REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2008/13094

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

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DATE SIGNATURE

In the matter between:

MOGALE ALLOYS (PTY) LTD	Applicant
and	
NUCO CHROME BOPHUTHATSWANA (PTY) LTD	First Respondent
DANIELINA CORNELIA BUTLER	Second Respondent
PHILLIPUS ARNOLDUS OLIVIER	Third Respondent
GERRIT MARTHINUS VAN ZYL	Fourth Respondent
UTHANGO MINING RESOURCES (PTY) LTD	Fifth Respondent
MARTIN ROSENBERG	Sixth Respondent
PREMIER, NORTH WEST	Seventh Respondent

J U D G M E N T

COPPIN, J:

[1] This is a trial action in which the plaintiff ("*Mogale*") is claiming specific performance of a written agreement ("*the agreement*") entered into between itself, a Mr Butler[1], and the first defendant ("*Nuco*") and in terms of which Butler sold to Mogale 33% of the shareholding in Nuco which Butler held. The main claim is for delivery of the shares purchased. Mogale also claims, as alternative relief, repayment of the amount of R3 million which it paid for the shares in terms of the agreement.

[2] It is not disputed that at the time of the sale Butler owned at least 52% of the issued shares in Nuco. Notwithstanding ambiguity in the wording of the agreement it was common cause that the intention was that Mogale was purchasing 33% of the shares in Nuco from Butler.

THE ISSUES

[3] Nuco and the second and third defendants ("the executors") are the only defendants defending the action. The other parties who have been cited as defendants are not defending the action, or have elected to abide the decision of the court. For convenience I shall refer to Nuco and the executors collectively as " the defendants".

[1] Mr Butler is since deceased and is represented by the second and third defendants who are executors of his estate.

[4] The defendants have relied on several defences in their plea. However, at the hearing before me, the defences were whittled down to a denial that two suspensive conditions in the agreement had been fulfilled, namely, a suspensive condition relating to ministerial approval for the disposal of a controlling interest in a company as contemplated in s. 11(2) of the Minerals and Petroleum Resources Development Act 28 of 2002 ("*the MPRDA*"), and a suspensive condition relating to the pre-emptive rights of other shareholders in Nuco as contemplated, *inter alia,* in Article 64 of the Articles of Association of Nuco ("*the articles*")

[5] The plaintiff contends, in essence, that ministerial approval as contemplated in s. 11(2) of the MPRDA was not required because there was no change in the controlling interest in Nuco as a result of the agreement and that the condition relating to pre-emptive rights had been fulfilled. In this regard the issue was whether one of the shareholders in Nuco, namely the Royal Bafokeng Nation ("*the RBN*"), had a pre-emptive right. The plaintiff's contention was that the RBN did not have such a right. The plaintiff contended, in the alternative, that if RBN had such a right, the condition should be held to have been fictionally fulfilled, because Butler (and his agents) deliberately prevented this condition from being fulfilled.

[6] In terms of clause 5.3 of the agreement it was contemplated that if any of the suspensive conditions in the agreement were not fulfilled within a period of 180 days from the date of signature of the agreement, then the agreement was to lapse and be of no force and effect.

BACKGROUND

[7] It is common cause that Nuco is a private company which has a prospecting right, in terms of the MPRDA, to prospect for minerals or precious metals, such as chrome ore and platinum group metals, on certain farms in the North West Province which fall within the area of the RBN.

[8] It was also common cause that in terms of its Memorandum of Association Nuco had an authorised share capital of R50 000 divided into 50 000 ordinary shares (par value) of R1,00 and that immediately before the signing of the agreement the shareholding was as follows:

Butler – holder of 52% of the shares.
Fourth defendant ("*Van Zyl*") – holder of 12% of the shares.
Fifth defendant ("*Uthango*") – holder of 26% of the shares.
RBN – holder of 10% of the shares.

[9] It was also common cause that after the agreement was signed, a shareholders agreement ("the Uthango shareholders' agreement") was entered into between, *inter alia*, Butler, Nuco, and Uthango (Pty) Ltd ("Uthango") in terms of which Butler sold 26% of the shareholding in Nuco to Uthango; that the Uthango shareholders' agreement was subsequently

cancelled and that the 26% was restored to Butler so that Butler's shareholding in Nuco was increased to 78%. It is common cause that Butler became ill and that he subsequently died.

[10] Mogale is a private company and at the time of the signing of the agreement, one Johan Frederick Oosthuizen ("*Oosthuizen*") was its managing director and represented Mogale in entering into the agreement. It was not disputed that Oosthuizen subsequently resigned as the managing director of Mogale but is still a director of that company.

THE EVIDENCE AND THE *ONUS*

[11] The evidence tendered consists mainly of documentary evidence. Oral evidence of Oosthuizen was also led by the plaintiff and the defendant called two witnesses, namely Mr Van Niekerk ("*Van Niekerk*"), an attorney who assisted Butler with the agreement and who represented Butler subsequently, as well as one Mr Rorke West-Evans ("*West-Evans*") a chartered accountant, who acted at the time, and since about 2006, as company secretary for Nuco.

[12] The oral evidence was largely common cause or not seriously contested. I will discuss the oral evidence to the extent that it is relevant.

[13] As regards the *onus,* it was common cause that the plaintiff bore the *onus* including of proving that the conditions, which were in issue, had been fulfilled.

ELABORATION ON THE ISSUES

The condition relating to ministerial consent

[14] Clause 5.1.2 of the agreement provides that it is subject to "*the approval of the Department of Mineral and Energy Affairs of the sale equity to the purchaser, to the extent such approval is required by law*".

[15] The parties were *ad idem* that this clause was a reference to s. 11(1) of the MPRDA. That section provides:

> "*A prospecting right or mining right or an interest in any such right, or 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 a change of controlling interest in listed companies.*" [2] (emphasis added)

[16] It is common cause that neither the Minister, nor the Department of Minerals and Energy, has consented to the sale of the shares from Butler to Mogale as envisaged in the agreement and that Nuco is not a listed company.

[17] On behalf of the plaintiff it was submitted that the Minister's written consent was not required. The contention was that in terms of the agreement there was no transfer of a controlling interest from Butler to Mogale. With reference, *inter alia*, to s.12(2) of the Competition Act[3], as well as the

[2] The "*Minister*" is the Minister of Minerals and Energy.
[3] No.89 of 1998

Diamonds Act[4], it was submitted on behalf of the plaintiff that the phrase, "*controlling interest*", means something other than a shareholding of more than 50%. The submission was further that "*controlling interest*" in s. 11(1) of the MPRDA, could imply different things, depending on the circumstances. The fact that Butler held 52% (or 78%) of the shares, according to this argument, did not necessarily make his interest a "*controlling interest*". Reliance was placed on the meaning given to the term "*control*" in s. 12(2) of the Competition Act[5]. That section lists different forms of control, including beneficial holding of shares[6]; entitlement to vote a majority of votes[7]; ability to appoint or to veto the appointment of the majority of the directors in a company[8] and being a holding company of a subsidiary firm in terms of s. 1 of the Companies Act[9].

[18] Section 1 of the Diamonds Act[10]defines the term "controlling interest" ,as used in that Act, in relation to a company as meaning:

" (i) more than 50 per cent of the issued share capital of the company;

(ii) more than half of the voting rights in respect of the issued shares of the company; or

(iii) the power, either directly or indirectly, to appoint or remove the majority of the directors of the company without the concurrence of any other person."[11]

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[4] No.56 of 1986
[5] No. 89 of 1998
[6] S.12(2)(a)
[7] S,12(2)(b)
[8] S.12(2)(c)
[9] S.12(2)(d). Reference is to the Companies Act 61 of 1973.
[10] No.56 of 1986
[11] The Diamonds Act provides in s.34(1) that a natural person who desires to transfer his license to a company or close corporation shall apply to the South African Diamond and Precious Metals Regulator, in writing, for approval for the transfer. The Regulator is not to

[19] Counsel for the plaintiff, Mr Solomon SC, who appeared with Mr. K. N. Tsatsawane, submitted that the different forms of control had to be considered. To determine whether Butler had control one had to consider whether he was entitled to vote a majority of votes, or whether he had the ability to appoint a majority of directors. Since Butler did not have such entitlement or ability, he was not in control of Nuco (i.e. even though he held 52% (or 78%) of the issued share capital of Nuco). Furthermore Butler only had the power to appoint one director to the board of Nuco.

[20] Mr Solomon further submitted that it was not Butler's position after disposal of the shares that had to be looked at, but Mogale's position upon acquisition of the shares in terms of the agreement. According to the argument, the 33% shareholding, acquired by Mogale from Butler in terms of the agreement, was not the controlling interest. Furthermore, Mogale could only appoint a single director in terms of clause 13 of the agreement, which provides for a voting pool, and that did not have the effect of vesting the controlling interest in Mogale. In terms of clause 13 of the agreement Butler, Mogale and Van Zyl each only had one vote and Mogale had no veto. It was also submitted that there was no evidence that Mogale was to be given shares of a class that would give it greater voting rights. The submission was further that if one looked at the number of shares one had to look at the number that were involved at the time of making the application to the Minister

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grant such approval if it is of the opinion, inter alia, that the licensee concerned does not hold the controlling interest in the company or close corporation. Section 35 provides that no person shall without the written approval of the Regulator acquire an interest in any company or close corporation after a license has been issued or transferred to that company or corporation.

for the necessary written consent. The application to the Minister could have been made at any time within the 180 days, i.e. from the date of signing the agreement. The submission was that within that time Butler had 45% of the shares (i.e. after the 26% was taken back from Uthango), Mogale was only going to have 33%, and that 45% of the shareholding (i.e. Butler's shareholding after the sale of the 33%) was not a "controlling interest".

[21] The defendants' argument (presented by Mr. Brett SC, who appeared with Mr. N. Segal), on this point, was briefly the following. Clause 13 of the agreement (i.e. the voting pool provision) had the effect of vesting control over Nuco in Mogale and so did clauses 7, 12.1 and/or 12.2 and/or 12.4 and/or clause 9.1.3 of the agreement. The submission was further that s. 11(1) of the MPRDA was not directed at the acquirer of the interest, because if that was so, the section would have said so expressly. The argument was that the section instead focused on the disposer of the interest. With regard to the meaning of the phrase "*controlling interest*" in s. 11(1) of the MPRDA, the defendant referred to a number of decisions and statutes in support of its argument that the Minister's consent was required for the disposal of the shares to Mogale as contemplated in the agreement.[12]

[22] Relying on the aforementioned authorities the defendants submitted that the term "*controlling interest*" in s. 11(1) refers to a majority shareholding

[12] *Thorntons Transportation (Rhodesia) (Pvt) Ltd v Macauly NO and Others NNO* 1962 (1) SA 255 (SR); *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another* 1962 (1) SA 459 (A) at 472. The definition of the term "*controlling interest*" as used in section 114(5)(b)(iv) of the repealed Liquor Act No. 30 of 1928 and section 1 of the Liquor Act No. 27 of 1989; *Klokow v Sullivan* 2006 (1) SA 259 (SCA) at 262 (D); section 12 of the Competition Act No. 89 of 1998; *Distillers Corporation (South Africa) Ltd and Another v Bulmer SA (Pty) Ltd and Another* 2002 (2) SA 346 (CAC) and *EE Sharp and Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) at 326I-327A.

in a company which owns prospecting or mining rights. At the date of the agreement Butler owned 52% of the shares, i.e. the majority of the shares in Nuco, and by selling 33% to Mogale, Butler was no longer going to be the majority shareholder of Nuco and would no longer be in control of that company. The voting provision in clause 13 of the agreement also had the effect of depriving Butler of control of Nuco. Accordingly, so it was argued, since the sale was going to have the effect of removing the controlling interest from Butler, the Minister's written consent was required.

[23] The issues raised calls for an interpretation of s.11(1) of the MPRDA. It is trite that when interpreting words in a statute they must be interpreted within their context. The "*context*" refers not only to the language of the remainder of the statute but also to the scope, purpose and background of the statute.[13]

[24] The objects of the MPRDA are set out in s. 2. Section 3 of that Act provides that mineral and petroleum resources are the common heritage of the South African people and the State is the custodian thereof. The State, represented by the Minister of Minerals and Energy, may, *inter alia*, "*grant, issue, refuse, control, administer and manage*" any prospecting or mining right. In terms of s. 3(3) the Minister is obliged to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy norms and standards, while promoting economic or social development.

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[13] See for example *Jaga v Dönges, NO and Another* 1950 (4) SA 653 (AD) at 662.

[25] Section 4 of the MPRDA provides, *inter alia*, that when interpreting a provision of that Act any reasonable interpretation which is consistent with the objects of that Act must be preferred over any other interpretation which is inconsistent with the objects of that Act.

[26] Chapter 4 of the MPRDA deals with regulation. Section 9, which falls within that chapter, deals with the processing of applications for the rights envisaged there. Section 10 deals with consultation with affected and interested parties. Persons, have a right, *inter alia*, to object to the granting of a prospecting right and such objections have to be considered by the Minister when deciding, in the terms of s. 10(2) read with section 17 of the MPRDA, whether to grant or refuse the application for a prospecting right. (I refer here specifically to a *"prospecting right*", because Nuco had a prospecting right).

[27] Section 11 of the MPRDA has a heading, "*Transferability and Encumbrance of Prospecting Rights and Mining Rights*". In summary, the purpose of s. 11 appears to be for the regulation of the transfer and encumbrance of those rights. Section 11(1) places, *inter alia*, a prospecting right, and an interest in such a right, or "*a controlling interest in a company or close corporation*", on the same footing. 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.

[28] Section 11(2) gives an indication, albeit indirectly, of the purpose of ss. (1). The subsection provides that in the case of the disposal of a right (i.e. referred to in ss. (1)) the Minister must consent if the acquirer of the right (be it the buyer, cessionary, transferee, lessee, etc) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and satisfies (i.e. in the case of a prospecting right) the requirements in section 17 of the MPRDA.

[29] Section 11(2) does not expressly mention the "*controlling interest*" referred to in ss (1) and only expressly refers to "*the right*". Reference to "*the right*" in ss (2) must include "*the controlling interest*" referred to in ss (1), otherwise there will be no apparent purpose, or guideline for the Minister when dealing, not with the disposal of what is described as a right is ss (1), but with the disposal of the "*controlling interest in a company or close corporation*". However, in dealing with the latter the enquiry may of necessity be slightly different because the right would vest in the company or close corporation and not in those who control the company or close corporation. However, I do not make a finding in that regard.

[30] Section 11(1) does not specifically mention which kind of company or close corporation is being referred to in that subsection, but it seems obvious that reference could only be to those companies, or close corporations, which have any rights or interests in the rights referred to in that subsection (i.e. either (a) prospecting right(s) or (a) mining right(s)).

[31] In my view the words "*controlling interest in the company*" (or close corporation) ought to be interpreted as one composite phrase[14].

[32] The word "*interest*" by itself has a number of meanings but the meaning that has to be given to that word, as used in ss (1), depends on its context[15]. The "*interest*" referred to there is the interest in the company, or close corporation, that is either the holder of a prospecting right or a mining right or has an interest in such a right. The word "*controlling*" further qualifies the nature of that "*interest*". An "*interest*" that is not a "*controlling interest*" is not covered by s. 11(1). The subsection only refers to "*a controlling interest*" in the company or close corporation. A disposal of a mere interest in a company, or close corporation that has a prospecting or mining right, or an interest in such right, does not seem to require the Ministerial consent envisaged in s. 11.

[33] The word "*interest*" could refer to, *inter alia*, a right, particularly if one considers s. 11(2) where reference is made to a right inclusive of an interest. But it means an interest that is capable of disposal by any of the means envisaged in s.11(1) and includes a proprietary interest.

[34] In *Thorntons Transportation (Rhodesia) Pty Ltd. v. Macauly No and Others NNO*[16] it was held that the phrase "*controlling interest in the company*", in the context in which that phrase was used in the legislation that was being

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[14] Compare *Thorntons* case *supra* at 257D.
[15] Compare *Stellenbosch Farmers' Winery* at 469F-G and the *Thorntons* case *supra*.
[16] Supra. Footnote 8

considered in that case, had the same meaning as "*controlling interest in the business of a company*"[17].

[35] In the *Stellenbosch Farmers' Winery* case[18] the court was dealing with the Liquor Act (30 of 1928) which defined "*controlling interest*" in relation to a company, as "*shares entitling the holders thereof to more than half its profits or assets*". Hoexter ACJ considered that the definition merely referred "*in abbreviated form to the proposition that a shareholder is entitled to his dividends declared out of profits and to his aliquot share of the assets in liquidation*".[19] In that definition, the fact that the shareholder by virtue of its majority shareholding (i.e more than50%) was entitled to more than half the company's assets or profits, denoted the "*control*" envisaged there.

[36] Having said the above, the "*interest*" referred to in s. 11(1) of the MPRDA, is something that is capable of being disposed of, be it by sale, cession, etc. It includes shares or rights. A share is an interest of the shareholder in a company and that interest is composed of rights and obligations in terms of the Companies Act[20] and the Memorandum and Articles of Association of that company.[21]

[37] The "*interest*" must be one that controls the company (or close corporation). From a review of the sources referred to above it is apparent that the term "controlling interest" cannot be confined to a single

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[17] See at 259D; compare the *Stellenbosch Farmers' Winery* case (*supra*) at 472B-E.
[18] See footnote 8
[19] See at 472H-473A.
[20] No. 61 of 1973
[21] *Commissioners of Inland Revenue v Crossman and Others* [1936] 1 All ER 762 (HL).

characteristic, or criterion. It could mean, in the case of a company, more than 50% of the issued share capital of the company, or more than half of the voting rights in respect of the issued shares of the company, or the power to either directly or indirectly appoint, remove or veto the appointment of the majority of the directors of the company without the concurrence of another. This list is not intended to be exhaustive, but it certainly includes the right of a shareholder, (even if notionally), to more than half of the company's profits or assets.[22] I say this for the following reasons. The ultimate purpose of s. 11 is to regulate the prospecting, or mining right that was granted. Section 11(2) makes it clear that one of the main purposes is for vetting the intended acquirer of that right. The majority shareholder, notionally at least, would be entitled by his majority shareholding to, *inter alia*, half of the company's assets, which include the prospecting right. Thus, the acquirer, or intended acquirer, of such a controlling interest in the company would, have to be vetted for regulatory purposes.

[38] As I mentioned earlier, disposal of the "*controlling interest*" is what is been regulated. What has to be determined is whether the interest was a "controlling interest", at least, at the time of the proposed disposal. 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

[22] Compare *Stellenbosch Farmers' Winery supra* at 472H-473A.

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. I say that for the following reasons. The Minister clearly has a discretion in terms of section 11 to consent to the disposal, or not to do so. If there is a disposal of the controlling interest and an acquirer thereof, the Minister must consent to the disposal if the acquirer of the interest meets the requirements set out in section 11(2). However, in other instances, the Minister has a discretion which has to be exercised in a lawful manner in the furtherance of the objects and purposes of the Act. The fact that the disposal would have the effect that the controlling interest no longer vests in the disposer thereof is a matter for the Minister's consideration. This is consonant with the Minister's regulatory function. A change in control may hold implications for the company's capabilities to comply with its obligations relating to its prospecting, or mining right, (or interest in such a right) and its capacity to sustain compliance with the requirement of section 17 of the MPRDA, in the case where the relevant right is a prospecting right.

[39] Butler was the holder of at least 52% of the shares in Nuco at the time of the agreement. This shareholding would, in my view, constitute a "*controlling interest*" in Nuco in the sense I held above. The fact that he did not sell the entire 52% to Mogale but only 33%, which would have had the effect of reducing his interest to less than a "*controlling interest*", does not mean that the Minister's consent for the disposal to Mogale, in terms of the

agreement, was not required. In my view the Minister's consent was indeed required.

[40] As the Minister's consent was not obtained to date, or within the 180 days allowed for in the agreement, the suspensive condition contained in clause 5.1.2 of the agreement was not fulfilled. In the circumstances the agreement has lapsed as contemplated in terms of clause 5.3 of the agreement.

[41] That conclusion is decisive of the plaintiff's claim, including its alternative claim for the return of the R3 million that it paid in terms of the agreement, since the agreement provides in clause 5.4 that if it fails because the condition stipulated in clause 5.1.2 is not fulfilled, Mogale would have no right to recover the R3 million paid in accordance with clause 4.1 of the agreement (but shall have the right(s) envisaged in clause 5.4). I shall, nevertheless, briefly traverse the question of the fulfilment of the second suspensive condition which was in issue, namely that which is contained in clause 5.1.3 of the agreement.

THE FULFILMENT OF THE CONDITION IN CLAUSE 5.1.3

[42] It was common cause that the RBN had not been given notice as contemplated in clause 64 of the Articles of Nuco and that it had not exercised, or given an indication that it intended to exercise any rights of pre-emption it may have in respect of the shares offered by Butler to Mogale in

terms of the agreement. On the contrary, it was common cause that the RBN had written a letter to the attorneys of Mogale, apparently in response to the letter sent to RBN on behalf of Mogale, in which they intimate that they have not consented to the proposed disposal of shares by Butler to Mogale.

[43] As I mentioned at the outset, the plaintiff submitted that the condition had been fulfilled because the RBN did not have a right of pre-emption in terms of the Articles of Nuco (and everyone-else who had a right of pre-emption had either waived, or had agreed not to exercise such right), alternatively, and should it be found that the RBN did have such a right, that the condition be held to have been fictionally fulfilled, because Butler deliberately prevented its fulfilment.

Did the RBN have a right of pre-emption?

[44] Plaintiff's argument in this regard is, to summarise, the following. Because the RBN was not proved to be the holder of A, B or C class shares as envisaged in the Articles, it was not proved to have had a right of pre-emption in terms of clause 64 of the Articles because article 64 only give such right to the holders of A, B or C class shares. Furthermore, on behalf of Mogale, it was also submitted that the RBN did not have a pre-emptive right in terms of the Uthango shareholders' agreement, because the RBN was not a party to that shareholders' agreement and it did not recognise that the RBN had such a right.

[45] The share certificates and extracts from the share register of Nuco, which were produced in evidence, do not state that shareholders were issued with either A class, B class or C class shares. Instead they affirm that the shareholders were issued with "*ordinary shares*" in Nuco. Similarly, the agreement does not describe the shares that formed the subject of that sale as A, B or C class shares. On the contrary, the shares, which Butler sold to Mogale in terms of the agreement, are described as "*ordinary shares*".

[46] The plaintiff's argument, as I understood it, was even though the Articles state that the issued shares of Nuco comprise A, B and C class shares[23], Nuco had the power to also issue ordinary shares by virtue of the power mentioned in clause 3.2.1 to issue "*any shares*". The plaintiff also produced and made submissions concerning a shareholders' agreement entered into between Butler, Errol Norman Keeton and Nuco ("*the Butler/Keeton shareholder agreement*") on 17 July 1989, in which it is stated that Butler had 60 "*A*" class shares and Keeton was the holder of 40 "*B*" class shares in Nuco.[24]

[47] Notwithstanding the description in the Butler/Keeton shareholders' agreement, no mention is made of these classes of shares in the extract of the share register of Nuco pertaining to Butler's shareholding. West-Evans, who gave evidence concerning Butler's shareholding in Nuco, was not questioned about classes of shares or the anomalies that existed between the Articles, the certificates and the Butler/Keeton shareholder agreement in that

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[23] In terms of the Articles the shareholding shall at all times be as follows: At least 25% A shares, at least 25% B shares and there shall be an equal number of A and B shares.

[24] Clause 1.3 of the Butler/Keeton shareholders' agreement.

regard. A share certificate produced, for example, in respect of Butler's shareholding, and dated the 24th of June 2005, states specifically that Butler is the registered owner of 78 ordinary fully paid up shares in Nuco. The certificate pertaining to the RBN and dated the 9th of November 1994, states that the Premier of the North West Province, in his capacity as trustee of the Royal Bafokeng Nation (the RBN) is a registered owner of 10 ordinary fully paid up shares in Nuco. Similarly, the share certificate produced in respect of Van Zyl, the fourth respondent, and which certificate is dated the 24th of June 2005, states that Van Zyl was the owner of 12 ordinary paid-up shares in Nuco. No share certificates were produced in evidence in which it is certified that any of the shareholders of Nuco, at least at the time of the agreement (or at any time for that matter) held anything other than ordinary shares in Nuco. The Articles do not preclude a holder of ordinary shares from being a member of Nuco.

[48] Article 64.1 of the Articles contains the essence of the pre-emptive right. It makes no express mention of any class of shares but refers to "*a member*". The Article provides as follows:

> "*Notwithstanding anything to the contrary contained in these articles, a member ('the offeror') shall not be entitled to sell, alienate or in any other manner dispose of or transfer any share in the company unless all the shares ('the shares') beneficially owned by the offeror and the whole of the offeror's claim by way of loan account ('the loan account') against the company have first been offered in writing ('the offer') to the other member ('the offeree') or if there is more than one member, to the other members ('the offerees') pro rata to their respective shareholdings in the company*."

[49] The Articles do not define the term "*member*". There is no reason why its ordinary meaning in a company law context, should not prevail. There is nothing in Article 64 that confines the right of pre-emption to only holders of class A, B or C shares.

[50] Uthango's shareholders' agreement to which the RBN was not a party, did not have the effect of depriving the RBN of the pre-emptive right it had in terms of Article 64. Clause 18 of the Uthango shareholders' agreement does not expressly, nor impliedly, regulate the RBN's rights in terms of Article 64. The Uthango shareholders' agreement only dealt with the rights of the shareholders who were parties to that shareholders' agreement.[25]

[51] In my view no intention is evinced in the Uthango shareholders' agreement to amend the Articles of Nuco to the extent of depriving the RBN of the right of pre-emption which it would have enjoyed in terms of Article 64 of the Nuco Articles. The Uthango agreement in my view clearly only regulated the position of those that were party to it.[26]

[52] It appears that the plaintiff's legal advisers were also of the view that the RBN was not party to the Uthango shareholders' agreement and that it therefore did not have a right of pre-emption. This view was wrong, because the RBN retained its rights in terms of Article 64. Oosthuizen also gave

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[25] The Uthango shareholders' agreement was subsequently cancelled according to West-Evans because Uthango failed to pay for the 26% shareholding sold to it by Butler in terms of that agreement. The plaintiff's argument was that Uthango's shareholders' agreement was divisible and that the termination could only have related to the sale of shares and not to the other aspects of the shareholders' agreement such as the agreement relating to pre-emptive rights etc. I do not need to decide that issue.

[26] "*Shareholders*" in the Uthango agreement is defined as "*Van Zyl, Butler and BEE shareholders*". It does not include the RBN.

evidence that the RBN was subsequently notified by Mogale's attorneys about the sale. The actual notification was not produced in evidence but the RBN's response, which I have referred to earlier, was produced. In it they, *inter alia,* intimate that they did not consent to the sale of the shares by Butler to Mogale. There is no proof that the notification, that Oosthuizen testified was sent by Mogale's attorneys to the RBN, complied with Article 64. In my view, given all of the aforementioned, the condition stipulated in clause 5.1.3 of the agreement was not fulfilled.

FICTIONAL FULFILMENT

[53] The plaintiff amended its particulars of claim on the first day of hearing to include an allegation that should it be found that RBN had a right of pre-emption in terms of either the Articles of Nuco, or the Uthango shareholders' agreement, the condition contained in clause 5.1.3 ought to be held to have been fictionally fulfilled, because Butler deliberately prevented its fulfilment.

[54] To succeed with such a claim the plaintiff must prove that the condition was not fulfilled and that Butler had a duty regarding the fulfilment of the condition and that he breached that duty with the intention of frustrating or preventing the fulfilment of the condition.[27]

[55] In terms of clause 10.5.2 of the agreement, the parties to the agreement bound themselves to "*use their best endeavours to procure the*

[27] *Scott v Poupard* 1971 (2) SA 373 (A).

fulfilment of the conditions". Thus both the plaintiff, Mogale, and Butler had a duty regarding the fulfilment of the condition. It was not Butler's sole duty.

[56] As regards the issue of intention, if a conditional debtor prevents the fulfilment of a suspensive condition and he is guilty of *dolus* in doing so, the condition is deemed to have been fulfilled. What *dolus* entails has not been precisely delineated, but it is at least clear that the debtor should have acted with the direct intention of preventing the obligation from becoming enforceable.[28] It is also accepted that negligence on the part of the conditional debtor is not enough[29].

[57] The plaintiff submitted that at all material times Butler was aware of Article 64; that Butler knew that RBN was a shareholder in Nuco; that Butler knew that RBN had pre-emptive rights in terms of Article 64 and that Butler knew what his obligations were in terms of that article and that it was not for Mogale to offer the shares to RBN. The plaintiff, in addition, submitted that Oosthuizen had testified that had Mogale known that RBN had pre-emptive rights it would have taken steps to ensure that Butler complied with Article 64 and made RBN aware of such a right.

[58] I should also mention that evidence was led, which was not contested, that Oosthuizen had written a letter dated the 11th of October 2007 to Butler and that Butler did not respond to the letter. In the letter Oosthuizen had said to Butler, *inter alia*, the following:

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[28] *Whyte v Da Costa Couto* 1985 (4) SA 672 (A) at 680.
[29] *Gowan v Bowern* 1924 AD 550 at 553 and 572.

> "*We understand that due notice to the other shareholders of Nuco of our offer and the period for the exercise of the rights of pre-emption by the other shareholders has also lapsed.*"

The letter concludes with the following sentence:

> "*If our understanding of any of the above members is not correct, please advise immediately.*"

[59] Evidence was also produced, which was common cause or not disputed, that Van Niekerk had stated, in writing, that Butler regarded himself as bound by the agreement.

[60] The defendants submitted that the plaintiff was not barred from gaining insight into Nuco's Articles. In terms of the agreement the plaintiff was entitled to do a due diligence investigation. The fact that it limited itself in that regard, as testified by Oosthuizen, cannot be blamed on Butler. The defendants further submitted, that there was no evidence to show that Butler deliberately frustrated fulfilment of the suspensive condition and that the claim for fictional fulfilment should fail.

[61] The plaintiff, curiously, submitted that "*on the evidence of Oosthuizen no absence of dolus can be shown on the part of Butler. No evidence has been led in this regard by the defendants and it should be found that it was Butler who prevented the fulfilment of such suspensive condition*". This submission is apparently based on the wrong premise that the defendants bore an *onus* to disprove, as it were, that Butler acted deliberately or with the requisite intention (*dolus*).

[62] On a conspectus of all the evidence one cannot conclude, on a balance of probabilities, that Butler acted intentionally with regard to the non-fulfilment of the condition under consideration, particular insofar as it pertains to RBN. As the plaintiff bore the *onus* of proof it cannot succeed with the claim in those circumstances. The fact that Butler did not answer to the letter of Oosthuizen does not justify an inference of *dolus*. It does not exclude the possibility that Butler genuinely, albeit mistakenly, believed that RBN did not have a pre-emptive right. Paradoxically, the reasonableness of such a mistake may be evident from the fact that the plaintiff itself submitted in these proceedings that RBN only had a pre-emptive right in terms of the article if it had class A, B or C shares and that it did not have a right of pre-emption in terms of the Uthango agreement.

[63] I need not decide hypothetical issues such as whether RBN would have consented, or would have exercised its pre-emptive rights if it was properly and timeously informed of Mogale's offer to Butler as evinced in the agreement. Letters were admitted in evidence that make it clear that RBN did not consent to the sale of shares by Butler to Mogale in terms of the agreement.

COSTS

[64] There is no reason why the costs should not follow the result. The costs of two counsel is justified.

I accordingly make the following order:

The plaintiff's claims are dismissed with costs (including the costs of two counsel).

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P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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JUDGMENT DELIVERED ON	11th MARCH 2011