

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HPC/474

BETWEEN:

KONKOLA COPPER MINES PLC

PLAINTIFF

AND

REPHIDIM MINING AND TECHNICAL SUPPLIES LIMITED 1st DEFENDANT

MIMBULA MINERALS LIMITED

MOXICO RESOURCES LIMITED 2ND DEFENDANT

3RD DEFENDANT



BEFORE HON. MADAM JUSTICE IRENE. Z. MBEWE (In Chambers)

For the Plaintiff: Mr. M. Ndalameta & Mr. A. Dudhia of Messrs Musa Dudhia & Company

For the Defendant: Mr. Z. Muya & Ms. M. Kabwe of Messrs Wilson and Cornhill Legal Practitioners

RULING

Cases Referred to:

- 1) *China Copper Mines Limited v Tikumbe Mining Limited, Attorney-General and Donald's Investment Limited 2017/HP/255*
- 2) *New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR 51*
- 3) *Dominic Mulaisho v Attorney General (2012) ZR 550*

- 4) *Gibson Tembo v Alizwani SCZ Judgment No 6 of 1996*
- 5) *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305*

Legislation and Other Works Referred to:

- 1) *Constitution of Zambia Act No 2 of 2016*
- 2) *High Court of Zambia, Chapter 27 of the Laws of Zambia*
- 3) *Mines and Minerals Development Act No.11 of 2015*
- 4) *The Limitation Act 1939. (English Act)*

This is a Ruling on the Defendants' application for summons to dismiss action for being statute barred and an abuse of court process made pursuant to *Order XI Rule 4 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia and Sections 97 (1) and 100 of the Mines and Minerals Development Act No. 11 of 2015 (hereinafter referred to as "the Act")*.

In the supporting affidavit dated 21st November, 2017 deposed to by Fidelis Chanda the director in the 1st and 2nd Defendant company, the salient facts are that as at 25th January 2007, the Ministry of Mines had issued a small scale licence No. 84441-HQ-SML before the Plaintiff exercised its call option relating to the disputed land. That the Plaintiff had previous business relations with the Defendants where proceeds from the said mine were sold to the

Plaintiff who since 2007 never raised an issue. According to the deponent, the Plaintiff cannot raise the issue of encroachment on their mining area 10 years after the licence in issue was granted. Further, that the Plaintiff has not followed the procedure of lodging its grievance as the Plaintiff should have taken issue with the Ministry of Mines pursuant to the relevant legislation. That the 1st and 3rd Defendant have done nothing to warrant litigation against them.

The opposing affidavit is deposed to by Moses Chibuye the Chief Surveyor in the Plaintiff Company. It is deposed that on 15th December 1999 the Plaintiff acquired all mining rights over Nchanga Copper Mine in Chingola in the Copperbelt Province as part of the privatisation process and included Lot 694/M. According to the Defunct Areas Call Options Agreement, it postponed the transfer to the Plaintiff of inter alia Lot 694/M pending an environmental clean-up by ZCCM. According to the deponent, the said defunct area was fully paid for and the Plaintiff was granted a call option requiring ZCCM to effect registration of the defunct areas in the Plaintiff's name. That the call option notice was made by the Plaintiff on 7th March 2008 and duly

accepted by ZCCM by letter dated 28th January 2009. (Exhibit "MC4-5"). That Lot 694/M has various installations of a 11KV electric power line, 11KV/380 volts step down transformer, access roads, dumps, open pits and a pump station. That issuance of a mining licence to the Defendants number 8441-HQ-SML on 25th January 2007 was never brought to the Plaintiff's attention by the Ministry of Mines and Minerals Development nor has the Director of Mining Cadastre ever informed the Plaintiff the reasons for granting the 1st Defendant the mining licence. Consequently, the Plaintiff was never notified of its right of appeal in this matter.

That in May 2017, the Defendants' purported licence was converted into a large scale mining licence Number 21816-HQ-LML and the Defendants' subsequently moved on site and placed boundary pegs on Lot 694/M, and in November 2017 the Defendants' moved staff and equipment onto Lot 694/M. According to the deponent, the Plaintiff's grievance is with the state of trespass and interference by the Defendants of the Plaintiff's operations, hence it is not an appropriate case to grant an order to dismiss the matter for being statute barred and an abuse of court process.

Both parties filed skeleton arguments and list of authorities. In the skeleton arguments, in summation, it is argued that the Defendants' have applied to dismiss this action for the following reasons:

- 1) *The same is an abuse of court process;*
- 2) *That the cause of action is statute barred; and*
- 3) *That in the alternative, the Defendants will be applying for misjoinder of parties.*

It is contended that the Defendants' right to the Mimbula disputed area is granted by mining licence No.8441-HQ-SML which was later reissued under licence No.21816-HQ-LML. That by the Plaintiff seeking the declaration that the Defendants have no right over the disputed area, is essentially challenging the licence which grants the Defendants the mining rights over the area. Further, that as a matter of law, this Court has jurisdiction to adjudicate on matters brought to it, and that Section 10 of the *High Court Act Chapter 27 of the Laws of Zambia* provides for how the said jurisdiction is to be exercised as regards practice and procedure. It is argued that the proper action was for the Plaintiff to challenge the decision of the

director if it was aggrieved by the decision in respect to the issuance of the mining licence. Counsel for the Defendants' further submitted that Sections 97, 98 and 100 of the *Act* are very clear on the procedure to be followed by a person aggrieved with the decision relating to issuance of a mining licence. In support of the proposition on challenging the jurisdiction of the High Court, the case of **China Copper Mines Limited v Tikumbe Mining Limited, Attorney-General and Donald's Investment Limited 2017/HP/255**¹ was called in aid. That in a plethora of authorities, the Court has stated that the mode of commencement is governed by the provisions of law and this proposition was supported by reference to the case of **New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR 51**².

In respect to the action being statute barred, it is submitted that the cause of action arose when the 1st Defendant was issued with a mining licence on the alleged Plaintiff's mining area and that this matter was commenced ten (10) years later which is against the legal principles on limitation of actions. In aid of this argument, the case of **Dominic Mulaisho v Attorney General (2012) ZR 550**³

was cited. I was further drawn to Section 2 (i) (a) of the *Limitation of Actions Act, 1939* where it is argued that the Plaintiff's allegation falls within the ambit of the law of tort and accordingly, the same cannot be brought after the expiry of six years. Based on the foregoing, it was contended that this action is statute barred and thus this Court lacks jurisdiction to adjudicate upon it.

In the Plaintiff's skeleton arguments, it is argued that the case before Court relates to trespass and that no consent for occupation of the Plaintiff's land has been obtained by the Defendants. That the dispute is between the owner and occupier and that the appeal in the *Act* can only be used for a claim which is made by the licence holder against the Ministry of Mines. In respect to ownership rights and possession of Lot 694/M, the case of **Gibson Tembo v Alizwani SCZ Judgment No 6 of 1996⁴** was cited. On the applicability of the *Act* to the law of trespass, the Court's attention was drawn to Section 52 of the *Act*. In terms of the action for trespass being statute barred, the Plaintiff cited the case of **Nykredit Mortgage Bank Plc v Edward Erdman Group Limited (No 2) [1998] 1 ALL E R 305⁵**. In terms of the preconditions

necessary for a statutory appeal process under the Act, the Plaintiff called in aid the case of **Musunka Silungwe v Zambia Institute of Architects Appeal No 214 of 2014**.

At the hearing of the application both Counsels made oral submissions. Counsel for the Defendant Mr. Muya reiterated the arguments in the skeleton arguments that the Defendants have a mining licence and their interest is in the mining licence for the area of which they were granted and their mining rights and not surface rights. On the assertion that the Plaintiff owns Lot 694/M, it is contended that a plot number or title to land relates to surface rights and one of the conditions is that it exempts mineral rights. Counsel argued that the installation of power lines over Lot 694/M was done after the Defendant had already acquired the mining rights and that the Plaintiff had been buying copper from the Defendant which was being mined from the said Lot 694/M. Counsel submitted that the Defendants are not asserting any surface rights in relation to Lot 694/M but their contention is that they obtained a mining licence which accrued rights. It is contended that the issue of deciding under what circumstances a

consent can be given or not for a mining right is a province of the Act. Counsel argued that this Court has no jurisdiction to hear matters relating to mining rights and therefore the proceedings are wrongly commenced.

In response, Counsel for the Plaintiff Mr. Dudhia, submitted that the issue before Court is one of the tort of trespass on land and not mining licences. Counsel argued that a certificate of title entitles the holder, to the land and not to surface rights, and that prior consent is required from the holder of land before a person can mine on such land. Counsel argued that there is no evidence on record of any application for consent and that the Plaintiff has had the mining licence under the disputed area since 2000. Counsel submitted that only the Court can determine when a land owner can refuse a mining right holder to come on to the land. He further urged the Court to take judicial notice that there is no Mining Appeals Tribunal and that if the Court is agreeable with the position that this Court has no jurisdiction to hear this matter, then the Court will be punishing the Plaintiff. In the alternative, it was prayed that if the Court is inclined to hold that the statutory appeal

process applies herein, then the ex parte injunction should be left in place and proceedings stayed until completion of the statutory appeal.

Mr. Ndalameta, Co-Counsel for the Plaintiff, submitted that there is evidence in the affidavit in support that the Defendants are not eligible to hold a mining licence and argued that the Act is not applicable in the instant case. Counsel submitted that it is not without significance that the Defendants have not argued that an action for trespass must be launched under the mining legislation.

In reply, Counsel for the Plaintiff submitted that in as much as the Defendants may claim to own the surface rights, the location of their surface rights and licensed area for the Defendant are not in the same area. Counsel argued that the surface rights do not relate to the disputed area and that once the issues concerning mining rights are settled in line with the Act, only then can the issue of trespass be determined. Further that the Plaintiff has not attached the diagram or title deed in these proceedings. Counsel submitted that asking the Court to proceed to hear this action in the absence of a Mining Appeals Tribunal would be requesting the Court to

extend its hand too far as the Act ought to be administered independently. He stated that the issues raised herein clearly relate to a dispute over mining rights, and that the Plaintiff's surface rights are not close to the underground rights that have been granted under the Act. It was prayed that the action be dismissed with costs.

I have carefully considered the affidavit evidence, skeleton arguments, list of authorities, as well as the written and oral submissions by Counsel on behalf of the respective parties in support of their respective rival arguments, of which I am indebted.

The issues for determination in this application are as follows:

- (1) whether the Plaintiff's action is statute barred.
- (2) whether these proceedings are an abuse of court process.

The Defendants' application is made pursuant to *Order X1 Rule High Court Rules, Cap 27 of the Laws of Zambia* and section 97 and 100 of the *Mines and Minerals Development Act*.

Order X1 Rule 4 (1) High Court Rules, Cap 27 of the Laws of Zambia states as follows:

"Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction."

The Court has jurisdiction to determine the matter.

By way of background, the Plaintiff commenced an action by Writ of Summons filed into Court on 10th November, 2017 and as amended on 10th January 2018, claiming for the following reliefs:

- (1) *A declaration that the Defendants have no right to enter upon Lot 694/M and the remaining Extent of Lot 564/M or the land in Nchanga Mine area without the prior consent of the Plaintiff.*
- (2) *A declaration that the Plaintiff has reasonable grounds to withhold its consent from the Defendants in respect of access to Lot 694/M and the Remaining Extent of Lot 564/M or the land in Nchanga Mine area.*

- (3) *An injunction to restrain the Defendants whether by themselves or by their servants or agents or otherwise howsoever from entering on or crossing the Plaintiff's said surface and mining rights or carrying on any activities thereon.*
- (4) *Damages for interference with the Plaintiff's operations.*
- (5) *Damages for trespass to the Plaintiff's land Lot 694/M and the Remaining Extent of Lot 564/M or the land in Nchanga Mine Area and facilities.*
- (6) *Further or other relief.*
- (7) *Costs of and incidental to this action.*

I shall first set out the procedural requirements under the Act as stipulated in various sections, and of relevance are sections 16, 52, 55, 97, 98 and 100 of the Act which provide as follows:

"16. An application for a mining licence over an area subject to another mining right shall apply for consent from the holder of the mining right which consent shall not be unreasonably withheld.

"52. A holder of a mining right or mineral processing licence shall not exercise any rights under this Act -

(a) without the written consent of the owner or legal occupier of the land or the duly authorised agent appropriate authority, upon any land

Section 55 of the Act provides as follows:

"55. Subject to subsection (2), a holder of a mining right who requires exclusive or other use of the whole or any portion of the exploration or mining area for the purpose of the mining right may, in accordance with the laws relating to such acquisition, acquire a lease of the land or other right to use the land upon such terms as may be agreed between the holder and the owner or occupier of land."

Section 97 of the Act provides as follows:

" (1) A person who is aggrieved by a decision of the Director of Mining Cadastre, Director of Mines Safety, Director of Mines, Director of Geological Survey or the Committee under this Act

may, within thirty days of receipt of the decision, appeal to the Minister in the prescribed manner and form.

(2) The Minister shall determine an appeal under subsection (1) in accordance with this Act and the circumstances of the case.

(3) A determination of the Minister under this section may include such directions to the Director of Mining Cadastre, Director of Mines Safety, Director of Mines, Director of Geographical Survey or the Committee as the Minister considers appropriate for the disposal of the matter, and the Director concerned or the Committee shall give effect to the direction.

(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."

Section 98 (3) of the Act states the scope of jurisdiction of the Mining Appeals Tribunal as follows:

"(3) The Tribunal has jurisdiction to -

- (a) *inquire into and make awards and decisions in any dispute relating to exploration, gold panning and mining under this Act;*
- (b) *to inquire into and make awards and decisions in any dispute relating to exploration, gold panning and mining under this Act.*
- (c) *generally inquire into and adjudicate upon any matter affecting gold panning, the mining or non mining rights and obligations of any person or the Government under this Act except for matters under Part VII which shall be heard and determined by the Tax Appeals Tribunal.*
- (d) *perform such other functions as may be prescribed under this Act or any other written law.*

Section 100 of the Act provides that:

“A person aggrieved with a decision of the Tribunal may, within thirty days of receiving the decision, appeal to the high court.”

Having set out the powers of the relevant designated functionaries and the Mining Appeals Tribunal, it is imperative to determine

whether the Plaintiff's claims fall within the scope of issues that require to be resolved under the Act. The Plaintiff argues that the cause of action arises from trespass and is between an owner, occupier and trespasser and any mining right requires the consent of the Plaintiff. A perusal of the pleadings shows that the reliefs the Plaintiff seek as endorsed in the Writ of Summons arise from issues emanating from the respective large scale mining licences. Why do I say so? Firstly, one of the claims relate to damages for trespass. The Plaintiff argues that it is the owner of the disputed land and demonstrated this through the Sales and Purchase Agreement and letters from ZCCM on the Defunct Areas Agreement and correspondence showing that the call option by the Plaintiff had been exercised, and accepted by ZCCM in a letter dated 28th January 2009 (Exhibit "MC5"). Conversely, the Defendants contend that they too have mining rights emanating from the large scale mining licence. The Plaintiff's cause of action is asserting that the Defendants have trespassed on the Plaintiff's land on the basis that there was no prior consent of the Plaintiff which consent is a requirement under the Act. In my considered view, both the issue of granting and withholding consent falls within the ambit of the

Act, specifically section 16 which is applicable pre-licensing whilst for post licensing, it is governed by section 55 and 56 which requires the prior consent of the holder of the mining right before acquisition of use of land by holder of a mining right. I opine that the requirement for prior consent is premised on the rights and obligations attached to the large scale mining licence issued to the parties herein. I take a similar position in respect to the Plaintiff's claim for interference of the Plaintiff's operations by the Defendants on the

Disputed land. I am of the settled mind that this falls within the matters contemplated under section 16, 52, 56 and 97 of the Act. In terms of the claim relating to a declaratory order, the Plaintiff argues that it has reasonable grounds to withhold its consent from the Defendants in respect of access to Lot 694/M. Equally, it is my considered view that the Plaintiff's claim falls under the purview of the Act, and consequently, this Court is restrained from dealing with the matter until the statutory procedures and processes are exhausted under the Act. As to the Plaintiff's argument in respect to the lack of prior notification of the Plaintiff by the Ministry

responsible for mines and minerals development, I opine that this too falls within the administrative procedures and processes stipulated under the Act.

On the issue of ownership rights and possession of Lot 694/M, Counsel for the Plaintiff argues that it is entitled to maintain this action as a purchaser in possession, legal or equitable and relied on the case of **Gibson Tembo v Alwina SCZ Judgment No 6 of 1996⁴**.

In my considered view, any possession whether legal or equitable arises as a consequence of the mining rights granted to both parties, and resolution of these conflicting rights are within the ambit of the Act.

It is trite that where there exists a mechanism to deal with a specific issue or dispute by a designated body or functionary such as under the Act, the jurisdiction of this Court should not be invoked until such mechanism has been exhausted. I am of the settled mind that this is one instance where the Court should exercise restraint as this Court at this juncture has no jurisdiction to deal with the matters herein. The Court cannot circumvent and change the established practice and procedure in the Act. For

reasons stated aforesaid, I am of the view that the Plaintiff's action constitutes an abuse of court process.

Counsel for the Defendants' prayed that the matter be dismissed as it is statute barred and relied on Section 2 of the *Limitation Act*, United Kingdom. In view of my earlier finding, I shall not delve into this aspect for the simple reason that this Court has no jurisdiction to determine any matter until the statutory procedures and processes are dealt with under the Act, only then can the matter come to the High Court by way of appeal.

Counsel for the Plaintiff argues that if the Court is inclined to refer the matter to the Mining Appeals Tribunal, the ex parte injunction should be maintained pending the determination of the matter as the Mining Appeals Tribunal has not yet been constituted. Counsel submits that the appeal process in the Act does not give any body or person in the Ministry responsible for mines the power to grant interim measures of protection while the appeal process is continuing or pending. I opine that irrespective of practical difficulties as to whether or not the Mining Appeals Tribunal is functional, this is no justification of circumventing the statutory

procedures and processes as laid out in the Act. In this respect, I am guided by the Supreme Court in the case of **New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR 51** where it was held as follows:

"It is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally determined by relevant statute."

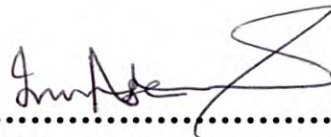
I am further mindful that this Court retains wide jurisdiction pursuant to Article 119 and 134 of the *Constitution of Zambia Act No 2 of 2016* and Section 10 of the *High Court Act, Cap 27 of the Laws of Zambia*. However, I opine that such jurisdiction is available where parties have exhausted the statutory processes and procedures set out in the Act. Where that is not the case, this Court shall not have the jurisdiction to grant the remedies sought. In view of my earlier finding that this Court has no jurisdiction to determine the matter, I forthwith discharge the ex parte injunction granted on the 10th November, 2017 with costs to the Defendants.

Consequently, the committal proceedings against the Defendants directors are dismissed with costs to the Defendant to be taxed in default of agreement.

In sum, the Defendants' application succeeds. For reasons stated aforesaid, the sum result is that the Plaintiff's action stands dismissed.

For the avoidance of doubt, all costs in the matter are awarded to the Defendants to be taxed in default of agreement.

Dated at Lusaka this 23rd day of April, 2018.



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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE