



MINING & RESOURCES

Section 11 consent: Can the regulator breathe life into a void transaction?

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1. Section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") is one of the most frequently invoked provisions in the mining regulatory landscape. Every cession, transfer or disposal of a prospecting or mining right, or of an interest in such a right is subject to its provisions. It is, however, easy to lose sight of what the consent process is actually designed to do. A recent judgment of the High Court of South Africa, Gauteng Division, Pretoria, serves as a timely reminder that ministerial consent is a regulatory approval of a transaction, not a cure for a transaction that never lawfully came into existence.

2. In *Misty Falls 45 (Pty) Ltd and Another v The Minister of Mineral Resources and Energy and Others* (Case No. 19058/2022) ("the Misty Falls Judgment"), handed down by Raubenheimer AJ and deemed delivered on 10 April 2026, the Court reviewed and set aside the Director-General's ("DG") consent to the transfer of the Kareepan mining right, as well as the Minister's dismissal of the internal appeal against that consent. Unusually, the Court went further and substituted its own decision: consent was refused.

3. By way of background, Misty Falls 45 (Pty) Ltd ("Misty Falls 45") holds a manganese and iron ore mining right over portions of the farms Kareepan 450 and Pensfontein 449 in the Kuruman district. A former director and shareholder ("the former director") sought, together with a director of Misty Falls 111 (Pty) Ltd ("Misty Falls 111"), consent under section 11 to transfer that right to Misty Falls 111.

4. The former director relied on a 2010 "Exchange of Rights Agreement" between shareholders and a 2011 shareholders' resolution as the source of his authority. The documentary record, however, showed that he had resigned as director in 2014. No special resolution in terms of sections 112 and 115 of the Companies Act 71 of 2008 was ever passed, and the then board expressly told the Department that no transaction involving the right should be processed without its permission.

5. The underlying causa also shifted over time. A February 2018 letter referred to a "cession agreement" between Misty Falls 45 and Misty Falls 111 which did not exist. A 2019 motivation letter relied instead on a November 2018 agreement between the former director personally and Misty Falls 111.

6. The DG nonetheless granted consent in January 2020, focusing on the transferee's financial and technical capacity without engaging with the questions of authority and causa. On appeal, the Department's Chief Director: Legal Services identified authority as the "crisp issue" and recommended that the appeal be upheld. The Minister dismissed the appeal two days later without engaging with that recommendation.

7. Section 11(1) provides that a prospecting or mining right, or an interest in it, may not be ceded, transferred, let, sub-let, assigned, alienated or otherwise disposed of without the Minister's written consent. Section 11(2) provides that consent "must be granted" if the transferee can comply with the obligations and conditions of the right and satisfies the requirements of section 17 or section 23, as the case may be. On its face, therefore, the enquiry is directed at the transferee and its capacity, and in practice that is where the attention of the Department is usually focused.

8. The Court, however, identified a logically prior question. As Raubenheimer AJ put it, section 11 "presupposes the existence of a lawful cession, transfer, alienation or disposal of a right", and the Minister's consent "cannot validate an otherwise unlawful or unauthorised transaction". Put simply, there must first be a valid transaction to which consent can attach.

9. Applying that principle, the Court found that none of the sources of authority relied upon could sustain the transfer-

9.1. The Exchange of Rights Agreement dealt only with the allocation of economic benefits from two prospecting rights among shareholders. Section 19(1)(b) confers on the holder of the prospecting right the exclusive right to apply for a mining right – this right is not conferred on individual shareholders. Reading the agreement as transferring a future mining right would render it unlawful as an attempt to circumvent section 11.

9.2. The 2011 resolution, properly construed, was aimed at establishing and operating the mine, not at disposing of the right itself. In any event, a private resolution cannot override the peremptory requirements of sections 112 and 115 of the Companies Act.

9.3. Whatever authority the former director held as a director lapsed upon his resignation, and a shareholder, even a majority shareholder, has no inherent authority to bind a company to the disposal of its assets.

10. The review Court accordingly concluded that the section 11 application was neither authorised by Misty Falls 45 nor supported by a valid underlying transaction, and that the consent was not authorised by the empowering provision. In considering remedy, the Court described the "central defect" as "the absence of both authority and a valid underlying transaction" and held that there was "no conceivable basis" on which the DG or the Minister could lawfully grant consent on the facts. Refusal was the only lawful outcome, and remittal "would serve no purpose other than to delay the inevitable".

11. The Court also addressed the limits of the regulator's role. The Minister is not empowered to adjudicate private disputes about shareholding, directorship or internal corporate arrangements, save to the extent necessary to determine whether the application is duly authorised and lawful. Faced with manifest disputes about authority, the Minister was required either to refuse consent or to insist that the parties resolve their dispute in the appropriate forum. By "siding" with one faction on contested questions of corporate law, the Minister exceeded the scope of his section 11 powers. In the Court's words, the regulator's role "is not to confer legitimacy on contested private arrangements that may themselves be unlawful or ultra vires".

12. The significance of the Misty Falls Judgment lies in its clear statement that a void transaction cannot be rescued through section 11. Consent is not a form of administrative ratification. The Court was careful to note that nothing prevents the parties from structuring a lawful, properly authorised transaction in future and applying afresh, but what is impermissible is "to validate, through administrative fiat, an unauthorised and opaque transaction". The Court also held that, while the capacity assessment under section 23(1)(b) attracts a more deferential standard, decision-makers remain obliged to consider whether the underlying transaction and authority are sound.

13. For the industry, the implications are practical. Regulators processing section 11 applications cannot confine themselves to a box-ticking assessment of the transferee's financial and technical capacity, particularly where objections from the right holder's board are on record. Practitioners should ensure that applications are supported by a written transaction concluded by the right holder itself, proper board authority and, where the right constitutes all or the greater part of the company's assets, the requisite special resolutions. Market participants acquiring rights should treat the existence of internal disputes as a serious red flag, since a consent obtained on a defective foundation is vulnerable to being set aside, with adverse costs to follow.

14. Whilst the Misty Falls Judgment is binding only in the Gauteng Division, it is persuasive elsewhere and restates a principle of general application: section 11 regulates lawful transactions, it does not create them. Where the foundation is absent, there is simply nothing for the regulator to consent to.



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