REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 6322/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE ABDURAZAK OSMAN FAMILY TRUST	First Applicant
THE TRUSTEES FOR THE TIME BEING OF THE BAZAN FAMILY TRUST	Second Applicant
THE TRUSTEES FOR THE TIME BEING OF THE LEZAK TRUST	Third Applicant
THE BAROLONG — BOO RAPULANA TRADITIONAL COUNCIL	Fourth Applicant
THE BAROLONG — BOORA TSHIDI TRADITIONAL COUNCIL	Fifth Applicant
THE KOPANO COMMUNITY AUTHORITY	Sixth Applicant
and	
MUNIU THOITO N.O.	First Respondent
(In his capacity as the joint administrator of ARM	

CEMENT PLC (under Administration)

[formerly ATHI RIVER MINING I IMITED])

GEORGE WERU N.O. Second Respondent

(In his capacity as the joint administrator of ARM

CEMENT PLC (under Administration)

[formerly ATHI RIVER MINING LIMITED])

ARM CEMENT PLC Third Respondent

(under Administration)

(formerly ATHI RIVER MINING LIMITED])

MAFEKENG CEMENT (PTY) LTD Fourth Respondent

***Delivered**: This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been on 3 February 2022.*

JUDGMENT

MATOJANE J

Introduction

[1] The applicants seek confirmation of the cancellation of the Shareholders Agreement, namely, the Mafeking Cement Shareholders Agreement, dated 4 May

2009 as read with the Novation of the Mafeking Cement Shareholders Agreement, dated 9 October 2009, collectively referred to as the Mafeking Cement Shareholders Agreement.

[2] In addition, the minority shareholders seek an order that respondents be directed to take all those steps listed in paragraph 2 of the notice of motion to effect the transfer of ARM's 70% shareholding in MCC ("the ARM") and all ARM's claims against MCC to the applicants. Lastly, applicants be directed to pay, against the delivery of the documents referred to in paragraph 2 of the notice of motion, the price in respect of the ARM shares equal to par value and in respect of the ARM claims at R1.00.

[3] The case for the applicant is that the bankable feasibility study was not completed by the dates stipulated in clause 6.2 of the Mafeking Cement Shareholders Agreement, which gave the applicants the right in terms of clause 7.4 read with clause 7.3 to cancel the Mafeking Shareholders Agreement and claim transfer of the ARM shares against payment of par value and transfer of the ARM claims against payment of R1.00.

[4] On 16 November 2018, the applicants gave written notice to the respondents of their election of exercising their right to terminate the shareholders' agreement agreements of clauses 7.4 and 7.3.

[5] The respondents oppose the relief sought in the notice of motion on four grounds, namely:

5.1 The relief sought in the notice of motion is incompetent because the minority shareholders did not obtain the Minister's written consent of section 11 of the Mineral and Petroleum Resources development act, 28 of 2002 ("the MPRDA") for the transfer of the ARM shares.

5.2 that the Minister is a necessary party and has not been joined to the application;

5.3 the shareholders' Agreement validly cancelled because the cancellation was exercised out of time, almost seven years after the expiry of the time period referred to in clause 6.2

5.4 respondent argue that if the cancellation of the shareholders' Agreement to be valid and the Minister gave written consent, then the provisions of clause 7.4 read with clause 7.3 of the shareholders' Agreement as a penalty as provided for in the Conventional Penalties Act,15 of 1962.

Background

[6] Mafeking Cement (Pty) Ltd ("MCC"), the fourth respondent, holds a mining right which gives it the sole and exclusive right to mine and recover limestone which is used in the manufacture of cement in properties in respect of which fourth to sixth respondents are the informal land right owners.

[7] The first to sixth applicants are the minority shareholders in MCC, collectively owning 30% of the shares and claims in MCC. The fourth and fifth applicants are the traditional councils and the sixth applicant is the community authority representing the informal land rights holders living within the proposed mining area where the mining plant was up to be constructed.

[8] The third respondent, ARM Cement PLC ("ARM"), a company registered and incorporated in Kenya, is the majority shareholder in MCC, owning 70% of the shares and claims in MCC. ARM was a cement producer with substantial knowledge and know-how to mine, produce, and operate mining manufacturing and distribution businesses in the SADC countries.

[9] On 4 May 2009, ARM entered into a written Shareholders Agreement with the third and fourth respondents. Simultaneously, the parties concluded a Sale of Shares and a subscription agreement. The sale of shares agreement lapsed as several conditions were not fulfilled on time. On 1 October 2009, the parties reinstated the Mafeking Shareholders' Agreement. The management agreement was concluded between the applicants and the third and fourth respondents.

[10] ARM paid USD1 000 000.00 for the purchase and acquisition of 70% of the shareholding in MCC. MCC had already taken cession of prospecting rights, which

cession was approved by the MinisterMinisters of section 11(2) of the MPRDA on 14 October 2008 but was awaiting registration.

[11] On 17 August 2018, the third respondent was placed under administration, and the first and second respondents were appointed as administrators of the third respondent.

[12] Clause 6.3 of the Mafeking Shareholders Agreement provides that ARM shall as soon as the bankable feasibility study has been completed, review same and make an election as to whether or not it wished to proceed with the 'Development Project'. ARM shall advise the MCC shareholders, in writing, of ARM' decision within 90 calendar days after the bankable feasibility study in its final form is produced, subject to any extensions as to time as is agreed by the parties in writing, as to whether it will proceed with the 'Development Project' (clause 6.3).

[13] If ARM fails to furnish MCC shareholders with a written notice provided in clause 6.3 within the time therein provided, it shall be deemed to have elected not to proceed with the 'Development Project (clause 6.4);

[14] If ARM decides, following the completion of the Bankable Feasibility Study, not to proceed with the Development Project, then the MCC Shareholders will have the option, for a period of 60 (sixty) days after receipt of such written notice (or expiry of the period for the giving of such written notice should the provisions of 6.4 above be applicable), to acquire the ARM Equity at a price in respect of the ARM Shares equal to the par value thereof and in respect of the ARM Claims at a price of R1,00 (one Rand). In the event that the MCC Shareholders elect to exercise such option they shall do so in writing and such written notice shall be accompanied by payment of the said purchase price. Immediately upon receipt of such notice and payment, ARM shall deliver to the MCC Shareholders:

14.1 the Share Certificates in respect of the ARM Shares,

14.2 Share Transfer Forms in respect of the ARM Shares duly signed;

14.3 a duly signed Cession of the ARM Claims;

14.5 the resignation of all directors of MCC appointed by ARM;

14.6 all documents held by ARM relating to the 'Prospecting', the Environmental Impact assessment, the bankable feasibility study and the business of MCC;

[15] It is common cause that prospecting was completed by 31 October 2011. The time period referred to in clause 6.2 of the shareholders' agreement for the commissioning and preparation of the bankable feasibility study in the final form expired on 30 December 2011, being 60 calendar days calculated from 31 October to 2011.

[16] On 16 November 2018, the applicants cancelled the shareholders' agreement in terms of clause 7.4 read with clause 7.3 by giving written notice of their election of exercising their right to terminate the shareholders' Agreement.

Issues to be determined

[17] Whether the relief sought in the notice of motion is incompetent in the absence of the Minister for Mineral Resources' written consent for the re-transfer of the shares in terms of section 11(1) of the Act.

[18] Sections 11(1) and (2) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") provides that prospecting right or mining right or 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.

[19] The applicants contend that section 11(1) does not require the Minister's consent prior to the acquisition of shares from ARM as there is no 'transaction' in which the shares are transferred. In terms of the draft order, the applicants seek transfer of the ARM Shares to them subject to the Minister's consent. The applicants rely on the decision in Thelo Rolling stock Leasing (Pty) Ltd v Elitheni Coal (Pty) Ltd,[1] where the court had to decide whether the attachment and sale in execution of the respondent's mining license is legally possible prior to obtaining the consent of the Minister.

[1] 2015 JDR 0998 (ECP

[20] In paragraph 47, Eksteen J held that any sale of the mining right in execution which may follow pursuant to an attachment would, when it occurred, require the consent of the Minister in terms of section 11 and such the sale in execution would therefore have to happen subject to the Minister consent being granted. At paragraph 49, the court held that the attachment of the mining right cannot be said to be an alienation or a disposition of the right and that the Ministerial function was not impaired thereby.

[21] In this context, Eksteen J stated that he was not convinced that section 11(1) requires the consent of the Minister before the conclusion of an agreement of sale but rather that the consent is required before the giving effect to the alienation or disposition. Following this decision, it was submitted on behalf of the applicants that should the court grant the relief sought in the notice of motion; it should specifically provide that the acquisition of shares by the minority shareholders is subject to the consent of the as envisaged in section 11 of the Act and if written consent is not obtained, the order will lapse.

[22] Thelo Rolling Stock is distinguishable. In prayer 1 of the notice of motion, the applicants seek an order that the Mafeking Cement Shareholders Agreement be declared cancelled. It bears mentioning that the Shareholder's Agreement was incorporated into the mining right by reference and is a term of the mining right[2].

[23] Clause 17 of the mining rights expressly states that the Shareholders Agreement forms part of the mining right and binds the MCC. It provides as follows:

> "In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated 4 May 2009 entered into between the Holder/ empowering partner and Athi River Mining Limited (70%) ….which Agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad-Based Economic Empowerment Charter developed in terms of the Act and such Agreement shall form part of this right".

[24] The mining right was granted in terms of section 23(1) of the MPRDA, which became effective on 9 May 2014 and remains valid, unless cancelled or suspended, for 30 years until May 2044. In terms of section 23(1) for the mining right to be

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[2] Mining right is defined in the mining right as it is defined in the MPRDA, and includes all the annexures to it, and the agreements and inclusions by reference. (own underlining)

granted to the applicant, the applicant must have (a) access to financial resources compatible with the intended mining operations and the duration thereof and technical ability to conduct the proposed mining operation optimally. (b) the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The applicant must also not be in contravention of the MPRDA and must have a social and labour plan in place. The applicant is required to ensure that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorization is issued.

[25] The applicants have not obtained the Minister written consent to the relief sought in the notice of motion and they have not alleged that they are able to satisfy the requirements of section 23 of the MPRDA.

[26] In Mogale Alloys (Pty) Ltd v Nuco Chrome Boputhatswana (Pty) Ltd[3] the holder of 78% of the issued share capital sold 33% and a dispute arose as to whether the sale required consent in terms of Section 11 of the MPRDA. Coppin J explains instances where the Minister's consent would be required as follows at par 38 of the judgment.

> "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."

[27] The Minister's consent is a condition in terms of the mining right and section 11(1) of the MPRDA before a Shareholders Agreement can be cancelled. Also, the third respondent's majority shares in the fourth respondent cannot be transferred to the applicants without the Minister's consent.

[28] The cancellation of the Shareholders Agreement would amount to a variation or amendment of some of the conditions on which the mining right was granted,

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[3] 2011 (6) SA 96 (GSJ)

which would amount to a breach of clauses 9(1) and (2)[4] of the mining right and contravention of section 11 of MPRDA.

[29] In terms of clause 4.1, the mining rights may not be amended or varied without the written consent of the Minister. Section 47 of the MPDA grants the Minister the authority to cancel or suspend any mining right if the holder or owner thereof breaches any material term or condition of such right.

[30] In the result, I find that the failure to join the Minister in these proceedings is a material non-joinder of a necessary party as the Minister has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in these proceedings. See Bowring NO v Vrededorp Properties CC and Another[5],

[31] In my view, it would be in the interest of justice to postpone the matter *sine die* to enable the applicants, if so minded, to join the Minister in these proceedings.

The order

1. The matter is postponed *sine die* for the Minister to be joined

2. Costs are reserved.

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K.E MATOJANE

Judge of the High Court

Gauteng Local Division, Johannesburg.

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[4] Clause 9.1. provides that "The mining right, a shareholding, an equity, an interest or participation in the right or joint venture, or a controlling interest in a company, close corporation or joint venture may not be encumbered, ceded, transferred, mortgaged, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister.

Clause 9.2 "Any transfer, encumbrance, cession, letting, sub-letting, assignment, alienation or disposal of the mining right or any interest therein or share or any interest in MCC, without the consent of the Minister referred to in section 11(1) of the MPRDA, will be of no force or effect and is invalid.

[5] 2007 (5) SA 391 (SCA) para 21.

Judgment	3 February 2022
For the applicant	Advocate Pretorius
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	Ref: MAT93/CNT2/MR BHIKA

For the firsts respondent

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