

IN THE CAPITAL MARKETS TRIBUNAL
HELD AT LUSAKA

2021/CMT/A/004

BETWEEN:

MWANGALA MWIYA

AND

SECURITIES AND EXCHANGE COMMISSION

APPELLANT
RESPONDENT



Before: The Registrar, Mr. M. Chola in Chambers

For the Applicant: Mr. Y. Silomba, Messrs Equitas Legal Practitioners

For the Respondent: Mrs. D. Sichone and Ms D. Mulondiwa, In-House Counsel, Securities and Exchange Commission

RULING

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021

Cases referred to:

1. Isaac Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v Liseli Mwala (Single Woman) – SCZ Judgment No. 6 of 1997
2. Simwanza v The People [1985] ZMSC 5
3. Delcy v Camille (2003) SLR 42

4. Wangzhou Meng v HSBC Bank PLC [2021] EWHC 342 (QB)

1. On 27th August 2021, the Respondent applied by summons for orders to summon and examine witness and for production of documents pursuant to rule 22 of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 (in this ruling referred to as “the CMT Rules”). In support of the summons, the Respondent filed on the same day an affidavit sworn by Dubholukulu Mulondiwa, Counsel seized with the conduct of this matter; and skeleton arguments.
2. The Appellant did not file any documents in opposition. An attempt was made at the hearing of the application to apply orally for an adjournment to enable the Appellant file appropriate process to oppose the application out of time. The attempt was unsuccessful.
3. The application was heard on 15th September, 2021, and ruling reserved to a date to be communicated to the parties. The ruling should have been delivered within ninety days after the hearing per rule 3 (2) of the CMT Rules as read with Order 36 rule 2 (2) (c) of the High Court Rules, Cap. 27, as amended by the High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020 (the HCR).
4. More than ninety days have gone by since this application was heard. In the premises, this ruling is being delivered out of time in line with Order 36 rule 2 (3) of the HCR with the necessary changes made as provided in rule 3 (2) of the CMT Rules. In other words,

and for the avoidance of any doubt, my jurisdiction to render this ruling despite the expiry of the ninety days prescribed for the delivery thereof emanates from the said Order 36 rule 2 (3) of the HCR.

5. The Respondent's grounds for the application are set out in its affidavit in support; and the arguments in support thereof are in the skeleton arguments as supplemented by oral arguments made at the hearing of the application. The gist of the Respondent's case is that the testimony of Mrs Patricia Mwape Munyoro, from whom the Respondent was unable to record a witness statement in time for its filing as directed at the scheduling conference, is material and as such the said Mrs Munyoro should be summoned and examined as a witness of the Respondent; and that an order be made for the production of copies of entries in the banker's books of United Bank for Africa relating to Hobbiton Investment Management Limited's account number 9010160034187.

6. In oral arguments in opposition to the application, the Appellant's Advocate urged me not to grant the application because the Respondent had not stated clearly in the affidavit in support of the application what they desired the witness to come and testify about; and on the basis the confidentiality of client information would be compromised and thereby cause an injustice to other clients associated with the account in question.

7. Rule 22 (1) (a) and (b) of the CMT Rules, in so far as is material, empowers the Registrar – on application by a party or at the

Registrar's instance – to summon and examine a witness; and order the production of a document, information or other thing before or during the hearing of a matter.

8. The reasons advanced for inability to have the witness of statement of Mrs Munyoro appear to be valid to me. I am also persuaded that she is a material witness for the Respondent. I do not agree with the arguments advanced by the Appellant's Advocate as to why the witness should not be summoned and examined as witness for the Respondent. In the premises, the Respondent's application with regard to the summoning and examining of Mrs Munyoro is granted.

9. While I have jurisdiction and discretion to order the production of documents in terms of rule 22 (1) (b) of the CMT Rules and the said rule does not stipulate the circumstances under which the said jurisdiction and discretion can be exercised, I am constrained to grant the Respondent's application on this front. This is because the records being sought to be produced relate to an entity, Hobbiton Investment Management Limited, that is not a party to these proceedings. In effect, the Respondent's application was asking me to make an order that affects the interests of a person that is not a party to the present proceedings without affording that person an opportunity to be heard. The Supreme Court, in the case of **Isaac Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v Liseli Mwala (Single Woman) (1)**, held that a court is legally and effectively precluded from considering the interests of non-parties to an action. The import of this case, as I understand it, is that a court should confine itself to deciding matters in dispute

between the parties and should refrain from making orders that place legal obligations or confer legal rights on persons that are not party to the proceedings before the court.

10. Moreover, the case law on production of bankers' books, in so far as I could ascertain, suggests that the courts exercise the jurisdiction to order the production of bankers' books in instances where the said books relate to a party to proceedings before them (see the cases of **Simwanza v The People (2)**; **Delcy v Camille (3)**; and **Wangzhou Meng v HSBC Bank PLC (4)**).
11. The long and short of my ruling is that the application for an order to summon and examine Mrs Munyoro as a witness for the Respondent is granted, while the application for an order to produce copies of entries in the banker's books of United Bank for Africa is refused.
12. Costs shall be in the cause.
13. Leave to appeal is granted.

DELIVERED THIS 28TH DAY OF FEBRUARY, 2022



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M. CHOLA
REGISTRAR