

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 4 OF 2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

TEAL MINERALS BARBADOS INCORPORATED

APPELLANT

AND

ZAMBIA REVENUE AUTHORITY

RESPONDENT

Coram : Musonda DCJ, Hamaundu and Mutuna JJS

On 7th June 2022 and 17th August 2022

For the Appellant : Mr. S. Chisenga and Mrs. M. Namwila-Mwala of
Corpus Legal Practitioners

For the Respondent : Mr. M. Mukwasa, Director Legal Services, ZRA
and Mrs. S. M. Chanda, Manager Legal
Services, ZRA

J U D G M E N T

Mutuna JS delivered the judgment of the court.

Cases referred to:

- 1) *R v Board of Inland Revenue, ex parte MFKK Underwriting Agencies Limited and others* (1990) 1 ALL ER 91
- 2) *R v Re Preston* (1985) AC 835
- 3) *Salomon v Salomon and Company Ltd* (1897) AC 22
- 4) *Macaura v Northern Assurance Company Limited* (1925) AC 619
- 5) *Christopher James Thorne v Christopher Mulenga and two others* (2010) 1 ZR 221

- 6) **Associated Chemicals Limited v Hill and Delamin Zambia Limited and Ellis and Co. (Sued as a law firm) SCZ judgment number 2 of 1998**
- 7) **Minister of Information and Broadcasting Services and Attorney General v Fanwell Chembo (Suing on his own behalf and on behalf of other members of the Media Institute of Southern Africa) and others SCZ judgment number 11 of 2007**
- 8) **Zambia Revenue Authority v Balmoral Farms Limited SCZ judgment number 34 of 2019**
- 9) **Zambia Revenue Authority v Professional Insurance Corporation (Z) Limited Appeal, number 34 of 2017**
- 10) **John Paul Kasengele and others v Zambia National Commercial Bank, SCZ judgment number 11 of 2000**
- 11) **Moses Chaonga v ZESCO Recreation Club, Itezhi Tezhi, Appeal number 16 of 2013**

Legislation referred to:

- 1) **Mines and Minerals Development Act, number 11 of 2015**
- 2) **Property Transfer Tax Act, Cap 340, as amended by Act number 16 of 2015**
- 3) **Income Tax Act, Cap 323**
- 4) **Companies Act, number 10 of 2017**

Works referred to:

- 1) **Black's Law Dictionary, by Bryan A. Gardner, West Group, USA**
- 2) **The Platform For Collaboration On Tax Discussion Draft: The Taxation of Offshore Indirect Transfer – A Toolkit 1 August 2017 to 20 October 2017 by Organization For Economic Co-operation and Development (OECD), United Nations (UN) and World Bank Group (WBG)**

Introduction

- 1) This is an appeal against the ruling of the Tax Appeal Tribunal (the Tribunal) delivered on 14th February 2022 dismissing the Appellant's appeal against the Respondent's decision to impose property transfer tax. The

tax was imposed on a transaction involving the transfer of shares and assignment of shareholder loans entered into by the Appellant and EMR Capital Bid Co. (No.2) Limited (EMR). The appeal addresses the complex tax issues that are a consequence of transfer of an interest, offshore, in a local company held by a multinational corporation.

Background

- 2) The facts of this case were largely undisputed. On 11th August 2017, the Appellant, a multinational company (incorporated in Barbados), entered into a share purchase agreement (the agreement) with EMR for the sale of all its shares in a wholly owned subsidiary company known as Konnoco (B) Incorporated (Konnoco)(also incorporated Barbados) . The agreement was executed in Barbados and involved the transfer of 80% shares of Lubambe Copper Mine Limited, (Lubambe) a company incorporated in Zambia. These 80% shares were held by Konnoco while the remainder, were held by ZCCM Investment Holdings PLC (ZCCM-IH).

- 3) The sale also involved the assignment of the shareholder loans advanced to Lubambe by the Appellant and its shareholders at a consideration agreed upon by the parties.
- 4) After the deal was struck, the Appellant, acting through its shareholders, Vale International Sa (VISA) and African Rainbow Mineral Limited (ARM), applied to the Minister of Mines for consent for the transaction to be concluded, pursuant to section 66 of the ***Mines and Minerals Development Act No. 11 of 2015***. The Minister responded by way of letter dated 17th September 2017 allowing the transaction to go ahead as long as it complied with the provisions of the law. This was followed by a formal letter granting consent on 31st October 2017 which was subject to the Respondent issuing a tax clearance certificate.
- 5) Subsequently, on 10th November 2017, the Appellant, through its tax advisor, KPMG, applied to the Respondent for a tax clearance certificate and explained the new ownership structure and the fact that loans owed to the

Appellant and other shareholders by Lubambe would be transferred to EMR, the purchaser of the shares, by way of consideration. They also concluded that the agreement was not subject to property transfer tax.

- 6) The Respondent, while agreeing with the conclusion reached by KPMG that there was no property transfer tax payable in respect of the transfer of the shares, indicated that its decision was based on the facts presented to it by the Appellant and was subject to change in the event that these were inaccurate. It also indicated that it reserved its decision to another date on whether or not the transfer of the shareholder loans to Lubambe by the Appellant and its shareholders was subject to property transfer tax.
- 7) After reconsidering the issue of property transfer tax on the agreement, the Respondent wrote to the Appellant on 30th November 2017, informing it that since the transfer of the shares and loans would result in change in the interest in the mining right owned by Lubambe, it was subject to property transfer tax. The Respondent accordingly assessed tax at K96,970,981.35. The decision by the

Respondent was based on its interpretation of section 66 of the ***Mines and Minerals Development Act No. 11 of 2015***, and sections 2(c), 4(1) and 5(3) of the ***Property Transfer Tax Act, CAP 340 of the Laws of Zambia*** as amended by ***the Property Transfer (Amendment) Act No. 16 of 2015***.

- 8) The Appellant objected to the assessment by way of letter dated 12th January 2018, on the ground that the Respondent erred in law and fact in its interpretation of sections 2(1), 4(1) and 5(3) of the ***Property Transfer Tax Act*** (as amended), as read with section 66(1) of the ***Mines and Minerals Development Act 2015***, when it found that the transaction resulted in a change in the interest of a mining right. The Respondent, upheld its assessment on 22nd March 2018, prompting the Appellant to appeal to the Tax Appeal Tribunal (the Tribunal).

Proceedings before the Tax Appeal Tribunal

- 9) Since the appeal hinged on the interpretation of provisions of the law, there was no hearing of evidence before the

Tribunal and it was determined based on the legal arguments presented by the two parties. The thrust of the arguments by the Appellant was that the share transfer did not give the purchaser direct rights, claim, title or legal share in the mining interest held by Lubambe because these are still held by Konnoco and ZCCM IH. The suggestion here was that all the purchaser had done was acquire an interest in Konnoco and not Lubambe. It was contended further that no transaction had occurred at the Zambian shareholder level and that the ownership of Lubambe remained unchanged.

- 10) The Appellant contended further that prior to the amendment to the **Property Transfer Tax Act**, tax was only payable on property transferred within the Republic of Zambia and situated in Zambia. Since the change in ownership of the shares did not occur in Zambia, tax was not payable. It also argued that the amendment to the Act which included taxation on property relating to transactions occurring outside Zambia only took effect on 1st January 2018, by virtue of the **Property Transfer Tax**

(Amendment) Act No. 11 of 2017, which was well after the transaction. Since the amendment was later in time it is not applicable to the transaction.

- 11) The Appellant also challenged the assessment contending that it was high in view of the fact the shares in Konnoco are valued at USD1 per share but the Respondent based property transfer tax on the amount paid as the purchase price for the assigned shareholder loans. It concluded by contending that the Respondent violated the doctrine of legitimate expectation when it reviewed its earlier decision contained in the letter dated 20th November 2017 that it would not charge property transfer tax on the transaction. The relevant portion of the letter which the Appellant referred to states as follows:

“After reviewing the transaction and the provisions of the Property Transfer Tax (PTT) Act, we are of the considered view that the sale of shares by Teal Minerals in Kannoco (B) Inc, which is a company incorporated in Barbados is not subject to the charge of property transfer tax. In the same vein the sale of the loans (which are financial instruments) by the current financiers of Lubambe Mines

Limited to EMR Capital GP II Limited is not a transaction that is subject to PTT.”

- 12) The Respondent on the other hand argued that the transaction was subject to property transfer tax because it involved the transfer of a controlling interest in the mining right held by Lubambe. It argued that the Minister of Mines had made this clear in his letter to the Appellant dated 17th September 2017, in which he corrected the Appellant's impression that the transaction was not subject to property transfer tax.
- 13) Advancing its argument, the Respondent stated that, according to the Preamble to the **Property Transfer Tax Act**, the intention of the Legislature is, to among other things, to provide for charging and collection of a tax based on the value realized from the transfer of property within the Republic. Further, section 2 of the same Act defines “property” as including a share issued by a company incorporated in Zambia.
- 14) In addition, although the word “*interest*” is not defined in the **Property Transfer Tax Act** or **Mines and Minerals**

Development Act, it is defined in **Black's Law Dictionary; eighth edition**, as including a legal share in something. Therefore, since the Appellant disposed of 100% of its shares in Konnoco, the controlling interest in Lubambe was assigned from the Appellant to the purchaser. This transfer of controlling interest in a mining right, according to the Respondent, is what triggers the payment of property transfer tax and not the provisions of the **Property Transfer Tax (Amendment) Act Number 11 of 2017**, (as contended by the Appellant) which was later in time. The assessment was, therefore, not based on a retrospective application of the law.

- 15) To reinforce the arguments in the preceding paragraph, the Respondent relied upon section 5(3) of the **Property Transfer Tax Act** as amended by Act No. 13 of 2012 and section 66(1) of the **Mines and Minerals Development Act** which all refer to the transfer of an interest in a mining right attracting tax and requiring the approval of the Minister.

- 16) The Respondent argued further that it did not create any legitimate expectation by its letter dated 20th November 2017. It contended that legitimate expectation can not arise from an ultra vires relaxation of the relevant statute and relied on the English case of ***R v Board of Inland Revenue, ex parte MFKK Underwriting Agencies Limited and others***¹. Further, the Respondent contended that the Commissioner General is empowered to amend an assessment to give effect to the provision of the Act in accordance with sections 3(1) of the ***Property Transfer Tax Act*** as read with section 63 of the ***Income Tax Act***.
- 17) Concluding its arguments on legitimate expectation, the Respondent submitted that the only legitimate expectation that a tax payer should have is that he/she will be taxed in accordance with statute as per the holding in the case of ***R v re Preston***².

Decision of the Tribunal

- 18) The Tribunal began its consideration by determining the issue of whether or not the transaction was amenable to

property transfer tax and, if so, the basis upon which the tax would be levied. It held that the answer to the issue depended on the following: whether the transaction resulted in a change in the interest in a mining right; whether the transfer amounted to a transfer of property in the Republic of Zambia; and, whether the **Property Transfer Tax Act** which was applicable at the time compelled the Appellant to pay property transfer tax on the transaction?

- 19) The Tribunal found as a fact that Konnoco was a wholly owned subsidiary of the Appellant prior to the sale and that Konnoco owned 80% of the shares issued by Lubambe, which was holder of a large scale mining licence. The Tribunal also found as an undisputed fact that the Appellant sold 100% of its shareholding in Konnoco, which continues to hold the 80% shares in Lubambe and that this resulted in a new shareholder structure in Konnoco.
- 20) The Tribunal then considered the provisions of the **Property Transfer Tax Act** which was in force at the time and held that it provided for the charging and collection of

tax based on the value realized from the transfer of certain property in the Republic of Zambia. By, section 2 of this Act, the definition of the word “property” includes, a share issued by a company incorporated in Zambia, a mining right issued under the **Mines and Mineral Development Act**, 2015, and an interest therein. It also found that the Act does not define the word “interest” and adopted the definition ascribed to the phrase by **Blacks Law Dictionary** as argued by the Respondent. It concluded that any transaction which results in the change in either the ownership of the mining licence or the interest in a mining right is amenable to the charging and collection of property transfer tax.

- 21) According to the Tribunal, the transaction resulted in the Appellant’s disposal of its interest in Lubambe because its wholly owned subsidiary Konnoco, holds 80% of the Lubambe shares. It also found that, although the transfer of the shares took place outside Zambia, the transfer of the interest in the mining right or the mineral licence took place in Zambia. Consequently, the transaction was

subject to property transfer tax. The Tribunal went on to conclude that the charging of property transfer tax on the transaction is not as a result of the amendment to the Act which occurred in 2017 but that the law as it stood prior to and post the 2017 amendment to the Act provided for charging and collection of property transfer tax on such transactions. In addition, the tax is chargeable regardless of the percentage of the interest transferred as there is no threshold prescribed by it.

- 22) In relation to the amount chargeable as tax, the Tribunal was guided by the provisions of section 5(3) of the **Property Transfer Tax Act** which stipulates the basis as being either the actual price of the mining right or any other amount determined by the Commissioner-General, whichever is the higher. It then noted that the consideration passing between the parties was the assumption of debt by the transferee which it found to be valuable consideration in the law of contract and concluded that the Commissioner - General did not err

when he used it as the basis for determining the amount of tax to be charged.

- 23) On the issue of legitimate expectation, the Tribunal reviewed the correspondence passing between the Appellant, the Minister and the Respondent and concluded that neither the Minister nor the Respondent unequivocally advised the Appellant that the transaction would not be subject to property transfer tax. It referred to the decision in the English case of ***R v Board of Inland Revenue, ex parte MFKK Underwriting Agencies Limited***¹ and held that for a plea of legitimate expectation to stand it must be based upon a promise which is clear, unambiguous and devoid of relevant qualification. In contrast to this holding, the Tribunal found that the Respondent had made it clear that its decision was subject to other facts that may arise later and was, as a result, a qualified one. It accordingly dismissed the appeal.

Appeal to this court and arguments by counsel

- 24) The Appellant is unhappy with the decision of the Tribunal

and has launched this appeal fronting four grounds of appeal. These grounds of appeal question the Tribunal's findings that: the transfer in mining rights in respect of the mining licence held by Lubambe took place within jurisdiction and, therefore, subject to property transfer tax, notwithstanding the fact that the transfer of the Lubambe shares was effected outside jurisdiction; any change in either the ownership of a mining licence or interest therein triggers a tax point in accordance with the ***Property Transfer Tax Act***; the tax payable should be based on the value of the loans which were assigned in consideration of the share transfer; and, there was no legitimate expectation created that the transaction would not be subject to property transfer tax based on the Respondent's letter of 20th November 2021.

- 25) Counsel for the Appellant argued grounds 1 and 2 together which addressed the question of the effect of the transaction on the mining right owned by Lubambe. They argued that a company is a separate legal entity from its shareholders and capable of, among other things, holding

property in its own name. Our attention in this regard was drawn to the provisions of sections 22 and 3 of the **Companies Act** and the case of **Salomon v Salomon and Company Limited**³ which restate the principle of corporate personality and its effect.

- 26) Counsel argued that in line with the authorities set out in the preceding paragraph, Lubambe holds its assets and/or rights assigned to it in its own name and is separate from its shareholders or owners. Therefore, any right or interest in property which it holds is held in its own name and not that of its shareholders. Further, shareholders of a company have no rights or interest in the property of the company. Counsel referred us to a passage in the case of **Macaura v Northern Assurance Company Limited**⁴ that no shareholder has any right to any property owned by the company. This principle was restated by the High Court and this court, respectively, in the cases of **Christopher James Thorne V Christopher Mulenga and two others**⁴ and **Associated Chemicals Limited v Hill and Delamin (Z) Limited and Ellis and Co. (sued as a law firm)**⁵.

- 27) Counsel concluded that the sale by the Appellant of its 100% shares in Konnoco, a shareholder in Lubambe, did not alter or change the shareholding in Lubambe. As such, there has been no change in the ownership, rights and/or interest which Lubambe has in any property or the mining licence which is still in its name. The only change is in the shareholding in Konnoco, a foreign company incorporated under the provisions of the laws of Barbados. Consequently, property transfer tax is not chargeable.
- 28) In an attempt at justifying the conclusion arrived at in the preceding paragraph, counsel argued that the Tribunal erred because it did not apply the literal rule of interpretation when interpreting the provisions of sections 66(1) of the **Mines and Mineral Development Act** and 2(1), 4(1) and 5(3) of the **Property Transfer Tax Act** as amended by Act number 16 of 2015. They argued that the words in the foregoing sections are clear, and unambiguous, therefore, they should have been construed using the literal rule of interpretation in accordance with our decision in the case of **Minister of Information and**

*Broadcasting Services and Attorney General v Fanwell Chembo (Suing on his own behalf and on behalf of other members of The Media Institute of Southern Africa) and others*⁶. In that case, we said that

the fundamental rule of interpretation of statutes is that they ought to be construed according to the words expressed in the statute.

- 29) Counsel went on to argue that there was no change in the title holder of the mining right held by Lubambe and that the change only occurred in relation to shareholders in Lubambe. The Tribunal, therefore, erred when it held that there was a transfer of property in accordance with sections 2 and 4(1) of the **Property Transfer Tax Act**. Arguing in the alternative, counsel contended that the sale of the shares in Konnoco by the Appellant to EMR did not give EMR as the new shareholder, a direct right, claim, title or legal share to the mining interest in Zambia. Consequently, there was no transfer in the mining right in Lubambe as it continues to hold the mining licence.

- 30) According to counsel, the **Property Transfer Tax Act** did not envisage the charging and collection of tax on transactions such as the one between the Appellant and EMR which are more or less an indirect transfer of ownership. The Act is concerned with direct transfer of the interest in a mining licence, hence the provisions of section 67 of the **Mines and Minerals Development Act** which provide for consent to be obtained from the Minister before effecting any change in the shareholding of an entity that holds a mining licence.
- 31) Applying the logic in the preceding paragraph to this appeal, counsel argued that the transaction was not subject to tax because the property that changed hands was not situate in Zambia. They argued that section 2(1) of the **Property Transfer Tax Act** imposes a tax on transfer of property situated in Zambia. According to counsel, the only interest which was situated in the Zambia was the mining right held by Lubambe. Since it did not change hands, it was not subject to tax. Counsel submitted that their argument was fortified by the fact

that one of the intentions of the ***Property Transfer Tax (Amendment) Act No. 11 of 2017*** was to extend charging of property transfer tax to interests transferred outside the country or indirect transfers. They went to great length to quote from passages of Parliamentary debate which preceded the enactment of ***Amendment Act number 11 of 2017***.

- 32) In arguing ground 3 of the Appeal, counsel interpreted the provisions of section 5(3) of the ***Property Transfer Tax Act*** to mean that tax will be charged on the actual value of the mining right. They argued that at the time of the transaction the shares in Konnoco were valued at USD1 each, therefore, property transfer tax should have been based on the value of the transferred shares and not the value of the loans transferred. The Act, counsel argued, does not provide for tax to be based on value of the loans transferred.
- 33) Under ground 4 of the appeal, counsel contested the holding by the Tribunal which dismissed the Appellant's contention that a legitimate expectation had been created

in favour of the Appellant that the Respondent would not charge property transfer tax. They argued that the Appellant's claim arose from the Respondent's letter dated 20th November, 2017 in which it committed itself to charging property transfer tax on the transaction only if there was a change in the facts surrounding the transaction. The legitimate expectation was that property transfer tax would only be charged in the event of change in the surrounding facts.

- 34) Counsel went on to contend that contrary to its commitment, by letter dated 30th November 2017, the Respondent reversed its decision on the charging of property transfer tax on a ground which was not stipulated in the letter of 20th November 2017. Here, we understood counsel to mean that the Respondent was bound by its letter of 20th November 2017, to charge property transfer tax only if the surrounding facts changed and not because the need had arisen because there would be a change in the interest associated with the mining licence, in

accordance with its subsequent letter dated 30th November 2017.

35) Advancing their arguments on the issue, counsel contended that in any event, the Respondent had not explained the change in the surrounding facts which justified the charging of property transfer tax. They concluded by drawing our attention to both our decision and English decisions on legitimate expectation. We have referred to some of these decisions in our determination of the issue on this ground later in this judgment.

36) At the hearing, we engaged counsel for the Appellant on what the ultimate prize of the transaction between the Appellant and EMR was and the beneficial interest tied to the share transfer agreement. Mr. S. Chisenga and Mrs. M. Namwila – Mwala responded as follows:

36.1 The intention of EMR, the purchaser of the shares, was to get a beneficial interest in the mineral rights held by Lubambe;

36.2 The intention as reflected in paragraph 36.1 was an indirect transfer of an interest in a mining right to

EMR which at the time of the transaction was not subject to property transfer tax;

36.3 The assets which were the subject of the transaction were listed in Appendix 15 to the agreement and they included the large scale mining licence number 7061-HQ-LML held by Lubambe. To this extent, the new shareholders of Konnoco would have an indirect benefit in the mining licence.

37) We were urged to allow the appeal.

38) In opening the arguments for the Respondent, counsel for the Respondent set out the general principles of statutory interpretation which mirrored the arguments advanced by their counterparts. The only departure was that they also set out the principles on interpretation of taxing laws in accordance with the English case of **Cape Brandy Syndicate v IRC**⁷ and the decisions of this court in the cases of **Zambia Revenue Authority v Balmoral Farms Limited**⁸ and **Zambia Revenue Authority v Professional Insurance Corporation (Z) Limited**⁹.

- 39) In the two cases we stated the cardinal principle of interpretation of tax legislation to be that a charging section of a tax legislation must be clear in its intendment and that courts must strictly assess any claim by a tax payer to a tax exemption. Any ambiguity in a charging section will be resolved in favour of the tax payer, while ambiguity in a section seeking to exempt tax will be resolved in favour of the State.
- 40) The next stage of counsel's arguments explained the principles relating to instances when appellate courts can set aside findings of fact by a trial court. Counsel did this by quoting passages from a number of decisions from the then Court of Appeal of Zambia and this court. The *ratio decidendi* in these cases which counsel referred to is that an appellate court will not reverse findings of fact made by a trial court unless it is satisfied that the findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly would reasonably make.

- 41) In addressing the grounds of appeal, counsel dealt with grounds 1 and 2 of the appeal together and identified the issue arising from the two grounds as being, whether the transaction between the Appellant and EMR resulted in a change in the interest of the large-scale mining licence held by Lubambe as contemplated by the **Property Transfer Tax Act** (as amended by Act number 11 of 2015) as read with the **Mines and Minerals Development Act**?
- 42) Counsel submitted that the decision of the Tribunal was supported by both the facts and law presented before it. They argued that the letter from the Minister justified the need for his consent for the transaction to go ahead because at the heart of it was the interest in and control of Lubambe which centered on the mining licence. Further, the letter from the Respondent to the Appellant's counsel clarified this point and explained the effect which the transfer of the shares would have on the mining licence and that it was the subject matter of the transaction. This was reinforced by the provisions of the agreement which

pointed to the mining licence as the subject matter of the sale.

- 43) Counsel concluded that arising from the facts set out in the preceding paragraph, the Tribunal cannot be faulted for finding that, while the transfer of the shares took place outside Zambia, the transfer of the interest in the mining right took place within Zambia. In addition, it could not be faulted for finding that any change in either the ownership of the mining licence or interest therein triggered a tax point in accordance with the **Property Transfer Tax Act**.
- 44) In justifying the second argument in the preceding paragraph, counsel drew our attention to the provisions of section 2(1) of the **Property Transfer Tax Act** as amended by Act number 13 of 2012 which define 'property' to include a mining right issued under the **Mines and Minerals Development Act**, or an interest therein. Our attention was also drawn to section 4(1) of the **Property Transfer Tax Act** which provides for the charging and collection of property transfer tax whenever property is transferred. They concluded that based on the provisions

of these two sections, an interest in a mining right falls within the definition of 'property', therefore, its transfer attracts the charging and collection of property transfer tax. Consequently, any interest in the mining licence held by Lubambe constitutes 'property' for purposes of section 2(c) of the **Property Transfer Tax Act**.

- 45) Reverting back to the principles of statutory interpretation which we pronounced ourselves on in the cases of **Balmoral Farms Limited**¹⁰ and **Professional Insurance Corporation (Z) Limited**¹¹, counsel argued that there is no ambiguity in section 4(1) of the **Property Transfer Tax Act** (which is a charging section) as read with section 2(1) which should be resolved in favour of the Appellant as tax payer. According to counsel, the provisions are so plain and clear that it would be strange for anyone to argue that property transfer tax is not payable on the transfer of an interest in the mining licence.
- 46) Counsel conceded that both the **Property Transfer Tax Act** and the **Mines and Minerals Development Act** do not define the phrase "interest in a mining right". For this

reason, it was the Respondent's counsel's contention that the Tribunal was on firm ground when it adopted the dictionary meaning of the word "*interest*" by reference to ***Blacks Law Dictionary*** which encompasses interest in a mining right.

- 47) To reinforce the contention that the subject matter of the share transfer agreement was the mining right in the licence held by Lubambe, counsel argued that the issue which we should address our minds to is: did the transaction between the Appellant and EMR result in the transfer of an interest in the mining licence held by Lubambe? In answer to the question, counsel drew our attention to the facts surrounding the transaction which they said point to EMR as 100% shareholder in Konnoco becoming the new beneficial owner of Konnoco's 80% shares in Lubambe, thereby assuming the controlling interest in Lubambe which includes the mining right. This, counsel argued, is in line with our decision in the case of ***John Paul Kasengele and others v Zambia National Commercial Bank Limited***¹² in which we held

that shareholders as beneficial owners of the company have overriding authority over the company's affairs and the board of directors and managers.

- 48) Counsel concluded arguments on grounds 1 and 2 of the appeal by interpreting the provisions of sections 66 and 67 of the ***Mines and Mining Development Act*** which they said do not refer to a direct or indirect interest in a mining right but merely refer to an "*interest*" in such right. For this reason, the Tribunal cannot be faulted for finding that any change in either ownership or interest in a mining licence triggers a tax point in accordance with the ***Property Transfer Tax Act***.
- 49) Counsel then addressed the contentions by the Appellant under grounds 1 and 2 which were anchored on the legal principle that a company is a separate and distinct entity from its shareholders. Further, that no shareholder has any right to any property owned by the company and the shareholder's only entitlement is to a share in the profit while the company continues to carry on business. Arising from these arguments, the Appellant has concluded that

the shareholders of Lubambe have no interest whatsoever in Lubambe's property. Therefore, the change in Konnoco's shareholding does not alter the interest, including the mining right held by Lubambe. Counsel concluded that these arguments are belated and were not presented before the Tribunal. This court should, therefore, not entertain them in accordance with the decision in the case of **Moses Choonga v ZESCO Recreation Club, Itezhi Tezhi**¹³. In that case we restated the principle in a plethora of cases that a party cannot raise an issue on appeal which was not raised in the court below.

- 50) Notwithstanding the argument advanced in the preceding paragraph, counsel still rebutted the Appellant's arguments on the issue of corporate personality. This was in contemplation that we would consider the arguments by the Appellant it challenged. We have not summarized this portion of counsel's arguments for reasons which become apparent later in this judgment.
- 51) In response to ground 3 of the appeal, counsel began by stating that the Tribunal did not err when it based the

property transfer tax payable on the total amount of the shareholder loans transferred to EMR. Counsel argued that the Commissioner-General acted in accordance with section 5(3) of the **Property Transfer Tax Act** which gives him the discretion to base the tax payable in respect of the transfer of a mining right or interest therein on either the actual sale price or any amount he so deems, whichever is the higher. In this case, counsel argued, there was no actual sale price of the interest in the mining licence, therefore, the Respondent was on firm ground when it determined the tax payable based on the amount of the shareholders loans which were assigned to EMR as consideration for the transfer of the shares, especially that this was the higher amount in accordance with section 5(3) of the **Property Transfer Tax Act**.

- 52) Arising from the arguments in the preceding paragraph, counsel countered the arguments by counsel for the Appellant on the issue by contending that they are selective in that they ignore the fact that section 5(3) gives the Respondent two options as a basis for determining the

tax payable. This is, either the actual price of the mining right or any other amount as determined by the Commissioner-General. Counsel contended further that the section does not refer to the “*actual value*” as argued by the Appellant but “*actual price*”.

- 53) Under ground 4 of the appeal, counsel identified the issue for determination as being: whether the Respondent’s letter dated 20th November, 2017 created a legitimate expectation which the Appellant relied upon and which the Respondent is estopped from going against? They then set out the provisions of section 3(1) of the **Property Transfer Tax Act** and argued that in his administration of the **Property Transfer Tax Act**, the Commissioner-General enjoys the same powers vested in him by the **Income Tax Act**. One such power is to amend tax assessment as many times as is necessary to give effect to the provisions of the **Income Tax Act**. This is in accordance with section 63(2).
- 54) Advancing their argument further on the issue, counsel drew our attention to a passage in the English case of **R v Board of Inland Revenue, ex parte MFKK Underwriting**

Agencies Limited and others¹. The holding in the case is as follows:

“...the legitimate expectation of the tax payer was held to be payment of the taxes actually due. No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it. There is in addition, the clearest possible authority that the Revenue may not dispense with relevant statutory provisions.”

Interpreting the foregoing extract from the case, counsel concluded that no legitimate expectation can arise from an ultra vires relaxation of the relevant statute by the Respondent. Further, the Respondent may not dispense with relevant statutory provisions which it is compelled to enforce.

- 55) To reinforce the arguments in the preceding paragraph, counsel drew our attention to a passage from the holding in the case of ***R v Re Preston***² that the tax payer's only legitimate expectation is that he or she will be taxed according to statute.
- 56) Concluding arguments on this ground of appeal, counsel submitted that on a proper interpretation of the letter

dated 20th November 2017, the Respondent left the door open to revisiting the issue of property transfer tax. This position is confirmed by the fact that no assessment had been issued by the date of the letter.

- 57) We engaged Mr. Mukwasa during the hearing on what he based his contention that the subject matter of the agreement was the interest in the mining licence. He responded that there are five aspects of the transaction which prove this fact and they are as follows:

57.1 The transaction was focused on the businesses of Konnoco and Lubambe as well as the assets of the two companies;

57.2 The business which was defined as the focus of the transaction in the share purchase agreement was the ownership and operation of Lubambe which could not be conducted without the mining licence. To this end, one of the warranties in the share purchase agreement was that the mining rights held by Lubambe should be in good standing;

57.3 There was another warranty namely, that Konnoco and Lubambe would at all material times conduct their business in accordance with the law. This, counsel said, was tied to the fact that the operations of Lubambe had to be by way of the mining licence and it accordingly, warranted that it was not conducting business in a manner which would risk the loss of the mining licence;

57.4 There was an express term in the share purchase agreement that during what was termed the interim period, EMR would be given reasonable access to the business (Konnoco), the assets of Lubambe and all its books and records to enable it familiarize itself with the business; and,

57.5 There was an express term in the agreement which compelled Lubambe to renew the licence before the date of completion.

58) Mr. Mukwasa concluded that all the documents before us speak to the fact that EMR, as purchaser of the shares, was solely interested in the assets of Lubambe which

included the mining right.

59) In her *viva voce* arguments, Mrs. Chanda drew our attention to an article in China Law at website www.chinalawinsight which she said addresses the issues raised in this appeal.

60) We were urged to dismiss the appeal.

61) In reply, Mrs. Namwila-Mwala reiterated that the provisions of the ***Property Transfer Tax Act*** at the time did not envision the taxing of indirect transfers of interest such as the one in this case. As regards the contention on legitimate expectation, counsel argued that paragraphs 3 and 8 of the letter dated 20th November 2017 create the legitimate expectation, because they suggest that no tax would be charged.

Consideration by this court and decision

62) We would like to begin by applauding counsel for the thoroughness in the preparation for the appeal and industry in arguing it. Regrettably, this is the shining exception rather than example.

- 63) In our consideration of this appeal, we have looked at the record of appeal and arguments by counsel, both written and *viva voce*. The starting point is the contention by the Respondent that the Appellant can not rely on the principles of corporate personality and separate legal entity in arguing grounds 1 and 2 of the appeal because they were not advanced before the Tribunal. There is merit in the Respondent's contention because the arguments as presented in those two grounds were not presented before the Tribunal and as such, they raise a new issue before us which was not addressed by the Tribunal. We will, therefore, not consider those arguments in our determination of grounds 1 and 2.
- 64) In arguing grounds 1 and 2 of the appeal, counsel for the Appellant contended that the provisions of the ***Property Transfer Tax Act*** as they were at the time of the transaction, the subject of this appeal, did not provide for the charging and collection of tax in a transaction that resulted in an indirect transfer of a mining licence. The issue we must, therefore, determine in respect of these two

grounds of appeal is whether or not the **Property Transfer Tax Act** provided for the charging and collection of tax on an indirect transfer of a mining right or interest therein? Side issues are, whether or not the Act provides for a distinction between “*direct*” and “*indirect*” transfer of a mining right or interest therein? And, was the transfer of the mining interest an indirect transfer?

- 65) The relevant provisions of the **Property Transfer Tax Act** which address this issue are sections 2(1) and 4(1). The former is as amended by Act number 13 of 2012, which defines property to include “*a mining right issued under the Mines and Minerals Development Act, or an interest therein*”, while the latter provides for the charging and collection of tax whenever any property is transferred. Our understanding of these two provisions is that all mineral rights or interest therein (as long as they are issued under the **Mines and Mineral Development Act**) fall under the description of property as envisaged by the Act and are subject to property transfer tax whenever they are assigned.

- 66) To the extent that the Lubambe shares were not transferred to EMR, the transfer of the interest in it was indirect. This, however, does not mean that the transaction was not amenable to property transfer tax because section 2(1) of the **Property Transfer Tax Act** refers to the transfer of mining rights or interest therein. 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". It stands to reason that an interest can either be legal, therefore direct or beneficial, therefore indirect. The Act does not distinguish between a direct or indirect transfer of such right or interest. The consequence of the transaction, as we will explain later, is that the transferee, EMR, gained indirect control of Lubambe and its mining right. We, therefore, do not accept the argument by counsel for the Appellant that the transaction which is the subject of this appeal is not amenable to tax because it was an indirect transfer of the interest in the mining right.

67) The argument by the Appellant is further negated by the fact that, and as counsel for the Respondent quite rightly argued, the subject matter of the transaction was Lubambe. A review of the agreement reveals a meeting of the minds between the Appellant and EMR that what was at the heart of the transaction was the operations of Lubambe through the mining licence. We entirely agree with Mr. Mukwasa's summary of the intention of the parties which we have set out at paragraphs 57.1 to 57.5, that the sole purpose of EMR as purchaser of the shares was to acquire the control and interest in Lubambe and in effect the mining licence. To this end, by Appendix 15 to the agreement, the parties listed the mining licence held by Lubambe as one of the subject matters of the transaction.

68) In advancing the case for the Respondent, Mr. Mukwasa urged us to look at the documents before us and the background to the transaction. One key point which stands out in this transaction is the fact that the Appellant as 100% shareholder in Konnoco sold all its shares in the

said company, which held 80% shares in Lubambe. Prior to the sale Konnoco was wholly owned by the Appellant and as such, the Appellant controlled and had a major interest in Lubambe by virtue of the 80% shares held by Konnoco, its wholly owned subsidiary. This is the interest which EMR acquired after the sale of the shares and it is subject to property transfer tax because it targeted the mining licence, an interest in a mining right. Counsel for the Appellant did not deny this fact when we engaged them as summarised in paragraph 36 of this judgment.

- 69) The scenario before us was anticipated by the legislature when it enacted the ***Mines and Minerals Development Act***. This is revealed by section 67(1)(b) of the Act which prohibits a holder of a mining licence from “*entering into an agreement with any person, if the effect of doing so would be to give that person control of the company*”. For all intents and purposes, Lubambe was under the control of Konnoco, whose “*strings*”, in terms of operations, were pulled by the “*Puppeteer*”, the Appellant, its holding company. The consequence or outcome of the transfer of

shares is that control of Lubambe was subsequently transferred to EMR.

- 70) The Minister was alive to the effect of the transaction as we have explained above. This is clear from his letter to the shareholders of the Appellant dated 17th September, 2017 where he stated as follows:

"...it is not the correct position at law that this transaction does not involve transfer of interest and control of company in Lubambe Copper Mines Limited. You may wish to note that the controlling interest currently is held by Vale and ARM and that this is the same controlling interest that is the subject of the transfer. You will therefore be required to seek the consent of the Minister and not just notification as suggested in your letter.

Please note that according to the Mines and Mineral Development Act No. 11 of 2015, you will be required to formally apply for transfer of interest and control in Lubambe Copper Mines Limited as provided for under Section 66 and 67 of the Act..."

The reasoning by the Minister cannot at all be faulted and was the basis of invoking the provision of the **Property Transfer Tax Act** which, at Section 2(1), defines property as including "... mining right issued under the Mines and Mineral

Development Act, OR AN INTEREST THEREIN". (The capital lettering is ours for emphasis only).

- 71) The facts we have set out in the three preceding paragraphs negate the argument by the Appellant that the transaction is not taxable because the transfer of the shares occurred outside the country. This may well be so, but the asset which was at the heart of the transaction is situate in the country and was, in any event, issued pursuant to the ***Mines and Minerals Development Act*** which is the only condition set by section 2(1) (c) for the charging and collection of property transfer tax.
- 72) The Appellant's fate is sealed by the principles we have articulated in the past in relation to the strict interpretation to be applied to a claim for tax exemption which Mr. Mukwasa referred us to. One of the arguments advanced by the Appellant was that an indirect transfer of a mining right does not attract tax. The Appellant was, in effect, arguing that such a transfer is exempt from tax. Unfortunately, the Appellant did not, in any way, seek to persuade us to agree with it by reference to our decisions

on the matter. We cannot hold such a transaction to be exempt in the absence of arguments to that effect by the Appellant.

- 73) The converse is also true as argued by Mr. Mukwasa. The Appellant cannot claim that the charging sections are ambiguous and, therefore, it must escape paying tax because the ambiguity should be resolved in its favour. No such argument was advanced before us. Instead, arguments to the contrary were laid before us which demonstrated that the provisions of the sections are clear and unambiguous and that we should, therefore, apply the literal rule in their interpretation. We entirely accept this invitation.
- 74) Consequently, we must hold that there is no merit in grounds 1 and 2 of the appeal.
- 75) Coming to ground 3 of the appeal which questions the basis upon which the tax payable was arrived at, the argument by the Appellant is that the value of each share which was being assigned was USD1. This is what should have formed the basis for computing the amount of tax

payable. The Respondent argued that the Commissioner-General enjoys wide discretion to determine the basis of a tax. It can either be on the actual sale price (and not value) or any other amount determined by him.

- 76) According to Appendix 9 to the share transfer agreement, the consideration for the transaction was tied to the shareholder loans made to Lubambe by the Appellant and its two shareholders. The Commissioner-General took this as a basis for calculating property transfer tax. In its determination of the issue, the Tribunal acknowledged this and found it to be valuable consideration in the law of contract. It concluded that the Respondent was on firm ground when it used the shareholder loans as a basis.

- 77) Section 5(3) of the **Property Transfer Tax Act** states as follows:

“Where the property to be valued is a mining right or interest in the mining right, the realized value of the mining right or interest shall be the actual price of the mining right or as determined by the Commissioner-General whichever is higher.”

- 78) The effect of section 5(3) of the **Property Transfer Tax Act** is that, in determining tax payable for the transfer of

a mining right or interest therein, the Commissioner-General will apply the percentage applicable to the actual price of the mining right. That is to say, 10% of the price at which the parties have agreed it will be sold at. The Commissioner-General is also mandated to consider any other amount as the tax to be paid as long as the latter is the higher amount. This gives the Commissioner-General discretion, where the parties to a sale agreement have deliberately deflated the sale price, to determine an appropriate figure as tax which should be paid.

- 79) In the matter before us, the Commissioner-General based tax on a percentage of the consideration paid by EMR for the shareholder loans it assumed because this was the consideration or sale price. We see nothing wrong with this, especially, and as the Tribunal correctly found, the assumption of the loans by the purchaser constitutes valuable consideration. Consequently, ground 3 of the appeal must also fail.
- 80) Coming to ground 4 of the appeal which contends legitimate expectation. The two crucial letters are those

dated 20th November 2017 and 30th November 2017. In the first letter, a portion of which we have quoted in paragraph 11 of this judgment, the Respondent's Commissioner-General indicated that the transaction was not subject to property transfer tax because the Konnoco shares which are the subject of the transaction were not issued in a company incorporated in Zambia.

- 81) The Respondent stated further that the mining right was not subject to property transfer tax because its understanding at the time was that the mining rights held by Lubambe would not change hands as a result of the transfer of the shares and sale of the loans. It concluded by stating as follows:

"However, note that we are unable to make a determination as to the taxability of the proceeds from the sale of the loans at the moment since our transfer pricing team requires additional time to study the transaction and thereafter review the implication of the transaction for income tax purposes.

Note further that all the confirmations herein regarding the transfer of the shares and its effect on the mineral rights and licence are based on the facts presented. Should it be established later that the facts differ from the

actual transaction, we reserve the right to make necessary adjustments as required by the respective revenue laws.”

The letter of 30th November, 2017, on the other hand, stated the change in the Respondent’s position regarding taxing of the transaction as being a determination that the transaction would after all “...lead to a change in the interest associated with the Mining right owned by Lubambe....”

- 82) To the extent that the change in position by the Respondent was not as a result of the change in the facts surrounding the matter or consultation with the transfer pricing team, there is merit in the argument by the Appellant. The Respondent bound itself by the reason given in the letter of 20th November, 2017. However, this is negated by the principle in the case of **R v. Board of Inland Revenue**¹¹ which we have set out in paragraph 54 of this Judgment. There is no legitimate expectation that can be found in the ignoring or relaxing of the law by the Respondent. It was bound to apply the law to the letter even if it meant retracting an earlier decision. This, indeed,

was the only legitimate expectation which was within the proper contemplation of the parties.

- 83) In addition, the Respondent's Commissioner General was well within his right to retract his earlier decision based on section 3 of the **Property Transfer Tax Act** and section 63 (2) of the **Income Tax Act** as counsel for the Respondent argued. The former vests the power to give effect to the provisions of the **Income Tax Act** in the Commissioner General, who is directed by the Minister in the performance of this function. The section states further that in the exercise of his functions under the said Act, he shall have the same powers as those he enjoys under the **Income Tax Act**. One such power is under section 63 (2) which authorizes the Commissioner General to amend an assessment as many times as is "*....necessary to give effect to the provisions of (the) Act and ... the liability to tax may be increased, reduced or cancelled, as the circumstances require.*"
- 84) When one looks at the two letters from the Respondent which are under discussion, it is easy to accuse the

Respondent of indecision and flip-flopping. This is a dim view because it fails to appreciate the complexity of the matter with which the Respondent was engaged. We would rather refer to it as prudent and perceptive as collector of revenue on behalf of the State. The issues that have arisen in this appeal on the effect of the transaction have in the past and continue in the present to engage not only entities such as the Respondent but courts in other jurisdictions as well. To give two illustrations, in 2006 India had ***The Vodafone case***¹ in which Vodafone purchased Hutchinson's participation in a joint venture to operate a Mobile phone company in India (the owner of an operating licence) for nearly USD11 Billion. This transfer was accomplished by Hutchinson, a Hong Kong based multinational, selling a wholly owned Caymen Island subsidiary holding its interest in the Indian operation to a wholly owned subsidiary a Vodafone incorporated, and for tax purposes resident, in the Netherlands. The

¹ See publication by the OECD, the Platform For Corroboration on Tax, Discussion Draft: The Taxation of the Offshore Indirect Transfer - A Toolkit - 1st August 2017 to 20th October 2017.

transaction thus took place entirely outside India, between two nonresident companies.

- 85) The Indian Tax Authority (ITA) sought to collect USD 2.6 Billion tax on the capital gain realized by Hutchinson on the sale of the Caymen holding company. Given that Hutchinson no longer had assets in India after the transaction, the ITA sought to collect the tax from the purchaser, Vodafone's Dutch subsidiary, arguing that it had the obligation to withhold the tax from the price payable to the seller. This sparked a protracted court case, with the Supreme Court of India ruling in 2012 in favour of the tax payer. The Supreme Court denied the ITA's broad reading of the law to extend its taxing jurisdiction to include indirect sales abroad, though it took the view that the transaction was in fact the acquisition of inputs located in India.
- 86) The Supreme Court of India cannot be faulted in arriving at this decision. Its decision, however, would contradict the position of our law in that, our ***Mines and Minerals Development Act*** does not distinguish between a direct

and indirect transfer. Further the ***Mines and Minerals Development Act*** is complimented by ***Section 2(1)(c) of the Property Transfer Tax Act*** which defines 'property' liable to be taxed on transfer, to include mining rights or an interest therein. The decision in the ***Vodafone*** case attests to the fact that the law in India, as it then stood, did not acknowledge indirect transfer of interests in property.

- 87) It is no wonder that the government of India subsequently changed the law to allow taxation of offshore indirect sales and tried to apply the new provisions retroactively, in a second attempt to collect the tax from Vodafone's Dutch subsidiary. The legality of a retroactive effect of the law was subsequently submitted to arbitration by the tax payer under the Indian Netherlands Bilateral Investment Treaty. As at the time of the OECD report from which these facts are drawn, the dispute was still ongoing before the arbitral tribunal.
- 88) Close to home, there was the ***Zain***² case in Uganda where in 2010, a Dutch subsidiary of the Indian Multinational

Barthi Airtel International BV purchased from Zain International BV, A Dutch Company, the shares of Zain Africa BV (also a Dutch Company) for USD 10.7 Billion, which, in turn, owned the Kampala registered mobile phone operator Celtel Uganda Limited (among the investments in Africa). The Uganda Revenue Administration (URA) held Zain International BV liable for corresponding capital gains tax, amounting to USD 85 Million. Uganda's Appeal Court ruled, in sharp contrast to the decision of the Supreme Court of India in Vodafone, that URA does have the jurisdiction to assess and tax the offshore seller of an indirect interest in local assets.


- 89) In referring to the two cases from India and Uganda we are alive to the fact that there is a difference between property transfer tax (which is the issue in this appeal) and capital gains tax (the issue in the two cases). However, the issue those two cases addressed are similar to the issues in this appeal on the extent of the jurisdiction of the Respondent in reference to transactions concluded offshore by multinational companies involving assets situated within

jurisdiction. The cases also addressed the issue of control by multinational companies of local companies. They are, to this extent relevant.

- 90) Consequently, ground four of the appeal also fails.

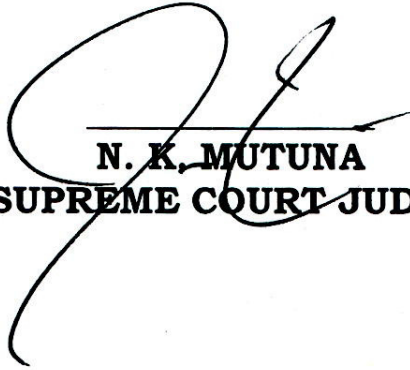
Conclusion

- 91) The result of our consideration is that all four grounds of appeal lack merit. We, hold that the transaction is taxable as contended by the Respondent and order that Appellant should pay the property transfer tax assessed as chargeable and collectable on the transaction plus any penalties and interest found to be due for the late payment. The said payment to be made within 30 days of the date of this judgment.
- 92) The appeal is accordingly dismissed with costs. These will be taxed in default of agreement.


M. MUSONDA
DEPUTY CHIEF JUSTICE



E. M. HAMAUNDU
SUPREME COURT JUDGE



N. K. MUTUNA
SUPREME COURT JUDGE