

**IN THE COURT OF APPEAL OF ZAMBIA**

**APP/74/2023**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**KALYMNOS PROCESSING LIMITED**

**1<sup>ST</sup> APPELLANT**

**ALBERTINA KASHIBA**

**2<sup>ND</sup> APPELLANT**

**AND**

**KONKOLA COPPER MINES**

**RESPONDENT**



**CORAM: SIAVWAPA JP, CHISHIMBA AND BANDA-BOBO , JJA**

On 20<sup>th</sup> 28<sup>th</sup> February 2024

FOR THE APPELLANT: MR. L. YETA OF MESSRS JPAY  
ADVOCATES WITH MR. J SINKALA OF  
JUSTINE LEGAL PRACTITIONERS.

FOR THE RESPONDENT: MR. E.C. BANDA SC WITH MR. T  
CHIBELEKA AND MR. N. CHALEKA ALL  
OF E.C.B LEGAL PRACTITIONERS

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**J U D G M E N T**

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**SIAVWAPA JP**, delivered the Judgment of the Court

**Cases referred to:**

1. *Konkola Copper Mines Plc v Rephidim Mining and Technical Supplies Limited, Mimbula Minerals Limited and Moxico Resources Limited Appeal 74 of 2018*
2. *Felix Chipota Mutati and 3 Others v Winnie Zaloumis SCZ Selected Judgment No 31 of 2018*
3. *Photo Bank (Z) Limited v Shengo Holdings Limited SCZ judgment No 10 of 2008*
4. *Sanhe Mining Zambia Limited v Andrew Mazimba and Tirumala Balaji (Z) Limited Appeal 83 of 2017*

**Legislation referred to:**

1. *The Mines and Minerals Development Act No. 11 of 2015*
2. *Lands and Deeds Registry Act, Chapter 189 of the Laws of Zambia*

**1.0 INTRODUCTION**

- 1.1 This is an appeal against a Judgement of the High Court delivered by Honorable Mr. Justice E. Pengele on 26<sup>th</sup> September 2022.
- 1.2 By that Judgment, the learned judge declared that the Appellants have no right to enter upon the Respondent's

land without its consent and granted an injunction in favour of the Respondent.

## **2.0 BACKGROUND**

2.1 By an agreement dated 15<sup>th</sup> December, 1999, the Respondent acquired, from Zambia Consolidated Copper Mines (ZCCM), of relevance to this case, the Nchanga Copper Mine and real property that includes Subdivision C of Farm No 927, Farm No 1426 and Farm No 942 (the properties).

2.2 The Respondent holds a large-scale mining license in the Nchanga Mine area, reissued as 7075-HQ-LM under the 2008 Mines Act, for a period of twenty-five years from 31<sup>st</sup> March, 2000, in part of the areas purchased from ZCCM and it holds surface rights in the remaining areas.

2.3 On 23<sup>rd</sup> November, 2016, the 1<sup>st</sup> Appellant was granted a small-scale exploration license No. 21443-HQ-SEL by the Ministry of Mines with duration of four years while the 2<sup>nd</sup> Appellant was issued an artisan's mining right for a period of two years commencing on 3<sup>rd</sup> October, 2016.



- 2.4 By a letter dated 11<sup>th</sup> May, 2017, the 1<sup>st</sup> Appellant sought consent to access the area covered by its exploration license, over which, the Respondent has surface rights.
- 2.5 The Respondent did not give consent which prompted the 1<sup>st</sup> Appellant, by a letter dated 26<sup>th</sup> January, 2018, to inform the Respondent that it would commence operations as the Respondent had unreasonably withheld consent.
- 2.6 In addition, the 1<sup>st</sup> Appellant informed the Respondent that it would incorporate the 2<sup>nd</sup> Appellant's artisanal Mining license into its operations.
- 2.7 By a letter dated 5<sup>th</sup> February, 2018, the Respondent refused to grant consent to the 1<sup>st</sup> Appellant entering upon the subject area because the Respondent was of the view that the Appellant's exploration license fell within both its surface and mining rights areas.
- 2.8 The Respondent further stated that the 2<sup>nd</sup> Appellant had not requested for consent to access its license areas. It therefore refused to grant access to the said area.



2.9 The Respondent actively went on site in the areas the Appellants sought to access prompting the 1<sup>st</sup> Appellant to make several complaints to the Ministry of Mines and Minerals Development until the Appellants finally wrote to the Respondent on 10<sup>th</sup> April, 2018, demanding that it ceases all operations in that area.

2.10 The Respondent reacted by commencing the present action in the Court Below.

### **3.0 MATTER IN THE COURT BELOW**

3.1 By summons dated 13<sup>th</sup> April, 2018, accompanied by a statement of claim of even date, the Respondent commenced an action against the Appellant claiming the following reliefs, *inter alia*:

i.A declaration that that the Appellants have no right to enter upon Subdivision C of Farm No 927, Farm No 1426 and Farm 942 or the land in Nchanga Mine area without the prior consent of the Respondent.

ii.A declaration that the Plaintiff has reasonable grounds to withhold its consent from the Defendant

in respect of access to numbers Subdivision C of Farm No 927, Farm No 1426 and Farm No 942 or the land in Nchanga Mine area

iii. An injunction to restrain the Defendant whether by itself or by its servants or agents or otherwise, howsoever, from entering or crossing the Plaintiff's said surface and mining rights or carrying on any activities thereon.

3.2 The Respondent pursued these claims by relying on the following facts.

3.3 According to the Respondent, the properties and its large-scale mining license cover Overburden dump 1 (OB1) and stockpile dump 6 (SP6) whereon the Appellants claim to have a small-scale exploration license and an artisanal mining right 21419-HQ-AMR.

3.4 The Respondent submitted that the Appellants' mining rights could not be exercised without its consent as it owns the mining and surface rights in the disputed area.

3.5 The Appellants settled their defence to the Respondent's claims in which they averred that their licenses merely border the Respondent's mining rights as the two share boundaries.

3.6 It was the Appellants' position that the Respondent unfairly and unreasonably denied them consent to enter upon the properties and carry out activities allowed by their licenses.

3.7 Based on assertions that the Respondent is mining within its tenement areas, the Appellants counter-claimed, amongst others, a declaration that they have a right to enter upon and conduct mining on the areas in dispute, that the Respondent render an account of all the tenements removed from the Appellants' areas and that the Respondent pay the sum of US\$ 2,400,000,000.00 being the value of the 12 Million tonnes of tenements collected from the Appellants' mining area.

#### **4.0 DECISION OF THE HIGH COURT**



- 4.1 The learned trial Judge addressed the claims as they were listed in the writ of summons.
- 4.2 On the first claim, the learned trial Judge noted that the area of dispute comprised of OB1 and SP6 and that these sit on the Respondent's properties.
- 4.3 In relation to whether the Respondent is the legal occupier and owner of surface rights covered by the properties, the learned trial Judge found that despite the Respondent's failure to produce certificates of title, the Appellants, in their submissions had acknowledged that OB1 and SP6 sit on the Respondent's surface rights as originally purchased from ZCCM, evidenced by clause 1.2.1 of the ZCCM Sale Agreement.
- 4.4 The learned trial Judge found fortification in the case of Konkola Copper Mines Plc v Rephidim Mining and Technical Supplies Limited, Mimbula Minerals Limited and Moxico Resources Limited<sup>1</sup> and the fact that two maps submitted before him to show boundaries reveal that the

disputed portions of OB1 and SP6, fall inside the boundaries of the Respondent's surface rights.

4.5 He therefore, found that in accordance with Section 52(1)(b)(i) of the Mines and Minerals Development Act (the Act) the Appellants have no right to enter upon the Respondent's properties without its written consent as it conducts its mining operations around that site.

4.6 After observing that section 52(3) of the Act shows that consent should only be denied if there are reasonable grounds for withholding it, the learned trial Judge found that only the 1<sup>st</sup> Appellant sought the consent of the Respondent as there was no evidence of any such request from the 2<sup>nd</sup> Appellant.

4.7 The learned trial Judge considered the reasons advanced by the Respondent for withholding its consent and found that the 1<sup>st</sup> Appellant's exploration license did not support the mining activities it sought to undertake.

4.8 Further, the learned Judge found that since it acquired the properties, the Respondent has been stockpiling

materials mined within its mining area on OB1 and SP6 for future reclamation.

4.9 This being the case, the learned trial Judge held that the Respondent was utilising its surface rights in that area.

4.10 In summation, the learned Judge declared that the Appellants could not enter upon the properties without the Respondent's consent which was reasonably withheld and awarded the Respondent an injunction against the Appellants in the disputed areas. The Appellants' counterclaims were dismissed.

## **5.0 THE APPEAL**

5.1 Dissatisfied with the outcome, the Appellants filed Notice and memorandum of Appeal fronting twelve grounds of appeal as follows:

- 1. The learned trial Judge erred in law and fact when he proceeded to hear and determine the Respondent's case when in fact, he had no jurisdiction.*



2. *The learned trial Judge erred in law and in fact when he found and held that the Respondent had proved on a balance of probabilities that it is the owner and occupier of surface rights over the three properties where OB1 and SP6 are located in the absence of a certificate of title, in light of the evidence on record to the effect that the assignment of property from ZCCM to the Respondent was not registered with Ministry of Lands and without any cogent evidence to prove ownership of the said properties.*
3. *The learned trial Judge erred when he accepted the testimony of PW2- Mr Moses Mambwe Chibuye that stockpiling is an essential aspect of mining and that the material is stockpiled on designated dumps for future reclamation.*
4. *The learned trial Judge misdirected himself when he disregarded the evidence of DW2, Mr Amigo Lumingo, that “reclamation of dumped material from a dump constitutes one of the forms of mining” and stated*

*that a perusal of the Act establishes that the Act does not contain any provision to that effect.*

- 5. The learned trial Judge erred in law and in fact when he held that the Respondent had the right to reclaim the material on the part of OB1 and SP6, which lie in the Appellant's license area ,merely on the basis that it is the surface rights owner and that the same belong to the Respondent.*
- 6. The learned trial Judge misdirected himself in law and in fact when he held that the Respondents were not mining on the disputed land.*
- 7. The learned trial Judge erred in law and in fact and misdirected himself when he found and held that there was absolutely no point at which either ZCCM or the Respondent abandoned or surrendered to the Government, OB1 and SP6 and further that OB1 and SP6 still belong to the Respondent contrary to the documentary evidence on record.*
- 8. The learned trial Judge erred in law and in fact when he held that the Respondent proved its entitlement to*

*the second relief on a balance of probabilities and declared that the Respondent had reasonable grounds for withholding its consent from the Appellants in respect of access to Farm No 927, Farm No 1426 and Farm No 942 or the land in Nchanga Mine Area when in fact the reasons advanced by the Respondent were not reasonable as envisaged under the Act.*

*9. The learned trial Judge erred in law when he held that the Appellants required consent from the Respondent to access the disputed land.*

*10. The Court below erred in law when it proceeded to grant the Respondent a permanent injunction against the Appellants on tenements where the Appellants have valid licenses without addressing the fate of the Appellant's licenses.*

*11. The learned trial Judge erred in law and fact when he dismissed the Appellants' counterclaim on the basis that the Respondent had proved all its claims*



*on a balance of probabilities without determining the Appellants' claims.*

*12. The learned trial Judge misdirected himself when he stated to the effect that the Appellants were misled by the Ministry of Lands that they owned portions of OB1 and SP6 considering the fact that the Appellants have valid licenses.*

## **6.0 ARGUMENTS IN SUPPORT**

6.1 In support of ground one, the Appellants argue that the learned trial Judge did not have jurisdiction to determine the Respondent's claims because the import of Section 52(3) and Section 56 (1) of the Act is that all issues relating to withholding of consent by a property holder must be referred to arbitration.

6.2 The Appellants therefore, urge us to set aside or/quash the Judgment of the Court below as it is a nullity.

6.3 In ground two, the Appellants argue that the Respondent, having failed to produce certificates of title for the

properties, failed to prove that it owns the surface rights in those areas.

6.4 The Appellants have relied on sections 4,5 and 33 of the Lands and Deeds Registry Act to argue that ownership of land can only be proven by production of a certificate of title.

6.5 The Appellants submit that there was no evidence that ZCCM owned OB1 and SP6 or that it transferred these to the Respondent as it also had disputes to resolve at the time it signed an agreement with the Respondent.

6.6 In relation to the Assignment of the properties, the Appellants argued that this was not registered at the Ministry of Lands and as such the ownership rights were not established.

6.7 In grounds three, four, five and six, the Appellants take issue with the learned Judge's finding that the Respondent had rights to reclaim what was dumped on OB1 and SP6 because they own the surface rights even though they have no mining rights in the disputed area.

- 6.8 This is premised on the argument that reclaiming what has been dumped following the mining process is also a form of mining and the holder of surface rights would need to obtain a license to reclaim the dumped material.
- 6.9 In ground seven, the Appellants invited us to examine the documentary evidence appearing at pages 9,10,15 and 30 to 39 of the Defendant's bundle of documents and page 16 of the Plaintiff's bundle of documents.
- 6.10 In grounds eight, nine and ten, the Appellants argue that for consent to be reasonably withheld by a property owner, one of the conditions in section 52(1)(b) of the Act must exist.
- 6.11 The Appellants submit that the Respondent, having failed to prove ownership of the disputed areas, and not having met any of the conditions under section 52, did not need to give consent and it should not have been granted an injunction.
- 6.12 In ground eleven, the Appellants rely on the cases of Felix Chipota Mutati and 3 Others v Winnie Zaloumis<sup>2</sup> and Photo



Bank (Z) Limited v Shengo Holdings Limited<sup>3</sup> to argue that their counterclaims should have been determined as an independent action and not based on whether the main claims succeeded.

6.13 In ground twelve, the Appellants bemoan the statement by the learned trial Judge that they were misled by the Ministry of Mines and Mineral Development when the said Ministry granted them licenses and has written to the Respondent on many occasions instructing it not to conduct operations on the Appellants' areas.

6.14 In this respect, we are referred to pages 579 to 594 of the record of appeal.

## **7.0 ARGUMENTS IN OPPOSITION**

7.1 The Respondent filed its heads of argument on 15<sup>th</sup> February 2024, following an order granted by the Court to extend time within which to file heads of argument.

7.2 In arguing ground one, the Respondent dispelled the view held by the Appellant that the Supreme Court, in the

case of United Engineering Group Ltd v Mungalu and others, (2007) ZR 30, held that the word may, denotes mandatory application. Most importantly, the Respondent argues that section 52 (3) of the Mines and Minerals Development Act, empowers the Court to determine whether or not consent has been unreasonably denied.

7.3 Having argued as above, the Respondent has submitted that in the instant case, the Court below found that the Court was within its powers to hold that consent was not unreasonably withheld and therefore, the Director of Mining Cadastre had nothing to submit to arbitration.

7.4 As regards the application of section 56 1 (a), (b) and (c), the Respondent argues that the disputes set out there are specific to withholding of consent pursuant to section 52 (1) (b) and instances where the Minister has prescribed by statutory instrument specific matters. That the conditions set out in sections 52 and 56 did not arise in this case.

- 7.5 In ground two, the Respondent argued that ownership of Farm 927, Farm 942 and Farm 1426 on which OB1 and SP6 are situated, was admitted to belong to the Respondent by the Appellants.
- 7.6 The Respondent also quoted extensively from a High Court decision in the case of Konkola Copper Mines v Martin Kalunga 2008/HK/68. In the Judgement, the learned Judge found it as fact that Konkola Copper Mines KCM, had purchased the assets in dispute in this appeal from ZCCM in 1999 and that it had surface rights over the tailings dumps which it had the right to reclaim.
- 7.7 The Respondent argued grounds three to eight together. In a nutshell, the Respondent has argued that based on the established ownership of the farms in issues and the tailings dumps thereon, the Respondent had rights over the same and any person wishing to enter thereupon and exercise surface rights requires to obtain the occupier's consent, in this case, the Respondent.



7.8 In ground nine, the Respondent argues that it took the Appellants to Court in order to assert its surface rights conferred upon it by the purchase agreement it entered into with ZCCM and GRZ. That section 52 of the Mines and Minerals Development Act was not in contemplation as the Respondent's grievances did not arise from there.

7.9 In firming up its argument, the Respondent extensively quoted from our Judgments in Konkola Copper Mines v Sensele Enterprises Limited, Appeal No 133 of 2008 and Konkola Copper Mines Plc V Rephidim Mining and Technical Supplies Limited and Moxico Resources Limited Appeal No 74 of 2018. In both cases, we separated claims arising out of mining rights and those arising out of the tort of trespass to land.

7.10 In ground ten, the complaint is that the learned Judge below should not have granted a permanent injunction against the Appellants in view of the licenses the Appellants have over the land. In that regard, the Respondent has countered by stating that in view of the

lack of consent by the Respondent, the Respondents remain trespassers. The Appellant also adverted to the principles governing the granting of injunctions as enunciated in the case of Shell and BP Zambia Limited v Canidaris & others (1975) ZR 174 and American Cyanamid case.

7.11 In ground eleven, the Respondent simply agreed with the learned Judge below that because the Respondent succeeded in all its claims, the counterclaim failed

7.12 In dismissing ground twelve, the Respondent has argued that the argument by the Appellants that because they hold licences entitles them to enter upon the land in issue is wrong. They further argued that the activities carried out by the Appellants were not in compliance with the terms of the licenses they possess.

7.13 The Respondent also argued that because the 2<sup>nd</sup> Appellant did not seek consent from the Respondent, he had no right to enter upon the premises to conduct mining activities. Moreover, there was no proof that the

2<sup>nd</sup> Appellant was a Zambian citizen entitled to an artisanal mining licence.

## **8.0 OUR ANALYSIS AND DECISION**

8.1 We have considered the evidence on the record, the Judgment of the Court below as well as the opposing arguments advanced by the parties.

8.2 In the first ground of appeal, the Respondent attacks the judgment of the Court below by questioning its jurisdiction to determine the claims laid by the Respondent.

8.3 The Appellants' argument as we understand it is that the dispute between the parties related to the Respondent's refusal, as a landowner, to give consent to the Appellant in accordance with section 52(1) of the Act.

8.4 Consequently, the dispute should have been referred to arbitration in accordance with Section 56(1)(a) and (b) of the Act.



8.5 The claims advanced by the Respondent before the Court below appear at page 54 of the record and paragraph 3.1 herein.

8.6 In essence, there are two claims brought forth, in the first claim, the Respondent sought to restrict the Appellant, as a third party, from entering upon its land. The second claim relates to a declaration that the Respondent reasonably withheld its consent for the Appellants to have access to its property.

8.7 Our view, therefore, is that the Respondent's first claim is rooted in the Appellants' insistence to enter upon the Respondent's property without its consent. In the *Rephidim case supra*, we did state that matters relating to surface rights can be enforced by taking out a civil action.

8.8 For ease of reference, we reproduce hereunder, the first claim the Respondent laid before the Court below;

- i) *"A declaration that the Defendants have no right to enter upon numbers subdivision C of Farm No 927, Farm No 1426 and Farm No 942 or the land in*

*Nchanga Mine area without the prior consent of the Plaintiff”*

8.9 The claim quoted above, arose from the Appellants’ decision to move onto the land upon which the Respondent has surface rights. The brief background is that on 11<sup>th</sup> May, 2017, the 1<sup>st</sup> Appellant wrote to the Respondent seeking consent to access the Respondent’s surface area to operationalize its small-scale exploration licence.

8.10 On 5<sup>th</sup> July, 2017, the 1<sup>st</sup> Appellant wrote a follow-up letter seeking consent. On 25<sup>th</sup> July, the Minister of Mines wrote to the Respondent asking it to consider granting consent to the 1<sup>st</sup> Appellant.

8.11 On 26<sup>th</sup> January, 2018, the 1<sup>st</sup> Appellant wrote to the Respondent expressing displeasure at the Respondent’s failure to respond to the letters seeking consent. It then went further to announce that it had officially commenced operations effective 31<sup>st</sup> January, 2028 and that it had incorporated in its operations Artisanal Licence No 21419-HQ-AMR.

8.12 To the above stated letter, the Respondent instructed its advocates, Messrs ECB Legal Practitioners to respond. In the response, dated 5<sup>th</sup> February, 2028, Messrs ECB Legal Practitioners categorically stated that the Respondent could not grant consent for reasons stated in the letter.

8.13 This series of correspondence brings us to the question whether, the first claim by the Respondent in the Court below comes within the contemplation of section 52 (1) (b) of the Mines and Mineral Development Act.

8.14 It is not in dispute that Section 52 (1) (b) clearly prohibits a holder of a mining right from exercising such rights without the written consent of the owner or legal occupier of the land. Having already established that the 1<sup>st</sup> Appellant did exercise its mining rights upon the land, the question is, is the Respondent the owner or legal occupier of the land upon which the 1<sup>st</sup> Appellant exercised its mining rights?



8.15 In the Court below, the learned Judge established that by Contract of Sale executed among ZCCM, the Government of the Republic of Zambia, and the Respondent, in 1999, the Respondent purchased, the land in issue along with specified equipment and the tailings dumps.

8.16 The next question is, did the dispute that ensued between the 1<sup>st</sup> Appellant and the Respondent fall to be resolved under the provisions of section 56 (1) (a) of the Act which provides as follows;

*“Where there is a dispute concerning-*

*(a) whether or not paragraph (b) of subsection (1) of section fifty-two applies in respect of any land, or the withholding of any consent under that subsection”*

8.17 We have thoughtfully considered section 52 (1) (b), and we find that the dispute is not about whether or not subsection (b) applies or about the withholding of the consent. The issue in dispute is that the Appellants had unlawfully moved onto the land upon which the Respondent has surface rights and started exercising its mining rights.

8.18 This dispute, in our view, is within the powers of the Court below and it rightly exercised jurisdiction over the claim. In any case having been refused consent, the 1<sup>st</sup> Appellant had the right to seek consent from the appropriate authority under section 52 (1) (a). Section 2 defines appropriate authority as the Minister or public officer authorised by the Minister. Section 52 (2) states that the Director of Mining Cadastre is vested with authority to grant consent if refused by the owner or legal occupier.

8.19 In our view, section 56 (1) (c) does not apply as rightly observed by the Respondent. The section applies to matters arising as prescribed by Statutory Instrument by the Minister.

8.20 Ultimately, we hold that ground one is bereft of merit and ought to fail. We dismiss it accordingly.

8.21 The next issue is a challenge on the learned Judge's decision to pronounce himself on whether or not the Respondent reasonably withheld consent. This takes us

back to section 52 (3) of the Act which provides as follows;

*“Where any consent required under this subsection is unreasonably withheld, the Director of Mining Cadastre may arrange for arbitration of the matter in accordance with section fifty-six.”*

8.22 The Respondent argued that the Court has the jurisdiction to determine whether the refusal of consent is reasonable or not and only if it determines that refusal was unreasonable, does the aggrieved party have the right to have recourse to section 52 (3)

8.23 We do not agree with that assertion because, when the person seeking to exercise their mining rights on another person's land writes to ask for consent, and consent is refused, that person, ought to go back to the Director of Mining Cadastre and make his case for unreasonable withholding of the consent. It is the Judgment of the said officer that will determine whether or not consent was unreasonably withheld and if he so determines, then, the Director, may arrange for arbitration.



8.24 In our understanding of the intent of the framers of the Act, recourse to Courts of laws can only be had after the grievance procedure set out under section 97 of the Act has been exhausted. The section clearly provides for complaints from aggrieved parties in relation to mining rights to lie to the Directors within the Ministry, then to the Minister thereafter, to the Tribunal and finally to the Courts of law.

8.25 We therefore, hold that the 1<sup>st</sup> Appellant, upon being denied consent, rather than trespass upon the Respondent's land, ought to have raised a complaint of unreasonable withholding of consent to the Mining Cadastre Director. We therefore, hold that the Court below lacked jurisdiction to determine that the Respondent withheld consent unreasonably. We set aside that decision for being made in excess of jurisdiction.

8.26 Consequent upon the above expressed views, grounds three, four, five, six, eight, nine, ten and eleven of the appeal have been rendered otiose.

8.27 The Appellants' arguments in ground two, which we find to be interrelated with grounds seven and twelve, take issue with the Respondent's failure to produce Certificates of Title for the properties in issue to prove that it is the legal owner.

8.28 We have no reason to disagree with the learned Judge's findings and decision which are well articulated in the Judgement at pages 29 and 30 of the Record of Appeal.

8.29 The learned trial Judge followed our guidance in the *Rephidim Case and* held that section 52 of the Act not only requires the written consent of an owner but also a legal occupier of land which we have already held the Respondent to be. This is by virtue of its position as a purchaser in possession of the land subject of this appeal.

8.30 As regards the overburden dumps and stockpiles, it is the Appellant's position that the dumps and stockpiles did not belong to ZCCM and as such, it could not transfer them to the Respondent.

- 8.31 The record shows that following the Sale Agreement with ZCCM, the Respondent and ZCCM executed a defunct areas option agreement on 31<sup>st</sup> March, 2000, which is at page 439 of the Record of Appeal. This was to give the Respondent the right to call for the transfer to it of some or all the defunct areas defined in the agreement.
- 8.32 The schedule setting out the defunct areas is not legible, however, the evidence on record is to the effect that the Respondent is the legal occupier of the areas in dispute because the Appellants' letter requesting access to the said areas at page 570 of the Record of Appeal, states that the Respondent has surface rights. This is repeated in the 1<sup>st</sup> Appellant's letter to the Respondent at page 574 of the Record of Appeal.
- 8.33 This is the same tone in the letter from the Minister of Mines and Minerals Development dated 25<sup>th</sup> July, 2017 appearing at page 573 of the record wherein it is stated that the Respondent has surface rights.



8.34 The maps featured at pages 515 and 559 of the Record of Appeal also show that OB1 and SP6 are within the Respondent's surface rights areas. The Appellants cannot now be heard to argue that these areas do not belong to the Respondent.

8.35 In relation to the argument that the Respondent abandoned the areas in issue, the minutes of the meeting dated 21<sup>st</sup> January, 2009, between the Respondent and ZCCM, at page 573 of the record, show that an area described as 'Fitula' was not retained by the Respondent. The area does not relate to OB1 and SP6.

## **9.0 COUNTERCLAIM**

9.1 The Appellants have counterclaimed as seen at page 67 of the record. The Counterclaim relates to a dispute on mining rights between the parties herein.

9.2 In the case of Sanhe Mining Zambia Limited v Andrew Mazimba and Tirumala Balaji (Z) Limited<sup>4</sup>, we held that the Mining Tribunal has jurisdiction to determine disputes that relate to the implementation of mining

rights and all intermediate matters that arise from the implementation of those rights.

9.3 The High Court, is therefore, not the right forum to determine the claims raised by the Appellants and part of the Respondent's claim that the Appellants are within the area covered by its mining license. In this regard, we repeat what we said in paragraph 8.24 above that the Appellants should have invoked the procedure set out in section 97 of the Act.

9.4 The result is that the learned Judge acted without jurisdiction and we set aside the proceedings and the findings in that respect.

## **10.0 CONCLUSION**

10.1 This Appeal raised issues upon which all the Superior Courts of this land have pronounced themselves from the High Court to the Supreme Court. In most recent times, we have interrogated the import of section 52 and 56 of the Mines and Minerals Development Act in the cases of Konkola Copper Mines Plc V Rephidim (supra), and

Attorney General and two others v Konkola Copper Mines, in which we firmly held that a person with mining rights cannot go onto land owned by or under the legal custody of another without obtaining written consent of the that other owner or legal occupier.

10.2 We further held that a holder of a mining right cannot enter upon land held by another solely on the basis that they have a mining right if they have not obtained the written consent of the owner or legal occupier.

10.3 We further held that where the holder of a mining right enters upon land owned or legally occupied by another without consent, the owner is entitled to treat such a person as a trespasser and that they can commence an action in tort for damages.

10.4 We therefore, find no difficult in upholding the decision of the Court below in respect of its claim of jurisdiction in the first claim.

10.5 We however, also firmly affirm the provisions of sections 52, 56 and 97 of the Act in so far as they take away the



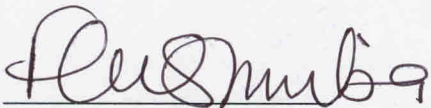
jurisdiction of the Courts in matters which relate purely to mining rights

10.6 The net effect of our judgment is that the appeal partially succeeds by reason which we order each party to bear their own costs.

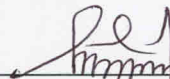


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M.J. SIAVWAPA  
**JUDGE PRESIDENT**



F. M. CHISHIMBA  
**COURT OF APPEAL JUDGE**



A. M. BANDA-BOBO  
**COURT OF APPEAL JUDGE**