

**February 2018***Without Prejudice*

In terms of section 11(1) of the Mineral and Petroleum Resources Development Act (22 of 2008) (MPRDA): "A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies" (own emphasis added).

It is simple enough to understand that when a prospecting or mining right is to be *inter alia* transferred or disposed of, the Minister of the Department of Mineral Resources would be required to grant consent for such a transfer or disposal.

In terms of section 11(2) of the MPRDA, the minister would grant the requisite consent if the person to whom the right would be transferred or disposed would be capable of complying with the obligations, terms and conditions of the right in question, and would satisfy the requirements contemplated in either section 17 or section 23, as the case may be. Essentially the minister would ensure that the right would be given to a person or entity capable of complying with the right, and the MPRDA moving forward.

However, the section is not entirely clear when it relates to the transfer or disposal of a "controlling interest" in a company, and this portion of the section has been open to hot debate.

In the case of *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 2011 (6) SA 96 (GSJ) (*Mogale* case), the defendant (who initially held 52% of the shares in a company) sold 33% of his shares to the plaintiff. The other three shareholders held 10%, 12% and 26% shares respectively. The court was asked to determine whether ministerial consent was required in terms of section 11 in order for the sale of the 33% shareholding to the plaintiff.

The plaintiff contested that ministerial consent was not required in the circumstances because a "controlling interest" was not transferred from the defendant to the plaintiff. In determining what was meant by "controlling interest" the plaintiff submitted that one had to consider whether he was entitled to hold a majority of votes or whether he could appoint the majority of the directors to the board. It was submitted that since the defendant did not possess such entitlements, he did not hold a controlling interest even when he held the majority of the shares in the company. Furthermore, looking at the position of the plaintiff after such transfer, he merely held a 33% share in the company, but did not have a controlling interest.

The defendant, on the other hand, argued that ministerial consent in terms of section 11 was required for the transfer or disposal of shares to the plaintiff. If it is accepted that the majority shareholder has a controlling interest in such a company, then any disposal in terms of which the shareholding reduces below a majority share would require consent. The sale of a 33% share would result in the defendant only holding a minority share, thus resulting in the defendant being divested of his controlling interest.

Section 4 of the MPRDA provides that when a provision of the Act is interpreted, a reasonable interpretation, consistent with the objects of the MPRDA, must be preferred over any other interpretation which is inconsistent with such objects. Section 11(2) does not specifically mention "controlling interest". However, the *Mogale* case interpreted it to include "controlling interest" because otherwise there would be no other guideline available to the minister when dealing with a disposal thereof.

The court in the *Mogale* case also considered what is meant by "controlling interest" and concluded that it must be an interest that controls the company; that is, holds more than 50% of the issued share capital, more than half of the voting rights or has the power to appoint or remove the majority of the directors. Considering the defendant transferred enough shares to divest him of his majority shareholding, it was ruled that ministerial consent was required.

In terms of the *Mogale* case, when a majority shareholder sells some of his shares but still retains more than 50% of the issued share capital after the sale, consent will not be required in terms of section 11 because his controlling interest is retained. Therefore, consent will only be required when he no longer holds more than 50% after the sale.

Based on this construction, the focus remains on whether the transferor loses his controlling interest as a result of the transfer. *PJ Badenhorst and JJ Du Plessis (PJ Badenhorst & JJ Du Plessis Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 (6) SA 96 (GSJ): recent case law *De Jure* 45: 388 – 404 (2012)) contest that the *Mogale* case is controversial in that consent is required when "controlling interest" is disposed of without any other party obtaining such "controlling interest". In the *Mogale* case, for instance, after the transfer, the defendant held a minority share, the plaintiff held 33% and the other shareholders were unaffected by the transfer.

This interpretation could have some unintended consequences. For instance, in a company where nobody holds the controlling interest, they could all sell their shares without any ministerial consent (arguably up until the point someone does in fact acquire a controlling interest). *PJ Badenhorst and JJ Du Plessis* contemplate that it may not have been the Legislature's intention to permit a situation where prospective companies are merely structured in a way to avoid anyone holding a controlling interest, thus allowing transfers without any involvement by the Department of Mineral Resources. Adding support to the speculation that this scenario could not be what the Legislature intended is the proposed amendment to section 11(1) of the MPRDA: "A prospecting right or mining right or an interest in any such right, or any interest in a close corporation or unlisted company or any controlling interest in a listed company (which corporations or companies hold a prospecting right or mining right or an interest in any such

right), may not be ceded, transferred, let, sublet, assigned alienated or otherwise disposed of without prior written of the Minister" (own emphasis added). (Section 11(1) to be substituted by section 8 of Mineral and Petroleum Resources Development Amendment Act (49 of 2008) with effect from a date yet to be proclaimed.)

In terms of the proposed amendment, the transfer or disposal of any interest in an unlisted company, not only a "controlling interest", would require Ministerial consent in terms of section 11. Therefore, whenever a share is sold in a company, even if it is the sale of a single share by a minority shareholder, consent would be required. This would undoubtedly put extreme pressure on the Department of Mineral Resources and would result in an administrative nightmare. The proposed section 11(5) also stipulates that any transfer or disposal made in contravention of section 11(1) would be void. The proposed sections are not promulgated as law, so the ramifications of the proposed amendments remain to be seen. However, it appears that all contemplated sales of shares would be unnecessarily delayed and subject to red tape which, in some cases, may seem completely unnecessary.

Although there are some concerns regarding the interpretation given by the court in the Mogale case (all of which are not considered here) PJ Badenhorst and JJ Du Plessis submit, as do I, that the case is "good law" in concluding that ministerial consent is in fact required where the transferee loses his controlling interest even in instances when nobody acquires a controlling interest.

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