



IN THE CAPITAL MARKETS TRIBUNAL
HELD AT LUSAKA

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 1ST INTENDED APPLICANT

MADISON FINANCIAL SERVICES PLC 2ND INTENDED APPLICANT

AND

SECURITIES AND EXCHANGE COMMISSION 1ST INTENDED RESPONDENT
PHILLIP CHITALU 2ND INTENDED RESPONDENT
ABRAHAM ALUTULI 3RD INTENDED RESPONDENT

CORAM:

Mrs. C. N. Tembo - Chairperson

Mr. M. Muyawala - Member

Mr. B. Kashinga - Member

For the Intended Appellants: Mr. M. Chooka, Messrs Milimo Chooka and Associates

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

RULING

1. The Parties appeared before the Tribunal on 30th November 2021 at 10:00 hours following the submission by the intended Applicants of an application by way of Summons for Stay of any further administrative or enforcement action by the 1st Respondent against the Applicants pending conclusion of proceedings before the Capital Markets Tribunal. This application was accompanied by an Affidavit in support and Skeleton Arguments filed on 5th November 2021.
2. The intended Respondent opposed the application by filing an Affidavit in Opposition to the Summons for stay of any further administrative or enforcement action by the 1st Respondent against the Applicants pending conclusion of proceedings before the Capital Markets Tribunal and Skeleton Arguments on 24th November 2021.
3. Before the application could be heard, the Tribunal requested the Parties to address the Tribunal on its jurisdiction to hear an application for stay when originating process has not yet been filed and considering that there is a pending application for leave to file an Originating Application out of time before the Registrar of this Tribunal.
4. Counsel for the intended Applicant's argued that in the interest of justice, the Tribunal could decide on how to proceed on the basis of Rule 3 (2) of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 ("the Capital Markets Tribunal Rules") which provides for the jurisdiction of the Tribunal as regards practice and procedure as read together with Rule 24(2) of the said Capital Markets Tribunal Rules as a gateway to proceeding with the application notwithstanding the absence of Originating Process.
5. In response, counsel for the intended Respondent relied on the Affidavit in Opposition and Skeleton Arguments filed on 24th November 2021 particularly

submissions made on pages 16 and 17 and further augmented them with oral submissions.

6. Counsel for the Intended Respondent argued that Rule 59/13/9 of the Rules of the Supreme Court of England (The White Book) 1999 Edition provides that and we quote:

“Normally the matter should be set down before the stay application is made”

7. The above quotation by counsel for the intended Respondent was actually misleading because Rule 59/13/9 of the Rules of the Supreme Court of England (The White Book) 1999 Edition relates to an appeal as opposed to a matter. The material wording of this rule is as follows:

“Normally the appeal should be set down before the stay applications is made, but, if the urgency warrants it, an application for a stay can be made in advance of the appeal being set down, provided that the applicant's solicitor (or the applicant, if in person) gives an undertaking to serve notice of appeal and to set down the appeal within seven days...”

8. Furthermore, counsel for the intended Respondent submitted that because there is no matter set down or commenced, the Tribunal has no jurisdiction to hear this application. The intended Respondent further argued that it would not be in the interest of justice when there is an application for leave to file Originating Application out of time pending before the Registrar. Additionally, this application may operate to prejudice the said application for leave pending before the Registrar. The intended Respondent argued that until the Registrar makes a determination, the Tribunal has no jurisdiction to hear and determine any application for stay.

9. Having considered submissions by Counsel, it is indisputable that there is no originating process before the Tribunal. It is also indisputable that there is an application for leave to file Originating Application out of time which is pending Ruling before the Registrar of this Tribunal.
10. We duly note, that this is an interlocutory application for Stay of any further administrative or enforcement action by the intended 1st Respondent against the intended Applicants pending conclusion of proceedings before the Capital Markets Tribunal. However, the question that must be addressed is whether this Tribunal has jurisdiction to hear and determine an interlocutory application before an originating process is filed. In this case, the interlocutory application is an application for stay which is before us. We are of the view that this question must be answered before we can delve into hearing the substantive application.
11. Our starting point is Rule 24 of the Capital Markets Tribunal Rules which provides for the procedure for making interlocutory applications. According to Rule 24(2) of the Capital Markets Tribunal Rules, an interlocutory application relating to a stay shall be made to the Tribunal. Rule 2 of the Capital Markets Tribunal Rules defines an "interlocutory application" in the following manner:

"interlocutory application – means an application made between the commencement and the conclusion of proceedings, and includes an application for permission to file originating process out of time"

12. In our considered view, it can be deduced from the above definition that interlocutory applications can only be filed after commencement of proceedings with only one express exception relating to applications for leave to file originating process out of time. Secondly, the above definition means that the viability of an interlocutory application such as an application for stay depends or rides on the existence of a matter. The existence of a matter would be evidenced by the fact

that a matter has first been commenced with proper commencing process as prescribed by law, in this case the Capital Markets Tribunal Rules. Counsel for the Intended Applicants in his submissions conceded to the fact that there was no matter before the Tribunal because process had not been filed in view of the pending Ruling on the application to file Originating Application out of time before the Registrar. Therefore, the present application for stay cannot stand because it does not meet the requirements of an interlocutory application as envisaged in Rule 2 of the Capital Markets Tribunal Rules.

13. Pursuant to Rule 3 (2) of the Capital Markets Tribunal Rules, the Tribunal can only rely on the practice and procedure in the High Court where the Securities Act and the Capital Markets Tribunal Rules or other written law do not provide for the manner in which the Tribunal may exercise its jurisdiction relating to practice and procedure. Clearly, there is no lacuna in the Capital Markets Tribunal Rules on how the Tribunal may exercise its jurisdiction relating to the practice and procedure of an interlocutory application for stay. This is buttressed by Rule 24 of the Capital Markets Tribunal Rules which is prescriptive on the practice and procedure relating to interlocutory applications before the Tribunal including an interlocutory application for stay. In any case, the Tribunal is further guided by the practice in the High Court of treating the viability of interlocutory applications as dependent on originating process duly filed and commenced. This position is supported by comments of Honourable Justice B.G. Lungu at page R5 in the case of **Alan Mulemwa Kandala v Zambia National Commercial Bank and 2 Others – 2012/HPC/0381** as follows:

"The term 'Interlocutory application' is defined by the Learned authors of Black's Law Dictionary, Bryan A. Garner, 10th Edition, at page 120 as " a motion for equitable or legal relief sought before a final decision."

It can be discerned from the above definition that an interlocutory application seeks to yield relief of an intermediate nature for the period between the commencement and termination of a cause of action”.

14. In the case of **Miyanda v The High Court (1984) Z.R 62** cited with approval by the Supreme Court in the case of **Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1994) S.J 22 (S.C)**, the term jurisdiction was defined as follows:

“The term “jurisdiction” should first be understood. In the one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both”.

15. The various aspects of the term “jurisdiction” referred to in the above quotation point to the fact that the Tribunal cannot exercise authority which is not in accordance with its enabling legislation. The Tribunal is a creation of statute particularly, the Securities Act No. 41 of 2016. This Act sets out the jurisdiction of the Tribunal under section 184 and contains specific provisions relating the jurisdiction of the Tribunal to grant a stay. The specific provisions relating to the jurisdiction of the Tribunal to grant a stay are sections, 28(2), 43(2), 54(2), 63(4), and 92(3). A cursory study of these provisions discloses the jurisdiction of the Tribunal, on sufficient grounds, to grant a stay of a decision of the Securities and Exchange Commission pending the determination of an Appeal. Aside sections, 28(2), 43(2), 54(2), 63(4), and 92(3), the Securities Act No. 41 of 2016 and the Capital Markets Tribunal Rules have no provision that extends the jurisdiction of

the Tribunal to hear and determine an interlocutory application for stay in the absence of an Originating Process.

16. We are cognizant of the pending matter before the Registrar but we firmly believe that for an interlocutory application for stay to be sustained, it must be anchored on the fact that a matter has been commenced before an adjudicative body and the nature of that matter is one under which a stay can be granted. On that basis, we hold that the Tribunal has no jurisdiction to hear an interlocutory application for stay in a matter that has not been commenced or where originating process has not yet been filed before the Tribunal.

17. We also add that justice is not delinquent, but that to facilitate delivery of justice, rules of procedure and practice are enacted and/or developed to guide adjudicative bodies in guaranteeing consistency and predictability of adjudicative processes and must be adhered to.

18. Accordingly, we hold that the application for stay of any further administrative or enforcement action by the 1st Respondent against the Applicants pending conclusion of proceedings before the Capital Markets Tribunal is hereby dismissed for want of jurisdiction.

19. Costs shall be in the cause.

Dated at Lusaka this 1st day of December 2021



Chairperson



Member



Member