CASE NO.: (P) I 3593/2010

1. **IN THE HIGH COURT OF NAMIBIA**

In the matter between:

HARALD METZGER **PLAINTIFF**

and

PURITY MANGANESE (PTY) LTD

DEFENDANT

CORAM: **SMUTS, J**

Heard on: 16 to 17 November 2011

Delivered on: 13 December 2011

JUDGMENT

Smuts, J

2. The plaintiff is a retired farmer and the owner of two farms

situated in the district of Okahandja. The defendant company is the holder of a mining license. It had entered into a prospecting and mining agreement with the plaintiff to conduct those activities on the plaintiff's farms.

3. In this action, the plaintiff claims that the defendant had breached terms of the agreement by failing to level and fill in excavations in respect of sites where operations had ceased permanently and by failing to rehabilitate or remove waste dumps and sand from the processing area. The plaintiff also contends that the defendant had breached the agreement by entering into a further camp whilst only being entitled to work in one camp at a time. The plaintiff also alleges that the defendant had breached the agreement by failing to maintain a road and by erecting new roads without consulting the plaintiff and also by failing to pay the required compensation due to the plaintiff. The plaintiff alleges that it gave notice to the defendant of these breaches at the defendant's chosen *domicilium citandi et executandi* and, upon the defendant failing to remedy the breaches, cancelled the agreement. The plaintiff accordingly claims an order confirming the cancellation of the agreement and for the ejection of the defendant from the farms together with costs.

4.

5. The defendant filed a special plea claiming that the plaintiff had not served the notice of breach by registered post upon it, as is required by clause 13 of the agreement. The defendant accordingly denies that the notice of breach was duly received by it and that the cancellation was consequently null and void.

6. The defendant also pleaded over on the merits and in detail denied the allegations of breach claimed by the plaintiff. The defendant further instituted a counterclaim alleging that the plaintiff had intentionally and unlawfully attempted to prevent and prevented the defendant from entering into a further camp to exercise its mining rights in that area and that the plaintiff had interfered with and prevented the defendant from exercising its mining rights, unlawfully attempted to cancel the agreement and unlawfully attempted to enforce a new agreement upon the defendant. As a consequence of this conduct, the defendant claimed damages in excess of N$6 million and also included a second claim, alleging overcharging by the plaintiff in the sum of N$28,263.86. The counterclaim was however withdrawn prior to the commencement of the proceedings set down for trial.

7. At the outset of the proceedings, the defendant applied for the special plea to be first determined. The plaintiff did not oppose this. The plaintiff led the evidence of a single witness in respect

of the special plea, namely the Acting Manager or Postmaster of the Olympia Post Office, Ms O Baisako. Before her evidence was led, the parties placed on record that a bundle of correspondence would be received in evidence by agreement without the need to adduce evidence in respect of the correspondence in question. The correspondence was largely between the parties or their legal practitioners. It was also recorded that the notice of breach had been served upon a certain Ms Kinda, a 26 year cleaner in the employ of the defendant at its offices. It was also recorded that Mr Asaf Aretz is the Executive Manager of the defendant and that the defendant employs some 350 workers at its mine at Otjizondo. It was also pointed out on behalf of the plaintiff that it was not contended that Mr Aretz had personally received the notice on the day that it was delivered.

8. The crux of the evidence given by Ms Baisako, who has been in the employ of Nampost in excess of 18 years, is that there is no street delivery of mail (registered or otherwise) by Nampost, the parastal which attends to postal services in Namibia. Her evidence was that Nampost's postal delivery services are confined to delivery to post office boxes located at post offices and that no postal seliveries are provided to physical addresses in the Republic of Namibia. Registered mail could thus only occur and be directed to a post office box address and not to a

physical address.

9. The issue accordingly arises as to whether the notice given by the plaintiff to the defendant was an effective notice for the purpose of the agreement between the parties and could give rise to cancellation on the part of the plaintiff in the absence of the defendant rectifying the breaches contended for in it.

10. The notice to the defendant was dated 26 July 2010. It is attached to the particulars of claim as annexure "B1". It was sent by the plaintiff's then legal practitioners and was entitled "Notice in terms of clause 13 of the Prospecting and Mining Agreement entered into on 1 September 2001". It is a detailed notice running into five pages and refers to several alleged breaches and to the clauses of the agreement which were allegedly breached. The notice also calls upon the defendant to immediately remedy the alleged breaches set out in it. It is not necessary to refer to the contents of the notice in any further detail for present purposes.

11. Attached to the particulars of claim is annexure "B2". It comprises an affidavit by the messenger of the plaintiff's erstwhile legal practitioners. He states under oath that he delivered the notice to the defendant at its office at Arno Henke House, 1564 Independence Avenue, Windhoek. He further

stated that the person at the counter at the defendant's offices did not sign a copy of the letter but acknowledged receipt of the letter in his delivery book. This person subsequently turned out to be Ms Kinda, a cleaner in the employ of the defendant. This delivery occurred on 27 July 2010. On 31 August 2010, he delivered a further letter to the defendant at the same address where the person again signed receipt for that letter.

12. The defendant contended that there was not effective delivery as the plaintiff did not comply with clause 13 of the agreement in respect of the delivery of the notice by failing to send it by registered mail. Clause 13 of the agreement provides:

> **"Should the Prospector or Owner breach any material term or condition of this Agreement and remain in default for a period of 30 (Thirty) days after receipt of written notice addressed to the domicilium citandi et executandi of the respective party, by registered mail, the non defaulting party shall be entitled, by notice in writing addressed to the defaulting party at its domicilium citandi et executandi to seek specific performance thereof, without prejudice to any other right the non-defaulting party may have against the defaulting party, which other right includes cancellation of this agreement and instituting action for damages".**

13. Clause 14 of the agreement, entitled **“domicilia”** sets out the parties’ chosen *domicilia citandi et executandi*. The defendant’s is given as

> **“PricewaterhouseCoopers**
> **344 Independence Avenue**
> **Windhoek”.**

14. Clause 15 of the agreement is entitled **“notices”**. It states:

> **“15.1 Any notice required to be given by either party to the other shall either be delivered at the *domicilium citandi et executandi* selected in terms of clause 14 thereof or shall be given by prepaid registered letter addressed:**
>
> **15.2 to the owner to PO Box 100, Okahandja, Republic of Namibia**
>
> **15.3 to the prospector to PO Box 11188, Windhoek, Namibia**
>
> **15.4 any notice given by either party to the other shall -**
>
> **15.4.1 if delivered to the *domicilium citandi et executandi* of such person, be deemed to have been received upon such delivery;**

15.4.2 if posted by letter, be deemed to have been received seven (7) days after delivery of such letter to the post office for posting."

15.

16. Ms Chase who appeared for the plaintiff submitted that delivery by hand of the notice of breach to the defendant's *domicilium citandi et executandi* at 1564 Arno Henke House, Independence Avenue, constitutes proper delivery of the notice of breach. In the alternative she submitted that there was sufficient compliance with the requirements of clause 13 alternatively clause 13 read with clause 15 of the agreement, to enable the plaintiff to give such notice and to cancel the agreement concluded between the parties. Ms Chase referred to the *domicilium* nominated by the defendant in clause 14 for the purpose of clause 13 as being a street address. She emphasized that the defendant had specifically chosen a street address and not a postal address as *domicilium*. As appears below, that street address was subsequently replaced with the street address at which service occurred. She referred to the fact that a postal address is nominated as an alternative to service at the *domicilium citandi et executandi* in clause 15.

17. Ms Chase further referred to the undisputed evidence of the Acting Postmaster, Ms Baisako to the effect that postal deliveries are only provided by Nampost to postal addresses within Namibia and that no street delivery occurs. Ms Chase accordingly submitted that it was impossible to deliver of mail the notice of breach by registered post at the defendant's nominated *domicilium* which is thus a street address. She then

submitted that the obligation to serve via registered mail would be extinguished by reason of this impossibility. Given the fact that it was impossible to comply with clause 13 of the agreement, Ms Chase submitted that clause 15 should be deemed to apply in order to give proper business efficacy to the contract.

18. Ms Chase further submitted that the fact that Ms Kinda did not have the authority to receive and sign for a notice would not avail the defendant if there was in fact delivery at the defendant's *domicilium*. She submitted that once a *domicilium* is chosen for service, it would not matter whether the person who received service had authority to receive it or whether the addressee was present at the time by reason of the fact that that party had elected to receive service at that chosen *domicilium*. She referred in this regard to *Amcoal Collieries v Truter* [1] in which it was held: [2]

> **"It is a matter of frequent occurrence 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**

[1] 1990(1) SA 1 (A)

[2] *Supra* at 5-6

abode: see Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170.) It is a well-established practice (which is recognised 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 and Van Winsen The Civil Practice of the Superior Courts of South Africa 3rd ed at 210. See Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W) at 331H - 333A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847D - 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 en 'n Ander (supra 333C - 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".

19. This matter was decided by the then South African Appellate Division at a time when it was the highest Court of appeal in respect of pre-independence Namibia. The approach set out in this judgment is also, with respect, correct and reflects the

position in Namibia.

20. Ms Chase submitted thus that there had been service of the notice to an employee of the defendant over the age of 16, who had, according to the affidavit, received service at the counter of the defendant. Both counsel referred to the decision in *Cohen and another v Lench and another* [3] where the following was stated with reference to service at a chosen *domicilium* pursuant to a contract:

> **"[35] There remains the question whether the attachment of the notice to the gate of the townhouse complex was sufficient to constitute delivery for purposes of the agreement, even though it was not received, which was what the Full Court found. Relying upon what was said in Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd, the Full Court said that delivery to a chosen domicilium 'presupposes . . . hand delivery in any appropriate manner by which in the ordinary course the notice would come to the attention of and be received by [the addressee]'. Acceptable methods, it went on to say, would include handing the notice to a responsible employee, pushing it under the door, or by placing it in a mailbox. But where none of those methods were possible, as in the present case, so the Court held, appending the notice to the main gate was an appropriate method of ensuring that it would in the ordinary course come to the attention of the Cohens. In support of that conclusion the Court below relied**

[3] 2007(6) SA 132 (SCA) at para 35 and 36

> **upon various cases which dealt with the appropriate manner of delivery when the domicilium was vacant land or was unoccupied.**
>
> **[36] I do not agree with the finding of the Full Court. No doubt it would be sufficient to attach a document to the door of a chosen domicilium, or to leave it at some appropriate place at the chosen domicilium, as indicated by the cases relied upon by the Court below, but the notice in this case was not left at the domicilium at all. <u>The chosen domicilium in the present case was not the townhouse complex but a specific unit in the complex</u>. The fact that the domicilium could not be reached because the perimeter gate was locked did not entitle the sellers to choose an alternative place for delivery, whether or not delivery at that place would ordinarily bring it to the attention of the addressee."**
> (My emphasis)

21. Ms Chase correctly contended that this case was distinguishable on the facts as the delivery had not occurred at the nominated address which was a specific unit in a complex but at the entrance of the complex itself.

22. Ms Chase further referred to the bundle of correspondence received in evidence and to a letter dated 15 September 2010 addressed by the defendant's South African legal practitioners to the plaintiff's legal practitioners in which the following was

recorded:

> **"We enclose herewith a letter dated the 5th of December 2005 notifying your client of the change of our client's *domicilia citandi et executandi* and a letter from your client dated 15th of March 2007 confirming a further notice of change of *domicilia citandi et executandi* to our client's current premises being Arno Henke House, 1564 Independence Avenue, Windhoek.**
>
> **We trust that the aforesaid confirms that the *domicilia citandi et executandi* of our client referred to in clause 14 of the agreement was duly and properly changed."**

23. The defendant's *domicilium* thus provided was the address at which delivery occurred. Ms Chase submitted that there had been delivery of the notice in terms of the contract and that the question of authority of the recipient at the defendant's premises was thus irrelevant in accordance with the authority of *Amcoal Colleries*. Ms Chase further and in any event submitted that the defendant, when it had obtained knowledge of the notice, said the following in a letter dated 8 September 2010 addressed on its behalf by their South African legal practitioners:

24.

> **"Our client persist (sic) with its contention that it has advised your client of the change of domicilium and your client has always acted in accordance with such**

notification by delivering all notices to our client's business address or postal address. <u>As the notice of breach only came to our client's attention on 31 August 2010 it has 30 (thirty) days to respond to the allegations made in the notice of breach and will accordingly respond to such notice of breach within the said time frame</u>".

25. (Emphasis supplied)

26. Ms Chase proceeded to refer to the response of the defendant's lawyer subsequently given on 28 September 2010 and foreshadowed in which it was denied that the defendant was in breach and stated:

"2. Our client's instructions are that it denies each and every allegation of the various instances of breach referred to in the said letter and more specifically denies the following:-

2.1 that it has failed to rehabilitate the mining are in accordance with the agreement;

2.2 that it has failed to maintain the roads giving access to its mining operations;

2.3 that it has failed to pay compensation to your client on due date in accordance with its obligation in terms of the agreement."

27. Ms Chase accordingly submitted that the defendant had

responded to the breach within 30 days of its stated knowledge of the notice. The present action for confirmation of cancellation was instituted on 22 October 2010. Ms Chase submitted that this was thus not a case where a defendant could contend that it had not had the opportunity to address the breaches had it wanted to do so. But the plaintiff's lawyers had already by then addressed a letter of cancellation dated 31 August 2010 to the defendant, annexure A3 to the particulars of claim. These developments would, however not be relevant in respect of the question as to whether there had been delivery of the notice in terms of the contract or not.

28. Mr Ram submitted that a breach notice which could give rise to cancellation is a drastic step and that such a notice would need to strictly comply with the terms of the agreement and needed to have been by registered mail to the defendant. He referred to clause 17 of the agreement which was entitled "**Oral variation of agreement ineffective**" providing

> **"No agreement at variance with any terms of this agreement shall be binding upon either THE OWNER or the PROSPECTOR unless contained in a written document signed by each of them. In the event of circumstances which arise which have not been foreseen by the parties and are not covered in this agreement, the party becoming aware of this shall notify the other accordingly, and the**

parties shall use their best endeavours to reach an agreement providing for such circumstances."

29. Mr Ram submitted that it was not foreseen by the parties in drafting the agreement that delivery to a physical address by registered mail could not occur. But the evidence of Ms Baisako was that during her 18 years of service with Nampost there had never been postal delivery to physical addresses and that postal delivery only occurred to post office box addresses. Mr Ram further referred to the maxim *expressio unius exclusio alterius* and submitted that clause 13 can mean nothing else but that service of a clause 13 notice is required by registered mail at the *domicilium* address of a party. He relied heavily upon *Swart v Vosloo* [4] where it was stated:

"**It is no doubt permissible for parties by their agreement to prescribe a particular procedure to be followed by a party who decides to invoke the contractual remedy of cancellation."**

30. He further referred to the argument advanced in that matter that a term should be implied in order to give a lease business efficacy by providing for a method of communicating the election to cancel a lease other than by notification to the lessee himself and the manner in which the Court dealt with it,

[4] 1965(1) SA 100 (A) at 112

in stating: [5]

> "**The question as to the circumstances in which a term ought to be implied in a contract has been discussed in a large number of judgments both of this Court and other Courts, and further detailed consideration of the principles which govern this aspect of construction appears to be unnecessary. The relevant authorities are catalogued in Mullin (Pty.) Ltd v Benade Ltd., 1952 (1) SA 211 (AD). As I have indicated above, the meaning to be given to clause 11 is that the lease is terminated when the landlord intimates to the lessee his election to cancel. I have also pointed to the fact that on this construction of clause 11 the landlord may select any one of a number of methods of communication which will, to his mind, in the particular circumstances be best suited to the achievement of his purpose, i.e., to discharge his contractual duty of making it known to the lessee that the lease is terminated. <u>That being so, I cannot agree with the contention that the lease would lack business efficacy unless the Court were to imply a term which would in effect excuse the landlord from the necessity of proving receipt of the notification by the lessee</u>. If the landlord desires some such term to be operative he should obtain the lessee's consent to its inclusion in the lease at the time the contract is concluded, as appears to have been done in some of the cases cited above. (Lovasz and Another v Estate Rosenberg and United Bioscope Cafés Ltd v Moseley Buildings**

[5] *Supra* p 115-117

Ltd., supra).

It was also contended on appellant's behalf that in this case delivery of the letter to Pansegrauw constituted in law a delivery thereof to the respondent. For this contention reliance was placed on the judgment in Barrett v New Oceana Transvaal Coal Company Ltd., 1903 T.S. 431. In that case the lease provided that in certain circumstances

> **'the lessor shall be entitled to declare the said lease forfeited, and to cancel the same by notice in writing posted to the lessee's address in Johannesburg'.**

The defendant, an English company having no office in Johannesburg, acquired its right as lessee by cession from the original lessee. The defendant company had a general manager who resided on the farm where the company carried on mining operations in terms of the lease. The company fell into arrear with the payment of rent, and a notice was delivered to the general manager calling upon the company to pay the arrear rent within 30 days. This demand was not complied with and the plaintiff accordingly caused a notice cancelling the lease to be handed to the general manager. The Court held that the reference to a Johannesburg address was inserted for the benefit of the lessor. It pointed out one way in which a notice of cancellation might be given, and did not prevent such notice being given in another way. The Court held, further, that

> **'as general manager of the company's property it was part of his duty to receive and deal with all notices and matters relating to such property',**

and that the letter must in those circumstances 'be taken to have been received by the company'.

Barrett's case can clearly be distinguished on the facts. We are not concerned in the instant case with an absentee lessee whose business activities are under the control of a general manager with wide powers which were either expressly assigned to him or naturally appertained to his position as such. It appears from the evidence that Pansegrauw was a bottle store assistant who performed his duties under the direct supervision of the respondent. While it was conceded that he would be authorised to receive a letter addressed to the respondent, his duty in that respect was limited to handing it to respondent or, if he were absent, to placing it on the desk in the office. On the evidence there is no warrant for a finding that he was expressly or impliedly authorised to receive a letter for a purpose other than that of facilitating its delivery to the respondent. The contention that delivery to Pansegrauw constituted delivery to the respondent, irrespective of the fact whether or not the respondent received the letter, must be rejected. I may point out that if the receipt of the letter by the respondent is in issue, proof that it was delivered to Pansegrauw in the circumstances

> **appearing from the evidence would go a considerable length towards establishing in a Court of law that the respondent in fact received it. That does not, however, mean that in law delivery to Pansegrauw constitutes delivery to the respondent."**
> (Emphasis supplied)

31. I have quoted from this case at some length so that the portion relied upon can be seen in its overall context. That case did not concern delivery at a chosen *domicilium* but the obligation to **"declare"** the lease cancelled to the lessee, implying that this declaration must reach the mind of the lessee. [6]The plaintiff in this matter did not contend that service upon the defendant be excused in order to give business efficacy to the agreement. On the contrary, I understand the plaintiff's approach to be that delivery upon the physical *domicilium* would be effective by reason of the fact that registered mail is impossible upon a street address. In this matter the procedure of delivery by registered mail at the domicilium chosen by the parties was impossible to effect as there is no delivery by registered mail upon a street address.

32. But Mr Ram submitted that once the parties had prescribed the procedure in their agreement for cancellation, this would need to be followed. If it could not be followed, then he submitted, it

[6]*Supra* at 105-106

would be incumbent upon the plaintiff to prove that the notice had been received by a person with the authority to receive it, being Mr Aretz, the Executive Manager. He pointed out that this had not occurred and that there had accordingly not been proper delivery in terms of the contract. He submitted that the way around the impossibility which arose would be for the parties to negotiate under clause 17 and only if those negotiations would fail, then the plaintiff could impose his will. In the absence of the plaintiff doing so, he submitted that service would need to be proven upon a person of authority, such as the Executive Manager, Mr Aretz.

33. Unlike in *Swart v Vosloo,* the parties in this matter did not contemplate in their agreement that service of such a notice or notices under the agreement needed to be delivered upon the plaintiff personally or any designated person on behalf of the defendant. They instead agreed to facilitate delivery of a notice under clause 13 to the *domicilium* by registered mail and delivery of any notices under the agreement either by delivery at the domicilium or registered mail to the designated postal address. Given the impossibility of delivering the notice by registered mail to the *domicilium* chosen in clause 14, a physical address, and later replaced by another physical address, where the notice was in fact delivered, the plaintiff would be excused from service by registered mail given this

impossibility and it would seem to me clause 13 should then be read with clause 15. The latter clause specifically provides that any notice to be given under the agreement is to be delivered at the chosen *domicilium* or be sent by registered mail to the postal addresses provided there. The agreement thus posited these two forms of service of notices, and their consequences. Given the impossibility to serve by registered mail, it would in my view follow, that delivery at the *domicilium* would suffice.

34. The defendant is a mining company, engaging in prospecting and mining at Otjizondo where some 350 employees are employed. It chose a *domicilium* for the purposes of service of notices under the agreement at its Windhoek address, firstly at its firm of auditors and then later at its own Windhoek address. By doing so, the parties did not intend that the defendant's Executive Manager, Mr Aretz, would need to be personally served with a notice under clause 13 of the contract, especially seeing that he managed the defendant which conducted its business of prospecting and mining operations (where it employed some 350 employees) some distance from Windhoek in the district of Okahandja.

35. Clause 15 expressly provides that a notice delivered at the chosen *domicilium* would be deemed to have been received upon such delivery. This also accords with the authorities

collected and followed in *Amcoal Collieries* cited by Ms Chase. These are to the effect that where a party chooses a *domicilium* in a contract for purposes of service of the notice in question then serve at the address is good service, whether the addressee is present at the time. This would also in my view accord with the intention of the parties in providing for service at a *domicilium.*

36. I thus find that the notice was effective under the agreement, given the interpretation which should in my view apply to the agreement.

37. This interpretation to the agreement would also in my view give business efficacy to the agreement.

38. Although not pertinent to the way in which the agreement is to be construed, it would in any event not appear that the defendant would have taken any steps to remedy the alleged breaches – the purpose of giving such notice. This is evident from its stance as set out in correspondence prior to the institution of the action after becoming aware of the notice and stating that it would respondent within 30 days which it did by denying the breaches. This stance is reiterated in its plea where it denies the breaches contended for.

39. It follows in my view that the special plea cannot be sustained. The order I make is:

> The special plea is dismissed with costs, which include the costs of one instructed and one instructing counsel.

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SMUTS, J

ON BEHALF OF PLAINTIFF:	**Ms E Schimming Chase**
Instructed by	Etzold-Duvenhage
ON BEHALF OF THE DEFENDANT:	**Mr Ram**
Instructed by:	HD Bossau & Co