

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2023/HP/974

IN THE MATTER OF: AN EXPARTE APPLICATION FOR GRANT OF
LEAVE FOR JUDICIAL REVIEW
PROCEEDINGS.

IN THE MATTER OF: ORDER 53 RULE 3 OF THE RULES OF THE
SUPREME COURT OF ENGLAND 1965.

IN THE MATTER OF: THE DECISION OF THE MINISTER OF MINES
TO CANCEL MWOMBEZHI LARGE SCALE
EXPLORATION LICENSE NO. 22399-HQ-LEL
CANCELLATION

IN THE MATTER OF: THE MATTER OF THE MINE AND MINERALS
DEVELOPMENT ACT NO. 11 OF 2015.

IN THE MATTER OF: STATUTORY INSTRUMENT NO. 18 OF 2018
AND THE MINING APPEALS (TRIBUNAL)
RULES OF 2018.

BETWEEN:

MWOMBEZHI RESOURCES LIMITED

AND

THE ATTORNEY GENERAL
GLOBAL DEVELOPMENT CORPORATION
CONSULTING ZAMBIA LIMITED

1ST RESPONDENT

2ND RESPONDENT

BEFORE HON. LADY JUSTICE S. CHOCHO IN CHAMBERS.

*For the Applicant (s): Mr. S. Sikota S. C. and Mr. K. Khanda of Messrs Central
Chambers.*

*Ms. D. Nalishuwa and Mr. I. Mungomba of Messrs Musa
Dudhia and Company.*

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For the 1st Respondent: Mr. A. Watopa Senior State Advocate of Messrs Attorney General Chambers.

For the 2nd Respondent: Mr. K. Mwale and Ms. M. Ngosa of Messrs K. M. Mwale and Company.

Cases referred to:

- 1. *Katiso Mining Company Limited V. The Minister of Mines and Minerals Development and Attorney General CAZ/08/66/2021.***
- 2. *Chiluba V. The Attorney General (2003) ZR 153.***
- 3. *Chief Constable of North Wales Police V. Evans (1982) IWLR 1155.***
- 4. *Roy Clarke V. Attorney General (2004) ZR 297.***

Legislation referred to:

- 1. *Order 53 Rules of the Supreme Court of England (White Book) 1999 Edition.***
- 2. *The Mines and Mineral Development Act Number 15 of 2015.***

R U L I N G

1. INTRODUCTION

- 1.1.** The Applicant's Originating Notice of Motion for Judicial Review is filed Pursuant to Order 8 Rule 3 of the Supreme Court (White Book) 1999 Edition.
- 1.2.** The Applicant seeks an Order of Certiorari quashing the decision of the Minister of Mines and Minerals Development by which he cancelled the Applicant's Large-Scale Mining License.

- 1.3. The Applicant also seeks in the alternative, an Order of Mandamus to compel the Mining Appeals Tribunal to admit the Applicant's Appeal and proceed to hear and determine the same.

2. BACKGROUND

- 2.1. The background to this matter as per Originating Notice of Motion and Affidavit evidence is that the Applicant herein seeks relief of Judicial Review for Order of Certiorari and Mandamus, against the Minister of Mines and Mineral Development.
- 2.2. The Applicant's Large-Scale Mining License was cancelled by the 1st Respondent and another license issued over the same area to the 2nd Respondent.
- 2.3. The 1st Respondent maintains that the Applicant's first appeal was duly considered and determined and the next step lies to the Mining Appeals Tribunal.
- 2.4. The 2nd Respondent also maintains that the Applicant license was cancelled and its appeal is outside the rules.

3. AFFIDAVIT EVIDENCE

- 3.1. The Applicant relies on the averments in its Affidavit in Support and Reply in Support of the Application. The Applicant avers that on 29th December, 2017, its prospecting License No. 16121 – HQ – LPL became a Large-Scale License No. 22399 – LEL, Pursuant to the Mines and Minerals Development Act Number 11 of 2015.
- 3.2. The Applicant further avers that a Default Notice dated 28th May, 2021 was issued relating to the said License, but only came to the Applicant's attention on 31st July, 2021, to which preliminary and detailed responses were submitted by the Applicant on 4th and 10th August, 2021 respectively.
- 3.3. The Applicant avers that on 19th October, 2021, the Director of Cadastre Department in the Ministry of Mines and Mineral Development,

cancelled License No. 22399-HQ-LEL on similar grounds contained in the default notice, and the cancellation notice was received on 7th November 2021.

- 3.4.** The Applicant further avers that it submitted/filed an Appeal against the Director's decision to cancel License, to the Minister of Mines and Mineral Development ("The Minister") on 9th November, 2021.
- 3.5.** The Applicant further avers that the Mines Licensing Committee recommended that a License be granted to the 2nd Respondent over the same area the Applicant previously held a license. A large-Scale Mining license was granted to 2nd Respondent on 2nd December, 2021.
- 3.6.** The Applicant avers that it also filed an appeal against the decision in 3.5 above, on 3rd January, 2022.
- 3.7.** The Applicant avers that the Minister declined the appeal and communicated his decision to the Applicant on the 3rd March, 2023 and 7th March, 2023.
- 3.8.** The Applicant further avers that it attempted to file an appeal against the Minister's decision on 23 March, 2023. The appeal was rejected.
- 3.9.** The 1st Respondent objects the Applicant's application and avers in its Affidavit in Opposition that a Default Notice was issued against the Applicant itemizing a number of breaches of terms and conditions of their license.
- 3.10.** The 1st Respondent further avers that the Applicant's response to the Default Notice was considered but dissatisfied with the same, the Applicant's license was cancelled.
- 3.11.** The 1st Respondent also avers that a new license over the same area the Applicant had, was issued to the 2nd Respondent.
- 3.12.** The 1st Respondent further avers that the Applicant did submit appeal to the Minister who was ordered to determine the appeal, by Court (Judicial Review Order of Mandamus).
- 3.13.** The 1st Respondent avers that the Minister upheld the decision to cancel the Applicant's License.

- 3.14.** The 1st Respondent avers that the Applicant appeal against the Minister's decision was eventually filed with the Mines Appeal Tribunal, awaiting the operationalization of the Tribunal.
- 3.15.** The 2nd Respondent also objects the Applicant judicial review application and avers that the Applicant's appeal to the Minister decision was made out of time.
- 3.16.** The 2nd Respondent further avers that this Court has no jurisdiction to hear the application because the Applicant failed to comply with the procedure under the Mines Act.
- 3.17.** The 2nd Respondent Affidavit in fact seeks to defend the actions of the 1st Respondent and avers that its license was issued correctly.

4. THE LAW, ARGUMENTS/SUBMISSIONS

- 4.1.** I have had occasion to review and consider the application having heard Counsel for the Applicant and Respondents, the Parties Affidavit Evidence, Skeleton Arguments and List of Authorities cited herein.

I am indeed grateful for Counsels' submissions and well-articulated and drafted pleadings and Skeleton Arguments. I will not endeavour to reproduce as the same are on record, suffice it to state that I have duly considered all submissions and arguments even though I may not directly make reference to them.

- 4.2.** This Court has jurisdiction to grant the Orders as requested for by the Applicant. The law is clear on fact that what is subject to that jurisdiction is the decision-making process and not the merits of the decision.
- 4.3.** The law on Judicial Review is well settled and there is a plethora of authorities including ***Order 53/14/Rules of the Supreme Court 1999 Edition (White Book), Chiluba V. The Attorney General 2003 ZR 153, Chief Constable of North Wales Police and Evans (1982) IWLR 1155, Roy Clarke V. The Attorney General (2004) ZR 297.***

- 4.4. The Applicant argues that the Director, Licensing Committee and Minister did not follow the procedure and particularly so **section 97 (1) and 72 (2) of the Mines and Minerals Development Act Number 11 of 2015**. It is their submission that the Committee should not have considered and issued mining license to the 2nd Respondent during the period that the Applicant was entitled to appeal, that in fact the Applicant's interests were not considered. Also argues that the Minister's upholding of the grant of license to the 2nd Respondent was illegal and procedurally improper and unreasonable.
- 4.5. The Applicant submits that the failure by the 1st Respondent to operationalise the Mining Appeal Tribunal cannot be used as defence/bar to proceedings before the Court for Order of Mandamus.
- 4.6. The 1st Respondent, contends that the Applicant is dissatisfied with the merits of the Minister's decision which upheld the Director's decision to cancel the Applicant's Mining License.
- 4.7. The 1st Respondent argues that the Applicant has not exhausted the administrative channels and thus cannot seek relief before this Court.

5. COURT'S DECISION

- 5.1. The clear and undisputed fact is that the Applicant's Large-Scale Mining License No. 22399 – HQ – LEL was cancelled by the Director of the Cadastre Department in the Ministry of Mines and Mineral Development.
- 5.2. It is also undisputed that the Applicant's appeal against the Director's decision was rejected and thus upheld by the Minister of Mines and Mineral Development (suffice it to state that this was after a Court Order of mandamus).
- 5.3. It is also undisputed that the Applicant's appeal against the Minister's decision cannot be heard on account of fact that the Mining Appeals Tribunal is not operationalised.

- 5.4. I have considered the authorities referred to under paragraph 4 above and upon review of the facts, I am of the opinion that the Applicant herein is dissatisfied with the merits of the Minister's decision and has not convinced me of the procedural impropriety/unreasonableness of Minister's decision to uphold the decision to cancel Large-Scale Mining License.
- 5.5. It is also abundantly clear that the Applicant's initial judicial review application under cause **2022/HP/1613**, granted them an Order of Mandamus for the Minister to determine the appeal, against the Director's decision.
- 5.6. The Applicant's submissions heavily rely on the decision of the Mining License Committee which decision was upheld by the Minister and saw to the granting of a license to the 2nd Respondent.
- 5.7. In the case of ***North-Western Energy V. Energy Regulation Board*** wherein the Court observed as follows:

"It is trite knowledge that following the celebrated statement of Lord Diplock in Council of Civil Service Unions and Others V. Minister for the Civil Service, Judicial Review has developed to a stage today where administrative actions are conveniently reviewed under three heads or grounds. Namely, illegality, procedural impropriety, unreasonableness, "or irrationality".

In the case of ***Roy Clarke V. Attorney General*** wherein the Supreme Court stated as follows with regard to the ground of illegality:

"Illegality or ultra vires entails that all public bodies and officials must act within the law. Ministers exercise powers as a consequence of statute and common law and cannot act beyond those powers as that would be illegal or ultra vires. When considering whether a body has been acting ultra vires,

the Court will look at the relevant statutory provisions and the purpose of the statute.”

- 5.8. In light of findings in 5.4 – 5.6 above, it is not within this Court’s jurisdiction to interfere/replace the Minister’s decision, I cannot comment on the merits of the decision to uphold the cancellation of the license.
- 5.9. I now address my mind to the Applicant’s alternative relief for an Order for Mandamus, to compel the Mining Appeals Tribunals to admit the Applicant’s appeal, hear, and determine the same.
- 5.10. All the parties to this matter agree and admit that the Mining Appeals Tribunal is in fact not operational. The 1st Respondent maintains that the Applicant’s appeal was actually filed and is with what I assume is the Registry awaiting the sitting of the Mining Appeals Tribunal.
- 5.11. I do agree with the 1st and 2nd Respondent that the Applicant needs to exhaust all administrative process before launching application for appeal of the Minister’s decision.
- 5.12. I find that in fact it is the 1st Respondent’s mandate to constitute and operationalise the Mining Appeals Tribunal, which action will then give the Applicant opportunity to have its appeal heard and determined.
- 5.13. I am fortified by the decision/authority in the case of ***Katiso Mining Company Limited V. The Minister of Mines and Mineral development and Attorney General CAZ/08/66/2021***. In that case it was held inter alia that;

“the Applicant has argued that the Minister’s indecision entitles it to ask the High Court to grant it an Order of Mandamus to compel the Minister to constitute the tribunal so that it can in turn appeal the Minister’s indecision to the Tribunal.

Our view is that such a move is not supported by the law and granting leave to move for judicial review to compel the

Minister to constitute the Tribunal would be contrary to the principles of judicial review.

Although, it would be within the province of judicial review to compel the Minister to constitute the Tribunal in a proper case, we hold the view that this is not a proper case as the case has not reached that stage yet.

The issue that the Applicant needs to deal with is the Minister's indecision. Once he decides, and if not in its favour, then the present application will be appropriate". Emphasis my own.

- 5.14. The case incasu can be distinguished from the Katiso case. In the Katiso case, the Applicant sought relief of judicial review of Order Mandamus to compel the Minister to constitute the Tribunal for purposes of the Applicant appealing the Minister's indecision. In casu, the Minister has already delivered his decision on Applicant's appeal of the Director's decision, and the Applicant is not satisfied with the same.
- 5.15. The Applicant in this action seeks to appeal the Minister's decision BUT the Mines Appeal Tribunal is not operational, a fact the 1st Respondent acknowledges. This set of facts make it appropriate for the application of Mandamus to compel the Minister to constitute the Tribunal. I have no doubt in my mind that the setting up/operationalising the Mining Appeals Tribunal is well within the mandate of the Minister of Mines and Minerals Development, it is his duty.
- 5.16. The appeal hierarchy under part VIII of the Mines and Minerals Development Act is clear and it is imperative that all offices/organs stipulated therein are operationalised, to ensure the right to justice is available and not infringed.

6. CONCLUSION

- 6.1.** For the foregoing reasons, I hereby Order that the Application for Certiorari quashing the decision of the Minister of Mineral Development fails.
- 6.2.** The alternative application/relief for an Order of mandamus succeeds and is granted. It is hereby ordered and directed that the Minister of Mines and Mineral Development, constitutes the Mining Appeals Tribunal. The Mining Appeals Tribunal is to be operationalized within 120 days from the date of this Ruling.
- 6.3.** The Applicant's appeal against the Minister's decision to uphold the Director's cancellation of its Large-Scale Mining License is deemed to have been duly filed with the Tribunal as per law provides and is to be heard and determined within 30 days of the operationalization of the Mining Appeals Tribunal.
- 6.4.** Costs to the Applicant, to be taxed in default of agreement.
- 6.5.** Leave to appeal is granted.

Delivered at Lusaka on the 11th January, 2024



S. CHOCHO
JUDGE

