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Mining & Minerals
ALERT

IN THIS ISSUE

Does an indirect change of control by means of a rights issue or otherwise require section 11 consent in terms of the MPRDA?

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides for the Minister of the Department of Mineral Resources and Energy (DMRE) (Minister) to consent to the transfer of prospecting and mining rights, including the transfer of a "*controlling interest*" in companies or close corporations that hold such rights.

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A company resolution to enter into business rescue must be passed in good faith, with the requisite intention of attaining the objectives of the Companies Act 71 of 2008 (Companies Act), i.e. rescuing the company. The timing of the resolution is in some instances equally important, as any prior application for the liquidation of the same company may invalidate such resolution.

This is in line with certain objects of the MPRDA (section 2) to (i) recognise the internationally accepted right of the state to exercise sovereignty over the mineral and petroleum resources within the Republic; and (ii) give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources.

Section 11(1) of the MPRDA provides that:

> *"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."*

One issue which had been the subject of considerable debate is what constitutes *"controlling interest"*? The balance of section 11 is silent on how a controlling interest should be determined and section 1 (Definitions) of the MPRDA does not provide such a definition. Accordingly, the determination of the change in the controlling interest of a company is left in the discretion of the Minister, albeit that the Minister may be guided by the Code of Good Practice for the minerals industry developed in terms of section 100(1)(b) of the MPRDA in making such determination. However, given the importance of this definition, it is not surprising that this issue has given rise to some division and dispute and parties have resorted to asking the courts to give guidance.

Mogale Alloys

In 2011, our courts shed some light on the determination of whether there was a change in the *"controlling interest"* in the matter of *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana Proprietary Limited* [2011] (6) SA 96 (GSJ). In this matter, Judge Coppin held that in the context of section 11(1), the term *"controlling interest"* cannot be confined to a single characteristic

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or criterion and could mean, in the case of a company, more than 50% of the issued share capital of the company, or more than half of the voting rights in respect of the issued shares in the company, or the power to either directly or indirectly appoint, remove or veto the appointment of the majority of the directors of the company without the concurrence of another.

In this case, consideration was had as to whether the interest was a controlling interest at the time of the disposal. It was common cause that if a majority shareholder intended to dispose of their entire shareholding to another party, ministerial consent would be required. Further, if a majority shareholder intended to dispose of only a portion of its interest, which would have the effect of that holder **losing** control, then ministerial consent would also be required. This would be the case even if there was no other party who acquired a controlling interest.

The court went onto state that one must consider whether, after the transfer, the company is still able to carry out and comply with its obligations and the terms and conditions of its prospecting or mining right and relevant requirements of the MPRDA.

Subsequent to the *Mogale Alloy* judgment, it was, however, still not clear whether the Minister would be required to consent to an indirect change of the controlling interest, for example if there was a change in the controlling interest of the *"ultimate beneficial owner"* as the **indirect** holder of the mining/prospecting right.

Indirect change of the controlling interest

In the recent matter of Vantage *Goldfields SA (Pty) Ltd and Another v Argomanzi (Pty) Ltd and Others (733/2022)[2023]* ZASCA 106 (27 June 2023), the Supreme Court of Appeal (SCA) had to consider whether section 11 consent was required for an indirect change in the controlling interest.

In this matter, Vantage Goldfields Limited (Vantage) was the ultimate beneficial owner of two subsidiaries, Makonjwaan Imperial Mining Company (Pty) Ltd (MIMCO) and Barbrook Mines (Pty) Ltd (Barbrook), each of which held a new order mining right. Pursuant to the business rescue of the Vantage group and in order to obtain funding for Vantage's *"proposal"* in terms of the business rescue plan, an Australian company, Macquarie Metals (Pty) Ltd (Macquarie), subscribed for new shares in Vantage, constituting 98% of the issued shares of Vantage. This resulted in a substantial dilution of the interests previously held by the remaining 34 shareholders in Vantage and placed Macquarie squarely in indirect control of MIMCO and Barbrook . Vantage contended that this issue of shares and subsequent dilution did not trigger section 11, as the transaction took place at a level above the mining right holder level.

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Arqomanzi had sought an order interdicting the Vantage business rescue practitioners from contending that the dilution of the previous shareholders' interests in Vantage could be implemented without section 11 consent and from proceeding without such consent. Arqomanzi argued that the controlling interest in Vantage, and indirectly in MIMCO and Barbrook, was alienated or otherwise disposed of, to Macquarie through the subscription transaction.

The SCA was of the view, having also made reference to the *Mogale Alloy* judgment, that the change in the controlling interest of Vantage resulted in an indirect change in the controlling interest in MIMCO and Barbrook. Accordingly, the SCA decided that section 11 of the MPRDA must be interpreted as including both direct and indirect cessions, transfers or leases as well as other forms of changing control including by means of the issue of new shares/dilution of interests in a company which directly or indirectly holds the mining right.

Substance over form

In light of the above, it is now clear that the section 11 consent requirement will be considered on "*substance over form*" approach and the DMRE is entitled to cast its net wide in the exercise of its powers by taking into account the complex structures of company groups, even if this results in section 11 having extra-territorial application to holding companies outside South Africa.

The wider interpretation to include the change of control at the level of the ultimate beneficial owner of the mining right is in line with the developments of the law in South Africa and globally, which require transparency and expanded regulatory reach into group structures. For example, (for entirely different reasons) earlier this year, there were amendments to the Companies Act 71 of 2008, in order to combat anti-money laundering, financial terrorism, tax evasion and corruption by giving a mandate to the Companies and Intellectual Property Commission (CIPC) to collect information of the beneficial ownership of companies and imposing obligations on companies to disclose their ultimate beneficial ownership to the CIPC.

In line with this trend, companies will be increasingly restricted in attempts to avoid section 11 consent requirements (or other regulatory requirements) by means of intricate intra-group structuring mechanisms and are advised to seek legal guidance before embarking on restructuring or share-based financing transactions.

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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.

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