

Section 11 of the Mineral and Petroleum Resources Development Act

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In terms of section 11(1) of the [Mineral and Petroleum Resources Development Act 28 of 2002](#) ("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 was clearly the intention of the Legislature that when a prospecting or mining right is to be *inter alia* transferred or disposed of by the mining right holder^[1], the Minister of the Department of Mineral Resources and Energy ("Minister") is required to grant consent under section 11 of the MPRDA before such a transfer or disposal can take place. Thus, the acquirer, or intended acquirer, of such a controlling interest in the company is required to be vetted in order to ensure that the acquirer meets the requirements of section 23 of the MPRDA. Essentially the Minister would sanction the transfer or disposal of the mining right to a recipient who is capable of complying with both the provisions of the mining right itself as well as the requirements that are imposed by the MPRDA on an applicant applying for a mining right. In addition, and strictly in accordance with the provisions of section 11 of the MPRDA, a party must procure the consent of the Minister under section 11 of the MPRDA if it **disposes** of a controlling interest or an indirect controlling interest in a mining right, prior to the disposal taking effect.

Section 11(1) is, however, not entirely clear in respect of the transfer or disposal of a "*controlling interest*" in the holder of a mining right or an "*indirect controlling interest*" in the holder of a mining right and the intended meaning behind this phrase has been the subject of litigation.

The Mogale Alloys Case

In the case of *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 2011 (6) SA 96 (GSJ) ("**Mogale Alloys**"), 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(1) in respect of the sale of the 33% shareholding to the Plaintiff.

The Plaintiff argued that ministerial consent was not required in the circumstances because a "controlling interest" had not been transferred from the Defendant to the Plaintiff. In determining what was meant by "controlling interest" it was submitted that one had to consider whether the Defendant was entitled to hold a majority of votes or whether he could be in a position to appoint the majority of the directors to the board. Since the Defendant was not entitled to do so, it was argued that he did not hold a "controlling interest" even though he held the majority of the shares in the company. In addition, after transfer of the shares had taken place, the Plaintiff merely held a 33% share in the Company.

The Defendant, on the other hand, argued that ministerial consent in terms of section 11(1) 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 see the Defendant only holding a minority share of 19%, thus resulting in the Defendant being divested of his controlling interest.

The Court in *Mogale Alloys* was required to consider 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 that the Defendant has transferred enough shares to divest him of his majority shareholding in the Company, the Court held that ministerial consent in terms of Section 11(1) for the disposal of shareholding was required.

As a result of the *Mogale Alloys* judgement, when a majority shareholder disposes of a portion of his shares but still retains more than 50% of the issued share capital after the sale, ministerial consent will not be required in terms of section 11(1) because his controlling interest is retained. Therefore, consent will only be required when a majority shareholder no longer holds more than 50% of the issued share capital once the transaction has been concluded, unless that shareholder retains control through other means such as retaining the right to appoint the majority of directors.

Effect of the *Mogale Alloys* Case

Based on this construction, the focus remains on whether the transferor loses his controlling interest as a result of the transfer. In *Mogale Alloys* it was held that ministerial consent is required when a “controlling interest” is disposed of even if no other party obtains such “controlling interest”. This interpretation could have some unintended consequences. For instance, (i) in a company where no one shareholder holds the controlling interest, they could all sell their shares without obtaining first obtaining the consent of the Minister under section 11 of the MPRDA and (ii) the wording of section 11(1) of the MPRDA implies that a party does not need to first obtain the consent of the Minister under section 11 of the MPRDA if it **acquires** a controlling interest or an indirect controlling interest in a mining right holder. It is unlikely that it was 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 and Energy (“DMRE”).

The Amendment Act

In order to remedy this, a proposed amendment to section 11(1) of the MPRDA provides that section 11(1) be substituted by the provisions of section 8 of Mineral and Petroleum Resources Development Amendment Act (49 of 2008) (“**the Amendment Act**”) which provides as follows –

“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).

In terms of the proposed amendment, the transfer or disposal of **any interest** in an unlisted company, not only a “controlling interest”, would require the consent of the Minister under section 11 of the MPRDA. This would mean that whenever a share is sold in a company, even if it is the sale of a single share by a minority shareholder, Ministerial consent would be required. This would undoubtedly put extreme pressure on the DMRE and would result in an administrative bottleneck.

The proposed new section 11(5) of the MPRDA also stipulates that –

“Any cession, transfer, letting, subletting, assignment, alienation or disposal of prospecting or mining right or an interest in a corporation or company made in contravention of subsection (1) is void.”

Whilst at present, section 11 of the MPRDA does not provide for the consequence of a transaction that is entered into without Ministerial approval, the accepted view is that such a transaction would be both unlawful and void. This is in keeping with the amendment, which specifically provides for this. The transaction, if void for noncompliance with section 11(1) of the MPRDA, cannot be retrospectively remedied.

The Amendment Act has not come into effect and accordingly the practical consequences 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

be entirely unnecessary.

Conclusion

Although there are some concerns regarding the interpretation given by the court in *Mogale Alloys* it is generally accepted that the case is “good law” in that its effect is that Ministerial consent is in fact required in instances where –

- the transferor disposes of his controlling interest in a mining right holder even in instances when no other shareholder acquires a controlling interest; or
- the transferor disposes of his indirect controlling interest in a mining right holder even in instances when no other shareholder acquires an indirect controlling interest,

save where the transferor retains control through other means other than his percentage shareholding in the mining right holder, such as retaining the right to appoint the majority of directors to the board of the mining right holder.

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Footnotes

[1] In this article, we will refer to the consent of the Minister under section 11 of the MPRDA in conjunction with a mining right, however, we note that the same principles also apply to a prospecting right



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