Case No 128/88
whn

AMCOAL COLLIERIES LIMITED ..... Appellant

and

JOHN EDMUND TRUTER ..... Respondent

NICHOLAS A J A

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

AMCOAL COLLIERIES LIMITED ..... Appellant

and

JOHN EDMUND TRUTER ..... Respondent

Coram: JOUBERT, MILNE, EKSTEEN, F H GROSSKOPF J J A

et NICHOLAS A J A.

Heard: 17 August 1989

Delivered: 7 September 1989

JUDGMENT

NICHOLAS A J A:

/This.....

This appeal concerns the proper interpretation of a clause in a prospecting and mineral-option contract which was concluded on 10 July 1984. The parties were JOHN EDMUND TRUTER ("Truter"), who was referred to in the contract as "die EIENAAR", and ANGLO AMERICAN PROSPECTING SERVICES (PTY) LIMITED ("AAPS"), which was referred to as "die PROSPEKTEERDER". In terms of the contract the owner granted to the prospector the sole right to prospect for coal on a certain property, together with the right to purchase the coal rights and other rights therein. The contract was for an initial period of one year from 3 July 1984, being the date on which it was signed by Truter, and was renewable annually for a period of not more than three years, called in the contract "die PROSPEKTEERTERMYN". In terms of clause 6 supplementary rights were granted to enable the prospector to carry out its activities. Clause 11(a)

provided:

a) Die PROSPEKTEERDER sal te eniger tyd gedurende die PROSPEKTEERTERMYN die alleen- en uitsluitlike reg hê om al die EIENAAR se regte tot steenkool, waarna in Klousule 2 hiervan verwys word ten opsigte van die EIENDOM ----------tesame met die bykomende regte waarna in Klousule 6 hiervan verwys word, te koop, teen R700-00 (SEWE HONDERD RAND) per hektaar.

Clause 11(b) contemplated that the option would be exercised in writing, which is in any event a statutory requirement for validity. In terms of clause 13 the prospector was entitled to cede or assign the contract to any person, syndicate or company. Clause 15 provided:

15. Die partye kies die volgende adresse vir bediening van kennisgewings kragtens hierdie kontrak:

Die EIENAAR -

VANDYKSPUT DIST WITBANK

Die PROSPEKTEERDER - Mainstraat, 44, Johannesburg.

On 26 September 1984 AAPS ceded its rights under the contract to AMCOAL COLLIERIES LIMITED ("AMCOAL").

The contract was duly renewed annually, and terminated by effluxion of time at midnight on 2 July 1987.

On 30 June 1987 Mr H Mammes was instructed by AMCOAL to deliver to Mr J E TRUTER of the farm Vandyksput in the district of Witbank, a letter giving notice of the exercise by AMCOAL of the option to acquire the rights described in the contract. Mammes arrived at the farm Vandyksput at approximately 18h00 on 30 June 1987. He was directed

to a house which was in darkness. There was no response to his knocking on the door. Enquiries of a farm labourer brought the reply that he did not know where Truter was, but thought that he was recruiting labour in the Transkei. Mammes accordingly returned to Johannesburg.

On the following morning (1 July 1987), Mammes tried to telephone Truter at the farm but got no reply. He went back to the farm, and again finding no one at home he pushed the letter together with a copy under the front door of the farmhouse at 14h30.

On 3 July 1987 AMCOAL wrote a letter to Truter confirming that it had exercised the option by delivering a letter by hand at the farmhouse. Truter's attorneys replied in a letter dated 14 July 1987, stating that Truter denied that AMCOAL had lawfully exercised the option to purchase the coal rights and that in the circumstances

Truter was entitled to deal with such rights as he deemed fit.

Further correspondence followed. On 18 September 1987 AMCOAL instituted proceedings against Truter in the Transvaal Provincial Division, by notice of motion, claiming a declaratory order, specific performance and costs. Truter filed answering affidavits opposing the grant of the relief claimed.

The matter was heard by VAN NIEKERK J who dismissed the application with costs. Leave having been granted, AMCOAL now appeals to this court.

In his judgment VAN NIEKERK J dealt with a number of points raised on behalf of Truter. On what he called "the real question" (i.e. whether the option

was duly exercised in terms of the contract) which is the only issue in the appeal, the learned judge concluded that

> ..... as *no* specific description as to how service should be effected is contained in the option clause I am of the opinion that 'bediening' requires more than simply placing a document under the door of the respondent.

In his answering affidavit Truter denied that the letter exercising the option was a notice such as that referred to in clause 15. He said that he received the letter (which was Annexure "I" to the founding affidavit) on 5 July 1987. He could not deny that Mammes delivered Annexure "I" to his farm on 1 July 1987. He was absent from the farm on that day, because he had gone to recruit labourers in the Transkei. He returned only on 2 July

1987. His wife gave him the letter on Sunday 5 July 1987. Mrs. Truter confirmed this in her affidavit.

The exercise of an option is governed by the ordinary principles applicable to the acceptance of an offer. The general and clearly established principle of our law of contract is that acceptance of an offer must be communicated to the offeror. It is however also well-established that the offeror may require or authorize a particular method of acceptance, and compliance with such method will result in the conclusion of a contract, even though the acceptance is not received by the offeror. (See Smeiman v Volkersz 1954(4) SA 170 (C) at 176 and cases there cited). Specifically with regard to the exercise of an option, see Ficksburg Transport (Edms) Bpk v Rautenbach en 'n Ander 1988(1) SA 318 (A) at 332 D-F.)

If the general principle applies in the

present case, then clearly no contract resulted, because Annexure "I" did not come to Truter's knowledge until after the expiry of "die PROSPEKTEERTERMYN". The question is accordingly whether in clause 15 Truter authorised delivery at the chosen address as a method for the exercise of the option.

VAN NIEKERK J regarded the word bediening in clause 15 as meaning service or betekening. In none of the Afrikaans dictionaries I have consulted is serve or beteken given as a meaning of bedien, nor is bediening given as a meaning of betekening. (See Die Afrikaanse Woordeboek; HAT; Van Schaik se Verklarende Woordeboek (Kritzinger & Labuschagne) 7e uitgawe; Tweetalige Woordeboek (Bosman, van der Merwe & Hiemstra) 8e uitgawe). In Botha N.O. v Botha 1965(3) SA 128 (E) MUNNIK J described the word bedien at 130 E as "n growwe en onnodige Anglisisme". In die Drietalige

Regswoordeboek Hiemstra & Gonin do not give bedien, but they say under the English serve

> (2)--on (prosesstukke) beteken
>
> bestel aan ... dien is hier n
>
> onnodige anglisisme. .....

Die Afrikaanse Woordeboek does give as one meaning of dien

> 8 ang., jur.) Besorg, afgee, aflewer
> - bv. stukke in 'n regsgeding : 'n Dagvaarding, 'n prosesstuk op iem. dien ; vgl BETEKEN.

VAN NIEKERK J said that in leaving the notice under the door Mammes did not comply with what would be requisite in terms of the rules of court. That is, with respect, of no moment. There is no basis forassuming that in using the word bediening the parties had a rule of court in contemplation as a dictionary for

interpreting a word not used in the rule.

In my opinion the word bediening was used by the parties for diening, and dien means (vide Die Afrikaanse Woordeboek (supra)) besorg, afgee, aflewer. It does not necessarily connote personal service.

It was argued on behalf of Truter that on a proper interpretation of clause 15 it required delivery to "Die EIENAAR" and that the address indicated no more than the place where "Die EIENAAR" was to be found. The clause is not capable of bearing that construction. It states that "Die partye kies die volgende addresse ....." and then goes on to particularize "die partye" - viz. "Die EIENAAR" and "Die PROSPEKTEERDER" - and their respective addresses for service.

In his answering affidavit Truter denied that Annexure "I" was a "kennisgewing kragtens hierdie kontrak"

in terms of clause 15. VAN NIEKERK J appears however, to have accepted that notice of the exercise of the option was the only "kennisgewing" that the parties could have envisaged and counsel for Truter did not contend to the contrary.

Truter raised another contention in his answering affidavit. He said that there was no fewer than five farms named "Vandyksput" in the magisterial district of Witbank. All of these farms form part of the land which constituted the original farm "Vandyksput". Two of those farms border on the farm on which Truter lives, which is also known as Vandyksput. All this he knew when he signed the agreement, and it was also known to Mr Engela, who negotiated the contract on behalf of AAPS. Truter said that he would never in these circumstances have agreed to the delivery of a notice at Vandyksput without more. Such a notice would probably not have reached him.

There is nothing in this contention. It is plain that the "Vandyksput" referred to in clause 15 is Truter's farm Vandyksput. The contract records that it was signed at Vandyksput by Truter in the presence of two witnesses, one of whom was Engela. Engela said in his affidavit that on 17 September 1987 he went with Mammes to the entrance of Truter's farm. At the gate leading off the Delmas - Kendal Road there is a signpost reading "VANDYKSPUT J. E. Truter". The residence is plainly visible from the gate. Mammes pointed it out to Engela as the house where he had delivered Annexure "I" on 3 July 1984. It was the same house where Truter had signed the contract on 3 July 1984 in Engela's presence. Mammes confirmed this evidence so far as it related to him. Plainly the parties did not contemplate that delivery would be effected by leaving the

notice on the farm at a place where it was unlikely that Truter would receive it. But they must have had in mind that it could be delivered to the house on the farm which Truter occupied.

To summarize. Annexure "I" was a notice of the kind referred to in clause 15. It was placed under the front door of the house at the address chosen in clause 15 of the contract.

It is a matter of frequent occurence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see Pretoria Hypotheck Maatschappy v Groenewald 1915 TPD 170.) It is a well-established practice (which is recognized

by rule 4(1)(a)(iv) of the Uniform Rules of Court) that if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found (Herbstein & Van Winsen, The Civil Practice of the Superior Courts of South Africa 3rd ed., p 210. See Muller v Mulbarton Gardens (Pty) Ltd. 1972(1) SA 328 (W) at 331 H-333 A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847 D-F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings. (Ficksburg Transport (Edms) Bpk v Rautenbach & 'n Ander (supra) 333 C-D). Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in

principle be the same as the choice of a domicilium citandi et executandi (Cf the Ficksburg Transport case ubi cit.), namely that service at the address chosen is good service, whether or not the addressee is present at the time.

The conclusion is that the delivery of Annexure "I" on 2nd July 1987 was an effective exercise of the option, and that AMCOAL is entitled to the relief which it claimed.

The appeal is upheld with costs. The order of the court a quo is set aside and there is substituted therefor -

"An order is granted

1. Declaring that the option contained in

the prospecting and mineral contract concluded on 10 July 1984 between the respondent and Anglo American Prospecting Services (Pty) Limited and ceded to the Applicant, in terms of which the Applicant acquired the right to purchase the rights to coal as defined in clause 2 thereof in respect of Portion 5 of the farm Prinshof 2 I.S. district Witbank, has been duly exercised by the applicant.

2. Directing that the respondent forthwith do all that is necessary to enable the rights to coal in respect of Portion 5 of the farm Prinshof 2 I.S. district of Witbank (including all base minerals as

defined in the Mining Rights Act No 20 of 1967 which are either adjacent to the coal seams or which occur independently on the said property within the boundaries of the coal occurences thereon) to be ceded to the applicant and registered in its name against payment of an amount of R150 660,58 being the purchase price payable in respect of such rights.

3. That the respondent pay the costs."

H C NICHOLAS A J A.

JOUBERT JA
MILNE JA Concur.
EKSTEEN JA
F H GROSSKOPF JA