REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/049627

Date of Judgment?	**12 February 2024**
Reportable?	**No**
Of interest to other judges?	**No**

In the matter between:

GOROSHA LEAF TRADING 143 CC	First Applicant
FOREVER YOUUNG PROJECTS AND PLANT HIRE (PTY) LTD	Second Applicant

and

IVOR LANCELOT VAN DIGGELEN	First Respondent
GFM MINING AND RESOURCES (PTY) LTD	Second Respondent
WAKEFIELD COLLIERY (PTY) LTD	Third Respondent
MANDLA CARL KHUMALO N.O.	Fourth Respondent
RACHAEL TSHOLOFELO KHUMALO N.O.	Fifth Respondent
TSHEPO MOSAKA N.O	Sixth Respondent
BAIPULE MATHABO SENATLE N.O.	Seventh Respondent

JUDGMENT

GREEN AJ:

1. The Wakefield Joint Venture (“the JV”), and the first respondent (“the Seller”) entered into a written agreement styled “Agreement of Sale” (“the Agreement”). That which was sold in terms of the Agreement are all the shares in Wakefield Colliery (Pty) Limited (“Wakefield”). Wakefield is the holder of a mining right over properties in the Bethel district.

2. The applicants allege that the Agreement is unlawful in that it falls foul of section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (“the Act”). Consequent on the unlawfulness of the Agreement the Applicants seek an order declaring the Agreement to be void and an order directing that a deposit of R2.5 million be returned.

3. The Seller and Wakefield have opposed the application.

4. From the papers that have been filed by the parties the following emerges:

    4.1. On 24 February 2022 the JV and the Seller concluded the Agreement.

    4.2. The Purchase price was R69 million which was payable by a “*deposit*” of R2,5 million and the balance in 12 equal monthly instalments.

4.3. On 25 February 2022 the first applicant paid R2.5 million to the first respondent's attorney. This payment was allocated to the discharge of the JV's obligation to pay the deposit.

4.4. The Shares were seemingly registered in the name of the JV. I say seemingly because the papers are, on my reading, not express in stating this. In the answer the Seller said, "I have restored the status quo as a result of the lawful cancellation of the agreement". In the reply this was responded to by the applicants as follows: "*[the Seller] failed to obtain the Minister's consent in terms of section 11 of [the Act]. Any purported transfer of the shares in Wakefield without such consent was of no legal effect.*" There seems to be agreement that the shares were transferred to the JV and then retransferred to the Seller, the point of difference is whether the transfer to the JV had any legal effect. However, what is clear is that the Seller was removed as a director and others were appointed as directors of Wakefield. This too was reversed by the Seller in "restoring the status quo".

4.5. An issue arose in respect of a Water Use Licence for which Wakefield had applied. The issues around the Water Use Licence had their origin in an Environmental Impact Assessment that had previously been procured by Wakefield.

4.6. In the absence of a Water Use Licence Wakefield was unable to mine and because of that the JV was unable to pay the monthly instalments due in terms of the Agreement. It is not explained how

the income generated by Wakefield was to be used to pay the purchase price.

4.7. Faced with the non-payment of the first instalment the Seller gave notice to the JV if his intention to cancel the Agreement.

4.8. The Seller's notification of intention to cancel the Agreement was met with an application to court action brought by Wakefield against the Seller ("the Interdict Application"). In the Interdict Application Wakefield sought an order to interdict the Seller from cancelling the Agreement, and an order to extend the time for payment of the instalments. The founding affidavit hitches this relief to the alleged defects in the Environmental Impact Assessment which in turn prevented a Water Use Licence from being obtained.

4.9. The interdict application was dismissed. The papers before me contain only the order in the Interdict Application and not the judgment. It seems that the Interdict Application might have been dismissed because it was brought by Wakefield and not the JV; the JV was the purchaser, it was the one which had to pay the instalments and it was the one which faced cancellation of the Agreement, not Wakefield.

4.10. The Seller cancelled the Agreement and took back the Shares and restored himself as a director of Wakefield. The papers do not explain how this occurred.

5. Faced with the situation set out above the Applicants have brought this application.

6. Section 11 of the Act, in relevant part, provides:

> ***11. Transferability and encumbrance of prospecting rights and mining rights.***—*(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.*

7. Section 11 was consider, in a different context in Mogale Alloys.[1] In the Mogale Alloys case Coppin J was faced with an agreement for the sale of shares in a company that held a prospecting right but the entire agreement was subject to a suspensive condition that approval by the Minister had to be provided, if that was required. Describing the purpose of section 11 Coppin J said:

> *"The section provides that such rights, or interests, may not be disposed of, in effect, by any means whatsoever, without the written consent of the Minister, unless the company is a listed company."*[2]

8. I agree with that as the purpose of section 11. Importantly Section 11 is directed at the "disposal", the section is not directed at the conclusion of an agreement which is to be the legal causa for the "disposal". This makes sound commercial sense as it will allow parties to enter into agreements but

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[1] Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others 2011 (6) SA 96 (GSJ)

[2] Para 27.

make the disposal of the controlling interest, or the entire agreement, conditional on the Ministerial consent stipulated by section 11. This is what occurred in Mogale Alloys. The ability to enter into an agreement for the disposal of an interest contemplated in section 11 subject to the consent of the Minister will allow parties to amongst other things secure finance against the agreement that has been concluded, the payment of which would in its turn be conditional on the Ministerial approval.

9. Stated somewhat differently section 11 is directed at the implementation of agreements and not the conclusion of the agreements. I return to this later in this judgment.

10. It is therefore necessary to interpret the Agreement to decide whether it has the effect of disposing of a controlling interest in Wakefield without the required Ministerial consent.

11. The modern approach to interpreting written agreements is now firmly established. What is required is a unitary approach that considers text, context and purpose as a single unitary exercise with the “gravitational pull” remaining towards the words. I consciously refrain from regurgitating the authorities that deal with the approach to interpretation, which are all too often trotted out as a “copy and paste” exercise.

12. Typical of many modern contracts the Agreement has an “Effective Date”. This is 24 February 2022. The Effective Date is, as its name suggests, the date when several issues dealt with in the Agreement become operative.

13. The sale of the shares in Wakefield is dealt with in clause 3 of the Agreement, and the sale is stipulated to be "*with effect from the Effective Date*". There is no conditionality to the sale.

14. Clause 5 of the Agreement deals with "*Delivery*". Clause 5.1 deals with the delivery of blank share transfer forms and requires the Seller to make the transfer forms available to the JV at his attorneys office within two days of the effective date.

15. Clause 6 deals with "*Ownership, Risk and Benefit*". Clause 6.1 provides that ownership, risk and benefit in the shares in Wakefield passes to the JV on the Effective Date.

16. The further sub-clauses of clause 6 require careful attention and for that reason I repeat them in full.

17. Clause 6.2 provides:

> *"The Purchaser has undertaken a due diligence, alternatively waives its right to perform a due diligence on the basis that it has been provided with the relevant report as well as a copy of the Minister's consent in terms of section 11 of the MPRDA, in compliance with the terms of section 23(1) of [the Act] …"*

18. Section 23 of the Act deals with Granting and Duration of a Mining Right. It is not clear to me why clause 6.2 refers to a section 11 consent "*in compliance with section 23*". On my reading of section 23 it does not require a section 11 consent.

19. Clause 6.3 provides:

> *With effect from the effective date, the Purchaser shall be entitled to engage with the land owners to which the mining rights referred to herein are attached for access to the mining areas and all information and data, whether confidential or not, secured, obtained or established by the other party, provided that such engagement and any arrangements with the land owners shall be at the expense of the purchaser.*

20. The reference to "*effective date*" in clause 6.3 is not capitalised. That seems to be a typographical oversight and the intention was to refer the Effective Date as defined. The effect of clause 6.2 is that from the time that the ownership in the shares passes the JV – which is the effective date - they are entitled to engage the owners of the land to which the mining right attaches. The engagement with the land owners could only be for the purpose of implementing the mining right, or readying themselves to implement the mining right. The JV's efforts to secure the Water Use Licence demonstrates that this is what the parties understood this clause to mean.

21. Clause 6.4 provides:

> *The Purchaser acknowledges and accepts sole liability and responsibility in respect of compliance with any and all statutory or regulatory requirements as may be necessary to undertake any business in the name of the Company, whether required by the Department of Mineral Resources or any other statutory body. The Seller hereby undertakes to cooperate fully to enable the Purchaser to comply with all statutory or regulatory requirements including in respect of the Section 11 Ministers consent, provided that the Purchaser acknowledges that any transfer of shares registered in the Purchases favour prior to the effective date shall be solely for the*

purposes of securing the required Section 11 Ministers consent and that should the Purchaser in any way default or breach the terms of this agreement, such share transfer shall be deemed immediately void and of no effect."

22. Clause 6.4 is important in that it expressly recognises the need for the Section 11 consent. In this respect clause 6.4 allocates the responsibility for procuring the consent on the JV, and at the same time requires the Seller to assist the JV to obtain the consent. The JV's suggestion that it was for the Seller to procure the section 11 consent is incorrect; that is something the parties had expressly regulated in the Agreement.

23. However, clause 6.4 goes on to provide that: "*any transfer of shares registered in the Purchaser's favour prior to the effective date shall be solely for the purposes of securing the required Section 11 Ministers consent*". In this respect the Agreement has misconstrued Section 11. The transfer of the shares is not required to obtain the minister's consent, instead the Minister's consent is required before the shares can be transferred. That is so because the transfer of the shares is the "*disposal*" that is regulated by section 11 and that may only take place once the Minister has consented.

24. In their founding affidavit the Applicants' adopted the position that "*the whole agreement was conditional on [the seller] obtaining written consent from the Minister to dispose of his controlling interest in Wakefield … it was a condition required to be fulfilled if the agreement was not to be void for illegality."* The answer to this allegation was "*The contents thereof or denied insofar as they contend that I failed to obtain the Minister's consent in terms of section 11 (1) of the MPRDA. I annex hereto as annexure "I4" a copy of*

the consent that was obtained. Furthermore, as is clear from the agreement, it was always understood by all parties concerned that any necessary compliance with the provisions of the relevant legislation to give effect to the sale of the shares would be the responsibility of the purchasers … .”

25. It is not clear why the Seller and Wakefield referred to annexure “*I4*”. Annexure “*I4*” is a document issued by the Minister dealing with the transfer of the mining right to Wakefield when it acquired the mining right. Annexure “*I4*” does not deal with the transfer of the shares in Wakefield to the JV. Further, the reference to annexure “*I4*” is inconsistent with the contention that it was for the JV to obtain the Ministerial consent. I have already found that it was for the JV to obtain the section 11 consent.

26. The context in which the Agreement was concluded is not dealt with in the papers. All that is apparent is that the Agreement was directed at all the shares of Wakefield, and Wakefield held a mining right. In that context the Agreement is one that was entered into in the mining industry, and in the context of the regulation of the mining industry.

27. The purpose of the Agreement was to effect the transfer of all of shares in Wakefield. The papers do not disclose the nature of the JV, what its intention was with the mining right, to who it hoped to sell the minerals that were extracted, or whether the members of the JV individuals or groups contemplated in the preamble or section 2 of the Act.

28. Having recognised the need for Ministerial consent what then is to be made of those clauses in the agreement that deal with the delivery of the shares and the transfer of risk and ownership? In my view the answer to these

clauses lies in clause 6.4 which, mistakenly in my view, contemplates that the shares would be registered in the name of the JV "*… for the purpose of securing the required section 11 Minister's consent …*". The Agreement proceeds from the faulty premise that the shares can be transferred to the JV to secure the Ministerial consent. Having recognised that is what the Agreement mistakenly envisaged the effect of the delivery and risk clauses of the Agreement is clear – they are clauses that give effect to the transfer that clause 6.4 contemplates in order the secure the Ministerial consent.

29. The transfer of the shares is not subject to a suspensive condition. Instead, the transfer of the shares is subject to what is in effect a resolutive condition the effect of which is that if the JV defaults in its obligations in terms of the Agreement, which default would include a failure to obtain the Ministerial consent, then the shares will revert to the Seller.

30. That finding on the interpretation of the Agreement brings into focus the question of whether section 11 is wide enough in its application to permit a situation where shares are transferred subject to the resolutive condition that they will revert to the Seller in the event of the Ministerial consent not being obtained. In my view Section 11 does not permit this. Section 11 is aimed at the disposal of the shares and ensuring that the party to whom the shares are transferred can comply with the terms of the Mining Right and comply with sections 17 and 23 of the Act. That purpose would be defeated if the shares could be transferred subject to a resolutive condition that they will revert to the Seller in the event of Ministerial consent not being obtained. What occurred in this matter makes this point – the JV set about to secure a

Water Use Licence which the papers say is an essential part of implementing the Mining Right; but that was all done before the Minister had assessed whether the JV could implement the Mining Right.

31. From what I have found thus far it follows that the transfer of the shares in Wakefield to the JV, was not permitted by section 11 of the Act, and the scheme established by the Agreement to transfer the shares was one that the Act does not permit.

32. The applicants have advanced their case on the basis that having regard to the way the Act must be interpreted "*… section 11(1) of the MPRDA must be interpreted to mean that any agreement purporting to sell a controlling interest in a mining right without ministerial consent will be without legal effect.*" That formulation overlooks the distinction between that which may flow from an agreement, the disposal of the interest, and the conclusion of an agreement. This distinction is one that has a sound basis in ordinary commerce and in the context of the Act.

32.1. It takes little imagination to envisage a composite agreement that may deal with the shares in a company that holds a mining right and holds other non-mining right assets. It would be an odd result if the non-mining right asset part of the agreement were illegal when the Act does not regulate that, and where the non-mining right asset part of the agreement is severable. If the parties had intended the non-mining right asset part of the agreement to be subject to the Ministerial consent it is open to them to include a clause that if any part of the agreement is unenforceable or illegal, then the entire

agreement will fail. Or to make the entire agreement subject to the Ministerial consent. That is a matter for the parties to agree, and there may be good reasons why the parties may want the non-mining right asset part of the agreement to remain operative.

32.2. Section 2 of the Act sets out its intended objectives. Those objectives are achieved by regulating the transfer of the shares in a company holding a mining right, without having to regulate what agreements parties may enter into.

32.3. I have already dealt with issues of the role that an agreement, subject to Ministerial consent, will play when parties attempt to secure finance for the purchase of a Mining Right.

33. The applicant's argument that the Agreement is void is also advanced on the basis that section 98(a)(viii) makes it an offence not to comply with the provisions of the Act. Once the distinction between the conclusion of an agreement and the disposal of the controlling interest in a company is recognised, it becomes clear that it is the disposal of the controlling interest, and not the conclusion of the Agreement that is an offence.

34. In this matter, because there was a transfer of the shares in Wakefield to the JV and thereafter a re-transfer of the controlling interest to the Seller, the unlawfulness that the Agreement set in motion by allowing the disposal without the Ministerial consent has been "undone". In my view, and criminal sanctions aside which are another matter and are something on which I express no view, the remedy for the disposal of the shares without Ministerial

consent would be to order a re-transfer of the shares. In this case that has already taken place.

35. The applicants aim in this application was to ultimately secure repayment of the deposit of R2.5 million which was paid. Given the conclusion that I have come to in respect of the Agreement the basis on which the Applicants sought to secure return of the deposit – the voidness of the Agreement cannot succeed. There is a further reason why the Applicants could not, in my view, have succeeded in securing the return of the deposit and it is this:

35.1. Clause 1.7 of the Agreement provides:

> *""the expiration, cancellation or other termination of this agreement shall not affect those provisions of this agreement which expressly provide that they will operate after such expiration, cancellation or termination or which of necessity must continue to have affect after such expiration, cancellation or termination, notwithstanding that the clauses themselves do not expressly provide for such continuation.*

35.2. The "*other termination of this agreement*" is a phrase of wide ambit. It must be contrasted with "*cancellation*" which the parties must have intended to be something different. In my view, whilst not ideally worded, "*other termination of this agreement*" is wide enough to encompass a case where the Agreement is of no force because offends section 11 of the Act.

35.3. Clause 4.2.1 provides for the payment of the deposit, and it is described as "*non-refundable*". This is to be contrasted with the balance of the purchase price which is not described as non-refundable. Some meaning must be given to the distinction and the

parties decision to expressly describe the deposit as "*non-refundable*".

35.4. In my view the Agreement contemplates the situation where the deposit is to be paid and is not to be repaid come what may. By contrast the balance of the purchase price is notionally repayable. The repayment of the balance of the purchase price may, in the context and scheme of the Agreement, arise when the section 11 Ministerial consent is not secured, and the shares revert to the Seller as contemplated in clause 6.4.

35.5. To give effect to the non-refundable nature of the deposit clause 4.2.1 must survive "*the other termination of the agreement".*

36. I therefore find that the Agreement is not void and that the Applicants are not entitled to repayment of the deposit. In making this finding I should not be understood to be saying that the result which the Agreement achieved was permissible in terms of the Act. In my view it was not, but that does not render the Agreement void, instead it renders the result unenforceable. Further, I should be understood to say that the transfer of the shares was not an offence. I expressly make no finding in this respect.

37. Given my finding it is strictly unnecessary to deal with the several points *in limine* raised by the Seller and Wakefield but because these were argued I do so briefly for the benefit of the parties. I limit myself only those points in limine that are dealt with in the Seller's and Wakefield's supplementary heads of argument.

38. The first point in limine was one of jurisdiction. The point was that the Pretoria Division of the Gauteng High Court had jurisdiction, but not the Johannesburg division of the Gauteng High Court. This point was, correctly in my view, not pursued in argument by the Seller and Wakefield.

39. The second point in limine relates misjoinder and non-joinder. It is difficult to understand the point that was raised under this heading. There is a reference to who paid the deposit, and there is a reference to the Applicants not having established that they act with the consent of the other members of the JV. It seems that the thrust of the second point in limine is that the agreement is one concluded between the Seller and the JV, but the JV is not the applicant and instead the applicants are two of the members of the JV. Of relevance to this point in limine is that the non-applicant members of the JV are all cited as respondents. The Applicants answer this point in limine by pointing the fact that the relief which they claim is based on unjustified enrichment and that the applicants are the parties who were impoverished by the payment of the deposit. The point is also made that Rule 14(2) which permits the citation of an unincorporated entity does not vest separate personality in the unincorporated entity.

40. The parties to the Agreement were the JV and the Seller, the party that paid the deposit due in terms of the Agreement was the JV. It may be that in the background there is an agreement amongst the members of the JV to deal with the funding for the payment by the JV, but it remains the JV which was liable to pay the deposit. Further, the primary relief sought in the application is a declaration of voidness of the Agreement, that is relief which in my view

must be claimed by the party to the Agreement, the JV, and cannot be claimed only by two members of the JV. I therefore find that the Applicant's, as members of the JV, are not the parties who are entitled to claim an order declaring the Agreement to be void, nor are they the parties entitled to reclaim the deposit. That is relief that ought to have been claimed by the JV either cited as such as a matter of convenience, or where all the members of the JV claimed the relief as applicants. The citation of the other members of the JV as respondents does not resolve the difficulty that the applicants are not able to claim the relief. I would therefore uphold the second point in limine.

41. The third point in limine is one of res judicata. The Seller and Wakefield advance this point relying on the interdict application. The argument is that in the interdict application it was contended that the Agreement was valid and operative, and the application was decided on that basis. From the papers in the interdict application that have been made available to me there is no indication that the Section 11 point that looms large in this application was mentioned by the parties, enjoyed any attention by the court, or formed part of the reasons for dismissing the interdict application. Further the interdict application was brought by Wakefield not the applicants. On the papers before me there simply not enough to find that the issue in this application is res judicata. I would therefore dismiss the third point in limine.

42. That leaves costs. Costs are a matter of discretion, which discretion must be exercised judicially having regard to the entirety of the matter.

43. The Seller has been successful and there is no reason that the costs should not follow that result.

44. It is not clear why Wakefield opposed the application. No relief is sought against Wakefield, and it is the object of the dispute, and not a party to the dispute. There is no reason for Wakefield to be awarded its costs of opposition.

45. I therefore make the following order:

1. The application is dismissed.
2. The applicants, jointly and severally, are to pay the first respondent's costs of this application on the scale as between party and party, such costs to be taxed or agreed.
3. The third respondent is to pay its own costs of this application.

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I P Green

Acting Judge of the High Court
12 February 2024

On behalf of the Applicants:	Adv P Buckland
Instructed by:	Smit Sewgoolam Inc
On behalf of the First and Third Respondents:	Adv Z F Kriel

Instructed by: Finck Attorneys