DELIVERED: 28 APRIL 2009
NOT REPORTABLE
/bh

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 34514/2008

IN THE MATTER BETWEEN:

RHINO PLAT (PTY) LTD	**FIRST APPLICANT**
BEVERLEY INVESTMENTS LTD	**SECOND APPLICANT**
AND	
THE MINISTER OF MINERALS AND ENERGY OF THE RSA	**FIRST RESPONDENT**
THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERALS AND ENERGY	**SECOND RESPONDENT**
THE REGIONAL MANAGER, LIMPOPO REGION: POLOKWANE OF THE DEPARTMENT OF MINERALS AND ENERGY	**THIRD RESPONDENT**
UMTHA RESOURCES (PTY) LTD	**FOURTH RESPONDENT**

JUDGMENT

SERITI, J

INTRODUCTION

[1] This matter came to Court by way of motion – In the notice of motion, the Applicants are seeking an order in the following terms:

> "1. Reviewing and setting aside the refusal by the first respondent ("the refusal decision") in terms of section 11 of the Mineral and Petroleum Resources Development Act, 2002 ("the MPRDA") to consent to the transfer to the first applicant of certain prospecting rights held by the fourth respondent in respect

of the farms Groningen 779LR and Inhambane 802 4R, District of Mokopane ("the prospecting rights").

2. Substituting the refusal decisions with a decision granting consent for the transfer of the prospecting rights to the first applicant, alternatively directing the first respondent forthwith to consent to such transfer in terms of section 11 of the MPRDA."

2. The founding affidavit was attested to by Mr Bruce Alan Jewels, financial advisor of both Applicants. The First Applicant is a company incorporated with limited liability according

to the laws of the Republic of South Africa, and the second applicant is a company incorporated according to the laws of Samoa.

BACKGROUND

[3] On 12 October 2005, two prospecting rights in respect of certain “Platinum Group Metals and associated minerals” were granted to the Fourth Respondent in terms of section 17(1) of the MPRDA in respect of the farms mentioned earlier.

[4] After various negotiations, on 15 February 2007, the applicants and the Fourth Respondent entered into a joint venture agreement (“JVA”).

In terms of clause 6.1 of the JVA, 74% of the participating interest of the First Applicant is held by the second applicant and the remaining 26% of the equity participating interest is held by the Fourth Respondent.

[5] In consideration of the obligations of the second applicant to fund the fourth respondent's equity participating interest in cash up and until the date of completion of the feasibility studies on the prospecting project, the fourth respondent was obliged, in terms of the clause 6.2 of the JVA, to assign, *inter alia,* the prospecting rights to the first applicant. On 28 February 2007, the fourth respondent took a resolution authorising Ms

Matshoba chairperson of the board of directors of the fourth respondent to sign all necessary documents to cede its prospecting rights to the first applicant.

[6] After the resolution mentioned above was adopted, prospecting operations commenced on the properties and the second applicant began to incur substantial expenses. To date, the second applicant has incurred expenses in excess of R30 million. The expenses incurred have resulted primarily from the costs of drilling and associated activities, salaries and wages, vehicles, furniture and IT costs.

[7] The inaugural board meeting of the first applicant was held on 30 April 2007, and at the said meeting it was resolved that an application for the transfer of the prospecting rights from the fourth respondent to the first applicant must be made urgently. On 1 August 2007 the application mentioned earlier together with annexures was lodged with the Third Respondent.

[8] On 20 September 2007 a meeting was held at the offices of the Third Respondent. Present at the said meeting was Mr Rapoo (the third respondent), first applicant's representatives, Ms Matshoba and other people.

The purpose of the meeting was to discuss the section 11 application. Mr Rapoo, during the said meeting, stated that the fourth respondent has been unfairly treated by the second applicant in the JVA) and also pointed out that he was not happy with the minority shares that the fourth respondent had been granted in the first applicant in terms of the JVA.

[9] During the above-mentioned meeting, Mr Rapoo suggested that the fourth respondent’s share n the first applicant should be re-negotiated. He further said that although the final decision of whether to approve the section 11 application lay with the first respondent he was not going to give his approval for the

application. He further stated that there was a strong likelihood that the first respondent would reject the application because of the structure of the transaction, which he believed did not conform to transformation requirements.

[10] There was an attempt by the fourth respondent to re-negotiate their share-holding in the First Applicant. The directors of the second applicant were of the view that since the JVA agreement has already been signed, they are not in a position to re-negotiate the question of share-holding.

[11] In a letter dated 22 May 2008, addressed to the Fourth Respondent by the Third Respondent the following is stated:

> "This is to inform you that after careful consideration for your applications in terms of section 11 of the Act for the transfer of the Prospecting Right in respect of the abovementioned property to Rhino Plat (Pty) Ltd, have been refused in that the granting thereof will defeat the objects of the aforesaid Act."

[12] Mr Rapoo, in the answering affidavit sates that at the time when the decision was made, the

requirements in respect of section 17 was the only consideration." He further states "However, had the Respondents been aware at that stage of the apparent deep lying dispute between the partners, the section would not have been the only consideration."

[13] He further stated that even if the First Respondent was wrong to refuse the consent (which is denied) then in that event there are relevant factors which require careful scrutiny, for instance whether the prospecting rights have not already lapsed, the joint venture agreement and the relationship of the parties to the joint venture agreement

[14] He further stated that the First Respondent is better equipped to properly consider the aspects mentioned above. No justifiable reasons have been advanced why there should be a substitution of the First Respondent's decision.

FINDINGS

[15] In the written Heads of Argument, the First, Second and Third Respondent's counsel submitted *inter alia* that:

> "It is common cause in this application that the sole reason for the refusal was that the shareholding by historically

disadvantaged South Africans in the First Applicant was considered inadequate and the transfer of the prospecting rights was therefore perceived as being contrary to the objects of the Act and in particular the object referred to in section 2(d) of the Act."

He also submitted that the JVA requires the Fourth Respondent to make a financial contribution equal to its participating interest when mining operations commences, and that will further dilute the already diluted participating interest of the disadvantaged South Africans in the project.

He further submitted that such a dilution is against section 2(d) of the Act and consequently the First Respondent was quite right in regarding the transfer as contrary to the objects of the Act.

[16] Section 2(d) of the Mineral and Petroleum Resources Development Act 28 of 2002 reads partly as follows:

> "The objects of this Act are to –
> substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitations of

the nation’s mineral and petroleum resources.”

Clause 6.1 of the JVA allocates 26% of the equity participating interest to the Fourth Respondent. According to clause 6.2 Fourth Respondent’s (which is a 90% black African owned company) equity participation was funded or going to be funded by the second Applicant.

In my mind, the above mentioned clause of the JVA does not in any way undermine the provisions of section 2(d) mentioned above. In fact, the objects of the Act mentioned above

are promoted by the said clause 6.1 mentioned above.

Clause 6.3 provides, *inter alia,* that if the Fourth Respondent, at a later stage, intends to dispose its participating interest, same can be acquired by a BEE entity. This clause ensures that the participating interest of a BEE entity is constant at all relevant times.

The submissions by the Respondent's counsel mentioned in the previous paragraph has no merits. I am unable to find any reason why the decision of First Respondent and or Third Respondent should not be set aside. Facts of this matter justifies the setting aside of the

refusal of the application in terms of section 11.

[15] As mentioned earlier, the only reason advanced by the Third Respondent for the refusal of the application in terms of section 11 of the Act, was that the grant thereof will defeat the objects of the Act. No other reason was advanced.

The Applicant's counsel submitted that if the court finds that the Respondents were incorrect to refuse the application on the grounds mentioned in the Respondent's letter dated 22 May 2008, it will serve no purpose in remitting

the matter back to the first respondent since the end result would be a foregone conclusion.

On the other hand the Respondents' counsel submitted that this is not a suitable instance for the court to substitute the decision by the First Respondent with a decision by the Court. This is so, (as the argument goes) as there are certain matters namely, possible lapsing of the prospecting rights, deep and irreconcilable conflict between the joint venture partners, etc. which need proper scrutiny.

It appears to me that the Respondent want, with the assistance of their counsel and attorney to seek new reasons why the section 11 application

should be refused. I assume that after the section 11 application was lodged, it was properly evaluated by the Respondents and the only reason they could find to refuse the application is the one stated in their letter dated 22 May 2008.

The new issues that the Respondents wish to investigate with the assistance of their legal team did not form the basis of the refusal of the section 11 application. The reconsideration of the reason which formed the basis of the refusal will invariably dictate to the Respondents that the section 11 application should be granted, particularly if one takes

into account the provisions of section 17 of the Act.

[16] Section 17(1) of the Act provides that:

> “Subject to subsection 4, the Minister must grant a prospecting right if:
>
> (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting optimally in accordance with the prospecting work programme;
>
> (b) the estimated expenditure is compatible with the proposed

prospecting operation and duration of the prospecting work programme;

(c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;

(d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996); and

(e) the applicant is not in contravention of any relevant provisions of this Act."

Subsection (4) thereof provides that in certain circumstances Minister may request an applicant to give effect to the object referred to in section 2(d).

On the papers, it appears to me that the Applicants meet all the requirements of section 17(1) mentioned above.

As stated earlier, the JVA complies with the provisions of section 2(d). That being the case, my view is that there is no valid reason why the section 11 application should not be granted by the Minister.

The Applicant’s counsel correctly submitted that referring the matter back to the Respondents will, amongst others cause severe prejudice to the applicant’s prospecting project.

My view is that the Applicants have made out a case for the relief contained in the notice of motion.

[17] Therefore, the Court grants an order in the following terms:

(1) The decision of the Respondents to refuse the application of the Applicants in terms of section 11 of the Mineral and Petroleum

Resources Development Act 28 of 2002 is set aside.

(2) The First Respondent should forthwith consent to the Applicants' application mentioned in paragraph 1 above.

(3) The Respondents are to pay the costs of the Applicants on a party and party scale, jointly and severally, the one paying the others to be absolved.

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W L SERITI

JUDGE OF THE HIGH COURT

Heard on:	16 April 2009
Applicant’s counsel:	C M Eloff SC and PJ Lazarus
Instructed by:	Doqulin Shapiro & Da Silva Inc
Respondent’s counsel:	M P Van der Merwe
Instructed by:	State Attorney, Pretoria