THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 458/97

In the matter between:

MILLSELL CHROME MINES (PTY) LIMITED Appellant

and

THE MINISTER OF LAND AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA (IN HIS CAPACITY AS TRUSTEE OF THE BAFOKENG TRIBE) First Respondent

THE REGIONAL DIRECTOR : DEPARTMENT OF MINERAL AND ENERGY AFFAIRS Second Respondent

THE REGISTRAR OF DEEDS Third Respondent

CORAM: **ZULMAN, STREICHER JJA**
MELUNSKY, FARLAM and MADLANGA AJJA

Date of Hearing: 14 September 1999

Date of Judgment: 28 September 1999

MINERAL LEASE - WHETHER OPTION DULY EXERCISED

JUDGMENT

ZULMAN JA:

[1] The issue in this appeal is whether the appellant entered into a valid and enforceable notarial mineral lease with the trustee of the Bafokeng Tribe.

[2] In December 1993 the President of the Republic of Bophuthatswana, in his capacity as trustee of the Bafokeng Tribe, as the first applicant, and the Tribe, as the second applicant, commenced motion proceedings against the appellant as first respondent in the Supreme Court of Bophuthatswana. The Regional Director: Department of Mineral and Energy Affairs and the Registrar of Deeds were cited as the second and third respondents respectively but they did not oppose the application. They also take no part in this appeal and abide by the decision of this Court. After re-incorporation of Bophuthatswana into the Republic of South Africa the Premier of North West Province attempted to substitute himself as the first applicant but his substitution was declared to be invalid. The true successor to the first applicant, the President of the Republic of South Africa, designated the Minister of Land Affairs as the Tribe's trustee. The Tribe withdrew as a party to the proceedings and the Minister, in his capacity as trustee, became the sole applicant. He is now the first respondent in this appeal.

[3] The notice of motion as finally amended claimed declaratory orders to the effect that there was no exercise, alternatively no valid or effectual exercise by the appellant of an option to acquire a mineral lease under and in terms of a notarial prospecting agreement which contained the option; alternatively, if there was a

valid and effectual exercise of the option, the appellant thereafter abandoned the resultant mineral lease; and, further alternatively, that the option contained in the notarial prospecting agreement lapsed without having been exercised.

[4] Waddington J dismissed the application with costs but granted the first respondent leave to appeal to the Full Court of the Bophuthatswana Division of the High Court.

[5] The Full Court (Khumalo, Hendler and Chulu JJ) allowed the appeal with costs and declared that no mineral lease arose under or in terms of the agreement relied upon by the appellant.

[6] On 18 August 1997 this court granted special leave to the appellant to appeal against the judgment of the court *a quo* and ordered the costs of the application to be costs in the appeal.

[7] The material facts of the case are not in dispute. On 28 July 1977 a notarially executed agreement was entered into between the deputy Minister of Bantu Affairs, acting for and on behalf of the Minister of Bantu Administration, Development and Education in his capacity "as Trustee of the Bafokeng Tribe under Chief Edward Molotlegi" as lessor and Palmiet Chrome Corporation (Pty) Limited ("Palmiet") as lessee. On 25 October 1978, in terms of a notarially executed document, Palmiet ceded, assigned and made over all its right, title and interest in the aforesaid agreement to the appellant. The amendment to the agreement was notarially

executed on 11 July 1979.

[8] The agreement as amended is of fundamental importance in this appeal. it is divided into two parts. The first part contains a prospecting agreement and the second an option to acquire a mineral lease. In order to determine whether a valid and enforceable mineral lease came into being, it is necessary to decide whether the option was effectively exercised. In terms of the prospecting part of the agreement the lessor granted the lessee the sole and exclusive right to prospect for chrome ore for a period of up to five years on portions of certain land owned by the lessor. The relevant part of clause 3, which contains the option for the mineral lease, reads as follows:

> "During the Prospecting Period the Lessee shall have the sole and exclusive option of mining and disposing of Chrome Ore in, on or under the Mining Area. The Lessee at its sole discretion, may exercise these rights by giving written notice to this effect to the Lessor, the Magistrate Bafokeng and the Bantu Mining Corporation Limited, Pretoria, and shall state a date within the Prospecting Period upon which such operations will commence."

It was common cause between the parties that The Bantu Mining Corporation Limited ceased to exercise functions in the then Bophuthatswana after it became independent and that notice to him was thereafter not required in terms of clause 3.

[9] Clause 1(a) of the agreement defines the "Prospecting Period" as being a period of up to 5 (five) years from the date of the agreement, i.e. 28 July 1977. The "Mining Area" is the area in which the lessee had the right to prospect.

[10] The outcome of this appeal depends upon whether the requirements of clause 3 and the provisions of section 3(1) of the General Law Amendment Act 50 of 1956 ("the Act") were complied with. The section provides that a lease of any right to minerals in land shall not be valid unless attested by a notary public. In my view, in order to succeed, therefore, the appellant had to establish -

(a) that the option was exercised in notarial form during the "prospecting period", i.e. on or before 27 July 1982;

(b) that written notice of the exercise was given to the following persons:

(i) the lessor as defined, namely, the trustee of the Bafokeng Tribe; and

(ii) the Magistrate Bafokeng;

(c) that the appellant duly "[stated] a date within the prospecting period upon which such operations" [the mining and disposing of chrome ore] "will commence".

[11] If any one of the above requirements were not fulfilled, it would follow that there was no effective exercise of the option.

Timeous exercise in notarial form and statement of commencement date.

[12] It is convenient to consider these two aspects of clause 3 together. Counsel for the appellant submitted that the exercise of the option in notarial form occurred

on 7 July 1982. On this date a document headed "Notarial Exercise of Option to Take a Mineral Lease" ("Annexure I") was notarially executed. On behalf of the first respondent it was contended that the notarial execution relied upon by the appellant, even though it occurred timeously, was defective in a number of material respects.

[13] One of these defects, so it was argued, was that in the operative portion of Annexure I, as distinct from the preamble thereto, the appellant purported to exercise the right to mine manganese ore and not chrome ore. This, according to the argument, introduced uncertainty and rendered the notarial document ineffective (cf *Boerne v Harris* 1949 (1) SA 793 (A) at 799). Although a substituted page of the notarial document which referred to chrome ore instead of manganese ore was forwarded to the Tribe's attorney, this occurred on 18 August 1982 and after the date for the exercise of the option had expired. The respondent's contention was rejected by Waddington J in the court of first instance but was upheld by the court *a quo*. It would appear to me, however, that the recipient of Annexure I should have realised that the appellant had intended to exercise the option to mine for chrome ore and that the reference to manganese ore was an obvious error. However in view of the conclusion at which I have arrived in regard to the non-compliance with certain of the other requirements of clause 3 it is not necessary to express a firm view on the first respondent's contentions concerning this aspect of the matter.

[14] A further objection advanced by the first respondent was that Annexure I did not specify a date on which mining would commence. The document merely recorded that the appellant exercised the option contained in the agreement and that it accepted a lease to mine "for manganese ore in, on and under the Mining Area". It was submitted on behalf of the appellant that although clause 3 of the agreement required the lessee to state a date within the prospecting period upon which mining operations would commence, the agreement drew a distinction between the date of commencement of the mineral lease and the date of commencement of the mining operations. The former, it was submitted, was a material term and required notarial execution but the latter not. Reliance was placed on a letter dated 7 May 1982 addressed to the Tribe's attorney and signed by a Mr S M Dougherty on behalf of the appellant in which it was stated:

> "In terms of the rights granted to the Lessee under clause 3, we hereby exercise the whole and exclusive option thereby granted the Lessee to mine and dispose of chrome ore in, on or under the mining area (as defined). It is our intention to commence such mining operations on 15 July 1982."

(An earlier letter sent to the Tribe's attorney in identical terms and signed by Mr Dougherty on behalf of Rand Mines Ltd, was not relied upon.)

On a proper construction of the provisions of the mineral lease it is, however, plain that the date of commencement of the mineral lease was to coincide with the stated

date on which mining operations were to commence. Clause 3(h) being one of the provisions that was to apply to the mineral lease, reads:

> "The Mineral Lease shall endure for an initial period of 15 (fifteen) years from the date advised in the written notices referred to in the first paragraph of this Clause 3, with two further periods of renewal of 10 (ten) years each if required by the lessee."

The date of the commencement of mining operations was, therefore, also the date on which the mineral lease was to commence. This date was a material term of the lease (cf *Johnston v Leal* 1980(3) SA 927(A) at 937B - 938B). It determined, *inter alia*, when the prospecting rights and duties would cease and when the mining rights and obligations would commence, when the lease would begin and when it would terminate and when the lessee's obligation to pay mining royalties would start. Counsel for the appellant conceded, quite correctly, that if the date of commencement of mining was material it had to be recorded in a notarially executed document and that the letter of 7 May 1982 would not suffice in this regard.

[15] In the court of first instance Waddington J held that in the absence of any other stated date in Annexure I, it was the date of execution of that document, 7 July 1982, that the appellant

> "must have intended should be regarded as the date on which mining operations would commence".

I am unable to agree with this conclusion. There is nothing to indicate that the appellant intended to regard 7 July 1982 as the date on which it would commence mining operations. Moreover, even if this was the appellant's intention, it was not expressed in the document and was not conveyed to the parties referred to in clause 3 of the contract.

[16] The provisions of the clause, if one reads the clause in its ordinary grammatical sense, fall to be construed conjunctively and not disjunctively. The requirements are imperative, since clause 3 specifies "and shall state a date" (the emphasis is mine). The wording is not simply "may" state a date.

[17] I also agree with the first respondent's contention that the scheme of clause 3 was that the exercise of the option to bring about a mineral lease did not in itself lead to commencement of the mineral lease. The appellant was required to state a date. This would determine two matters. The first would be the date when mining operations "will commence" and secondly as a consequence thereof, the date when the prospecting agreement referred to in the document would cease and a mineral lease would become operative in terms of the second paragraph of clause 3. This paragraph provides as follows:-

> "In the event of these mining rights being exercised the liability for paying prospecting rentals as provided under Clause 1 hereof and the prospecting rights granted under Clause 2 hereof shall cease as from the date that the mining right shall commence. The following terms and conditions shall then apply as from the date:-"

(A number of terms and conditions then follow in clauses 3(a) to 3(h)).

There were thus two relevant dates. The one being the date on which the notice itself had to be given and the other the date when the mining operations "will" commence. The notice had to be given by 27 July and the date upon which mining operations were to commence had to be on or before the same date.

[18] It was also argued on behalf of the appellant that Annexure I, which was in notarial form and was executed in that form on 7 July 1982, "declared on that date" to exercise the option contained in clause 3 to take "thereby" a lease. The taking of the lease, so it was argued, is intended to take effect from the declaration therein that the appearer states himself "thereby" to take. That being so the duration of the lease extended from that date, namely 7 July 1982. I find this argument untenable. There might have been some merit in the argument were it not for the clear and unambiguous requirement of clause 3 that there was to be a statement which was to be communicated to "the lessor, the Magistrate Bafokeng and the Bantu Mining Corporation Ltd" of the date in the written notice exercising the option "in the Prospecting Period upon which such operations will commence". This provision cannot simply be ignored.

As the appellant failed to state in a notarially executed document the date on which mining operations would commence, it follows that the exercise of the option is of no force and effect and that no mineral lease came into existence. There are,

moreover, other obstacles in the appellant's path. These are considered briefly hereunder.

The giving of notice

[19] It is trite that ordinarily and in the absence of any contractual provision to the contrary, the fact of the exercise of an option which involves the acceptance of an offer, must, to bring about a binding contract, be communicated to the grantor. The exercise of an option is governed by the ordinary principles applicable to the acceptance of an offer. (See for example *R v Nel* 1921 AD 339, *Laws v Rutherfurd* 1924 AD 261 at 262, and *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986(2) SA 555(A) at 573 E - G and *Amcol Collieries Limited v Truter* 1990(1) SA 1 (A) at 4 D-F*).* Not only did clause 3 of the agreement not dispense with communication but it required it in clear and unequivocal terms. This is not a case such as *Driftwood Properties (Pty) Ltd v McLean* 1971(3) SA 591(A) where the agreement dispensed with communication of acceptance. In this case the appellant, as was the situation in *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd and Others* 1988(1) SA 583 (ZS), was required in terms of clause 3 to communicate its exercise of the option. Even although such communication was not required to be in notarial form, it was required to be in "written form". Furthermore the communication had to be made on or before 27 July 1982.

Counsel for the appellant correctly conceded that there was no communication of the purported exercise of the option before 27 July 1982 and that the option then lapsed. He sought, however, to rely on some sort of subsequent communication by conduct which he called a "waiver". He argued that the subsequent communication by conduct, enabled one to conclude that the option was "revived", as it were. It seems to me, as I put to counsel for the appellant during the course of his argument that one cannot "breathe life into a corpse". Van Heerden JA stated the matter in these lucid terms in *Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988(3) SA 625 at 639 I - 640 A:-

> "Die opsie moes voor 'n bepaalde datum uitgeoefen word. By onstentenis daarvan sou die bedingde aanbod tot verlenging outomaties verval. Daar sou dus nie meer 'n reg kon wees waarvan die eiseresse afstand kon doen nie. Kortom, die eiseresse se "verpligting" om nie die aanbod te herroep nie en die verweerder se ooreenstemmende reg om dit te aanvaar, sou uitgewerk gewees het. Gevolglik kon 'n gepoogde afstanddoening na die sperdatum nie herlewing van die verpligting en die reg tot gevolg gehad het nie."

[20] The decision in *Neethling v Klopper en Andere* 1967(4) SA 459 (A) to which the appellant's counsel referred does not assist the appellant. In that case it was held that the revival of a contract for the sale of land which had been terminated by waiver of the rights which arose from the termination of the contract did not have to comply with the formal requirements of section 1(1) of the Act. This case is distinguishable from the present case in that it concerned the revival of an existing contract, not the creation of a contract where none previously existed. Here no

contract came into being.

[21] In any event there is no specific allegation in the papers, by the appellant, to the effect that there was a waiver. In so far as it may be inferred from the papers that there was such a waiver, there is no indication or averment that such waiver took place by any person authorised by the respondent to waive his rights.

As the option lapsed it was no longer available to be turned into a mineral lease. In consequence thereof, no subsequent non-notarial circumstances may be relied upon by the appellant as amounting to a fresh notarially executed contract. This is especially so in the light of the provisions of s 3(1) of the Act.

[22] The fact that the parties or even one of them believe that there was a valid contract is irrelevant (*Fuls v Leslie Chrome (Pty) Ltd and Another* 1962(4) SA 784(W) at 787 C - E). Part performance by either or both of the parties cannot make up for the need for notarial execution. (*Wilken v Kohler* 1913 AD 135 at 142 and 143). Furthermore the fact that royalty payments were formally agreed upon between the parties and that such payments were made and accepted without objection is also irrelevant (*Fuls'* case (supra) at 787 E - F, *Jolly v Herman's Executors* 1903 TS 515 at 522 and *Pucjlowski v Johnston's Executors* 1946 WLD 1 at 3). It is trite that parties may not, by private agreement, derogate from, or vary or waive statutory requirements which are not intended to be exclusively for their benefit. This is so because the formality required by the statutory requirement set

out in s 3(1) was introduced as a matter of public policy, and not for the benefit of any class of person for example lessors or lessees (cf *Wilken's* case (supra) at 142, *Hersch v Nel* 1947(3) SA 365 (O) at 369 and *Fuls'* case (supra) at 787H - 788C).

[23] I conclude therefore that the appellant did not enter into a valid enforceable mineral lease with the respondent.

The appeal is accordingly dismissed with costs.

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ZULMAN JA

STREICHER JA)
MELUNSKY AJA)
FARLAM AJA)CONCUR
MADLANGA AJA)