IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/078/2017**

HOLDEN AT LUSAKA **Appeal No. 153 of 2017**

(*Civil Jurisdiction*)

IN THE MATTER OF: **STATUTORY INSTRUMENT NO. 6 OF 1984**

AND

IN THE MATTER OF: **SECTION 150(4) AND 153 OF THE MINES AND MINERALS ACT NO. 7 OF 2008**

AND

IN THE MATTER OF: **AN APPEAL AGAINST THE DECISION OF THE HONOURABLE MINISTER OF MINES AND MINERAL DEVELOPMENT**

BETWEEN:

KATENGE RESOURCES LIMITED **APPELLANT**

AND

AVARMMA MINING CORPORATION LIMITED **1ST RESPONDENT**

ZCCM INVESTMENTS HOLDING PLC **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
04 SEP 2018
CIVIL REGISTRY 2
P. O. BOX 50067, LUSAKA

Coram: Mulongoti, Ngulube and Sichinga, JJA.
On 23rd May, 2017 and 4th September, 2018

For the Appellant: *Mr. M. Katolo, Messrs. Milner and Paul Legal Practitioners*

For the 1st Respondent: *Messrs. Mweemba Chashi and Partners*

JUDGMENT

SICHINGA, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. ***Godfrey Miyanda v Attorney-General (No.1) (1985) Z.R.185 (S.C.)***
2. ***Kay v Godwin (1836) BING 576 at 582***
3. ***City Express Service Limited v Southern Cross Motors Limited (2007) ZR 263***
4. ***Kringer and another v Christian Council of Zambia (1975) ZR 152***
5. ***Chikuta v Chipata Rural Council (1974) Z.R. 241 (S.C.)***
6. ***Polythene Products Zambia Limited v Cyclone Hardware and others (2008) ZR 396***
7. ***Costellow v Somerset County [1983] 1 ALL ER 592***
8. ***Zinka v The Attorney General (1984) Z.R. 44***
9. ***Zambia Consolidated Copper Mines v Jackson Munyika Siame And 33 Others (2004) Z.R. 193 (S.C.)***
10. ***Goodson Kapaku and others v Mwinilunga District Council Minister of Finance (As A Corporation Sole-Third Party) (2006) Z.R. 158***

LEGISLATION REFERRED TO:

1. ***Mines and Minerals Act No. 7 of 2008***
2. ***Mines and Minerals Development Act, No. 11 of 2015***

This is an appeal from the decision of the High Court dated 15th September, 2017 in which the High Court ordered that the appellant's Large Scale Prospecting Licence Number 16199-HQ-LPL (hereinafter called "the Licence") be cancelled and returned to the 1st respondent herein.

This matter was commenced in the High Court on 1st December 2015 by way of Originating Motion of Appeal pursuant to ***Section 153 of the Mines and Minerals Development Act***[1] and ***Order 55 Rule 3 of the Rules of the Supreme Court of England 1999***. The appeal was against the decision of the Minister of Mines and Mineral Development Honourable Christopher Yaluma, MP (hereinafter called "the Minister") given at Lusaka on 6th August, 2015, by which the Minister cancelled the licence held by the 1st respondent and gave it to the appellant. The 1st respondent in its Notice of Appeal before the High Court raised four grounds of appeal, namely:

1. *The Minister misdirected himself and made a wrong decision when he ignored the laid down procedure for revocation of licences and verbally revoked the mining licence of the respondent and granted it to the appellant and 2nd respondent without following the provisions of section 150 (4) of the Mines and Minerals Act, which required that the appellant should have been given an opportunity to be heard before the said decision.*
2. *The decision of the Minister was wrong in law and in fact in that he did not communicate with the appellant prior to his decision to revoke the licence and as such denied them an opportunity to be heard before a decision was made.*
3. *The Honourable Minister erred in law and fact in ignoring the fact that the Zambia Environmental Management Agency (ZEMA) and the Mining Advisory Committees had extended the*

time frame within which the appellants were to complete the ecological compliance documents and thereby made a decision that was so outrageous as to defy logic.

4. *The Honourable Minister acted in contempt and erred in law and fact in proceeding with his decision to revoke the appellant's licence number 16199-HQ-LPL which is the subject of court proceedings in the Lusaka High Court under cause number 2014/HP/1389 before Judge S. Newa and thereby prejudiced the appellant.*

The event that gave rise to the Originating Motion of Appeal was the decision of the Minister to give the people of Kasempa a Large Scale Prospecting Licence for Katokamena Mine in the Kasempa District of Zambia (hereinafter called "the Mine"), which decision was televised on 10th August 2015 on ZNBC News. Avarmma Mining Company Limited (the 1st respondent herein) alleged that the mine belonged to it pursuant to a Prospecting Licence number 16199-HQ-LPL and application number 19841-HQ-LML, having purchased the said licence from Lions Resources Limited with the approval of the Minister in 2013. Following this decision, the community of Kasempa descended on the Mine and took possession. When a dispute arose between the community of Katokamena and the 1st respondent company, the Ministry of Mines wrote to the 1st respondent company on 17th February 2015, advising that it had deferred the application for a large scale mining licence dated 16th

July, 2014 pending the presentation of the Environmental Impact Assessment (EIA) decision letter.

On 15th June 2015, the Director of Mines granted the 1st respondent an extension of time within which to submit the EIA decision letter and a comprehensive ore reserve statement by another six months from 17th August 2015 to 17th February 2016. The 1st respondent submitted that the Minister should not have proceeded to grant another licence in an area which is subject of an application and an extension of license in line with ***Section 25 of the Mining and Minerals Development Act***[1]. The 1st respondent sought an order of the High Court to issue judicial review against the decision of the Minister and to reverse the said decision pending determination of the matter.

The trial court found that the 1st respondent was granted a Large Scale Prospecting License issued on 2nd July 2014 as confirmed by a certificate and coordinates confirming that Avarmma was the license holder. The court also found that the 1st respondent wrote to the Ministry seeking to convert the said licence to a Large Scale Mining Licence, and the Ministry responded by deferring the application pending the submission of an approved EIA decision letter and a comprehensive ore reserve statement, and that the period for the submission of the said documents was extended for a further six months from 17th August 2015 to 17th February 2016 by a letter dated 15th June 2015, authored by the Director of Mines.

In response to the 1st respondent's affidavit in support of notice of motion, the appellant herein filed an affidavit in opposition deposed by one Fred Banda - Mining Engineer in the Ministry of Mines, who stated that the Mine was under prospecting licence number 16199-HQ-4L when the licence was valid but it expired and the 1st respondent did not renew it, while the application for a large scale mining 19841-HQ-LML did not meet all the requirements as stated under ***Section 12 of the Mines and Minerals Development Act***[2]. The deponent further stated that the Director of Mines rejected the 1st respondent's application on 23rd July 2015, as the recommendation to grant the 1st respondent an extension of 6 months as indicated in the letter dated 17th February, 2015 to finalise the EIA was not supported by law.

The Court held that since ***Act No. 11 of 2015*** took effect on 1st July 2015, the letters referred to were processed under ***Act No. 11 of 2015*** and therefore, the extension granted by the Director of Mines could not be said to have been ultra vires ***Act No. 7 of 2008***. In this regard, the learned trial judge agreed with the 1st respondent herein that the extension had the effect of suspending the application until submission of the EIA and decision letter from ZEMA.

The trial court held further that the purported rejection of the application because the company did not submit an approved EIA as required by ***Section 12(2) of Act No. 11 of 2015*** is ultra vires

Act No. 7 of 2008, which was the law at that time. The court below noted that the speed at which the Ministry of Mines cancelled the 1st respondent's license and proceeded to grant the same to the appellant without notice is questionable and against the rules of natural justice. The trial court held that the purported rejection of the 1st respondent's application in spite of a letter extending the period within which to submit the EIA and decision letter from ZEMA was against the intention and requirement of ***Section 102 of Act No. 7 of 2008***, which was the law obtaining at that time. Further that the grant of the licence to the appellant during the period the 1st respondent had applied is a nullity because it defies the rules of natural justice and commercial sense. The court then proceeded to cancel the said licence and returned it to *the* appellant.

Dissatisfied with the judgment of the High Court, the appellant has now lodged an appeal before this Court on the following grounds:

Ground One

The Court below erred in fact and law when it proceeded to determine the matter under the repealed law namely the *Mines and Minerals Act No. 7 of 2008* when the action herein was commenced in 2015 when there was in force a new *Mines and Minerals Development Act.*[2]

Ground Two

The court below erred in law and fact when it proceeded to hear the matter in which it had no jurisdiction to hear, as the applicant had not exhausted the procedures stipulated in the Mines and Mineral Development Act before filing an appeal in the High Court.

Ground Three

The court below erred in law and fact when it proceeded to hear the matter and cancel the 3rd respondent's prospecting licence without affording the 3rd respondent an opportunity to be heard on the matter, contrary to the rules of natural justice.

In support of its appeal, the appellant filed heads of argument on 1st December 2017. It is submitted that seeing as the 1st respondent's complaint in the lower Court is based on a news item aired on ZNBC on 10th August 2015, its cause of action accrued on or about the said date, at which time the law regime had changed from the ***Mines and Minerals Act***[1] to the ***Mines and Mineral Development Act***[2], which came into force on 1st July 2015, although it was only assented to on 14th August 2015. Reference is made to section 1 of the latter Act to this effect. Thus that after 1st July 2015 anything which relates to actions or decisions made after that date ought to have been commenced under the new act, namely ***Mines and Mineral Development Act.***[2] ***Section 14(3) of the Interpretation and General Provision Act, Chapter 2 of the Laws of Zambia*** is cited, where it is stated that:

"(3)Where a written law repeals in whole or in part any other written law, the repeal shall not- (a)revive anything not in force or existing at the time at which the repeal takes effect..."

In applying this statutory provision to the matter at hand, counsel submitted that as at 1st July 2015 when ***Act No. 11 of 2015*** came into force, there was no decision of the Minister giving a large scale prospecting licence to the appellant, and the 1st respondent was therefore precluded from reviving the provisions of ***Act No. 7 of 2008*** by commencing the action under the repealed Act.

Further, counsel calls in aid the case of ***Godfrey Miyanda v Attorney-General***[1] which states that:

> ***"Section 14 (3) (c) of the Interpretation and General Provisions Act does not preserve rights of the public at large; it only preserves the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition."***

We were further invited to consider the case of ***Kay v Godwin***[2], where it was stated that:

> ***"The effect of repealing a statute is to obliterate it completely from the record of parliament as if it had never been passed; and it must be considered as law that never existed except for those actions which***

were commenced, prosecuted or concluded whilst it was an existing law."

On the basis of these authorities, counsel argued that the matter *in casu* was commenced on 1st December 2015 when there was a new Act, and that the old Act having been repealed, the rights of parties ought to be decided under the law existing at the time of commencement of the action.

The appellant acknowledges that it is alive to the position of the law that a party is precluded from raising new issues on appeal, and argues that notwithstanding this legal position, the first ground of appeal is properly before this Court, as it relates to a serious point of law which can arise at any stage of the proceedings and the Court is not precluded from considering it. The appellant in this regard is fortified by the case of ***City Express Service Limited v Southern Cross Motors Limited***[3] which held that:

"There can be no estoppel against a statute. A litigant can plead the benefit of a statute at any stage of the proceedings."

The Supreme Court case of ***Kringer and another v Christian Council of Zambia***[4] is also cited, where it was stated that:

"As to estoppels, the matter is in my view concluded against the Plaintiff by the principle that one cannot set up an estoppel against a statute."

In conclusion of his argument under the first ground of appeal, the appellant submits that following the repeal of the said ***Mines and Minerals Act***[1], it was not open for the 1st respondent to commence an action under the repealed law as the Court below lacked jurisdiction to entertain such an action and the whole proceedings must therefore be rendered a nullity.

Under the second ground of appeal, the appellant relies on ***Section 97(4) of Act No. 11 of 2015***, which provides that;

> ***"A person aggrieved with the decision of the Minister may appeal to the Tribunal within 30 days of receipt of the Minister's decision."***

Counsel submits in this regard that it was wrong for the Court to entertain an appeal that flouted the procedure under the statute.

Chikuta v Chipata Rural Council[5] is also cited, in which it was held that:

> ***"Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declaration."***

Further, ***Section 100 of Act No. 11 of 2015*** provides that;

"A person aggrieved with the decision of the Tribunal may within 30 days of receiving the decision appeal to the High Court."

Based on these authorities, it was counsel's submission that the High Court would only have had jurisdiction to entertain an appeal from the decision of the Tribunal, and not the Minister. As such, the appeal was irregularly before the High Court, as there was clear and blatant disregard of the procedure prescribed in ***Sections 97(4) and 100 of the Mines and Minerals Development Act***[2], which was the law prevailing at the time the action was commenced. Counsel calls in aid the case of ***Polythene Products Zambia Limited v Cyclone Hardware and others***[6] where it was held that"

"Where a statute provides for the procedure of commencing an action, a party has no option but to abide by the procedure...

The High Court's unlimited jurisdiction under Article 94(1) of the Constitution is subject to compliance with prescribed procedure. It does not entitle a party to deviate from procedure prescribed by statute and commence an action or raise a counter-claim in an action in the High Court in disregard of the prescribed procedure."

With regard to the third and final ground of appeal, the appellant contends that when the matter came up for hearing on 2nd February, 2017, the appellant's advocates applied to withdraw from the record, and leave of court was granted to this effect. The court proceeded to adjourn the matter to 28th April 2017 for ruling without affording the 3rd respondent an opportunity to be heard, as the record does not show that the return date of 28th April 2017 was communicated to the appellant by the 1st respondent. Counsel submits that by cancelling the appellant's large scale prospecting licence without giving it or the 3rd respondent an opportunity to be heard, the Court invariably failed to comply with the basic requirement that where a decision affects a party's interest, that party must be heard. Counsel calls in aid the case of ***Costellow v Somerset County***[7] wherein it was held that:

> ***"The plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate."***

In the same regard, counsel also places reliance on the case of ***Zinka v Attorney General***[8], and accordingly submits that there was a duty on the Court below to ensure that the appellant was given an opportunity to be heard on the merits before depriving it of its interests in Katokamena Mine.

The 1st respondent filed heads of argument dated 30th May 2018. It argues in response to the first ground of appeal that the appellant not having raised the issue of commencement of the action in the court below under ***Act No. 11 of 2015***, it is not competent for the appellant to raise it on appeal. Ground one should therefore be dismissed. The case of ***Barclays Bank Zambia Plc v Zambia Union of Financial Institution and Allied Workers***[9] was cited in support of this position of the law.

Further, that should we be inclined to consider this ground of appeal, we should bear in mind that the actions that led to this matter began on 17th February 2015 when the Ministry wrote to the 1st respondent that its application of 16th July, 2014 had been deferred for six months pending presentation of the EIA decision letter and ore reserve statement. By a letter dated 15th June 2015, this period was extended for a further period of six months. These actions were undertaken under ***Section 102 of Act, No. 7 of 2008*** and that even though the new Act came into effect on 1st July 2015, the actions taken and decision made by the Ministry under the old Act remained valid and enforceable.

To support the position that an enactment does not have retrospective effect, counsel for the 1st respondent relies on the case of ***Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 Others***[10] wherein it was held that:

"There is always a presumption that any legislation is not intended to operate retrospectively but prospectively and this is more so where the enactment would have prejudicial effect on vested rights but any enactments which relate to procedures and practice of the court have retrospective application."

The case of ***Goodson Kapaku and others v Mwinilunga District Council and Minister of Finance (As a Corporation Sole-Third Party)***[10] is also cited, wherein it was held that:

"The general principle is that a statutory enactment is not intended to operate retrospectively. The exception to this rule is that enactments of a procedural nature may apply retrospectively."

In applying these authorities *in casu*, the 1st respondent submits that the new Act was not enacted to have retrospective effect so as to have a prejudicial effect on the 1st respondent's vested rights under the old Act. It is submitted that the decision of the Minister on 6th August, 2015 was based on the old Act, and the actions thereunder which had the effect of vesting rights in the 1st respondent remained valid despite the new Act coming into effect. On this premise, the action was correctly commenced under the old Act.

In response to the second ground of appeal, our attention is drawn to the provisions of ***Section 102(3)*** of the old Act which provide for the cancellation of a mining right or non-mining right, as well as ***Section 72(2)*** of the new Act *vis* suspension or revocation of a mining right or processing licence. Counsel submits that prior to the Minister's announcement on 10th August 2015, the 1st respondent was not served with a written notice of the Ministry's intention to suspend or revoke its large scale prospective license under the old Act or the new Act, and that the laid down procedure was not followed by the Minster, as the 1st respondent was not given an opportunity to be heard. Consequently, the 1st respondent sought to protect its rights by commencing proceedings in the High Court in order to stay the decision of the Minister, which had the effect of the community of Kasempa taking possession of the 1st respondent's mine to the detriment of the 1st respondent.

In response to ground three, the 1st respondent argues that upon withdrawing from the record, the appellant's advocates ought to have brought it to their client's attention that they had withdrawn from representing them and served their client with the requisite documents to enable them further defend the matter. Further, that the record shows that the appellant's advocates appeared before court in April 2016 and February 2017 but did not file an affidavit in opposition despite being served with the 1st respondents originating motion of appeal and supporting affidavit for a period of over 15 months. The matter was determined on affidavit evidence

and since the appellant was aware of the proceedings, the Court below was on firm ground when it went ahead to determine the matter, and the appellant's claim not to have been given an opportunity to be heard lacks merit.

We have considered all the evidence in the court below, the judgment appealed against and submissions of counsel for both parties herein. Under ground one, we observe that the prospecting licence in question was first issued to Lions Resources Limited in 2013 and transferred to Avarmma in 2014. There is no record that Avarmma applied to renew its prospecting licence before its expiry on 21st July 2014. What it had applied for was a large scale mining licence before the coming into effect of the new Act, which licence had not been granted.

The status of the appellant as at 1st July 2015 when the new Act came into effect was that it was not holding a prospecting licence, since the same expired on 21st July 2014, and there was no application for renewal. In our view, the appellant's cause of action arose on 10th August 2015, by which time the Act that was in place was the new Act, which had repealed the old one. There is therefore merit in ground one.

After having already determined that the applicable Act is the new Act, it follows therefore that a party aggrieved by a decision of the Minister ought to follow the requisite procedure under the new Act.

Section 98 of the new Act establishes a Mining Appeals Tribunal, clothed with jurisdiction to determine a complaint against the decision of the Minister, which according to ***Section 97(3)*** includes the power to inquire into and make awards and decisions relating to exploration and mining under the new Act. ***Section 97(4)*** of the new Act provides in this regard that:

> ***"(4) A person who is aggrieved with the decision of the Minister may appeal to the Tribunal within thirty days of receipt of the Minister's decision."***

According to ***Section 100*** of the new Act, a person aggrieved with the decision of the Minister may appeal to the High Court within thirty days after receiving the decision.

Applying the aforesaid provisions *in casu*, it is clear from the record that the reliefs sought by the 1st respondent in the lower Court included an order to stay the decision of the Minister and a declaration that the Minister's decision violated and contravened the provisions of ***Section 150(4)*** of the old Act.

Given the provisions of the new Act that we have cited above, it is with no difficulty that we find that the correct procedure that the 1st respondent herein should have followed upon being aware of the news item on ZNBC on 10th August 2015 to the effect that the Minister had given the mine to the community of Kasempa was to seek recourse with the Tribunal within 30 days. If unsatisfied with

the decision of the Tribunal, to appeal to the High Court. We are inclined to agree with the case of ***Polythene Products Zambia Limited v Cyclone Hardware and others***[6] cited by the appellant regarding the time the action was commenced; that the High Court's unlimited jurisdiction does not entitle a party to deviate from procedure prescribed by statute. The High Court therefore ought not to have entertained the 1st respondent's purported appeal, as the same, did not fulfill the requisite legal provisions relating to the prescribed grievance procedure. We therefore find merit in the second ground of appeal.

As regards the third and final ground of appeal, the record indeed shows that the day that the appellant's advocates withdrew from acting for it, that is on 2nd February 2017, the Court adjourned the matter to 28th April, 2017 for ruling. The 1st respondent argues that the appellant's advocates should have advised their client that there were still ongoing proceedings against it. In our view, it was wrong for the lower Court to have proceeded to reserve the matter for a ruling on the same day that it granted leave to the appellant's advocates to withdraw from the record. This had the effect of rendering the appellant unrepresented, thereby denying it an opportunity to engage other lawyers before the matter could be reserved for ruling. For this reason, we find that the third ground of appeal is also meritorious.

In conclusion, we find merit in all three grounds of appeal, and accordingly allow this appeal, with costs to the appellant, to be taxed in default of agreement.

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J. Z. Mulongoti
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE