breach of the Constitution.

The court concluded that Telkom's interpretation of municipal planning was constitutionally flawed. Section 151(4) of the Constitution prohibits national and provincial government from impeding a municipality's right to exercise its powers. As such, an attempt to curtail municipal powers in the fashion proposed by Telkom was contrary to the Constitution's aim to provide municipalities with powers to control and regulate the use of land within their jurisdictions.

Telecommunication mast invasion – upholding your property rights

...continued

The CC has once again confirmed that it is essential for ECNS licensees to comply with municipal bylaws when exercising their rights in terms of section 22 of the ECA.

Conflict

Section 156(3) of the Constitution provides that a bylaw that is in conflict with national legislation is invalid. Telkom relied on this provision to support its case, stating that the bylaw in question was in conflict with section 22(1) of the ECA as it required licensees to first obtain municipal approval before exercising their right to erect infrastructure in the City.

However, the CC held that section 156(3) may only be invoked in cases where there is a real conflict between bylaw and national legislation. What constitutes a real conflict goes beyond bylaws that prescribe how parties may exercise certain rights in terms of national legislation. A party will only be able to successfully raise an issue of a conflict if the two pieces of legislation cannot reasonably operate alongside each other. Consequently, where there is an inadvertent overlap between the regulation of municipal planning and telecommunications, licensees may not arbitrarily elect to disregard bylaws.

The CC also indicated that section 22(1) of the ECA could not be considered in isolation, as section 22(2) also expressly provides that licensees must give due regard to applicable law. Applicable law, in this instance, included municipal bylaws. The only exception, as explained by the CC in *City of Tshwane v Link Africa and Others* 2015 (6) SA 440 (CC), is where the sole purpose of a bylaw is to thwart the purpose of a statute by requiring the municipality's consent. The present dispute, however, did not fall within this exception.

Conclusion

The CC has once again confirmed that it is essential for ECNS licensees to comply with municipal bylaws when exercising their rights in terms of section 22 of the ECA. This confirmation holds licensees accountable, empowering municipalities (and property owners) to ensure that licensees abide by the bylaws of their specific municipality, especially property zoning bylaws.

Anja Hofmeyr and Omolola Botsane

CDH
CLIFFE DEKKER HOFMEYR

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2020 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2020 ranked our Public Procurement sector in Band 2: Public Procurement.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2020 in Band 3: Dispute Resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2020 as Senior Statespeople: Dispute Resolution.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 2: Dispute Resolution.

TOP RANKED Chambers GLOBAL 2020

CDH IS THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:

Insuralex Global Insurance Lawyers Group
(the world's leading insurance and reinsurance law firm network).

CLICK HERE TO READ MORE

insuralex GLOBAL INSURANCE LAWYERS GROUP

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Joe Whittle is recommended in Construction in TTHE LEGAL 500 EMEA 2020.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Timothy Baker is recommended in Dispute Resolution and Construction in THE LEGAL 500 EMEA 2020.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.
Siviwe Mcetywa is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

The LEGAL 500 EMEA

CDH'S COVID-19 RESOURCE HUB

Click here for more information

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR