

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

2014/HP/1954



BETWEEN:

TUKONGOTE MINING LIMITED

PLAINTIFF

AND

ATTORNEY GENERAL

1ST DEFENDANT

AARON SOKO

2ND DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiff:

Mr. R. Mainza - Messrs Mainza & Co

For the 1st Defendant:

*Mr. C. Mulonda – Senior State Advocate-
and Ms. J. Mazulanyika – State Advocate-
Attorney- General Chambers.*

For the 2nd Defendant:

Mr. D Mazumba - Messrs Douglas & Partners

J U D G M E N T

Cases referred to:

1. Khalid Mohammed v. The Attorney General (1982) Z.R 49 (S.C).
2. Zambia Railways Limited v. Pauline S. Mundia, Brian Sialumba (2008) Z.R. 287 (S.C).

Legislation and other material referred to:

1. The Mines and Minerals Development Act No.7 of 2008.

On 9th November 2014, the Plaintiff filed a writ of summons in Principal Registry seeking the following reliefs:

- i) *A declaration that the Plaintiff having paid renewal fees and Area charges for the period April, 1998 to April, 2013 as demanded by Ministry of Mines and Mineral Development is entitled to be issued a Small-Scale Gemstone Licence in respect of Plot No.9C, Ndola Rural by the Director of mines.*
- ii) *An order directing the Director of Mines to cancel the Small Scale Gemstone Licence issued to the 2nd Defendant on 30th November, 2010.*
- iii) *Costs of the proceedings.*
- iv) *Any other reliefs the court may deem fit.*

In the statement of claim that accompanied the writ, the Plaintiff averred that on 28th April, 1998, it was issued with a Gemstone licence by the Director of Mines.

That by a written agreement made sometime in 1995 between the Plaintiff and one Alfred Kunzle and Makumbe Gemstones Limited the

said Alfred Kunzle and Makumbe Gemstones Limited acquired 60% shares in the Plaintiff Company while one Robert Monde retained 40%.

It was averred that by Clause 9 of the said Agreement, the parties agreed that Mr Alfred Kunzle would be responsible for all financial matters of the Plaintiff Company.

Further, by Clause 9 of the said Agreement the parties to the said Agreement agreed that the management of the Plaintiff Company should be solely in the hands of said Mr. Alfred Kunzle.

That on or about 26th June, 2001 Mr. Alfred Kunzle and Makumbe Gemstones Limited commenced an action in the High Court for Zambia against the minority Shareholder/Director of the Plaintiff Company Robert Monde under Cause No.2001/HP/0559 in which they sought *inter alia* damages for breach of contract and an injunction restraining the said Mr. Robert Monde from occupying or taking possession or interfering with the operations of the Plaintiff Company at Plot 9C, Ndola Rural.

The Plaintiff averred that upon taking over the mine in January, 2013, the minority Shareholder/Director discovered that the Gemstone licence

issued to the Plaintiff on 28th April, 1998 by the Director of Mines had expired.

The Plaintiff further averred that upon learning that the Gemstone Licence had expired, the minority Shareholder/Director approached the Ministry of Mines and Mineral Development who advised him to pay K2, 700.00 being fees for renewal of the Small Scale Gemstone Licence.

That at the time of effecting payment for renewal of Small Scale Gemstone Licence, the Ministry of Mines and Mineral Development advised the Plaintiff to pay area charges for the period April, 1998 to April, 2013.

The Plaintiff averred that it duly paid area charges for the period April, 1998 to April 2013 amounting to K31,481.80 on 7th October, 2013 under General Receipt No. G4664702 as directed by Ministry of Mines and Mineral Development.

It was also averred that having remedied the default referred to in paragraph 16, the Director of Mines was obliged to renew the Plaintiff's Small Scale Gemstone Licence.

Prior to paying the area charges for the period April, 1998 to April, 2013, the Plaintiff received a letter from Messrs Douglas and Partners on 31st July, 2013 in which they alleged that the emerald mine located at Plot No.9C, Ndola Rural belonged to the 2nd Defendant.

It was averred that the Director of Mines was fully aware that Plot No.9C, Ndola Rural was still being litigated upon at the time he decided to issue the 2nd Defendant a Small Scale Gemstone Licence relating to Plot No.9C, Ndola Rural.

The Plaintiff averred that the 2nd Defendant who was an employee of the Ministry of Mines and Mineral Development holding the position of Inspector of Mines used his position to acquire the Small Scale Gemstone Licence Plot No.9C, Ndola Rural in total breach of the procedures set out in the Mines and Mineral Development Act, 2008. The Plaintiff further averred that the Director of Mines having accepted renewal fees from the Plaintiff and the Plaintiff having remedied the default regarding area charges was obliged to grant the Plaintiff a Small Scale Gemstone Licence.

The 1st Defendant filed a Defence in which paragraphs 5 to 10 of the statement of claim were denied.

In relation to paragraph 11 to 19, the 1st Defendant averred that the licence issued to the Plaintiff on 28th April, 1998 was issued for a period of ten (10) years and clearly stated the validity period.

The 1st Defendant averred that the Plaintiff did not apply for renewal but submitted a fresh application over the same area they held a Small Scale Gemstone licence since the licence had long expired and had gone out of the renewal period; that the Plaintiffs payment of the sum of ZMW 2,700.00 on 6th March, 2013 did not amount to a renewal of licence fees but a new application.

It was further averred that mining activities should and could only take place on an area that had been granted a mining right; that an application which awaited evaluation which was subject to approval or rejection would not give way to mining activities.

The 1st Defendant also averred that the amount of ZMW 31,481.80 paid on 7th October, 2013 was outstanding area charges for the period April 1998 to April 2013. However, the payment in fact should have been for

the period April, 1998 to April, 2008 for which the licence was valid for. The Plaintiff was therefore only entitled to the amount in excess from 2009 -2013.

It was averred further that the licence the Plaintiff was claiming to have renewed had already expired and renewal was not possible as renewal was supposed to be made at least sixty (60) days before expiry of the previous licence. That a new application could be made and that was what the Plaintiff did.

Further that the Director of Mines was under no obligation to grant a licence solely on the Plaintiff's efforts to settle the outstanding charges. That the granting of the said licence was discretionary.

It was averred that the 2nd Defendant at the time of his application was eligible to acquire a mining right and was not disqualified and that all procedures were followed in granting him a licence.

The 2nd Defendant also filed a Defence. He averred that the Plaintiff ought to have known that prior to expiry of the licence, the law required that it applied for a renewal sixty (60) days before it expired.

The 2nd Defendant denied paragraph 12 and 13 and averred that at the time they were applying for a renewal, they had already been granted a mining license since there wasn't any licence on the said mine.

He also averred that the fact that he was an employee of the Ministry of Mines and Minerals Development did not preclude him from applying for a mining licence. Further that the Director of Mines ought not to have accepted the renewal fees since there was already another mining licence issued.

He therefore averred that the Plaintiff was not entitled to the claims since at the time the licence was issued to the 2nd Defendant there was no licence existing on Plot No.9C Ndola Rural.

1. PLAINTIFF'S EVIDENCE

At the hearing of the matter, **ROBERT MONDE** a shareholder in Tukongote Mining Company and the Plaintiff herein testified as **PW1**.

He testified that Tukongote Mining was incorporated on 28th April, 1998 and established to mine and sell emeralds; that their company had a mine in Chief Lupuma's area in Lufwanyama District, Plot 9C.

He explained that they were issued with a Gemstone Mining Licence for ten (10) years by the Ministry of Mines on 28th April, 1998. That in 2008, he went to court with Alfred Kunzle and Makumbe Gemstone Limited in 2001. He gave him 60% and he remained with 40%.

He stated that the Court banned him from going to the mine for five (5) years and was only released in January, 2013.

When he went to the mine in 2013, he did not find Alfred Kunzle and Makombe so he went to the Ministry of Mines where he was told that the licence had expired four (4) years earlier and was required to pay for the licence. In that regard, he paid ZMW 2,700.00 for renewal of the Gemstone Licence and was issued a receipt and told to go and start working. He also paid ZMW 31,481.80 as area charges. He stated that he was not issued with a new Gemstone Licence.

Thereafter, the 2nd Defendant went to him and asked him to vacate because the mine was his. He then instructed his lawyers who wrote to the Ministry of Mines on 15th and 19th August, 2013 but received no response.

When referred to pages 2 to 7 of the Plaintiff's bundle of documents which showed the case between the Plaintiff and Kunzle, he admitted that judgment was delivered on 16th February, 2006 and that he was entitled to attend Shareholders meetings.

When further cross examined, he admitted that he was aware that failure to pay area charges could lead to cancellation of the mining licence. He stated that he was only told in 2013 that the licence had expired as he did not know what was going on at the mine. That at the time of renewal he was only told after paying that the mine had been given to someone else.

He stated that a bigger portion of the area charges was what had accrued in ten (10) years and that ZMW2, 700.00 was payment for renewal of the licence which had expired.

It was his evidence that an application for a licence could be successful or not. When referred to page 1 of the 1st Defendant's bundle of documents, which was a letter from the Mines Development Department to the Director of Tukongote Mining, PW1 denied having received the letter.

In re-examination, he told the Court that when he submitted his application on 6th March, 2013, the address he gave for Tukongote Mining was Wusakile, in Kitwe. That the registered office for Tukongote Mining was in Kitwe and Lusaka near University Teaching Hospital (UTH). That the letter which suggested that the application was unsuccessful was addressed to Plot No.14702 and that he did not know that address and that Tukongote did not operate from there.

PW1 also told the Court that he was not invited to attend any Board and Shareholders meetings.

That marked the close of the Plaintiff's case.

2. DEFENDANTS EVIDENCE

The Defendant's first witness, **DW1** was **SIMUKALI MULANGWE**, a Mining Engineer in the Ministry of Mines and Minerals Development.

He testified that the Plaintiff Company was granted a Small Scale Gemstone Mining License over Plot 9C in Lufwanyama area in 1998 for a period of 10 years with conditions attached. The said conditions

included payment of annual area charges. The licence was renewable by applying for renewal ninety (90) days before expiry.

DW1 identified the Plaintiff's mining licence on page 17 of the 1st Defendant's bundle of documents and told the Court that it was granted on 28th April, 1998 for a period of ten (10) years and was to expire on 27th April, 2008. That the Applicant was supposed to lodge an application for renewal three (3) months before but they never saw any application for renewal.

He explained that if a licence had expired and there was no application, the area became free. That Mr. Soko applied for a Small Scale Gemstone licence over Plot 9C which was granted to him on 30th November, 2010. This was two (2) years after the Applicant's licence had expired.

DW1 told the Court that they did not receive any application for renewal but what was received was a fresh application. He identified the receipt on page 6 of the 1st Defendant's bundle of documents as the receipt of acknowledgement of fresh application of the licence that Tukongote made over Plot 9C. He told the Court that the application was made in

2013, five (5) years after expiry of the licence. That it was therefore not in order to apply for a renewal as alleged.

The witness further identified the documents at pages 7 to 12 of the 1st Defendant's bundle of documents and stated that where an application was for renewal as alleged, it would have indicated –“Renewal for Mining Right’ and not ‘Application for Mining Right’.

He further told the Court that when calculating area charges, there was a mistake made by the officer doing the calculations as he included the times when the licence had expired and the charge amounted to K31, 481.80 but the Plaintiff owed area charges from 1999 to 2008. He told the Court that this mistake could be rectified since it was a mistake on the part of the Ministry.

He further testified that payment of area charges was an obligation to Government and had no effect as anyone who was owing ought to have paid.

He testified that the 2013 application was rejected as shown on page 1 of the 1st Defendant's bundle of documents and the reason was clearly indicated that it was under an active mining licence right 14408-HQ-HSGL.

DW1 explained that in relation to paragraph 25(i) for a declaration, the allegation that he lodged a renewal licence was not correct and that because he paid area charges did not guarantee that the licence should be reinstated to him and the Director of Mines was not obliged to reinstate it as there were rules to be followed. He told the Court that when an application was made, there were two answers to be expected: a positive responsive was given if the conditions are satisfied. In this case, the conditions were not satisfied, that was why it was rejected.

The witness told the Court that cancellation of a licence that was issued following the acceptable procedures would be unfair and unjust because the 2nd Defendant followed the laid down procedure.

When cross examined by Mr. Mainza, counsel for the Plaintiff, he told the Court that prior to 2015, it was the duty of the Director of Mines to sign for licences. He stated that he joined the Ministry of Mines on 19th

April, 2013 and when the Small Scale Gemstone mining licence was issued to the 2nd Defendant, he was not working for Ministry of Mines.

DW1 told the Court that the procedure for applying for a mining licence in 2010 was that an applicant identified the area and got the coordinates. Thereafter an applicant went to the Ministry where he was given forms to fill in and paid the application fee.

He stated that where one did not file an application form, that person could not be granted a licence.

He admitted that there was no application form filled in by the 2nd Defendant in the Defendant's bundle of documents for purposes of applying for a mining licence.

He also told the Court that the application form on page 7 to 12 was the Plaintiff's application. DW1 admitted that the correspondence to the Plaintiff was sent to a wrong address which was an error on the part of the Ministry.

When referred to page 3 of 1st Defendant's bundle of documents, the witness told the Court that the quotation given to the Plaintiff had an error and the Ministry did not write to the Plaintiff about the error.

The witness admitted that the errors on the area charges outstanding amount accrued by the Plaintiff had not been rectified.

He further told the Court that the 2nd Defendant was issued the licence in 2010 when he was working under the Mines Safety in the Ministry of Mines in Kitwe. He added that Mr. Soko was an employee in the Ministry of Mines and that the Ministry did not advertise that Plot 9C was available. He told the Court that when the Plaintiff's application was received in 2013, the Ministry was not aware that there was a licence issued to Mr. Soko in 2010.

When cross examined by Mr. Mazumba, DW1 stated that the Plaintiff Company was supposed to pay area charges from 1998 to 2008 which were not paid and that the error on page 4 of the 1st Defendant's bundle of documents was that it included the years 2009 to 2013.

He also told the Court that the address where the rejection letter was sent was the same as the one in the Plaintiff's application form.

It was his evidence that the Mines Safety Department was not directly involved in issuing licences but the Director of Mines Safety was part of the licensing committee.

When referred to page 1 of the 2nd Defendant's bundle of documents, the witness told the Court that it was an announcement published in the Daily Mail on 26th February, 2010 to facilitate the notification system that all licence holders granted under the replaced Mines and Minerals Development Act of 1995 had to comply with the Act of 2008. That despite the Plaintiff not having paid their renewal fees, their licence was not terminated but expired, and that the effect of an expired mining licence was that the area became available for any application from eligible persons.

DW2 was **AARON SOKO**, a Meteorological / Environmental Engineer and the 2nd Defendant herein.

He told the Court that he had been looking for a Gemstone licence and had been making efforts to see areas that were vacant but to no avail. In 2010 after the Ministry of Mines Development put up an advert reminding mining licences holders to convert their licences and after that

date had expired, he started looking if there could be any vacant Gemstone Mining Licences. He discovered that there were a lot of vacancies not as a result of termination but expiry of licences. He scrutinized them like any other member of the public and chose two licences one of which was Plot 9C. He went on the ground to see if he could find these areas and he managed to get the coordinates. DW2 physically went to the area and found an open pit which was abandoned. There was no presence of anyone except a hut which had been eaten by termites. He then got the application forms, filled them in and submitted the same.

He told the Court that he started waiting for a response which came in November, 2010. He identified the receipt for the application form on page 2 of the 2nd Defendant's bundle of documents.

He also identified the licence for the Small Scale Gemstone Licence on page 3 of the 2nd Defendant's bundle of documents. He stated that he stayed for about two (2) years before going to the mine because he had gone out of the country. When he visited the site, he found that someone had built a thatched house and when he enquired from that person, he was told that it belonged to the Plaintiff. He went there again and found

the person was still there and he asked him to tell the people who were representing the Plaintiff that the mine belonged to him as the Plaintiff's licence had expired.

When no one came forth, he engaged Douglas & Partners so that they could compel the Plaintiff to leave. A letter was written which was to be submitted to the Plaintiff. He identified the letter which was at page 6 of the 2nd Defendant's bundle of documents.

He told the Court that there was some resistance by the Plaintiff to leave the area. He then went to the Ministry to find out the status and he was issued a letter to establish the owner of the mine. He identified the said letter in Court. He took the letter to the Commandant so that the Plaintiff could be removed and when they were removed, the witness went to the site and later received summons that there was an action in Court.

It was his testimony that he did not use his position to acquire the mining licence as there was no law which forbade Government officers or civil servants from acquiring mining rights. He stated that after all the pre-requisites and the application were tabled before the Mining

Advisory Committee which did not consist of one person and that he had no influence over the committee.

He told the Court that his licence could not be cancelled because he followed the correct procedure of lodging on the area that was vacant. He stated that Plot 9C was not active, the licence was issued legitimately and so he was against the cancellation.

When cross-examined by Mr. Mainza, he told the Court that the proof that he had applied for the licence was that he had a licence and that the Advisory Committee could not issue a licence without an application form.

In further cross examination, he explained that he did not know whether by virtue of the Ministry of Mines not producing the application it meant that they did not have it. He stated that he submitted the application form earlier and the licence was issued on 30th November, 2009 and not on the same day the application was issued.

He explained that at the time he acquired the licence, he was working for Ministry of Mines as Inspector of Environment and he had not been to the mine.

When cross examined by counsel for the 1st Defendant, Ms. Mazulanyika, he told the Court that he was not a member of the Mining Advisory Committee and that his department had no connection with the Advisory Committee.

In re-examination, he told the Court that when one lodged an application, there was a fee paid that was for processing and issuance of the licence. That this fee was paid before the licence was issued. The application form remained with the cadasters unit and that was the reason why he did not have it.

He further told the Court that his position had no connection with the expiry of licences or termination.

That was the close of the Defendants Defence.

3. SUBMISSIONS

The Court invited submissions from all the parties but only the 1st Defendant's submissions were received.

In the 1st Defendant's submissions, learned Senior State Advocate representing the 1st Defendant Mr. C. Mulanda gave a brief background

of the Plaintiff's claim against the Defendants and summarized the evidence adduced in Court.

In his submissions, counsel contended that the Plaintiff made an application to renew its 1998 licence over Plot 9C in 2013. That however the application ought to have been made at least sixty (60) days before expiry of the licence. Reliance was placed on Section 70(1) of the Mines and Minerals Development Act in this regard.

It was submitted that the 1st Defendant could not issue the Plaintiff with a licence over the said plot because the same had already been issued to the 2nd Defendant according to Section 65 of the Mines and Minerals and Development Act which provides as follows:

“(3) The Director shall reject an application for a small-scale gemstone licence where-

- (a) the applicant has, under section seventy-two, been required to apply for a large-scale gemstone licence;**
- (b) the applicant is disqualified under section seven;**
- (c) the area over which the applicant seeks a small-scale gemstone licence is already subject to a mining right and the holder has not granted consent;**

(d) the area in respect of which a small-scale gemstone licence is sought is in excess of the area required to mine the deposits identified by the applicant; or

(e) the applicant is in breach of any condition of any other mining right or any provision of this Act.”

It was submitted in this regard that the Plaintiff was not entitled to a licence over Plot 9C merely because it applied for one. That by law, the 1st Defendant could not issue out a licence over Plot 9C to the Plaintiff in 2013 because at the time, a licence had already been granted to the 2nd Defendant.

Further that in accordance with Section 65(4) of the Act, the Plaintiff was informed of the decision to reject its 2013 application in a letter dated 25th October, 2013.

It was further submitted regarding the Plaintiff's claim to cancel the mining licence issued to the 2nd Defendant that the 2nd Defendant was qualified to hold the Small Scale Gemstone mining licence over Plot 9C once the same became vacant. Reliance was placed on Section 7 of the Act which provides for persons disqualified from holding mining rights as follows:

“(1)A mining right or non-mining right shall not be granted to any person except in accordance with the provisions of this Act.

(2) A mining right or non-mining right shall not be granted to or held by-

(a) an individual who-

(i) is under the age of eighteen years;

(ii) is or becomes an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any written law, or enters into any agreement or scheme of composition with creditors, or takes advantage of any legal process for the relief of bankrupt or insolvent debtors; or

(iii) has been convicted, within the previous ten years, of an offence involving fraud or dishonesty, or of any offence under this Act or any other law within or outside Zambia, and been sentenced therefore to imprisonment without the option of a fine or to a fine exceeding fifty thousand penalty units....”

It was further submitted that the Plaintiff failed to prove that the 2nd Defendant used his position to obtain the mining licence.

It was argued that mere payment of area charges in excess over Plot 9C did not entitle the Plaintiff to legal rights over the said plot. That area charges were prescribed by the Act and it was only proper that the Plaintiff settled its arrears with the Ministry before making its

application for a fresh licence over Plot 9C. Section 143 of the Act was relied on in this regard which provides for annual charges in respect of licences.

It was contended that the Plaintiff neglected to comply with the requirements of Section 143(1) of the Act by failing to pay the annual fees for the duration of the subsistence of the licence since 1998. That when the Plaintiff applied for a licence again in 2013, it was made to pay outstanding arrears of annual fees. Unfortunately, the 1st Defendant in its computations of these monies included years when the Plaintiff did not have a licence and that the Plaintiff ought to be refunded in that respect.

In conclusion, the case of **Khalid Mohammed v. The Attorney General** ⁽¹⁾ was referred to. It was submitted in this regard that the Plaintiff had failed to prove its case on a balance of probabilities. It was contended that the Plaintiff was not entitled to the reliefs sought and prayed that its claims be dismissed with costs.

4. FINDINGS

I have carefully considered the evidence before this Court and the submissions by the learned Senior State Advocate on behalf of the 1st Defendant.

This action relates to the issuance of a Small Scale Gemstone Licence in respect to Plot No.9C, Ndola Rural. The Plaintiff seeks a declaratory order that having paid renewal fees and the area charges for the period, April 1998 to April, 2013, it is entitled to be issued a Small Scale Gemstone Licence by the Director of Mines for Plot No.9C, Ndola Rural. It also seeks an Order directing the Director of Mines to cancel the Small Scale Gemstone Licence issued to the 2nd Defendant on 30th November, 2010.

It is settled law that the burden of proof is on the party that alleges and this has been stated in a plethora of authorities including the case of **Zambia Railways Limited v. Pauline S. Mundia, Brian Sialumba** ⁽²⁾ where the Supreme Court reiterated, *inter alia*, that:

"The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable."

Therefore, the Plaintiff has the onus to prove on a balance of probabilities that it is entitled to be issued a Small Scale Gemstone License by the

Director of Mines for Plot No.9C, Ndola Rural and that the Small Scale Gemstone License issued to the 2nd Defendant on 30th November, 2010 should be cancelled.

In view of the reliefs sought by the Plaintiff, the starting point is to consider the relevant provisions of the **Mines and Minerals Development Act of 2008** which was applicable at the material time.

Section 64 provides as follows:

“(1) A person shall apply to the Director for a small-scale gemstone licence in the prescribed manner and form upon payment of the prescribed fee.

(2) An application made under subsection (1) shall include:

(a) a description and sketch, with geographical coordinates of the area of land over which the gemstone licence is sought, but not exceeding one hundred and twenty cadastre units and with whole numbers of cadastre units, sufficient to enable the officers at the local office to identify the area and provide a plan to be annexed to the licence;

- (b) the proposed program of mining operations, including a forecast of investment and the estimated recovery rate of ore and gemstones;
- (c) a statement, to the best of the applicant's knowledge and belief, of the gemstone deposits in the area over which the licence is sought;
- (d) a tax clearance certificate issued under the Income Tax Act; and
- (e) such other information as the Director may require for disposing of the application."

Section 67 provides that:

"A small-scale gemstone licence shall be granted for a period not exceeding ten years."

Further in **Section 70(1)**, the Act provides that:

"A holder of a small-scale gemstone licence may apply to the Director at least sixty days before the expiry of the licence, for the renewal of the licence in the prescribed manner and form upon payment of the prescribed fee."

Section 143 provides for annual charges in respect of licences as follows:

“(1) There shall be payable to the Republic by a holder of licence or permit, an annual fee of such amount as may be prescribed, or as may be calculated in the manner prescribed, by the Minister, by statutory instrument.

(2) The annual charge referred to under subsection (1) shall be payable on the grant of the mining right and thereafter annually on the anniversary thereof until the termination of the licence.”

It is clear from the foregoing provisions that certain requirements have to be met before applying for a small-scale gemstone licence and that the licence is granted for a period not exceeding ten (10) years. In terms of renewal, the licence is supposed to be renewed at least sixty (60) days before it expires. The Act also imposes an obligation on the holder of a mining licence to pay annual charges in respect of the licence.

In support of its case, the Plaintiff's evidence is that it was issued a Gemstone Licence on 28th April, 1998 by the Ministry of Mines for a period of ten years. He produced the licence before Court.

That in 2001 PW1 was banned from going to the mine for five (5) years after a dispute he had with Alfred Kunzle and Makumbe Gemstone Limited; that when he was released in 2013, he decided to go to the mine and found that Alfred Kunzle and Makombe Gemstone Limited were not there. PW1 referred the Court to the judgment of 16th February, 2006, delivered by Judge T. Kakusa to support his assertion that he was banned from going to the mine.

Further that he went to the Ministry of Mines where he was told that the mining licence had since expired four (4) years earlier and he was told to pay for that licence. That he paid K2, 700.00 for renewal of the mining licence and K31, 481.80 for area charges and he was told to go and start working. He was however not issued with a new licence but was only given a receipt. He produced the receipts at pages 15 and 16 of the Plaintiff's bundle of documents to support this evidence.

That after he paid, Aaron Soko, the 2nd Defendant went and told him to vacate the premises as the mine belonged to him. His lawyers wrote to the Ministry of Mines on 15th August and 19th August, 2013 but there was no response.

The 1st Defendant's evidence through DW1 on the other hand is that they did not receive any application for renewal as alleged but a fresh application for a small scale gemstone mining licence. That if the Plaintiff's application was for renewal, it was going to read, '*Renewal for mining Right*' and not '*Application for Mining Right*'.

He explained that at the time the Plaintiff went to lodge an application, there was a mistake on calculation of area charges as they included the years when the licence had already expired and could be rectified by the Ministry. DW1 told the Court that where a licence had expired, and if there was no application, the area was free and that Mr. Soko was granted a Small Scale Gemstone Licence over Plot 9C on 30th November, 2010.

From the evidence of the parties, it is not in dispute that the Plaintiff's Small-Scale Gemstone Licence expired in 2008 as it was issued on 28th April, 1998. It is also not in dispute that the Plaintiff lodged in an application with the Ministry of Mines in 2013, five (5) years after the licence had expired in 2008.

However, it is clear that the parties have given conflicting positions whether the application made by the Plaintiff in March, 2013 following the expiry of the licence was a renewal or a fresh application for the licence.

The first issue I have to consider therefore is whether the Plaintiff's application was for renewal of licence as it paid area charges from April, 1998 up to April, 2013.

From the evidence adduced, it is not in dispute that the Plaintiff paid area charges from April, 1998 up to April, 2013.

That notwithstanding, as I have mentioned, the 1st Defendant's contention is that the Plaintiff's application was a fresh application and that it was only supposed to pay area charges for the period 1998 to 2008 and that the area charges paid for the period 2009 to 2013 were made in error.

I have given careful consideration to this evidence and I am inclined to accept it because the receipt at page 14 of the Plaintiff's bundle of documents is very clear in that the payment was for an application made for a Small Scale Gemstone licence and not renewal of the licence.

Furthermore, the document which is at page 7 of the 1st Defendant's bundle of documents shows that PW1 filled in Form 1 in 2013 which is an APPLICATION FOR A MINING RIGHT made in accordance with **Regulation 9(1) of the Mines and Minerals Development (General) Regulations, 2008**. If the application was for a renewal of licence, the PW1 should have filled in Form XXXV in the Fifth Schedule which is an APPLICATION FOR RENEWAL OF MINING RIGHT as provided for under **Regulation 26**.

In addition, there is a letter at page 1 of the 1st Defendant's bundle of documents addressed to the Plaintiff Company by the 1st Defendant. I note that PW1 in his evidence stated that he had not seen this letter as it was sent to a wrong address as the Plaintiff's physical address in Lusaka was near the University Teaching Hospital and also in Kitwe. Although PW1 stated that, what is clear from Gemstone Licence dated April, 1998 which is at page 1 of the Plaintiff's bundle of documents is that the address for the Plaintiff Company is P.O. Box 36570, Lusaka which is the same postal box number which appears at the letter at page 1 which PW1 claims was sent to the wrong address.

There is no evidence that has been adduced by the Plaintiff to show that it notified the 1st Defendant that the address on the licence it issued was a wrong one. For this reason, I find no reason not to consider it.

For the avoidance of doubt, the letter reads as follows:

*The Director
Tukongote Mining Limited
Plot No. 14702 Lumumba Road
P.O. Box 36570
LUSAKA*

25th October, 2013

Dear Sir,

APPLICATION FOR GEMSTONE MINING LICENCE 18768-HQ-SGL (PLOT 9C)

We make reference to the captioned matter even your application submitted on 6th March, 2013.

We wish to advise that your application was not successful as Plot 9C applied for is not available. Following expiry of your licence No. 7433-HQ-SGL on 27th April, 2008, Plot No. 9C was allocated to another applicant. Currently the plot is under an active mining right 14408-HQ-SGL.

Kindly be advised accordingly.

Yours faithfully,

*Dickson Banda
Acting Registrar of Mining Rights
For/Head Mining Cadastre
MINING CADASTRE UNIT*

Having carefully examined the above letter, there is nothing in the letter which suggests that the application which was being considered was for renewal of a Small Scale Gemstone licence. Conversely, what it shows is that the Plaintiff's application had been rejected as it had expired and that the plot was under an active mining right. This is in line with Section 65(3) of the Mines and Minerals Development Act which provides as follows:

“(3) The Director shall reject an application for a small-scale gemstone licence where-

- (a) The applicant has, under section seventy-two, been required to apply for a large-scale gemstone licence;**
- (b) The applicant is disqualified under section seven;**
- (c) The area over which the applicant seeks a small-scale gemstone licence is already subject to a mining right and the holder has not granted consent;**
- (d) The area in respect of which a small-scale gemstone licence is sought is in excess of the area required to mine the deposits identified by the applicant; or**
- (e) The applicant is in breach of any condition of any other mining right or any provision of this Act.**

Furthermore, I have accepted the explanation by DW1 that the acceptance of outstanding area charges for the period 2009 to April 2013

was an error which they were willing to rectify. This is because I find it unusual that the 1st Defendant could have accepted payment of area charges on 7th October, 2013 for the period 1998 to 2013 and later reject the application for the alleged renewal of licence on 25th October, 2013, eighteen days later. As I have mentioned, the application was rejected because the Plaintiff's licence had expired in 2008 and the plot was under an active mining licence.

Based on the foregoing, I find the following facts proved:

1. The application made by the Plaintiff on 6th March, 2013 was for a fresh application of a Small Scale Gemstone licence and not renewal of licence.
2. The Ministry of Mines rejected the Plaintiff's fresh application for a Small Scale Gemstone licence over Plot 9C in its letter dated 25th October, 2013 as the Plaintiff's licence had expired and the area was under an active mining licence right 14408-HQ-SGL.
3. The acceptance of area charges by the Director of Mines from the Plaintiff for the period 2009 to 2013 was done in error.

The second issue I have to consider is whether the 2nd Defendant used his position as an employee of the Ministry of Mines and Development to acquire the Small Scale Gemstone Licence on Plot No.9C.

It is not in dispute that the 2nd Defendant was an employee of the Ministry of Mines and Development at the material time when he was granted the Small Scale Gemstone Licence.

That being the case, are government employees disqualified from holding mining rights?

The 2nd Defendant in his evidence denied that as a Government employee he was disqualified from being issued with the licence. In their submissions, the 1st Defendant placed reliance on Section 7 of the Act and argued that by virtue of this provision, the 2nd Defendant was not disqualified to hold a Small Scale Gemstone Licence.

To put matters in perspective, this section reads as follows:

“(1) A mining right or non-mining right shall not be granted to any person except in accordance with the provisions of this Act.

(2) A mining right or non-mining right shall not be granted to or held by-

(a) an individual who-

(i) is under the age of eighteen years;

(ii) is or becomes an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any written law, or enters into any agreement or scheme of composition with creditors, or takes advantage of any legal process for the relief of bankrupt or insolvent debtors; or

(iii) has been convicted, within the previous ten years, of an offence involving fraud or dishonesty, or of any offence under this Act or any other law within or outside Zambia, and been sentenced therefore to imprisonment without the option of a fine or to a fine exceeding fifty thousand penalty units....”

The foregoing outlines the persons who are disqualified from holding a mining right. It seems to me perfectly plain from the above provision that being a Government employee is not one of the disqualifications from holding a mining right and so I find.

In view of the above finding, can it be said that the 2nd Defendant, a Government employee used his position and did not follow procedure when he acquired mining rights over Plot 9C?

In his evidence, PW1 did not adduce any evidence on the procedure that was not followed by the 2nd Defendant to acquire the Small Scale

Gemstone licence but only stated the 2nd Defendant was an Inspector of Mines for Small Scale Mines under the Ministry of Mines.

On his part, the 2nd Defendant denied that he was an Inspector of Mines for Small Scale Mines but that he was an Inspector of Environment. On the procedure, the 2nd Defendant stated that he followed procedure when he was issued with a licence.

In this regard, his evidence was that in 2010 after the Ministry of Mines Development put up an advert reminding mining licences holders to convert their licenses and after that date had expired, he started looking if there could be any vacant Gemstone Mining Licences. He discovered that there were a lot of vacancies not as a result of termination but expiry of licences. He scrutinized them like any other member of the public and chose two licences one of which was Plot 9C. He went on the ground to see if he could find these areas and he managed to get the coordinates.

He stated that he physically went to the area and found an open pit which was abandoned. There was no presence of anyone except a hut which had been eaten by termites. He then got the application forms, which he submitted after he filled them in.

The 2nd Defendant also added that all the prerequisites and his application were tabled before the Mining Advisory Committee which did not consist of one person and that he had no influence over the committee.

DW1 in his evidence also stated that the procedure was followed as an applicant first identified the area, got co-ordinates and then went to the Ministry and was given forms to fill in and paid an application fee. That the Registry staff were required to check all the documents and that where one did not file an application form, they could not be granted a licence.

He added that the application form that was filled in by the 2nd Defendant was not produced in Court. The 2nd Defendant in his evidence stated that he did not produce the application in Court because the application forms remained at the cadastre unit.

Given the foregoing evidence, I find no reason to discount the 2nd Defendant's evidence that he followed procedure when he was issued with the licence although the application form was not produced in Court for the following reasons:

- (i) His evidence was that an advert was placed in the Newspaper in February 2010 inviting licence holders to facilitate migration system-to remind the licence holders granted under the 1995 Act to comply with the Act of 2008. A copy of the advert was produced at page 1 of the 2nd Defendant's bundle of documents.
- (ii) It was after this exercise that he identified Plot 9C Ndola Rural and other mines as vacant mines and followed the procedures of applying for a small scale gemstone licence like any other member of the public. The evidence that he was the one who identified the area is in tandem with the evidence by DW1 who stated that an applicant identified a vacant area and got coordinates which were sent to the Ministry.
- (iii) There is also evidence that the 2nd Defendant paid for the licence fees as shown by the receipt at page 2 of the 2nd Defendant's bundle of documents. According to Section 69 of the Act, an applicant is supposed to pay the prescribed fee when making an application for a mining right. Under Regulation 39 of the Mines and Minerals (General) Regulations, and the Sixth Schedule of the Regulations, Licence fee is one of the prescribed fee to be paid before one is granted a mining right.

- (iv) I consider as plausible the 2nd Defendant's explanation that it was not possible for him to produce before Court the application form he used to apply for the mining licence as it remained with the cadastre unit. This evidence was not in conflict with the evidence of DW1 who explained that application forms were not given back to the applicants but remained on the file.
- (v) The explanation alluded to in (iv) above, is also supported by the fact that the Plaintiff did not produce the application forms in its bundle of documents but were produced by the 1st Defendant on behalf of the Director of Mines, the client.
- (vi) The Plaintiff has not provided any proof or evidence to the satisfaction of this Court that shows any impropriety in the manner in which the licence was acquired. The absence of an application form alone, cannot be reason to hold that he used his position to acquire the mining licence.
- (vii) There is no evidence to support the averment in paragraph 23 of the statement of claim that the Director of Mines was aware that there was a pending matter in Court when the 2nd Defendant's licence was issued to him. This is because the judgment at page 2 of the Plaintiff's bundle of documents shows

that the judgment in the case between Alfred Kunzele and Makumbe Gemstone Limited v. Robert Monde (PW1 herein) was delivered 2006, four (4) years before the 2nd Defendant was issued with the licence.

(viii) The 2nd Defendant's evidence is that all prerequisites and his application were considered by the Mining Advisory Committee. Mining rights are granted by the Director in liaison with the Mining Advisory Committee. The members are listed in Regulation 1(1) of the Mines and Mineral Development (General) Regulations. The members include,

- (a) the Director who is the chairperson of the Committee;
- (b) the Director of Geology;
- (c) Director of Mines Safety;
- (d) The head of the cadaster unit who is the Secretary and ex-officio member of the Committee;
- (e) One representative each from Ministry responsible for environment, land finance, labour, community development and a representative of the Attorney – General, Zambia Development Agency, Citizen Economic

Empowerment, Environmental Council of Zambia and the Geological Society of Zambia.

It is clear that the 2nd Defendant is not a member of the Advisory Committee. Therefore, I am not entirely satisfied that the 2nd Defendant could have used his position to influence all the members of the Committee from different ministries and departments that the licence be granted to him. In any event, there is no such evidence apart from the fact that he is a Government employee.

Taking into account the foregoing, I find as a fact proved that the 2nd Defendant who is a Government employee of the Ministry of Mines did not use his position to acquire the Small Scale Gemstone Licence of Plot 9C, Ndola.

Furthermore, in the absence of any procedural impropriety I find as a fact that the licence was legally granted to the 2nd Defendant.

Having made the above findings, I will consider the reliefs sought.

The first relief is that the Plaintiff having paid renewal fees and the area charges for the period, 1998 to April, 2013, he is entitled to be issued a

Small Scale Gemstone Licence by the Director of Mines for Plot 9C, Ndola Rural.

It is clear from Section 70 of the Act which I have already referred to that a holder of a Small Scale Gemstone licence may apply to the Director at least sixty (60) days before expiry for the renewal of the licence.

I have made a finding that the Plaintiff did not apply for a renewal but made a fresh application as the initial licence granted to it had expired five (5) years earlier.

Section 65(3) of Act which I have already cited also provides the grounds upon which the Director shall reject an application for a Small Scale Gemstone Licence. One of the grounds is where the area in respect of which the licence is sought is already subject to a mining right and the holder has not granted consent.

In the present case, the Plaintiff's application was rejected because the plot was under an active mining right. This active mining right was in relation to the Small Scale Gemstone licence legally granted to the 2nd Defendant.

I have also made a finding that the acceptance of area charges by the Director of Mines for the period 2009 to 2013 was done in error. The Plaintiff cannot therefore argue that because of this payment, he is entitled to be issued with a licence as the Director has the power to reject the application on grounds set out in Section 65 (3) of the Act.

It is for these reasons that I find that the Plaintiff has failed to prove that he is entitled to a declaratory order that he be issued with a Small Scale Gemstone Licence by the Director of Mines for Plot 9C, Ndola Rural. This claim therefore fails.

The second relief is for an Order directing the Director of Mines to cancel the Small Scale Gemstone Licence issued to the 2nd Defendant on 30th November, 2010.

As already alluded to, I have made a finding that the 2nd Defendant did not use his position in the Ministry of Mines to acquire the mining licence that was granted to him. Therefore, notwithstanding the fact that the 2nd Defendant was a Government employee when he was granted a Small Scale Mining licence, there is no basis for this Court to cancel the licence as it was legally granted to him.

For these reasons, I find that the Plaintiff has failed to prove that he is entitled to an Order directing the Director of Mines to cancel the Small Scale Gemstone Licence issued to the 2nd Defendant on 30th November, 2010. I decline to grant this Order and therefore this claim fails.

In the result, I hold that the Plaintiff has failed to prove its case on a balance of probabilities that it is entitled to the reliefs sought. Accordingly, the whole action is dismissed with costs to the Defendants. Leave to appeal is granted.

Delivered at Lusaka this 30th day of June, 2020



.....
M.C. KOMBE
JUDGE