

IN THE COURT OF APPEAL FOR ZAMBIA

SP 48/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



KONKOLA COPPER MINES PLC (In Liquidation) APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

SHENZEN RESOURCES LIMITED 2ND RESPONDENT

KAKOSO METALS LEACH LIMITED 3RD RESPONDENT

CORAM: SIAVWAPA JP, BANDA-BOBO AND PATEL JJA

On 29th May and 19th August 2024

FOR THE APPLICANT: MR. E.C. BANDA, SC, MR. CHIBELEKA AND
MR. KANGWA, ALL OF MESSRS. ECB LEGAL
PRACTITIONERS

FOR THE 1ST RESPONDENT: MR. P.S PHIRI, ACTING PRINCIPAL STATE
ADVOCATE

FOR THE 2ND AND 3RD RESPONDENTS: MRS. S. PHIRI AND MR. HINJI,
BOTH OF MESSRS CHIFUMU
BANDA & ASSOCIATES

R U L I N G

SIAVWAPA, JP, delivered the Ruling of the Majority.

Cases Referred to:

1. *Bidvest Food Zambia Ltd & Others v CAA Import and Export SCZ Appeal No 56 of 2017*

Legislation referred to:

1. *Court of Appeal Act No 7 of 2016*
2. *Mines and Minerals Development Act No. 11 of 2015*

1.0 INTRODUCTION

- 1.1 By this motion, the Applicant seeks leave to appeal to the Supreme Court against our Judgment dated 23rd August 2023.
- 1.2 The motion is dated 2nd November 2023 and it was made pursuant to Section 13 of the Court of Appeal Act No 7 of 2016.

2.0 THE MOTION

- 2.1 The grounds on which the Applicant seeks leave are; that the intended appeal raises points of law of public importance, that the appeal has reasonable prospects of success and that there is some other compelling reason for the appeal to be heard.
- 2.2 In the affidavit in support of the motion, deposed to by one Tundo Chibeleka, advocate for the Applicant, the deponent states that the intended appeal raises a point of law of public importance relating to whether the Director

of Mining Cadastre can compulsorily acquire land and grant consent for a party to enter upon a surface area held on title.

2.3 On the prospects of the appeal succeeding, the deponent has referred us to the draft grounds of appeal as contained in the Applicant's draft memorandum of appeal exhibited as "TC 3".

2.4 The Applicant also asserts that there is a compelling reason for the appeal to be heard because the 1st Respondent failed to provide evidence before the Court to show that the Director of Mining Cadastre had made a decision that went to the root of the appeal.

2.5 Based on the above arguments, the Applicant has urged us to grant it leave to appeal to the Supreme Court.

3.0 ARGUMENTS IN OPPOSITION

3.1 The 2nd and 3rd Respondents filed a joint affidavit in opposition into Court on 22nd November 2023. The affidavit was deposed to by Griver Chola Sikasote in his capacity as Director in the 2nd and 3rd Respondents.

3.2 The gist of the arguments in opposition is that we were right to set aside the Ruling of the High Court because; the Applicant used the wrong mode of commencing the action as the High Court had no jurisdiction to determine the dispute.

3.3 Based on the above view, the 2nd and 3rd Respondents have argued that the intended appeal had no prospects of success as the law was clear that a party aggrieved by the decision of the Director of Cadastre Mining should appeal to the Minister.

3.4 The 2nd and 3rd Respondents have equally dismissed the argument on compelling reasons for want of merit.

4.0 OUR ANALYSIS AND DECISION

4.1 We have considered the motion, affidavit in support and the arguments in support and in opposition to the motion.

4.2 Section 13 of the Court of Appeal Act provides four prerequisites upon which we may consider granting leave to appeal to the Supreme Court. The Applicant has sought to rely on three of them namely; a point of law of public importance, reasonable prospects of success and compelling reason for the Supreme Court to hear the appeal.

4.3 On the point of law of public importance, the Applicant argues that in our Judgment, we held the view that the Director of Mining Cadaster has authority to grant consent to enter upon a surface area held on title and

that it is in the public interest that the law that supports this view be enunciated.

4.4 Further, the Applicant argued that it is imperative for the Supreme Court to determine the intended appeal because it not only affects the parties to this appeal but affects persons and entities who possess land that may be subject to a mining right.

4.5 In the *Bidvest Food Zambia Ltd & Others v CAA Import and Export* case, the Supreme Court of Zambia stated that a point of law relied on to seek leave to appeal must emanate from the appeal that was before this Court.

4.6 We have combed through our Judgment and at no point did we state that the Director of Mining Cadastre has authority to grant consent to enter upon a surface area held on title. What we found as a fact, as revealed in paragraph 7.9, is that the Director gave consent to the 2nd Respondent after the Applicant had declined to give it consent.

4.7 The question whether or not the Director of Mining Cadastre had authority to grant consent was not an issue in the appeal. What we were called upon to determine in the appeal was whether the Appellant had taken its grievance before the right forum and we held that it had not.

- 4.8 In relation to prospects of success, the Applicant has fronted three arguments, among them, the argument that the Director of Mining Cadastre has no authority to grant consent, which we have dealt with in the preceding paragraphs.
- 4.9 The second argument is that we did not address our minds to Section 56 of the Mines and Minerals Development Act which provides for the procedure that may be undertaken by the Director of Mining Cadastre when there is a dispute relating to surface rights.
- 4.10 This argument is way out of context because in our Judgment, we indicated that the correct procedure was for the Applicant to appeal to the Minister against the decision of the Director. Having found that the Court below had no jurisdiction to entertain the matter before it, we could not attend to the procedural issues contained in section 56 of the Act.
- 4.11 Lastly, the Applicant argues that we failed to draw a distinction between surface rights held by a title holder and mining rights held under the Mining and Minerals Development Act. We find this assertion irrelevant but, suffice to state that we alluded to the difference in paragraphs 7.5, 7.6 and 7.7 of our Judgment.
- 4.12 On the criticism that we erred by not satisfying ourselves on the written consent of the Director, as a compelling

reason to grant leave to appeal, we accepted the submission because the Applicant did not dispute it

4.13 This position is evident in paragraph 7.9 of our Judgment where we clearly indicated our acceptance of the evidence that the Respondents had obtained the consent of the Director upon refusal by the Applicant.

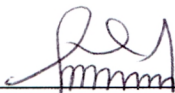
4.14 There is therefore, no compelling reason to justify the granting of leave to appeal to the Supreme Court in this case.

5.0 CONCLUSION

5.1 The sum total of our Judgment is that leave to appeal is denied and the motion is dismissed with costs to the Respondents to be taxed in default of agreement.



**J.M. SIAVWAPA
JUDGE PRESIDENT**



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

Dissenting Ruling

Patel, JA delivered the minority Ruling.

Legislation Referred to:

1. The Court of Appeal Act No. 7 of 2016
2. The Mines and Minerals Development Act No. 11 of 2015
3. The Lands Act Chapter 184 of the Laws of Zambia
4. The Lands and Deeds Registry Act Chapter 188 of the Laws of Zambia

Cases Referred to:

1. Proximity Engineering and Mining Limited v Paulgil Cheick Enterprises Limited – CAZ Appeal No. 170/2022
2. New Plast Industries Limited v The Commissioner of Lands and the Attorney General (2001) ZR 51
3. Chikuta v Chipata Rural Council (1974) ZR, 241

1. I hold a different view from the majority Ruling of my learned seniors and my dissenting Ruling will be read separately as below.
2. As noted in the Ruling of the majority, by this Motion, the Applicant seeks leave to appeal to the Supreme Court against the Judgment of the Court delivered on 23rd August 2023.

3. I see no need to repeat the contents of the Motion, nor re-state the competing arguments ably advanced and annexed to the Motion, save to state that I have seriously interrogated the Motion, the competing arguments and reflected on the Judgment of the Court, the subject of the Motion.
4. It is also trite and needs no repetition, that for an application to be sieved under this process and to satisfy the requirements of **section 13(3)** of the Court of Appeal Act, the applicant must, cross a huge threshold and discharge the stringent test established by the cited case of **Bidvest Food Zambia Limited**.
5. What is cardinal, is that for leave to be granted by the Court, the appeal must raise a point of law of public importance, must transcend beyond the Parties to the Motion and have wide consequences to the community, as opposed to simply advancing the interest of the Parties in the suit. Needless to say, the intended appeal should also demonstrate a reasonable prospect of success.
6. My point of respectful departure from the Ruling of the majority, rests on the determination that there is no compelling reason to justify the grant of leave to appeal to the Supreme Court.
7. What is fundamental in this Motion, and is in my considered opinion, a point of law of wide public importance, is under what circumstances the Director of Mining Cadastre can give consent to the holder of a mining right where it has been withheld by the owner of surface rights.

8. The question of law of public importance that the proposed appeal raises on the issue of consent of the Director of Mining Cadastre, and its wide-reaching implications, including the compulsory acquisition of land of a title holder, without any corresponding sanction, or relief, is indeed an issue that deserves to be interrogated and addressed by the Supreme Court for reasons canvassed by the Motion.
9. The interplay of the provisions of the Mines and Minerals Development Act (MMDA), the Lands Act and the Lands and Deeds Registry Act, and their effect on an owner of surface rights (with or without mining rights) viz the owner of a mining licence, cannot simply be overlooked by the refusal to grant leave to appeal to the Supreme Court.
10. It is my understanding that the critical issue in the Motion before us is the source of the power of the Director Mining Cadastre to grant consent in situations where it has been withheld. **Part IV** and **section 52** of the MMDA deals with *mining rights and surface rights*. It has not been canvassed or submitted what the consent must look like save that **section 52 (2)** refers to the *terms of the written consent*. **Section 52 (3)** requires that consent where required, and which is unreasonably withheld, the Director of Mining Cadastre may arrange for arbitration in accordance with **section 56**.
11. I have noted that in the Judgment of the Court (**paragraphs 7.9 to 7.11**), we appear to have made a finding of fact that the Director of Mining Cadastre having granted consent to the 2nd and 3rd Appellant, the Respondent (the Applicant), in the Motion before us, ought to have appealed the decision of the Director as prescribed by **section 97 (1)** of the MMDA. The critical issue

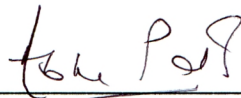
in my considered opinion, *is where did the consent and subsequent decision sit and what form did it take?*

12. The argument canvassed by the Applicant in the Motion seeking leave to appeal to the Supreme Court, is that if this Court holds the view that the Director of Mining Cadastre has the authority to grant consent, in circumstances that presented themselves in the case at hand, which consent as a matter of course amounts to a compulsory acquisition, the Court must cite the specific law which has given such extensive powers to the Director. This issue, in my humble opinion, is in the public interest and must be addressed by the Supreme Court.
13. It may also be canvassed that the Judgment which noted that the Respondent ought to have appealed the decision of the Director as prescribed by **section 97 (1)** of the MMDA may not have addressed its mind to **section 56** of the MMDA which speaks to the procedure that may be undertaken by the director of Mining Cadastre when there is a dispute as to consent to surface rights.
14. What is, however, mandatory under **Part VIII**, is that a *decision* and the reasons for that *decision* be notified to the affected party in writing, informing the person notified of that person's right of appeal. **Section 96** refers. To the extent that the consent, and subsequent decision may not have been communicated to the Parties, the cited cases of **Chikuta v Chipata Rural Council** and **New Plast Industries** may be distinguished.
15. Without delving into the merits of the proposed appeal, I am simply alive to the fact that we have recently pronounced ourselves on what constitutes a

decision of the Director of Mining Cadastre. I refer to a Judgment, of the Court delivered in the case of **Proximity Engineering and Mining Limited v Paulgil Cheick Enterprises Limited**.

16. I am also alive to the fact that the 1st Appellant (The Attorney General), being the party aggrieved by the decision of the High Court and successful in the Judgment on appeal in this Court, did not object to the Motion as it is premised on a point of law.
17. For the reasons above, I am of the humble view that there is merit in this Motion and that I would grant leave to appeal to the Supreme Court as the proposed grounds sit in the wider domain and are not simply of concern to the Parties to this action.

This concludes my dissenting Ruling.



Abha N. Patel S.C.
COURT OF APPEAL JUDGE