



Accessing Surface Rights Under Zambia's Mines Act, 2015: Navigating Arbitration and Unreasonable Withholding of Consent

Introduction

The Mines and Minerals Development Act, No. 11 of 2015 (the “**Mines Act**”) grants mining rights holders the authority to carry out mining activities, but these rights are subject to several limitations when it comes to surface access on land they do not own. A prominent challenge is the process of securing consent from landowners, particularly where such consent is unreasonably withheld.

This article explores the legal recourse for mining rights holders in Zambia when faced with unreasonable withholding of consent by

landowners, focusing on the provisions for arbitration under the Mines Act and relevant judicial interpretations.

The Requirement for Landowner Consent

Section 52(1) of the Mines Act mandates that a mining right holder obtain written consent from the landowner to exercise mining rights on the owner’s land. This provision applies, for instance, to mining activities occurring within specified proximity to structures or land under cultivation. The purpose of this requirement is to protect landowners’ interests by ensuring that mining activities do not unduly encroach on their use and enjoyment of the land.

However, the process of obtaining this consent is not always straightforward. When consent is unreasonably withheld, section 52(3) provides

that the Director of the Mining Cadastre Department (the “**Director**”) can arrange for arbitration as a dispute resolution mechanism.

Unreasonable Withholding of Consent: Arbitration as a Remedy

The Mines Act addresses cases where consent is withheld unreasonably. In such cases, section 52(3) allows the Director to initiate arbitration. However, as arbitration is based on consent of the parties, this can place the mining right holder in a difficult position if a landowner withholds both land access consent and the agreement to arbitrate.

This notwithstanding, a literal construction of the section supports the view that if the land owner does not give consent to engaging the Director to resolve the dispute or require the parties to submit to arbitration, the holder of the mining right may commence an action in the High Court to challenge the reasonableness of the refusal and potentially seek alternative relief to facilitate the exercise of mining rights.

In the recent Court of Appeal case of *Kalymnos Processing Limited & Albertina Kashiba v Konkola Copper Mines (Appeal No. 74 of 2023)*, Konkola Copper Mines, holding a large-scale mining licence, denied Kalymnos Processing access to surface land, and the refusal was challenged as unreasonable and threatened to proceed without consent, leading Konkola Copper Mines to take legal action in the High Court to prevent unauthorised access.

While the High Court initially ruled that Konkola Copper Mines’ refusal was justified, the Court of Appeal clarified that, under section 52(3), it is the Director who has the jurisdiction to determine whether consent has been unreasonably withheld. If the Director finds the refusal unreasonable, only then may the Director arrange arbitration to resolve the dispute. Importantly, the Court of Appeal held that recourse to Courts of law can only be had after the grievance procedure set out under section 97 of the Mines Act has been exhausted.

Conclusion: Arbitration’s Role and Limitations

In conclusion, navigating surface access under Mines Act requires mining rights holders to carefully address the challenge of securing landowner consent. The Mines Act’s arbitration provisions offer a path to resolve unreasonable withholding of consent. Recent judicial interpretations highlight the role of the Director in assessing consent issues before Court intervention.

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