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MINING & RESOURCES

Does section 11 (1) of the MPRDA apply to an indirect change in control?

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In the recent decision of Vantage Goldfields SA (Pty) Ltd & Another v Arqomanzi (Pty) Ltd & Others[1] (**Vantage**) the Supreme Court of Appeal (**SCA**) considered whether section 11 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**) applies in circumstances where there is a change in the controlling interest of the ultimate mining right holder.

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."*

Barbrook Mines (Pty) Ltd (**Barbrook**) and Makonjwaan Imperial Mining Company (Pty) Ltd (**MIMCO**) were the holders of new order mining rights. The shares in Barbrook and MIMCO were ultimately 100% held by Vantage Goldfields Limited (**Vantage**). Vantage initially had 34 shareholders until Macquarie Metals (Pty) Ltd ("**Macquarie**"), an Australian company, acquired 98% of the shares in Vantage. One of the questions that the SCA had to consider was whether the change in control of Vantage triggered the need for ministerial approval in terms of section 11(1) of the MPRDA in relation to the new order mining rights held by Barbrook and MIMCO.

In considering the aforesaid question the SCA had regard to the judgment in *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* **[2]** (**Mogale**).

Mogale is, however, of limited application to the facts in Vantage. The court in *Mogale* was concerned with the situation where there had been a change in control of the direct holder of the mining right. In contradistinction Vantage was concerned with the situation where the controlling interest in the mining right holder had changed i.e. an indirect change of control.

In interpreting section 11(1) of the MPRDA the SCA had regard to the objects of the MPRDA, section 2(a) and (b)[3] in particular.

The SCA held that when regard is had to the objects of the MPRDA that it would be "*an absurdity*" to confine the interpretation of s 11(1) of the MPRDA to direct changes in control of the mining right holder because such an interpretation would undermine two of the principle objects of the MPRDA. The court therefore held that section 11 of the MPRDA must be interpreted to include both direct and indirect changes in control.

The SCA thus found that the change in control in Vantage triggered section 11(1) of the MPRDA in respect of the new order mining rights held by Barbrook and MIMCO.

The Vantage decision puts to an end the long enduring debate in regard to whether an indirect change in control of the holder of a mining right triggers section 11(1) of the MPRDA. Given the objects of the MPRDA the interpretation of the SCA is sensible. Were it otherwise section 11(1) of the MPRDA would be rendered academic by simply interposing an entity between the direct holder of the mining right and the ultimate holder of the mining right.

Footnotes

[1] [2023] ZASCA 106 (27 June 2023).

[2] 2011 (6) SA 96 (GSJ)

[3] The objects of the Act are (*inter alia*) to-

- recognize the internationally accepted right of the State to exercise sovereignty over the mineral and petroleum resources within the Republic;
- give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources



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