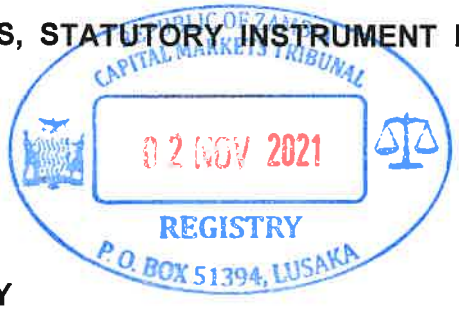
IN THE CAPITAL MARKETS TRIBUNAL
HELD AT LUSAKA

2021/CMT/OA/001

IN THE MATTER OF: SECTION 9 (2) (g) AND (h) OF THE SECURITIES ACT, NO. 41 OF 2016

IN THE MATTER OF: RULE 8 OF THE SECURITIES (CAPITAL MARKETS TRIBUNAL) RULES, STATUTORY INSTRUMENT NO. 32 OF 2021



BETWEEN:

MADISON ASSET MANAGEMENT COMPANY LIMITED	FIRST APPLICANT
MADISON FINANCIAL SERVICES PLC	SECOND APPLICANT

AND

SECURITIES AND EXCHANGE COMMISSION	FIRST RESPONDENT
PHILLIP CHITALU	SECOND RESPONDENT
ABRAHAM ALUTULI	THIRD RESPONDENT

Before:	The Registrar, Mr. M. Chola, in Chambers
For the Applicants:	Captain I.M. Chooka, Messrs Milimo Chooka & Associates
For the Respondents:	Ms. D. Mulondiwa, In-House Counsel, Securities and Exchange Commission

RULING

Legislation referred to:

1. The Legal Practitioners Act, Chapter 30 of the Laws of Zambia
2. The Securities Act, No. 41 of 2016
3. The High Court Act, Chapter 27 of the Laws of Zambia
4. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
5. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021
6. The Legal Practitioners Practice Rules, Statutory Instrument No. 51 of 2002
7. The Rules of Supreme Court, 1999 edition

Cases referred to:

1. New Plast Industries v the Commissioner of Lands and the Attorney-General – SCZ Judgment No. 8 of 2001
2. John Sangwa v Sunday Bwalya Nkonde SC – 2018/HP/1029
3. Dean Mung'omba and Others v Peter Machungwa and Others – SCZ Judgment No. 3 of 2003
4. Jamas Milling Limited v Imex International (Pty) Limited – SCZ Judgment No. 20 of 2002
5. The Law Association of Zambia v. The President of the Republic of Zambia, the Attorney-General and the National Assembly – 13/CCZ/2019 (Unreported Ruling dated 26th September, 2019)
6. Leopold Walford (Z) Limited v Unifreight (1985) Z.R. 203
7. The Republic of Botswana, Ministry of Works, Transport and Communications, Rincean Design Consultants (sued as a firm T/A KZ Architects v. Mitre Limited (1995 -1997) Z.R. 113
8. Standard Chartered Bank (Z) PLC v John M. C. Banda – SCZ/8/108/2015

9. African Banking Corporation Zambia v Mubende Country Lodge Limited – Appeal No. 116/2016

Introduction

1. On 27th August, 2021, the Applicants filed a Notice of Motion to raise Preliminary Questions on a Point of Law ("the motion"). The application was made pursuant to rule 3 (2) of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 ("the CMT Rules"); Orders 14A rules 1 and 2 and 33 rules 3 and 7 of the Rules of the Supreme Court 1999 edition ("the RSC 1999"); sections 42 (1) and (2) and 43 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia ("the LPA"); and rules 24 (2) and 27 (b) of the Legal Practitioners Practice Rules, Statutory Instrument No. 51 of 2002 ("the LPPR"). The motion is supported by an Affidavit sworn by Mercedes Kumoyo Imasiku Mwansa, the Chief Executive Officer of the First Applicant, and Skeleton Arguments filed on 27th August, 2021; and a Supplementary List of Authorities filed on 13th September, 2021.

2. On 6th September, 2021, the First Respondent filed List of Authority and Skeleton Arguments in opposition to the motion. The said Skeleton Arguments were signed by Legal Counsel in the employ of the First Respondent and expressed to have been settled by said Legal Counsel as Advocates for the Respondents.

3. The motion was heard on 8th September, 2021, and ruling reserved to a date to be communicated to the parties. On the date communicated to the parties, the ruling was not ready due to unforeseen circumstances. The delay in rendering the ruling is regretted.

Evidence

4. According to the Affidavit in support of the motion, the deponent was availed by the Applicants' Advocates the following documents – some of which were signed by the First Respondent's employee by the name of Diana Sichone – filed by the First Respondent on behalf of the three Respondents:
    a. Affidavit in Opposition to Summons for Leave to File Originating Notice of Motion Out of Time;
    b. Respondents' List of Authorities and Skeleton Arguments against Application to File Out of Time;
    c. Ex Parte Summons for an Order for Misjoinder of Parties;
    d. Affidavit in Support of Ex Parte Summons for an Order for Misjoinder of parties; and
    e. Skeleton Arguments on Misjoinder of Parties.

5. It was also the Applicants' evidence that the First Respondent is named on each of the documents referred to in paragraph 4 as the Advocate for the Respondents. However, this is not true in respect of the Affidavit in Opposition to Summons for Leave to File Originating Notice of Motion Out of Time on record as same does not name the First Respondent as Advocates for the Respondents.

6. Paragraphs 6, 7, 8 and 9 of the Affidavit in support of the motion contains extraneous matters in the nature of legal arguments, conclusions and prayers. In terms of Order 5 rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia – which applies to the practice and procedure at the Tribunal by virtue of rule 3 of the CMT Rules – **"[a]n affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion"**. In the

premises, the said paragraphs have been treated as not being part of the said Affidavit.

7. The Respondents did not file an Affidavit in Opposition to the motion.

Skeleton Arguments and Hearing

8. At the hearing of the motion on 8th September, 2021, Counsel relied on their respective process filed on 27th August, 2021, and 6th September, 2021; and augmented their Skeleton Arguments with oral submissions.

9. After setting out the basis for invoking Orders 14A and 33 of the RSC 1999 for the motion, the Applicants' Skeleton Arguments put forth four questions for determination in respect of the Affidavit in Opposition to Summons for Leave to File Originating Notice of Motion Out of Time and the Summons for Misjoinder of Parties filed by the First Respondent. According to the Applicants, the issues or questions which the Registrar was being invited to determine were suitable for determination without the need for a full and lengthy consideration of the Respondents' Affidavit in Opposition to Summons for Leave to File Originating Notice Out of Time and its attendant Skeleton Arguments or Summons for Misjoinder of Parties because the Registrar was only required to interpret the law on an incorporated person's legal capacity to act as an Advocate for a natural person. In the main, the question put for determination is whether the First Respondent has the legal capacity to act as an Advocate for a natural person. The other questions flow from this question.

10. The gist of the Applicants' case is that the First Respondent, being an incorporated person, lacks the legal capacity to act as an Advocate for a natural person. The Applicants relied on the LPA for this assertion. In view of the provisions of the said LPA, the Applicants argued, the documents filed by the First Respondent as "Advocates for the Respondents" ought to be struck out and expunged from the record.

11. Moreover, the Applicants argued that leave be granted to the Applicants to commence contempt proceedings against the First Respondent and its employed practitioner, Mrs Diana Sichone. It was the Applicants' contention that the Tribunal has, on the basis of rule 3 (2) of the CMT Rules, inherent jurisdiction to grant leave to the Applicants to commence contempt proceedings.

12. Lastly, the Applicants prayed for the costs of the application.

13. The Skeleton Arguments, filed by Legal Counsel in the employ of the First Respondent and expressed to have been filed by said Counsel as Advocates for the Respondents, attacked for irregularity the Applicants' Affidavit in support of the motion. It was contended that said Affidavit was irregular because it contained several paragraphs that included information and beliefs with the sources and grounds thereof; and that this being the case, said Affidavit ought to be struck off the Tribunal's record.

14. It was further argued on behalf of the Respondents that a Notice of Motion to Raise Preliminary Questions on a Point of Law could not be used to determine interlocutory applications and the motion was, therefore, incompetent and irregular.

15. It was contended in the alternative that, in the event that a determination of the questions in the motion were made, the questions should not be resolved in favour of the Applicants because the application for misjoinder was made by a duly qualified practitioner in the employ of the First Respondent; the First Respondent had a legal obligation to represent the Second and Third Respondents in order to enforce their statutory and common law immunity from suit; a literal interpretation of the rule prohibiting employed practitioners from acting for an employee of the practitioner's employer would lead to several absurd, unreasonable, unjust and undesirable consequences; any defects in the application for misjoinder could be cured by merely ordering the First Respondent's employed practitioner to recuse themselves as opposed to expunging the application from the record; there were no grounds on which contempt proceedings could be issued against the First Respondent and its In-House Counsel; and the Applicants were not entitled to costs but rather that a wasted costs order should be made against Counsel for the Applicants.

16. In augmenting the Applicants' Skeleton Arguments, Captain Chooka submitted that the Applicants appropriately relied on the RSC 1999 to make the present application as this was permissible in terms of rule 3 (2) of the CMT Rules. He referred to the case of **New Plast Industries v The Commissioner of Lands and the Attorney-General (1)** as further authority for reliance on the RSC 1999 where an Act was silent or not fully comprehensive on a matter of practice.

17. It was also Counsel's submission that, in the case of **John Sangwa v Sunday Bwalya Nkonde SC (2),** the High Court rejected a submission to the effect that Order 14A of the RSC 1999 was unsuitable for

determination of interlocutory questions and held that the court could, on its own motion, decide to determine a question of law under Order 14A of the RSC 1999. He argued further that Order 14A of the RSC 1999 could be applied with great flexibility and celerity.

18. Captain Chooka reiterated that the motion was proper and the Tribunal had jurisdiction to consider the questions put forward by the Applicants. He stressed that resolution of the questions in favour of the Applicants entailed that the Respondents had failed to properly and competently oppose the application for leave to file originating application out of time; and that, given the scenario of the motion being upheld, the application for leave to file originating application out of time should be granted.

19. He summed up his oral arguments by stating that the general position of the law in Zambia was that matters ought to be heard on merit and that this position should be applied in favour of the Applicants. Thus, the Tribunal should allow the Applicants to file originating application out of time while giving effect to the mandatory provisions of section 42 of the LPA.

20. In her response, Ms Mulondiwa conceded that the practice and procedure for raising preliminary issues was not covered under the CMT Rules. However, she argued, the case of **Dean Mung'omba and Others v Peter Machungwa and Others (3)** laid down the principle that, once it was accepted that the Supreme Court Rules did not provide for the practice and procedure on judicial review and the practice and procedure obtaining in England was adopted, our rules for judicial review purposes were completely discarded and there was

a strict following of the procedure in Order 53 of the RSC 1999. Applying this principle to the present case, she contended that the practice and procedure set out in Order 14A of the RSC 1999 ought to be strictly followed; that the only type of questions that could be determined under the said Order were those that would lead to dispensation with the need to hold trial in respect of the matters in dispute. According to Counsel, a perusal of the motion showed that the questions put for determination by the Tribunal merely related to issues arising from the Respondents' application for misjoinder of parties. She contended that the said motion did not touch on the issues that the Respondents raised in the Affidavit and Skeleton Arguments in opposition to the application to file originating application out of time. Additionally, Counsel submitted that a determination of the questions in the motion would not determine or resolve the substantive dispute between the parties. In view of these arguments, she submitted that the motion was irregular and improperly before the Tribunal; and as such should be struck out with costs to the Respondents.

21. With regard to Captain Chooka's submission that the general position of the law required that matters be heard on merit, Ms Mulondiwa contended that it was trite that the Tribunal was a fast track court intended to resolve matters with expediency and alacrity. She pointed out that, in the case of **Jamas Milling Limited v Imex International (Pty) Limited (4),** the Supreme Court of Zambia stated that in matters before fast track courts the rules of procedure must be strictly followed. Therefore, according to her, this matter could only be allowed to be heard on its merits if and only when the Applicants complied with the rules of procedure.

22. In his reply, Captain Chooka, indicated that there was only one application by the Applicants before the Tribunal, namely an application for leave to file originating application out of time; and that pursuant to the said application, the Respondents filed an Affidavit and Skeleton Arguments in opposition as well as ex parte summons for misjoinder of parties. He argued that the attack made by the Applicants against the two sets of documents filed by the Respondents entailed that if the attack was successful, then there was no opposition to the application for leave to file originating application out of time. The documents filed by the Respondents, he contended, were irregular and should not be entertained by the Tribunal especially in the light of the Applicants' objection to said documents. He stressed that, in effect, there would be no need to hear the application for leave to file originating application out of time because there was no opposition to said application.

23. In reply to Ms Mulondiwa's submission that determination of the questions in the motion would not determine or resolve the substantive dispute between the parties, Captain Chooka stated that the only substantive issue before the Tribunal was whether or not the Applicants should be granted leave to file originating application out of time; and that questions put by the Applicants had the effect of crippling the Respondents' opposition. He further submitted that, if the **Jamas Milling case (4)** were to be adopted, the Tribunal was precluded from delaying determination of the application for leave to file originating application out of time as there was no opposition that had been properly filed by the Respondents. Counsel concluded his submission by reiterating the Applicants' substantive prayers as

consolidated by the application for leave to file originating application out of time and the present motion.

Issues for Determination

24. I have considered the motion, the Affidavit in support of the motion, skeleton and oral arguments advanced in support of, and in opposition to, the motion. I am indebted to Counsel for their industry and fairly detailed and spirited submissions. The starting point in dealing with this matter is to consider and determine whether or not the motion is properly before me. In this regard, the following issues must be addressed:
    i. Whether the High Court practice and procedure on raising preliminary objections on a point of law applies to the Tribunal; and
    ii. whether the motion satisfies the requirements for raising preliminary issues on a point of law in terms of the RSC 1999.

25. A determination as to whether or not the motion is properly before me will decide the fate of the specific questions put forth in the motion at hand.

26. Counsel for the Applicants contended that the CMT Rules do not have specific provisions relating to the filing of a Notice of Motion before the Tribunal; adding that the said rules, in terms of rule 24 (1), (3) and (4) (b), provide only very minimal guidance on the proper procedure for raising a preliminary objection by way of a Notice of Motion. This being the case, Counsel submitted, rule 3 (2) of the CMT Rules provided the gateway to reliance on the procedure for raising preliminary objections applicable in the High Court. Counsel appearing for the Respondents

conceded that the CMT Rules did not have specific provisions on the practice and procedure for raising preliminary issues.

27. Rule 3 (2) of the CMT Rules provides that

> ***"[t]he practice and procedure applicable in the Court shall apply, with necessary changes, where the [Securities] Act and these Rules or other written law do not provide for the manner in which the Tribunal may exercise its jurisdiction relating to practice and procedure".***

28. I agree with the Applicants' Counsel that the court referred to in rule 3 (2) of the CMT Rules is the High Court. This is because section 20 (2) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia provides that ***"[t]erms and expressions used in a statutory instrument shall have the same meaning as in the written law under which the instrument was made";*** and section 2 of the Securities Act, No. 41 of 2016, defines "Court" as the High Court. In other words, the meaning of the term "Court" in the CMT Rules is the same as the meaning of the said term in the Securities Act because the CMT Rules were made under the said Act. In this regard, rule 3 (2) enjoins the Tribunal to adopt, with necessary changes, the practice and procedure applicable in the High Court where the Securities Act and the CMT Rules or other legislation do not provide for the manner in which the Tribunal ought to exercise its jurisdiction with regard to practice and procedure.

29. At this point, the question that arises is whether or not the manner in which the Tribunal should exercise its jurisdiction in relation to the

raising of preliminary issues on points of law is provided for in the Securities Act, the CMT Rules or indeed other written law. Both Captain Chooka and Ms Mulondiwa are of the view that the CMT Rules do not have specific provisions relating to the raising of preliminary issues on points of law even though the former suggested that rule 24 of the CMT Rules provides minimal guidance on the same. Indeed, a perusal of the CMT Rules does not reveal any provision expressly setting out the manner in which the Tribunal ought to exercise its jurisdiction in respect of preliminary issues on points of law.

30. Moreover – even though Counsel did not say anything about the Securities Act or "other written law", which rule 3 (2) of the CMT Rules recognises as possible sources of the practice and procedure at the Tribunal– a perusal of the said Act and indeed the statute book generally (with the exception of the High Court Act, Chapter 27 of the Laws of Zambia) does not reveal any provisions specifically detailing the manner in which the Tribunal should deal with preliminary issues on points of law. The High Court Act is not among the "other written laws" available for perusal in the statute book because, in terms of rule 3 (2) of the CMT Rules, the practice and procedure applicable in the High Court (which practice and procedure is founded on section 10 of the High Court Act) can only be resorted to if the Securities Act, the CMT Rules or other written law are devoid of provisions on the manner in which the Tribunal may exercise its jurisdiction relating to practice and procedure.

31. Paragraphs 29 and 30 hereof clearly show that the Securities Act, the CMT Rules or other written laws do not expressly provide for the manner in which the Tribunal ought to exercise its jurisdiction relating

to practice and procedure on the raising of preliminary issues on a point of law. This being the case, can rule 24 of the CMT Rules be said to provide – albeit not expressly – for the manner in which the Tribunal should exercise its jurisdiction relating to practice and procedure on the raising of preliminary issues on a point of law? A consideration of the essence of rule 24 of the CMT Rules is useful in answering this question.

32. Rule 24 of the CMT Rules in so far as is material to the present matter sets out the requirements that parties to interlocutory applications ought to comply with in relation to interlocutory applications. It provides for the manner of making, and opposing, an interlocutory application as well as service of process relating to interlocutory applications. According to rule 2 of the CMT Rules an interlocutory application is ***"...an application made between the commencement and the conclusion of proceedings, and includes an application for permission to file originating process out of time"*** (underlining mine for emphasis). While not expressly stated in this definition, it appears by necessary implication that an application triggered by an interlocutory application is itself an interlocutory application. As an application for permission to file originating process out of time is an interlocutory application in terms of the CMT Rules, it follows that an application triggered by the application for permission to file originating process out of time is an interlocutory application. In this regard, the summons for misjoinder of parties is an interlocutory application even if it was made before any originating process has been commenced.

33. The motion before me arises from two interlocutory applications, namely the application for leave to file originating notice of motion out

of time and the summons for misjoinder of parties. This being the case and in light of paragraph 32 hereof, the said motion is an interlocutory application. In terms of rule 24 (3) of the CMT Rules, an interlocutory application must be made by summons supported by an affidavit and skeleton arguments. The present application, however, was made by notice of motion supported by an affidavit and skeleton arguments. What then is the fate of the notice of motion herein?

34. Before I address this question, it is necessary for me to deal with the place of preliminary issues in interlocutory applications in order to provide guidance to litigants before the Tribunal. In so doing, I will deal with two important issues in providing clarity as to the Tribunal's practice and procedure of the Tribunal on preliminary issues. Firstly, whether or not a preliminary issue can be raised in respect of an interlocutory application; and secondly, the place of High Court practice and procedure in respect of preliminary issues before the Tribunal.

35. According to skeleton arguments filed on behalf of the Respondents, Order 14A procedure cannot be used to determine interlocutory applications or procedural issues and should only be employed to determine the substantive dispute between the parties. While case law on preliminary issues on point of law generally involves an attack on originating process, the assertion that the Order 14A procedure is only available where the applicant seeks to impeach originating process does not reflect the correct position at law. In the **John Sangwa case (2),** the High Court of Zambia stated that ***"[i]n our view, it is an inherent right of a litigant to raise a preliminary issue in any matter"*** (underlining mine for emphasis).

36. According to section 2 of the High Court Act, "matter" includes every proceeding in the [High] Court not in a cause; and a "cause" includes any action, suit or other original proceeding between a plaintiff and a defendant and any criminal proceeding. It is quite evident from these definitions that in the High Court, an interlocutory application is a matter. Moreover, "matter" in terms of rule 2 of the CMT Rules includes an interlocutory application. To the extent that "matter" in the High Court and the Tribunal include an interlocutory application, and in view of the statement of law quoted in the Sangwa case above, an interlocutory application can properly be the subject of another interlocutory application to raise preliminary issues.

37. While it is legally tenable to raise preliminary issues with regard to interlocutory applications, it is my considered view that Counsel or parties should be slow to take this route because it tends to unnecessarily prolong proceedings. The ends to be achieved through making an interlocutory application to raise preliminary issues in respect of another interlocutory application can be attained by simply filing, as the case may be, either an affidavit in opposition and skeleton arguments or an affidavit in reply and skeleton arguments. Taking the route of filing an affidavit in opposition or in reply averts the potentially long-winded and costly approach of filing interlocutory application upon interlocutory application. In this regard, the Constitutional Court's guidance in **The Law Association of Zambia v. The President of the Republic of Zambia, the Attorney-General and the National Assembly (5)** on the neater approach to matters similar to the subject of this paragraph is apt. The Constitutional Court, at page R12 of its ruling, stated the following:

"...this Court frowns upon the practice of raising preliminary issues which have a tendency of unnecessarily delaying proceedings. Given the policy implications of constitutional questions and the wide public interest in the said matters it is important that they are heard in a timely manner without undue delay. Litigants are therefore encouraged to incorporate their preliminary issues in their opposing affidavit and skeleton arguments so as to minimise the possibility of multiple hearings".

38. That the case cited above relates to proceedings in constitutional matters does not, in my view, render the general principle of ensuring the timely hearing of matters stressed by the Constitutional Court inapplicable to this Tribunal. This is because the just, speedy, and inexpensive determination of matters are some of the guiding principles of the Tribunal.

39. Coming to the issue relating to the place of High Court practice and procedure in preliminary issues before the Tribunal, it is necessary to consider the import of rule 24 of the CMT Rules in the context of the present matter. The import of rule 24 of the CMT Rules in the context of the present matter is that it governs the form and contents of process required in respect of the application and the manner in which said application ought to be made and responded to if a respondent decides to file process in opposition. In other words, the practice and procedure in the High Court does not apply in respect of matters provided for by rule 24 of the CMT Rules.

40. But rule 24 of the CMT Rules covers only part of the practice and procedure with regard to the raising of preliminary issues on points of law because, while the said rule sets out the mode of making interlocutory applications and related procedural requirements, it does not provide guidance on other aspects relating to the manner in which the Tribunal ought to exercise its jurisdiction with regard to preliminary issues on points of law. In this regard, rule 24 of the CMT Rules is indeed limited when it comes to practice and procedure for raising preliminary issues on points of law; and this being the case, the High Court practice and procedure on preliminary issues applies, *mutatis mutandis,* to the Tribunal for aspects of practice and procedure – on preliminary issues – that are not covered by rule 24 of the CMT Rules.

41. In terms of section 10 (1) of the High Court Act,

> ***"[t]he jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and <u>in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England</u> and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999".*** (underlining mine for emphasis).

42. The High Court Act and the rules made thereunder do not provide for the practice and procedure regarding the manner in which the High Court ought to exercise its jurisdiction on preliminary issues on points of law. The RSC 1999, which apply to the practice and procedure in the High Court by virtue of section 10 (1) of the High Court Act, provide for the practice and procedure regarding the manner in which the High Court and – by virtue of rule 3 (2) of the CMT Rules – the Tribunal ought to exercise their jurisdiction on preliminary issues on points of law. The RSC 1999 provisions regarding the practice and procedure relating to preliminary issues on points of law do not apply to the Tribunal in their totality. For example, Order 14A rule 2 of the RSC 1999 requiring that an application for disposal of case on point of law be made by notice of motion or summons does not apply in respect of the raising of preliminary issues relating to interlocutory applications before the Tribunal because rule 24 of the CMT Rules already provides for the manner in which an interlocutory application – which an application to raise preliminary issues on points of law in respect of an interlocutory application is – ought to be made, i.e. by summons, affidavit in support of summons and skeleton arguments.

43. On the other hand, however, the RSC 1999 apply in respect of aspects of interlocutory applications that are not covered by rule 24 of the CMT Rules. For example, the considerations set out in Order 14A rule 1 of the RSC 1999 apply, with necessary changes, to the raising and determination of preliminary issues on points of law in interlocutory applications before the Tribunal.

44. Turning back to the fate of the motion before me, the general rule is that rules of procedure are regulatory in nature and a breach thereof

ought to be treated as a curable irregularity (see the cases of **Leopold Walford (Z) Limited v Unifreight (6)** and **The Republic of Botswana, Ministry of Works, Transport and Communications, Rincean Design Consultants (sued as a firm T/A KZ Architects v. Mitre Limited (7)**). Moreover, in the case of **Standard Chartered Bank (Z) PLC v John M. C. Banda (8)** at page J10, the Supreme Court of Zambia held that

> ***"[i]f an irregularity can be cured without undue prejudice then it is desirable that such irregularity be put right subject to an order as to costs against the erring party".***

The Court went on to state the following at page J12:

> ***"We think that rules of court should indeed serve a definitive purpose and we are not to apply them using a rigid approach without regard whatsoever to the consequences of any delayed rectification of their breach. In case of breach of rules that do not result in any real or serious prejudice or negative consequences to any party, the court does surely retain the discretion always as to what order would best meet the justice of the situation".***

It appears from the **Standard Chartered Bank (Z) PLC case (8)** that an irregularity is not curable if it would result in negative consequences to any party or in undue, real or serious prejudice is not curable.

45. Ms Mulondiwa contended that the motion was irregular and improperly before me for want of strict compliance with the requirements of Order 14A of the RSC 1999. She thus prayed that the motion be struck out with costs to the Respondents. It should be noted that her attack (and I will return to the issue momentarily) on the motion was not on the

basis of it being irregular for want of compliance with the requirements of rule 24 of the CMT Rules with regard to the manner of making interlocutory applications. Captain Chooka, on the other hand, urged that the motion be heard on its merits.

46. I stated earlier in this ruling that an application to raise preliminary issues on an interlocutory application is, itself, an interlocutory application; and that rule 24 of the CMT Rules sets out the manner in which an interlocutory application ought to be made, i.e. by summons, affidavit in support of summons and skeleton arguments. In filing a notice of motion for an interlocutory application when the rules of the CMT require summons, the Applicants breached the applicable rules of procedure. As to whether this breach is curable or not depends on whether curing the irregularity would result in negative consequences to the Respondents or in undue, real or serious prejudice to the Respondents.

47. Curing the irregularity in the present application would entail ordering either that the motion be treated as summons or that the Applicants file summons in place of the irregular motion. Either order would entail that the Respondents file an affidavit in opposition so as to ensure compliance with rule 24 (8) of the CMT Rules, which requires a party opposing an interlocutory application (and the Respondents' skeleton arguments in opposition to the motion point to a clear intention by the Respondents to oppose an application attacking their affidavit in opposition to summons for permission to file originating application out of time and their summons for misjoinder of parties). No doubt this would result in negative consequences to the Respondents in that they would have to, among other things, incur expenses – over and above

those incurred in opposing the motion – in preparing and filing an affidavit in opposition to the application if either order referred to above were made.

48. Additionally, curing the irregularity would delay the disposal of the applications at the centre of the motion because it would entail deferring determination of the present application to allow the Respondents file their affidavit in opposition to the application; and, in the event that the present application is not determined in favour of the Applicants, the hearing of the summonses for permission to file originating application out of time and for misjoinder of parties would have to be delayed further.

49. In view of the negative consequences that curing the irregularity as to manner of making the present application, I find that this is not a proper case for me to exercise my discretion to order that the irregularity be cured.

50. In any case, even if the irregularity were to be cured, the application in so far as it relates to the affidavit in opposition to the summons for permission to file originating application out of time would still fail. This is because the questions sought to be determined in its respect would not have the effect of determining the said application or any issue or claim therein with finality as required by Order 14A rule 1 (1)(b) of the RSC 1999. Even assuming that the said affidavit in opposition were to be expunged from the record, this step would not finally determine (subject only to appeal) the application for permission to file originating application. The said application for permission to file would still have

to be determined on its merits even if it is determined that the application is not opposed.

51. As for the summons for misjoinder, Order 14A rule 1 (3) of the RSC 1999 requires that a determination of a question of law ought only to be made if the parties had the opportunity to be heard on the question or consented to judgment or an order on the question. The editorial notes relating to this rule states that

> ***"[t]he wording of para. 1 (3) makes it clear that the determination of any question of law or construction under this Order can only be made if the defendant has given notice of intention to defend."***

In the case of **African Banking Corporation Zambia v Mubende Country Lodge Limited (9),** it was held at page J33 that

> ***"[i]n the view that we take what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under O14A, RSC".***

In the context of raising a preliminary issue on a point of law on an interlocutory application before the Tribunal, it follows, the notice of intention to defend would be an affidavit in opposition accompanied by skeleton arguments as required by rule 24 (8) of the CMT Rules. The Applicants filed no such affidavit and skeleton arguments before filing the present application. This being the case, the application in so far as it attacks the summons for misjoinder of parties would fail.

52. It must be pointed out that not even Order 33 of the RSC 1999 would rescue the Applicant's application raising preliminary issues on points of law because the said Order 33 cannot be relied on to the exclusion, or independently, of the compulsory requirements of Order 14A of the RSC 1999. This position of the law was articulated in the **African Banking Corporation Zambia case (9)** at page J36 in the following terms:

> ***"...Order 33 rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A, RSC ..."***

53. Ms Mulondiwa was thus on firm ground in her contention that the motion was improperly before me. The motion is clearly irregular and improperly before me as it does not satisfy the procedural requirements for interlocutory applications in terms of the CMT Rules and the mandatory requirements for raising preliminary questions or issues on points of law in terms of Order 14A of the RSC 1999. It is, therefore, not necessary for me to delve into the merits or otherwise of the questions put for determination by the Applicants.

Final Orders

54. For the avoidance of doubt, the Applicants' notice of motion to raise preliminary questions on a point of law is dismissed for being irregular and improper.

55. In light of the power of the Registrar, in terms of rule 22 (1) (d) of the CMT Rules, to take any course which – in the Registrar's opinion – may help determine a matter in a just, speedy and inexpensive manner, the following orders are made:

i. The Applicants to file, if they so desire, an affidavit in reply and skeleton arguments in respect of their application for permission to file originating application out of time. The said affidavit and skeleton arguments, if any, to be filed within fourteen days of this order;

ii. The Applicants to file, if they intend to oppose the summons for misjoinder of parties, an affidavit in opposition and skeleton arguments within fourteen days of this order; and

iii. I will hear the summons for misjoinder of parties and the summons for permission to file originating application out of time shall, if no appeal against this ruling is filed, on 19th November, 2021, at 09:00 hours.

56. The costs of and incidental to this application are awarded to the Respondents, to be taxed in default of agreement.

57. Leave to appeal is granted.

DELIVERED THIS 2ND DAY OF NOVEMBER, 2021

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M. CHOLA

REGISTRAR

REPUBLIC OF ZAMBIA
CAPITAL MARKETS TRIBUNAL
02 NOV 2021
REGISTRAR
P.O. BOX 51394, LUSAKA