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The Impacts of Cross-Border Restructuring Transactions on Your South African Mining Right

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The proposed amendments to the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"), published in May 2025, have reignited longstanding uncertainty surrounding the scope and application of section 11 of the MPRDA, particularly in relation to what constitutes a "*change in the controlling interest*" of a company holding a prospecting or mining right. While the amendment bill appears to signal a move towards a more interventionist regulatory approach, including the potential expansion of ministerial oversight over changes in control in mining right holders for purposes of section 11 of the MPRDA, it does so against a jurisprudential backdrop that has itself only recently begun to settle the contours of section 11 of the MPRDA.

Judgments handed down in recent years such as *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* and the *Vantage Goldfields SA (Pty) Ltd v Arqomanzi (Pty) Ltd* judgments have sought to broaden the definition of "*controlling interest*" by adopting a substance over form approach when determining if there is a change in the controlling interest of a right holder thus triggering the requirement for parties to obtain Ministerial consent under section 11 of the MPRDA.

This trajectory of a substance over form approach was adopted more recently by the Supreme Court of Appeal ("**SCA**") in the *Nkwe Platinum Limited and Another v Genorah Resources (Pty) Ltd and Others*^[1] ("**Nkwe case**") which was called upon to determine if a cross border

restructure would trigger the requirement to lodge a section 11 application with the Department of Mineral and Petroleum Resources ("DMPR").

Nkwe Platinum Limited ("**Nkwe**"), a private company incorporated in Bermuda held a 74% undivided share in the Garatouw Mining Right through its South African subsidiary Nkwe Platinum SA Proprietary Limited ("**Nkwe SA**") in a joint venture with Genorah Resources Proprietary Limited ("**Genorah**") who held the remaining 26% undivided share in the Garatouw Mining Right.

Nkwe entered into an amalgamation agreement with another Bermuda-registered company in accordance with the Bermuda Companies Act[2], and following the conclusion of that amalgamation agreement, Garatouw launched an application in the High Court and sought relief on the basis of its contention that the conclusion of the amalgamation agreement resulted in the transfer of the Garatouw Mining Right, or alternatively constituted a change in control of Nkwe, without the approval of the Minister of Mineral and Petroleum Resources under section 11 of the MPRDA[3].

In light of the above, the SCA had to determine whether the conclusion of the amalgamation agreement resulted in (i) the cessation or the deregistration of Nkwe in accordance with section 56 of the MPRDA, and (ii) the transfer or disposal of Nkwe's interest in the Garatouw Mining Right, or a change of control of the Garatouw Mining Right for purposes of section 11 of the MPRDA.

Section 56 – Nkwe cessation or deregistration?

Section 56(1)(c) of the MPRDA provides that –

"Any right, permit, or permission granted or issued in terms of this Act shall lapse, whenever –

...

(c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused;"

The SCA concluded that Nkwe was not registered in accordance with the company laws of South Africa, and the relevant provisions dealing with registration or deregistration of companies in South Africa would thus not apply to Nkwe[4].

Section 104(1) of the Bermuda Companies Act sets out the following –

"(1) two or more companies which are registered in Bermuda, may subject to section 4A amalgamate and continue as one company: Provided that if the amalgamated company is to be a local company it shall comply with the Third Schedule".

Nkwe, post amalgamation and in terms of Bermudan company law, shall accordingly not cease to exist and shall continue as an amalgamated entity. Chief Justice Hargun, within the Bermudan courts, confirmed this position and stated the following –

"upon issuance of a certificate of amalgamation, the property of each amalgamating company becomes the property of the amalgamated company and accordingly assets that were held by one of the amalgamated companies prior to the amalgamation become the property of the amalgamated company by operation of law and not by way of transfer or by operation of contract[5]."

The SCA held that Nkwe was accordingly not deregistered under South African company law or Bermuda company law and that Nkwe's assets prior to the amalgamation continued to vest in Nkwe notwithstanding the amalgamation[6]. Thus, Nkwe's undivided share in the Garatouw Mining Right had not lapsed.

Section 11 – Was section 11 triggered?

Section 11(1) of the MPRDA states that –

"(1) 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."

Section 11 thus deals with the statutory requirement to obtain ministerial consent before a mining right is transferred to another person, and is *"in essence, an anti-avoidance measure which is designed to prevent persons who qualify according to the criteria in the MPRDA to be granted a prospecting or mining right"*. [7]

Zijin Mining Company ("Zijin") held a 60.47% share in Nkwe prior to the conclusion of the amalgamation agreement. After the amalgamation, Zijin held a 74% share in Nkwe. Zijin accordingly remained the ultimate controlling shareholder/ majority shareholder in Nkwe both pre and post amalgamation.^[8]

It was therefore accepted by the SCA that the ultimate controlling interest in Nkwe was unaffected by the amalgamation pre and post the agreement, as such there had been no transfer, or change in the ultimate controlling interest of Nkwe and amalgamation did not constitute a disposal of Nkwe's undivided share in the Garatouw Mining Right, accordingly section 11 was not required for the amalgamation transaction^[9].

Conclusion

Mining right holders must remain cognisant that a cross-border restructure of a mining right holder has the potential to trigger section 56 and/ or section 11 of the MPRDA. Unknowingly triggering these sections may have devastating effects for mining right holders, including the mining right being declared void or being deemed to have lapsed. As evidenced by this judgment, this may not always have been the case, but mining right holders are advised to consider the foreign law applicable to the transaction to determine if a (i) transfer of the mining right or (ii) change in the ultimate controlling interest in the mining right holder has occurred. If the cross-border restructure results in either the transfer of a mining right or a change in the ultimate controlling interest in a mining right, then it is essential that the consent of the Minister under section 11 of the MPRDA be obtained prior to the implementation of the cross-border transaction.

^[1] (921/2024) [2026] ZASCA 27 (11 March 2026)

^[2] Companies Act No 59 of 1981

^[3] Nkwe case paragraph 4.

^[4] Nkwe case paragraph 11.

^[5] Nkwe case paragraph 12

^[6] Nkwe case paragraph 12.

^[7] MO Dale 'South African Mineral and Petroleum Law', issue 38 (March 2025) at paragraph 117.1.

^[8] Nkwe case paragraph 14.

^[9] Nkwe case paragraph 17.



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