

Landmark Tax Judgment raises questions on creation of Security Interest over Shares in Mining Companies in Zambia

8th May, 2023

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1. Introduction

On 17 August 2022, the Supreme Court delivered a landmark tax decision that has sparked debate not only on the merits of the decision but also on the use of shares in mining companies as security for loans. The article delves briefly into the details of the decision and its potential impact on the use of shares as security in the mining sector in Zambia.

2. Landmark Tax Supreme Court Judgment

2.1 On 7 June 2022, the Supreme Court was faced with a dispute on payment of property transfer tax ("PTT") in *Teal Minerals Barbados Incorporated v Zambia Revenue Authority* (the "**Teal Minerals Case**"). The main issue was whether the transfer of 100 percent stake by Vale International SA and African Rainbow Mineral Limited to EMR in *Konnoco (B) Inc.*, which held 80 percent stake in the issued share capital of Lubambe Copper Mines Limited, a mining licence holder in Zambia, constituted a transfer of an interest in a mining right so as to trigger the payment of PTT under the Property Transfer Tax Act, Chapter 340 of the laws of Zambia ("**PTT Act**") with the Zambia Revenue Authority ("**ZRA**"). On 17 August 2022,

the Supreme Court delivered its decision and held that "PTT was payable in that there was a transfer of an interest in a mining right".

2.2. In arriving at this decision, the Supreme Court held that in terms of the PTT Act the reference to "**interest**" in a mining right implies an indirect transfer in light of the definition ascribed to it using the words "including a legal share in something".

2.3. Following this decision, on 27 December 2022, the PTT Act was amended by the Property Transfer Tax (Amendment) Act, No. 27 of 2022 such that a 'share' for the mining sector is now defined to include "interest in a mining right" and "an interest in a mineral processing licence". ZRA's position on this amendment is that this was a housekeeping measure amendment to curb the risk of double taxation created by the ambiguity of the repealed definition of a 'share' under the PTT Act. This means that for the purposes of tax, an interest in a mining right and mineral processing licence will not be subject to tax separately when there is a transfer that involves shareholding changes in a holder of a mining right or mineral processing licence in Zambia.

3. Share Transactions under the Mines Act

- 3.1. In 2015, the Mines and Minerals Development Act (the “**Mines Act**”) was enacted to provide for the legal framework on transactions relating to mining rights and non-mining rights in Zambia. The Mines Act also regulates certain transactions in respect of shares of companies with a mining or mineral processing licence.
- 3.2. In terms of the Mines Act, a person is required to seek an approval from the Minister of Mines and Mineral Development (“**Ministerial Approval**”) before a right or interest in a mining licence may be encumbered, assigned, or transferred. This is a mandatory legal requirement and failure to comply, attracts an unfavourable consequence of revocation of such a mining licence. The Mines Act further provides that a company with a mining or mineral processing licence must obtain Ministerial Approval where: (a) the transfer of any share or shares in the company to any person or that person's nominee, if the effect of doing so would give that person control¹ of the company; or (b) enter into an agreement with any person if the effect of doing so would be to give that person control of the company.
- 3.3. In financing transactions, while a share charge does not necessarily involve the transfer or encumbrance of a

mining or mineral processing licence, the same is often used so that the lender can sell the relevant company as a going concern in an enforcement situation or for the lender to take control of the company. In this regard, as the definition of a 'share' has been revised to include 'an interest in a mining right' or 'mineral processing licence', although in the context of tax as demonstrated above, this definition has raised questions on the practice relating to charges over shares in mining companies in Zambia, including whether:

- (a) the concept of separate legal personality in dealing with shareholders in a mining company in Zambia will apply for the purposes creating security over shares in the event of financing. The Mines Act appears to place obligations on the holder of a mining right or mineral processing licence and not a shareholder in a mining company. The Supreme Court in the Teal Minerals Case did not pronounce itself on this point and how the same would apply in the context of the Mines Act;
- (b) the threshold regarding control as per the Mines Act is applicable to security interest over shares in a mining or mineral processing company. Will a share charge which does not have the effect of changing control in a mining company trigger the requirement for Ministerial Approval?;

¹ In terms of the Mines Act “a person is deemed to have control of a company: (a) if the person or that person's nominee holds, or the person and that person's nominee together hold, a total of fifty percent or more of the equity shares of the company; or (b) if the person is entitled to appoint, or to prevent the appointment of, half or more than half of the number of Directors of the company.”

- (c) the Ministerial Approval has any bearing on the integrity of the share charge in mining companies in Zambia. What does perfection of a share charge mean in mining companies in Zambia?; and
- (d) there is an interplay between the Movable Property (Security Interest) Act, 2016 ("MPA") and the Mines Act, considering that the MPA is only subject to the provisions of the Constitution (Amendment) Act, 2016 as regards security interests in movable property in Zambia.

4. Conclusion

While the Mines Act does not expressly provide guidance on share charges in mining companies in Zambia, the definition of a 'share' in the Teal Minerals Case and the PTT Act appears to raise various legal issues that lenders need to consider in devising a security package that includes security over shares in mining companies in Zambia. It is crucial for lenders to carefully check and take security that does not raise legal issues that would undermine the integrity of the security taken. Further and more importantly, the Mines Act may also need to be amended to provide more clarity as it relates to Ministerial Approval requirements for encumbrances such as a share charge in mining companies in Zambia.

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