THE SUPREME COURT FOR ZAMBIA **SCZ/07/08/2026**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
12 AUG 2026
SUPREME COURT REGISTRY 1
P.O. BOX 50067, LUSAKA

BETWEEN:

CALEB MULENGA **APPLICANT**

AND

KANSANSHI MINING PLC **RESPONDENT**

Before : Hon. Mr. Justice Nigel K. Mutuna at Chambers on 12th August, 2026

For the Applicant : *Mr. J. Chimankata and Mr. M. Chisunka of Messrs Cholt Legal Practitioners*

For the Respondent : *Mrs. M. S. Namwila-Mwala and Mr. K. Kawana of Messrs Corpus Legal Practitioners*
Mr. C. Domingo – Kansanshi Mining, In-House Counsel

RULING

Cases Referred to:

1. *Bidvest Food Zambia Limited and 4 Others v CAA Import and Export Limited, SCZ Appeal No. 56 of 2017*
2. *KV Wheels and Construction Limited v Investrust Bank PLC, SCZ/8/29/2021*
3. *Rhephidim Institute Limited v Attorney General, SCZ/7/17/2024*
4. *Tanfern Limited v Cameron MacDonald, (2000) 1 WLR 1311*
5. *London Ngoma and Another v LCM Company, CAZ Appeal 122 of 2017*
6. *Lovely Malumani V Bonanza Cash Express Limited, CAZ/8/0330/2021*
7. *Aristogerasmos Vangelatos and Others V Metro Investments and Another, Selected Judgment No. 35 of 2016*

8. *ZCCM Investment Holdings PLC v First Quantum Minerals Limited and Others, Appeal No. 92 of 2020*
9. *Kekelwa Samuel Kongwa v Meamui Georgina Kongwa, SCZ/8/05/2019*

Legislation Referred to:

1. *Court of Appeal Act No. 7 of 2016*
2. *The Constitution of Zambia*
3. *Rules of the Supreme Court 1965 (White Book)*

Introduction

1. This is the applicant's motion for permission to appeal to the Supreme Court against the decision of the Court of Appeal delivered on 9th May, 2025. It follows a similar application made before the Court of Appeal which was declined.

Background

2. The origin of this motion is in the judgment made by the Learned High Court Judge, Mwenda–Zimba J, delivered on 5th October 2022. The judgment followed an action taken out by the applicant against the respondent in the High Court. The action arose from a dispute between the two involving a joint venture.

3. The applicant was issued a prospecting licence which was numbered 17019-HQ-LPL for cobalt, copper, gold and iron ore.

The effective date of the licence was 5th December, 2012 and it covered an area spanning 210.1503 square kilometers in Solwezi.

4. Sometime in 2013, the applicant and respondent engaged in discussions for the two to enter into a joint venture agreement for the exploration of the area covered by the applicant's licence. Following from this, and acting on instructions from the respondent, First Quantum Mining Operations Limited (FQM) wrote to the Director of Geological Survey at the Ministry of Mines indicating the intention of the two parties to enter into the joint venture.

5. The letter from FQM also informed the Director of Geological Survey that the parties also wished to include prospecting licence number 1871/6-HQ-LPL owned by the respondent which covered the same area, into the joint venture. According to FQM, a combination of the two licences would enhance the benefits to be reaped from the joint venture especially that FQM would avail its expertise in exploration of minerals.

6. Arising from this, the two parties executed what they called a Binding Terms Sheet (BTS) in terms of which the respondent

agreed to acquire all rights, title and interest in the applicant's exploration licence for the sum of ZMW 5,371,100.00 which at the time converted to USD1,000,000.00.

7. The other conditions of the BTS were as follows:

   7.1 It was a condition precedent to the acquisition of the exploration license that the parties were obliged to obtain all the necessary government, regulatory and other approvals which would enable the transfer of the exploration licence;

   7.2 The BTS would terminate if condition under 7.1 above was waived or one of the parties failed to perform it;

   7.3 Upon the transfer of the licence, the respondent was to convert the exploration licence to a mining licence and commence mining operations; and,

   7.4 Upon commencement of mining operations, the respondent would pay to the applicant Net Smelter Retain Royalty (NSR) of 1.5% of the yield with the maximum total NSR payable pegged at ZMW 21, 484,400.00.

8. Pursuant to the said agreement, the applicant applied to the Ministry of Mines for consent to transfer the exploration licence. This consent was granted by the Ministry of Mines on 4th November, 2013. Subsequently, and on 8th October, 2014, the parties executed an amendment to the BTS whose effect was to alter the NSR payable by the respondent to the applicant from ZMW 21,484,400.00 to USD 4,000,000.00. For this purpose, the respondent was to provide regular reports on the exploration and mining activities it conducted in the area.

9. Later, the applicant claimed that the respondent had breached the BTS and instituted proceedings against it claiming the following relief:

   9.1 An order compelling the respondent to complete exploration activities;

   9.2 An order compelling the respondent to disclose all the mineral deposits discovered in the exploration licence area from the date of transfer of the exploration licence to date;

9.3 An order compelling the respondent to take any mineral deposits discovered to production within reasonable time;

9.4 An order compelling the respondent to make an account under oath detailing the mining activities undertaken in the exploration licence area from the date of the transfer to date;

9.5 An order for payment of the NSR by the respondent to the applicant in the sum of USD 4,000,000.00 or alternatively in lieu of payment, repudiation of the binding term sheet with attendant consequences at law;

9.6 Damages for breach of contract;

9.7 Interest on all sums found due from the date of the BTS to date of full payment;

9.8 Costs.

The significance of this claim is apparent later in this ruling.

Decisions of the High Court and Court of Appeal

10. After hearing the matter, the Learned High Court Judge, Mwenda-Zimba J, dismissed the applicant's claims except the one to compel the respondent to render an account on the exploration and mining activities. This was for purposes of ascertaining the amount due to the applicant as NSR, if any. The claim by the applicant, therefore, substantially failed. This prompted him to appeal to the Court of Appeal.

11. Following the hearing of the appeal, the Court of Appeal held that there was no merit in all six grounds of appeal advanced by the applicant and dismissed his appeal. He, therefore, sought permission from that court to appeal to the Supreme Court, which permission was declined. Hence the motion before me.

The motion for leave to appeal and the parties' respective positions

12. The applicant anchored the motion on **section 13(1)** and **(3)** of the **Court of Appeal Act** that the proposed appeal to the Supreme Court, raises points of law of public importance; there are reasonable prospects of success; and, there are compelling

reasons for the appeal to be heard. Under each ground, the applicant has defined the issue which he alleges the intended appeal will address which is the effect of the amalgamation of the two licences.

13. The evidence in support of the motion was led by way of an affidavit sworn by the applicant. He set out the facts leading up to the action he commenced in the High Court and what he understood the effect the amalgamation of the two licences had on the BTS. The applicant contended that the amalgamation resulted in difficulty in enforcing his entitlement to NSR because it was not possible to ascertain what minerals, if any, were extracted from the original exploration area covered by his licence.

14. The applicant testified further that the Court of Appeal did not address its mind to this factual issue which was before it and did not adjudicate on the matter. He stated that this omission resulted in the Court of Appeal failing to determine the respondent's obligations and manner of the exercise of such obligations to pay the NSR to the applicant.

15. According to the applicant, the issues raised by the matters in the two preceding paragraphs (i.e. on the effect of amalgamation of the licences), have not been determined previously by any decision of the Supreme Court and are, thus, novel in nature and transcend the parties before me. He also testified that there are reasonable prospects of success of the intended appeal because the Court of Appeal did not examine the impact of the amalgamation on enforceability of clause 7 of the BTS on payment of the NSR to the applicant by the respondent. These are the same reasons the applicant advanced for the contention that there are compelling reasons for the intended appeal to be heard.

16. In the written arguments in support of the motion, in so far as they were relevant to the matters before me, the applicant began by defining the threshold for the grant of permission to appeal with reference to the case of ***Bidvest Food Zambia Limited and 4 Others v CAA Import and Export Limited***[1]. He argued that "*...only weighty issues in the most deserving of cases...*" should be allowed passage to the Supreme Court. Further, an applicant has an obligation to frame the points of law of public

importance which arise from the decision of the Court of Appeal sought to be assailed.

17. It was the applicant's submission that the points of law which the intended appeal raises should be on issues adjudicated upon by the Court of Appeal. To this end, the applicant contended that the grounds of the intended appeal which he has presented satisfy this test.

18. Concluding arguments on this issue, the applicant set out the test for what qualifies as a point of law of public importance with reference to the cases of ***Bivest***[1], ***KV Wheels and Construction Limited v Investrust Bank PLC***[2] and ***Rhephidim Institute Limited v Attorney General***[3]. Advancing his argument, the applicant submitted that there are two other questions for determination. The first is whether a contractual right to a royalty can survive where the subject area of that right is merged into a larger licence resulting in difficulty in monitoring production from the original area. While the second is, whether contractual discretion may be exercised in an unfettered manner by a party in a superior bargaining position,

particularly where that discretion directly extinguishes the counterpart's benefit in the contract.

19. On the issue of prospects of success, the applicant argued that the intended appeal had strong prospects of success. He set out the test in the English case of ***Tanfern Limited v Cameron MacDonald***[4] that prospects of success must be realistic.

20. As for the ground of compelling reason for the appeal to be heard, the applicant argued that the intended appeal will give the Supreme Court an opportunity to develop jurisprudence around the effect of amalgamation of exploration licences in Zambia. There is need for development of case law in this area in line with the Supreme Court's mandate pursuant to **Article 125(3)** of the **Constitution**. To support this argument, the applicant also referred me to a passage from the ***Bidvest***[1] case to this effect.

21. Advancing his arguments on the issue, the applicant submitted that the intended appeal will give the Supreme Court an opportunity to clarify the uncertainty that surrounds the law relating to frustration of contracts and develop Zambian law on the subject and anticipatory breach, which hitherto are

governed by Common Law principles. I was urged to allow the motion.

22. The evidence opposing the motion was led by Kate Towela Viyuyi Musana. In so far as the evidence was relevant to the issues before me, it revealed that the dispute which was deployed before the High Court between the two parties was centered on the interpretation and effect of the BTS, with emphasis being on the respondent's discretion to commence mining and the applicant's entitlement to NSR.

23. The deponent went on to testify that she had been advised by her counsel and she verily believed that the applicant intends, by this motion, to introduce a wholly new factual and legal case which is not permissible and departs from the issues determined by the High Court and Court of Appeal. She stated that the effect of the amalgamation of the licences upon the rights of the applicant was not an issue that was raised in the High Court or Court of Appeal. In support of her evidence she set out the issues which were before the Court of Appeal as contained in the grounds of appeal to that court.

24. These grounds, the witness testified: contended an alleged breach by the respondent of the BTS arising from the failure to commence mining under Licence No. 17019-HG-LPL; and raise the issues; whether the timing for the commencement of mining activities in the licence area was material to the BTS; whether there existed implied obligations to disclose mineral finds; and; whether the BTS constituted a joint venture rather than an outright purchase. According to the witness, the allegation that the incorporation of the exploration licence into the respondent's mining area made it impossible to determine which minerals were extracted in the licence area is another factual allegation which was not raised in either the High Court or Court of Appeal.

25. On the contention that the appeal raises points of law of public importance, the witness testified that it does not because it is focused on the applicant's personal interests and his dissatisfaction with the judgments of the High Court and Court of Appeal. It does not disclose any novel issues or points of law that warrant the grant of permission to appeal. This is reinforced, according to the witness, by the fact that the

principles sought to be articulated in the appeal have already been litigated upon and they veer from the dispute which was before the High Court and Court of Appeal.

26. The witness testified further that the intended appeal has no prospects of success as indicated by the Court of Appeal in its ruling declining permission to appeal.

27. In the arguments in opposition, the respondent argued that the sole issue for determination was whether the applicant has met the threshold required to be granted permission to appeal to the Supreme Court. It then set out the threshold which an applicant needs to surmount if permission to appeal is to be granted by reference to **section 13(3)** of the **Court of Appeal Act**, **Order 59 rule 14 sub rule 18** of the **Rules** of the **Supreme Court 1965 (White Book)** and the cases of ***Bidvest***[1] and ***London Ngoma and Another v LCM Company***[5]. In doing so, the respondent explained the rationale for the creation of the Court of Appeal and resultant restriction of access to the Supreme Court.

28. The respondent then argued that the intended appeal does not meet the threshold for grant of permission to appeal for the following reasons:

28.1. Contrary to settled principles of appellate procedure, the applicant seeks to raise new issues and factual scenarios which were neither pleaded in the trial court or deployed before the Court of Appeal. To this end, there is no indication that the intended grounds of appeal seek to assail the judgment of the Court of Appeal nor do they highlight points in contention arising from the said judgment;

28.2. Arising from 28.1 above, an applicant is required, if he relies on the ground of point of law of public importance, to frame the point of law of public importance sought to be tabled before the Supreme Court, arising from the judgment of the Court of Appeal, if permission to appeal is to be granted. It was argued that contrary to this, the applicant has introduced new claims and legal arguments in the intended appeal that were not the subject of the judgment of the Court of Appeal. The respondent identified the issues which were before the Court of Appeal and argued that the effect of the amalgamation of the exploration licence with the respondent's licence was not one of the issues adjudicated upon by the Court of Appeal. According to the respondent, the introduction of this issue which was not adjudicated upon in the lower courts, is embarking on a course of action which is procedurally impermissible and inconsistent with the principles which define the jurisdiction of the Supreme Court. To this end, the intended appeal fails to raise any point of law of public importance within the meaning contemplated by **section 13** of the **Court of Appeal Act**. To reinforce the arguments, the respondent referred to the cases of ***Lovely Malumani v Bonanza Cash Express Limited***[6] and ***Aristogerasmos Vangelatos and Others V Metro Investments and Another***[7];

28.3. Generally speaking, the issues which the intended appeal raises are, in any event, self-serving and upon determination will only affect the applicant. The grounds will in no way affect the public at large and the questions they raise are oblivious and elementary. To support this argument, the respondent set out a portion of the decision of the Supreme Court in the case of ***ZCCM Investment Holdings PLC v First Quantum Minerals Limited and Others***[8] which explains the task which the court performs when dealing with a matter which raises a point of law of public importance. Reference was also made to the Court of Appeal decision in the case of ***Kekelwa Samuel Kongwa v Meamui Georgina Kongwa***[9];

28.4. The applicant has not satisfied the threshold for reasonable prospects of success in accordance with decisions of the Supreme Court and courts in other jurisdictions. The respondent argued that the legal issues arising from the intended appeal are unmeritorious and cannot be said to be rational or hopeful. This, it was argued, is compounded by the fact that the intended appeal raises issues which no factual findings or legal determination was made by the two courts below; and,

28.5. The threshold for compelling reasons for the appeal to be heard was not satisfied because the grounds advanced issued outside the scope of the decision of the Court of Appeal.

29. The applicant's evidence and arguments in reply, in so far as they were relevant to this motion, restated the earlier evidence and arguments.

Consideration and Decision

30. I have considered the motion before me, evidence and arguments. I must from the outset state that I find the applicant's motion rather murky. In paragraph 9 of this ruling, I have deliberately set out the claims which were before the Learned High Court Judge. These, as the respondent argued, are a determination by the court as to whether the BTS had been breached by the respondent; whether the respondent was compelled to commence mining activities and if so, when; whether, upon commencement of the mining activities, the respondent was compelled to disclose mineral finds; whether the applicant was entitled to NSR; and whether the BTS constituted a joint venture.

31. The motion before me seeks permission to appeal to advance an appeal to primarily question the effect of the amalgamation of the applicant's licence with that of the respondent. Did this amalgamation affect the applicant's right to claim the NSR? Did it vary the terms of the BTS? Did it frustrate the contract? The applicant contends that all these questions raise points of law of public importance, have reasonable prospects of success and raise compelling reasons for the appeal to be heard.

32. At the hearing, I engaged counsel for the applicant, Mr. Chimankata, and asked him to direct me to the applicant's pleadings or claims made in the High Court which sought the court's determination of the effect of the amalgamation of the two licences. He took me to relief number 5 at page 15 of the record of motion which contains the summary of the claim made by the applicant before Mwenda-Zimba, J.

33. The relief reads as follows:

> **"5. An order for payment of NSR by the defendant to the plaintiff in the sum of USD 4,000,000.00 or alternatively in lieu of payment repudiation of the**

binding term sheet with attendant consequences at law."

According to Mr. Chimankata, grounds 1 to 8 of the intended appeal were crafted from this relief and essentially seeks the interpretation of the effect of the amalgamation of the licences. He argued that the trial Judge erred by refusing to interpret the effect of the amalgamation despite it being sought in relief 5 aforestated.

34. Relief number 5 is simple as to its intendment. It merely asked the trial court to determine whether the applicant was entitled to payment of the NSR claimed of USD 4,000,000.00. Alternatively, it sought the repudiation of the BTS. The position I have taken is that the relief did not in any way call upon the trial judge to interpret the effect of the amalgamation as argued by Mr. Chimankata. It merely required the Judge to determine whether the BTS had been breached by the respondent which would have entitled the applicant to the NSR claimed. I accordingly dismiss his arguments to that effect.

35. The ***Bidvest***[1] case which counsel for the two parties referred to is specific that an intending appellant should frame the point of law of public importance, arising from the judgment of the Court of Appeal, if permission to appeal is to be granted. What this means is that the point of law of public importance sought to be presented before the Supreme Court, should arise from the determination made by the Court of Appeal. Therefore, since the point of law or points of law of public importance framed by the applicant in the motion before me arises from factual and legal issues which were not before the two courts, the applicant has not met the threshold.

36. In his response to my query at the hearing, Mr. Chimankata indicated that relief 5 justified intended grounds 1 to 8 of the intended appeal. As for intended ground 9, the contention of the applicant is that the amalgamation affected the applicant's right to payment of the NSR. That the trial judge erred by not considering this issue.

37. This again arises from the effect of the amalgamation upon the rights of the parties under the BTS which was not the subject

of adjudication in the two courts. Its fate is similar to those I have discussed earlier in this ruling.

Conclusion

38. The fate of this motion is that it must inevitably fail. The applicant has failed to convince me that the threshold under **section 13(3)** has been met because he seeks to present before the Supreme Court a dispute which was not adjudicated upon in the courts below. There is thus: no point of law of public importance; no reasonable prospects of success; or compelling reason for the appeal to be heard. I decline to grant permission to appeal.

39. I accordingly, dismiss the motion. The respondent will have its costs, which will be taxed in default of agreement.

Dated at Lusaka this 12th day of August, 2026.

Nigel K. Mutuna
Supreme Court Judge