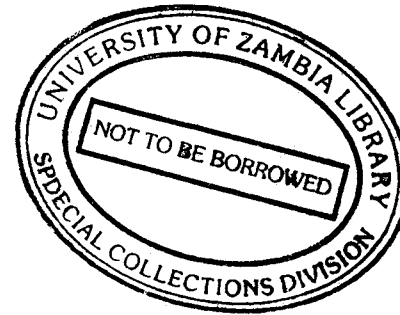


**WEAKNESSES OF THE LAW RELATING TO TRESPASS TO LAND (by  
Relation) AND NUISNACE IN ZAMBIA**

By

**MUSUKWA KONDWANI BRIGHTS**



**Being a paper submitted in partial fulfillment of the examination requirement for  
the Degree of Bachelor of Laws of the University of Zambia**

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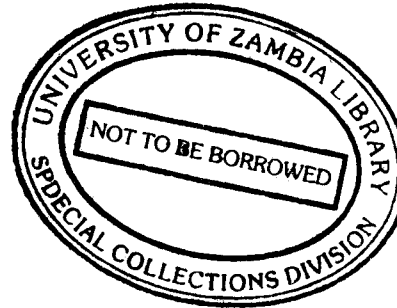
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**JUDGE KABAZO CHANDA**

# Preface

Having grown up in an area which is constantly subjected to gaseous emission because of the mining industry (the Copperbelt). I was prompted to write this paper concerning the environmental problems that continue to haunt the people of the Copperbelt and knowing that some do not even know that they have a remedy definitely saddens a person who is literate in environmental laws.

Worse still every other day one reads in the news papers about how the native people of Zambia are being forced out of the land, on the ground that they do not have a better title to land they have always possessed and occupied for ages. It is even more saddening to know that this land which is got from them is at times not obtained *bona fide* (in good faith) i.e. according to the laid down procedures for alienating land owned under customary tenure. It is a disgrace to see a person become destitute in his home country. Hence, there is need to properly consider the laws.

These problems are compounded by the fact that unlike some of the other 'core subjects,' the range of the issues falling within these categories affect basic principles of Human Rights.

I for this reason felt appropriate to contribute in helping solve these problems by preparing a collection of materials and cases and researching on these matters that have been brought before the courts for determination several times.

I declare that I am fully responsible for all the mistakes and short comings in this work. And that it is my own way of expression of known ideas.

**Kondwani B. Musukwa**

University of Zambia,

December, 2005.

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## DEDICATION

To my Dad and Mum (**Pastor & Mrs. Musukwa**) you have always been and will continue to be a source of strength in your own unique and special way. You are the best parents the whole world over.

To my two little Nieces, **Chawezi** and **Chisomo**, may you grow to learn that, in this life on earth, the fear of the LORD is the beginning of wisdom and the knowledge of the Holy one is understanding, so Labour not to be rich: cease from thine own wisdom.

## ACKNOWLEDGEMENTS

Heartfelt thanks to my God for always been there for me and awarding me a privilege of being a lawyer. And much more for giving me a blessed assurance that *“I can do all things through Christ who strengthens me, for my flesh and my heart may fail, but God is the strength of my heart and my portion for ever.”* I remain highly indebted.

Philippians 4:13 & Psalms 73:26

Unmatched thanks to my one and only brother, Blessings and my four dear sisters Beatrice, Zelda, Rebecca and Taonga, for always being there when I needed you the most and pushing me when I felt like giving up in life. You are the best family one can ever have. I remain indebted to each one of you.

Special thanks to my friends Naomi Zulu, Ilunga Joseph, Moses J. Nyirenda, Mando Mwitumwa, Benson Mpalo, Melinda T. Nakamba, Lita Mwanza, Katongo Ian Waluzimba, Philemon Tembo, Dorica Nkhoma, Sara Sinkala, Mulapwa & Kafula Yowela, Gady M. Museka and not forgetting Chakumwamba Mwanza for making my life so much fun and bearable.

I would be ungrateful if do not appreciate the following persons Mao, Matale Suba, Anyoti Anjela, Chimuka Abigail, Namuchana Mushabati, Mayamba Mwanawasa, Alfred Muma, Titus M. Walamba, Nancy Kaunda, Sombo Kawilila, Illack Luwewe, Kelly Kaira, Chiti Mulenga, Kalandanya Gideon, Mukupa Victor, Chabu Terrence, Mukumba Mulele, Monford Chishimba, Mwewa Chola, Besa Friday, Taurai M. Nzonzo, Mutinta Syulikwa and Maggie Kapambwe, for helping me gain the confidence that I needed to stand on my own and always assuring me that I could count on you.

To all my innumerable friends at UNZA. For adding color to my life and making UNZA a better place.

Last but not least, thanks to my supervisor, Judge Kabazo Chanda, for his patience, tolerance, time and guidance.

## INTRODUCTION

Over the past decades, the concept of environmental protection as a priority for all countries has steadily gained recognition. There has been a realization upon countries globally that a pertinent need for stringent and effective environmental laws exists.

Countries, through the United Nations and various other regional groupings, have been able to mobilize themselves over the past decades to come up with comprehensive conventions that have established what may be termed as international environmental laws. These international, as well as regional conventions, are administered differently in the member countries depending on the type of legal system followed. That is, either dualism or monism.<sup>1</sup>

Zambia as a country has been endowed with an abundance of natural resources. Following this, an enormous task upon the legislators and administrators exists to ensure that whilst Zambia utilizes her natural resources, she does not in the process degrade the environment in which the resources are deposited. Zambia's economy, like that of many other African countries in Southern Africa, acknowledges the contribution of 60% by the mining sector to the GNP.<sup>2</sup> As a direct result, Zambia aims to maximize profits from this sector. In the process, the issue of care for the environment arises. The task of ensuring that mining is conducted under the auspices of international conventions, regional conventions and local legislation is one that requires careful execution.

It is against the foregoing that this paper evolves. Zambia, like many other countries, has taken positive steps to manage its biological resources on a sustainable basis. It is a party to several international and regional conventions, a few of which are outlined below:

- World Heritage Convention
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)
- Ramsar Convention on Wetland Management (1975)

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<sup>1</sup> J. Thornton, S. Beckwith, *Environmental law*. London: Sweet and Maxwell, 1997, p. 9

<sup>2</sup> SADC Mining website ([www.sadcmining.org.zm](http://www.sadcmining.org.zm))

- Basel Convention on Control of Trans-Boundary Movements of Hazardous
- Wastes and their Disposal.
- Convention on Desertification
- Convention on Biological Diversity (CBD)
- SADC Mining Sector Protocol<sup>3</sup>

Case studies shall be based mostly on Konkola Copper Mines and Chilanga Cement PLC.

On the other hand, with the acquisition of land being given into the hands of everyone and not only the indigenous Zambians it is important that those who purchase these pieces of land know their rights and duties with regard to the land purchased. This should be done with taking into consideration the land purchased and converted from customary land to a lease what is the position of those that were formerly occupants of the same land? Does their prolonged continuance in occupation amount to trespass what has the courts held in such a situation and what should be done and does this amount to trespass to land as perse.

The copying from the western world of everything by Africans from a paper clip to a nuclear reactor and more so the laws and kind of administering land titles has left many of the native Zambians homeless. This is caused a big problem for the locals.

One Major Robbie Chizyuka is quoted as saying,

“if we do not band together now and fight there will be no land left for fight for. As individuals we are weak because we are poor and politically powerless. Together we form such a powerful force that can never easily be humiliated into painful destitution.”<sup>4</sup>

The kernel of this paper is to focus on the weaknesses of the law relating to the torts of nuisance and trespass to land. Why is it so prominent? Are people alive to the duties they are owed by others and the rights they owe others? Does it mean that the law that regulates trespass to land and nuisance is inadequate?

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<sup>3</sup> S. Peter, *The Effectiveness of International Environmental Agreements*, A survey of existing legal instruments. London: Grotius Publications, p. 13

<sup>4</sup> The Post News Paper, November 30, 2005

This paper in considering the named above issues will tackle the problems in the following manner: Chapter One, will give an introduction of the topic and explain the theories and concepts involved in trespass to land and nuisance and the situation in Zambia. Chapter Two will look at a number of statutes that seek to regulate use of land so as to reduce the incidents of the two torts to be studied. In this regard it will also consider a number of cases. Chapter Three will give a conclusion, discussion and recommendations of the author on trespass to land (by relation) with regard to the Zambian situation. Chapter Four, Is the last chapter and will show conclusions drawn from the study and also express views of the author. The summary and recommendations, on the topic of nuisance with regard to the Zambian incidence.

“Judicial action only achieves ... legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.”

Abram Chayes, 1976

## CHAPTER ONE

### CONCEPTS AND THEORIES GOVERNING THE LAW OF TRESPASS TO LAND AND NUISANCE IN ZAMBIA

#### 1.10 INTRODUCTION

In 1036, William, the Duke of Normandy conquered England and declared himself owner of all the land in the United Kingdom. Land was held for him by other people who were subordinate to him who also assigned their land to others and the bottom were the peasants who exchanged their labour for the protection they were to be given by the king. This process of owning land was called feuduciary.<sup>1</sup>

At the time of independence Zambia was wanting on a number of relevant statutes and therefore, it imported most of the statutes from the United Kingdom. Among other things imported into Zambia was the vesting of land in the sovereign or the head of state. Therefore, the vesting of land in the president. This was done, so as to consolidate unity in the nation but otherwise had no legal backing apart from the fact that it was viewed that the president was the king and therefore, could represent the interest of the public.<sup>2</sup>

#### 1.11 ZAMBIAN TORTOUS LAW

Zambia with regards to the law of torts of nuisance and trespass to land, like most other laws shares the same principles with England. This is so because most of the English law applicable in Zambia and other Commonwealth countries has just been imported

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<sup>1</sup> Kenneth Smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. *English law*. Pitman publishing inc. London p.318

<sup>2</sup> Class notes by Mr. P. Matibini

from England. In Zambia this has been brought into our system through the English Law (extent of application) Act.<sup>3</sup> Some have been imported with certain modifications while still others have been imported as they are and are applicable *mutatis mutandis*. Trespass to land by aircraft for example has been imported straight from the united kingdom and is provided for by the civil Aviation Act,<sup>4</sup> which provides in one section that,

“that no action shall lie in respect of trespass or ...nuisance, by reason only of the flight over any property at a height above the ground which ...is reasonable, or the ordinary incidents of such flight.”

Therefore, in order to understand the position of the law in Zambia in these circumstances, it is important to firstly appreciate the theories, principles and the concepts as established by the English law.

In England, for hundreds of years, the action for trespass has been the main remedy for direct injury, consequential injuries being dealt with by an action on the case e.g. for nuisance or negligence. For the same historical reasons trespass is actionable *per se*<sup>5</sup> Many Scholars and Jurists have defined trespass differently. Some define Trespass as an unjustifiable interference with possession. Still others say, this is a tort involving “direct and forcible injury.” Others also say that every invasion of private property is a trespass.”<sup>6</sup> It still also has been considered that, Trespass to land is precisely is the unjustifiable, directly and immediate interference with another’s possession of land e.g. by walking on it, or improper use of the high way. That is to say a person is a trespasser

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<sup>3</sup> Cap 4 of the laws of Zambia

<sup>4</sup> Of 1949

<sup>5</sup> Without proof of actual damage.

<sup>6</sup> Curzon L.B .1983. *A Dictionary of law*. 2<sup>nd</sup> ed. London: Macdonald and Evans ltd. p. 647

if he enters the premises of another knowing that he is entering in excess of the permission or being reckless whether he is so doing.<sup>7</sup>

Any unlawful entry upon land or building in the possession of another is actionable as a trespass. Even a person in wrongful possession can bring trespass against anyone without better title.

Possession in this sense means the right to exclude others, whether or not the possessor is physically present.<sup>8</sup> A person who leaves his house for long period, but intends to return, retains this right of general exclusion and therefore possession.

*No jus tertii*, because trespass is a wrong to possession a trespasser cannot raise the defense of *ius tertii*, i.e. that a third person has a better title than the plaintiff in possession. It is good defense, however, that the defendant was entitled to immediate possession as against the plaintiff.

Trespass has many legs, which comprises the following:

One leg of trespass to land is trespass without personal entry this does not necessarily involve personal entry, but may consist e.g. of placing objects on the land.<sup>9</sup>

Trespass by abuse of authority is another type.<sup>10</sup> A person who has authority to enter another's land for a particular purpose becomes a trespasser if goes beyond that purpose. This applies particularly to abuse of public and private rights of way.

Notice should be taken to the fact that the public's right on the highway is that of passing and re-passing, anything beyond this is *prima facie* a trespass.<sup>11</sup> It was therefore

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<sup>7</sup> R v. Jones (1976) 1 WLR 672

<sup>8</sup> J.G.M. Tyas. 1973. 2<sup>nd</sup> ed. *Law of torts*. Macdonald and Evans Ltd. London p. 38

<sup>9</sup> *Gregory v. Piper* (1829), release of oil was considered trespass in *Esso corp. Ltd v. Southport corp.* (1956) AC 218

<sup>10</sup> Kenneth Smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. *English law*. Pitman Publishing Inc. London pp. 318

<sup>11</sup> J.G.M. Tyas. 1973. 2<sup>nd</sup> ed. *Law of torts*. Macdonald and Evans Ltd. London pp. 18-57

observed in the case of *Hickman v. Maisey*,<sup>12</sup> where the plaintiff owned the soil of the highway and occupied adjoining land on which racehorses were trained. Defendant traversed the highway for two hours so as to observe the form of horses, that this was an ordinary and reasonable use of the highway. The defendant had abused his right of entry and was therefore a trespasser.

Continuing trespass is another one.<sup>13</sup> If a trespasser remains on the land or allows things he has unlawfully placed on it to remain there such trespass can be subject of fresh action for each day that it continues; but this must be carefully distinguished from the continuing consequences of a past and completed trespass e.g. digging a hole on the land which gives rise to action only.

And finally but not the least is, Trespass to land by relation. This type of trespass is mostly affected by title and ownership to land. Who is the true owner of land? Because this tort is committed when a person with a better title enters the land, the first occupier immediately becomes a trespasser; also the person with a better title can sue for trespass to land committed since his right of entry accrued, as his possession will be held to relate back to that time although he must be in actual possession when the action is brought this is the doctrine of trespass to land by relation. And this is the gist of this research concerning the tort of trespass to land.

Trespass is a tort against possession, it follows therefore, that in order to succeed in his action a plaintiff must establish his right of possession. Thus if his right to possess has

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<sup>12</sup> (1900)

<sup>13</sup> Kenneth smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. *English law*. Pitman publishing inc. London p.38

accrued and his interests in the land are better than the one in possession at the material time.

An owner who is not in possession cannot sue except for permanent damage to his reversionary interest. This was first established in the case of *Baxter v. Taylor*,<sup>14</sup> the plaintiff sued for trespass to his land in possession of tenants when the defendant unloaded stones upon it. **Held**, that the plaintiff could not maintain trespass, as his reversionary interest was not injured.

If there is more than one possessor, each can sue for trespass to his own portion.

Wild animals without an owner that trespass may be killed or captured by the occupier, unless protected by the statute.

Wild animals with an owner may be killed for good cause but the onus is on the killer to establish the reasonable necessity of his action.

*Hamps v. Darby*,<sup>15</sup> a farmer without first trying to drive away, shot plaintiff's homing pigeons, which were eating his peas. **Held**; the plaintiff could sue for trespass in the circumstances.

Nuisance can either be public or private. But to avoid multiplicity of actions public nuisance is actionable as a tort only by one who has suffered particular damage over and above that suffered by the public at large. This is because public nuisance may also be private and a tort but otherwise it is a crime.

It was held in *Campbell v. Paddington Corp.*<sup>16</sup> that though the corporation committed a public nuisance of obstructing the highway with a grandstand from which to view a

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<sup>14</sup> (1832) 100 E.R. 128. 5<sup>th</sup> Ed. *A casebook on tort*. Suffolk: Sweet and Maxwell

<sup>15</sup> (1948) 100 E.R. 128.

procession, thus preventing the plaintiff letting her windows for that purpose. She could not recover damages for private nuisance.

It was established in the case of *AG v. PYA Quarries Ltd*<sup>17</sup> that a nuisance would not be public unless the number of persons affected is sufficiently large to constitute a class.<sup>18</sup>

It must be noted that some nuisances are forbidden by statutes e.g. public health Act, deposit of poisonous wastes Act. But these will be discussed in the preceding chapters.

As for now it suffices to just introduce them.

Nuisance is therefore an unlawful interference with another's use of enjoyment of or right over or in relation to land or damage resulting from such interference.<sup>19</sup>

The tort of nuisance is governed by the common law maxim: *sic utere tuo ut alienum non laedas*- "so use your own property as not to injure your neighbor's."<sup>20</sup> The beauty of this tort is that, the plaintiff need not to have any interest in land, but it will depend on the circumstances and nature of the defendant's conduct. Not every phenomenon is an actionable nuisance, for the law requires reasonable give and take among neighbors.

On private nuisance Atkinson L.J. observes

"private nuisance arises out of a state of things on one man's property whereby his neighbor's property is exposed to danger."<sup>21</sup>

Interference will only be unlawful if it is unreasonable. For "a balance has to be maintained between the right of the occupier to do what he likes with his own, and the

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<sup>16</sup> (1911) Tony Weir

<sup>17</sup> (1957) 2QB169

<sup>18</sup> Per Lord Romer

<sup>19</sup> Kenneth Smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. English law. Pitman publishing inc. London p.308

<sup>20</sup> Kenneth Smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. English law. Pitman publishing inc. London p.312

<sup>21</sup> Spicer v. smee (1946)

right of his neighbor not to be interfered with.”<sup>22</sup> However, interference will not be unreasonable unless it is substantial.

“The law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view...the time, locality and all the circumstances should be taken into consideration.”<sup>23</sup>

Abnormal sensitivity of property or persons is immaterial to the question of reasonableness. Thus *Robinson v. Kluivert*,<sup>24</sup> the defendant heated a cellar thereby damaging plaintiff’s unusually sensitive brown paper on the floor above. The heat would not have damaged paper generally. **Held**; no nuisance.

Similarly *Heath v. Mayor of Brighton*,<sup>25</sup> the incumbent of a church alleged nuisance by noise from adjacent power station. The noise was not excessive and the congregation had neither diminished nor complained. **Held**; no nuisance and injunction refused.

However, permanent and continuous interference may be lawful and a transitory or momentary interference may be a nuisance. In *Leeman v. Montague*,<sup>26</sup> cocks crowed for weeks in a residential area. **Held**: this amounted to a nuisance.

Similarly, in *Bolton v. Stone*,<sup>27</sup> cricket balls were hit into the highway about six times in thirty years. **Held**; no nuisance.

An act not otherwise a nuisance may become one if done maliciously in order to annoy the plaintiff. *Stoakes v. bridges*, the defendant, because of a grievance against the

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<sup>22</sup> Per lord Wright in *sedleigh-denfield v. O’Callaghan* (1940)

<sup>23</sup> Per lord Westbury L.C. in, *st. Helens Smelting co. v. Tipping* (1863)

<sup>24</sup> (1889) Tony Weir

<sup>25</sup> (1908) Tony Weir

<sup>26</sup> (1936) Tony Weir

<sup>27</sup> (1951) Tony weir. 5<sup>th</sup> Ed. *A casebook on tort*. Suffolk: Sweet and Maxwell, 1983.

plaintiff persistently telephoned the latter. Held; a nuisance for “you are not entitled to abate a nuisance by creating another.”<sup>28</sup>

## 1.12 CONCLUSION

For historical reasons nuisance and trespass are exclusive. Trespass lies only for direct interference with land; nuisance only for indirect interference.

Nuisance is not actionable *per se*.

The weaknesses of this law is that it has been imported to Zambia and applies here *mutatis mutandis*, thereby, making it almost difficult to apply here and also rendering the continuation of the problem. Zambia has since her birth thus 40 years ago failed to establish her own stand in issues of law all because there has been very little guidance on these subjects of the law and in Zambia. Unlike in the United Kingdom where the queen’s subjects at least understand the law, very few Zambians have even got the knowledge of their own rights.

The main weakness of the Zambian system *viz a vis* the tort of trespass to land is that some incidents do not apply to the Zambian system or people have failed to grasp the concept.

It suffices in this chapter to conclude by saying that Zambia borrowed laws or imported laws are a source of the problems of the tortuous laws as will be observed in the following chapters.

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<sup>28</sup> Per Bramwell B. in *Barnford v. turney* 1862

“Any nuisance is ‘public’ which materially affects the reasonable comfort and convenience of life of a class of her majesty’s subjects. The sphere of the nuisance may be described generally as ‘the neighbourhood’, but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case.”

Romer L.J. in *A-G v. P.Y.A. Quarries Ltd*

## CHAPTER TWO

### ZAMBIAN TRESPASS AND TORTUOUS LAW IN DETAIL- THE IMPLEMENTATION AND ENFORCEMENT OF THE LAWS

#### 2.10 INTRODUCTION

In pre-independence Zambia, land was held under customary tenure, supervised by traditional rulers (chiefs or chieftainesses) or through other authorities in the local community. The coming of white settlers introduced freehold and leasehold tenure systems, with colonial administration designating as Crown Land the most fertile areas. The indigenous people were confined to less fertile areas known as Reserve Lands and Trust Lands. Title was given to whites for Crown Land. With independence (1964), many whites left the country but retained title to their land. By the early 1970s, this land was converted to State Land. Statutory leasehold was to be for a period of 99 years. All land, including traditional land, was vested in the Republican President, “to hold it in perpetuity for and on behalf of the people of Zambia.”<sup>1</sup> This is what has led to the problems of ownership of land in Zambia as will be observed below.

#### 2.11 TRESPASS TO LAND

Moreover, *Inter alia*, the things done in the early days of the sovereign state of Zambia was that on the 24<sup>th</sup> of November 1964, a cabinet land policy committee was established to review all the aspects of land policy which were inherited on

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<sup>1</sup> Lucy Sichone, ministry of lands, October 1998

independence and to submit recommendations on a comprehensive Zambian land policy. The recommendations inter alia were that all freehold should be converted to leasehold and that all leases should be for any number of years not exceeding 100 years. And because of these recommendations the Land (Conversion of titles) act 1975 was enacted.

Moreover, section 13 of the same Act provided that all land was vested in the president, thereby, making all dealings in the use and transfer of land requiring the consent of the president. The effect of this is that all dealings involving land without the consent of the president was illegal because a person involved in such dealing in land was deemed to be a trespasser to the same land.

This is evidenced by the case of *Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited*,<sup>2</sup> the plaintiff sought an injunction to restrain the defendant from interruption of the plaintiff's peaceful and quiet enjoyment of its occupation of the demised premises. The premises were demised under a contract to lease which was neither executed nor entered into with the consent of the president. The action arose out of defendant's re-entry and possession upon the plaintiff falling into several months rent arrears. In interpreting section 13(1) of the Act Kakad J. found that the defendant was strictly restricted from subletting the premises to the plaintiff without consent of the president and observed as follows:

“I therefore, consider that in the absence of the written consent of president, there was no legal estate or interest on the premises conveyed to plaintiff”

This case therefore shows that at that time any person dealing in land without the consent of the president was a trespasser and therefore had no good title.

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<sup>2</sup> Mr. P. Matibini, Land law in Zambia from his thesis p. 45

The land (conversion of titles) Act was amended by the insertion of new sections and was called the land (conversion of titles) Amendment (number 2) number 15 of 1985. This amendment is the main source of the current problem as it allowed non- Zambians to purchase land if they qualified to be investors under the Industrial Development act. In the case of *G.F. Construction (1976) Ltd v. Rudnap Zambia ltd and Another*,<sup>3</sup> the supreme court considered the effect of the of the amendment and held that no land should be granted alienated, transferred or leased to non Zambian after 2<sup>nd</sup> April, 1985 the date of assent, except inter alia, to an approved investor.

The Lands Act was later on amended in 1995 and led to the enactment of the Lands Act of 1995. This Act continues vesting land in the president but with the provision that the president shall not alienate any land situated in a district or an area where land is held under customary tenure without taking into consideration the local customary law on the land tenure which is not in conflict with the Act; and without consulting the Chief and the local authority in the area in which the land to be alienate is situated.

It is interesting to note that the statutory recognition of customary law under the Act is a major innovation because 70% of Zambia's total area comprises land governed by customary law.<sup>4</sup> Further, the conception of ownership of land under customary law has always been that the land remains with the family or the community. An individual can have at any rate, a right only to use it. In other words the concept of ownership of land

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<sup>3</sup> Ibid

<sup>4</sup> Phillip Mukuka, *Land development, control and use in Zambia*, 2001 p.4

is that of the community and the individual members of the community have mere possession.<sup>5</sup>

This has brought a problem because there has been a problem between a person who own land under customary law and another person who gets titles to the same land under the Act. The effect is that the former becomes a trespasser to the land he formerly possessed on behalf of the family or the community. This is so because of the concept of trespass by relation. And any customary law contrary to the concept is considered repugnant to the Act.

In a matter between *Makwati v. Senior Chieftainess Nkomeshya*,<sup>6</sup> the lands tribunal upheld the applicant's claim of title to land because of the absence of any irregularity in the way the land was acquired in the first place and subsequently sold to the appellant. In the course of judgment, the lands tribunal observed that once a certificate of title is issued in respect of customary land, such land ceases to be customary land and the Chieftainess ceased to have control over the land.

Section 8(3) of the Lands Act<sup>7</sup> provides that no title other than a right to use and occupation of any land under customary tenure shall be valid unless it has been confirmed by the chief and a lease granted by the president.

Section 9(1) and (2) of the same Act provides that a person shall not without lawful authority occupy or continue to occupy vacant land. Any person who occupies land

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<sup>5</sup> *ibid*, note 4

<sup>6</sup> Phillip Mukuka, *Land development, control and use in Zambia*, 2001 p.2

<sup>7</sup> Chapter 184 of the Laws of Zambia

without lawful authority shall be liable to be evicted. A case in point is the *Roberts v. Bandawe and others case*.<sup>8</sup> The respondents established a village on a farm, belonging to the appellant. Despite repeated requests by the appellant that the respondents vacate the said the farm, and an offer for alternative land, the respondents refused to vacate the farm, arguing that the land in dispute was given to them by Chieftainess Nkomeshya. The tribunal wondered how Chieftainess Nkomeshya could have offered the respondents lands held on title by the applicant. The tribunal allowed the appeal and ordered the respondents and their families to vacate the land within a period of three months from the date of judgment.

Similarly, in the latest matter recently reported, the Government had sold land in Kalulushi, Kitwe in the Copperbelt province to company thereby rendering the initial owner of that particular land in trespassers and hence need to vacate the land.<sup>9</sup>

“Government has assured over 200 squatters in Luela area that they would be given alternative land within Kalulushi after their houses are demolished...squatters were told that they would be provided with land within Kalulushi but urged them to comply with the owner of the land. Hybrid (the company which is the new owner of the land) won the case in court and there was no way they (locals) could continue settling on the land. The company would soon start demarcating the land and those found encroached the company would move to the land where the government would find for them.”<sup>10</sup>

## **2.20 THE LAW OF NUISANCE**

### **2.21 PRIVATE NUISANCE**

Private nuisance as explained in the previous chapter, involves a nuisance committed by one person against another thereby causing discomfort and inconvenience to that

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<sup>8</sup> (LAT/20/99)

<sup>9</sup> Reported in the ZAMBIA DAILY MAIL, MONDAY, AUGUST 8, 2005-KALULUSHI SQUATTERS TO BE GIVEN ALTERNATIVE LAND- STATE- VOL. 9 No. 198

<sup>10</sup> Ibid

other person's enjoyment of his property. Nonetheless, it may be committed against a group of people but giving the right to sue in individual capacity, only to a person who suffers much more than any other of his colleagues.

In the case of *National Hostels Development Corporation T/A Fairview Hostel v. Motala*,<sup>11</sup> The appeal concerned noise nuisance and the issues were whether it was wrong to find the appellant liable at all and secondly, if the answer be in the negative whether it would be wrong to ban forever the playing of music on the terrace of the appellant's hotel. The parties were neighbours separated only by a road and the respondent complained that the playing of loud music on the terrace more or less overlooking his house late in the night disturbed his quiet and convenient enjoyment of his house. The appellant's position was that the playing of music on the terrace attracts more patrons and its absence would lead to serious financial loss. Held: Whether an act constitutes a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including for example, the time of the commission of the act complained of; the place of its commission, the manner of committing it. That is whether it is done wantonly of the reasonable exercise of rights and the effects of its commission that is whether those effects are transitory or permanently, occasional or continuous, so that the question of nuisance or no nuisance is one of fact. The court referred to the case: *Sedleigh-Denfield v. O'Callaghan*,<sup>12</sup> some experts were called to record the noise levels in decibels with the defendant submitting that the plaintiff was oversensitive and should have no cause of action. This type of civil wrong has long been recognized to raise questions of fact, such as whether noise disturbance, which deprives a neighbor of rest or sleep, can or

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<sup>11</sup> SUPREME COURT (SCZ JUDGMENT NUMBER 10 OF 2002)

<sup>12</sup> (1940) A.C. 880 N.

cannot inconvenience any other person of ordinary firmness or sensibility. The learned authors of Clerk and Lidsell on Torts put the whole position very well, when they write,

“In nuisance of the third kind, ...the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves.”<sup>13</sup>

There is no absolute standard to be applied. It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as noise, smells or vibration will usually be lawful acts, which only become unlawful from the circumstances under which they are performed, such as the time, place, extent or manner of performance. In any organized society, everyone must put up with a certain amount of discomfort and annoyance from the litigate activities of his neighbors, and in attempting to fix the standard of tolerance the vague maxim *sic utere tuo, ut alienum non laedas* has been constantly invoked. But the maxim is no use in deciding what is the permissible limit in inconvenience and annoyance between neighbors, and the courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property. No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.”

“Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, whether it was done wantonly or

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<sup>13</sup> Ibid note, 17

in the reasonable exercise of rights; and the effects of its commission, that is, whether those are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact.” Respectfully, the court along with the foregoing propositions. The problem was one of striking a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property. It was thought that, the ban would be too harsh and it ignores the rights of the defendant which equally need to be recognized and protected. In this regard, the appeal was allowed to the extent that the complete ban on the playing of music on the terraces was set aside. Instead, conditions imposed and the order of an injunction rephrased so as to permit the playing of music on the terraces during reasonable hours. Every instance of breach of these times was to entitle the plaintiff to damages to be assessed on an aggravated footing by the Deputy Registrar on application by the plaintiff. In sum, the appeal succeeded to the extent indicated.

## **2.22 THE LEGAL FRAMEWORK GOVERNING PRIVATE NUISANCE**

Control of land use in Zambia is done by complying with the Town and Country-planning Act.<sup>14</sup> This act prevents development of land, which is contrary to public interest thereby preventing the continuance commission of the tort of nuisance by the landowners. It also ensures that the development of land is in conformity to the development plan. Section 22 of this Act makes it mandatory for any land developer to obtain prior permission for any proposed development or subdivision of any land. Development accordingly has two legs namely operation and uses. The essence of the

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<sup>14</sup> Cap 283 of the laws of Zambia

term was considered by Lord Parker in *Cheshire C.C v. Woodward*,<sup>15</sup> referring to the concept of operation this is what he had to say “ it is some act which changes the physical characteristics of the land or of what is under it or above it.” Use refers to the purpose to which land or buildings are devoted. Lord Denning explained the distinction between the two concepts in the following way,

“it seems to me that the first half operation, comprises actions which result into some physical alteration of the land which have some permanence in relation to the land itself whereas the second half use comprises activities which are done in alongside or on the land but do not interfere with actual physical characteristics of the land.”<sup>16</sup>

In the case of *Marlin v. Municipal Council of Ndola and Kelway*<sup>17</sup>, the appellant appealed against the refusal of the respondent planning authority to grant her permission to establish a day nursery in an area zoned for residential purposes. Kelway also objected on the grounds that it would cause a nuisance or annoyance to him or other adjoining occupants. Court held that the area in which the premises were situated was good class residential area and anyone who was building a dwelling house on a plot in that area might reasonably expect the privacy and quite enjoyment of the area. Court further held that the establishment of a day nursery would cause a nuisance and annoyance to the adjacent occupiers particularly the objector since the play area for children on the premises was to be on the side of the premises, which immediately adjoin the plot of the objector. Further the court held that the degree of interference caused to the quite enjoyment and privacy to which the objector was entitled to, was

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<sup>15</sup> (1962) 1 ALLER 517

<sup>16</sup> Cited in the above case

<sup>17</sup> (1965) ZR 162

such as to justify the tribunal in upholding the objector's objection and the respondent's refusal of the planning permission.

In another case of, *Caltex oil Zambia ltd v. the Lusaka City Council*,<sup>18</sup> the appellant proposed to build petrol and filling station services in long acres for an area zoned for general business. The planning authority refused to grant permission on the basis that such a development would lead to nuisance and congestion of traffic on the long acres area. However, the Supreme Court overruled the decision of the tribunal and the planning authority saying that public interest in this case could override personal interest and therefore the foreseen nuisance.

### **2.23 WEAKNESS OF THE TOWN AND COUNTRY PLANNING ACT**

The weakness of the statute is according to section 31 any developments and subdivisions done on the land without permission or conditions to which permission was granted are not complied with, if after four (4) years there is no enforcement notice issued of the breach of the planning control then the unauthorized development or breach of the conditions becomes immune from any action. That is to say the nuisance is going to be perpetuated.

The other weaknesses of the statute are that the Act does not apply to certain areas meaning in these development is done anyhow and therefore consequence is that development in most of these areas is up hazard, uncoordinated and uncontrolled thereby causing even more nuisance viz a vis buildings.

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<sup>18</sup> Mr. P. Matibini

And lastly the law is obsolete meaning this statute, the Zambian Town and Country Planning Act is Modeled on the British, which was designed to control development in a different and specific urban situation.<sup>19</sup>

### 2.30 PUBLIC NUISANCE

There are a number of statutes governing the law relating to Public Nuisance in Zambia. These statutes seek to cover up for the nuisance committed at the macro level i.e. the type of nuisance caused by the mining and the cement production systems to be precise.

A public nuisance may be authorized by statute, but the right to commit acts amounting to a public nuisance cannot be required by prescription or justified on the ground that in some respects it is a convenience to the public.<sup>20</sup>

Public Nuisance is best defined in the case of, *A-G v. P.Y.A. Quarries Ltd*,<sup>21</sup> the defendant in the course of blasting operations at their quarry hurled stones and splinters out of the quarry and caused a nuisance by dust and vibration to nearby dwellers. It was held that this constituted a public nuisance.

In this case, Romer L.J. observed,<sup>22</sup>

“any nuisance is ‘public’ which materially affects the reasonable comfort and convenience of life of a class of her majesty’s subjects. The sphere of the nuisance may be described generally as ‘the neighbourhood’, but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case.”

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<sup>19</sup> Ibid

<sup>20</sup> Kenneth Smith and Dennis Keenan. 1982. 7<sup>th</sup> ed. *English law*. Pitman publishing inc. London pp.318  
<sup>21</sup> (1957) 2QB169

<sup>22</sup> P.184

As already discussed public nuisance is a crime and not a tort therefore, the office of the Director of Private Prosecution or the Attorney General can only bring an action. In sum meaning, it cannot be initiated by an individual unless he has suffered to a greater extent. But law in Zambia protects some legal persons from prosecution under the law.

### 2.31 PUBLIC NUISANCE IN ZAMBIA

The mining sector has been listed as one with the most potent activities having tremendous physical impact on the environment. In this paper the term 'mining' shall include the extractive industry. Mining involves two main processes that are of environmental concern. That is the method of extraction and the processing method. Mining impacts the environment through extraction, processing transport and through supporting infrastructure.<sup>23</sup>

The most common effects enunciated by these activities include inter alia:

- i) Land degradation: this involves the removal of soil and rock; the loss of fertile topsoil, devegetation, soil erosion from exposed surfaces; subsidence from underground mining.
- ii) Hydrological effects: this refers to chemicals and acid drainage; release of large amounts of water used in mining process to surrounding water system; sedimentation of rivers and reservoirs.
- iii) Wildlife and biodiversity: loss of habitats; poisoning with chemical pollution, loss of river and inshore fisheries and reefs; unaccustomed human activity.
- iv) Public health: diseases; occupational hazards; accidents to workers; chemical pollution of water used for drinking, irrigation, fishing, dust (with

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<sup>23</sup> . T. Winpenny; *Values for the Environment; A guide to economic appraisal* (1991) HMSO, London. P. 203

or without toxic elements) noise; exotic diseases introduced amongst indigenous peoples.

High scale of copper mining and production occurs on the Copperbelt of Zambia.

Following research conducted on the Copperbelt province, data is available on how copper mining contributes to the degradation of the environment.

The most popular causes of this are the solid wastes, liquid wastes and the gaseous wastes.

Liquid wastes are the worst because they lead to the deterioration of the water quality.

The plant effluent water from Konkola Mines, which is mixed with the mine water prior to discharge, has over the past years contained elevated suspended solids and metal levels discharged at a quality that does not comply with Zambian regulations.<sup>24</sup>

Smelt Co, which processes concentrates from the Nkana, Chibuluma, Nchanga and Konkola Copper Mines (KCM), also contributes to the deterioration quality of the surface water. With Smelter Co, there is a problem of metals, such as copper and cobalt, being released from the plant storm water system into the surrounding water environment. There are also acidic materials released, split, washed or leached into the surface water drainage system or into the ground water, without adequate treatment, resulting in low PH.<sup>25</sup> Smelter Co also contributes to the amount of chemicals and hazardous that gets spilled or leaks into the ground and is washed into the storm water system. Studies on the Copperbelt province have revealed that effluents from the

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<sup>24</sup> *Environmental Assessment* Vol. 2.1 Konkola mine, KCM PLC, April 2001

<sup>25</sup> *Environmental Assessment* Vol. 5.1 ZCCM, (SmelterCo) Ltd, May 2001

former ZCCM chimneys and concentrators polluted the Kafue and Kafubi rivers with impurities.<sup>26</sup>

Gaseous wastes constitute pollutants that lead to the deterioration of the air quality within the confines of production site and the surrounding environment. Gaseous wastes are more prevalent at the processing stage. This occurs at Smelter Co. Emissions of concern are sulphur dioxide, sulphur trioxide and dust.<sup>27</sup> Sulphur dioxide causes the most significant threat. It causes sneezing, coughing, bronchoconstriction and cessation of respiration, bronchiolitis and pneumonia. There is also adverse change in the teeth, eyes and skin.<sup>28</sup>

These gaseous problems have also led to pronounced cases especially in rainy season. This impact has manifested itself on human health, vegetable gardens and buildings in the area. Notably the township of Wusakile in Kitwe has experienced stunted plant growth and the development of mini deserts. A soil assessment has shown that the soil is contaminated.

A study in Mufulira has revealed that sulphur dioxide has nearly caused the extinction of lichen vegetation.

Chilanga Cement PLC does cement manufacturing in Zambia, at two plants. One in Chilanga, Lusaka province and the other in Ndola Copperbelt province. Both plants are engaged in quarrying works and the actual manufacturing of cement. The process occurs in stages. Unlike copper mining, the major concern with cement manufacturing has to do with air pollution.

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<sup>26</sup> November 2001, *Mining Mirror*

<sup>27</sup> Opcit. Environmental Assessment Vol. 5.1

<sup>28</sup> H. H Fawcett; Hazardous and Toxic materials; safe handling and disposal: (1988) John Wiley and sons, New York. P. 157

With Ndola works, research has revealed that the main areas of environmental concern are dust emissions, fuel gases, bearing cooling water draining into Kafubu Dambo.<sup>29</sup>

With the Lusaka works, main areas of concern are dust emissions and material spillage in various plant sections. Dust emissions of cement contain high concentrates of silica (SiO<sub>2</sub>). The inhaling of silica causes silicosis. This ailment is manifested by shortage of breath and rapid breathing. An acute form is usually identified after 18 months of massive exposure and becomes pulmonary silicosis after about 15 years of exposure.

The other gas present at the cement quarries areas is carbon monoxide, which is an extremely dangerous pollutant. Extreme exposure to carbon monoxide causes headaches, dizziness, nausea, vomiting, and difficulty in breathing. In other instances it has been known to cause immediate brain damage.<sup>30</sup>

### **2.32 THE LEGAL FRAME WORK GOVERNING MINING**

The preceding paragraphs briefly outlined some of the contentious environmental issues needing immediate attention. Most if not all issues resulted from years of operation of the mining and cement manufacturing entities. The Laws dealing with environmental protection are dispersed through statutes either as specific pieces of legislation or targeted provisions incorporated in more general statutes. When the mines started operating in the 1930s, legislation was put in place to exempt the mines from litigation under the laws of Zambia (the Actions for Smoke Damage Prohibition Act Cap 327 of 1959) in the event that other parties were affected by the emissions.<sup>31</sup>

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<sup>29</sup> Paper (November) Energy conservation and plant recovery; Chilanga Cement PLC, Chilanga works

<sup>30</sup> W. Bach; Atmospheric Pollution: (1972) Mc Graw- Hill book Co, Hawaii. P. 56

<sup>31</sup> *Environmental Assessment* Vol. 5.1 ZCCM, (SmelterCo) Ltd, May 2001

The initiative to protect the Zambian environment was led by former president Kenneth Kaunda. This initiative led to the birth of the National Conservation Strategy. The Strategy was adopted and prepared by the Ministry of Lands and resources in 1985.<sup>32</sup> Notable achievements of this include the setting up of institutional and legal framework, the establishment of the Environmental Protection and Pollution Control Act, No. 12 of 1990 and the Environmental Council of Zambia.<sup>33</sup> The strategy later proved to be inadequate therefore in order to curb the inadequacies, the National Environmental Action Plan. (NEAP) of 1994 was developed.<sup>34</sup> In August 1996, the Actions for Smoke Damage Prohibition Act, cap 327 was repealed. This officially ended the mines exemption from litigation. However, a number of statutes still exist that may be said to have a bearing on protecting the environment in the mining sector. These are considered below.

### 2.33 THE CONSTITUTION<sup>35</sup>

This is the supreme law of the land. Every law that is enacted in Zambia has to be in conformity with the provisions of the constitution. The constitution, inter alia lays the foundation for environmental protection. Under part IX, entitled the 'Directive Principles of State Policy and Duties of Citizens,' Article 112 (d), (h) and (i) state that:

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“ The state shall endeavour to provide clean and safe water  
... the state shall strive to provide a clean and healthy  
environment for all... the state shall promote substance,  
development and public awareness of the need to manage the land,

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<sup>32</sup> National Conservation Strategy For Zambia P. 8

<sup>33</sup> Concept Paper on ESP of NEAP P.2

<sup>34</sup> ibid

<sup>35</sup> Cap 1 of the laws of Zambia

air and water resources in a balanced and suitable manner for present and future generation.”

The laws governing mining and environmental protection stem from the above enunciated responsibilities. Therefore whatever regulations are put in place, the ultimate aim of the state should be the fulfillment of the constitutional requirement. Therefore, the other Acts of parliament put in place need to be looked at.

### **2.34 ENVIRONMENTAL PROTECTION AND POLLUTION CONTROL ACT No. 12 of 1990 (EPPCA)**

This is the principle piece of legislation that provides for the protection of the environment through provisions of natural resources management as well as pollution control through the Environmental Council of Zambia. Section 3 of Part II establishes the Council whose major responsibility is overseeing the control of pollution.

Protection of the environment entails making provision for the health and welfare of persons, animals, plants and the general environment. The Act deals specifically with environmental protection and pollution control.

### **2.35 AIR POLLUTION CONTROL (LICENSING AND EMISSION STANDARDS) REGULATIONS, S.I No. 141 of 1996.**

This statutory instrument places a mandate upon the council to:

- i) Assess the quality of ambient air in order to safeguard the general health.
- ii) Assess the safety or welfare of persons, animal life, plant life or property affected by the works, industrial or business activities undertaken by an operator.

The above outlined areas of concern have to be in accordance with the established guidelines by the council. The established guidelines, for example, provide for permitted concentrations of sulphur dioxide, carbon dioxide, and nitrogen oxide in the ambient air. The statutory Instrument also provides guidelines for the production of cement and lime. It for example lists limits for cement, dust concentration in emissions.

## **2.36 THE MINES AND MINERALS (ENVIRONMENTAL) REGULATIONS**

### **S.I No. 29 of 1997**

This instrument establishes the requirement for the preparation and submission of an environmental project brief. This need to be submitted before any developer undertakes any prospecting, exploration or mining operations. The instrument lays out what is to be included in the Environmental Impact Statement, which is submitted to the director of mines. The instrument also provides guidelines to govern mine dumps, air quality and emission standards, water standards and storage, handling and processing of hazardous material.

## **2.37 PUBLIC HEALTH ACT<sup>36</sup>**

The main objective of this Act is to provide for the prevention and suppression of diseases. The Act prohibits the causing of nuisance or other conditions, which may be injurious or dangerous to health.

This Act provides for the suppression and prevention of disease. The Act places a mandate upon every local authority to take all lawful, necessary and reasonably practicable measures.

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<sup>36</sup> Cap 535

“ For preventing any pollution dangerous to health of any supply of water which the public within it’s district has a right to use and does use for drinking or domestic purposes”<sup>37</sup>

The Act further grants authority to the local authority to commence proceedings at law against any person polluting any stream so as to be a nuisance or danger to health.<sup>38</sup>

Through the activities of the local authority, the council is able to ensure that the general public health in the mining sector is as it should be.

The Public Health Act may therefore be seen as taking over from where the other Acts leave off. That is, it focuses on matters to do with preventing pollution and controlling it after it has occurred. The other Acts look at exactly how prevention and controlling may be done.

### **2.38 S.I No. 19 of 2000(THE MINES AND MINERALS (ENVIRONMENTAL) (EXEMPTION) ORDER, 1999**

This instrument legalizes the ‘Environmental Liabilities Agreement’ of 31<sup>st</sup> March 2000, between KCM and the government of Zambia. It grants KCM temporary derogation from the standards set out in legislation. The environmental liabilities agreement provides that the government of Zambia shall not take any action to secure KCM’s compliance with the environmental laws earlier or to a greater extent than agreed in KCM’s environmental plans or impose fines or penalties upon KCM. Under the same agreement the government has among other things undertaken not to amend the environmental laws which prevent KCM from complying with its environment.

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<sup>37</sup> Section 78 (a)

<sup>38</sup> Section 78 (b)

**2.39 THE ENVIRONMENTAL PROTECTION AND POLLUTION  
CONTROL (ENVIRONMENTAL IMPACT ASSESSMENT)  
REGULATIONS 1997.**

These regulations were passed in accordance with Zambia's obligation under international environmental law. The need for a developer to submit an environmental impact assessment is a requirement under the convention on Biological Diversity, which Zambia ratified on 28<sup>th</sup> May 1993 the environmental impact statement that is to be submitted to the council for approval, contains a study of the work to be undertaken by a developer. It lists out the foreseeable impact of such development as well as the problems present as left by previous owners if any. Such statements include the environmental and social impact.

**2.40 CONCLUSION**

**2.41 ANNALYSIS OF THE LEGAL FRAMEWORK**

The major flaw with the statutory instruments comes in the form of statutory instrument No. 19 of 2000. This instrument amounts to a flaw in that; people and all other constituents of the environment will be the recipients of the uncontrolled emissions by KCM during the stabilization period. In the year 2000, the Citizens for a better Environment (CBE) a Kitwe based group, sued Chambishi Metals for respiratory problems and destroying farmers crops. Chambishi Metals, which had privatized, pleaded 15-year agreement entered into between itself and the government of Zambia. The agreement grants Chambishi Metals legal immunity regarding uncontrolled sulphur dioxide emissions. Naturally, the case was thrown out. Similar to the Chambishi Metals exemption and its consequences, the exemption order granted to KCM will mean that

people will suffer the adverse effects of KCM emissions for the length of time such immunity will be enjoyed. The immunity period has been said to be twenty (20) years.

## **2.42 WATER ACT<sup>39</sup>**

This Act provides for the ownership, control and use of water excluding water of the Zambezi, Luapula and a portion of Luangwa rivers, constituting a boundary between Zambia and Mozambique. The Act makes it an offence to pollute water or render it harmful to man, animal and vegetation. The appropriate provision is section 35, which states:

“Any person who willfully or through negligence pollutes or fouls any public water so as to render it harmful to man, beast, fish or vegetation shall be guilty of an offence.”

However the Water Act basically provides for the ownership, control and use of water, with a few exceptions. This Act is of general application as opposed to being a specific piece of legislation directed at mining and environment. As a result, the Act could not be effectively be invoked when the issue of water pollution arises. This is so in that mining process produces liquid wastes it is inevitable that water pollution will occur. The issue therefore, is the quality of liquid wastes released into any given water source. The Water Act does not cover the issue of quality.

## **2.43 (AIR POLLUTION CONTROL (LICENSING AND EMISSION STANDARDS) REGULATIONS, S.I No. 141 of 1996.)**

The rigidity of the Statutory Instrument may be seen in the wake of the Council implementation the requirements of the instrument. A perfect example of this is that, from 23<sup>rd</sup> November 1997, the council has made it mandatory for all mines to obtain licences to emit air pollutants, in accordance with the Instrument. The Regulations

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<sup>39</sup> Cap 312

allow for the Inspectorate to prescribe intermediate limits, which are higher than long-term emission limits.

Furthermore, the Public Health Act as opposed to the other statutes and Instruments put in place to avoid Nuisances it may be seen as taking over from where the other Acts leave off. That is, it focuses on matters to do with preventing pollution and controlling it after it has occurred. The other Acts look at exactly how prevention and controlling may be done.

“ Men are like birds of the sky, they converge in a Kachele tree (type of fig tree but with small fruits) and eat its fruit to their fill; so are men, they till and harvest from the land. There is no need to quarrel over land since nobody owns it but God for his people is the true Owner.”

Chief Sairi of the Ngoni people- Eastern Province 1984.

“ I conceive that the land belongs to a vast family of which many are dead, few are living and countless numbers are yet unborn.”

One Nigerian Chief 1917

## CHAPTER THREE

### DISCUSSION, RECOMMENDATIONS AND CONCLUSION ON THE LAW RELATING TO TRESPASS TO LAND

#### 3.10 INTRODUCTION

This chapter seeks to conclude on trespass to land in view of what has already been discussed in the above chapters. Though there is an Act of Parliament seeking to settle problems of ownership and title to land, problems still continue. Much of scholars' ink has been spilled in an attempt to guide and counsel the legislators on land policy and ownership of land (specifically trespass to land by relation which is ever a growing problem) but no heed has been paid. It is therefore, prayed and hoped by the author of this paper that this ink is the last to be used on this subject.

#### 3.11 TRESPASS TO LAND BY RELATION

It would suffice for the purpose of the chapter to consider a few more cases that have continued rocking the doors of the court, notwithstanding the law currently available to curb the problem.

In the case of *Still Water Farms v. Mpongwe District Council and the Commissioner of Lands And Dawson Lupunga and Bantis Kapula*,<sup>1</sup> this was an appeal by Still water farms limited against the decision by the commissioner of lands' refusal to issue title deeds to it in respect of a farm in Mpongwe district on the ground that the decision was discriminatory, unconstitutional and against rules of natural justice. In a letter to the commissioner of lands, Mpongwe district council recommended issuance of title deeds

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<sup>1</sup> LAT/ 30/ 2000

to the appellant. However, despite the foregoing events, the provincial lands officer wrote to Mpongwe district council directing it to revisit the whole issue, allegedly because Lupunga and Kapula claimed the farmland in issue was theirs, given to them by the predecessor of the incumbent Chief Lesa. Later Mpongwe district council appealed to the lands tribunal for help in resolving the issue.

The appellant acknowledged that he had been told that the same land was owned by Kapula and Lupunga under customary tenure and following this submission it became clear to the council that the two a recognizable interest in the land in issue which the council had overlooked in its earlier decision and hence decided to reverse the decision accordingly.

It was also established that there was no inquiry made by the present chief Lesa with the two (Kapula and Lupunga) or indeed any of the villagers abutting the said land before he purported to allocate the land to the appellant. Consequently their interest as indigenous local people was not taken into account before the allocation to the settler who had enough land which he was using, contrary to section 3(4) (c) of the Lands Act which talks about consultations been made with any other person or body whose interests might be affected by the grant.

Under customary arrangement of owning land, one does not necessarily need any evidence in writing to show that one owned that land but people in that area could confirm whether or not it belonged to him. The tribunal basing on this held that the commissioner of lands' decision to withhold the issuance of title deeds when he realized that there were strong objections from Kapula and Lupunga was correct. The decision was not therefore discriminatory or unconstitutional; neither was the third and fourth respondents' claim false, vexatious and racially motivated as the issue was in

compliance with section 3 (4) (c) lack of consultation as provided under this section was fatal. Therefore, the continuation in the use of the land in issue by the third and fourth respondents after the issuance of land to the respondent by the Chief did not amount to trespass to land as they had a recognizable interest in the land.

*Yengwe Farms Ltd v. Masstock (Z) Ltd and two others*,<sup>2</sup> the Appellant having satisfied all the dictates of the then Lands (Conversion of Titles) Acts had his application for land been approved and issued title deeds in respect of 2,000 hectares by the Commissioner of Lands. The President then approved a grant of 20 hectares of land to the first respondent contrary to the president's orders the Commissioner of Lands approved and allocated two, 500hectares of each farm. One of the farms encroached on the appellant's farm. He brought this to the attention of the Commissioner. The Commissioner ordered the appellant to surrender his title deeds claiming that it was erroneously issued. The supreme court of Zambia held the provisions of section 3 (4), which forbids the president to alienate land in a customary area without consulting other interested groups such as district council, Chiefs or individuals whose interests may be affected by such grant were not followed.

This decision demonstrates that:

- i. The president is not in strict legal sense an owner of land in Zambia;
- ii. Land in Zambia is *bona vacantia*<sup>3</sup> but can be claimed by any of the three interested parties.

Therefore land ownership in Zambia today can be described as a “pendulum in ceaseless oscillation” bended on three fulcrums namely, the president, the chiefs and

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<sup>2</sup> SCZJ No. 11 of 1999

<sup>3</sup> Ownerless

the citizenry. However, the law must be certain and predictable. It must be authoritative enough to exert the principle of *res justicata* on parties to the dispute, which this law is lacking.

*Village Headman Albert Phiri Mupwaya and Another v. Mathew Mbaimbai*,<sup>4</sup> the appellant granted deserted land to Mr. Kaamal Jeet Sign an investor in Kabwe rural. As construction work was half way through the respondent emerged, claiming that the land so allocated as belonged to his late uncle who died many years ago. As such, he could only be the right heir of the land. The land tribunal gave judgment in his favour. The appellants made an appeal to the Supreme Court Zambia. The Supreme Court without taking into account the development that had since taken place and the fact that the land remained deserted for several decades upheld the decision of the tribunal.

### 3.12 RECOMMENDATIONS

- Land law reforms should be focused on the land held and tied to traditional values. The process itself should take a democratic path.
- The machinery of vesting land in the president and chiefs must be changed. The presidency and the chieftaincy are two supreme institutions in their respective (political and Traditional) hierarchy, such that persons aggrieved by their decisions will not the right of appeal if their rights are infringed upon. In addition, indeed the doctrine of natural justice is denied its prime role of ensuring that those with interest in an action should not be judges. Instead, land administration should vest with neutral persons namely the Commissioner of

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<sup>4</sup> SCZJ No. 41 of 1999

Lands, who would himself be under the supervision of both the president and the chiefs. This will work to reduce the problems of ownership and likewise reduce cases of trespass to land by relation.

- The role of the Commissioner of Lands in land administration should be revisited with a view to deregulate the current rules in order to allow for total devolution in planning and implementation of development. This will entail that all planning powers and issuance of title to land should be delegated to his subordinates at provincial levels who are conversant with the local people and areas.
- The major role played by the law from its inception in society has been shaping and reshaping social order of society. However, the manner of legal intervention varies with time, place and circumstances for any given society. In its position as an instrument for change, it operates in three successive phases. The lands Act should be amended to style it like the Agricultural Lands Act of 1960<sup>5</sup>, which has provided for Lands Board appointed by the minister. Its function is to receive and approve or otherwise, all applications for agriculture land. Equally, if Boards were introduced at various authorities, it will operate more effectively. And as such the prevailing conflict of interests in land will be minimized

### **3.13 CONCLUDING REMARKS**

Charging legislation does not exclude the lawyers from this task. A contemporary lawyer in all states but most emphatically in developing nations must be an active and responsible participant in the shaping and formulation of development plans. He must

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<sup>5</sup> Cap 187

guide and counsel where necessary. In the case of trespass to land by relation in Zambia, it is the duty of a lawyer to advise the legislators and planners on the difference between various types of interests affected according to social and economic equities.

In this noble cause that affects the masses of the Zambian people needs to be tackled with unit among the people of Zambia. Therefore, everybody needs to come together and find a lasting solution. But however, it must be remembered that the lawyers as they are the most land law literate should lead in this fight.

“To keep adapting the law to fresh social and economic conditions and legislation is an essential means of attaining a progressive society, however, imperfectly.”

Sir Henry Maine (1822-1888)

## **CHAPTER FOUR**

### **DISCUSSION, RECOMMENDATIONS AND CONCLUSION ON THE LAW RELATING TO NUISANCE**

#### **4.10 ZAMBIA AND INTERNATIONAL CONVENTIONS**

Zambia, being an active member of the international community, has over the past years become a signatory to a number of international conventions.<sup>1</sup> Two international conventions, however, stand out as having an undeniable bias towards mining and quarrying and the environment. These are the Convention on Biological Diversity (CBD) and the Basel Convention on Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal.

#### **4.11 CONVENTION OF BIOLOGICAL DIVERSITY**

The Convention was adopted in June 1992. Zambia became a signatory on 11th June 1992 and ratified the same on 28th May 1993.<sup>2</sup> Article 1 of the Convention, sets out its objectives. The Principles of the Convention are contained in Article 3. These Principles are drafted in accordance with the Charter of the United Nations and the principles of international law. Article 3 states that states have the sovereign right to exploit their own resources pursuant to their own environmental policies. The Article further states that the responsibility of ensuring that activities within the jurisdiction of a member state do not cause damage to the environment of other states or of areas

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<sup>1</sup>The Pacific fur seals Arbitration (1893) 1 Moore's International Arbitration awards 755

<sup>2</sup> Times of Zambia, 2nd July 2001

beyond the limits of national jurisdiction rest on the state.<sup>3</sup>

However, Zambia in meeting with the commitments required under this Convention, more recently, through the Ministry of Environment and Natural Resources (now called the Ministry of Tourism, Environment and Natural Resources), in keeping abreast with this Convention, advertised the requirement of biodiversity experts to register with the Ministry for inclusion on the mandated roster of experts.<sup>4</sup>

#### **4.12 BASEL CONVENTION**

Under the auspices of the United Nations Environment Programme (UNEP), the concept of this Convention was introduced in 1989. Since then, it has been held periodically enabling it to keep vigil of the environmental developments.<sup>5</sup>

From an overview of the Convention, it is clear to interpret that it calls for affirmative action in the control and governing of hazardous wastes. The need for states to report every six months of any new developments means that the Convention, which is constantly amended, is able to monitor current and new environmental developments.

Member parties also meet to constantly discuss the workability of the various articles.<sup>6</sup>

Zambia became a signatory in 1991. Unfortunately, to date, the Zambian parliament has not ratified it. It therefore follows that possibly one of the most effective international conventions, governing the control of hazardous wastes has not been interpreted into Zambia's domestic legislation.

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<sup>3</sup> Convention on Biological Diversity

<sup>4</sup> Times of Zambia, 2nd July 2001

<sup>5</sup> Basel Convention series: No 00/01

<sup>6</sup> Ibid

#### **4.13 REGIONAL ENVIRONMENTAL LA W- SOUTHERN AFRICA**

The interest in conserving the environment in the Southern African region came about in the early 1980s when the threat posed to the environment through environmental degradation was brought to the attention of the Southern African Development Co-ordination Conference (SADCC) member states by scientists and the international community.<sup>7</sup>

The first form of environmental co-ordination in the region came in the 1980s in the form of the Environmental Land Management Sector (ELMS).<sup>8</sup> This has continued to exist under SADC.

#### **4.20 EFFICACY OF THE ZAMBIAN LAW**

This essay has discussed the law in Zambia and has identified the constituents of solid, liquid and gaseous wastes and their effect on the environment. It has also analyzed the legal provisions governing waste control in the mining sector. It is important to note that prior to privatization, mining environmental laws were scattered in different statutes. The provisions, however, cannot be said as having had direct reference to the governing of environmental issues in the mining sector. Save -for the EPPCA and the Mines and Minerals Act, the other pieces of legislation could only be regarded as useful in the Mining sector in certain instances. Following the privatization of the mines and the repeal of the Actions for Smoke Damage Prohibition Act, the post 1996 period has seen the enactment of vital pieces of legislation with direct emphasis on mining and the

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<sup>7</sup> SADC Policy and Strategy for Environmental and Sustainable Development, 1996. P 3

<sup>8</sup> Ibid p5

control of pollution. The laws governing mining post privatization, on the whole, are more comprehensive and aim at specific issues as opposed to generalizing.

A problem that is eminent, though, is that the laws tend to focus more on liquid and gaseous wastes. As was discussed above, solid wastes are just as much a matter of concern as the other kinds of waste. One may justify this by stating that the Waste Management (Licensing of Transporters of Wastes and Waste Disposal Sites) Regulations of 1993 adequately cover this. However, this may not entirely be accurate seeing that these Regulations are more concerned with the classification and disposal of wastes on a more general level. What is needed is a more specific piece of legislation directed at solid waste management in the mining sector. On the whole though, it may be submitted that the laws governing waste management in the mining area adequately address most contentious issues.

The effectiveness of the law on the face of it brings about the next vital question:

#### **4.21 HOW EFFECTIVE ARE THE ADMINISTRATIVE BODIES IN THE IMPLEMENTATION OF ENVIRONMENTAL LAWS?**

The question of the adequacy of the law emanates as one issue. The implementation of such law is a totally different issue altogether. This brings to light the effectiveness of the Environmental Council of Zambia (ECZ) and local authorities such as district councils. Though the ECZ has the power of enforcement and implementation, it lacks autonomy.

Firstly, the ECZ is not totally independent of government control. The Council falls directly under the Ministry of Tourism Environment and Natural resources. The minister, as provided for under section 4, appoints members of the Council. This

creates the possibility of a problem. The Minister may abuse such power of appointment. As such, some of his appointments may merely be according to his whims and caprices, worse still may be based on partisan basis as opposed to expertise.

Secondly, the Council merely plays an advisory role to the government. This means that some of the policy recommendations produced by it may, or may not be accepted. The Minister responsible for the environment and natural resources has done all regulations passed pursuant to the Act. The Council has no mandate to promulgate at its own instance any legislation governing environmental matters.

The issue of funding is another hindering factor to the successful implementation of government policy in the mining sector. For example, most local authorities are unable, due to lack of funds and equipment, to monitor the level of liquid wastes in trade effluent. This is indeed a handicap as the local authorities cannot discharge their duties effectively as required by the Local Administration (Trade Effluent) Regulations. The ECZ as well faces constraint in relation to funding. Though moneys appropriated to it by parliament, or by grants or donations and fees paid to it fund the ECZ, such monies may only be accessible through the Minister's approval.

The question of the effectiveness of the administrative bodies, therefore, falls on the government. It is not doubted that the laws currently in existence, save for a few exceptions, adequately address problems raised and discussed in the essay. However, implementation of such policies remains administrative. What is needed is for such administrative bodies to be made autonomous in their implementation of government policy in the mining sector. Only with such reform can there be more room for the improvement and development of mining environmental laws.

#### **4.30 THE COHERENCY OF NATIONAL (ZAMBIA) ENVIRONMENTAL MINING LAWS WITH INTERNATIONAL ENVIRONMENTAL MINING LAWS**

Zambia being a member of the international community has got certain obligations that it needs to meet. Environmental laws have got three basic functions. That is;

- i) Prevention
- ii) Setting environmental quality standards
- iii) Cleanup and recommendations

These three basic functions encompass the role of environmental laws for the mining sector under international environmental law. Established as the number one custodian over all elements of the environment is the state. In Zambia, this requirement may be seen as provided for under the Constitution. The Constitution places responsibilities upon the state that are incidental to the preservation of public health and the environment. The pieces of legislation discussed in above are responsive to the principles of international environmental law. These principles summed up simply state:

- Preventive action
- Polluter pays
- Sustainable development

The pieces of legislation discussed in the same chapters are also responsive to Zambia's commitment to international conventions biased toward mining. An example of this is the Convention on Biological Diversity' (CBD). This Convention among other things calls for impact assessments to be demanded from any prospective developers. Zambia, in response to the CBD, has interpreted this requirement into the Environmental

Protection and Pollution Control (Environmental Impact Assessment) Regulations.

Similarly, under international mining environmental law, the Basel Convention is a very important regulatory framework. The Convention deals with classification of wastes, their transportation and storage. The Zambian government has not ratified this Convention. It has however enacted the Waste Management (Licensing of Transporters of Wastes and Waste Disposal Sites) Regulations. Though these Regulations do not cover vital issues as required under the Basel Convention, it does generally classify wastes and offers guidelines for governing mine dumps. The provisions of the Regulations though do not meet up to international standards. The laws governing environmental issues in the mining sector are also responsive to most of the requirements under the SADC Mining Protocol. For example, Article 10 of the

Protocol states that member states should undertake to jointly develop and observe internationally accepted standards of health, mine safety and environmental protection. This requirement has been met by Acts such as the. Public Health Act, the Pneumoconiosis Act. These two Acts deal with issues of public health. The Public Health Act is of general application. The latter Act aims specifically at illnesses present in the Mining sector. Such an Act is of immense importance as it is a requirement under international environmental mining requirements that such Acts regulating health in the mines be enacted.

Another requirement under the Protocol is for states to collaborate in the development of programmes to train environmental scientists in fields related to the mining sector. In response to this provision, the Zambian government through the involvement of the

donor community has undertaken such an initiative. The other vital players are the University of Zambia School of Mines. The academics and researchers from this school are busy cooperating with other mining schools within the region. The aim is to develop terms of reference when training environmental scientists for the mining sector.

#### **4.40 THE TOWN AND COUNTRY PLANNING ACT**

The weakness of the statute is section 31 because any developments and subdivisions done on the land without permission or conditions to which permission was granted are not complied with, if after four (4) years there is no enforcement notice issued of the breach of the planning control then the unauthorized development or breach of the conditions becomes immune from any action. That is to say the nuisance is going to be perpetuated.

The Act does not also apply to certain areas.

The decisions of the tribunal and the planning authority are easily overruled by the Supreme Court and perpetrate the problems of nuisance at private level.

And lastly the Zambian Town and Country Planning Act is Modeled on the British, which was designed to control development in a different and specific urban situation.<sup>9</sup>

#### **4.50 CONCLUSION**

From the discussion that has constituted the scope of this paper, it is clear to see that the concept of mining and the environment is not unknown to the Zambian legislators, the public and the environment as the eventual recipient.

From the whole study, it suffices to state that Zambia's environmental laws in the

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<sup>9</sup> Ibid

mining sector are reasonably well framed and tackle most contentious threats posed by the mining sector. Most of Zambia's more effective laws, most of which have been passed after privatization, focus more directly on the activity of mining. These regulations, read in with international conventions, provide a consolidated text of effective laws, which, if implemented properly, will control the level of pollution in the mining sector. What lacks however, is the ability to add more detail to one or two vital pieces of legislation. One such Act has to do with solid waste management and the classification of wastes.

Finally it suffices to state that most of these recent mining regulations are still in their infantry stages. As such, their true impact is yet to be felt and understood.

#### **4.60 RECOMMENDATIONS**

- In order to bring about development in the manner of implementation of the law, a number of issues need to be addressed and adopted by the policy makers, legislators, mining industries and the public in general.

#### **4.61 The Council**

- The ECZ should be granted more powers to draft regulations that are enabling to carry out effective pollution control and monitoring, as opposed to the current advisory and consultative role it plays in the drafting and enacting of the various regulations.
- There should be a revision of the appointment procedure for members of the council. Such appointment should be based on merit, upon different individuals

applying for the posts.

- The issue of funding needs to be revisited. The ministerial approval requisite when accepting donations and grants should be done away with.
- The Council should be granted full autonomy. This will enable it implement government policy in a more effective and expedient manner.

#### **4.62 The Public**

- All aggrieved citizens need to step out in confidence and tell of any form of pollution. The individual citizens need to play an active part in ensuring that polluters in the mining sector are deterred from unnecessarily polluting the environment. This may be done by forming associations, or organizations that act as watchdogs specifically over mining and environment matters.

#### **4.63 The Government**

- As a major player, the government needs to continue ensuring that feasible pieces of legislation, that strike a balance between economic gain and environmental protection, are enacted.
- The Government needs to reduce taxes paid on plant and machinery that is going to be used for cycling and reprocessing of the wastes. This would lead to reduction in the wastes emitted into the environment.
- There is need to revisit the implementation process. This may be achieved by firstly appreciating that implementation is strictly administrative. The government needs to grant more autonomy to major players in the implementation process.

- There is need for nation wide awareness campaigns. The government needs to avail to people the reasons why they should not tolerate any pollution from the mining sector. This may be done by sensitizing the people on the adverse effects of exposure to mining wastes.
- An environmental court should be established. This court should be constituted of experts who are literate in the field of International Environmental Law.
- Interpret more international conventions into domestic legislation
- The issue of inadequate funding needs to be addressed. More funding, especially to the local councils, needs to be allocated.
- Above all the government needs to consider the Mung'omba Draft Constitution. This is because in this constitution there is a provision for environmental protection as of right. Article 71 provides that "every person has the right to an environment that is safe for life and health: to free access to information about the environment; to compensation for damages arising from the violation of the rights recognised under this Article; and to protection of the environment for present and future generations." This provision must be enshrined in the Bill of Rights of the Constitution as it is the supreme law of the land it the most effective way of protecting the citizens of the sovereign State of Zambia from unhealthy environment.

#### **4.64 The Mining Industry**

- The mines should take it upon themselves to ensure that purification equipment is kept in good working condition.
- The issue of workers health policy needs to be revised so as to provide for a sound medical plan. The industry needs to investigate all ailments associated

with its line of mining and implement means of preventing it and compensation for exposed workers in the health policy.

- There is need to invest in reprocessing plants. This is particularly true for the copper mines. KCM needs to invest in reprocessing the slag that merely rests, piled up in heaps.
  
- Chilanga Cement PLC needs to update its dust controlling equipment. This would inevitably reduce the levels of dust pollution in the area.

Much of scholars' ink has been spilled in an attempt to guide and counsel the legislators on, land policy and ownership of land (specifically public nuisance which is a growing problem) but no heed has been paid. It is therefore, strongly prayed and hoped by the author of this paper that this ink is the last to be used on this subject.

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