IN THE HIGH FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(JUDICIAL REVIEW JURISDICTION)

2022/HP/1435

IN THE MATTER OF: **AN APPLICATION FOR JUDICIAL REVIEW PURSUANT RO ORDER 53 RULES 3 OF THE RULES OF SUPREME COURT 1965 (WHITE BOOK 1999 EDITION).**

BETWEEN:

THE PEOPLE

AND

THE ATTORNEY GENERAL (MINISTER OF MINES AND MINERALS DEVELOPMENT (Respondent), **HANDA RESOURCES LIMITED** (Interested Party)
EX PARTE **ZAMSORT LIMITED** (Applicant).

Before: ***The Honorable Mr. Justice Charles Zulu.***

For the Applicant:	Mr. B.S. Sitali of Messrs Butler and Co.
For the Respondent:	Mrs. M. Kamuwanga Senior State Advocate, Attorney General's Chambers.
For the Interested Party:	Mr. A.J. Shonga SC, Mr. S.M. Lungu SC, Mr. N. Ng'andu of Shamwana and Company.

R U L I N G

Cases referred to:

1. ***B.P Zambia Plc v Zambia Competition Commission and Another (SCZ Judgment No. 22 of 2011).***
2. ***Dr. Ludwig Sondashi v the Attorney General (SCZ Judgment No. 27 of 20000.***
3. ***Kansashi Mining Plc v Zambia Revenue Authourity (SCZ Appeal No 143/2014***).
4. ***Nyali v the Attorney General (1956) 1 QB 1 at page 16-17).***
5. ***Katiso Mining Company Limited v Minister of Mines v Minerals Development & Another (CAZ/08/66/2021).***

Legislation and other materials referred to:

1. ***The Rules of the Supreme Court (1965) White Book 1999 Edition Vol. 1).***
2. ***The Mines and Minerals Development Act No. 11 of 2015.***
3. ***Halsbury's Law of England*** *4th Edition Reissue Vol. 1(1) (Butterworths London 1989) at para 61, page 94.*

1.0 INTRODUCTION

1.1 This ruling is in respect of an application dated September 15, 2023, by the Applicant, ZAMSORT Limited for leave to apply for judicial review. The application was made pursuant to Order 53 rule 3 (2) of the ***Rules of the Supreme Court (RSC) 1965, White Book 1999 Edition***. The application was heard *inter partes* on March 7, 2024.

1.2 The decision, the subject of the Applicant's grievance is here-below stated:

> ***The decision of the Minister of Mines and Minerals Development to grant consent for the transfer of large scale exploration licence No. 19906-HQ-LEL from the Applicant (ZAMSORT LIMITED) to HANDA RESOURCES LIMITED as contained in a letter dated 18th August 2023, and which decision only came to the attention of the Applicant when it conducted a search on 12th September, 2023.***

1.3 And if leave is granted, the Applicant's substantive claim seeks for an order of *certiorari* to quash the said decision for illegality, procedural impropriety and irrationality. And the main ground for judicial review advanced by the Applicant is that the said transfer was not at the instance of the Applicant, neither was

the change effected by consent of the Applicant. But the Respondent and the Interested Party hold a contra position that the change of ownership of the subject mining licence was a product of adjudication by way of a settlement agreement executed by the Applicant and the Interested Party.

1.4 The Applicant filed its requisite documents together with an affidavit in support deposed to by Kelvin Vlahakis. Equally, the Respondent filed an affidavit in opposition deposed to by Eddie Kwesa.

1.5 An affidavit in opposition for and on behalf of Handa Resources Limited was deposed to by Rajendrakumar Manubhai Patel.

1.6 I will not labour to summarize the affidavit evidence seriatim, given the opposition by the Respondent and the Interested Party, hinging more on a question of law, particularly with regard to the correctness or otherwise of the mode of commencement adopted by the Applicant.

3.0 ARGUMENTS FOR AND AGAINST THE APPLICATION

3.1 Mr. Sitali started by arguing that recourse to this application was against the backdrop that, the Applicant had exhausted the appeal procedure outlined under the ***Mines and Minerals Development Act No. 11 of 20215*** (hereinafter referred to as the Act). Section 97(4) of the Act was cited, which provides:

> ***A person who is aggrieved with the decision of the Minister may appeal to the Tribunal within thirty days of receipt of the Minister's decision.***

3.2 And section 100 provides:

A person who is aggrieved with the decision of the Tribunal may, within thirty days of receiving the decision, appeal to the High Court.

3.3 Mr. Vlahakis, in his affidavit in support deposed that when the Applicant was made aware of the impugned decision, an appeal dated September 2023 was lodged with the Minister of Mines and Minerals Development. The same was exhibited marked KV5.

3.4 It was observed by Mr. Sitali that, an appeal could not be heard by the Tribunal, because the Tribunal was non-operational. Therefore, it was argued that since the Mining Appeals Tribunal was non-operational, it should be deemed that, the Applicant exhausted the appellate procedure ordained under the Act. It was reasoned that the application was competently before court.

3.5 The Respondent's Advocate and Counsel for the Interested Party took serious issue with the mode of commencement of the present action. According to them, in the face of section 100 of the Act, it was argued that the matter ought to have come to this Court by way of appeal and not by judicial review.

3.6 Mrs. Kamuwanga contended that, the Minister's decision could only be challenged in this forum by way of appeal and not judicial review. The present matter was said to be a nullity and open to be set aside.

3.7 And the Counsel for Interested Party cited the case of ***B.P Zambia Plc v Zambia Competition Commission and Another***[1] in which it was held:

The mode of commencement of any action depends generally on the mode provided by the relevant statute...Since the dispute leading to this appeal arose from the decision of the Commission which was exercising this power under the Competition and Fair Trading Act, the applicable statute was the Act and not Order 53 of the Rules of the Supreme Court because the statute prescribes the mode of commencement.

3.8 It was thus submitted that given the availability of an alternative appeal process, judicial review was untenable. And the Court was reminded that it could not assume jurisdiction over this matter, which jurisdiction the court did not have in the first place. It was submitted that the Applicant did not exhaust the appeal process rendering the matter unfit for grant of leave to commence judicial review.

4.0 DETERMINATION

4.1 I have carefully considered the facts and the arguments rendered thereof. Paragraph 53/14/55 of the ***White Book 1999 Edition***, outlines the factors that the Court should consider at the stage when leave is sought, thus:

The purpose of the requirement of leave is:

(a) to eliminate at an early stage any applications which are either frivolous, vexatious, or hopeless.

(b) to ensure that an application is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigations.

4.2 The primordial question is whether judicial review as a mode of commencement to render possible redress to the Applicant's grievance is tenable. The answer to this question is axiomatic

in the provisions of sections 97 and 100 of the Act. Additionally, rules and principles governing judicial review are readily accessible to resolve the issue. Firstly, the learned editors of ***Halsbury's Laws of England*** 4th Edition Reissue Vol. 1(1) at para 61, page 94, submit as follows:

> ***The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal. However, judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are: whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower than the procedure by way of judicial review; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body. Further, a court should bear in mind the purpose of judicial review and the essential difference between appeal and review.***

4.3 The above approvingly mirrors with what is recorded under paragraph 53/14/27 of the White Book to the effect that:

> ***The courts will not normally grant judicial review where there is another avenue of appeal. It is a cardinal principle that, save in the most exceptional circumstance the jurisdiction to grant judicial review will not be exercised where other remedies were available and not used***. (emphasis supplied)

4.4 Furthermore, in the case of ***Dr. Ludwig Sondashi v the Attorney General***[2] our Supreme Court reaffirmed the above principle by stating that:

> ***It is a requirement in judicial review that all available remedies must be exhausted before applying for prerogative writs.***

4.5 Mr. Sitali being cognizant of the legal hurdles given the mode taken by his client, and in an attempt to evade the hurdles, adroitly postulated that since the Tribunal was non-operational, it should be deemed that, the Applicant exhausted the prescriptive appellate procedure ordained under the Act. This argument is conclusively debunked by the holding in the case of ***Kansashi Mining PLC v Zambia Revenue Authourity***[3] in which it was held:

> ***The argument by the appellant that the Tribunal had not yet been constituted, and hence there was no decision upon which the appellant could appeal to the High Court, does not, in our considered view, justify commencing an action by writ of summons summons under Order 6, or any other mode other than that prescribed by statute. We, therefore, reiterate our decision in the*** *New Plast* ***case that the mode of commencement of an action is not dependant on the relief sought, but on what the statute provides as a mode of commencing an action. The High Court only has jurisdiction if a matter is correctly commenced before it.***

4.6 Likewise, the want of operationalization of the Mining Appeals Tribunal does not justify the commencement of this action via judicial review when the mode prescribed by statute is by way of appeal. The question follows, how then is the Applicant's grievance to be addressed by courts of law in the absence of the

Tribunal. The learned authors of ***Halsbury's Laws of England*** (supra) contend that:

> ***[J]udicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'.***

4.7 The above common law principle cannot be applied *carte blanche* in our jurisdiction, it is for this reason Lord Denning in ***Nyali v the Attorney General***[4] guided that:

> ***The common law cannot be applied in foreign lands without considerable qualification. Just like an oak tree, so with English common law. You cannot transplant it to the African continent and expect it to retain the character which it has in England.***

4.8 And as earlier noted, our home grown decision in ***Kansashi Mining Plc***[3] seals the answer to the above question. Furthermore, our Court of Appeal in ***Katiso Mining Company Limited v Minister of Mines v Minerals Development & Another***[5] took a similar approach by stating that:

> ***The question, however, is whether the application [to apply for leave to issue judicial review] is tenable at law. This is because the Act [the Mines and Minerals Development Act] very clearly prescribes the appellate hierarchy as from Director to Minister from Minister to the Tribunal and from the Tribunal to the Court.***

4.9 The Court of Appeal postulated that the only way judicial review was tenable in that situation akin to the situation here was for the applicant to distinctively apply for leave to issue judicial review, and seek an order of *mandamus* against the Minister's alleged nonfeasance or indecision to constitute the Mining

Appeals Tribunal as prescribed by section 98 of Mines and Minerals Development Act.

5.0 CONCLUSION

5.1 In the light of the foregoing, the application for leave to set in motion judicial review is untenable for want of jurisdiction. Indeed, the grant of leave under the present circumstances will be a nullity. The application is dismissed. And I make no order as to costs, since the application incidentally raised somewhat a novel issue of public importance; whether direct access to the judicial system was tenable via judicial review in the absence of the Mining Appeals Tribunal.

5.2 The application is dismissed.

5.3 Leave to appeal is granted.

DATED THIS 17TH DAY OF APRIL, 2024.

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THE HON. MR. JUSTICE CHARLES ZULU