

IT

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

2024/HP/0117



BETWEEN:

LUAPULA SMALL SCALE MINING COOPERATIVE UNION PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

**BEFORE: HONOURABLE, LADY JUSTICE G. C. CHAWATAMA IN
CHAMBERS ON THE 23RD SEPTEMBER, 2024**

For the Plaintiff : Mrs. M. Mumba from Olive Legal Practitioners
For the Defendant : Miss. E. Mtonga and Mrs. C. Bwalya -Assistant
Senior State Advocate from the Attorney Generals
Chambers

RULING

CASES REFERRED TO:

1. *Indeni Petroleum Refinery Co Limited v Kafco oil Limited and Others Selected Judgment No. 29 of 2017*
2. *African Banking Corporation Zambia v Mubende Country Lodge Limited Appeal No. 116 of 2016*
3. *Kalymnos Processing Limited, Albertina Kasiba v Konkola Copper Mines CA No. 74 of 2023*
4. *JCN Holdings limited v Development Bank of Zambia (SCZ Judgment No. 22 of 2013)*
5. *Sanhe mining Limited v Andrew Mazimba & others*
6. *Jama Abdirashid Mohammed v Attorney General SCZ Appeal No. 169 of 2015*
7. *Lcndon Ngoma & Others v LCM & United Bus Company of Zambia Limited*
8. *R V Secretary of State for the Home Department, Ex parte Swati 1986 1 ALL ER 717*

LEGISLATION AND OTHER WORK REFERRED TO:

1. *Rules of the Supreme Court of England 1999 Edition*
2. *Mines and Minerals Development Act No. 11 of 2015*

1.0 INTRODUCTION

1.1 This is a Ruling on the application by the Defendant to raise preliminary issues seeking determination of the following question, couched as follows:

1. ***Whether this Court has jurisdiction to determine this matter when the Plaintiff has not exhausted the statutory processes and procedures set out in the Mines and Minerals Development Act No. 11 of 2015.***
2. ***Whether this Honourable Court should dismiss this matter with costs to the Defendant.***

1.2 The application was moved by way of notice of motion pursuant to **Order 14A Rule 1 and Order 33 rule 2 of the Rules of the Supreme Court (Whitebook) 1999 Edition** which provides that:

Order 14 *"The Court may upon the application of a party or its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:*

(a) Such question is suitable for determination without a full trial of the action and Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."

Order 33 rule 2: *"Subject to the provisions of these rules, a cause or matter, or any question or issue arising therein, may be tried before—*

(a) a Judge alone, or

(b) a Judge with a jury, or

(c) a Judge with the assistance of assessors, or

(d) an Official Referee with or without the assistance of assessors, or

(e) a Master, or

(f) a Special Referee..”

2.0 HISTORICAL BACKGROUND

2.1 The brief facts leading to the Defendant’s application, is that on the 24th January, 2024, the Plaintiff by way of a writ of summons and statement of claim commenced this action seeking a declaration that the cancellation of mining licence no 34352 is irregular and void; an order setting aside the consent order entered into between the Respondent and Bayan Construction Limited for irregularity and damages for loss of business among others.

3.0 THE DEFENDANT’S AFFIDAVIT EVIDENCE

3.1 The affidavit in support of the notice of motion to raise preliminary issues was sworn by Etambuyu Mutonga, in her capacity as Counsel seized with conduct of this matter for the Defendant. she deposed that on the 6th October, 2023 the licensing committee of the Ministry of Mines issued an artisan’s mining license no. 34352-HQ-AMR to the Plaintiff. A copy of the mining license was exhibited and marked “EM1”.

3.2 That on the 20th November, 2023 the Director of Mining Cadastre Department informed the Plaintiff of the revocation

of the license No. 34352-HQ-AMR. A copy of the letter of revocation was exhibited and marked "EM2".

- 3.3 It was further deposed that the Plaintiff was duly informed by the Director of Mining Cadastre of the reasons for revocation. That the Plaintiff being dissatisfied with the decision of the Director of Mining Cadastre commenced this action against the Defendant by way of a writ of summons and statement of claim. That the Plaintiff ought to have lodged the appeal to the Minister within thirty days of receipt of the decision of the Director of Mining Cadastre. Thereafter, appeal to the Mines Appeals Tribunal within thirty days from receipt of the Minister's decision. That this matter ought to have come to this Court by way of appeal.
- 3.4 That this Court has no jurisdiction to determine this matter until the statutory processes and procedures are dealt with under the Mines and Minerals Development Act.
- 3.5 In the skeleton arguments filed, this Court was referred to Order 14A rule 1 and order 33 Rule 3 of the Rules of the Supreme Court. That this Court is clothed with jurisdiction to determine or hear the Defendant's application to raise preliminary issues on point of law at any stage of the proceedings before judgment. The Court was referred to the case of **Indeni Petroleum Refinery Co Limited v Kafco Oil Limited and others¹** wherein the Supreme Court held that:

“Order 14A rule 1 of the Whitebook permits a judge of the High Court to raise an issue on his own motion and to dismiss the substantive matter if the determination of the issue substantially disposes of the matter. The explanatory notes to the foregoing Order 14A Rule 2 sub rule 2 of the Whitebook indicate that the Court may proceed to make such determination at any state of the proceedings”.

Also, the case of *African Banking Corporation Zambia v Mubende Country Lodge Limited Appeal*² wherein the Supreme Court held that:

“Certain requirements must be fulfilled before a matter can be disposed of on a point of law and one of such requirements is giving a notice of intention to defend”.

3.6 It was then argued that following the African Banking Corporation case, the first requirement under Order 14A/2/3 of the Whitebook has been met by the Defendant.

3.7 With regards to whether this Court has jurisdiction to hear, determine or make any pronouncements this matter when the Plaintiff has not exhausted the statutory processes and procedures set out in the Mines and Minerals Development Act. Counsel cited **section 97 of the Mines and Minerals Development Act No. 11 of 2015** which provides that:

“(1) A person who is aggrieved by a decision of the Director of Mining Cadastre, Director of Mines Safety, Director of Mines, Director of Geological Survey or the Committee under this Act may, within

thirty days of receipt of the decision, appeal to the Minister in the prescribed manner and form.

(2) The Minister shall determine an appeal under subsection (1) in accordance with this Act and the circumstances of the case”.

(3) A determination of the Minister under this section may include such directions to the Director of Mines Cadastre, Director of Geographical Survey or the Committee shall give effect to the direction.

(4) A person who is aggrieved with the decision of the Minister may appeal to the Tribunal within thirty days from receipt of the Minister’s decision.

3.8 It was further submitted that **section 100 of the Mines and Minerals Development Act** provides that:

(2) “A person aggrieved with the decision of the tribunal may, within thirty days of receiving the decision, appeal to the High Court”.

3.9 Counsel cited the case of **Kalygnos Processing Limited, Albertina Kasiba v Konkola Copper Mines**³ wherein the Court of Appeal held:

“In our understanding of the intent of the framers of the Act, recourse to Courts of law can only be done after the grievance procedure set out under section 97 of the Act has been exhausted. The section clearly provides for complaints from the 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. 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 and part of the Respondent’s claim that the Appellants are within the area covered by its mining license. The result is that the learned Judge

acted without jurisdiction and we set aside the proceedings and findings in that respect”.

3.10 The Courts attention was drawn to ***Rule 3(1) of the High court (Appeals) (General) Rules Statutory Instrument No. 6 of 1984*** which provides that:

“Any person desiring to appeal to the High Court from a decision of a tribunal shall within thirty days of the date of the issue of the order containing such a decision, give notice of appeal as hereinafter provided”.

It was then argued that the Plaintiff has not exhausted the statutory processes and procedures set out in the Mines and Minerals Development Act as the Plaintiff should have taken issue with the Ministry of Mines pursuant to the relevant legislation. That ***sections 97 and 100 of the Mines and Minerals Development Act as well as Rule 3 (1) of the High Court (Appeals) (General) Rules Statutory Instrument No 6 of 1984*** are clear on the procedure to be followed by a person aggrieved with the decision relating to issuance or cancellation of a mining licence. That the Plaintiff ought to have appealed to the Minister within thirty days of receipt of the decision of the Director of Mining Cadastre. That therefore, the appeal to the Mines Appeals Tribunal within thirty days from receipt of the Minister’s decision before approaching this Court.

3.11 This Court was referred to the case of *JCN Holdings limited v Development Bank of Zambia*⁴ wherein the Supreme Court held that:

“It is settled law that if a matter is not properly before a Court, that Court has no jurisdiction to make orders or grant any remedies”.

Also, the case of *Crossland Mutinta and Others V Donovan Chipanda*⁵ where the Supreme Court held that:

“Absence of jurisdiction nullifies whatever decision that follows from such proceedings...similarly in the present case, we conclude that the absences of jurisdiction on the part of the Magistrate nullified proceedings in the subordinate Court. To that extent, it was futile exercise on the part of the High Court to purport to consider an appeal and consequently uphold a judgment of the trial magistrate when, for want of jurisdiction, the court proceedings from which it arose were null and void ab initio. As we said in the Vengelatos case, the decision of a court which purports to exercise a jurisdiction it does not have amounts to nothing”.

3.12 It was finally submitted as regards the question as to whether this Court should dismiss this matter that due to the Plaintiff's failure to exhaust the appeal procedure under the Mines and Minerals Development Act, this matter is improperly before this Court. That this matter should suffer only one fate, the fate of dismissal with costs to the Defendant.

4.0 AFFIDAVIT IN OPPOSITION

- 4.1 The Defendant on the 19th September, 2024 filed an affidavit in opposition wherein it was deposed that the Director Mining Cadastre wrote a letter of cancellation but that the letter fell short of form, requirements procedure and contents as per requirements of the Mining and Minerals Development Act.
- 4.2 That the Act stipulates the circumstances under which a licence may be cancelled. That the Defendant gave the reason of the consent order executed through Court as the reason for the cancellation and this effectively ousted the Minister's powers and the Tribunal to deal with the appeal. That the Court Order could not be challenged by the Minister in the event there was an appeal.
- 4.3 It was averred that the Plaintiff could not appeal to the Minister for redress as the process had been circumvented by the Defendant by referring to the consent order granted by the Court. That the letter clearly demonstrates that it fell short of the required norm and that the Plaintiff could not challenge the cancellation by way of appeal as the Defendant did not inform the Plaintiff of the right to appeal to the Minister.
- 4.4 That the procedure regarding the processes and procedures are not couched in mandatory terms and therefore gives the

Courts the discretion to handle some matters as a Court of first instance when circumstances require it to do so.

4.5 In the skeleton arguments filed, the Plaintiff argued that the reason for the cancellation of the Plaintiff's artisanal license given by the Defendant was via a consent judgment entered into with a third party. That it could not have been overturned by way of the appeal process as provided by the Act but a fresh action before this Court. The case of **Sanhe mining Limited v Andrew Mazimba & others**⁵ was called in aid where a preliminary issue to dismiss a matter on a point of law was raised on account of failure to exhaust the appeal processes provided under the Act. That the Court of Appeal laid down the appeal process for an aggrieved party with a decision relating to mining and non-mining rights relating to section 96 to 98 of the Act.

4.6 It was then submitted that this Court has jurisdiction to determine this matter as the issue in contention being the cancellation of a mining license due to the existence of a consent judgment could not have been determined by way of an appeal process under the Act. That the conduct of the office of the Director Cadastre itself did not have in contemplation any right to appeal by the Plaintiff to the Minister hence did not include it in his letter as the circumstances of the matter did not require.

- 4.7 Counsel argued that a perusal of the Defendant's defence at paragraph 6 avers that the license issued to the Plaintiff was made in error because of the existence of the consent order which cannot be impugned by the Minister if the appeal procedure is followed. Reliance was placed on the case of ***Jama Abdirashid Mohammed v Attorney General SCZ***⁶ that an order of the Court cannot be overridden by a ministerial decision.
- 4.8 This Court was also referred to the case of ***London Ngoma & Others v LCM & United Bus Company of Zambia Limited***⁷. Wherein it was held that the appellant had an interest in the matter and they should therefore have been notified of any action taking place concerning the properties on which they had paid deposits and which were subject of a contract. Also, that the lower Court erred in holding that the appellants could not be joined to the action after the consent judgment had been granted as the consent judgment was one which the appellants were not parties and were not aware of. That in the current case the Plaintiffs were interested parties in the consent judgment entered into by the Defendant and a third party and ought to have been joined to the action prior to the cancellation of their artisanal licence.
- 4.9 It was submitted that section 96 of the Act is couched in a manner that makes it mandatory that an aggrieved party by a decision ought to be informed of their right to appeal. That the Plaintiff were only informed of the decision to cancel their license attributed to the consent judgment entered into with

a third party. Which correspondence did not inform them of their right to appeal as the letter of cancellation exhibited in the Defendants affidavit in support of application will shows. That the failure or omission by the Director of Cadastre to inform the Plaintiffs of their right to appeal goes to confirm that the cancellation of their license was in bad faith hence the only reference to the consent judgment, which for all intents and purposes is a judgment of the Court which cannot be overturned by appeal to the director, minister or the tribunal under the Act.

4.10 Furthermore that it is trite law that *"he who comes to equity must come with clean hands"* and in the case in casu, the Defendant is seeking to raise preliminary issue to dismiss the matter for want of jurisdiction notwithstanding their own omission to comply with the mandatory requirements of section 96 by informing the plaintiff of their right to appeal against the decision to cancel their license. That the failure by the defendant to inform the Plaintiffs of their right to appeal was a dereliction of duty and they cannot at this late hour raise a preliminary issue to dismiss the matter for want of jurisdiction.

4.11 Finally it was submitted that this court has jurisdiction to make any orders in the interest of justice and that this is a fit and proper case in which it can invoke the inherent power by dismissing the Defendant's application.

5.0 HEARING

5.1 At the hearing of this matter, Ms. Mtonga counsel for the Defendant relied on the affidavit in support and skeleton arguments filed on the 21st August, 2024. She also briefly augmented that this matter is improperly before this Court due to the Plaintiff's failure to exhaust the statutory procedures as provided for under the Mines and Minerals Development Act. That this failure affects the Court's jurisdiction and the court has no jurisdiction to hear this matter. Counsel stated that the doctrine of exhausting of administrative remedies is well established in statutes and case law. She argued that when an Act of Parliament prescribes a specific procedure for addressing grievances such procedures must be followed by the party before invoking the court's jurisdiction.

5.2 Counsel referred the Court to section 97 of the Mines and Minerals Development Act. The said provision provides for specific appeal process in cases where parties aggrieved by the decision of the Director of Mines Cadastre. That the process starts with an appeal to the Minister followed by an appeal to the Mines Appeal Tribunal. That it is only after these steps are exhausted that a party may approach the High Court by way of appeal. That in the present case, the Plaintiff is aggrieved by the decision of the Director regarding the cancellation of the mining licence. Counsel submitted that the Plaintiff has by passed the statutory procedure by

commencing proceedings directly to the High Court. That there is no evidence on record to demonstrate that the Plaintiff appealed to the Minister after the decision regarding to withdrawal or revocation of the Mining licence was made.

- 5.3 She added that there is further no evidence to show that the Plaintiff appealed to the Mines Appeal tribunal as prescribed by the Act. That this failure to follow correct procedure deprives the Court of its jurisdiction to hear this matter. To buttress this argument, Counsel cited the case of ***R V Secretary of State for the Home Department, Ex parte Swati***⁸. Wherein the Court held that where an alternative remedy is prescribed by Statute that remedy must be used first failure to exhaust statutory remedies deprives the court of jurisdiction.
- 5.4 It was further submitted that Courts only have jurisdiction to hear matters that are ripe for litigation. The fact that the Plaintiff did not exhaust statutory procedure in this matter it entails that this matter is not yet ripe or rather it has been brought before this Court prematurely, for that reason the Court's hands are tied or the Court cannot intervene. Counsel urged this Court to dismiss this matter with costs to the Defendant for the Plaintiff's failure to follow procedure resulted in unnecessary litigation.
- 5.5 In opposing, Mrs. Mumba counsel for the Plaintiff also relied on the affidavit in opposition filed on the 19th September, 2024 as well as skeleton arguments filed on the same day.

She briefly augmented that the Defendant has relied on the law as provided and given the maxim that *'he who comes to equity must come with clean hands'*, that Defendant wrote to the Plaintiff informing them that they did not follow the law themselves by issuing a notice and informing the Plaintiff of the right to appeal. Further that the Plaintiff had engaged the Minister but were informed that they should go to Court.

5.6 The Plaintiff's counsel argued that the provision with regard to appeal in the Act is not couched in mandatory terms because the framers of the Act were aware that there are instances where the procedure may not be followed. That if there was need, it was incumbent upon the Defendant to inform the Plaintiff of the right of appeal. That when the law was being enacted it had in mind people like the Plaintiff who maybe of low levels of education and may not be aware of the provision in the law. Counsel stated that this matter is properly before this Court for reasons already argued in the list of authorities and skeleton arguments. Counsel prayed that this Court dismiss the Defendant's application.

5.7 In reply, Counsel for the Defendant argued as regards the submission that the Plaintiff had engaged the Minister and that they were informed to come to Court. It was argued that there is no documentary evidence and that the submission amounts to hearsay. As regards the assertion that the Plaintiff was not aware of the procedure in the Act, counsel argued that ignorance of the law is not an excuse. That the

Plaintiff's decision to commence this by way of writ rather than appeal undermines their case because it is a fatal procedural flaw.

6.0 ANALYSIS AND THE DECISION OF THIS COURT

6.1 I have critically considered the application before me, the affidavit evidence and the skeleton arguments filed by the parties. The question posed for determination that the Defendant raises are:

- 1. Whether this Court has jurisdiction to determine this matter when the Plaintiff has not exhausted the statutory processes and procedures set out in the Mines and Minerals Development Act No. 11 of 2015.**
- 2. Whether this Honourable Court should dismiss this matter with costs to the Defendant.**

6.2 I will start by setting out findings of facts in this matter which has influenced my decision hereunder. It is not in dispute that the Director of Mines Cadastre department on the 29th November, 2023 withdraw licence 34352-HQ-AMR belonging to the Plaintiff. In so far as the commencing of this action is concerned by the Plaintiff, it came about as a result of the Defendant's revocation of the Plaintiff's licence. The reasons advanced for the revocation according to the letter from the Defendant produced in evidence marked as "EM2" is that the decision followed the Court judgment no 2013/HP/1636

made in the High Court for Zambia on 26th September, 2023 in favour of license no. 27282-HQ-LEL belonging to Bayan Construction Limited on the same area as the Plaintiff. The Plaintiff was not a party to the proceedings in cause 2013/HP/1636 which resulted into a consent judgment. That the consent judgment in the said cause adverse affected the Plaintiff as it resulted in the revocation of its license.

- 6.3 It is this chain of events that is subject to these proceedings prompting the Plaintiff to file a writ of summons seeking an order to set aside the consent order entered into between the Defendant and Bayan Construction Limited for irregularity and also a declaration that the cancellation of the mining licence no 34352 is irregular, null and void among others.
- 6.4 In this application, the Defendant in the affidavit in support and the skeleton arguments have demonstrated that this Court has no jurisdiction to entertain this matter for failure to exhaust the statutory processes and procedures set out in the Mines and Minerals Development Act which involves lodging an appeal to the Minister and appealing the Ministers decision to the Tribunal and thereafter appealing to the High Court against the decision of the Tribunal. The Defendant have strongly argued that the Plaintiff is challenging the decision under the Mines and Minerals Act and as such has to exhaust the prescribed the statutory process and procedure under the Act.

- 6.5 The Plaintiff in its affidavit and skeleton arguments has made concessions that indeed the Mines and Minerals Development Act prescribes the procedure to be adopted in challenging the decision made under the Act. However, since the Defendant gave the reason of a consent order executed through the High Court as the reason for the cancellation effectively ousted the Ministers powers and the Tribunal to deal with this matter.
- 6.6 I note that the originating process used by the Plaintiff in commencing this action is a writ of summons seeking an order to set aside the consent order entered into between the Defendant and Bayan Construction limited. Indeed, I agree with both learned counsel for the parties that the procedure to challenge a decision made under the Mines and Minerals Development Act through the High Court is by way of an appeal after exhausting the procedure prescribed under the Act.
- 6.7 The question that ought to be determined in this application to raise preliminary issues is whether an appeal can lie before the Minister or the Tribunal to competently hear and determine the relief sought by the Plaintiff to set aside the High Court consent judgment entered into between the Plaintiff and Banyan Construction Limited and order cancellation of the mining license no 34352 for being irregular, null and void as the Plaintiff has sought in this action so as to comply or exhaust the procedure required

under the Mines and Minerals Development Act. Albeit, simply put, can the Minister or the Tribunal set aside a consent judgment of the High Court subject of this proceeding.

- 6.8 In answering this question, my attention is drawn to **Rule 2 of the High Court (Appeals) (General) Rules** which defines a Tribunal to mean:

“Any board, authority (whether consisting of one person or more) tribunals or other body (including a minister) which is empowered by any written law to determine matters of judicial or quasi-judicial nature and from the decision of which an appeal lies to the High Court”.

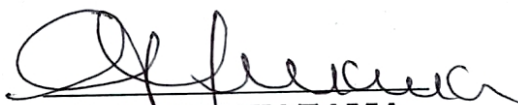
- 6.9 Furthermore, it is clear also from Rule 3 (1) of the High Court (Appeals) (General) Rules that any person aggrieved from a decision of a Tribunal can appeal to the High Court from the decision of a Tribunal. This demonstrates that Tribunals are inferior to the High Court and cannot set aside a consent judgment executed by parties in the High Court. Therefore, to require the Plaintiff to exhaust the procedure of the Mines and Minerals Development Act where the Plaintiff is seeking an order of setting aside the High Court consent judgement is absurd.

- 6.10 In any case, the Plaintiff in commencing this matter by way of a fresh action is challenging a consent order entered into between the Defendant and Bayan construction Limited which rendered the Plaintiff mining licenses being revoked by

the Defendant. The Plaintiff is legally entitled to commence this action without exhausting the procedure in the Mines and Minerals Development Act.

6.11 The application by the Defendant to raise preliminary issues is in my considered view misconceived. I find no merit in the application and is accordingly dismissed. Each party to bear its own costs.

DELIVERED AT LUSAKA THIS 19TH DAY OF MARCH, 2025.


G.C. CHAWATAMA
HIGH COURT JUDGE