IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 83/2017**

HOLDEN AT LUSAKA **CAZ/08/131/2017**

(Civil Jurisdiction)

B E T W E E N:

SANHE MINING ZAMBIA LIMITED **APPELLANT**

AND

ANDREW MAZIMBA **1ST RESPONDENT**

TIRUMALA BALAJI (Z) LIMITED **2ND RESPONDENT**

CORAM: *Chisanga, JP, Chishimba, Kondolo, SC, JJA*

This 11th day of September, 2017 and 12th day of June 2018

For the Appellants: *Mr. G. Nyirongo of Messrs Nyirongo and Company*
For 1st and 2nd Respondents: *Mr. A. K. Phiri of Messrs S. M. Munsanje & Company*

JUDGMENT

CHISANGA, JP delivered the Judgment of the Court

Cases referred to

1. ***Corpus Legal Practitioners and Mwanandami Holdings Limited (SCZ Judgment No. 50 of 2014)***
2. ***New Plast Industries vs The Commissioner of Lands and The Attorney General (2001) ZR 51***
3. ***Mazoka and Others vs Mwanawasa (2005) ZR 138***
4. ***Indo Zambia Bank Ltd vs Mushankwa Muhanga (2009) ZR 266***
5. ***Reserve Bank of India vs Peerless Co. AIR (1987) SC 1023***
6. ***Anderson vs Ryan (1985) 2 ALL ER 355, at P 359***
7. ***Pepper vs Hart (1993) 1 ALL ER 42 P 50***
8. ***Barclays Bank of Zambia PLC vs Zambia Union of Financial Institutions and allied Worker (2007) ZR 106***

9. ***Fitzgerald vs Hall Russell and Co. Ltd (1970) AC 984 P1000***
10. ***Bank of Zambia vs Chungu & Others (2008) Vol 1 ZR 81***
11. ***Barrows vs Rhodes (1899) 1QB P 821***

Legislation referred to:

1. **The Mines and Minerals Development Act No. 11 of the 2015**
2. **14A of the Rules of the Supreme Court 1999 Edition**
3. **The Employment Act CAP 268 of the Laws of Zambia**

Other Works referred to:

1. **Justice G. P. Singh, Principles of Statutory Interpretation 12th Edition, 2010 lexus nexus**
2. **Benion on Statutory Interpretation Fifth Edition 2008, Lexus Nexus At P 745**

This appeal lies against the Ruling of the Court below, rendered on the 15th May 2017. Thereby, the learned judge dismissed the entire action for want of jurisdiction. The appellant, whose action was dismissed by the learned judge was dissatisfied, and now appeals against the ruling.

The background is that the appellant commenced the action against the respondents, claiming the following reliefs:

(1) Damages for nuisance and trespass in the plaintiff's mining area at Kampumba – Kapiri Mposhi as covered by Mining Licence Number 8164 -HQ-AML.

(2) An interlocutory and permanent injunction order restraining the 1st and 2nd defendants whether by themselves or agents from ever entering

into the plaintiff's mining area and or in any way whatsoever interfering with their mining operations.

(3) A declaratory order that by virtue of the said 2nd Defendant's Small Scale Mining Licence Number 8297-Hq AML having expired on 8th May 2015, the said 1st and 2nd Defendants whether by themselves or agents have no legal right to be in Kampumba Mining area or at all.

(4) A declaratory order that in view of the previous and persistent nuisance and trespass on the plaintiff's mining area by the 1st and 2nd defendants the 3rd defendant should never issue any mining right to the 1st and 2nd Defendants anywhere in Kampumba area or at all.

(5) Any other reliefs.

The salient facts on which these claims were premised, as averred in the statement of claim are that by a judgment dated 13th July 2011, the High Court at Kitwe, under Cause Number 2006/HK/283 adjudged inter alia:

1. That the plaintiff was holder of Small Scale Mining Licence Number 8164 – HQ – SML (SML 214) in respect of 415 hectres in Kampumba area, and also that the 2nd defendant was holder of Small Scale Mining Licence Number 8297 – HQ – SML (SML 234) in respect of 8 hectres in the said Kampumba area adjacent to the plaintiff's mine.

2. That the 8 hectres pertaining to Small Scale licence Number 234 as granted to the 2nd defendant were *"a three (3) sided polygon"* and or a triangle.

3. The plaintiff and the 1st and 2nd defendants were ordered to stick to their designated mining area.

It was averred that a search revealed that the 2nd defendant's small scale mining licence was issued to them on 9th May 2005 and expired on 8th May 2015. The license had not been renewed. Thus, the plaintiffs have no licence or at all to mine any minerals in Kampumba area – Kapiri Mposhi. Despite this, the 3rd defendant, who is Attorney General, has consistently assisted the 1st and 2rd defendants with mining surveyors and engineers to go to the plaintiff's Kampumba mining area and carry out survey verification exercises with the resultant effect of confusion for the 1st defendant.

It was further averred that on the 7th October 2015, the Director of Mines, who knew fully well that the 2nd defendant's mining licence number 8297 – HR – SML expired on 8th May 2015, went ahead to summon the plaintiff, and the 1st and 2nd defendants to meet at the plaintiff's Kampumba mine so that new beacons could be put in place in line with the new automated bulk conversion system. The Decision of the Director of Mines was however stayed by an order for judicial review by the Kabwe High Court under Cause Number 2015/HK/84. The order was in force at the time the statement of claim was being settled.

Additionally, or about 16th October 2015, the High Court at Kitwe, under cause Number 2006/HK/283 issued an order for leave to commence contempt of court proceedings against the 1st and 2nd defendants herein for their continued interference with the plaintiff's mining operations at Kampumba Mine in Kapiri Mposhi despite both the 1st and 2nd defendants not having any mining licence or at all in Kampumba area.

Further, on or about 31st January 2017, the High Court at Kitwe, under Cause Number 2006/HK/283, had granted the 2nd defendant a writ of possession wherein it had been ordered that the 2nd defendant takes possession of 8 hectares of the Kampumba Mine in accordance with the bulk automated cadastral regulations notwithstanding the glaring fact that both the 1st and 2nd defendants do not have any mining licence in Kampumba area. The 1st and 2nd defendants have continued to be a nuisance and trespassers on the plaintiff's Kampumba Mine as covered by their Small Scale Mining Licence Number 8164-HQ-SML 9SML-214) in respect of 415 hectares.

It was further averred that the plaintiff has suffered loss and damage in that as a result of the continuous nuisance and trespass created by the 1st and 2nd defendants, the plaintiffs have had to continually disrupt and halt their mining operations to attend to meetings, summonses by Ministry of Mines officials, court attendances and police stations all in a bid to bring order and sanity to their Kampumba Mine.

As a direct result of the 1st and 2nd defendants' conduct, the plaintiff had lost out on many potential investors who were scared by the confusion created by the 1st defendant especially. As a result the plaintiff's mine has not expanded to its desired standards due to constant and persistent disruptions.

Upon being served with the writ of summons and statement of claim, the 1st and 2nd defendants entered conditional appearance. They also filed summons to dispose of the matter on points of law pursuant to **Section 98(3) and 100 of the Mines and Minerals Development Act No. 11 of 2015**, and Order **14A of the Rules of the Supreme Court.**

The point of law on which it was proposed to dispose of the case was whether or not the action was properly before the honourable court and whether the court had jurisdiction to entertain the matter as a court of first instance when the same was a dispute relating to mining or non-mining rights covered in **Section 98(3) of the Mines and Minerals Development Act No. 11 of 2015** when under Section 100 of that Act, the High Court was an appellate court.

Upon hearing the application, the judge in the court below was persuaded that she possessed no jurisdiction to hear and determine the matter.

Dissatisfied with this decision, the appellant has appealed on the following grounds:

1. The trial court erred at law when she found that the Mining Appeals Tribunal as created under Section (1) of the Mines and Minerals

Development Act, No. 11 of 2015 was a court of first instance in relation to mining matters when in fact not.

2. The trial court erred at law and fact when it found that notwithstanding the provisions of Section 96 and 97 of the Mines and Minerals Development Act, No. 11 of 2015 and regardless of the fact that the Plaintiff had no material or at all emanating from the Minister, Committee or any of the Directors or the Mining Appeals Tribunal upon which an appeal could be anchored, the entire Cause Number 2017/HK/143 was improperly before the court as couched.

Before us, both parties have filed heads of argument as required. On behalf of the appellant, it is argued that the decision of the court below, that **Section 98(3) of the Act** widens the jurisdiction of the Tribunal to that of a court of first instance is against the law. This is because **Part VIII of Act No. 11 of 2015** deals with 'APPEALS'. According to section 96, an appeal can lie against the decision of *"....the minister, the committee, or any of the Directors or an authorised officer....."* Section 97 spells out the hierarchy of the appellate process. According to subsection (1) an appeal can lie to the Minister against the decision of the Director of Mining Cadastre, Director of Mines Safety, Director of Mines, Director of Geological Survey or the Committee..." Subsection (4) provides that *"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 100 provides that *"a person aggrieved with a decision of the*

Tribunal may, within thirty days of receiving the decision, appeal to the High Court". Section 101 marks the end of the appeals part.

It is contended, that nowhere in part VIII of Act No. 11 of 2015 does it provide that the Mining Appeals Tribunal shall operate as a Court of First Instance. It is argued that according to section 97(4) an appeal to the Tribunal can only arise from a Decision of the Minister. In this case, the appellant had no decision from the Minister on which to found an appeal. It is submitted that the lower court's finding that the issues before it should have been brought by way of appeal is wrong at law.

The appellant's alternative argument is that the claims on the writ of summons and statement of claim included damages for nuisance and trespass on the plaintiff's mining area, an interlocutory and permanent injunction.

Reference is made to the Decision in ***Corpus Legal Practitioners and Mwanandami Holdings Limited***[1], where the Supreme Court reportedly said:

> ***"From the above, it is clear that the correct mode of commencing proceedings, seeking an order for the removal of a caveat, is by originating summons, however, we must hasten to mention here that the Rural Development Corporation Limited case is distinguishable from the present case in the sense that the relief sought by the Appellant for the removal of the caveat in this case, is not the only claim, which the Respondent is seeking in the court below. In our view, the position of the law, as stated in the Rural Development Corporation Limited case envisages a situation and is only applicable where the sole claim in an action is for an order for removal of a caveat."***

It is then argued that the claims for damages for nuisance and trespass and an interlocutory injunction could not have been commenced by way of an appeal to the Mining Appeals Tribunal. Additionally, the expiry of the 2nd Respondent's Small Scale Mining Licence No. 8297 – HQ – SML on 8th May 2015 is not the only claim which the appellant advanced for determination. It was therefore not proper for the court to dismiss the entire case.

The 1st and 2nd Respondents' opposing arguments are that the lower court was on firm ground to dismiss the appellant's entire action. It is argued that the appellant's action in the court below was centered on a dispute relating to the mining rights of the plaintiff on the one hand, and the 1st and 2nd Respondents' on the other.

When the Act in question came into force, a Mining Appeals Tribunal was established whose mandate it is to make decisions in any dispute relating to mining under the Act and to adjudicate any matter affecting the mining or non-mining rights of any person including the Government.

It is argued that the jurisdiction of the Mining Appeals Tribunal is two-fold:

> appellate in relation to appeals from decisions of the Minister as per section 97(4) of the Act, and original as per section 98 (3) of the Act.

The court below was therefore right to hold that the jurisdiction of the Tribunal is not limited to hearing appeals only. It was also on firm ground to hold that the words *inquire, make awards and decisions* and *adjudicate* do not import

appellate jurisdiction, but indicate a wide scope of jurisdiction. As the dispute between the parties related to mining and non-mining rights, the Mining Appeals Tribunal was the forum of first instance to hear and determine the dispute.

It is submitted that by virtue of Section 100 of the Act, no action relating to matters captured by Section 98(3) may be brought to the High Court as a court of first instance, but by way of Appeal from the Mining Appeals Tribunal.

These contentions are grounded on ***New Plast Industries vs The Commissioner of Lands and The Attorney General***[2]. It is argued that the mode of commencement goes to jurisdiction.

As regards the appellant's alternative argument, it is argued that the *Corpus Legal Practitioner's case* is distinguishable from the present case, in that there is statutory provision in section 100 of the Act requiring that matters relating to mining and non-mining rights go before the High Court by way of Appeal. There is therefore no choice to a litigant but to comply and commence the action in that manner.

At the hearing, Mr. Nyirongo, appearing for the appellant, relied on the heads of argument and augmented them by arguing that Part 8 of the Mines and Minerals Development Act of 2015 is clear on appeals, and deals exclusively with appeals. The Appellant had nothing to appeal about. The claim cannot be dealt with by the officers who sit on the Tribunal as envisaged by section 97.

On his part, Mr. Phiri, appearing for the respondents placed reliance on the heads of argument.

We have considered the proceedings in the record, the ruling appealed against, and the arguments of the parties. The issue that arose before the court below, was the import of **Sections 96 to 98 of the Mines and Minerals Development Act No. 11 of 2015**: Whether it confided jurisdiction to hear and determine all disputes in the Mines Appeals Tribunal, thereby stripping the High Court of jurisdiction to adjudicate on the matter before it.

Before us, the said issue falls for determination, as this appeal agitates the lower court's interpretation of the stated sections. It is settled in this jurisdiction that the literal rule of interpretation of statutory provisions will be applied, unless it leads to absurdity. See ***Mazoka and Others vs Manawasa***[3] and ***Indo Zambia Bank Ltd vs Mushankwa Muhanga***.

It should be borne in mind that the court is obligated to promote the object of the enactment. If a literal construction leads to absurdity, the purposive approach should be employed as it will assist in interpreting the enactment. We find the statement in ***Reserve Bank of India vs Peerless***[5] *apt.* It was stated as follows:

> ***"The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.***

With this knowledge, the statute must be read, first as a whole and then section-by-section, clause-by-clause, phrase-by-phrase and word-by-word. If a statute is looked at in the context of its enactment with the glasses of the makers, the intention of the makers appears apparent on the face of the law. It is settled law that when there is ambiguity in the provisions of the statute, the courts must lean to an interpretation which is consistent with the object that the legislature has intended."

It will be recalled that the literal rule of interpretation postulates that the words of a statute are to be understood in their natural, ordinary and popular sense, and construed according to their grammatical meaning. It is only when the legislative intent is not clear, that the other rules of interpretation, such as the mischief and purposive rule, will be resorted to.

Justice G. P. Singh, in **PRINCIPLES OF STATUTORY INTERPRETATION, 12th Edition, 2010,** states, at page 124:

".....The rule which is also known as the 'purposive construction' or 'mischief rule' enables consideration of four matters in construing an Act:

(i) What was the law before the making of the Act;

(ii) What was the mischief or defect for which the law did not provide;

(iii) What is the remedy that the Act has provided; and

(iv) What is the reason for the remedy.

The rule then directs that the courts must adapt that construction which 'shall suppress the mischief and advance the remedy.'

In ***Anderson vs Ryan***[6], Lord Roskill said:

"Statutes should be given what has become known as a purposive construction, that is to say that the courts should identify the mischief which existed before

passing of the statute and then if more than one construction is possible, favour that which will eliminate the mischief so identified."

In ***Pepper vs Hart***[7], Lord Griffith said:

"The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

The appellant in this appeal argues that **Part VIII of Act No. 11 of 2015** deals with 'APPEALS'. Section 96 stipulates decisions against which an appeal will lie. The respondents on the other hand contend that the jurisdiction of the Mining Appeals Tribunal is two-fold. The first is in relation to appeals from decisions, while the second jurisdiction is to inquire into, adjudicate and make awards and decisions in disputes.

It is correct to assert, as done by learned counsel for the appellant that the heading must be taken into account. In ***Barclays Bank Zambia PLC vs Zambia Union of Financial Institutions and allied Workers***[8], the Supreme Court confined **Section 26B of the Employment Act** to oral contracts, as that was the heading of the part in which Section 26B is. The heading was determinative of the ambit of the Section.

According to **BENION ON STATUTORY INTERPRETATION fifth Edition 2008, LEXIS NEXIS at P 745**,

A heading written in an Act, whether contained in the body of the Act or a Schedule is part of the Act. It may be considered in construing any provisions

of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which is it attached.

Benion goes on to state that nevertheless, a heading is of very limited use in interpretation because of its necessarily brief and inaccurate nature. Any heading can only be an approximation, and may not cover all the detailed matters falling within the provision to which it is attached.

Where a heading differs from the material it describes, this puts the court on enquiry. However, it is most unlikely to be right to allow the plain literal meaning of the words to be overridden purely by reason of a heading - See ***Fitzgerald vs Hall Russell and Co. Ltd***[9].

With the above in mind, we turn to the relevant provisions. **PART VIII of Act No. 11 of 2015** is headed: "APPEALS."

Section 96 enacts the following:

"Whenever the Minister, the committee, any of the Directors or an authorized officer makes a decision against which an appeal lies by virtue of a provision of this Part, the holder or applicant affected by the decision shall be informed of the decision and the reasons for the decision by notice, in writing, and the notice shall inform the person notified of that person's right of appeal.

Section 97 reads as follows:

97 (1) A person who is aggrieved by a decision of the Director of Mining Cadstre, 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 Geological 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 directions.

(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 states:

98 (1) There is established the Mining Appeals Tribunal.

(2) The tribunal shall consist of five members appointed by the Minister as follows:

(a) The chairperson, who is a legal practitioner of at least ten years experience

(b) The vice-chairperson, who is a legal practitioner of at least ten years legal experience; and

(c) Three other members who are experts with not less than eight years experience and knowledge in matters relevant to mining of licensing under this Act

(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) inquire into, and make awards and decisions relating to, any dispute of compensation to be paid under this Act;

(c) generally to 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; and

(d) perform such other functions as may be prescribed under this Act or any other written law.

It will be noted that the Mining Appeals Tribunals has jurisdiction over disputes relating to exploration, gold panning and mining. It also has jurisdiction to enquire into **any** matter affecting gold panning, mining or non-mining rights of any person or the Government under the Act. It equally has jurisdiction to determine disputes relating to compensation.

The mining rights that may be granted under the Act are an exploration licence and a mining licence. Non-mining rights that may be granted are, a mining processing licence, a mineral trading permit, a mineral import permit, a mineral export permit, and a gold panning certificate.

Section 12(1) of the Act stipulates as follows:

12(1) a person shall not explore for minerals or carry on mining operations, mineral processing operations or gold panning except under the authority, of a mining right, mineral processing license or gold panning certificate granted under this Act.

Subsection (3) provides:

12 (3). A person who contravenes subsection (1) or (2) commits an offence and is liable, upon conviction in:

(a) in the case of an individual, a partnership or co-operative, a fine not exceeding seven thousand penalty units or to imprisonment for a term not exceeding seven years or to both; or

(b) in the case of a body corporate, to a fine of five million penalty units.

As correctly submitted on behalf of the respondents, the mode of commencement does not depend on the relief sought, but is generally provided for by statute. See ***Bank of Zambia vs Chungu & Others***[10] and ***New Plast Industries vs The Commissioner of Lands and The Attorney General***[2].

The provisions of section 98 are under the part headed '*appeals*'. We have cogitated on the question whether the heading confines the provisions in that part to appeals. It is of note that the Mining Appeals Tribunal may perform such other functions as may be prescribed under the Act or any other written law. This provision negates the proposition that the Mining Appeals Tribunal is to be confined to the hearing of Appeals only. The heading does not conclusively lead to the deduction that the Tribunal is confined to the hearing of appeals, as argued by the learned counsel for the appellant. It is indisputable however that presently, the disputes that the Tribunal is to inquire into and determine are those that affect mining or non-mining rights. It will be remembered that a person or an entity may be granted a mining or non-mining right. The appellant was and appears to be holder of a Small Scale Mining Licence. The 2nd respondent was holder of a Small Scale Mining Licence, and the areas over which the two companies had these small scale mining rights were adjacent to each other.

According to the appellant, the 2nd respondent's mining licence has expired. It is the appellant's assertion that as a result, the respondents have no business in the area, and have in fact trespassed and have been a continuous nuisance.

There is no defence to these averments, as the defendant filed a conditional appearance, and took out an application to dispose of the matter on a point of law. As stated in ***Barrows vs Rhodes***[11], a party who raises such a plea as has been advanced by the defendant is, for purposes of the argument, taken to have admitted all the facts alleged in the pleading to which he objects.

In our considered view, the disputes that the Tribunal is empowered to resolve are those that relate to mining and non-mining rights, inter alia. A disputant therefore must have been granted a mining right, or a non-mining right or may have applied for a mining or non-mining right. The disputes that arise must relate to applications for the mining or non-mining rights, and the implementation of the rights, and all intermediate matters that arise from the application for the grant of the rights, as well as the implementation of those rights.

In the present case, it is alleged that the Director of Mines has been involved in the surveying of the appellant's mine, and has involved the respondents, who he knows do not possess a small scale mining licence. It will be recalled that it is contrary to the law for anyone to explore for minerals or carry on mining operations, mineral processing operations or gold panning except under the authority of a mining right, mineral processing licence or gold panning certificate granted under the Act. It should also be noted that contravention of this provision is an offence. The offence would be tried by a court seized with

jurisdiction to try such cases, and not the Tribunal, as it possesses no jurisdiction to try the offence.

As the respondents did not file a defence, the averments in the statement of claim, for purposes of the application before the lower court, stood unrefuted. These were that the respondents have no small scale mining licence, and this was known to the Director of Mines. That being the case, the respondents appeared to be mere busy bodies and trespassers. Our reading of the Act does not lead to the conclusion that the Tribunal is endowed with jurisdiction to try cases of trespass and render judgment accordingly. It cannot enjoin a trespasser from continuing to trespass on another's licenced area. Therefore, the High Court has jurisdiction to try cases in which trespass has been alleged, against a person or entity who or which has no mining right or non-mining right over the area in question, and who trespasses on or becomes a nuisance to a small scale mining licence holder. The learned judge therefore erred in holding that she had no jurisdiction to try the case. This is because it is not in all matters that the Tribunal has jurisdiction. Its jurisdiction is confined to disputes that relate to matters we have highlighted above. It was not shown, on the evidence before learned judge that the respondents had a mining or non-mining right concerning which a dispute had arisen with the appellant.

We find merit in this appeal, and set aside the High Court's Ruling. We remit the case to the High Court, to be assigned to another judge. The appellant will have the costs of this appeal.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE