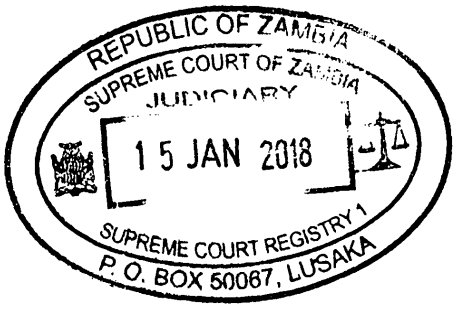
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 52/2012**

HOLDEN AT LUSAKA **SCZ/8/69/2012**

(Civil Jurisdiction)



BETWEEN:

CHIBULUMA MINE PLC APPELLANT

AND

IFINTU LODGE LIMITED RESPONDENT

CORAM: Mwanamwambwa D.C.J., Wood and Malila JJs

On 14th April, 2015 and 12th January, 2018

For the Appellant: *Mr. S. Chisenga & Mr. I. Siame of Corpus Legal Practitioners.*

For the Respondent: *Mr. S. Twumasi & Mr. N. Siamwanza of Kitwe Chambers.*

J U D G M E N T

Mwanamwambwa, D.C.J., delivered the Judgment of the Court.

Cases Referred to:

1. ***Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) Z.R. 69 Vol. 1 (SC)***
2. ***Jean Mwamba Mpashi v Avondale Housing Project Limited (1998-1999) Z.R. 140***
3. ***Ndongo v Mulyango & Banda (2011) Z.R. Vol. 1 187***
4. ***Sithole v The State Lotteries Board (1975) Z.R. 106 (S.C.)***
5. ***Wesley Mulungushi v Catherine Bwale Mizi Chomba (2004) Z.R. 96 101***
6. ***Zulu v Avondale Housing Project Limited (1982) Z.R. 172***

Other Works Referred to:

1. ***Halsbury's Laws of England*, 4th Edition, Volume 16, paragraph 1219**

This appeal is against a High Court judgment, which dismissed the Appellant's counterclaim for, *inter alia*, an order cancelling the Respondent's certificate of title to land which it purchased from the Appellant.

The background is that the Appellant holds a Large-Scale Mining License in Kalulushi under a certificate of title. In 2005, the Appellant agreed to auction part of its land to the Respondent. Before the auction sale, one Jason Ndhlovu, an employee of the Appellant who was in charge of the auction, showed the Respondent the extent of the land in question. An offer letter was written and the Respondent paid the full purchase price immediately.

Subsequently, the Respondent got a direct lease from the Commissioner of Lands and was issued with a certificate of title relating to the land.

In July 2007, the Respondent commenced action against the Appellant. Its claim was for, *inter alia*, specific performance by the

Appellant to obtain, from the Mines Safety Department and the Environmental Council of Zambia, an official Closure Certificate for a certain portion of the premises. The Appellant counterclaimed and pleaded fraud on the part of the Respondent. It sought, among others, a declaration that the Respondent cannot obtain title to land which is owned by the Appellant and is subject to a Large-Scale Mining License; that the Respondent's certificate of title is null and void; and an order that it be cancelled.

Judgment was rendered in favour of the Respondent. The Court below ordered the Appellant "*to immediately commence the process to do all the work so that the portion of the [Respondent's] land that needs official closure is rehabilitated*". It also found that the Appellant had not established fraud in the manner in which the Respondent obtained its certificate of title to the land in dispute. The trial Court took the view that Mr. Ndhlovu, as an employee of the Appellant, played a key role in the transaction leading to the Commissioner of Lands issuing title to the Respondent. The Court dismissed the counterclaim.

Not satisfied with the Judgment, the Appellant appealed. The following are the grounds of appeal:

1. *That the Honourable Court below erred in law when it dismissed the Appellant's counterclaim and held that there was no fraud in the manner in which the Respondent obtained a certificate of title to the land in dispute notwithstanding the fact that the Appellant had a parent certificate of title to the land in issue, which was not formally subdivided and assigned to the Respondent by the Appellant;*
2. *That the Court below again erred in law and in fact when it did not address the issues of whether the Respondent could obtain title to land which is already subject of another certificate of title without consent to assign and the payment of property transfer tax;*
3. *That the Court erred in law when it did not adjudicate on the issue whether the Respondent could obtain title to land without an official closure certificate being obtained to the land in issue from the Ministry of Mines and Minerals*

Development which was a condition precedent to the sale of the land;

4. *That the Court below erred in law and in fact when it concluded that Mr. Ndhlovu played a part in the Commissioner of Lands to issue title to the Respondent when this allegation was not proved at trial and notwithstanding the fact that this allegation was rebutted during trial; and*

5. *That the Court below erred in law and in fact when it wrongfully ordered that the Appellant should commence rehabilitation of the land in issue within 6 months notwithstanding that the agreement to sell the land in issue to the Respondent was not time-specific and the Mines Safety Department was yet to issue a statutory notice in writing within which period the mine clearance was to be undertaken after the Appellant had indicated that this process would begin in the 2007/8 financial [year], which process was curtailed by the premature action by the Respondent in the Court below.*

Both parties filed their respective heads of argument, which they augmented orally. For convenience, we shall address grounds one and four together because, in our view, they are related. Grounds two and three shall also be dealt with together because the issues they raise are similar, while ground five will be addressed separately.

On ground one, Mr. Chisenga and Mr. Siame submitted, on behalf of the Appellant, that there was no evidence on record that the Appellant approved the survey diagrams made by PW2 and submitted to the Ministry of Lands. That the Appellant did not even approve of the way in which the Respondent proceeded to obtain title to the land in contention. Counsel argued that PW1, one Martin Chimpampwe, conceded in cross-examination that there was no consent from the Appellant for transfer of the property to the Respondent. On this submission, we were referred to **page 352 paragraphs 5-23** of the record of appeal. It was submitted that unless there was some fraud involved, the Commissioner of Lands would not have granted a direct lease on property that was already a subject of a certificate of title.

According to Mr. Chisenga and Mr. Siame, there was no way the land could have been conveyed to the Respondent without the Appellant obtaining consent to assign. Among the cases cited in support of this argument are ***Jean Mwamba Mpashi v Avondale Housing Project Limited*** [2] and ***Wesley Mulungushi v Catherine Bwale Mizi Chomba*** [5].

Counsel also submitted that there was a misapprehension of facts by the trial Court, when it found as a fact that the Respondent disclosed to the Ministry of Lands that the property in question was purchased from the Appellant, and that the Appellant verified the survey diagram on the certificate of title. That the issuance of a certificate of title to the Respondent was as a result of the failure by the Respondent to disclose to the Ministry of Lands that there was a vendor involved in the transaction.

Further submission by Counsel for the Appellant was that the Respondent obtained physical possession of the property in dispute without an official Closure Certificate being issued. That the only inference which the Court below should have drawn from this is that the Respondent obtained its title to the land fraudulently.

Counsel argued that the Appellant had a parent certificate of title to the land in issue, which was not formally subdivided and assigned to the Respondent by the Appellant. Therefore, the finding that there was no fraud in the manner the Respondent obtained a certificate of title to the land is perverse and not supported by the law or the evidence on the record. As such, it ought to be reversed.

In rebuttal, Mr. Twumasi contended that the Court below correctly found that there was no fraud in the way the Respondent obtained a certificate of title to the land. He submitted that the finding was premised on unchallenged evidence of facts, the summary of which is that the Appellant authorised and paid PW2 to survey the extent of the land that was to be sold to the Respondent. That the site plan produced by PW2 was submitted to the Appellant, and the Appellant did not object to it. Further, that the Appellant even requested Mine Safety Department to exorcise the area sold to the Respondent so that the Respondent could obtain full legal title to the premises.

Mr. Twumasi submitted that fraud cannot be made out in this case, where the Appellant approved of, or had no issue with, the

manner in which the Respondent acquired title. He also defended the lower Court's finding that no fraud had been established against the Respondent by failing to disclose to the Ministry of Lands that the property was purchased from the Appellant.

It was the Respondent's submission that ground one of the Appeal must fail because the findings of fact being challenged by it were not perverse, nor were they made in the absence of relevant evidence or upon a misapprehension of facts. The following cases were cited in support of this submission:

1. ***Zulu v Avondale Housing Project Limited*** [6]; and
2. ***Ndongo v Mulyango & Banda*** [3].

In ground four, the Appellant is challenging the trial Court's finding that Mr. Ndhlovu played a key role in the transaction leading to the Commissioner of Lands issuing title to the Respondent. The Appellant's argument is that there is no evidence on record of any correspondence between Mr. Ndhlovu and the Commissioner of Lands in relation to the subject land. That Mr. Ndhlovu was only assigned to show the Respondent the extent of the land being sold; to merely identify the property. It was the

Appellant's submission that the finding that Mr. Ndhlovu played a key role in the transaction was perverse and must be reversed.

In rebutting the Appellant's submission, Mr. Twumasi argued that ground four was attacking a finding of fact which is based on the undisputed evidence of PW1 and PW2 at **pages 346 - 358** of the record of appeal. That ***Zulu v Avondale Housing Project Limited*** [6] and ***Ndongo v Mulyango & Banda*** [3] embody trite law and must be upheld in dismissing this ground.

We have keenly considered the issues and the arguments raised in grounds one and four. We have also perused the portions of the lower Court's Judgment, as well as the authorities, referred to by the parties in support of their respective submissions.

At the outset, we wish to reaffirm our position in the case of ***Anti-Corruption Commission v Barnnet Development Corporation Limited*** [1]. In that case, we held that a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition. However, we agree with the learned trial Judge that in civil cases, fraud must be proved, by the party alleging it, to a standard higher than a mere balance of

probabilities. That is what we said in ***Sithole v The State Lotteries Board*** [4].

In attacking the trial Court's holding that fraud had not been established against the Respondent, the Appellant relies on the fact that there was no consent to assign and no assignment had been executed when the Respondent obtained title to the land in dispute. Further, that fraud can be inferred from the Respondent's having obtained physical possession of the property without an official Closure Certificate being issued.

According to **Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 1219**, fraud "*usually takes the form of a statement that is false or suppression of what is true.*" As we see it, the Appellant is not contending that the Respondent acted fraudulently by making any statement that is false. Rather, that it obtained title fraudulently by not disclosing to the Ministry of Lands that it bought the land in dispute from the Appellant.

The record shows that PW3 gave evidence that Kalulushi Municipal Council, as agents for the Ministry of Lands, "*sought authority from the Commissioner of Lands to number the piece of*

land which was hived off the Defendant's main Farm No. 1848, and that permission was granted". Clearly, the fact that the Respondent bought the land in question from the Appellant was known to the Council, who were agents of the Ministry of Lands. It cannot be said, therefore, that the Respondent obtained title because there was no disclosure to the Ministry of Lands that the land in dispute was bought from the Appellant.

Coming to ground four, the Appellant is clearly attacking the finding of the Court below as to the role played by Mr. Ndhlovu. As far as we see it, this matter revolves around the extent of the land sold by the Appellant to the Respondent. It is not in dispute that Mr. Ndhlovu was an employee of the Appellant who, in the words of the Appellant, was "***assigned to show the Respondent the extent of the land under sale***". Indeed, it was Mr. Ndhlovu who showed both the Respondent and PW2 the extent of the land that was to be sold to the Respondent. At **page 356** of the record of appeal, PW2 testified that he came up with the survey diagram after visiting the site "*on three or four occasions, mainly in the company of Mr. Ndhlovu and the owner of the property*".

The direct lease granted to the Respondent related to the land described in the survey diagram as shown to PW2 by Mr. Ndhlovu. Clearly, it is in this context that the Court below found that Mr. Ndhlovu, as an employee of the Appellant, played a key role in the transaction, "***leading to***" the Commissioner of Lands issuing title to the Respondent. We cannot fault the learned trial Judge for this finding, which is the basis on which she dismissed the allegation of fraud against the Respondent.

In our view, the Appellant's submissions in support of grounds one and four do not show any false statement, or suppression of truth, by the Respondent in obtaining title to the land in dispute. The mere fact that the Respondent obtained title to the land in issue without consent to assign, property transfer tax and an official Closure Certificate cannot be said to be evidence of fraudulent conduct on the part of the Respondent.

Based on the ***Sithole*** case, we agree with the learned trial Judge that the Appellant failed to establish fraud against the Respondent to the requisite standard of proof. Therefore, grounds one and four of the appeal are dismissed for want of merit.

We now turn to grounds two and three of the Appeal. On ground two, the Appellant reiterated its submissions in ground one, that there was no consent to assign, property transfer tax was not paid and the land was already subject of another certificate of title. It was submitted that the Court below failed to address the issue of whether, notwithstanding the foregoing, the Respondent could obtain title to the land.

In respect of ground three, Mr. Chisenga and Mr. Siame submitted that the Court below failed to pronounce itself on the issue of whether the Respondent could obtain a certificate of title to land without a mine Closure Certificate.

It was argued that the failure by the trial Court to address the foregoing issues was a dereliction of its duty to adjudicate matters brought before it. That it is an established principle of law that a court must, as far as possible, adjudicate upon all matters in controversy between parties so that they may be completely and finally determined. In support of this argument, Counsel for the Appellant cited, among others, ***Zulu v Avondale Housing Project Limited*** [6].

Mr. Twumasi, on the other hand, submitted, on behalf the Respondent, that the Court below did, in fact, adjudicate on the issues raised by the Appellant in its counterclaim. Counsel referred us to a portion of the Judgment, where the learned trial Judge stated that:

> *"Consequently, I am not satisfied that the Defendant is entitled to declaratory relief that the Plaintiff cannot obtain title to land which is subject of another title deed of the Defendant and is subject to a large-scale mining license. A declaration is a discretionary remedy which is granted for good cause on proper principle and consideration, and will not be granted when no useful purpose can be served."*

It was the Respondent's argument that the Court below could only have arrived at the above position after careful adjudication of the issues in question. That the trial Court could not have granted the Appellant's counterclaim without any evidence supporting it.

We note that at **page 360 lines 10 - 11** of the record, there is testimony of PW3 that: "*the Commissioner can grant a direct lease or*

subdivision of land that is already subject to a certificate of title". This testimony is unchallenged. In addition, the learned trial Judge stated the following at page J36 of the Judgment appealed against:

> "*Admittedly, the Defendant did not mark off the piece of land from its Certificate of Title or obtain state consent or sign any assignment, but the Commissioner of Lands granted permission to hive off and number the piece of land sold to the Plaintiff.*"

Given the foregoing extracts, we do not agree with Counsel for the Appellant that the trial Court did not address the issue of whether the Respondent could obtain title to land which is subject of another certificate of title without consent to assign. It is also clear, from the extract quoted by Mr. Twumasi, that the learned trial Judge did pronounce herself as to the issue of the Respondent acquiring title to land which is subject to a large-scale mining license. In our view, grounds two and three of the appeal are devoid of merit. We accordingly dismiss them.

Finally, on ground five, Counsel for the Appellant submitted that the order that the Appellant should commence rehabilitation of

the land in issue within six months is not tenable at law. Counsel argued that the process of mine closure is supervised and certified by the Mine Safety Department (MSD), working in conjunction with the Environmental Council of Zambia. That on the totality of the evidence, the directive by the Court below was misconceived. Therefore, the appeal should succeed, with costs to the Appellant.

In countering this ground, Counsel for the Respondent submitted that the trial Court was well guided when it made the order being contested by the Appellant. It was submitted that the order was both realistic and attainable, considering that:

1. the Appellant was directed by the Mine Safety Department, on 18th October, 2006, to commence demolition immediately and ensure completion of the mine closure by 2012, according to the Environmental Management Plan (EMP);
2. the Appellant undertook, in July 2005, to implement the directive in the 2007/2008 financial year; and

3. there was no injunction restraining the Appellant, or any other cause shown to inhibit its performance of the undertaking.

Mr. Twumasi urged us to dismiss this ground and uphold the order made by the Court below.

We agree with Counsel for the Appellant that the supervision of mine closure is the duty of the Mine Safety Department. In fact, we note that the learned trial Judge expressed the same view in deciding whether it was tenable, on the facts, to order that the Appellant do all necessary work so that official closure is granted for the relevant portion of land. At this point, a brief overview of the background to the issue will be helpful.

The learned trial Judge found, as a fact, that the Appellant's letter of 25th July, 2007 showed that the Appellant was eager to conclude the EMP in order to obtain the mine closure certificate. That, however, when the Court visited the site, in December 2010, nothing was being done to make the mine safe. This was despite MSD's 2006 directive that demolition should start "***now***", and the

fact that the EMP provided that the mine closure would be completed by 2012.

Against this background, the learned trial Judge ordered the Appellant "*to immediately commence the process to do all the necessary work so that the portion of the Plaintiff's land that needs official closure is rehabilitated*". She reasoned that six months from the date of her Judgment would be sufficient time to complete the demolitions of the structures and foundations "*to enable the [Appellant] to carry out other management actions on the premises so as to complete mine closure by 2012*".

In our view, the order which the Appellant is challenging did not in any way negate the EMP or the directive of the MSD in relation to the rehabilitation of the land in dispute. On the contrary, it reinforced them. We do not agree with Counsel for the Appellant that the order in question is misconceived and not tenable at law. On that basis, we refuse to invalidate the order. Ground five of the appeal also fails for lack of merit.

All five grounds having been unsuccessful, we dismiss the appeal with costs to the Respondent. The costs are to be taxed, in default of agreement.

M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

.....
A.M WOOD
SUPREME COURT JUDGE

.....
M. MALILA, SC.
SUPREME COURT JUDGE