Mogale Alloys (Pty) Ltd v Nuco Chrome Boputhatswana (Pty) Ltd
2011 (6) SA 96 (GSJ)

Alienation or disposal of a "controlling interest" in a prospecting company

1 Introduction

Section 11(1) of the Minerals and Petroleum Resources Development Act 28 of 2002 (hereafter "MPRDA") contains a restraint against the alienation or transfer of prospecting rights, an undivided share in such rights or a controlling interest in a company or close corporation holding such rights, unless the approval of the Minister of Mineral Resources is obtained. The restraint also applies to mining rights to minerals, exploration and production rights to petroleum (ss 11(1) and 69(2) MPRDA). As the *Mogal*e decision dealt with prospecting rights, our discussion shall focus on prospecting rights but the principles are of course also applicable to the other rights. The *Mogale* decision is significant because it gives some indication of what is meant by a "controlling interest" in terms of section 11(1) of the MPRDA. It also illustrates how important it is to meticulously execute conditions in contracts, and to understand the consequences of the non-fulfilment of suspensive conditions if these consequences are harsh and unfair but stipulated in the agreement. In effect, the plaintiff in this case paid R3 million for shares, but was unsuccessful in enforcing the agreement through an order for specific performance because two suspensive conditions were not fulfilled, and the contract contained a clause preventing the plaintiff reclaiming the R3 million. In short, the plaintiff paid R3 million but never became a shareholder of the company and could not recover the payment contractually.

At the outset, an exposition of the facts, the relief claimed, the arguments of the court and what was decided by the court will be covered. In our commentary the requirements for the granting of prospecting rights will be given as background information, followed by our analysis of section 11(1) and (2) of the MPRDA. We intend to show that a clear distinction ought to be made between the alienation of a prospecting right (or share thereof) and the alienation of a "controlling interest" in a company or close corporation holding a prospecting right. The meaning of a "controlling interest" in a company or close corporation for purposes of section 11(1) will be examined, as well as the complexities of determining such meaning. It will be argued that requirements in terms of section 11(2) apply to the prospecting company or close corporation that intends to alienate, transfer or

dispose of a prospecting right (or undivided share therein). However, the requirements of section 11(2) do not apply to the shareholder or member of a close corporation (whether a juristic person or a natural person) that intends to alienate, transfer or dispose of the person's "controlling interest" in a prospecting company. Section 11(2) also does not apply to the person (whether a juristic person or a natural person) that obtains such a "controlling interest". We argue that there is confusion in the *Mogale* case between the juristic person holding the prospecting right and the shareholders or members of the close corporation holding a "controlling interest" in a company or close corporation wanting to alienate, transfer or dispose of such "controlling interest".

2 The Facts

Nuco Chrome Boputhatswana (Pty) Ltd (hereafter "Nuco") is a private company, which held a prospecting right for precious metals on certain farms in the North West province (par 7). The shareholding of Nuco was as follows: Butler held 52%; Van Zyl 12%; Uthango (Pty) Ltd 26%; and the Royal Bafokeng Nation 10% (pars 2 and 8). Butler sold 33% of his shares to Mogale Alloys (Pty) Ltd (hereafter "Mogale") for R3 million. For current purposes, four clauses in the agreement between Butler and Mogale (Pty) Ltd are of particular importance.

There were two suspensive conditions in the agreement. The first (clause 5.1.2) required "the approval of the Department of Mineral Resources of the sale [of] equity to the purchaser, to the extent such approval is required by law" (par 14). The parties were *ad idem* that this clause was a reference to section 11(1) of the MPRDA (par 15). In terms of section 11(1) of the MPRDA, such approval was required, *inter alia*, for the transfer, alienation or disposal of a "controlling interest" in a private company (or close corporation) holding a prospecting right (Nuco held such right).

The second suspensive condition (clause 5.1.3) related to the pre-emptive rights of other shareholders in Nuco (Pty) Ltd, as contemplated in article 64.1 of Nuco's Articles of Association – article 64.1 was very similar to the standard pre-emptive right provision contained in private companies' Articles of Association, requiring shareholders in private companies to first offer their shares to the other shareholders in such a private company before the shares could be sold to third parties (see par 48). The question arose as to whether the Royal Bafokeng Nation, as one of the shareholders, had such a right of pre-emption (par 4).

The third important clause in the contract between Butler and Mogale was clause 5.3, which stipulated that if any of the suspensive conditions were not fulfilled within a period of 180 days from the date of the signature of the agreement, then the agreement was to lapse and be of no force and effect (par 6).

The fourth important clause, clause 5.4, is quite a remarkable clause as it stipulated that if the agreement failed because the Minister's approval was not obtained (the clause 5.1.2 suspensive condition),

Mogale Ltd would have no right to recover the R3 million paid for the 33% of Butler's shares, but shall have the right(s) envisaged in clause 5.4 (par 41). Unfortunately, it is not revealed what these rights were.

Butler passed away (par 9). Neither the Minister nor the Department of Mineral Resources had consented to the sale of shares by Butler to Mogale (par 16). When the Royal Bafokeng Nation was informed about the intended sale to Mogale they indicated that they did not consent to the sale either (see par 52).

3 Relief Claimed and Arguments Raised

In a claim for specific performance, Mogale claimed delivery of the shares purchased (par 1). In the alternative, Mogale claimed repayment of the R3 million which it had paid for the shares in terms of the agreement (par 1).

Nuco and the executors of Butler ("the defendants") denied that the suspensive conditions in clauses 5.1.2 and 5.1.3 of the agreement had been fulfilled (par 4). They argued that the Minister's consent was required for the disposal of the shares to Mogale (par 22). According to the defendants, section 11(1) of the MPRDA was directed at the acquirer and not the disposer of the interest (par 21). They submitted that "controlling interest" in section 11(1) of the MPRDA referred to the majority shareholding in a company which held prospecting rights (par 22). At the date of sale, Butler owned the majority of the shares and by selling 33% to Mogale, Butler would no longer hold the majority shares in Nuco (par 22). It was argued that the Minister's written consent was required because the sale was going to have the effect of moving the controlling interest from Butler (par 22) as he would then only hold 19% of the shares (52% minus 33%).

Mogale contended that ministerial approval was not required because the agreement did not change the "controlling interest" in Nuco (par 5) or transfer a controlling interest from Butler to Mogale (par 17). It was submitted that "controlling interest" meant something other than a shareholding of more than 50%. "Controlling interests" in section 11(1) of the MPRDA "could imply different things, depending on the circumstances" (par 17). It was argued that the fact that Butler held 52% of the shares did not necessarily make it a controlling interest (par 17). Reliance was placed on the meaning of "control" and "controlling interests" in section 12(2) of the Competition Act 98 of 1998, and section 1 of the Diamonds Act 56 of 1986 (see par 7). Mogale also contended that the Royal Bafokeng Nation did not have a right of preemption (par 5). In the alternative, it was contended that, "if RBN had such a right, the conditions should be held to have been fictionally fulfilled, because Butler (and his agents) deliberately prevented the condition from being fulfilled" (par 5).

4 Decision

At issue was whether the abovementioned suspensive conditions had been fulfilled (see par 4). The court held that the first suspensive

condition was not fulfilled because the Minister's consent was required but not obtained (par 40). Despite the court's conclusion being decisive of Mogale claim and alternative claim, the court "nevertheless, briefly traversed the question of fulfilment of the second condition…"(par 41). The court also found that the second condition was not fulfilled (par 52). The outcome was that Mogale could not claim the R3 million because the contract prevented it from doing so (par 41). The decision of the court will now be examined in more detail.

4 1 Alienation of a "Controlling Interest"

According to the court, section 11 of the MPRDA has as its purpose the regulation of the transfer and encumbrance of prospecting rights that were granted by the Minister (parr 27, 37). According to the court, section 11(1) of the MPRDA places a prospecting right, an interest in a prospecting right and a controlling interest in a company or close corporation on the same footing (par 27). It applies to companies and close corporations which have prospecting rights (par 30) and regulates the disposal of the controlling interest (parr 28, 38). Section 11(1) of the MPRDA only refers to "controlling interest" in companies and close corporations (par 32).

"Controlling interest" is not defined in the MPRDA. An "interest" is described as something that is capable of being disposed of by any of the means envisaged in section 11(1) of the MPRDA and includes a proprietary interest (see parr 33, 36). An interest includes shares or rights (par 36; see also Dale, Bekker, Bashall *et al South African Mineral and Petroleum Law* (2005) 168 par 118.4). According to the court, the words "controlling interest" ought to be interpreted as a one composite phrase (par 31). A "controlling interest" has to be the interest that controls the company (or close corporation) (par 37). According to the court, the "term 'controlling interest' cannot be confined to a single characteristic, or criterion" (par 37). The list of criteria is not exhaustive but, in the case of a company, it may, mean any of the following:

(a) more than 50% of the issued share capital of the company;
(b) more than half of the voting rights in respect of the issued shares of the company;
(c) 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; or
(d) the right of a shareholder (even if notionally) to more than half of the company's profits or assets (par 37).

According to the court, section 11(2) of the MPRDA indirectly indicates the purpose of section 11(1), namely, the acquirer must be capable of complying with the requirements, terms, conditions and obligations of a prospecting right before the Minister can consent (see par 28). Section 11(2) makes it clear that "one of the main purposes is for vetting of the intended acquirer of that right" (par 37). The court concluded that the "acquirer, or intended acquirer, of such a controlling interest in the company would have to be vetted for regulatory purposes" (par 37).

The court held that "what has to be determined is whether the interest was a 'controlling interest' at least at the time of the proposed disposal" (par 38). Coppin J provided the following scenarios:

> If a majority shareholder intends to dispose of his entire shareholding to another, or others, the Minister's consent would clearly be required. If the majority shareholder, with the controlling interest, intends to dispose only of a portion of his interest and the disposal will not result in a change of control, i.e. the shareholder will retain the controlling interest, then the disposal would, in my view, not require the Minister's consent. If, however, the effect of the disposal would be that the holder of the controlling interest would lose such control, then the disposal would require the Minister's consent, even if no one else acquires that controlling interest (par 38).

Applied to the facts, Coppin J held as follows:

> Butler was the holder of at least 52% of the shares in Nuco at the time of the agreement. This shareholding would, in my view, constitute a '*controlling interest*' in Nuco in the sense I held above. The fact that he did not sell the entire 52% to Mogale but only 33%, which would have had the effect of reducing his interest to less than a '*controlling interest*', does not mean that the Minister's consent for the disposal to Mogale, in terms of the agreement, was not required. In my view the Minister's consent was indeed required (par 39).

Coppin J reasoned that the Minister has a discretion in terms of section 11 of the MPRDA to consent to the disposal or refuse it (par 38). The fact that the disposal would have the effect that the controlling interest no longer vests in the disposer, is a matter for the Minister's consideration (par 38). It was held that a change in control may hold implications for the company's capabilities to comply with its obligations relating to prospecting, and its capacity to sustain compliance with the requirements of a prospecting right in section 17 of the MPRDA (par 38).

The court found that because "the Minister's consent was not obtained to date, or within the 180 days allowed for in the agreement, the suspensive condition contained in clause 5.1.2 of the agreement was not fulfilled" (par 40). Due to non-fulfilment of this condition, the court held that the agreement had lapsed. Therefore, in terms of clause 5.4 of agreement, the R3 million paid could not be recovered by Mogale (par 41). Despite its finding the court deemed it necessary to briefly consider the fulfilment of the second suspensive condition in clause 5.1.3 of the agreement as well (par 41).

4 2 Right of Pre-emption

The court found that the Royal Bafokeng Nation had retained a right of pre-emption in terms of article 64.1 of the Articles of Association (par 52). Proof of the actual notification of the proposed sale of shares to Mogale (Pty) Ltd was not produced. In the Royal Bafokeng Nation's response (which was produced as evidence) it indicated that they did not consent to the proposed sale of shares (see par 52). The court found that the second condition (stipulated in clause 5.1.3 of the agreement of sale)

was also not fulfilled (par 52). (By implication, the agreement had lapsed as contemplated in clause 5.3 of the agreement (see par 40)).

As to Mogale's alternative claim of fictional fulfilment of the condition because of Butler's alleged prevention of fulfilment, the court required (par 54) that Mogale:

> [m]ust prove that the condition was not fulfilled and that Butler had a duty regarding the fulfilment of the condition, and that he breached that duty with the intention of frustrating or preventing the fulfilment of the condition.

The intention required is *dolus*: the "debtor should have acted with the direct intention of preventing the obligation from becoming enforceable" (see par 56). The court concluded on the evidence that Butler had not "acted intentionally with regard to the non-fulfilment of the condition under consideration, particularly insofar as it pertains to RBN" (par 62). Thus, the plaintiff was also unsuccessful in proving "fictional fulfilment" of clause 5.1.3.

As we are of the view that the court's finding about the second condition was not really necessary, but correct, it will not be discussed further.

5 Commentary: The Alienation of Prospecting Rights (or Undivided Share Thereof) or a Controlling Interest in a Company Holding Prospecting Rights

5 1 General Requirements

The acquisition and exercise of prospecting rights, and the alienation of prospecting rights or a controlling interest in a company holding prospecting rights, are governed by the MPRDA. A prospecting right to minerals is granted to an applicant by the Minister of Mineral Resources (s 17(1) of the MPRDA). This power of the Minister has been delegated to the Deputy Director-General: Mineral Development (s 103 of the MPRDA; item 5 of the *Delegation of powers by the Minister of Minerals and Energy to officers in the Department of Minerals and Energy* 2004-05-12 (further references would, however, still be to the "Minister")).

In terms of section 17(1), for a prospecting right to be granted to an applicant, it is required that the applicant must have: (a) the financial resources and the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; and (b) the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The applicant must also not have contravened any relevant provision of the MPRDA (see s 17(1)(e) MPRDA). It is further required that the estimated prospecting expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme, and prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment (see s 17(1)(b), (c) MPRDA). In addition, the grant of a prospecting right may not result in an exclusionary act, prevent fair competition, or result in the concentration of the particular mineral

resource under the control of the applicant (see s 17(2) MPRDA). It may be required of an applicant to expand the opportunities for historically disadvantaged persons in terms of section 2(1)(d) of the MPRDA (see s 17(4)). These are the requirements for the acquisition of a prospecting right in terms of section 17 of the MPRDA.

A prospecting right is granted for five years (s 17(6) MPRDA). Such prospecting right is subject to the stipulated terms and conditions of the right, the MPRDA and any other relevant law (s 17(6) MPRDA). In *Maccsand v City of Cape Town* ((709/10) [2011] ZASCA 141 par 33) and *Louw NO v Swartland Municipality* ((650/10) [2011] ZASCA 142 parr 11, 12) the Supreme Court of Appeal held that "relevant laws" includes provincial legislation, such as the Land Use Planning Ordinance 15 of 1985 of the Western Cape ("LUPO"), which regulates land use planning and zoning by municipalities. The Constitutional court confirmed that the exercise of a mining right granted in terms of the MPRDA is subject to LUPO ((*Maccsand (Pty) Ltd v City of Cape Town* ((CCT 103/11) [2012] ZACC 7) par 51). The court reasoned that there is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or mining permit (44). The holder of a prospecting right is entitled to apply for a retention permit (s 31) to suspend the prospecting right (s 32(2)), whilst retaining the exclusive right to apply for a mining right (s 35(1)). The prospector has the exclusive right to apply for -

(a) the renewal of a prospecting right (s 19(1)(a)), and
(b) a mining right in respect of the mineral and prospecting area (s 19(1)(b)).

Linkage of a prospecting right with a future mining right is thus ensured, making a prospecting right, depending on the results of prospecting, a very valuable right. Various duties relating to prospecting are imposed upon a prospector (see further s 17(2)). Environmental provisions in chapter 4 of the MPRDA impose several environmental duties and responsibilities on prospectors and miners. For instance, a prospector or miner is responsible for any environmental damage, pollution or ecological degradation caused by his prospecting operations (s 38(1)(e)) and the management thereof until the Minister has issued a closure certificate to the holder of the prospecting right (s 43(1)). Directors of a company may even become jointly and severally liable "for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented" (see s 38(2)).

Section 11(1) provides that a prospecting right, an interest in a prospecting right or controlling interest in a company or close corporation, may only "be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of" with the written consent of the Minister (s 11(1)). The consent required in section 11(1) does not apply to a change of the controlling interest of a listed company (s 11(1); as to the meaning of a "listed company", see further Dale, Bekker, Bashall *et al* 174 par 118.8). An interest in a prospecting right refers to an undivided

(*aliquot*) share for purposes of coholdership of prospecting rights, whereas, an interest in a company refers to shares in the company. At common law, two or more holders could have held mineral rights and a co-holder was entitled to mine his proportionate share of the mineral deposits, provided such exercise takes place without prejudice to the rights of the other holder(s) (*Erasmus v Afrikander Proprietary Mines Ltd* (1976 1 SA 950 (W) 950, 962H). In terms of the common law, prospecting (or mining) rights granted in terms of the MPRDA are capable of being jointly held by two or more holders (see Badenhorst and Olivier "Conversion of 'old order mining right': "Sleeping at the MPRDA's wheel of (mis)fortune? *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources"* (unreported decision) Case no 28980/10 (NGD) 2012**).

The Minister has to provide proper reasons for her decision. For instance, the Minister's refusal of an application for the transfer of a prospecting right in terms of section 11(1) of the MPRDA was set aside in *Rhino Plat (Pty) Ltd v Minister of Minerals and Energy* (2009 JDR 0399 (GNP) 17) and the only reason given by the Minister for her decision was the statement that the grant would defeat the objectives of the MPRDA (par 11). The court found on the papers that the applicant met the requirements of sections 17(1) and 2(d) of the MPRDA (par 16). In addition, the court found that there were no reasons why the application should not be granted by the Minister (par 16). An order was made by the court that the Minister should forthwith consent to the Applicant's application! (par 17) The decision of Seriti J is clearly incorrect because it was not an instance where the court could substitute the decision by the Minister with a decision by the court (see par 15) and order the Minister to consent thereto. Because the decision has been set aside, the Minister would have to consider the application anew, exercise her discretion and give proper reasons for her decision.

Restraints against the transfer, alienation or disposal of prospecting or mining rights also occur in other mineral law systems. For instance, similar prohibitions against assignment, sub-letting or transfer of mining rights or interests in mining rights without ministerial permission or approval, occur in the mining laws of some Australian states (see s 300 Mineral Resources Act 1989 (Qld); s 83(1) of the Mining Act 1971 (SA); s 33 Mineral Resources Development Act 1990 (Vic); and s 83(1)(d) of the Mining Act 1978 (WA)). Before approval is granted in the state of Victoria, the Minister must be satisfied that: the applicant is a fit and proper person to hold the mining licence, intends to comply with the Act, genuinely intends to do the work, has an appropriate work programme, and is likely to be able to finance the proposed work and rehabilitation of the land (s 15(6)).

5 2 Disposal of "[a] Prospecting Right or an Interest in Such a Right"

The first part of section 11(1) clearly deals with the prospecting right or an undivided share therein. As was explained under paragraph 5.1

above, this is the prospecting right granted for a period of five years by the Minister, and takes into consideration the requirements mentioned under paragraph 5.1 above. As there are requirements pertaining to "financial resources" and "prospecting expenditure", it will normally require some capital investment and most probably more than one person involved in the project or undertaking. In this regard a private company or a close corporation as holder of the prospecting right is an ideal business vehicle for such undertakings, unless large amounts of capital are required, in which case a public company will be the obvious business form. Several individuals can take up shares in the private company or a member's interest in a close corporation. In the case of Nuco (Pty) Ltd, the company had an authorised share capital of R50 000, divided into 50 000 ordinary shares (par value) of R1,00 (par 8), and the shareholders would have taken up those shares proportionally to determine their percentage of shareholding. Although we do not have the details in Nuco', there will normally be additional forms of financing for such undertakings, for example, bank loans or overdraft facilities for the company or the close corporation.

In the exercise of a ministerial discretion to grant a prospecting right to a company or close corporation, the Minister will doubtlessly take into consideration who the shareholders of the company or the members of the close corporation are, otherwise the general aim of fairness and community considerations could be defeated. As was seen above in the case of Nuco, there were two individuals involved (Butler, 52% and Van Zyl, 12%), but also a company (Uthango Pty Ltd, 26%) and the Royal Bafokeng Nation (10%). It should, however, be appreciated that the prospecting right will be granted to the company or the close corporation as separate legal entities, not to the individual shareholders or members. Section 11(1) clearly provides for ministerial approval if a company or close corporation would in any way attempt to cede, transfer, let, sublet, assign, alienate or otherwise dispose of the "prospecting … right or an interest in any such right" (first part of 11s (1)). Section 11(2) then contains an interesting provision:

> 11(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of-
> (a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and
> (b) satisfies the requirements contemplated in section 17 …

It should be noted that there are two different sets of requirements here. The one contained in 11(2)(a) deals with the "obligation and the terms and conditions of the right in question". In other words, here the focus will be on whether the new holder of the prospecting right can still carry out and comply with the obligations, terms and conditions initially attached to the prospecting right when it was granted. Section 11(2)(b), as far as a prospecting right is concerned, simply refers to the requirements of section 17 (see further discussion below).

It is apparent that there is no discretion for the Minister if the requirements are met – "[t]he consent referred to in subsection (1) *must be granted* … " (emphasis added). In other words, a company or close corporation that holds prospecting rights and that passes a resolution to dispose of the prospecting right, say to another company or close corporation, must obtain the approval of the Minister, but the Minister cannot refuse it if the requirements of section 11(2) are met. We appreciate that whether or not the requirements in section 11(2) are actually met or not could lead to complex disputes, but that is not the focus of this case note. That is particularly so because of the two sets of different requirements contained in section 11(2)(a) and section 11(2)(b), respectively.

Suppose some of the minority shareholders or members holding a minority interest in a close corporation are opposed to the disposal of the prospecting right, is there anything they can do? There will be at least two forms of protection for the minority shareholder or members of a close corporation if they are not happy with the disposal, and all the requirements expected in section 11(2) are met. First, a special resolution (75%) will be required if a company or close corporation disposes of the whole, or substantially the whole, of the company or close corporation, or disposes of all or the greater part of the assets of the corporation (see s 228(1) Companies Act 61 of 1973 (hereafter the "1973 Companies Act"); s 112(2)(a) Companies Act 71 of 2008 (hereafter the "2008 Companies Act"); s 46(b) Close Corporations Act 69 of 1984 (hereafter the "CC Act")). The disposal of the prospecting right of a company or close corporation formed for prospecting or mining purposes will surely be considered to be such a disposal. Secondly, there are remedies available for minority shareholders and members of close corporations in the case of oppressive and unfairly prejudicial conduct (see s 252 1973 Companies Act; s 163 2008 Companies; s 49 CC Act).

5 3 Disposal of a "Controlling Interest"

One of the difficulties experienced by Coppin J in the *Mogale* decision was that neither "control", nor "interest" nor "controlling interest" are defined. It is, therefore, of interest to make a few general comments about these concepts that may throw some light on the intention of the Legislator, and may assist if the term "controlling interest" needs to be interpreted in future cases.

Traditionally, the concept of "control" in company law is used to determine whether there exists a relationship of a holding company and subsidiary between companies (groups of companies) and to establish whether there were abuses of "control". Also linked to this is "control" of companies by managers and directors to determine under which circumstances loans made by companies to directors or managers were prohibited. Under the 1973 Companies Act these aspects were governed by sections 1(3), 37 and 226. There are, of course, now comparable provisions in the 2008 Companies Act, but as the case was decided under legislation drafted when the 1973 Companies Act was still in the

governing piece of legislation, we will not refer to the new provisions, but realise that they will be of considerable importance for future purposes. The interrelationship between sections 1(3), 37 and 226 of the 1973 Companies Act has been renowned for its complexities and technicalities, not least because of the different meanings of "control" in, for instance, section 1(3) and section 226(1A)(B) of the 1973 Companies Act. It is beyond the scope of this case note to analyse these complexities, but it may be of some interest to note the similarities of "controlling interest" in section 1 of the Diamonds Act 56 of 1986 as quoted by Coppin J (par 18) with the way in which the holding company-subsidiary relationship was determined under section 1(3) of the 1973 Companies Act. It will be noted that for purposes of that subsection, a company shall be deemed to be a subsidiary of another company if that other company is a member of it and:

(a) holds a majority of the voting rights in it; or
(b) has the right to appoint or remove directors holding a majority of the voting rights at meetings of the board; or
(c) has the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise.

It is also important to take note of the requirements for "control" for purposes of section 226 of the 1973 Companies Act. Section 226 dealt, *inter alia*, with the prohibition of loans to directors and managers. It provided that these loans could not be made directly to a director or manager of the company, its holding company or any other company which is a subsidiary of its holding company (s 226(1)(a) 1973 Companies Act). Furthermore, and this is of particular importance for our current discussion, such loans or securities could also not be made to any other company or other body corporate *controlled* by one or more directors or managers of the company, or of its holding company or of any company which is a subsidiary of its holding company (s 226(1)(b) 1973 Companies Act).

It was, thus, vital for purposes of section 226 that "control" was defined and that was done in section 226(1A) of the 1973 Companies Act. The circumstances when it would have been deemed that there was such control by one or more directors or managers ("controlling" director or manager) of a company can be summarised as follows:

(a) When the "controlling" director or manager can appoint or remove the majority of the directors in another company. The power to appoint directors will then be deemed to exist if the directors in the other company can only be appointed as directors of that other company if the "controlling" director's or manager's consent or concurrence is required for such an appointment;
(b) When the "controlling" director or manager holds more than one-half of the equity share capital of that other company or body corporate or, if that other body corporate is a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act 69 of 1984), more than 50 per cent of the interest in such corporation.

It would be surprising if, when the phrase "controlling interest" was included in section 11(1) of the MPRDA (the 1973 Companies Act was then still the governing piece of company law legislation), the Legislator did not have in mind some of these forms of "control". Thus, we agree with Coppin J that "[t]he 'interest' must be one that controls the company (or close corporation)" (par 37). In terms of general company law principles, it is the power of control over the company's two primary organs, namely, the board of directors and the general meeting (shareholders) that would give control over company matters. The simple reality is that if you control the board of directors or you have control over the general meeting, you control the company. We note that Dale *et al* (172 par 118.5) submit that the term "controlling interest" will include "both a direct or indirect controlling interest" and we agree with that. However, it will probably provide particular challenges to determine exactly what such "indirect controlling interests" are and when and how they are disposed of or alienated. For example, if a holding company has two subsidiaries and one subsidiary holds 25% of the shares (each share representing one vote) in a prospecting company and the other subsidiary holds 26% of the shares (each share representing one vote) in such a prospecting company, then the holding company has "indirect" control over the prospecting company – the holding company's two subsidiaries hold more than 50% of the shares and can exercise more than 50% of the voting rights at the prospecting company's general meeting. Does this mean that if the "controlling interest" of the holding company is affected that it "indirectly" affects the "controlling interest" in the prospecting company and that ministerial approval for the shift of the "controlling interest" in the holding company will also be required?

Also, suppose one of the two subsidiaries sell, say, 2% of their shares, then the holding company loses its indirect control over the prospecting company, because it can no longer, indirectly, control the prospecting company through its subsidiaries – the two subsidiaries jointly now only hold 49% of the shares and voting rights in the prospecting company. Will such a disposal of shares in one of the subsidiaries then also trigger the application of section 11(1), requiring ministerial consent? Furthermore, if the holding company no longer controls any one of the two subsidiaries in our example (in other words, one or both of them are no longer considered subsidiaries), will such a change in the group composition trigger the application of section 11(1), requiring ministerial consent? It is submitted that it will indeed be the case in all the examples given above, illustrating how complex matters can get, but there are even more complexities involved here.

Aspects like shareholder agreements, weighted voting rights and agreements between companies and third parties (for instance, an agreement between a prospecting company and a third party that the third party can appoint the majority of the directors of the prospecting company or can remove the majority of the directors of the prospecting company) can all be determining factors of who controls prospecting companies. That means, to cede, transfer, assign, alienate or otherwise

dispose of any such "controlling interest" ("direct or indirect controlling interests") may require the consent of the Minister. This obviously adds to the complexity of this area of law and could lead to considerable uncertainty. We are of the opinion that reliance on principles enshrined in paragraph 2.1.3.2 of the Codes of Good Practice for the Minerals Industry (GN 446 *GG* 32167 2009-04-29 (as suggested by Dale *et al* 171 par 118.6)) or other provisions of the Code will not resolve these uncertainties.

5 4 Distinguishing Between "The Right" and "Controlling Interest" in Section 11(2) of the MPRDA

In our view it is of particular importance to note that section 11(2) of the MPRDA only refers to "the right" and not to the "controlling interest". In fact, it would be an absurdity from a company law point of view if the Minister is required to consider whether the acquirer of the "controlling interest", that is, the new shareholder who holds the "controlling interest", meets the requirements of section 11(2) of the MPRDA. It is, therefore, submitted that the following statement of Coppin J is incorrect: "Thus, the acquirer, or intended acquirer, of such controlling interest in the company would have to be vetted for regulatory purposes" (par 37).

The prospecting right vests in the company (Nuco) and the rights and liabilities are the company's (Nuco). Shareholders are protected against liability by the corporate veil or, to put it differently, can rely on one of the most fundamental concepts of modern company law, namely, the concept of "limited liability of shareholders". That means it is totally irrelevant to consider whether the shareholders, or a new shareholder now holding the "controlling interest", have: (a) the financial resources and the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; and (b) the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The requirements mentioned in section 17 (see reference to it in section 11(2)(b)) of the MPRDA are also totally irrelevant as far as the shareholder having a "controlling interest" in a company or a close corporation is concerned. It is the company (in this case Nuco) that will have to meet those requirements.

Thus, in our view, the following statement of Coppin J is also incorrect:

> If there is a disposal of the controlling interest and an acquirer thereof, the Minister must consent to the disposal if the acquirer of the interest meets the requirements set out in s 11(2) (par 38).

This statement ignores the distinction in section 11(1) of the MPRDA between "the prospecting right" (or undivided share therein) and the "controlling interest" and who owns the right, that is, the company (Nuco). The statement would have been correct if Nuco, as a company with a separate existence from its shareholders, intended to dispose of the prospecting right. Then the Minister needs to consider the requirements mentioned in section 11(2) of the MPRDA. Coppin J clearly realises the dilemma. He points out that "[r]eference to 'the right' in ss

(2) must include 'the controlling interest' referred to in subsection (1)". He then explains that:

> ... otherwise there will be no apparent purpose, or guideline for the Minister, when dealing, not with the disposal of what is described as a right in ss (1), but with the disposal of the 'controlling interest in a company or close corporation' (par 29).

Coppin J makes no finding in this regard (see last sentence of par 29), but points out that "in dealing with the latter, the enquiry may of necessity be slightly different because the right would vest in the company or close corporation and not in those who control the company or close corporation" (par 29). With respect, as was already mentioned above, the enquiry will not be "slightly different", it will be completely different. None of the requirements mentioned in section 11(2) of the MPRDA, including the reference to section 17 of the MPRDA, is relevant for purposes of who holds the "controlling interest" in a company or close corporation. In fact, whether a person holding a "controlling interest" in a company or close corporation disposes of such "controlling interest" in part or completely and, whether a new person holds such a "controlling interest" after such a disposal, cannot have any bearing on whether or not the company or close corporation will continue to have the capability to comply with the statutory requirements set out in section 11(2) of the MPRDA. The only thing which happens when there is a disposal of a "controlling interest" is that the shareholding or holding of a member's interest will change hands. Thus, we fail to understand the logic behind the following statement of Coppin J (last sentence of par 38):

> A change in control may hold implications for the company's capabilities to comply with its obligations relating to its prospecting, or mining right, (or interest in such a right), and its capacity to sustain compliance with the requirement of s 17 of the MPRDA, in the case where the relevant right is a prospecting right.

There are indeed no specific guidelines or rules to assist the Minister in determining whether to give consent, or to refuse consent, for the disposal of a "controlling interest" in a company or close corporation as required by section 11(1) of the MPRDA and the amendment of section 11. Promulgating regulations to provide rules and guidelines to assist the Minister in this regard is something that the Department of Mineral Resources should consider seriously. We would like to emphasise that we are firmly of the opinion that the approval required under section 11(1) as far as a "controlling interest" is concerned should not be linked to the requirements referred to in section 11(2) – section 11(2) only applies to the Minister's consent under section 11(1) in so far as such consent is required in relation to "[a] prospecting *right* or mining *right* or an interest in any *such right*" (emphasis added). In other words, we disagree with Coppin J's statement that "[r]eference to 'the right' in ss (2) must include 'the controlling interest' referred to in ss (1)" (par 29). We appreciate that it might be of considerable importance that the Minister should have a discretion in consenting or not consenting to the transfer of a "controlling interest" in a company or close corporation holding prospecting or

mining rights and will, in what follows, make a few comments on this aspect.

5 5 Ministerial Discretion to Consent to the Disposal of a "Controlling Interest"

Let us first speculate about instances where there could be no doubt that the written consent of the Minister is required for disposal of a "controlling interest" in the context of the *Mogale* decision. Coppin J is clearly correct if he states that if a majority shareholder disposes of all his shares, the Minister's consent will clearly be required. He is also right that no ministerial consent is required if the majority shareholder maintains the majority shareholding after the disposal (par 38). As examples, if Butler sold all his shares (53%) to Mogale, the approval must be obtained but, if he only sold 1% of his shares to Mogale, no ministerial consent is required. However, it should be understood that if Butler sold 25% of his shares to Uthango, Uthango Ltd would then hold 51% of the shares in Nuco (its existing 26% plus another 25%) and that would have required ministerial consent to the disposal of the "controlling interest". The "controlling interest" would then move away from Butler to Uthango and that should be seen as a disposal falling under section 11(1) of the MPRDA.

The controversial part of the *Mogale* decision is that Coppin J held that by giving up his "controlling interest" without enabling anybody else to acquire the "controlling interest", the ministerial approval under section 11(1) was still required. This is significant as it implies that, in effect, *ministerial approval is required in all cases where*, for instance, a holder of more than 50% of the shares in a company (or member's interest in a close corporation) with prospecting rights sells shares (member's interest in a close corporation) that would reduce the person's shareholding (member's interest in a close corporation) in that company (or close corporation) to below 50%. That will be the case irrespective of the fact that after such disposal nobody would hold a "controlling interest" in that company or close corporation.

In order to illustrate the significance of ministerial discretion when there is a disposal of a "controlling interest", we can use an example related to the case under discussion. Suppose there were good reasons for the Minister originally to vest the prospecting rights in the company (Nuco), because the Minister was of the opinion that the Royal Bafokeng Nation must hold 51% of the shares in Nuco. It is then understandable that if the Royal Bafokeng Nation plans to dispose of the whole or part of that "controlling interest", in line with the spirit of the legislation (see again discussion under 5 1 above), the Minister should have a discretion whether or not to consent to the "controlling interest" shifting away from the Royal Bafokeng Nation. The discretion will then probably be based on the best interests of the Nation, the communities or, in particular, the best interests of the Royal Bafokeng Nation in our example.

It will be clear from this conclusion that we agree with Coppin J's conclusion that ministerial consent is required under circumstances

where the "controlling interest" moves to a different person, as well as in circumstances where the person holding the "controlling interest" no longer holds the "controlling interest", even though nobody else obtains such "controlling interest". That was what happened in the case under discussion: Butler sold off 33% of his 52% shareholding to Mogale (Pty) Ltd, resulting in nobody holding any "controlling interest" any longer, as the shareholding in Nuco would then have looked like this: Butler held 19%, Van Zyl 12%, Uthango (Pty) Ltd 26%; the Royal Bafokeng Nation 10%; and Mogale 33%. This is, of course, based on the assumption that the agreement was valid and the Minister's approval was sought, as well as that the pre-emptive rights provided no obstacle to the validity of the agreement (as was pointed out above, that was not what Coppin J decided).

It is appropriate to make a final important point relating to "controlling interests". As far as shareholding or holding a member's interest is concerned, a very interesting practical consequence follows if nobody holds a "controlling interest" any longer. It means that the shareholders in our example above can dispose of any of their interests without any ministerial approval required, up to a point where somebody else acquires such a "controlling interest" again. If this consequence is correct, then prospecting companies or close corporations would be well-advised not to structure their companies or close corporations when applying for a prospecting right with anybody holding more than 50% of the shares or members' interest. In this way, no ministerial approval will be required for any disposal of shares or members' interests up to the point where one person acquires a "controlling interest" in such companies or close corporations. One wonders whether this was the intention of the Legislature. This provides another reason why it is probably quite important for the Department of Mineral Resources to clarify section 11 by amendment thereof or promulgation of regulations to provide rules and guidelines pertaining to the disposal of "controlling interests".

6 Conclusion

Section 11(1) of the MPRDA prohibits the alienation, transfer or disposal of -

(a) a prospecting right or an undivided share in a prospecting right; or
(b) a controlling interest in a company or close corporation holding such interest.

In situation (a), the alienee or transferee of the prospecting right or undivided share therein must meet the requirements of section 17 of the MPRDA, and be capable of carrying out the duties imposed by the prospecting right and the terms and conditions thereof. We have argued that there are several uncertainties as far as situation (b) is concerned, and we have dealt with them in the context of general and specific company law principles and provisions.

In situation (b), the company or close corporation (as a juristic person) holding a prospecting right must still meet the requirements of section

17, and must still be capable of carrying out the duties imposed by the prospecting right and the terms and conditions thereof, when the "controlling interest" in such company or close corporation moves away from one person or when another person acquires such "controlling interest". A controlling interest "must be one that controls the company" and that can be a direct or indirect "controlling interest". In terms of general company law principles, it is the power of control over the company's two primary organs, namely, the board of directors and the general meeting (shareholders) that would give control over company matters. We have, however, argued that the mentioned requirements do not need to be met by the person who disposes of the "controlling interest" or the person acquiring the "controlling interest". In this regard we criticised statements in the *Mogale* decision in so far as they leave the impression that these requirements also apply to the person who disposes of the "controlling interest" or the person acquiring the "controlling interest".

Even though the outcome for the plaintiff was harsh, the *Mogale* decision is good law as far as it was held that ministerial consent is required if the "controlling interest" in a company or close corporation moves away from one person without anybody else acquiring a "controlling interest". However, as pointed out, there are a few statements in the case that should be treated with circumspection.

The complexities and possible uncertainties regarding the notion of a "controlling interest" make it quite important for the Department of Mineral Resources to clarify section 11 by amendment thereof or promulgation of regulations, in order to provide rules and guidelines pertaining to the disposal of "controlling interests" in prospecting (as well as mining) companies and close corporations.

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