

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2023/HP/0660



BETWEEN:

MAPOMPO INVESTMENTS LIMITED
AND
ZESCO LIMITED

PLAINTIFF

DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers, March 7th,
2025.

For the Plaintiff (s): Mr. C. Chizawu of Messrs KCK and Associates.

For the Defendant (s): Mr. M. V. Chiwale of Messrs Macroby Chiwale
and Company.

JUDGMENT

Cases referred to:

1. *Zesco Limited V. Clive Mukando Appeal No. 022/20/6 of 2018.*
2. *David Kabuku Mwitumwa V. Airtel Networks Zambia Plc and Another Appeal No. 52 of 2001.*
3. *Khalid Mohamed V. Attorney General (1982) ZR 49*
4. *Abel Hachaambwa V. Cheelo Mweemba SCZ 8/208/2016.*
5. *Anderson Kambela Mazoka and 2 Others V. Levy Patrick Mwanawasa and 2 others (2005) ZR 138.*
6. *Shell BP (Z) Limited Vs. Conidaris and Others SCZ No. 37 of 1975.*

Legislations referred to:

1. **Section 23 (2) of Electricity Act No. 11 of 2019.**
2. **Section 29 (2) of the above names Electricity Act No. 11 of 2019.**
3. **Mines and Minerals Development (General) Regulations Statutory Instrument No. 7 of 2016.**
4. **Section 52 (1) (c) of the Mines and Minerals Department Act No. 11 of 2015.**

Other works referred to:

1. **Salmond on the Laws of Torts, 6th edition at page 156.**

1. **INTRODUCTION**

- 1.1. This Judgment is in respect of the Plaintiff's claim as against the Defendant. The record shows the Plaintiff's claims as follows;
 - I. A declaration that the Defendants have illegally encroached and trespassed on the property of the Plaintiff.
 - II. An Order requiring the Defendants to remove the said 330kv transmission lines.
 - III. Damages for illegal trespass/encroachment.
 - IV. Compensation of Two Hundred and Ninety-Two Million, Eight Hundred Thousand Kwacha (K292,800.00).
 - V. Pecuniary damages for loss of prospective earnings.
 - VI. Interest thereon and any other relief the Court may deem fit.
 - VII. Costs.
- 1.2. In response the Defendant entered appearance and filed a Defence on May 2nd, 2023. By that Defence the Defendant denied the

Plaintiff's claims, averring that all legal and statutory requirements were adhered to.

- 1.3. The Plaintiff by Reply dated May 16th, 2023 joined issue with the Defendant's Defence.

2. TRIAL COURSE

- 2.1. Matter was scheduled and heard on August 13th and 14th, 2024. The Plaintiff called 5 witnesses in aid of its case and the Defendant called 4 witnesses in defence.
- 2.2. PW1 was Panji Botha, a Site Manager at the Plaintiff Company. PW1 testified under oath and filed a witness statement dated October 27th, 2023.
- 2.3. PW1 testified in chief that in late 2021, while supervising at the mine, he saw some workers from some Company, constructing pylons in the Plaintiff Company's mining area.
- 2.4. PW1 further testified that he approached the men who told him that the construction of the pylons was on behalf of Sino Hydro Limited. He then reported the issue to Plaintiff Company Management.
- 2.5. Under cross examination, PW1 conceded that he was not aware of whether the Plaintiff Company had consent from Chieftainess Nkomesha to occupy the land where mine is. He also testified that he did not know if the Defendant Company was granted consent by Chieftainess Nkomesha to erect the pylons on the subject land.
- 2.6. PW1 was not re-examined.

- 2.7. PW2 was Charles Chileshe, Administrative Manager at the Plaintiff Company. PW2 testified under oath and filed a witness statement dated October 27th, 2023.
- 2.8. PW2 testified in chief that the Plaintiff Company had acquired mining rights from the Ministry of Mines and Minerals Development and was fully operational since 2008 with a Small-Scale Mining Licence as appears on pages 4-5 of Plaintiff's bundle of documents.
- 2.9. PW2 further testified that he first saw the Defendant Company erecting pylons on the Plaintiff Company's mining area in 2021. That he contacted their Advocates to contact Zesco because some pylons were over the mineral deposits.
- 2.10. PW2 testified that other pylons were constructed right where the other pits for Copper Ore, Limestone and Dolomite were placed, forcing them to abandon mining and cancelling contracts with their clients.
- 2.11. PW2 further testified that Plaintiff Company could not work under the power line as this was against the law.
- 2.12. PW2 testified that Management at Plaintiff Company tried to settle issues with Defendant Company even reporting to the Energy Regulation Board but to no avail.
- 2.13. PW2 further testified that the Plaintiff Company did not give the Defendant Company consent to erect pylons in the mining area pursuant to provisions of the **Electricity Act No. 11 of 2019** and the guidelines from the Zambia Environmental Agency (ZEMA).

- 2.14. Under cross examination, PW2 conceded that he was not aware of any consent given by Chieftainess Nkomesha to the Defendant Company to erect the pylons.
- 2.15. PW2 further testified that the Plaintiff Company had consent from Chieftainess Nkomesha to mine but no document was on Court record to prove this.
- 2.16. Under re-examination, PW2 re-confirmed that the Plaintiff Company had consent from the Headman to occupy the land they mined on.
- 2.17. PW3 was Winston James Nyondo an Accountant at the Plaintiff Company, since 2008. He testified under oath and filed witness statement dated October 27th, 2023.
- 2.18. PW3 testified in chief that the Plaintiff Company obtained a Small-Scale Mining Licence in 2008 and was in full operation at the mine since 2008. That when the mining activities started there were no Zesco pylons erected.
- 2.19. PW3 further testified that they knew about Zesco's activities in 2021. The pylons were constructed right in the mining area where the pits for Copper Ore, Limestone and Dolomite are placed, the Plaintiff Company was forced to abandon the limestone business and cancel contracts signed with clients.
- 2.20. PW3 testified that the Plaintiff Company could not work under the pylons and this resulted in huge loss of income.
- 2.21. PW3 testified that discussions with the Defendant Company failed to yield positive results even in presence of Energy Regulation

Board (ERB). He referred the Court to page 60 of Plaintiff's bundle of documents.

- 2.22. PW3 testified that the Defendant Company never got consent from Plaintiff Company, to erect the pylons in the mining area.
- 2.23. PW3 further testified that the Plaintiff Company has incurred loss, legal costs and damage to its reputation. He estimated loss of production to ZMW 8,760,600.000,00. PW3 referred the Court to page 64-73 of Plaintiff's bundle of documents.
- 2.24. Under cross-examination, PW3 testified that the Plaintiff Company commenced mining in 2008. Further that the renewal licence documents were submitted in 2018 and renewal received on October 22nd, 2020.
- 2.25. PW3 further testified that they continued to mine between 2018 – 2020 because the rules allow for this if a party has made payments for renewal.
- 2.26. PW3 conceded that the licence conditions are not before Court, full original mining licence not put before Court.
- 2.27. PW3 further conceded that page 60-61 of Plaintiff's bundle of documents speaks to establishment of dispute and not encroachment. PW3 conceded that the last part of paragraph 3 of his witness statement is not true.
- 2.28. In re-examination, PW3 confirmed that page 4-5 of Plaintiff's bundle forms part of the Plaintiff's mining license renewed in 2018 for further 10 years.

- 2.29. PW3 testified that page 61 of Plaintiff's bundle of documents is consistent with paragraph 3 of his witness statement.
- 2.30. PW4 was Forceman Chiboola, a Director at the Plaintiff Company. He testified under oath and filed witness statement dated October 27th, 2023.
- 2.31. PW4 testified in chief that in 2006, Plaintiff Company discovered mineral deposits in Nguluka Village and thus commenced process of obtaining necessary authority to commence mining in the aforesaid area.
- 2.32. PW4 further testified that firstly, they applied for Mining Rights on the 2nd December, 2006 in Nguluka Village, Malundu Zone of Nkomesha Chiefdom in Kafue District in Lusaka Province as shown on page 1 of the Plaintiff's bundle of documents. PW4 further testified that the letter of Authority was granted on 2nd December, 2006 and a money deposit of K10,000,00 was paid and a balance of another K10,000.00 was paid on August 28th, 2018 as shown on page 2 and 3 of Plaintiff's bundle of documents.

PW4 proceeded that secondly, they applied for a Small-Scale Mining License from the Ministry of Mines and Minerals Development pursuant to the Mines and Minerals Development Act which licence was granted for a period of 10 years commencing on December 22nd, 2008. PW4 further testified that the license was renewed for a further period of 10 years commencing on December 22nd, 2008 as exhibited on page 4 of Plaintiff's bundle of documents.

- 2.33. PW4 testified that the Plaintiff Company started mining Talc in 2008, during which time they discovered Copper, Dolomite and Lime stone which they also started mining.
- 2.34. PW4 testified that in 2021, the Defendant Company were erecting pylons on their mining area. That a joint onsite meeting was held with Plaintiff, Defendant and Ministry of Mines.
- 2.35. PW4 further testified that the documents at page 62-63 of Plaintiff's bundle of documents were provided to Defendant Company. That this and field Report at pages 15 to 20, confirmed the Defendant Company's encroachment.
- 2.36. PW4 testified that the Defendant Company refused to settle the issue amicably.
- 2.37. Under cross examination PW4 testified that the Plaintiff Company received consent from Chieftainess Nkomesha to occupy the land and this is what they used to obtain the Mining License.
- 2.38. PW4 further testified that page 2 of Plaintiff's bundle of documents shows consent from Chieftainess Nkomesha. When asked to show where on document, PW4 conceded that the document was signed by a Headman.
- 2.39. PW4 conceded that the document was left with Headman Nguluka who was to take it to the palace for process.
- 2.40. PW4 conceded that he was not there when the document prepared by Headman Nguluka was signed and stamped. That he could not confirm whether the Senior Headman Kalenga was there/not.
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- 2.41. PW4 testified that they received the consent/reply 4 days from date of stamp, sometime in May, 2019.
- 2.42. PW4 further testified that in 2006 the Plaintiff Company had an Artisan licence and applied for renewal licence in 2008. That they received verbal consent from Headman in 2006 but the formal letter only stamped in 2019.
- 2.43. PW4 conceded that the Plaintiff Company only received authorization from ZEMA in 2020 even though they commenced mining in 2008. That they had no authorization from ZEMA prior in 2008.
- 2.44. PW4 further conceded that the ZEMA decision letter at paragraph 2.0 page 9 of Plaintiff's bundle of documents shows that no mining activities had commenced in 2020.
- 2.45. In re-examination, PW4 clarified that the Plaintiff Company started mining in 2008 with Artisan Licence and consent from Zambezi Resources Limited and the Chief.
- 2.46. PW4 further testified that the Plaintiff Company already had a licence in 2008 and the Headman merely gave authority for their presence there.
- 2.47. PW5 was Mataa Liondo, the Plaintiff Company's Secretary since 2008. He testified under oath and filed witness statement dated October 27th, 2023.
- 2.48. PW5 testified in chief that in 2021, he went to the Plaintiff Company's mine and saw Sino Hydro Limited workers erecting pylons for Zesco in the mining area.
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- 2.49. PW5 further testified that one pylon is erected right where Copper, Dolomite and Limestone deposits are. That this rendered it impossible for the Plaintiff Company to extract their Copper, Dolomite and Limestone.
- 2.50. PW5 testified that the Defendant Company did not co-operate in excuria settlement discussions of their issues with Plaintiff Company.
- 2.51. Under cross examination, PW5 conceded that the Mining Licence at page 4 of Plaintiff's bundle of documents does not contain Copper Minerals and did not have right to mine copper.
- 2.52. In re-examination, PW5 testified that the Plaintiff Company did not mine Copper but only Dolomite, Limestone and Talc.
- 2.53. The Plaintiff closed its case.
- 2.54. DW1 was Sonny Mwamutenta Musakabantu, Manager Safety, Health Environment and Quality Southern Region, in the employ of the Defendant. DW1 signed witness statement dated October 27th, 2023 and avers that at all material times he was Chief Environmental Scientist North Region in the employ of the Defendant.
- 2.55. DW1 testified under examination in chief that his day to day duties included supervising the implementation of environmental safeguards on Defendant's projects to ensure compliance to environmental laws (National, Regional and International) in all Defendant's projects and other areas of operation. Facilitate good participation and representation in various fora related to environmental and water resources management both at National
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and International Levels, and supervise wayleave acquisition and wayleave management including initial land acquisition for Defendant's infrastructure.

- 2.56. DW1 testified that the parties attempted to settle this matter excuria in 2022 when the Plaintiff sent its demand letter. The excuria discussions failed.
- 2.57. DW1 testified that the Defendant did not encroach on the Plaintiff's mining premises. That the Defendant's project to build the Kafue Gorge Lower 330KV line started with feasibility studies around 2009, and he worked on project from 2013.
- 2.58. DW1 further testified that as part of the Environmental and Social Impact Assessment (ESIA), the Defendant engaged all Stakeholders including Her Royal Highness Chieftainess Nkomesha of Chongwe and Her Royal Highness Chieftainess Chiyawa of Chirundu District. That the Defendant obtained the necessary consent to implement the project, from the identified land custodians in the chiefdoms.
- 2.59. DW1 further testified that the wayleave was surveyed in 2017-2018 and marks were placed at intervals. Construction was commenced and concluded.
- 2.60. DW1 testified that at no point did the Royal Highness Chieftainess Nkomesha/her subjects put any limitations on the extent of land approved and consented for use to the Defendant Company with regards to Miners/the Plaintiff Company. That the guidelines of the extent of land use by the Defendant Company was overseen by the Senior Headman and his team for and on behalf of the Chieftainess.

- 2.61. DW1 further testified that he personally coordinated the ESIA, Resettlement and Compensation Action Plan (RCAP), Stakeholder engagement, wayleave acquisition and operationalization of the safeguard instruments. He referred the Court to documents in Defendant's bundle of documents.
- 2.62. DW1 testified that his office performed its due diligence before and during the project as per regulations and law. Further that no mining activities were found at the time traditional leadership approved Defendant's use of the area.
- 2.63. DW1 testified that ZEMA certification was granted in 2016 to the Defendant Company, which approval would not have been granted if the alleged dangers of presence of use of explosives by the Plaintiff in their mining activities were true in the transmission lane.
- 2.64. DW1 further testified that upon receipt of the Plaintiff's Writ of Summons and Statement of Claim that he visited the area in Zone 9, managed by Senior Headman Kalenga who explained that the Plaintiff sought to draw material for making tiles and not a Mine. Further that the customary leadership did/could not agree and the Headman representing the Chieftainess halted the consent process, since September, 2022, the said piece of land the Plaintiff wanted has been dormant.
- 2.65. DW1 testified that in the initial stages, the leadership of the customary land never mentioned anything to us of a possible mine to lookout for near or around the Defendant's marked area. That maybe because there is a distance away from the area given to the Defendant Company and the alleged mining area. DW1 Further testified that they could not see the need to inquire or investigate

the possibility of the mine in the said area next to the Defendant transmission lines because the area was very open and clear with no activities to suspect ownership of a third party during the initial stages and at completion of the project. That if there was any mention, his team would have incorporated in planning of the line in order to co-exist e.g Chilanga Quarries, especially that the Defendant Company had been on the ground since 2009.

- 2.66. Under cross examination, DW1 confirmed that he did personally participate in the project as coordinator and engaged Stakeholders – Communities, Chilanga Cement, Oriental Quarries, Traditional Leaders, Farmers and Landowners.
- 2.67. DW1 conceded that he did not engage the Plaintiff Company and he was not aware of any mining activities there.
- 2.68. DW1 testified that paragraph 3 of his witness statement entailed that according to the Regular (Energy Regulation Board-ERB) the Defendant Company had no fault and thus the Plaintiff had to go to Court.
- 2.69. DW1 testified that document at page 38 Defendant's bundle of documents proves that clearance was done.
- 2.70. DW1 further testified that the letter at page 60 of Plaintiff's bundle of documents is different from that at page 38 Defendant's bundle of documents, even the addressees are different.
- 2.71. DW1 testified that he was not aware that a team from Ministry of Mines certified the encroachment and was referred to page 32 of Plaintiff's bundle of documents.

- 2.72. DW1 testified that in reference to pages 15-18 Plaintiff's bundle of documents that the Plaintiff claimed during discussions that the Defendant Company had encroached because the Plaintiff owned the land but could not be true as Defendant Company had obtained consent to construct the line through traditional land from the traditional leadership. Further that there was no mining activity when Defendant Company was erecting the pylons.
- 2.73. DW1 testified that page 13 of Defendant's bundle of documents shows consent for Defendant Company to erect pylons.
- 2.74. DW1 conceded that the Defendant Company did not receive consent from Chieftainess Nkomesha.
- 2.75. DW1 testified that the Plaintiff Company was not contacted during Stakeholder engagement because the Defendant Company was advised that, that land belonged to the traditional leaders.
- 2.76. DW1 conceded that he was not aware that the Plaintiff Company had mining rights from 2008. He was referred to the Mining Licence at page 4 of Plaintiff's bundle of documents. DW1 testified that on the ground there was no mining activity from 2013 to 2022 when Defendant Company was erecting pylons.
- 2.77. Under re-examination, DW1 testified that document at page 9 of Plaintiff's bundle of documents dated March 26th, 2020 mining by the Plaintiff had not yet started.
- 2.78. DW1 further testified that he could not authenticate the letters at pages 15 and 32 of the Plaintiff's bundle of documents.
- 2.79. DW2 was Godfrey Chisokwe, the Village Headman of Nguluka Village in the chieftdom of Her Royal Highness Chieftainess
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Nkomesha. He signed a witness statement dated February 2nd, 2024. (Amended by leave of Court).

- 2.80. DW2 testified that he reports to Senior Headman Kalenga who is the Chairperson of Malundu Zone 9 Executive Committee.
- 2.81. DW2 testified that the procedure for consent for land use in the chieftdom of Chieftainess Nkomesha passes several stages. That firstly, when an interested party comes to request for land for specific use, the village council sits and deliberates weigh the benefits the said project is likely to bring in their community. That once they agree to host the said interested party, they proceed to make recommendations to the Zone Committee for their guidance and consider seeking approval from the Chieftainess Council. DW2 proceeded that in the case of the Plaintiff, consent was not and has not been given yet. That the Plaintiff's application is at the stage for consideration by the Zone Committee headed by Senior Headman Kalenga, for further escalation to Her Royal Establishment Council.
- 2.82. DW2 further testified that he signed document at page 3 of Plaintiff's bundle of documents without the consent/knowledge of his Supervisor or Her Royal Highness Chieftainess Nkomesha. He testified that he signed it in 2019 and it was agreed with the Plaintiff to backdate letter to 2006.
- 2.83. DW2 testified that before signing as above, he had advised the Plaintiff Company's agents that Zone 9 Committee had conditions precedent to be met before the request could be forwarded to the Chieftainess. That his consent was given in secret and to assist the
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Plaintiff Company make money and their operations look registration and renew their Mining Licence.

- 2.84. DW2 testified that the Plaintiff Company continued mining even after the Zone 9 Committee cautioned them to desist until formal process conditions of repairing road among others was complied with. In 2022 the Plaintiff truckloads of material was confiscated from the Plaintiff.
- 2.85. DW2 conceded that he dubiously used Senior Headman Kalenga's date stamp without authorization. Further conceded that it was not within his mandate to give consent over customary land.
- 2.86. DW2 testified that the Plaintiff Company had no consent/rights over the customary land and thus their Mining Licence was void and proper procedure was not followed.
- 2.87. Under cross examination, DW2 testified that the Defendant Company applied for consent between 2009 – 2015 but he was not present at time, only the Headmen of Zone 9 lower were present.
- 2.88. DW2 testified that Plaintiff Company went to his village in 2006 to ask to work in his village and not to request for consent. He testified that the Plaintiff Company came back in 2008 and they were asked to pay "Odi" which they only paid in 2018. He conceded that village council agreed to host the Plaintiff Company.
- 2.89. DW2 testified that Defendant Company applied to Zone 9 Council.
- 2.90. DW2 conceded that he allowed Plaintiff Company they could start mining in 2018. Also conceded that he had no mandate to authorise/give mining rights.

- 2.91. DW2 confirmed that the documents at page 3 of Plaintiff's bundle of documents was backdated to suit the date the Plaintiff first went to the village.
- 2.92. DW2 conceded that the Headman's Council Village Nguluka benefited from the K20,000.00 from the Plaintiff Company.
- 2.93. DW2 confirmed that the Plaintiff Company did not complete the consent application process with Zone 9 Committee.
- 2.94. DW2 conceded that he used crooked ways to give the consent.
- 2.95. DW2 testified that the Mining Licence should be cancelled because the Plaintiff Company did not follow correct procedure.
- 2.96. In re-examination DW2 confirmed that the Plaintiff paid money to enter the village (odi) and not to mine.
- 2.97. DW2 conceded that he did not follow the correct procedure when signing the consent and he was taken to task about it by the Zone 9 council. Further that consent from Chieftainess refers to use of land.
- 2.98. DW3 was Katebe Sakala a Geomatic Engineer in the employ of the Defendant Company. He signed witness statement dated October 27th, 2023.
- 2.99. DW3 testified in chief that his day to day duties include planning and executing all survey works required for Generation, Transmission and Distribution projects for the Defendant Company. Facilitating for Cadastral Surveys leading to obtaining title deeds for the Defendant's properties across the country.

Allocation of work to Geomatic Engineers, just to mention but a few.

- 2.100. DW3 testified that he did not agree that the Defendant Company encroached on the Plaintiff's mine as there was no mining activity in the area during the survey. DW3 proceeded to refer to a documents attached to the witness statement which I have ignored as the same is not properly before me.
- 2.101. DW3 further testified that the Defendant Company obtained requisite consent from Stakeholders to build the transmission lines.
- 2.102. DW3 testified that the Defendant engineers proceeded to build the transmission lines on the strength of or guidance presented in good faith. DW3 testified that if the claim by the Plaintiff came legitimately, especially at the initial stage, the issue raised would have been handled as per procedure used in companies operating in the similar lines of business such as Chilanga Cement Quarry and Sinoma Cement Plant along this same electric route corridor. He further testified that the Defendant Company transmission lines have not recorded any problem or complaints from the above-mentioned companies. That when they visit these areas, their plant industries are active with equipment and established buildings that are very visible and impossible to miss even by an ordinary person without qualifications like that of his office.
- 2.103. Under cross examination, DW3 testified that the purpose of the survey, referred to on page 23 of Defendant's bundle of documents was a corner point placement for wayleave before they do any survey they go with people from Environmental and Social Unit in
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Zesco for Route Planning using Google Maps to show where the line will pass and plot. That they then go on the ground to do route verification, Google Maps will show areas with activity and settlement they do in-depth verification.

DW3 proceeded that they engaged Headman Kalenga who appointed Mr. Njobvu to work with them.

- 2.104. DW3 conceded that the map included the area where Mapompo is but that Defendant Company only came to know about Mapompo in 2022. The map does not show specific areas such as house and did not show any mining activity.
- 2.105. DW3 conceded that the Court record shows evidence of encroachment.
- 2.106. Under re-examination DW3 confirmed that based on the coordinates plotted on the map the Defendant Company's lines pass through Mapompo area. Further that the Defendant Company did not know about any mining activity and if they did Defendant Company would have avoided the place all together like at/for Chilanga Cement and Sinoma Cement.
- 2.107. DW3 confirmed that Defendant Company went on the ground during wayleave inspection and there was no sign of mining activity whatsoever.
- 2.108. DW4 was Frank Kalenga Matabula, Farmer and Senior Headman Kalenga in the chiefdom of Her Royal Highness Chieftainess Nkomesha. He signed a witness statement dated February 2nd, 2024.

2.109. DW4 testified in chief that his day to day duties stem from the authority through delegated instructions from Her Royal Highness Chieftainess Nkomesha. That his responsibilities he handles among other duties are, to provide front services for the Chieftainess with people who wish to make meeting appointments. To facilitate for the process of issuing out consent for third parties who wish to have access and use the customary land in his area of jurisdiction. To resolve customary disputes brought to his attention from 48 Headmen he supervises in his area of jurisdiction. To publish information concerning the developmental activities in his area of jurisdiction from the Chieftainess to the subjects, and forward concerns from the subjects to Her Royal Highness and to provide checks and balances on third parties who come in the Chieftom for Her Royal Highness attention.

2.110. DW4 further testified that between 2010 and 2017, the Defendant Company held several meetings with Stakeholders over their wayleave project. That the Defendant Company was formally granted consent to pass/erect their project over traditional land in 2017.

2.111. DW4 testified that in 2017 when Defendant Company was granted consent there was no mining activity in the area.

2.112. DW4 testified that the procedure for allocation of land in their Chieftom requires consent to be given to any interested party for use after due consideration by several chieftom committees in the Zone. DW4 proceeded that before consent by the Chieftainess is given, the application by an interested party such as the Plaintiff Company passes several stages. That the 1st stage is the village

council committee which committee is responsible for receiving the application for use of a specific land. PW4 testified that the village council if interested in the reasons given for the request of the land, forwards the application to the 2nd stage which is the Zone Committee with recommendations why they support the application for further consideration. That if there is need to provide guidance to the Applicant in order to have the consent considered they do so at the Zone stage.

2.113. DW4 testified that the Zone committee is responsible among other duties to formulate conditions precedent the interested Applicant is expected to meet for the benefit of the entire community before the issuance of the consent by the customary leadership. DW4 testified that failure to meet the said conditions results into the consent not forwarded to the Chieftainess Council for approval.

2.114. DW4 further testified that the final stage is where the Chairperson reports to Her Royal Highness establishment council of the application for her approval. That all Senior Headmen are part of Chieftainess Nkomesha's royal establishment council. PW4 proceeded that upon approval been given to allow the interested Applicant in the chieftdom by the Council, then the Senior Headmen concludes to issue a formal signed consent as Chairperson of that Zone where the land is located. PW4 testified that Nguluka village is in Malundu Zone 9 his area of jurisdiction. That he represents Nguluka Village and other 47 villages in Malundu Zone in the Chieftainess Nkomesha Royal establishment council. PW4 testified that for consent to be valid it must have passed the above-mentioned procedure.

- 2.115. DW4 testified that immediately after consent is issued the village leadership expects to be visited by ZEMA depending on the reasons advanced in the application for the use of their land. That the meeting with ZEMA assists the community to reconcile the integrity under which the land applied for is to be utilized in the confines of the law and to confirm the legal standing of the Applicant with the community.
- 2.116. DW4 further testified that the Plaintiff Company approached one of his Headmen for a portion of land for mining. That the consent process/procedure was not completed because the Plaintiff Company did not comply with specified conditions precedent.
- 2.117. DW4 testified that he did not authorise nor stamp the alleged consent at page 2 of the Plaintiff's bundle of documents. That the Headman in question acknowledged wrong doing on his part.
- 2.118. DW4 further testified that the Plaintiff does not have any valid consent from the chieftom to conduct the mining activities. That the Plaintiff's Company's application for consent over the customary land is still pending.
- 2.119. Under cross examination, DW4 confirmed that the consent application process, in his area starts from Headman Nguluka who sits on a committee with 10 other Headmen.
- 2.120. DW4 conceded that the Plaintiff Company approached Headman Nguluka (DW2), who brought Plaintiff Company representatives to the Zone Committee.
- 2.121. DW4 denied that the K20,000.00 paid by the Plaintiff Company was for consent over the land.
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- 2.122. DW4 testified that he did not know about the survey and Mining Licence given to the Plaintiff Company.
- 2.123. In re-examination, DW4 confirmed that he is in charge of Malundu Zone 9 under Chieftainess Nkomesha.
- 2.124. DW4 further confirmed that Headman Nguluka brought the Plaintiff Company's agents to the Zone, they were seeking consent over customary land.
- 2.125. DW4 confirmed that only 3 people signed on the document at page 3 of Plaintiff's bundle of documents, while the Village Committee consisted of 10 people.
- 2.126. DW4 further confirmed that the Headman has no mandate to grant consent for use of land that is for the Chieftainess to grant.
- 2.127. DW4 confirmed that the term '**Odi**' does not mean one is purchasing land.
- 2.128. The Defendant closed its case.

3. LAW AND SUBMISSIONS

- 3.1. The parties filed written submissions for which I am grateful. I shall not re-state the full contents of the said submissions as the same are on record. The Plaintiff filed on October 14th, 2024 and the Defendant on November 11th, 2024.
- 3.2. The Plaintiff submits that the Defendant encroached on the subject land where the Plaintiff's mine is. In support of this, the Plaintiff referred the Court to Page 61 of its bundle which is a letter from the Energy Regulation Board (ERB) indicating that two of the Defendant Company's transmission towers are erected in close

proximity to where mining activity is to be undertaken. Also referred to page 32 of their bundle of documents letter/report from Ministry of Mines and Minerals Development.

- 3.3. The Plaintiff further submits that the Defendant Company failed/neglected to obtain consent from the Plaintiff, to erect the pylons on the Plaintiff's land. That the Defendant did not adhere to the mandatory provisions of **Section 23 (2) of Electricity Act No. 11 of 2019** which provides for the following:

“A licensee shall, before placing a transmission or distribution line in position accordance with sub Section (1) serve for consent on the landowner and the person lawfully occupying it or the case of a street, on the Local Authority concerned a notice of the intention to erect a transmission or Distribution line, in the prescribed manner and form, with a description of the lines proposed to be placed unless the owner or occupier is not resident in the Republic or has no representative within the Republic.”

The Plaintiff further drew the Court's attention to **Section 29 (2) of the above-named Electricity Act No. 11 of 2019** which provides for the following:

“A licensee shall ensure prompt payment of fair and adequate compensation to a local authority and any other person for any damage or loss suffered by the Local Authority or any other person by reason of exercise of the licensee's powers, and in default or agreement between the parties, the amount and

application of the compensation shall be determined by a Court of Competent Jurisdiction.”

- 3.4. The Plaintiff submits that the Defendant trespassed on the Plaintiff's land by erecting the pylons without written consent from the land owner.
- 3.5. The Plaintiff submits that it is entitled to damages for the Defendant's actions. Reference was made to the following cases:
- **Zesco Limited V. Clive Mukando Appeal No. 022/2016 of 2018¹.**
 - **David Kabuku Mwitumwa V. Airtel Networks Zambia Plc and Another Appeal No. 52 of 2001².**
- 3.6. The Plaintiff further submits that it has/had mining rights over the subject land, and the validity of the Mining Licence was not challenged by the Defendant.
- 3.7. The Plaintiff submits that the Defendant failed/neglected to conduct due diligence to ascertain whether encumbrances obtained on the subject land.
- 3.8. The Plaintiff submits that DW4 and DW5 confirmed granting the Plaintiff Company consent to the land and that Plaintiff was supposed to meet condition of construction of road, and that this amounted to consent that DW4 and DW5 could not revoke.
- 3.9. The Plaintiff moves that on a balance of probabilities, the Plaintiff has proved its case and Judgment be entered in its favour.
- 3.10. The Defendant submits that the law provides that a party that claims must prove said claims. Reliance was placed on case of

Khalid Mohamed V. Attorney General (1982) ZR 49³ among other cases.

- 3.11. The Defendant submits that the Plaintiff Company has failed to prove/show that it possessed over the subject land but only produced evidential existence of renewal of Small-Scale Licence Number 12865-HQ-SML dated December, 2022.
- 3.12. The Defendant further submits that the renewal licence produced by the Plaintiff does not confirm to Farm XIX as set out in the first schedule of the **Mines and Minerals Development (General) Regulations Statutory Instrument No. 7 of 2016** as no coordinates for the mine is set, no schedule describing mining area and the conditions for the grant of licence not shown.
- 3.13. The Defendant further submits that Plaintiff does not have land/surface rights over the subject land. That the mining and surface rights are separate and distinct at law.
- 3.14. The Defendant submits that the subject land is customary land under the jurisdiction of Chieftainess Nkomesha in Kafue District. Further submits that the Plaintiff has not proved that it has surface rights as no written consent was given to them by Chieftainess Nkomesha and/or local authority for the District in which the village is situated.
- 3.15. The Defendant submits that the Plaintiff Company has not complied with **Section 52 (1) (c) of the Mines and Minerals Department Act No. 11 of 2015** and this point distinguishes case in casu to that of **Zesco Limited V. Clive Mukando⁴**.

- 3.16. The Defendant submits that the Plaintiff Company does not have surface rights on the subject land as it did not follow the process of obtaining consent as laid down by DW4 and DW5.
- 3.17. The Defendant submits that the alleged consent from Headman Kalenga was not in compliance with **Section 52 (1) (c) of the Mines and Minerals** because only Chieftainess Nkomesha is authority to grant requisite consent.
- 3.18. The Defendant further submits that this case is distinguishable from the **Zesco Limited V. Clive Mukando** case because in the later the Respondent produced proof of Title (Certificate of Title).
- 3.19. The Defendant submits that the Plaintiff not having proved surface rights cannot claim trespass/encroachment.
- 3.20. The Defendant further submits that the Plaintiff has failed to substantiate the liquidated sum of ZMW 292,800,000.00. No proof of loss as been adduced.
- 3.21. The Defendant submits that Plaintiff cannot claim pecuniary damages for loss of income and prospective earnings when it does not have surface rights over the subject land.
- 3.22. The Defendant moves for the Court to dismiss the Plaintiff's claims with costs.

4. COURT'S DECISION

- 4.1. The clear and undisputed fact is that both parties claim land rights over the subject land granted by the Chieftainess Nkomesha.

- 4.2. It is also undisputed that the Defendant erected pylons on the subject land.
- 4.3. The questions to be answered in determining this matter is/are:
 - 4.3.1 Does the Plaintiff have surface/land rights on the subject land?
 - 4.3.2 Can the Plaintiff claim trespass as against the Defendant?
- 4.4. In dealing with the first question, I shall consider the law as relates to land rights on customary land and the process of obtaining such land/surface rights.
- 4.5. The Plaintiff submits that it has both mining and surface rights over the subject land.

The Plaintiff provides this Court with copy of their Mining Licence as at pages 4-5 of its bundle of documents. The same is title Small Scale Mining Licence granted for a period of 10 years commencing December 22nd, 2008. Further a Renewal of the said licence (submitted on December 22nd, 2018) and approved on October 23rd, 2020. The documents do not provide the conditions of the grant of licence. I take judicial notice that for there to have been a renewal denotes existence of initial licence needing renewal.

- 4.6. I find that the Plaintiff Company obtained and has a Mining Licence Number 12865-HQ-SML issued by the Ministry of Mines and Minerals Development for the period December 22nd, 2018 to December 21st, 2028 (20 years upon renewal). The licence relates to the Mining of Minerals known as Dolomite, Calcium, Mica, Talc-Soapstone, Iron Ore and Limestone (General). I also find that the Plaintiff failed/neglected to prove to Court the conditions of mining

and the mining area as should have been attached to the said Mining Licence.

- 4.7. The Plaintiff's witnesses particularly it's Director PW4 testified that the Plaintiff Company commenced mining in 2006 with an Artisan Licence and with consent from ZEMA -and Chieftainess Nkomesha. Again, the Plaintiff failed/neglected to prove the existence of the Artisan Licence and I am left with no option but to find for a fact that no such licence existed in 2006.
- 4.8. I must state for the record that PW4 was/appeared to be an untruthful witness. He claimed the Plaintiff Company obtained consent and commenced mining in 2006 when the Plaintiff's documents at page 9 paragraph 2.0 (being Decision letter dated March 26th, 2020 from ZEMA) states that

“The project area is currently virgin land with mining activities yet to begin”.

This to me points to fact that the witness is/was economical with the truth when no mining activities were seen/identified even by ZEMA as of 2020, before the licence was actually granted to the Plaintiff Company, in 2008.

- 4.9. It is trite that mining rights do not automatically entitle one to land/surface rights.

It is not disputed that the subject land falls under the jurisdiction of Chieftainess Nkomesha, it follows that for the Plaintiff Company to show/prove surface/land rights it must show that the necessary consent was received from the Chieftainess.

4.10. The **Mines and Minerals Development Act No. 11 of 2015** provides in **Section 52 (1) (c)** which provides that:

“52 (1) A holder of a mining right or mineral processing licence shall not exercise his rights under this Act-

a)

b)

c) Upon land occupied as a Village, or customary tenure without the written consent of the Chief and the local authority for the district in which the village is situated.”

This denotes that the Plaintiff Company can only exercise its mining rights after obtaining written consent of the chief and local authority in the locality of the land.

4.11. I accept the evidence of DW4 and DW5 as points to the procedure to be followed when applying for land/surface rights under customary tenure.

4.12. I further accept and believe the testimony of DW2 who states on record that he signed the purported consent as appears on page 2 of Plaintiff’s bundle of documents, without the authorisation of the Headman Council, Senior Headman and ultimately the authorisation of Chieftainess Nkomesha. DW2 testified that he had no mandate/authorization to place the Senior Headman’s stamp or ‘grant’ consent to the Plaintiff Company. This evidence was not disputed or challenged by the Plaintiff.

I am of the considered opinion that in fact the Plaintiff Company’s agents – the Director PW4 included was well aware of fact that DW4

could not grant valid consent for land/surface rights. PW4 testified that in fact the stamp was placed in 2019 and in the same breath that verbal consent was granted in 2006 and used to obtain the Small-Scale Mining Licence in 2008. DW2 evidenced that the date on the 'consent' letter was backdated with knowledge and behest of Plaintiff agents was not disputed by the Plaintiff.

The provisions of **Section 52 (1) (c) Mines and Minerals Development Act** as referred to in paragraph 4.10 above is clear that **one must obtain written consent from the Chief and Local Authority**. I find that the Plaintiff has failed to prove that it obtained said consent from either the chief/local authority.

4.13. I find that the alleged consent as appears on page 2 of Plaintiff's bundle of documents is defective and void abinitio. As a matter of fact, the document at page 3 specifically states that the sum of K20,000.00 was paid as "money for odi in the village". This in no way suggests that it was meant as a consent fee.

The Supreme Court in obiter dicta, in the case of **Abel Hachaambwa V. Cheelo Mweemba SCZ 8/208/2016⁵** states that:

"Our considered view is that traditional institutions such as the Headman and the Chief are central in determining disputes relating to access, use and control of land and natural resources in rural livelihoods and are thus in the best position to settle any land disputes arising in their communities. Although chiefs are the primary administrator of customary land, in practice their authority is largely delegated to village headmen."

It is clear in my mind that DW2 had no such authority delegated to him by Chieftainess Nkomesha. In fact DW2 testified that he had no mandate/authorisation to sign and stamp the document the Plaintiff provides as evidence of consent.

- 4.14. The Plaintiff Company has not proved the second limb of **Section 52 (1) (c)** as relates to written consent from the Local Authority where the customary land is. It is trite that a party must prove its claims. I am forfeited by the authority in the case of **Anderson Kambela Mazoka and 2 Others V. Levy Patrick Mwanawasa and 2 others (2005) ZR 138⁶**, where the Court stated that:

“An unqualified position that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent’s defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff’s case has collapsed of its own volition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence”.

- 4.15. I find as a matter of fact that the Plaintiff Company does not hold land/surface rights over the subject land.

- 4.16. Having answered the first question as put in paragraph 4.3.1 above, **in the negative**. i.e to say the Plaintiff Company does not have land/surface rights over the subject land. It follows to

reason that the Plaintiff Company cannot claim that the Defendant Company/anyone else for that matter trespassed/encroached on the subject land.

4.17. The answer to the second question as appears in paragraph 4.3.2 above is also **in the negative** i.e to say the Plaintiff cannot claim damages for trespass on land that they have no surface rights/licence.

4.18. The learned authors of **Salmond on the Laws of Torts, 6th edition at page 156** stated that:-

“The wrong of trespass to land (trespass quare clausum fregit) consists in the act of (1) entering upon land in the possession of the plaintiff, or (2) remaining upon such land, or (3) placing or throwing any material object upon it – in each case without lawful justification.”

Further the Supreme Court held in **Shell BP (Z) Limited Vs. Conidaris and Others SCZ No. 37 of 1975⁷**:

“Trespass to land is an unlawful entry on land in the possession of another; a licence prevents the entry of the licensee from being a trespass and renders it lawful.”

4.19. Having found that the Plaintiff Company does not have surface rights, it follows that it's alleged possession of the subject land was/is in itself without lawful licence.

4.20. The negative answers to the questions in paragraph 4.3 above denotes that all of the Plaintiff's claims fail. It becomes otiose to

discuss or analyse the rest of the Plaintiff Company's claims. The collapse of the claim on surface/land rights collapses the whole action.

5. CONCLUSION

- 5.1. For the foregoing reasons and on a balance of probability I find that the Plaintiff's case fails in its entirety.
- 5.2. The Plaintiff's action is dismissed with costs, to be taxed in default of agreement.
- 5.3. Leave to appeal is granted.

Delivered at Lusaka on March 7th, 2025



**S. CHOCHO
HIGH COURT JUDGE**

